

1 Wednesday, 18 November 2020

2 (10.00 am)

3 LADY SMITH: Good morning and welcome back to the hearings  
4 in relation to Scottish Government. How wonderful it is  
5 to have the sun streaming in this morning. We must  
6 enjoy it while it's here.

7 Mr Peoples, I think we have a witness who is ready.

8 MR PEOPLES: Yes, good morning. The next witness is  
9 Peter Peacock.

10 LADY SMITH: Thank you.

11 Good morning, Mr Peacock. Could we begin by you  
12 raising your right hand, please, and repeating after  
13 me ...

14 MR PETER PEACOCK (affirmed)

15 LADY SMITH: Please sit down and make yourself comfortable.

16 (Pause)

17 There is a copy of your statement in that red folder  
18 but you may have marked your own copy, so feel free to  
19 use that if you find it more helpful, and indeed if you  
20 have any other notes with you that you want to use, that  
21 is quite all right.

22 Help me with this, what would you like me to call  
23 you, Mr Peacock or Peter? Which are you most --

24 A. I have been called many things in my life but Peter will  
25 be best.

1 LADY SMITH: If you are ready, Peter, I will hand over to  
2 Mr Peoples and he will take it from there.

3 Mr Peoples.

4 Questions from MR PEOPLES

5 MR PEOPLES: Good morning, Peter, and thank you for coming  
6 today.

7 A. Good morning.

8 Q. As her Ladyship has said, there is the red folder in  
9 front of you. All it contains, I have to say, is the  
10 signed statement that you prepared. If there are other  
11 documents which I would like you to look at in the  
12 course of your evidence today, these will be brought up  
13 on the screen in front of you. You will see already  
14 that your own statement has been brought up, and other  
15 documents will be brought up in the same way, so that is  
16 the way we are doing things today, to explain to you.

17 So far as your statement is concerned, for the  
18 purposes of our transcript, it is WIT-1-000000370. That  
19 is our reference number for it. That is for our  
20 purposes. If I could ask you just at the beginning to  
21 turn to the final page of the statement that you have  
22 provided and confirm that you have signed the statement  
23 on the last page, page 32 I think it is.

24 A. I have, yes, by a DocuSign device.

25 Q. And can you also confirm that you have no objection to

1           your witness statement being published as part of the  
2           evidence to the Inquiry, and that you believe the facts  
3           stated in your statement are true insofar as your  
4           recollections and examination of past records permit.  
5           I think that is --

6           A. Yes, I am happy with both. Yes.

7           LADY SMITH: Peter, perhaps before you start, could I just  
8           assure you I do appreciate you are being asked about  
9           events that took place a long time ago, they didn't just  
10          take place yesterday or last year, and I know you have  
11          had a busy life since then, so please don't think that  
12          I expect you to have the sharpest of recollections.

13          A. That is great to hear. Although I have to say, having  
14          had access to all the -- both Government documents and  
15          documents you have supplied that you got from the  
16          Government, it has been a prompt to my memory in  
17          a number of respects, and it is amazing how you actually  
18          get sequences wrong until you go back and check, so I am  
19          reassured by your comment.

20          LADY SMITH: I am glad that helps. And feel free if, as  
21          you're giving your evidence, you want to revise your  
22          recollection, to do so. Let's have the best that you  
23          have got today.

24          A. Thank you.

25          LADY SMITH: Mr Peoples.

1 MR PEOPLES: As a guide, I will maybe give you the assurance  
2 that if there is anything I have come across since you  
3 signed the statement that I think might be relevant or  
4 may assist you in further recollections, then I will  
5 endeavour to alert you to that, because I think there  
6 are one or two gaps which may remain which I perhaps can  
7 help you fill today --

8 A. Okay.

9 Q. -- if possible. So if we proceed on that basis then  
10 hopefully we can, as her Ladyship says, get your best  
11 recollection of events.

12 We are clearly concerned with a period mainly  
13 between 2002 and 2014, and this week we are really  
14 concentrating on the first part of that period, from  
15 2002 to May 2007, when there was a change of  
16 administration. You are here today because you were  
17 Minister for Education and Young People between  
18 20 May 2003 and I think 14 November 2006, is that  
19 correct?

20 A. Yes.

21 Q. We have heard some evidence already this week,  
22 yesterday, from one of your former ministerial  
23 colleagues, Cathy Jamieson, and indeed from the former  
24 convener of the Public Petitions Committee,  
25 Michael McMahon, so we have a certain understanding of

1           how the Committee worked, and also an understanding of  
2           the initial stages of what we are calling the  
3           Daly petition that was lodged with the Committee  
4           in August of 2002, so if I don't ask you too much about  
5           some of these matters, it's not because they don't  
6           matter. We have had evidence. I will try and focus on  
7           some of the things which perhaps in a public hearing are  
8           of particular interest to the Inquiry and to those who  
9           sought the Inquiry.

10           You can take it we have read all of your statement.  
11           It will be considered, and considered again in due  
12           course along with all other evidence, so just to give  
13           that assurance at this stage.

14           One matter if I could just take shortly from you,  
15           because we did hear this from Cathy Jamieson yesterday,  
16           is that prior to the Daly petition being submitted  
17           in August 2002 to the Public Petitions Committee, we did  
18           hear evidence, and I think this is uncontroversial, that  
19           prior to that petition being submitted, the  
20           administration of which you were part was engaged in an  
21           extensive programme of child improvement measures and  
22           reform, and we have heard about that programme of  
23           reform. So I'm not planning to spend a lot of time  
24           today on that matter, but you can take it we are  
25           conscious of that context in which you were acting as

1 minister and what was happening in the wider picture at  
2 that time.

3 A. I think it is worth saying on that, it was very  
4 extensive, you know, I reckon covering something like 25  
5 different policy areas. But the important thing --  
6 I don't know what Cathy said yesterday, the important  
7 thing is to understand in part how these things are  
8 interlinked. That when you look at child protection in  
9 the round, you are talking about a whole variety of  
10 facets of policy which interlink and connect and relate  
11 very much to looked-after children as the most  
12 vulnerable group amongst all children in schools,  
13 probably.

14 Q. Yes, I think she made the point, and indeed I think it  
15 is perhaps self-evident, that reform was for protection  
16 of all children and young people in Scotland, both  
17 children in the community and children living away from  
18 home in institutional care, so it was a policy across  
19 the board?

20 A. Yes. And if you didn't get aspects of it right, more  
21 children would end in up institutional care, and we know  
22 the outcomes for children in institutional care were  
23 pretty awful, frankly. So that is why it was really  
24 important to get the interconnectedness and the base of  
25 policy right to try and prevent more children ending up

1 in institutional care.

2 Q. And the other point I think that was made by  
3 Cathy Jamieson and I think we heard about was that the  
4 former First Minister Jack McConnell did have  
5 a particular interest in the interests of children and  
6 young people --

7 A. Yes.

8 Q. -- and giving them opportunities for better outcomes --

9 A. Yes.

10 Q. -- wherever they were.

11 A. I think, by recollection, he had had some experience  
12 when he was a teacher that gave him insights that he  
13 then pursued really throughout the rest of his career,  
14 and he was very anxious to give young people, and  
15 particularly those young people who had fallen foul of  
16 society in some way and ended up in children's hearings  
17 system, ended up in supervision or secure care, whatever  
18 it was, that they were to get a second chance or a third  
19 chance to try and get them back into mainstream society,  
20 because the consequences of not doing that have profound  
21 implications for people's mental health and their  
22 employability and their housing status, and so on. So  
23 it was absolutely fundamental to him and indeed to the  
24 administration.

25 Q. You can take it that Lord McConnell will be giving us

1 evidence as well. He has provided a statement already,  
2 but he will be giving evidence this week also, so he may  
3 well say something about that as well.

4 If I could look at the statement. The first part of  
5 your statement is a more general part which seeks to  
6 give some general information about how Government  
7 works, because I think you will be now very familiar  
8 with how Government works and the public may not be  
9 quite as familiar with some of the aspects of  
10 Government, and I think the purpose of this section of  
11 your written statement was to give us some insight as to  
12 what happens in reality and in practice, is that  
13 correct?

14 A. Absolutely correct. I am conscious that I have learned  
15 throughout the years that there are -- it's a bit of  
16 a mystery how Government works, it is sometimes  
17 a mystery when you are within it, I have to say, but it  
18 is certainly a bit of a mystery when you are outwith it.  
19 I think just basic things like the difference between  
20 the Parliament and Government in a Scottish context, it  
21 has taken many years for people to really grasp that.  
22 But inside Government is what I put in my statement is  
23 how it tends to function, and the reason I did that was  
24 because I was conscious that people would be reading  
25 that and wondering how exactly does advice get packaged,



1           what influences that, and all that sort of thing.

2           Q. I will deal with that first and I will go back to some  
3           of your background experience when I come to ask you  
4           more specifically about the Daly petition. So if we  
5           could just stick with that issue first of all, and  
6           I think really that starts at about paragraph 9 of your  
7           statement, about how Government works and what -- you  
8           tried to pick up certain key features, or features that  
9           are a normal part of Government.

10                   The first one is that each minister has his own or  
11           her own private office, that is something that you tell  
12           us about. Can you just briefly summarise what a private  
13           office does for a minister?

14           A. A private office does a number of really crucial things.  
15           At one level it is there to protect the minister from  
16           all the pressures of people trying to get access to them  
17           and control that, and control the flow of people getting  
18           access to you, because the demands upon you are far greater  
19           than your capacity to fulfil them. But they are also there  
20           principally to make sure that the flow of information that you  
21           require to make decisions, and the system is demanding of you  
22           to make decisions, operates effectively.

23                   So they receive all the submissions that are coming  
24           up from officials all across your department and they

25

1 will to some extent prioritise that and make sure you  
2 get that. At this time we were not then using email as  
3 extensively as became the case, so you would get a lot  
4 of written submissions, mostly in the evening. After  
5 the civil servants had gone home you were expected to  
6 work late into the evening clearing papers, so that you  
7 were getting them back, if you could, the following  
8 morning so people could action things. That was called  
9 your box. You would get an evening box and also  
10 a weekend box full of papers.

11 So the private office would prioritise all of that.  
12 They may simply have a word with you, "So and so has  
13 confirmed that such and such has happened", or whatever,  
14 a lot of communication between yourself and your private  
15 secretary. They also controlled your diary and they  
16 arranged all appointments and meetings and conference  
17 speeches and all that sort of stuff, all the logistics  
18 of all of that.

19 They were there also to offer advice. In a sense,  
20 and this is going to sound an odd thing to say, but in  
21 a sense they are on your side and trying to make sure  
22 you are aware of some of the dynamics within Government  
23 they are picking up on. They will have constant  
24 conversations with other members in the department.  
25 Heads of department, members of staff will be trying to

1 explain to them, "I need to speak to the minister about  
2 this and here is the reason why", and they are weighing  
3 up where does that fit with other priorities you have to  
4 deal with. So it's all that sort of stuff, absolutely  
5 fundamental to the functioning of a ministerial role.

6 Q. Can I ask you two questions arising out of that? The  
7 first is are these officials -- and I think the senior  
8 official in the office is the private secretary, is that  
9 right?

10 A. Yes.

11 Q. So the Minister for Education or whatever minister in  
12 the department concerned. Is that, the person, a senior  
13 civil servant?

14 A. That is a good question. I wasn't very good at  
15 understanding all these grading things, to be perfectly  
16 honest with you. I didn't pay an awful lot of attention  
17 to that. They wouldn't all be senior civil servants,  
18 no, but you would sometimes get what they called  
19 fast-streamers, who are people who are destined to  
20 become senior civil servants who are on their way up,  
21 and they would spend time in private office as part of  
22 the experience of them understanding how Government  
23 works and the role of a minister, so you would get some  
24 who were heading that way. I couldn't swear they were  
25 all senior civil servants, no. Some would not progress

1           beyond the level of --

2       Q.   -- moving down?

3       A.   Seldom.  Private secretaries were normally very, very  
4           capable people and extremely --

5       Q.   Sorry, I wasn't --

6       A.   No, no.  They were extremely hard-working.  And as you  
7           will have picked up from all the stuff you have seen,  
8           there were things going on sometimes late into the  
9           evening, and emails and phone conversations happening  
10          and so on, so they were doing all that sort of stuff.  
11          In the days before mobile phones, then private  
12          secretaries would also listen in to every telephone  
13          conversation that you had and they would take notes on  
14          those.  After the advent of everybody having mobile  
15          phones that practice fell away because you could  
16          no longer operate.

17                 So they had all those functions.  They would take  
18                 notes of meetings, and sit in on meetings, give their  
19                 impressions of things that had happened, and so on and  
20                 so forth.

21       Q.   The other question I was going to ask you was  
22           this: ministers would receive submissions, briefings,  
23           minutes, there are various terms that have been used in  
24           the papers, I will just use them as generally simply  
25           communications in writing from officials to ministers.

1           When they are addressed to you and go to your private  
2           office as part of the process, would it have been the  
3           practice for the minister always to read submissions  
4           that come to his office or are -- when you say there is  
5           a degree of prioritisation, does that mean that they may  
6           not all be read?

7           A. You would get the vast bulk of things but you would get  
8           them -- I shouldn't refer to this but I will. You've  
9           watched "Yes Minister" and the secret of the minister  
10          finding the important paper in his box of an evening?  
11          Well, a private secretary was there actually to try and  
12          make sure the important stuff was on the top. So there  
13          would be some things you might not get to for a wee  
14          while, because they weren't ranking at that particular  
15          level, but you would get through most or all of it.

16                 This later switched on to email so that during the  
17          day, once we were much more on to email, you were  
18          getting stuff all through the day. So that you weren't  
19          necessarily catching up in the evening on that, you were  
20          trying to clear stuff off as you went. So you would get  
21          to see the vast bulk of things. You would get stuff  
22          coming in, which would be from officials in a department  
23          which they would simply administer and return. You  
24          would get a submission from somebody which was going to  
25          require advice from somebody else, and the private

1           secretary knew that, so I wouldn't necessarily see that  
2           until they had passed it on, got the other advice, and  
3           then came back to me with both bits of advice. But that  
4           kind of administrative discretion was available to the  
5           private office.

6       Q. That is maybe another question that arises, if I could  
7       deal with it at this stage.

8           We see sometimes officials providing a submission or  
9           a briefing, and it may be addressed to a particular  
10          minister or ministers, and it tells you the subject  
11          matter and so forth. But in the days at least of email,  
12          we sometimes see a distribution list, so that am I right  
13          in thinking that some documents of importance will go to  
14          a range of people but with different reasons in mind  
15          because not, presumably, everybody will have the direct  
16          interest in the document, is that right?

17       A. That is absolutely right. And one of the -- I remember  
18       older civil servants bemoaning the advent of email  
19       because suddenly, instead of deciding who got the five  
20       copies, everybody just got put on the list because  
21       everybody was then covered. But also, if I remember  
22       correctly, there would tend to be a list of recipients  
23       but there would also be a column that said "For  
24       interest", "For decision", "For noting purposes". So it  
25       kind of allocated to those people who were receiving it:

1 look, this is really important, we want your  
2 observations on this. Or simply: we are just telling  
3 you this has happened. So it covered those functions.

4 Q. So if there was something, for example, marked "For  
5 portfolio interest", that would mean this had relevance  
6 to the minister's own portfolio and perhaps they should  
7 pay more attention to it?

8 A. Absolutely.

9 Q. And if it was simply "For interest", then it might  
10 simply be something that they could take note of --

11 A. Exactly.

12 Q. -- or read and, if necessary, make comment?

13 A. Exactly so.

14 Q. Was it routine to send advice to ministers to the  
15 First Minister and the Deputy First Minister in your  
16 period, even for information?

17 A. Well, that is a very good question. At one level  
18 I wouldn't actually know that, I don't suppose, but  
19 the -- you simply couldn't give the First Minister's  
20 office everything because it would just be awash with  
21 information that couldn't be processed. So they would  
22 certainly -- they would get all the key stuff they had  
23 to see, clearly, and they would no doubt be copied in on  
24 a whole range of other things. The First Minister can  
25 talk better -- the former First Minister can talk better

1 on this than I can because he was there in his office,  
2 but he would have had many more private secretaries or  
3 assistant private secretaries. So they would be sifting  
4 all of that and they would be deciding he has to see  
5 this or ... And there might also be liaison with the  
6 special advisers on that in saying -- we'll come on to  
7 talk about them, but in saying to them just quickly,  
8 "I think the First Minister should see this. What do  
9 you think?" And they might say "Oh, yes. That has  
10 a political consequence that he's aware of", or  
11 something else.

12 So all of that sort of stuff is going on all the  
13 time. But there simply is no way the First Minister  
14 could see or deal with everything that was happening in  
15 every department, that is why you get ministers with  
16 a large amount of discretion to get on with stuff. But  
17 certainly on the key things, yes. Or on things he had  
18 expressed a particular interest in, that he had  
19 a personal interest in, that he wanted to be kept  
20 informed and that would happen.

21 Q. So was it somewhere between, to use an analogy,  
22 somewhere between Ronald Reagan and Jimmy Carter; one  
23 who simply wanted it on A4 and the other who wanted to  
24 read everything? So it's maybe getting a balance, is  
25 that right?



1           A. It is also -- I had a real struggle with my department  
2           for a while until -- you tend to get, when a new minister  
3           arrives in a department, you get all sorts of stuff about, you  
4           know, the minister's preference is to deal with  
5           correspondence in this way or whatever. And  
6           I had a bit of a battle because I was getting very  
7           lengthy submissions, which were actually recommending  
8           things at the end or whatever, or something summarised  
9           at the beginning, which were within policy, within  
10          budget, weren't novel or contentious, so I didn't really  
11          need to see 30 or 40 pages of something. So we  
12          eventually got down to working on the basis that I would  
13          get a one-page summary with all the paperwork attached  
14          and I could dig into it to the level that I wanted to.

15                 As an aside, when this first happened, I asked for  
16          it to be on one side of A4. The first submission under  
17          that new regime came and it wasn't on one side of A4, so  
18          I thought: I need to make a stand on this. So I asked  
19          for it to be on one side of A4, so they just shrunk the  
20          font size and I got it back.

21                 So there were struggles that went on to get  
22          information in a way that you could manage and  
23          understand what was happening across a range of things  
24          that you were dealing with and then you could delve into  
25          the detail to the level you thought was appropriate, and

1           that was the way I personally operated.

2           Q. We have some evidence from one of the senior civil  
3           servants who we will hear from as well, Colin MacLean,  
4           who you will be familiar with, and I think one of  
5           the points he makes in his written statement is that the  
6           Education Department, which was broken into various  
7           branches and groups, divisions, was a busy department at  
8           that time and had quite a lot on its plate. Would that  
9           be fair comment?

10          A. Yes, it was a huge -- one, it's a very big portfolio,  
11          but secondly, we were well in the midst of the major  
12          child protection reforms you touched on, which were very  
13          extensive, covering how social workers and health  
14          workers and police, and so on, interacted the  
15          development of the GIRFEC, "Getting it right for every  
16          child" scheme, into children's hearings system into  
17          adoption, fostering, into child protection committees.  
18          I can go on. A huge range of things that were going on.

19                 And then on the education side, major changes in  
20          curriculum and significant efforts going on at that time  
21          dealing with behavioural difficulties in school, an  
22          exclusions policy, and that in particular impacts on  
23          looked-after children, because very often the first to  
24          be excluded from school are obviously those with the  
25          greatest behavioural challenges and very often, or

1 disproportionately, I should say, those were  
2 looked-after children. So big education reforms, a big  
3 school buildings programme going on, all that sort of  
4 stuff.

5 We also were doing a Gaelic policy, so we were doing  
6 the Gaelic Language Act and all the stuff around that,  
7 and we were doing fairly major bits of legislation on  
8 adoption and so on and so forth. Very extensive and  
9 very busy, yes.

10 Q. I think, and I'm not wanting to go into the detail  
11 today, but I think one or two of the major pieces of  
12 legislation that were current around that time, one was  
13 the regulation of care legislation in 2001 to set up the  
14 Care Commission and establish the Scottish Social  
15 Services Council to regulate the social care workforce,  
16 and another piece that was current around that time in  
17 2003 was to do with the protection of children --

18 A. Yes.

19 Q. -- from unsuitable adults?

20 A. Yes. And that had just been approved, just before the  
21 election in 2003, and therefore all the implementation  
22 of that fell to me. So the establishment of  
23 Disclosure Scotland and all that went with that, all the  
24 operating guidance and all sorts of things, that was  
25 part of what we were doing as well.

1 Q. You mentioned -- you touched upon another type of  
2 official, if I could put it that way, the ministerial  
3 special advisers.

4 A. Yes.

5 Q. You tell us about that in paragraph 10. Can you just  
6 again, in brief, tell us what is different about  
7 a special adviser?

8 A. I think -- again, somebody else will have to tell you  
9 because I can't remember the technicalities of this, but  
10 they were essentially political appointments who came  
11 in -- I don't know if they were formally part of the  
12 Civil Service or not, I can't remember. There will be  
13 some technical way of employing them, obviously. But  
14 they were essentially there to make sure, on behalf of  
15 the political arm, the ministers and the Government and  
16 their manifesto that they were elected to deliver, they  
17 were there to help make sure that that political  
18 manifesto got delivered. They were not civil servants,  
19 so they weren't trained in the Civil Service. They came  
20 from different -- they were academics, people from, in  
21 my case, people having worked in Social Services  
22 generally in the voluntary sector, third sector and so  
23 on, and they were the kind of political eyes and ears of  
24 the administration.

25 They technically, I think I am correct to say, all

1 worked for the First Minister and were allocated to us,  
2 rather than being our -- so I wouldn't be appointing my  
3 special advisers, they would be appointed by the  
4 First Minister, and then he would get access to those  
5 special advisers who would tend obviously to go to the  
6 areas of policy that they knew.

7 So they were the political eyes and ears. They  
8 would very often deal with troubleshooting in the  
9 department. If you were having difficulty in trying to  
10 get the administrative machine to do what you wanted it  
11 to do, to understand fully what you were trying to do;  
12 although I spent a lot of time with officials just  
13 talking them through that, nonetheless your special  
14 adviser would, after those meetings, re-emphasise  
15 points, make clear why this is important politically for  
16 ministers to pursue this, why that approach might not be  
17 appropriate but why that approach might be.

18 They would work with the Civil Service alongside,  
19 helping anticipate how a minister might react to  
20 something that was going to be sent to them and try to  
21 make sure the advice was appropriate in that context.  
22 All those kind of roles.

23 They would also liaise extensively outside  
24 Government with their contacts or making contacts, in my  
25 case very much the third sector and those agencies in

1 the third sector who are relevant to our portfolio. So  
2 there would be informal contact going on between the  
3 special advisers. And they were also -- they obviously  
4 worked together collectively, and they were taking  
5 a view and advising the First Minister: this is not  
6 going well, not going down well, or this is, or we are  
7 going to have to work harder on that. All that kind of  
8 stuff. They were the political antennae of the  
9 organisation in some way, or part of the political  
10 antennae and management of it.

11 Q. Obviously in Government, as in many large institutions  
12 and organisations, there would be a press office, and  
13 perhaps a press office for individual departments?

14 A. That's right. I would have a team of three or four.  
15 They were generally on, not a kind of full 24 hour rota,  
16 but almost. So you had quite a number of them but they  
17 were on shift work. They were preparing set piece press  
18 releases and interviews you would do with the media, but  
19 they would also be fielding the numerous enquiries that  
20 came in every day from different aspects of the media  
21 looking for information, looking for a quote or  
22 whatever. You would have a weekly meeting with them,  
23 looking at what was happening, looking at your planning  
24 of your work schedule, what announcements were coming,  
25 how you wanted to handle them, what were the key

1           messages you wanted to get across, and they may make  
2           suggestions. And the special advisers would be very  
3           much part of that dynamic as well where that was  
4           possible.

5        Q. I was going to say it sounds as if the description you  
6           have given of both roles is that there would be  
7           a reasonably close working relationship between the  
8           special advisers and the press offices to find out what  
9           was going on, and no doubt to also alert them to what  
10          was no doubt important to the minister or the  
11          First Minister and so forth. Is that the way perhaps  
12          the system worked in broad terms?

13        A. In broad terms, yes.

14        Q. You also have a section at paragraph 11, I think, about  
15          senior or main grade civil servants. Are these really  
16          what we might describe as "officials" in broad language?

17        A. Yes.

18        Q. They are civil servants who are employed as part of the  
19          administration of Government. In their role they are  
20          politically neutral. They are intended to assist the  
21          Government of the day in various ways, is that --

22        A. Absolutely, they are career civil servants and they  
23          serve every Government that comes along, and do so, as  
24          you say, within the Code of the Civil Service in  
25          an impartial way, offering their impartial advice.

1 Q. Then you have another set of individuals that you deal  
2 with called the legal advisers, and that starts at  
3 paragraph 12. We have already heard that there was  
4 OSSE, Office of the Solicitor to the Scottish Executive.  
5 In broad terms, that is the in-house Scottish Government  
6 legal team, is that right?

7 A. It is.

8 Q. Headed by the Solicitor --

9 A. Yes. Yes, indeed. Obviously you are having to get  
10 legal advice constantly, not necessarily directly  
11 constantly, but the system is having to produce legal  
12 advice. So they will be checking the boundaries of what  
13 you want to do: have you got the powers to do what you  
14 want to do, or have you got a duty to do what you may  
15 not want to do? All that kind of stuff. So they would  
16 be keeping you right in terms of legal propriety: are  
17 you acting within your powers? Are you bound to act in  
18 these circumstances? Then what are the parameters of  
19 the actions that you might be able to take?

20 Constant advice, principally between the key  
21 officials you have touched on and the lawyers who are  
22 preparing policy advice for you and will be checking  
23 out: does this stand up? Is this compliant with  
24 Convention rights? Et cetera, et cetera, et cetera. So  
25 there would be all that sort of stuff going on. And



1           then the advice you would get would incorporate in its  
2           content -- or influenced by or incorporate what the  
3           legal advice was that they were getting. So there would  
4           be that sort of interaction.

5           You would have occasionally lawyers in meetings.  
6           Not all the time, you'd principally be working with your  
7           policy officials, but you could on occasion, if you were  
8           discussing something that was particularly difficult in  
9           some way, or complex or intricate because of the legal  
10          complexities, you would have them perhaps in the  
11          discussion. You would also meet lawyers all the time  
12          when you were doing a bill in Parliament, because you  
13          would have a bill team and a lawyer would be part of  
14          that team, generally speaking, and therefore you would  
15          be interacting with them on that basis. That is very  
16          distinct from the Parliamentary draftsman role where  
17          ministers were not supposed to meet the draftspeople, it  
18          was a linear process.

19          But generally speaking, that is what would be  
20          happening, and very important that you are getting that  
21          legal advice.

22          Q. Just so that people are clear about how this operates,  
23          it's quite a normal part of Government for ministers,  
24          through officials or even directly, to seek advice  
25          either from the in-house lawyer team, OSSE, or in some

1 cases from the law officers who I think were a separate  
2 legal team or legal advisers, the Government's legal  
3 advisers, and also of course the Lord Advocate being the  
4 independent head of the prosecution system in Scotland.

5 A. Indeed.

6 Q. That was another category that could provide advice --

7 A. Yes, and did.

8 Q. -- and did so.

9 A. At that time -- this changed after the Government  
10 changed in 2007, I think I am correct in saying, but at  
11 that time the Lord Advocate was a member of Cabinet and  
12 sat in Cabinet. I have heard the then Lord Advocate on  
13 a number of occasions give legal advice, and sometimes  
14 extremely firm legal advice, you know, on proposed  
15 actions or the possibility of proposed actions and so  
16 on. So, yes, that was very much part of it. And again,  
17 the Solicitor General would also be involved at  
18 an appropriate -- in appropriate ways as well.

19 Q. So far as advice that is given by lawyers, including the  
20 law officers, can we just confirm, so the public are  
21 aware, it is quite legitimate for these lawyers, like  
22 any other lawyer, to give advice to protect the  
23 interests of the client, in this case the Executive or  
24 the Government, that is part of their function?

25 A. It is.

1 Q. So that they will be looking at advice from that  
2 standpoint, and they will be trying to give the best  
3 advice, in their judgment, for ministers to take  
4 decisions on sometimes very controversial or difficult  
5 matters, is that the case?

6 A. It is, that is absolutely the case, and you have to take  
7 that seriously.

8 I would have to say, and I do say at some point in  
9 my statement, I think probably paragraph 25, I begin to  
10 set out something about --

11 Q. Yes, you have some evidence about the different ways in  
12 which legal advice can come to ministers. They can ask  
13 for it, they can sometimes just offer it, but a lot of  
14 the time it is asked for.

15 A. Mostly it will be asked for by officials on your behalf,  
16 although things will come up in a meeting and you'll say  
17 "We need to get some legal advice on that", and you get  
18 that clear.

19 I think the thing you are maybe touching on, or  
20 maybe you are not but I will say it anyway, is that  
21 there is unquestionably -- one of the dynamics, one of  
22 the features of Government, and this is not just true of  
23 ministers but I think it is also true of policy  
24 officials, is that you have to get your ideals and your  
25 ideas and your policy proposals past the lawyers and

1           very often that is where you run into tensions and  
2           difficulties. Because once you have got an idea that we  
3           need to do this, or we need to make this progress, you  
4           are content to get advice which may be discouraging of  
5           that, and we will come to that I am quite sure.

6           Q. We will.

7           A. But this is not unusual, this is just a given in  
8           Government, that I think most -- I can't speak for  
9           former colleagues or current ministers, but I think  
10          there is a sense that the advice we got was extremely  
11          cautious, and that was-- very often characterised as the  
12          entire system. However, it is also at times extremely  
13          necessary to be extremely cautious but also that is just  
14          the nature of -- it's a given. Once you have got your  
15          ideas that you are forming, and your official will be  
16          saying to you "You'll never get that past the lawyers",  
17          or "We'll be surprised if you get that past the lawyers."  
18          We will need to check this out with the lawyers".

19                 So it can be seen, if you like, as a slight drag on  
20          the system, but it is also a necessary drag on the  
21          system. Because you can't have just -- you can't just  
22          shoot off and do things without understanding some of  
23          the political consequences or the legal consequence in  
24          particular in this sense. But also you then have to  
25          weigh that up and you have to make a balanced judgment,

1           notwithstanding the advice. Provided you are within  
2           your powers, provided it is legally competent, then it  
3           is up to you to decide the balance of a risk with a  
4           particular course of action, and again we come to some  
5           of that later on in my statement.

6                     But that is not -- I wouldn't want you to think, in  
7           highlighting these dimensions in this statement, that it  
8           is only typical of this dimension of what was happening  
9           in Government. This is a given within Government.

10       LADY SMITH: Peter, just to be clear, this expression

11                     "You'll never get that past the lawyers", am I right in  
12           thinking what you are trying to capture is not that the  
13           lawyers had the power to stop you pursuing your ideal or  
14           idea but, in whatever circumstances applied, it looked  
15           as though you were going to get clear, firm advice to  
16           the effect that: if you do that, the consequences will  
17           be adverse consequences.

18       A. That's right, or they may be adverse, or there is a risk  
19           attached.

20                     One of the challenges -- and you know this better  
21           than I do, you're a practising lawyer, but one of  
22           the challenges is actually assessing the level of risk.  
23           I used to get -- this is true of my Local Government  
24           days too, I have to say, when I was also getting lots of  
25           legal advice in the positions I held in Local

1 Government. I was never satisfied with just being told  
2 there was a risk, I wanted some idea of, look, are we  
3 talking about -- you can't quantify these things  
4 precisely, but are we talking about something below 20%  
5 risk or something above 80% risk? Where are we here?  
6 What are the precedents elsewhere? What case -- well,  
7 we wouldn't be advising a case.

8 It's that kind of thing. So I think the caution  
9 I refer to is sometimes, just thinking about it, is  
10 sometimes due to that dimension that, not necessarily  
11 weighing up or helping, you weigh up the risks, just  
12 stating there is a risk.

13 LADY SMITH: Yes. Can I just say, as a lawyer for longer  
14 than I like to remember, lawyers generally would love to  
15 be able to tell their client "That's great, there's no  
16 problem in doing what you want to do, there's no risk  
17 attendant on it", and they can personally feel as  
18 excited about what the client wants to do as the client  
19 is. However, the good lawyer often has to put a damper  
20 on enthusiasm.

21 A. I completely understand that. It just gets a bit  
22 frustrating at times.

23 LADY SMITH: The lawyers do understand that.

24 MR PEOPLES: So the general point you are making here, and  
25 I think it is an important point that you are trying to

1           get across, is that what you described as the caution  
2           that you sensed on this occasion is an innate caution  
3           that you tended to sense across Government in your  
4           experience.

5       A. Yes, it is.

6       Q. That is not unique to this particular issue?

7       A. No. I think that is a good way of putting it, there is  
8           an innate caution within the system, and that is  
9           recognised within the system. It is one of the little  
10          frustrations, if you like, within the system, but it's  
11          a given, you just have to work with it. You know you  
12          have to get to that point.

13                 What I would say is in some of the instances here,  
14           there was a heightened level of caution, I would have  
15           said. There was even greater anxiety and concern about  
16           some of the things we were proposing than I had  
17           experienced before. I am sure we will come to it, but  
18           at one stage I got a pretty extensive submission from  
19           the head of OSSE, pretty unprecedented in my experience,  
20           and that indicated in this context, and there are other  
21           dimensions of this, where there were really heightened  
22           concerns about what we were planning to do and wanting  
23           to do.

24       Q. I will come to that so don't worry. We will get to  
25       that.

1           The other point that I think you made, and indeed  
2           you touch on in your witness statement, is that in most  
3           cases it is open to ministers to reject advice given by  
4           the lawyers. It is not usually "You cannot, in law, do  
5           what you propose to do", it is usually "Yes, you can do  
6           it, but these are the consequences, being the downside,  
7           of doing it and the possible implications".

8           A. Yes, unless it was absolutely clear that you simply do  
9           not have the power to do that, in which case the advice  
10          would say "You do not have the power to do that".

11          I remember a particular case in Local Government where  
12          we wanted to spend some money on something and the  
13          lawyers were quite clear it was outwith our competence  
14          to do it, end of story. You no longer can act on that.

15          No, most of the advice -- the advice would not,  
16          other than in those kind of circumstances, be framed in  
17          terms of: you can or cannot do something, it would be:  
18          unless you cannot do it you are empowered to do it, but  
19          here are the things you need to think about and the  
20          possible consequences.

21          Q. Yes. And this context, and we will get on to the sort  
22          of advice you were getting and the concerns being raised  
23          by lawyers, including the law officers, was that: think  
24          long and hard and there are some risks here for  
25          a variety of reasons?



1 A. Yes.

2 Q. But in general terms, it wasn't saying that you can't do  
3 this?

4 A. No.

5 Q. So we are in that territory so far as --

6 A. Absolutely. And of course you are having to weigh up  
7 those risks and decide your course of action. Given  
8 that you are within competence, you are having to say,  
9 right, can I do ... There's one submission, it's not in  
10 my statement, but there is a submission you have had  
11 access to where I think in relation to the question of  
12 the rapporteur, which I am sure we will come on to,  
13 there was a quantified risk that: yes, you can do this,  
14 but there might be a £30 million bill as a consequence  
15 of doing it.

16 That's perfectly proper advice and you need that  
17 advice. You then have to decide, and in fact the advice  
18 said this, you need to decide if a £30 million bill is  
19 worth doing. That is your political judgment, that is  
20 why you are there as a politician.

21 Q. We went through with your former colleague,  
22 Cathy Jamieson, the sort of formula that officials  
23 advise and ministers decide, and in broad terms that is  
24 what happens in practice unless you are constrained by  
25 legal advice saying: you can't do this?

1 A. Yes.

2 Q. So you have to make judgments, and sometimes difficult  
3 judgments, and you try to do what you think is the best  
4 judgment in the circumstances, weighing up all relevant  
5 considerations. Is that the way you tried to  
6 approach --

7 A. Yes.

8 Q. So far as innate caution is concerned, if I just  
9 continue on that theme for the moment. Would it be fair  
10 to say that if someone, for example, was calling on the  
11 Government to set up a public inquiry, at that time  
12 anyway, if we go back to 2002, that the innate caution  
13 that you have described that is perhaps a feature of  
14 legal advice would also be something that ran through  
15 officials' advice that they (inaudible) like that, there  
16 would perhaps be an innate sort of: I don't think we  
17 should go down this route --

18 A. I think you need to understand in that context, as  
19 I understand it, and Colin MacLean, when you hear from  
20 him, I am sure will be much more able to answer this  
21 having been an official. The officials are not in  
22 a position to outrank the lawyers. If the lawyers are  
23 saying to the officials "We think this is ill-advised",  
24 that will be reflected, chances are, in the advice, or  
25 it might be drawn out.

1           The officials don't have a basis for assessing the  
2           same risks that the lawyers can assess in that context,  
3           the legal risks, so they are bound to be very heavily  
4           influenced by the legal advice. So I would have thought  
5           that that would be -- all the advice you would get in  
6           that sense would be -- you may get circumstances, but  
7           I am speculating here, and this didn't happen in these  
8           instances, where the officials may be saying, you know,  
9           "We have been advised this by the lawyers. It might be  
10          worth speaking to the Lord Advocate", or whatever, "to  
11          see if they share that view". Because they were -- they  
12          themselves were slightly doubtful, perhaps, about  
13          the advice. But I wouldn't overstate that, I am  
14          speculating there --

15        Q. I'm not sure you will be speculating. I think we will  
16          come to an example of that where the solicitor was  
17          concerned enough to perhaps have a conversation with the  
18          Lord Advocate on that matter --

19        A. That is a slightly different matter. We will come to  
20          that, I am sure, but I am talking about policy officials  
21          as opposed to legal -- legal officials might well --  
22          I don't know how they would do that, because I have no  
23          real insight into that, other than this case. But they  
24          might well refer up to the Lord Advocate about a worry  
25          about something a minister was seeking to do, which we

1 have seen here.

2 But policy officials would not do that, no. Policy  
3 officials may say to their minister in a meeting about  
4 the advice, "Look, it might be worth having a word with  
5 the Lord Advocate", but, again, I can't think of  
6 a specific instance of that.

7 Q. They wouldn't go direct. They would go to the in-house  
8 lawyers, the in-house lawyers would make a judgment  
9 whether they would give the advice or whether --

10 A. Absolutely.

11 Q. -- alert the law officer and seek some kind of guidance.  
12 And I think, you may not know this, but I think at that  
13 time, and no doubt today, the in-house legal team will  
14 keep the Lord Advocate and the law officers informed, if  
15 I could put it this way, of what is going on that may be  
16 relevant to --

17 A. Absolutely.

18 Q. -- their interests.

19 A. Absolutely. And number two, it's an interesting point  
20 that we may come to in another context as part of this,  
21 but the Lord Advocate, the First Minister, and the  
22 permanent secretary, for example, their interests are  
23 across Government. I am thinking here we will come to  
24 this, I am quite sure, the time bar matters. I have a  
25 particular view on all of that. I am sure you will come

1 to that. But I was in a slightly luxurious position in  
2 the sense that my interests at that point were only in  
3 relation to survivors of abuse. Cathy Jamieson,  
4 Jack McConnell, the Lord Advocate would have that  
5 interest as well but they have a wide range of other  
6 interests, and they have to think about not just that  
7 narrower interest, if I can put it that way, that  
8 I might have and I may be pushing, but what are the  
9 precedents that might set for other aspects of policy in  
10 other departments, in other spheres of Government?

11 I was spared the burden of having to think about  
12 that in that context. I was batting on a pretty narrow  
13 wicket whilst understanding all of that. But they have  
14 that responsibility, so they might have to take  
15 a different view on some of the things because they are  
16 taking that more balanced corporate --

17 Q. I think what you are saying is that time bar doesn't  
18 just apply to claims for childhood abuse --

19 A. Precisely.

20 Q. -- it applies to claims generally, for example, for  
21 personal injury in a variety of contexts. And I think  
22 maybe one that you might indeed have been aware of at  
23 that time were the claims for slipping out and stuff --

24 A. Precisely.

25 Q. -- and that was a big problem.

1 A. Precisely. So they are thinking about all of that.

2 I am batting on the wicket of saying, well, what can  
3 we do in this particular circumstance? I accept there  
4 is a difference.

5 Q. You have a section headed "Dynamics of Decision-Making".  
6 To some extent you have probably covered this already,  
7 but one point I want to pick up is the statement you say  
8 at paragraph 14:

9 "Decision-making as a minister is a formal process,  
10 and records, such as those available to the Inquiry,  
11 exist around advice received by ministers and decisions  
12 taken. Proper process in decision-making is  
13 a foundation of good governance."

14 That should be the key principle, that there should  
15 be a good record of key decisions and --

16 A. Yes --

17 Q. -- policy positions and so forth, is that right?

18 A. Yes, when you get to the formal decision-making bit, but  
19 there is also -- I also -- I can't remember, it is in  
20 this section, but there is also a huge amount  
21 of informal conversations and discussions going on. So  
22 you as a minister are in regular contact with your other  
23 ministerial colleagues. I think, I can't remember if  
24 I mention it in here or not, offhand, but for example we  
25 met every morning quite early on before Cabinet, we had

1 breakfast together in Bute House, very informal. You  
2 had toast and whatever, you had a cup of tea or coffee,  
3 a banana, whatever. There were lots of informal  
4 conversations going on there. There would be a Labour  
5 ministers meeting before Cabinet; there are no records  
6 of any of these discussions. There would be Labour  
7 group meetings that you would be taking part in every  
8 week; there are no records of these discussions. You  
9 would be having constant conversations with your special  
10 advisers, with back bench MSPs about concerns that they  
11 have. There aren't records of these conversations, but  
12 all of these conversations impact on how decisions might  
13 ultimately be taken.

14           However, you get to the point where you have had  
15 your political conversations with colleagues, you are  
16 determining a direction of travel. You are then  
17 speaking to your officials to say "Look, here's what we  
18 are thinking about", or it may be an interpretation of  
19 a manifesto commitment, whatever, "Here's what we are  
20 thinking about. You need to work up the advice for me,  
21 think about this". And then they would be coming back  
22 and saying "Yes, we think this will work and it's within  
23 powers", and so on and so forth, "and we think this is  
24 the best way of doing it". Or they might come back and  
25 say "Really good idea. We think there are elements of

1 this that would work but others that wouldn't work.  
2 Here are the reasons why".

3 You might then have further iterations between  
4 yourself and your political colleagues, "Look, this is  
5 the advice I am getting. What is your instinct for  
6 this? What is your feel for it? My instinct is this".  
7 And then that would get fed back in to reshape the  
8 instructions, if you like, to the officials to allow  
9 that to happen.

10 So, yes, once you get to the formal decision-making,  
11 proper record-keeping in that sense is built in, and you  
12 have seen most of that in what you have been given  
13 access to. But to be clear, there aren't records of  
14 a great many conversations in this that are important.

15 Q. You are saying that that would have been the normal  
16 practice. There wasn't a practice that such  
17 conversations would be minuted or recorded and so  
18 therefore we wouldn't expect to find records. It is not  
19 as if there would have been records but we have not had  
20 access to --

21 A. No. I have seen literally thousands of pages of  
22 documentation, having gone back over all -- some of  
23 which, of course, I am seeing for the very first time.  
24 Exchanges between officials about what you're up to you  
25 are seeing for the first time, some of which was really



1 quite enlightening.

2 So the records -- I can't say you have seen  
3 everything. I don't know. But I am clear you have seen  
4 everything that is materially important to this, from  
5 what I have ...

6 Q. Can I ask you this: obviously, good record-keeping of  
7 key decisions is part of good governance. If on  
8 a matter of some importance, such as the question of  
9 an apology, there was a direction of travel that had  
10 been agreed between a minister and the First Minister  
11 about what they would do by way of policy response,  
12 would you expect a matter of that kind, which is  
13 described as an agreement, to be in some way minuted --

14 A. Well --

15 Q. -- to ensure that everyone understands the direction of  
16 travel, and indeed it informs any subsequent discussions  
17 of the type that you have just described today?

18 A. Only when it gets to a certain point, because there are  
19 discussions that are going on -- you know, maybe I am  
20 completely wrong about this, but sometimes people think  
21 the Government is a constantly well-considered,  
22 deliberate, long-run process. It ain't all the time.  
23 Things happen. Was it Macmillan who said "What is the  
24 most difficult thing in Government? Events, dear boy,  
25 events".

1            Things happen, things change around you. You are  
2            spotting things in the environment, and you are having  
3            political discussions with your colleagues, the  
4            First Minister included, "What are we going to do about  
5            this? How are we going to respond to this?" And you  
6            would be having a series of iterations and conversation  
7            about that until you get to the point where you think  
8            you have cleared your mind sufficiently, you have got  
9            sufficient agreement amongst colleagues, and you then  
10           say "Right, we now need some formal advice on this".

11           But from the point you get to when you need formal  
12           advice, I would expect there to be records of that. And  
13           for the most part, as far as I am aware, I think there  
14           are, but there will be a bit up until that point where  
15           you won't necessarily know what's going on. And a lot  
16           of that will be about when is the right time to  
17           introduce this into the official system, when do we  
18           think the conditions are right for this? You will know,  
19           I think we touch on the Apology, but I am sure we will  
20           come to this in detail, you know you are going to get  
21           into the really difficult discussions about what you can  
22           and can't say, when is the right time to do that.

23           So all those discussions would be going on, and  
24           there won't be records because these are largely  
25           political discussions and they are people making

1 political judgments trying to work out how we are going  
2 to handle this to most effect for all the interests  
3 concerned.

4 Q. So in the example I have given of some informal -- or  
5 some sort of discussion between a minister and the  
6 First Minister about the direction of travel on  
7 a certain issue of some significance, and some level of  
8 agreement between them, it doesn't follow that as soon  
9 as that agreement has been struck, indeed for some time  
10 after, that the officials who might have responsibility  
11 for giving effect to that policy will be made aware of  
12 it, the position, and be allowed to consider and weigh  
13 up the risks or the --

14 A. It will very much depend on the issue, and there might  
15 be some things you are clearing out the way, saying to  
16 the First Minister, "Look, I am thinking about this.  
17 Are you comfortable with that?" "Aye, okay". I am not  
18 trying to be glib here, but that kind of conversation.  
19 You would then go off and say to your officials, "Look,  
20 I think we can move this thing forward. Here is what it  
21 is, here is what I am thinking about", and so on, or you  
22 might do that to a special adviser, to go and speak to  
23 officials.

24 Equally, there will be things where you are saying  
25 "We need to think about that a bit more. Now is not the

1           time to introduce that", and then you end up -- so it  
2           might be some time after you then introduce that to  
3           officials.

4           Q. Can I maybe bring this down to the present context? At  
5           this stage I just want your response. The former  
6           First Minister has said to the Inquiry in his written  
7           statement that he was "determined from the outset", is  
8           the expression, to ensure that a proper apology was  
9           delivered in Parliament by him as First Minister, to use  
10          his expression, "at the appropriate time". And he says  
11          that he and Cathy Jamieson agreed that they would work  
12          towards an apology at the appropriate time. What did  
13          you know about that?

14          A. You come to Lady Smith's point. I don't have a specific  
15          recollection of being told there was an agreement  
16          between Cathy and Jack about this. Remember that I was  
17          in a different portfolio when Cathy was no doubt talking  
18          to Jack about that, and I have covered my recollection  
19          of this. I am sure we will come to that. But that --  
20          there is no reason, notwithstanding what you have just  
21          read out, that that would go to officials at that  
22          particular point. There is no particular reason why  
23          that would happen. You have got to -- one of the things  
24          I will look at with you, I'm sure, when we come to my  
25          appearance before the Public Petitions Committee, was

1 consideration of these things. Would it have been  
2 appropriate -- I don't want to pre-empt what you are  
3 going to get to on that, but would it have been  
4 appropriate for me to make the Apology at the Public  
5 Petitions Committee? My view on that is no, it wouldn't  
6 have been appropriate, so that wasn't being proposed as  
7 a specific at that point. But because you would want to  
8 do that in a much different way, you'd want to elevate  
9 that, and my view was the First Minister ought to do  
10 that, and that should be done to the full Chamber on  
11 a different occasion.

12 So you wouldn't necessarily have shared your  
13 political thinking on that with your officials.

14 Q. Okay, I take the point you are trying to make. But if  
15 I go back to my point, that if we are told there was  
16 an agreement, and I think Cathy Jamieson, if I am  
17 correct, said she didn't have a specific memory of the  
18 agreement and when it may have been reached, but the  
19 First Minister -- she accepted there would be  
20 conversations, so she wasn't suggesting there wasn't  
21 such a conversation. But it came at the outset,  
22 according to the First Minister. That would be around  
23 somewhere between November 2002 and February 2003,  
24 because part of what he remembers is that they were  
25 going to submit a holding response to the Public

1 Petitions Committee, and we know when that was  
2 submitted. So let's just assume that agreement of this  
3 type had been reached by some process at that point, but  
4 this is early 2003.

5 Now, Cathy Jamieson was the Education Minister then,  
6 and so maybe she was the right person to have this  
7 discussion with, if she was responsible for responding  
8 to the petition. You became the Minister for Education  
9 following the election in May of 2003, a few months  
10 later. What maybe puzzles some of us is, well, if you  
11 took over, why was this information not maybe conveyed  
12 at least to you to say --

13 A. No.

14 Q. No, I am just asking: you don't recall it being done?

15 A. No.

16 Q. And I just wonder whether --

17 A. But the agreement -- I don't know, I am speculating.

18 You are telling me things I don't know so I am  
19 speculating. But the agreement might have been: yes, we  
20 should head for an apology, but let's keep that to  
21 ourselves. Meantime, we're not going to do anything.  
22 And that could be a whole variety of other  
23 considerations I am unaware of around it.

24 I am not unduly surprised about that, in a sense.  
25 It depends what status you give to the term "agreement".

1           It is not like there is a formal minuted agreement: this  
2           is what we are going to do. This is a political  
3           understanding you've reached and we ought to do that,  
4           you know, do we ...

5       LADY SMITH: Let me ask you this, Peter. If you had been in  
6           Cathy's position and she was the incoming minister the  
7           following year, would you have told her about that?

8       A. Not necessarily. This is where ministerial life is  
9           really very odd. When you are in a new job you move on  
10          and you ain't got much time to think back. Actually,  
11          I am not clear about the protocols here. I know that  
12          your advice given to an incoming Government should not  
13          reveal what the advice was given to a previous  
14          Government. I am not clear whether that is a change of  
15          administration of the same party or whether that is  
16          between parties, but I would not normally -- not  
17          necessarily have expected to know or for that minister  
18          to tell me.

19                You are literally moving and you are having to get  
20                up a steep learning curve in your new job, so I wouldn't  
21                have necessarily expected that. Having said that, in  
22                the conversations that we would have had as colleagues  
23                around the breakfast table or in the pre-Cabinet meeting  
24                when we were ministers, or on any another occasion when  
25                we were meeting, these matters would be discussed and

1           maybe -- I don't remember a specific about that, you  
2           know, there was a firm agreement. I wouldn't see it in  
3           that way.

4           MR PEOPLES: I am just giving you the words --

5           A. Okay.

6           Q. -- it's put in the language of agreement. I am not  
7           worried about whether --

8           A. Maybe to a lawyer an agreement is a specific thing.  
9           Maybe to a politician it is not --

10          Q. I think you are maybe missing the point I am making to  
11          you. The point I am making is that he felt -- whatever  
12          he wanted to say about his thinking to officials at that  
13          early stage, he had reached a position that he was  
14          prepared to share with the relevant minister, who was  
15          the Minister for Education. All I am asking you is to  
16          perhaps try to tell us why, if you became the relevant  
17          minister a few months later, that information was not  
18          maybe conveyed to you either by your predecessor or by  
19          the First Minister who was one and the same?

20          A. My recollection is that when we did -- when the  
21          First Minister and I did talk about this, this wasn't  
22          a matter of any difficulty. It wasn't like this was  
23          a new idea to him or anything. I was simply confirming  
24          that I think we need to give an apology and I think you  
25          should do it. That was the kind of message. And there



1           was no difficulty with any of that. So that might  
2           reflect the fact he had already settled on this in  
3           his -- in fact, it might well reveal the fact that he  
4           had already settled on this in his own mind.

5       Q. Just to put a time context on that conversation you were  
6           having, I am right in thinking, am I not, that any sort  
7           of discussions you were having about an apology would be  
8           in 2004 in the run-up to the debate --

9       A. It was in the run-up to the PPC.

10      Q. To the PPC, I'm sorry.

11      A. The PPC appearance --

12      Q. 29 September 2004 --

13      A. Yes.

14      Q. -- in the run-up to that --

15      A. That was when I was and others were beginning to really  
16           focus on this, so that was -- you've got to understand,  
17           I don't know, you probably do understand. I don't mean  
18           that in a sort of flippant way. But there's a huge  
19           number of things going on in Government and the  
20           First Minister in particular has got a colossal span of  
21           things to deal with. The fact he doesn't tell me about  
22           something, that he had an "agreement", from my point of  
23           view, with Cathy Jamieson, isn't really surprising. You  
24           are dealing with colossal issues and -- you know, I am  
25           not unduly surprised about that.

1 Q. Perhaps I can just respond by saying, though, that we  
2 have heard, and indeed the former First Minister will  
3 no doubt tell us, that he had a particular interest --

4 A. He does.

5 Q. -- in this matter, and indeed from an early stage he  
6 asked his special adviser, Jeane Freeman, to make  
7 comments on it, on the submission, the initial  
8 submission to the PPC. So clearly whatever the  
9 generality, and however busy the First Minister was, we  
10 are being told that on this matter at least he had  
11 a particular interest and was keeping note. Because,  
12 indeed, not only did he ask for comments from his  
13 adviser in relation to the initial submission to the  
14 PPC, he did indeed ask what was the outcome of a meeting  
15 that you attended where the decision was that there was  
16 not to be an inquiry. He asked officials "What was the  
17 outcome of that meeting?" You will remember that,  
18 I think?

19 A. I take your word for it --

20 Q. I will come to it. I am just trying to make the point  
21 that on two occasions he has intervened to ask --

22 A. Yes, but --

23 Q. -- what is going on? But between those two occasions,  
24 I think you will agree that any records that you have  
25 seen between, say, for example, March 2003 right through

1 to perhaps June 2004, when you replied to the PPC, if we  
2 look at any records that we have been given, there is  
3 nothing really about an apology or what the  
4 First Minister's position on that was. Do you agree?

5 A. I can't recall seeing correspondence about that or  
6 submissions. That doesn't mean there weren't  
7 conversations taking place about it.

8 Q. But not with you?

9 A. My recollection is that the conversations about  
10 the specifics of the Apology arose in the lead up to the  
11 PPC. That doesn't mean there weren't other  
12 conversations taking -- I don't -- I don't think that --  
13 that is my recollection of events.

14 LADY SMITH: I suppose what might be taken from this, Peter,  
15 is the First Minister had talked to Cathy Jamieson about  
16 doing this in her capacity as Minister for Education,  
17 and he hadn't got push-back from her, and she had agreed  
18 that she would work with him towards that, I think that  
19 is his specific wording in his statement. So tick,  
20 Minister for Education is on board and we can work  
21 towards this.

22 Then Minister for Education changes and no specific  
23 steps, according to your recollection, or I think  
24 anything that we have seen in any document, are taken by  
25 the First Minister to confirm that the new Minister for

1 Education is not going to give him push-back, and is  
2 going to work with him, so matters carry on. And that  
3 might explain why, if you didn't know, you didn't say to  
4 anybody, "Hey, wait a minute. What about this apology  
5 that the First Minister told me was being worked  
6 towards? Am I supposed to be doing anything about that?  
7 Do we need to talk about that?"

8 A. You might reason that. I think he might also have taken  
9 the view -- I have known Jack a long time, we got on  
10 well with respect to each other. He might have taken  
11 the view "He will get to that, he is not going to be  
12 a problem with this", because he knows my mind. So he  
13 might equally have taken that view. "And we will deal  
14 with it when we get to it".

15 LADY SMITH: But it wasn't flagged up as something that  
16 had --

17 A. I don't remember the specifics of that, but remember my  
18 recollection is that this did not -- the fact of the  
19 petition in which this arises was not, as I recall,  
20 flagged to me in the initial briefings I had on becoming  
21 a minister, which I find odd because I think the same  
22 official who was advising Cathy would also be advising  
23 me. On the other hand, on things I am quite sure we  
24 will come to, this had maybe gone off the radar because  
25 of correspondence going to the wrong department. I am

1           sure we will come to that.

2           So in that context, there was -- nobody was saying  
3           to me -- to be honest with you and straightforward about  
4           it, if I had been told at the first briefing with  
5           officials that you get -- it is a very odd world.  
6           I remember that briefing rather vividly, actually, in  
7           one sense, because I was sitting down with your senior  
8           officials in the department, having been appointed to  
9           the job maybe 45 minutes beforehand or something, and  
10          I was asked "So what are your policies on this?" And  
11          you are saying, "Hang on a minute, I didn't know I was  
12          going to have this job this morning. I've now got this  
13          job. You tell me what I have got to deal with and then  
14          we will get on top of how we are going to pursue the  
15          manifesto commitments and so on".

16          If I had been told then "There is a petition you  
17          have to deal with", that would have got attention  
18          straightaway. I simply don't recall that having  
19          happened, for reasons I am sure we will go into. And  
20          that would have been the point at which you would then  
21          have picked up on --

22          MR PEOPLES: The reason I am asking some of this is because  
23          the call for an apology from State bodies and others was  
24          made in August 2002.

25          A. Yes.

1 Q. The Apology that came from the First Minister was on  
2 1 December 2004. On the face of it, that is a long,  
3 long time.

4 A. It is a long time.

5 Q. And we are looking to kind of get an explanation why,  
6 particularly if we are told now that from the outset the  
7 First Minister's own position was he was determined to  
8 make an apology at the appropriate time. When is the  
9 appropriate time?

10 A. You also have to understand, you may well be saying to  
11 yourself we need to give an apology, and you may well  
12 have a chat with your then minister about that. That  
13 doesn't mean -- there are processes to be gone through,  
14 there's all the Petitions Committee, the people who are  
15 being asked about this. There's a kind of formal  
16 relationship with the Petitions Committee. That is not  
17 to say the First Minister, who I could tell you is  
18 a very determined guy. Just the fact that you don't  
19 pursue something on the day that you thought about it,  
20 perhaps for all sorts of other tactical reasons, and you  
21 are going to keep that, it doesn't mean you are not  
22 going to come back to it, it means that come the moment,  
23 this is what we're going to do.

24 Q. He might have a long memory and he might well come back  
25 to it, and we will no doubt hear about that in due

1 course. But all I am putting to you is it seems  
2 an unacceptably long time to get back to it?

3 A. I am sure we are going to go into the delay question so  
4 I will pick that up then, if I can.

5 Q. Do you agree just in general?

6 A. It is a long time. I can give you some explanation for  
7 that, I can't give you any excuse for that in terms of  
8 procedure, but I will happily try and do that.

9 Q. Are you quarreling with my description: it was  
10 unacceptably long to get to the point of making a public  
11 apology?

12 A. I wouldn't necessarily go along with that. We had to  
13 come to a judgment about when it would be right to make  
14 an apology. Remember too that in the very first  
15 instance, the Apology was being requested of the  
16 Parliament, not the Government.

17 Q. Of State bodies, and that would include the Executive.

18 A. Yes, but the Parliament could not give an apology for  
19 the Government --

20 Q. The petitioner might not know that.

21 A. Well --

22 Q. I think it is clear what he was wanting?

23 A. I tend to agree. I am just saying that that is what --  
24 I asked myself the question, for example, why did we not  
25 discuss the Apology at the meeting of the 20 ...

1           whatever it was, of September, following the  
2           Colin MacLean minute. And the only reason I can think  
3           of for that, because I don't have a reason for that, is  
4           the officials might have interpreted the petition  
5           literally, and therefore that was not a matter for the  
6           Government.

7           But I honestly don't know why that wasn't discussed  
8           at that meeting, I can't think of -- other than that.

9       Q. There is no real evidence of that, though, that that's  
10      --

11     A. No, I agree. I am just saying it's a slight mystery.

12     MR PEOPLES: My Lady, I wonder if this is a good time to  
13      have a short break?

14     LADY SMITH: Yes. Peter, we usually have a break around  
15      this point in the morning. Would that work for you?

16     A. Absolutely fine.

17     LADY SMITH: Very well.

18      (11.13 am)

19                               (A short break)

20      (11.30 am)

21     LADY SMITH: Are you ready for us to carry on?

22     A. Please.

23     LADY SMITH: Mr Peoples.

24     MR PEOPLES: Before I finish about this generality, there  
25      was one thing that Cathy Jamieson said in a statement,



1           and I maybe want to put it to you, on the subject of  
2           advice. One of the dilemmas, she said, as a minister,  
3           is that you are relying on the advice that comes from  
4           your officials. Does that resonate with you?

5           A. You are very dependent on your officials, in that sense,  
6           and you will at times feel quite constrained by the  
7           advice you are getting. On the other hand, you can  
8           sometimes feel quite liberated by it too. So I think --  
9           I am not entirely sure what she means by that.

10          Q. I'll help you a bit more. The context in which she  
11          actually made the remark, although I think it was  
12          a general point she was making, that you have to rely on  
13          advice, that is your source of advice, information  
14          often, and that is the basis on which decisions are  
15          taken.

16          A. Yes.

17          Q. But she said this in the context of the initial briefing  
18          from her officials about how to respond to the Public  
19          Petitions Committee, and I think you are familiar now,  
20          I'm sure, that the initial briefing said we have no  
21          plans to hold an inquiry --

22          A. Yes.

23          Q. -- and that was the response that was recommended. But  
24          she didn't like that, she wasn't happy. She asked to go  
25          back and produce a revised response. And eventually

1 in February, for a variety of reasons, the Committee  
2 were told that the Executive was considering whether to  
3 hold an inquiry of the type requested by Mr Daly "or  
4 some other forum", I think was the expression used, and  
5 that really it was, I think, a holding position, but  
6 saying it was being considered. It hadn't been decided  
7 that it would not happen.

8 So it was in that context, because she said that  
9 of course her background as a social -- with her  
10 background in social work and her experience with the  
11 Edinburgh Inquiry, which I think you would be familiar  
12 that she had been involved in, had helped her on this  
13 occasion to make that judgment, that that advice wasn't  
14 advice she was happy with and that she wanted to take  
15 more time to look at the --

16 A. Cathy was very experienced in that sphere. In fact she  
17 has gone back to work in it, I gather, since she -- or  
18 I know, since she left politics.

19 So I understand that, yes, you -- but that is not  
20 uncommon, that you get advice you don't particularly  
21 like, and you test it and you ask for it to be thought  
22 about again. You probably have a meeting with the  
23 officials and try and explain your perspective and why  
24 you think this isn't right, "What more can we do?" And  
25 ask them to reconsider. That was -- in that sense I can

1 see what she means, that you are very dependent on the  
2 official who has given you that advice, and if you don't  
3 particularly like it, your job is to test that and  
4 change it if necessary, or to make the decision  
5 notwithstanding the advice that you want to make.

6 Q. I think, while there may be some questions as to whether  
7 you too readily followed advice, I think some might want  
8 me to ask you about that.

9 There are occasions, and I think we will come to  
10 them, when I think you decided the advice you were  
11 getting, for example, the rapporteur proposal, you  
12 weren't prepared to follow. You had your own view on  
13 the matter, and I think we will come to that in due  
14 course. So the point you are making is ultimately, yes,  
15 you have to make a judgment?

16 A. Yes.

17 Q. And unless constrained by the law rather than the legal  
18 advice --

19 A. Yes.

20 Q. -- then it's your judgment?

21 A. It's your judgment to make. And sometimes you have to  
22 fight quite hard for that. It is the nature of  
23 Government. Sometimes people think that, you know,  
24 politics and so on is just a clash of great ideals  
25 between the political parties. It is partly that, and

1           that is hugely important, but it is also trying to get  
2           the machine to deliver what it is you want delivered,  
3           and that is why you are there, in the end, is to make  
4           the judgments, notwithstanding the advice you have got,  
5           provided you are within the law.

6           Q.   If I could move directly to petition PE535, which was  
7           submitted in August 2002 to the Scottish Parliament's  
8           Public Petitions Committee. I will call it, for  
9           convenience, the Daly petition. It's a bit of  
10          a mouthful to keep going back to its number.

11                    I want to focus on your involvement with that  
12          petition. You can take it we have heard some evidence  
13          of what happened before you took over as Minister for  
14          Education and Young People, and what happened in that  
15          period from your predecessor, Cathy Jamieson. So while  
16          I am sure you have some knowledge of what happened in  
17          that period, I am not proposing to go through it with  
18          you today.

19                    There were some difficulties in communications  
20          because of where letters were sent, and clearly the  
21          First Minister took an interest, and I think that did  
22          influence the timing of the response to the Public  
23          Petitions Committee, but these are matters which we are  
24          already familiar with so I am not going to trouble you  
25          with asking --

- 1 A. Are you going to go into the reasons for the delays?
- 2 Q. I am going to go into reasons for further time taken to  
3 get to the point of a substantive response, yes, I will,  
4 but in your time, not in her time.
- 5 A. No, indeed. Fine.
- 6 Q. So if we start that you are appointed Minister for  
7 Education and Young People in May 2003 following the  
8 election. The same administration is returned to power  
9 as part of a coalition Government, is that right?
- 10 A. Yes.
- 11 Q. And stayed in power until May 2007?
- 12 A. Yes. Although I --
- 13 Q. You bowed out --
- 14 A. -- in late November 2006.
- 15 Q. I will take note of that, obviously.
- 16 You mentioned you did have an initial discussion  
17 with your officials in your new department and it wasn't  
18 flagged up that there was this --
- 19 A. I certainly don't --
- 20 Q. -- in the in-tray, if you like --
- 21 A. I don't recall --
- 22 Q. You don't recall anything had been discussed at that  
23 time.
- 24 A. No.
- 25 Q. I think you say at paragraph 32, and I don't want to

1 take too much time over this, but you believe that you  
2 probably first became involved or aware of the petition  
3 and what was going on in relation to it around the end  
4 of August 2003 --

5 A. Yes.

6 Q. -- roughly?

7 A. Yes. And that is from reading documentation, really, of  
8 the time.

9 Q. It looks like it's a fair inference from what we have  
10 seen that that is the likely stage at which you become  
11 aware.

12 A. Yes.

13 Q. What we know is that officials had a chat about matters  
14 pertaining to the petition on 10 September, and I am not  
15 going to take you to that. I will deal with that with  
16 the official who gives evidence. But there was  
17 a meeting of officials to discuss what the key issues  
18 were, and so forth, and that resulted in a briefing to  
19 you as the minister on 23 September 2003 by officials.

20 A. Yes, that is the Colin MacLean minute, correct.

21 Q. Can I put up that for you?

22 A. No, I'm fine. I actually have a copy here.

23 Q. That is helpful. I don't want to focus -- we have the  
24 minute or the submission there if we require it, but if  
25 you have a copy and wish to refer to it, by all means do

1           so.

2       LADY SMITH: If it is going to be referred to I think we  
3           should have it on the screen.

4       A. I have a copy, but by all means put it on the screen.

5       MR PEOPLES: Let's put it on the screen. I am not wanting  
6           to spend too much time on it as such, because it is your  
7           decision, it is not the officials', but we should know  
8           at least what you were asked to decide.

9       A. Absolutely.

10      Q. Can we look at the briefing which is SGV-000046937. It  
11         should come up on the screen.

12      A. Yes.

13      Q. I think that is familiar to you, and I think you have  
14         just told us that you do have a hard copy that you can  
15         refer to as well.

16                 Just so that we understand how these things perhaps  
17         appear, you have almost had your way of having one page  
18         of A4, not quite --

19      A. I have to say, on going back through the files and  
20         discovering this, I thought this is an absolutely  
21         first-rate, classic piece of Civil Service advice. It's  
22         well succinct, but it has the detailed annexes and so  
23         on.

24      Q. Because there had been another official who had been  
25         involved, and we have a statement from him, who I think

1           was the lead official prior to this period, but it does  
2           appear this one runs in the name of Colin MacLean, who  
3           was a more senior official in your department at the  
4           time.

5       A.   Yes.

6       Q.   I think he was head of the Children and Young Persons  
7           Group, so that is quite a senior position within the  
8           department?

9       A.   Yes.

10      Q.   It's addressed to you, but I think it was circulated to  
11           those who attended the meeting as well. I think it  
12           would have been circulated to everyone prior -- in fact  
13           it was. I think there is a copy of the distribution  
14           list, it's quite a large distribution list, and indeed  
15           we see who gets copies.

16      A.   I think that reflects the fact that this is also  
17           a minute that has been prepared after discussion by  
18           officials across Government, not just within the  
19           department.

20      Q.   Yes, if we actually turn -- maybe just to allow people  
21           to see how this sort of things works. If we turn to the  
22           third page of that document, we see there is  
23           a distribution list. It's quite a large list.

24      A.   That is what I was talking about earlier. You've got --

25      Q.   The columns, yes, "For action", "For comments", "For



1 information because of portfolio interest",  
2 "Constituency interest", "General awareness". These are  
3 the different categories that are flagged up. And there  
4 is an awful lot of officials who receive copies as well  
5 as we can see.

6 If we go back to the first page again, though, to  
7 see what was said, it starts off in typical fashion,  
8 I think this is a typical style of submission or  
9 briefing or minute.

10 A. Yes. They are not always so succinct.

11 Q. No. But it is to advise that:

12 "The Executive does not set up an inquiry into  
13 historic claims of abuse in residential institutions but  
14 that we look to improve service responses for adult  
15 survivors and offer to help victims with access to files  
16 held by the Executive. This advice has been agreed by  
17 colleagues across the Executive."

18 So, yes, you are being told it might be  
19 Colin MacLean who has put his name to it, but this is  
20 what the officials collectively are advising the  
21 minister?

22 A. Yes.

23 Q. I think, as Cathy Jamieson I think confirmed, that  
24 in fact was also the position when she got her initial  
25 briefing to say the Executive has no plans to hold

1 an inquiry. So officials at the early stage had got  
2 their heads together and said to the minister: no  
3 inquiry. But as we now know, she didn't accept that  
4 position, and we get to this stage where the matter is  
5 under consideration --

6 A. I think I am correct in saying it doesn't specifically  
7 refer to legal advice, but this would reflect the legal  
8 input that Colin MacLean had had in offering this  
9 advice.

10 Q. Yes, I think you are right in pointing that out.  
11 In fact yesterday, when Cathy Jamieson was giving  
12 evidence, I did refer to the fact that when the initial  
13 response was being put together, it was clear from  
14 records we have seen that OSSE were shown drafts of the  
15 response, and one comment from that quarter was that the  
16 initial response should avoid any expression of regret  
17 because of ongoing litigation against the Executive, and  
18 others, in relation to institutional abuse of children.

19 A. Yes.

20 Q. And no doubt this was very much along the same vein?

21 A. Yes.

22 Q. You see that, by way of background, it's recorded that  
23 there had been a number of allegations of abuse, sexual  
24 and physical, at residential schools over the last  
25 40 years or so, so it's a considerable period that is in

1 issue here.

2 It then goes on:

3 "These have resulted in a few criminal convictions  
4 and a large number of ongoing civil claims against those  
5 involved, mainly religious institutions but including  
6 the Executive through the role of Her Majesty's  
7 Inspectorate of Education. A petition requesting  
8 a wide-ranging inquiry has been lodged in the  
9 Scottish Parliament ..."

10 That is the Daly petition that we referred to.

11 And there are more details in the annex, and I think  
12 this was to reflect the way you liked minutes to be  
13 presented.

14 Then in paragraph 4, it goes on to say:

15 "We have identified a range of options the Executive  
16 could take in response to these allegations ..."

17 And there are four options set out:

18 "(i) a full inquiry in public or private chaired by  
19 a senior figure involving a wide-ranging remit, evidence  
20 from witnesses, counsel for parties affected; (ii)  
21 a Truth and Reconciliation Commission allowing survivors  
22 of abuse to tell their stories in private, not as  
23 evidence and probably without counsel; (iii) no inquiry,  
24 but a package of other measures, including access to  
25 files for legal advisers, improved health and social

1 care services for survivors of sexual abuse and, in some  
2 cases, compensation; (iv) to do nothing, let existing  
3 criminal and civil cases run their course in the normal  
4 way but retaining the health dimension."

5 There is a more detailed discussion of these options  
6 and explanation why the preferred option is option (iii)  
7 that we have just looked at.

8 Then it just summarises:

9 "Our advice is that the Executive should not set up  
10 an inquiry or Commission into these cases. Neither the  
11 weight of cases nor the nature of the allegations  
12 indicates a systemic failure or organised abuse that  
13 might justify a full inquiry. We are confident that  
14 work being done through the Child Protection Reform  
15 Programme will address any remaining institutional  
16 issues. A Commission [I think that is the truth and  
17 reconciliation idea] does not provide a satisfactory  
18 forum for these issues to be aired. The issue of  
19 compensation should be looked at again in the light of  
20 the courts' decisions on the civil cases in the next few  
21 months."

22 So that is the way that the matter is set out  
23 succinctly for your consideration and that of other  
24 ministers at the meeting.

25 On the following page at paragraph 8 we have the

1 recommendation itself which is that:

2 "(i) the Executive concentrates on the service  
3 responses for adult survivors of childhood abuse as our  
4 main response to the needs of victims; (ii)  
5 the Executive looks to help those alleging abuse to  
6 access information from Executive files."

7 Just pausing there, before we go to the meeting.  
8 The reference to "civil cases", that I think is  
9 a reference to certain what are described as test cases  
10 that were then going through the courts to test some of  
11 the issues arising out of this subject matter. One of  
12 which was an issue in the test case called M v Hendron,  
13 which I am sure you are familiar with --

14 A. I am familiar with the title, not the detail.

15 Q. I am not going to go into the detail. But in broad  
16 terms, Hendron was trying to test the question of who  
17 had legal liability for past abuse of children in  
18 institutional care, and in that case there had been  
19 a large number of parties sued -- I think at one stage  
20 it was 19 defenders, if I recall correctly, or something  
21 along those lines -- and that one of these defenders was  
22 Scottish Ministers, the Lord Advocate representing  
23 Scottish Ministers. So that was one matter that this  
24 test case had raised.

25 The other issue that was raised was whether these

1 cases could proceed because they had been raised out of  
2 time, and that is what I would call the limitation  
3 issue. Because all of the defenders, including  
4 the Scottish Executive, as you well know, took  
5 a limitation defence and indeed maintained it throughout  
6 the course of these proceedings. So these were the  
7 issues that were in Hendron.

8 Separately there had been another case which you may  
9 or may not recall, but I will help you here, called  
10 Kelly, which had been decided in May 2002 at first  
11 instance which raised the difficult issue of pre-1964  
12 abuse, and in that case the Lord Ordinary, Lady Paton  
13 I think it was, decided that these cases could not  
14 proceed and should be dismissed because the claims had  
15 been extinguished by prescription, which meant they  
16 didn't exist in law. There was no legal claim to  
17 pursue. So it wasn't an issue of limitation, it was  
18 an issue of prescription.

19 So that was decided. As I recall, the decision in  
20 Kelly was appealed to see if that decision could be  
21 overturned. And just so that we understand this, and we  
22 are not at this stage in September 2003, but it is  
23 relevant I think to what happens. In July 2004  
24 an Appeal Court, the Inner House of the Court of  
25 Session, refused the appeal and adhered to the decision

1 of the Lord Ordinary, the judge at first instance, and  
2 said yes, these claims are prescribed and you can't  
3 pursue the matter.

4 The only other thing I would say at this stage for  
5 your benefit, we have already heard this, is that the  
6 pursuer in Kelly wasn't seeking to establish abuse in  
7 that process. The pursuer in Kelly had a conviction  
8 that could be relied on, as I recall --

9 A. Was this from Fife, Kelly?

10 Q. I think it was a Glasgow case, if I remember, Glasgow  
11 Council.

12 LADY SMITH: I think it was Glasgow.

13 MR PEOPLES: It was a Local Authority was one of  
14 the defenders. It would be called something against,  
15 and I am not sure how many other defenders --

16 LADY SMITH: But, Peter, the point was this wasn't something  
17 that had the status of simply allegation. It had been  
18 established to a criminal standard of proof and there  
19 had been a conviction, so it could be taken for civil  
20 litigations purposes as an established fact.

21 MR PEOPLES: So that was the problem. That people who, on  
22 the face of it, had established abuse couldn't pursue  
23 the legal avenue, if you like. And basically, although  
24 Kelly was decided in 2002 in first instance, that had  
25 been the legal position for something in the order of

1 18 years because of what was then the law of  
2 prescription that said, in 1984, the law of prescription  
3 was disapplied to this type of case, but it didn't have  
4 any retrospective effect, so it meant anyone who had  
5 suffered abuse before 1964 was not able to pursue  
6 a legal claim.

7 So we are not talking here about people who have  
8 an action and the issue is limitation, which a defender  
9 can choose to waive if they wish, and I think we will  
10 hear about your personal thoughts on that. We are  
11 talking about a situation where they don't have legal  
12 recourse. So that is the pre-1964 prescribed claims.

13 A. This is very helpful because I never completely  
14 understood --

15 LADY SMITH: Just to fill in one gap that may have been left  
16 from Mr Peoples' explanation as to why changing the law  
17 in 1984 didn't retrospectively help pre-1964 cases. The  
18 problem was that the law said you have had this right  
19 for 20 years, it dissolves at 20 years. So people who  
20 had lost the right before the law changed had nowhere to  
21 go.

22 MR PEOPLES: That is called the long negative prescription  
23 of 20 years, which is a legal doctrine which is, as  
24 I think I said yesterday, fundamentally different in law  
25 from a limitation provision, which is simply



1 a procedural bar on a claim which exists but can't be  
2 pursued unless the court, which has a discretion, allows  
3 it to proceed.

4 And of course some of the cases in that area were  
5 floundering because the court, having weighed up the  
6 competing arguments for and against allowing to proceed,  
7 were tending to say that the discretion would not be  
8 exercised in favour of claimants.

9 So that is -- if that assists your general  
10 understanding at this stage?

11 A. Yes, complex stuff. And of course one of the things --  
12 we will maybe come to this -- that is a feature, it  
13 seemed to me, of dealing with survivors of abuse is that  
14 there is a kind of maturing of time before people have  
15 the confidence very often to raise these matters, and  
16 that could well be in excess of 20 years, and so it's  
17 a pretty harsh measure.

18 Q. Indeed, and one of the points made in these cases was  
19 that many people had in some ways locked away these  
20 memories for a long period of time and they were  
21 triggered by various events, such as publicity that was  
22 received in the press or other circumstances that  
23 brought them back, and they sought to say that that  
24 should be taken into account and should allow them to  
25 bring their claims at a much later --

1 A. I'm not sure if I am supposed to be asking questions,  
2 but in relation to Colin MacLean's minute, at the time  
3 of this minute we were waiting for the appeal which was  
4 then heard in the July of -- 2004?

5 Q. Yes, and I think Hendron was already in court.

6 LADY SMITH: Yes, the --

7 A. That is why the recommendation to set aside -- the  
8 decision to set aside compensation considerations until  
9 the appeal was heard was in case it permitted cases  
10 pre-1964.

11 MR PEOPLES: Yes.

12 LADY SMITH: That would be right, because September 2003  
13 would be a date between the first instance decision from  
14 the Outer House, from Lady Paton, and the hearing and  
15 decision in the Inner House. Technically we call it  
16 a reclaiming motion but it's an appeal.

17 MR PEOPLES: Yes, and without getting too detailed in this,  
18 there was an argument, a legal argument, to try and get  
19 round the problem by saying that as long as you focus on  
20 a later injury that is distinct from an earlier injury,  
21 because everyone who is abused suffered injury at the  
22 beginning. If they suffered a further separate injury,  
23 such as a psychological injury brought on many years  
24 later --

25 A. And that didn't wash.

1 Q. No, it didn't wash in that case, in Kelly, and it didn't  
2 wash in the limitation context in a case called  
3 Aitchison in 2010. It was an attempt by lawyers to find  
4 a way around the problem but it didn't work in either  
5 case. In Kelly, I don't think -- I am correct in  
6 thinking Kelly went any further than the Inner House.  
7 I don't think it went to the House of Lords which is  
8 another possible appeal avenue.

9 LADY SMITH: I think it was only the time bar argument that  
10 went to the House of Lords in the Sisters of Nazareth  
11 case.

12 MR PEOPLES: Yes, it was only the limitation cases that were  
13 pursued on various grounds, including whether discretion  
14 ought to be exercised in favour of claimants, and we  
15 will come to maybe a little bit about that.

16 Hopefully that gives you a flavour, but that is  
17 I think the context in which that remark is being made,  
18 that there is this ongoing litigation. And clearly we  
19 know from earlier records that that was a factor that  
20 OSSE had concerns about in terms of what could be said  
21 in response to the petition: don't mention expressions  
22 of regret. That is familiar to you because --

23 A. Yes.

24 Q. -- you got the same --

25 A. I got the same --

1 Q. -- advice in 2004?

2 A. Yes.

3 Q. And we will come to that.

4 So we are at 2003, September 2003. So that is  
5 the advice you are getting. There is one matter I want  
6 to raise with you, and it is this sort of statement that  
7 you were presented with in paragraph 5, that:

8 "Neither the weight of cases nor the nature of the  
9 allegations indicates a systemic failure or organised  
10 abuse that might justify a full inquiry."

11 I think we know what "organised abuse" means, and  
12 I think we know that "systemic failure" can be something  
13 different. Can you tell me, did you simply proceed on  
14 the basis of that statement, or what view did you hold  
15 at that time about the extent of the abuse that had or  
16 appeared to have occurred over the past 40/50 years and  
17 more -- in fact 40 years, as it is said in the minute.  
18 What was your view?

19 A. It is interesting you raise this because in re-reading  
20 this just over the weekend, I was asking myself  
21 the question about systemic failure. You might want to  
22 come on to the nature of systemic failures later, I am  
23 not sure, but whether that referred -- was referring to  
24 systemic as within an institution, so that everybody in  
25 the institution was abusing, in that sense being

1           systemic, as distinct from being systemic across the  
2           entirety of the care provision. That is a question  
3           I have now got in my head.

4           I think we took it or I took it that it was talking  
5           about within an institution rather than abuse -- that  
6           abuse was systemic within that institution. As to the  
7           organised abuse, this was presenting itself as the  
8           actions of rogue individuals within some institutions,  
9           rather than this being a systemic problem across every  
10          institution in every setting in the State. And I guess  
11          that was to some extent reinforced by the nature of some  
12          of the cases you referred to, where there were criminal  
13          convictions, but also by the particular actions that  
14          were being taken in the civil courts of which the  
15          numbers here are set out.

16          But this was presenting itself and characterising  
17          itself as these rogue individuals, if I can put it that  
18          way, within particular institutions, and it wasn't, you  
19          know, happening everywhere in every institution all of  
20          the time.

21          Q. Well, I think some might say, on a fair reading of that  
22          statement, systemic failure is really a failure of the  
23          system as a whole, the childcare system that put  
24          children in institutions, children who, in the care of  
25          the State, and who went to places like institutions run

1 by religious orders, suffered abuse. I think the point  
2 being made there is, according to the officials at  
3 least, they are saying that the weight of cases and the  
4 nature doesn't indicate a systemic problem with the  
5 system as a whole.

6 If you take that as perhaps the intended meaning,  
7 you have raised a point that you have a recollection  
8 that you were being advised I think along lines that  
9 these --

10 A. No, that was my -- that is what -- this is me last  
11 weekend --

12 LADY SMITH: Last weekend, yes, I can see that.

13 A. -- thinking what did I --

14 MR PEOPLES: (Overspeaking) I'm sorry. I think the  
15 officials, though, were probably thinking along the same  
16 lines at the time, that these were not organised abuses  
17 because there were convictions against individuals  
18 acting alone, not acting as a group.

19 A. Yes.

20 Q. And there were allegations against individuals, not  
21 allegations against people as a network of individuals  
22 acting in concert. So it may well be what you were  
23 thinking last weekend was the same thought that the  
24 officials were having in 2003?

25 A. But also, and I have thought quite a lot about this

1 systemic question, partly because of questions you asked  
2 me when we were doing the witness statement, but you  
3 could also say that this was indicating there were no  
4 systemic failures in the supervision of the systems  
5 which allowed abuse. So there's a variety of potential  
6 interpretations.

7 I honestly cannot remember at the time which  
8 interpretation I gave it. Simply coming back to it  
9 I was thinking, well -- and of course I have thought  
10 more about the question of systemic abuse as distinct  
11 from systemic failures or weaknesses in the systems that  
12 oversaw what was happening. I think there are quite --  
13 there were quite clear systemic weaknesses, certainly by  
14 the standards of today. And that is another factor in  
15 this: is this by the standards of today or by  
16 the standards of that time in terms of a systemic  
17 failure of supervision of the systems?

18 Q. I don't want to necessarily here debate the issue, but  
19 can we call it that obviously what appears to be being  
20 said here is that the problem of abuse, institutional  
21 abuse, was not --

22 A. Was not systemic.

23 Q. Or was not a widespread problem. Whether it was due to  
24 systemic failures or not is another question, but the  
25 indications are on one reading of this that it says "the

1 weight of cases ... doesn't indicate", it says  
2 a "systemic failure", but you could read that as saying,  
3 well, there are not enough cases to say this is a big  
4 problem for the system?

5 A. As I say, it was presenting itself, as you say, as  
6 you've indicated, as individuals acting alone within  
7 some institutions, not organised abuse amongst  
8 colleagues within an institution or across all  
9 institutions. So it was very much characterised  
10 as problems sporadically arising and not part of  
11 a pattern.

12 LADY SMITH: I think, Peter, what Mr Peoples is interested  
13 in is did you, insofar as you can remember, think that  
14 you were being told it's not a widespread problem and,  
15 if you read on, where it refers to the nature of the  
16 allegations, and these are not very serious allegations?

17 A. I don't think I would have accepted they are not serious  
18 allegations, because they are serious allegations. It  
19 is a question of -- on your first point, I think it  
20 was -- the advice very clearly was this is not happening  
21 everywhere in large numbers, it's happening in a  
22 sporadic way, and remember that, again reading back,  
23 I wouldn't have known this in just reading the  
24 submission, but -- or maybe it's in the appendices,  
25 I can't recall offhand, but the officials were



1           undertaking across departments of Government an exercise  
2           trying to work out how many cases are there here, and  
3           they were talking to the police and all sorts of things.  
4           I think, you know, it was very unlikely that the  
5           Government files were going to reveal an awful lot on  
6           that because of the nature of the Government files. The  
7           Government weren't the direct provider of the services  
8           necessarily, but --

9           LADY SMITH: But just picking up again, Peter --

10          A. -- but the officials were doing that, and this was their  
11          advice to us on the conclusions of what they have said  
12          and I think it is very much as Mr Peoples has  
13          characterised.

14          LADY SMITH: I get that, but going on and saying there  
15          aren't many or it's not widespread and the nature of the  
16          allegations is relevant in their thinking this doesn't  
17          justify an inquiry, if you talk about the nature of  
18          something, to my mind you are talking about the content.  
19          What were these allegations about? What was being said  
20          in these allegations? Any memory at all of being told  
21          about that?

22          A. No, but, you know, I don't think that -- there was never  
23          any doubt in ministers' minds that abuse had been  
24          happening. This was never questioned and in fact, from  
25          our perspective, the survivors of abuse were being

1           believed in all of that. It just never arose as  
2           a question. I guess it was the question of when you are  
3           getting around to thinking about the merits of  
4           discussing this, the advice is clear, it was there, you  
5           are referring to it, when you get round to discussing  
6           it, you are weighing in all sorts of other factors as  
7           well, and no doubt we will come on to talk about that.

8           MR PEOPLES: We will look at the reasons why, and you have  
9           set them out in your statement. But before we go to  
10          that, just going back to pick up a couple of points you  
11          said, Cathy Jamieson, when she gave evidence, and she  
12          had her social work background, she had been in the  
13          Edinburgh Inquiry, and I think I asked her directly  
14          whether she needed persuading or convincing that there  
15          had been abuse and the problem was perhaps bigger than  
16          was being presented by officials, and I think her  
17          position, if I understood it correctly was, no, she knew  
18          that whatever was being said by officials, that that  
19          didn't represent what she thought was the position. So  
20          she wasn't starting from a position that it wasn't  
21          a widespread problem, nor indeed I think that there  
22          wasn't perhaps systemic failures that may have  
23          contributed to that problem. That is her starting  
24          point. I don't know if she disclosed that at the  
25          meeting on the 25th --

1       A. Cathy is very experienced in these things, very clear  
2       about these things. But also at the meeting  
3       Elish Angiolini was there, I rather imagine -- I don't  
4       know about this, but was she not the Fiscal in Aberdeen  
5       (overspeaking) I rather imagine that she was under no  
6       illusions about this as well. And I think too -- I have  
7       said somewhere either -- in my statement I think I have  
8       said that it would be naive to think that, just because  
9       these cases were surfacing in the court, as evidenced by  
10      the figures here, this was the extent of it. There  
11      would be other people in the system who were yet to  
12      present themselves in that sense.

13      Q. And indeed I think the officials do recognise that more  
14      cases might come to light in the way they have done  
15      before. But the other thing I would tell you at this  
16      stage is that I think it is the former First Minister's  
17      position that, so far as he was concerned, what was  
18      known, the known-cases, were "the tip of the iceberg",  
19      I think is the expression he used in his written  
20      statement. So he wasn't being persuaded, as officials  
21      seemed to be, that the problem wasn't a big problem that  
22      might have merited investigation and might have  
23      indicated, if it was a bigger problem than they thought,  
24      might have merited an inquiry to say: well, why was it  
25      such a big problem? I suppose I put back to you the

1 question: well, if that was the position of  
2 Cathy Jamieson, of the First Minister, if there was  
3 evidence that it was more than a very rare case of an  
4 allegation of abuse or a very rare conviction, why did  
5 that not trigger a decision that, well, we need to look  
6 into this, we need to have an inquiry to get a proper  
7 understanding of the scale of the problem, given what we  
8 don't know and given how little we do know, and  
9 therefore the way to do that is to have some form of  
10 investigation. That was ruled out on 25 September, and  
11 the officials were saying don't have it.

12 A. Yes.

13 Q. So why was that?

14 A. Do you want to come onto the reasons for --

15 Q. I will come to those, but I was just getting a general  
16 answer why, in that state of knowledge, which seems  
17 rather incomplete, you are making a key judgment?

18 A. I'm not sure, notwithstanding we thought there would be  
19 more cases around, and it would be naive to assume there  
20 weren't, whether that of itself then constitutes a  
21 systemic problem across the entire system.

22 Q. But you don't know though?

23 A. Indeed.

24 Q. That is why you have an inquiry, is it not?

25 A. You could argue that, but that is not the decision we

1           came to.

2           Q. I know and we will come to why you didn't. But I am  
3           just making that point: you can't start from the  
4           assumption that, well, because there is no evidence of  
5           systemic failure, therefore we shouldn't have an inquiry  
6           because you don't know whether the evidence exists until  
7           you go and look for it?

8           A. Yes, but you also get into a sort of circular argument.

9           Q. I don't think that is circular, that is just basic,  
10          isn't it? That if you don't know something then --

11          A. But would you --

12          Q. -- you go and find out?

13          A. That doesn't necessarily mean -- I am debating the point  
14          that it doesn't necessarily mean that you would have  
15          a full public inquiry. There might be other measures --

16          Q. I am not saying that, I am just saying that you ruled  
17          out an inquiry or any other forum, you didn't say as  
18          ministers "We are not sure that a full inquiry  
19          on conventional lines is the answer", but "We are not  
20          going to have an inquiry at all". We are not going to  
21          look at the past at all?

22          A. I think too our focus was very much on -- I am getting  
23          ahead of myself because you are going to come to the  
24          decision. So it might be better to keep it until then.  
25          But also the focus was on what do you do to support the

1 survivors? I think the atmosphere of the meeting that  
2 I chaired which was the consequence of Colin MacLean's  
3 minute, which involved three Cabinet ministers, a deputy  
4 minister and the Solicitor General and various senior  
5 officials, the focus was very much on: what can we do to  
6 support survivors? That was where we ended up, partly  
7 because the advice we were being given was pointing us  
8 in that direction, and this advice, remember, was coming  
9 also from an official who was held in very high regard.  
10 This is somebody with a safe pair of hands, stable  
11 individual, a considered individual. So that would  
12 weigh quite heavily with ministers depending where we  
13 got to.

14 LADY SMITH: Peter, can I just pick up one other thing that  
15 comes out of this document. The officials appear to  
16 have been looking only at sexual abuse, judging by what  
17 is said at 4(iii) for instance, because the proposal is  
18 to improve services for survivors of sexual abuse.

19 A. Yes --

20 LADY SMITH: Hang on a minute. What I picked up from -- and  
21 I don't think she actually spoke about this specifically  
22 yesterday, but from her written statement, for example,  
23 Cathy Jamieson tells us that at a meeting in -- and this  
24 must be one of her last meetings -- early in 2003, it  
25 was said that 160 former pupils from St Ninian's,

1 Falkland, that was a Christian Brother institution, were  
2 being interviewed in relation to both sexual and  
3 physical abuse. I know from what I have heard in the  
4 Christian Brothers case study that there were very, very  
5 serious allegations of physical abuse at Falkland and  
6 that, in the fullness of time, the wider range of abuse  
7 became clear, including emotional abuse. But the  
8 official by this stage, September 2003, seems to have  
9 pulled back considerations only to sexual abuse.

10 A. That would not be my interpretation, and the discussion  
11 didn't focus on only sexual abuse.

12 MR PEOPLES: Could I help you with that, My Lady, as well?

13 If we go back to the briefing in annex A, which does  
14 discuss what is described at the beginning as  
15 allegations of abuse at residential institutions,  
16 annex A which is page 4 of this document. I will just  
17 set out for you what -- if you look there at paragraph 1  
18 it says:

19 "In the past few years there have been a series of  
20 allegations of abuse of children in residential  
21 institutions, primarily List D schools (known as  
22 approved schools before 1972) in the 1940s, 50s, 60s and  
23 70s. Attention has recently focused on the schools run  
24 by the De La Salle Brothers, a Roman Catholic order,  
25 following a criminal case in July 2003 in which two

1 members of staff and a former member of [the order] were  
2 found guilty of various offences of physical and sexual  
3 abuse and received prison sentences. There have been  
4 previous police investigations of alleged abuse at other  
5 residential institutions, some of which have also ended  
6 in criminal prosecutions."

7 I will just say in passing there that one of the  
8 major investigations which you may or may not have been  
9 aware of at that stage, or perhaps should have been told  
10 about, was Operation Orbona, which was a major police  
11 investigation over several years starting around 2000.  
12 I think it was into allegations of abuse at Quarriers  
13 which ultimately resulted in a significant number of  
14 convictions of staff, some of whom were convicted by the  
15 stage of this meeting. So it's not mentioned in terms  
16 but I am just giving you that as background. If we read  
17 paragraph 2, which is also giving a flavour for the  
18 background:

19 "There are also a number of civil cases before the  
20 courts seeking damages for alleged abuse at these  
21 institutions. Most are being handled by the law firm  
22 Ross Harper (through their partner Cameron Fyfe). The  
23 Lord Advocate on behalf of Scottish Ministers is cited  
24 as one of the defenders along with the religious orders,  
25 managers of the schools and the local authorities. We



1 understand that 78 such cases have applied for  
2 legal aid. Ross Harper have suggested that there are  
3 potentially 300 such cases. These cases are currently  
4 adjourned to see the outcome of one test case. Initial  
5 legal arguments in the case (for example whether the  
6 actions are time-barred) are not due to be heard until  
7 June 2004."

8 That is a reference, I think, to the Hendron case:

9 "Although OSSE colleagues are looking into whether  
10 this could be brought forward. Following these legal  
11 arguments, provided a relevant case has been made out  
12 against at least one of the defenders, there will be  
13 a full hearing on the factual evidence which may take up  
14 to another year."

15 Then it goes on to discuss requests for access to  
16 information and files which has come from both  
17 a journalist in July, following the convictions, and  
18 also in the form of various requests under the Data  
19 Protection Act by individuals. And I think the  
20 background to that is that the Sunday Mail encouraged  
21 people to submit requests to the Executive to seek  
22 information --

23 A. They did.

24 Q. -- that may be held about the place they were in or the  
25 treatment they received. So that was the background to

1           that and I think that ultimately was a factor in your  
2           Executive's decision to open up access to files.  
3           Because I think you said earlier that ultimately the  
4           conclusion -- at least the preliminary conclusion  
5           reached on trying to locate the files was that they were  
6           unlikely to have much detailed information about  
7           individuals, given the nature of the files and the  
8           matters they dealt with. And the reason I refer that to  
9           you is I think you earlier said something about  
10          the limited knowledge anyway in the files, but I think  
11          you only gained that insight once your officials started  
12          to search for the files, and even then, and I will just  
13          put this to you just now, but I think they made clear  
14          they weren't analysing these files in any detailed way,  
15          they were trying to locate what appeared to be relevant  
16          files. They didn't go through them systematically and  
17          say, "This is what is held", "This is relevant to abuse  
18          or treatment", they just tried to say, "We will find the  
19          files, we will redact them to make sure that the law is  
20          complied with in terms of publication of information and  
21          we will then release them", and I think that happened  
22          2005?

23          A. Yes, I think the exercise at that point was very much to  
24          establish how much work was going to be involved in,  
25          one, locating the files, secondly, having to redact the

1 information and then the other support you had to put  
2 around people when they were -- can I go back to  
3 Lady Smith's point on page 1, paragraph 4(iii)?

4 LADY SMITH: Yes.

5 A. I read that as being you would improve the current  
6 social care services for survivors of sexual abuse and  
7 widen it therefore to those of -- as survivors. That is  
8 the way I read that. It wasn't saying we will provide  
9 services only in relation to sexual abuse, it was saying  
10 we are currently providing services in relation to  
11 sexual abuse and we will -- it's an improved package  
12 they are talking about. That is the way I took that.  
13 But also, if you go on to annex B on page 6 at 1(i) you  
14 will see that Colin MacLean does explicitly refer to  
15 sexual, physical and psychological abuse. Actually  
16 "psychological" I think gave way to "emotional" abuse at  
17 some point in proceedings. So I think it was -- I'm not  
18 in any doubt we were not just thinking this was about  
19 sexual abuse, it was much wider than that.

20 LADY SMITH: This question of weight, I have to say, still  
21 troubles me, Peter. Because even on these documents and  
22 the annex we just looked at there is reference to  
23 Ross Harper's information of having 300 cases in the  
24 pipeline, the convictions that have taken place, and  
25 I suspect that the objective bystander would say: well,

1           how many did it take for the adviser -- and this is the  
2           adviser's view, I accept that -- how many would it take  
3           for him to think there is enough weight there? Because  
4           that might be the tip of the iceberg of course, once you  
5           set up an inquiry that actively (inaudible) --

6           A. And these are matters of judgment in the end and that is  
7           what -- we came to the judgment we came to about whether  
8           to proceed to an inquiry or not.

9           MR PEOPLES: I think at least Cathy Jamieson, who was party  
10          to this decision, wasn't proceeding on the footing that  
11          the problem wasn't widespread. I think, given her  
12          answer, she couldn't have been. She must have thought  
13          at least I don't need convincing and indeed, from what  
14          we have read, that appears on the face of it to be a  
15          quite significant body of evidence pointing to a wide  
16          enough problem to justify an inquiry?

17          A. In a sense that is part of the point, isn't it? That if  
18          you already believed these figures are not the whole  
19          story, then you are accepting that abuse was more  
20          widespread. That is not in question.

21          LADY SMITH: Let me assure you I wasn't suggesting that was  
22          your view. But that is what was being put in front of  
23          you as persuasively as he could by a well-respected  
24          official as being his assessment, and it just doesn't  
25          feel quite right on the information --

1 A. I am quite sure you will ask the official --

2 MR PEOPLES: I am quite sure I will, but I am just asking  
3 you at the moment. I suppose it seems, on the face of  
4 it, to show from the information, even in the briefing  
5 itself, that there is a wide enough problem to justify  
6 an inquiry, particularly -- and you will come back to  
7 this later on -- to justify an inquiry to give an answer  
8 to, well, why was this allowed to happen? It may not  
9 have allowed you to reach any conclusion at that stage  
10 on whether there was a systemic failure, but I think  
11 what people would probably want to know, particularly  
12 those who were making these allegations or had been in  
13 these proceedings were going to say, "Well, why did this  
14 happen to me?" And it seems to me that just rolling out  
15 an investigation of whatever type, that was premature  
16 and in fact the wrong decision. Do you disagree?

17 A. There are two different points here. As Cathy has said  
18 to you yesterday obviously from what you have -- and  
19 what I am saying to you today, we weren't under any  
20 illusions that abuse would be much more widespread than  
21 is the case set out in the paper. That was not a matter  
22 of any question between ministers. We understood that.  
23 It would be naive to think that there were no more cases  
24 kicking around than those that had already surfaced. So  
25 in terms of the weight of the problem, we were not

1 saying there is no weight to the problem,  
2 notwithstanding whatever the advice was, we were clear  
3 in moving forward that we thought this was more  
4 widespread. That is a slightly different point from the  
5 one that you moved on to, which is that what we were  
6 seeking to do through what became the Tom Shaw  
7 Commission and Report, was to look at the reasons why  
8 abuse was taking place. It wasn't to assess the number  
9 of cases.

10 Q. No, I take your point, but all I am saying is, well,  
11 yes, ultimately the Tom Shaw Review was put up and you  
12 announced the appointment of an expert in December 2004,  
13 but at this stage no one is talking about Tom Shaw and  
14 an investigation into the past, they are just saying: we  
15 are not going to have an inquiry and we are not going to  
16 have some other forum, either to hear the stories or to  
17 hear allegations and work out why this abuse happened,  
18 if that was --

19 A. Yes, and that is where on -- in consequence of the  
20 meeting that was held and the submission then going to  
21 the First Minister to see what the outcome was that he  
22 then suggested, well, actually we ought to --

23 Q. Look at the past?

24 A. Yes.

25 Q. I will come to that, but before I leave this document

1           you have said it's succinct, it is by a well-respected  
2           senior civil servant whose judgment you trusted. Just  
3           looking at the discussion that was given to you to  
4           persuade -- or that persuaded them to make the  
5           recommendation and no doubt was intended to persuade you  
6           to agree to the recommendation, if we look at the  
7           section annex B where the four options are considered in  
8           more detail, you see there is a "Discussion" section at  
9           the foot of the first page of annex B?

10          A. Yes.

11          Q. I will just read out what it says:

12                 "The pressure for the Executive to act on this issue  
13                 has not been intense."

14                 That is the start of the discussion to justify the  
15                 recommendation:

16                 "Aside from the petition to the Parliament and the  
17                 two stories in the Sunday Mail, there has not been  
18                 widespread Parliamentary or press interest."

19                 The submission goes on to say:

20                 "It is noticeable that the cross-party group has not  
21                 taken up the case and that the Sunday Mail story  
22                 attracted less than 20 requests to see our files from  
23                 former List D pupils."

24                 Then I think this is maybe something that I was  
25                 trying to remember where I had seen it:

1           "The criminal convictions so far have been  
2 isolated ..."

3           Is the expression used in this briefing:

4           "... and no evidence has emerged of widespread or  
5 organised abuse at Scottish institutions."

6           So that I think is what the officials were saying to  
7 you. It would, therefore, be feasible at this stage to  
8 do nothing, and indeed they say this is the approach  
9 that has been taken to similar allegations in England  
10 and Wales. So that is what you are being told and --

11       A. But equally he wasn't recommending doing nothing, he was  
12 --

13       Q. No, no, I agree. But he wasn't recommending doing any  
14 form of investigation either?

15       A. No.

16       Q. How influential is this sort of discussion to ministers,  
17 to see what the officials are thinking and what --

18       A. You are dealing with officials who have had much more  
19 time to look at this than you have had. You are coming  
20 to it looking at the issues in the context of advice.  
21 So you have to give reasonable weight to this and, as  
22 I say, Colin was a well-respected official. Colin was  
23 a compassionate -- I shouldn't say "was" -- is still  
24 a compassionate man who would be thinking about  
25 the needs of survivors. So I think that is all



1 reflected in --

2 Q. Did you give weight to what he said there?

3 A. In what sense, sorry?

4 Q. In making a decision, did you give weight to what --

5 A. Give weight?

6 Q. Yes, did you give weight to these --

7 A. Yes, you get advice and you obviously weigh it up, and  
8 you obviously have respect for it. It doesn't mean you  
9 agree with every dot and comma in it by any means. We  
10 had a discussion on the circumstances arising from this  
11 and what we should do and that is where we made the  
12 decisions that we made.

13 Q. Can I tell you now that you got incorrect information in  
14 this briefing in that paragraph that I have just read  
15 out. Because it wasn't the case that the cross-party  
16 group had not taken up the case, because in fact the  
17 Public Petitions Committee had asked for their views  
18 earlier and in March 2003 at their meeting I think they  
19 said in the report that the cross-party group supported  
20 calls for an inquiry. So their position to the  
21 Committee who were considering the petition and trying  
22 to move it forward was that they supported an inquiry.  
23 Now you are being told in September of the same year by  
24 your officials that they are not taking an interest, and  
25 that seems to be at the forefront of their argument why

- 1           it could be in fact justified in doing nothing. And you  
2           say that you placed weight on these views and I am  
3           telling you that you got wrong information.
- 4       A. You are telling me something I have not known up until  
5           this moment --
- 6       Q. Exactly --
- 7       A. -- so I couldn't have considered it at the time  
8           because --
- 9       Q. Would that have carried weight --
- 10      A. -- because you are telling me something new. In  
11           fairness, it is only one factor in a range of factors.  
12           But, nonetheless, if you are saying that is incorrect  
13           then I've got no basis for challenging that.
- 14      Q. We can look at the report. The report is there. But  
15           it's a point that is clear that they have been asked and  
16           they are supportive and I think the cross-party group,  
17           if we could perhaps just at this stage be clear about,  
18           this was a group that was formed before the  
19           Daly petition --
- 20      A. And it was in relation to childhood sexual abuse.
- 21      Q. Childhood sexual abuse wherever it occurred. It wasn't  
22           specific to institutional childhood sexual abuse, and it  
23           was formed in something like -- was it 2001? Maybe,  
24           2000.
- 25      A. I don't know.

1 Q. It was a group that got together to try and advance the  
2 interests of this particular class of abuse victims.

3 A. Yes.

4 Q. And indeed they were lobbying for improvements,  
5 improvement in services and so forth.

6 A. Yes.

7 Q. I think the background that maybe we need to know is  
8 that, quite apart from the Daly petition -- was it  
9 Malcolm Chisholm, the Health Minister, set up some sort  
10 of short life working group to look into the services  
11 for adult survivors of childhood abuse?

12 A. Yes.

13 Q. They produced a report to the Executive in 2004 --

14 A. And that is what is referred to on the first page of  
15 the --

16 Q. That was in 2004. I think they hadn't reported --

17 A. Sorry, I beg your pardon.

18 Q. Then I think the Executive were faced with a decision:  
19 well, what do we do about that report? And what they  
20 did in the end, which again was separate from the  
21 petition, was set up a strategy called the  
22 National Strategy, which initially was for survivors of  
23 childhood sexual abuse, and that was launched  
24 in September 2005. It became known as Survivors  
25 Scotland and ultimately a sub-group was formed to look

1           at the specific interests of in care survivors. You may  
2           not know that, but that is how it developed.

3           A. Right, okay.

4           Q. And that led to the In Care Survivors Support Service in  
5           2008. But again that was after your time. So does that  
6           help you with the context of the cross-party group?

7           A. Yes. That is news to me.

8           Q. But if you had been given the correct information, it  
9           seems to me (a) you would pay attention to the fact that  
10          Colin MacLean said it but (b) that would have been  
11          a factor that you would have taken into account --

12          A. It would have been a factor, yes.

13          Q. And he thought it was important enough to mention.

14          A. Clearly.

15          Q. So if we go on to the meeting itself. I am sorry  
16          I spent quite a bit of time, but I think it's  
17          an important point, and it maybe goes back to the basic  
18          point that Cathy Jamieson says, well, you are reliant on  
19          advice from officials to a large extent but also you  
20          have to hope that the advice you are getting and the  
21          information you are receiving is correct?

22          A. Absolutely, yes.

23          Q. If we go to the meeting itself. You have very helpfully  
24          I think attempted to summarise the conclusions of the  
25          ministers at that meeting and the factors that seem to

1 weigh with them, including yourself, in coming to the  
2 decision you did.

3 A. Yes.

4 Q. Would you like in addition to -- I think we should put  
5 up the note of meeting as well just for completeness at  
6 this stage. It's SGV-000046887. It should appear on  
7 the screen.

8 A. Yes, got that.

9 Q. You have your own statement in front of you, but what  
10 I think you might be wanting to refer to at points is  
11 the section headed "Ministers' Decision" in your  
12 statement. It starts at paragraph 37 and I think  
13 particularly paragraph 38 where you list a number of  
14 factors that seem to have influenced the decision of the  
15 ministers. And it was a unanimous decision at the end  
16 of the day, is that right?

17 A. Yes.

18 Q. I think, as we can see from the note of the meeting, it  
19 was quite a high powered meeting?

20 A. If you think that is high-powered, that is high-powered.  
21 In a sense that, yes, it's three Cabinet ministers,  
22 deputy minister, Solicitor General, senior officials,  
23 Deputy Crown Agent, legal secretary. Yes, it is.

24 Q. It is a significant meeting?

25 A. Absolutely.

- 1 Q. And it took a significant decision?
- 2 A. Yes, and I think it also indicates that we were taking  
3 the issue seriously.
- 4 Q. Can I just make this point before we look at it; the  
5 decision that was taken on an inquiry was there was to  
6 be no inquiry and, indeed, there was to be no other form  
7 of forum or investigation. That was ruled out as  
8 a result of the discussion at that meeting at that time?
- 9 A. There was to be no inquiry.
- 10 Q. Well, no truth and reconciliation --
- 11 A. Yes.
- 12 Q. And there was no suggestion that any other form of  
13 inquiry was going to be considered by ministers?
- 14 A. No.
- 15 Q. I know the First Minister came in with another idea --
- 16 A. That is right.
- 17 Q. -- and we will talk about that in due course. So that  
18 was done. Am I right in thinking that the decision on  
19 an inquiry, about a public inquiry, was taken on  
20 25 September unanimously by ministers and,  
21 notwithstanding the First Minister came in with another  
22 idea, that decision remained in place and was not  
23 reconsidered by either the First Minister or you prior  
24 to publication of the decision in June 2004 in your  
25 letter to the Public Petitions Committee?

- 1 A. That is right.
- 2 Q. So the decision had been taken?
- 3 A. The decision had been taken.
- 4 Q. In September 2003?
- 5 A. Yes.
- 6 Q. Can I just ask you then to look at your own statement  
7 just to give us some idea of the things that seem to  
8 have weighed in ministers' minds when they took this  
9 important decision.
- 10 A. Do you want me to run through it?
- 11 Q. I will start and I will give you the heading and you can  
12 tell me --
- 13 A. Okay.
- 14 Q. You can maybe flesh it out if necessary. The first  
15 factor is the evidence of the extent of the abuse did  
16 not justify a full public inquiry. To an extent we have  
17 had a little exchange on that already, but you just tell  
18 me what the ministers were thinking.
- 19 A. Just that; that we didn't think that the evidence of the  
20 extent of the abuse justified a full public inquiry.  
21 That was our judgment on that.
- 22 Q. It does beg the question: what evidence would you need?
- 23 A. Sorry?
- 24 Q. We have heard there was obviously quite a lot said in  
25 the briefing that a lot had been alleged over a long

1 period and yet ministers thought that wasn't enough,  
2 even if it was only the tip of the iceberg?

3 A. But also we weren't trying to establish that there  
4 was abuse and that it was widespread. We accepted  
5 completely that there was abuse and it was widespread.

6 Q. So therefore, even if it was widespread, that wasn't  
7 grounds for a public inquiry?

8 A. That was the judgment we came to.

9 Q. Why did you judge that to be the appropriate --

10 A. For that reason and for all the other reasons, we  
11 thought on balance it didn't warrant a public inquiry.  
12 Other people might make other judgments, but that was  
13 our view. But also I think I made clear in my statement  
14 that that is a view that is built on the circumstances  
15 that you are considering at that moment in time. It may  
16 well change --

17 LADY SMITH: Mr Peoples, I am going to have to take a break  
18 just to check whether all the connections that are  
19 important are still working, because one of them we know  
20 has gone down. Hopefully just for five minutes or so.  
21 Sorry about this, Peter.

22 (12.34 pm)

23 (A short break)

24 (12.43 pm)

25 LADY SMITH: There does seem to be a problem with the



1 connection at the moment, so what I am going to do is  
2 stop for the lunch break now, and I am hoping we will be  
3 able to sit again at 1.45 pm rather than have you all  
4 hanging around wondering what is going to happen next.  
5 So we will rise now for lunch. Thank you.

6 (12.44 pm)

7 (The short adjournment)

8 (1.43 pm)

9 LADY SMITH: I understand that the systems are all happy  
10 again and connected in a way they should be, so we are  
11 able to carry on if you are ready for us to do so,  
12 Peter.

13 A. Absolutely.

14 LADY SMITH: Mr Peoples.

15 MR PEOPLES: My Lady.

16 Good afternoon, Peter. Can I begin by just  
17 revisiting the briefing note before we go back to the  
18 meeting. I think we had looked at the discussion  
19 section, and I have been asked to perhaps complete that  
20 section before we go back to the meeting itself. We  
21 will be hearing from the official whose name appears on  
22 this but it may be as well to find out at this stage  
23 what else was said in this briefing.

24 It should be on screen in front of you, I hope.

25 A. Yes.

1 Q. We did discuss the various options that were presented  
2 in this briefing, but the bit I was going to look at is  
3 to go back to the annex B, which was the discussion  
4 section, and you will recall this morning I took to  
5 paragraph 2 of the discussion section and asked some  
6 questions about that.

7 If we carry on with the discussion just to see what  
8 else was said. It is said in paragraph 3, in the  
9 briefing note of 23 September 2003, having set out that  
10 there may be a basis for doing nothing, it then goes on:

11 "On the other hand, there have been criminal  
12 convictions and it is hard to believe there were no  
13 other instances of abuse at these institutions in  
14 Scotland. The civil claims now number in the hundreds.  
15 Whether or not these are justified, there is a strong  
16 case for the Executive acting now on this issue, rather  
17 than waiting for further evidence to emerge in the  
18 courts or for political and press pressure to grow."

19 I don't need to ask you to comment at this stage,  
20 that was obviously being told to you, and no doubt it  
21 was pointed out there was a strong case for doing  
22 something at that stage.

23 A. Yes.

24 Q. Then it goes into perhaps a little bit more detail,  
25 and I would like to read this out as well so we have it

1 in our transcript:

2 "A full inquiry headed by a senior, probably legal  
3 figure would provide the best opportunity to establish  
4 events in our institutions over the last 30 to 40 years.  
5 The aim of the inquiry would be to come to conclusions  
6 on the truth of the allegations and make  
7 recommendations. Advantages of such an inquiry include  
8 it would not be bound by strict rules of evidence and  
9 would not be time-barred. However, as these are serious  
10 allegations, we would have to look at how evidence was  
11 given and what procedural safeguards were needed for the  
12 victims and the alleged perpetrators. This would  
13 probably involve legal representation at a minimum. The  
14 standard of proof would also have been to be considered.  
15 The inquiry need not all be in public as private  
16 sessions can encourage candour, particularly from staff  
17 members."

18 And then it goes on in a little more detail about  
19 the option of a full inquiry. I will just read this out  
20 as well, at this stage, if I may:

21 "There are other issues with this option,  
22 for example, (i) drawing up a practical remit. The  
23 allegations range from the 1940s onwards and cover  
24 sexual, physical and psychological abuse. There would  
25 be criminal allegations against individuals and failures

1 of management. The most wide-ranging remit might be  
2 open-ended, and any limitation on that would exclude  
3 individuals. We would have to let the inquiry interpret  
4 its remit in a practical way but it will need to be  
5 given direction."

6 Then the second point made:

7 "The level and nature of the allegations do not seem  
8 adequate to justify a full inquiry."

9 Which I think echoes what was said previously.

10 "The allegations are against isolated individuals  
11 rather than widespread evidence of systemic failure or  
12 conspiracy by management across a number of schools."

13 The third point made:

14 "The relationship between the inquiry and the  
15 criminal and civil justice systems would have to be  
16 considered. For example, what would happen with  
17 existing live civil proceedings (which would normally  
18 bar the Executive from taking action as the inquiry  
19 would risk prejudicing the issues before the court)?  
20 Would the inquiry have power to make compensation awards  
21 or would individuals have to return to the courts?  
22 Could the jurisdiction of the courts be excluded if  
23 individuals were unhappy with the inquiry's  
24 conclusions?"

25 Fourthly, it said:

1           "The time and costs of the inquiry are likely to be  
2 substantial. For example, the Saville Inquiry on  
3 Bloody Sunday, which will take some six years, is  
4 currently estimated at £155 million. The Hutton Inquiry  
5 on a very short timescale will cost over £1 million.  
6 The Executive can expect to be invited to pay for legal  
7 representation at least for victims."

8           Then the fifth point made:

9           "It is not clear what useful lessons can be learned  
10 or recommendations for improving current practice could  
11 be made by such an inquiry."

12          Then it says:

13          "We do not recommend the full inquiry option. It  
14 does not seem that the allegations that have emerged are  
15 sufficient to justify this route, nor do they disclose  
16 a pattern that would allow a sensible and practical  
17 remit to be drawn up. The inquiry is unlikely to make  
18 recommendations relevant to modern practice in  
19 residential institutions, and any findings it makes with  
20 regard to compensation or the culpability of individuals  
21 would need to work with the criminal and civil courts."

22          That is the rest of the discussion for the purposes  
23 of the issue of the inquiry as such.

24          I'm not going to read all the rest because it deals  
25 with other options at this stage and I don't think it is

1 necessary to do so, but that is part of what you were  
2 being presented with to allow you to discuss the  
3 question of an inquiry.

4 If we go back then, against that background, to the  
5 meeting itself, and I think when we broke for the early  
6 lunch we were looking at paragraph 38 of your witness  
7 statement. I think at the same time I asked if we could  
8 put up the note of the meeting itself of  
9 25 September 2003, which is SGV-000046887, so that you  
10 have that in front of you too. It says "Annex A", but  
11 please ignore that because I think this note was  
12 attached to a later briefing on a separate matter or  
13 a separate but related matter. But it does, I think,  
14 bear to be the only note we have of the meeting itself  
15 and who was present.

16 I don't know if you have had a chance or you want  
17 a chance to go through that. Maybe we could just look  
18 at it briefly before we look at your own witness  
19 statement.

20 It does set out that you are being asked to look at  
21 four options with the benefit of advice from officials.

22 Then it records at paragraph 2:

23 "In discussion, the following points were made ..."

24 Maybe we should look at those briefly. One point  
25 made was:

1           "a public inquiry was unlikely to help individuals  
2 concerned or help to inform on how to improve things for  
3 the future. It would be likely to reveal lessons  
4 already learned about residential childcare in the  
5 period."

6           A second point that is recorded as having been made  
7 is:

8           "The purpose of a Commission ..."

9           This is, I think, to do with truth and  
10 reconciliation rather than an inquiry:

11           ... was unclear, and operational questions such as  
12 how any such Commission would fit with --"

13 LADY SMITH: I'm sorry, we have flicked to another witness  
14 statement. There are apologies flooding from behind  
15 you, Mr Peoples.

16           Thank you.

17 MR PEOPLES: If we can go back to the paragraph 2 which is  
18 the discussion -- I read out the first point, and  
19 I think I just --

20 LADY SMITH: You were on the second point.

21 MR PEOPLES: It's to do with truth and reconciliation, the  
22 second point, so I am not going to spend too much time  
23 at the moment on that.

24           Then the third point made is:

25           "Both a public inquiry and a Truth and

1 Reconciliation Commission would involve heavy costs,  
2 most of which would be likely to accrue to legal and  
3 other advisers rather than to the victims themselves."

4 LADY SMITH: I take from that we are talking about costs  
5 that wouldn't be borne by the Executive,  
6 Scottish Executive?

7 A. I would have thought so.

8 LADY SMITH: Because of course there are other costs,  
9 for example, people who bear their own costs of  
10 representation.

11 A. Yes.

12 MR PEOPLES: Then the fourth point that is recorded as  
13 having been discussed or made was:

14 "The issue was not confined to adult survivors of  
15 sexual abuse in residential care. There were other  
16 forms of abuse to be considered, for example physical  
17 and emotional abuse, and other settings, for example  
18 foster care, which had not so far attracted much  
19 attention. The costs of extending services to these  
20 groups would have to be identified but at this stage the  
21 extent of support should not be limited."

22 Fourth, the next point that is recorded is:

23 "There were different reasons for accessing  
24 information on files to allow counselling for those  
25 suffering or to justify compensation."



1           I think that is the point about the access to files,  
2           and that was ultimately something that was agreed that  
3           would happen.

4           Then the next point is also about access to files,  
5           and this was to do with the point about having to blank  
6           out certain names:

7           "Allowing access to files and divulging the names of  
8           individuals ... raised a number of difficult issues.  
9           For example, current legal proceedings would have to be  
10          considered, both ongoing criminal investigations and  
11          existing civil litigation which could be jeopardised by  
12          Executive actions. If access was only allowed to legal  
13          representatives, the Executive could be asked to pay  
14          legal costs. There would also be difficulties in  
15          controlling the use of information once access had been  
16          given. For example, there were concerns that legal  
17          advisers would be able to identify other individuals and  
18          approach them to also make claims."

19          The next point:

20          "There may be fewer difficulties if other names on  
21          the files were redacted which would protect the privacy  
22          of others. The amount of work required to redact the  
23          files would have to be examined further, along with the  
24          cost and staff resources required and where this burden  
25          would fall. Access to redacted files would not be

1 limited to legal representatives, so there would be less  
2 pressure for the Executive to meet legal costs."

3 Then there is a point about liability, legal  
4 liability:

5 "The Executive's legal liability for compensation  
6 might be limited. There may have been methods of  
7 complaining to ministers that would have been to be  
8 investigated, but generally Government involvement was  
9 only in inspection."

10 Then:

11 "Compensation beyond the Executive's strict legal  
12 liability would raise difficult issues and should be  
13 considered further when the prospects for existing civil  
14 claims was clearer, which would not be until legal  
15 argument in the test case in June 2004."

16 That seems to be more a reference to the Hendron  
17 case rather than Kelly which we discussed this morning.

18 The next point:

19 "There was a need to consider how other  
20 organisations had handled similar claims, for example,  
21 the churches and voluntary organisations. Barnardo's  
22 and Quarriers had already undertaken work to support  
23 victims of abuse and those from whom essential personal  
24 information had been withheld; including counselling  
25 ..."

1           Sorry, I have read that badly. They had:

2           "... undertaken work to support victims of abuse and  
3 those from whom essential personal information had been  
4 withheld ..."

5           That is, I think, a remedy for that situation that  
6 they sought to address:

7           "Barnardo's in particular were felt to have taken  
8 a particularly enlightened, positive and victim-focused  
9 approach and they should be contacted to see whether  
10 there were lessons to be learned."

11          And:

12          "The experiences of other countries might also be  
13 relevant. There were doubts about the effectiveness and  
14 the cost of the approach taken in Ireland. The  
15 Canadians had generally adopted a no fault compensation  
16 scheme. The Australian approach might be more promising  
17 and should be investigated further. Previous public  
18 announcements by the Executive, and in particular any  
19 ministerial statements in response to these allegations,  
20 should be checked for any existing commitments."

21          And then there's a paragraph that sums up the  
22 outcome that you, as the Minister for Education and  
23 Young People, said:

24          "The meeting agreed a package of other measures was  
25 the preferred option. A number of actions had been

1 identified. The options for and costs of allowing  
2 access to files should be examined further with a view  
3 to the files being redacted for access by those making  
4 allegations. Barnardo's and other voluntary  
5 organisations should be contacted to see what actions  
6 they had taken and methods of access to other  
7 institutions should be considered. The approach in  
8 other countries, particularly Australia, should be  
9 looked at in more detail. Current Health Department  
10 work would have to be examined to see how it could  
11 relate to adult survivors of abuse other than sexual  
12 abuse. The experiences of those in foster care in the  
13 relevant period should be examined further. Previous  
14 ministerial statements should be established. The  
15 public handling of this issue would also have to be  
16 considered and ministers should be given further advice  
17 on all of these issues."

18 That was the note that was made. I don't know if  
19 you saw the note at the time, but do you consider that  
20 a reasonable representation of the points --

21 A. I am not sure I would have seen it at the time, because  
22 we tended not to, but I have no particular disagreement.  
23 Of course, what I pick up on from that is that it is  
24 different from the first point in my statement, which is  
25 no doubt what you are coming to, because it says -- my

1 statement of course is my recollection 17 years after  
2 the event, and I think it's more of a fusion of the  
3 Colin MacLean minute and this formal minute. The formal  
4 minute doesn't say what I say in the first point of  
5 my --

6 Q. No, it doesn't. I think that is a fair point. But the  
7 briefing does make a similar point at paragraph 5.2 that  
8 we just looked at about evidence of abuse not justifying  
9 a full inquiry. There is something along the same lines  
10 in the briefing.

11 A. Yes, that is my point. My witness statement for you  
12 today is a fusion of those things, whereas a formal  
13 record of the decision does not actually give weight to  
14 that point at all.

15 Q. We don't really, from the note, get a flavour of who  
16 made the points and what relative weight was given to  
17 them. There is quite a lot about redaction and access  
18 to files, for example. There is much less about the  
19 benefits of an inquiry.

20 A. Yes.

21 Q. Is that not a fair comment?

22 A. Yes. I think -- my recollection of the meeting was this  
23 was not a difficult meeting in the sense of there was  
24 disagreement around the table. People arrived at the  
25 position we arrived at fairly readily, there was not

1 a lot of -- colleagues weren't saying "I take  
2 a different view from you on that", that wasn't the  
3 nature of the meeting. There was a consensus of the  
4 points that are made and that was arrived at reasonably  
5 quickly. It wasn't disputed in many ways.

6 Q. It might well be one could make a reasonable assumption  
7 that to some extent the advice that had been given in  
8 the briefing and the considerations that were raised,  
9 there was no challenge to them, because we might have  
10 seen something in the discussion to say "Well, I see the  
11 briefing says this but I don't agree".

12 A. Yes. Other than the point about ministers thinking this  
13 was a wider problem, I'm not sure there would have been  
14 a lot of (inaudible). And particularly the point you  
15 just rehearsed, when we got on to the minute in annex 2  
16 of Colin MacLean's note where he is setting out the  
17 points you were just talking about.

18 I have lost my point now.

19 Q. Just take your time. (Pause).

20 A. He is setting out the options for a full inquiry. I  
21 think he is saying on the one hand there is no case for  
22 an inquiry, on the other hand there is a case for an  
23 inquiry. And on balance I come to the conclusion that  
24 I have come to, that he is setting out under  
25 paragraph 4.5 onwards in particular. I would suggest

1           that is heavily influenced by the legal advice he was  
2           getting and I would have no basis for disputing the  
3           points that -- perhaps with the exception of  
4           Elish Angiolini, who may have an independent view on it  
5           but didn't express a contrary view, we would have  
6           accepted what that was saying because it was, you know,  
7           I am not a lawyer, other members around the table are  
8           not lawyers, and that would be heavily influenced by  
9           the legal advice. That is all about what an inquiry  
10          would require, all the procedural stuff.

11         Q.   Just on what was said in the briefing re what were  
12             called the other issues with the inquiry option, they do  
13             raise the question of the relationship with existing or  
14             future legal proceedings, whether criminal or civil, and  
15             that point is to some extent picked up, albeit in the  
16             context of access to files, in the discussion of  
17             ministers, and we have a Solicitor General present and  
18             a Deputy Crown Agent, and the legal secretary to the law  
19             officers.

20                 So we can perhaps take it that if these points were  
21             raised, perhaps to some extent they were raised because  
22             of the presence of these individuals and the  
23             confirmation that these were issues that had to be taken  
24             into account?

25         A.   I think when you are a minister and you are dealing with

1 things beyond your own kind of professional experience  
2 or qualifications, and particularly pertaining to the  
3 legal matters, it is very difficult to dispute the legal  
4 advice you are being given. You may not like it but it  
5 is very difficult to dispute it. So I think most of  
6 that would have been accepted --

7 Q. We don't see any sign that the briefing was seriously  
8 challenged or questioned to any extent by ministers. It  
9 is not like a Cathy Jamieson reaction to the original  
10 submission saying "I am not happy with this" --

11 A. No, there was no --

12 Q. So nothing like that?

13 A. No.

14 Q. The only other thing I would say about the points made  
15 that it's a strong case, and indeed the statement "there  
16 is a strong case for the Executive acting now on this  
17 issue", what we do see, however, that follows, it seems,  
18 in support of the recommendation, is yes, it's not  
19 a do nothing situation. We should do something. But  
20 the one thing we shouldn't do, say the officials, is to  
21 have an inquiry or a Truth and Reconciliation  
22 Commission.

23 So they are not departing. Even if they said there  
24 were strong arguments, they are still quite clear they  
25 don't think that is the route to go down?



1       A. I think inevitably they are saying on the one hand this,  
2       on the other hand that, on balance we come to that  
3       decision or that conclusion and make that  
4       recommendation.

5               In a sense -- this is part of the point Cathy was  
6       making yesterday, from what you have said. In a sense  
7       you are sort of damned if you do and damned if you  
8       don't, when it comes to official advice, because if you  
9       don't follow that, I could see myself at a different  
10      public inquiry in a different context with a different  
11      subject saying "Why on earth didn't you follow the  
12      advice?" On the other hand, you can take the opposite  
13      view that you shouldn't always follow the advice. So  
14      you are kind of damned if you do and damned if you  
15      don't, in one sense.

16      Q. While I have that document up, can I maybe go to one  
17      final paragraph that I'm not sure I did read, the  
18      briefing.

19      LADY SMITH: I just want to know which paragraph you are  
20      talking about.

21      MR PEOPLES: It's paragraph 16 in annex B of the briefing of  
22      23 September.

23      A. This was the compensation scheme.

24      Q. Yes. This is the briefing note. If we go to the final  
25      page of that, I perhaps should have referred you to

1 this. SGV-000046937. If we go to the final page, at  
2 paragraph 16, the final paragraph addresses the issue of  
3 what I call a compensation scheme. I should read that  
4 so we have it in our heads at this stage:

5 "We have also considered [this is the officials]  
6 whether the Executive should set up a no fault  
7 compensation scheme for those alleging abuse. There  
8 could be argued to be a general moral responsibility for  
9 the Executive to meet claims as victims would have been  
10 in the public care system under the general supervision  
11 of the Government when they suffered abuse  
12 (the Executive's strict legal liability is one of  
13 the matters to be determined by the courts in the  
14 current civil cases). This case would be strengthened  
15 if existing civil claims prove to be time-barred when  
16 the test cases get to court next June, leaving some  
17 genuine claimants with no recourse to compensation. On  
18 the other hand, there are arguments about setting  
19 a precedent for Executive compensation schemes in the  
20 absence of legal liability and we would want to  
21 establish our possible compensation. A mechanism for  
22 testing claims (modelled on criminal injuries,  
23 for example) would have to be established. We recommend  
24 that this issue is considered further when the test case  
25 has been resolved."

1           On that issue the advice is to defer consideration  
2           until, at that stage, the test case, which I think  
3           was ... mainly the Hendron case has been resolved,  
4           although we did have the Kelly case which was on the  
5           same --

6   LADY SMITH: I think there is maybe a conflation of the two  
7           cases there.

8   MR PEOPLES: I think there is.

9           Maybe this goes back to -- you did very fairly say,  
10          Peter, that your understanding of prescription  
11          limitation was limited --

12   A. Limited.

13   Q. It may be that the knowledge of your officials was  
14          similarly limited. It's something no doubt we can ask  
15          in due course.

16   A. You may think that; I couldn't possibly comment.

17   Q. No. But that is the position. They are saying just  
18          don't address it now, there are test cases, and once the  
19          outcome of these --

20   A. I think the other thing that is quite interesting is  
21          that that paragraph, it's not entirely unsympathetic to  
22          the idea of compensation, in fact there are references  
23          to moral obligations and so on, and I would have taken  
24          that as reasonably encouraging that, subject to what  
25          happened in the court cases, we might get some progress

1 on all of that.

2 Q. Yes, although the position of the Executive in the court  
3 cases, this wasn't based on Colin MacLean's advice, was  
4 the Executive had no strict legal liability for abuse,  
5 it was the responsibility legally of others. I think  
6 that was the position at that stage.

7 A. That is a comment on legal responsibility, not moral  
8 responsibility.

9 Q. Absolutely. But that was the position. That is not the  
10 time-bar point defence that you are maybe less  
11 comfortable with.

12 If we go back. We have seen the discussion as  
13 recorded and you have said, having seen that, that  
14 perhaps some of the reasons, if I can put it, which  
15 influenced the decision as recorded in paragraph 30 of  
16 your statement may be a conflation, you say, of the  
17 briefing and discussion.

18 A. Recollection.

19 Q. And recollection. But just so that we are complete as  
20 to what the reasons are, the reasons you set out, one  
21 was that the evidence of the extent of the abuse didn't  
22 justify a full inquiry. That is something the officials  
23 were saying.

24 A. Yes.

25 Q. Certainly in the briefing.

1 A. Yes.

2 Q. "Remedy through the courts was already being sought in  
3 a number of cases."

4 Well, that is a matter of record.

5 A. Yes. But I think the significance of that, in a sense,  
6 is that we saw that as a good thing, it was an important  
7 outlet, an important opportunity, that is not the right  
8 word, an important vehicle by which survivors could both  
9 assert what had happened to them, state what had  
10 happened to them, and potentially gain acknowledgment of  
11 that through the court system. So that was seen as  
12 actually quite important. And up until this point it  
13 was really the basis of the previous administration's  
14 and this administration's policy, was to encourage  
15 people to go to court.

16 Q. I will maybe come back to where we were ultimately on  
17 the various positions on these issues but I would just  
18 like to get the story through before I do that.

19 LADY SMITH: Peter, we see this expression "full inquiry"  
20 being used on more than one occasion. Help me with  
21 this: what is an inquiry that is not a full inquiry?

22 A. That is a very good question. I think what it is trying  
23 to do is say that a full public inquiry is a big thing,  
24 it's not some small thing, and so it's trying to get  
25 a sense of this is not an insignificant matter, this is

1 quite a significant matter. We are trying to give  
2 weight to that. But there is no technical -- I'm not  
3 going to claim there is some precise technical  
4 description of what's a full public inquiry.

5 LADY SMITH: I will be frank with you. I was a bit worried  
6 that somebody had in mind that you could have a halfway  
7 house inquiry. I just wonder if, by "full inquiry",  
8 what is meant is a public inquiry.

9 A. Yes, I think that is true.

10 MR PEOPLES: Maybe I can help you with that. Was the  
11 concern -- and it is not unique, I think, perhaps, to  
12 your administration, we might find that a full public  
13 inquiry, as used here, was considered to be  
14 a conventional public inquiry, as they were then held,  
15 where there was quite a lot of formality, legalistic  
16 processes, representation of lots of parties. But not  
17 only that, that it became more like a trial process  
18 because, unlike this Inquiry, there would be a number of  
19 parties represented and a number of parties asking  
20 questions cross-examining, and so forth. So that type  
21 of inquiry -- as we know, there were lots of examples in  
22 the past. Was that the sort of inquiry --

23 A. I think --

24 Q. -- that officials had in mind?

25 A. I think that is very fair. And in many ways what

1 Colin MacLean's appendix B narrative is doing is setting  
2 out the complications and the nature -- I simply don't  
3 know what has given rise to the change of approach to  
4 inquiries, but I think your observation is fair.

5 Q. I think the short answer is that a public inquiry can  
6 determine its own procedures and how they do it --

7 A. It was a lack of imagination rather than anything else.

8 Q. Yes. And to some extent perhaps, as I think was pointed  
9 out yesterday, the current legislation of 2005 wasn't  
10 obviously in place in 2003, there was legislation on the  
11 issue, but there seemed to have been a thought process  
12 that a full inquiry, public inquiry --

13 LADY SMITH: "Full inquiry" is the expression, yes.

14 MR PEOPLES: Was something of the type that I just described  
15 to you.

16 A. I think that is very fair.

17 Q. So I am just putting that -- because I think we have  
18 already heard in the opening of this hearing that had  
19 an inquiry been described as something like the present  
20 Inquiry, and the way it proceeds and the procedure it  
21 adopts, survivors who had any reservations about a full  
22 inquiry in the old sense or conventional sense would  
23 have a very different perspective on the issue?

24 A. Yes. I think -- this refers to events subsequent to the  
25 PPC, but I know from -- I remember, on leaving the PPC,

1 I was surrounded by a gaggle of people, not uncommon in  
2 that sense, journalists, but also lots of survivors, and  
3 after I had dealt with radio interviews and all that  
4 kind of stuff, I spoke to Chris Daly and Helen Holland  
5 and others, there was one guy pulled me aside as I was  
6 leaving and said "I was listening to what you've got to  
7 say and the last thing I want is an inquiry for exactly  
8 the reasons ..."

9 What was in his mind was very much what you just  
10 said. So I think that was probably a common perception.  
11 But that is 17 years ago, things have moved on, people  
12 have learned how to do things differently, and that is  
13 something that -- we are constrained, I guess, to some  
14 extent, by our vision of what all that meant.

15 Q. I think I can take you further. I think there were some  
16 records to the effect that some of your own officials in  
17 the later period in the run-up to the debate were asking  
18 INCAS --

19 A. Yes.

20 Q. -- about the issue of an inquiry --

21 A. Yes.

22 Q. -- and what they envisaged by an inquiry --

23 A. Absolutely.

24 Q. And I think one of the things that is recorded by your  
25 officials, at least, was that they didn't want -- and



1 I think it was a Fraser-type inquiry, was the example  
2 given, which was to do with the building of the  
3 Scottish Parliament, which is along the lines of a more  
4 traditional --

5 A. Absolutely.

6 Q. -- with lots of lawyers, lots of questions, lots of  
7 cross-examination, people going in, and they're not sure  
8 how they are going to end up at the end of the day in  
9 terms of the questions being asked and the findings  
10 being made.

11 A. Yes, that is absolutely right.

12 Q. Maybe that helps us to get the context of these  
13 expressions.

14 Another point you mention is that abuse was not  
15 considered to be systemic. Well, that certainly is  
16 reflected in the briefing even it is not recorded as  
17 such in the discussion, but that might have been taken  
18 as accepted by some of the people at the meeting, no one  
19 seems --

20 A. Nobody was disputing that.

21 Q. Then it says:

22 "There was knowledge of causes of abuse from  
23 previous inquiries."

24 And I think to some extent there is a flavour of  
25 that in the discussion, that we are unlikely to get any

1 more lessons learned from another inquiry?

2 A. I think what that summarises in a sense is we now  
3 understand an awful lot more than we did a few years ago  
4 about what was happening, and would an inquiry of the  
5 sort we have just talked about allow us to make  
6 substantial changes and improvements, and our judgment  
7 was because of all the big things we were doing, which  
8 were trying to address systemic weaknesses in the  
9 oversight of child protection in care, we were well down  
10 the road on that, and we were open to do anything,  
11 frankly, so we weren't convinced an inquiry would add to  
12 that particular --

13 Q. I think the fifth point you make in paragraph 38 is  
14 along the same lines, that there had been a lot of  
15 things that had changed since the days of the abuse that  
16 was referred to in the petition, and that that  
17 represented a different landscape, the system was very  
18 different to the historical perspective.

19 I just wonder though, given that you raised that  
20 there, and to some extent it is raised in the  
21 discussion, whether you might, on reflection, think that  
22 the focus was too narrow at that time both on the part  
23 of officials and ministers to look at whether an inquiry  
24 would help improve the current system, rather than  
25 addressing perhaps a more direct question, well, it's

1 a petition by survivors, would an inquiry help them to  
2 move on, to get closure, to get answers, to get measures  
3 in place that weren't there already. Do you think there  
4 is any mileage in that point, that maybe the focus was  
5 too much on the current system and whether an inquiry  
6 would do anything for that?

7 A. I think two things or maybe just one thing. The key  
8 point is that when you get this arising, the  
9 circumstances here arising under petition, one of  
10 the first things you think about as a minister at that  
11 time is: is this still happening today? That is your  
12 first concern. Are there kids still being abused in  
13 institutional care? If we'd had concerns about that,  
14 that might have been a reason to have an inquiry, to get  
15 to the bottom of why that was happening. We didn't  
16 really have concerns about that at that point in time  
17 because of point 6 there which relates to point 5. It's  
18 because of the things that were happening.

19 You raise a very separate point about the extent to  
20 which we may have underestimated something. I think the  
21 difficulty with your question is that you are asking me  
22 to apply hindsight to a decision that was --

23 Q. I am asking you to reflect on the decision and the main  
24 reasons that prompted it. If the main reasons were  
25 maybe more to do with: would an inquiry help us improve

1 the current system? The flavour of that, in your  
2 reasons there is a flavour of that in the discussions --

3 A. That was certainly one of the prime considerations: is  
4 this happening today? If it were, if we had any  
5 concerns about that, an inquiry might help with that.  
6 We hadn't addressed specifically your other point.

7 Q. The reason I also ask that is this was a big decision.  
8 This was adult survivors saying "We suffered abuse. We  
9 want various things, including an investigation and an  
10 inquiry, we want apologies", and so forth. This was the  
11 decision on that request. So you were wanting to look  
12 at presumably all the considerations that might feed  
13 into that.

14 The point I put to your colleague, and no doubt  
15 I will put to others, is it's not apparent to me that  
16 prior to 25 September 2003, when the decision was  
17 taken -- forget about what happened afterwards,  
18 including up to the debate. It is not apparent to me  
19 that survivors -- that there was meaningful engagement  
20 or consultation with the survivors about the issue of  
21 an inquiry and why it might be important to them not  
22 just to protect the current children and children in  
23 care in the future, but important to them, the inquiry  
24 itself, the process, and what it would mean and what it  
25 would do for them.

1           I am not finding, or I haven't found in anything we  
2 have received, any indication that there was much  
3 attention drawn to that. And it's not clear at the  
4 meeting that anyone said, "Well, what are the survivors  
5 telling you?" I know they said things later on, and you  
6 have said and others have said there was a range of  
7 views about a full inquiry, if you like. But that was  
8 after the boat had sailed. You were making the decision  
9 now, and you don't have their input. Is that a fair  
10 point to put to you, that that should have been done?

11       A. I think you have got to also see this in the context of  
12 which we were dealing with this at the time, and that is  
13 that this was part of an established Parliamentary  
14 procedure. So the petition that was introduced by  
15 Chris Daly was to the Petitions Committee, not to the  
16 Government, and the Petitions Committee then deal with  
17 the Executive on the questions that they want to raise  
18 with the Executive on the petition, and we then go back  
19 through the Petitions Committee and they go back to the  
20 survivors, if you like.

21           So it wouldn't have been seen as our job, in  
22 relation to the petition, to cut across the relationship  
23 between the petitioner and the Petitions Committee. It  
24 was rather -- I have said this to you before, when we  
25 were talking about this in Inverness, that it's rather

1           like if you are my solicitor and I ask you to write to  
2           another party, another solicitor, on my behalf in  
3           relation to a case and they came directly back to me,  
4           you wouldn't be best pleased about that, and in a sense  
5           it's kind of the same system.

6           So I think we would have felt constrained -- we were  
7           responding to a petition within the formal process of  
8           Parliament and the Executive, and therefore it wouldn't  
9           have been in relation to the petition, our job to do  
10          that. You might have an argument about more generally  
11          were we engaging sufficiently with survivors? There was  
12          some evidence that we were, but it was not extensive and  
13          it progressively grew over time.

14         Q. Yes, I think you are correct, the records show that over  
15          time engagement improved. Particularly in the run-up to  
16          the debate you had a lot of engagement. You met with  
17          them personally, as no doubt we will hear about in due  
18          course. But at that stage there wasn't. And I have to  
19          say I can see the point you are making about a direct  
20          approach to the individual petitioner or those that were  
21          part of the petition, but it doesn't seem to me in  
22          principle that there would be any difficulty about  
23          looking at the whole class of people and putting out  
24          some form of general consultation, "What do you think?"  
25          That was done later on in another administration, your

1 successor one, that they put out, through general  
2 consultation with survivors, an acknowledgement and  
3 accountability form, I think it was called then.

4 So there was nothing fundamentally objectionable.  
5 I take the point you don't want to tread on toes and  
6 step over into someone else's territory, but surely if  
7 you have got what I think are termed stakeholders, to  
8 use the jargon, you should be asking the stakeholders  
9 "Why are you asking for this? Why do you think it is  
10 right? We have got our own views but we want to hear it  
11 from you".

12 A. I think, in the way that we were dealing with this, this  
13 was in the formal way in which we were interacting with  
14 Parliament. There are -- again, you are going right  
15 back to the beginning of devolution, when it was still  
16 quite a new institution. One of the things that  
17 Donald Dewar used to impress upon us, right in the early  
18 days when he was First Minister, was that -- because he  
19 was sort of regarded as the father of Parliament, having  
20 got to Parliament in that sense. He was very clear  
21 the distinction between the Parliament and the  
22 Executive, they had different jobs to do, there were  
23 clear lines of separation as well as there were clear  
24 lines of connection, we had party systems and so on, and  
25 it was vital to respect the role of Parliament, was

1 Donald's view.

2 I remember, in discussions with ministers at that  
3 time, being told that when all the deputy ministers were  
4 being schooled in these things by Sam Galbraith, as it  
5 were.

6 So I think that would be weighing quite heavily with  
7 us. It's not our job in that context --

8 Q. (Overspeaking) -- but the only difficulty I have with  
9 it, I have to say, is I don't find evidence that the  
10 officials and the ministers were saying that and saying,  
11 well, one of the reasons we haven't done that, as we all  
12 know, based on what Donald Dewar said, was we can't  
13 really go to that group or ask them, or go to a class  
14 and consult with them?

15 A. Yes, but you'd think that would have been a given.  
16 Certainly for me, I can't speak for others, but for me  
17 that would be a given. We are dealing with the  
18 Petitions Committee and we are dealing with  
19 the petitioner --

20 Q. Can I just take that forward. If that was a given in  
21 2003, why was it not a given in 2004? Because you did  
22 engage directly with INCAS at that time to establish  
23 what they, on behalf of survivors, wanted. There was  
24 quite a heavy engagement. Your officials engaged. You  
25 eventually thought it was important, you engaged. And



1 ultimately you reached a position which was made public  
2 on 1 December.

3 A. I think --

4 Q. So what changed?

5 A. Two things I think changed. One, we got a letter  
6 directly from Chris Daly immediately after, as I recall,  
7 immediately after the Petitions Committee meeting where  
8 they requested me to attend at the next meeting. So  
9 Chris Daly had established direct contact with the  
10 Executive then on these points, so I guess that was  
11 one -- you know, we can now talk to Chris Daly in that  
12 sense, and officials took it upon themselves to do that,  
13 I have no difficulty with that, and no doubt with my  
14 encouragement.

15 But also at the point at which you get to the end of  
16 the Petitions Committee meeting, the Petitions Committee  
17 had questioned me about would I -- they were asking me:  
18 will you now engage with survivors? And I agreed to  
19 meet Chris Daly. My statement in here touches on this,  
20 that I would agree to meet Chris Daly after that request  
21 from the Petitions Committee.

22 So I think that is what was changing. We were  
23 getting beyond that point that I was talking about in  
24 the early days of the petition.

25 Q. The other matter I might just touch on at this stage,

1 based on some of the things that are said in the  
2 discussion of the meeting and indeed in your own  
3 statement, paragraph 38, is this concern that setting up  
4 an inquiry or any other form of past investigation might  
5 be prejudicial, if I can put it, broadly speaking, to  
6 both the criminal justice process, including  
7 investigations of crime, and the existing civil justice  
8 process, which can hear claims and determine allegations  
9 and decide on the appropriate remedy.

10 There seems to be, running through all of this, this  
11 undercurrent that that is a critical consideration and  
12 to some extent acts on a break on how you as a minister  
13 and others felt -- how far they felt they could in terms  
14 of satisfying the demands. Is there something in that?

15 A. How do you mean, is there something in it?

16 Q. In the point that in the background you are getting  
17 this --

18 A. Well, I mean, if --

19 Q. -- advice that, well, don't do anything that will  
20 jeopardise our civil justice system, our criminal  
21 justice system, the investigation of crime, and if you  
22 delve into the past and you start examining things, you  
23 may be cutting across the work they do?

24 A. Absolutely. I thought you were asking me whether  
25 I agreed with the legal point.

- 1 Q. No.
- 2 A. Which I wouldn't have a view on. But unquestionably  
3 that was happening, and it happened, as I am sure we  
4 will come on to, right up to the time of the appointment  
5 of the rapporteur. I think I mentioned earlier there  
6 was extreme nervousness about this. And from a lay  
7 point of view, I'm not in a position -- if I am being  
8 told by fairly senior lawyers in the Executive, and you  
9 have seen the people who were at the meeting, "You are  
10 in danger here of doing all sorts of things that have  
11 legal consequences which are --"
- 12 Q. That is what --
- 13 A. Then that of course weighs heavily --
- 14 Q. I did ask what the interest of the Solicitor General was  
15 at the meeting, and it might be that you have just given  
16 me the answer.
- 17 A. I think that is exactly --
- 18 Q. That they wanted to be sure the ministers didn't go off  
19 on a route that would give rise to the concerns that are  
20 noted in that note of meeting. Would that be a fair --
- 21 A. I think that is extremely fair, yes.
- 22 Q. Keep you in check?
- 23 A. Elish Angiolini didn't operate that way. She was a  
24 colleague --
- 25 Q. I think --

1       A. But I am quite clear that if we had been -- the reason  
2       they were there, and the officials with her were there,  
3       if we were going to start talking about doing something  
4       then they would have started participating in the  
5       meeting to a much greater extent, so it never got to  
6       that point.

7       Q. What we don't know from a meeting like this is who was  
8       making these points because the note isn't particularly  
9       helpful in that regard, so one would have to speculate  
10      on who was making particular points.

11     A. Yes. It wouldn't have been the non-lawyers making the  
12     legal points. You can take that for granted.

13     Q. There is one other point I would like to raise with you  
14     which -- about this meeting and the factors that may  
15     have played a role in the decision that was taken. You  
16     say at paragraph 40 of your witness statement that the  
17     cost of an inquiry was not an active consideration.  
18     I might be forgiven for thinking, when I see the  
19     briefing talks about the rather large costs of the  
20     Saville Inquiry, that a point is being made to the  
21     ministers by the officials about the cost of inquiries,  
22     and to some extent it may well be that it is actually  
23     raised in the discussion itself. I see --

24     A. I can probably help you with this.

25     Q. -- would involve heavy costs. So someone --

1       A. I can probably help you with this. When I was reading  
2       this the other night again, I thought "active" is the  
3       wrong word, it should be "major consideration". Let's  
4       be clear about this, the officials would be failing in  
5       their duty to ministers if they had not raised questions  
6       of costs.

7                I have to say to you that it was not a major  
8       consideration at all between the politicians that were  
9       there. And I should maybe explain that, although you  
10      have mentioned it due to my statement earlier on, I'd  
11      been a Finance Minister for three years prior to this.  
12      I knew how much money was in the system, and a cost of  
13      30, 40, whatever, that wasn't an issue.

14               That might sound incredible to people but that was  
15      the case. We were not at that time -- this might also  
16      sound incredible to people in the light of today's  
17      circumstances, we were not short of money in those days.

18      Q. This was before 2008, for example, the financial crisis?

19      A. Yes. And just at a time when, having stuck to the  
20      spending plans of the previous administration in the  
21      first years of the Labour Government at the UK level,  
22      the brakes had come off and there was a lot of new  
23      public expenditure flowing. One of my jobs as  
24      a Finance Minister was to get the money spent.

25      Q. I take all of that. I suppose everybody is looking to

1 see why someone at the meeting itself -- presumably  
2 these discussion points are generally made by ministers,  
3 there is no point in just recording what officials are  
4 saying at a meeting, these are points the ministers are  
5 wanting minuted and recorded?

6 A. Yes. It just wasn't an issue for ministers.

7 Q. But someone raised the fact that there would be heavy  
8 legal costs --

9 A. In the advice from Colin MacLean --

10 Q. No, if I go to the note of the meeting.

11 A. I beg your pardon, I beg your pardon.

12 Q. We are at cross-purposes here.

13 LADY SMITH: You are thinking of the note that refers to  
14 Bloody Sunday and Hutton, or not?

15 MR PEOPLES: No, the note of ministerial meeting. If we go  
16 back to that again. It's the 25th, the actual  
17 ministerial meeting. SGV-000046887.

18 At paragraph 2:

19 "In discussion, the following points were made ..."

20 And I was saying I am assuming that is an attempt to  
21 record what the minister's points were?

22 A. Not necessarily. Your officials would take part in  
23 these discussions as well --

24 Q. Well, someone at the meeting has said the public inquiry  
25 and the Commission would involve heavy costs likely to

1           accrue to legal and other advisers rather than victims.

2           So someone felt that point was significant --

3           A. I think you can take it that would have come from  
4           officials. It could have come from the Finance Minister  
5           but I'm not going to pin my finger on that person --

6           Q. Who is that at that time? Do you remember?

7           A. Andy Kerr I think, I'm not going to say it was there,  
8           but there is a range of possibilities. The point is  
9           notwithstanding it's a relevant consideration for  
10          ministers, it by no means was a major consideration  
11          because of what I have said. If we decided that was the  
12          right road to go down, it would have been done  
13          irrespective of the cost --

14          Q. The money would be found?

15          A. Absolutely. And it wouldn't have, in those days, been  
16          difficult to find that money.

17          Q. I would like to move on --

18          A. Before you do that, just two points to make.

19                 I think I may also I have said somewhere else in the  
20          statement, I can't lay my finger on it now, you might  
21          know. But no decision is forever, and once you have  
22          taken a decision you are taking it on the advice you are  
23          getting. You are weighing up your own experience, your  
24          views on that advice, and you're weighing up all the  
25          evidence you have got and taking a balanced decision

1 to -- the balanced decision that you ultimately take.  
2 That is a matter of judgment. These are all matters of  
3 judgment. But no decision is forever, and if the  
4 circumstances change, or if any of the factors I am  
5 talking about had changed, that could have given rise to  
6 a different decision.

7 Q. So --

8 A. And in a sense, I don't know why the present Government  
9 took the decision they did to set up the Inquiry, but in  
10 a sense that is indicative of that point I am just  
11 making, that we made that judgment, and that judgment  
12 was to the best of my understanding, although I haven't  
13 read into this in detail, continued by the new  
14 administration, the SNP Government as it then was, right  
15 through until 2014, and then something changed and the  
16 decision changed.

17 So that is just to make that point. And who knows  
18 what triggered a change in our mind? I simply don't  
19 know and I would be speculating --

20 Q. I think we have someone else who will tell us the answer  
21 to that in due course so I am not going to ask you to  
22 speculate.

23 But the point you are making is never say never to  
24 an inquiry, because ministers may change their mind  
25 depending on changed circumstances or factors that at



1 a later date might seem to justify a change of policy.

2 A. Yes.

3 Q. But having said all of that, and I appreciate the point  
4 you are making, until May 2007 there was never any  
5 change in the position of the administration you were  
6 part of?

7 A. No, and I am completely speculating here, but,  
8 for example, had the Tom Shaw Inquiry come back and  
9 discovered something really fundamental that affected  
10 all this, who knows, that might have triggered  
11 an earlier inquiry. But I am entirely speculating.

12 The other point I want to make before you leave this  
13 is those judgments we came on this, whether anybody  
14 agrees with them or not, were the judgments we were then  
15 scrutinised by Parliament on. So that was what I was  
16 being grilled on by the Public Petitions Committee, and  
17 that subsequently rolled on to the whole Parliament.

18 So those were the decisions that were then subject  
19 to public scrutiny in Parliament on the judgments that  
20 we have made which is a perfectly normal part of the  
21 democratic process.

22 Q. But did you know, either directly from your dealings  
23 with the Committee or in some way informally, that  
24 the Committee wanted an inquiry?

25 A. I am not clear, did the Committee formally --

1 Q. I don't think they formally recorded in their meetings  
2 they had decided an inquiry was right. They held a  
3 debate so the issue could be ventilated in Parliament,  
4 but I think we had evidence yesterday from Michael  
5 McMahon that he was pretty clear where he wanted --

6 A. That might well be.

7 Q. -- the petition to end up.

8 A. That might well be. My recollection, again I was  
9 reading this at the weekend and I might be wrong about  
10 this, was that Michael made it clear the Petitions  
11 Committee were not taking a position.

12 Q. I think there may have been something said at the  
13 Parliamentary debate that they didn't want to anticipate  
14 what the House, the Members of Parliament might decide  
15 or determine or what view they might express. I think  
16 they wanted to hear the views. But all I am telling you  
17 is that he seemed quite clear he was -- if I could use  
18 the expression the First Minister used -- working  
19 towards an inquiry.

20 LADY SMITH: I think he said there was a consensus within  
21 the PPC --

22 A. (Overspeaking) Michael is a very honourable, upright  
23 citizen and if that is what he says -- I don't think  
24 that is what was said in Parliament but no doubt that  
25 can be checked.

1 MR PEOPLES: We can look at it, I think you are right, but  
2 I think we have to take on board what he was thinking  
3 and perhaps why he wanted the matter to go to  
4 Parliament, to see if he could get the outcome he  
5 thought was --

6 A. Absolutely fair, absolutely fair tactic, if that is  
7 the way to describe it, yes.

8 Q. I have finished with September 2003 and move on  
9 to December, what I call the First Minister's fifth  
10 option. We have had four options on the table,  
11 ministers have selected option 3, the package of  
12 measures, but leaving compensation to one side for  
13 a time. And we move on. You tell the First Minister,  
14 who is interested in what happened at the meeting --  
15 I don't want to go through the record because it will  
16 take up time that is unnecessary -- and you send him  
17 a minute in December to explain what has happened. He  
18 comes back with another suggestion, and maybe I should  
19 just take you to that briefly at SGV-000046922. That  
20 should come up on screen.

21 A. Yes.

22 Q. That sets out at the bottom of the page, if we could  
23 start there. There is an email from the  
24 First Minister's private office to you, and a host of  
25 others as well it would appear, saying that:

1           "The First Minister has seen [your] minute ..."

2           This was rehearsing what had been decided in  
3           September.

4           "... and associated papers and has commented 'Are  
5           the 4 options in the minute of 23 September [the Maclean  
6           briefing] the only options? Have ministers considered  
7           appointing an expert (without a working group or  
8           committee) to review the position, recent developments,  
9           and recommend any procedural changes which might be  
10          advisable to reassure people now? Grateful for  
11          Mr Peacock's views on this."

12          So the First Minister steps in and gives his  
13          comments and puts another option on the table  
14          in December of 2003.

15         A. Yes.

16         Q. But he doesn't dissent from the decision on the inquiry  
17          or the truth and reconciliation commission. He is just  
18          suggesting some form of review by an independent person.  
19          It's not very clear I think at that stage what he had in  
20          mind, and no doubt we can ask him when he gives  
21          evidence, but let's just proceed. He has put another  
22          option on the table.

23         A. Yes.

24         Q. Again, I am not going to spend time with you. I may do  
25          it tomorrow with Mr MacLean, but I am not going to spend

1           time trying to look at the period of delay in  
2           considering that option, but there was delay?

3           A. Yes.

4           Q. We know that the First Minister put this matter on the  
5           table on 22 December -- if we perhaps just scroll back  
6           up on that document I have just asked you to look at, we  
7           can see the intention was on 22 December that officials  
8           would need to put supplementary advice to you on your  
9           return in January, and the writer, the official who was  
10          a fairly senior person in the department, was it, at  
11          that stage --

12          A. Maureen Verrall? Don't ask me the grade.

13          Q. No, I don't want her grade. Let's see what she says:

14                 "My initial reaction is that the appointment of an  
15                 independent experts fails on the same basis as an  
16                 inquiry or commission, ie that ministers know what the  
17                 problems were. There would be little, if anything, more  
18                 to be learned. Current procedures have changed so much  
19                 since the alleged abuses that the circumstances could  
20                 not be repeated now and all effort should therefore be  
21                 focused on providing what help we can to the victims of  
22                 this historical abuse. This was pretty much the view of  
23                 all of the ministers at the meeting they had  
24                 in September."

25                 But it makes clear you wanted the First Minister's

1 approval to what had been decided and I think that  
2 triggered the exchanges you had?

3 A. Yes.

4 Q. So the idea seemed to be that officials were going to  
5 get together in January, formulate a position and give  
6 you advice?

7 A. Yes.

8 Q. As I say, I am not going to look at the records, but  
9 what happened was for one reason or another that didn't  
10 happen, and it was only in March that someone asked the  
11 question: did the minister ever get any advice on this  
12 matter? In March 2004. And the answer clearly was no.

13 A. Not May 2004?

14 Q. If you let me finish, I think this was when the  
15 oversight was picked up. But the advice itself on the  
16 option, as you're quite right in saying, was given to  
17 you on 20 May 2004 --

18 A. Yes. This is one of the mysteries of this, and you are  
19 aware of this as much as I am, that there is just a sort  
20 of black hole in the records for this period. And apart  
21 from what you have just mentioned, 23 March --

22 Q. I think in fairness to those that were involved, I don't  
23 want to go through all of this because I think to some  
24 extent it is an issue that -- I would rather look at  
25 more important matters. It is not unimportant, but

1 I think things were happening in that period, officials  
2 were doing certain things, but for some reason  
3 consideration of the specific proposal and the advice on  
4 it didn't really start to happen until March/April, and  
5 they were working up a submission dealing with that, and  
6 to some extent perhaps revision to responses to the  
7 Committee, a substantive response.

8 So it wasn't a period of complete inaction, if  
9 I could put it that way, but I don't think we want to  
10 take up time --

11 A. I think --

12 Q. But they missed this. It should have been back to you  
13 quite quickly?

14 A. Absolutely --

15 Q. And I think they accept --

16 A. Absolutely. That is what I -- when I did -- both in the  
17 letter to the Petitions Committee and when I appeared at  
18 the Petitions Committee I was very clear that there was  
19 simply no excuse for what had happened. It was  
20 inexcusable and it should not have happened. There are  
21 combinations of circumstances here. If you take the  
22 whole period from the petition arriving in the Petitions  
23 Committee and the first contact with the Executive by  
24 the Petitions Committee, right through until the day  
25 after the Petitions Committee had met in June when they

1 got the letter, there is a series of events, none of  
2 which are excusable. You can explain part of what  
3 happened but none of is it excusable. And that is what  
4 I said to the Petitions Committee unequivocally, mea  
5 culpa, this should not have happened.

6 Q. I will try and take this short but I will come to the  
7 letter to the Committee, because I think as I say this  
8 oversight in not giving the advice was picked up  
9 in March and action was taken to put together  
10 a submission on -- a general submission to provide  
11 a formal response to the Public Petitions Committee and  
12 to other MSPs who had been writing on the subject to  
13 the Executive. So this was all being done. And I think  
14 the unfortunate thing was there was a combination of  
15 events, that you got advice on 20 May. Unfortunately  
16 the PPC, the Petitions Committee, had met on 12 May, had  
17 still not got a response despite a number of reminders,  
18 lost patience, as I put it to Michael McMahon, who  
19 I think agreed and decided he was going to write to you  
20 and the First Minister, which was -- it was a serious  
21 step to write to the First Minister, it was --

22 A. They were absolutely right. Unequivocally what happened  
23 should not have happened and is it inexcusable.

24 Q. So that letter arrived at your door around the same time  
25 as the submission on the First Minister's option, which



1 was unfortunate. So you were confronted with a very  
2 angry Petitions Committee, because they were awaiting  
3 a reply and hadn't got one, so you have that situation  
4 to address, and you receive the submission from your  
5 officials which tells you they are not recommending the  
6 First Minister's option. Indeed they seem -- they were  
7 very quick to come up with an initial reaction, at least  
8 one of them was, on 22 December, but they stuck with  
9 that in the end, is that correct?

10 A. Could you repeat that, sorry?

11 Q. They came up with an initial reaction that the  
12 First Minister's idea --

13 A. Sorry, on 22, yes, yes, but then the trail goes cold.

14 Q. The trail went cold. But then you do get a submission  
15 and I will take you to that. Maybe we can put that on  
16 screen. It's a submission on 20 May 2004,  
17 SGV-000046956.

18 A. Yes, got you.

19 Q. You see that is addressed to you and it's from the  
20 official who had up until then been leading on the  
21 matter of co-ordinating advice and providing advice to  
22 ministers. It's recommending, if we look at the first  
23 page, that the Executive continues its policy of  
24 releasing Executive files. I think that had already  
25 been decided as one of the ways forward to support

1 survivors:

2 "... as a response to allegations of historical  
3 claims of abuse at List D schools ..."

4 A reply should made to -- GF?

5 A. Green folder.

6 Q. Correspondence to ministers --

7 A. Yes, all your correspondence arrives in a green folder,  
8 so they were called --

9 Q. These outstanding -- there were a number of MSPs who had  
10 written on this subject, you and others, I think?

11 A. Yes.

12 Q. Between August 2003 perhaps and --

13 A. Yes.

14 Q. -- May 2004 on the subject, and they were awaiting  
15 substantive replies about issues such as what you were  
16 going to do about an inquiry, or whatever, and so forth.  
17 That is what the outstanding GFs --

18 A. Yes.

19 Q. You also had to reply to the Petitions Committee to give  
20 them a substantive response to --

21 A. Yes.

22 Q. -- the petition itself. Indeed it does say it's pretty  
23 urgent because the GFs have been outstanding since last  
24 year. Because these should be dealt with in practice  
25 much more quickly --

- 1       A. Absolutely. I'm not going to claim all Executive  
2       correspondence was turned around quickly but it should  
3       never have taken that length of time.
- 4       Q. I think we may hear from Colin MacLean that  
5       the department was under a lot of pressure, resources --  
6       there was a lot to deal with, and that eventually there  
7       was a restructuring I think in 2004?
- 8       A. That is right. And coming at one point, just after this  
9       point actually, Colin and I had a discussion about this  
10      where he reassured me that things were getting sorted,  
11      because it was simply unacceptable what was happening.  
12      So it got there but, you know, the fact that the  
13      department was overloaded is not much consolation to the  
14      Petitions Committee or the people waiting for a reply.
- 15      Q. It does -- this particular minute, and I will come to  
16      a later minute where you had something to say, but this  
17      minute does recognise that ministers had agreed a full  
18      inquiry or Truth and Reconciliation Commission was not  
19      justified. We see that in paragraph 3. But the  
20      question of looking at ways to give access to files was  
21      something that was to be pursued and explored as part of  
22      the agreed package of measures. And also they were to  
23      look at how other jurisdictions and organisations had  
24      handled similar claims, then it does mention  
25      First Minister's option of the expert.

1           Annex A discusses the First Minister's proposal, but  
2           you get forewarning that the conclusion of the officials  
3           is that an independent expert raises a similar  
4           disadvantage as an inquiry or Commission and its  
5           advantages do not outweigh the disadvantages. There is  
6           then some information on recent developments as well in  
7           what has been happening. To some extent paragraph 5,  
8           which I will not read out, may confirm what I have just  
9           told you, that some things were happening behind the  
10          scenes, but maybe not the things that should have been  
11          happening, like replying to the First Minister by giving  
12          you early advice.

13          A. Yes.

14          Q. The recommendation is to continue the previous strategy  
15          of releasing information on List D schools and residential  
16          establishments after redaction, that is blacking out  
17          information that, by law, shouldn't be contained or  
18          sensitive information that ought not to be released.

19                 I think it produced a reply to the -- a proposed  
20          reply to the Petitions Committee. So that is where it  
21          stood. I don't want to go through all the  
22          pros and cons, but in annex A there is a list of  
23          advantages of an expert and disadvantages, but the  
24          conclusion on balance is that that option shouldn't be  
25          pursued, that is the officials' judgment, and they set

1 out their reasons there. And then in annex B they give  
2 quite a lot of information about what has been happening  
3 since ministers made the decision in September and so  
4 forth.

5 So that I think -- I don't plan to spend a lot of  
6 time on that because we now know -- we have got to the  
7 stage, the fifth option has been put on the table, the  
8 advice is, no, we won't go down that route either. But  
9 of course you are also facing the unfortunate problem  
10 that the Committee are chasing and you have had a letter  
11 and the First Minister's had a letter. He is not happy,  
12 you are not happy. You have had words with  
13 Colin MacLean. Certain things do happen after that,  
14 some restructuring, I believe?

15 A. Yes.

16 Q. Some change of personnel and so forth?

17 A. Yes.

18 Q. The next development is that Colin MacLean steps in  
19 maybe more directly, would that be fair to say?

20 A. I --

21 Q. -- this problem?

22 A. Yes. It was clear things had been going wrong. I was  
23 irritated about it, and those kind of reasons you set  
24 out, and Colin took increasing interest. But also by  
25 that time I think Shirley Laing and Rachel Edgar had

1           come in, who were both excellent officials, and things  
2           began to get sorted.

3           Q.   So the next document, I might ask you now, because  
4           I think you were puzzled by why, despite a letter to you  
5           and one to the First Minister, the Executive still  
6           managed to miss the Petitions Committee meeting on  
7           29 June and give them a letter after you had been  
8           invited to give evidence in the absence of any response.  
9           You had problems with that?

10          A.   Absolutely.  When I got into looking at these files 17  
11          or 16 years later and I saw the sequence of events  
12          I thought, my God, how on earth did we get into this  
13          mess?  Because I can think of few things that  
14          a committee would regard as more insulting than to  
15          receive a letter the day after they had met to consider  
16          the issues on which you were supposed to be replying to  
17          them.  So I completely understand how they were  
18          irritated.  Again there is a slight mystery here.  It  
19          was you actually, in your trawling of documents, that  
20          uncovered and explained to me that it appears I signed  
21          a letter in advance, hopefully to get to the Committee  
22          in time.  And then it's not entirely clear what happens.  
23          I suspect it was, you know, run that past --

24          Q.   Don't run ahead.  I will help you with that.

25          LADY SMITH:  Peter, you are sounding quite calm all these

1           years on as you explain this. I am just wondering  
2           whether you were furious at the time?

3           A. I tend not to be furious. I might have been quietly  
4           seething but I don't display it. This was really just  
5           completely unacceptable, and it was clear to me it was  
6           completely unacceptable. But you don't know until you  
7           know. If you sign a letter you think that it is going  
8           to go, even though it in turn was far delayed from where  
9           it should have been. As far as I was concerned I had  
10          signed a letter, it was now in due process or getting  
11          there. It turns out it wasn't. I was not best pleased.

12         MR PEOPLES: Let me try and help you --

13         LADY SMITH: Inwardly seething, as you say.

14         MR PEOPLES: Let me try and help you today, if I may. Could  
15           we first look at a document which is in our bundle which  
16           is a submission to you and the First Minister of  
17           8 June 2004.

18         A. From Colin?

19         Q. Yes. It's SGV-000046929, if we could have that in front  
20           of you.

21                 Now we have a submission which is addressed both to  
22           you and the First Minister, and I think we can work out  
23           why both of you are copied into this. This is to  
24           provide a briefing and a proposed response to the  
25           Committee. I don't want to be unkind to the person who

1 prepared the previous response and briefing, but was  
2 this an attempt on Colin MacLean's part to give a more  
3 polished briefing?

4 A. I thought -- I am working from recollection here but  
5 I am pretty sure I went back on the Gerald Byrne  
6 submission to say "I am not happy with this", partly  
7 because it almost -- it does acknowledge that ministers  
8 took a decision, it doesn't acknowledge that that  
9 decision had been taken by a group of ministers at  
10 a meeting and all that kind of stuff, so --

11 Q. Slow down. You may actually have had a bit of a problem  
12 with this one as well.

13 A. I could well have had.

14 Q. All I am saying is it is in slightly different  
15 language --

16 A. Yes.

17 Q. -- and form to the previous submission on 20 May, but  
18 what it's trying to do, I think, is to effectively  
19 prepare the way for how you would set out your reasons  
20 for the decision to the Public Petitions Committee, and  
21 have been -- it has been set out about how the question  
22 was addressed and answered by consideration of four  
23 related issues.

24 This is the sort of -- it became the basis of the  
25 response to the Petitions Committee in the letter of



1 30 June. The issues were whether -- well, if we look at  
2 the document, the four issues that we start off at  
3 paragraph 4, just to see what the issues were identified  
4 as being to answer whether there should be an inquiry,  
5 is:

6 "Whether we have taken sufficient steps to prevent  
7 future abuse in residential care settings."

8 The second issue:

9 "Whether we are providing sufficient high quality  
10 services for individual survivors."

11 Third:

12 "Whether we are providing sufficient support to meet  
13 the legal interests of individual survivors."

14 The fourth on the next page:

15 "Whether an inquiry would lead to enhanced public  
16 confidence in the system."

17 And then it says:

18 "Finally, we considered what form the inquiry might  
19 take and when it might lead to positive outcomes that  
20 might outweigh the above."

21 It discusses the various forms of inquiry that might  
22 be held in public or private and how formal or informal  
23 it would be. Then if I go to the third page of the  
24 submission -- we can read all of this for ourselves. On  
25 balance again we see:

1            "It would not be helpful to hold an inquiry into  
2 this matter although we recognise there are strong  
3 arguments in favour ..."

4            Echoes of a previous briefing we looked at earlier  
5 today. It is really going back to: we still think the  
6 proper approach is improve support for survivors in a  
7 variety of ways and we won't look back to the past. We  
8 won't have an inquiry or investigation into the past,  
9 and so forth.

10           So the view of the officials hasn't changed on this  
11 matter, but indeed it reflects now the decision had been  
12 taken in September of the previous year by ministers as  
13 well, unanimously.

14           But the one thing it does do is -- sorry, it doesn't  
15 seek to even say that the rejection of the  
16 First Minister's option or the recommendation not to  
17 pursue it, there is no attempt to try and say, well, on  
18 reflection, maybe we have should have given that one  
19 a run?

20           A. I think it goes back to the Shirley Laing note of  
21 earlier --

22           Q. So we have that as starting point. The next document  
23 you might want to have a look at is SGV-000047655. If  
24 we could have that up.

25           A. Yes.

1 Q. I am really referring to this just to show you that  
2 having -- this submission having been circulated, we see  
3 there that there are some comments on the minute or  
4 submission of 8 June by Cathy Jamieson about the need  
5 for further -- to consider further handling of  
6 presentation on this issue, including discussing the  
7 issue with relevant voluntary organisations prior to  
8 issuing the letters, and I think the letters include the  
9 letter to the PPC.

10 It says:

11 "The minister commented that it's vital to get the  
12 message across that there is no 'covering up' and that  
13 we do accept that abuse in care happened. Reference  
14 should also be made to previous inquiries."

15 So that is her comment on the submission we have  
16 just looked at.

17 A. Just to be clear, that is to Colin -- I have lost sight  
18 of the top of the page. That is to Colin MacLean and  
19 Shirley Laing?

20 Q. Yes.

21 A. And myself.

22 Q. That is her comment.

23 A. And the First Minister.

24 Q. That is her comment on the submission of 8 June.

25 If we can go to another document in the bundle, it's

1           SGV-000046919. These comments were on 14 June that she  
2           made. I just note that.

3           Then we see your comment on the same day,  
4           14 June 2004. You have seen the submission of 8 June  
5           and your comments, and I will quote:

6           "Sorry to come back on this again, however the  
7           minute does not acknowledge that ministers, me, Cathy,  
8           Euan [that's Euan Robson, the Deputy Minister for  
9           Children and Young People], the Solicitor General,  
10          unanimously concluded consideration of the merits of  
11          an inquiry last year. It was only when our  
12          recommendations went to First Minister that he was not  
13          content and suggested a single person considered. The  
14          minute needs to set out the sequence of events. This is  
15          not the first time the First Minister has considered the  
16          issues here."

17          So you were looking for that to be reflected in the  
18          briefing and the advice notes at that time because you  
19          are thinking, well, they are just missing out on a very  
20          key event and we have taken the decision, we did  
21          consider the merits, and that should be --

22          A. I think what I said earlier, that I thought I had  
23          responded to the Gerald Byrne minute in those terms --

24          Q. It was the Colin MacLean one?

25          A. It was actually this one.

1 Q. You feel as if, as worded, it seems to me --

2 A. It was like we were starting completely afresh.

3 Q. -- as if there is a decision to be made, ministers.

4 Here's our advice. You make the decision. And you are  
5 saying hang on --

6 A. -- already made the decision.

7 Q. -- already made the decision?

8 A. Yes.

9 Q. Is that fair --

10 A. Absolutely, yes.

11 Q. Then can I ask you to look at another email around the  
12 same time. SGV-000047651. That is 15 June, the day  
13 after you had made your comments, and you can see there  
14 that there is an email from Joanne Clinton who is  
15 an assistant clerk to the Public Petitions Committee on  
16 15 June to the Executive, which refers to the letter  
17 that was sent to you after the meeting in May. The  
18 letter I think to you was 19 May or something like that.  
19 It notes the response is still outstanding.

20 Then the Executive is told:

21 "It's likely that the Committee will further  
22 consider petition PE535 at its last meeting before  
23 recess on 29 June ... I should therefore be grateful if  
24 you would let me know as soon as possible whether the  
25 Executive is likely to be in a position to respond to

1 the Committee's request for information by Tuesday  
2 22 June."

3 So they are giving fair warning, it is to be  
4 considered, and they're trying to get a response in good  
5 time for the meeting?

6 A. Yes.

7 Q. Do you see that on 15 June? Then if we move on to  
8 another document, which is SGV-000047652, we see that  
9 this is another submission or briefing from  
10 Colin MacLean dated 16 June 2004, again to you and the  
11 First Minister. Essentially it has quite a similarity  
12 to the previous one of 8 June but what it does do,  
13 I think, is to add or reflect the fact -- or to reflect  
14 your comments.

15 And if we go to paragraph 6 on the final page, do we  
16 see that there it reads:

17 "On balance it would not be helpful to hold an  
18 inquiry into this matter although there are strong  
19 arguments in favour. This is the conclusion that  
20 the Ministers for Education, Finance, Justice and the  
21 Deputy Minister for Education and the Solicitor General  
22 reached unanimously when they considered this matter  
23 last year."

24 And so forth. So it takes on board your comments  
25 and includes them in the official briefing in relation

1 to this matter.

2 A. Yes.

3 Q. But otherwise it is in substance the same --

4 A. Yes.

5 Q. -- recommendation. There is no other, I think, material  
6 change for present purposes. So we have that. So they  
7 have taken on board what you were saying.

8 Then if we go to another document, SGV-000046920,  
9 which, if we just scroll down to the second half, we see  
10 there that there is an email from -- it says the  
11 Minister for Education, I think it is from your private  
12 office probably, but it's dated 17 June, 16:26, which is  
13 saying that -- it's confirming you are content now for  
14 the submission and the draft responses to be issued to  
15 the First Minister, and indeed it is said that  
16 the official has since issued the revised submission.

17 Your comments seem to be along the lines:

18 "The minister has also commented the letters will  
19 need co-ordinated signing and should not issue until  
20 First Minister indicates he is content. He also  
21 indicated we need to have a press-handling strategy  
22 before the letters are issued and in particular lines on  
23 how to handle the Sunday Mail as they have campaigned on  
24 this. I would be grateful if a handling strategy could  
25 be prepared as a matter of urgency."

1           We see how the process is developing. The idea of  
2           a handling strategy is not unique to this sort of --

3           A. No.

4           Q. -- it's a common thing --

5           A. It's a normal routine thing you would do, yes. You just  
6           have to get all your ducks in a row. You have to make  
7           sure the letter is going out. You have a line to take  
8           when you are asked about --

9           Q. The significance of the Sunday Mail, as we recall, is  
10          the previous summer and indeed on other occasions the  
11          Sunday Mail had been quite active in terms of looking at  
12          allegations of abuse --

13          A. Yes, I think it was Marion Scott --

14          Q. Marion Scott at the time was writing something --

15          A. Yes --

16          Q. In fact they were still taking an interest in May  
17          because I think, unfortunately, I haven't referred you  
18          to it, but I think someone asked the question: are you  
19          going to respond before the meeting on 12 May? And that  
20          caused a bit of internal consternation. I think your  
21          officials received a communication from a press  
22          officer --

23          A. I see.

24          Q. -- an enquiry from the press: what are you doing?

25          A. Yes.



1 Q. The Committee are going to meet to discuss the petition  
2 and -- well, we know what happened?

3 A. Yes.

4 Q. So we have this. Then can we go to another document  
5 which is SGV-000061806. Another email just to get the  
6 story. We are now on 21 June 2004, and do we see now  
7 that this comes from the First Minister's office, and it  
8 says:

9 "The First Minister has seen Colin MacLean's minutes  
10 of 8 and 16 June and Marion MacKay's media handling plan  
11 of 18 June."

12 So a plan has been prepared.

13 "He has said that to go public on the rejection of  
14 an inquiry without proactive media work - especially  
15 with the Sunday Mail - is unwise. He has also said that  
16 we must be able to say something about support for  
17 survivors and that a delay in that will not be helpful."

18 So he wants some good news as well as some bad news  
19 I suppose is the underlying message.

20 And the private secretary or the assistant private  
21 secretary to the First Minister adds:

22 "I note that the Short Life Working Group is looking  
23 to report to ministers shortly. Perhaps its conclusions  
24 can be brought forward quickly or are they conclusions  
25 which can be divulged before the report is finalised?"

1           That is a reference to the report life of the Short  
2 Life Working Group into adult survivors of childhood  
3 sexual abuse which we mentioned earlier. Okay? So we  
4 have this, and of course we have this deadline to work  
5 towards. And I don't think the whole of this is clear  
6 from this note, but if you scroll down that particular  
7 page toward the bottom, you can see one of your  
8 officials on 17 June had sent an email around to your  
9 office, the First Minister's office and to the  
10 Justice Minister's office, to alert all three offices to  
11 the fact that the Committee was planning to consider the  
12 issue before the end of June and was looking for  
13 a response by 22 June. And I think, although we don't  
14 have the whole of that statement in bold, it is that  
15 it's extremely helpful to have final clearance clearly  
16 before that happens. I think that is what he is  
17 wanting. So he is basically alerting everyone: let's  
18 get this together before the deadline.

19           So we have that. So we have got to 21 June, and if  
20 we just look at another document, if we may, which is  
21 SGV-000046938. This is on 21 June. The reason I refer  
22 you to this is just to show that the officials,  
23 including Colin MacLean, your private secretary, and the  
24 First Minister's assistant private secretary, have got  
25 together and had a discussion in Gerald's absence.

1 I think Gerald was off sick, we know that. There were  
2 some discussion about the First Minister's points about  
3 how one might do some proactive media work and put some  
4 more information in about victim support as he wanted.  
5 That is the gist of it.

6 A. Yes.

7 Q. I don't want to go through the detail at this stage,  
8 I just want to get the broad picture. So they are  
9 trying to do what the First Minister wants them to do  
10 and put something together as part of his -- or to give  
11 effect to his comments.

12 LADY SMITH: Mr Peoples, I see it is now 3.10 pm. I think  
13 we should break for the stenographers' sake, and other  
14 people might welcome a break too.

15 I always break sometime in the middle of the  
16 afternoon to give the stenographers a breather, Peter,  
17 if that is all right.

18 (3.11 pm)

19 (A short break)

20 (3.23 pm)

21 LADY SMITH: Are you ready for us to carry on, Peter?

22 A. Absolutely.

23 LADY SMITH: Mr Peoples.

24 MR PEOPLES: We were looking at some documents that appeared  
25 in the run-up to the letter that was sent to the

1           Petitions Committee. If I could take you to another  
2           document to see if I can fill in some gaps. The next  
3           document I would like you to look at is SGV-000063486.

4                     We moved on to 24 June, which is the day before the  
5           letter that you signed, which was dated 25 June.

6           A. Yes.

7           Q. And do we see -- we see there that there has been what  
8           I might term proactive work to try and address some of  
9           the points that the First Minister had raised. Indeed  
10          the media handling plan had been by then adjusted, it  
11          would appear from the email that we have here, and  
12          indeed the Health Department had been consulted to see  
13          what more could be said on the issue of support for  
14          survivors of childhood sexual abuse. And I think your  
15          private secretary has been told that there is more that  
16          can be said on that front which could be incorporated  
17          into the response to the Public Petitions Committee, and  
18          indeed the letters to -- the GF letters, I think we call  
19          them.

20          A. Yes.

21          Q. Basically you are being asked if you are content that  
22          with the work that has been done up to then, to the  
23          24th, whether the matter can be forwarded to the  
24          First Minister's office for final clearance. I think  
25          that is what you are being asked. So we are up to the

1 24th, which I believe was a Thursday. Friday was the  
2 25th. So we are at the 24th as of now and that is where  
3 matters stand, it's going off to the First Minister's  
4 office for clearance.

5 If we go to another document, SGV-000063487, we see  
6 there that there is some information about services that  
7 can be -- support services that can be incorporated in  
8 the response. So this is just giving information to --  
9 along the lines that the First Minister was hoping could  
10 be added before the response goes out to the PPC and  
11 other bodies. It does appear that at that stage, on the  
12 25th, which is the Friday, that the plan is to issue  
13 a response on 25 June and to brief the Sunday Mail. If  
14 we look at the bottom of that page, if we go further  
15 down, we see just at the purpose there is an email from  
16 Marion MacKay to Colin MacLean and another:

17 "As you will be aware, ministers want to issue the  
18 letters today and brief the Sunday Mail."

19 Presumably for the edition on Sunday 27th, but after  
20 you had issued the letter to the Public Petitions  
21 Committee, so you wanted to get the order right. And  
22 what you did that day is to sign a letter on the 25th,  
23 which bore to be a reply to the convener's letter to you  
24 of 19 May, I think it was?

25 A. Yes.

1 Q. So you signed it, no doubt with the intention that that  
2 letter would go out that day and would be the  
3 substantive response to the Committee, and that  
4 the Sunday Mail would be briefed in whatever terms about  
5 what had been done, including the support work and  
6 whatever?

7 A. Yes.

8 Q. That didn't happen --

9 A. Yes.

10 Q. -- as you can gather.

11 If we look at another document just briefly, which  
12 is SGV-000063528. Another email, when it comes up,  
13 which is on the same day in the afternoon at 1.20. It  
14 looks as if the official on education is bringing  
15 a letter to you to sign, and you did sign a letter that  
16 day, and it says:

17 "Can we confirm that the FM [First Minister] is also  
18 writing to the PPC with our mea culpa this afternoon."

19 So it looks like the plan was you would write with  
20 the substantive response and an apology from your  
21 department to the convener, and that at that stage it  
22 was thought the First Minister would write a separate  
23 letter with a mea culpa. Do you see what is being said?

24 A. This is news to me.

25 Q. That is what the plan was.

1 A. That is fine. It appears like news to me.

2 Q. It just explains that you have signed the letter and you  
3 are wondering why on earth it didn't go out as you  
4 thought it should have done or would have done --

5 A. I am talking about the actual words here.

6 Q. That is what is there. So it seems that that was seen  
7 as the plan.

8 And then if we just move on to see how things  
9 unfolded, if we could look at another set of emails  
10 which are SGV-000063527. We are now at Friday evening,  
11 6.33, end of a busy week, no doubt, but Colin MacLean is  
12 thanking everybody for the hard work in the last couple  
13 of weeks to get to this stage:

14 "We are now at the stage where, subject to any views  
15 from FM, all of the preparation has been done."

16 In fact I should have read the one below that first,  
17 which is the prior email.

18 On 25 June, the Friday, at 5.10, Gerald Byrne emails  
19 Colin MacLean to give him the unfortunate news:

20 "Just to let you know the letters did not issue  
21 today as the First Minister did not see the latest  
22 (last?) draft. We have the letter to other interested  
23 parties ready to go. I also discussed it with INCAS on  
24 the telephone (before we were told the First Minister  
25 was going to have to approve) but I haven't called

1           anyone else. I made it clear that to Alan Draper of  
2           INCAS that ministers weren't committed to this yet and I  
3           was giving him a heads up on our latest position so  
4           I think that is fine.

5                     "Dave Stuart ..."

6                     Is that your PS?

7           A. Yes.

8           Q. "... reckons it may well be Tuesday ..."

9                     Which I think was the 29th, the day of the PPC  
10           meeting.

11                    "... or Wednesday the 30th before these letters are  
12           cleared by the First Minister."

13                    So for whatever reason, there was a problem trying  
14           to get the clearance that was required.

15                    Then if we go to the other email which I started to  
16           read and I should have read after that one, at 6.33  
17           Colin MacLean is thanking everyone for their hard work.

18           He says:

19                    "We are now at a stage where, subject to any views  
20           from the First Minister, all the preparation has been  
21           done. All that remains is to ensure coordinated  
22           distribution of letters and briefing before recess. If  
23           we miss that deadline then we run the risk of further  
24           adverse publicity. I am assuming Marion ..."

25                    The press officer?



1 A. Yes.

2 Q. "... and David [your PS] will ensure that does not  
3 happen. Let me know early next week if there is  
4 a problem."

5 Unfortunately it would appear that everybody lost  
6 sight of the fact that the 29th was the day of the  
7 meeting and that a response would be needed before the  
8 meeting started, so that is where matters stood then --

9 A. That is a Friday, the 25th?

10 Q. Friday was the 25th.

11 A. And the meeting was on ...

12 Q. On Tuesday the 29th.

13 If I could ask you briefly to have a quick look at  
14 SGV-000063532.

15 LADY SMITH: And of course that was going to be six days  
16 later than the clerk to the Committee had asked --

17 MR PEOPLES: The deadline was --

18 LADY SMITH: -- the letter to be sent, the deadline he had  
19 asked --

20 (Overspeaking)

21 A. I presume from the earlier correspondence, where someone  
22 was being asked to square this with the clerk to the  
23 Committee, the clerk to the Committee was told that  
24 the deadline would be met, and indeed --

25 MR PEOPLES: I am not sure we've got anything -- I will come

1 to another document I was just about to show you --

2 A. It must be just around this time Michael McMahon spoke  
3 to me --

4 Q. I think he had spoken to you before then and I think you  
5 got some assurances that, yes, you will get a reply.  
6 I wouldn't swear it was at this point in time, I think  
7 it was slightly earlier but we can check that. You are  
8 right, you did seem to have some conversation with him  
9 which he -- I think he said something about that in one  
10 of the meetings, to say he had actually spoken to you  
11 directly.

12 I do wonder if that was before he actually wrote the  
13 letter to you because I think you had maybe had  
14 a conversation in the hope that that could spur  
15 a response?

16 A. I remember a conversation with him, but I can't swear to  
17 when that was, being reassured by my officials that it  
18 would be dealt with. That is what I told him.

19 Q. If we look at the next document that I was asking. This  
20 is a document that -- there's a couple of emails here  
21 from 29 June in the afternoon. The committee has  
22 already met by now, and what we are getting from the  
23 press office on 29 June at 2.28 is a copy of this  
24 morning's Petitions Committee and what the press  
25 office -- what the Press Association is running as the

1 story, "MSPs slammed for slow response to Committee's  
2 questions", and so forth. So there is bad publicity  
3 about the failure to reply.

4 A. Yes.

5 Q. Despite reminders, and indeed despite letters to the  
6 First Minister and yourself, and indeed an expression of  
7 anger from Linda Fabiani who was then a member of the  
8 Committee. So that is what we are getting. We also see  
9 an email just after than from one of the officials  
10 involved in this, Gerald Byrne, on 29 June, at 15:09,  
11 3.09:

12 "Oh dear, I think we thought we had had an assurance  
13 from the Committee this wouldn't happen."

14 He asks someone to recall from whom:

15 "I blame myself for being on sick leave."

16 So he seems to have had some period of sick leave  
17 during this time but seems to be accepting a degree of  
18 blame that this matter wasn't actioned in time for the  
19 meeting, the deadlines and so forth. So that seems to  
20 be the background to this.

21 So what we have is deadline missed, meeting missed.  
22 Media coverage which is not reflecting well on  
23 the Executive, and then an official blaming himself for  
24 being responsible, at least in part, for what has  
25 happened. So that is where we are.

1           Needless to say, the PPC met on 29 June, and I am  
2 not going to take you to that, but I think you can  
3 anticipate what the general view was. And indeed  
4 I think then they decided, well, we want the minister to  
5 come and give us evidence after the recess which is what  
6 happened.

7           The substantive response which was sent out, which  
8 was in exactly the same terms as the letter you signed  
9 on 25 June, save in one respect, instead of being  
10 a letter from you, the convener, it was a letter from  
11 you on behalf of the First Minister and from you to the  
12 convener. That was the shift. The mea culpa letter  
13 disappeared.

14       A. That is right, yes.

15       Q. So that is the story, unfortunately, why the deadline  
16 was missed, and of course you were then summoned or, no,  
17 requested to give evidence?

18       A. I think --

19       Q. Maybe summoned is the right word?

20       A. I think so in the circumstances, yes.

21       Q. There was a substantive response along the lines of what  
22 Colin MacLean put in his submissions as to the reasons  
23 why a public inquiry had been decided against. I don't  
24 think -- in view of the time, I don't want to take up  
25 time. We can read that again. But it basically set out

1 the explanation, and indeed you provided the same  
2 explanation with a degree of expansion when you appeared  
3 before the Petitions Committee on 29 September 2004 to  
4 give evidence. And again we do have a report of those  
5 proceedings as part of the bundle for the hearing.

6 I probably don't need to ask you to look at that in  
7 detail because I think what you really did was in some  
8 way underline what the reasons were based on the reasons  
9 in the letter, and the points that we have seen in the  
10 other meetings. What I really need to establish and  
11 I think I just want to take from you is that you didn't  
12 apologise at that meeting for past abuse.

13 A. No, that is correct.

14 Q. You expressed profound sorrow for the harm caused to  
15 people who had been abused but you didn't apologise for  
16 the abuse itself, and that was on advice.

17 A. Yes. It is probably worth going into this because  
18 I think it is important --

19 Q. You do want to go into it. I was going to ask you to  
20 look at a couple of documents in that respect. Maybe  
21 I can put one of them up for a start which is  
22 SGV-000061850. If we scroll down a bit more -- I don't  
23 think that is the one I want. Sorry, yes, it's the one  
24 I want.

25 If we go to "Background", about eight lines down,

1 this is giving some briefing to the Minister for  
2 Parliamentary Business on 2 November 2004, so it's  
3 a little bit after the meeting. You appeared before the  
4 Committee to explain and to apologise for the delay in  
5 responding to the petition, and you reiterated at the  
6 meeting that the Executive didn't plan to hold  
7 an inquiry, and outlined the actions the Executive was  
8 taking to address needs of survivors. You acknowledged  
9 abuse took place, and I think that is all a decent  
10 summary of what did happen, and you expressed profound  
11 sorrow about the damages caused to individuals.

12 Then it adds:

13 "The words he used were carefully chosen to reflect  
14 concerns from OSSE that the Executive is not seen to  
15 accept liability for abuse (given a number of current  
16 cases in which the Executive is cited as a defender)."

17 If we read on a little bit while we are here:

18 "Mr Peacock told the Committee that the Scottish  
19 Law Commission has been asked by Ms Jamieson to  
20 undertake a review of the law of limitation which  
21 currently stops many survivors from bringing civil cases  
22 to court. The Committee expressed concern at the length  
23 of time any such review would take. Following the  
24 meeting, the Committee decided to seek a debate in  
25 Parliament; this Committee debate is now scheduled for

1 the afternoon of Wednesday 1 December. Since  
2 29 September, officials have met with INCAS to explore  
3 what further action the Executive might take to meet the  
4 needs of survivors. Mr Peacock is due to meet with  
5 INCAS on Tuesday 23 November 2004."

6 There we see that there were attempts to restrict  
7 the extent to which you might express regret or apology  
8 for past abuse. I don't need to look at all the detail,  
9 but I think OSSE were concerned, for the reasons that  
10 are stated there, that if you used the word "apology" in  
11 the context of past abuse, or even expressed regret for  
12 that abuse having happened, that it might in some way  
13 have consequences for the litigation that the Executive  
14 was involved in. That was their concern.

15 A. Yes, and --

16 Q. And you went along with that?

17 A. Well, yes, up to a point, but there was a lot of toing  
18 and froing around all of that. When I was going to the  
19 Petitions Committee I knew I was going to get a hard  
20 time, I couldn't not get a hard time given what had  
21 happened for the administrative reasons you have been  
22 going through. I also knew I had to openly acknowledge  
23 in public, personally, for the first time properly, that  
24 abuse had taken place, and it was inexcusable that that  
25 had happened, and that the survivors were being believed

1 by the Executive in what they were saying. There was no  
2 real doubt about that. And we were going to prioritise  
3 giving support to survivors as part of the -- which  
4 would be the third option that Colin MacLean had set out  
5 in his study. But I was also clear, I wanted to make it  
6 clear I had an open mind to doing more, and I went out  
7 of my way to make that point.

8 And also there is an exchange I had with  
9 Karen Gillon --

10 Q. Sorry, can I interrupt. I have to say the Inquiry did  
11 go over those passages, so you can take it we do have  
12 the record, particularly of your statements to the  
13 effect you had an open mind about what you do, so don't  
14 think we haven't seen that.

15 A. It's just that this is significant from the conversation  
16 that we were having with the lawyers. It was perfectly  
17 clear the lawyers were deeply, deeply anxious about  
18 saying anything, frankly, and there is correspondence  
19 that you can -- people can see, I am quite sure, where  
20 conversations between officials who were saying the  
21 ministers don't have to say anything about this at all.

22 In the lead up to the Public Petitions Committee, my  
23 recollection is there were certainly discussions between  
24 Jack McConnell and myself about an apology, how far  
25 could I go? My view was that we had to make an apology



1 at some point, and we touched on some of this earlier.  
2 But my view was also that for me to make the apology  
3 would not be the right thing to do, it would be far  
4 better for the First Minister to do it, and therefore me  
5 making an apology at the Petitions Committee would not  
6 accord the matter sufficient status that would otherwise  
7 be accorded if the First Minister made the statement and  
8 he made it in Parliament.

9 So this is quite important, that if you are going to  
10 make an apology you have to do it in a big and serious  
11 way, and not put it out through, albeit a Cabinet  
12 minister, at a routine Petitions Committee meeting.

13 So all of that was under consideration, and that is  
14 partly why I was using the phrase "I have got an open  
15 mind to doing more". But more significantly, and I was  
16 reading this again at the weekend, if you look at the  
17 exchange with Karen Gillon, I do make the point that --  
18 because she was pressing me and saying "All you have  
19 said is fine, but does that constitute an apology?"

20 Q. "Acknowledgement isn't an apology", I think was the  
21 passage you're thinking of --

22 A. So she was pressing me on that. And my response to  
23 that, I say a couple of times "That is as far as I can  
24 go today", and the important word is "today", because  
25 I suspect -- I don't suspect, but the belief was that we

1           were going to have to move to an apology -- we wanted to  
2           move to an apology, that is a better way of putting it,  
3           but that wasn't the occasion to do it. And when Karen  
4           was pushing me on that, that was the opportunity to say  
5           "This is as far as I can go today".

6                     But it was all constrained by the lawyers. I think  
7           it was in relation to this where -- again there is  
8           correspondence on the record, where the officials have  
9           been trying to, and I am using their words, "tone down"  
10          my statement --

11         Q. Yes, there is a -- I don't need to go to it, but that is  
12          the language they used, trying to "tone down" --

13         A. Yes. And also an acknowledgement that whilst we had  
14          agreed on using the words "profound sorrow" as being as  
15          far as I could go that day, and that left open the  
16          possibility, yet to be finally decided upon, of an  
17          apology which the First Minister would give. But they  
18          were also saying, ruefully I think, and this is one  
19          lawyer to another lawyer in terms of internal  
20          correspondence, as I recall, "I don't think we can get  
21          him to tone it down any further", was essentially what  
22          they were saying.

23                     So there was a tussle going on, and I remember some  
24          of that, where I was pretty determined we had to get  
25          across that open acknowledgement that abuse took place,

1           that these young people had been wronged, and that it  
2           was inexcusable. The survivors are being believed. And  
3           we found the compromise words that satisfied their  
4           desire to protect against any adverse consequences while  
5           still communicating all of that, but just short of  
6           an apology. So I think that is a fair description of  
7           where we were.

8           Q. I think again, and maybe in fact said in terms, that as  
9           far as the lawyers were concerned in their own  
10          exchanges, the Apology was seen as a problem, an ongoing  
11          problem, rather than something that advice had to be  
12          given on. They saw it as a problem because they were  
13          no doubt looking at the litigation and looking at how it  
14          might bear on the litigation?

15          A. There was no doubt they saw it as a significant  
16          problem --

17          Q. Whether it was given by you or the First Minister.

18          A. It didn't matter who it was given by. Anybody. It was  
19          still a problem. It wasn't --

20          Q. But separately the point you are making, if I have  
21          understood it, is they saw it that an apology or  
22          anything that might appear as an apology would be  
23          a problem so far as the litigation is concerned and were  
24          trying to tone down anything you said in case it was  
25          interpreted as an apology, but at the same time

1           separately, on the matter of an apology, as I understand  
2           it, you and the First Minister at least were moving  
3           towards or wanted an apology, but your view at that  
4           time, before you appeared, was that it would be better  
5           if he made the Apology and on a different occasion to  
6           you making it at the Committee stage. Is that what it  
7           comes to?

8           A. Yes, I will be careful what I say here given the earlier  
9           conversation about the word "agree", but that was the  
10          point that we had arrived at together, that, yes, we can  
11          make an apology, he needs to make it. I remember that  
12          conversation, that "You need to make this to give it the  
13          status it deserves". And he had no difficulty at all  
14          with that. I rather suspect he would have made the  
15          point at some point that "That's great, we will do that,  
16          provided we don't let the churches off the hook".  
17          Because he was also quite concerned that we didn't take  
18          actions that somehow absolved other people from what  
19          might be their responsibilities to equally. But all of  
20          that was then tidied up in the lead-up to the Apology  
21          being given by the First Minister in advance of the  
22          debate on I think 1 December.

23                 And again it is a matter of record, and again people  
24                 can see this from the records that are available, there  
25                 was a huge amount of stuff flying around the system

1 right up to the last minute, literally almost the last  
2 minute, the last evening, late on, trying to get a final  
3 form of words. Because the original drafts of that  
4 Apology were drafted in terms of the First Minister  
5 apologising on behalf of the people of Scotland and not  
6 apologising on behalf of the State and the people of  
7 Scotland. This again became quite a material  
8 consideration. Right up until the last couple of days  
9 beforehand that had been the drafting, and then the  
10 drafting changed to include the apology being on behalf  
11 of the State and the people of Scotland.

12 Q. Can I then just try and pull that together. I'm not  
13 sure it is necessary to go to -- the documents exist and  
14 confirm this, but what I will say is this. If I can run  
15 through a chronology to try and short-circuit the  
16 documents because there is -- we can see it from the  
17 documents but I think it is better perhaps just to get  
18 this story out as you have said.

19 You have said there were discussions behind the  
20 scenes with the First Minister, you both were wanting to  
21 move to an apology, you explained what was happening  
22 with OSSE at the time of the appearance before the  
23 Committee. And we know from the documentation that  
24 there were discussions between officials, your officials  
25 and INCAS, before you met with INCAS on 23 November?

1 A. Yes.

2 Q. And we know that you were being told as a result of  
3 those discussions that INCAS, among other things, wanted  
4 an apology and one from the First Minister?

5 A. Yes.

6 Q. And they wanted it to be on behalf of the State?

7 A. Yes.

8 Q. Not the people of Scotland?

9 A. I don't think there were ruling out on behalf of  
10 the people of Scotland but they certainly wanted it from  
11 the State.

12 Q. I think their position is it's not the people of  
13 Scotland --

14 A. That is fine --

15 Q. I tell you that because my recollection is, and I said  
16 this to others I think, that Frank Docherty was quite  
17 instrumental at that time when the First Minister did  
18 give the Apology and said it wasn't the people of  
19 Scotland --

20 A. He was very hot on that. I know Chris Daly was much  
21 more relaxed about that and thought that the ultimate  
22 Apology was both heartfelt and so on, and he both  
23 supported it then and I know from his evidence continues  
24 to support it. So I am not saying -- they certainly  
25 wanted an apology from the State but --

1 Q. They didn't get that.

2 A. They didn't get that.

3 Q. Which is a point they make, and I think it is fact.

4 They didn't get that.

5 A. Yes, and --

6 Q. But I am just saying they did raise it with your

7 officials --

8 A. Yes, absolutely.

9 Q. -- wish list as a big priority, as an apology on behalf

10 of the State from the First Minister?

11 A. Yes.

12 Q. So they had set it out quite clearly --

13 A. Yes.

14 Q. -- when you were engaging with the Committee?

15 A. Yes. And that is why in the last days leading up to

16 this being all finally signed off, the words "on behalf

17 of the State" appeared back in the statement.

18 Q. I will come to that because I think I can help you

19 again.

20 A. Jolly good.

21 Q. I hope I don't need to go to documents, I hope you will

22 trust me on how this unfolded, because I think it is --

23 I'm conscious of the hour and I don't think -- the

24 documents will I think bear this out in general terms.

25 If we go to -- there had been these discussions between

1 the officials in October, I think it was, and before  
2 then I think as well, there had been discussions between  
3 the officials and representatives INCAS, and on  
4 29 October there is a record to the effect that your  
5 officials were telling you that they would explore with  
6 OSSE the risks of a full apology, to use that  
7 expression, and that may well reflect the fact you were  
8 interested in exploring it but taking advice on risks  
9 and so forth.

10 On 12 November 2004 the officials, Colin MacLean and  
11 I think it is Shirley Laing, discuss between themselves  
12 the possibility of the First Minister making an apology.  
13 And Colin MacLean is asked I think by Shirley Laing or  
14 Rachel Edgar, I'm not sure which, to speak to you about  
15 that proposal to get your reaction. That is on  
16 12 November?

17 A. Yes.

18 Q. Can I pause there and say that suggests to me that  
19 whatever you knew about the Apology, that was not  
20 something that they were privy to.

21 A. I would agree that is what that sounds like --

22 Q. It sounds like that, doesn't it?

23 A. It may well be we knew we were going to run into  
24 challenge on this and that we were taking our time to --

25 Q. I am just trying to get the picture and see if I can



1 fill in the gaps.

2 On 16 November 2004 at your request advice was  
3 sought from OSSE on the risks of an apology on behalf of  
4 the people of Scotland. And can I say, I think it is  
5 clear that the statement that was presented to OSSE with  
6 that formulation was drafted by Colin MacLean and  
7 perhaps Rachel Edgar, but your officials had drafted  
8 something.

9 A. Yes.

10 Q. So that was the formula they got. Then they were told  
11 I think probably around the same time -- sorry, you  
12 were -- they were told, OSSE were informed around the  
13 same time that you were minded to discuss the matter  
14 with the First Minister and the Lord Advocate with  
15 a view to the First Minister making an apology for past  
16 abuse in advance of the debate, so there was some talk  
17 of that at that stage?

18 A. Yes.

19 Q. I think one possibility was that it might be done at  
20 First Minister's Questions, which was --

21 A. Yes --

22 Q. -- where it would be before Parliament, the  
23 First Minister would be taking questions and could make  
24 a statement at that time, and I think indeed 25 November  
25 may have been suggested as a possibility?

- 1 A. Yes.
- 2 Q. So that was being discussed, maybe that jogs your  
3 memory --
- 4 A. That is fine.
- 5 Q. Indeed there is a record that there was -- you had some  
6 informal, and your officials describe it as "preliminary  
7 discussion" with the First Minister on the 18 November  
8 of 2004, that is how -- they must have understood that  
9 you had had that discussion or had a discussion about  
10 an apology and perhaps other things?
- 11 A. Yes, that is -- I think they are talking there about  
12 a diaried meeting which --
- 13 Q. I don't think it is clear from -- I think they just  
14 record the fact you had a "preliminary discussion", and  
15 I think it maybe was --
- 16 A. It wasn't that preliminary because we had already had --
- 17 Q. I know, I think that -- I know that is what your  
18 position is --
- 19 A. That is the point --
- 20 Q. -- as far as they are concerned, they probably saw it as  
21 the beginning of a process maybe moving towards certain  
22 things happening?
- 23 A. Yes.
- 24 Q. Around that time OSSE cleared the text of the Apology?
- 25 A. Yes.

1 Q. But they do so at a time when they think it's an apology  
2 on behalf of the people of Scotland. Don't worry about  
3 how I know this, but I think that is what they do. They  
4 didn't know at that stage --

5 A. No, I think they cleared it, yes, but there was  
6 a subsequent --

7 Q. I am going to come to that. So they cleared the  
8 original Apology.

9 A. Absolutely.

10 Q. Indeed Colin MacLean's first impression, when he got  
11 something back from them, because they had actually  
12 tinkered with it as well, was to say:

13 "It reads stronger than the version you and I ..."

14 That's his other official.

15 " ... prepared and might lead PP and FM ..."

16 That's you and the First Minister.

17 "... to reconsider their position."

18 I am going to ask you about that because he is  
19 saying, as I read that that, well, we have given  
20 a version to OSSE, an apology on behalf of the people of  
21 Scotland. They've made some changes to it, they're not  
22 changing "on behalf of the people of Scotland", and it  
23 reads stronger than their own version. And this might  
24 lead the First Minister and you to reconsider your  
25 position.

1           What I want to ask you is in view of that comment  
2           and that record, and I'm not suggesting you may have  
3           seen this, but were you and the First Minister at that  
4           stage unsure about making an apology at that stage  
5           because there was a concern about whether it might be  
6           seen as being forced or grudging or something along  
7           those lines? Is that what the officials sensed?

8           A. I honestly don't know what that refers to. Another  
9           interpretation could be the First Minister and I were  
10          actually talking about putting the word "State" in, "on  
11          behalf of the State", and this was saying because this  
12          is firmer than they had drafted, maybe that would  
13          satisfy us. I don't know --

14          Q. You are not sure why they said that?

15          A. I'm not sure why they said that.

16          Q. We can probably ask Colin MacLean. He may be able to  
17          help us with that.

18          A. I don't think -- certainly from my point of view and  
19          from Jack McConnell's point of view, there was no doubt  
20          about we were heading for an apology and the challenge  
21          was in the form of words that would be used --

22          Q. That is fine. And I think you tell us in your statement  
23          at paragraph 78 that there's ongoing informal  
24          discussions with the First Minister, is your  
25          recollection, I think along the lines, in principle,

1           that you want to make an apology, and that is what you  
2           are telling us today. But you do say at paragraphs 79  
3           to 80, and we will come to this, that the wording was  
4           not finalised until the day before the debate and  
5           I think that is correct.

6           A. Yes.

7           Q. There were certain concerns about the wording from the  
8           lawyers.

9           A. Yes.

10          Q. So far as the wording is concerned, I said to you that  
11          initially what OSSE was asked to look at was a draft  
12          statement apologising on behalf of the people of  
13          Scotland?

14          A. Yes.

15          Q. That formulation was changed?

16          A. Yes.

17          Q. It appears that the change was made after you met with  
18          INCAS on 23 November?

19          A. Yes.

20          Q. It changed to "on behalf of the Government in Scotland  
21          and the people of Scotland". I am supposing that as  
22          a matter of probability you met with INCAS, they made  
23          clear the importance of an apology?

24          A. Yes.

25          Q. You took on board what they were saying, and they were

1           saying it's not just an apology, it's on behalf of the  
2           State, and from the First Minister. So what you did at  
3           that stage, and I think there is a hint of that in your  
4           statement, you may well have gone away, as you did in  
5           other situations, and revised the text?

6           A. I think there are two possibilities: one, I did that, in  
7           order to try and get that in because that was a clear  
8           priority for INCAS, but also the other possibility is  
9           that in discussions I was having with special advisers,  
10          who I think you can see their fingerprints on this,  
11          because it has changed into the language of the  
12          First Minister, that they and I have discussed it and we  
13          have said to write it in and we will see what OSSE says.  
14          It was testing the proposition. And then --

15          Q. I am not sure, in fairness to OSSE, that by then they  
16          have -- because at the meeting you had with INCAS, you  
17          mention what you have called the rapporteur proposal, an  
18          "independent expert". You used that term then and you  
19          have explained why it was changed to "independent  
20          person", and you say it was very much along the lines of  
21          Jack McConnell's suggestion in December of 2003 of  
22          an independent review? But you mentioned that to INCAS  
23          at the meeting you had with them?

24          A. Yes.

25          Q. That you were considering that?

- 1 A. Yes.
- 2 Q. And that would involve some degree of looking back?
- 3 A. Yes.
- 4 Q. I think, if I understand, you can't recall what the  
5 exact reaction of INCAS was --
- 6 A. They found the word difficult, but the idea there would  
7 be some retrospective look at some things they were very  
8 comfortable with.
- 9 Q. That, according to the officials in the record, they  
10 thought that was something new. They hadn't come across  
11 this proposal before and so they were slightly taken by  
12 surprise that this came up. And indeed they then  
13 decided, oh, we had better ask OSSE about this because  
14 a new suggestion arose when Mr Peacock met INCAS.
- 15 A. I will come to that before. Just before we signed the  
16 Apology, though, once those words "on behalf of the  
17 Government and the people of Scotland", the Government  
18 being the relevant bit, had been put in that went back  
19 to OSSE for clearance. OSSE then did clear it, but  
20 I suspect -- I mean, this was done in very quick order.  
21 I suspect they just didn't pick that up, and that was  
22 subsequently picked up --
- 23 Q. I am going to come --
- 24 A. -- by the Lord Advocate. I think these are two separate  
25 issues, the rapporteur and the Apology.

1 Q. They are. But the reason I mentioned the rapporteur was  
2 that OSSE got very concerned about the rapporteur, and  
3 maybe because they were so concerned about that they  
4 missed the other point?

5 A. That may be.

6 Q. That looks --

7 A. Their concerns about the rapporteur were considerably  
8 greater than their concerns with the Apology, but their  
9 concerns about the Apology were very significant.

10 So on the second note of the Apology, and you may be  
11 right, maybe they were so consumed by this new  
12 suggestion, as they saw it, that they lost sight of what  
13 was being said about the Apology. Nonetheless it was  
14 cleared, and that then was picked up by the  
15 Lord Advocate the day before the Apology --

16 Q. I do want to look at the documents for that so we have  
17 that. Because you are right, whatever the explanation,  
18 whether OSSE saw it and missed it or didn't consider it  
19 was a significant change, I don't think at the end of  
20 the day -- we know that it was there at some point.  
21 Whether you put it in and they --

22 A. Yes.

23 Q. -- problem with it or whatever. And it stayed in, as  
24 you say, in the Apology text until the day before the  
25 debate, and that was 30 November.



- 1 A. Yes.
- 2 Q. Which is Tuesday.
- 3 A. Yes.
- 4 Q. Tuesday 30 November. And that was the day that for the  
5 first time I think the Lord Advocate actually cast his  
6 eye over the proposed text of the Apology?
- 7 A. Yes.
- 8 Q. We can look at the documents against that background if  
9 we may, briefly. If we look at SGV-000017810.
- 10 LADY SMITH: The debate was on 1 December. Is that a  
11 Thursday?
- 12 MR PEOPLES: Wednesday.
- 13 LADY SMITH: I thought we'd previously --
- 14 MR PEOPLES: No, the First Minister's Questions is usually  
15 on a Thursday.
- 16 LADY SMITH: It doesn't matter. We know it was  
17 1 December 2004.
- 18 MR PEOPLES: If we go to 30 November, the day before the  
19 debate, and we see there, do we not, an email from the  
20 Lord Advocate's office at 2.34 on the day before the  
21 debate?
- 22 A. Yes.
- 23 Q. If we just scroll down, stopping there. This is from  
24 Colin Boyd, the Lord Advocate then, who says:  
25 "I have just seen the draft statement for the first

1 time."

2 This is the text of the Apology, and this is to you

3 I think.

4 "It is of course your decision on what to say."

5 A. The First Minister.

6 Q. It's the First Minister, sorry.

7 A. What time of day was this, by the way?

8 Q. 2.34.

9 A. Okay.

10 Q. He says:

11 "I have just seen the draft statement for the first  
12 time [the Apology]. It is of course your decision on  
13 what to say. There is a risk that any apology, however  
14 crafted, will be used against ministers. As presently  
15 drafted, the Apology is pretty unequivocal. It is on  
16 behalf of the Government and people of Scotland. It's  
17 done in a context of recognition of institutional abuse  
18 and a recognition of the role of Government in  
19 regulating such institutions. I consider that at  
20 present there is a strong possibility that this could be  
21 taken as an admission of neglect and failure by  
22 the predecessors of Scottish Ministers and opens the  
23 door to establish fault and liability against ministers.  
24 There are at present some 1300 claims and the potential  
25 liability is enormous.

1            "You should also be aware that the institutions  
2            where the abuse occurred and who arguably should bear  
3            the primary responsibility will be only to pleased to  
4            see ministers seemingly accepting liability in order to  
5            minimise their exposure to actions for damages."

6            So the law officer comes in at the last minute and  
7            comes in with that, in strong terms?

8            A. Yes.

9            Q. So it has to be taken seriously?

10          A. Absolutely, yes.

11          Q. Can I ask --

12          A. The last paragraph in particular would be one that would  
13          catch the First Minister's eye because he was very  
14          anxious not to let the institutions off the hook.

15          Q. Yes, that is a point made by you and others. He doesn't  
16          want other people to get off the hook.

17          A. Yes.

18          Q. So that is coming in at the last minute. This isn't  
19          just the in-house lawyers, this is the law officer  
20          coming in and seeing it for the first time.

21          A. I then got a phone call from the First Minister as  
22          I recall.

23          Q. Go on?

24          A. I think it would be that afternoon. I presume he either  
25          had spoken with Colin or had seen this and he was saying

1 to me, which again you have a record of. The  
2 First Minister's private secretary said for the  
3 avoidance of doubt, he was asking -- the First Minister  
4 was asking me to get this legal stuff sorted out by the  
5 following morning when this went to Cabinet, so --

6 Q. -- document that might help you --

7 A. Sorry?

8 Q. Can I show you another document that might help you with  
9 the sequence.

10 A. Fair enough.

11 Q. It's SGV-000017919.

12 LADY SMITH: When you said Colin there, you meant the  
13 Lord Advocate?

14 A. Yes, I did, sorry.

15 LADY SMITH: It's just because you have also got  
16 Colin MacLean appearing quite often in your evidence.  
17 It is pretty clear it's Colin Boyd.

18 MR PEOPLES: So I have another document here at -- sorry,  
19 that is not the one I want.

20 A. Yes, that's the one.

21 Q. 17919?

22 A. That is it. That is the one I was referring to, the  
23 email.

24 Q. He says following his conversation with Mr Peacock:

25 "... the First Minister is clear that we need

1 written advice today on what he can say tomorrow,  
2 cleared with all interested ministers and the law  
3 officers that accurately quantifies any risks. He does  
4 not want to make a statement that does not include  
5 an apology and this needs to be reconciled with the need  
6 to avoid acceptance of liability for compensation  
7 payments."

8 Then:

9 "Soundings need to be taken from the churches  
10 concerned to ascertain what their response would be.  
11 This need not involve briefing them on what ministers  
12 are going to say, just ask how they will respond to the  
13 calls for apologies that will inevitably come from the  
14 debate tomorrow. Mr Peacock needs to be in a position  
15 to explain clearly at Cabinet tomorrow how this issue  
16 will be handled in Parliament and in the media and  
17 legally. Happy to discuss."

18 So he couldn't be clearer. He wants to know what he  
19 can say.

20 A. I think what was happening here, and actually it is only  
21 since I have seen some of this documentation that I  
22 wouldn't have seen at the time that everything falls  
23 into place for me. Because I rather think that the  
24 First Minister and I, in the ongoing informal  
25 conversations, I was saying to him "We have got this

1 tidied up legally, we have got authority for the  
2 statement", and suddenly the Lord Advocate comes in and  
3 the First Minister is phoning me and saying "I thought  
4 we had got this agreed with the lawyers".

5 As far as I was concerned it was agreed with the  
6 lawyers, and I took that to have embraced the  
7 Lord Advocate. It turns out that is not the case, and  
8 that that is when OSSE, having cleared the statement  
9 that included the word "Government" in it, it all came  
10 to light. And then I recall vaguely that I had  
11 a conversation after speaking to the First Minister, I  
12 had a conversation with Jeane Freeman to say "What is  
13 going on here? We need to get this sorted". And then  
14 there was toing and froing going on, and eventually the  
15 First Minister was sent a package of stuff, I think it  
16 was emailed into the evening, going on between people,  
17 until the First Minister signed off the final words.

18 Q. I think you are now maybe conflating two issues that  
19 day, one was the rapporteur, which is still a live  
20 issue, and things were happening on that front as well  
21 at the last minute.

22 A. Yes.

23 Q. Because just following the Apology, can I show you  
24 another document then. We just looked at that email  
25 which I think was sent at 16:11. Can we just go to

1 another document then to try and get some sort of  
2 timeframe. SGV-000063495.

3 LADY SMITH: As that document is being brought up, Peter,  
4 you had a recollection that you had OSSE clearance. Did  
5 you say you were assuming that they must have run it  
6 past the Lord Advocate as well?

7 A. That was probably a wrong assumption on my part, but  
8 I thought we at that point had got legal clearance, but  
9 it was clear when the Lord Advocate saw it we hadn't.

10 I was working on one set of assumptions that we have  
11 now got this approved by OSSE and it is free to go.

12 I probably had communicated that to the First Minister  
13 at some point. And then suddenly the First Minister is  
14 hearing that this isn't cleared. What is going on here?  
15 And that was what that was about.

16 MR PEOPLES: We can speculate all we like. But in relation  
17 to the rapporteur proposal, for example, the way in  
18 which the Lord Advocate got to know about that was  
19 because of the concerns of OSSE. Richard Henderson, the  
20 solicitor was so concerned that he felt the need to have  
21 a conversation with Colin Boyd. It didn't quite turn  
22 out the way he hoped, because Colin Boyd didn't  
23 necessarily want to give advice that directly supported  
24 Richard Henderson's views on rapporteur, but was happy  
25 for him to send his views to you, to send Richard

1 Henderson's views to you. We can look at that --

2 A. I would hope we would.

3 Q. We will. In that way he became involved in the  
4 rapporteur matter and made some comments on it, and we  
5 can look at that --

6 A. I think that was two or three days before.

7 Q. Yes, but I am just trying to say that the way in which  
8 he got knowledge of that is someone alerted him to it  
9 and wanted him to take an interest, and indeed the Crown  
10 Agent was also so exercised that he had a word with  
11 Colin Boyd as well about the proposal. So it's not  
12 uncommon --

13 A. No, not at all. One of the things people observing this  
14 from outside might be amazed about is how the statements  
15 get adjusted right up to the last minute. I have to  
16 tell you this is not uncommon, this is the nature of  
17 how -- this is a particular example, but it is not  
18 uncommon for statements to be knocked about right up to  
19 the last minute.

20 Q. What one might say is that if someone brings a matter to  
21 the attention of the Lord Advocate, perhaps through OSSE  
22 because they have a certain concern, they are doing that  
23 for a reason, because they know that while their advice  
24 is taken seriously, the Lord Advocate's advice is taken  
25 particularly seriously and any view he has is accorded



1 a certain weight --

2 A. Absolutely.

3 Q. -- that might win the argument, if you like --

4 A. I can pick more of that up when we get to rapporteur.

5 Q. I think we get the idea. If you get the backing of the  
6 Lord Advocate, that is good backing to have.

7 A. It is equally not good opposition to have.

8 Q. Can I take you to this document at 4.19 on 30 November  
9 on the question of the Apology. This is from the  
10 Lord Advocate's office and it says -- it's to the  
11 First Minister and to you, or to your private offices:

12 "Please see attached statement which has been  
13 revised by Patrick Layden in OSSE. The  
14 Lord Advocate ..."

15 He was the Deputy Solicitor at the time.

16 "The Lord Advocate is content with this statement as  
17 it avoids the implications of acceptance of legal  
18 liability."

19 So what has happened is the Lord Advocate has  
20 expressed his concerns. The First Minister says "Sort  
21 this out". OSSE get the Deputy Solicitor to come in and  
22 basically put his pen through on behalf of the  
23 Government in Scotland along those lines, as well as  
24 making some other changes?

25 A. Yes.

- 1 Q. That is how we got to the formula for the Apology that  
2 was given by the First Minister --
- 3 A. Which was essentially back to the way it had been --
- 4 Q. Back to the original --
- 5 A. -- before the INCAS --
- 6 Q. Yes, but it wasn't an apology on behalf of the State.
- 7 A. Right.
- 8 Q. So that was how that matter unfolded and it was very  
9 last minute?
- 10 A. Yes, it was in terms of the then deletion of "and the  
11 Government", "on behalf of the Government".
- 12 Q. Can I make another point on this about the Apology. We  
13 see here that what the Lord Advocate was trying to do,  
14 and what the First Minister seemed to accept should be  
15 done, was to express an apology in words which would not  
16 carry with it any implication of acceptance of legal  
17 liability, is that -- that is what it says? They don't  
18 want it to be connected to -- be treated as an admission  
19 of negligence or a breach of duty or an admission of  
20 fault, because that would have a bearing on the legal  
21 claim?
- 22 A. That is exactly --
- 23 Q. They weren't accepting legal responsibility for past  
24 abuse, they wanted words that would avoid that?
- 25 A. That is exactly right. You would have to ask

1 Jack McConnell this, but I don't know -- as I said to  
2 you earlier today, he has to also weigh up the broader  
3 corporate responsibilities. So having advice from the  
4 Lord Advocate and motivation behind that is something  
5 you would pay close attention to, as you should.

6 I'm not clear what weighed most heavily with Jack,  
7 whether it was the liability point or whether it was the  
8 point about letting the institutions off the hook. You  
9 about you will have to -- he will be weighing up all of  
10 that stuff.

11 Q. The reason I -- you might think this is pedantic, but  
12 the reason I am raising this with you is that it is has  
13 already been said at the opening of this Inquiry, this  
14 part of the hearings, that for survivors a meaningful  
15 apology, a meaningful apology, has to meet certain  
16 criteria, and one of the criteria is that there is  
17 an acceptance of responsibility along with the apology.  
18 It's not just enough to apologise in words that avoid  
19 responsibility, you have to have the words with  
20 responsibility and indeed you have to also have action,  
21 sufficient action in terms of things like compensation,  
22 redress, matters of that kind, access to justice, all  
23 the things that I think ultimately survivors were  
24 wanting. The full package.

25 So I am just -- that is why I am putting this to

1           you, that the words were quite carefully chosen because  
2           at that point the Government's position was: we will  
3           apologise.

4       A. Yes.

5       Q. As the First Minister says he wanted to do from the  
6           outset. But the one thing we are not going to do is to  
7           say anything that will be interpreted as accepting any  
8           legal responsibility for the past abuse?

9       A. I think the Cabinet note reflects that too, that that  
10          was the final consideration.

11      Q. So that was just something that was --

12      A. And clearly if the Lord Advocate is saying that to you,  
13          you are going to pay attention.

14      Q. Yes, I am not arguing on that point with you. I am just  
15          trying to be absolutely clear why the words were  
16          chosen --

17      A. I guess the important thing by that point too is that  
18          you are actually getting -- there is going to be  
19          an apology, and that notwithstanding it's in those  
20          particular terms, which INCAS ultimately didn't prefer,  
21          but I think Chris Daly was content with the fact that  
22          an apology was going to be given, and that of itself was  
23          a very significant moment because it was a very clear,  
24          top level, to the whole Parliament, acknowledgement that  
25          abuse had taken place, and so I think that was

1 a significant moment.

2 And I think too the way that Parliament responded to  
3 that, which you can see from the terms of the debate,  
4 was that people were very pleased that this had happened  
5 and were lining up behind saying this was an inclusive  
6 apology, and so on and so forth.

7 There may be many people in the Parliament who might  
8 also want to see that on behalf of the State, but  
9 principally people were really pleased and thought it  
10 met the needs of the moment and the time that an apology  
11 was being given by the First Minister on behalf of the  
12 people of Scotland.

13 Q. I follow all of that. The point I am trying to put to  
14 you now, because I think it is a point that will come up  
15 in this hearing, and perhaps in any submissions made  
16 about the significance of that apology, is that from the  
17 perspective of survivors according to -- and I think  
18 there is now some research on this matter. From the  
19 perspective of survivors, not that it was available  
20 then, but for them a meaningful apology has to have  
21 certain ingredients, one key ingredient being that  
22 the person apologising, whether they had personal --  
23 whether they were personally involved in the matters or  
24 somebody apologising on behalf of an organisation with  
25 responsibility, they do have to accept responsibility

1 along with apologising, and they will say, and have said  
2 I think, and will say, that that didn't happen on  
3 1 December. Yes, it was a nice apology, yes, it was  
4 symbolic and significant and went down well in  
5 Parliament, it would appear, and no one asked to press  
6 a vote for an inquiry. But from their perspective it  
7 fell short, because it wasn't truly meaningful in the  
8 sense they wanted.

9 A. I think you are giving me information I have not had  
10 before --

11 Q. I know I am, but I just want to have your comment --

12 A. All I can say to you is the reaction at the time was  
13 very positive.

14 Q. Yes, although --

15 A. It was very positive. And then I have read  
16 Helen Holland --

17 Q. She did give evidence about --

18 A. -- and it's quite clear that she initially thought this  
19 was great, and then after speaking with Frank Docherty  
20 she took a somewhat different view because he then  
21 emphasised, as you have said earlier, "I wasn't abused  
22 by the people of Scotland".

23 Q. It was more than that, and I think she explained why  
24 Frank Docherty had a problem with this type of apology,  
25 that his position was, yes, I wasn't abused by the

1 people of Scotland, but I was put into care of a third  
2 party provider by the State, and it was the State  
3 therefore that was responsible for my childhood and my  
4 safety and my protection and they failed me, and  
5 therefore they should be apologising. Whether it's --  
6 the State doesn't change, it may -- the people within  
7 the State, who are the governing individuals, change,  
8 but the State doesn't. So I want the State to say to me  
9 "We are sorry for what we did. We take responsibility,  
10 whether we are legally liable or not". I think that is  
11 the position.

12 A. And that is kind of where I was at when I was putting  
13 the words in the statement, either me and/or with the  
14 special advisers after conversations was to try and  
15 reflect that, but in the end that was not the position  
16 that emerged.

17 Q. You wanted to talk about the rapporteur and so I did.  
18 That is a separate issue but was one that arose quite  
19 sharply after the Committee hearing. Can I say there  
20 was no hint that that was going to be the  
21 development -- I know you said you kept an open mind.  
22 You might have kept an open mind, but you didn't reveal  
23 what was a possibility that might be getting active  
24 consideration then --

25 A. Yes, I think the best --

1 Q. -- to the Committee? You didn't tell them --

2 A. No --

3 Q. -- good news --

4 A. Well, I wouldn't -- it's dangerous territory to tell  
5 a committee something you have not cleared off with your  
6 colleagues, so I wasn't going to do that. But also  
7 I think it would be -- I think it was a fair reflection  
8 on the time, and I say this in my witness statement,  
9 that I knew before I went to the Petitions Committee  
10 I was going to get a hard time, there was a lot of  
11 serious questioning going on. It was quite clear that  
12 on leaving the Committee, my view was we have more to do  
13 on this, and I'd been laying the trail for saying "I am  
14 open to consider other things, I've got an open mind",  
15 and so on. At that point I was also making clear we  
16 weren't apologising "today", but that was also quite  
17 deliberate wording, I think, to leave the possibility of  
18 that being rectified, which we got to eventually.

19 On the rapporteur point, I think the conversations  
20 subsequent to the Petitions Committee with INCAS in  
21 particular, and you have touched on this earlier, where  
22 people were -- my officials were exploring with INCAS:  
23 what are you thinking about when you talk about  
24 an inquiry? It doesn't have to be the full public  
25 inquiry we touched on earlier, so to speak. And I would



1 be getting feedback from my officials about that, I am  
2 confident, and I probably saw that as an opportunity.  
3 I probably thought, ah, right, there is probably  
4 something we can do here.

5 I was also conscious, however, that this had been  
6 ruled out in terms of the First Minister's suggestion  
7 from back in the December of 2003, am I right? 2003?  
8 Yes, when he made --

9 Q. The First Minister's suggestion, the date, he put that  
10 forward in December 2003. The officials in May 2004  
11 said don't do that, and indeed --

12 A. That's right, and I was obviously conscious of that  
13 position. So I suspect what I was also trying to do was  
14 find some way of describing all of this that wasn't  
15 going to attach me to a previous decision about, you  
16 know, we are not going to do this. And because the word  
17 "rapporteur" was very familiar to me because of past  
18 work in European Committee of the Regions, and so on,  
19 and would also be a term very familiar to Jack McConnell  
20 because of the work he was doing in the European  
21 context, where this was a method of working in the  
22 European context, I started floating the term  
23 "rapporteur".

24 I think you can take it, I have no specific  
25 recollection of this, but I think you can take it,

1           because I tend not to busk it on policy. I'm not going  
2           to go to meetings and make an offer to do something if  
3           I haven't cleared it with colleagues. When I met with  
4           INCAS on -- was it 23 November that I met with INCAS,  
5           where I made what my officials called "a new  
6           suggestion", that had been the subject of conversation  
7           with the First Minister, in the sense of me saying to  
8           him at some point "Look, we need to go a bit further.  
9           How about a rapporteur?" He would know exactly  
10          what I meant by that, as I knew. He probably thought,  
11          yes, that is worth looking at, we can move that forward,  
12          or whatever. And when I got to the INCAS meeting I was  
13          beginning to firm all of that up and trying to get their  
14          reaction to what would happen.

15                 So there was an unfolding of the development of  
16          thinking following the PPC. We saying we need to do  
17          more. What could it be? And this beginning to emerge  
18          as a proposition. Dressed up, if that is the way you  
19          put it, or titled, I should say, rather, as the  
20          rapporteur.

21                 That caused all sorts of difficulties. It also got  
22          attention, I have to say, as a result of that. But the  
23          term "rapporteur", people just didn't understand inside  
24          the Executive, the lawyers in particular I think didn't  
25          understand --

1 Q. -- "independent person".

2 A. And it got converted eventually to "independent person".

3 I have to stay whether it was "rapporteur" which caused  
4 challenges to the lawyers in its own terms, or whether  
5 it was "independent person", they were seriously  
6 concerned about anybody looking at this retrospectively.  
7 Very seriously concerned.

8 Q. Can I just ask you two points on that in terms of --

9 I think you say the rapporteur proposal was really  
10 something that was a follow-up or a resurrection of the  
11 First Minister's --

12 A. It was close to that principle, yes.

13 Q. -- kind of pursuing that development?

14 A. Yes.

15 Q. The First Minister I think in his statement says  
16 something along the lines that he doesn't give up on  
17 things. He had been told "This is not a good idea"  
18 in May and in June, and indeed it doesn't therefore  
19 feature in your letter to the Committee. But his  
20 position is, well, it didn't, but it wasn't ruled out  
21 either in terms to the letter, and there was -- it was  
22 still on the table. I think he said words along the  
23 lines "I insisted it remain on the table", effectively.

24 Do you remember in June 2004 when -- in the run-up  
25 to the letter being send out, that he said something

1 along these lines, "Well, they are not --"

2 A. That is entirely possible. Jack McConnell is a very  
3 determined person, and just because you can't win  
4 something today doesn't mean you are not going to come  
5 back and try it tomorrow, so --

6 Q. Do you remember him saying to you in your presence  
7 something along the lines of "I insisted this stayed on  
8 the table or remained an option"?

9 A. I have no explicit recollection of that. Having said  
10 that, that is absolutely typical of Jack McConnell.  
11 That is the way -- I must be careful how I characterise  
12 this, but he doesn't give up on things easily. He may  
13 make tactical retreats on things, "I have other things  
14 I am dealing with right now, I can't deal with this  
15 right now", or "I need to make a tactical retreat".  
16 That does not mean he is not going to come back in six  
17 months or a year, or whatever, and try again.

18 That would characterise quite a lot of politicians  
19 actually, myself included, that just because you lose  
20 something on day one because you can't win the argument  
21 at that point, that doesn't mean you give up on it. So  
22 it's very typical of him.

23 Q. So when he made these comments on 21 June, for example,  
24 of 2004, about the submission and the need to have  
25 proactive media work, and do this and that, you don't

1 find it surprising that he wouldn't also have added "And  
2 by the way, I hear what you say, but I'm not ..."?

3 A. No. No, no. You just tuck that away and you come back  
4 to it when it suits you and when you think you can win  
5 it, that is the important point.

6 Q. But as far as the officials were concerned, you raised  
7 the rapporteur suggestion for the first time?

8 A. As far as the officials were -- I have to say I am a bit  
9 surprised about that because my style is one not to just  
10 busk it on policy and make things up as I go along, and  
11 certainly it was generally not to bounce officials into  
12 things. It is entirely possible that it was entirely --  
13 those officials have not been involved -- that was  
14 Shirley Laing and Rachel Edgar, so they had not been  
15 involved at the December point in 2003 when the  
16 First Minister had been raising: let's have  
17 an independent -- or could we have an independent  
18 person?

19 They must have known about that. I would have  
20 thought they would have known about it. They would not  
21 necessarily have heard the term "rapporteur" before.

22 Q. There is some suggestion in a briefing I think that you  
23 were given for your meeting with INCAS that you might  
24 consider what was termed an "independent reference  
25 group"?

1 A. Yes.

2 Q. That would look at --

3 A. That was advice from officials to me.

4 Q. Yes. It was a briefing before you met INCAS and --

5 A. That is right.

6 Q. -- I am just wondering whether they put this seed in

7 your mind --

8 A. No.

9 Q. Bear with me, that they put the seed in your mind that,

10 yes, we can see INCAS want some past investigation, some

11 look at systems, so why don't we have an independent

12 reference group that in part will look at this. And

13 they are briefing you along these lines. You go to the

14 meeting, you don't mention "independent reference group"

15 but you mention "rapporteur". Is there any connection

16 between the two?

17 A. I don't think so necessarily. I think there is just

18 a lot of thought going on about what can we do here?

19 Q. But do you think your informal conversation with the

20 First Minister on 18 November, shortly before you met

21 INCAS, might have included an informal discussion about

22 a rapporteur?

23 A. Absolutely, almost certainly it would have included

24 that. And I think Colin was involved in that

25 conversation, Colin Boyd. Am I right?

1 Q. Colin Boyd?

2 A. I think it was Colin Boyd, I seem to --

3 Q. You say you were minded to meet the Lord Advocate and  
4 First Minister to discuss things and --

5 A. That is maybe what I am recalling, yes.

6 Q. We have this suggestion --

7 LADY SMITH: Mr Peoples, I'm sorry to interrupt you. How  
8 are we doing?

9 MR PEOPLES: There is this matter to finish off and there is  
10 another matter that I raised with the witness yesterday  
11 about the Law Commission to cover. I'm not confident  
12 that -- at the moment it is, what, nearly 4.30pm. How  
13 long do we -- I am willing to carry on.

14 LADY SMITH: I am concerned about Peter.

15 A. I am fine.

16 MR PEOPLES: I will try and cover it as quickly as I can.  
17 Obviously as long as everyone else is -- I would  
18 certainly like to finish Mr Peacock tonight because I'm  
19 conscious of --

20 LADY SMITH: Yes, I'm very conscious of that too. I would  
21 like to if we can. Perhaps --

22 MR PEOPLES: I will go through it as quickly as I can.

23 A. There are some really important points here that people  
24 need to understand.

25 MR PEOPLES: In terms of the rapporteur, I again give you

1 a kind of summary of where I think -- how it unfolded.  
2 You mention the suggestion, it's seen as a new  
3 suggestion. Because it is seen as a new suggestion,  
4 your officials ask OSSE for their advice on this  
5 suggestion, and they do provide advice, although against  
6 the background where they are being told by your  
7 officials that the Cabinet is quite supportive of this  
8 idea. By then I think you had given some disclosure of  
9 it to the Cabinet on 24 November.

10 A. Yes, and I would have cleared it also with my  
11 colleagues, my Labour colleagues. And indeed within the  
12 coalition, I would have had to clear it with them.

13 Q. Richard Henderson of OSSE and some of his colleagues  
14 have real concerns about it because they think it might  
15 breach Convention rights, there might be all sorts of  
16 problems with the whole idea depending on how it is  
17 structured. And he speaks to the Lord Advocate and, as  
18 I have said, the Lord Advocate responds to him by saying  
19 "I am not going to give formal advice, I'm not so sure  
20 about your arguments, but by all means let the minister  
21 know what you think". And what you get is a long note  
22 from Richard Henderson on I think the 25th, or  
23 thereabouts, of November on the proposal. You have  
24 a discussion with the Lord Advocate around the same time  
25 about that matter and you seem reassured by that



1 discussion --

2 A. Yes.

3 Q. Perhaps because of what I have just told you, he wasn't  
4 really thinking this was a problem. So you respond to  
5 Richard Henderson's note by saying "Yes, I appreciate  
6 all you say, but I think the right thing to do is to  
7 appoint someone and I intend to do so", and you set out  
8 your reasons for that --

9 A. Yes.

10 Q. -- on 26 November?

11 LADY SMITH: Mr Peoples, very briefly. You mentioned  
12 Convention rights raised by Richard Henderson. Was that  
13 Article 6?

14 MR PEOPLES: Article 6, and Article 8 as well, I think. So  
15 there were some -- I think he mentioned -- yes,  
16 Article 6 and 8 are the two main ones.

17 LADY SMITH: I would not be at all surprised if --

18 MR PEOPLES: (Overspeaking) -- how these might play out in  
19 terms of this proposal. He set it all out in a long  
20 note --

21 A. I think you are understating it when you say he had  
22 "some concerns". He had a lot of concerns.

23 Q. Obviously, as we say, he went to the Lord Advocate, he  
24 had a chat, but he said "I'm not going to write a formal  
25 note on this matter. I'm not convinced by what you are

1 saying and so I will let you make the note and I'll let  
2 the minister know", and he did. And you replied and  
3 said "No, I have considered it but I think it's  
4 something we should do".

5 And I think at the same time you also said it was  
6 central to the management of the debate that you went  
7 ahead with this and also put a bit of flesh on the bones  
8 so that when you went to the debate, you were able to  
9 offer something that, not just a proposal or  
10 a possibility, but an actual plan to do some form of  
11 review or investigation?

12 A. Yes.

13 Q. That was your thinking at that time?

14 A. Yes.

15 Q. So you wanted to proceed in that way?

16 A. Yes.

17 Q. So that is how you expressed yourself at that time. But  
18 I don't think that OSSE gave up, if you like, because  
19 they came back with further risks later on. Indeed  
20 I think on 30 November a further risk was flagged up  
21 about how in some way you might expose yourself to  
22 liability from other defenders if you started going down  
23 this route, that you might in some way be compromising  
24 their position.

25 But they put this all in emails to you, and I think

- 1 Patrick Layden wrote a note to you on 30 November?
- 2 A. Yes.
- 3 Q. His advice was "Don't announce the rapporteur, just say  
4 you are going to explore it as a possibility".
- 5 A. Yes, that is what they were saying.
- 6 Q. So that let's just keep our options open. And he  
7 offered suggestions that your speech be changed to that  
8 effect.
- 9 A. Yes.
- 10 Q. I think, in fairness to him, you did to some extent get  
11 swayed by that and you did -- you were prepared at one  
12 point shortly before the debate to go along with that  
13 formulation that he had -- well, do you want me to  
14 show --
- 15 A. I don't particularly recall that. I was very, very  
16 clear in my mind that we had to make this move --
- 17 Q. Yes, I know. I'm not denying that you said that on the  
18 26th. But he came in later on and I think your official  
19 said they'd flagged up all these risks. He suggested  
20 some changes to accommodate their position on risk to  
21 kind of keep the matter --
- 22 A. But it wasn't saying to go to Parliament and say "I am  
23 thinking about this", it was to go to Parliament and say  
24 "I am intending to do this". The --
- 25 Q. Can I just stop you there. Can I go to a document, just

1 to help you. I appreciate this is a long time ago and  
2 you had a lot of things going on.

3 SGV-000063518, which is an exchange of emails on  
4 1 December, that's the day of the debate.

5 A. I am not familiar with these, I don't think.

6 Q. I'll just show you in case ...

7 You will see if we just scroll down, this is the day  
8 of the Cabinet, and no doubt as these things happened  
9 you had a conversation with Jack McConnell and the  
10 Cabinet. And if you see the email written at 9.53,  
11 which is halfway down the page?

12 A. Yes.

13 Q. "I have just had a phone call from Mr Peacock ..."

14 This is one of your officials, Rachel Edgar.

15 "... to say the First Minister has told him he  
16 doesn't want to say that we are considering appointing  
17 someone, but that we will appoint someone, and he wishes  
18 to the new text to reflect that."

19 What did happen is -- no, you are perfectly right,  
20 you said you wanted to do it, and that you had to do it  
21 in a way because it was no good just offering  
22 possibilities, but it would appear you were prepared to  
23 go along with the revision.

24 A. I honestly have no recollection of that revision.

25 Q. But you can see --

1       A. I can see that, but I am slightly perplexed because  
2       I was very clear we had to do this and I was -- I have  
3       to be careful what I say here because the legal advice  
4       I got from Richard Henderson, and I have said this in my  
5       witness statement, was perfectly proper. It was not  
6       saying "You cannot do what you are proposing to do", it  
7       was very lengthy by standards that I had been normally  
8       accustomed to. I would not normally get an intervention  
9       like that directly from the head of OSSE, so they were  
10      obviously taking it very seriously, so I knew I had to  
11      consider it seriously.

12             But it was also in tone, as you have hinted at, and  
13      I will say this, it was strongly discouraging of what we  
14      were seeking to do, and I looked -- I have to say I was  
15      not impressed by it in the sense that I thought there  
16      were a lot of eggs in that particular pudding, and that  
17      I was seeing obstacles being put in the way of what  
18      I thought had to be done in order to manage the  
19      situation and to move towards what INCAS was doing. And  
20      as you say, the recruiting of the interest of the  
21      Lord Advocate to try and, I guess, encourage the  
22      Lord Advocate to support OSSE, that would have made my  
23      position extremely difficult, I have to say.

24             Colin Boyd in discussion, however, did not take that  
25      position, and I think the words I have used in my

1 witness statement is "having spoken to Colin Boyd, it  
2 gave me the confidence to go ahead with what I was  
3 proposing to do", so that is where we got to.

4 I think I am also correct in saying that at that  
5 time, or maybe subsequent to that, I'm not sure, there  
6 were efforts to try and recruit the interests of the  
7 head of my department as the accountable officer --

8 Q. Yes, you are right --

9 A. -- to try and say -- to recruit his interest in saying  
10 "Are you aware that what your minister is about to do  
11 might cost X millions of pounds?"

12 Q. Did you know about that?

13 A. I did not know about that.

14 Q. Because Colin MacLean, around 29 November, wrote to Mike  
15 Ewart, who was also head of department, to raise whether  
16 there was any issue --

17 A. Yes.

18 Q. -- about proposing to follow, and Mike Ewart came back  
19 and said "It's your call".

20 A. That is right.

21 Q. "It's within your --"

22 A. I don't think Colin MacLean would be in any way trying  
23 to derail what I was trying to do. Colin MacLean was  
24 very helpful in facilitating what I was trying to do, as  
25 indeed was Rachel Edgar and Shirley Laing. They were

1 all very helpful in all of that. And I think Colin was  
2 simply being proper in that regard. But there were  
3 a lot of things going on --

4 Q. It's an insurance policy, is it not? Because ultimately  
5 if you are getting all these concerns from the legal  
6 department -- indeed, can I put to you another document  
7 that might have put even more pressure on the situation  
8 and this is the email from the Crown Agent.

9 We can find that and put it to you briefly.  
10 SGV-000046996. I will just put that up for you, if  
11 I may.

12 The then Crown Agent weighs in on 29 November,  
13 Norman McFadyen, he writes to Richard Henderson who  
14 seems to be the common thread here, that:

15 "Robert Gordon copied me in to your minute, which we  
16 have discussed briefly by email and which I have also  
17 been able to discuss briefly with the Lord Advocate.  
18 Coming to this rather cold, I do have concerns - which  
19 are shared by the Lord Advocate - about how what is  
20 proposed might affect (or trigger) criminal  
21 investigations and prosecutions, and in particular how  
22 this would relate to decision making by  
23 Procurator Fiscal and Crown Counsel. I appreciate that  
24 such concerns could be allayed by firming up on the  
25 scope and remit of a inquiry.

1            "I do not know whether such an inquiry might cut  
2 across actual criminal investigations or prosecutions,  
3 but given the possible breadth of the inquiry it may be  
4 necessary for COPFS to trawl all eleven COPFS areas and  
5 for our areas to trawl police forces. I am aware that  
6 there is at least one possible prosecution in the  
7 Central Scotland area (under consideration by  
8 Crown Counsel) and there is no shortage of potential  
9 'new' complainers in that area.

10           "It would certainly be necessary to have very clear  
11 ground rules as to what the rapporteur could do and  
12 say - and when s/he required to defer to the Procurator  
13 Fiscal and any police investigation, or indeed report to  
14 the Procurator Fiscal, in relation to criminality. It  
15 may be easier to regard aspects of live investigations  
16 as out of bounds than to deal with allegations arising  
17 in the course of the inquiry.

18           "But fundamentally from the position of the  
19 prosecution service, it would be necessary at the outset  
20 to be clear as to the remit of the rapporteur relation  
21 to decision making by prosecutors. There is, of course,  
22 much lore on that subject - but previous inquiries -  
23 going back to the Waters Inquiry in 1959 and more  
24 recently the Dunblane Inquiry - have recognised that  
25 prosecution decision making should not be reviewed by



1 an inquiry.

2 "It would be helpful if this office and in  
3 particular Bill Gilchrist, the Deputy Crown Agent, could  
4 be closely involved in the development of this proposal.  
5 I am copying to him and to Colin Baxter, given the  
6 possible involvement of the police."

7 There we have another intervention quite late on, so  
8 you are being put under a lot of pressure on this  
9 matter?

10 A. Yes. As I said, I regarded it as a very conscious  
11 effort to try and put obstacles in the way of what we  
12 were trying to achieve. Having said that, I was also  
13 very clear that viewed from their point of view where  
14 they were taking a -- what I would regard maybe  
15 necessarily their point of view, they were taking  
16 a narrowly focused interest in the direct effect on  
17 prosecutions that they were involved with, with  
18 consequences potentially for the Executive, whereas  
19 I was trying to take a much broader view of how: do we  
20 manage this situation? How do we move in the direction  
21 of trying to answer what I thought were very legitimate  
22 questions from survivors of why was this allowed to  
23 happen us to? Why did nobody stop it? And that is what  
24 we wanted to get looked at to try and find those  
25 answers.

1           But you are left in the position as a politician in  
2 these circumstances that you are signing up to --  
3 you understand and you want to do something by the  
4 survivors on the one hand, and you are being told on the  
5 other hand that if you do that, you are opening up all  
6 sorts of nasty potential risks and consequences. And  
7 you have to steer a course between those positions.

8           I think in this instance we successfully did it. We  
9 went ahead with what we wanted to do but we also tried  
10 to accommodate, as far as we could, the anxieties that  
11 the legal officials were having in not unnecessarily  
12 opening yourself up.

13           I have to say too that there is one dimension to the  
14 Richard Henderson -- and this comes to your point about  
15 time bar and so on. There was one part of his  
16 submission that I referred to perhaps obliquely in my  
17 response which was kind of saying, look, minister, don't  
18 do this, because suddenly that might give survivors  
19 information that would allow the time bar to be set  
20 aside, and we wouldn't be able to defend our position,  
21 was kind of what I read that as saying.

22           My view is if you can't defend your position you  
23 shouldn't be defending it. It really kind of got my  
24 hackles up a bit and I thought we're in the wrong place  
25 here, we're in absolutely the wrong place. On the one

1 hand we are saying to survivors that we want to do the  
2 right thing by you, and on the other hand we are arguing  
3 technicalities in the court on a case that we probably  
4 couldn't defend on its merits. That is a very difficult  
5 place to be, but that is partly why I was unimpressed by  
6 some of this, frankly --

7 Q. -- you put that in your response to the note, there is  
8 a --

9 A. There is a reference to that.

10 Q. But at the end of the day you were ultimately on the eve  
11 of the debate, perhaps reluctantly I think, given the  
12 evidence you have given, prepared to go along with the  
13 formulation that Patrick Layden came up with. But on  
14 the day of the debate, having chatted to Jack McConnell,  
15 he says "No, we are going to announce an appointment",  
16 and that happened?

17 A. I may be prepared to go along with -- I can't remember  
18 that formulation, frankly --

19 Q. But you see now it's obviously --

20 A. I have seen the response but I don't remember that, and  
21 it doesn't ring true to me in the sense that I might  
22 well have been prepared to make some wording adjustments  
23 to move towards your position, but I was not going to  
24 move away from establishing a rapporteur as far as I am  
25 concerned.

1 Q. Because you feel quite strongly about it, can I just --  
2 I had better put this document to you because I think it  
3 is maybe one you should at least be aware of as part of  
4 your evidence. SGV-000063518. Sorry, SGV-000063514.

5 This is an email you sent at 10:18 on 30 November,  
6 which was on the day --

7 A. In the evening.

8 Q. It's quite late on. You say:

9 "I have seen the revised speech following the latest  
10 advice from OSSE."

11 That is along the lines I have indicated to you.

12 "I am content with the speech as it now stands and  
13 assume this will minimise any concerns at this stage any  
14 risk to the Executive is being extended unnecessarily.

15 "The real risk here, of course, is that by not  
16 giving ground the pressure for a full public inquiry  
17 will become irresistible to Parliament - that is  
18 something that needs factored into all considerations of  
19 risk and I trust OSSE are doing that.

20 "I look forward to seeing the further advice from  
21 OSSE."

22 I think at that point you hadn't received  
23 Patrick Layden's note on this matter but you did get it  
24 later on that day, that night, and you were prepared  
25 I think, it looks like reluctantly from what you are

1           telling us, to at least accept his formulation which  
2           recommended exploring the possibility of an expert  
3           rather than appointing one. And then Jack McConnell and  
4           you discussed the matter the following day, and he says  
5           "No, I want you to say you are going to appoint  
6           a rapporteur or expert", and the changes -- it is  
7           changed back to what you had --

8           A. I do find it -- clearly I have written that, so I accept  
9           it, obviously, but I find it very odd that having not  
10          seen the words, I was clearing the words.

11          Q. I think you had been made aware of what was --

12          A. In which case --

13          Q. Although you say "I have seen the revised speech",  
14          I don't think you had seen Patrick Layden's note to  
15          support his position. I think you had been shown  
16          a draft --

17          A. I genuinely don't recall that, so --

18          Q. -- of the speech that contained the changes. What you  
19          were waiting for was a formal note that but you also  
20          sent later that evening. So you hadn't seen the  
21          substance of the note but you knew what was going on and  
22          you knew what changes he had put in. He then explained  
23          matters in the note about the concerns. So I think that  
24          is how it unfolded. I appreciate it was a long time ago  
25          but I think it's clear --

- 1           A. I am slightly perplexed by that because in my mind there  
2           was never any doubt we were going to have to proceed --  
3           not going to have to; we were going to proceed with  
4           this, and that was why we invented what we invented  
5           around the rapporteur, so --
- 6           Q. So are you content that at least from the records it  
7           does appear that you did have a very clear position and  
8           you did feel it was important to make that announcement  
9           rather than perhaps be more guarded? You did appear at  
10          the last minute, because of this advice you were  
11          receiving, to make a change, but that was changed back,  
12          and indeed we had the announcement itself. But that  
13          said, because of the currents that were expressed, and  
14          I don't want to go into the detail of this, it's fair to  
15          say, is it not, that the remit as drafted for Tom Shaw  
16          was quite restrictive on its face in terms of what he  
17          could do, it was more of a systemic review, not  
18          a listening forum to survivors, not an investigation  
19          into past abuse. And even though he got a certain  
20          amount of latitude to talk to survivors, it wasn't  
21          a listening forum, it wasn't an investigation into past  
22          abuse, it was a review of systems and procedures,  
23          largely based on records but to some extent based on  
24          testimony?
- 25          A. Yes. And the reason for that was that we thought, still

1 think, that we -- and I still think that we knew -- or  
2 we understood a lot about why things were allowed to  
3 happen. As Chris Daly kept asking "Why was this allowed  
4 to happen to me? Why was it not stopped?" I think we  
5 understood a good deal about why that was the case.  
6 Nowhere had that been examined and set out. So the  
7 intention was to try and get the answer to that, and we  
8 thought the answer to that lay in what certainly, by  
9 today's standards, and the standards of 17 years ago,  
10 not just today as in 2020, but a lot of the systems that  
11 were in place -- well, there were systemic weaknesses in  
12 the entire way in which the oversight of institutional  
13 care took place, and that that was what we wanted to get  
14 to to see if the independent person actually verified  
15 that or didn't verify that, but what was their view on  
16 it.

17 It was trying to answer that question, that was the  
18 essential purpose. It wasn't seen as a forum to which  
19 lots and lots of people could come and make that forum  
20 aware of what that happened to them. We saw that being  
21 done more by the counselling services that we were  
22 talking about establishing, but also by continuing to  
23 encourage and facilitate survivors going to the court to  
24 pursue their cases. So that is the kind of way in which  
25 that fitted together, I would say.

1 Q. Can I now try and draw together and finish with -- what  
2 I am trying to do here is to summarise, as far as I can  
3 understand from your evidence, and the documents and so  
4 forth, the Scottish Executive's policy position, if you  
5 like, between August 2002 and the election in May 2007  
6 on various issues and components of the non-recent abuse  
7 of children in historical care.

8 I will start with the Apology. We have an apology  
9 given on 1 December 2004, on behalf of the people of  
10 Scotland, so we have got an apology. It's not the  
11 apology INCAS wanted, so that seems to be clear from the  
12 evidence. The First Minister has said to the Inquiry he  
13 was determined from the outset to ensure that a proper  
14 apology was delivered in Parliament by him as  
15 First Minister at the appropriate time. His position is  
16 that he and Cathy Jamieson agreed they would work  
17 towards such an apology at the appropriate time, and  
18 I think you and he wanted to work towards that in 2004,  
19 whatever knowledge you had before then.

20 On the issue of compensation, which was another  
21 important issue at that time, that issue was considered  
22 quite early on. You were not, I think, involved, but it  
23 received consideration in 2002 following the Kelly case  
24 that I mentioned. And a possibility of making  
25 a reference to the Law Commission at that stage was



1 floated, but it was decided as early as  
2 25 September 2003, at the meeting of ministers, to defer  
3 any decision until the outcome of the test cases were  
4 known. And once a reference had been made to the  
5 Law Commission, it was decided that the matter should be  
6 deferred until the Commission had reported -- completed  
7 its review and reported on the law of limitation and the  
8 law of prescription.

9 A. Yes.

10 Q. What I mentioned to Cathy Jamieson, who was the Minister  
11 for Justice, yesterday and I will mention to you today  
12 is the that first reference in September 2004 was on  
13 limitation only. The second reference on prescription  
14 was made on 3 August 2005, well after the debate. The  
15 first reference was raised by you in your evidence to  
16 the Public Petitions Committee on 29 September 2004?

17 A. Yes.

18 Q. And it was again raised at the debate on  
19 1 December 2004?

20 A. Yes.

21 Q. And members of the Committee and at least some of the  
22 MSPs at the debate, including the current  
23 First Minister, appear to have been left with the  
24 impression, which was not correct and I'm not  
25 necessarily being pejorative, but was not corrected by

1 the Executive, that the Commission would be looking at  
2 the issue of prescribed claims. But in fact the  
3 reference never asked it to do that, the first  
4 reference. I don't know if you were aware of that. Did  
5 you at that stage fully appreciate the difference  
6 between the two concepts?

7 A. I can't say that I did, and I think that -- we touched  
8 on this earlier today. I think you would have to look  
9 at what I said to Parliament in the scripted bit of what  
10 I said, as opposed to what I said when you are picking  
11 up questions on-the-hoof without briefing and responding  
12 to them. I think my recollection when I read this again  
13 at the weekend, although not anticipating a question  
14 about this necessarily, was that I was talking about  
15 a limitation caused by time, if that is the right way of  
16 putting it -- I refer to the time bar or claims limited  
17 by dint of time, which is a slightly different way of  
18 putting it. It might actually be slightly ambiguous.  
19 But that would be in my scripted statement and I would  
20 simply be using the words I had been given there by  
21 officials. Remember in this context I am really passing  
22 on information to Parliament in the way that I was of  
23 a decision of another minister in another department.  
24 So I would simply use the terms that they had given me.  
25 When it comes to a free flowing debate in which I am

1           responding to the debate, it is entirely possible that  
2           I have said -- I have included the word "prescription"  
3           not -- inadvertently using that if it didn't  
4           particularly apply, but I wouldn't be clear about that.

5       Q. I think in fairness to you, you didn't do that, but  
6           I think what happened was that those listening to your  
7           words, including at the Committee and at the debate,  
8           were left with the impression that all the issues would  
9           be looked at by the Law Commission. Nicola Sturgeon  
10          welcomed the review and thought that that might lead to  
11          a change in the law of prescription. That was never  
12          going to happen under the first reference --

13       A. You are telling me that now. My impression was that we  
14          were getting this question opened up and I wasn't  
15          particularly clear on the fine distinctions that you are  
16          now drawing. So I think though too what is slightly odd  
17          about this is that, if I had inadvertently misled  
18          Parliament by saying what I did, then there is  
19          a mechanism for rectifying that in Parliamentary  
20          procedures. Because Parliamentary procedure accepts  
21          that this can happen and, therefore, there is a way of  
22          doing it. I don't think any officials of mine were  
23          smuggling in notes or passing me notes during a debate  
24          or during the Petitions Committee saying: you've got  
25          that wrong, you need to change it. Nor subsequently was

1 I advised by officials that I had got this wrong,  
2 because that would be the wrong procedure. If a lawyer  
3 had been listening to what I had said and that I had  
4 inadvertently said something which was not technically  
5 accurate, they would be aware of that being raised with  
6 me. As I say, there is a procedure then for you as  
7 a minister telling those who have got a need to know  
8 that that that has happened, but also then of changing  
9 the official record, the official report, to reflect  
10 that. And none of that happened.

11 Q. I appreciate what you say but it does appear that that  
12 was the impression left, and all I put to  
13 Cathy Jamieson, who became the Minister of Justice, who  
14 made the first reference and who made the second  
15 reference, was that subsequently I think that point was  
16 picked up in about April of 2005 --

17 A. Which led to the second.

18 Q. Which led to the second reference. But what I also said  
19 to her was that at the time that it was picked up and  
20 she asked to have informal discussions with the  
21 Law Commission, what she was getting back from these  
22 discussions was that they wouldn't be recommending any  
23 change in the law and indeed they were prepared to give  
24 early advice to that effect. But after some feedback  
25 from you and the Lord Advocate who -- it turned out that

1           you suggested it would be better that prescription and  
2           limitation were considered together and reported on  
3           together, so that is what happened. So therefore they  
4           waited until, as it turned, out December 2007 to get  
5           their views but ultimately the view was exactly the same  
6           one as they were they telling you they were going to --

7           A. This was a considerable frustration to me at the time.  
8           I just thought we were in the wrong place on this  
9           entirely, and that is why I was pushing it and arguing  
10          what I was arguing at the Executive. I think I was not  
11          confident, I have to say -- I say this in my witness  
12          statement. I was not confident that the matter being  
13          referred to the Law Commission would result in a change.  
14          I am conscious that the forces for the status quo in  
15          public policy are enormous. So I wasn't confident.  
16          Nonetheless --

17          Q. You couldn't have been confident --

18          A. It was a reasonable thing --

19          Q. You couldn't have been confident because the  
20          Law Commission had said basically pretty clearly --

21          A. I'm not sure that I would necessarily -- I may have  
22          known that but --

23          Q. You were shown it and you made a comment --

24          A. Well, fine. But, anyway, I was not confident it would  
25          end up in the right place. Nonetheless, and this comes

1 back to something I said earlier today, when  
2 Cathy Jamieson is thinking about this, or indeed the  
3 First Minister or the Lord Advocate, they have to think,  
4 not just of the narrow confines that I was thinking  
5 about, about how does this affect the survivors of  
6 institutional abuse, they have to think how does it  
7 affect every other aspect of law. And that is why  
8 I didn't think it was going to result in a change.  
9 Nonetheless, it was important that that was allowed to  
10 happen. So Cathy made the right decision to refer these  
11 things.

12 Q. The point I am getting at is the prescribed claims issue  
13 had been raised in 2002, the first reference was in  
14 2005. There was an early indication of what was going  
15 to happen, but it just was allowed to proceed and we got  
16 the outcome in 2007. A lot could have happened quicker  
17 had you just taken the early advice and considered the  
18 compensation question. That is the point I think that  
19 could be made against you. That is the point I am just  
20 putting to you. And I suspect it was partly because  
21 there was a degree of misunderstanding about the  
22 interplay between prescription and --

23 A. Yes, I think that is partly right. I think too that  
24 I was also -- I always kind of held the view that these  
25 young people who had been in institutional care, like

1 Chris Daly and many, many others, had been seriously  
2 wronged and that, if it was necessary to pay  
3 compensation, we should just get on with it. Therefore,  
4 all this limitation stuff and prescription was a real  
5 frustration to me. But, nonetheless, you have to go  
6 through the proper decision-making process. You have to  
7 allow these things to be considered by the people who  
8 know most about them. But it still remained  
9 a frustration. And I now gather that we have got  
10 to a position where the current Government are acting to  
11 allow compensation --

12 Q. Yes, it has taken until 2020 to put this matter in  
13 a legislative scheme. So that is one matter. But the  
14 other matter, the inquiry into past abuse, if I can just  
15 summarise again where we were on that during your  
16 period -- in your Government's administration. That was  
17 ruled out on 25 September 2003. That decision was made  
18 public on 30 June 2004. It wasn't departed from at any  
19 stage during your period as a minister or until the  
20 election, as far as I am aware from anything I have  
21 seen. Some other forum, a truth and reconciliation  
22 forum, was ruled at the meeting on 25 September. The  
23 fifth option of the First Minister was looked at and  
24 eventually a review was put in place that you announced  
25 in September 2004, but it was perhaps a much more

1           limited review than you might have wished or survivors  
2           might have wished because of some of the constraints  
3           that were being urged upon you by the legal advice. And  
4           we have heard about that.

5           So far as the other matter, which is an important  
6           matter I think for survivors, which they emphasised at  
7           phase 1, is how the Executive in your period responded  
8           to calls for accountability, justice and redress. Prior  
9           to the election in May 2007, based on what we have been  
10          told by you and others, the Scottish Executive saw  
11          accountability, justice and redress as matters for the  
12          justice system, both civil and criminal. That seems to  
13          be their position. It is for the courts, and there is  
14          access to the courts, and the Executive simply to assist  
15          or improve access opened up their files, although as it  
16          turned out you said they maybe didn't contain as much  
17          evidence as might have assisted claims as people may  
18          have thought. And the other thing they did, apart from  
19          that, to assist those pursuing legal routes was to make  
20          these two references, perhaps in the hope that some sort  
21          of change in the law might improve the position of  
22          survivors. And that is what they did. They weren't  
23          prepared to do anything beyond that. Compensation they  
24          might look at, once all of that had been resolved. But  
25          that was the position and remained the position until



1 2007.

2 So far as the other actions are concerned, there was  
3 a package of support measures, which you have said. I'm  
4 not going to go through these. You have told us.  
5 Except that the compensation, if it was a support  
6 measures, was to be deferred until the test cases and  
7 the Law Commission had reported. There were  
8 unacceptable delays, you have told us, for a variety of  
9 reasons. Perhaps there was quite a limited knowledge of  
10 the actual extent of abuse in the absence of  
11 investigation. There wasn't much engagement with  
12 survivors before the key decision on 25 September 2003,  
13 and there was limited engagement with the providers  
14 prior to 2004 in December, mainly to do with access to  
15 information and files.

16 In terms of record-keeping, it could be argued that  
17 key decisions ought to have been perhaps better  
18 recorded. At least in hindsight. So far as the advice  
19 is concerned, some might say perhaps too much deference  
20 was paid to advice from officials, in particular legal  
21 advice. In that regard can I just remind you of what  
22 Lord Hope said in the Bowden case, and this is my final  
23 point, at paragraph 4 of the decision in Bowden in 2008:

24 "The appellants have drawn attention to the fact  
25 that on 1 December 2004 the then First Minister

1 Jack McConnell made a public apology for what happened  
2 in these institutions to the Scottish Parliament. It  
3 must be stressed, however, that this was a purely  
4 political initiative. It has no legal significance  
5 whatsoever. It is for the courts to establish [as he  
6 said] in accordance with the law where legal  
7 responsibility lies and what is to happen as a result."

8 So there may have been a fuss about nothing in terms  
9 of the particular apology on one view --

10 A. There was quite a fuss about nothing.

11 Q. Yes, and --

12 A. Again, and I referred to this in my witness statement,  
13 I'm not clear therefore why did the Scottish Parliament  
14 approve -- pass an Apologies Act, as I understand it,  
15 which tried to clarify these things? It seems to me  
16 that that is the evidence that actually these issues  
17 were regarded to be real by politicians at the time  
18 because -- but I have always thought Lord Hope was  
19 a very sage individual, so I am happy to go along with  
20 this.

21 Q. There are good reasons and I think you can make  
22 statements which are statements of fault and admissions  
23 which can be used in evidence in proceedings. What I am  
24 putting to you is the sort of apology we are talking  
25 about here is in such terms that it would not have been

1 of any evidential relevance to legal proceedings against  
2 the Executive. It would have had to have been much more  
3 specific and much more pointed in terms of  
4 responsibility and admissions of fault or actions and  
5 omissions that amounted to negligence. That is  
6 the point I think that the Apologies Act is trying to  
7 address. Do you have any problem with my summary?

8 A. I would -- I can't remember exactly what you said about  
9 acknowledgment of abuse. We were trying very much to  
10 acknowledge that abuse took place. There was no  
11 question in our mind that abuse had taken place. So  
12 that issue for us didn't arise. So I don't think from  
13 our point of view we were not forthcoming in that and  
14 that was partly what I said or tried to say at the  
15 Petitions Committee, what the Apology said as well --

16 Q. I'm not for one minute suggesting, and I'm not sure  
17 anyone else is suggesting, that the Executive did not  
18 acknowledge the existence of abuse at the Committee or  
19 indeed in December. I think the issue was a different  
20 one about what else they did in terms of either  
21 apologising or putting in place other measures that  
22 were --

23 A. Okay.

24 Q. So do --

25 A. Okay. I think on the questions of engagement too that,

1           yes, engagement was limited to begin with. It got  
2           progressively better. That is not untypical of any new  
3           situation that is emerging, until you get up to speed on  
4           it, until you have got through all the initial work you  
5           have to do and then things progressively engage more and  
6           more. That is not to say that, if you had engaged  
7           earlier, there might not have been some benefit from it.  
8           But that is not untypical of how these sorts of  
9           things emerge, and we did get there and that engagement  
10          became very, very important and very real and survivors  
11          were being listened to in the form of -- Chris Daly and  
12          Helen Holland in particular were engaging regularly with  
13          officials in a very constructive way. I wasn't clear  
14          about your point about key decisions, the recording of  
15          key decisions?

16         Q. I think that was my general point, about if someone has  
17          a strategy, for example, about we are going to have  
18          an apology and we are going to work towards --

19         A. I see.

20         Q. You might have a record. But you have given your  
21          position. You have explained why that might not happen  
22          and so you don't have to go back on it.

23         A. Okay. On the point about deference to officials, I said  
24          it earlier: you're damned if you do, you're damned if  
25          you don't, and in the end you hear the advice that you

1           are being given and you have got to weigh it up in the  
2           balance with other considerations and take the decisions  
3           you think are right. And twas ever thus.

4       Q. I am conscious now that there was an issue raised in  
5           some of the questions about the destruction of records,  
6           and all I want to ask you is this: at any point are you  
7           aware that ministers, either yourself or the  
8           First Minister or others, ever issued an instruction  
9           that relevant records be destroyed? Because Chris Daly  
10          mentioned this in I think his evidence to the Inquiry.  
11          I think it was in a different context but I am asked to  
12          put it to you. Are you aware that instructions --

13       A. I can say unequivocally this question never arose. It  
14          has certainly never been suggested by anybody I know in  
15          a political sense in Government. If it had been  
16          suggested to me by officials, it would certainly never  
17          have been sanctioned. If it had actually happened, it  
18          would have been condemned. Destroying records is the  
19          route to ruin, frankly. So it wouldn't have got any  
20          time associated with it. I think in fairness, in  
21          reading Chris Daly's stuff, I think -- and correct me if  
22          I am wrong, you have had more chance to study the  
23          documents -- I think this was in reference to something  
24          that came out of the Tom Shaw report --

25       Q. It was (inaudible) --

1 A. And I think -- fine. I think Tom Shaw was referring to  
2 it in the context of local Government.

3 Q. It was. I'm only putting it to you because I was  
4 asked --

5 A. That is right.

6 Q. It didn't come in Central Government.

7 A. Absolutely not.

8 Q. The other side of the coin though, if you were wanting  
9 to make records available that would be relevant to  
10 claimants and (inaudible) --

11 A. Quite.

12 Q. -- did the Executive do the other thing; issue  
13 a positive instruction to officials not to destroy  
14 records under routine --

15 A. I don't know about that. But, frankly, you would be mad  
16 to start destroying records when this was an emerging  
17 issue.

18 Q. You are talking about specific instructions --

19 A. I am not aware of a specific instruction, but I'm not  
20 clear what the policy was on the destruction of records  
21 either frankly. Whether it was after 40, 50 ...  
22 I really don't know that. I think actually the evidence  
23 shows that not only were we doing the opposite, we were  
24 trying to open the files and give access to records and  
25 we were getting the Information Commissioner to come in

1 and independently check that what we were doing was  
2 reasonable and proper. I am pretty sure if the  
3 Information Commission had thought that our policy --  
4 general policy of when you destroy records was at odds  
5 with what we were trying to do, the Information  
6 Commissioner would have raised that. So I have got no  
7 reason to believe that was a concern.

8 MR PEOPLES: That concludes my over-lengthy perhaps  
9 questioning of you, but it was important I think that we  
10 dealt with this issues satisfactorily and I'm grateful  
11 for the fact that you were able to continue.

12 LADY SMITH: Ms O'Neill, have you an application for  
13 questions?

14 MS O'NEILL: My Lady, it is a point of clarification. It is  
15 a very short point arising from the exchange about  
16 Richard Henderson's advice on the rapporteur.

17 LADY SMITH: Would you like to explain what it is?

18 MS O'NEILL: Mr Peoples I think explained that Mr Henderson  
19 had given advice to the Lord Advocate. The  
20 Lord Advocate had responded by saying: you can put that  
21 advice to Mr Peacock if you want, but I don't have  
22 anything to say about that. I just wondered if there is  
23 a document with the Lord Advocate's response. We have  
24 the advice going from Mr Henderson to the Lord Advocate.  
25 We have the advice going from Mr Henderson to

1 Mr Peacock's office, but not that coming back, and it is  
2 just whether there is a document or it comes from  
3 somewhere else.

4 MR PEOPLES: There is an email to Richard Henderson from  
5 Colin Boyd's office saying something along the lines  
6 of he isn't prepared to put his own position to the  
7 minister but he wants the minister --

8 A. Or to know what --

9 LADY SMITH: You have a recollection, Peter?

10 A. My recollection was it was maybe a note from  
11 Richard Henderson commenting on what the Lord Advocate  
12 had said to him, which --

13 MR PEOPLES: He mentioned he has raised the point with the  
14 Lord Advocate. He didn't go as far as to say that  
15 therefore it comes with the Lord Advocate's approval and  
16 that it reflects his position. But he was doing what  
17 the Lord Advocate suggested; you may want to tell the  
18 minister what we think so he can take it on board. But  
19 there was a communication --

20 LADY SMITH: Mr Peoples, let me deal with it this way; can  
21 we leave it that you will identify the reference to that  
22 document and you can tell us what it is tomorrow  
23 morning. So anyone who wants to check the terms would  
24 have the Nuix numbers to do it.

25 MR PEOPLES: I don't want to take up time tonight but I am



1           pretty confident there is something.

2           LADY SMITH: Nothing else from anybody? Is that all right,  
3           Ms O'Neill?

4           MS O'NEILL: Absolutely. Thank you, my Lady.

5           LADY SMITH: Peter, can I just make one observation that  
6           I would quite like to air in the hearing just now.  
7           I couldn't help but notice from your written statement  
8           at paragraph 108 you do pay tribute to Chris Daly, and  
9           I think I should say that I did notice that. You say  
10          you think he has done a remarkable job:

11                        "He was acting as an individual at the beginning of  
12          the petition process. He wasn't part of INCAS at that  
13          time. I think it was a very strong thing to do to raise  
14          the issues in public in the way he did. I have huge  
15          admiration for him sticking with this in the way it was  
16          done."

17                        Can I take it that you adhere to what you said there  
18          about the important work he did in getting this whole  
19          ball rolling?

20          A. Absolutely. I regard it as -- it is actually a very  
21          significant -- he had had a very significant -- not just  
22          him, but he commenced the procedures. It has had a very  
23          significant influence on a whole range of things in  
24          public policy, and it is to be admired because of that.  
25          I remember bumping into Chris by accident on George IV

1           Bridge some years after I had been involved in this and  
2           we had a very amiable and good conversation about some  
3           of this stuff. And it was also very good to see how he  
4           was personally moving on in his life and doing all sorts  
5           of interesting things as well.

6           LADY SMITH: Particularly the point that he took this on his  
7           own shoulders and, at the time that he got things going,  
8           seemed --

9           A. And I do think, we haven't touched on this today, there  
10          is no question in my mind, particularly viewed against  
11          the standards of today, and it is very difficult to  
12          judge things in the past by today's standards, in  
13          fairness. But there is no doubt that Chris Daly and  
14          young people like Chris Daly -- Helen Holland and all  
15          the others, David Whelan, everybody else that has been  
16          involved in this, they were seriously failed by society,  
17          certainly by the standards of today, in this historic  
18          sense that it's now perfectly clear to me, and it's part  
19          of what I allude to, that we thought we understood a lot  
20          of what had gone on, that people weren't looking for  
21          abuse in the system. There was a sense in which, or  
22          I have the sense in which, there was a sense in which  
23          people were looking at the institutions children were  
24          being sent to, very often Christian institutions, and  
25          believing they were loving, caring places, and it

1 transpires that they weren't in all circumstances.

2 And even if children had raised their concerns, if  
3 there had been the means to do that, the attitude at the  
4 time would mean they wouldn't have been believed, the  
5 probability is, and/or they would have been potentially  
6 punished for having raised such wicked suggestions about  
7 these wonderful people who were giving up their time to  
8 look after them. We simply didn't have, by today's  
9 standards, the kind of systems in place that would  
10 protect children. We weren't vetting adults to work  
11 with children anything like the way in which we do  
12 today. We weren't training people adequately, we  
13 weren't remunerating people adequately in the way that  
14 we do today. We didn't have things like the Children's  
15 Commissioner or the Care Commission that was  
16 inspecting -- or the types of inspection, we weren't  
17 asking the right kind of questions that we would ask  
18 today.

19 We now not only inspect institutions, I am talking  
20 about my time, we are beginning to inspect local  
21 authorities as well, looking at their child protection  
22 mechanisms and the child protection committees and all  
23 the things they did or indeed weren't doing, even up to  
24 the time we were involved in Government.

25 So there is a whole range of failings across the

1 system by the standards of today, which let Chris Daly  
2 and others like him down, and that is why it is  
3 important that we were trying to do what we could,  
4 notwithstanding we didn't go as far as they wanted at  
5 that time in terms of an inquiry, but we did what we  
6 could, or were trying to do what we could to support  
7 survivors in the very, very difficult circumstances that  
8 they found themselves in.

9 I think it is important to say all of that. I do  
10 mention a lot of that at the end of my statement. It is  
11 in that context that Chris Daly's work has been very  
12 important, but also that of Helen Holland and all the  
13 others at INCAS. But also just to stress that  
14 everything we were doing in Government around the child  
15 protection programme was to continue to address what we  
16 still saw in 2003/2004, and because of a lot of the work  
17 that had gone on in other inquiries, the Edinburgh  
18 Inquiry, the Fife Inquiry, because of the child deaths  
19 that were still happening, all of the work we were doing  
20 was trying to sort out system-wide weaknesses in the  
21 governance and the arrangements for trying to treat  
22 children properly and make sure that the kind of  
23 difficulties, the challenges in all of the lives of  
24 the young people who were badly treated then suffered  
25 just wasn't going to happen again.



19 November 2020)

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