

Wednesday, 25 November 2020

(10.00 am)

LADY SMITH: Good morning and welcome to today's hearing of more oral evidence. We have two witnesses to come I think. Welcome to a morning of sunlight. I suppose we have to grab it while we can before it disappears again.

Mr Peoples.

MR PEOPLES: Good morning, my Lady. The next witness is Duncan Wilson. (Pause)

LADY SMITH: Good morning. Could we start with you raising your right hand, please, and repeating after me ...

MR DUNCAN WILSON (affirmed)

LADY SMITH: Please sit down and make yourself comfortable.

I see you have brought some papers with you, probably your statement or your own notes. Do feel free to use them if you would find that helpful. It's important that you are as comfortable giving your evidence as you can be, and if you need to remind yourself that is absolutely fine. The red folder has your statement in it and your statement will also come up on the screen as we are referring it, which I hope will be helpful to you.

The last thing I need to speak to you about at the moment is how would you like me to address you?

1 Mr Wilson or Duncan?

2 A. Duncan.

3 LADY SMITH: Duncan, if you are ready, I will hand over to
4 Mr Peoples.

5 A. Thank you.

6 LADY SMITH: Mr Peoples.

7 Questions from MR PEOPLES

8 MR PEOPLES: Good morning, Duncan. As her Ladyship has
9 said, the red folder does have a copy of the signed
10 statement you have already provided to the Inquiry and
11 it does appear on the screen in front of you. If I put
12 up a document I would like you to look at, it will come
13 on the screen in front of you. I may do so but we will
14 just see how we get on.

15 So far as your signed statement is concerned, could
16 I ask you just at this stage -- for the purpose of the
17 transcript, first of all, your signed statement has been
18 given the identification WIT-1-000000382. You don't
19 need to be concerned about that, it's something that we
20 use.

21 So far as your statement is concerned, could you
22 turn to the final page of the statement and confirm that
23 you have signed your statement?

24 A. I confirm that I signed my statement.

25 Q. I think on the preceding page you say you have no

1 objection to your statement being published as part of
2 the evidence to the Inquiry and that you believe the
3 facts set out in your statement are true?

4 A. I do.

5 Q. If I could take you to the beginning of the statement
6 and maybe just take some preliminaries. The reason you
7 are here today really is you were formerly the head of
8 Strategy and Legal Affairs at the Scottish Human Rights
9 Commission between December 2008 and October 2014?

10 A. That is correct.

11 Q. You tell us in your statement that you hold the degrees
12 of Bachelor of Laws and Master of Laws?

13 A. That is correct.

14 Q. You have, I think, in the past, worked in a number of
15 positions with a human rights dimension, is that
16 correct?

17 A. That is correct.

18 Q. I think in particular you tell us you were employed for
19 a time by Amnesty International, you also worked as
20 a co-ordinator for a UN Special Rapporteur, you also
21 were an Associate Expert in Human Rights with UNESCO,
22 and that you have also lectured on a part-time basis in
23 international human rights law in the past?

24 A. All of that is correct.

25 Q. So far as the Scottish Human Rights Commission is

1 concerned, I think you tell us at paragraph 7 of your
2 statement that that Commission was established by the
3 Scottish Commission for Human Rights Act 2006?

4 A. Yes.

5 Q. It operates as an independent body, and I think it
6 became operational around about 1 December 2008 when you
7 joined?

8 A. Yes, or just before.

9 Q. You tell us that the first Chair of the Commission was
10 Alan Miller, and there were also three part-time
11 Commissioners at the time, is that right?

12 A. Yes.

13 Q. I take it there was no equivalent body before 2006?
14 Because we have been hearing about events that occurred
15 in relation to historical abuse going back to the early
16 2000s, and I think at that stage those that were having
17 to wrestle with those issues did not have the benefit of
18 a Scottish Human Rights Commission, is that correct?

19 A. It's correct.

20 Q. So far as the Commission's relevance to today's
21 proceedings is concerned, I think you tell us in your
22 statement that the Commission was commissioned by
23 Scottish Government in about March 2009 to assist in the
24 development of the design and delivery of
25 an acknowledgement and accountability forum which was to

1 be human rights-compliant?

2 A. Yes, to provide evidence on how to develop
3 an acknowledgement and accountability forum that was
4 human rights-compliant, yes.

5 Q. But what you were asked to do was to look at a forum
6 with both of these aspects, not something that,
7 for example, had simply acknowledgement or was
8 a confidential committee type forum, it was to look at
9 something that had both of these elements within it, is
10 that correct?

11 A. Yes, at that time it was described as an acknowledgement
12 and accountability forum, that is what the
13 Scottish Government was consulting on.

14 Q. I don't know if you are able to help us with this, there
15 was some suggestion in some records we have seen that it
16 was the Commission that approached the Government around
17 the time of the Commission rather than the other way
18 around. I don't know if you can help us with that,
19 whether that is the case?

20 A. I say in my statement there were discussions preceding
21 my employment with the Commission between Alan Miller
22 and Jean MacLellan, so I couldn't state who approached
23 whom.

24 Q. Can I take you to a paragraph towards the end of your
25 statement, paragraph 116. I think you tell us there

1 that prior to the involvement of the Commission --
2 I will just call it "the Commission", if I may -- you
3 considered that there had previously been what you
4 describe as:

5 "... a piecemeal approach to issues arising from
6 non-recent abuse of children in institutional care."

7 And I think what you --

8 LADY SMITH: Is that paragraph 116 that we should bring up?

9 MR PEOPLES: Paragraph 116.

10 LADY SMITH: Which should be page 29, I think, is it?

11 MR PEOPLES: If we scroll down. So I think you characterise
12 the approach prior to the Commission's involvement as
13 "piecemeal". I think we know, and you don't need to
14 worry at this stage about telling us what the various
15 steps that were taken were, because we have heard
16 evidence about that, but I think that is how you
17 characterise the situation when the Commission became
18 involved, is that right?

19 A. Yes, it is.

20 Q. I think you also say there that:

21 "The response to the Inquiry and the investigations
22 requirement in relation to the human rights perspective
23 of this issue was one aspect of the Scottish Government
24 being slow to come to the realisation that what was
25 needed was an overall comprehensive response to issues

1 arising from historical abuse."

2 Is that ...

3 A. That remains my opinion.

4 Q. When the Commission became involved in around
5 March 2009, there was a consultation exercise being
6 conducted in relation to a proposal for an
7 acknowledgment and accountability forum, and that was
8 I think about to conclude really?

9 A. That sounds correct, yes.

10 Q. You tell us at paragraph 13 that:

11 "The Commission was working to independently advise
12 on the development of a forum for acknowledgement and
13 accountability that would reflect best practice in terms
14 of the human rights of everyone involved, that is both
15 survivors of abuse and others such as former workers who
16 might be accused of abuse."

17 I want to ask you about the word "independently"
18 there. Do I take it that once the Commission became
19 involved, it was very much left to the Commission itself
20 to decide how to take the work forward? It wasn't a
21 joint effort with officials and Government?

22 A. That is correct, the Commission wouldn't have become
23 involved in any other way.

24 Q. You will appreciate there was quite a key meeting in
25 30 September of ministers who took a certain decision,

1 I will come to that in due course. But prior to that
2 meeting on 30 September 2009, were you having any
3 regular liaison or discussions about the work of the
4 Commission with officials or can you say what the nature
5 of the contact was?

6 A. Yes, I think I mention in my statement that we submitted
7 to the Government drafts in July of both the legal paper
8 and the research paper and we had informal contact,
9 I don't recall how many meetings, but we certainly
10 exchanged emails and we would have met during that
11 period.

12 LADY SMITH: Duncan, just before you move on, a couple of
13 points at this stage. In your statement, you stress
14 that the Commission insisted that they work
15 independently. I fully understand why. For those that
16 aren't as immersed in these issues as I am, can you just
17 explain why it was, and is, so important for SHRC and
18 a body like that to be independent of Government?

19 A. Absolutely. So the Commission was established by an Act
20 of the Scottish Parliament and its accountability was to
21 a cross-party group within the Scottish Parliament. The
22 appointment of Chair, the appointment of Commissioners,
23 the submission of annual reports, the budget of the
24 Commission, all of that is and was directed by the
25 Scottish Parliament rather than Government. So the

1 entire ethos is to be independent, and that is crucial
2 not just domestically for the Commission's legitimacy,
3 but also internationally, because the Commission is
4 a national human rights institution and is accredited
5 within the United Nations system and that depends very
6 much on its independence.

7 LADY SMITH: I can see that. Does maintenance of its
8 credibility internationally depend, amongst other
9 things, on always being able to demonstrate that it only
10 worked independently?

11 A. That it worked independently, yes, absolutely.

12 LADY SMITH: Mr Peoples.

13 MR PEOPLES: You have a paragraph where you make a certain
14 point, paragraph 14, and I would like you to help us
15 with that. What is the point you are making in that
16 paragraph? I think it explains what you saw as your
17 task and what was involved in that. Can you just try
18 and help us with what point you are getting across there
19 about a process?

20 A. Yes, absolutely. So the point that I was making was
21 that we viewed the task as advising on the steps that
22 the State ought to take to ensure justice and remedies
23 for survivors of abuse, so we looked at that in the
24 round as a sort of comprehensive and holistic set of
25 measures that should be taken. Whether that could be

1 rolled into one forum or not was -- it wasn't a limiting
2 factor to us. So we looked at the broad range of rights
3 that everybody had to justice and remedies.

4 Q. The reason I ask that is obviously what was decided by
5 ministers was what I might call a single forum that
6 focused on the issue of acknowledgement. But what you
7 are saying is that so far as what you were asked to do,
8 it needn't be that that was the one forum that would
9 have to be put in place to achieve the objectives of
10 acknowledgement and accountability, is that --

11 A. Yes, that is correct.

12 Q. I think you do say in fact that the two aspirations that
13 you were seeking to advance were acknowledgement of past
14 abuse and accountability for that abuse but in a human
15 rights-compliant way. Is that really what your task
16 was?

17 A. That sounds correct, yes.

18 Q. You tell us at paragraph 16, because I think this became
19 an issue later on, that there was no delivery date for
20 the completion of the work that this Commission was
21 asked to do?

22 A. Yes, and I checked the documentation before signing this
23 statement and that is indeed correct.

24 Q. But you do tell us I think at a later paragraph,
25 paragraph 24, that what you describe as a working

1 deadline of November 2009 was initially discussed with
2 Scottish Government officials, is that the case?

3 A. Yes.

4 Q. Indeed, you perhaps don't know this, but I think that
5 was actually mentioned by officials in the briefing that
6 they gave to ministers before they took the decision to
7 pilot the confidential forum, but that is maybe not
8 something you were aware of?

9 A. I was not.

10 Q. I will ask you a bit more detail about this in due
11 course, but I think you make a point towards the
12 beginning of your statement at paragraph 18. I will
13 read what you say:

14 "The Commission's view was that a human rights-based
15 approach to responses to historical abuse of children in
16 institutional care required the State to ensure a range
17 of remedies."

18 So was that really a key principle if you are trying
19 to achieve a human rights-based approach to these
20 issues?

21 A. Yes. We drew on international standards on reparations
22 for gross human rights abuses, and that does indeed
23 require a range of steps to be taken.

24 Q. Can I just ask you this: I think you make this point at
25 paragraph 22, that the Scottish Government did not at

1 any stage, as I understand it, seek to limit the
2 approach the Commission was taking to the work that it
3 was doing, is that right?

4 A. It is.

5 Q. And you did, as you say, interpret the work as requiring
6 a holistic approach and to look at matters in the round?

7 A. That is correct.

8 Q. I have been asked to ask you whether you accept that
9 Scottish Government must have understood that the
10 Commission might make recommendations which would go
11 beyond what had already been decided by the
12 Scottish Government at that point?

13 A. Yes.

14 Q. You have told us already, and I think you deal with this
15 beginning about paragraph 23 of the statement, and we
16 have that there, that the Commission submitted a draft
17 legal paper and a research paper which had been prepared
18 by CELCIS to the Scottish Government in July 2009, and
19 the Human Rights Framework itself was published
20 in February 2010 and that included recommendations?

21 A. That is correct.

22 Q. Essentially, I suppose, the Commission was being asked
23 to give advice on human rights issues in a particular
24 context to the State, is that really what it came to?

25 A. Yes.

1 Q. I don't want to get too detailed now, but so far as the
2 legal issues are concerned, so that we have
3 an understanding of what was being said and done by the
4 Commission, I think at paragraphs 25 to 27, can you
5 perhaps confirm you were seeking to summarise the
6 evolution over decades in the understanding of what
7 amounted to a violation of Article 3 of the
8 European Convention on Human Rights which prohibits
9 torture and inhuman or degrading treatment or
10 punishment?

11 A. That is a large part of paper, yes.

12 Q. You also, in the paper that was submitted, were
13 reviewing contemporary understandings of the State's
14 duty of response, including the duty to investigate
15 where Article 3 is or might be engaged, is that correct?

16 A. Yes.

17 Q. Just to be clear, you have a section where you deal with
18 some comparisons with approaches in other countries,
19 including Ireland. I think in your statement at various
20 points you perhaps return to the point that you make
21 there about there being no one model for getting to the
22 truth. Can you just explain what you were trying to say
23 in that paragraph? I think you say it also at 53 and
24 paragraphs 66 and 68, that there is a point you are
25 trying to get across that people have to understand.

1 A. Yes. It's to say really that a number of countries have
2 taken different approaches to respond to their duty of
3 response in respect to historic child abuse. Ireland is
4 one model, there is also now Northern Ireland, there are
5 a number of Nordic countries, there is Canada,
6 Australia, there may be many more that I am unaware of,
7 so there is a range of possible responses.

8 The Irish example was most often cited by Government
9 because I think in part it became very expensive,
10 whereas other approaches were less expensive to the
11 State and to other -- other actors that may also have
12 complied with international requirements.

13 Q. So can we say that really the point you were getting
14 across, and I think maybe it was a point you were making
15 to Government during the period of the Commission, was
16 there was no one model for getting to the truth, no one
17 model of investigating past failures and State
18 responsibility for such failures or learning lessons for
19 the future, is that really what it comes to?

20 A. Yes.

21 Q. You give us a little bit of knowledge about Article 3 at
22 paragraphs 29 to 31 under a section headed "Violation of
23 Article 3 of the Convention". I would like to ask you
24 a little bit about that. I think the point you seek to
25 make is that the conduct that amounts to violation of

1 that Article, indeed any other Article of the
2 Convention, has changed over time; is that something we
3 have to understand when we are looking at these issues?

4 A. It is. Yes.

5 Q. I think you tell us that if the issue is whether at
6 a particular point in time there was a violation of
7 Article 3, if that was the question, then when judging
8 that or deciding that question, the conduct in issue has
9 to be judged by the standards applicable at the time?

10 A. That is correct. I cite the example of a case which
11 originated from Scotland and went to the European Court
12 of Human Rights where the court spent some time
13 examining the prevailing standards that should have been
14 complied with at that time and found that the conduct in
15 the 1970s, I think it was, did indeed breach
16 contemporary standards at that time.

17 Q. Perhaps you can help us without going to the detail of
18 that case: how does the court, when faced with that
19 issue, how does it determine what the standards were at
20 the time? How did it do it in the case you have in
21 mind?

22 A. Taking expert evidence, and in that case I believe it
23 was Anne Black who provided evidence as to prevailing
24 social work standards and social care standards in
25 Scotland at that time.

1 Q. Can you tell us what the issue was, if you can recall?

2 It doesn't matter if you --

3 A. I don't recall exactly, but it was certainly related to
4 historical child abuse in Dumfries and Galloway,
5 I believe.

6 Q. But the court was going to rely on expert evidence to
7 tell them what the standards were?

8 A. Yes.

9 Q. At paragraph 32 you deal with something which perhaps
10 people don't always grasp when -- you talk about
11 violations of Article 3, and that being in the context
12 of perhaps a State's failure to do something when
13 something has happened, but you also tell us a bit about
14 the State's positive obligation under Article 3 to
15 intervene so as to prevent harm occurring. Can you tell
16 us a little bit about that so we have an understanding
17 of that obligation?

18 A. Yes. It is a more recent expansion or understanding of
19 the State's obligations under Article 3 to prevent, to
20 protect and to respond. So these are positive
21 obligations under Article 3, which relates to torture
22 and cruel and inhuman and degrading treatment and
23 punishment, and also Article 2 which relates to the
24 right to life. So our view was that that the failure to
25 realise those positive obligations today remained

1 a continuing violation and should be judged by today's
2 standards.

3 LADY SMITH: So you are saying that of itself is a standard
4 and, in effect, it will always be contemporary?

5 A. Yes. Exactly.

6 LADY SMITH: Thank you.

7 MR PEOPLES: Can I put it this way, if I may: historical
8 conduct should be assessed according to the standards of
9 the time, however the duty to respond to historical
10 conduct when it remains unfulfilled should be according
11 to the contemporary understanding of the obligation of
12 response. Was that a fair way of putting it?

13 A. That is exactly right. It was discussed in the
14 Commission and that was our view.

15 Q. In the paragraphs that follow you look at I think some
16 particular issues from a human rights perspective. And
17 can I just be clear, when you are giving your answers
18 and the evidence in your statement, that when you look
19 at issues such as acknowledgement and accountability or
20 compensation, reparation, justice, redress and so forth,
21 you are looking at those issues in the context of
22 historical abuse of children in institutional care from
23 a human rights perspective, so you are trying to inform
24 people with that perspective, is that correct?

25 A. It is correct.

1 Q. You mention one of the issues that we have been hearing
2 some evidence about, and indeed the issue that you were
3 asked -- the Commission was asked to look at in
4 particular, and that is the question of acknowledgement
5 and accountability. I think you deal with that in
6 paragraph 33. Can you just help us, just -- tell us
7 today what are you saying there about these issues?

8 A. So what we are saying is that the rights of survivors in
9 this case of historical child abuse are both to have
10 an acknowledgement of the harms that they experienced
11 and an accountability, and that may include individual
12 accountability for criminal conduct but it would also
13 include accountability of the State and public bodies
14 for failures.

15 Q. Because accountability is quite a wide concept. It's
16 more than simply things like criminal responsibility or
17 civil responsibility in terms of strict legal
18 obligations. In a human rights context does
19 accountability have a wider meaning?

20 A. It does. So it would extend to access to justice, to
21 investigations of criminal conduct, but it would also
22 extend to learning the lessons, essentially, and
23 ensuring that systemic failures are addressed.

24 Q. So even if you have access to justice and so you can
25 make a claim arising out of past abuse, or indeed there

1 is a prosecution of a perpetrator, that doesn't simply
2 meet the needs, does it, in terms of the issue of
3 accountability? You have to sometimes do other things
4 to fully address that issue, is that right?

5 A. Yes. The human rights standards talk about guarantees
6 of non-repetition, which means essentially taking all
7 reasonable steps to ensure that the State has done what
8 it can to ensure that the conditions that allowed abuse
9 to occur or enabled abuse to occur are addressed.

10 Q. You also have a section headed "Empowerment" that starts
11 at paragraph 34. I just want to know what, from a human
12 rights perspective, you are conveying by the expression
13 "empowerment"?

14 A. I think it is intended to mean that people first of all
15 know what their rights are and are enabled to realise
16 them. So we spent some time talking about how
17 survivors, for example, would be aware of the range of
18 avenues that they might have either to pursue justice or
19 other support from the State and how they would be
20 signposted and supported to access them.

21 Q. To some extent the essence of that is about making
22 rights effective, isn't it? You have to know you have
23 rights and, secondly, you have to have the ability to
24 access those rights in an effective way?

25 A. Yes.

1 Q. You also have a section headed "Corporal and Other
2 Punishment from a Human Rights Perspective" at
3 paragraphs 36 to 39. I don't intend to deal with this
4 at too much length, but does what you say there
5 illustrate a point you made earlier that historically
6 corporal punishment of children, just taking that --
7 unless manifestly excessive, would not have engaged
8 Article 3 of the Convention even though, when judged by
9 today's standards, such punishment would be regarded as
10 unacceptable in some countries and is now illegal in
11 Scotland.

12 A. I suppose it depends what you mean by "manifestly
13 excessive".

14 Q. Yes.

15 A. But to be clear, conduct has to be judged by the
16 standards that prevailed at the time. That relates to
17 corporal punishment as well. And I give some examples
18 which were shared with us which would seem to me, as
19 a non-expert on the prevailing standards at that time,
20 to be, in your words, "manifestly excessive".

21 Q. If you can -- are you able to help us or can you recall
22 the sort of things you had in mind?

23 A. I mention some examples.

24 Q. Maybe if you can ...

25 A. Yes, in paragraph 37 I mention maybe three or four

1 examples, such as leaving young children outside in the
2 rain as punishment, or in soiled bed sheets, or in
3 conditions of isolation, or shut in darkened rooms which
4 they were told were morgues. Those would all seem to me
5 to be manifestly excessive, irrespective of the
6 prevailing standards at the time.

7 Q. So we would have to get some evidence of what was seen
8 as acceptable punishment or unacceptable at that time,
9 and we might have experts who would tell us that.
10 But on the face of it you are saying you don't need
11 an expert to say, when you look at these examples, they
12 fall foul of the test?

13 A. That is what I am saying.

14 LADY SMITH: What about where an organisation has written
15 its own rules about punishing children? I have seen
16 this in the case of some of the religious orders, and
17 they do not keep to those rules, they do not restrict
18 themselves to the circumstances in which particularly
19 corporal punishment can be administered, the amount
20 of it, needing to be in the presence of somebody senior
21 or only with their permission, that kind of thing.

22 If they have written their own rules, is it okay in
23 your view to take that as the best evidence I can get of
24 the standards of the time that apply to that child?

25 A. I would say I wouldn't necessarily agree with that.

1 LADY SMITH: Okay.

2 A. I would look to the obligations of the State in
3 oversight and protection. In many cases would I imagine
4 that children would have been placed by the State in the
5 care of these institutions, meaning that the State would
6 retain an obligation to ensure that all treatment of
7 them was appropriate and to review the standards of
8 punishment that were in place in those institutions.

9 LADY SMITH: Would you expect the State to at least have
10 regard to or take account of what the institution had
11 set out for itself as being the limits of punishment
12 that were appropriate?

13 A. That they ought to review those? Today we would expect
14 inspections reviews. I would say the State retained an
15 obligation to ensure that the treatment of children in
16 care, wherever they were placed by the State, remained
17 appropriate, yes.

18 LADY SMITH: Thank you.

19 MR PEOPLES: Can I ask a couple of questions arising out of
20 that? The standards of the time, and you mentioned the
21 Scottish case and the expert evidence from a person who
22 had familiarity with Scottish standards, in the context
23 of human rights and Article 3, however, are we applying
24 an international standard so that if there was evidence
25 that in the 1950s internationally a certain type of

1 treatment of children was condemned by a body,
2 a respectable body of experts, could that, whatever the
3 Scottish view, engage Article 3?

4 A. Yes, absolutely. In the European human rights context
5 it would be the prevailing European --

6 Q. You're not looking at domestic standards necessarily, it
7 may be part of your exercise to see what the domestic
8 standards were, but you are comparing them with
9 international standards and seeing whether they match or
10 are at odds with each other?

11 A. Yes, you are right. If the prevailing national
12 standards were themselves incompatible with the European
13 standards then that would remain a violation, yes.

14 Q. In relation to the other issue which you were asked
15 about there, which is where an organisation under the
16 domestic law has power, it's not illegal to make its own
17 rules on corporal punishment, and I think that was the
18 situation for some of the period we are looking at. If
19 they break their own rules or their own standards, from
20 the context of human rights and Article 3 that doesn't
21 necessarily mean anything, does it? It may not either
22 breach domestic law in terms of criminal law or civil
23 law and it may not even get near Article 3, it just
24 might mean they have their own standards and they have
25 failed to live up to them, is that what it comes to?

1 A. Yes, I agree with that characterisation.

2 Q. Because some organisations we have seen in this Inquiry
3 already may have taken what we today might think was
4 a more enlightened approach to corporal punishment,
5 others took maybe a more traditional approach, but it
6 might be that neither approach would go anywhere near
7 triggering Article 3 by the standards of the day?

8 A. That is correct.

9 Q. In terms of responsibility, and I think you may have
10 covered this to an extent already but I just want to be
11 clear what you are saying. What is the point you are
12 making about the approach from a human rights
13 perspective to the question of responsibility at
14 paragraph 38 in your statement? Can you just help us
15 with that? Is it an approach we have to consider if we
16 are looking at human rights and issues of
17 responsibility?

18 A. Yes, so the point that I was making there was that the
19 State retains an obligation to ensure that the treatment
20 of children in any institution is adequate, and that
21 includes practices such as how many adults had
22 responsibility for supervising a certain number of
23 children.

24 Q. You go on to deal with the issue of apologies, which is
25 clearly something that people who wanted an inquiry had

1 campaigned for and sought from various bodies, and we
2 have heard evidence about that. What is the point you
3 are making at paragraph 39 about apologies today for
4 past conduct? And I think you make a similar point at
5 paragraph 43, about:

6 "... acknowledgement of conduct considered
7 unacceptable by today's standards whatever the position
8 historically."

9 What are you saying about apologies in the context
10 there?

11 A. That there is nothing to stop an institution apologising
12 even if the prevailing standards at the time would have
13 permitted the conduct.

14 Q. Because I think we have heard and you probably will be
15 aware, no doubt you know from your own experience, that
16 some organisations seem to find it difficult to make
17 an apology or an unconditional apology for something
18 that happened in the past within an establishment which
19 was run by the organisation.

20 A. Yes, we heard that a number of times, and some of the
21 reasons that were given were pressure from insurance
22 companies or ambiguities in civil liability which may
23 now have been addressed in legislation.

24 Q. Did you personally -- or did the Commission at that time
25 see these as obstacles to making a general apology?

1 A. No, and we sought to remove the obstacles through the
2 introduction of an apology law. It was debated, and
3 I had discussions with representatives of the Justice
4 Department, exactly what the legal liability was. But
5 the reality was that whatever the exact legal standard
6 at that time, it was acting as an impediment, it was
7 seen as an impediment, and introducing an apology law
8 would explicitly remove that impediment, so that is what
9 we tried to do.

10 Q. Yes, it was seen as such, but I think there were
11 certainly statements -- and I have mentioned one
12 previously in a case, Bowden, which was in the
13 House of Lords with Lord Hope -- that really answered
14 the question whether an apology from the First Minister
15 had any legal significance, and I think he said quite
16 shortly, no, it didn't. Because it wasn't something
17 that was conventionally a statement of admission of
18 liability or an admission of fault, it was an apology in
19 such wording that it wouldn't have any legal
20 significance but it might have other significance and
21 importance to survivors.

22 A. Yes. We looked into the legal situation and the
23 characterisation you are giving sounds correct. But we
24 also took a pragmatic approach that whatever the state
25 of the law, the nuance of the law, the reality was that

1 you could remove any ambiguity by introducing explicit
2 legislation to permit apologies, which is what we sought
3 to do.

4 Q. I don't know how much you know about the legislation as
5 passed, but it was a fairly short Act in Scotland based
6 on models elsewhere, but I think it doesn't remove the
7 evidential value of a true admission or confession of
8 fault or liability, I think it is an apology that is not
9 admissible in legal proceedings. But if you go further
10 and make an explicit statement of admission of fault or
11 failure, then you can find yourself perhaps being -- you
12 can find that being used in civil proceedings,
13 for example.

14 A. I don't know the detail of the legislation that was
15 passed after I stopped working for the Commission but we
16 did look at examples elsewhere, I mentioned
17 British Columbia, I mentioned I think New South Wales,
18 where -- indeed British Columbia was also extremely
19 brief, but it explicitly stated that a full and
20 effective apology couldn't be used as the basis for a
21 civil litigation, nor for voiding an insurance contract.
22 And there were positive outcomes of the similar
23 legislation in New South Wales in increasing the numbers
24 of apologies that were given. So that was why we were
25 pursuing that as an option.

1 Q. I think you make a point there that is quite important
2 to remember: it's not just from the point of view of
3 getting an apology for survivors that they may want, but
4 it is to make sure that if the organisation apologises,
5 their insurer won't jump in and say "Sorry, your cover
6 has gone"?

7 A. Yes, and we heard from some who were anxious about the
8 possibility of the implications of an apology from their
9 insurance providers.

10 LADY SMITH: Just rewinding a moment, Duncan. When you were
11 talking about ambiguities in civil liability that were
12 felt to exist, or uncertainty in the legal position
13 getting in the way of institutions or the State
14 apologising, what did you have in mind?

15 A. I recall that there were conversations regarding the
16 case law, and I spent some time looking into it but I am
17 not an expert, in relation to whether or not an apology
18 could be used as the basis or evidence to advance
19 a civil suit of liability. And the balance of views
20 seemed to be that it couldn't, but there was still
21 anxiety at the very least. And, as I say, the role of
22 insurance companies was to minimise their risk, and
23 certainly some institutions spoke about the concerns
24 that, if they were to make an apology, their insurance
25 company would not be happy with that.

1 LADY SMITH: Did you look at the range of impacts on
2 survivors depending on the type of apology? I suppose
3 at one end of the scale you have: if these things
4 happened, we are sorry they happened.

5 A. Yes.

6 LADY SMITH: And at the other end: we recognise these things
7 happened, we apologise for them.

8 A. I spoke with the Ombudsman's office and they were very
9 helpful in pointing to guidance on how apologies could
10 be made and the full and effective apology as opposed to
11 the kind of apology that you are describing. Again it
12 wasn't an area of expertise but it was something that
13 informed the approach that we took, yes.

14 LADY SMITH: Presumably the Ombudsman had seen what the
15 value of the apology was depending on how it was termed?

16 A. Absolutely, and at the time they had very clear guidance
17 to encourage full and effective apologies, taking
18 responsibility and, yes, providing greater what you
19 might call satisfaction. It's the term in international
20 law anyway.

21 LADY SMITH: Thank you. Mr Peoples.

22 MR PEOPLES: So if the apology is along the lines of: if
23 children were abused, we apologise for that
24 unreservedly. That is a conditional apology. It is not
25 acknowledging abuse, it is simply saying if it happened

1 we are sorry.

2 A. Yes.

3 Q. That is not I think a full apology or one that
4 acknowledges abuse, is that correct?

5 A. That is correct.

6 Q. There is also now, I don't know if you have been
7 following the way these things have been moving, but we
8 have been referred to a recent -- a fairly recent paper
9 on what is described as a meaningful apology and what
10 are the components of a meaningful apology, whether it
11 has to include an acceptance of responsibility by the
12 party apologising, in the broad sense at least, and
13 whether it ought to also include things such as it
14 should be accompanied by offers of redress, and that if
15 you don't have these and some other components, it would
16 appear that recent research is saying that that may not
17 represent, in the eyes of survivors at least,
18 a meaningful apology that will, in their eyes, be of
19 some benefit and give them some satisfaction. Is that
20 something that, at the time you were looking at this
21 matter, was current, or is there some more modern
22 development?

23 A. It sounds aligned with the advice that we received from
24 the SPSO and indeed their public advice at that time on
25 apologies.

1 Q. You understand obviously why people might use that as
2 a touchstone for whether an apology is meaningful or
3 not. Leaving aside the qualified apology, but if we are
4 actually looking at an apology that appears on the face
5 of it to be a full apology, but it doesn't acknowledge
6 responsibility in terms and it doesn't -- it's simply
7 an apology and nothing else, that some, as I say, see
8 that as not meaningful or not meaningful enough. Do you
9 see the point there?

10 A. I do, and it was a view that was shared by survivors
11 during my time working here, yes.

12 Q. You have another section in your statement headed
13 "Systemic Failures from a Human Rights Perspective".
14 I just want to ask you this: in your view, if you have
15 a situation of abuse in a range of care settings
16 together with a lack of adequate systems for protecting
17 children in those settings, if you have those in
18 combination, can that be seen as a systemic failing on
19 the part of the State to take effective preventative
20 steps?

21 A. Yes.

22 Q. So if you get that as the ingredient, you could say the
23 State could be in the dock for saying they didn't fulfil
24 their positive obligations?

25 A. That would not be in compliance with positive

1 obligations, yes.

2 Q. Can I just -- there is always an issue of whether
3 particular conduct reaches the threshold to get into
4 Article 3. That is often a nice question, one that
5 perhaps no doubt exercises the courts who have to
6 address the issue. Can I just be clear about this, and
7 I think I know the answer but I want to be clear. As
8 regards sexual abuse by adults of children placed in
9 a range of care settings by the State, the abuse itself,
10 would that be conduct for the purposes of Article 3 that
11 amounted to inhuman or degrading treatment? Is there
12 any issue about that?

13 A. No, there is no issue about that.

14 Q. Could I move to the Framework paper. You tell us a bit
15 about that at paragraph 45 and following. That is
16 the paper the Commission produced in February 2010
17 having been commissioned around March 2009.

18 First of all, would you like the paper in front of
19 you, by the way? Would it be of some assistance?

20 A. If there is a copy.

21 Q. Could we put up SGV-000024135.

22 That perhaps will be familiar to you as the front
23 page of the Framework paper that was published. The
24 paper, and I will maybe refer to it in a moment, but the
25 paper did include recommendations for steps that should

1 be taken to comply with human rights obligations on the
2 part of the State and on the part of others?

3 A. Yes. Most of their recommendations from memory were
4 directed to the Scottish Government but there were
5 certainly requirements for other public bodies and
6 others to take action.

7 Q. Can I just ask you this, because I think there may be
8 some confusion in other evidence we have heard. There
9 was a later interaction process and I will ask you about
10 that in due course, but am I right in thinking the
11 Framework was not recommending at that stage, when
12 published, an interaction process of the kind that
13 subsequently took place, is that ...?

14 A. That is correct. So the intention was to publish
15 a report with recommendations, and then to revert to the
16 role as a national human rights institution to monitor
17 the implementation of those recommendations.

18 Q. Was it only because there was some delay, if I can put
19 it this way, in getting a commitment to implement the
20 recommendations in a way that seemed satisfactory, that
21 it was subsequently thought, well, we will have to find
22 a way to put move this forward, and the interaction
23 process was devised and developed to do that?

24 A. Yes, when we saw that the recommendations were not being
25 implemented we determined that we should take some

1 action and responsibility to ensure that was the case.
2 If they had been implemented in February 2010 or at any
3 point prior to the interaction process beginning, or
4 even ending, there would have been no need for the
5 interaction process.

6 Q. Was that the brainchild of Alan Miller or the Commission
7 in general or someone else?

8 A. Alan Miller developed the idea for an interaction
9 process in general as a way of resolving human rights
10 disputes. It was then introduced in Commission meetings
11 as an option that we might use to resolve this impasse,
12 really, in ensuring justice and remedies for survivors.

13 Q. So it wasn't just tailored for this particular
14 situation, he saw it as a way or a mechanism to resolve
15 other types of disputes that may have a human rights
16 dimension and that this was a process that could be
17 used, almost like a peace process or a negotiation
18 process of interested parties, to get some resolution or
19 way forward?

20 A. Yes. It was on the table as one of the tools that the
21 Commission might use to realise human rights in general
22 from the outset of the Commission, in fact pre-dating my
23 employment by the Commission. Of course the way in
24 which it was applied and used in this context was very
25 carefully considered contextually, but the general

1 principles of the purpose of an interaction and how it
2 would work were broad-ranging.

3 Q. Just on the Framework while we have that in front of us,
4 if we can turn to page 7, I think. I'm not going to go
5 through the whole of this document, but do we see there
6 is a section headed "Securing Effective Access to
7 Justice: Effective Remedies and Reparation for Survivors
8 of Childhood Abuse", and then it sets out I think that
9 to deliver on meeting the needs of survivors and having
10 a human rights-based approach, a comprehensive approach,
11 then certain things have to happen.

12 I think you then set out in the Framework nine
13 recommendations that might be put. I think we see them
14 there. I'm not going to go through them all, but if we
15 take page 7 and page 8, do we see that there are various
16 recommendations, if I can put it that way?

17 A. Yes.

18 Q. Is that correct?

19 A. Yes, I see them there, and there are nine.

20 Q. So that is what essentially would be the Commission's
21 recommendations to take matters forward?

22 A. Yes.

23 Q. As you say, they are essentially matters that Scottish
24 Government would have to commit to to achieve?

25 A. Without the commitment of Scottish Government it would

1 have been impossible. Others would have been required
2 to take action as well, but the Scottish Government was
3 the key actor.

4 Q. Yes, because I think an interaction process with some of
5 the survivors and Scottish Government would not have
6 been a success. It needed to take in other parties such
7 as care organisations?

8 A. Absolutely.

9 Q. Yes. I think just while we have that document, I'm not
10 going to, as I say, go through it, but if we go to
11 page 14 as well we see there it tells us what a human
12 rights-based approach involves. I think we have
13 discussed some of the matters that have to be considered
14 and addressed if you are to achieve such an approach,
15 including addressing issues of acknowledgement,
16 accountability, reparation and redress and so forth, is
17 that ...?

18 A. Yes. We took the elements of the human rights approach
19 from the United Nations and developed them extensively
20 ourselves, but, yes, they are outlined there.

21 Q. What you do there I think, having set out what the
22 approach is, the general approach, I think there is then
23 a discussion of various issues, including the ones we
24 have talked about this morning, accountability, the duty
25 of the State to ensure effective remedies and so forth

1 and what has to be done to meet those obligations, is
2 that --

3 A. Yes.

4 Q. -- what it's all about?

5 You also have a section in your statement about Time
6 To Be Heard. You can take it we have had a bit of
7 evidence about Time To Be Heard. We have had
8 a statement read from Tom Shaw who was involved in Time
9 To Be Heard, and we have heard from some ministers who
10 took the decision to pilot a confidential forum that
11 became known as Time To Be Heard, so you can assume we
12 have a certain knowledge of the situation.

13 I think the section on that is from paragraphs 46
14 through to 53, if we can have that in front of you in
15 case you wish to refer to your written statement.

16 As we said earlier, and as has already been
17 discussed at this Inquiry, the Commission was still
18 working on its advice when ministers decided on
19 30 September 2009 to pilot a confidential committee-type
20 forum, perhaps not dissimilar to the sort of forum that
21 had been part of the Irish model, the confidential
22 committee model?

23 A. That is correct.

24 Q. At paragraph 47, do you tell us that the Commission was
25 not involved in making or informing that decision, is

1 that the situation?

2 A. That is absolutely correct.

3 Q. So even if there was what might be described as
4 discussions during the work and liaison and so forth,
5 I just want to be clear, that didn't involve some
6 discussion specifically around a pilot forum of the type
7 that ministers decided on or what the views of the
8 Commission were about such a forum and the timing of the
9 forum?

10 A. No. We were made aware that this was going to happen at
11 a certain point.

12 Q. That was as far as it went?

13 A. To my recollection it is, yes.

14 Q. Just so we are clear, you told us already that a draft
15 paper, a legal paper and a research paper were submitted
16 to Scottish Government in July of 2009. Had the
17 Commission advised Scottish Government ahead of the
18 ministerial decision on 30 September 2009 of any of the
19 recommendations which subsequently appeared in the
20 Framework Report?

21 A. No, not the recommendations, no.

22 Q. I think some of those recommendations did address the
23 pilot forum when the report was published. Was that
24 after the decision had already been taken? You were
25 addressing it because you were aware there was a pilot

1 forum and you wished to at least say something about
2 that to ensure that the forum that had been decided upon
3 was compliant with human rights requirements?

4 A. Yes. My recollection is that we were informed that
5 there would be a pilot forum around the time of the
6 ministerial announcement, and that was several months
7 before the Framework paper was ultimately published, so
8 the Commission decided to direct certain recommendations
9 towards the pilot forum.

10 Q. Prior to the ministerial decision -- well, you have told
11 us already that the Commission's view, and I think it
12 was a consistent view, was that a human rights-based
13 approach to responses to historical abuse of children in
14 institutional care required the State to ensure a range
15 of remedies. You told us that was the view of the
16 Commission. Prior to the ministerial decision on
17 30 September 2009, was that view being made known to
18 Scottish Government officials or was that something that
19 appeared more in the report itself? Were you already
20 telling them that?

21 A. I don't recall exactly the detail of the conversations.
22 I would imagine that we were giving an indication of the
23 scope of the steps that we would be putting forward, but
24 I don't recall exactly the communication.

25 Q. But given that view that I have just mentioned, can

1 we take it that an acknowledgement forum such as the
2 pilot forum, without more, would not have met the
3 necessary requirements if the State was endeavouring to
4 adopt a human rights-based approach?

5 A. Yes, we said as much in our written evidence
6 in September 2009. I think Alan Miller mentioned it in
7 his presentation prior to the commencement of the Time
8 To Be Heard forum in early 2010. It can be one element,
9 but on its own it is insufficient to fulfil the State's
10 obligations.

11 LADY SMITH: So that goes back to what you were saying
12 earlier about often the way forward in circumstances
13 like this being a holistic approach and that will have
14 a series of actions that require to be taken to achieve
15 the objective of meeting the totality of a human rights
16 approach to the problem.

17 A. Yes, indeed.

18 LADY SMITH: Mr Peoples.

19 MR PEOPLES: You took issue with something that
20 Jean MacLellan, who was a lead official within
21 Scottish Government at that time, you took issue with
22 something she had said to the Public Petitions Committee
23 and I think you deal with that matter at paragraphs 48
24 and 49. Can you just tell us a little bit about that?
25 We are yet to hear from her. We have a statement from

1 her. But is this to do with an issue of timing of the
2 report and whether it was delayed or not? Can you help
3 us with what you were -- what the issue was?

4 A. I wanted to clarify that the report that we were working
5 on, whilst we had a working deadline of November 2009,
6 that we had shared drafts with the Government in July of
7 the legal and the research paper and informed them in
8 an agreed deadline for delivery in I believe it was
9 August 2009 of January 2010, which indeed is when we
10 delivered the draft to the Government. So the
11 suggestion that the pilot forum was announced prior to
12 receiving our recommendations because of slippage, if
13 you like, in the timescale of our work, I felt was
14 unfair.

15 Q. Maybe you could just -- you wrote a letter I think to
16 the Committee, the Petitions Committee, on
17 18 November 2010, and it was in connection with another
18 petition. We have been dealing mainly with an earlier
19 petition, PE535, but there was also a petition PE1351,
20 Time For All To Be Heard, and I am not going to get you
21 involved in that. But the letter you wrote at that
22 time, could you just read out what you said? It's at
23 paragraph 49. You've got an extract from it. Would you
24 read that for us?

25 A. "In undertaking this work, the Commission entered into

1 a grant agreement with the Scottish Government to
2 deliver the Framework. This agreement did not include
3 a timetable for delivery although a working deadline of
4 November 2009 was initially discussed. In August 2009
5 a delivery date of end of January 2010 was agreed. The
6 grant agreement under which the Framework was developed
7 was for £28,050 ... Throughout the process the
8 Commission updated the Government on its progress,
9 sharing drafts of the legal analysis in July 2009, the
10 draft research paper in December 2009 and the draft
11 Framework in January 2010. In refining the Framework
12 the Commission took into account the announcement by the
13 Scottish Government in November 2009 of the current
14 pilot and comments of the Scottish Government on the
15 draft Framework provided in January 2010. The
16 Government's decision to announce a pilot forum was made
17 independently of and prior to the Commission presenting
18 its recommendations."

19 LADY SMITH: And we saw from the document that it was dated
20 February 2010.

21 A. Yes, so the final Framework was published in
22 February 2010, a draft was shared with the
23 Scottish Government in January 2010.

24 MR PEOPLES: So can we take it that the Commission did not
25 agree -- sorry, I am putting that badly. Did the

1 Commission agree with the decision to announce the pilot
2 ahead of the Framework Report? Can you try and look
3 back and tell us what their thoughts were when they
4 found out?

5 A. No, I think there was frustration.

6 Q. So they didn't agree in essence?

7 A. No. No.

8 Q. Was that view conveyed between November and February to
9 Scottish Government, can you recall?

10 A. I have no doubt that it would have been. I don't recall
11 exactly how or when.

12 Q. It would not be surprising. It is likely something
13 would be said, "Why have you announced this? We are
14 still working"?

15 A. Yes.

16 LADY SMITH: It was, I suppose, on one view, a high risk
17 strategy on behalf of the Government, because between
18 September 2009 and the end of January 2010, as the
19 Commission refined its views, they could have decided
20 that it would be quite wrong to go ahead with the truth
21 project alone without at that time also having committed
22 to or commencing other aspects of what needed to be
23 done?

24 A. Yes, there was discussion within the Commission as to
25 how to respond. I think the ultimate view, and this is

1 my recollection, that prevailed was that we needed to be
2 sure that nothing we did delayed the action that could
3 be taken. I mention at some point in the statement and
4 in correspondence that what can be done today should be
5 done today, and we didn't want to be slowing anything
6 down. So given that the Government had committed to
7 a step, albeit not a sufficient step to fulfil all of
8 its obligations, ultimately we decided simply to make
9 recommendations in relation to the way in which that
10 Committee could run, but also to reaffirm that that
11 alone was not enough.

12 LADY SMITH: Thank you.

13 MR PEOPLES: A briefing was prepared for ministers for the
14 meeting of 30 September 2009, and I have been asked to
15 ask you some questions about that so I will put it on
16 the screen for you.

17 LADY SMITH: Is this the officials' briefing you are
18 referring to?

19 MR PEOPLES: Yes. It's SGV.001.001.8028. Is this
20 a document you have ever seen before?

21 A. I don't recognise it. It's possible I have seen it but
22 I don't remember seeing this.

23 Q. There is no real reason why you would. It's addressed
24 to the Minister for Public Health and for Children and
25 Early Years and the Minister for Community Safety and

1 the Lord Advocate. But you can take it it's a briefing
2 by officials for the meeting where the decision was
3 taken to pilot a confidential forum and I have been
4 asked to just ask you to look at that.

5 If we look at paragraphs 2 to 4 headed "Background",
6 and take your time if you want. It gives some
7 background to there was a statement by Adam Ingram
8 in February 2008, I think you probably would know about
9 that, the scope of truth and reconciliation forum, which
10 I think became an acknowledgement and accountability
11 forum because I think there was a view that the title
12 needed changing, and there is some discussion about that
13 and saying that this was a response to the Shaw Review
14 that had previously been published in November 2007.
15 Then there had been a consultation paper that had been
16 prepared with the assistance of the SurvivorScotland
17 National Reference Group and that had been issued
18 in October 2008, and I think you knew there was
19 a consultation process I think when the Commission
20 became involved.

21 Then at paragraph 4 we have -- it says there that:

22 "Officials were approached by the Commission ..."

23 So that is what they understood was the situation.

24 "... who offered their expertise and were

25 commissioned to provide a human rights Framework for the

1 forum which would ensure the rights of all parties are
2 represented."

3 Then there are various annexes to this paper which
4 set out options and give information about various
5 matters. I don't want to take up too much time with
6 that, we have been through it.

7 I have been asked to put to you: do you agree that
8 the paragraphs we have just looked at make it clear that
9 the concept of a truth and reconciliation forum had been
10 discussed in 2008 and, with the input from the National
11 Reference Group, had become a proposal for
12 an acknowledgment and accountability forum that was the
13 subject of consultation between October 2008 and
14 April 2009? I suspect the answer is yes, you did?

15 A. Yes, that was my understanding at the time, yes.

16 Q. But I am asked to ask you another question.

17 Scottish Government wish me to ask whether you accept
18 that the decision to pilot a confidential committee type
19 forum in September 2009, and I will use their words:

20 "... represented a further step in the development
21 of the proposal rather than a wholly new innovation?"

22 Do you see the point they are making?

23 A. I understand the point they are seeking to make. Our
24 view was that the consultation at the time was for
25 an acknowledgement and accountability forum or process

1 and that a purely confidential committee would not
2 reasonably be seen to encompass accountability. So, no,
3 I would not accept that.

4 Q. They also wished me to ask whether you acknowledge that
5 it was accepted at the time of the ministerial decision
6 that the recommended model for the forum would require
7 to meet the requirements of the Human Rights Framework
8 being designed by the Commission, and there is reference
9 to something along those lines being said by officials,
10 but was that something that was accepted or was a given
11 and, if it was, did you know that? That they were going
12 to make sure that whatever they did with the pilot it
13 would meet human rights requirements, including any
14 requirements that were being incorporated into the
15 Framework that was later published? Did you know they
16 were going to proceed in that way?

17 A. I don't recall having that message conveyed and I don't
18 really see how that could be possible, given the model
19 that they were pursuing did not engage many or most of
20 the elements of the Human Rights Framework.

21 Q. Yes, because you had to comment on the Framework after
22 the decision and you made specific recommendations about
23 the pilot, but you hadn't conveyed those at the date of
24 the decision?

25 A. Absolutely not. I can confirm I have not seen this

1 document. I have not seen this before.

2 Q. I think maybe they are trying to say they were advising
3 or recommending this model and that, if ministers agreed
4 to it, they were saying we want it to be human
5 rights-compliant. But they wouldn't know exactly what
6 that would involve at that stage and they hadn't
7 discussed the matter with the Commission. Is that in
8 essence what you recall as the situation?

9 A. Yes. They are slightly different things, to say the
10 forum would run in a way that was human
11 rights-compliant, and that it would comply with the
12 range of the State's obligations of response which it
13 clearly didn't do. So it may well have done the former
14 but it couldn't do the latter, if that makes sense.

15 LADY SMITH: So are you saying that if you ask the
16 Human Rights Commission or any human rights advisers to
17 help, you have to accept that if the help is to help us
18 with something we have already decided to do, the answer
19 might be: you may have decided to do that, but if you do
20 it that way that you are intending to do it, it's not
21 going to comply with human rights?

22 A. Yes, that is a fair characterisation of what actually
23 happened, yes.

24 LADY SMITH: Mr Peoples.

25 MR PEOPLES: I am asked to ask you, and I'm not sure this is

1 something you are perhaps best positioned to answer, but
2 whether the recommended model was presented to ministers
3 as only one of a number of potential avenues of
4 accountability for survivors? Because there are
5 references to there may be other things that need to be
6 done.

7 I'm not sure whether you are in a position to
8 comment on how the matter was presented by officials,
9 maybe we will just have to look at the briefing and
10 decide for ourselves. I am asking the question, but
11 perhaps --

12 A. I can't comment on it. I have no idea how it was
13 presented to ministers, I wasn't privy to conversations
14 within Government. I haven't seen this document before
15 although it answers some questions that I had at the
16 time. So, no, I can't comment on that.

17 Q. So any suggestion that the model might meet human rights
18 requirements, if there was any flavour of that in the
19 briefing, and I think there are sentences along those
20 lines which we looked at with another witness, they
21 wouldn't be based on something you had conveyed to
22 officials to say that this model does meet or seems to
23 meet the requirements of human rights or human rights
24 issues that arise if you proceed with it? You weren't
25 telling them that at that stage?

1 A. No. And not only did the purely confidential committee
2 not comply with the range of obligations of response,
3 but we ultimately made several recommendations
4 specifically about what was actually proposed, as the
5 confidential committee, to ensure that it was -- there
6 were elements in which we felt it needed to be adjusted
7 to comply with human rights responsibilities itself.

8 Q. Yes. I'm not going to go back to the Framework, but
9 I think the part before the bit we looked at contained
10 some specific recommendations related to the pilot forum
11 when the Framework was published in 2010, and I think to
12 some extent these points were addressed in the setting
13 up of the forum, is that ...?

14 A. Yes. From memory there were two broad areas, the
15 independence that it should be established
16 independently, and that led to I think quite rapid
17 adjustments in how the Government was intending to
18 establish and run the pilot forum. And secondly, to
19 comply with the duty of investigations, and that was
20 more contested by the members of the Time To Be Heard
21 forum, and we had a number of exchanges and discussions
22 with Kathleen Marshall. I think the outcomes of those
23 are summarised at the end of the Time To Be Heard Report
24 and indeed the forum did establish some working
25 practices with the police at that time.

1 Q. Because they were going to be hearing things that might
2 involve criminal conduct and so forth, and to some
3 extent, although they weren't making judgments or
4 finding facts, they were going to be hearing information
5 that might be relevant in other contexts. So was it
6 part of that that you were at least exploring and
7 considering the human rights perspective on and what
8 they should be doing --

9 A. Yes.

10 Q. -- with that information?

11 A. Yes, the position of the Commission was that where there
12 are reasonably credible allegations then those should be
13 investigated, and if the Committee is unable to perform
14 that investigation function it should pass those to
15 a body, such as the police, that could conduct those
16 investigations.

17 Q. So that was the area. And I think something was
18 resolved, that there was some sort of protocol that the
19 Shaw Review had to enable some form of investigation to
20 take place.

21 On the other issue of independence, just so that we
22 can be clear, you had raised that as another point.
23 What was the significance of the Shaw Review being
24 independent of the State, I take it?

25 A. Independent of the State. So both to provide the

1 ability to consider -- well, so that if it was
2 established independently, firstly, it would have more
3 credibility as independent of the State and, secondly,
4 to consider their duties as a public -- if they would be
5 a public body. So ultimately that was not a contested
6 recommendation and the forum was established in a way
7 that ensured a greater degree of independence from the
8 Scottish Government than it would have otherwise.

9 Q. So far as Time To Be Heard is concerned, I think you
10 tell us at paragraph 54, if we go back to your
11 statement, that the Commission did not become
12 significantly involved in Time To Be Heard, which
13 started around May 2010, except for the fact that they
14 made some recommendations which we have just discussed.
15 And I think it is correct to say, and you may not have
16 detailed knowledge of this, that Professor Alan Miller
17 did attend two events prior to the start of Time To Be
18 Heard to I think assist in explaining possibly the work
19 of the Commission, but also to explain what the forum
20 was about, perhaps, as part of a discussion that was
21 held around February and March 2010, there was
22 a survivor event and an event for organisations.

23 I don't know if you know much about that, but are
24 you familiar there was something along those lines going
25 on?

1 A. Yes, I say in my statement I don't recall, but that may
2 well have been the case. Subsequently there is a note
3 on the Scottish Commission website which outlines what
4 Alan said at one of those events, and it sparked my
5 recollection of the intention that we had to explore
6 whether Time To Be Heard could be used as a forum in
7 which survivors could also recount their experiences of
8 seeking to access justice and remedies and document also
9 their wishes in relation to justice and remedies. Even
10 if the forum itself could not fulfil those purposes, it
11 could document in ways that could inform future
12 processes. That was one large part.

13 Q. I will maybe ask you about that. Before I do that, and
14 that is part -- I think you deal with this as
15 observations on Time To Be Heard, I think starting at
16 paragraph 58.

17 But before I do that, Time To Be Heard, so we are
18 absolutely clear, was not an investigation or inquiry
19 into non-recent abuse of children in institutional care,
20 it was simply a listening forum. It wasn't
21 an accountability forum either, it was just a listening
22 forum?

23 A. Yes.

24 Q. And you say, and I think you have just touched on it,
25 that the Commission would have liked survivors who

1 participated in that forum, and it was confined
2 ultimately to survivors from -- or former residents from
3 Quarriers, because I think they weren't all survivors,
4 ultimately. But the Commission would have liked
5 survivors to be asked what they wanted by way of
6 redress, justice or anything else when they were
7 attending the forum. They just wanted that information,
8 it would be a useful source in informing ways forward.
9 Is that what the Commission wanted?

10 A. It is.

11 Q. Did the Commission ask Scottish Government at the time
12 to include questions about redress, justice and so forth
13 as part of the forum, do you recall?

14 A. I certainly recall discussions with Tom Shaw and
15 Kathleen Marshall in that regard. I don't remember
16 whether we also conveyed those messages directly to
17 Scottish Government.

18 Q. But what response were you getting back when you raised
19 that, either through Tom Shaw or from
20 Scottish Government? What was the response?

21 A. They didn't want to confuse the purpose of the forum and
22 so they were not inclined to do it.

23 Q. They didn't really want to have those matters discussed
24 or raised, they simply wanted survivors and others to go
25 along, recount their experiences, be listened to, and

1 no doubt also to pass on information if necessary for
2 investigation purposes. But that was it? They didn't
3 want to explore other matters like redress or
4 accountability?

5 A. That is my recollection of conversations, yes.

6 Q. As regards the Framework's recommendations, the ones
7 that we did look at that were in the Framework document,
8 I think we have been told, or at least there is evidence
9 we have, that what might be called an interim response
10 was made to the Commission about the Time To Be Heard
11 recommendations in 2010. But apart that, and I think
12 you deal with this at paragraph 57 if you want to have
13 that in front of you, Scottish Government did not
14 respond to the wider recommendations until Time To Be
15 Heard had concluded and the Time To Be Heard Report had
16 been issued in about February of 2011, so that is about
17 a year on from the publication of the Framework Report,
18 is that right?

19 A. Yes.

20 Q. While the Government responded to the Framework Report
21 I think around -- is it around February/March 2011?
22 There was some form of response then. Can I just be
23 clear, is it the position that the Scottish Government
24 at that stage did not commit to participating in
25 an interaction process, and indeed you have told us it

1 was to deal with an impasse, so they weren't committing
2 to what became the interaction process at that stage if
3 it was being talked about?

4 A. They were not committing to it. And at that stage we
5 were looking for them ideally to implement the
6 recommendations because there was a need for it.

7 Q. So the first thing was: are you going to implement? And
8 when that didn't happen or you weren't getting any
9 commitment of that kind, this was when the alternative
10 plan B came in: we will see if they will commit to
11 an interaction process. And that took time?

12 A. Yes.

13 Q. The reason I ask about the taking time to get the
14 commitment to participate in interaction, that was
15 really something that was happening during 2011, was it
16 not?

17 A. Yes.

18 Q. And I think you say in your evidence the commitment to
19 participate only came around December 2011 or
20 thereabouts?

21 A. Yes.

22 Q. Jean MacLellan has said in her written evidence to the
23 Inquiry that it was always understood that
24 Scottish Government would participate in the interaction
25 process. That doesn't seem to square with your

1 recollection?

2 A. No, that is not my recollection.

3 MR PEOPLES: I wonder if this is a good time to have a short
4 break? I am going to move on to something different.

5 LADY SMITH: Yes, we can take the morning break now.

6 Duncan, we take a break for about quarter of an hour
7 in the middle of the morning, usually about now. If
8 that works for you, we will do it now. Thank you.

9 (11.25 am)

10 (A short break)

11 (11.45 am)

12 LADY SMITH: Duncan, are you ready to carry on?

13 A. I am.

14 LADY SMITH: Thank you, Mr Peoples.

15 MR PEOPLES: Can I just change the topic a little bit and
16 ask you a few questions on the question of a public
17 inquiry. The Commission became involved in March 2009
18 to provide advice on the acknowledgement and
19 accountability forum. We know from other evidence that
20 there was a direct involvement of the Cabinet Secretary
21 for Education, Mike Russell in 2014, he became quite
22 directly involved at that time as he has told us.

23 Between those two dates, 2009 and his direct
24 involvement, can you recall the question of
25 a public inquiry coming up in discussions between

1 the Commission and Scottish Government and, if it did,
2 what was the attitude of Scottish Government towards
3 such an inquiry, can you recall?

4 A. In the human rights Framework and throughout the
5 process, the Commission had always said that there
6 should be some form of investigation and exploration of
7 lessons to be learned et cetera. The discussions of
8 what form that should take, I think at times -- I think
9 I reference this in my written evidence, that when
10 people spoke about an investigation, everybody seemed to
11 have different ideas as to what that might mean and
12 indeed whether that would include an inquiry and, if so,
13 what the inquiry might do.

14 There were discussions on an inquiry specifically
15 throughout the interaction process, certainly in the --
16 it was part of the outcome of the first interaction as
17 a possible step on accountability, and the second
18 interaction in more depth, and there was what we called
19 a mini interaction which was used to flesh out or
20 develop the options that could be pursued specifically
21 on the question of an inquiry. The Scottish Government
22 of course was represented at all of those interaction
23 and mini interaction meetings, so they were part of
24 discussions on inquiries.

25 The primary line early on from Scottish Government

1 was referring to the Irish Investigations Committee and
2 anxiety at the cost and the introduction of barristers
3 or QCs, counsels' fees, et cetera, et cetera, so the
4 cost was certainly a factor that was raised in early
5 discussions. And their response to -- their fuller
6 response to the recommendations, in other words the
7 letter they sent in February 2011 or thereabouts, did
8 not see the value in a national inquiry, to my
9 recollection. Their position was that there had been
10 many inquiries. There had been local inquiries, let's
11 say Edinburgh, I think Fife and others, and that there
12 were -- the lessons had been learned. Those inquiries
13 in combination with the Historic Abuse Systemic Review,
14 in other words Tom Shaw's 2007 Report, essentially
15 negated the need for a public inquiry.

16 That is my understanding of what the Government's
17 position was in 2011 and that essentially remained
18 consistent throughout most of the interaction process.

19 Q. Just so I can pull this together, so I am clear, the
20 Commission's position during the period we have been
21 discussing, from 2009 through to 2014 when I think
22 things began to change, I think is that essentially
23 captured at paragraph 116 of your witness statement
24 where you say:

25 "The Commission's position in 2010 ..."

1 If we could have that up, perhaps, or if you could
2 refer to it?

3 A. Yes.

4 Q. "The Commission's position in 2010 was that there should
5 be some kind of ..."

6 And you use the word "investigation".

7 "... by the State into the whole situation. The
8 position did not change from 2010."

9 So I think that is what you have just been telling
10 us was the Commission's view?

11 A. Yes. And I say that to be clear: the Commission's
12 position didn't change. So in our engagement with the
13 interaction process we were representing that view.
14 What form that investigation might take, the role of
15 a public inquiry within it, et cetera, those were for
16 discussion, but there had to be some form of
17 investigation.

18 Q. So the bottom line was there had to be an investigation.
19 The precise form, whether it was a public inquiry or
20 some other form of inquiry or some other model of
21 investigation, was up for discussion and exchange of
22 view, but that was the -- that was the issue rather than
23 the broader question: should there be any investigation?
24 The Commission was quite clear there should be
25 something?

1 A. Yes.

2 Q. I think you have probably answered this but just so we
3 are absolutely clear, if the Commission favoured some
4 kind of investigation, whatever that was, was that view
5 being regularly communicated to the Scottish Government
6 during that period, either through the interaction
7 events or process or more generally, was that something
8 they couldn't have missed, if you like, that that was
9 the Commission's position?

10 A. Yes, it was in the Framework, it was in every discussion
11 around the interaction process. Yes, that was our view,
12 it was constantly stated.

13 Q. Another thing you have -- you made this point this
14 morning, earlier this morning, that it doesn't have to
15 be a conventional public inquiry, it could be
16 an inquisitorial process or some other process of
17 investigation. But was that a message that you were
18 saying to Scottish Government during the period we are
19 discussing, that it doesn't have to be the sort of
20 inquiry that perhaps people traditionally thought
21 happened that had lots of lawyers, lots of examination,
22 cross-examination, public proceedings, and so forth?
23 You were saying that doesn't have to be the way that
24 these things are done?

25 A. Yes, and we were pointing to examples elsewhere. So

1 earlier I mentioned Northern Ireland which around,
2 perhaps it was 2013, launched a public inquiry where the
3 model was entirely different from the Republic, from the
4 Irish Committee, Investigations Committee, and the cost
5 as part of that was significantly lower.

6 Q. Just maybe referring to something you say at
7 paragraph 70, if you could have that before you.
8 I think you refer there to conversations with ministers
9 as early as 2011 where the Commission is raising the
10 possibility of an inquisitorial approach. You are
11 saying that prior to the decision to establish the
12 National Confidential Forum it appeared that the
13 Scottish Government was against an investigation
14 mechanism because of the costs, and they had in mind
15 no doubt the Irish model. Was that the sense you were
16 getting?

17 A. Yes.

18 Q. In terms of the response to the human rights Framework,
19 you have a section in your report on the Government's
20 response to the Framework. You have a section in your
21 report from paragraphs 75 through to 82. Just looking
22 at that for the moment can I ask you a few things. You
23 tell us at paragraph 76:

24 "Providing forms of redress and reparation was built
25 into the Human Rights Framework as a component of

1 a human rights-compliant response by the State to the
2 historical abuse of children in care."

3 And then you go on at 77 to say:

4 "One of the recommendations in the Framework was
5 that the Scottish Government should develop a redress or
6 reparation programme."

7 You also say:

8 "Due to the operation of time bar and the
9 limitations of the criminal injuries compensation
10 scheme, there was no adequate compensation route for all
11 survivors of historical child abuse when the Commission
12 published the Framework in February 2010. Remedies have
13 to be real and accessible, they cannot be theoretical."

14 So that was the clear message from the Framework?

15 A. Yes.

16 Q. I think you tell us, do you not, at paragraph 78, what
17 the Scottish Government's position was at least
18 in February 2011 on this particular recommendation -- or
19 these recommendations? I think you tell us they were
20 telling you that they intended to conduct a scoping
21 exercise to consider issues surrounding a possible
22 reparation scheme?

23 A. Yes.

24 Q. On the face of it, that is not really a commitment to
25 anything, is it, other than to consider?

1 A. True. It was better than ruling it out altogether.

2 Q. Yes. It was better than that, but it wasn't going very
3 far? Very non-committal, I suppose?

4 A. Yes, correct.

5 Q. If I just move on to paragraph 80, something you say
6 there. You refer in your statement to a submission made
7 by the Commission on 22 March 2013 to a consultation
8 on -- it was described as civil law of damages, issues
9 and personal injury, as giving the clearest articulation
10 you believe of the Commission's general position on
11 redress in this period.

12 I think the background to that is that the
13 Government had various reports from the Law Commission,
14 Scottish Law Commission, on various aspects or issues on
15 personal injury, including prescription and limitation
16 issues, and they had embarked on some general
17 consultation on this matter and you were one of
18 the parties who put in a submission at that time.

19 Can I just be clear: were you saying in effect at
20 that stage, and perhaps it echoes what had been said in
21 the Framework already, that there would require to be
22 a revision of the way in which the law on limitation was
23 being applied, that is one of the first points, but also
24 a recognition of the likelihood that the law on
25 prescription would not be changed, and that was what the

1 Commission had -- the Law Commission had said should be
2 the position. Were you also saying there is a need for
3 an alternative to the civil justice system for what I
4 call pre-1964 survivors whose rights had been
5 extinguished by the law of prescription? So were you
6 saying these two things around that time? And perhaps
7 before then?

8 A. Yes, that seems to me a good articulation of our
9 position. It's a very nuanced and technical area of
10 Scots law and I would stand by what we wrote in our
11 written submission. But, yes, that is my recollection
12 of the broad thrust of the --

13 Q. Did you sense at this stage, because I have raised this
14 with others, officials and ministers, how well they
15 understood the distinction, which is not technical in
16 one sense, it's quite fundamental to a lawyer, between
17 prescription and limitation, did you sense in your
18 discussions with officials and perhaps any dealings with
19 ministers that they had grasped the fundamental
20 difference between the two situations? That you can do
21 something about limitation, perhaps, but it may be very
22 difficult legally to do anything with prescription?

23 A. I am not sure I could offer an opinion on whether
24 individuals we spoke to grasped that distinction but it
25 certainly was a crucial one, that both elements had to

1 be addressed in order to ensure the human rights
2 requirements in terms of access to remedies that were
3 effective for survivors.

4 LADY SMITH: Help me with this, Duncan, and I appreciate why
5 you might say you are not sure whether individuals in
6 Government actually understood the distinction, but do
7 you remember anybody that was involved seeming to be
8 clear on the difference between prescription and
9 limitation and the difference in the issues that arose?

10 A. I took advice within the Commission from Shelagh McCall,
11 our Commissioner, and she was -- my recollection is she
12 would have been quite heavily involved in drafting our
13 submission because it is such a technical area of law.
14 We also met with I believe the lead official who was
15 overseeing the consultation on those issues who came to
16 what we called the mini interaction. She came to
17 a specific discussion on access to justice within the
18 interaction process and was open and engaged. I also
19 spoke with Colin MacKay, who at that time had a senior
20 role within the Justice Directorate, who was equally
21 open and engaged, and I think I put that in my written
22 statement. So I experienced certainly those two
23 officials, Colin and -- I don't recall the name of --

24 MR PEOPLES: Maureen Bruce? You mentioned her in your
25 statement. Are you thinking of someone else?

1 A. Maureen Bruce, to my recollection, was in the Health
2 Directorate. It was the official who was leading the
3 Scottish Government's engagement with the specific
4 consultation on the Damages Act. They certainly both
5 seemed to understand that distinction no doubt better
6 than I did.

7 LADY SMITH: Did you engage with anyone who was advising the
8 minister who was leading on the wider issues that you
9 have been looking at for the Framework? Leading on
10 advising the ministers that were involved at that time,
11 three ministers specifically.

12 A. Yes, so we engaged -- I think now we are in the period
13 in which Maureen Bruce would have been the lead
14 official. And as I mention in my written statement,
15 that coincided with greater access and engagement to
16 officials in different directorates, so we were able to
17 engage directly with the officials who had
18 responsibility for the various elements of the
19 Framework. So around 2013 and 2014 we had much more
20 engagement with a wider range of officials across the
21 Scottish Government.

22 LADY SMITH: And by that time -- you mentioned Colin MacKay,
23 for example. That would have been Justice?

24 A. Yes.

25 LADY SMITH: Yes. I think I can see what is happening here.

1 Those who would be heavily involved in the legal issues
2 arising from prescription and limitation, and no doubt
3 liaising with the Law Commission, would know exactly
4 what they were talking about, but officials in other
5 directorates might not appreciate the distinction
6 between limitation and prescription.

7 A. That may well be true. As I say, it's very complex.
8 I certainly took a great deal of time to examine it and
9 understand it and, as I say, our submission would have
10 been heavily scrutinised by Shelagh McCall who was
11 a Commissioner and, as you will know, a leading lawyer
12 in Scotland.

13 LADY SMITH: Thank you. Mr Peoples.

14 MR PEOPLES: Whatever the understanding of the officials,
15 and it was officials mainly that were involved in the
16 interaction process when it got running. Ministers came
17 and went at the beginning and the end, but I think you
18 tell us -- or at least others may have told us that it
19 was mainly officials that were attending these events
20 and no doubt reporting back. And I think the sense
21 I get is that at the beginning there may have been one
22 or two people from particular departments, but as time
23 went by officials from a range of departments with
24 an interest may have become involved so that the
25 messages coming out of the interaction were being maybe

1 disseminated more directly by their attendance to -- and
2 there seemed to be at least something that made
3 a certain degree of progress, would that be fair to say?

4 A. Yes, I don't know how cross-Government co-ordination and
5 exchange was happening in the earlier part of our
6 engagement on this process, but it was certainly clear
7 from the time that Maureen Bruce took up the reins, if
8 you like, as a lead official on this process that there
9 was an entry point for us right across Government and
10 facilitation of access to the correct officials on
11 different aspects. So, yes, that sounds right to me.

12 Q. If we are looking at one of the points that needed
13 addressing, apart from the law of limitation, there is
14 also the need for an alternative to the civil justice
15 system for the pre-1964 survivors, the prescribed claims
16 if I can call it that.

17 In looking at that, there were discussions, were
18 there, within the interaction process, about these
19 difficulties presumably in trying to find a solution to
20 that? Was that part of the process?

21 A. Yes. I am not sure how much detail we would have gone
22 into in the InterAction process but it was certainly
23 raised.

24 Q. It was flagging up that these were real difficulties?

25 A. Absolutely, yes.

1 Q. They had existed for at long time, particularly in the
2 case of pre-1964, because we have heard evidence that
3 the matter was then highlighted as along ago as 2002.

4 A. Right.

5 Q. You don't know that but we do.

6 At paragraph 81 of your statement I think you are
7 saying that one possibility that the Commission at least
8 had in mind was that one could consider a support fund
9 contributed to by care providers, perhaps to provide
10 a form of reparation, compensation, redress, whatever
11 you wish to call it. But was that something that was
12 being floated and discussed in the interaction process,
13 that this was one way forward?

14 A. Yes. And the reason it was termed "support fund", this
15 was to my recollection Alan Miller's attempt to broaden
16 the purpose of that to supporting survivors to access
17 a wider range of reparation steps that might not be
18 monetary, they might be access to counselling or other
19 forms of support.

20 Q. But what you do say in that paragraph is that such
21 a fund, and perhaps you were looking at a contributory
22 fund in particular, could satisfy from a human rights
23 perspective the requirement for adequate compensation
24 where there was no effective access to civil justice, is
25 that ...?

1 A. Yes.

2 Q. I don't want to go back to this at any length because
3 I think you have touched on this already, but if we are
4 looking at willingness to correct to such a fund, and
5 I can maybe take you to paragraph 106 just in case this
6 helps, am I right in thinking that you can recall some
7 organisations perhaps -- if we can just go to that.
8 Just carry on a bit further, perhaps, to the rest of
9 106.

10 It appears you have a recollection of some
11 organisations being perhaps more receptive to the idea
12 of such a fund than others, because in discussing the
13 interaction process at that point I think you are
14 saying, are you not, that you got the impression that
15 the background influence of insurance companies was, for
16 some institutions at least who were participating in the
17 interaction process, what I think you describe as "a
18 practical impediment to progress". That was the sense
19 you were getting?

20 A. Yes, and I think those were direct conversations with
21 directors of different institutions, I don't recall
22 which ones, but they were -- that was the general sense
23 that I got.

24 Q. If I could move back to paragraph 83 through to 86,
25 which is the section headed "Interaction Process and

1 Participation of Scottish Government". If we go back to
2 that. If we start at paragraph 83, what you are telling
3 us there I think is that throughout 2011 there were
4 meetings between the Commission and Scottish Government
5 primarily to secure a commitment to either immediately
6 implement the recommendations in the Framework or
7 alternatively, failing that, to engage in a process of
8 interaction to agree steps to implement the
9 recommendations, so that was what was happening then?

10 A. Yes.

11 Q. And you say there, and I think this is something we
12 touched on earlier, that the interaction process, and
13 you have told us how that came about, was developed to
14 avoid in essence what you considered to be an impasse at
15 that point, you weren't making the progress you would
16 like?

17 A. Yes.

18 Q. Things moved on a bit towards the end of 2011, I think,
19 and you told us earlier that in December 2011 I think
20 the Scottish Government committed to engage in
21 an interaction process and to consider in good faith the
22 outcomes of that process, and you say that at
23 paragraph 86, so that was -- but before we get to that,
24 can you just help me with this. At 84 you tell us that
25 you gave evidence to the Public Petitions Committee

1 in November of that year, and I think you have a memory
2 that that was quite a significant day, it wasn't just
3 you giving evidence. Can you tell us a little bit about
4 that before we move on?

5 A. Yes, I was one person giving evidence, but I was to be
6 followed by a panel of Scottish Ministers and perhaps
7 officials who were also giving evidence. On the day
8 itself there was a march of survivors down the
9 Royal Mile, it was pouring with rain, as I recall.
10 There was a very powerful photo which I mention in
11 The Herald capturing Frank Docherty at the front of that
12 procession, and banners demanding justice and
13 accountability, and interviews that a number of
14 survivors I think undertook in front of
15 Scottish Parliament.

16 Q. Do you consider that perhaps had some impact in moving
17 things on? Because you got the commitment the next
18 month?

19 A. Yes, I think that day was crucial.

20 Q. Prior to December 2011, just so we are clear, was it
21 made clear before then why the Scottish Government
22 appeared to be not willing to commit to engaging in
23 an interaction process?

24 A. Not to my memory, no.

25 Q. However, I think perhaps in mitigation, if you like, you

1 have a paragraph at 87 which I think is a recognition
2 that some of the steps that were being recommended by
3 the Commission were complex and required commitment not
4 just of survivors and Scottish Government but a range of
5 other, I think to use a term which is fashionable,
6 "stakeholders". I suppose that is right; you have
7 already indicated there was perhaps even -- once they
8 participated, there were some difficulties because of
9 perhaps the influence on insurance in particular. But
10 that obviously would be something anyway that would have
11 required a bit of time to get organisations to engage as
12 well as Government. So there would have been a certain
13 amount of time required anyway, would there not, if you
14 were going to have an interaction process?

15 A. Yes, there was, and that occupied the bulk of 2012. But
16 without the commitment of the Government to engage in
17 good faith, a sort of sense we had that they would
18 consider the outcomes of the interaction, there was no
19 point in pursuing -- that was the first step that was
20 needed before we could take the rest.

21 Q. I suppose if they had even committed to that process
22 without committing to implementing the recommendations,
23 either in February 2010 when the report was published or
24 in February 2011 they formally responded, the process
25 would have begun earlier?

1 A. That is true. But to be clear, we didn't require them
2 to accept the outcomes but to consider in good faith the
3 outcomes. That was the standard. It was lower but
4 significant.

5 Q. Perhaps on one view time was lost because they neither
6 committed to implement the recommendations nor to take
7 part in an interaction and consider in good faith the
8 outcomes of that process?

9 A. Time was certainly lost, a lot of time was lost at every
10 stage. When the recommendations in the Framework were
11 launched in February 2010 the Government could simply
12 have agreed to implement those recommendations. It
13 would have taken them time to work out how but they
14 could have done so.

15 Q. To some extent it appears that in 2010 one reason
16 advanced for not responding fully to the Commission was
17 the existence of Time To Be Heard, and we have to see
18 what happens and what it reports and what lessons we can
19 learn. I suppose if Time To Be Heard had waited for
20 your report we might not have had that delay?

21 A. Yes, that is true.

22 Q. I am asked to ask you about the interaction process by
23 Scottish Government. I am asked to ask you whether the
24 process should be viewed, and I quote, "as a positive
25 and necessary step rather than an avoidable part of the

1 process", as I think the Government think you may be
2 suggesting at paragraph 83, that this was a step that
3 needn't have taken place?

4 LADY SMITH: I think, put shortly, you said if they had
5 committed to implementing your recommendations when they
6 were delivered in February 2010 there would have been no
7 need for an interaction process?

8 A. Yes. In a letter on 5 December 2011 to the Petitions
9 Committee I think I stated that the Scottish Government
10 could exercise leadership. And although there are
11 a range of bodies that would ultimately have been
12 required to take action, it needn't have been the Human
13 Rights Commission and an interaction process that made
14 sure that happened, that could have been done and led by
15 Scottish Government.

16 MR PEOPLES: So you don't really agree it was a necessary
17 rather than an avoidable process? It could have been
18 avoided?

19 A. It became a necessary process but it wasn't in
20 principle.

21 Q. The other way of dealing with it, just going ahead to
22 try and implement showing leadership, might have
23 resulted in time having to be spent to carry that
24 forward, but the process that happened didn't have to
25 take place to do that?

1 A. Correct.

2 Q. You deal with the interaction process itself from
3 paragraph 87 onwards. And we have talked about this
4 earlier, but in essence does the process involve
5 bringing all interested parties together to discuss all
6 relevant issues in the hope that, through discussion,
7 they will agree a way forward which complies with human
8 rights principles?

9 A. Yes.

10 Q. I think you have already touched on this as well. After
11 about a year of planning and designing and negotiating
12 with interested parties to secure their participation in
13 that process, there were a number of interaction group
14 meetings and I think the first took place in early 2013?

15 A. Yes.

16 Q. And you were looking at probably trying, at that stage,
17 to get broad heads of agreement then to drill down into
18 specific issues which would be discussed at subsequent
19 interaction events, meetings, mini interactions and so
20 forth?

21 A. That is correct.

22 Q. You tell us at paragraph 97 that the independent Chair
23 of the process was Dr Monica McWilliams, and you tell us
24 she had been Chair of the Northern Ireland Human Rights
25 Commission and had been an active participant in

1 negotiation of the Good Friday Agreement?

2 A. That is correct.

3 Q. You do make a particular point in your statement about
4 things that emerged from the interaction process and one
5 point you make is at paragraph 107. I wonder if you can
6 just tell us what that is?

7 A. I mention there that there was a recognition during the
8 interaction process, including from former residents as
9 well as others, that some children in care had good
10 experiences as well. In fact some -- a number of
11 survivors made a point of underlining that, despite
12 their own negative experiences.

13 Q. I think you say in particular because one of the big
14 campaigners amongst survivors groups, INCAS, that even
15 members of INCAS themselves at times spoke of some
16 positive experiences in care. So survivors who had
17 experienced abuse did also say there were good times and
18 positive experiences as well?

19 A. Yes.

20 Q. You have another section headed "Participation of the
21 Catholic Church in Scotland in the Interaction Process".
22 I would like to ask you briefly about that. Towards the
23 end of that section in paragraph 110, the final
24 sentence, you say:

25 "I understood there to be an increasing

1 institutional engagement and commitment towards the
2 outcome of the process."

3 I wonder if you could help us. What was, at that
4 stage, your sense of the position of the Church so far
5 as interaction was concerned, because clearly you were
6 discussing issues like accountability, redress,
7 compensation, possibly an inquiry or investigation. So
8 what were you getting, and did the position change over
9 time during interaction?

10 A. What I am referring to there was the level of
11 engagement, firstly, from the representatives of the
12 Catholic Church or different orders within the
13 Catholic Church.

14 Q. You mean the intensity of engagement, or the people
15 higher up the food chain or the hierarchy were becoming
16 more involved in the process, or a bit of both?

17 A. I think it's the numbers, the spread of representatives,
18 and the perception of the connection between those who
19 were there and the hierarchy. So it was a very
20 difficult process to engage with the Catholic Church, as
21 I outline, and that engagement was really pursued more
22 by colleagues within CELCIS, one colleague in particular
23 who had a connection with the Conference of Religious,
24 and her engagement was critical I thought in securing
25 a greater level of involvement from the Church.

1 Q. What was the particular difficulty you mentioned? Was
2 it a structural difficulty, or was it a difficulty
3 because of the issues that were under discussion?

4 A. It was certainly a structural difficulty in that, as
5 I began to understand, there was no single entity
6 necessarily in Scotland that represented the
7 Catholic Church as a whole, but there were many separate
8 entities that may have their own direct lines of
9 accountability ultimately to the Vatican.

10 So there was a need for somebody who understood the
11 structure of the representation of the Catholic Church
12 in Scotland to navigate within it and a good faith
13 engagement of the representatives who came, and I felt
14 that increased also during the process.

15 Q. Were you getting any sense that those within the Church,
16 whatever the legal responsibilities for children in care
17 might have been of religious orders and the hierarchy,
18 if any responsibility, did you get any sense that they
19 were embracing the holistic approach of looking at the
20 issue in the round and accepting that we mustn't get
21 bogged down by issues such as structure and so forth?
22 Because the Church in the eyes of many people, including
23 survivors, may be "Well, it's the Church. The Church
24 should be coming up, they should be making
25 acknowledgements, they should be making apologies, they

1 should be considering redress", and so forth. Were you
2 getting any sense that they were embracing that idea at
3 that time?

4 A. Certain individuals who were there in representation of
5 the Church were certainly open to that, but they faced
6 challenges internally.

7 Q. Did they have the power really to commit the Church to
8 these things, or were they really simply people who were
9 listening and feeding back to those with the
10 decision-making power?

11 A. I think it was more the latter.

12 Q. You tell us -- you have a section "Participation of
13 Local Authorities in the Interaction Process", and you
14 tell us that, perhaps somewhat disappointingly, nowhere
15 near all of the local authorities participated in the
16 process and very few local authorities responded to the
17 consultation on the Action Plan that was produced as
18 a result of the interaction process.

19 I think you say that is not necessarily surprising
20 in your experience with local authorities, but was that
21 a source of disappointment, that they didn't seem to be
22 as interested in engaging as they should have been?

23 A. There was a certain amount of disappointment that we
24 didn't get more responses even to the consultation paper
25 from local authorities, but again there is a structural

1 challenge there in engaging with -- I think at the time
2 it was 32 local authorities.

3 Q. One matter I would just like to ask you about in
4 relation to a section which is headed "Options for
5 Inquiry or Investigation: Views of Survivors. The
6 Commission's Position and the Position of
7 Scottish Government". It starts at paragraph 114. On
8 the question of an inquiry, what are you saying at
9 paragraph 115 about the views of survivors during the
10 interaction process on that question of an inquiry or
11 investigation? Can you just explain for us what you
12 took to be -- what was coming out of that?

13 A. Yes, I think throughout I have been asked at times about
14 the views of survivors and I find that an impossible
15 question to answer. Firstly, because it would be much
16 better to ask them themselves, but, secondly, because
17 I couldn't possibly speak for them. And also we at no
18 point had contact or even knowledge of the range of
19 survivors, and I think I mention in the statement there
20 that most survivors are probably not known still, that
21 was certainly the impression at the time, and that there
22 are a number of different survivors groups, but that
23 there are no doubt many, many more who are not part of
24 any group.

25 Having said that, those that engaged, and there were

1 a number who engaged, both part of survivors groups and
2 not, in the interaction process did have different views
3 and --

4 Q. Sorry. On the question of, if I can use your term,
5 "investigation", while there might have been different
6 views about a public inquiry, was there any consensus
7 about there had to be some form of investigation, which
8 was I think the Commission's position; was that more
9 universally accepted amongst the survivors, that there
10 had to be some investigation whatever that was?

11 A. The survivors who were part of the Reference Group which
12 guided the whole interaction process all seemed to be
13 aligned in pursuing some form of investigation or
14 inquiry, but there were others at times who participated
15 in interaction events and who engaged with the CELCIS
16 research at other moments who were cautious about such
17 an approach. But from those that I engaged with, my
18 experience was that a majority, a significant majority,
19 were looking for a form of investigation and inquiry.

20 Q. Therefore, can I maybe ask you to move to paragraph 117
21 where I think you attempt to explain why interaction
22 reports, because reports of these various events I think
23 were prepared, you explain there why reports talked
24 about, and I quote, "finely balanced views", I think
25 that is as far as a public inquiry was concerned. I

1 think you make a point that one has to be careful to
2 understand why that is the way of putting matters. Can
3 you just explain what that point is?

4 A. Yes. The report of the interaction process incorporates
5 the views of all of those who took part, so the process
6 itself is a discussion between survivors, Government
7 officials, representatives of institutions, of the
8 Church, and so on and so forth, so the spread of views
9 represents in part the spread of participants.

10 Q. And when you look at the whole spread then perhaps that
11 is why you can say that there is a finely balanced view,
12 but that doesn't mean there is a finely balanced view
13 amongst survivors, for example, on the issue?

14 A. Correct, that is true.

15 Q. Can you tell us, and I do appreciate the reservations
16 that you have given already, can you tell the Inquiry
17 what was coming across most strongly from the
18 discussions with survivors who were wanting an inquiry?
19 What were they saying was the importance of an inquiry
20 for them? Did you get any particular flavour as to what
21 was uppermost in their minds about the need for
22 an inquiry?

23 A. I think I mentioned a slight hesitation in that when
24 anyone used the term "inquiry" or "investigation" they
25 may have had different processes in mind or different

1 expectations as to what it could deliver. But the
2 overriding impression was to ensure accountability, to
3 understand what had happened, where the failures lay, to
4 ensure that lessons, all lessons, were being learned,
5 and that necessary changes were put in place to avoid
6 those risks recurring.

7 Q. The interaction process produced an Action Plan.

8 I think a draft plan was published, if I understand it,
9 about August 2013 and a revised plan was published in
10 2014. You will correct me if I am wrong about that.
11 The plan was put out for consultation, and I think you
12 have already said that local authorities weren't
13 particularly good at responding to that, but -- so that
14 plan was formulated and put out for consultation, and if
15 we just have before us -- I will maybe just take you to
16 this briefly if I may. It's LIT.001.001.1240. I think
17 this bears to be an interaction -- an "Action Plan on
18 Justice for Victims of Historic Abuse of Children in
19 Care". I don't want to go through it in detail, but if
20 we go to page 6 perhaps and just scroll down. If we
21 look under "Purpose" it says:

22 "The purpose of the Action Plan on Justice for
23 Victims of Historic Abuse of Children in Care is to
24 agree and co-ordinate steps to implement the
25 recommendations in the Scottish Human Rights Commission

1 Human Rights Framework on the basis of the outcomes from
2 InterActions."

3 So that was the broad purpose of the plan?

4 A. Correct.

5 Q. If we move on to page 10, do we see that I think the
6 nature of this plan was that really there was perhaps
7 an attempt to secure certain outcomes which would
8 reflect the Framework and the recommendations and so
9 forth, and one was wanting to get -- I think the idea
10 was to get parties to commit to taking steps to try and
11 achieve the various outcomes, is that right?

12 A. Yes.

13 Q. If we look at page 10, I think under paragraph 1 in bold
14 in relation to what might be called an "investigation"
15 to use your expression rather than the more perhaps
16 contentious "inquiry", the way the matter was put in the
17 plan is:

18 "There should be a review of the lessons learned
19 from previous inquiries and related processes such as
20 the Historical Abuse Systemic Review [that is
21 the Shaw Review]. The review should consider what added
22 value a National Inquiry on Historic Abuse would have,
23 and should scope the potential costs."

24 So that was the way the matter was left in the plan,
25 is that right?

1 A. Yes.

2 Q. I think you told us in your statement before we reached
3 this stage or around the time of consultation you had
4 some degree of agreement from Scottish Government to
5 commit to some aspects of the Action Plan, was that ...?

6 A. Yes.

7 Q. But on the question of an investigation or public
8 inquiry, you hadn't got any agreement or commitment from
9 Government, is that right?

10 A. This form of words represents the best commitment we
11 could get.

12 Q. I think at paragraph 125, if we go back to your
13 statement, you do explain I think how the Action Plan
14 dealt with the issue of an investigation or inquiry and
15 why it dealt with it in that way. If we go to
16 paragraph 125, I think in essence what you are telling
17 us there is you wanted to keep that option open and that
18 was the way you did it at that stage to see if you could
19 make further headway, is that right?

20 A. Yes. The minimum is to ensure nothing was removed from
21 the table.

22 Q. We will probably hear this more directly from the
23 minister involved, Mike Russell, and he will explain why
24 this happened, but towards the final quarter of 2014 the
25 Scottish Government's position on an inquiry began to

1 shift quite considerably or markedly, at least in public
2 anyway. I think you were sensing that things were
3 moving perhaps in the direction of what you wanted to
4 achieve, of some form of investigation. Is that fair
5 comment?

6 A. Yes. Political momentum.

7 Q. You have a section headed "Final Thoughts" where I think
8 you are seeking to make what you consider to be some
9 important points. Can you just help us with the points
10 you are making at paragraphs 135 and 136?

11 A. So the first point in 135 is the one that I came back to
12 a moment ago; in terms of lessons, it is crucial not to
13 assume that, when we use the same terms, that we have
14 the same understanding of them, and it was true of
15 "investigation" or "inquiry". And, secondly, that
16 expectations are managed and the implication of certain
17 changes is understood, both what they can and what they
18 can't achieve, and that was the case with the time bar,
19 for example.

20 Q. I think the point about the time bar you are making is
21 that, yes, you can lift the time bar and that has
22 happened now by legislation, but it doesn't follow that
23 your case will necessarily be heard on its merits and
24 you will get the outcome you want?

25 A. Exactly.

1 Q. Because there are other considerations that bear on
2 that?

3 A. Exactly, yes. Many survivors spoke about the removal of
4 the time bar, certainly at the beginning of this
5 process, as though that would result in justice and
6 reparations and it may well not.

7 Q. Paragraph 136 makes a different point I think which
8 I think you also consider to be quite important, about
9 maybe how you categorise a situation where people are
10 looking for redress or justice or whatever, and how you
11 present the actions you are taking. Can you just tell
12 us what point you are making there?

13 A. Yes, I was really struck by a comment that
14 Colm O'Gorman, who is still Director of Amnesty
15 International in Ireland, who previously ran
16 an organisation called "One in Four" who is himself and
17 has written a book about his experience as a survivor of
18 abuse, he made in a round table that we held before we
19 finalised the human rights Framework, to caution against
20 any representation of any aspect, particularly
21 a confidential forum, as "therapeutic". It was the
22 experience of him and of others in Ireland that it can
23 be a very traumatic experience and I was making the
24 point that I felt uncomfortable when I believe
25 Scottish Ministers even represented a confidential forum

1 gives us time to do the cleaning we do between
2 witnesses. That is fine. I will rise now and sit again
3 at 1.45 pm.

4 (12.37 pm)

5 (The short adjournment)

6 (1.47 pm)

7 LADY SMITH: Mr Peoples.

8 MR PEOPLES: The next witness is Fergus Ewing.

9 LADY SMITH: Thank you. (Pause).

10 Thank you. Could we begin, please, by you raising
11 your right hand and repeating after me ...

12 MR FERGUS EWING (sworn)

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

14 I see you have brought a bundle of papers with you
15 which no doubt have your own notes on. Do feel free to
16 use them if you find that helpful, it's important that
17 you are as comfortable as you can be when giving
18 evidence. Your statement is also in that red folder
19 beside you, and it will come up on screen as we refer to
20 it, so you have those available to you as well.

21 A. Thank you.

22 LADY SMITH: Tell me this: what would you like me to call
23 you? Mr Ewing or Fergus?

24 A. Fergus is fine.

25 LADY SMITH: Very well, Fergus, I will hand over to

1 Mr Peoples and we will take it from there.

2 Questions from MR PEOPLES

3 MR PEOPLES: Good afternoon.

4 A. Good afternoon.

5 Q. Can I begin just for the purposes of the transcript in
6 these proceedings, you have provided a written statement
7 to the Inquiry before giving evidence today which is
8 WIT-1-000000341. You needn't concern yourself with
9 that.

10 A. Yes, I have provided a statement.

11 Q. If I could ask you at the outset if you could turn to
12 the final page of the statement that you have provided
13 and confirm that you have signed your statement?

14 A. Yes, I did. I remember signing it. This is redacted,
15 but ...

16 Q. Yes, sorry, the one that is coming up. But I think you
17 can confirm that behind that there is a signature that
18 you put on 10 March of this year?

19 A. Yes.

20 Q. Can you also confirm you have no objection to your
21 witness statement being published as part of the
22 evidence to the Inquiry and that you believe the facts
23 set out in your statement are true?

24 A. Yes, I can.

25 Q. Can I begin just with -- you have been a member of the

1 Scottish Parliament since 1999?

2 A. I have.

3 Q. You have held various ministerial posts and indeed you
4 have one at present. Can I concentrate on one period of
5 ministerial office because I think you were the Minister
6 for Community Safety between November 2007 and May 2011?

7 A. I was.

8 Q. Was that a Minister within the Justice Department of the
9 Scottish Government?

10 A. Yes, it was effectively Deputy Justice Minister,
11 supporting Kenny MacAskill who was the Cabinet Secretary
12 for Justice.

13 Q. You will appreciate that today with you I will focus on
14 issues relating to adult survivors of non-recent abuse
15 in institutional care.

16 So far as ministerial responsibility is concerned
17 for such issues, I think you tell us in your statement
18 that you were involved with in particular the law of
19 prescription and limitation applying to claims for
20 compensation which survivors wished to pursue arising
21 out of historical abuse, is that correct?

22 A. Yes, that was -- that was the issue which fell to me to
23 deal with as opposed to other colleagues.

24 Q. Yes, you can take it -- we have already heard in fact
25 from Adam Ingram and Shona Robison, both oral and

1 written evidence, and they have explained their
2 responsibilities so far as health and education are
3 concerned, so we have a grounding and a background so
4 you don't perhaps need to explain that to us.

5 A. Okay.

6 Q. So there were three ministers with a ministerial
7 interest in these issues. We have already heard there
8 were some important developments in 2007, towards the
9 end, the publication of the Shaw Review in
10 November 2007, and the publication of the Scottish Law
11 Commission Report on prescription and limitation
12 in December of that year.

13 We have also heard there was an important decision
14 of the House of Lords in Bowden in May 2008 which
15 effectively upheld decisions not to allow claims
16 concerning non-recent abuse to proceed out of time. It
17 sent a marker that those cases would not generally be
18 allowed to proceed to a hearing on the merits.

19 And I think you will be aware of this: the Scottish
20 Law Commission in 2007, December, had produced a Report
21 in which they recommended no change to the law of
22 prescription which meant that pre-1964 claims for
23 compensation for past abuse could not be brought to
24 court?

25 A. Yes.

1 Q. So I think that is all the background that, to some
2 extent, you and other ministers had to deal with?

3 A. It was. And I did just try to briefly refresh my memory
4 as to the contents of the SLC December 2007 Report
5 before I came along, just in case matters came up,
6 because my memory is such that I couldn't remember much
7 of the detail, I am afraid.

8 Q. I am not going to take you to too much detail, I will
9 perhaps raise a couple of points in due course, but you
10 will probably have picked those up as part of your
11 preparation for today.

12 In a sense you were responsible for the response
13 from Justice, if you like, to these developments I just
14 mentioned. The Inquiry has already been told by
15 Adam Ingram that you had really come to the conclusion
16 that it was impossible or almost impossible for people
17 who had been abused many years previously to have
18 effective access to the civil justice system, so that
19 was the situation you were confronted with. Would that
20 be a fair comment?

21 A. I think as an overall conclusion, yes, that is. But
22 I would divide it into prescription and limitation, and
23 I think they needed to be considered separately by me
24 and they were considered separately because there are
25 different arguments.

1 Q. Yes, I will come perhaps --

2 A. But overall I reached the conclusion that the legal
3 route, the civil legal route for old cases is extremely
4 challenging because of the law of prescription and
5 limitation. And also I guess it's impossible to
6 disassociate one's own personal experience from one's
7 approach to making decisions, and as a solicitor of some
8 years in practice, I was not unfamiliar with the
9 difficulties of sufficiency and reliability of evidence
10 at the best of times, even for matters which occurred
11 few months back. But for matters that occurred decades
12 ago, I had kind of a sense of just how difficult it is
13 for someone, even someone in the appalling situation of
14 having faced sexual abuse as a child, to come to court
15 decades later.

16 It's a very difficult area for the law, and that is
17 really why the law of prescription and limitation
18 I guess exists, to create a set of rules that is
19 relatively clear about what cases can go to civil claims
20 pursuit and what cannot. And I was also aware of the
21 distinction that these matters -- prescription, cutting
22 off a claim, and limitation, limiting a claim -- were
23 civil law matters. And of course in theory there is
24 also the right of every citizen to make a report to the
25 police and Procurator Fiscal, and so on, and pursue

1 matters through the criminal court. But of course the
2 trouble with that is the standard of evidence beyond
3 reasonable doubt is an even higher bar, in fact a much
4 higher bar.

5 I am just saying that, sir, because that was the
6 background, rightly or wrongly, with which I approached
7 the task of providing advice to my colleagues in
8 Government on the legal situation.

9 Q. And I think you are making a general point that even
10 if -- and this is speaking of limitation at the
11 moment -- even if one could address and overcome the
12 barrier of limitation, I think the point you are making
13 is that that was no guarantee that, if you had your day
14 in court, or tried to have your day in court, that the
15 outcome would be the one you desired because of some of
16 the difficulties you have explained, the legal
17 requirements of corroboration or the passage of time,
18 loss of evidence, recollection, and so forth?

19 A. All these factors were in my mind.

20 Q. I will come back to how you I think explained the
21 position of the Government in relation to the response
22 to the report, but before I get to that can I ask you
23 this, some questions about a public inquiry. Between
24 December 2007 when the Law Commission Report was
25 published and Adam Ingram made a statement in Parliament

1 on 7 February 2008 on behalf of the Government, can you
2 recall any ministerial discussion about whether there
3 should be a public inquiry into non-recent abuse of
4 children in institutional care, which of course was one
5 of the things that was called for way back in
6 August 2002 by Chris Daly in petition PE535. So can you
7 recall any discussions along those lines at that time?

8 A. I am afraid I can't recall any discussion in which
9 I participated. And just re-reading the statement and
10 other papers before, I think I would have recalled if
11 I was involved in a major discussion. I was not
12 involved in that many meetings, and I do have
13 a recollection, albeit somewhat vague, of the meetings
14 to which I make reference in my statement. So I infer
15 from that that I was unlikely to have been involved in
16 any discussion about whether or not a public inquiry
17 should or should not be held because that really wasn't,
18 if you like -- that was outside the somewhat narrow,
19 restricted scope of my remit as a minister, which was
20 restricted to looking at the complex legal issues about
21 prescription or limitation as they applied to victims of
22 sexual abuse.

23 Q. I suppose it might be said, if one is looking at the
24 question of an inquiry, the Justice Department, just
25 looking at it globally, would have an interest in that

1 issue because of perhaps issues such as how it might
2 interact and interplay with the legal system?

3 A. Absolutely. And let me stress, I guess one of
4 the reasons why there was more than one minister
5 involved was because this was taken very seriously by
6 Government, of which I formed part, and I think our
7 predecessors, and by Parliament as a whole. Everyone
8 felt that what happened required redress of some form,
9 the question was what.

10 My view was that legal redress through the civil
11 courts was extremely challenging. It was impossible for
12 some, prior to 1964, because of prescription, as
13 I understand it, and that had been reviewed in 1984, as
14 I reminded myself, before the 2007 reconsideration, so
15 that is -- the SLC Report pointed out it was a 43-year
16 lapse, which is a long, long time for someone to
17 remember what happened.

18 However, my role was really kind of restricted to
19 the legal side, and I guess from a layman's perspective
20 it was: is there a real opportunity for the law, the
21 civil law, to provide kind of a fair chance for a remedy
22 in practice? I am afraid I thought, because of all the
23 difficulties that we will probably go on to discuss in
24 a bit more detail, that the practical answer was likely
25 to be no in most or all cases. And I think the

1 relevance of that is what I was saying is, "Well, it's
2 really over to you, colleagues, Adam and Shona. We need
3 to find another way to deal with this". Because the
4 civil courts might in theory be available for limitation
5 cases, but it's very difficult, a very narrow set of
6 criteria I think -- I am no expert in this,
7 incidentally, so forgive me, I don't want to sound as if
8 I am being pedantic here, because I am not an expert.
9 But my understanding was the rules about limitation, to
10 overcome the time bar, mean that it's a very difficult
11 hurdle to overcome, and that seemed to be what was
12 happening in the judicially decided cases.

13 Therefore I reached the conclusion that we wanted to
14 provide a solution for people who had been through this
15 appalling situation. I am quite sure every minister of
16 whatever Government, whatever party, had the same view,
17 but my view was the legal route was just not really
18 likely to be of any practical benefit or even
19 availability.

20 And not just that, but the stress involved in going
21 to challenge someone in the civil courts, it's
22 an adversarial process. That factor also was I think
23 not irrelevant, that, you know, do you want to put
24 people through the extreme pressure of being a litigant?
25 I saw in practice what that meant for people in cases

1 involving money or whatever. It tends to take over
2 people's whole lives, and the tension -- they couldn't
3 talk about anything else.

4 So to put people who had been through this
5 unimaginably dreadful experience through a further
6 hurdle of going to civil court also seemed to me to be
7 something that just wasn't a great solution. Therefore,
8 I guess -- I don't mean to say this passing the buck,
9 but it was really over to colleagues who were dealing
10 with other aspects of it to pursue a more practical
11 outcome, as has subsequently been done to some extent
12 but by no means sufficiently.

13 LADY SMITH: Fergus, just going back to the matter of
14 a public inquiry. We are at 2007 and at that time there
15 was new on the books the Inquiries Act 2005. Are you
16 saying that the Justice Department wouldn't have taken
17 to do, to use an old Scottish expression, with assisting
18 those who had this under consideration as one of
19 the things they might look at, just what the
20 implications of an inquiry under that legislation were.
21 For example, that the inquiry wouldn't determine
22 criminal liability or civil liability, that the Chair
23 would have a wide discretion as to the way the inquiry
24 was conducted, and so on, and that there were separate
25 Scottish procedure rules?

1 A. I'm not saying these matters were not considered.
2 What I am saying is I wasn't really asked to consider,
3 within the specific limited remit that I had, to go
4 beyond that. I'm not saying they weren't considered;
5 I don't know to what extent they were considered because
6 I just wasn't involved in that work. I can't speak for
7 others in the Justice Department, Kenny MacAskill, and
8 I can't speak for Mr Ingram, nor should I. But I was
9 asked to do a fairly narrow piece of work as part of
10 an overall jigsaw of considering the situation.

11 So I am afraid, my Lady, I just can't answer the
12 question of whether or not consideration was given to
13 that. But what I can say is that it wasn't something
14 which was given to me as a remit, I had just the very
15 narrow remit that I have tried to set out in the
16 statement, and here we are.

17 LADY SMITH: Thank you. Mr Peoples.

18 MR PEOPLES: Adam Ingram has told the Inquiry that at the
19 time these matters were under consideration, in late
20 2007/early 2008, the Scottish Government was not looking
21 at having a public inquiry. I appreciate all the things
22 you have just said, but are you disagreeing with that or
23 are you just saying "I don't know"?

24 A. I don't know. And there is another reason I think
25 I should try and make clear why I don't know, because it

1 might seem to the lay person odd that ministers don't
2 know things. But number one, we are doing a huge number
3 of different things all the time, and that is just -- we
4 are just extremely busy as ministers. But more
5 important, the main discussions about policy matters
6 really take place in or around the Cabinet, and I wasn't
7 in the Cabinet. I would only attend the Cabinet for the
8 process that applies if Kenny MacAskill was unable to
9 attend, and he was an assiduous attender. So I think in
10 the whole four-year period that I was Kenny's junior,
11 in effect, I stood in for him on a handful of occasions
12 and I cannot remember being at any Cabinet meeting where
13 that was discussed, but I would be very surprised if the
14 public inquiry issue weren't considered or discussed at
15 Cabinet level.

16 And nor do I know whether Adam actually -- he was a
17 junior minister as well, whether he attended Cabinet.
18 Because sometimes a junior minister will attend Cabinet
19 to make a presentation on an important piece of work,
20 and this was an important piece of work. So I am afraid
21 it is not that I am contradicting him, I just really
22 don't know what consideration was given to whether or
23 not there should be a public inquiry.

24 I do recall that there was a sort of sequential
25 element to how things seemed to be being dealt with.

1 What I recall was that Adam Ingram and Shona Robison
2 were wanting a forum using a confidential model, Time To
3 Be Heard or something of that nature, and I think that
4 went on to be tried out with Quarriers in some shape or
5 form, but --

6 Q. I will come to that. I think you were actually at the
7 meeting that that decision was taken?

8 A. Yes.

9 Q. So I will maybe come to that, if I may.

10 Just sticking on the question of the inquiry, and
11 you have told us what your position on that was.
12 Shona Robison wasn't a member of the Cabinet at that
13 stage either, she was a more junior minister, but she
14 told the Inquiry as part of her evidence that there were
15 concerns at ministerial level around a public inquiry
16 taking a long time and perhaps not necessarily providing
17 the desired outcome for everyone in whose interests it
18 was established. Did you get any sense of those
19 concerns when you were Minister for Community Safety in
20 that period?

21 A. I just can't remember any discussion in which I was
22 involved where there was consideration of the -- whether
23 or not there should be a public inquiry. I am afraid
24 I just can't remember any discussion about that in
25 relation to this matter. It may have taken place at the

1 meeting to which you refer, but I am sorry, I just can't
2 remember after this length of time.

3 Q. So if I was to ask you whether the First Minister, at
4 that stage Alex Salmond, had the sort of concerns she
5 mentions about taking a long time and not necessarily
6 providing the desired outcome, would you be able to
7 comment on that?

8 A. No, I don't think I ever had a discussion with Alex
9 about this.

10 Q. Obviously you were the Deputy Justice Minister. Could
11 you tell me, or are you able to say whether the Cabinet
12 Secretary for Justice, Kenny MacAskill, had the concerns
13 that Shona Robison mentioned to us, or would you know
14 about -- he had concerns about the implications of
15 a public inquiry --

16 A. I don't recall any discussion with Kenny. As I said in
17 my statement, we did have regular weekly meetings.
18 These tended to focus very much on the practical matters
19 he was dealing with, police numbers and things like
20 that, prison populations, very practical matters.

21 I have been thinking about this: why wasn't
22 I involved in the discussion about a public inquiry?
23 I can only infer that it was (a) because I had a very
24 narrow remit, and (b) because actually Adam was kind of,
25 I thought, more or less in the lead here, and therefore

1 it wasn't a piece of work where Kenny was in the lead
2 where it's likely he then would have discussed this in
3 the course of weekly meetings because, to be quite
4 candid, most of the time in weekly meetings were taken
5 up by his business, which trumps mine as the junior
6 minister, and also tended to be in the political scheme
7 of things somewhat more important or sensitive. That
8 was just the way it was.

9 So Kenny wasn't really dealing with this, so maybe
10 that is why we didn't have a discussion about it. And
11 I certainly can't remember, I am afraid, any specific,
12 focused discussion on whether or not there was to be
13 a public inquiry, because it is a perfectly valid point
14 and I am absolutely sure that the Inquiry will focus on
15 this and look at all the evidence. I am just sorry
16 I can't help you more on it because I don't have any
17 real evidence to offer on it, frankly.

18 Q. So you can't really give us a view on whether Kenny
19 MacAskill is a supporter of a public inquiry in relation
20 either non-recent abuse of children or indeed on any
21 other issue, you don't know what his views are. So if
22 it was a matter that might have been discussed in
23 Cabinet we would have to ask others --

24 A. I think so, yes. I think so.

25 Q. I think we may be able to do that so I will pass on, if

1 I may.

2 I touched upon the statement by Adam Ingram to the
3 Scottish Parliament on 7 February 2008. In that
4 statement there was an announcement of a proposal to
5 look at a truth and reconciliation model. I appreciate
6 I think in your statement you say you don't have a lot
7 of recollection of the statement although you think you
8 were in Parliament that day, but I think it represented
9 the Government's position by way of responses to the
10 Shaw Review and indeed perhaps the Scottish Law
11 Commission Report at that time, I think that is what
12 others are telling us. Would you go along with that at
13 least, that that was the formal response to Parliament?

14 A. Yes, that was my understanding --

15 Q. At that stage the focus was on looking at that and it
16 was perhaps seen as a model other than a court process,
17 which would to some extent address issues of importance
18 to survivors such as acknowledgement of past abuse and
19 accountability for that abuse having occurred. So that
20 would have been, I think, the general aims?

21 A. Indeed.

22 Q. And I think maybe, given the background you have said
23 and the conclusions you reached about the legal avenues,
24 that probably was an explanation why they were looking
25 at alternatives?

1 A. Yes. I had said "Look, the legal route is of no
2 practical value and could in fact be very hurtful and
3 harrowing, but in any event it is just not practical,
4 and therefore let's ..." Other solutions seemed to me
5 to be the way forward but I wasn't in charge of them,
6 but I do recall the Time To Be Heard approach was one
7 that Adam I think spent a lot of time on and it took
8 a lot of Parliamentary, quite rightly, focus and
9 attention. But because he was the lead I kind of left
10 him to it and got on with my job.

11 Q. He did tell the Inquiry this type of forum made sense to
12 him, because it was a forum where survivors could speak
13 about their experiences and perhaps have abusers and
14 organisations which had employed them involved in the
15 hope of bringing together, in that forum, people as
16 a healing process and to bring some closure to some
17 survivors. He said something along those lines.

18 Did you have any view on that matter at the time?
19 Did you share that view, that it made sense to pursue
20 a truth and reconciliation forum, can you recall?

21 A. I think my view was that this was the pathway that was
22 decided and that it should therefore be pursued because
23 it was Government policy. I cannot really recall now
24 whether I offered any reflections on the utility of that
25 from the point of view of the survivors, the victims.

1 But my understanding was that it was designed to provide
2 an informal opportunity in a confidential, sympathetic
3 forum for those who had been through these experiences
4 to share them.

5 The term in common parlance, which I think is a bit
6 hackneyed and suggestive of Hollywood movies, was
7 "closure". I am not sure I am ever really satisfied
8 that closure is something that is possible in these
9 cases, but I suppose the idea was to try to provide
10 a method of allowing these people, victims, to be heard,
11 something that hadn't taken place by the State. They
12 probably confided in family members and friends, but not
13 the State. The State had not given them the opportunity
14 to relate and explain their experience.

15 Of course, the downside about any such forum is that
16 it doesn't lead to any financial compensation, and as
17 a solicitor I was acutely conscious that that was the
18 case. But I think it was in my mind, and I just can't
19 be sure about this, that there would be a sequential
20 process, that the Time To Be Heard forum therefore could
21 be followed by compensation. And I think I was aware at
22 the time that the compensation had been recommended
23 I think by the SLC in one of its -- at the end of its --

24 Q. I'm not sure it went quite in that way but we can maybe
25 explore that.

1 A. In other words, what I am trying to say is that Time To
2 Be Heard was to become a policy so I supported it.
3 You're in the Government, you support the policy.
4 I don't think I questioned it particularly, because it
5 was determined and I felt it was worth trying, but its
6 limitation was that, one, you can't really expect that
7 in itself to bring closure, whatever closure means.
8 And, secondly, it wouldn't provide practicality of
9 financial redress. Therefore, I had hoped that there
10 would be a sequential process where the financial
11 redress is something that we -- it wasn't an issue which
12 I was involved with, but perhaps it might be dealt with
13 in due course after the Time To Be Heard forum.

14 But maybe I am saying all this with the benefit of
15 hindsight, because I just can't, I am afraid, remember
16 the detail of the conversations that we had which were
17 fairly few in number anyway.

18 Q. I think what I was trying to say there was that
19 Adam Ingram announced a truth and reconciliation type
20 model that would be explored in February 2008, and he
21 said why it made sense to him and told the Inquiry why.
22 But in fact over time, by the time we got to the
23 following year, to 30 September 2009, there was
24 a ministerial meeting which you attended, Shona Robison
25 attended and Adam Ingram attended, and ministers

1 collectively decided to follow a recommendation at that
2 stage by officials and go down the confidential forum
3 route, Time To Be Heard as it became?

4 A. Yes.

5 Q. Which I think Adam Ingram said to us was a rather
6 different model than the one he had in mind when he
7 stood up in Parliament the year before. Because truth
8 and reconciliation involves a number of parties; the
9 confidential forum, although it involved an organisation
10 being selected to pilot, it wasn't a participation model
11 where organisations, abusers and survivors were all
12 together in a process of reconciliation or healing.

13 Do you see the point he is making? It was a rather
14 different model to the one he started off announcing in
15 Parliament the year before. He said it was.

16 A. I hear what you say. I can see the point you make.
17 I don't think earlier I said we had agreed to have
18 a truth and reconciliation model, which at the time, I
19 think, was it not associated with South Africa? So on
20 that kind of model. I don't think I did suggest that
21 that was what was agreed. What was agreed was Time To
22 Be Heard.

23 Q. You are perfectly right.

24 A. I don't think I had really thought further than how
25 would that work out in practice, mainly because it

1 wasn't my job to do it, so I was --

2 Q. Do I take it that between Adam Ingram's statement
3 in February 2008 and the ministerial decision on what
4 became Time To Be Heard in September 2009, you wouldn't
5 be directly involved or even keeping watch on what was
6 going on in that process? You simply went to the
7 meeting. You weren't the lead minister. There was
8 a recommendation. I think Adam Ingram questioned
9 whether the model was strong enough, there is a note of
10 that, but ultimately that was the agreed model. So are
11 you saying that --

12 A. That is fair.

13 Q. Is that is the way it --

14 A. Adam was in the lead, he was dealing with it. I had
15 every confidence in Adam and his desire to try to do
16 justice to this issue as best he could.

17 Q. I think actually Adam Ingram probably, from his
18 perspective, thought Shona Robison was the lead
19 minister, so you must have thought differently because
20 he spoke up in Parliament. But if I am correct, I hope
21 I am, she was seen very much as the driver of this, and
22 indeed it had been her officials I think who had put
23 together a briefing for that meeting.

24 A. I can't remember who did the briefing, and because my
25 role was peripheral I don't have a recollection of that

1 meeting. And I hope this doesn't sound callous to
2 anyone who is watching who has been through these
3 experiences, it is simply that in Government you have
4 quite a lot on your own plate to deal with and you
5 generally don't, and are not well advised to, start
6 telling your colleagues -- who are working hard, doing
7 their best -- how to do their job unless you are
8 absolutely certain that you know there is a serious
9 flaw, in which case, yes, I think you have a duty to
10 express it. But it's not something you would do every
11 day or do lightly, and especially not a junior minister,
12 because I hadn't been involved in any of the Cabinet
13 discussions.

14 Moreover, although I think I did attend the debate
15 with Mr Ingram, by and large you don't really, as
16 a minister, have time to attend other people's debates.

17 LADY SMITH: That is the January 2008 one?

18 A. Exactly.

19 LADY SMITH: Sorry, February, the beginning --

20 A. Yes. I think you do go and support your colleagues if
21 you are working with them on an issue, that is a sort of
22 convention, if you can. But by and large, and I hope
23 I am not giving State secrets away here, you are busy
24 doing other things. So you can't sit in Parliament all
25 day and listen to everything else that you are not

1 responsible for. You are away, out speaking to people
2 about doing what you are responsible for.

3 LADY SMITH: I imagine you don't remember exactly when this
4 first was, but have you any feeling for when the three
5 of you, that is you, Shona Robison, Adam Ingram, talked
6 together about these issues?

7 A. Do I have any what, sorry?

8 LADY SMITH: Any recollection of approximately when the
9 three of you talked together about these issues?

10 A. The only recollection I have was there was the one
11 formal meeting that we had which ... I am just
12 struggling to remember when exactly that -- but
13 what I am saying is I think it was -- my recollection is
14 it was one meeting and one meeting alone where the three
15 ministers were together. It doesn't actually happen
16 very often.

17 LADY SMITH: So that would be the 30 September 2009 meeting
18 that we know about, would it?

19 A. I think so, yes.

20 LADY SMITH: What about one-to-one conversations, that is
21 you and Shona or you and Adam?

22 A. I cannot recall having any direct conversations with
23 them. That doesn't mean they may not have happened.
24 But the whole explanation for this, my Lady, is just
25 that my role I felt was a very restricted role. I tried

1 to perform that, but that really was it. Although the
2 issues involved in prescription and limitation are not
3 straightforward, the conclusion I reached was, as I have
4 said, fairly simple, that the legal route wasn't going
5 to provide much practical benefit to anybody, and
6 therefore it was over to you, Adam and Shona, although
7 I did think that Adam was basically in the lead because
8 he was the guy standing up in Parliament, and I was
9 aware that he was doing a lot of -- I was aware in the
10 background, because you see what Parliamentary business
11 there is, and Adam seemed to be pretty active in taking
12 this forward.

13 There were lots of MSPs who pursued this issue over
14 the years, of all parties I think, so it was constantly
15 being raised in Parliament, and one is kind of aware
16 when that is the case just generally. But I didn't have
17 sidebar discussions. Frankly, ministerial life is too
18 busy to shoot the breeze in that kind of way, at least
19 it is for me anyway. So you just don't really tend to
20 have sidebar discussions about these things unless there
21 is a particular need or reason and there was no need or
22 reason for me to do it.

23 LADY SMITH: What prompted you to go to the debate
24 in February of --

25 A. It's just a convention, my Lady, that if you are

1 involved in a topic in any way then ... There is a kind
2 of convention that you should be there to support your
3 colleague.

4 LADY SMITH: I understand that. But would somebody else
5 have drawn the debate to your attention? Did you notice
6 it yourself? Did Adam say to you --

7 A. No, I would have been told by the whips office.

8 LADY SMITH: The whips office would have told you?

9 A. Probably. Or private office, private secretary. You
10 know private secretaries --

11 LADY SMITH: Yes.

12 A. -- are in touch with the whips office. So it might have
13 come through my private office, "Look, you had better --
14 listen, Adam is doing the debate, you had better go and
15 sit in for the openings, for the openers", that is how
16 it's normally put, and you would go out of respect to
17 Parliament. And also, because it is such an emotive
18 issue, you wanted to actually physically be there if you
19 possibly could, just out of respect.

20 MR PEOPLES: There is maybe another explanation also, if
21 I can put it to you, that he was making a statement on
22 behalf of the Government and he was responding to both
23 Shaw and the Law Commission, and in doing that, and in
24 saying that the Government was to an extent accepting
25 the Law Commission's recommendations, he was dealing

1 with a matter which was within your remit --

2 A. That is true.

3 Q. -- so maybe for that reason it would be relevant that
4 you were at least present by his side when that was
5 being said. Would that be a possible explanation for
6 your presence that day as well?

7 A. Yes, it would be.

8 I should also have said, my Lady, for the sake of
9 completeness, it could have been the special advisers
10 who very often say "Get yourself down to the Chamber
11 pronto". So it could have been private office, special
12 advisers or the whip, but it kind of happens by and
13 large.

14 Q. I appreciate that life in Government is busy and maybe
15 you don't have time for too much small talk, but what
16 you are saying, I have this picture where you have to
17 just focus on your brief and really there is not a lot
18 of time, formally or informally, for discussions on
19 other issues. We have heard evidence of another
20 administration and the way it operated before 2007 where
21 one of the points that seems to have come out in this
22 Inquiry is that quite a lot of things were done by way
23 of informal discussions which weren't always formally
24 recorded. That was sometimes the way people chatted
25 about big issues, reached views on certain matters and

1 took them forward. So maybe things were done rather
2 differently under the new administration post-2007,
3 would that be ...?

4 A. I wouldn't infer that from what I have said because my
5 role was so restricted that there was no reason for me
6 to become involved in informal discussions. And I can't
7 speak for the previous administration. But I can say in
8 the work I do I have a series of informal discussions
9 with colleagues regularly, so I am not -- the key thing
10 here is the limited, well-defined, restricted scope of
11 what I had to do. That is the key -- to me it is the
12 key thing here, which is why I didn't have sidebar
13 discussions when I wasn't involved. I wasn't in the
14 Cabinet, I wasn't involved in taking this forward. My
15 job was kind of done, I thought, and that was that
16 really. But, yes, sidebar discussions take place in
17 every Government, I expect.

18 Q. Can I ask you this, just one issue about this decision
19 that ministers took on 30 September 2009. Can you
20 recall, in choosing the confidential committee option
21 rather than some other model at that time, whether costs
22 were a factor in that decision in terms of the cost of
23 that model as opposed to the cost of other models that
24 might be under consideration?

25 A. I am afraid I just can't remember.

1 Q. You can't remember. We have seen the briefing, I don't
2 think there is much point in taking you to the briefing
3 or the note, but we do see there --

4 LADY SMITH: I wonder if it would help Fergus to see the
5 briefing because he would have had it at the time.

6 MR PEOPLES: Very well. SGV.001.001.8028.

7 That is a briefing that was provided to four
8 parties, including yourself, on 24 September of 2009.
9 Does that ring any bells now that you see it? It
10 clearly went to you.

11 A. No, it doesn't ring any bells, I am afraid.

12 Q. We'll just have a quick look at it.

13 A. Yes.

14 Q. In the body of the briefing, the purpose is to provide
15 a briefing for the meeting that was to take place on
16 30 September and to decide whether to pilot
17 an acknowledgement and accountability forum for adult
18 survivors and to try and agree on a model from a range
19 of options which are set out in annex A. We see there
20 that there is a reference to the background, including
21 Adam Ingram's statement in paragraph 2. I don't need to
22 take this at too much length, I hope. We see there was
23 a consultation exercise about an acknowledgment and
24 accountability forum between October 2008
25 and April 2009, that is paragraph 3., and there was some

1 attempt to describe the outcome of the consultation
2 process. Also there is some reference in paragraph 4 to
3 the involvement of the Scottish Human Rights Commission
4 to provide a Human Rights Framework which would inform
5 the design of an acknowledgement and accountability
6 forum.

7 So we see all of that, which no doubt you presumably
8 would have read at the time, do I take it?

9 A. I would have expected to have read it at the time. Yes.

10 Q. We see there that one matter that is flagged up in
11 paragraph 4 is the cost of the Irish model, if I can
12 call it that, €136 million, over 60% of which was spent
13 on legal costs, so --

14 LADY SMITH: That is a reference to the Ryan Commission in
15 Ireland which was a public inquiry.

16 A. I must admit I can't recall that information and having
17 considered that information, so ...

18 LADY SMITH: What about the last sentence:

19 "We are seeking to ensure that we keep within
20 a modest budget and the proposals are designed
21 accordingly."

22 A. No, I just can't remember that particular submission.
23 I mean, now that I see it ... My view in approaching
24 this meeting was that my role was really only there to
25 discuss any legal matter which I had been dealing with.

1 My view was that Adam was pursuing this, and he was
2 pursuing this with a great deal of care and
3 attentiveness. Essentially that was his job. So
4 therefore I wasn't going to start to kind of, as I saw
5 it, interfere and offer my views because I felt that he
6 was not only well capable of doing his job but he was
7 very determined to do it as well as he possibly could.

8 Therefore I kind of -- it's not a debating society
9 we are having here, we are trying to work as a team to
10 get the best outcome. I had formed the view, rightly or
11 wrongly, that this was being taken very seriously by us
12 all and my colleagues were leading it, and therefore it
13 really wasn't for me to start to second-guess their
14 opinion. That may have led me not to study the papers
15 in detail. I just can't remember reading that. I think
16 I would have, but I just can't remember having read that
17 at the time. The background was as I've tried to
18 explain a few times now.

19 LADY SMITH: Fergus, you went on and went to the meeting on
20 the 30th. What were you taking to the meeting?

21 A. I was asked to go to the meeting so I attended. Quite
22 a lot of meetings you go to you play no part in, no
23 major part. You don't always know in advance,
24 of course, what matters are going to arise, but I had
25 had an involvement so I was on the submission. So

1 I went to the meeting, because it was my job to go to
2 the meeting, but I don't recall playing, my Lady, any
3 part in that meeting at all, because I didn't feel it
4 was my role so to do.

5 MR PEOPLES: Maybe just before we -- could I look a little
6 further at the briefing, if I may, at annex A. This is
7 what is called an options appraisal. You will have seen
8 plenty of those in your time, I imagine, as a minister,
9 that officials set out various options for choice.

10 A. Yes.

11 Q. And it goes through the different possibilities. I'm
12 not going to go through all of that, but yet again if
13 I could draw your attention in that section, annex A,
14 the first page, paragraph 3, we see in bold that the
15 majority of the expenditure in Ireland was on legal fees
16 for appearances before what was called the Investigation
17 Committee, which was not a model that was accepted by
18 ministers. You and others went down a different route.
19 So it is being flagged up there, the large costs of the
20 Irish model, the Ryan Commission model.

21 Then there are various options set out: no action,
22 confidential committee model, which was the one that
23 ministers decided on. And again at paragraph 9 in
24 option 2, if we go down, we see yet again in bold:

25 "In Ireland nearly 60% of the Commission's costs

1 [the Ryan Commission] were to cover legal fees for
2 survivors' institutions, Government departments and the
3 Commission itself, but this expenditure was not incurred
4 as part of the Confidential Committee's work."

5 So it is again being stressed there in bold.

6 Then there is option 3, which is the following page
7 investigation committee model. Then there is the
8 combination, option 4, of confidential and investigation
9 committees, which is also referred to and discussed. In
10 the conclusions section of annex A we see that the
11 officials are recommending option 2, the confidential
12 committee model, and that is the one that ministers
13 decided.

14 So we see all of that. If I could take now just to
15 the meeting itself. There is a very short note, I have
16 to say, of the note of ministerial meeting and I will
17 just put that to you.

18 LADY SMITH: Before that comes up, whilst it's being
19 searched for, Fergus, what we have here is a briefing in
20 which you are included as one of four ministers, and
21 this is for a meeting at which a decision is going to be
22 taken on one of these four options, or I suppose one
23 possibility is the decision could be: we are not doing
24 any of these.

25 A. Could be.

1 LADY SMITH: Wouldn't you have needed to form a view, take,
2 for example, whether it was relevant to look at
3 potential costs of an inquiry as opposed to the other
4 options, if you were going to be asked to participate in
5 the decision-making?

6 A. In general terms, yes. I am afraid I cannot recall
7 clearly whether I played a part in that meeting. It is
8 fair to say, and I think -- I don't think anyone would
9 contradict it, that I do very often question the
10 expenditure of public money and value for money, and
11 indeed I think frankly I am known to do that, and
12 therefore if it seems to me that there are questions
13 about whether, by expending public money, we will
14 achieve things, then I'm not slow to point that out.
15 Nor am I slow to point it out when lawyers would be the
16 main beneficiaries of the expenditure of an enormous
17 amount of money where, frankly, one would want those who
18 receive any pot of money that's available to be the
19 survivors.

20 It may well be that I offered that view at the
21 meeting, but the backdrop I am trying to put forward is
22 that I had confidence in my colleague's handling of this
23 matter. It was obvious that this was a major piece of
24 work and I was taking a lead from him.

25 Ultimately, putting it another way, my Lady, had

1 they decided to go down the Irish route and spend
2 136 million, then if I was true to type I would most
3 certainly have intervened and said "Why are we spending
4 all that money on lawyers, with all respect to lawyers,
5 when we should be giving it to provide some finance
6 redress to the victims?" Although that then gets the
7 difficult question of who is the victim and what is the
8 criteria for establishing entry to that category.

9 But that wasn't the case. Nobody was suggesting we
10 should go down the route of blowing 136 million of
11 public money on lawyers' fees.

12 LADY SMITH: It is one of the options that's put forward.
13 The officials are not pushing that option, but it is one
14 of the options there --

15 A. Well, nobody was --

16 LADY SMITH: -- information.

17 A. I can't recall anybody pushing that as an option. What
18 I am saying is had somebody said "Let's spend
19 136 million on lawyers", unless I was just not playing
20 a proper part in the meeting, and usually I do
21 participate in meetings where appropriate, had they gone
22 down the route of saying "Let's go down this route of
23 spending all this money on lawyers", I am pretty sure
24 I would have said "No, no, no", because that is what
25 I do, I challenge officials every day to back up the

1 expenditure of public money by giving proper details of
2 who is getting it, where it's going, and what it is
3 going to achieve, and very often one is presented with
4 a submission saying "We want to spend 3 million quid",
5 and unless there are details of where the money is going
6 then the submission goes straight back to the officials.
7 And that is kind of -- that is I think the right thing
8 to do as a government minister because it is taxpayers'
9 money that we are spending to get value for the members
10 of the public.

11 But the point is nobody was, as I recall, arguing
12 that we go down this ill-advised route so it wasn't
13 really necessary to knock it down.

14 MR PEOPLES: Can we look at the note of the meeting on that
15 point. SGV.001.001.8059. It's a short note. It shows
16 who was present and there are three ministers.
17 Shona Robison is described as the lead minister in the
18 note, and I appreciate this note would have been
19 prepared after the event. There are three officials
20 from the Adult Care and Support division within the
21 Health Department. There is someone from Civil Law,
22 would that be within Justice, Anne Hampson?

23 A. Yes.

24 Q. Is that a name that means something to you?

25 A. Yes.

1 Q. Janine Kellett looked after children, that would be from
2 Education, I take it?

3 A. Yes.

4 Q. Who is an official from --

5 A. Yes.

6 Q. What the note says is:

7 "Agreement was reached at the meeting to conduct
8 a pilot of a forum to give adult survivors of in care
9 abuse the opportunity to describe their experiences.
10 The proposals contained in the submission to ministers
11 of 24 September were accepted."

12 And then it is noted that the following issues were
13 raised and discussed, and under "Confidential Committee
14 Model", which was the preferred option of officials, it
15 says:

16 "There was discussion instigated by Mr Ingram about
17 the strength of the model being proposed and whether a
18 confidential committee would be ambitious enough,
19 particularly since it was proposed that the institution
20 from which survivors would be drawn should not be given
21 any formal status at the pilot forum."

22 It then goes on:

23 "Officials noted the difficulties revealed in the
24 work of the Irish Commission on the investigation of
25 child abuse associated with institutions' direct

1 involvement in the process as the pilot forum would then
2 have to consider evidence from both parties. All
3 parties would have to be given legal representation.
4 This could radically alter the nature of the process,
5 making it more difficult to create a therapeutic
6 environment, adding hugely to costs, creating possible
7 delays, and taking the focus away from survivors.
8 Institutions might refuse to take part in such
9 a fact-finding process. Ms Robison stressed the
10 therapeutic nature of the pilot forum."

11 Then it is noted there was an extensive consultation
12 and contributions from the National Reference Group.

13 Clearly one minister raised the issue of whether the
14 preferred option was the appropriate option because he
15 had started off in Parliament saying truth and
16 reconciliation, which became acknowledgment and
17 accountability by the time of this meeting, and he was
18 questioning the strength of the confidential committee
19 model which didn't have accountability built into it.

20 So there was a discussion. The way that the note is
21 set out suggests that to meet these points, it was the
22 officials that came in at that point and gave all the
23 reasons why you might not want to select
24 an investigation committee. One of the factors raised
25 was the huge costs that would be incurred and the

1 possibilities of delay as well as perhaps difficulties
2 getting institutions to take part. Then Ms Robison, the
3 minister, is recorded as stressing the therapeutic
4 nature of the forum.

5 So there clearly was perhaps one supporter, if you
6 like, of something that might be quite expensive. It's
7 not as if it is at a ministerial level?

8 A. I don't see where -- I'm sorry, I just don't quite see
9 where in this note of the meeting it can be inferred
10 that there was somebody supporting going down the Irish
11 route.

12 Q. Mr Ingram told us he questioned the model at the time.
13 Ultimately he went along with the decision and he
14 said -- I think he says in his statement that had he
15 perhaps been the lead minister, he might have gone down
16 a different route. But he wasn't, according to him.
17 But he did question it and he had reservations, because
18 it was only giving one part of what he had announced in
19 Parliament. It wasn't giving accountability.

20 But at the end of the day we have the record of what
21 appears to have been said, and ultimately he agreed to
22 the preferred option of officials. So that is how he
23 put it to us. It's not a very long minute, it doesn't
24 get the full discussion, it's not a transcript, clearly,
25 but we can see enough from that and his evidence to be

1 able to say to you that he did raise the question. And
2 if you did weigh in and say "Hang on, €136 million is
3 a lot of money" --

4 A. If I had said anything it would have been to say
5 "136 million, it's ludicrous to spend that amount
6 of money on lawyers". That is just the way I am.
7 I would have said that if I had said anything at all.

8 LADY SMITH: In fairness, I don't think the whole of the
9 136 million was going to the lawyers in Ireland. Wasn't
10 it 60% of that was --

11 MR PEOPLES: It was the overall cost of the -- a percentage,
12 a significant percentage --

13 A. It would be ludicrous to pay that amount of money to
14 lawyers, in my humble opinion, when in fact the victims
15 should be getting the money, and if I had expressed any
16 view it would have been that.

17 I am very sorry because I really do want to help the
18 Inquiry, it's an extremely serious matter, but I just
19 can't remember any more detail of what actually happened
20 rather than what I would have said, and so on and so
21 forth.

22 But I am very, very hot on value for money for the
23 public. Ask any civil servant and they will tell you
24 that straightaway, because they have had their
25 submissions sent right back to them if they don't spell

1 out what benefit we are going to get and who is going to
2 benefit from spending public money. It's one of
3 the most important things, in my view, that ministers
4 do.

5 MR PEOPLES: Can I just say this, that if you were -- if
6 that was a consistent position you would take as
7 a minister, and there was at least someone that seemed
8 to be supporting the expensive option, if I could put it
9 that way, and you had said something at the time, would
10 you have expected someone making a note of that meeting
11 to have recorded your view, rather than just simply
12 saying officials noted X and Y and Ms Robison said
13 something. You would have expected your position to be
14 recorded, would you not?

15 A. Possibly.

16 Q. If it was a proper minute or note?

17 A. Possibly. I don't take the minutes. Sometimes minutes
18 aren't particularly informative. Sometimes they are
19 maybe deliberately not very informative, frankly, where
20 you have a sensitive discussion for the interests of
21 candour, particularly regarding these matters, but that
22 is just speculation on my part.

23 But I really can't recall having played an active
24 part in that meeting and it doesn't look to me as if
25 there was any serious argument that we go down this

1 hugely expensive route. I can't remember Adam --
2 obviously, my Lady, I haven't spoken to any of the other
3 witnesses, that would be completely improper, so I have
4 no idea what he said or what Shona said. But he was a
5 very laid back character, he wasn't somebody who went
6 off the handle and argued in a ferocious way, he was
7 always very calm and measured in the way he went about
8 things. That was his demeanour almost at all times.

9 I can't just recall -- I wish I could recall the
10 discussion to help you more on this, but if I had said
11 anything it would have been "Look, let's not waste the
12 money on lawyers. Let's try and get the money out to
13 the victims", and that is what I would have said. But
14 as I say, my role was kind of done at that point, as far
15 as I can recall.

16 LADY SMITH: What is a difficulty for me in that note or
17 minute is that the confidential committee model
18 paragraph doesn't tell me whether the discussion was
19 simply between the decision-makers, namely, the three
20 ministers, or the discussion being referred to there was
21 a decision in which the officials participated and to
22 which they contributed as well as the ministers. It
23 could be read either way. I have certainly seen a style
24 that would say "Officials noted" when what that is
25 telling you is the people doing the discussing, making

1 the decision, had seen that officials had noted
2 something, had told them something. The word "noted" is
3 often not used perhaps very accurately. It leaves me
4 with an ambiguity in my head, I have to say.

5 A. I don't think I can help you unravel that ambiguity,
6 I am afraid.

7 MR PEOPLES: Maybe you can help me with something else then.

8 Shona Robison has told the Inquiry that
9 a confidential forum was not seen as being the only
10 answer or the sole response to the issues being raised
11 by adult survivors. Are you able to help me with what
12 other possible responses were under active consideration
13 at that time in terms of the issues affecting adult
14 survivors, or not?

15 A. No, I am afraid I couldn't.

16 Q. So you can't tell me if a public inquiry, for example,
17 was under active consideration?

18 A. No, I'm sorry, I can't remember.

19 Q. But one thing you can tell me I think, at least as far
20 as the position in 2008 was concerned, was whether
21 a compensation scheme for those who had no legal redress
22 was under active consideration. Because I think in
23 paragraph 28 of your statement you say that
24 Kenny MacAskill, the Justice Minister, the Cabinet
25 Secretary, wrote a letter in August 2008 where he said

1 something on the question of compensation and whether
2 the Scottish Government ought to establish a fund to
3 compensate survivors of historical abuse. He went on to
4 say that Adam Ingram had recently explained to the
5 Scottish Parliament that there were no such plans.

6 So whatever else was under active consideration in
7 2008, a compensation scheme was not, and in fact
8 Kenny MacAskill was writing to people publicly saying
9 that. I think that is something you tell us, is that
10 not right?

11 A. My recollection is that I wasn't asked in my role as to
12 whether or not we should have a compensation scheme and
13 therefore it wasn't part of my remit. Plainly the issue
14 of compensation is an obvious one that people in society
15 would probably have foremost in their minds, that these
16 people who have been through what they have been through
17 deserve compensation. But it wasn't something that
18 I was tasked to deal with, so it didn't fall to me to
19 deal with it as a minister with a restricted remit.

20 Q. I follow, and I think that is the point you make in
21 paragraph 30, it was not an issue you were seized of,
22 and I take the point you are making. All I am saying is
23 that earlier in your statement you are telling me that
24 a minister, the Cabinet Minister for Justice, was
25 writing in August 2008 to say that there were no plans

1 for a compensation scheme. So it is just information,
2 I am not saying you were dealing with it, but that was
3 the position that Government was --

4 A. That was the position. When the Government uses the
5 phrase "no plans", it doesn't mean there might not be
6 plans in the future, it simply means what it says, that
7 there are no plans at present. In fact, that
8 formulation is one that is not unhelpful to Government
9 when it is in one's mind that there may well need to be
10 plans in future, so --

11 Q. It may well be, but --

12 A. It doesn't mean in itself that the whole issue had been
13 ruled out of hand, just that there weren't any plans to
14 pay out money at the time. My standpoint was, I guess,
15 that I hoped that a means could be found of overcoming
16 all the difficulties about compensation, and there are
17 several, and it didn't fall to me to consider any of
18 them so I didn't consider them in detail. But
19 rationally, going through them, there is a whole series
20 of problems about fraud, anti-fraud device, how do you
21 establish eligibility, what do people have to go through
22 to establish eligibility, how much should the quantum
23 be, can any amount of money frankly recompense people
24 properly? There's a whole series of issues.

25 But my point was that because it wasn't my job to

1 consider them, I didn't consider them, because I would
2 then be kind of interfering, if you like, in taking on
3 a responsibility that wasn't given to me to discharge,
4 and that is just not the way I think Government works,
5 or should work, actually. You shouldn't be breenging in
6 to do things that are not part of your responsibility
7 and, if you do, you are almost always stepping on
8 someone else's toes and interfering with a process which
9 has usually been a thought out process, rightly or
10 wrongly, a process that has been thought out and
11 orderly, and therefore ...

12 There are very, very good reasons. I am just trying
13 to explain myself a bit better as to why one doesn't
14 stray beyond one's remit, especially as a junior
15 minister.

16 Q. I don't think I am really suggesting that proposition to
17 you. I think I was just saying, as a question, whether
18 a compensation scheme for people who had no legal
19 redress was under active consideration, and I was
20 putting to you information you provided which suggests
21 that the answer to that is, no, it wasn't under active
22 consideration. "No plans" means it is not to say it
23 would never happen, but it wasn't under active
24 consideration in 2008 at least?

25 A. That is correct.

1 Q. You were at the meeting in September 2009 and, as we
2 know, that took a decision to have a private
3 confidential forum which became known as Time To Be
4 Heard, and Time To Be Heard was a process that took
5 place in 2010 between about May and September/October of
6 that year.

7 A. Right.

8 Q. I don't think we need to be precise about the dates. In
9 2010, and I don't know how much knowledge you had of
10 this, but the Scottish Human Rights Commission
11 in February 2010 produced what is called a human rights
12 Framework Report to inform the design of
13 an acknowledgement and accountability forum and made
14 various recommendations as part of that Framework Report
15 in February 2010.

16 We have heard evidence from a witness who was
17 employed by the Commission at that stage and actively
18 involved in this matter that there was no Government
19 response to the wider recommendations of that report
20 until 2011 in February, or thereabouts, when the Time To
21 Be Heard Report was published. I think that was just
22 shortly before you left this ministerial position. But
23 that is what he told us.

24 So there was the production of the Human Rights
25 Framework Report in February 2010, there was no response

1 to that until about a year later. I am just trying to
2 keep that -- if you can keep that in mind. And he did
3 say to us that following the publication of the report
4 in 2010, in February, there was a delay in getting
5 a response. And when the response came in 2011, there
6 was no commitment by Scottish Government to implement
7 all the recommendations, and it took until I think
8 December 2011, if I recall correctly, before the
9 Government committed to participating in what was known
10 as an interaction process, I think you will know
11 a little bit about that, I'm not going to ask you in
12 detail, but that was what he told us in broad terms.

13 He did say that matters to some extent moved on in
14 the late part of 2011, but I think before then you had
15 actually appeared before the Public Petitions Committee
16 in December of 2010, is that correct? Do you remember,
17 you appeared with Shona Robison and Adam Ingram, I
18 think. Do you have a recollection of that?

19 A. Yes, I do remember --

20 Q. Maybe I can take you to that --

21 A. -- appearing.

22 Q. It is INQ.001.001.1269. That is a report of the
23 proceedings of the Public Petitions Committee on
24 21 December 2010. I think that was about five or six
25 months before you left this post?

1 A. That would be correct.

2 Q. Maybe we could have a quick look at that --

3 A. I did look earlier at some of the papers of this meeting
4 to refresh my memory.

5 Q. If I could ask you briefly about that because I think
6 you made a contribution --

7 A. I did.

8 Q. -- at that meeting. It was described as a meeting at
9 which there was a triumvirate of ministers by one of the
10 members of the Committee and you were one of that group.
11 You all made contributions at different points during
12 the Committee meeting.

13 If we go to page 7, column 2, we see I think your
14 first contribution on that day. It's just to get
15 an idea of what was being said publicly by the
16 Government on various issues, including issues you had
17 responsibility for, so I am just going to see what you
18 are saying there.

19 You see halfway down column 2 on that page:

20 "We are considering the important issues of
21 prescription and limitation. The previous
22 administration was quite right to ask the Scottish
23 Law Commission to provide a report into this matter.
24 That report was issued in 2007, and a number of matters
25 have occurred since then, but the answer to Nigel Don's

1 question is yes, we intend to take the matter forward.
2 This very matter was discussed at the meeting with the
3 Convener of the cross-party group on survivors of
4 childhood sexual abuse ... At that time meeting we
5 explained our intention to consult formally on a range
6 of matters relating to prescription and limitation.

7 "People may now ask why we have not consulted before
8 now [this is December 2010]. As Mr Butler will know [he
9 was a member of the Committee at that stage, I think] we
10 previously intended to consult on related issues
11 concerning damages and personal injury but our plans so
12 to do -- which we set out in December 2009 -- were
13 postponed because Mr Butler quite fairly introduced the
14 Damages (Scotland) Bill which has taken our officials a
15 considerable amount of time to deal with, as members
16 will accept. In addition to that, there have been
17 significant developments in two court cases, the
18 Aitchison v Glasgow City Council and Bowden v Poor
19 Sisters of Nazareth. It seemed sensible to take account
20 of the very important decisions that were issued and,
21 perhaps more important, the reasons for those decisions.

22 "What will our consultation paper do? It will
23 consider the Scottish Law Commission's recommendations
24 to extend the standard limitation period from three
25 years to five years and to clarify the circumstances in

1 which the courts might exercise their discretionary
2 power to allow cases to proceed outwith the standard
3 limitation period. We are minded to look at additional
4 options, including considering the merits of the
5 approach that has been adopted in Ireland involving the
6 time bar clock and the stopping of periods of
7 limitations. In Ireland those periods are excluded in
8 which a person is said to be under a disability, which
9 includes their being under 21 years of age. That plays
10 an important part as the courts in Ireland have the
11 power to disregard childhood or a proportion of
12 childhood. We can all see the sense of that as
13 a proposition."

14 You also make a reference to something said by
15 Lord McEwan in a case in 2008 about whether the sections
16 on limitations provisions really had in contemplation
17 the types of cases that you were being asked to look at
18 involving childhood abuse in adults who were saying they
19 had basically put these memories out of their mind and
20 they were triggered some years later by some event and
21 that produced --

22 A. Yes.

23 Q. -- symptoms. You say all of that at that point. So you
24 have explained what you were intending to do to consult,
25 you have explained there was a delay in the consultation

1 because of the Damages Bill?

2 A. Yes.

3 Q. But you are also saying you are minded to look at
4 additional options. I think that was the stance the
5 Government was --

6 A. Taking then.

7 Q. -- taking publicly.

8 If we go to page 8, I think further down you go on
9 to say in the final full paragraph in column one that:

10 "Justice is obtained when someone has the
11 opportunity to go to court. The outcome of going to
12 court cannot be guaranteed for anyone. That is sadly
13 a fact. I say sadly, because we are talking about such
14 a sensitive issue. The evidential difficulties in cases
15 that involve things that occurred decades ago may be
16 hard to overcome. Even if the law opens the door to the
17 courts to allow someone to go to court and win
18 a judgment in their favour, there must be evidence to
19 substantiate the case in the civil courts, which is what
20 I am talking about, rather than criminal prosecutions
21 which are different as there is no time bar. Justice
22 would be guaranteed if people had the opportunity to
23 state their case in court. That is what I mean by
24 providing people with justice. I very much hope that
25 these are the kind of issues that those who wish to

1 respond to the consultation paper put in their
2 responses."

3 So that I think was you giving the Government's
4 position at that time. I think later on you say in
5 column two on page 8, when you are being asked about
6 sharing a draft of the paper with others including the
7 cross-party group, you also say:

8 "We all want to get this right and we want the
9 consultation to allow us to look carefully at what
10 happens and what has been achieved in Ireland. We also
11 want to consider a more radical approach than that which
12 is outlined in the Scottish Law Commission's
13 recommendations which I well appreciate has caused
14 considerable frustration."

15 So you are certainly flagging up the possibility of
16 what you describe as a more radical approach at that
17 stage.

18 You then go on in your contribution to the meeting
19 to say that -- this is in the context of I think
20 petition 1351 which was a petition where what was being
21 asked for was a Time For All To Be Heard and to set up
22 a compensation scheme for survivors?

23 A. Yes.

24 Q. So it's that petition that you are referring to there.

25 LADY SMITH: That one was presented by Chris Daly as well.

1 MR PEOPLES: In August 2010.

2 LADY SMITH: Was that the one that was not just in his name?

3 It was Helen Holland as well, yes.

4 MR PEOPLES: You do say that really this matter of
5 incorporating a compensation scheme is more a matter
6 that is being dealt with by your colleague -- is it
7 Shona Robison?

8 But anyway, you go on to say:

9 "I should say that, at present, compensation is
10 potentially -- I come back to the word 'potentially' --
11 available to survivors of historic abuse through
12 a compensation order of the successful criminal
13 prosecution. There have been some, although sadly very
14 have few of those, of which I have details."

15 You then say you can get an award of damages if
16 there is a successful civil action.

17 "That is open at the moment for those who can get
18 through that the door."

19 That is the time bar door, limitation door.

20 "Thirdly, an award can be made under the criminal
21 injuries compensation scheme which is not dependent on
22 any court proceedings. There are potential routes for
23 compensation at present ..."

24 And I think you make an important qualification
25 here:

1 "... but I can well understand that too many victims
2 view those routes as more theoretical than real."

3 So that was the reality?

4 A. Indeed.

5 Q. Page 9 I will just take you through a little bit longer,
6 if I could. At the top of column two on page 9 you are
7 again saying something -- you mention Lord McEwan and
8 what he said in relation to the case that we just
9 mentioned, and you say that really what he is really
10 saying is that the Act is too inflexible and that is
11 the only view one can reach from reading the judicial
12 comment, you think.

13 "The strong view is that the law is out-of-date and
14 inflexible and that more discretion should be
15 permitted."

16 There seems to be a recognition there that the law
17 needs to be changed on limitation, and we are not
18 talking about prescription here?

19 A. Exactly.

20 LADY SMITH: Fergus, was it really a lack of discretion?

21 The legislation gave judges an unfettered discretion.
22 Wasn't the problem more that the sets of facts with
23 which judges were often being presented could not get
24 the pursuer over the time bar hurdle once all the
25 factors that a judge reasonably had to take into

1 account, looking at the points made by both sides, were
2 considered?

3 A. That may well be the case, my Lady. Yes, I can see the
4 point you make. That may well be --

5 LADY SMITH: It was a distinction in Scottish legislation
6 that it was a wide, unfettered discretion. Indeed the
7 Inner House emphasised that in a case called
8 Carson v Howard Doris in 1980/1981, around then I think.

9 A. That may well be the case, that the discretion was
10 sufficient but the facts were such that the time bar
11 would be applied. I guess it is difficult to generalise
12 these things. Maybe I was over-generalising there
13 because there may be different factors, but I think
14 I was setting out there a position that we had given
15 some thought to that we wanted to try to be helpful in
16 allowing access to civil claims.

17 I think the first point was we were going to extend
18 the triennium to five years, and I think that was linked
19 to Bill Butler's action. Bill was to do with damages
20 for asbestosis victims, I think, and that is a separate
21 issue which has been very controversial in relation to
22 time bar, obviously because people are not aware they
23 have asbestos diseases for some time after when the
24 disease starts.

25 So the question of the date of knowledge -- is that

1 right, the phrase -- is relevant. But because we were
2 dealing with Mr Butler's Bill, which I think we were
3 supportive of, we kind of parked the other issues
4 because we thought we should deal with them as one
5 entity. And of course extending the triennium to five
6 years would open the gate for quite a lot of people, but
7 really going back to the 1960s, well ...

8 LADY SMITH: It wasn't going to deal with the pre-1964
9 cases --

10 A. -- limitation. But in any event, that was what I said
11 at that point, so things had moved on a little bit
12 from --

13 MR PEOPLES: Yes, I am just telling you what you were saying
14 to Parliament, and certainly the Law Commission did
15 suggest that some form of statutory guidance identifying
16 potentially relevant factors might be of assistance in
17 the exercise of the discretion under the limitation
18 provisions. So you weren't just coming up with that,
19 the Law Commission was thinking that would be a good
20 idea too.

21 A. Indeed.

22 Q. Perhaps to make -- well, perhaps to lead to a different
23 result for some claimants. Whether that was a --

24 A. It's all more theoretical than real, in my opinion. It
25 is not likely to be but there we are. You have to try

1 to improve the justice system --

2 Q. But just --

3 A. -- criticism, even if you think very few people are
4 going to be able to benefit from the reforms.

5 LADY SMITH: Mr Peoples, am I right in thinking we are
6 getting close to the end of Fergus' evidence or should
7 we take a five-minute break?

8 We have stenographers working and they do need
9 a break every so often.

10 MR PEOPLES: I think if we could just have a short break.

11 I don't plan to be too much longer, if that assists
12 Mr Ewing in such commitments as he may have later today.

13 A. I have to vote, so ...

14 LADY SMITH: Thank you.

15 (3.10 pm)

16 (A short break)

17 (3.20 pm)

18 LADY SMITH: Are you ready to continue, Fergus?

19 A. Yes.

20 LADY SMITH: Mr Peoples.

21 MR PEOPLES: Can I just finish with this report of the
22 proceedings. There was just one other passage I wanted
23 to pick up with you. It's on page 13. We are in
24 December 2010 at the moment and Anne McLaughlin, who's
25 a member of the Committee, was raising some points with

1 you. And in column one on page 13 she asked a fairly
2 direct question:

3 "Will the Government implement the recommendations
4 of the Framework [that's the human rights Framework that
5 we know of] in full? If it will, is there a timescale
6 for that?"

7 So she asked about that matter in December 2010.

8 Your answer was:

9 "Plainly, as a Government, we are keen to do the
10 right thing by those whose human rights have been so
11 abused. However, it is probably correct to consider
12 first the publication of the report by Tom Shaw [that's
13 on Time To Be Heard] which my colleague Shona Robison
14 mentioned, and in particular his recommendations. In
15 other words, having asked him to opine and report,
16 I think we should wait to see what his report will say.
17 However, I would very much expect our response to be in
18 the spirit of what Anne McLaughlin has asked."

19 So you weren't confronting the question head-on in
20 the sense that you were giving any clue as to whether
21 the recommendations, which the Government was aware of
22 by then, would be implemented, you just said we'll wait
23 to see what Time To Be Heard says and we can look at it
24 then. That was the position of Government at that
25 stage, is that correct?

1 A. It must have been. I can't remember all the details.
2 But you have to be -- everything you say, you say as a
3 minister. So if you undertake to do something, then if
4 you don't do it you are letting the Government down.

5 So generally speaking, one tries to be circumspect
6 in answering direct questions like that if you are
7 uncertain. It is unwise to give the answer that your
8 heart may want to give to help people, you are better to
9 be circumspect. I think at the end I say:

10 "... I would very much expect our response to be in
11 the spirit of what Anne McLaughlin has asked."

12 So I was trying to be positive without committing
13 the Government to any particular course at that time.
14 I can't remember whether, frankly, the argument
15 I gave -- how it fitted in with things, that is what
16 I am slightly puzzled about, but --

17 LADY SMITH: Can you remember whether you had read the
18 Framework Report from the Scottish Human Rights
19 Commission at that stage?

20 A. No, I am afraid I can't, my Lady. I can't.

21 LADY SMITH: Is it possible you hadn't?

22 A. Lots of things are possible. I do recall -- the
23 evidence I gave at that Committee, I do recall that
24 I did do some studying, as I would term it, of papers
25 beforehand to look at the legal situation, look at

1 Lord McEwan's judgment. I don't think I would have read
2 it in full necessarily, but I do remember spending some
3 time before going to the Petitions Committee to prepare
4 for the Petitions Committee on the particular topics
5 that we covered before the break, but not to do with the
6 recommendations of the Framework Report which I think
7 probably would have fallen into the category of other
8 people's responsibilities.

9 LADY SMITH: I suppose you might have confined yourself to
10 that part of the Human Rights Commission's
11 recommendations that dealt with access to justice going
12 back to your prescription and limitation remit?

13 A. Yes.

14 LADY SMITH: You confined your considerations to that?

15 A. I don't really think I was involved in the work of the
16 Human Rights Commission's Framework very much, if at
17 all. That is my recollection.

18 MR PEOPLES: I think that was an initiative from Health, as
19 we may find out. I think we may have already found out,
20 but I think we will confirm that tomorrow, that really
21 it came through them and I think they took the lead.
22 I think it was Jean MacLellan that was involved in that
23 quite actively and she was in Health.

24 A. I didn't deal with --

25 Q. No, I appreciate. So we can maybe ask her a little bit

1 about that.

2 Just looking at where matters were in December 2010,
3 we are told -- we have seen what you were saying on
4 behalf of the Government in relation to issues within
5 your responsibility, prescription and limitation, and
6 that there was a commitment to consult and to at least
7 explore, perhaps, going beyond the recommendations of
8 the Law Commission.

9 Can I just though focus on one group, the pre-1964
10 survivors. At that stage, that group of survivors in
11 terms of civil law had no access to justice because
12 their claims had gone, they were extinguished?

13 A. Yes.

14 Q. And the Law Commission wasn't recommending recreating
15 an obligation for a variety of reasons, and the
16 Government hadn't sought to -- they had just accepted
17 that that was a proper recommendation?

18 A. Yes.

19 Q. While in terms of accountability for the abuse that
20 happened then, before 1964, you did I think recognise
21 the possibility of some accountability of perpetrators
22 under the criminal law, but that of course depended on
23 whether they were still alive in the first place and,
24 secondly, whether there was a sufficiency of evidence.
25 So I think the way you put it in your statement is that

1 route wasn't without its difficulties?

2 A. Yes.

3 Q. So if we take a situation where the perpetrators of
4 pre-1964 abuse were deceased, and there must have been
5 quite a few people in that category, the criminal law
6 wouldn't be an avenue open at all for victims, and nor
7 was the civil law. So if these avenues weren't
8 available to achieve accountability and justice, what
9 was the Government doing for them? They had been
10 waiting for however many years for some form of justice,
11 the legal route seems to be barred whether you go in the
12 civil door or the criminal door, so what was the
13 Government thinking about that? Apparently
14 a compensation scheme wasn't within plans, according to
15 the letter that Kenny MacAskill sent in 2008, so I am
16 just wondering what was being thought about them? They
17 were a group that had no rights, legal rights,
18 particularly the ones whose perpetrators were deceased,
19 as I say.

20 A. Whose perpetrators were deceased, yes.

21 Q. They had no rights in civil law, whether they were
22 deceased or not, and they certainly didn't have
23 a prospect of a trial if the perpetrator was deceased or
24 perhaps unfit to stand trial --

25 A. It is a very fair point. The answer is I don't know

1 what consideration was being given because it wasn't
2 really within my remit. I do recall considering the
3 advice regarding the cut-off in 1964, and the advice was
4 I think that that had been reviewed in 1984, as I think
5 I may have mentioned earlier. And it had been decided
6 in 1984 when the matter had been reviewed that those
7 whose claims arose pre-1964 should not have a reinstated
8 right, that that decision was taken having regard to
9 inter alia that it would be retrospective and it would
10 probably breach the European Court of fundamental rights
11 and freedoms protocols in that regard. And therefore
12 even if a law were passed, that that be done, and that
13 pre-1964 cases could be justiciable, even if that
14 happened the thinking was that that would then be
15 subject to a legal challenge by, for example, a defender
16 in a civil action.

17 LADY SMITH: It would have been an Article 1, Protocol 1
18 argument under the Convention.

19 A. Precisely. So in other words, that is what I was
20 considering. However, you are absolutely right that for
21 those people who had been abused before 1964 and not
22 after 1964, they were left without a remedy. But my
23 point was that I was asked to look solely at the legal
24 issue, and the legal issue on prescription I thought was
25 a cul-de-sac for these reasons, and if it was impossible

1 to do anything in 1984, I think the Law Commission,
2 I did re-read this part of the Law Commission's report
3 earlier today, they said, well, if we couldn't do it in
4 1984 we certainly can't do it in 2007 when the earliest
5 of the cases would have been 43 years previous, so ...

6 But I think it was the ECHR issue that was the
7 clincher. In other words, even if we did pass a law out
8 of good intentions to let people come to court -- and of
9 course in our mind also was the parallel with Second
10 World War war crimes and pursuit of war crimes which
11 have been pursued prior to 1964, obviously, by
12 definition. You know, it has happened. But even if we
13 did try to make it justiciable it would have been ruled
14 out by the ECHR anyway, so it just seemed like
15 a cul-de-sac. But you are quite right --

16 MR PEOPLES: I think that is my very point --

17 A. -- it was a cul-de-sac. But the point I am making, it's
18 a hard one to get across, but it just wasn't my
19 responsibility to take forward that particular mischief,
20 unfairness, if you like.

21 I am pleased to say it has been taken forward. We
22 are here. Advance payments I think have been made of
23 some sort. I was part of the Cabinet discussions
24 I think when that was discussed, presumably I am allowed
25 to say that?

1 Q. I was going to finish off with this. But the point
2 I was making -- I'm not trying to argue with you that in
3 some way you had a legal solution to the prescription
4 issue in 2007 to 2011. You are quite right, the
5 Law Commission explained why that would not be
6 a feasible route. All I am saying is, that being so and
7 that being a given, that was perhaps a time for
8 Government to say these people have waited long enough,
9 there isn't a legal avenue for them, or many of them,
10 whether civil or criminal, so we must do something for
11 them whatever else we do for others.

12 And that is the point I am putting to you, that some
13 might say that was the time to act, not now.

14 A. Some might -- people may well say that. I can see the
15 argument and I have a lot of sympathy with it. What
16 I am saying is I don't quite know if there was
17 consideration given to that issue because it wasn't
18 within my remit.

19 Q. If I can just try and see where we were at that period
20 when you were minister. As regards Government policy on
21 accountability, justice and redress, I think I am
22 correct in saying from your evidence, and indeed
23 evidence we have heard before, that the
24 Scottish Government saw these being achieved through the
25 justice system, both civil and criminal. If you wanted

1 accountability, justice and redress the proper place to
2 seek it was in the justice system. That was the
3 starting point. That was the policy, the broad policy.
4 And that the Scottish Government were simply seeking
5 ways of making access to justice easier for survivors,
6 whether it be making records available, as the previous
7 administration did, that might assist claims, but also
8 whether you could make the limitation provisions
9 different in a way that perhaps would allow more claims
10 to be heard on their merits. So it wasn't shifting the
11 policy, it was just saying, well, we can perhaps improve
12 the conditions for access. But that is our policy. If
13 you want justice, go to the justice system. Is that
14 fair? That is the policy?

15 A. That always has to be the policy. That is what the
16 courts are for, and the legal system is
17 a well-established one. So that must always be the main
18 source of redress. We are very proud of our courts in
19 Scotland and our legal system. But it wasn't the only
20 approach, because we were pursuing this Time To Be Heard
21 confidential forum approach. So you are right in saying
22 that the justice system should always be the primary
23 system for individuals to have access to justice in
24 Scotland --

25 Q. I didn't say that, sorry. I am just trying to get what

1 Government policy was --

2 A. It wasn't the only approach that we were taking for this
3 particular group of people. If you like, there were two
4 approaches; there was the approach to try to amend the
5 law, difficult though it is, limited though may the
6 number of people that would be able to benefit, if any,
7 theoretical though the remedies may be rather than real
8 but, nonetheless, we have a duty to do that. Quite
9 a lot of law that is passed doesn't really apply to very
10 many people actually. That is another argument. But in
11 tandem with that we were also pursuing, and this seemed
12 to me to be the main approach, the work that I thought
13 Adam was leading on Time To Be Heard and the
14 confidential forum, is that the right phrase? The
15 pilot. But I wasn't really involved in that, but I did
16 think it was because the justice system wasn't really
17 providing a real recourse or remedy that other means
18 should be pursued and that is what we did. Maybe we
19 didn't do it fast enough or maybe we didn't do it in
20 exactly the right way but we were trying to supplement
21 a legal system which, by definition, couldn't really
22 provide remedies, my Lady, with some other separate
23 system that would provide some benefits for the people
24 involved, even although they couldn't make up for what
25 had happened to them.

1 LADY SMITH: What benefits?

2 A. Pardon?

3 LADY SMITH: What benefits?

4 A. The benefits of being listened to by the State. That is
5 surely a big benefit. If I feel that I am in a society
6 that cares nothing for what happened to me and won't set
7 up any kind of process to allow me to have my say, then
8 I am pretty isolated. So at least if one has the right
9 to tell one's story about what has happened, dreadful
10 things that happened, to a Time To Be Heard or
11 a confidential forum or something of this nature, then
12 I would have thought that -- maybe "benefit" is not the
13 right word, but it is an opportunity to put your case.
14 Maybe the word "benefit" is putting it too highly.

15 LADY SMITH: There are various reasons I asked you that,
16 Fergus, one of which is the evidence we have that it
17 should never be assumed that it will be of benefit to
18 a survivor to talk about their experiences. It very
19 much depends on the context in which that happens, the
20 steps that are taken to protect them from being
21 retraumatised and whether or not the context extends to
22 more than simply being listened to by somebody but,
23 for example, as a public inquiry can do, make
24 authoritative findings as to whether or not the abuse
25 that is alleged by survivors happened, name and shame

1 those who abused them, just as two of the examples
2 an inquiry can do. Mr Peoples.

3 MR PEOPLES: So I think we are agreed what the policy was
4 about accountability, justice and redress, and I think
5 you have already alluded to it, but the problem with the
6 general policy was a problem that you identified when
7 you appeared before the Committee on 21 December 2010
8 when you accepted that there were "many people", and
9 those were your words, who might view all possible legal
10 avenues of redress as more theoretical than real. So
11 that is where matters stood. And you were saying at
12 that time that the Scottish Government should be looking
13 to go further than the Law Commission's recommendations
14 on changes to the law of limitation and what you did was
15 to commit to consult on changes to the law, I think
16 changes to the law of limitation, I think, not the law
17 of prescription and limitation, and I think you may have
18 said either in your statement -- or you may have had
19 this sense, that there was a need to consider creative
20 solutions and that may have been the alternative to
21 legal avenues.

22 In response to the Human Rights Framework the
23 Scottish Government said in early 2011, shortly before
24 you left this office, this ministerial office, that it
25 intended to conduct a scoping exercise to consider

1 issues surrounding a possible reparation scheme.

2 With all that in mind, perhaps based, on what you
3 said in December 2010 and what the Government said to
4 the Human Rights Commission in early 2011, that may have
5 raised expectations among survivors that a breakthrough
6 was on the horizon, if they thought that the Government
7 was looking for a creative solution, looking to reform
8 limitation and so forth, but the reality was that there
9 was no break through because the law on limitation was
10 reformed but that only happened in 2017 when the
11 Limitation (Childhood Abuse) (Scotland) Act of 2017 was
12 passed, and it's only now, as I think you mentioned
13 earlier, that a financial redress scheme is going
14 through the Scottish Parliament, the Redress for
15 Survivors (Historical Child Abuse in Care) (Scotland)
16 Bill which was introduced as recently as 13 August 2020.
17 So I suppose the question might be asked, and I am going
18 to ask it to you: between 2007 and 2011 what did the
19 Justice Department headed by Kenny MacAskill do for
20 survivors that made a real difference?

21 A. I can see the argument. First of all, I think I was
22 trying in the Committee appearance in December 2010 to
23 be careful not to raise expectations that I couldn't
24 fulfil. That must have been why I answered the question
25 to Anne McLaughlin the way I did and also why

1 I mentioned the phrase, and I think it was my phrase,
2 I don't think it was reading it from a brief, that the
3 remedies, even if they were to be enhanced, would be
4 more theoretical than real. And the reason why I say
5 that, sir, is that I am very keen as a minister on not
6 over-promising and under-delivering. So I am conscious
7 that, if you raise expectations, then if they are dashed
8 you have let people down very badly. That means that
9 you often have to tell people less than what they want
10 to hear. That is what I was trying to do in that
11 Committee, looking back and looking at the wording that
12 I used and the approach that I took. But to answer your
13 main question: what did we achieve in the Justice
14 Department? I am not sure we can say that we achieved
15 a great deal between 2007 to 2011, if I am quite candid,
16 as I have to be. Because I don't actually think that in
17 the Justice Department we were the lead on this issue in
18 terms of how we should tackle it. What I hope I have
19 tried to say in my evidence, I hope I have said this
20 clearly, is that I don't really think that the justice
21 system in Scotland was capable of providing fairness,
22 a remedy. In theory it can provide justice, namely,
23 going to court, but redress is getting a result.
24 Justice is served when a case is heard but, if a pursuer
25 can't succeed because of evidential problems, there may

1 be justice but there is no redress, if you see the
2 distinction. So I don't actually think that the law
3 being as it is, the difficulties facing people in this
4 horrible situation of having in their childhood suffered
5 this abuse, I don't actually think the justice system
6 was capable of providing redress for all but perhaps
7 a very small number of cases. Because the civil system
8 was effectively closed because of time bar or
9 limitation, cut off, and the criminal system was
10 effectively closed because of the high bar of evidence.

11 So I don't actually think, to turn your question
12 round, that it was necessarily reasonable to expect that
13 the justice system and the Justice Ministers, myself and
14 Kenny MacAskill, could have provided a solution through
15 the courts. You could say, well, why didn't you have
16 a compensation scheme earlier than we did and that would
17 be a perfectly fair question, but it wasn't one of which
18 I was seized, because I wasn't in the Cabinet and
19 I wasn't involved in those higher level discussions
20 about the overall handling of the case. Anyway, I hope
21 that answers --

22 LADY SMITH: Could you also legitimately ask why wasn't the
23 time bar legislation put in place earlier?

24 A. In 2017?

25 LADY SMITH: Yes, the one that has enabled some cases to go

1 ahead.

2 A. I am afraid I ceased to be the -- I'm not --

3 LADY SMITH: I appreciate that. I'm not trying to blame
4 you, Fergus. I am just being --

5 A. I know. But it is just the way it works is --

6 LADY SMITH: -- an objective bystander.

7 A. -- if you are given a portfolio, you do your portfolio.
8 You don't hark back to the portfolio you used to do.
9 And I can tell you, if you do that, the current
10 incumbent of the portfolio doesn't take it very kindly.
11 So when you move on, as I moved on to an economy
12 portfolio in 2011, my time was done as the Community
13 Safety Minister and, therefore, it was for someone else
14 to pursue. It did take a long time. I didn't notice --
15 I reminded myself just re-reading -- it took far too
16 long. But law reform very often takes an awful long
17 time, a very, very long to do time to do. And as I am
18 sure I don't need to say to anybody here, there are good
19 reasons for that. Because one has to try to get law
20 right. That is an another story. But given the
21 importance of the issue to people involved, it did take
22 an awful long time. But applying the argument I just
23 applied a minute ago, it wouldn't have made much
24 difference anyway because how many people would have
25 availed themselves of the enhanced -- the wider gateway,

1 if you like?

2 LADY SMITH: You don't know. You don't know, for example,
3 who has died.

4 A. That is a fair point. But I am not sure -- if I was
5 correct in arguing that the argument seemed to be more
6 theoretical than real in 2010, it would be surprising if
7 they ceased to be right between 2010 and 2017. But it
8 does appear it took some time to progress that. Why
9 that is the case, I am afraid I can't comment on at all
10 because I ceased to have that direct role then, and the
11 particular evidence I gave was quite technical actually,
12 as far as this evidence goes. So I would have expected
13 the officials to pursue these matters -- justice
14 officials to pursue these matters with my successor as
15 the Justice Minister or Community Safety Minister.
16 I think it was still Community Safety Minister in 2011
17 to 2016.

18 MR PEOPLES: I have no more questions.

19 LADY SMITH: Are there any outstanding applications for
20 questions? Fergus, that completes the questions we have
21 for you this afternoon. It simply remains for me to
22 thank you very much for the assistance you have given
23 us, both with your written statement and coming today to
24 talk to us about the matters that you are able to cover.
25 I do appreciate your time directly involved was very

1 limited but it has been so helpful to hear from you
2 directly. Thank you very much.

3 A. Thank you.

4 LADY SMITH: I am now able to let you go.

5 (The witness withdrew)

6 LADY SMITH: Mr Peoples, that completes the evidence for
7 today, does it?

8 MR PEOPLES: Yes, it does. We have two witnesses tomorrow.
9 The first is by a video link, so we are hoping that
10 there are no problems with that.

11 LADY SMITH: I think the testing all ran very well the other
12 day, so hopefully it will be okay tomorrow.

13 MR PEOPLES: Yes, hopefully.

14 LADY SMITH: I will rise now and I will sit again at
15 10 o'clock tomorrow morning. Thank you.

16 (3.46 pm)

17 (The Inquiry adjourned until 10.00 am on Thursday,
18 26 November 2020)

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