

Friday, 4 December 2020

(10.00 am)

LADY SMITH: Good morning. Today of course is the day that we are going to hear closing submissions in relation to the Scottish Government section of our case studies, and I am glad to see that everybody has managed to get here despite what currently has to be referred to as thundersnow that surprised us all in the early hours of this morning.

Mr Peoples.

Closing submissions by MR PEOPLES

MR PEOPLES: My Lady, good morning. I will start today with a short introduction and then I will look at the evidence. I intend to be fairly succinct and say what I think we have learned without going into too much detail today, because clearly the evidence is still fresh in everybody's mind, and your Ladyship has the benefit of submissions from all leave to appear participants who have obviously covered the issues which they consider should be focused upon as part of your consideration.

So in this hearing we have heard evidence about the period between August 2002, when the Daly Petition PE535 was submitted to the Public Petitions Committee of the Scottish Parliament, and December 2014, when the Scottish Government announced a public inquiry under the

1           Inquiries Act 2005. The evidence has come mainly from  
2           individuals who were either ministers or officials of  
3           the Scottish Government during that period. I will use  
4           the term "Scottish Government", I hope --

5       LADY SMITH: That is fine.

6       MR PEOPLES: The evidence they have given, both written and  
7           oral, has been aided and, in some cases, supplemented by  
8           contemporaneous records and the bundle of documents  
9           prepared for this hearing.

10           During the first week there was evidence about  
11           the period between August 2002 and May 2007. There was  
12           oral evidence from Michael McMahon who, for most of that  
13           period, was Convener of the Petitions Committee;  
14           Cathy Jamieson who was Minister for Education and Young  
15           People until May of 2003 and then, following the  
16           election in that year, Minister for Justice until  
17           May 2007 when there was a further election;  
18           Peter Peacock, who was Cathy Jamieson's successor as  
19           Education Minister, who remained in that post until  
20           November 2006; Colin MacLean, who was a senior civil  
21           servant within the Education Department during the  
22           period; and Lord McConnell who was, in that period, the  
23           First Minister of Scotland.

24           All of these witnesses had previously provided  
25           signed witness statements.

1           Witness statements were provided by Gerald Byrne,  
2           who was an official in Education who for a time headed  
3           the branch with responsibility for looked after  
4           children, and Jeane Freeman, who was then a Senior  
5           Special Adviser to the First Minister, were read into  
6           the record of the proceedings.

7           During the second week there was evidence about  
8           the period from May 2007 until December 2014. There was  
9           oral evidence from Adam Ingram, who was Minister for  
10          Children and Early Years between May 2007 and May 2011  
11          when there was another election; Shona Robison, who was  
12          Minister for Public Health and Sport from May 2007  
13          to May 2011; Fergus Ewing, who was Minister for  
14          Community Safety within the Justice Department between  
15          November 2007 and May 2011; Michael Russell, who was the  
16          Cabinet Secretary for Education and Lifelong Learning  
17          from December 2009 until November 2014; and finally  
18          John Swinney, who was Cabinet Secretary for Finance,  
19          Employment and Sustainable Growth from May 2007 until  
20          November 2014 and who is currently Deputy  
21          First Minister, a post to which he was appointed  
22          in November 2014, and is currently Cabinet Secretary for  
23          Education and Skills, a post he has held since May 2016.

24          The Inquiry also heard oral evidence from  
25          Jean MacLellan, a senior civil servant within the Health

1 Department for much of this period, and from  
2 Duncan Wilson, who was head of Strategy and Legal  
3 Affairs at the Scottish Human Rights Commission between  
4 December 2008 and October 2014.

5 All of these witnesses, apart from Adam Ingram,  
6 previously provided signed witness statements.  
7 Adam Ingram was seen by the Inquiry prior to giving oral  
8 evidence and a draft witness statement was prepared  
9 based on that interview, and he confirmed during oral  
10 evidence that the draft that was used fairly and  
11 accurately reflected the evidence he gave at his  
12 interview, and he is arranging, I think, to produce  
13 a signed statement.

14 LADY SMITH: Good.

15 MR PEOPLES: When I refer today to the evidence, I am  
16 referring to the oral evidence, the witness statements  
17 previously provided, and indeed other evidence contained  
18 in documents in the hearings bundle released to those  
19 with leave to appear, and perhaps occasionally records  
20 which I made reference to which are not in the bundle  
21 but I think are relevant to some issues that cropped up  
22 in the hearing.

23 I think we can say from the evidence that we now  
24 know what happened between 2002 and 2014. Perhaps the  
25 more difficult thing is to know the reasons why certain



1 things happened or didn't happen as the case may be.  
2 I will try to summarise broadly what we learned from the  
3 evidence, although I will leave it to others to perhaps  
4 make their own comments at this stage on what they took  
5 from the evidence.

6 LADY SMITH: Speaking very generally, Mr Peoples, this is  
7 a chapter of evidence that does invite decisions to be  
8 made about what inferences can be drawn from material,  
9 written material, and from what witnesses have said  
10 before me, and there is certainly in some places room  
11 for considerable inferences to be drawn, in other places  
12 less.

13 MR PEOPLES: Yes. Can I also say perhaps before I go into  
14 what we learned, I think you may feel able to conclude  
15 that everyone was doing their best to do the right  
16 thing, although it is ultimately a matter for you, but  
17 ultimately whether they did the right thing and did it  
18 at the right time may be matters for argument and  
19 submission, and you will no doubt hear various views  
20 from those who have leave to appear on that question.  
21 But I don't think -- I think there is a reference  
22 briefly in the Scottish Government's submission to bad  
23 faith issues, and no issue of that kind arose on the  
24 evidence as far as, in my submission, the hearing is  
25 concerned. I don't think there was any suggestion by

1           anyone that anyone is motivated for the wrong reasons.

2           LADY SMITH: I don't think so.

3           MR PEOPLES: So I just pass on that, but I just mention it  
4           because I don't think there is any suggestion that one  
5           could say that. One might criticise; one might say that  
6           certain things were not adequately done or not  
7           satisfactorily done, which are matters of judgment, but  
8           I think we are not in the territory of bad faith, in my  
9           respectful submission.

10           Can I turn to what we did learn from the evidence,  
11           and I am going to look first at the period 2002 to 2007,  
12           if I may, before the change of administration in 2007.  
13           Turning to that period, we know there was recognition  
14           within Government in 2002 at ministerial level that  
15           historically abuse of children in institutional care in  
16           Scotland had been a widespread problem within the  
17           State's childcare system.

18           Cathy Jamieson and the then First Minister,  
19           Jack McConnell, did not need any convincing of that.  
20           I think that was the tenor of their evidence. The known  
21           cases were, as far as Jack McConnell was concerned, only  
22           the tip of the iceberg, and had Cathy Jamieson not had  
23           a social work background nor been a member of the panel  
24           for the Edinburgh Inquiry, the initial "do nothing"  
25           recommendation in the initial briefing of

1           13 November 2002 might have been accepted. Because, as  
2           she said in paragraph 37 of her witness statement:

3                 "Generally speaking ministers rely, and indeed have  
4           to rely, on advice and information that comes from their  
5           officials."

6                 I think that is the reality of government, there has  
7           to be a heavy reliance, and indeed one has to pay close  
8           attention to certain advice, in particular legal advice,  
9           so I don't think one can shrink from that.

10          LADY SMITH: I understand that, Mr Peoples, and we will  
11          no doubt come back to this, but in relying on that  
12          advice ministers have a duty to consider it carefully,  
13          to consider whether the advice makes sense, whether the  
14          advice gives rise to questions that are not answered in  
15          the advice. Shorthand: they have to do their homework  
16          in reading their papers properly and thinking carefully  
17          about what the advice is they are being given and asking  
18          themselves whether there are any gaps they require to  
19          have filled.

20          MR PEOPLES: Yes, absolutely, I think that is the function  
21          of ministers, and they have to do these things, take  
22          these responsibilities. And of course, ultimately, in  
23          relation to most advice, they have to exercise an  
24          independent judgment at the end of the day.

25          LADY SMITH: Yes. What are they there for otherwise?

1 MR PEOPLES: Exactly. So although I say they do rely  
2 heavily, as they must, you are perfectly correct, they  
3 do have to bear in mind these responsibilities, and they  
4 are important responsibilities. They can't simply just  
5 take something and look at the bottom line and say "That  
6 sounds okay" and proceed.

7 And fortunately, in the case of the initial  
8 briefing, it is a good example of where a minister did  
9 step in and said "No, I don't think this is right.  
10 We've got to do something else. We've got to consider  
11 this more fully. It may be the collective advice based  
12 on the soundings and feedback of the various relevant  
13 officials but I am not convinced that this is the way to  
14 go".

15 So that was a good example of someone who did  
16 instinctively, perhaps, take the right course of action  
17 at that point in time, and so she did I think in  
18 fairness do the things that you have said.

19 LADY SMITH: Yes.

20 MR PEOPLES: Colin MacLean told the Inquiry in his oral  
21 evidence there was both a recognition on the part of  
22 officials as early as 2002 that institutional abuse had  
23 been widespread, and indeed an acceptance that there  
24 were major systemic failings within the childcare system  
25 when that abuse took place.

1           Now, if there was such recognition and acceptance on  
2           the part of officials, the briefings to ministers in  
3           2002 and 2003 did not make that clear as they ought to  
4           have done. I am not going to labour this point today,  
5           but I think it is clear when we did explore the  
6           statements and the way they were couched that clearly,  
7           whatever they may have intended to say, they didn't  
8           express it in the way they should have done. And  
9           indeed, when it came to Peter Peacock's evidence and we  
10          took him to some of these documents after the passage of  
11          time, he had some difficulty trying to work out what was  
12          the proper interpretation of the words used, although  
13          Colin MacLean was saying, "Well, we would have  
14          understood what we meant", but I think that was perhaps  
15          rather an optimistic approach given what was actually  
16          written at the time.

17          So I make that comment because, if I take just  
18          a brief example, at the initial briefing of  
19          13 November 2002 in a section headed "Evidence of  
20          Institutional Abuse in Scotland", notwithstanding what  
21          is said in that section, officials were saying to  
22          ministers at paragraph 8, and I quote:

23                 "There is not currently evidence of systematic  
24                 widespread abuse throughout the residential  
25                 establishments in Scotland."

1           And at paragraph 11 they repeated the same  
2           statement. In a further briefing a year later on  
3           23 September 2003, just before the key meeting of  
4           ministers, more detailed information about institutional  
5           abuse was given in annex A, which we had a look at, but  
6           at annex B, paragraph 2, headed "Discussion", officials  
7           were still saying much the same, and I quote:

8           "The criminal convictions so far have been isolated  
9           and no evidence has emerged of widespread or organised  
10          abuse at Scottish institutions."

11          Whatever Colin MacLean may have said in evidence, it  
12          seems to me that that statement speaks for itself, that  
13          they are at least saying on paper that there is neither  
14          evidence of organised abuse nor evidence of widespread  
15          abuse. He may not have meant that, officials may not  
16          have meant that. Well, if that is the case, there  
17          should have been clarity when there wasn't.

18          I take these as examples, I don't want to labour the  
19          point. It is one which I think even he accepted, at the  
20          end of the day, that they should have done a lot better  
21          in terms of important briefings.

22       LADY SMITH: When you question the reliability of that  
23          statement, do you have in mind matters such as the  
24          references also to the number of litigations?

25       MR PEOPLES: Oh, yes.

1 LADY SMITH: That is a good example, 300-odd.

2 MR PEOPLES: Yes. If one looks at that, on the face of it,  
3 within their own briefing, it might have occurred to  
4 them, hang on, this looks like more than an isolated or  
5 rare problem. Whether it's systematic, whether it's  
6 organised may be another question, but it's hard to  
7 think that someone looking at that would instantly say  
8 "Well, that justifies a statement that we have no  
9 evidence of a widespread problem".

10 I think in the end he says "We didn't mean that, we  
11 didn't intend to say that", so in a sense he has almost  
12 accepted that that evidence was sufficient evidence to  
13 justify a rather different statement, that there is  
14 evidence of a widespread problem, rather than the  
15 opposite.

16 So I don't think one needs to perhaps press the  
17 point much further than that. I think a senior civil  
18 servant probably is stung when he looks at briefings,  
19 particularly ones he may have been involved in, after  
20 the passage of time, and perhaps wants to put the best  
21 complexion on what is said, and perhaps uses language  
22 today that he might have even used at the time, had the  
23 matter been raised, to suggest that all is not as bad as  
24 it appears. But to some extent it is bad, and it  
25 shouldn't have happened, and perhaps it didn't cause

1           prejudice at the end of the day because ministers didn't  
2           necessarily accept the statements as worded, but that is  
3           not really the point.

4       LADY SMITH: That is not the point.

5       MR PEOPLES: I just say that at this stage.

6           We also know when the Daly Petition was submitted,  
7           and I think this is clearly a key consideration in  
8           trying to work out why things were done and how things  
9           were done, that there were civil actions against the  
10          Scottish Executive and many others indeed seeking  
11          financial compensation for harm caused by institutional  
12          child abuse. And on the evidence, there were  
13          a significant number of actions against the  
14          Scottish Executive in the pipeline as your Ladyship has  
15          just referred to in the briefing.

16          In these actions, the Executive denied liability on  
17          two main grounds. Firstly, that the actions had been  
18          brought out of time and should, for that reason, be  
19          dismissed without any hearing on their merits; and,  
20          secondly, that the Executive was not legally liable to  
21          pay compensation to any individual who had suffered  
22          abuse while in institutional care. So that was their  
23          outward public position in relation to those civil  
24          claims.

25          This was also against a background, which again is



1 relevant, that in May 2002 in the case of Kelly v Cox  
2 and Glasgow City Council, the judge at first instance  
3 had dismissed an action brought by a pursuer in respect  
4 of abuse suffered before 1964. The pursuer relied as  
5 proof of abuse on a conviction. The court held that  
6 the pursuer's claim had prescribed and, for that reason,  
7 could not be pursued. That decision was subsequently  
8 appealed, and in July 2004 an appellate court upheld the  
9 decision as correct in law and there was no further  
10 appeal as regards that particular issue.

11 So that is something I think we have to keep in mind  
12 when we are looking at the actions and decisions and  
13 rationale of ministers in relation to the steps that  
14 were taken.

15 We do know now that ministers unanimously ruled out  
16 an inquiry or indeed a truth and reconciliation  
17 commission on 25 September 2003 and, in doing so,  
18 followed the advice and recommendations of officials as  
19 set out in a briefing dated 23 September 2003. That  
20 decision, however, was not made public until  
21 30 June 2004.

22 At this point, I might just pause and say that  
23 although Colin MacLean talked about this matter being --  
24 well, officials gave an opportunity to revisit the  
25 matter and review the decision, I think it is plain that

1       so far as the politicians and the ministers were  
2       concerned, the decision had been considered on its  
3       merits in September 2003 and there was no question of  
4       going back to reconsider. And if it was intended at  
5       that stage to reflect less certainty on the part of  
6       officials, again there was a lack of clarity. If  
7       Colin MacLean and his officials wanted ministers to at  
8       least think again about whether they should revisit the  
9       issue, the briefing that he submitted on 8 June was not  
10      couched in those terms, it was simply to agree  
11      a response to the Committee. It was not an invitation  
12      on the basis of some greater uncertainty on the part of  
13      officials that ministers should perhaps look at this  
14      matter again. I think he tried hard to say that that  
15      was the position and that's what officials were doing,  
16      but I think the reality is somewhat different.

17           It may have been intended to some extent to mask  
18      a delay that shouldn't have happened because the  
19      decision had been taken in September, it was not made  
20      public to the Committee until June of the following  
21      year. The initial submission of 8 June, which he  
22      focused on, very much read as if ministers were facing  
23      a new decision that they hadn't even considered before,  
24      and that led to Peter Peacock commenting "Hang on, we  
25      decided this matter some time ago".

1 LADY SMITH: Nine months earlier.

2 MR PEOPLES: "Please reflect that in the submission", which  
3 led to another submission on 16 June being prepared that  
4 did at least record that fact.

5 So however hard he tried to put that in those terms,  
6 I think we really have the decision which was taken in  
7 2003, and to an extent was never really departed from or  
8 even thought to be worthy of the consideration  
9 thereafter by that administration or, until 2014, by the  
10 new administration that came in in 2007. So the  
11 decision was really taken at that point although not  
12 disclosed.

13 Curiously perhaps, in view of the evidence given by  
14 Lord McConnell of his intention to give an apology, the  
15 briefing of 23 September 2009 made no mention of  
16 the matter of an apology. Colin MacLean said he was  
17 unaware of the First Minister having discussed  
18 an apology with Cathy Jamieson --

19 LADY SMITH: 2009?

20 MR PEOPLES: Sorry, 2003.

21 LADY SMITH: Yes. So that's going back to the briefing  
22 of --

23 MR PEOPLES: Yes. There was no mention of the briefing on  
24 23 September 2003 -- sorry, my apologies. It made no  
25 mention of the matter of an apology. Colin MacLean said

1           that he was unaware of the First Minister having  
2           discussed an apology with Cathy Jamieson at an earlier  
3           stage and having agreed to work towards an apology given  
4           by Jack McConnell as First Minister in the  
5           Scottish Parliament, to use his expression, "at the  
6           appropriate time". So he wasn't aware of this, he said.

7           And as to who knew about this discussion and the  
8           First Minister's position on an apology, Lord McConnell  
9           did say, as I recall, it was in his own head and "known  
10          to", my note says, "those around me". I don't think he  
11          was more specific than that, other than perhaps  
12          indicating that maybe those in the private office or  
13          someone close might have been aware, but he didn't name  
14          names as such or suggest that people like Colin MacLean  
15          or other civil servants of that level of seniority were  
16          privy to what had been said or made them aware of it.

17          And I think that certainly is consistent with  
18          Colin MacLean's own evidence. He was quite clear,  
19          I think, quite confident on that matter, that he didn't  
20          know anything about this which is, well, rather odd.

21   LADY SMITH: Yes.

22   MR PEOPLES: When one looks at names on the Petition, if  
23          this matter was sufficiently important to be singled out  
24          by the First Minister in 2002 or early 2003, this matter  
25          didn't receive any treatment in the briefings or the

1        discussions of ministers that followed on, and indeed it  
2        wasn't mentioned in the comments of the First Minister  
3        himself in December 2003 when he had the opportunity to  
4        raise the issue, as well as the fifth option of an  
5        independent expert. So to some extent there may have  
6        been a missed opportunity there to simply remind people,  
7        or tell them if they didn't already know, that that was  
8        something he felt strongly about that he was working  
9        towards with his ministers.

10       Cathy Jamieson had no recollection of the discussion  
11       with Lord McConnell but she didn't suggest it didn't  
12       take place, and indeed we have this general evidence  
13       that, at least in the era of Jack McConnell, there was  
14       informal discussion; important matters would be  
15       discussed informally by ministers on various occasions.  
16       Perhaps Fergus Ewing lived in a different administration  
17       with a rather different philosophy because he didn't  
18       seem to ever get into informal discussions on matters of  
19       this kind, but he wasn't here at that time. That was  
20       the evidence of what happened at that time, that things  
21       were done in that way, and we have to take account of  
22       that when considering these matters.

23       Peter Peacock, for his part, appears to have been  
24       unaware of Jack McConnell's position on an apology  
25       before 2004 and, as I say, as far as Colin MacLean was

1           concerned, the issue of an apology only began to feature  
2           in 2004, particularly in the run-up to the Public  
3           Petitions Committee meeting on 29 September 2004 and  
4           between then and the debate on 1 December 2004. So  
5           clearly it was a matter under discussion and I don't  
6           think, ultimately, it is terribly significant to work  
7           out whether it was discussed in June, July, September,  
8           but it certainly was in the background in some shape or  
9           form, and I don't think it is necessary perhaps to pin  
10          down precisely when perhaps it received more active  
11          consideration, but we know it was there, even if it was  
12          not trailed in any way to the Public Petitions Committee  
13          at the meeting as Peter Peacock gave evidence.

14       LADY SMITH: But isn't it the case, however you look at it,  
15               there was a long delay between a clear intention being  
16               formed to make the Apology, and the Apology actually  
17               taking place.

18       MR PEOPLES: Yes. I am not sure what Lord McConnell's  
19               position was on that because, in one sense, he seems to  
20               say the appropriate time was this debate, as if there  
21               was no other time before then that would have been  
22               appropriate, and yet curiously, again, the debate wasn't  
23               of his making, the debate was something that he couldn't  
24               have anticipated. It required the Committee to take  
25               that action, it followed on Peter Peacock being brought

1 or summoned to the Committee because they hadn't got the  
2 attention that they were entitled to in terms of  
3 responses, so one might think it was rather odd that  
4 "I had this intention from the outset. It's a firm goal  
5 of mine. I'm going to choose the right time to make  
6 this public statement in Parliament, but unfortunately  
7 until December 2004 there was no such time that I could  
8 have chosen".

9 LADY SMITH: What was he going to do if the PPC hadn't  
10 pushed matters the way they did?

11 MR PEOPLES: Well, it's a nice question. Presumably he  
12 would have had to find another appropriate time but it  
13 is difficult to know exactly when that would have been.  
14 And if the key issue was to make an apology, and to make  
15 it through the First Minister and to make it in  
16 Parliament, we are not dealing with a state of affairs  
17 where you can't put that combination together.

18 Indeed there is a suggestion in the records that  
19 prior to the debate there was some talk of the  
20 First Minister doing this at First Minister's Questions,  
21 that idea was maybe dropped or abandoned, but it was  
22 being talked about. So one does question whether one  
23 needed to wait this long to achieve that goal that was  
24 there from the outset. Even if one accepts, as  
25 Peter Peacock I think did say at one point in his

1 evidence, that it would have been wrong for him to have  
2 made the Apology at the Public Petitions Committee, that  
3 wasn't the right place or the right time. Even if one  
4 accepts that, and one can see perhaps a basis for  
5 thinking that, even if he was pressed on the matter, as  
6 he was, it's difficult to see how one couldn't have  
7 otherwise found an appropriate time and therefore pushed  
8 the matter forward on the agenda a lot sooner than  
9 happened.

10 I leave that as something that one can reflect upon  
11 at least at this stage, because I don't think there was  
12 ever any convincing evidence why there was no other  
13 appropriate time prior to December 2004.

14 On the matter of the First Minister, he did not  
15 question, challenge or dissent from the decision of  
16 ministers to rule out both an inquiry and a truth and  
17 reconciliation commission in September 2003. He said he  
18 understood the rationale behind the decision to do that,  
19 and that rationale can be variously found, particularly  
20 in the note of the meeting of 25 September 2003, the  
21 short note, but also to some extent perhaps in an  
22 expanded form in the subsequent letter of 30 June 2004  
23 to the Public Petitions Committee which Peter Peacock  
24 and others saw and must have approved in broad terms as  
25 reflected in substance, the sort of thinking that



1 underpinned their decision.

2 So Lord McConnell did not challenge or question that  
3 decision. He saw the decision, though, as simply  
4 a recommendation which required final approval by him.

5 LADY SMITH: Is that right?

6 MR PEOPLES: I think clearly there are some issues which  
7 would normally go to Cabinet for a final approval, and  
8 there are some issues which might be thought to require  
9 clearance by the First Minister if he takes an interest,  
10 and I think arguably this was such a matter because he  
11 had stepped in before December 2003 and asked about  
12 the outcome of the meeting, and Peter Peacock did, on  
13 his own initiative, send him a minute in December 2003  
14 to get his approval or clearance for the position they  
15 adopted.

16 Whether it's a recommendation, it's a nice question.  
17 I'm not sure it is one that matters greatly, ultimately,  
18 because he didn't in any sense say "Well, you've taken  
19 a decision but I'm going to overrule it", or "I'm going  
20 to treat it as a recommendation, I'm going to do  
21 something different", he just suggested an additional  
22 option. So I'm not perhaps trying to push that too far,  
23 but that is how he described it: all this large team of  
24 ministers took a -- I'm doing the same thing -- they  
25 considered an issue, took a position, and intimated it

1 to him for his approval or clearance, and he made  
2 comments in December 2003. So whether you call it  
3 a decision or recommendation, I think in the end in  
4 substance it is not a big issue in the context of our  
5 hearings and the actions taken.

6 Certainly in evidence he didn't suggest that he did  
7 other than accept, if you call it, the recommendation  
8 when he made his comments on 22 December of 2003,  
9 however he did put on the table a further option for  
10 consideration, and he explained why. In essence, in his  
11 political judgment, and this might have been a smart  
12 political judgment on his part, there had to be some  
13 step that involved looking back to the past, and he  
14 indicated I think he was looking for something that  
15 would provide survivors with an opportunity to recount  
16 their experiences, which of course was one of the aims  
17 of the Daly Petition.

18 His evidence I think was to the effect that he  
19 wanted to explore a proposal that would give survivors  
20 a voice, enable their voices to be heard. And I think  
21 he said, although it is not always clear just what he --  
22 I think the proposal is quite embryonic, but I think he  
23 said he had in mind an option that would at least listen  
24 to experiences from survivors. I don't think it was  
25 a very well thought through proposal, but assuming that

1           that was in his mind and in his head, to use his  
2           expression, if so, that is not on the evidence what he  
3           got or what survivors got at the end of the day.

4           The Shaw Review, as I think Tom Shaw and indeed  
5           others would accept, and did accept, was a systemic  
6           review. It was not an inquiry or an investigation into  
7           past abuse with power to hear testimony and make  
8           findings. It was not a listening forum, similar to Time  
9           To Be Heard and the National Confidential Forum. The  
10          remit for the Shaw Review was carefully framed, with the  
11          benefit of legal advice during 2005 after the debate, so  
12          as to exclude testimony from individual survivors,  
13          although there was evidence that in 2006 Tom Shaw was  
14          permitted at his request to have some direct contact  
15          with survivors. But to suggest that that then elevated  
16          it to a listening forum I think would be simply just --  
17          it wouldn't square with the reality of the situation.  
18          He had access for a number of reasons, including I think  
19          there were difficulties at that time in terms of the  
20          representative groups were going through difficult  
21          stages, which I don't need to labour, but there were  
22          reasons why he asked, and to some extent he wanted some  
23          background information. But it wasn't a listening  
24          forum, it wasn't the forum Chris Daly asked for in his  
25          Petition is the short point I am seeking to make on the

1 evidence.

2 Then after the First Minister's comments we have  
3 a period of delay between December 2003 and March 2004  
4 due to oversight, and that is covered by both  
5 Colin MacLean and the evidence of Gerald Byrne and I'm  
6 not going to go into it. Clearly it was missed and it  
7 shouldn't have been, but ultimately officials in  
8 May 2004 recommended against the First Minister's  
9 option. I think they were clearly addressing it in  
10 March, April, and preparing some sort of draft  
11 submission. So work was going on but it was far too  
12 late and it should have come a lot sooner in response to  
13 the comments made in December of the previous year, and  
14 I think everyone accepted that and found it unacceptable  
15 and inexcusable.

16 But the rather mitigating factors there were about  
17 the department, the resources, the pressures of work and  
18 so forth, we all have them. But I think as well if the  
19 First Minister puts an option on the table, whatever  
20 else you do, it seems to me you address it, and you  
21 address it --

22 LADY SMITH: It goes to the top of the list.

23 MR PEOPLES: Yes, prioritisation. So there is not really  
24 any excuse why that took so long. It wasn't the only  
25 period of delay, but that was an obvious oversight that

1           should not have happened.

2       LADY SMITH: What about the delay caused by the PPC  
3           initially thinking that it was Health they should be  
4           communicating with? We don't have any correspondence,  
5           do we, actually showing that Health woke up to the fact  
6           and told the PPC "You really should be going to  
7           Education. We have an interest but I think Education  
8           would be leading on this"?

9       MR PEOPLES: I think there may be something at one point  
10          where someone -- when things are not happening, I think  
11          there may have been an exchange perhaps in August of  
12          2003.

13       LADY SMITH: 2003, a year later.

14       MR PEOPLES: Yes, it is a year later. It's an unfortunate  
15          thing, and I suppose one could say that sole  
16          responsibility for that state of affairs doesn't just  
17          lie with the Executive, there is a problem with the PPC,  
18          because they did get a reply back from Health. So there  
19          may be to some extent fault on both sides, if you like,  
20          for that state of affairs, although --

21       LADY SMITH: Health also operated a slightly relaxed  
22          timetable, if I put it that way, with their responses.

23       MR PEOPLES: Yes. Well, yes, that is true I'm sure. But  
24          I think ultimately if something comes from a committee,  
25          and it goes to a department which doesn't appear to have

1 responsibility, one would have thought that someone  
2 would take steps fairly expeditiously to say "This is  
3 isn't ours but we had better look around. It's  
4 an important committee, according to John Swinney and  
5 Michael McMahon, and it has an important function". So  
6 it's not a case of saying "Oh well, I don't know what  
7 this is all about", and sticking it into the in-tray for  
8 consideration at some point. Because clearly it did get  
9 to Health, it did get from Health to Education but  
10 belatedly.

11 LADY SMITH: Eventually.

12 MR PEOPLES: Eventually. Because when it did get to  
13 Education in 2003, there was a flurry of activity.  
14 There was a meeting of officials on 10 September, there  
15 was a briefing prepared on the 23rd and there was  
16 a meeting of ministers on the 25th. So things could  
17 move quickly when it mattered or if it mattered if there  
18 was a situation of urgency perhaps due to mistakes that  
19 had been made in the past.

20 Clearly there were a lot of periods where things  
21 could have been done quicker, not simply that certain  
22 decisions, key decisions, might have been taken or  
23 certain steps might have been taken sooner, there was  
24 also delay over and above that, and the whole thing has  
25 expanded the twelve-year period -- or expanded to

1 a twelve-year period that we are looking at in this  
2 hearing.

3 So we have the First Minister's option being  
4 rejected in May 2004 by officials, very much for the  
5 same sort of reasons as the other steps that might  
6 involve looking into the past were concerned. Officials  
7 seem to have had a difficulty in recommending something  
8 that looked backwards rather than forwards, for whatever  
9 reason. There might have been an undercurrent of civil  
10 litigation, criminal proceedings, prejudice to the  
11 justice system, because that kind of runs through the  
12 whole period, and that may have been one of  
13 the influencing factors, but certainly there was no --  
14 there didn't seem to be any enthusiasm for saying "Let's  
15 look backwards".

16 The Shaw Review was to some extent probably a  
17 compromise because it maybe reflected some of the  
18 concerns that were voiced by the rapporteur proposal by  
19 narrowing it as much as possible, but giving something  
20 that would involve looking backwards without  
21 investigating allegations of mistreatment or  
22 establishments and so forth.

23 We know that there was public acknowledgement of  
24 abuse by the Scottish Executive in Peter Peacock's  
25 letter of 30 June 2004 to the Petitions Committee and

1           there is evidence to the Committee on 29 September 2004.  
2           But there was no Apology. There was no hint that  
3           consideration was or might be given to the appointment  
4           of an independent expert although Lord McConnell has  
5           said in his evidence that he insisted on keeping that  
6           option open.

7           At paragraph 79 of his signed statement he said he  
8           insisted that the final response to the Petitions  
9           Committee must keep that option open. He said that the  
10          letter of 30 June 2004, which missed the deadline, and  
11          the meeting of the 29th was cleared with him beforehand.  
12          He described it as:

13               "... carefully worded so as not to rule out that  
14               option."

15          The contemporaneous records provided to the Inquiry  
16          do not confirm his recollection on that matter. And in  
17          saying that, I do include his own comments on  
18          21 June 2004 which came from his private office. There  
19          is nothing that says, "And by the way, I want my option  
20          to be kept open. I have read what the officials say but  
21          I am not happy, so make sure the letter keeps that  
22          option open". However, there was evidence that unless  
23          the First Minister expressly accepted rejection of one  
24          of his ideas, he would or might return to it at a later  
25          date, and I think one has to accept that the letter to



1       the Public Petitions Committee does not contain anything  
2       that would rule out that option, but that is the nature  
3       of replies to committees. They say what they have to  
4       say, they maybe say it in terms of "We have no plans",  
5       or they don't specifically exclude something, therefore  
6       one can perhaps either return to it or introduce it at  
7       a later stage.

8             In any event, that was his recollection, that he was  
9       insistent that that still stayed on the table at that  
10      time. And again, I don't think ultimately much turns on  
11      that point but that was his position.

12            We know there was an apology on behalf of the people  
13      of Scotland by the First Minister, Jack McConnell, in  
14      the Scottish Parliament on 1 December 2004. After  
15      meeting INCAS on 23 November 2004, records indicate that  
16      Peter Peacock changed the draft Apology from one that  
17      was on behalf of the people of Scotland, to an apology  
18      on behalf of the Government in Scotland and the people  
19      of Scotland. I think that is probably the moment at  
20      which the original text did change. It doesn't seem  
21      that that was perhaps picked up by the in-house team,  
22      OSSE, but ultimately it was picked up by the  
23      Lord Advocate when he saw the draft, and I'll come to  
24      that. But that seems to have been the -- he did seem to  
25      take on board what was being said by INCAS and, in doing

1           that, he reflected that by changing the draft. But we  
2           know why the Apology given was not on behalf of  
3           the Government in Scotland, because on 30 November 2004  
4           there was a late intervention from the Lord Advocate who  
5           had seen the draft Apology for the first time.

6           It is perhaps unfortunate, the timing of that  
7           intervention, given the importance of the matter and  
8           given what the survivor groups were asking for and the  
9           symbolic importance of the occasion, if there was to be  
10          an apology. I am just reminded what the Deputy  
11          First Minister said I think in his evidence that, to  
12          him, there was a bit of a hurry to get all of this  
13          together, I think he put it. The advice of the  
14          Lord Advocate came the day before the Apology was given,  
15          that is very late in the day, and I think he was  
16          reflecting that it might have been a good idea if he had  
17          been brought in earlier or asked for his thoughts or  
18          advice at an earlier stage, and that might have put less  
19          pressure in the situation they were in.

20          But we have this intervention and the Lord Advocate  
21          said this to the First Minister:

22          "I have just seen the draft statement for the first  
23          time. It is of course your decision on what to say, but  
24          there is a risk that any apology, however crafted, will  
25          be used against ministers. As presently drafted, the

1       Apology is pretty unequivocal. It is on behalf of the  
2       Government and people of Scotland, it's done in  
3       a context of recognition of institutional abuse and  
4       the recognition of the role of Government in regulating  
5       such institutions. I consider that at present there is  
6       a strong possibility that this could be taken as an  
7       admission of neglect and failure by the predecessors of  
8       Scottish Ministers and opens the door to establish fault  
9       and liability against ministers. There are at present  
10      some 1300 claims and the potential liability is  
11      enormous.

12            "You should also be aware that the institutions  
13      where the abuse occurred, and who arguably should bear  
14      the primary responsibility, would be only too pleased to  
15      see ministers seemingly accepting liability in order to  
16      minimise their exposure to actions for damages."

17            So essentially the Lord Advocate has advised against  
18      using words which might be interpreted as an acceptance  
19      by the Scottish Executive of responsibility for past  
20      abuse, or indeed saying something that others who it was  
21      thought should bear the primary responsibility might  
22      seize on to minimise their exposure to court actions for  
23      damages.

24            The latter consideration was one that appears to  
25      have weighed heavily with the First Minister, according

1 to the evidence he gave to the Inquiry, at the time when  
2 he accepted the advice of the Government's senior law  
3 officer and principal legal adviser, the not letting  
4 others off the hook point. He even at one point if that  
5 paragraph hadn't been in it he might have maybe paused  
6 a little bit more, even given the advice was coming from  
7 someone he particularly trusted whose advice he did  
8 listen to very carefully.

9 So that certainly seemed to have been perhaps the  
10 stronger of the factors, but he equally accepted the  
11 advice at that time, and that explains why the wording  
12 wasn't as asked for by INCAS, and it perhaps also  
13 explains why there was I think at the time and  
14 subsequently a mixed reaction to the wording of the  
15 Apology, as well as for other reasons that may not have  
16 been accompanied by enough terms of other actions.

17 On the matter of advice on this question of  
18 apologising and the background of legal actions, the  
19 evidence did disclose that as far back as November 2002,  
20 when the officials were preparing briefings in relation  
21 to the initial response to the Petitions Committee, the  
22 in-house legal team, OSSE, were advising against  
23 inclusion of any wording that might be interpreted as  
24 accepting responsibility for past abuse.

25 We also know that in the run-up to the Petitions

1 Committee meeting on 29 September 2004, that  
2 Peter Peacock gave evidence at, that OSSE was  
3 attempting, and I use their words, "to tone down", it's  
4 in an email that was sent internally, Peter Peacock's  
5 proposed statement to the Committee to avoid him saying  
6 anything that might be seen as an acceptance of  
7 responsibility.

8 And indeed OSSE seems to have been giving this  
9 advice in complete ignorance of the First Minister's  
10 position on the question of an apology. So it's not for  
11 that reason that they are telling him "Don't say  
12 'apology', Peter. Leave the stage to the  
13 First Minister", it's for another reason. And it was  
14 only later, after Peter Peacock had appeared before the  
15 Committee, that OSSE were informed of the possibility of  
16 an apology by the First Minister. So there were a few  
17 wires crossed, or at least a communication issue there  
18 which -- well, one would have thought by then the issue  
19 of the Apology and the First Minister's position should  
20 have been known to all.

21 We know that on the same day as the First Minister's  
22 Apology, Peter Peacock announced the Executive's  
23 intention to appoint an independent expert to carry out  
24 a systemic review. MSPs were also told that the  
25 Scottish Executive was in the process of making publicly

1       available records that they held in relation  
2       to residential establishments for children. MSPs were  
3       also told the Executive had asked the Scottish  
4       Law Commission to review the law on limitation.

5       The report of the proceedings in the  
6       Scottish Parliament, which is part of the bundle,  
7       discloses I think a range of views on the question of an  
8       inquiry, and indeed it was not ultimately put to a vote.  
9       I think the position of the Petitions Committee, at  
10      least ostensibly, was a neutral one; they wanted the  
11      matter to be aired and let MSPs have their say, although  
12      I think they were privately, according to  
13      Michael McMahon, supportive of the aims and they wanted  
14      to try to achieve the best outcome for the Petitioners.

15      However, so far as the debate goes, there appears to  
16      have been general support for some kind of investigation  
17      into the past and, accordingly, the announcement of a  
18      review by an independent expert seems to have been  
19      generally welcomed as far as one can tell.

20      At that stage, MSPs received only a broad outline of  
21      the expert's remit, and of course the remit itself was  
22      later drawn up with assistance from OSSE in 2005. The  
23      formal appointment of Tom Shaw was made in August 2005,  
24      at which time he received the finalised remit. And it  
25      was I think carefully worded and did reflect concerns

1 about the proposal that had been aired by a number of  
2 parties prior to the debate, particularly with the  
3 lawyers.

4 The evidence disclosed in a reference, which I'll  
5 call the first reference, was made to the Scottish  
6 Law Commission by the Minister for Justice,  
7 Cathy Jamieson, in or around September 2004. The first  
8 reference asked the Law Commission to review certain  
9 provisions in the Prescription and Limitation (Scotland)  
10 Act 1973 relating to limitation of actions seeking  
11 reparation for personal injury.

12 On about 3 August 2005, about eight months after the  
13 debate, a further reference, which I will just call the  
14 second reference, was made to the Scottish  
15 Law Commission. It was asked to review the law of  
16 prescription as it applied to claims for compensation  
17 for institutional child abuse said to have been suffered  
18 before 1964.

19 The evidence includes reports of the proceedings  
20 before the Public Petitions Committee on  
21 29 September 2004 and the debate on 1 December 2004. It  
22 shows that members of the Petitions Committee and MSPs  
23 who attended the debate on 1 December 2004, including  
24 the current First Minister, were left with the false  
25 impression that the first reference would involve the

1 Law Commission looking at the prescribed claims problem  
2 and they appear to have been reassured by that.

3 The question then arises: did Peter Peacock,  
4 a non-lawyer when he gave evidence to the Committee  
5 in September 2004, or when he spoke in the debate  
6 in December 2004, did he not properly grasp the  
7 fundamental difference between prescription and  
8 limitation, and may he have unintentionally created in  
9 the minds of those listening to him an expectation that  
10 the Law Commission would be looking at both the  
11 prescription problem and the difficulties encountered by  
12 pursuers who are met with a limitation defence?

13 LADY SMITH: I think that is a very fair question to pose on  
14 the evidence, Mr Peoples, and it seems entirely possible  
15 that nobody explained to him the difference in principle  
16 between limitation and prescription. Whose job was it  
17 to do that?

18 MR PEOPLES: I am hesitant to go too far on that point  
19 because I think officials did make clear the difference  
20 between the references in communications internally, so  
21 I am not really wanting to push the idea that maybe the  
22 officials didn't clearly spell it out. I think there  
23 was indications that they tried to avoid anything being  
24 said that would create false expectations. So it is  
25 difficult to know, given that background, quite why this



1           happened, and indeed why the first reference was about  
2           limitation when in fact the obvious thing, if you are  
3           looking at it, the first reference should be about  
4           prescription.

5       LADY SMITH: It may be that one can accept that in some of  
6           the documentation the real problem with prescription,  
7           about retrospectivity for example, is set out, and that  
8           is nothing to do with time bar or limitation, so that  
9           was there. But what wasn't there was making it plain to  
10          Peter Peacock that by the time he was speaking in 2004,  
11          the Law Commission had not yet been asked to look at  
12          prescription. The outstanding reference was only in  
13          relation to limitation, ie time bar.

14       MR PEOPLES: Certainly I did look at what was said  
15           in December, and perhaps before the Committee, and  
16           certainly the word "limitation" does get used, and  
17           sometimes "time bar" loosely gets used. What seems to  
18           happen is whenever these words are used, those that  
19           listen think it's the whole problem. So he may never  
20           have said that it's reviewing the law of prescription as  
21           such, in terms, and I think that may well be borne out  
22           by what he said, but the problem was it was clear from  
23           the interventions that people were seeing this first  
24           reference as perhaps a potential panacea to the problem,  
25           including the problem with the pre-1964 difficulty.

1           But it had been highlighted as far back as 2002 in  
2           what was known as the Beaton Submission, which  
3           Gerald Byrne referred to, and indeed had led to  
4           correspondence from MSPs at that time saying that this  
5           has created a problem, are there plans to have  
6           a compensation scheme? They were saying that as early  
7           as 2002, and this problem never went away.

8       LADY SMITH: Of course it could be said, if you look at  
9           matters from the perspective of the survivors, that  
10          prescription needed to go first, because clearly that  
11          affected the oldest cohort of survivors.

12       MR PEOPLES: Absolutely.

13       LADY SMITH: And they needed to know first whether their  
14          problem was solved or not.

15       MR PEOPLES: Yes. The Government could say, until the  
16          Law Commission came back on limitation, "There is  
17          a prospect that the law can do something for you that  
18          will ease the difficulties you are facing", and they  
19          could say that with a clear conscience, and they did say  
20          things to that effect, but they certainly would have had  
21          more difficulty on the other issue. It wasn't that they  
22          were saying "Well, the law isn't as good as it should  
23          be"; the law basically said you don't have a claim and  
24          you haven't had one for a long time and, okay, there  
25          were ingenious attempts in Kelly to try and get round

1           that, but they failed, and they failed as early  
2           as July 2004. So the problem was there, and it's only  
3           now the problem is being solved.

4           Just on the question of confusion, I did look at  
5           Peter Peacock's evidence, and one thing I think he did  
6           say at one point in his evidence, when I explained what  
7           Kelly did, or the effect of the decision, "This is very  
8           helpful because I never completely understood". And he  
9           said at another point that his understanding of  
10          prescription and limitation were limited, so maybe out  
11          of his own mouth one gets the answer to that point.

12          It is certainly something that I think should have  
13          been much more sharply focused, and care should have  
14          been taken that no one was left with a wrong impression.  
15          Even if it wasn't created by the exact words, someone  
16          should have said "Hang on, don't assume that everything  
17          you think is going to happen in this review is going to  
18          happen, because I'll remind you of what the terms of the  
19          remit was".

20          The remit itself was quite precise. They refer to  
21          the limitation provisions in terms of those set out  
22          in -- I think both Jack McConnell sets it out in his  
23          statement, and it's certainly set out in the SG Report.  
24          They're quite clear. It is easy for me as a lawyer to  
25          say that, and no doubt that is the response some will

1 say, but it was an important point, and if it was  
2 important it had to be conveyed that "You've got to be  
3 very careful what you are saying because people are  
4 thinking that this is going to be something that might  
5 help them".

6 We know that following the debate on 1 December 2004  
7 and the First Minister's Apology on that date the  
8 Shaw Review got on with its work, as did the  
9 Law Commission, Scottish Law Commission. It should be  
10 noted, however, that before the making of the second  
11 reference, at the request of the Minister for Justice,  
12 Cathy Jamieson, there had been informal discussions with  
13 the Law Commission in relation to prescription for  
14 pre-1964 abuse claims, and records do show that  
15 in April 2005 the Scottish Law Commission advised  
16 the Scottish Executive informally that it would  
17 recommend against the introduction of legislation to  
18 create obligations which had legally ceased to exist in  
19 or before 1984. It indicated it could provide  
20 definitive advice on the subject in early course without  
21 waiting for the conclusion of its review on limitation,  
22 first reference.

23 Officials, according to the records, recommended  
24 taking that offer up, the offer of early formal advice,  
25 and added they would be likely to support

1 a recommendation by the Law Commission that the law  
2 should not be changed. In the event, after seeking  
3 Peter Peacock's comments, the Minister for Justice,  
4 Cathy Jamieson, did not take up that offer.

5 Peter Peacock said at the time he didn't favour doing  
6 so. He said:

7 "It seems to me that the issues of limitation and  
8 the 1964 issue need to be seen to be taken together and  
9 reported at the same time."

10 And rather optimistically one might think, without  
11 having any apparent basis for such optimism, he said:

12 "Who is to say that, during the review, views might  
13 not mature and develop?"

14 I think there is an element of naivety there which  
15 perhaps ought to have been responded to.

16 But he went on:

17 "I am less concerned about timescales than I am  
18 about having the issues looked at in the depth and in  
19 the round. As a matter of principle in the case of  
20 survivors of abuse I am not clear how we can, in all  
21 conscience, maintain a limitation of this sort. It  
22 seems arbitrary, discriminatory, and I am not clear of  
23 its necessity."

24 The Lord Advocate, who was then Colin Boyd, provided  
25 his comments at the time, and I quote:

1           "The Lord Advocate is reluctant to get involved in  
2           this issue but has seen Mr Peacock's response. He is  
3           content with the Scottish Law Commission being asked to  
4           take more time but is doubtful about the last point made  
5           by Mr Peacock. It seems difficult to argue that  
6           a limitation on actions should be extended solely for  
7           survivors of abuse. That might seem arbitrary and  
8           discriminatory to others."

9           There are other records, and we haven't really  
10          touched on this much, but there are other records that  
11          show that Peter Peacock and the Lord Advocate at various  
12          times locked horns on the limitation defence, but in the  
13          end the defence was maintained on the advice of the  
14          Lord Advocate, whose advice was accepted by the  
15          First Minister, Jack McConnell. And I think, in  
16          fairness to Peter Peacock, he did recognise that while  
17          he had a concern about this particular issue, others  
18          with greater expertise of the general point might  
19          realise there might be other implications. Therefore,  
20          although I think he still maintained that he didn't like  
21          that defence, he could understand why others were  
22          advising that he maintain it as a matter of principle  
23          and for good and substantial reasons. But I mention it  
24          because that was another little exchange that they had,  
25          but ultimately the defence was maintained.

1           So how do matters stand at May 2007? There has been  
2 a recognition within the Executive since 2002, it would  
3 appear, at ministerial and, it seems, official level  
4 that historically abuse of children in institutional  
5 care had been widespread and there had been serious  
6 systemic failings.

7           An apology had been given, perhaps belatedly, but  
8 not the apology INCAS had wanted, and when making the  
9 Apology in December 2004, the Scottish Executive was not  
10 prepared at that stage to accept responsibility for the  
11 abuse and considered others to be primarily responsible.  
12 And I suspect that will generate a point by some of the  
13 other LTAs about a meaningful apology and the need to  
14 accept some element of responsibility, but they were not  
15 prepared to do that at that stage and the wording  
16 reflects that position.

17           An inquiry or investigation into past abuse had been  
18 ruled out. There is no evidence that officials at any  
19 point between August 2002 and May 2007 advised ministers  
20 that they favoured holding an investigation or inquiry  
21 into past abuse. Whatever doubts may have crept into  
22 the mind of Colin MacLean, and he didn't voice them  
23 which was perhaps unfortunate, it didn't in any way lead  
24 to the officials saying, "Well, we now think that there  
25 is something in this question of an inquiry and we think

1       you should revisit it", so we never got that from the  
2       officials.

3           A truth and reconciliation commission had also been  
4       ruled out, but that was returned to at a later point as  
5       I will come to shortly, and whatever the First Minister  
6       may have had in mind in December 2003, the Shaw Review  
7       was not a listening forum to which survivors could  
8       choose to go to recount their experiences of abuse while  
9       in care. So if one is trying to relate that back to the  
10      calls in the Petition: no listening forum, no inquiry,  
11      an apology but not the apology perhaps that was asked  
12      for. Well, it wasn't the apology that was asked for.  
13      So they are not getting very much so far of what they  
14      were asking.

15          The issue about compensation scheme had been  
16      deferred to await the outcome of the test case, Bowden,  
17      and the Review by the Law Commission of prescription and  
18      limitation. That does beg the question: was there  
19      a missed opportunity to consider the issue of a  
20      compensation scheme by not taking up the  
21      Law Commission's offer of early formal advice on the  
22      prescription problem? So there was an opportunity.

23          The Scottish Executive, led by Jack McConnell, saw  
24      accountability, justice and redress as matters for the  
25      justice system, both civil and criminal. References on



1 prescription and limitation had been made to the  
2 Law Commission, and the Scottish Executive had sought to  
3 support or assist those wishing to go down the legal  
4 route simply by a policy of giving access to relevant  
5 government records and had encouraged other  
6 organisations to do likewise.

7 That is the extent of it, it was support, but they  
8 still maintained this policy position that if you want  
9 accountability, justice and redress the courts are the  
10 place you have to go to, despite the difficulty  
11 obviously for pre-1964 survivors.

12 There was a public commitment on 1 December, 2004 to  
13 improve support services for survivors of in care abuse,  
14 and indeed that was followed up by the new  
15 administration which resulted in September 2008 of the  
16 establishment of In Care Survivors Service Scotland. So  
17 that was not a controversial area, no one ever seemed to  
18 have any difficulty with it.

19 There had been unacceptable delays in responding to  
20 the Public Petitions Committee, as we have discussed  
21 this morning, in relation to the Daly Petition. Before  
22 Peter Peacock's appearance before the Committee on  
23 29 September 2004, there is no evidence of any  
24 significant or meaningful engagement with survivors or  
25 survivor groups. That is something Colin MacLean did

1 say there could have been. Peter Peacock and  
2 Jack McConnell had this theory that they couldn't tread  
3 on the toes of the Committee, but when I asked  
4 Colin MacLean about that at some length he did say,  
5 well, there was nothing to stop taking views. It just  
6 didn't happen.

7 So I make that point because I think they did try to  
8 suggest an explanation for that, and I'm not sure it  
9 really holds water at the end of the day. And I think  
10 Colin MacLean did say in other areas that people would  
11 have been sounded out or consulted on issues in  
12 Education at that time. So that seems to be the  
13 position, there wasn't that meaningful engagement, and  
14 that only happened in the run-up to the debate on  
15 1 December and included direct engagement between  
16 a minister, Peter Peacock, and representatives of INCAS  
17 on 23 November 2004.

18 LADY SMITH: That was because he was going to attend the  
19 meeting of the National Reference Group the same day, is  
20 that right? Or was that another day?

21 MR PEOPLES: No, this was a planned meeting. I think he  
22 decided that although officials had been meeting with  
23 INCAS and he was getting feedback of what they wanted,  
24 he I think wanted to see them personally and he saw them  
25 on that day, and of course it was that day that led to

1 officials writing -- a new suggestion came up for the  
2 rapporteur.

3 LADY SMITH: Sorry, I am thinking about Mike Russell going  
4 to the NRG.

5 MR PEOPLES: So that was the directed engagement by the  
6 minister.

7 There appears to have been little engagement up  
8 to December 2004 with other organisations on issues  
9 arising from historical institutional abuse, other than  
10 encouraging them to make their records available, which  
11 I think was done in a letter of 18 November 2004 from  
12 Peter Peacock to various providers. In particular there  
13 appears to be little or no engagement before  
14 1 December 2004 with care providers or indeed the  
15 Catholic Hierarchy in Scotland on issues such as an  
16 apology, a compensation scheme and an inquiry or  
17 investigation into past abuse.

18 One might think by that stage, given there was  
19 an outstanding petition, that that sort of engagement  
20 might have been more extensive by then. For whatever  
21 reason it doesn't seem to have happened, in any depth,  
22 certainly.

23 The last point I make, just before I move on to the  
24 next chapter post-May 2007, is that the advisers advise  
25 and ministers decide. We certainly heard that said

1 a few times. And much advice was given to ministers,  
2 and your Ladyship has made the point this morning about,  
3 well, there is another role once the advice is received.  
4 But much advice was given, some of which is, on the  
5 evidence, open to criticism, and indeed serious  
6 criticism in my submission. There are matters such as  
7 the incorrect information in the briefing of  
8 23 September 2003 about the position of the cross-party  
9 group. It may not have had consequences, as  
10 Colin MacLean tried to say, but that is not the point  
11 again, it was incorrect information, and it was a matter  
12 that the officials felt was important enough to include  
13 in the discussion.

14 So that was one matter, for example, and it is just  
15 an example --

16 LADY SMITH: That was quite striking because I can picture  
17 now the letter that states in terms that the cross-party  
18 group had an interest in this matter and were I think  
19 actively considering it. That is not the exact wording  
20 but that was the message.

21 MR PEOPLES: Yes, absolutely. And they said that to the  
22 Petitions Committee as early as March 2003, the  
23 Committee having canvassed or sought their response. So  
24 that is striking.

25 There is also of course, and I don't want to labour

1       this again, a statement in the briefings about the scale  
2       of the problem of abuse which appears not, if  
3       Colin MacLean's evidence is accepted, to have been  
4       clearly or accurately expressing views held by  
5       officials. That is unforgivable, in my submission. If  
6       this is, as I think Gerald Byrne said, it was a big  
7       issue and an important -- a big decision that was called  
8       for at that time, it was at the heart of the demands in  
9       the Petition, and yet we get statements that they are  
10      now saying, on reflection, should have been better  
11      crafted, more carefully worded, or points better  
12      clarified or better expressed.

13           There was a lot of legal advice, mainly from OSSE,  
14      but at times OSSE enlisted others when its advice was  
15      not being acted upon. In particular I have in mind when  
16      its advice on the rapporteur proposal was not accepted,  
17      there was an intervention by the Crown Agent on  
18      29 November 2004, two days before the debate, and OSSE  
19      attempted, in relation to that proposal, to get the  
20      support of the Lord Advocate for its position, although  
21      I think he shied away from overt support and just said  
22      "You can let the Minister know I am not necessarily as  
23      attracted to some of these points as you are, but you  
24      tell him".

25           There is nothing wrong with them giving advice and

1 explaining the risks as they see them, but one might  
2 think on this occasion it did seem a little overzealous,  
3 and I think Peter Peacock felt he was being put under a  
4 bit of pressure beyond the normal levels of caution that  
5 he saw from the legal advisers.

6 So one does question whether they either overreacted  
7 or were overzealous in that particular example. It's  
8 one thing to say you have to be comprehensive and set  
9 out all the risks and consequences, but you do get, or  
10 one is left with the impression that this was a bit of  
11 a concerted attempt to say, well, we're going to get  
12 this minister to drop this idea.

13 LADY SMITH: He was being pushed very hard.

14 MR PEOPLES: And indeed at the very last minute Patrick  
15 Layden's note was saying: do change the speech to not  
16 appointing an expert but the possibility of appointing  
17 an expert. And of course Jack McConnell on the day said  
18 "No, we can't do that. Stick to the original plan. We  
19 are going to appoint".

20 I think on that occasion it could be said that there  
21 was an overreaction, perhaps an overzealous effort,  
22 although in fairness to Peter Peacock generally speaking  
23 on that matter he stood his ground, although perhaps he  
24 was weakening at the last minute in terms of how he  
25 would express the matter, but ultimately he pulled back

1 from that.

2 There is also the broad question of whether, at  
3 times at least, ministers may have given too much  
4 deference to legal advice. Yes, consider it carefully,  
5 but you do have to make your own judgments. There are  
6 examples where they did make their own decisions, and  
7 this is one where the politicians clearly recognised  
8 "We can't go to a debate and say we are still  
9 considering something, it looks backwards". So I think  
10 that is the political hat coming in on that occasion.

11 As I say, there may be a suggestion that at least at  
12 times the advisers overreacted, certainly in relation to  
13 the rapporteur proposal, and I suppose I raised the  
14 issue whether reaction to the draft Apology worded in  
15 the very general terms, but including "the Government in  
16 Scotland", was perhaps on one view a fuss over nothing  
17 having regard to what Lord Hope said in Bowden.

18 It may be said it didn't include the words that were  
19 taken out, but I think one could argue that even you  
20 left those words in, the wording was so general and was  
21 so vague that it had no evidential value ultimately and  
22 could not seriously have been founded upon by a claimant  
23 in a litigation.

24 So I make that point. I understand what was said by  
25 Duncan Wilson (inaudible) law, and why it might have

1           given comfort. But when one goes back to that point, it  
2           does appear as if to some extent, perhaps if they had  
3           stood back a little bit more, they might have said,  
4           well, yes, statements of fault do have consequences, but  
5           are we saying it in such a way that they will have  
6           consequences? We need to apologise, and what is wrong  
7           with the State saying that? They might have put the  
8           children in but it doesn't mean legal responsibility in  
9           terms of liability would attach to abuse in due course.

10                 So I just raise that because it did become -- maybe  
11           it goes back to John Swinney's point, that a bit more  
12           measured reflection might have caused a slightly  
13           different response or different advice. Maybe it was  
14           too much. That is one possible conclusion.

15       LADY SMITH: And still very cautious. There is no sign of  
16           anybody saying "Wait a minute, how is this going to  
17           sound to survivors and what is the best we can do?"

18       MR PEOPLES: We know of course now because they did ask for  
19           an Apology from the State, from the First Minister.  
20           They were quite clear in what they wanted. And we know,  
21           as we heard in evidence, "It wasn't the people of  
22           Scotland who abused us, it was the State who put us  
23           there. The State had a responsibility for us even if  
24           the care provider had the day-to-day responsibility".  
25           So it's quite clear how important perhaps the wording



1           was and how that might have resulted in the mixed  
2           reaction that perhaps followed then and subsequently  
3           from survivors to those words, however symbolic the  
4           moment was, and I think it was a symbolic moment, and  
5           no doubt that was captured at the time.

6       LADY SMITH: It was a forward step.

7       MR PEOPLES: It was a step, yes, and clearly it did move it  
8           on a bit. Maybe it was to encourage others, including  
9           providers, to step up and do likewise, but --

10      LADY SMITH: That was the hope.

11      MR PEOPLES: That was the hope.

12      LADY SMITH: It is hard for the word "naive" not to spring  
13           to one's mind.

14      MR PEOPLES: Yes, it's maybe another example of naivety that  
15           sometimes has crept into this situation, yes.

16           Can I turn to post-May 2007, and to some extent  
17           I can take this a little bit shorter. Turning to that  
18           period, from May 2007, by the time the Shaw Review  
19           reported in November 2007 and the Law Commission  
20           in December 2007, there had been an election in May 2007  
21           which resulted in a minority administration coming to  
22           power, the SNP administration. There was a new  
23           First Minister and new Ministers in Education, Justice  
24           and Health, I think one of whom will now tell us she was  
25           relatively inexperienced at the time and called upon to

1           make perhaps quite key decisions, the Health Minister.

2           On the evidence, until 2014 there was no decision of  
3           ministers or recommendation by officials to revisit the  
4           decision not to have an inquiry. It was not until 2014  
5           that the Cabinet was called upon to decide whether or  
6           not to have a public inquiry.

7           There was one very important development in this  
8           period that should not be lost sight of. The Scottish  
9           Human Rights Commission was established by legislation  
10          in 2006 and became operational at the end of 2008. On  
11          the evidence, it was to play a key role in progressing  
12          matters, in particular securing an investigation into  
13          past abuse, establishing an apology at law that enabled  
14          providers to acknowledge and apologise for past abuse  
15          without an apology having legal consequences, and  
16          ensuring the establishment of a listening forum, Time To  
17          Be Heard, which was human rights compliant. So it was  
18          quite instrumental in taking things forward.

19          But on the evidence, it would be open to conclude  
20          that in the period between December 2007 and the  
21          Scottish Government committing to participation in  
22          an InterAction process in December 2011, that that was  
23          an extremely frustrating period for survivors. On the  
24          positive side, there were actions which were intended to  
25          meet some of the needs of survivors, and one example is

1 the In Care Survivors Service Scotland, which was  
2 launched in about November 2008 at a one-year-on seminar  
3 which discussed the Shaw Review, and essentially  
4 continues to this day as Future Pathways, so it does  
5 exist.

6 But the evidence shows that actions such as that, as  
7 was also the case prior to May, before May 2007, that  
8 these actions were manifestations of what Duncan Wilson  
9 characterised as a piecemeal approach to issues arising  
10 from historical abuse of children in institutional care,  
11 and what was needed, he said, was an overall  
12 comprehensive response, that is a range of remedies and  
13 choices.

14 During the period 2007 to 2011, what began  
15 in February 2008, when Adam Ingram made a statement in  
16 the Scottish Parliament on 7 February 2008 as the  
17 exploration of the development of a truth and  
18 reconciliation model or, as it later became known,  
19 an acknowledgement and accountability forum, what began  
20 then was then abandoned in 2009 in favour of  
21 a confidential committee type model similar to one  
22 component of the model in the Republic of Ireland.

23 A standing item on the agenda of meetings of the  
24 National Reference Group that we heard evidence about,  
25 the meetings that took place between 7 February 2008,

1 the Adam Ingram statement and the ministerial meeting on  
2 30 September 2009, the standing item was initially truth  
3 and reconciliation. I have checked that, there were  
4 a couple of meetings, but that was the heading. But  
5 from about 26 September 2008 the standing item was known  
6 as acknowledgement and accountability. So that item was  
7 a regular topic of discussion but one has to note what  
8 was being discussed.

9 The Chair of the National Reference Group was  
10 Jean MacLellan, but it appears from records that the  
11 first discussion of a rather different model, the  
12 confidential committee model, was at the last meeting of  
13 the National Reference Group before the ministerial  
14 meeting in September 2009. The decision to pilot  
15 a confidential committee type forum was made by  
16 ministers on 30 September 2009. That forum was  
17 recommended by officials in a briefing dated  
18 24 September 2009.

19 There is clear evidence that cost was a significant  
20 factor, both in the minds of officials giving advice to  
21 ministers and in the minds of the ministers themselves.  
22 The note of the meeting also records that there was  
23 ministerial agreement:

24 "... that the current name 'Acknowledgement and  
25 Accountability' was not an accurate representation of

1           what was proposed."

2           So the idea that in some way this was simply perhaps  
3           a modest or slight variation on the original truth and  
4           reconciliation, acknowledgement and accountability model  
5           flies in the face of the evidence and the facts.

6           Shona Robison, the Health Minister, clearly favoured  
7           the option which her own officials were recommending, as  
8           a note of the meeting does confirm. Adam Ingram had  
9           concerns about the strength of the recommended model but  
10          said in evidence that an alternative acknowledgement and  
11          accountability model that might cost the sort of sums  
12          mentioned in the briefing was, he thought at the time,  
13          unaffordable, I think that was his position.

14          Fergus Ewing, who was at the meeting, said he would  
15          always have the cost of any option on the table at the  
16          forefront of his mind. And from his evidence, although  
17          he has no recollection of his contribution, if any, to  
18          the meeting, and he couldn't even say whether he had  
19          read the briefing, it seems clear he wouldn't have been  
20          pushing for an investigation committee model, whatever  
21          else might be said. So that was the state of it. But  
22          on the evidence --

23        LADY SMITH: Fergus Ewing seemed at times keen to make the  
24          point that really he was on the periphery of all this.

25        MR PEOPLES: Yes, I will come to that. Yes, he did, and he

1           had a very narrow view of how government works: I have  
2           my brief, my remit, I don't concern myself with what  
3           someone else does, although we are all in government and  
4           we are all acting sometimes on a cross-ministerial  
5           issue. Which might suggest to the outsider that it's  
6           good to talk.

7       LADY SMITH: Exactly.

8       MR PEOPLES: But clearly not the way he did things at the  
9           time.

10           On the evidence, of course, we now know that money  
11           was there in 2009 for a public inquiry or  
12           an investigation along the lines of the investigative  
13           committee model in Ireland. That was the Deputy  
14           First Minister's revelation last Friday on the costs  
15           side. But of course no one went to John Swinney to ask  
16           for money that would be sufficient for such an inquiry  
17           or investigation, and by not asking I suppose the  
18           question arises: was an opportunity for an investigation  
19           lost? Had officials and ministers known money could be  
20           made available, would the advice or the decision have  
21           been different?

22           It may be a little speculation but it was there, the  
23           money was there. So if that was an influencing factor,  
24           they shouldn't have been as concerned as they were.

25       LADY SMITH: Also the view seemed to be taken by officials,

1           because of what they had learned in circumstances that  
2           we don't know about, it could have been simply  
3           conversational in Ireland about the costs projected,  
4           I think it was going to be projected over a nine-year  
5           period by the Auditor General there, for that very  
6           different exercise from what they were considering, in  
7           the light of whatever was the level of Irish lawyers'  
8           fees, that was frightening, terrifying, and we should  
9           not walk into that type of expenditure in Scotland. But  
10          I think, as I commented at the time, that did sound  
11          rather like comparing apple with pears.

12       MR PEOPLES: It was quite a superficial comparison and very  
13       broadbrush. All they wanted was the headline. They  
14       didn't really care whether, when one drilled down to the  
15       figures, they were a reasonable basis of comparison,  
16       they just wanted something to jump out: €136 million,  
17       enough said.

18       LADY SMITH: For a different exercise if you actually think  
19       about it properly, if you even think about it a bit  
20       beyond what we saw evidence --

21       MR PEOPLES: Absolutely. But unfortunately perhaps  
22       questions weren't asked at the time, and maybe that is  
23       also something the Minister should maybe have taken  
24       a keener interest in as well at that time.

25               We do have of course the fact that the briefing was

1 preceded by two meetings involving officials, one on  
2 19 May 2009 shortly after the end of the consultation,  
3 and one on 3 August 2009, and certainly at the second of  
4 these meetings a draft briefing was discussed and  
5 changes were suggested, including highlighting the high  
6 legal costs of the investigative committee model based  
7 on information about actual and estimated costs related  
8 to the Irish model. So clearly they were lining this up  
9 for the briefing.

10 Then there was a meeting with Chris Daly on 4 August  
11 of 2009 which was attended by Helen Holland,  
12 Jean MacLellan and Sue Moody, we touched on this in  
13 evidence. But I did seek to find something out about  
14 that, and I can just say this briefly. There is a note  
15 of that meeting, as it happens. Chris Daly was made  
16 aware there was an upcoming meeting of ministers to make  
17 decisions about any pilot forum. He appears to have  
18 been at least told in general terms of the involvement  
19 of the Human Rights Commission. He was told that while  
20 work in relation to acknowledgement and accountability  
21 was a matter for Health, other adult survivor issues,  
22 such as time bar, were within the remit of other  
23 departments. That is a point Jean MacLellan kept coming  
24 back to.

25 Chris Daly and Helen Holland at that time expressed



1 concern about confidentiality and access by third  
2 parties to evidence given to the forum in connection  
3 with other proceedings, civil proceedings and the  
4 Criminal Injuries Compensation Authority.

5 It also appears from the note that Chris Daly was  
6 finding the National Reference Group meetings stressful  
7 at that point, and I think that maybe dovetails with  
8 evidence he did give to us in phase 1. There were  
9 certain issues, which are not spelt out in the note,  
10 concerning survivor involvement with the National  
11 Reference Group. But they do seem to have been tacked  
12 on because, as has been established for a different  
13 purpose, adult survivors of childhood sexual abuse were  
14 seen largely as a community problem, and somehow it was  
15 just added on to their agenda.

16 The note says:

17 "Jean advised that survivors' views and wishes  
18 varied enormously ..."

19 That was something she kept stressing I think in her  
20 oral evidence.

21 "... and that strong efforts were made to ensure  
22 their voices were heard."

23 It does appear Chris Daly made the point then that  
24 his response had not been included as part of the  
25 consultation exercise and Sue Moody said she would

1 follow that up.

2 The note also records that Helen asked about  
3 acknowledgement by Scottish Government of its  
4 responsibility for historic abuse. Jean noted that the  
5 Tom Shaw Report highlighted failures by Central and  
6 Local Government and by the institutions themselves.

7 The note records that references were made to the  
8 Irish Commission, including the high cost of legal  
9 representation, the length of time taken and "the other  
10 problems experienced by the Irish survivors". So one  
11 can see the direction of travel there.

12 And on the consultation point, I can maybe just deal  
13 with that. Officials did look into the matter and their  
14 position was Chris Daly did not submit a consultation  
15 response. He had submitted his thoughts, they said, on  
16 the questions to be contained in the consultation paper,  
17 which he sent in before the paper was issued. Sue Moody  
18 said at the time that Jeannie Hunter, who we heard about  
19 from Health, tried to explain this to him, gave him  
20 every chance to submit a response, and thought that  
21 nothing more could have been done. So that is just to  
22 tie that matter up in case it is of any significance.

23 There was of course the important meeting of the  
24 National Reference Group on 26 August 2009, the last  
25 meeting before the ministerial decision at the meeting.

1 That was the one where Sue Moody's paper on  
2 acknowledgement and accountability was discussed. There  
3 was, according to the note of the meeting, a lengthy  
4 discussion, and we did see -- we looked at that in  
5 evidence. But the note does record towards the end that  
6 it was asked:

7 "... why the confidential model and not the  
8 investigative model had been chosen as possibly the best  
9 route for the forum. It was explained that in Ireland  
10 both models were used. The investigative model was  
11 hugely expensive (the vast majority of this expenditure  
12 was on legal fees) and it was doubtful whether the  
13 process had been in the best interests of survivors."

14 Sue Moody was not actually at that meeting but the  
15 paper was discussed at that point.

16 Of course the meetings themselves that the officials  
17 had to discuss everything had been preceded by a  
18 consultation exercise between October 2008 and  
19 April 2009, and I suppose whatever Jean MacLellan may  
20 now be saying in her oral evidence, the consultation was  
21 to obtain views on a particular proposal, namely, to  
22 develop an acknowledgement and accountability forum for  
23 adult survivors of childhood abuse. One just needs to  
24 read the letter to see that.

25 I should say in relation to that consultation, FBGA

1           did make a lengthy submission in response to the  
2           consultation on 13 January 2009, but I think in the  
3           traditional consultation period we had some evidence  
4           that the respondents were not necessarily survivor  
5           groups or survivors in the majority. They had this  
6           separate second-part consultation which we discussed --

7       LADY SMITH: I think that was quite clear.

8       MR PEOPLES: Then of course towards the end of the process,  
9           in March 2009 the Scottish Human Rights Commission was  
10          commissioned by the Scottish Government to produce  
11          an independent Human Rights Framework for the design and  
12          implementation of a proposed acknowledgement and  
13          accountability model. So it's the same thing.

14                The briefing itself to ministers was on the evidence  
15          relied upon heavily by the ministers who attended the  
16          meeting. It seems to me that is a fair conclusion.  
17          A number of options were set out in annex A but much of  
18          that annex concentrated on the preferred option. The  
19          significant expenditure in Ireland on legal fees was  
20          highlighted on more than one occasion. The preferred  
21          option for a pilot was a confidential forum where  
22          survivors but not institutions or alleged abusers would  
23          have the opportunity to speak.

24                By then there had been informal contact with  
25          Quarriers. A suitable chair, Tom Shaw, had been

1 identified for the preferred forum. And annex E, as  
2 I think I raised with witnesses, contained the sort of  
3 detail on the preferred option that suggested officials  
4 were, whatever Jean MacLellan may be telling the  
5 Inquiry, confident as to the outcome of the ministerial  
6 meeting. I don't think there is much doubt that they  
7 went in there knowing what was going to happen, even if  
8 theoretically ministers could have said no.

9 The briefing was prepared by officials --

10 LADY SMITH: It wasn't just that Tom Shaw had been  
11 identified, he had been written to by then, had he?

12 MR PEOPLES: Yes, he must have been --

13 LADY SMITH: I think so. We have the letter.

14 MR PEOPLES: Well, no, I think probably --

15 LADY SMITH: Or is that later?

16 MR PEOPLES: -- is that the actual appointment proceeded on  
17 about 12 November, shortly after the ministerial  
18 meeting, which was some might say --

19 LADY SMITH: Yes, that's right. Sorry.

20 MR PEOPLES: -- in haste, but it might also be suggested  
21 that --

22 LADY SMITH: But it was clear from the letter that went out  
23 later that there had been discussions and it was tying  
24 up what the basis of his appointment was going to be.

25 MR PEOPLES: Yes. Jean MacLellan said of course if they

1           didn't decide on that option we wouldn't have sent the  
2           letter, but ...

3       LADY SMITH: Yes.

4       MR PEOPLES: It had all been tee'd up, and indeed Quarriers  
5           had been tee'd up as well. They still had to do some  
6           formal steps to get official formal approval to  
7           participate in the way they did. But, yes, it was --  
8           maybe I was putting it too highly in saying it was  
9           a fait accompli, but certainly they would have been  
10          shocked if the outcome had been any different to the one  
11          we see recorded in the note of meeting.

12               And the briefing was prepared by officials in  
13          Health --

14       LADY SMITH: It might have wasted a lot of time and effort  
15           doing all the work on the preferred option if the  
16           decision had been different.

17       MR PEOPLES: They didn't set out the detail for the other  
18           options. If ministers chose the other options they  
19           didn't say, "Well, if you choose that, ministers, this  
20           is how we will have to lay it all out so we get early  
21           action", so it maybe tells its own story.

22       LADY SMITH: Mr Peoples, I think we will now take the  
23           morning break. Thank you.

24       (11.30 am)

25                               (A short break)

1 (11.50 am)

2 LADY SMITH: Mr Peoples.

3 MR PEOPLES: My Lady, just before the break I was turning to  
4 the briefing of 24 September 2009, just before the  
5 ministerial meeting to select the confidential committee  
6 type forum. That was prepared by officials in Health.  
7 It was a lengthy briefing, but I suppose the real  
8 question is was it an informative briefing given the  
9 importance of the issue and the fact that a number of  
10 departments were to be represented at the meeting?

11 It included information about the consultation  
12 responses in annex C. Did it include adequate  
13 information on matters such as the nature of the work of  
14 the Scottish Human Rights Commission, the stage at which  
15 that work had reached and, importantly, the extent to  
16 which the Commission had been involved in giving views  
17 in relation to the timing of any ministerial decision on  
18 a pilot or the preferred option of officials?

19 Did it include adequate information on the  
20 consultation process? Should it have separated out in  
21 annex C the views of survivors on the one hand and the  
22 views of other respondents on the other? Did it create  
23 the impression that survivors wanted acknowledgement but  
24 were more divided on the issue of accountability?  
25 Did it give any information on the views of the National

1 Reference Group, including the views of the members of  
2 INCAS who were members of that group?

3 And insofar as human rights issues were touched  
4 upon, did the briefing make clear whether any views  
5 expressed in it were those of officials or those of the  
6 Scottish Human Rights Commission?

7 So I think one can criticise it. On the face of it,  
8 it looks a substantial briefing, but when one analyses  
9 it and says what it does say and what it doesn't say, it  
10 seems on one view to leave out an awful lot of matters  
11 that would be germane to the decision that had to be  
12 taken.

13 So I think we have been through a lot of this and  
14 you have heard the evidence but I don't think, in the  
15 end, one could reach a view that the briefing was  
16 informative in the sense that I have described it needed  
17 to be on the matters that should have been addressed at  
18 that stage. But ultimately it's a matter for  
19 your Ladyship, what view you form.

20 We do know when the decision to pilot the forum, the  
21 confidential type/committee type forum was taken by  
22 ministers, the Human Rights Commission had not completed  
23 its work. Duncan Wilson said, and this was recorded in  
24 the Human Rights Framework itself published  
25 in February 2010, that the Scottish Government's



1 decision to announce a pilot forum was made  
2 independently of and prior to the Commission presenting  
3 its recommendations, and I don't think Jean MacLellan  
4 dissented from that in her oral evidence.

5 LADY SMITH: It is quite clear: they hadn't reported, they  
6 hadn't finished, it wasn't known what their final views  
7 were going to be.

8 MR PEOPLES: No. Clearly they did have views on the forum,  
9 once they knew about it, and recommendations were to  
10 some extent acted upon in setting up the forum but that  
11 was at much later stage in the process, not the  
12 pre-decision stage which one might have thought was the  
13 appropriate to time to ask for their views.

14 Duncan Wilson said the Commission made no  
15 recommendations prior to the decision, either of a  
16 general nature or in relation to any proposed pilot. He  
17 said the Commission was unhappy with the timing of the  
18 announcement, and no doubt the Commission was even more  
19 unhappy when it published the Framework in February 2010  
20 and was told that Scottish Government's response to the  
21 recommendations, other than those relating to Time To Be  
22 Heard, would not be given until the Time To Be Heard  
23 Report was available which happened in February 2011,  
24 a year later.

25 Even then Duncan Wilson told the Inquiry the

1 Scottish Government was not prepared to commit to  
2 implementing the recommendations of the Framework, and  
3 to resolve this impasse the InterAction process was  
4 suggested by the Commission, but there was no commitment  
5 by the Scottish Government to participate in such  
6 a process until around December 2011, I think, on the  
7 evidence that he gave.

8         Apart from Time To Be Heard in 2010 and the launch  
9 of the In Care Survivors Service Scotland in 2008, both  
10 of which were Health Department initiatives, what else  
11 had happened between December 2007 and May 2011?

12         I asked Fergus Ewing: what did Justice do between 2007  
13 and 2011 for survivors that made a real difference? He  
14 said that he was not sure his department achieved  
15 a great deal, adding that Justice was not leading on the  
16 issue of response to historical abuse of children in  
17 care.

18         Now, he was representing the Justice Department at  
19 ministerial meetings concerned with issues relating to  
20 adult survivors of abuse as children while in  
21 institutional care. He described, and your Ladyship  
22 mentioned this as peripheral, his role. But that was  
23 despite the fact that survivors, such as Helen Holland,  
24 were above all else seeking justice. Indeed, that is  
25 what they told the Inquiry during phase 1. That was one

1 of the big aims of the persistent campaign to achieve  
2 the aims of the Petition.

3 Fergus Ewing was the minister who said to the Public  
4 Petitions Committee on 21 December 2010 that there were  
5 many people who might view all possible legal avenues as  
6 "more theoretical than real". Before then, as he  
7 confirmed, he had come to the conclusion that it was  
8 impossible or almost impossible for people who had been  
9 abused many years previously to have effective access to  
10 the civil justice system.

11 Despite reaching that conclusion, the policy of the  
12 Scottish Government on accountability, justice and  
13 redress remained as it had been between 2002 and  
14 May 2007. Accountability, justice and redress were  
15 still seen as matters for the justice system both civil  
16 and criminal. The furthest the Scottish Government was  
17 prepared to go was to look at ways of making access to  
18 justice easier for survivors. There was, Fergus Ewing  
19 said, a commitment to consult on changes to the law on  
20 limitation and to explore whether the  
21 Scottish Government could go further than the Scottish  
22 Law Commission's recommendations.

23 In early 2011, in response to the Human Rights  
24 Framework, the Scottish Government also said that it  
25 intended to conduct a scoping exercise to consider

1 issues surrounding a possible reparation scheme.  
2 Perhaps these commitments, limited though they were,  
3 raised expectations among survivors that a breakthrough  
4 might be on the horizon, but there was no breakthrough.  
5 The law on limitation was reformed but that did not  
6 happen until 2017. As for a financial redress scheme,  
7 only now is a Bill, which was introduced on 13 August of  
8 this year, going through the Scottish Parliament.  
9 Pre-1964 abuse survivors have had a long wait for  
10 justice since the prescription problem was first  
11 highlighted to Government in 2002. For those who have  
12 died since then, the wait was too long.

13 Lord McConnell said an inquiry ought to be announced  
14 in the 2008 once the outcome of the test case was  
15 known and in the light of the Scottish Law Commission's  
16 Report on prescription and limitation. Again, the  
17 question may be asked: was that a missed opportunity?  
18 The issue of compensation, he said, should have been  
19 part of the remit of any inquiry, and we do know from  
20 Fergus Ewing's evidence that the Cabinet Secretary for  
21 Justice, Kenny MacAskill, was stating publicly  
22 in August 2008 that there were no plans to compensate  
23 survivors of historical abuse.

24 An inquiry was announced in December 2014, more than  
25 twelve years after the Daly Petition. Michael Russell

1 explained how and why that happened. Even then,  
2 according to him, securing an inquiry was not without  
3 its difficulties. His evidence was to the effect that  
4 there were influential figures in Cabinet who he said  
5 were opposed to a public inquiry and there was, as he  
6 put it in his witness statement, a bit of an impasse.  
7 Following a change of minister on 19 November 2014 and  
8 ministerial changes, an inquiry was in fact announced in  
9 the December of that year.

10 I would just like to make a comment about a matter  
11 which was drawn to my attention last night. There was  
12 a newspaper article published yesterday --

13 LADY SMITH: There were two. There was one in the Scotsman  
14 and one in The Evening Times, but I think The Evening  
15 Times picked up what was in the Scotsman --

16 MR PEOPLES: Yes, I think the Evening Times picks up  
17 The Scotsman article, which was an article by  
18 Kenny MacAskill, published yesterday, entitled "SNP  
19 colleagues should not treat Scotland's Child Abuse  
20 Inquiry as a political football". According to that  
21 article, as I understand it, he, Alex Salmond, and the  
22 then Lord Advocate, Frank Mulholland, were not, before  
23 Alex Salmond's resignation in 2014, saying no to  
24 an inquiry, that is they were not blocking an inquiry,  
25 and the article appears to be saying that the Cabinet as

1 a whole was moving towards an inquiry but there was work  
2 that needed to be done before a decision could be made  
3 on the matter. Prior to leaving office, according to  
4 Mr MacAskill, the collective decision within Cabinet was  
5 a commitment to make a decision on a further inquiry by  
6 the end of 2014.

7 According to Mr MacAskill, the Lord Advocate in  
8 autumn 2014 pointed out, and I quote, "some  
9 deficiencies" in a proposal brought to Cabinet by  
10 Michael Russell and, again I quote, "issues that could  
11 arise as a result of it". That intervention, says  
12 Mr MacAskill, was, and I quote again, "to enhance, not  
13 detract from, Government policy".

14 He says that Cabinet supported the views of the  
15 Lord Advocate, and again I quote:

16 "... and the result was Mr Russell being directed by  
17 the then First Minister to improve the proposals but  
18 confirm the direction of travel towards an inquiry,  
19 which he duly did in a Parliamentary statement on  
20 November 11, 2014."

21 And he says that the announcement of an inquiry was  
22 made the following month.

23 I would just like to make a few comments on that, if  
24 I may.

25 This is not evidence given to the Inquiry by

1 Mr MacAskill. We do not know if he has published this  
2 article with the express approval, consent and indeed  
3 support of Alex Salmond and/or the former Lord Advocate.  
4 Using the media, he is responding to media coverage last  
5 week of a small part of the evidence given by  
6 Michael Russell and John Swinney. He has chosen to wait  
7 until the day before closing submissions to challenge  
8 the accuracy of that evidence.

9 This hearing is concerned with actions of  
10 Scottish Government between 2002 and 2014 in response to  
11 historical abuse of children in institutional care and  
12 is exploring the reasons why it took more than twelve  
13 years to announce a public inquiry from the call for  
14 an inquiry made in the Daly Petition that was submitted  
15 in August 2002.

16 Whether in the months immediately preceding the  
17 announcement of an inquiry in 2014 there were or were  
18 not differing views on the question of an inquiry within  
19 Cabinet is not, it is suggested, an issue that has to be  
20 resolved by this Inquiry.

21 Whether or not the Cabinet was united in the latter  
22 half of 2014 on whether there should be an inquiry,  
23 there is plainly incontrovertible evidence that  
24 the administration led by Alex Salmond, in which  
25 Mr MacAskill served as Cabinet Secretary for Justice,

1 did not between 2007 and 2014 (a) establish an inquiry  
2 in response to the historical abuse of children in care,  
3 institutional care notwithstanding continuing calls for  
4 one from survivors and others, (b) put in place  
5 a compensation scheme for survivors who had in that  
6 period and for many years before had no access to the  
7 courts, and (c) make changes to the law of limitation.

8 Seeking to understand the reasons for not doing so,  
9 rather than focusing upon the matter raised by  
10 Mr MacAskill in his article, in which he also raises  
11 issues that are not relevant to this Inquiry, are the  
12 matters that lie at the heart of this particular hearing  
13 and should, in my respectful submission, be the real  
14 focus of attention.

15 LADY SMITH: Thank you for that, Mr Peoples.

16 MR PEOPLES: I don't intend to spend too long on the  
17 evidence of Michael Russell, it should be still fresh in  
18 the memory of those who heard it.

19 He said his involvement with issues concerning  
20 historical abuse of children in institutional care had  
21 been "tangential", was his word, until mid-2014. He had  
22 a general awareness of what was going on, that is the  
23 InterAction process during 2013 and 2014 that had  
24 produced an Action Plan which, as Duncan Wilson  
25 explained, left the option of an investigation or



1 inquiry into historical abuse on the table.

2 The view of the Scottish Human Rights Commission had  
3 been a consistent one since 2010, there should be some  
4 kind of investigation by the State into the whole  
5 situation, and a human rights-based approach to  
6 responses to historical abuse of children in  
7 institutional care required the State to ensure a range  
8 of remedies.

9 Michael Russell acknowledged that the InterAction  
10 process was a very significant factor in taking matters  
11 forward. When the Scottish Human Rights Commission  
12 published the Human Rights Framework in February 2010 it  
13 recognised that, and this comes from the Framework,  
14 a series of significant steps had been taken to address  
15 historical childhood abuse and its impact on those who  
16 were abused. What was produced was:

17 "A Human Rights Framework for the design and  
18 implementation of the proposed acknowledgement and  
19 accountability forum and other remedies for historic  
20 child abuse in Scotland."

21 The Framework reflected the Human Rights  
22 Commission's consistent view from the time of its  
23 commission in early 2009 that a human rights-based  
24 response to historical abuse of children in  
25 institutional care required the State to ensure a range

1 of remedies.

2 Michael Russell also acknowledged the profound  
3 impact his engagement with survivors on 27 October 2014  
4 at an InterAction event had in persuading him of the  
5 need for an inquiry.

6 While he concluded the time was right for an inquiry  
7 and persuaded others, such as John Swinney, of the need  
8 for an inquiry, the question must still be asked: were  
9 there other, earlier times which were right for  
10 an inquiry? On the evidence it suggested it would be  
11 open to an inquiry to say yes to that question.

12 I think John Swinney, in giving his evidence, first  
13 of all accepted, as he was bound to do, that the  
14 financial redress scheme was far too long in coming.  
15 But on the question of whether an inquiry should have  
16 been announced earlier, I just quote from his evidence:

17 "I think it would have been better if that was the  
18 case. I think we would have helped survivors if we had  
19 got here earlier and I apologise for the time it has  
20 taken us to get to that point".

21 The importance of the role of the Public Petitions  
22 Committee was acknowledged by the Deputy First Minister  
23 in giving his evidence. He said:

24 "I think what has led up to this Inquiry is  
25 an illustration of the power and effectiveness of the

1 public petitions process."

2 On the evidence, its former Convener,  
3 Michael McMahon, played a key role. He was prepared to  
4 listen, and listen carefully, to those supporting the  
5 Daly Petition, and he and his fellow members on the  
6 Committee between 2003 and 2007 did their utmost to help  
7 survivors who were calling for an inquiry and supporting  
8 the other aims of the Daly Petition.

9 As Michael McMahon told the Inquiry, seeking  
10 a debate in the Scottish Parliament, the "nuclear  
11 option", in his words, to discuss the issue of  
12 historical child abuse was, for the nascent Public  
13 Petitions Committee, a first.

14 The Deputy First Minister acknowledged deficiencies  
15 in engagement with survivors during the period 2002 to  
16 2014 for which he, on behalf of the Scottish Government,  
17 unreservedly apologised. I put this to Lord McConnell  
18 too, and I think he took no issue with what was said in  
19 that part of the evidence or in the relevant part of the  
20 Scottish Government Report.

21 On the evidence, lessons appear to have been  
22 learned, and the Deputy First Minister recognised the  
23 need to choose carefully officials with the  
24 responsibility for engaging with survivors. Making  
25 correct choices was, he said, a vitally important

1 matter.

2 On the issue of engagement, his own reflections had  
3 led him to conclude that "the boldest steps on the  
4 journey to where we are today", in particular the  
5 First Minister's Apology in 2004, and the decision in  
6 2014 to hold an inquiry, "came about through direct  
7 engagement with survivors." However, he accepted that  
8 on too many occasions survivors asked for things to be  
9 done but were not listened to, sadly a situation very  
10 familiar to them both as children and as adults. The  
11 Government had failed to listen to survivors.

12 As the Deputy First Minister acknowledged, and  
13 I quote:

14 "The landmark moments here are when we actually  
15 listened, when we got to the right judgments."

16 So these are all the submissions I would make at  
17 this stage and I leave it to others to make their  
18 submissions in due course.

19 LADY SMITH: Mr Peoples, that is very helpful. I am sure  
20 others will have found it of great assistance to hear  
21 you go through the amount of detail that has been  
22 referred to in your submissions. I think that was  
23 necessary.

24 I would like to turn now to the representation for  
25 INCAS, if I may. Mr Scott, whenever you are ready.

1 Closing submissions by MR SCOTT

2 MR SCOTT: Thank you, my Lady.

3 "There are some things which happen that you just  
4 get a sense they are not going to go away. They are  
5 going to keep on and get more difficult, and sooner or  
6 later either eventually they subside or you end up doing  
7 something you could have done much more easily a few  
8 years earlier, and that happens frequently right across  
9 politics."

10 This was Colin MacLean answer in response to  
11 your Ladyship's question as to why he was uneasy right  
12 from the beginning of discussions on child abuse and the  
13 Scottish Government's approach to this. Of course his  
14 sense must have depended to a great extent on his  
15 impression of survivors like Chris Daly and  
16 Helen Holland. Your Ladyship might well conclude that  
17 if he formed that view and if it was based on what he  
18 knew of them, he was absolutely correct.

19 In one sense, although this case study is about  
20 the response of the Scottish Government between 2002 and  
21 2014, it is really just as much about the strength and  
22 determination of a small group of survivors who simply  
23 would not accept no for an answer and would not  
24 compromise on their demands: acknowledgement, apology  
25 and accountability, demands made on behalf of all

1 survivors, despite attempts to persuade, cajole,  
2 distract or patronise them.

3 Your Ladyship too will have seen their incredible  
4 resilience and justified obstinacy when confronted by  
5 officials and others who were only too quick to throw up  
6 obstacles and explain why certain things could just not  
7 be done.

8 Of course people like Helen, who is here today,  
9 would say that they are just ordinary people. But in  
10 how they have succeeded in allowing a voice to be given  
11 to previously unheard children they are anything but  
12 ordinary. No doubt there were many times when it would  
13 have been easier for them personally to give up, but  
14 they felt and feel a deep sense of responsibility in  
15 a quest for justice and they feel the heavy weight of  
16 those who are no longer with us.

17 Ministers and others have paid tribute to them, and  
18 rightly so. That tribute must extend also to some who,  
19 because of the Government's delays in getting to where  
20 we are, died before they were able to see the full  
21 extent of their achievements, and I have been asked to  
22 mention in particular Frank Docherty and Jim Kane.

23 This is not just about delays, my Lady, it is about  
24 delays which have had real consequences.

25 We have now heard more about some of the obstacles

1 and obstructions survivors have had to overcome for the  
2 last 18 years. Regrettably, some of this seems to have  
3 happened through poor listening and poor communication  
4 generally. Too often what we have heard of suggests  
5 prioritisation of views and action in accordance with  
6 pretty much foregone conclusions. While presented as  
7 decisions which could have been changed subsequently,  
8 that was not usually or often the reality.

9 In looking at the response of Government, it is  
10 right to acknowledge that much has now been done.  
11 Indeed, more has been done arguably in these last six  
12 years than in all of those about which we have heard.  
13 And not least of what has been done is this Inquiry,  
14 which gives survivors acknowledgement and accountability  
15 in living embodiment of part of Chris Daly's Petition.  
16 To that has been added the Advance Payment Scheme and  
17 the Redress for Survivors Bill.

18 Taken together, although still not perfect, and  
19 survivors are still working with Government and others  
20 to address the deficiencies, the Apology now offered,  
21 the one from 2018, and repeated by the Deputy  
22 First Minister, meets I suggest the five elements of  
23 a meaningful apology set out in the academic literature  
24 to which I referred in my opening statement. In  
25 particular, clear acceptance of responsibility on behalf

1 of the State and an offer of repair or corrective  
2 action.

3 I should say although that academic study is more  
4 recent, I don't accept that hindsight was necessary to  
5 work out that an apology without action might be seen as  
6 of less value.

7 Not yet enough, my Lady, but as long as more  
8 requires to be done, there are survivors who will keep  
9 pressing, and that is perhaps a useful warning to  
10 ministers and officials.

11 In her opening statement on of behalf of the  
12 Scottish Government, Ms O'Neill made it clear she was  
13 not instructed to defend the Scottish Government in  
14 a manner typical perhaps of litigation, and that is  
15 entirely appropriate and welcome and in accordance with  
16 how Government should approach a public inquiry. And  
17 nor is she instructed to minimise the criticisms offered  
18 by INCAS and others. And accepted, I should say.  
19 Having had the benefit of reading the Government's very  
20 detailed submissions, there is a great deal of common  
21 ground and that is also welcome.

22 Importantly, Ms O'Neill made it clear that  
23 the Scottish Government would not seek to attribute  
24 institutional responsibility to civil servants, and that  
25 is in keeping with the phrase which Mr Peoples mentioned



1       this morning, and we have heard a lot this year in other  
2       respects, that advisers advise and ministers decide,  
3       although the reality is, regardless of intent, of  
4       obstructions placed in the way by ministers and  
5       officials, sometimes it seems because of poor or  
6       non-existent communication.

7             One advantage of looking now at matters some years  
8       ago is that we have the benefit of hindsight, including  
9       what we have learned from this Inquiry, and it's not  
10      going too far to say it would have been extremely  
11      difficult for some of the things that were said about  
12      public inquiries in some of what we have read to be  
13      repeated to your Ladyship here, now, after the last  
14      several years work that your Ladyship and the Inquiry  
15      team have carried out. But as I said, hindsight wasn't  
16      required for that wisdom to arrive and several witnesses  
17      in recent weeks have acknowledged this much.

18            I want to look again briefly at the Apology in 2004,  
19      and then the long delay in establishing a public inquiry  
20      even after the Apology.

21            In relation to the Apology, Cathy Jamieson was shown  
22      records in which "regret" disappeared from a statement  
23      apparently on legal advice, and legal advice also saw  
24      "the Government of Scotland" disappear from the  
25      First Minister's Apology in 2004.

1           The accuracy of the relevant legal advice can  
2           perhaps be seen, as Mr Peoples suggested, with the  
3           benefit of Lord Hope's remarks in Bowden, that it was  
4           a purely political initiative with no legal significance  
5           whatsoever. But I accept there may in that be  
6           an element of hindsight, however. If matters had been  
7           explored in more detail, I am sure better wording could  
8           have been found.

9       LADY SMITH: There was such a rush at the end, Mr Scott,  
10           wasn't there?

11       MR SCOTT: The last change was made within 24 hours before  
12           the Apology was delivered.

13       LADY SMITH: I have to say, for my part, I do wonder about  
14           the idea that by apologising in 2004 for things that had  
15           happened long before under previous administrations,  
16           there was any basis on which any wording, even the  
17           wording that was rejected, could have been seen as an  
18           admission of liability.

19           Admitting liability involves you applying the legal  
20           standard to yourself, in your thinking, and some people  
21           will apologise for things that actually they don't need  
22           to apologise for, it wasn't their fault. And then it  
23           involves understanding the law as to whether they have  
24           got the standard right but the facts don't show that the  
25           law would hold them responsible. It's a long shot.

1 MR SCOTT: Of course, my Lady, absolutely.

2 Even legal advice subsequently shown to be incorrect  
3 might, on its own, provide an adequate explanation for  
4 last minute contortions over the wording of an apology,  
5 although one wonders also whether perhaps a delay,  
6 a pause, at that stage, might -- in an important matter  
7 last minute legal advice that potentially means you have  
8 to change the whole thing, even if there were  
9 consequences of delaying, that delay might have been  
10 better than simply proceeding, especially if the full  
11 range of how this was going to be presented had not been  
12 properly considered.

13 In fairness, if the rest of the necessary suite  
14 of measures suggested by the Scottish Human Rights  
15 Commission and requested by survivors, some of which  
16 have subsequently been put in place had been made  
17 available shortly after the Apology, then for all its  
18 recognised limitations that Apology might have sufficed.  
19 It is largely the failure to do more at the time that  
20 started to undermine the Apology, which is why I would  
21 say more about the other aspects of the delay than about  
22 the Apology itself today.

23 Given that part of the reasoning for the wording of  
24 the First Minister's Apology was to not let others off  
25 the hook by apologising on behalf of the State, it is

1       ironic that what happened not only allowed institutions  
2       to remain off the hook, and looking in the other  
3       direction of the hook, if I am not going to stretch the  
4       metaphor too far, it also left the impression of the  
5       State letting itself off the hook.

6             But more significant than the wording of the Apology  
7       are the failures around the issue of a public inquiry,  
8       failures to listen, failures to explain frankly,  
9       failures to accurately represent the views of survivors,  
10      and failures to act.

11            So turning then to the Inquiry, Michael McMahon said  
12      on Day 201:

13            "They were failed in the past, they should not be  
14      failed now."

15            The decision not to hold an inquiry in  
16      September 2003 was finalised nine months before it was  
17      announced, and I suggest that what happened during that  
18      period of nine months, and Mr Peoples said as much,  
19      cannot truly be considered a meaningful review, but it  
20      is a lengthy period during which to keep engaged  
21      survivors in the dark about the Government's true plans.

22            Michael McMahon explained that the Shaw Review,  
23      which followed the Apology, disappointed many. There  
24      are positives from it, which are referred to in the  
25      Government's closing submissions, but the deficiencies

1           led to renewed calls for a full a public inquiry.

2           Mr McMahon explained that civil servants had  
3           controlled the process to stop a public inquiry from  
4           happening. It was more than they weren't trying; they  
5           were trying to stop it from happening, as he said,  
6           guided by those who didn't want to have that inquiry for  
7           whatever reason, legal reasons or governmental  
8           precedents or whatever the Government has.

9           And this helps to explain, and your Ladyship  
10          explored this point with as well on the question of  
11          independence, why survivors wanted an independent  
12          inquiry, because they had lost confidence in civil  
13          servants to be able to deliver that.

14          It is most odd, my Lady, that we have official  
15          advice on this issue which those involved in writing  
16          have told us didn't mean what it said, and those  
17          involved in reading said they didn't believe anyway.  
18          One example is the initial briefing on 13 November 2002  
19          for the Minister for Education and Young People.

20          Documents like this were not simply unclear, as was  
21          suggested. They are entirely clear. In fact, in their  
22          arguments against specific action, it is not that they  
23          were unclear, they were positively misleading. And  
24          consider the position, my Lady, if we had not heard from  
25          the witnesses. The question of the accuracy of advice

1           and records is important because civil servants move,  
2           ministers move, they may leave Government entirely, they  
3           are may depend for their whole recollection on what the  
4           records say. In fact, because perhaps of the issues  
5           involved, people had their own memories to bring but  
6           there are situations where the records are all  
7           an inquiry might have to go on, and then your Ladyship  
8           would have been left with an entirely different picture.

9           Misleading advice which could be properly understood  
10          it seems only with prior knowledge and discussions which  
11          are not reflected in the records, that is no way to keep  
12          important records.

13          The advice from officials frequently emphasised  
14          likely costs and problems with the public inquiry, as  
15          your Ladyship point odd out during the evidence of  
16          Jean MacLellan there is a question over the relevance of  
17          the comparators used in the absence of more information  
18          and I welcome the acknowledgement by Government if  
19          closing submissions that the presentation of costs was  
20          superficial.

21          We were told that costs did not drive decisions, but  
22          the frequency, extent and prominence of warnings about  
23          costs is striking and were certainly not used to support  
24          the idea of a public inquiry.

25          But as with legal advice costs are an appropriate

1 consideration for Government, indeed it would perhaps be  
2 irresponsible of Government to approach something  
3 without considering the costs in making important  
4 decisions. But look at what happened subsequently it  
5 seems Scotland could have better afforded the cost of  
6 a public inquiry when it was first sought than had when  
7 they eventually decided to hold it and that may be  
8 something of significance for the public in Scotland  
9 now.

10 At the same time as emphasising costs I suggest  
11 advice understated support for a public inquiry based on  
12 selective attention to consultation responses as well as  
13 partial and misleading representations of the views of  
14 survivors. I recognise that there is a difficult issue  
15 in there and that some individuals and some groups are  
16 more vocal than others, and even within a group like  
17 INCAS there is a range of views, it is not a single  
18 voice with a single view or list of views. But better  
19 listening can address that. And it is certainly not as  
20 perhaps appeared to be suggested that we don't know if  
21 they are representative and therefore we are not really  
22 going to listen probably at all or we are not going to  
23 listen to them because they might not be as fully  
24 representative that is not the way of doing it that suggests  
25 more effort than listening properly rather than saying

1 we need to be careful about how much weight we give to  
2 that.

3 We have also seen misrepresentation which had been  
4 mentioned by Mr Peoples in relation to the views of the  
5 cross-party group on survivors of childhood sexual abuse  
6 and there is a pattern there of misrepresentation in one  
7 direction it is not misrepresentation which favours  
8 a public inquiry, it is all misrepresentation which  
9 suggests it shouldn't happen.

10 Whether part of a pattern or not, survivors feel  
11 that what an inquiry would have been like was  
12 misrepresented to them. Clearly there was a significant  
13 change in this area of the law in I think it  
14 was June 2005 that the inquiries Act came into force,  
15 and that still left plenty of time to have honest  
16 discussion with survivors about the options without  
17 referring to off-putting examples which were by no means  
18 the only models.

19 My next heading is the disappearance of  
20 accountability, the position on a Time To Be Heard might  
21 suggest pre-judgment from Government, when Government  
22 announced plans for a confidential acknowledgement forum  
23 before the Scottish Human Rights Commission had  
24 reported, the Commission having agreed to consider this  
25 very issue, in terms of an overall Human Rights



1 Framework for an acknowledgement and accountability  
2 forum.

3 According to Jean MacLellan a proposal to develop  
4 an acknowledgement and accountability forum was not, in  
5 fact, a proposal to develop an acknowledgement and  
6 accountability forum. Despite stating that the name  
7 acknowledgement and accountability could be interpreted  
8 more broadly, rather what she seems to have known should  
9 have been interpreted much more narrowly as involving no  
10 element of accountability. Perhaps because of some  
11 misinterpretation on the part of officials of responses  
12 to the consultations as to the meaning of  
13 accountability, or respondents perhaps not liking the  
14 words. But I may say, my Lady, in the discussions I had  
15 been involved in with survivors for the past several  
16 years, there has not been any difficulty with the  
17 expression "acknowledgement and accountability", and it  
18 comes up more in conversations from the survivors than  
19 it does from the legal team.

20 Later Ms MacLellan said that "acknowledgement and  
21 accountability" was just a label, and your Ladyship can  
22 I think take it that it was much more than a mere label  
23 for survivors.

24 LADY SMITH: It is what it says, it's holding people to  
25 account for harm that was caused.

1 MR SCOTT: And as long as that remained how documents and  
2 meetings were titled, it carried that implication for  
3 survivors.

4 As the Deputy First Minister accepted in his  
5 evidence, given the significance of known meetings  
6 between ministers and survivors, and this is one of  
7 the areas of common ground, the real significance when  
8 ministers met survivors for themselves, identifying  
9 those who are to listen on behalf of Government is  
10 important, and the question of them being trauma  
11 informed is clearly important that also features in the  
12 Government's submissions, and is absolutely right, and  
13 I think there is a tacit acceptance that it was missing  
14 at least from some of the officials at the time.

15 Your Ladyship might conclude I don't suggest it is  
16 a finding in fact but your Ladyship might conclude the  
17 right people were not in fact identified to listen to  
18 survivors at the right time.

19 Even with a change of Government ministers and  
20 officials did not remove all unnecessary obstructions.  
21 We know that Government heard from institutions which  
22 have been and may yet be the subject of case studies and  
23 formed views about what should happen based on their  
24 input and that second-hand of their insurers, and legal  
25 advisers. It seems odd perhaps that the concerns about

1           how representative survivors stated views were doesn't  
2           seem of it featured when hearing from institutions.

3           That led -- that contributed to I should say rather  
4           than led contributed to the removal of accountability  
5           from Government plans albeit not from all the paperwork.  
6           Without more effort it was unlikely that accountability  
7           was simply going to happen on its own, doesn't look as  
8           though the institutions were going to insist on it. Or  
9           say to Government that we think there should be more  
10          accountability here. Clear advice from officials  
11          apparently based on consultation responses -- this is  
12          a point I should have made slightly earlier -- was that  
13          survivors may not relate to the term "acknowledgement  
14          and accountability", and clearly what I was meaning to  
15          say, my Lady, earlier, was what about the concept of  
16          accountability, regardless of what you call it?

17          Taken together, this led in 2010 to a further  
18          petition to address the limitations of a Time To Be  
19          Heard. So there is another message for Government: you  
20          have a group of passionate, committed, engaged survivors  
21          and they are having to go back with another petition.  
22          What does that say about a process that by that stage  
23          had been going for several years? Back to the  
24          extraordinary ordinary people whose patience had not  
25          been rewarded with appropriate action which they had

1       understood would follow their discussion and, for their  
2       part, good faith engagement.

3       In my opening I mentioned the Catholic Church,  
4       and I mention it again because it featured specifically  
5       in evidence. Lord McConnell said it was clear from  
6       discussion with Cardinal O'Brien that the Church would  
7       not voluntarily step up to the plate. Michael McMahon,  
8       who explained his perspective in particular, which made  
9       it more puzzling for him, couldn't understand the  
10      position of the Catholic Church, which was just to pass  
11      by on the other side, and clearly there are biblical  
12      connotations with that expression, and to refuse  
13      point-blank to take any moral responsibility.

14      While acknowledging -- I said "niceties", I'm  
15      perhaps being unkind -- some of the requirements of  
16      canon law, or the implications of canon law, we have  
17      seen in this Inquiry the Church can play its role in  
18      offering acknowledgement and accountability and cut  
19      across some of the strict demarcations.

20      It may be that changes in leadership make  
21      a difference not only in Government but also in the  
22      Church. It is regrettable that it took so long for this  
23      to start happening, and I regret that for survivors the  
24      Catholic Church still has much to do and, amongst other  
25      things, may need to review its approach to the Redress

1 Bill. It is one thing perhaps to play their part in  
2 a public forum, such as the Inquiry, but it is important  
3 for them to engage properly with important discussions  
4 in relation to other matters which are not within  
5 your Ladyship's remit but sit to the side in a way that  
6 is important to survivors.

7 This Inquiry, my Lady, provides proof, I suggest, of  
8 the systemic failure and organised abuse which advice  
9 from officials, leaving aside claimed intentions and how  
10 it was now said it was received, stated was absent. The  
11 weight of evidence seen and heard in this Inquiry, and  
12 more, was there at the time if they had chosen to look.  
13 We know that it was much more than sporadic abuse by  
14 rogue individuals, as it was characterised by Mr Peacock  
15 on Day 202 when he was trying to address the question of  
16 whether it was widespread or not, and the word play over  
17 "systemic" and "systematic".

18 No one now appears to argue anything different to  
19 what this Inquiry has seen in abundance, and in fact  
20 they could not do so. Before I turn to the suggested  
21 findings, I hadn't noticed Mr MacAskill's piece in the  
22 Scotsman, and I will just content myself very briefly  
23 with saying, having now read it, it perhaps begs more  
24 questions than it answers, but I agree entirely with  
25 what Mr Peoples said. It may be that Mr MacAskill has

1           made the mistake that one or two other individuals have  
2           made in thinking this Inquiry is about them as opposed  
3           to bigger issues, but for fear of reading an answer to  
4           anything I might say today in tomorrow's Scotsman,  
5           I will content myself with agreeing with Mr Peoples  
6           otherwise.

7       LADY SMITH: Wisdom noted, Mr Scott.

8       MR SCOTT: Thank you, my Lady.

9           I suggest the following, admittedly stark, findings  
10          in fact for this case study, but actually again common  
11          ground with what is accepted and submitted on behalf of  
12          Government.

13          Firstly, that Government record-keeping and advice  
14          on this subject was often inaccurate or at least  
15          incomplete, inadequate. Secondly, consultation with  
16          survivors was inadequate. Thirdly, communication with  
17          survivors was inadequate. Fourthly, perhaps going  
18          slightly further than contained in the Government  
19          submissions, your Ladyship would, from the records, be  
20          entitled to make an inference that officials had decided  
21          that a public inquiry was inappropriate and framed their  
22          advice to ministers accordingly.

23          That leads on to number five, which is that advice  
24          from officials emphasised reasons for not holding  
25          a public inquiry over reasons for having one and,

1           for example, the possible costs. Sixthly, advice from  
2           officials gave an incomplete and inaccurate account of  
3           the views of survivors about a public inquiry. And then  
4           lastly an area of common ground, and something quite  
5           striking from the evidence, that policy decisions about  
6           the Scottish Government's response changed, or were at  
7           least heavily influenced, when ministers personally met  
8           with survivors. So it goes back perhaps to the point  
9           about the right people at the right time speaking to the  
10          individuals.

11        LADY SMITH: Thinking about what that tells me, Mr Scott,  
12           are you asking me to consider whether officials should  
13           have advised ministers that they should seriously  
14           consider doing so at an earlier stage?

15        MR SCOTT: Yes, indeed my Lady, and I think what was said  
16           about the concerns in the early stages about cutting  
17           across the position of the Public Petitions Committee  
18           doesn't really withstand scrutiny. If some of these  
19           meetings and discussions with survivors had happened  
20           direct at an earlier stage, I quite accept, as the  
21           Deputy First Minister said, he couldn't possibly see  
22           everyone, but if you have got officials exercising good  
23           judgment, there will be occasions where they will say  
24           "This time you need to speak to this group or these  
25           individuals personally". And if it is done with

1 an appropriate use of judgment, then it is not going to  
2 swamp ministers. But this is one of those occasions  
3 where that should have happened at an earlier stage and  
4 it may be, given what we have heard, different decisions  
5 would have been made or the same decisions would have  
6 been made at an earlier stage.

7 I go back to the starting quote, my Lady:

8 "There are some things which happen that you just  
9 get a sense they are not going to go away. They are  
10 going to keep on and get more difficult, and sooner or  
11 later either eventually they subside or you end up doing  
12 something you could have done much more easily a few  
13 years earlier ..."

14 We know of course that with the determination of  
15 Helen and her colleagues and David Whelan, this was not  
16 an issue which would subside or be allowed to subside.  
17 So here we are, with survivors feeling they had to push  
18 constantly uphill to force the Government to do the  
19 right thing.

20 Unfortunately it does appear, as I suggest in my  
21 opening statement, that more effort went into justifying  
22 not having a public inquiry, indeed expense went into  
23 justifying not having a public inquiry, than looking at  
24 the possibility with an open mind as to what was best  
25 for most survivors, as reflected in what INCAS and



1 others were actually saying from a very early stage back  
2 to the Daly Petition.

3 Written advice, my Lady, was skewed with belated  
4 attempts made here to re-interpret it with the benefit  
5 of hindsight and in light of thoughts sometimes  
6 apparently kept in people's heads rather than shared and  
7 recorded.

8 I suggest that the clear thrust of the advice  
9 overall was that there should be no inquiry, and  
10 thankfully we had INCAS and others who persisted, and  
11 eventually a Government and officials that listened.

12 Can I conclude, my Lady, by thanking Mr Peoples for  
13 his incredible success in blending our submitted  
14 questions into his examinations, not only those that  
15 were submitted in advance but also picking up on matters  
16 raised in emails sometimes just minutes before. This is  
17 an occasion where proceeding as he did avoids the  
18 criticism that I was making about the First Minister's  
19 Apology, discussions that happened on the day and  
20 emails, all of which were blended in seamlessly to  
21 Mr Peoples' examination.

22 Otherwise I thank you.

23 LADY SMITH: Thank you for that gratitude to Mr Peoples.

24 I am sure he appreciates it. Thank you also for your  
25 very helpful submissions, Mr Scott, I am grateful to you

1           for that.

2           I turn now to the representation for FBGA. Mr Gale,  
3           when you are ready.

4                       Closing submissions by MR GALE

5   MR GALE: Thank you, my Lady.

6           Again can we repeat our thanks for the opportunity  
7           to participate in this section of the Inquiry.

8           At the outset, can I thank Mr Peoples in particular  
9           for his careful submission that he has just made, with  
10          which I am in really quite clear agreement, and also for  
11          the careful, knowledgeable and thorough way in which he  
12          laid the evidence before the Inquiry.

13          Can I perhaps just mention at this stage, it's  
14          perhaps a useful place to do so, my Lady, I did read  
15          Mr MacAskill's article yesterday in the paper and I had  
16          intended to make some comment on it. It's quite  
17          apparent that Mr MacAskill has his own agenda and, so  
18          far as what he said, I am in entire agreement with what  
19          Mr Peoples has already said.

20   LADY SMITH: Thank you.

21   MR GALE: My Lady, turning to our submission, what is of  
22          particular interest to David Whelan, as the  
23          representative of the Former Boys and Girls Abused in  
24          Quarriers, is the exploration that these hearings have  
25          afforded into the reasons for the twelve years delay, on

1 the part of successive Scottish Governments of differing  
2 political hues, to arrive at a view that an inquiry of  
3 the type in which we are presently engaged was the  
4 appropriate course for the Government to take.

5 I begin with the Chris Daly Petition. Its terms are  
6 well known to my Lady. I make brief repetition of them  
7 there but I don't think it is necessary to take up time  
8 here with them, other than to say that what Chris Daly  
9 sought in 2002 was, as we have emphasised,  
10 an opportunity to tell of the abuse that they, the  
11 survivors, suffered to a sympathetic and experienced  
12 forum. That was utterly critical to Mr Daly's Petition.

13 We say that Mr Daly's Petition was and remains  
14 an extraordinary document. Its tone was entirely  
15 measured, it was succinct, but exhaustive in setting out  
16 what the Petitioners sought. Not a single word of it  
17 was superfluous. It was nuanced in that the drafter  
18 appreciated an unreserved apology by the State and the  
19 establishment of an inquiry were matters within the  
20 powers of the Executive, but that only pressure could be  
21 brought to bear on the institutions in which abuse had  
22 taken place to offer an unconditional apology.

23 LADY SMITH: I was and remain struck also, Mr Gale, by  
24 Mr Daly's appreciation of the need to look at matters  
25 not only from the perspectives of survivors but the

1           perspectives of those who were responsible for the abuse  
2           happening. He knew that if an inquiry was going to be  
3           fair and proper, all views, both sides, needed to be  
4           given a voice, and what they said taken into proper  
5           account.

6       MR GALE: Indeed, the perspective of the victims and the  
7           perspective of the persons responsible for committing  
8           the abuse.

9       LADY SMITH: Which of course is one of the things that  
10          Duncan Wilson pointed out in relation to the Framework  
11          that the SHRC drew up for the review that was to go  
12          ahead.

13       MR GALE: Yes, both those considerations are critical.

14               My Lady, I go on to deal with the survivors'  
15          interaction with Government. We make initially the  
16          point that when Helen, the late Frank Docherty,  
17          Chris Daly and David Whelan began their campaigns on  
18          behalf of survivors they were not professional  
19          lobbyists, they were primarily survivors of abuse within  
20          institutions in Scotland, and were motivated to act with  
21          a view to improving in whatever way they could the lot  
22          of others who had been similarly abused.

23               They did not come to the process which required them  
24          to interact with ministers and officials, with  
25          a knowledge of the internal workings of Government.

1       They came bearing the consequences of their own  
2       experience of abuse. As such, they were entitled to be  
3       treated with respect, civility and compassion. They  
4       were entitled to be kept informed of the Government's  
5       relevant policy thinking. The Government accepts this  
6       did not happen.

7       Officials in conversation with survivors or within  
8       their earshot used demeaning expressions, such as  
9       "We can't have the room full of nutters", that is Helen,  
10      and "What a waste of space", Chris. I think that was  
11      directed at him. The use of these terms indicated  
12      a culture of the time that was entirely inappropriate  
13      and was reflective of the scepticism of the genuineness  
14      of the survivors' case. I give the example of -- I go  
15      on to say this approach displayed a disturbing level of  
16      ignorance, and I give the example of the use of the word  
17      "nutter" and say it is a loaded expression.

18      The two examples I have given, the Children's  
19      Laureate, Michael Morpurgo, in 2004, described the need  
20      to attract into the teaching profession what he termed  
21      "nutters", but he said that in the context of eccentric  
22      teachers from whose teaching he had certainly benefited,  
23      and I can certainly say I had a few of those. But ten  
24      years earlier, at a fringe meeting of the  
25      Conservative Party Conference in Blackpool, the then

1 Secretary of State for Education, John Patten, described  
2 Professor Tim Brighouse, who was then Birmingham City's  
3 Chief Education Officer, as "a nutter and a mad man".  
4 Mr Patten subsequently settled Professor Brighouse's  
5 libel action for £50,000, which sum Mr Patten had to  
6 meet from his own pocket, it was not covered by the  
7 Government, and which actually Professor Brighouse  
8 donated to charity.

9 There can be little doubt but that, in our view,  
10 officials whose comments were made in the presence of  
11 Helen and Chris were intended to be construed in the  
12 Patten contemptuous sense and were indeed so understood.

13 What is of concern to us is that approach in the  
14 early days of dialogue between the survivors and civil  
15 servants confirmed and indeed added to the feeling of  
16 distrust of officialdom that survivors carried from  
17 their experience of abuse. It conveyed a feeling that  
18 those in officialdom could dictate the tone and content  
19 of the discussions with survivors.

20 The immediate and unequivocal dismissal of  
21 the possibility of an inquiry, a request which was at  
22 the heart of Chris Daly's Petition, and FBGA's campaign,  
23 suggests that the officials were not amenable to  
24 persuasion by survivors.

25 We make reference to the debate that followed the

1 Apology, and in particular one of the politicians, Rosie  
2 Kane MSP, said this:

3 "We must consider what the experts want and demand.  
4 By 'experts' I mean Chris, David, Helen, [REDACTED], Frank,  
5 and others whose names we do not yet know."

6 It seems very unlikely, my Lady, from what we have  
7 heard, that the survivors were regarded by officials as  
8 persons who brought with them their expertise in  
9 describing what had happened to them and explaining  
10 their informed knowledge of what would assist in dealing  
11 with the consequence of abuse in those early days of  
12 dialogue.

13 We make reference, my Lady, to a document that  
14 I think Ms MacLellan referred to, the Civil Service Code  
15 of Conduct. The Code that I have been able to look at  
16 is one published on 11 November 2011, which was  
17 obviously current for Ms MacLellan, but I haven't been  
18 able to find the predecessor of that.

19 What the 2011 Code refers to are core values of  
20 "integrity, honesty, objectivity and impartiality",  
21 being values which support good government.

22 Civil servants must always act in a way that is  
23 "professional and deserves and retains the confidence of  
24 all those with whom you have dealings". As I have said,  
25 we have been unable to find the version that was

1 applicable in the early 2000s, but we think it  
2 reasonable to assume that something akin to the core  
3 values in the quoted passage would have been likely  
4 applicable at that time.

5 My Lady, with that in mind, the conduct of the civil  
6 servants complained of, and as summarised in  
7 paragraph 1.6 of SGV-000000056, was not in accordance  
8 with what we reasonably assume was the guidance for the  
9 conduct of civil servants at the time, and it appears  
10 again that the Scottish Government accepts that to have  
11 been the case.

12 In the course of evidence your Ladyship mentioned  
13 the need for civil servants and other public officials  
14 who deal with vulnerable members of the public, not just  
15 vulnerable members of the public but all members of the  
16 public, to be carefully selected for such interaction  
17 and to have special training. We entirely support that  
18 suggestion and would ask that at the appropriate time  
19 your Ladyship makes such recommendation.

20 I turn to the Apology. We say the evidence has  
21 shown that it was largely driven by, first,  
22 Cathy Jamieson and then latterly by the First Minister,  
23 Jack McConnell, both of whom had, through previous  
24 experience and constituency work, dealings with  
25 survivors of institutional child abuse. In particular



1 Cathy Jamieson had an inkling, maybe more than  
2 an inkling, of the scale of the abuse.

3 That the terms of the Apology delivered were diluted  
4 from one on behalf of the Government and the people of  
5 Scotland to one on behalf of the people was, as  
6 Jack McConnell explained in evidence, in consequence of  
7 the very late intervention by the Lord Advocate whose  
8 advice is then quoted. It has been gone over by  
9 Mr Peoples, I don't need to repeat it.

10 Jack McConnell readily accepted the advice and, as  
11 Mr Peoples said, emphasis was particularly given to  
12 other institutions being let off the hook, if I can put  
13 it that way.

14 It is regrettable that the Lord Advocate's  
15 intervention came so late in the process. His further  
16 consideration might have led to a more tempered  
17 intervention. That is by the Lord Advocate. And even  
18 with such advice as was given, the First Minister might  
19 have had an opportunity to reflect on the advice in  
20 a less time pressured situation.

21 The advice made no reference to the fact that, in  
22 the majority of cases that were under consideration, the  
23 claimants faced the very considerable obstacle of  
24 overcoming a plea of time bar, as the law on that matter  
25 was then understood, as well as all the other general

1 liability issues and causation issues that were raised.  
2 We say, my Lady, that it did not require a jurist of the  
3 calibre of Lord Hope of Craighead to conclude that  
4 the public apology made by the First Minister was  
5 a "purely political initiative" devoid of any legal  
6 significance.

7 As is apparent from the Parliamentary debate which  
8 followed the statement, there was spread across the  
9 party political divide praise for the statement,  
10 possibly due to the fact that the statement contained  
11 an acceptance by the First Minister of the existence of,  
12 and consequences of, the abuse that had occurred.

13 For survivors who had lived for years with the  
14 stigma of being disbelieved by the establishment, that  
15 apology was at least progress. Things were not,  
16 however, quite as they seemed. The terms of the Apology  
17 had not been discussed with the representatives of  
18 survivors before it was made. The Apology was prefaced  
19 by the following statement by the First Minister, and  
20 I quote:

21 "It is for this generation of the people of Scotland  
22 to say quite clearly that it was unacceptable that young  
23 people were abused and that it was appalling that they  
24 were abused by those entrusted with their welfare."

25 The role of the general populace of Scotland should

1           have been passive. It was for the general public to be  
2           properly informed of the fact, nature and extent of the  
3           abuse that had gone on for decades within Scottish  
4           institutions. It was for the State to apologise on its  
5           behalf for the fact that, under its regulatory and  
6           supervisory umbrella, abuse of children had occurred.

7           In the context of the continuing refusal of  
8           institutions to offer an apology for the abuse which was  
9           perpetrated in the institutions and by their supposed  
10          carers, it was for the State to draw the public's  
11          attention to that fact by urging the institutions to  
12          properly apologise. That is what Chris Daly asked for.  
13          When viewed in this way, the First Minister's Apology  
14          fell far short of what was required.

15          We make reference again to Chris Daly and also to  
16          Frank Docherty who made quite clear his dissatisfaction  
17          with the Apology in his statement that it was not the  
18          people of Scotland who abused him.

19        LADY SMITH: Mr Gale, what you do say about the idea that  
20           this would lead the way and, if this apology was given,  
21           the organisations and institutions would surely follow  
22           and do the same?

23        MR GALE: That would be the hope, I think, my Lady.

24        LADY SMITH: How realistic was it?

25        MR GALE: I think the subsequent conduct of the institutions

1 does suggest that it was a naive hope, a faint hope, but  
2 it would have brought to the public's attention that  
3 dichotomy between what the State was accepting and what  
4 institutions, who should be the bodies accepting the  
5 responsibility, were not accepting. And that would have  
6 been pinpointed if that had been done and it wasn't.

7 LADY SMITH: Thank you.

8 MR GALE: My Lady, I make reference to what Mr Scott  
9 helpfully drew our attention to in his opening  
10 statement, and we agree with him that the Apology was  
11 deficient when measured against the second and fifth  
12 criteria of the guidance. That said, however, it should  
13 have been apparent to the Government in 2004 that the  
14 Apology was inadequate, it was an example of what we say  
15 was an unwillingness to grasp the nettle in order to  
16 produce what was right.

17 I turn now to the section on the road to the  
18 Inquiry. In our opening statement we advance the view  
19 that the First Minister's Apology should have been  
20 accompanied by a commitment to hold an inquiry, which is  
21 what Chris Daly asked for, whether under the then  
22 statute or bespoke into institutional child abuse.

23 We base that submission on the narrative as  
24 contained in chapter 2 of SGV-000000056. We have now  
25 had an opportunity to consider the oral evidence led in

1 the contemporaneous documents and, as a result, we are  
2 reinforced in that view that we have already expressed.

3 It is obviously appropriate to have regard to the  
4 various Government initiatives post-Apology but  
5 pre-Inquiry, and we recognise that some of those  
6 advanced the sum total of the knowledge and nature and  
7 scale of institutional child abuse in Scotland and  
8 allowed some survivors to recount their experiences. It  
9 is, however, necessary to examine why. Notwithstanding  
10 these initiatives, the Government eventually came to be  
11 of the view in 2014 that this Inquiry was necessary.

12 My Lady, I then give a personal note, and really  
13 perhaps the last line is the important one.

14 On a number of occasions I have speculated as to  
15 what my advice to Mr Whelan would have been if in, say,  
16 2007 he had sought my opinion on whether either he as  
17 an individual or FBGA as an organisation could have  
18 commenced an application for judicial review of  
19 a decision to refuse to hold an inquiry. It is  
20 obviously entirely academic now, and indeed with the  
21 time, but I tend to think that my advice would likely  
22 have been that a refusal by the Government would have  
23 been within the range of reasonable responses open to  
24 the Government.

25 Invoking Convention rights might have allowed one to

1       stray into a merits-based assessment of the refusal, but  
2       that said, having regard to the information that  
3       Mr Whelan had at the time regarding the scale of the  
4       abuse which took place in Quarriers, including the  
5       criminal convictions, allied with the information that  
6       INCAS had concerning the abuse of which they had  
7       knowledge about the religious orders, and the knowledge  
8       of the number of claims handled by Cameron Fyfe and  
9       other solicitors, I would have been concerned that  
10      a decision by the Government to refuse to commission  
11      an inquiry, while beyond challenge by way of judicial  
12      review, would have been the wrong decision.

13           The evidence to the Inquiry of Duncan Wilson was, we  
14      say, extremely impressive, and in it David Whelan has  
15      found articulation of his concerns throughout the period  
16      under consideration.

17           We remind the Inquiry that the call for  
18      a public inquiry was central to FBGA's campaign on  
19      behalf of survivors from the outset. It was felt by  
20      Mr Whelan that only a public inquiry with its powers to  
21      compel the attendance of witnesses, and for the chair of  
22      such an inquiry to make findings which would command  
23      respect, was the correct way to proceed. It would also  
24      have overcome the intransigence of institutions to  
25      become involved in the process which was seen as

1 an obstacle. It was therefore the Human Rights  
2 Framework and the InterAction process which gave  
3 encouragement to David that matters were finally  
4 progressing as he wished.

5 I then quote from Duncan Wilson, I think Mr Peoples  
6 has already made reference to this. That the SHRC's  
7 position in 2010 was that:

8 "... there should be some kind of investigation by  
9 the State into the whole situation."

10 And he concluded that:

11 "The entire ethos of the Human Rights Framework and  
12 the InterAction process was to move away from the  
13 previous piecemeal approach. Indeed, it laid out the  
14 comprehensive framework of what is required of the State  
15 to respond to the severe systemic human rights  
16 violations that we have yet to fully account for. The  
17 response to the Inquiry and the investigations  
18 requirement is an aspect of the Scottish Government  
19 being slow to come to the realisation that what was  
20 needed was an overall comprehensive response."

21 LADY SMITH: Mr Gale, it is now 1 o'clock. Would that be  
22 a point at which we could pause in your submissions just  
23 now?

24 MR GALE: Yes, my Lady.

25 LADY SMITH: I will sit again at 1.50 pm to try to make sure

1           we have enough time this afternoon.

2           (1.02 pm)

3                               (The short adjournment)

4           (1.50 pm)

5       LADY SMITH: Mr Gale, whenever you are ready to resume.

6       MR GALE: Thank you, my Lady.

7           My Lady, I was at paragraph 17 of our written  
8       submission, and continuing from there.

9           We say what went before the Human Rights Commission  
10       Framework was, in our submission, accurately described  
11       by Mr Wilson as "piecemeal". In our view, it lacked  
12       an acknowledgement of the seriousness of the issue, and  
13       it lacked direction. It was apparent from the debate on  
14       the First Minister's Apology that there was an unlikely  
15       alliance of politicians, and I give the politicians in  
16       the footnote. There was an unlikely alliance who were  
17       of the view that an independent inquiry, whether it be  
18       one in public or otherwise, was the necessary next step.

19          However, the response to Chris Daly's Petition,  
20       insofar as it sought a public inquiry, was already  
21       largely settled by officials who considered that  
22       the nature and the scale of the problem appeared to be  
23       different in Scotland as against Ireland, and that there  
24       was no current evidence of systemic widespread abuse  
25       throughout the residential establishments in Scotland,



1       such as appeared to have existed elsewhere, and that the  
2       need for improved child protection was already being  
3       addressed.

4       The relevant part of the advice note to ministers  
5       dated 23 September 2003 was in the following terms:

6       "Our advice is that the Executive should not set up  
7       an inquiry into these cases. Neither the weight of  
8       cases nor the nature of the allegations indicates  
9       a systemic failure or organised abuse that might justify  
10      a full inquiry."

11      Just pausing there, my Lady. With respect, that is  
12      not looking at the right issue, we say. What it  
13      suggests is that what was being looked at was whether  
14      there was some form of organised or concerted abuse and  
15      that clearly was and should have been known to the  
16      officials to not be the case.

17      In essence, my Lady, the opposition at official  
18      level to a full public inquiry was ingrained from then  
19      on. Subsequent reference was made to the cost of such  
20      inquiries, but somewhat surprisingly there appears to be  
21      no detailed cost projection for such an inquiry and, as  
22      my Lady said, there seem to have been comparisons with  
23      apples and pears rather than apples and apples.

24      While reference was made to what might have been  
25      thought of as an adversarial inquiry with the

1 involvement of counsel and hostile cross-examination,  
2 and the understandable concern that such an inquiry  
3 could adversely affect survivors who engaged with it, or  
4 deter survivors from engaging with it, there was little  
5 or no consideration of a bespoke inquiry for this  
6 matter.

7 LADY SMITH: What we saw, Mr Gale, so far as the predictions  
8 for the inquiry, if it took place, were concerned, was  
9 an assumption that it would be a horrible experience, it  
10 would be a bad thing, and not the road to go down at  
11 all. And by the way, it would also cost far too much  
12 money.

13 MR GALE: Exactly. And that is again an example of  
14 an attitude at official level where the officials are  
15 saying, "Well, we know what is best for you, we can  
16 identify what is best for you", but ignoring what  
17 organised groups of survivors and individual survivors  
18 were saying to the officials.

19 LADY SMITH: I suppose one could look on it as a regrettable  
20 degree of paternalism which was exactly what was not  
21 required.

22 MR GALE: My Lady, I will come to, when I briefly comment on  
23 Ms O'Neill's submission, that the word "paternalism" is  
24 used, and in my submission it accords very much with  
25 what my Lady has said: that is not what was needed. But

1 I will come to that in due course, if I may.

2 Also, my Lady, the Inquiries Act of 2005 came into  
3 force on 7 June of that year and, notwithstanding that  
4 it was the most significant development in the law  
5 relating to inquiries in over 80 years, and that it  
6 introduced very much in general terms a statutory regime  
7 for inquisitorial inquiries, where the chair has the  
8 power to set the procedure to be followed, there appears  
9 to have been little, if any, consideration by the  
10 Scottish Government of an inquiry into institutional  
11 child abuse under this Act until 2014.

12 LADY SMITH: Of course, Mr Gale, it wasn't as if before then  
13 it had proved impossible to hold fair and appropriate  
14 inquiries into a whole range of matters, including the  
15 interests of children. If one looks at the  
16 Orkney Inquiry, for example, that was chaired by a judge  
17 long before then.

18 MR GALE: Yes. My Lady, that is why I said in the previous  
19 paragraph there seemed to be little consideration of  
20 a bespoke inquiry such as -- I didn't mention the  
21 Orkney Inquiry but, as my Lady says, many inquiries  
22 occur and have occurred where there are vulnerable  
23 witnesses. The Dunblane Inquiry is as example. I can  
24 think of little that is less horrific to enquire into,  
25 and the effect on witnesses that that would have had,

1           but it was done.

2           LADY SMITH: Yes.

3           MR GALE: My Lady, significantly, the consistency of advice  
4           from officials appears to have given little weight to  
5           the fact that significant organisations representing  
6           survivors were pressing for an inquiry having  
7           articulated to the Scottish Government representatives  
8           the benefits of such an inquiry for survivors.

9           Shall I just put this in, because the quote struck  
10          me at the time. On the first day of the present  
11          hearings the former Downing Street Cabinet Secretary,  
12          Sir Mark Sedwill, gave evidence to the House of Commons  
13          Select Committee on Constitutional Affairs. John Crace,  
14          the Guardian's political sketch writer, described  
15          Sir Mark as "someone who wears you down by attrition as  
16          much as by force of argument".

17          My Lady, I am not singling out any particular  
18          official, it's difficult to do so, but that  
19          characterisation very much reflects the feelings of  
20          David, and I am sure of Helen and others. In their  
21          dealings with officials in the efforts to secure  
22          an inquiry, the answer was always "No".

23          My Lady, it's also of note that consideration of the  
24          State's obligation in terms of human rights law to  
25          provide for the investigation into breaches of

1 convention rights in the context of historic child abuse  
2 was not considered until 2010. I appreciate it was  
3 after the establishment of the Human Rights Commission,  
4 but it was not considered until then. That also  
5 coincided with the decision to proceed with the Time To  
6 Be Heard exercise, and we have previously made clear our  
7 position on behalf of FBGA in relation to that exercise.

8 The hasty communication of its terms placed  
9 Mr Whelan, as the representative of FBGA, in  
10 an invidious position, and the exclusion from the  
11 exercise of survivors from other institutions led to  
12 Helen and Chris Daly understandably presenting the Time  
13 For All To Be Heard Petition on 30 August 2010.

14 Mr Wilson's understated expression in evidence of  
15 his reaction to the announcement of Time To Be Heard in  
16 the context of the Human Rights Framework spoke volumes.  
17 As your Ladyship observed to Mr Wilson, had the  
18 Government shown leadership in 2010 and agreed to the  
19 recommendations in the Human Rights Framework then there  
20 would have been no need for the InterAction process.

21 And I noted, and would emphasise, the word that  
22 your Ladyship used which was "leadership".

23 Throughout the whole journey to the eventual  
24 announcement of the establishment of this Inquiry,  
25 a feature of concern was the apparent absence of any

1 sense of urgency. In simple and harsh terms, the  
2 survivors were people past the first flush of youth. We  
3 know obviously that Frank Docherty did not live to see  
4 the first day of the Inquiry.

5 While it must be known to the Government that those  
6 abused in the 1950s, 1960s and 1970s in residential  
7 establishments would, in the first two decades of the  
8 21st Century, have been middle-aged or elderly -- as I  
9 approach that, I now use 70 as the benchmark for being  
10 elderly -- but this fact does not seem to have been an  
11 express consideration in the minds of ministers and/or  
12 officials of the Scottish Government.

13 The response of the Government to the calls for  
14 a public inquiry following the change of First Minister  
15 in 2014 was as comprehensive as it was welcome. It was  
16 obviously reinforced by the Human Rights Framework but,  
17 perhaps more significantly, by the political leadership  
18 of the now First Minister whose views we know from  
19 a contribution to the debate on apology. Of  
20 Mike Russell, whose evidence of his meetings with  
21 survivors at the Mitchell Library conveyed very clearly  
22 the impact of listening to what survivors had been  
23 through and what they wanted had on him. And also of  
24 John Swinney.

25 FBGA, my Lady, is not an organisation that is allied

1 to any political party, but having had the opportunity  
2 to review its dealings with the Scottish Government over  
3 the period of 2002 to 2014, we have come to the  
4 conclusion that throughout that period there was a lack  
5 of political leadership, leadership which should have  
6 appreciated the significance of the matter the  
7 administration was dealing with of the need to take the  
8 right decision for survivors.

9 My Lady, that lack of political leadership was  
10 really brought home in this Inquiry by the evidence of  
11 Fergus Ewing who, notwithstanding his relevant position  
12 as a minister, could really barely recollect what  
13 involvement he had had and if he had any knowledge at  
14 all of it. It was a worrying indication of the level of  
15 political leadership at a high level at that time.

16 My Lady, I quote the oft-quoted remark of Bismark,  
17 that "Politics is the art of the possible", but it is  
18 important to have regard to the full albeit brief  
19 quotation which is that "Politics is the art of the  
20 possible, the attainable - the art of the next best".

21 In the period between 2002 and 2014 the  
22 Scottish Government, in its dealings with survivors, saw  
23 its response not simply as achieving the next best, but  
24 in pursuing policies and initiatives which were further  
25 down the ladder of options. We say this applies to both

1 the Apology in 2004 and the initiatives short of  
2 an inquiry.

3 It is a mark of good government, we say, that  
4 an administration can admit its failings and those of  
5 its predecessors. We appreciate the candour of  
6 John Swinney in what he said to the Inquiry under  
7 reference to paragraphs 58 to 63 of his witness  
8 statement. This is quoted by Ms O'Neill at the  
9 conclusion of her submission but it is worth repeating:

10 "I know that many survivors believe that in the  
11 period 2002 to 2014, Scottish Governments failed to  
12 understand their needs and to genuinely involve them in  
13 the work that we undertook to respond to their needs."

14 While there were different views as to what was the  
15 right thing to do at various times:

16 "... the Scottish Government regrets that it did not  
17 do more to listen to survivors who advocated for steps  
18 that we later took."

19 My Lady, survivors were right in what they sought  
20 from Government in this period. It is just a shame that  
21 it took so long for Government to be of the same view.

22 My Lady, I wonder if I could respond briefly to some  
23 matters in the other submissions?

24 LADY SMITH: Certainly.

25 MR GALE: Firstly, there is nothing in the submission of



1 Mr Scott on behalf INCAS with which we would disagree.  
2 Indeed, we would commend its terms.

3 Ms O'Neill's submission for the ministers is  
4 detailed but very helpfully sets out in the summary the  
5 essential points. Within that, there are a number of  
6 candid acceptances of where successive governments went  
7 wrong in this process. In particular, we welcome the  
8 acceptance that the measures taken during the period  
9 short of an inquiry did not meet the need of survivors  
10 for accountability.

11 We would say that, throughout, that was a reasonable  
12 expectation of the survivors and should have been so  
13 regarded by the Government. The length of time that it  
14 has taken to arrive at "a more comprehensive approach",  
15 ie this Inquiry, was explained in these terms, and  
16 I quote:

17 "On many occasions we between 2002 and 2014  
18 survivors were not properly listened to and heard."

19 But the Government did not initially seek out the  
20 views of survivors and, when it did, it did not give  
21 them sufficient weight. That is what happened. Why it  
22 happened is less easy to ascertain. And the closest we  
23 come to an explanation for those failings was that there  
24 was a misplaced attitude of "paternalism", that is  
25 the quote from Ms O'Neill's submission, which led to the

1 identification by officials of what might be termed  
2 "therapeutic measures".

3 Now, government as my father was not what was  
4 required. The attitude disclosed in the evidence  
5 referred to in chapter 1 of SGV-000000056 was not in any  
6 way benevolent. It was dismissive. My Lady, that  
7 perhaps was anticipated by my learned Lady in her  
8 reference to "paternalism".

9 LADY SMITH: Indeed.

10 MR GALE: On the matter of the potential costs of an inquiry  
11 it is accepted that, while mentioned on a number of  
12 occasions, the analysis was "relatively superficial" and  
13 did not properly consider the benefit such an inquiry  
14 who bring for the survivors.

15 It is slightly distasteful to regard this matter in  
16 the context of a cost-benefit analysis, that is in the  
17 criticisms of Ms O'Neill. But another aspect of the  
18 benefit to which limited, if any, weight was given was  
19 the benefit to the country when made aware of what had  
20 happened in residential institutions.

21 We are also pleased to note that the Government  
22 accepts that it took too long to present the Bill that  
23 eventually became the Limitation (Childhood Abuse)  
24 (Scotland) Act 2017, and that was a matter on which  
25 Mr Whelan and FBGA consistently campaigned. He is left

1 to wonder about the extent to which the influence of  
2 insurers was a factor in this ongoing delay.

3 We note what has been said in Ms Donald's submission  
4 on behalf of Jack McConnell, particularly in  
5 paragraph 46, regarding the ability of ministers to have  
6 direct contact with survivors once the matter of the  
7 Petition was before the Petitions Committee. With  
8 respect, we do not see the rationale for preventing such  
9 contact. The matter of the Petition is before the  
10 Committee, but we see no reason why ministers should not  
11 have a view on the matter informed by discussions with  
12 survivors, and my Lady had discussion with Mr Peoples  
13 about this earlier.

14 It is also said at paragraph 51 of Ms Donald's  
15 submission that the terms of the Apology delivered by  
16 Mr McConnell was "arrived at after much advice, debate  
17 and dialogue", and that there was concern that  
18 institutions should be absolved. We would say that  
19 the important part of the Apology, ie the removal of any  
20 reference to the State, was the subject of last minute  
21 advice and very limited debate and dialogue, and that  
22 the absence of co-operation of the institutions should  
23 not have debarred the Government from apologising on its  
24 own behalf.

25 Finally, my Lady, one matter that I think unites us

1 all in this Inquiry, and this session of the Inquiry, is  
2 that the evidence in this chapter of the Inquiry bears  
3 testament to the determination and courage of a number  
4 of ordinary individuals who, in the face of initial  
5 Government hostility, and thereafter intransigence, were  
6 prepared to do the extraordinary, to fight for what was  
7 right. That should never be forgotten, and where we are  
8 now is vindication of that campaign.

9 My Lady, that completes what I have to say, unless  
10 there is anything further I can assist with.

11 LADY SMITH: No, only for me to thank you very much for a  
12 very thoughtful submission, Mr Gale. That is very  
13 helpful.

14 Can I now turn, please, to the representation for  
15 Lord McConnell. Ms Donald, you are here to present  
16 that. Whenever you are ready.

17 Closing submissions by MS DONALD

18 MS DONALD: Good afternoon, my Lady.

19 My Lady, I provided written closing submissions  
20 which narrate the timeline of the period with which  
21 I have an interest, but Mr Peoples has addressed your  
22 Ladyship in great detail today, and with far greater  
23 eloquence than I could, on the timeline of the period  
24 2002 to 2014, for which I thank him. I need not go  
25 there in detail. I propose simply to look at certain

1 points that I wish to draw my Lady's attention to,  
2 limited particularly to the period 2002 to 2004, the  
3 timeline of the Petition.

4 I did set out in my opening statement a programme of  
5 reform which had started prior to 2002, and I don't  
6 intend to rehearse that at all any further, just noting  
7 that reform had been looked at.

8 I should also acknowledge the opening statement made  
9 by Ms O'Neill for the Scottish Government for the whole  
10 period of 2002 to 2014. She was very clear that her  
11 instructions were not to minimise the criticisms  
12 levelled at Government by survivors or to suggest the  
13 response of the Government was in all respects  
14 satisfactory. I am instructed by Lord McConnell to echo  
15 that feeling.

16 My Lady, I want to look just a little bit at  
17 decision-making. It is, in my submission, important to  
18 note that decisions taken in the period between 2002 and  
19 2007, and beyond, were decisions taken by ministers  
20 exercising their own judgment and they were not taken by  
21 individual civil servants or officials. Any decisions  
22 to be made by ministers were subject to advice, whether  
23 legal or policy, and those decisions were taken after  
24 listening carefully to that advice.

25 LADY SMITH: Ms Donald I know that is the bones of the way

1           the system works, but as I have already mentioned today,  
2           it will only work properly if, firstly, the advice is  
3           thoughtfully and carefully drafted after the relevant  
4           official or officials have done their homework properly,  
5           and then the minister will only be taking the best  
6           decision possible in the circumstances if advice that  
7           has been prepared on that basis is carefully read and  
8           thoughtfully considered before judgment is exercised.

9       MS DONALD: And that is accepted, my Lady. My Lady will  
10       recall Lord McConnell giving evidence that he expected  
11       his officials or advisers, including at ministerial  
12       level, at that time the Lord Advocate was Cabinet  
13       Minister, to be full and frank in their advice to him,  
14       so I accept what your Ladyship is saying.

15       LADY SMITH: Thank you.

16       MS DONALD: We did also hear from I think all ministers in  
17       the week in which I was interested that as well as  
18       having advice from officials, there was generally a  
19       great deal of ongoing discussion, not only between  
20       ministers and officials but between ministerial  
21       colleagues. It's unfortunate of course that a number of  
22       those conversations haven't been distilled to writing  
23       and we are reliant on recollection, but colleagues do  
24       discuss matters and don't write everything down  
25       and I simply mention that in passing.

1           It was the evidence that we heard from ministers  
2           that they could and often disagree with advisers on the  
3           advice they were given. For the period 2002 to 2004,  
4           looking at the Petition, there were four clear examples  
5           of the McConnell administration not accepting advice:  
6           Ms Jamieson's refusal to accept the original advice  
7           in November 2002; Mr Peacock's refusal to further tone  
8           down what he was to say before he appeared before the  
9           Committee, that was in September 2003; the  
10          First Minister refusing to accept that no apology be  
11          made at all, because that was the original advice; and  
12          the refusal to accept an expert or rapporteur, Mr Shaw  
13          as it became, could be appointed.

14          Just thinking about advisers and advice again, civil  
15          servants and the officials are the principal advisers to  
16          ministers and their advice, subject to the caveat  
17          your Ladyship noted, the advice being fully informed and  
18          worked up, must be given proper weight. The identity of  
19          the adviser needs to be given some consideration, and  
20          your Ladyship will recall Lord McConnell stating I think  
21          in response to a question from the Chair, that when  
22          altering the Apology on the advice of the Lord Advocate  
23          of the time, Colin Boyd, Lord McConnell said "I think  
24          I can say, hand on heart, that he is the only one who  
25          could have made me change my mind".

1           I want to move, my Lady, to look at the delays just  
2 briefly. It is very clear that the ministers involved  
3 condemned the length of time it took to get  
4 to December 2004. I have tried to give some context to  
5 that in my written submission, not in any way to excuse  
6 it but simply to give some context.

7           In relation to the interest in the Petition,  
8 Lord McConnell and his ministers, and here I am  
9 referring of course to Ms Jamieson and Mr Peacock, took  
10 an interest in the Petition whenever it was brought to  
11 them with further advice or for decisions or progress to  
12 be pushed by them. Ms Jamieson had a relevant  
13 background in the field of social work and that caused  
14 her to immediately reject the advice in November 2002.

15           It was revised and Lord McConnell asked his special  
16 adviser to discuss the proposed response with  
17 Ms Jamieson. That was early 2003. That response kept  
18 open the question of an inquiry, at least it left the  
19 door open. Ms O'Neill suggests in her closing  
20 submission at paragraph 13.3 that that contributed to  
21 a delay, but it was a fairly short hiatus, and it was  
22 reasonable given Lord McConnell's interest in the matter  
23 in my submission.

24           During 2003 matters were not moved on until  
25 September. That period was punctuated by an election



1 of course. And I raise this now, my Lady, because you  
2 will recall that Lord McConnell suggested there should  
3 be a more formal process instituted for the handing over  
4 of any outstanding petitions to the relevant ministers  
5 from before to after the election just to make sure  
6 things were not dropped. I simply draw that to  
7 your Ladyship's attention as it may be something she  
8 wishes to consider in making recommendations.

9 In December of that year, after the September  
10 ministers meeting, the First Minister responded to the  
11 report, and asked whether consideration had been given  
12 to the appointment of an expert, and that was the first  
13 time that suggestion is seen.

14 It appears that that suggestion was not worked up  
15 and not taken forward. Mr Peoples referred to that.  
16 But pausing here, I raise that because Lord McConnell  
17 also suggested that a central system for follow up of  
18 petition responses and/or advice be instituted, in  
19 I think the same way as Government correspondence is  
20 followed up, and that that may be something  
21 your Ladyship wishes to consider.

22 Moving forward, or looking at the period September  
23 to December, after Mr Peacock gave his evidence to the  
24 Committee, the Committee were not satisfied and took the  
25 relatively unusual step -- it was an unusual step at

1           that stage, it was the first time they had done it -- of  
2           asking for Parliamentary time to debate the Petition.

3           So in September we had Mr Peacock giving the  
4           Petitions Committee his response to the Petition, and  
5           immediately thereafter the Petitions Committee asked for  
6           Parliamentary time to debate it.

7           Your Ladyship and Mr Peoples discussed this morning  
8           when the Lord McConnell may have considered the  
9           appropriate moment to make the Apology and how he was  
10          going to come to that. It may be, my Lady, although we  
11          didn't hear evidence on it, that he was not forced,  
12          bounced into it, on the debate day by the debate having  
13          been arranged prior to any further consideration of when  
14          it could be. Had the debate not been sought, it may be  
15          that after the Petitions Committee ministers could have  
16          considered further when the Apology could be made as  
17          your Ladyship --

18       LADY SMITH: Sorry, I am not sure I follow you, Ms Donald.

19           Are you saying I could take from the evidence, by way of  
20           inference, that before 1 December Lord McConnell didn't  
21           appreciate that that was going to be the day for the  
22           Apology? Because that doesn't fit with the evidence  
23           about all these last minute changes.

24       MS DONALD: I apologise.

25       LADY SMITH: Could you explain it to me again?

1 MS DONALD: I will. This occurred to me when I was  
2 listening to Mr Peoples this morning. We don't know  
3 when Lord McConnell intended the Apology to be made  
4 because we don't have that evidence. However, the final  
5 response to the Petition having been made at Committee  
6 in September 2004, it would have been appropriate to  
7 move forward to the Apology after that. But before the  
8 First Minister of the time had an opportunity to do  
9 anything of that nature, the Committee sought  
10 Parliamentary time to debate the issue. So it seems  
11 that that debate became the appropriate moment by  
12 chance.

13 LADY SMITH: Thank you.

14 MS DONALD: My Lady, the delays which occurred in getting  
15 the Petition through to 1 December 2004 have been  
16 subject to appropriate scrutiny and have been explained  
17 as far as they are capable of being explained.  
18 Lord McConnell accepted those delays impacted and still  
19 impact on the survivors. Mr Peoples referenced this  
20 morning the fact that he took Lord McConnell to the  
21 Scottish Government Report, and in response to the  
22 questions on that, my Lady, which can be found at  
23 Day 204, page 120, Lord McConnell said:

24 "I think it is entirely unacceptable that it took  
25 from August 2002 to December 2004 to properly respond in

1 full to the original Petition. There are parts of the  
2 delays and the ways that things were handled at that  
3 time that have a rational explanation but there are many  
4 that do not. And I think given the sensitivity of  
5 the subject matter, and the trauma previously  
6 experienced by those on whose behalf Chris Daly had  
7 submitted the Petition, the whole process should have  
8 been handled more sensitively and with a greater degree  
9 of urgency, and I want to be absolutely crystal clear  
10 about that."

11 He went on to recognise the impact that those delays  
12 had, saying at the end of his answer:

13 "At the core of this is a group of individuals who  
14 suffered abuse and who were traumatised by that  
15 experience, and by the way they have been treated since,  
16 and we should not have added to that. We should have  
17 dealt with it more effectively."

18 My Lady, just to touch briefly on costs, there are  
19 plenty of submissions on the issue of costs, I am simply  
20 going to draw your Ladyship's attention to  
21 Peter Peacock's evidence where he said:

22 "I have to say to you it was not a major  
23 consideration at all between the politicians that were  
24 there."

25 That is on 25 September 2003. And he went on to

1 explain that as Finance Minister for three years prior  
2 to this, he knew how much money was in the system at  
3 that time, that he didn't see cost as being an issue for  
4 him in considering whether or not there should be  
5 a public inquiry, or indeed for the ministers at that  
6 meeting.

7 LADY SMITH: It's fair to say, though, he didn't give such  
8 a clear picture of the availability of funding that the  
9 Deputy First Minister did.

10 MS DONALD: No. No, they didn't. The fact is of course  
11 they were taking into account, setting aside costs of  
12 the ongoing court actions which appear to have been  
13 a fairly large consideration for the ministers at that  
14 time.

15 My Lady, just looking at the First Minister's  
16 interventions at the time, he did tell us he had  
17 an interest in the subject matter from the outset. It  
18 was his role to have an overview of the response. He  
19 was acutely aware of the tip of the iceberg, which he  
20 characterised as being his personal or gut instinct, and  
21 he spoke of the impact of meeting survivors in his  
22 constituency and finding conversations traumatising. He  
23 in particular referred to the face-to-face discussions  
24 in his very small constituency office and your Ladyship  
25 will recall that evidence.

1 LADY SMITH: Indeed.

2 MS DONALD: He asked his special adviser to become involved.

3 He discussed the matter with Ms Jamieson. When he was  
4 advised late in 2003 that a package of measures was  
5 proposed he felt that that was not what the survivors  
6 wanted. Although he knew some survivors were  
7 uncomfortable about an inquiry, he knew others were  
8 intent upon it. And he was acutely aware that to reject  
9 any kind of inquiry would be a further insult to  
10 survivors, and his evidence Day 204, pages 53 to 54  
11 makes this clear:

12 "When I heard about the recommendation from the  
13 ministerial meeting, my instinctive reaction at that  
14 time was we can't go back and tell these people there is  
15 nowhere for them to go."

16 Further intervention was his suggestion that  
17 an expert be appointed, as I have said already.

18 The fact that the decision or the conclusion of the  
19 meeting of 25 September was unanimous was a big sway for  
20 the First Minister accepting what they were saying, but  
21 he did want to:

22 "... push them to consider another option because  
23 I didn't want to close off the opportunity for survivors  
24 to be heard."

25 Again he was influenced in his desire to allow

1 the court actions to run their course which would allow  
2 those who wished to be heard to be heard if they were  
3 successful accepting now that they were not.

4 We were told by the First Minister that:

5 "I didn't think ruling out a public inquiry at that  
6 stage meant it would be ruled out should circumstances  
7 change, if for example there was an outcome to the court  
8 cases that we didn't like, but also there was the  
9 opportunity at that point to push a fifth option of  
10 having some kind of opportunity for people to be heard  
11 that wouldn't compromise a future inquiry and wouldn't  
12 compromise the court cases, so it was a balanced  
13 judgment at the time. I was getting a unanimous  
14 recommendation from the ministers that seemed based on  
15 good intentions, not bad intentions."

16 And your Ladyship and Mr Peoples had an exchange  
17 this morning about everyone acting with good intentions.

18 Mr Gale of course suggested just a short while ago  
19 the Inquiries Act came into force in June 2005 and the  
20 earlier reconsideration of an inquiry at perhaps that  
21 stage or a year or two afterwards ought to have taken  
22 place. In 2005, of course, Lord McConnell's Government  
23 had already put in place the appointment of Mr Shaw to  
24 revisit the issue and the context remained the same with  
25 ongoing court cases on that basis --

1 LADY SMITH: But the Shaw Review was never going to be  
2 anything like a public inquiry.

3 MS DONALD: No, my Lady, but Shaw was the first step down  
4 a line. I think Lord McConnell told us that they would  
5 look at matters again after Shaw had reported.

6 LADY SMITH: Still, that is what happened. I get that,  
7 Ms Donald. I'm not sure I really understood why you  
8 would go down that route if you had in mind really still  
9 the possibility of a public inquiry meeting all the  
10 aspects of what, in 2002, Chris Daly had intelligently,  
11 calmly and in a balanced manner set out in his Petition.

12 MS DONALD: Yes, my Lady, but those are my instructions,  
13 that in 2005 the Shaw Report was to be carried out, the  
14 court cases were ongoing, so the background context  
15 hadn't changed at that stage.

16 LADY SMITH: Why did the court cases being ongoing matter?

17 MS DONALD: Lord McConnell I think explained that he was  
18 keen to see all parties being allowed to seek redress  
19 through the courts so the responsible parties could be  
20 involved in the conclusion of the matter, I suppose,  
21 and I include in that the churches, the various homes.

22 LADY SMITH: Keen to see people in this category of  
23 survivors having to litigate?

24 MS DONALD: I think Lord McConnell saw it more as being  
25 allowed to have their say in court.



1 LADY SMITH: That wasn't what Chris Daly was asking for.

2 MS DONALD: I accept that, my Lady.

3 LADY SMITH: I accept you are bound by your instructions,  
4 but in fairness to you and Lord McConnell, I can't help  
5 but make clear that these are observations that occur to  
6 me at the moment.

7 MS DONALD: That was his perception of what was helpful at  
8 that time.

9 LADY SMITH: It could also, if one was cynical, be seen as  
10 an approach that might get Government off the hook,  
11 particularly since they were not the ones directly in  
12 the firing line, it was those who had been providers,  
13 the organisations that had run the institutions, who  
14 were directly in the firing line.

15 MS DONALD: If one was being cynical, my Lady, yes. I think  
16 Lord McConnell did give evidence -- I don't have the  
17 reference to hand -- that to him it didn't matter if the  
18 Apology, I think it was around the Apology, if the  
19 Apology was going to cost the Government money. He  
20 wasn't particularly affected by that, that was his  
21 evidence.

22 LADY SMITH: Yes, thank you.

23 MS DONALD: My Lady, turning now to engagement with  
24 survivors. It is accepted that engagement by ministers  
25 with survivors as a group, and certainly in response to

1 the Petition, was not as it should have been until the  
2 latter half of 2004 when it improved at that stage. And  
3 it did continue to improve over the following period.  
4 The evidence was that ministers were aware of the depth  
5 of feeling held by those they met as constituency MSPs,  
6 and I have turned to Lord McConnell's evidence already.

7 I was going to address the issue of the Petitions  
8 Committee being given its place. Your Ladyship has  
9 discussed that with both Mr Peoples and Mr Gale today.  
10 That was the evidence that we heard, that was what  
11 Mr Peacock as the minister at the time felt was the  
12 appropriate way to deal with it, that is the --

13 LADY SMITH: You are dealing here with the submissions that  
14 have been made about ministers engaging directly with  
15 survivors.

16 MS DONALD: Yes.

17 LADY SMITH: But correct me if I am wrong, there were no  
18 rules applying to the PPC at that time, nor was there  
19 any stated intention on their part to hear directly from  
20 survivors that would have meant there was going to be  
21 direct engagement between them and survivors, isn't that  
22 right?

23 MS DONALD: I think your Ladyship is quite correct. But we  
24 did also hear from Mr McMahon that he, having become  
25 Convener of the Petitions Committee, had changed

1 policies and procedures rather than rules in that he  
2 stopped MSPs from presenting petitions and made it clear  
3 it was only the public who could present petitions, and  
4 it may be that that has caused a perception, if it's  
5 only a perception, that the public deal directly with  
6 the Petitions Committee, and the Petitions Committee  
7 then deal with the Executive.

8 LADY SMITH: But that doesn't mean that you take from that  
9 that the PPC were going to take the next step of  
10 themselves gathering evidence actually, doing some  
11 fact-finding themselves about what lay behind the  
12 matters that were articulated in the Petition.

13 MS DONALD: No, my Lady, but I think it is my submission  
14 that that would have been for the officials to do rather  
15 than the ministers to do.

16 LADY SMITH: Exactly, and it wouldn't -- that is not the  
17 point here, because I think we have talked both about  
18 officials engaging and ministers engaging, but the  
19 possibility that the PPC might do so doesn't appear to  
20 be evidence based --

21 MS DONALD: And it was not.

22 LADY SMITH: Thank you.

23 MS DONALD: I mention engagement with survivors in the  
24 context of the PPC because Lord McConnell was asked if  
25 officials were given training to help them engage with

1 survivors and he suggested to your Ladyship it would be  
2 helpful if the Inquiry made some comment on that.

3 My Lady, I am coming on to the issue of the Apology.  
4 There is no mention of that given in any records in 2004  
5 and that has been discussed at some length. It  
6 surprised Lord McConnell who set out in his statement  
7 that he was determined from the outset to ensure that  
8 a proper apology be given:

9 "... delivered in Parliament by me as  
10 First Minister, not minimised by an announcement in any  
11 other form."

12 Although there is nothing written down, Ms Jamieson  
13 knew the First Minister wanted to deliver an apology,  
14 and Mr Peacock gave evidence that he recalled discussing  
15 the apology in the run-up to giving evidence to the  
16 Committee. He said:

17 "My recollection is that we did. When the  
18 First Minister and I did talk about this, this wasn't  
19 a matter of any difficulty. It wasn't like this was  
20 a new idea to him or anything."

21 He went on to consider:

22 "In fact, it might well reveal the fact that he had  
23 already settled on this in his own mind."

24 Your Ladyship asked Mr Peoples this morning about  
25 who knew, and Mr Peoples referred to it being in his

1 head. The evidence to that is on page 30 and 31 of  
2 Day 204. In conclusion in his answer about this, Lord  
3 McConnell said:

4 "My best guess would be that the people closest to  
5 me in my private office, and probably the senior people  
6 responsible for my media relationships, would have been  
7 aware in order that we did not make a mistake in  
8 handling this when asked by media outlet."

9 That is the highest we can take the evidence,  
10 my Lady.

11 LADY SMITH: I can see it seems highly unlikely that his  
12 media advisers wouldn't have known in advance.

13 MS DONALD: Yes.

14 LADY SMITH: Although it's always difficult to know exactly  
15 when that would have been.

16 MS DONALD: Indeed.

17 My Lady, the briefings and minuted meetings  
18 throughout the period, 2002 to certainly the mid-part of  
19 2004, all focus on the Inquiry and it is not clear why  
20 they don't focus on the other elements raised by the  
21 Petition. A logical explanation may be that officials  
22 were focusing on the Inquiry as the bigger issue and  
23 they may have overlooked other elements of the Petition.  
24 They may have wanted to ignore it as being too  
25 difficult. That would have been unfortunate and I don't

1 suggest that that is the case, it's simply one  
2 possibility.

3 Mr Gale has touched on I think this paragraph. That  
4 the Apology was on behalf of the people of Scotland has  
5 been the subject of much discussion, and I do set out  
6 that the expression was arrived at after a great deal of  
7 advice, debate and dialogue, and it was only after the  
8 intervention of the Lord Advocate who advised against  
9 the wording which was intended to be used, and I have  
10 set out Lord McConnell's reaction to that already.

11 Lord McConnell wanted to ensure he did not in some  
12 way let others off the hook and your Ladyship has  
13 debated that with others.

14 I would point out that after the Apology was made in  
15 Parliament, each political party associated themselves  
16 with it and welcomed it. Many survivors welcomed it and  
17 we know some still do welcome it. At the time the form  
18 of wording was considered appropriate and it was of its  
19 time, in my submission. It was certainly meant  
20 sincerely. Since then we have moved on as a society,  
21 and for example we do now have the  
22 Apology (Scotland) Act.

23 Picking up on the opening statement and in fact the  
24 closing submission by Mr Scott on behalf of INCAS, he  
25 noted the 2004 Apology was deficient and it did not meet

1 the five criteria set out in the report which appears to  
2 have been produced after a great deal of work in 2018,  
3 from my internet searches because I don't have a copy of  
4 it.

5 Mr Scott accepts that the Apology now offered does  
6 meet those criteria, and that is something to be  
7 expected in the light of current knowledge and thinking.

8 Lord Hope's remarks in Bowden have been touched upon  
9 several times where he pointed out the Apology was  
10 a purely political initiative with no legal  
11 significance. I would simply submit we don't know what  
12 Lord Hope would have said in 2008 about the Apology had  
13 it been delivered, including the Apology on the part of  
14 the Government. We all know what we think about it in  
15 2020, and I simply submit that 2008 was a long time ago  
16 and a long time before the Apologies Act.

17 My Lady, in concluding on behalf of Lord McConnell,  
18 I acknowledge on his behalf the delays which occurred  
19 over the life of the Petition. They were regrettable.  
20 It struck me, listening to Mr Peoples this morning, that  
21 when ministers became involved or were approached in  
22 November 2002, September 2003, February 2003 as well,  
23 December 2003 and then the following May and June, they  
24 responded quickly to advice. They were able to respond  
25 and react to the advice, imperfect though it may have

1           been.

2           The Petition, it must be acknowledged, was  
3           an important step in the already started work to better  
4           the provision of the care and rights of all children in  
5           Scotland. It is undoubtedly the case that the Petition  
6           added considerably, setting aside the public inquiry  
7           that we finally reached, to the momentum of the  
8           programme of change and improvement. The work of  
9           Lord McConnell and his ministerial team, and the  
10          ministerial team since then, is demonstrative of how  
11          significant change in society can be achieved and  
12          actions by citizens are very powerful when they are  
13          listened to.

14          My Lady, I have nothing further to say, I think  
15          I have picked up the points I wanted to pick up, and  
16          those are my submissions.

17       LADY SMITH: Ms Donald, thank you very much. And thank you  
18          for your written submission as well, which I have, and  
19          I appreciate that you have highlighted some parts of it  
20          and left others in written form.

21          Finally, could I turn to the representation for  
22          Scottish Ministers, please. Ms O'Neill, whenever you  
23          are ready.

24                 Closing submissions by MS O'NEILL

25       MS O'NEILL: Thank you, my Lady.



1           My Lady, the Scottish Government has lodged detailed  
2 written submissions on the evidence heard by the Inquiry  
3 in this phase of its work and I adopt those detailed  
4 written submissions in full.

5           My Lady, I don't propose to narrate those  
6 submissions in their entirety for interests of time,  
7 amongst other reasons. What I propose to do instead is  
8 to read the summary section that has been included at  
9 the beginning of the written submissions and then to  
10 highlight a number of key themes from the evidence and  
11 certain specific findings that the Government invites  
12 the Inquiry to make.

13           I should also say the written and oral submissions  
14 focus on the matters that were explored in oral evidence  
15 in the hearings that have taken place in the last  
16 several weeks. The Government is conscious that the  
17 question of its response to survivors in the period 2002  
18 to 2014 is the subject of the lengthy report submitted  
19 to the Inquiry and a very substantial amount of  
20 documentation, and it is impossible to do justice to all  
21 of that material in these submissions.

22           The summary contained in the written submissions is  
23 at section 1 and reads as follows:

24           "For the whole period from the lodging of  
25 Petition PE535 in the Scottish Parliament in 2002 until

1 the announcement of a public inquiry by the  
2 Scottish Government in December 2014, adult survivors of  
3 non-recent abuse called consistently for a form of  
4 inquiry that would secure accountability, the key  
5 elements of which would be admission of fault by those  
6 responsible for abuse, and the making of amends for that  
7 abuse.

8 "Scottish Government took a wide range of steps to  
9 meet the needs of survivors of non-recent abuse. Those  
10 steps were important and had real value, but  
11 cumulatively they were not enough, and in particular  
12 they were not enough to meet the needs of survivors for  
13 accountability.

14 "A key reason for the length of time it took for the  
15 Scottish Government to adopt a more comprehensive  
16 approach to the needs of survivors, and for the time it  
17 took in establishing this Inquiry, was that on many  
18 occasions between 2002 and 2014 survivors were not  
19 properly listened to or heard.

20 "There are a number of reasons why the Governments  
21 did not effectively listen. They include, in the early  
22 part of the 2002 to 2014 period, an approach to  
23 policy-making that did not seek out the views of  
24 survivors of abuse and, at later stages, an approach  
25 which included survivors in the process but which did

1 not give sufficient weight to their views. More  
2 fundamentally, Scottish Government's engagement with  
3 survivors was influenced by an attitude of paternalism,  
4 a view that the Government knew better than survivors  
5 what would be in their interest, and an assumption that  
6 the needs of survivors would be met by measures that  
7 would be 'therapeutic' and would allow them to move on  
8 from their experiences of abuse."

9 LADY SMITH: Thank you for capturing that. You are actually  
10 capturing two sets of assumptions there, an assumption  
11 that if they did what they were talking about, what  
12 survivors needed would be entirely satisfied, and  
13 separately it could be safely assumed that what they had  
14 in mind would be therapeutic, yet there was no basis for  
15 particularly that second assumption in any form of  
16 expert testimony that they were relying on, or expert  
17 advice. And indeed we later in the evidence heard that  
18 there are certainly views to the contrary, that it can  
19 be damaging, and we know that, that unless this sort of  
20 process is very carefully handled people will be  
21 retraumatised in a damaging way.

22 MS O'NEILL: My Lady, I do address both assumptions in  
23 greater detail in the written submissions.

24 LADY SMITH: Yes, I saw that, and I'm grateful to you for  
25 it.

1 MS O'NEILL: What I would say about the word "therapeutic"  
2 is I think it was used in a non-technical and loose  
3 sense, and I think a number of the people who used it in  
4 the period in question may have meant different things  
5 by the use of that expression. But it is entirely  
6 accepted that there was no expert evidence to base that  
7 assumption on.

8 LADY SMITH: Thank you.

9 MS O'NEILL: "Despite not being listened to properly,  
10 survivors remained tenacious and did so despite  
11 experiencing at times conduct from officials that was  
12 wholly unacceptable. Direct engagement with survivors  
13 was a critical factor in persuading ministers of the  
14 need for action, including the need for an inquiry. The  
15 crucial importance to survivors of a forum in which  
16 their abusers would be called to account for the abuse  
17 that they had suffered was not properly heard or  
18 understood by Scottish Government. When this importance  
19 was communicated directly to ministers by survivors, its  
20 effect was compelling and (relatively) immediate.

21 "The Scottish Government's handling of its response  
22 to the Public Petitions Committee in the period 2002 to  
23 2004 was inadequate. The Government does not attempt to  
24 excuse the delays that took place in responding to the  
25 Committee.

1           "The language of the Apology given by  
2           the First Minister, Mr (now Lord) McConnell in the  
3           Scottish Parliament on 1 December 2004 was influenced by  
4           the concerns of Government legal advisers about  
5           the implications of an apology for ongoing litigation  
6           against the Government and the potential for an apology  
7           to be used by litigants to establish State liability for  
8           past abuse. Those concerns were not unique to  
9           Scottish Government.

10          "Survivors had at the time of the Apology, and  
11          continued to have by the time the Inquiry heard evidence  
12          in 2017, mixed views about the Apology.

13          "Scottish Government has, since the 2004 Apology,  
14          made a number of other apologies to survivors of  
15          non-recent abuse, including by the Deputy First Minister  
16          both in the Scottish Parliament in October 2018 and  
17          before this Inquiry.

18          "The Daly Petition's call for victims of abuse to be  
19          afforded 'an opportunity to tell of the abuse they  
20          suffered to a sympathetic and experienced forum' was  
21          responded to by Scottish Government first by Time To Be  
22          Heard and subsequently by the creation of the National  
23          Confidential Forum. Both Time To Be Heard and the  
24          National Confidential Forum provided an opportunity for  
25          survivors to talk about their experiences of abuse in

1 a private setting. That opportunity was regarded as  
2 valuable by some survivors.

3 "However, Time To Be Heard and the National  
4 Confidential Forum did not, and could not, meet  
5 survivors' needs for accountability, and it would have  
6 been better if steps had been taken at the time Time To  
7 Be Heard was decided upon to adequately address the  
8 issue of accountability. The need for accountability is  
9 served in part by this Inquiry but could have been met  
10 by other investigation models: 2005 Act inquiries are  
11 not the only mechanism by which accountability can be  
12 achieved.

13 "Scottish Governments decisions not to establish  
14 an inquiry prior to 2014 did not flow from any belief  
15 that abuse of children in care had not occurred. From  
16 the earliest point in the period under review it was  
17 accepted by officials and by ministers that abuse had  
18 occurred and had been widespread problem. Rather, there  
19 was an assumption that the failures that had allowed  
20 abuse to happen had already been explored in the context  
21 of earlier inquiries, that lessons had already been  
22 learned and that a programme of reform was in place to  
23 address previous failures.

24 "The potential cost of a public inquiry or other  
25 similar forum was a factor referred to repeatedly in

1           advice from officials. It is appropriate for officials  
2           to give advice to ministers on the financial  
3           implications of the policy choices before them, and it  
4           is undoubtedly the case that in many cases public  
5           inquiries require substantial expenditure of public  
6           funds.

7           "However, it is accepted that the analysis of  
8           the potential cost of an inquiry put to ministers at  
9           various times was relatively superficial and, more  
10          importantly, failed to address the question of 'value'  
11          by reference to the benefits to survivors in terms of  
12          accountability that would accrue from establishing  
13          an inquiry."

14          My Lady, on that point I take up Mr Gale's  
15          submission --

16   LADY SMITH: I was about to ask you, yes.

17   MS O'NEILL: He very fairly said I was not attempting  
18          a cost/benefit analysis, and that is not what I am  
19          attempting to do. I am distinguishing between cost  
20          between affordability and value, and in the analysis of  
21          value the Government ought to have had regard to the  
22          value to survivors, but I accept unreservedly that  
23          another aspect of that value is the value to the  
24          country, to the nation --

25   LADY SMITH: The entirety of the public interest.

1 MS O'NEILL: Indeed, my Lady. No difficulty with that at  
2 all. But in this particular aspect of my submissions I  
3 am making reference to the value to survivors of  
4 accountability, and that was missing from the analysis.

5 LADY SMITH: Of course not only were superficial assumptions  
6 made about what a public inquiry would cost, there was  
7 no indication of consideration of what the proposals  
8 they were advancing were going to cost, whether you are  
9 talking about the Shaw Review, Time To Be Heard,  
10 involving the Scottish Human Rights Commission, going on  
11 to the National Confidential Forum, that wasn't totted  
12 up.

13 MS O'NEILL: My Lady, not in material we have seen before  
14 the Inquiry. I would hesitate to say that amongst the  
15 vast amount of documentation that the Inquiry may have  
16 there may not be discussion of the costs of those  
17 particular items, but in the briefings we have seen, the  
18 key pieces of advice we have seen, there is very little  
19 by way of reference to the costs of alternative  
20 measures.

21 LADY SMITH: And certainly no reference in oral evidence.

22 MS O'NEILL: No, my Lady, not that I can recall.

23 LADY SMITH: Thank you.

24 MS O'NEILL: Moving on, my Lady:

25 "Ministers have, on the whole, been clear in their



1 evidence that cost was not a factor that led them to  
2 reject the call for a public inquiry. And while there  
3 was some disagreement on the point, the balance of  
4 evidence leads to a conclusion that an inquiry would  
5 have been more affordable in 2007 to 2010 and its costs  
6 would have been met if a decision had been made to  
7 establish an inquiry.

8 "While the evidence of Mr Wilson was that  
9 the Scottish Human Rights Commission's view was that the  
10 InterAction process established in 2011 ought not to  
11 have been necessary, it is clear that the process was  
12 extremely valuable, not least in providing an important  
13 forum for engagement with, and a platform for, survivors  
14 and played a key role in the process that led to the  
15 decision to establish the Inquiry.

16 "The civil justice system presented a number of  
17 barriers to survivors obtaining accountability (in the  
18 form of formal findings of abuse against defenders and  
19 in the form of financial redress) for the abuse they had  
20 suffered. Those barriers included laws on prescription  
21 and limitation, but also included evidential  
22 difficulties and the fact that some survivors at least  
23 did not wish to face what was (or was perceived to be)  
24 an adversarial litigation process.

25 "Reform of the law on limitation was an issue of

1 real difficulty for the Scottish Government. Legal  
2 advisers expressed concern about the precedent effect of  
3 making changes to the law applying only to the issue of  
4 historic abuse. The Scottish Law Commission did not  
5 recommend reform of the then current law, and the same  
6 concerns about singling out survivors of historical  
7 abuse in relation to the reform of the law were  
8 expressed by Government legal advisers in 2014.

9 "Scottish Government accepts that it took too long  
10 to make the decision to introduce the Bill that became  
11 the Limitation (Childhood Abuse) (Scotland) Act 2017.

12 "Scottish Government also accepts that there are  
13 a range of ways including but not limited to traditional  
14 claims for damages for personal injury in which  
15 survivors' entitlement to financial redress may be met.  
16 The Advance Payment Scheme and the scheme that will be  
17 created if the Scottish Parliament passes the Redress  
18 for Survivors (Historical Child Abuse in Care)  
19 (Scotland) Bill are two such initiatives. They ought to  
20 have been taken much sooner."

21 My Lady, that concludes the summary. The written  
22 submissions go on to highlight what Scottish Government  
23 considers are the key themes arising from the evidence  
24 heard by the Inquiry in this phase before addressing  
25 proposed findings on specific issues.

1           The overarching themes are intended to set the  
2           context for the submissions on the specific findings and  
3           the themes are: survivors' calls for an inquiry;  
4           Government decision-making; knowledge of abuse within  
5           Government during the relevant period; understanding and  
6           responding to the needs of survivors during the relevant  
7           period; advice given by and conduct of civil servants;  
8           the role of legal advice; financial implications; and  
9           the impact made by survivors when they were heard.

10          My Lady, again I would propose to attempt to  
11          summarise the detailed written submissions on these  
12          themes.

13          On the first theme, which is survivors' calls for  
14          an inquiry, it is clear that adult survivors of  
15          childhood abuse in Scotland called for a public inquiry  
16          throughout the period 2002 to 2014. None of the other  
17          policy initiatives undertaken by the Scottish Government  
18          satisfied their need for an inquiry. The desire for  
19          an inquiry is evident from Chris Daly's Petition in  
20          2002, and from the evidence given by Mr Daly and  
21          Helen Holland to the Public Petitions Committee  
22          following the debate and Apology in December 2004.

23          Survivors continued to call for an inquiry before,  
24          during and after the Shaw Review and in their  
25          participation in the National Reference Group. It is

1 clear from their reaction to the Time To Be Heard pilot  
2 and in their involvement in the InterAction process.

3 Mr Russell was asked whether the Inquiry should be  
4 regarded as a compliment to those who just would not go  
5 away. He replied that it was a compliment to people who  
6 are determined to have justice.

7 Ms Holland's evidence was that INCAS have asked for  
8 an inquiry since day one. We have always supported  
9 a public inquiry. In all of our membership's eyes it  
10 was the only answer. It was the only answer because, in  
11 our opinion, an inquiry is set up to get to the truth  
12 and to get to the bottom of things and how things were  
13 allowed to happen.

14 The Government's submissions note that evidence has  
15 been given to the Inquiry that there were mixed views  
16 among survivors about the desirability of an inquiry.  
17 That evidence is referred to, my Lady, for completeness.  
18 It's not to suggest that the question of whether there  
19 should have been an inquiry was a matter of weighing  
20 mathematically views for and against.

21 The submissions also respond briefly to Mr Scott's  
22 opening submissions on the question of whether survivors  
23 were misled or put off by the characterisation of  
24 an inquiry and his suggestion that, if survivors had  
25 been told that this was the Inquiry they would get, they

1           would not have hesitated to support it.

2           On that submission, my Lady, I would say, first,  
3           given the diversity of survivors and experiences, there  
4           will be some survivors who, with their eyes open, would  
5           still have doubts about an inquiry because, for them,  
6           the existence of an inquiry may cause pain. Second,  
7           I have made submissions in the written submissions about  
8           the context in which, particularly in the earlier years  
9           the Government was operating, the 2005 Act had not been  
10          passed at that time and in the later period direct  
11          experience of 2005 Act inquiries would have been  
12          limited.

13          Third, I have made what I hope is an uncontroversial  
14          point that inquiries do not always operate smoothly and  
15          that caution on the part of officials was  
16          understandable.

17          On the theme of Government decision-making, which is  
18          dealt with in section 6 of the written submissions, the  
19          submissions reiterate that officials are responsible for  
20          advice and ministers are responsible for decisions taken  
21          by Government, and, before your Ladyship asks me the  
22          question, I accept the proposition that was put to  
23          Ms Donald that advice must be properly given and  
24          ministers must respond appropriately to that advice.  
25          However, I would reiterate the point, my Lady, that, so

1 far as Government is concerned, ministers are  
2 responsible and accountable for the decisions that are  
3 made, and the submissions invite the Inquiry, where it  
4 makes findings that relate to Government action, to make  
5 those findings direct to the Scottish Government as  
6 an institution.

7 The theme that is dealt with in section 7 of the  
8 submissions is that of knowledge of abuse within  
9 Scottish Government. For the avoidance of doubt, that  
10 submission is not that Scottish Government had available  
11 to it at any time the depth of knowledge about the  
12 existence and scale of abuse that is being or will be  
13 uncovered by this Inquiry. The submission is rather  
14 that, even from the earliest part of 2002 to 2014, the  
15 2002 to 2014 period, Scottish Government was aware that  
16 abuse had taken place and was widespread. The decisions  
17 that were taken by Scottish Government were not based on  
18 there being any doubt about the existence of abuse.

19 My Lady, on the next theme in section 8 on  
20 understanding and responding to the needs of survivors,  
21 I propose to read the following parts of the written  
22 submissions from paragraphs 8.1.1 to 8.1.6:

23 "The Scottish Government's response to survivors of  
24 historical childhood abuse during the period 2002 to  
25 2014 was influenced by assumptions about the nature of

1 survivors' needs and about the purpose of mechanisms  
2 such as public inquiries.

3 "The first assumption was broadly that survivors'  
4 needs were recuperative and that action should be  
5 focused on providing support services to allow survivors  
6 to recover from, and move on from, their abusive  
7 experiences. An aspect of that assumption was a view of  
8 survivors as victims whose vulnerabilities persisted,  
9 who required care and for whom an inquiry might be  
10 harmful or damaging. In its worst manifestation, the  
11 assumption involved regarding survivors as having mental  
12 health problems rather than bringing about a deeper  
13 understanding of the impact on them of the trauma caused  
14 by abuse.

15 On that point, my Lady, I have referred to the  
16 evidence of Helen Holland:

17 "In parallel, it was assumed that a key purpose of  
18 a public inquiry was to learn lessons for the future  
19 (and there was doubt about the extent to which a review  
20 of practices from many decades earlier would result in  
21 relevant recommendations, given the changes that had  
22 been made in the legislative and regulatory regime since  
23 the abuse in question took place).

24 "The importance of an inquiry to survivors as  
25 an accountability mechanism had little prominence in the

1 early part of the period in question. It came to be  
2 better understood as time progressed but was not  
3 properly addressed before 2014 when this Inquiry was  
4 announced.

5 "The assumptions described above were made at the  
6 earliest point at which Scottish Government was given  
7 notice of the Daly Petition and persisted to a greater  
8 or lesser extent throughout the period 2002 to 2014.  
9 They were overcome only when survivors voices were heard  
10 properly by Government.

11 "At the same time Scottish Government over the  
12 period 2002 to 2014 took a range of steps to address the  
13 needs of survivors of childhood abuse. Those steps were  
14 taken alongside a very substantial reform agenda in  
15 relation to child protection and the care of  
16 looked-after children. The Government continues to  
17 commit substantial resources, human and financial, to  
18 survivor support. The steps were, and are, of value and  
19 should be acknowledged."

20 The written submissions point to a range of evidence  
21 that the assumptions I have described were made and how  
22 they influenced decision-making throughout the period.

23 As is set out in the submissions, and I will come  
24 back to this point, one reason why these assumptions  
25 were able to persist was that survivors were not being



1 properly heard. Steps were taken to create frameworks  
2 for engagement with survivors but they were not  
3 wholly successful, although each initiative, including  
4 the National Reference Group, did make some positive  
5 contributions. The written submissions suggest that  
6 part of the reason why survivors were not heard and part  
7 of the reason why the way in which Government engaged  
8 with survivors caused further anger, hurt and distrust  
9 was a lack of appreciation of the particular needs of  
10 survivors of non-recent abuse and the impact that abuse  
11 can have on them.

12 Officials did not have the kind of training and  
13 trauma-informed practice that is given now and which is  
14 described in more detail in the written submissions.

15 My Lady, there is a section at the end of the  
16 submissions that deals with the current practice in  
17 relation to survivors of abuse.

18 Officials also regarded survivors in much the same  
19 way as other stakeholders involved in the National  
20 Reference Group. In my submission, my Lady, that  
21 reflected an approach to engagement by Government that  
22 puts emphasis on Government being a neutral party or  
23 an honest broker among different view points and while  
24 that approach may be appropriate in some settings, it  
25 fails to recognise the unique position of survivors in

1           that environment.

2           A further theme in the written submissions in  
3           section 9 addresses the issue of advice given by and the  
4           conduct of civil servants. That section deals with the  
5           briefings in 2003 and 2009 that were the subject of  
6           particular discussion during the hearings in this phase,  
7           and in those submissions I have sought to draw the  
8           Inquiry's attention to relevant material bearing on  
9           those briefings.

10          My Lady, on this point I do make reference to one  
11          issue raised in Mr Peoples' submissions this morning,  
12          and that is in relation to the submission of which  
13          Colin MacLean was the author in June 2004, and that is  
14          the follow-up submission the year after the decision has  
15          already been taken on the Petition.

16          There was an exchange between your Ladyship and  
17          Mr Peoples about the fact that the decision had already  
18          been taken and the briefing did not apparently recognise  
19          the fact that that had already been the subject of  
20          discussion. My Lady, in terms that briefing does say to  
21          ministers in relation to the question of an inquiry that  
22          they had explicitly dealt with this matter the previous  
23          year. There is reference in the briefing, and I make  
24          the point for the sake of completeness that, on that  
25          particular point, it is very explicitly, and indeed

1           emboldened, in that particular briefing.

2           My Lady, the submissions emphasise that  
3           Scottish Government is responsible for the actions of  
4           civil servants. However, the Government will not defend  
5           unacceptable personal conduct. That point was made by  
6           the Deputy First Minister and it is made again now.

7           A further theme dealt with in the written  
8           submissions is that of legal advice and the role that  
9           legal advice plays in the work of the  
10          Scottish Government, and legal advice was of course  
11          an issue discussed with a number of witnesses.

12          My Lady, the Government has deliberately taken the  
13          position that it should not attempt to second-guess the  
14          legal advice that was given at various times during the  
15          2002 to 2014 period. The submissions note that it is  
16          both legitimate and necessary for the Government to have  
17          legal advice on proposed decision-making, and that is  
18          no doubt not in dispute. And reference is made in the  
19          written submissions to the importance of the Scottish  
20          Ministerial Code on that point.

21          Again, my Lady, there is one point that I wish to  
22          pick up from Mr Peoples' submissions in relation to  
23          legal advice. There was a discussion about the Office  
24          of the Solicitor to the Scottish Executive, and I think  
25          this is the way it was expressed this morning,

1 attempting to get the support of the Lord Advocate for  
2 its position and that the Lord Advocate declined to give  
3 that support.

4 I think the response that is recorded as coming from  
5 the Lord Advocate, and it's recorded second-hand by  
6 Mr Henderson himself, is that the Lord Advocate would  
7 prefer that the advice came from the office of the  
8 Solicitor to the Scottish Executive.

9 The further point I would make, my Lady, is that  
10 I think there was a discussion about whether advice was  
11 overzealous and whether, in obtaining or seeking to  
12 obtain the advice of the Lord Advocate, solicitors were  
13 being overzealous. My submission, my Lady, is that, if  
14 the Solicitor to the Scottish Executive, who was then  
15 Mr Henderson, is seeking the advice of the  
16 Lord Advocate, that should be taken as evidence that the  
17 Solicitor regards a matter as being of the utmost  
18 seriousness and I would urge the Inquiry to treat very  
19 carefully a submission that legal advice was overzealous  
20 when it is impossible to make that judgment, in my  
21 submission, from this vantage point.

22 LADY SMITH: Do I have any evidence that tells me anything  
23 about the circumstances in which in normal practice  
24 OSSE, as it then was, would have turned to the  
25 Lord Advocate for advice?

1 MS O'NEILL: I don't think any of the witnesses were asked  
2 about that, my Lady. Certainly the officials gave  
3 evidence that legal advice was a routine part of  
4 policy-making and that advice from Scottish Government  
5 Legal Directorate was a routine matter, but nothing,  
6 my Lady, I don't think on the general practice of when  
7 legal advice is sought from the law officers. I have in  
8 the written submissions made reference to what is said  
9 in the Scottish Ministerial Code about the circumstances  
10 in which law officer advice may be necessary to be  
11 sought.

12 My Lady, on the same theme, the submissions also  
13 record, as was explained very clearly by Mr Peacock in  
14 his evidence from the ministerial perspective, that,  
15 provided there is no question of a breach of the  
16 overarching duty on ministers to comply with the law,  
17 ministers may choose to act in a way that is contrary to  
18 the recommendation of legal advisers.

19 That leads, my Lady, to a discussion of more  
20 specific issues, including the Government's position on  
21 the defence of claims made against it. The submission  
22 for the Government is that, in the context of the state  
23 of the law at any given time and the responsibilities of  
24 Government for public funds, any decision taken as  
25 a matter of policy not to take an available defence

1 would require careful consideration, not least because  
2 it is fundamental to the operation of Government that  
3 its expenditure must ultimately be authorised by  
4 Parliament and there is a process of accountability for  
5 the expenditure of public funds. Any claim which might  
6 result in expenditure requires an assessment of  
7 liability based on the evidence and the relevant law.

8 On the issue of defence of claims I should here also  
9 respond briefly to one aspect of Lord McConnell's  
10 submissions. Paragraph 31 of those submissions states  
11 that ongoing court actions were considered relevant and  
12 a reason not to jump to an inquiry. Then it is said,  
13 and I quote:

14 "The ministers were being advised that limitation  
15 and prescription defences were being taken and, whatever  
16 they thought of that, the defences were being run."

17 My Lady, I take from that submission a suggestion  
18 that the defences being taken by Government was a matter  
19 outside of ministerial control and an exception to the  
20 general principle otherwise strongly endorsed by  
21 Lord McConnell that, while advice can be influential, it  
22 is for ministers to decide on Government action.

23 For completeness I note that the documents released  
24 by the Inquiry for this phase include exchanges in which  
25 Mr Peacock expresses doubts about the wisdom of

1 maintaining time bar points in defences to claims  
2 relating to historical abuse at the point at which  
3 grounds of appeal were being lodged in the M v Hendron  
4 case, and that is at SGV.001.005.3070. However, I also  
5 note that the issue was revisited in May of 2006 as the  
6 deadline approached for lodging notes of argument in  
7 that case. At that stage a further exchange took place  
8 which begins with legal advice that states that  
9 ultimately it is for ministers to decide whether they  
10 wish to proceed with all arguments in any particular  
11 case, and the exchange concludes with an email of  
12 24 May 2006 in which it is said:

13 "Following discussions with the Lord Advocate,  
14 Mr Peacock and Mrs Jamieson, the First Minister is  
15 content all available grounds of appeal should be relied  
16 upon, including time bar. We would be grateful if  
17 Press, Education and the Lord Advocate's office could  
18 consider the presentational implications of this course  
19 of action and agree a handling strategy. We would also  
20 be grateful if Mr Peacock and Mrs Jamieson could discuss  
21 the wider and ongoing issue of compensation for victims  
22 of abuse."

23 And that is at SGV.001.005.3032.

24 The submissions also touch on the question of legal  
25 advice about the 2004 Apology and the potential for an

1 apology to give rise to legal liability, and the point  
2 in the written submissions is a short one. Legal  
3 advisers may or may not have been justified in being  
4 concerned about legal risk, but the concern was not  
5 unique to Scottish Government. Concerns about the legal  
6 risk created by apologies persisted and they were  
7 addressed by the Apology (Scotland) Act 2016.

8 The submissions include at section 11 as a further  
9 theme the issue of the financial implications of  
10 an inquiry. Again the point is relatively short and has  
11 been discussed already. Officials should, when advising  
12 on policy proposals, give advice about costs. In the  
13 context of a proposed public inquiry, the consistent  
14 theme was that inquiries involve significant expenditure  
15 of public funds, and that point is uncontroversial.  
16 What is not addressed is the question of value that  
17 I have already discussed with your Ladyship.

18 All of that being said, the evidence from ministers  
19 has been that, in the event, the potential cost of  
20 a public inquiry was not at any stage a decisive factor  
21 in decisions by ministers not to establish an inquiry.

22 The final theme addressed in the written submissions  
23 comes under the heading of the impact of survivors when  
24 they were heard, and again I would propose to read out  
25 that part of the written submissions in section 12.



1 Mr Gale I think referred already to Mr Swinney's  
2 evidence that the boldest steps in the journey have come  
3 about as a consequence of direct engagement with  
4 survivors:

5 "So Mr McConnell's Apology in 2004 was a direct  
6 consequence of the engagement with survivors, with the  
7 Public Petitions Committee and the pressure that gave  
8 rise to that. The direct engagement of Michael Russell  
9 with survivors in 2013/2014 gave rise to the Inquiry.

10 "The impact of hearing directly from survivors was  
11 also recognised by Lord McConnell:

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

22 "There is equally no doubt that direct engagement  
23 with survivors was crucial in persuading Mr Russell of  
24 the need for an inquiry and in galvanising him to  
25 persuade colleagues in Cabinet of that need:

1            "'It was utterly mind-blowing and it was very  
2            affecting and I felt that we had to move on this.  
3            I didn't feel an inquiry would necessarily answer all  
4            the questions, but I couldn't see how you could go  
5            through that experience and say to people, "No, we are  
6            not doing it", I just couldn't see that.'

7            "Ms Robison accepted that in relation to  
8            decision-making around Time To Be Heard it would have  
9            been better if ministers had engaged directly with  
10          survivors. Mr Swinney's evidence was that:

11          "'If I had any doubts in my mind about the  
12          importance of an inquiry, my first encounter with  
13          survivors in 2016 as Cabinet Secretary for Education  
14          reinforced my view that Mr Russell was absolutely right,  
15          and I understood immediately, and I mean within minutes  
16          of that meeting, why he had come to that conclusion  
17          after his interaction with survivors.'"

18          It is accepted, my Lady, by Scottish Government that  
19          there is a challenge to ensure that on an issue such as  
20          historical child abuse the views of those affected by  
21          decision-making are properly heard by ministers.  
22          Mr Swinney reflected on that issue as follows:

23          "I think it is perfectly possible for engagement to  
24          be taken forward by officials on behalf of ministers and  
25          for that to be properly conveyed to ministers so that

1 ministers can make a judgment, because there are lots of  
2 my officials engaged with all sorts of people on my  
3 behalf and I will then consider the output of that  
4 because I simply don't have enough hours in the day to  
5 do all the direct engagement I would like to do. I do  
6 a lot of it but I don't have all the hours in the day to  
7 do all that direct engagement. So it is perfectly  
8 possible for those issues to be properly represented  
9 but, reflecting on my own engagement with survivors on  
10 this particular topic, I don't think it is possible to  
11 have conveyed to you in a submission what is the true  
12 feelings and hurt of survivors. I think that is tough.'

13 "He accepted that on some issues direct rather than  
14 more arm's length engagement would be necessary."

15 The written submissions then go on to invite the  
16 Inquiry to make findings on specific matters that have  
17 been dealt with in the evidence. I don't intend to go  
18 through those in details and would invite the Inquiry to  
19 have regard to all of them, but I do wish to pick out  
20 a number of those submissions now. My Lady, I do not  
21 know if you want me to carry on?

22 LADY SMITH: It is now 3.15 pm. We can have a five-minute  
23 break now and you will still have time to finish off  
24 after that I think, Ms O'Neill.

25 (3.15 pm)

1 (A short break)

2 (3.30 pm)

3 LADY SMITH: Ms O'Neill.

4 MS O'NEILL: My Lady, I said that I would pick out a number  
5 of the particular findings that the written submissions  
6 invite the Inquiry to make.

7 The first is that the Inquiry should find that there  
8 were inexcusable failures by the Scottish Executive in  
9 responding to the Scottish Parliament on the  
10 Daly Petition. The delays in responding to the PPC are  
11 attributable to a range of factors that have been  
12 explored in evidence. None of those factors justifies  
13 the length of time it took the Executive's first  
14 response to be submitted to the PPC or for the follow-up  
15 letter from the Committee of 28 March 2003 to have been  
16 addressed.

17 The Inquiry should find that the decision in 2004  
18 not to establish an inquiry was not taken because  
19 ministers were under any misapprehension about the scale  
20 of child abuse. They accepted completely that there was  
21 abuse and that it was widespread, but nevertheless made  
22 the judgment that an inquiry ought not to be  
23 established.

24 The Inquiry should find that Lord McConnell chose  
25 the final wording of the Apology that was given in 2004,

1 and the two main reasons that influenced the final  
2 wording were, first, Lord McConnell's desire to speak on  
3 behalf of all of Scotland to everyone in Scotland and,  
4 second, a feeling that an apology on behalf of the  
5 Government of Scotland might allow institutions that had  
6 been responsible for abuse off the hook, and that is  
7 taken from his witness statement at paragraph 95.

8 The Inquiry should find that Lord McConnell was  
9 influenced by the advice given by the Lord Advocate but  
10 did not regard himself as being bound by that advice.

11 The Inquiry should find that there were and remain  
12 mixed views among survivors about the value of the  
13 Apology given in 2004, and reference is made in the  
14 written submissions to the evidence of Helen Holland,  
15 David Whelan and Chris Daly and to that of  
16 Michael McMahon.

17 The Inquiry should find that the origins for  
18 the Tom Shaw review lie in the suggestion made by the  
19 then First Minister on 22 December 2003 that  
20 consideration should be given to the appointment of  
21 an expert to "review the position, recent developments  
22 and recommend any procedural steps which might be  
23 advisable to reassure people now."

24 It should find that survivors were involved in the  
25 development of the remit of the Shaw Review but were not

1           always content with the level of engagement.

2           The Inquiry should find that, notwithstanding their  
3           doubts about its value, survivors, including  
4           Helen Holland, David Whelan and Chris Daly, engaged with  
5           the Review.

6           The Inquiry should find that the Review was  
7           an important and valuable exercise which made  
8           an important contribution to Government action in  
9           response to non-recent abuse. All of Mr Shaw's  
10          recommendations were accepted in principle by the  
11          Scottish Government immediately following publication of  
12          the Review, followed by a statement by Mr Ingram on  
13          7 February 2008 setting out more detailed proposals for  
14          implementation. The recommendations have been  
15          implemented.

16          The Inquiry should find that the recommendations of  
17          the Shaw Review led directly to the Keeper's review of  
18          public records legislation and thereafter to the Public  
19          Records (Scotland) Act 2011.

20          The Inquiry is invited to make findings about  
21          the events leading to the decision to establish what  
22          became Time To Be Heard. It is invited to find that  
23          the briefing to ministers that led to their decision  
24          in September 2009 did not highlight the survivor  
25          concerns about the proposed model that had been raised

1 in National Reference Group meetings. The discussion  
2 among ministers reflected different views of the needs  
3 of survivors and purpose of the forum, with differing  
4 emphasis on the need for accountability and the need for  
5 a "therapeutic" setting in which survivors could  
6 describe their experiences.

7 The Inquiry should find that the choice of Quarriers  
8 as the subject of the pilot was an understandable one in  
9 the context of the choice of a confidential forum,  
10 participation in which by institutions responsible for  
11 abuse would be voluntary rather than compulsory. It is  
12 clear that the reasons why Quarriers were chosen  
13 included that institution's willingness to be involved  
14 but only in a process that would not involve findings of  
15 fault or liability, and the perceived availability of  
16 records.

17 The Inquiry should find that no parallel process was  
18 taken forward to prioritise the hearing of testimony  
19 from elderly survivors who had been in the care of other  
20 institutions.

21 The Inquiry should find that, throughout the period  
22 of development of the proposal for an acknowledgment and  
23 accountability forum, ministers did not engage directly  
24 with survivors. The views of survivors as communicated  
25 to ministers were mediated by officials and it would

1           have been better if ministers had engaged directly with  
2           survivors.

3           My Lady, before moving on from Time To Be Heard  
4           I make one submission in relation to the 2009 briefing  
5           and, my Lady, there are submissions in the written  
6           submissions on this point. I am conscious that --

7       LADY SMITH: Can you remind me of where?

8       MS O'NEILL: My own submissions?

9       LADY SMITH: Yes.

10      MS O'NEILL: There are submissions on the findings -- and  
11      I am sorry, my Lady --

12      LADY SMITH: No, it is this particular point that you are  
13      about to turn to.

14      MS O'NEILL: Yes, I am speaking from a shorter document than  
15      the long document. The section is 13.38, and it goes to  
16      13.54.

17      My Lady, it's just the point that was raised by  
18      Mr Peoples in his submissions about the way in which  
19      that briefing was constructed. If I remember his  
20      submissions correctly, he used language along the lines  
21      of officials "lining up" a particular result.

22      My Lady, the written submissions accept without  
23      reservation that that briefing was inadequate. It  
24      accepts that the briefing did not properly reflect the  
25      views of survivors and it reflects that the emphasis was



1           on the preferred option being advanced by officials.  
2           But it is the Government's submission that there is no  
3           evidence that officials were deliberately -- and it's  
4           the expression "bad faith" that was used this morning,  
5           that there was bad faith in the conduct --

6       LADY SMITH: No, no. Mr Peoples didn't suggest that.

7       MS O'NEILL: No, my Lady --

8       MR PEOPLES: [The stenographer was unable to hear  
9           Mr Peoples]

10      MS O'NEILL: My Lady, I make the point again for  
11           completeness simply because of the language of things  
12           being "lined up". That was what jumped out at me.  
13           I say no more about it than that, but I felt obliged to  
14           address the point.

15      LADY SMITH: Can we go as far as you telling me officials  
16           accept the briefing was inadequate?

17      MS O'NEILL: The Government accepts that the briefing was  
18           inadequate.

19      LADY SMITH: You actually said "officials". You meant the  
20           Government?

21      MS O'NEILL: Yes, my Lady.

22      LADY SMITH: And that it is also accepted there was undue  
23           emphasis on the preferred option?

24      MS O'NEILL: That it's unbalanced. I think the language  
25           that is used in the written submissions is that it is

1 not balanced. The written submissions do go on to  
2 explain the context in which the briefing was prepared  
3 by way of context, but it is accepted, again without  
4 reservation, that it is unbalanced.

5 LADY SMITH: And is it accepted -- and the way, as you say,  
6 Mr Peoples put it -- that matters were being lined up  
7 towards -- had been lined up towards a particular  
8 result? It was plain a lot of work had been done to  
9 take matters to that outcome, to the preferred option  
10 outcome.

11 MS O'NEILL: That is also accepted, my Lady, so long as it  
12 is accepted with the proviso that it was always open to  
13 ministers to decide not to accept that preferred option,  
14 and that is the Government's submission; that it  
15 remained the choice and responsibility of ministers to  
16 make that decision.

17 LADY SMITH: Thank you.

18 MS O'NEILL: The Inquiry should also find that Time To Be  
19 Heard and the National Confidential Forum were valuable  
20 initiatives in their own right and provided  
21 opportunities for survivors different from that  
22 presented by the Inquiry.

23 The written submissions describe the work and  
24 involvement of the Scottish Human Rights Commission.  
25 The Inquiry is invited to find that the SHRC made

1 an important contribution to the process that led to the  
2 establishment of this Inquiry and to responding to the  
3 needs of survivors more generally.

4 The InterAction process was undoubtedly a positive  
5 step and the written submissions set out the chronology  
6 of steps that were taken that led to the InterAction  
7 process. It led, among other things, to the Action  
8 Plan, the great majority of recommendations of which  
9 Scottish Government considers to have been implemented.

10 It led directly to Mr Russell's change of mind on  
11 the issue of a public inquiry. While the view can be  
12 taken that the InterAction process should have been  
13 unnecessary, and Scottish Government has accepted that  
14 many steps, including the commissioning of the Inquiry,  
15 should have been taken sooner, it seems unlikely that  
16 everything that has been achieved through the  
17 InterAction process, including the confidence in  
18 the process that has been generated in survivors, would  
19 have been achieved by the Scottish Government leading  
20 that process. The interaction considered a very wide  
21 range of issues with a very wide range of stakeholders  
22 and, using methods that an independent human rights  
23 agency has the expertise to deploy, it has made a range  
24 of recommendations through the Action Plan and its work  
25 has not concluded. The InterAction process demonstrates

1           the unique value and contribution that can be made by  
2           the SHRC.

3       LADY SMITH: Do I take it though that it is recognised,  
4           because Mr Wilson's evidence was quite clear on this,  
5           that the SHRC's view was that, if Scottish Government  
6           had responded promptly by accepting their  
7           recommendations, there would have been no need for  
8           an InterAction process at all.

9       MS O'NEILL: That was Mr Wilson's evidence. On the  
10          chronology, my Lady, as I say, it's in the written  
11          submissions, I do make the submission that there is  
12          a chronology that shows that the SHRC brought its  
13          proposals for an interaction in August of 2011 and by  
14          the end of the year that had been agreed to, and I take  
15          Mr Wilson's evidence that that was only brought forward  
16          because there was a delay on Scottish Government's part.  
17          I am not disagreeing with that, I am simply --

18       LADY SMITH: And by that time, was it six months had passed  
19          since they had handed over their report?

20       MS O'NEILL: At least, my Lady, and perhaps longer. So  
21          I simply --

22       LADY SMITH: I just jumped a year.

23       MS O'NEILL: I think you have, my Lady.

24       LADY SMITH: I have. I have just jumped a year, have I? It  
25          is 2010, yes.

1 MR PEOPLES: [The stenographer was unable to hear  
2 Mr Peoples]

3 LADY SMITH: Thank you.

4 MS O'NEILL: My Lady, my submission is no more than to give  
5 credit to an organisation that I don't represent; it is  
6 to say that the contribution of the SHRC was vital to  
7 the progress that was made.

8 The Inquiry should also find that the question of  
9 whether to establish a public inquiry returned to the  
10 attention of the Cabinet in 2013 partly in consequence  
11 of media coverage of allegations of abuse at  
12 Fort Augustus Abbey School, but that, until at least  
13 middle of 2014, the Cabinet, including Mr Russell,  
14 remained unconvinced about the value of an inquiry.

15 The Inquiry should find that key to Mr Russell's  
16 change of attitude on the issue of an inquiry was, as  
17 has been discussed, his participation in the InterAction  
18 process, his direct engagement with survivors and his  
19 experience of those survivors', and I am quoting,  
20 "righteous anger".

21 The Inquiry should find that Mr Russell became  
22 a powerful advocate within Cabinet on the question of  
23 an inquiry. Mr Swinney said:

24 "I was convinced by Michael Russell's line of  
25 argument at the Cabinet in the summer and the autumn of

1       2014, and I supported him in his efforts to secure  
2       an inquiry. I have known Michael for about 40 years  
3       probably and I trusted him. I trusted implicitly the  
4       strength of the argument he put forward on that occasion  
5       because I could hear from him -- having listened to him  
6       for 40 years, I could hear in his voice what was -- what  
7       had influenced his thinking, what had made this profound  
8       impact on his thoughts and I thought that was  
9       a persuasive argument."

10       The Inquiry should find that there continued to be  
11       disagreement within Cabinet on the question of  
12       an inquiry in the course of 2014, and that the decision  
13       to establish an inquiry was taken by the Cabinet  
14       in December 2014 after the change in First Minister.

15       On the issue of prescription and limitation, the  
16       Inquiry should find that it was appropriate and  
17       reasonable for the Scottish Government to seek the views  
18       of the Scottish Law Commission on reform of the law. As  
19       was evident from the discussions that took place with  
20       witnesses before the Inquiry, it was understood that the  
21       law of prescription and limitation was complex and that  
22       law reform to make specific provisions of survivors with  
23       of historical abuse would give rise to wider questions,  
24       including of fairness to other groups.

25       The Scottish Government accepts that reform of the

1 law of limitation was a significant issue for some  
2 survivors and that not reforming the law before 2017 may  
3 have had the result that individual survivors died  
4 before the 2017 Act was passed.

5 My Lady, I say "may", not out of scepticism, but  
6 simply because I don't identify any particular  
7 survivors. But it is accepted that that is one of  
8 the consequences of the Act not being passed until 2017,  
9 and that point was accepted by Mr Ewing in his evidence.  
10 Nevertheless, it is also submitted that there is some  
11 force in Mr Ewing's evidence that limitation was only  
12 one of the significant obstacles to redress for  
13 survivors through traditional civil litigation  
14 processes.

15 Mr Swinney's evidence in relation to the  
16 difficulties posed by time bar was that what that also  
17 then gave rise to was a requirement for us to consider  
18 what we should do about people who found themselves in  
19 that situation where their claim had essentially been  
20 extinguished by time, which is where we have then  
21 arrived at in relation to the Advance Payment Scheme  
22 which has now been making payments, and also the redress  
23 scheme that Parliament is currently legislating for. Mr  
24 Swinney accepted that the financial redress scheme that  
25 is currently before the Scottish Parliament, and I

1 quote, "has been far too long in coming."

2 The written submissions, my Lady, conclude with  
3 reference to three matters raised in evidence and in  
4 relation to which the Scottish Government can provide  
5 further material to the Inquiry if that would be  
6 helpful.

7 On the issue of trauma-informed practice, the  
8 submissions describe the steps that have been taken  
9 within Scottish Government to ensure that officials who  
10 engage with survivors of non-recent abuse are  
11 appropriately recruited and trained to do so.

12 On the issue of record-keeping, it is submitted that  
13 the issue of record-keeping was dealt with in this phase  
14 of the Inquiry's hearings in a general way, such that it  
15 would not be possible for the Inquiry to make findings  
16 on the question of record-keeping. In particular, there  
17 are distinctions to be made between the recording of  
18 decisions and creation of records, the archiving of  
19 records and the ability to recover records at a later  
20 date, and should the Inquiry wish to have an explanation  
21 from the Scottish Government about protocols for  
22 creating records, including ministerial decisions and  
23 storing and retrieving records, that can be provided.

24 Finally on the issue of responding to public  
25 petitions, the Scottish Government can provide further



1 information to the Inquiry if that would be helpful, but  
2 guidance now exists for officials responding to  
3 petitions received from the PPC, and the relevant  
4 Parliamentary guidance notes are referred to in more  
5 detail in the written submissions.

6 LADY SMITH: Yes, I would find it helpful to have those and  
7 you say you refer to those in your --

8 MS O'NEILL: Yes, my Lady, at the very end --

9 LADY SMITH: From 14.10 onwards.

10 MS O'NEILL: Yes, my Lady. The guidance is not produced but  
11 it is described from 14.10 onward.

12 LADY SMITH: And we can get that?

13 MS O'NEILL: Yes, my Lady.

14 LADY SMITH: That would be helpful. Thank you.

15 MS O'NEILL: My Lady, the written submissions conclude by  
16 setting out in full the statement that the Deputy  
17 First Minister made at the end of his evidence on  
18 27 November. That statement was the DFM's to make and  
19 I don't intend to repeat it. I do, though, want to take  
20 this opportunity to address one further matter.  
21 The Deputy First Minister in his witness statement to  
22 the Inquiry expressed regret that the  
23 Scottish Government, and I am quoting:

24 "... did not do more at the time to listen to those  
25 survivors who advocated for steps we later took, not

1       least of all those survivors who are sadly no longer  
2       with us."

3               To be clear, the Scottish Government acknowledges  
4       the point that has been made by survivors and by those  
5       acting on their behalf that one consequence of  
6       the Government not having responded sooner is that some  
7       survivors of childhood abuse died before they had the  
8       opportunity to be heard by this Inquiry. That is  
9       a matter of profound regret to the Government and the  
10      Apology given by the Deputy First Minister in his  
11      statement extends without qualification to the families  
12      of those survivors.

13             I would conclude these submissions by quoting from  
14      another part of Deputy First Minister's evidence when he  
15      said the following:

16             "I think a number of what were individually  
17      sensible, rational and considered steps to try to  
18      support survivors and to secure the outcomes that they  
19      wanted were being taken. At no stage in the last, going  
20      back to 2002, was nothing being done. Lots and lots of  
21      things have been done. But I think if you look back at  
22      those -- well, the twelve years between Chris Daly's  
23      petition and the announcement of the agreement by  
24      Cabinet to an inquiry, lots of things were done. There  
25      was hardly a period in there when there was nothing

1           happening. There was always something happening in this  
2           respect.

3           "The question we have to ourselves, and it is  
4           a question I have asked myself, is: was it enough  
5           cumulatively? Individual compartments were all  
6           individually fine, but cumulatively was it enough? No,  
7           it wasn't. And I think we are now in a position with  
8           the Inquiry, with the support services that are  
9           in place, and with the Advance Payment Scheme and the  
10          prospect of a Redress Bill, subject to Parliamentary  
11          approval. Obviously it is, as you correctly say,  
12          a legislative proposal before Parliament just now. On  
13          the assumption that Parliament makes legislative  
14          provision for that then I think we as a country, and me  
15          as a representative of the State, are beginning to  
16          address the failings of our country in the past."

17          My Lady, those are the submissions of the  
18          Scottish Government.

19        LADY SMITH: Thank you very much, Ms O'Neill. Is there  
20          anything else you wish to pick up on Mr Peoples or not?

21        MR PEOPLES: [The stenographer was unable to hear  
22          Mr Peoples].

23        LADY SMITH: Thank you very much indeed.

24          Thank you to all four of you representing the four  
25          people and organisations that have leave to appear for

1       this part of the Inquiry. Thank you in particular for  
2       your attention to detail in what, although a relatively  
3       short period of evidence, covered an enormous amount  
4       of material, both written and oral, and it has been very  
5       helpful to me to hear the mastery that you all have of  
6       that today.

7             Before I rise there is one thing I want to say about  
8       documents. Of course there are a lot of documents in  
9       the bundles that were released to all of you who have  
10      leave to appear for the purposes of this part of the  
11      Inquiry. You all know what is in those, but there may  
12      be others who want to know when those will be able to be  
13      accessed or if they will be able to be accessed, and  
14      I can understand that. Could I just take this  
15      opportunity to explain that what I intend to do is  
16      publish the documents that were released to those with  
17      leave to appear in the future, probably at the stage  
18      that my findings in relation this part of the Inquiry  
19      are published. They have already been put through our  
20      normal redaction processes and could I just assure  
21      everybody that anybody mentioned in the documents who  
22      has the protection of my General Restriction Order won't  
23      be identified when the documents are published, and  
24      also, in accordance with normal practice, we have  
25      of course redacted personal contact details, because

1       there are an unusual number of, for instance, email  
2       addresses, telephone numbers and addresses, some home  
3       addresses, in these documents, irrespective of whether  
4       the people to whom they relate are protected by the GRO  
5       or not.

6               So the short point is they will be published, not  
7       now, later, and they will be appropriately protected,  
8       either by my General Restriction Order or normal  
9       practice, to make sure that people's sensitive personal  
10      data and personal data that ought to be protected are  
11      protected.

12             If anyone has any further queries about that, please  
13      don't hesitate to get in touch and ask us about it.

14             Otherwise, I am now going to rise. This section of  
15      the Inquiry is finished for now. But thank you all and,  
16      as we are not far from that season of the year where it  
17      should be white, although it has already been white, and  
18      we can all celebrate, it's going to be different for  
19      everybody this year but, whatever your personal  
20      circumstances are, I hope you are all able to take  
21      a breather, have some fun and appreciate the joy that  
22      can be found in however we celebrate our Christmas.

23      Thank you.

24      (3.55 pm)

25      (The Scottish Government Evidence phase of the Inquiry

concluded)

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