



Abuse in Care

Royal Commission of Inquiry

15 August 2019

Dr Stephen Winter
Email: royalcommissionforum@gmail.com

Dear Dr Winter

Thank you for your letter dated 15 July 2019 on behalf of the Royal Commission Forum. We very much appreciate the attention that you and the other members of the Royal Commission Forum are paying to how the Royal Commission carries out its mandate, and we welcome your constructive feedback on issues that you consider should be brought to our attention. We look forward to further ongoing discussions throughout the life of the Inquiry. In your letter, you highlight as most pressing a number of issues that you believe are yet to be adequately addressed. We would like to take this opportunity to respond to your concerns in a fulsome way and are happy to engage further if you have any more questions or comments.

Survivor Advisory Group

We agree that it would have been helpful to recognise and highlight at the Preliminary Hearing the important work that the Survivor Advisory Group does and will continue to do for the Royal Commission. We will ensure this is reflected in our speeches and publications as appropriate in future.

With regard to their attendance at the hearing, there are 18 members of the Survivor Advisory Group so it will not always be possible for all members to be included in all Royal Commission activities. However, we will endeavour to include members as far as possible and in ways that fully recognise their key advisory role.

We have checked our website for any corrections required to the membership of the Survivor Advisory Group. It refers to the current membership. There is a media statement dated 21 May 2019 that refers to Ms Paora Moyle as a member of the Survivor Advisory Group. As you will be aware, Ms Moyle subsequently resigned from her role. We keep all media statements on the website as part of the Commission's record.



Abuse in Care

Royal Commission of Inquiry

Status of private sessions

We agree with you that it is not helpful to draw a distinction between “evidence” and “not evidence” in this context. The Inquiry will receive information in a variety of ways, in a comparable way to other similar inquiries overseas. At the Preliminary Hearing, Counsel Assisting quite deliberately did not say that information from private sessions is “not evidence”. The reference to the private sessions not being “evidence on oath” was to emphasise the non-legalistic way in which the private sessions will operate, rather an attempt to soften the point. Those attending private sessions are not asked to swear an oath or make an affirmation, and the information provided is essential to the Inquiry, including in order to identify subject matter for the hearings, research and investigations and to develop recommendations. (There may be limitations in the way confidential evidence from private sessions can be used given the Inquiry’s natural justice obligations, but that is a separate point.)

Unfortunately, it appears that the consent forms used in the early private sessions contained a reference to the information being “not evidence”, but that reference has been deleted for future private sessions. The Commission will be careful to avoid any such language.

Legalism

We can reassure you that the Inquiry will not operate in a heavily legalistic way. We expect this Inquiry will be less legalistic than other comparable inquiries, and we have invested a lot of thought into designing processes that are open, engaging and accessible for people with or without lawyers. More generally, we are determined to strike the right balance between different modes of operating, some of which have greater levels of formality and others of which are less formal.

At the less formal end of the scale, private sessions will comprise the largest component of the Inquiry in terms of the number of survivors spoken to. These sessions will be almost entirely non-legalistic. We have maintained that view, and while lawyers may attend as support people, legal representatives cannot ‘appear’ at private sessions unless there are exceptional circumstances. There will also be research and policy activities, round tables, issues paper and submissions processes, hui-a-iwi, community meetings and many other forms of engagement at different types of venue. These processes will operate in a relatively informal way.



Abuse in Care

Royal Commission of Inquiry

Public hearings will be at the more formal end of the scale but will not be overly or heavily legalistic. They play a critical part in the role of the Commission to hold people and institutions to account, and we are aware that they are a very important part of the Inquiry for some people. Public hearings will be preceded by investigations, which will be led by a counsel with a multi-disciplinary team, including policy and research experts and other specialists as relevant to the topic. Public hearings must of course take place in public. Within limits, they will give parties a chance to question those giving evidence, subject to the Commissioners' discretion and control. That facilitates participation and openness. Other current New Zealand inquiries have been heavily criticised for not allowing this. (See, criticism of the Inquiry into EQC for not holding public hearings and not allowing cross-examination; criticism of the Operation Burnham Inquiry for taking place in private and not allowing cross-examination; and, criticism of the Mosque Attack Royal Commission for operating in private.)

Lawyers will be present at public hearings and will typically be the ones to ask questions. However, that does not mean the process will be heavily or overly legalistic. We have carefully selected the lawyers to be on our panel of counsel assisting, and we are confident they have the skills and backgrounds to conduct public hearings sensitively, openly and without alienating people or treating the hearings in an adversarial way. There will be some occasions where robust questioning of those in positions of power may well be appropriate – and our counsel will adjust their styles according to the context. We will work to ensure that counsel appointed to assist survivors have a similar approach and culture. The Commissioners also have a role in controlling hearings, and when appropriate will ask questions in keeping with the inquisitorial nature of this inquiry, we will make sure we set an open, inclusive and sensitive tone.

You have mentioned specifically the Canadian Truth and Reconciliation Commission. There is a considerable amount that can be learned from its approach to national, community and individual truth-telling, the sharing and acknowledging of experiences for individual and community healing and reconciliation, and the creation of an historical record on the residential schools legacy. Aspects of the approach of the Canadian TRC could be interwoven into our processes, such as group or community truth-telling and forms of public engagement and education.

At the same time, our terms of reference differ considerably from those of the Canadian TRC. While truth-telling and documenting is a significant aspect of what it was set up to do, the Royal Commission is also empowered to make adverse findings or conclude there has been violation of relevant standards. In carrying out these responsibilities, the Royal Commission must comply with the terms of reference, the Inquiries Act, and also the principles of natural justice. The extent to which the Royal Commission is seen to do so will potentially significantly affect its legitimacy and credibility.



Abuse in Care

Royal Commission of Inquiry

We also want to confirm that the research programmes of the Commission are being led by the Policy and Research Directorate, although this Directorate will work closely with the Public Hearings and Investigations Directorate for the life of the Commission. Counsel Assisting will appropriately oversee investigations that will culminate in the public hearings, to which the Research and Policy Directorate will contribute. At the same time, Policy and Research has developed and works to its own research plan under the leadership of its Director.

Survivors have a right to their personal information

The Royal Commission does not consider the information provided by survivors during their private sessions to be its property. For a number of reasons, which included confidentiality concerns and advice received on trauma and re-traumatisation, a decision was initially made not to allow the recording of private sessions by survivors. A decision has since been made to provide each survivor with a written transcript of their private session, if they would like to have one. In addition, should a survivor wish to, they will be able to record their session. In relation to the Royal Commission providing support to survivors to obtain their records, we currently refer any survivor who wishes to get access to their records to the appropriate agency and give them information about how to do it. We do not unfortunately have the resources to attempt to obtain records on behalf of survivors.

Legal Counsel

In the interests of ensuring participants receive quality legal advice, we are currently finalising a process for legal assistance. We sought the feedback of a number of barristers who will be engaging with the Commission during its design. A practice note outlining this process will be available on the Royal Commission's website once approved. Related, we will soon be seeking expressions of interest from appropriately qualified practitioners wishing to be considered for inclusion on the Inquiry's Legal Assistance Panel. Participants will be able to select a lawyer from that approved panel and make an application to the Royal Commission for legal assistance funding. There is also a mechanism to apply for an exemption in order to instruct a lawyer who is not on the approved Legal Assistance Panel. Regarding private sessions, the focus is to allow survivors to share their experiences with the Commission. As noted above, lawyers can attend in the capacity of a support person if desired by a survivor, although this will not be funded through legal assistance as the private sessions are not a legal process. We have also established a panel of lawyers, funded by the Royal Commission, to talk through with a survivor how to prepare for a private session, including any preparation of a written statement or account before the session and any issues of self-incrimination.



Abuse in Care

Royal Commission of Inquiry

Accessibility

The Commission's Community Engagement team is aware of the need to ensure the environment in which participants are required to engage with the Commission is accessible and any barriers to participation are minimised, if not eliminated, whilst balancing technical needs and security. To that end we have been considering a range of options to ensure the appropriate balance is met with respect to places of engagement. Additionally, we will be using a range of venues such as marae, local government facilities and/or community centres. We are aware that survivors have diverse needs and we will be led by the feedback they provide us on which venue most suits the individual survivor as far as possible.

In our recent meeting with Rosslyn, we mentioned that we have secured a space in Auckland where we are purpose-building a public hearing space. Rosslyn provided some concrete and useful ideas for creating that space so that it will have a less legal appearance and be welcoming to all those who come into it. Those ideas have been taken on board and passed on to those working directly on this.

We will also be ensuring that survivors in Australia, the Pacific or abroad elsewhere have access to and can participate in the Inquiry. Using technology to enable meaningful participation is one aspect of this, and Commissioners will travel to meet survivors as appropriate in the circumstances.

Accountability

We envisage that the Royal Commission will be investigating individuals and institutions, including government officials, for post-1999 actions in terms of how they responded, or failed to respond, to claims of neglect and abuse. This is directly within scope as one of the Royal Commission's terms of reference is to inquire into the redress and rehabilitation processes for individuals who claim, or have claimed, abuse while in care, including improvements to those processes.

We understand that for many of those who were in care during the period 1 January 1950 – 31 December 1999, their experience did not end when they left care. We will, and have already begun to, hear from those who experienced ongoing issues post-care (for example, unsatisfactory experiences with redress processes, difficulties accessing records, lack of response to allegations made, etc). We agree that it is important for the Royal Commission to investigate and report on the full experience of survivors, including their more recent and present-day treatment.



Abuse in Care

Royal Commission of Inquiry

In addition to those who were in care during 1950 - 1999 and who had ongoing experiences with officials as you have outlined in your letter, the Royal Commission also has discretion to hear from those who were in care after 1999 to inform recommendations for the future. The Royal Commission is conscious that while the Inquiry has a historical focus, our work must be completed with an eye firmly on the present and the future to fulfil our intent to make transformative recommendations about care in New Zealand.

Thank you again for raising the issues you have in your detailed and helpful letter. We welcome your ongoing monitoring of our work and look forward to a constructive and open conversation with the Royal Commission Forum as our work proceeds.

Yours sincerely

Anand Satyanand
Chair