



Abuse in Care

Royal Commission of Inquiry

MINUTE 7

FOLLOWING PROCEDURAL HEARING ON 25 FEBRUARY 2020

STATE RESPONSE TO CIVIL REDRESS AND CIVIL LITIGATION CLAIMS

27 February 2020¹

1. This Minute records the matters addressed at the procedural hearing on Tuesday 25 February 2020, the resulting decisions and orders, and related directions in advance of the hearing set down to commence on 23 March 2020 (phase 1). Phase two will commence on Tuesday 12 May 2020 – refer Minute 6.
2. Those present or represented at the procedural hearing were:
 - a. Counsel Assisting (Mr Mount QC and Ms Janes)
 - b. Four named survivor witnesses (Ms Cooper and Ms Hill)
 - c. Māori survivors of abuse in state care with claims before the Waitangi Tribunal, (Ms Sykes) **“The Waitangi Tribunal claimant group”**
 - d. The Crown (Ms Aldred and Ms White)
 - e. The Bishops and Congregational Leaders of the Catholic Church in Aotearoa New Zealand (Ms McKechnie and Ms Thorp)
 - f. The Anglican Church in Aotearoa, New Zealand and Polynesia (Ms Guy-Kidd QC)
 - g. The Salvation Army (Ms Dobbs)
3. The Inquiry received written material from the National Collective of Independent Women’s Refuges (**“NCIWR”**), represented by Ms McCartney QC, Mr Timu, National-International President of the Hastings Mongrel Mob, represented by Mr Stone, and two survivors.

¹ Re-issued on 28 February 2020 with correction to para [19].

4. The Inquiry also received a request from Frances Joychild QC for Leave to Appear at the hearing on behalf of survivors of abuse at the Lake Alice Psychiatric Hospital.

Core Participants

5. The Inquiry received a number of applications for Core Participant status. Those designated Core Participants for the redress investigation are:
 - a. The Crown
 - b. The four survivors represented by Cooper Legal
 - c. Individuals in the Waitangi Tribunal claimant group represented by Ms Sykes²
 - d. The Bishops and Congregational Leaders of the Catholic Church in Aotearoa New Zealand
 - e. The Anglican Church in Aotearoa, New Zealand and Polynesia
 - f. The Salvation Army
 - g. The National Collective of Independent Women's Refuges.
6. Decisions on any further applications will be issued by the Inquiry in due course. It will not be the Inquiry's practice to circulate Core Participant applications to other participants.
7. Core Participants have the right to give evidence and make submissions to the Inquiry, subject to any directions made by the Inquiry. Matters such as access to statements of evidence and supporting documents will be determined by the Inquiry as required, and a full practice note will be issued in the near future.
8. In general, the Inquiry's preference is to designate Core Participants for each investigation, as is the approach adopted by similar inquiries overseas.³ That will better allow the Inquiry to manage investigations and hearings, ensure fairness, and efficiently carry out the work of the Inquiry. Participants can be reassured that the Inquiry will exercise its discretion to designate Core Participants in an open and transparent way, consistently with the Inquiries Act 2013 ("the Act"), the Terms of Reference, and Te Tiriti o Waitangi.

Leave to Appear

9. The Inquiry received several applications for Leave to Appear at the redress hearing. Leave is granted to:

² Ms Sykes is directed to confirm the names of the individual clients who seek core participant status to the Solicitor Assisting so that status can be confirmed for those individuals.

³ In particular, see < <https://www.iicsa.org.uk/core-participant-status-frequently-asked-questions>>. By way of another example where Core Participant status may attach to particular aspects of an Inquiry, see < <https://www.infectedbloodinquiry.org.uk/sites/default/files/documents/Statement-of-Approach-Core-Participant-Status-1.pdf>>

- (a) The Crown;
 - (b) The four survivor witnesses represented by Cooper Legal;
 - (c) The Waitangi Tribunal claimant group;
 - (d) NCIWR;
 - (e) The Anglican Church;
 - (f) The Salvation Army;
 - (g) Survivors of abuse in state care at Lake Alice psychiatric hospital (represented by Frances Joychild QC).⁴
10. Leave to Appear does not require any participant to be present at all or any of the hearing days. It is understood and expected that those with Leave to Appear will exercise judgment about the days in which they attend the hearing. If any participant with Leave to Appear elects, on reflection, not to attend the hearing there is no need to take any formal step, but informal notice may be given to the Inquiry through Counsel Assisting as a matter of courtesy.
11. In granting Leave to Appear, the Inquiry notes that questions of funding, including legal assistance funding, must be addressed separately. A grant of Leave to Appear does not guarantee or indicate that legal assistance funding will be available in relation to any particular aspect of a hearing. Leave to question witnesses is also dealt with separately.

Access to Statements of Evidence and Supporting Documents

12. The Inquiry directs:
- (a) Core Participants will be given access to witness statements on request and subject to any orders under s15 of the Act or other directions of the Inquiry. This will be facilitated as soon as practicable.
 - (b) Statements are not to be published in advance of the witness giving evidence at the hearing and, until that time, are to be used only for the purpose of preparing for or participating in the redress hearing.⁵ Subject to any orders of the Inquiry, witness statements will be published on the Inquiry's website after each witness gives evidence.
 - (c) Core Participants may request access to supporting documents referred to in the witness statements that they identify as being directly relevant to them, subject to any s15 orders or directions of the Inquiry. Fairness and natural justice will guide decisions on access to supporting documents, and those seeking access must articulate the grounds for seeking access, the basis on which they are sought, how they are intended to be used and the intended circulation. Before making a decision, the Inquiry will consult and seek the views of the witness/party/entity who provided those supporting documents. If Counsel

⁴ Ms Joychild QC is directed to advise the names of her individual clients to the Solicitor Assisting as instructions are confirmed.

⁵ See also Minute 5.

Assisting are unable to resolve the issue, the request may be escalated to the Commissioners for determination.

- (d) Cooper Legal has filed a Pseudonym Register with the Inquiry, which has been provided to the Crown. It will not be more widely circulated to Core Participants or those granted Leave to Appear. If access is sought, the same process outlined at (c) above will apply.
13. Leave to Appear has also been granted to survivors of abuse at the Lake Alice psychiatric hospital, represented by Frances Joychild QC. Any further applications will be considered if and when received, but in the meantime Leave to Appear is granted and it is directed that Ms Joychild QC will be given access to those statements relevant to the psychiatric investigation on the same basis as the Core Participants.

Section 15 Inquiries Act Orders

14. The Crown applied for an interim order under s 15(1)(a) of the Act prohibiting publication of:
- (a) Names and identifying details of the individuals listed in Schedule A of their memorandum (provided to Cooper Legal and the Inquiry); and
 - (b) The unredacted version of the Cooper Legal bundle of documents received by the Crown on 7 February 2020.
15. In oral submissions, the Crown withdrew its application in respect of one of the named individuals (Mr N) and said it would abide the decision of the Inquiry whether the name was referred to in public or not.⁶ The Crown indicated it would put the application in relation to the other person on hold, so did not seek a determination from the Inquiry at this time.
16. The unredacted supporting documents (bundles of documents) filed with witness statements contain significant material that should be protected for reasons of privacy, confidentiality, privilege and natural justice. However the bundles also include a number of publicly-available documents, for example Court judgments. It is therefore not appropriate to issue a broad order under s 15(1)(a) prohibiting *publication* of everything in the bundles. Rather, an order under s 15(1)(b) prohibiting *access* to the unredacted bundles is more appropriate.
17. Having heard from participants, and considered the matters in s 15(2) of the Act, the Inquiry makes an order under s 15(1)(b) of the Act prohibiting public access to the unredacted supporting documents (bundles of documents) produced to the Inquiry with the statements of each of the redress hearing witnesses without permission of the Inquiry. Counsel may be permitted access as directed by the Inquiry.
18. Cooper Legal sought orders under s 15 of the Act for two named witnesses that (with some modification by the Inquiry):
- (a) The names and identifying details of the two witnesses may not be published, and each is to be provided with a pseudonym;

⁶ It is noted that this individual was named in the contextual hearing.

- (b) The unredacted witness statement and bundle of documents will be provided only to the Crown and the Inquiry;
 - (c) The affidavit of each named witness, with redactions approved by the Inquiry, can be made available to non-Crown counsel and Core Participants; and
 - (d) The bundle of documents in support of each witness statement is not to be provided to non-Crown Counsel or Core Participants or those granted Leave to Appear.
19. Having heard from counsel and considered the matters in s 15(2) of the Act, the Inquiry makes orders sought in the same terms as (a) to (d) above. Leave is reserved to seek variation of these orders if required.
20. The Inquiry records that interim orders under s 15(1)(b) of the Act apply to all information provided by the Crown under s 20 Notices to Produce. These orders restrict public access to the documents without permission of the Inquiry. Counsel may be permitted access as directed by the Inquiry.

Hearing Plan

21. The current proposal for phase one of the redress hearing, starting on 23 March, is to hear evidence from survivor witnesses in the first four days followed by IHC, Stand Tū Māia, and Cooper Legal.
22. A hearing plan, including the dates and times for witnesses to give evidence, will be published closer to the hearing date. The same will apply to the phase 2 hearing commencing on 12 May 2020.

Leave to Question Witnesses

23. Counsel were referred to Minute 5, and reminded that questioning of witnesses at the hearing is by leave of the Inquiry. Any participant seeking leave to question a witness must identify the proposed areas of questioning in advance. Compliance with this procedure is particularly important to protect survivors, and in the case of survivor witnesses the expectation is that Counsel Assisting will put any supplementary questions, rather than counsel for participants.
24. The Inquiry directs:
- (a) Applications for leave to question witnesses, setting out the proposed areas of questioning, should be filed with the Inquiry by **13 March 2020**. This does not apply to Counsel Assisting. Leave is reserved for oral applications to question to be made at the conclusion of each witness's evidence in chief, to allow for the potential that witnesses expand on their briefs in answer to questions. However, participants are directed to make written applications for leave to question, where possible, in advance.
 - (b) Cooper Legal will lead the evidence of the four survivor witnesses briefed by the firm.
 - (c) Any applications to question survivor witnesses, other than through Counsel Assisting, must provide compelling grounds.

Order of Questioning

25. The Crown memorandum proposed that questioning of all witnesses should be primarily through Counsel Assisting, apart from Commissioners, and sought clarification from the Inquiry of the order in which the Inquiry intended questioning to proceed. Subject to any further directions, the order of questioning at the redress hearing will be:
- (a) Counsel leading the witness;
 - (b) Counsel Assisting (if not leading the witness);
 - (c) Other counsel granted leave to question;
 - (d) Commissioners; and
 - (e) Counsel leading the witness (for re-examination, if required).
26. As noted above, the Inquiry's expectation is that survivor witnesses are questioned by Counsel Assisting rather than participants. The Inquiry will, however, take a less restrictive approach to the questioning of other (non-survivor) witnesses by participants.

Submissions

27. The Crown requested the Inquiry to consider making directions regarding receipt of submissions in terms of s 17(3) of the Act.
28. The Inquiry directs:
- (a) Counsel are permitted a maximum of 10 minutes at the commencement of the redress hearing to introduce themselves, their client, and outline the purpose for attending the hearing. This opportunity may or may not be afforded in future hearings.
 - (b) No formal oral submissions will be required at the conclusion of the hearing. Counsel for Core Participants and those granted Leave to Appear may file written submissions no later than **25 May 2020**.
 - (c) The Inquiry may make further directions as requested or required.

Outstanding Evidence

29. In response to matters raised in the Crown memorandum, the following timetable is directed:
- (a) Outstanding witness statements are to be filed by **28 February**.
 - (b) Outstanding bundles of supporting documents relating to witness statements are to be filed by **28 February**.
 - (c) Access to these witness statements and supporting documents will be subject to the same process outlined at paragraph [12] above.

Hearing Bundle

30. In relation to hearing bundles, the Inquiry directs:
- (a) Counsel Assisting and the Crown will work together to ensure documents arising from the s20 Inquiries Act Notices to Produce in respect of survivor witnesses are identified and approved for provision to survivor witnesses to prepare for questioning, and inclusion in any bundle of documents, no later than **6 March**.
 - (b) A bundle of documents for the phase one redress hearing is to be agreed between the Crown, Cooper Legal and Counsel Assisting by **6 March**. The Inquiry will make the final determination about the content of the bundle.
 - (c) Any common bundle of Crown / Cooper Legal documents for phase one should be provided to the Inquiry, paginated and with any required redactions, no later than **13 March**.
 - (d) For the phase two hearing commencing on 12 May, the Crown and Cooper Legal are to provide any further documents they wish to be included in a common bundle by **17 April**.
 - (e) The Inquiry will provide notice of its documents for any common phase two bundle by **4 May**.
31. Cooper Legal noted that there was some 'without prejudice' material still pending decisions by the Crown for the phase one hearing bundle. The intention was for Cooper Legal and the Crown to liaise to resolve these, but Cooper Legal sought leave to refer this matter back to the Inquiry for decision if it could not be resolved. Leave is granted, if required.
32. Counsel Assisting advised that the Inquiry is awaiting decisions from the Attorney-General in relation to waiver of privilege requests for the Ministry of Social Development, the Ministry of Education, and the Ministry of Health. These are urgently required as the delay is impeding the Inquiry's ability to identify documents for the hearing bundle. It is directed:
- (a) The Crown should deal with each request for waiver of privilege as received, and as soon as practicable, so the Inquiry can identify documents for the phase one bundle by **6 March**. Requests should not be delayed in order to aggregate them before seeking the Attorney-General's waiver.
 - (b) Decisions on any outstanding requests, and any further requests, should be provided to the Inquiry as soon as practicable, but no later than **24 April** to permit the Inquiry to identify documents for the phase two common bundle by **4 May**.
33. Documents in the common bundle will be formally produced at the hearing and will form part of the evidence, even if not expressly referred to at the hearing. Where natural justice issues may arise, the Inquiry will take appropriate steps to ensure matters are brought to the attention of the relevant individual, organisation or entity before any adverse findings are made, as required by s 14 of the Act.

Other Matters

34. Counsel for the Waitangi Tribunal claimants emphasised the importance of accurate Te Reo translations in the hearing transcript. This is a matter of importance to the Inquiry, and steps are being taken to address this.
35. Leave is reserved to any participant to seek further directions as required.

Produced by the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions

Wellington

27 February 2020



Judge Coral Shaw

Chair