

**ABUSE IN CARE ROYAL COMMISSION OF INQUIRY
FAITH-BASED INSTITUTIONAL RESPONSE HEARING**

Under The Inquiries Act 2013

In the matter of The Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions

Royal Commission: Judge Coral Shaw (Chair)
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Mr Brian Henry for Gloriavale Leavers' Support Trust

Mr Chris Shannon and Ms Clare Sykes for Gloriavale Christian Community

Venue: Level 2
Abuse in Care Royal Commission of Inquiry
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TRANSCRIPT OF PROCEEDINGS

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10 **OPENING STATEMENT BY THE CROWN**

11 **MS SCHMIDT-McCLEAVE:** Kia ora anō. Kei aku nui, kei aku rahi, tēnā koutou katoa. Ko te
 12 mihi tuatahi ki te mana whenua o tēnei rohe, Ngāti Whātua ki Ōrākei, tēnā koutou. Ki ngā
 13 Kaikōmihana, tēnā koutou anō. Ki ngā mōrehu i te kaha, i te maia ki te kōrero i ngā
 14 huihuinga ngā kua pahure ake nei, kei te mihi, kei te mihi, kei te mihi. Ko Ms Schmidt
 15 McCleave tōku ingoa. Ko māua nei ko Ms White, ngā roia mō te Karauna. (I acknowledge
 16 you all my distinguished friends. My first greeting I extend to the tribal authority of this
 17 region, Ngāti Whātua, Ōrākei. To you the Commissioners, again my salutations. To the
 18 survivors, for your strength and bravery for sharing your stories in the previous
 19 proceedings, I acknowledge, greet and salute you all. My name is Ms Schmidt McCleave,
 20 myself and Ms White are the lawyers for the Crown.)

21 For those watching who may not be familiar with the Inquiry process or the Crown
 22 response, I represent all the core Government agencies involved with the Inquiry, and also
 23 sitting with me is Ms White, General Counsel for the Crown Response Unit.

24 For those who can't see me, I am a middle-aged Pākehā non-disabled woman. I
 25 have brown hair and brown eyes, due to a contact lens malfunction this morning I am
 26 wearing glasses today, and I'm wearing a grey dress and a cream jacket.

27 Thank you, Madam Chair and Commissioners for the opportunity to present this
 28 brief opening statement for this faith-based institution response hearing. The Crown, as
 29 represented by the key agencies involved in State care in a range of different settings has,
 30 of course, recently been part of the State institutional response hearing and in that hearing
 31 responded to evidence concerning some themes and structural issues that may also relate to
 32 the activity of some faith-based organisations.

33 My friend Ms Beaton has outlined what this hearing is about, and who you will be
 34 hearing from in the hearing, but I note that many of these organisations referred to by my

1 friend received or continue to receive Government funding for the schools, homes and other
2 social services they operated or operate.

3 Agencies such as the Ministry of Education, the Education Review Office, Oranga
4 Tamariki and the Ministry of Social Development have different roles in the accreditation,
5 monitoring or regulation of schools, both private and State-integrated, and of care homes
6 and other contracted social services.

7 Further, agencies such as Oranga Tamariki and the Police have also been involved
8 in various ways in relation to allegations of abuse raised by people in the care of faith-based
9 organisations.

10 So, in that regard, agencies following this hearing either through representatives in
11 the room or via the livestream, include Oranga Tamariki, the Ministry of Social
12 Development, the Ministry of Education, the Ministry of Health, Whaikaha (the Ministry
13 for [of] Disabled People), the Police, and the Education Review Office.

14 I note that the duties owed by the Crown were varied through different arms of the
15 Government and evolved over time. And the Crown, consistent with its approach in this
16 Inquiry to listening and continuing to learn and respond to what it hears, is therefore
17 interested in the evidence being presented to this Inquiry -- this part of the Inquiry and
18 attends this hearing in that capacity.

19 And I emphasise to Commissioners that learnings from this faith-based hearing will
20 feed back into the delivery of care more generally.

21 I do, on behalf of the Crown, Madam Chair, seek leave to ask questions of witnesses
22 either as required through the hearing or through Counsel Assisting if matters arise in the
23 course of evidence which relates to evidence previously given by the Crown.

24 **CHAIR:** That leave is granted but subject to the usual protocols, which is generally through
25 Counsel Assisting.

26 **MS SCHMIDT-McCLEAVE:** Thank you, Madam Chair.

27 The Ministry of Education has provided this Commission with evidence setting out
28 the Department of Education's role and functions in relation to private and State-integrated
29 schools and how this has changed over the years and, as advised, and as I've submitted
30 before, the Department always had considerably less involvement in private school settings
31 by comparison to the State school system.

32 Oranga Tamariki, and to some extent the Ministry of Social Development, has
33 provided evidence about their current roles and the role of the former Department of Social

1 Welfare in relation to independent care homes and other third-party providers of social
2 services.

3 I note that while the Crown or the State is sometimes talked of and thought of as a
4 single unified entity, its statutory roles and responsibilities for people in different forms of
5 faith-based care were generally owed by particular Crown agencies and this means that the
6 Crown, through its various agencies, had a range of functions and obligations and that
7 depended on a number of factors, including the legal status of any child within any school
8 or institution, and the applicable policy and statutory schemes at the time.

9 I've set out in my submissions at paragraph 16 there a number of sources of the
10 various aspects -- and I should note there, Madam Chair, of course this will be provided in
11 its final form, so the Commission can upload it to its website after this.

12 **CHAIR:** You mean your submissions will be?

13 **MS SCHMIDT-McCLEAVE:** Yes. So I've set out there a number of sources of the various
14 aspects of Government responsibility for these children and young persons in faith-based
15 care in relation to the Ministry of Education, Oranga Tamariki, the Ministry of Social
16 Development, and the Police.

17 So I want to turn now briefly to each of these agencies and summarise the salient
18 points from the evidence provided at the State institutional response hearing as it relates to
19 faith-based care settings.

20 First, the Ministry of Education. There was a different landscape and statutory
21 framework existing between 1950 and 1989. Until the establishment of the Ministry of
22 Education in 1989 the primary and secondary school systems in New Zealand were
23 overseen through the Department of Education under the 1914 and 1964 Education Acts.

24 Different types of schools were subject to different legislative and regulatory
25 frameworks, and they can generally be distinguished as follows: Since 1877 in
26 New Zealand, State schools have been established and funded by the State. New Zealand's
27 first schools were private, they were established by missionaries to teach Māori and the
28 children of missionaries from the 1820s, and once State schools were established from
29 1877, the Catholic Church in particular began to establish its own network of schools.

30 Private schools have always been owned, run and operated by private persons and
31 organisations other than the State. They receive some funding from the State, but they are
32 not fully funded like State schools. And in addition, private schools may charge school
33 fees.

1 Private schools have considerable flexibility in choosing their own curriculum,
2 qualifications, frameworks and assessment methods and they offer education within an
3 educational environment of their own design.

4 Most State-integrated schools were originally private schools and the Private
5 Schools Conditional Integration Act in 1975 facilitated the voluntary integration of private
6 schools into the State education system. State-integrated schools receive government
7 funding, as State schools do. However, they retain their special character and although they
8 must teach the New Zealand curriculum, teaching can reflect their special character.

9 The Crown's responsibilities as they arise from the various Education Acts provide
10 for and provided for a different approach to these different schools.

11 So, first, in relation to private schools: Registration has been required since 1921.
12 There were no limits on who could apply to register a private school. The focus in
13 determining registration was on the concept of efficiency, which Commissioners have
14 heard about before. And in introducing that requirement in 1921, the Minister of the time
15 noted that:

16 "The Government feels that it is not sufficient that we should allow any person to
17 open a school in any sort of building and with any sort of instructions. To the children who
18 attend these private schools the Government owes some duty to see that the schools are
19 reasonably efficient. Just as in the case of nursing homes, private hospitals, dentists and
20 plumbers, we insist upon registration to protect the public and secure efficiency."

21 And this concept of efficiency meant that:

22 "The premises, staff, equipment and curriculum of the school are suitable, that the
23 instruction is efficient as in a public school of the same class, and that suitable provision
24 [and I'm still using the words of the Minister of the day] is made for the inculcation in the
25 minds of the pupils of sentiments of patriotism and loyalty..."

26 And a private school could then be removed from the register if the director
27 considered it was no longer efficient.

28 But as was covered in the Crown response hearing in August, there is now
29 considerable regulation of private schools and their teachers which is certainly beyond this
30 rather limited concept of efficiency that used to exist.

31 Moving now to the Education Review Office. As the Commissioners and others
32 heard in the State response hearing, the ERO is an independent Government department
33 established under the Education Act 1989. It has responsibility for qualitatively evaluating

1 and publicly reporting on the education and care of children and young people in early
2 childhood services and schools.

3 ERO also reviews school hostels to evaluate whether students are provided a safe,
4 emotional and physical environment that supports learning.

5 These reviews are mainly regular, although on occasion ERO will complete a
6 review on a particular matter of concern or as directed by the Minister of Education.

7 I note that ERO has different processes for reviewing State-integrated and private
8 schools. When it reviews registered private schools, ERO reports on whether the school is
9 meeting the criteria for registration under the 2020 Education and Training Act and these
10 criteria were amended in May 2019 to include the provision that the school is a physically
11 and emotionally safe place for students, and I note that this requirement did not exist for
12 registered private schools prior to that 2019 amendment.

13 I've set out at paragraph 28 the criteria now for registration as a private school and
14 you will see there, Commissioners, that there are a range of factors, including that
15 managers who are fit and proper persons are the managers of a private school, and that it is
16 a physically and emotionally safe place for students.

17 And prior to these criteria being inserted in 2010, ERO registered private
18 schools -- reviewed registered private schools under the 1989 Education Act and used that
19 criteria that the schools be efficient.

20 So, Commissioners, you'll see there's been a range of approaches in terms of ERO's
21 review over the years.

22 And before reviewing a private school, ERO will look at documents, including the
23 school's curriculum and delivery programme, and its relevant policies and procedures. As
24 we heard in the State response hearing, an ERO officer attends the school to observe
25 teaching and learning, and speaks with staff and students in the school environment.
26 Officers also look at information about achievement expectations, risk assessment,
27 attendance registers, records of stand downs and suspensions et cetera, and once that review
28 is completed, ERO prepares a report and it's sent to the school managers and the Ministry
29 of Education and it is published on ERO's website.

30 In regards to teachers within private schools, from 1997 – and I apologise for the
31 range of dates, Commissioners, but it is all set out in the written submissions – from 1997,
32 the 1989 Act explicitly required private schools to employ only registered or provisionally
33 registered teachers. And in granting registration, the Teaching Council must be satisfied
34 that a teacher is of good standing, fit to be a teacher, satisfactorily trained to teach and has

1 satisfactory recent teaching experience. And again, as we heard in the State hearing, the
2 Teaching Council, or the Teachers' Disciplinary Tribunal, in disciplinary proceedings can
3 cancel a teacher's registration where a teacher does not meet those requirements.

4 I want to touch briefly on the Crown's responsibilities for private schools and how
5 that compares with State schools, and as Commissioners will have seen from the regulatory
6 framework I've just outlined briefly, the Department of Education, and subsequently the
7 Ministry, has always had considerably less involvement in private school settings by
8 comparison to the State school system. While every child is required to be enrolled in and
9 attend a school, arrangements relating to the enrolment of a child in a private school are a
10 contractual matter between the school's proprietors and the child's caregivers.

11 In terms of the landscape today, the existence and operation of private schools with
12 limited interference by the State allows children and their parents a variety of education
13 options. There are currently 90 private schools in New Zealand and that represents around
14 3.5% of the total schools in the country. 39 of those 90 private schools are faith-based.

15 Of course, balanced against this is the requirement for State oversight, and over
16 time various legislative and regulatory requirements have been implemented to improve
17 students' safety in education settings including in private schools. I've set out at paragraph
18 35 what those are and in summary there's been restrictions on certain practices, including
19 the use of corporal punishment and the use of seclusion, as well as limits placed on the use
20 of physical restraint, since 2017.

21 Mandatory three-yearly Police vetting was introduced for teachers in State and
22 private schools in February 2002 and from April of that year non-registered school staff and
23 contractors were required to be Police vetted every three years. And then in 2010, that
24 requirement was added for employees of contractors. All children's workers must also be
25 safety checked under the Children's Act 2014.

26 From 1996 court registrars have had a mandatory obligation to report to the
27 Teaching Council if a person currently or previously employed as a teacher has been
28 convicted of an offence that's subject to a term of three months' imprisonment or more.
29 And from 2004 this mandatory reporting obligation was imposed on teachers themselves.

30 Since 1997 managers of private schools have also been mandatorily required to
31 report to the Teaching Council in relation to all dismissals and resignations, complaints,
32 possible serious misconduct of teachers, and matters relating to their competence.

33 In 2010 a number of changes were made to the regulation of private schools and
34 that followed some work undertaken by the New Zealand Law Commission. And

1 consistent with the Law Commission's recommendations, that efficiency standard I've
2 mentioned required of private schools was significantly expanded.

3 In the same amendments in 2010, the Secretary's powers in relation to private
4 schools were expanded, and I've set out there how they were expanded and the enforcement
5 options which became open to the Secretary of Education.

6 And a specific provision introduced at that time allowed for the suspension of a
7 private school's registration where the Secretary had reasonable grounds to believe the
8 welfare of students was at risk.

9 In 1990, new provisions were introduced into the 1989 Act giving the Ministry
10 extensive powers of entry and inspection in all registered schools, and in 1998 the Ministry
11 was given authority to enter and inspect a private school which was suspected of operating
12 whilst unregistered.

13 You heard some evidence in August about the effect of the Education Hostels
14 Regulation of 2005 and the purpose of these was to ensure the safety of students who board
15 at hostels, and that covers hostels at all registered schools including private schools and
16 residential special schools. Those regulations brought in minimum requirements for
17 pastoral care, including a code of practice and a mechanism for direct intervention when
18 serious safety concerns are identified.

19 In 1998 provisions expanding a private school principal's obligation to notify the
20 Ministry about the suspension of or expulsion of a student were introduced and, in
21 particular, the principal is now required to provide the Ministry with a written statement of
22 the reasons for the actions.

23 We heard in August about the NELPs, the adherence to statement of National
24 Education and Learning Priorities, and from 2017 the managers of a private school and that
25 school's principal and staff were required to have regard to NELP. And the NELPs set out
26 the Government priorities for all schools and that includes State, State-integrated, private,
27 kura, early learning services, me ngā Kōhanga reo and communities of learning, Kāhui
28 Ako.

29 So, in summary, the framework offers a range of different types of education
30 provision for students, giving caregivers a variety of options in relation to their children's
31 education and the level of intervention and control by the Department, and subsequently the
32 Ministry, varies to reflect this.

33 Private schools are of necessity subject to less direct State oversight and control
34 than State and State-integrated schools, reflecting Government policy at the time.

1 Historically, churches and private enterprises have been active players in the
2 provision of private education in New Zealand.

3 Moving on to Oranga Tamariki. I note that in the time period covered by the
4 Commission, 1950 to 1999, children were placed in schools and other faith-based
5 institutions for different reasons. These included special homes, training institutions,
6 residential programmes, or institutions such as children's and family homes and hostels.

7 Placement by the State to all institutions was governed by the Child Welfare Act
8 1925 which was replaced by the 1974 Children and Young Persons Act and finally the
9 1989 Children, Young Persons and their Families Act, now the Oranga Tamariki Act.

10 Other than four former industrial schools, private schools sat outside of these Acts.

11 The 1927 Child Welfare (Amendment) Act provided for the registration and
12 inspection of children's homes and to become registered the Minister of Social Welfare had
13 to be satisfied with the inspection report, which the Superintendent of Child Welfare
14 completed, and then after that registration, inspections occurred once a year by the district
15 Child Welfare Officers and that would usually include a doctor from the Department of
16 Health, interviews with the children and staff, and an inspection of the building and
17 programmes.

18 I note that the responsibilities of the agencies to those children and young persons in
19 the care of private organisations was focused on those in State care rather than the wider
20 cohort of all children and young persons placed at these locations. In 1989 the Act saw the
21 introduction of section 396 and a significantly more comprehensive regulatory framework
22 for the approval, monitoring and inspection of private institutions.

23 The Government policy was to place children and young people who needed
24 residential care within Social Welfare's own institutions, but, in some situations they could
25 be placed in private institutions if that institution met a need that the Social Welfare facility
26 could not.

27 The social work manuals, which have been provided to the Commission, set out the
28 policy and guidelines for the placement of children in faith-based institutions. Parental
29 consent had to be sought before placing a Protestant child in a Catholic institution, and vice
30 versa, and often the decision to enrol a child at a faith-based school or private care home
31 was a private arrangement made by the child's parents rather than being placed there by the
32 State.

33 There were minimum requirements for visiting children and young persons in State
34 care, once every four months, and progress reports were expected on a six-monthly or

1 annual basis. And these requirements were set out in practice manuals and social work
2 manuals rather than directly in the statutes or regulations.

3 Those visiting and monitoring responsibilities, in line with the regulatory regime at
4 the time, focused on children who had status under Child Welfare legislation rather than the
5 wider cohort of all those in the different forms of faith-based care.

6 I've also noted there that both private institutions and Oranga Tamariki both had a
7 role in relation to New Zealand's adoption history and I've set out there a report to
8 Parliament in 1974 that noted that the placement of children for adoption might be lawfully
9 arranged without the assistance of Social Welfare and detailed the agencies responsible for
10 the arranging of adoptions as including private organisations, maternity homes, doctors, and
11 other professionals including solicitors, priests, parents and grandparents, and I've noted
12 there that private organisations arranged 158 of the total 2005 placements for adoption in
13 1972 and a similar percentage in 1973.

14 The 1957 fieldwork manual clarified that in New Zealand, unlike some overseas
15 countries, there were no private adoption agencies or societies, but there were several
16 private agencies which specialised in the care of unmarried mothers and made tentative
17 arrangements for adoption placements, but they had no legal right to make the actual
18 placements; that had to be done with approval from a Child Welfare Officer or an order
19 from the court.

20 The Ministry of Social Development: I've referred there to the evidence and
21 attachments of Barry Fisk in the Crown institutional response hearing about MSD's
22 accreditation function which occurs via Te Kāhui Kāhu and how that has evolved from
23 approving and accrediting third-party providers on behalf of the Ministry and Oranga
24 Tamariki, to accrediting on behalf of six Government agencies through individual service
25 level agreements, and MSD now approves providers under section 396 under specific
26 delegation from the Chief Executive of Oranga Tamariki.

27 And I've set out there, that function has evolved and in the period before 1999 sat
28 within the Department of Social Welfare.

29 Police investigation: Aside from the various sets of obligations that various Crown
30 agencies have had in relation to faith-based institutions, the Crown has also had an
31 important role in investigations and prosecutions, and Police are committed to continuously
32 improving the existence of everyone who reports abuse to them and in the context of this
33 hearing acknowledges the particular vulnerabilities of the survivor witnesses who have
34 given evidence and the wider survivor group.

1 Before I finish I'd also like to make a brief note about the keeping of public records.
2 It is worth noting that the Public Records Act in 2005 requires every public office and local
3 authority to create and maintain records of its affairs, including the records of any matter
4 that is contracted out to an independent contractor. So where that applies to NGO [non-
5 governmental organisation] records, the statutory obligation is on the public office to
6 maintain the records and not on the NGO.

7 However, although the Act is retrospective in its application to records created or
8 received before 2005, faith-based institutions would not necessarily have previously
9 understood that they had an explicit legislative responsibility to treat records of their care
10 work done under contract to Government agencies as public records.

11 In ending these submissions, the Crown reiterates once again its commitment to the
12 work of this Commission. The Crown is committed to providing information and evidence
13 to enable fruitful recommendations, to ensure that the terrible experiences heard throughout
14 the Inquiry do not occur again. No reira, tēnā rawa atu koutou katoa. (With that, my
15 sincere thanks to you all.)

16 **CHAIR:** Thank you, Ms Schmidt-McCleave. I have a question which I don't know if you can
17 answer now. It came up in the State institutional response hearing, but it relates to the
18 extent of State oversight, which, as we have heard, has fluctuated over the years and which
19 is gradually, seems to be by process of accretion, adding more and more layers of oversight.

20 Is it possible for you to point, maybe not now but later, whether indeed there is any
21 specific obligations for the State in relation to churches and faith-based institutions to see
22 that these institutions adhere to the principles of Te Tiriti and whether they have any
23 obligation to see that these churches, these care institutions, are adhering to the human
24 rights obligations that the State imposes, either domestic or international?

25 That's a big question, I appreciate.

26 **MS SCHMIDT-McCLEAVE:** Yes, and my preliminary response, and, of course, I'd like to seek
27 instructions and provide a fuller response, is that consistent with the framework I've
28 outlined, those kinds of obligations will be fed into the specific functions and obligations of
29 each agency, and certainly there's Te Tiriti, human rights obligations throughout the
30 documents, including in the recent Oranga Tamariki care standards which apply equally to
31 faith-based institutions.

32 I will provide Commissioners, though, with a more fulsome response, but that's my
33 initial --

1 **CHAIR:** Yes, and I appreciate I've caught you on the hop, and I also appreciate there are
2 contractual documents. My question really is at the higher level, the legislative level. So
3 that's something I think that we need clarification on if you can provide that.

4 **MS SCHMIDT-McCLEAVE:** Yes, absolutely. Again, I would make the point that certainly the
5 Commissioners heard a lot, for instance, about section 7AA and the Chief Executive's
6 Te Tiriti obligations under the Oranga Tamariki Act which, of course, filtered down
7 throughout to those organisations.

8 **CHAIR:** It's one aspect --

9 **MS SCHMIDT-McCLEAVE:** One aspect of it, yes, but we're very happy to provide a fuller
10 response in relation to all the agencies.

11 **CHAIR:** Thank you very much, and thank you for your submissions.

12 **MS SCHMIDT-McCLEAVE:** Thank you, Madam Chair; thank you, Commissioners, tēnā
13 koutou katoa.