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MANAAKITIA A TĀTOU TAMARIKI
Children's Commissioner

17 April 2018

Rt Hon Sir Anand Satyanand
Chair
Royal Commission of Inquiry
Historical Abuse in State Care

Dear Sir Anand

Royal Commission of Inquiry – Draft Terms of Reference

1 Thank you for the opportunity to comment on the Royal Commission of Inquiry's (**Inquiry**'s) draft Terms of Reference (**TOR**). I welcome the innovation of being given such an opportunity to contribute to the shape and scope of the Inquiry's task.

2 My comments, set out below, are informed by:

a discussions with the leadership team of the Office of the Children's Commissioner; and

b the obligations set out in section 12 of the Children's Commissioner Act 2003 (the Act), in particular my obligation to:

i raise awareness and understanding of children's interests, rights, and welfare (section 12(c));

ii act as an advocate for children's interests, rights and welfare (section 12(f)); and

iii promote, in relation to decisions that affect the lives of children –

A the participation of children in those decisions; and

B an approach that gives due weight to children's views (section 12(j)).

3 As a matter of transparency, I need to draw your attention to that part of my functions under section 13 of the Act which include the monitoring and assessment of the policies and practices of what was previously Child, Youth and Families Services, now known as Oranga Tamariki. It might be argued that as the Office had a role to play in uncovering historical abuse in the discharge of that monitoring function, then I am in a position of conflict in terms of this Inquiry. I need to alert you to that issue. However, I do not believe that this issue precludes me making a submission about the TOR.

4 I have also sought advice from Kensington Swan and have incorporated that advice in my comments below.

The size and scope of the task

5 New Zealand has a shocking history of child abuse. This Inquiry takes place after many advocates have, for many years, called for an independent inquiry into abuse in state care (a sub-set of much wider child abuse in this country). This both increases the expectation of what the Inquiry can deliver, but also increases the likely demand from individuals wanting to participate to tell their stories, and to have those stories heard.

6 Equally, the experience of similar inquiries in the UK and Australia indicates that identifying and acknowledging 'the nature and extent of the abuse that occurred' and the 'impact of the abuse on individuals and their families, whānau and communities' is in itself a mammoth undertaking and may take longer than initially anticipated. The TOR, as currently drafted, includes these objectives as just the first two of up to eight separate issues for consideration. From my own information, I know that this hugely demanding task of the Australian Inquiry's work was significantly underestimated.

7 We know many of the individuals who will wish to participate will be vulnerable. Recounting the events of their past will be difficult and the time required to allow them the space and safety to do this should not be underestimated. Their contributions to the Inquiry will, in effect, be 'the children's stories'. These sit at the very heart of the Inquiry and understanding what happened and how from the perspective of children (past, present and future) is essential for the completeness of the Inquiry.

8 In broad terms, it seems to me that the TOR can be divided into two stages:

a **Stage 1** – Looking back: A mapping of the extent of abuse in state care, the impact of that abuse and the factors which may have caused or contributed to the abuse. The principal questions are what happened and why?; and

b **Stage 2** – Looking forward: An identification of what changes either need to be made in practice, or where gaps that exist to cause or contribute to abuse can be addressed, and how. This phase also contains a review of current prevention settings to test whether these are fit for purpose and/or how they can be improved or developed. The principal question is how can we be sure what stage 1 has established to have happened, cannot happen again?

9 For a range of reasons, the Inquiry might better address public and political expectations by formally dividing its work programme into these two separate stages, with a report issued at the completion of each stage.

10 In the event that the Inquiry hears from an unexpectedly large number of individuals, each seeking to tell his or her story, this two-stage approach would allow the Inquiry to demonstrate progress (and honour the stories of the individuals concerned) in a timely manner. At the completion of stage 1, the Inquiry would be able to provide a clear definition of the size and scope of historical abuse in state care, the impact of that abuse and why it was able to be perpetuated and/or tolerated.

11 Only once the Inquiry has addressed those historical factors can it effectively focus on the very important question of how can New Zealand ensure abuse in state care does not continue to occur. Managed in this way, organisations that may be deemed to have been at fault or have been responsible for institutions where abuse took place, would be able to later make positive suggestions for future improvements.

12 I note under clause 13 ('methods of work') the Inquiry is undertaking to ensure that institutions and other parties are given sufficient time to respond to requests for information. Operating the Inquiry in two stages would provide clarity to all parties. It should make requests for information more targeted and therefore easier to respond to. It provides all agencies the opportunity to take more time to consider the future focus; that should ultimately be of benefit to the quality of the recommendations.

13 Divided in this way, the 'forward focused' stage 2 report has the potential to be a principled blueprint for politicians, government agencies, NGOs and iwi organisations to adopt and follow. If the recommendations have fiscal implications, they too can be clearly identified.

14 If the result of this Inquiry is to be meaningful and enduring change in order to protect New Zealand's children, then this two-stage process is my recommended approach. It would be difficult for the Inquiry to manage both the historical and the future focused aspects of the submissions simultaneously. The TOR include a natural tension between looking back and looking forward. In practice, it would mean while those individuals who present their stories to the Inquiry team would want (and need) to be accorded the time and space to be heard patiently, others making submissions may be impatient to push the Inquiry into recommendations for future change. Managing this will be challenging and is, in my opinion, best addressed by considering each separately and in sequence.

Definitions

(a) Abuse

15 The wide definition of abuse proposed by the Inquiry is appropriate.

(b) State care – timeframes covered by the Inquiry

16 The Inquiry proposes to consider the experience of 'any individual who was in state care between 1 January 1950 and 31 December 1999 inclusive'. The 1999 cut-off is, it seems to me, an arbitrary line without a clear justification.

17 Our preference would be for a definition that included:

> 'any individual who experienced state care up to 2010 and who is no longer in state care' (with discretion to consider even more recent cases).

18 The distinction here is that anyone currently in state care can make a complaint about abuse under the Oranga Tamariki complaints processes, or approach the Children's Commissioner's Child Rights Advice Line, or contact my office directly, or the Ombudsman. These processes are designed to address any issue being faced by any child who is currently in state care. The Inquiry is designed to address the abuse suffered by individuals who are now adults, or for whom State care has otherwise ended.

19 Retaining the 1999 cut-off potentially excludes those individuals who were in State care between 2000 and 2010. These individuals will mainly be adults now, and no longer in state care, and access to the Inquiry process should be made available to them.

20 Incorporating those individuals who were more recently in state care would provide a more complete picture of whether standards and practices have changed and, if so, in what ways. In particular it would usefully inform an assessment of whether the range of mechanisms introduced since 2000 have had a meaningful impact on the welfare of those in state care. It is often asserted, on the basis of little evidence, that "things have improved" and that in recent times the incidence of abuse in State care has reduced. Extending the timeline would enable this assertion to be tested.

21 Put another way, it may be that those drafting the TOR considered that post-1999, the key drivers of abuse in state care had been addressed. If that is the case, then extending the timeframe of the Inquiry would not create any additional workload. If that is not the case, that is in itself a crucial finding, and the Inquiry should be permitted to make findings to that effect.

(c) State Care – width of the definition and role of the churches

22 As this is an inquiry into historical abuse 'in state care', there is an attractive logic about excluding the churches from consideration. However, the lines between 'state care' and 'church care' are unhelpfully oblique. For example, under the TOR it appears a child attending a church-run school (where abuse took place) could report this abuse if, at the time, he or she was also a state ward. But the child who sat next to him/her, and was also abused at the school by the same perpetrator, could not. Such an outcome does not seem to be in the best interests of either child. Without the evidence of both children (now adults) the Inquiry would not be able to determine the full extent of abuse, its impact and its drivers.

23 Alternatively:

a the Inquiry might include all institutions in which children who were in state care were placed – this would include certain church-run schools and homes but exclude others; or

b if the Inquiry adopts the two-stage approach recommended above, it might invite the Churches to conduct a parallel stage 1 process which could then be incorporated into the Inquiry's 'map' of abuse and inform its wider understanding of the scope and scale of historic abuse. (If this approach is adopted, there needs to be care taken that those cooperating with this Church-led inquiry are not in any way more vulnerable than those cooperating with the Inquiry (i.e. not provided with equal levels of support, confidentiality etc).

24 Any inclusion of 'church care abuse' may also require a definition of 'church'. I note that both the Anglican and Catholic churches have expressed a willingness to be included in the Inquiry. But there are many other churches or organised religions.

25 In broad terms, however, if the Inquiry proceeds on the basis that those abused by or in church-run institutions are excluded, the final report/s could be seen by many as being incomplete. This is not an attractive position to contemplate before the Inquiry has even commenced.

Treaty issues

26 The TOR recognises that the Inquiry is 'invited to have particular consideration for Māori and any groups where differential impact is evident' (clause 5.2.2). There is, however, no express recognition of the Treaty, although at clause 12 there is reference to 'taking a whānau centred view' and 'working in partnership with iwi and Māori'.

27 Our preference would be to include (either under the existing clause 13 or, preferably as a new clause 13 (before 'Methods of work') an express provision such as:

> 'The Inquiry will at all times act in such a way as to give effect to the principles of the Treaty of Waitangi'.

28 I note the Commissions of Inquiry Act 1908 is silent as regards the Treaty. However, given the subject that sits at the heart of this Inquiry, and the fact that well over half of all children currently in state care are Māori, an undertaking of consistency with the Treaty principles is required.

Evidential issues

29 In clause 13, the current TOR states that as a method of work, information or evidence that may be received by the Inquiry that identifies particular individuals will be dealt with 'in a way that does not prejudice current or future criminal or civil proceedings or other contemporaneous inquiries'. This assurance creates a number of issues. It:

a encourages individuals to 'lawyer up' (even though the Inquiry has as one of its principles, 'avoiding a disproportionately legalistic approach');

b discourages certain individuals to both appear and/or be entirely truthful to the Inquiry. In particular, it discourages those individuals who worked for the state (nurses, assistants, carers in state institutions etc), since to provide information could be self-incriminating; and

c is likely to add to the burden of hearing evidence, as the Inquiry will need to be continually alert to, and advise witnesses of the privilege against self-incrimination (section 60 of the Evidence Act, section 6 of the Commissions of Inquiry Act 1908).

30 The TOR need to provide greater guidance on privilege against self-incrimination. The wider objectives of the Inquiry (and the interests of children) are best served by the fullest possible disclosures by the widest range of individuals. To facilitate this, further consideration should be given to whether the Inquiry could provide a protection such that evidence presented to the

Inquiry cannot be used as evidence in a proceeding (in the same way that information disclosed in a mediation cannot be used in proceedings). Alternately, the police could be encouraged to issue a protocol providing certain assurances to those who provide information.

31 I am conscious this Inquiry has not been set up as a 'truth and reconciliation' process. The individuals who have been the victims/survivors of the abuse have yet to be heard and some may in fact want individuals prosecuted. This is a difficult balancing exercise. However, as currently drafted, clause 13 puts the weight on the prospect, even likelihood, of future prosecutions. This would, in my view, be too chilling.

Privacy

32 The TOR are silent on the issue of privacy.

33 There can be no doubt the information disclosed by individuals is personal information. If this Inquiry is like others before it, some individuals will disclose information in this forum that they have never told anyone else.

34 There must be protocols about how the Inquiry will manage this information and the privacy of those who share it.

35 In some cases, individuals will only provide information on the basis of confidentiality undertakings. Other individuals will want details to be known.

36 A detailed set of privacy protocols are required that provide security to all individuals that all information (from the first point of contact with the Inquiry to final publication of the report/s) will be managed in such a way as to protect privacy. This protocol should be attached as a schedule to the TOR.

Support for individuals

37 The individuals who tell their stories to the Inquiry will need substantial support. The experience of the Confidential Listening and Assistance Service (CLAS) was that individuals had historically been under-supported or had no support at all and disclosing information about traumatic childhood events was difficult and in itself traumatic.

38 Clause 14 refers to the establishment of a 'survivor advisory group'. This group, while a good idea, appears to be focussed on assisting the Inquiry members. Another group would be required to coordinate and provide assistance to those victims/survivors who wish to appear before the Inquiry.

39 Further thought is required on how best to provide the care, counselling and wider support these individuals will need. That support needs to be in place before the Inquiry advertises for people to come forward. Like the other aspects of the Inquiry's work, the support team needs to understand obligations of confidentiality. The experience of the Australian Royal Commission will doubtless be of considerable help on this issue.

Other Issues

40 There are other issues to identify and briefly canvas:

a One is the status of previous testimony to the CLAS, and the use to which it can be put. If such previous evidence is available, must it be adopted by the witness, repeated, or simply (with the witness's consent) accepted by the Inquiry? Is cross examination permitted? If the witness is now deceased or uncontactable, what use can be made of the evidence/ statement by the witness previously made to CLAS?

b Although the Inquiry, as observed, (para 31) is not being set up as a "truth and reconciliation" process, there is certainly the opportunity to afford witnesses a restorative justice option, if the alleged perpetrator accepts wrongdoing, and consents. This is attractive as a means of providing healing and closure for a survivor of abuse. But it could compromise future prosecutions. A protocol would be required. That said, restorative justice approaches have a long and respectable track record in New Zealand. Facilitators would be readily available. The restorative justice process and the necessary protocols are well understood. In my view it would be a pity if a New Zealand Inquiry, given our international leadership in the restorative justice field, missed this opportunity.

Availability to meet

I am available to meet personally with you and your staff, or together with my senior staff and Kensington Swan partners, if you think it appropriate.

Yours faithfully

Judge Andrew Becroft
Children's Commissioner
Te Kaikōmihana mō ngā Tamariki o Aotearoa