

15 July 2019

Royal Commission of Inquiry  
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Re: Important procedural issues for the Commission.

Dear Commissioners,

Congratulations on the opening public session of the Royal Commission on Abuse in Care. The Commissioners' presentations reflected a depth of analysis, a recognition of the complexity of your task and a strong commitment, both individually and collectively, to find justice for those who have been abused in care.

There is much we welcomed in the hearing, especially the appreciation by the Commission that the tasks that confront them are significant and that they remain open to new ideas. The clarity around the Commission's timeframes was very useful, as was the description of the eight Pou. We applaud the Commission's recognition that participation in the Commission by survivors is both necessary and presents significant challenges.

In general, the framework that the Commission has adopted appears robust. The comments we have received from those present or who watched the live streaming have been generally positive. People have told us they felt encouraged and reassured by what they heard. We believe that the hearing has put the Commission on firmer footing.

As you are aware the Royal Commission Forum was set up to monitor developments and provide constructive feedback. Despite the positive steps taken to date, not unexpectedly there remain issues that have yet to be adequately addressed.

We identify the most pressing as:

**Survivor Advisory Group.** It would have been appropriate to recognise the importance of the Survivor's Advisory Group in the design and ongoing work of the Commission. It would have helped to have Group members introduced at the opening hearing. Only Commissioner Gibson recognised Keith Wiffen's presence. We think that it would have been appropriate for all members of the Group to have been invited to attend. As an aside, we note that information regarding membership of the Group available on the website appears to be incorrect.

**The second-class status of private sessions.** Experience overseas indicates that many more survivors are likely to participate in private sessions than in public

hearings. That means, for most survivors, their private session is likely to constitute their primary experience of the Commission.

While the explanation offered about how the information from the private sessions will be used to guide the work of the Commission was useful, the Legal Counsel still noted that they did not constitute evidence – he tried to soften it by saying it is “not evidence under oath”. We would urge the Commission to consider whether legal concepts of “evidence” is appropriate to its work. The Commission is not a court of law. Overseas, most inquiries of this nature have understood themselves as attempting to obtain and present information relevant to policy recommendations and to underpin judgements regarding systemic operations. Legal concepts of evidence are unnecessary to those tasks and may serve as potential impediments.

**Legalism.** We would point to general concerns with the legal character of the proceedings. While the Anglophone inquiry model is heavily legalistic, there are alternatives. The Canadian TRC is a clear alternative model and there are also European Commissions that provide alternative models of inquiry.<sup>1</sup> We have concerns with respect to the suggestion that Counsel for the Commission will lead its investigatory research programs.

**Survivors have a right to their personal information.** At present the Commission appears to treat information obtained from survivor during a private session as its own property. This is most clear in the prohibition of survivor’s recording their own sessions. Many survivors might like a recording of their sessions and they may have good reason not trust the accuracy of government records. As they are telling their own stories as survivors, they should be able to record them as they wish.

Similarly, it is not presently clear how the Commission will coordinate private sessions with the desire of many survivors to obtain their personal records. Given the nature of personal memory, records are an important element of historical recovery that may inform the survivor’s understanding of their own story. The Confidential Listening and Advice Service offered survivors assistance in obtaining their records. It might be worth considering whether survivors should be offered support to obtain records prior to, or as part of, the private session.

**Legal Counsel.** Overseas research emphasises the right of survivors to be represented by legal counsel of their own choice.<sup>2</sup> There are several good models, including that of Australia, that might supplement existing legal relationships, but there are serious drawbacks to not facilitating the survivor’s own choice of counsel with regard to these very difficult processes. In that regard, we understand the Commission’s desire to ensure that private sessions are not legal events. However, given the complex and serious legal concerns many survivors will have, it may be advisable to facilitate legal advice with regard to their participation in private

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<sup>1</sup> A good example is the Swiss Independent Expert Commission (IEC) on Administrative Detention. <https://www.uek-administrative-versorgungen.ch/home>

<sup>2</sup> Darcie Bennett et al., *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (BC Civil Liberties Association, 2012).

sessions: it is clear that these sessions are not without legal risks to survivors and other stakeholders, such as family members. In our opinion, survivors should be able to explore those risks with counsel of their own choice.

**Accessibility.** The use of potentially intimidating environments, such as court rooms and government offices, should be re-considered. While there are potentially some security risks, there have been thousands of hearings in similar bodies across the world and no examples of serious injuries. Arrangements could be made to use marae whare, local government facilities or community centres. Again, the example of the Canadian TRC might prove useful.

In addition, we would ask how survivors now living in Australia and elsewhere are expected to engage with the Commission. Does the Commission envision hosting sessions in major Australian centres?

**Accountability.** There is lack of clarity about whether and how governments officials will be investigated for post-1999 actions. There have been a number of serious claims that officials have misused state powers and resources to deny or impede claims of abuse and failed to act against perpetrators despite credible evidence being presented. The credibility of the Commission will depend on its ability to speak to the present-day treatment of survivors.

In closing, we emphasise how important we regard the work of the Royal Commission. The issues we have raised are intended to help strengthen your processes and procedures. We are available to discuss them with you.

Warm regards

A handwritten signature in black ink, appearing to read 'Stephen Winter', written in a cursive style.

Dr Stephen Winter

On behalf of the Royal Commission Forum