Abuse in Care
Royal Commission of Inquiry

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

MINUTE 18 – NATURAL JUSTICE, DR LEEKS

29 November 2021

Introduction

1. This Minute sets out the Inquiry's response to submissions made on behalf of Dr Selwyn Leeks regarding the Inquiry's ability to make adverse findings about his conduct.

Factual background

2. In August 2020, the Inquiry published the scope of its investigation into allegations of abuse at the Child and Adolescent Unit at Lake Alice Psychiatric Hospital.[1] Dr Selwyn Leeks was the lead psychiatrist at the Child and Adolescent Unit at the relevant time. Since the 1970s, Dr Leeks has faced allegations that he was responsible for acts of abuse against patients at the Unit.

3. Over the years, Dr Leeks has responded to these allegations on a number of occasions. These include:

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1 Available here: https://www.abuseincare.org.nz/library/v/125/scope-of-case-study-into-allegations-of-abuse-at-the-child-adolescent-unit-at-lake-alice-psychiatric-hospital

- an explanation of the treatment he gave to a patient, provided to an Ombudsman's investigation into the case in December 1976;
- his oral evidence and written submission to a Commission of Inquiry into Hake Halo's case in 1977;
- his statements to the *Evening Post* regarding the use of ECT as punishment in May 1977;
- his statements to the Police regarding aversion therapy in June and July 1977;
- his statements to an Ethical Committee of the New Zealand Medical Association in response to a complaint in July 1977;
- his oral evidence and written submission to the New Zealand Medical Council in relation to a complaint in November 1977;
- an unpublished written account of the Lake Alice Child and Adolescent Unit from approximately 1977;
- an affidavit he swore in response to the civil lawsuit bought by Leoni McInroe in 1995;
- his statements under cross-examination during civil proceedings in the County Court of Victoria in August 2006; and
- a 2006 media interview.

4. In April 2021, the Inquiry designated Dr Leeks as a core participant. Around the same time, we appointed Mr Hayden Rattray as counsel for Dr Leeks, funded through the Inquiry's legal assistance programme.

5. In advance of the public hearing into the Child and Adolescent Unit, the Inquiry disclosed to Dr Leeks and his counsel a bundle of material relevant to Dr Leeks. This included witness statements and primary documents containing the allegations against him. The Inquiry also provided copies of Dr Leeks' previous statements listed above to ensure his counsel was aware of the statements previously made.

6. The Inquiry held a public hearing into the Lake Alice Child and Adolescent Unit between 14 –29 June 2021. Counsel for Dr Leeks attended the hearing by video-link, and made opening and closing submissions on behalf of Dr Leeks. The hearing was livestreamed on the Inquiry's website, and a full transcript is available. In accordance with the Inquiry's Practice Note 6 – Public Hearings,[2] Dr Leeks had an opportunity to seek permission to question witnesses through his counsel, or alternatively could suggest lines of questioning to counsel assisting, but did not take up this opportunity.

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2 Available here: https://www.abuseincare.org.nz/library/v/133/practice-note-6-public-hearings

7. The public hearing considered among other things the adequacy of the State's redress and rehabilitation response to victims and survivors of abuse at the Unit. This was signalled in the scope document released in 2020. The Inquiry is presently finalising an interim report to the Government on redress, which is due to be presented to the Governor-General by 1 December 2021.

8. The report will include a description and evaluation of the Crown's response to the lawsuit brought by Lake Alice survivor Leoni McInroe in the 1990s. Dr Leeks was a defendant in that lawsuit, and he participated in it by filing an affidavit and attending a settlement conference, among other steps. The report also includes reference to the claims for redress made by a group of Lake Alice survivors represented by Grant Cameron in the 1990s and 2000s.

9. Some of the comments in the sections are adverse to Dr Leeks. Those comments do not introduce any new allegations or new content beyond what was traversed at the public hearing in June this year, and indeed many public forums over the years. Out of an abundance of caution, the Inquiry supplied the McInroe case study and the other relevant passages to counsel for Dr Leeks as part of the Inquiry's natural justice process.

Submissions on behalf of Dr Leeks

10. On behalf of Dr Leeks, Mr Rattray submits the Inquiry is not able to make any findings adverse to Dr Leeks. He relies on s 14(3) of the Inquiries Act, which states:

> **14. Regulation of inquiry procedure**
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> ...
>
> (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person —
>
> (a) is aware of the matters on which the proposed finding is based; and
> (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.
>
> ....

11. Mr Rattray submits that because of Dr Leeks' age (92 years) and cognitive impairment, Dr Leeks is not able to exercise his rights as a core participant to give evidence or make submissions. He submits that Dr Leeks is incapable of being aware of the matters upon which adverse findings would be based, and incapable of responding to those matters. This, it is submitted, precludes the Inquiry from making any adverse findings about Dr Leeks.

12. Mr Rattray relies in particular on a neuropsychological assessment of Dr Leeks, carried out by Dr Sara Lucas in April 2021. Dr Lucas described Dr Leeks as

having a cognitive profile "most likely suggestive of Alzheimer's disease" and concluded:

> I do not believe Mr Leeks has the cognitive capacity to take on board and retain relevant information in order to make an informed decision and instruct his legal practitioners. He identified some very vague information about matters to date, but could not provide any specifics (including the occurrence of a Royal Commission, or times, or dates). The cognitive deficits observed on testing, particularly in relation to delayed memory, are likely to impact his ability to be able to give consistent and informed instructions.

Analysis

13. The submissions on behalf of Dr Leeks are based on an interpretation of s 14 of the Inquiries Act which provides in full:

> **14 Regulation of inquiry procedure**
>
> (1) An inquiry may conduct its inquiry as it considers appropriate, unless otherwise specified—
>
> (a) by this Act; or
>
> (b) in the terms of reference of the inquiry.
>
> (2) In making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must—
>
> (a) comply with the principles of natural justice; and
>
> (b) have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.
>
> (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person—
>
> (a) is aware of the matters on which the proposed finding is based; and
>
> (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.
>
> (4) Without limiting subsections (1) to (3), an inquiry may determine matters such as—
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> (a) whether to conduct interviews, and if so, who to interview:
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> (b) whether to call witnesses, and if so, who to call:
>
> (c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held:
>
> (d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry:
>
> (e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions:
>
> (f) whether to allow or restrict cross-examination of witnesses.

14. The starting point is that the Act empowers the Royal Commission to conduct its inquiry as it considers appropriate, subject to the specific requirements of the Act or Terms of Reference, and s 14(4) affords considerable flexibility to the Inquiry. Subsection (2) requires the Inquiry to comply with "**the principles of natural justice**". At common law, the principles of natural justice are inherently flexible and focused on fairness in a non-technical sense, as the courts have repeatedly emphasised:

- "the expression natural justice is one that is not precise and probably should not be defined": *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 (HC) at 613;
- "the requirements of fairness or natural justice are flexible": *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at132;
- "the so-called rules of natural justice are not engraved on tablets of stone": *Lloyd v McMahon* [1987] AC 625 (HL) at 702;
- "Natural justice is but fairness writ large and juridically. It has been described as "fair play in action": *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718
- "A decision … made in breach of the rules of natural justice, which in a word means unfairly": *R v Oxford Regional Mental Health Review Tribunal* [1988] AC 120, 126.
- "there are … no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter under consideration and so forth": *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118;
- "we often speak of the rules of natural justice. But there is nothing rigid or mechanical about them": *Wiseman v Borneman* [1971] AC 297 (HL) at 308;
- "the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration": *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718;
- "All cases in which the principles of natural justice are invoked must depend on the particular circumstances of the cases. [In this case] Fairmount has not had … a fair crack of the whip.": *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1225, 1265.
- "It is … impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lie, or when the principles of natural justice are to

apply, or what makes a hearing unfair. Everything depends on the subject matter and the facts and circumstances of each case": *Stanley Cole v Sheridan* [2003] EWCA Civ 1046, [2003] 4 All ER 1181 at [33];

- "what fairness requires depends on the context and the particular circumstances": *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 at [27];
- "fairness is a broad and even elastic concept, but it is not altogether the worse for that": *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) at 357;
- "the rules of natural justice … are not rigidly dogmatic and are varying in application": *Coles v Chairman, Councillors and Inhabitants of the County of Matamata* CA 69/74, 30 April 1976 at 1;
- "natural justice is a flexible concept which adapts to particular situations": *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [67]; and
- the "requirements of natural justice … [are not] confined within hard and fast rules": *Attorney-General v Bay of Islands Timber Company Ltd* [1979] 2 NZLR 511 (CA) at 517.

15. These are just some examples of statements emphasising the flexibility of the natural justice principles at common law, and the need to focus on actual fairness rather than a narrow or technical approach.

16. The work that led to the Inquiries Act 2013 indicates no legislative intention to depart from the common law understanding of the principles of natural justice. The Law Commission said "the manner in which natural justice applies depends on the circumstances and the nature of the issue under consideration".[3] The Law Commission quoted Cleary J in *Re The Royal Commission to Inquire into and Report Upon State Services in New Zealand*:[4]

> No formula has been evolved which can be applied to all cases, other than one expressed in quite general terms, for so much depends upon the nature of the inquiry, its subject matter and the circumstances of the particular case.

17. The Law Commission considered whether to include natural justice rules in legislation, and proposed to do so saying: "The provisions we propose only go so far as to set out those principles of natural justice which are now very well established tenets of our law. We believe that setting out some of these requirements is necessary to provide inquirers (some of whom are not legally qualified) and courts, with greater direction about the applicable protections".[5]

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3 Law Commission *A New Inquiries Act* (NZLC R102, 2008) at [4.32].

4 *In Re The Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 (CA) at 116.

5 *A New Inquiries Act,* above n 3,at [4.35].

18. The proposal of the Law Commission led to the following draft clause in the Inquiries Bill introduced in 2008:

> **17. Application of principles of natural justice**
>
> An inquiry must not, in its report, make any finding that is adverse to any person (whether a natural person or a body corporate), unless the inquiry
>
> has—
>
> (a) taken all reasonable steps to—
>
> (i) give that person reasonable notice of the intention to make the finding; and
>
> (ii) disclose to that person the contents of the proposed finding, the relevant material relied on for that finding, and the reasons on which it is based; and
>
> (iii) give that person a reasonable opportunity to respond to the proposed finding; and
>
> (b) properly considered

19. A few days before the Inquiries Act was passed, a Supplementary Order Paper replaced this clause and added the current s 14 of the Act as quoted above. This change reflected the approach taken by the High Court in *Dow v Royal Commission on the Pike River Coal Mine Tragedy*.[6] As one commentator explained:[7]

> The wording of ss (3)(a) and (b) reflect the common law position that before making an adverse finding the decision-maker must be satisfied whether, considered overall, the person has had sufficient notice of the material on which it is based, (which must include the critical allegation) and an opportunity to respond during the course of the inquiry. If so, then as the court emphasised in *Pike River*, there would be no need to do anything more.

20. In other words, it appears the late change by Supplementary Order Paper was intended to give inquiries more flexibility rather than less.

21. The interpretation advanced on behalf of Dr Leeks seeks to read the obligations in s 14(3) narrowly, in a way that would preclude the Inquiry from making an adverse finding unless the person affected is currently subjectively aware of the matters on which the finding is based, and able to engage directly or through counsel with the Inquiry by way of response. It is said that Dr Leeks' cognitive

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6 *Dow v Royal Commission on the Pike River Coal Mine Tragedy* [2012] NZHC 2404.

7 Gillian Coumbe "The 'Erebus ground' of Natural Justice" (2014) NZLJ 152 at 157.

decline operates as an absolute bar to findings against him, regardless of whether the Inquiry's process, overall, has accorded fairness to Dr Leeks.

22. Such a narrow and rigid interpretation of s 14(3) would not be consistent with the flexible common law approach to the principles of natural justice. For example, it could mean that a person who deliberately avoided engagement with an Inquiry could avoid any risk of an adverse finding. There would be a strong incentive on any person potentially at risk of an adverse finding to avoid contact with an Inquiry. Equally, a person left without capacity for any reason would be immune from adverse comment, no matter what steps the Inquiry took in substance to ensure the person was treated fairly. There is nothing in the drafting history of the Inquiries Act 2013 to suggest that Parliament contemplated such a rigid, narrow or inflexible position. Nor is there anything to suggest that the common law principles, properly applied, would lead to such a conclusion.

23. We consider that such an interpretation would undermine the statutory purpose of enabling inquiries to be carried out effectively, efficiently and fairly,[8] and would in many cases be unworkable and potentially lead to unfairness against other participants, as well as undermining the public interest. It is a well-established principle of statutory interpretation that an unworkable interpretation should be avoided.[9]

24. We are satisfied that the requirements of s 14(3), properly interpreted, are met so long as the Inquiry has taken reasonable steps to ensure the matters in sub paragraphs (a) and (b) have been satisfied. To require more than reasonable steps, and to read s 14(3) as imposing rigid and narrow rules would not accord with the statutory intent. Nor would it accord with the surrounding context: s 14(2) refers to the "principles of natural justice", which, as we have outlined above, are inherently focused on overall fairness, rather than on technical or narrow rules. For the reasons summarised above, this interpretation is also required in order to avoid an unworkable position. In textual terms, the interpretation requires the following words to be read into the section:

> (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that **all reasonable steps have been taken to ensure** the person—
>
> (a) is aware of the matters on which the proposed finding is based; and
>
> (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.

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8 Inquiries Act 2013, s 3.

9 See for example *Northland Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 530 (HC) at 537; *International League for the Protection of Horses v Attorney-General* CA 106/93, 31 May 1993; *Vu v Ministry of Fisheries* [2010] NZSC 162, [2011] 3 NZLR 1; *Chief Executive of the Ministry of Fisheries v United Fisheries* [2010] NZCA 356, [2011] NZAR 54; *Hudson v Youth Court at Palmerston North* [2007] NZFLR 331 (HC). See also *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [41]–[44].

25. The requirements of s 14(2) remain: "… in making a finding that is adverse to any person, an inquiry must **comply with the principles of natural justice**; and have regard to the need to avoid unnecessary delay or cost…" In other words, the "reasonable steps" qualification in s 14(3) does not alter the primary obligation to comply with the principles of natural justice. This operates as a safeguard to the interpretation we adopt: having taken 'all reasonable steps', the Inquiry must also be satisfied it has complied with the principles of natural justice overall in relation to any adverse finding.

26. Applying that interpretation to the present case, we are satisfied that the Inquiry as complied with the principles of natural justice, and that all reasonable steps have been taken to ensure Dr Leeks is aware of the matters upon which the proposed findings are based, and has had an opportunity to respond on those matters.

27. In particular, the Inquiry has ensured that independent legal advice has been provided to Dr Leeks, funded by the Inquiry. Counsel was provided with all relevant documents and an opportunity to participate in a public hearing at which the evidence has been heard. The Inquiry has taken into account all of Dr Leeks' previous responses and explanations and has done all it can to ensure that Dr Leeks' perspective is taken into account. Counsel for Dr Leeks was provided with proposed draft text (arguably a step that Inquiry did not need to take) and did not suggest any of the proposed findings or statements were unfair or unsupported by the evidence. The only challenge was the narrow interpretation outlined above, which would act as a total prohibition on any adverse finding being reached. Standing back, we do not consider that any other reasonable steps could have been taken to ensure fairness for Dr Leeks, and we are satisfied that he has been treated fairly.

Conclusion

28. For the above reasons, we are satisfied the Inquiry has complied with the requirements of s 14 of the Inquiries Act 2013 in relation to Dr Leeks in the forthcoming redress report.

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

Wellington

29 November 2021

Coral Shaw

Chair