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

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REASONS DECISION

FOR PROCEDURAL DIRECTIONS FOR FAITH-BASED REDRESS HEARING

24 February 2021

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Background

1. On 20 November 2020, the Inquiry held a hearing to consider procedural matters ("**the Procedural Hearing**") prior to a substantive hearing commencing on 30 November 2020 into faith-based redress ("**the Faith-based Redress Hearing**").

2. The Procedural Hearing was primarily convened to hear submissions on applications for non-publication orders made by the Bishops and Congregational Leaders of the Catholic Church in Aotearoa New Zealand, through Te Rōpū Tautoko ("**Tautoko**") under section 15 of the Inquiries Act 2013 ("**the Act**"). The applications sought non-publication orders in respect of certain aspects of survivor witness evidence due to be heard at the upcoming Faith-based Redress Hearing.

3. Because it was important to determine these applications at the earliest reasonable opportunity, the Inquiry released a results minute on 25 November 2020 recording its decisions and directions ("**the Results Minute**") with reasons to follow. This was to allow the hearing to take place in a trauma-informed manner without undue delay or disruption.

4. The Results Minute declined all section 15 applications, save for one. The application for non-publication of the name and identifying particulars of Sir Peter Trapski was granted on an interim basis (for a period of 14 days) to allow Sir Peter a reasonable opportunity to respond to the Inquiry's natural justice letter dated 11 November 2020. WITN0113001 had made critical comments about Sir Peter which were the subject of the natural justice letter. As part of its interim order, the Inquiry determined that it would not live stream the evidence of witness WITN0113001 to allow the Inquiry to hear the witness' evidence in full. A video recording and transcript of the evidence was published following the hearing with appropriate redactions and amendments made in line with the interim order.

5. On 8 December 2020, Sir Peter applied for a permanent order under section 15 preventing publication of his name and identifying details in the evidence of WITN0113001, including the video recording and the transcript of that evidence.

6. That application is declined for the reasons set out below. This decision also records the Inquiry's reasons for the rulings and directions contained in the Results Minute. Given the extensive discussion at the Procedural Hearing about the relationship between section 15 of the Act and natural justice obligations, the Inquiry has also taken this opportunity to set out the manner in which it will apply section 15 going forward.

7. For the avoidance of doubt, nothing in the Results Minute or these reasons prevents (or prevented) any survivor or witness from giving their evidence in full including about allegations that any section 15 order relates to.

Issues

8. While the Procedural Hearing was convened primarily to consider specific section 15 applications made by Tautoko, a number of additional matters were raised by Tautoko, The Salvation Army ("**TSA**") and the Anglican Church in Aotearoa, New Zealand and Polynesia ("**Anglican Church**") (together the "**Three Faith-based Institutions**").

9. In addition to (and in some instances in the context of) determining the specific applications, the Inquiry was asked to make findings on the following issues:

    a. Does the Inquiry's General Section 15 Restriction Order ("**GRO"**) dated 2 September 2020 at GRO-(B)(5) extend to deceased persons subject to allegations of abuse for which the person has not been convicted? Additionally, or in the alternative, can the Inquiry make non-publication orders under section 15 in respect of deceased persons?

    b. If the Inquiry makes a section 15 order for non-publication of matters in a survivor's evidence, should that survivor be prohibited from saying those matters in oral evidence?

    c. Is a natural justice letter only required when a survivor witness is giving oral evidence, or is one also required in respect of written evidence considered by the Inquiry?

    d. Can the Inquiry require particular evidence to be "withdrawn" by a survivor witness in circumstances where the evidence appears to be outside the scope of the Inquiry's Terms of Reference ("**TOR**")?

10. After setting out the legal framework through which we will determine these issues, we consider each in turn.

Relevant legal framework

11. There are five relevant aspects to the legal framework required in determining the applications made by Tautoko and the issues raised by the Three Faith-based Institutions:

    a. the Inquiry's TOR;

    b. section 15 of the Act;

    c. the Inquiry's existing framework for and relating to decisions under section 15, including the GRO and Practice Note 4 (Section 15 Orders – Anonymity and Redactions) ("**the Practice Note**"));

    d. the law relating to suppression and non-publication orders in civil proceedings; and

    e. the principles of natural justice.

Terms of Reference

12. The Inquiry's TOR set out the way in which the Inquiry must discharge its functions and, alongside the Act, the framework through which it must consider the present applications.

13. Section 18 of the TOR provides:

> 18. The inquiry will discharge its functions in accordance with the provisions and principles of these terms of reference and the Act. Given the seriousness of the issues under consideration, the inquiry will operate with professionalism and integrity in line with relevant domestic and international good practice guidance. The inquiry will implement policies, methods, processes and procedures that enable it to conduct its work in a manner sensitive to the needs of individuals and their families, whānau, hapū, and iwi, or other supporters.

14. The principles the Inquiry must adhere to are set out in section 19. They include (but are not limited to):

> (a) do no harm:
>
> (b) focus on victims and survivors:
>
> (c) take a whānau-centred view:
>
> (d) work in partnership with iwi and Māori:
>
> (e) work inclusively with Pacific people:
>
> (f) facilitate through meaningful participation of those with disabilities, mental illness, or both:
>
> (g) respond to differential impacts on any particular individuals or groups:
>
> (h) be sensitive to the different types of vulnerability that arise for people in care:
>
> (i) ensure fair and reasonable processes for individuals and organisations associated with providing care:
>
> (j) avoid an overly legalistic approach.

15. And throughout the TOR, the importance of recognising and giving adequate representation to Te Tiriti o Waitangi and Pacific people is reinforced:

> 6. The inquiry will give appropriate recognition to Māori interests, acknowledging the disproportionate representation of Māori, particularly in care. The inquiry will be underpinned by Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, and will partner with Māori throughout the inquiry process.
>
> 7. Pacific people have also been disproportionately represented in care. The inquiry will recognise this, together with the status of Pacific people within an increasingly diverse New Zealand.

Section 15

16. Section 15 of the Act provides:

> **15 Power to impose restrictions on access to inquiry**
>
> (1) An inquiry may, at any time, make orders to—
>
> (a) forbid publication of—
> (i) the whole or any part of any evidence or submissions presented to the inquiry:
> (ii) any report or account of the evidence or submissions:
> (iii) the name or other particulars likely to lead to the identification of a witness or other person participating in the inquiry (other than counsel):
> (iv) any rulings of the inquiry:
> (b) restrict public access to any part or aspect of the inquiry:
> (c) hold the inquiry, or any part of it, in private.
>
> (2) Before making an order under subsection (1), an inquiry must take into account the following criteria:
>
> (a) the benefits of observing the principle of open justice; and
> (b) the risk of prejudice to public confidence in the proceedings of the inquiry; and
> (c) the need for the inquiry to ascertain the facts properly; and
> (d) the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand; and
> (e) the privacy interests of any individual; and
> (f) whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made under subsection (1); and
> (g) any other countervailing interests.
>
> (3) If the instrument that establishes an inquiry restricts any part or aspect of the inquiry from public access, the inquiry must make such orders under subsection (1) as are necessary to give effect to the restrictions.

17. Tautoko's applications were made under section 15(1)(a), seeking non-publication orders over portions of survivor evidence provided to the Inquiry. Before making such an order, the Inquiry must take into account the criteria in section 15(2). These factors are mandatory considerations and may conflict. For example, in some circumstances it may be the case that the benefits of observing the principles of open justice are outweighed by the privacy of individuals (and vice versa). Similarly, the need for the Inquiry to ascertain the facts properly has to be considered in light of administration of justice obligations. All the criteria must be balanced against each other with some being given more weight depending on the circumstances.

18. Countervailing interests, as provided for in section 15(2)(g), include the survivors' right to freedom of expression, any relevant interests of the person to whom the natural justice obligations are owed and any associated interests. The possibility that publication will encourage others who have been abused to come forward is another relevant interest.

19. In its preparation of the draft bill for the Act, the New Zealand Law Commission ("**NZLC**") recorded its view on the principles which should guide non-publication and suppression in the context of an inquiry:[1]

> The framework should be guided by the following principles, some of which support public access and some weigh against it. The principles are:
>
> - establishing the truth;
> - public confidence;
> - freedom of expression;
> - freedom of information;
> - open justice; and
> - privacy.

20. In discussing the extent to which the principles of open justice and need to establish the truth apply to inquiries, the NZLC said:[2]

> Like courts, inquiries usually operate in the public environment and require public accountability. Open justice maintains public confidence in the justice system, and the tenet "[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done" arguably applies to inquiries just as it does to courts. However, there are limits on the principle of open justice where issues such as national security, dignity, privacy and special vulnerability arise. Inquiries are also frequently concerned with sensitive information, which may justify limitations on public access to their proceedings or information held by them.
>
> …
>
> The very purpose of inquiries must also be relevant in considering the extent to which inquiries should be open or not. As noted above, openness can in some circumstances have a chilling effect on a witnesses' cooperation with inquiries. In some circumstances, inquiries may be more likely to get cooperation if witnesses can be sure that what they can say will be treated in confidence. This should be a valid consideration.
>
> Conversely, there is also an argument that inquiries may obtain better evidence by being held in public. Advantages of evidence in public include:
>
> (a) witnesses are less likely to exaggerate or attempt to pass on responsibility;
> (b) information becomes available as a result of others reading or hearing what witnesses have said;
> (c) there is a perception of open dealing which helps to restore confidence;
> (d) there is no significant risks of leaks leading to distorted reporting.

21. Turning to the issue of suppression, the NZLC noted that in the United Kingdom the same test is used when determining whether to suppress evidence and identifying details as is used when determining whether to hold an inquiry in public or private.[3] The NZLC concluded that inquiries

[1] Law Commission *A New Inquiries Act* (NZLC R102, 2008) at 91.
[2] At 92 – 93 and 95.
[3] At 98.

should have the express power to suppress the name of any witness or any particulars likely to lead to their identification, in order to provide for concerns about privacy, without unduly undermining public access (now codified in section 15 of the Act).[4]

General Restriction Order

22. The GRO is an order made in general terms. It was made using the Inquiry's powers under section 15 of the Act to prohibit or restrict public access to aspects of the Inquiry and/or prohibit publication of evidence, submissions, report, accounts, names or other particulars presented or given to the Inquiry.

23. Both the GRO and the Practice Note (discussed below) must be applied in accordance with the Act, including the mandatory criteria set out in s 15(2).

24. The GRO applies to all matters described in clauses A-F. In summary:

    a. GRO-A refers to anonymity orders in relation to persons who have been granted anonymity.

    b. GRO-B contains a list of persons about whom identifying information must not be disclosed and/or made public. Relevant to this decision, GRO-B(5) prohibits publication of identifying information about persons who are the subject of allegations of abuse but who have not been convicted in respect of that allegation.

    c. GRO-C allows for personal information to be redacted from evidence and documents when the Inquiry considers it to be conducive to the Inquiry fulfilling its TOR, or to be necessary in the public interest.

    d. GRO-D applies to the identity of a person whose medical information has been provided to the Inquiry.

    e. GRO-E relates to confidentiality pertaining to requests and notices.

    f. GRO-F states that where a written statement provided to the Inquiry contains criticism of a named person or organisation, the witness' written statement *may* be disclosed to the person or organisation criticised for the purpose of obtaining their response to the criticism raised.

    g. GRO-G sets out general exceptions to the GRO, which include where the information is already available to the public (GRO-G(10)(d)). The exceptions in the GRO-G apply

[4] At 98.

automatically. In order words, they do not depend on the exercise of a discretion by the Commission.

h. GRO-H sets out general matters, including that the GRO should be read in conjunction with the Practice Note. It also expressly provides that the GRO may be varied or revoked by further order during the course of the Inquiry.

Practice Note 4

25. The Practice Note sets out how the Inquiry approaches redacting information from documents or any other evidence received in the course of its investigation, pursuant to section 15 of the Act. Where the interests of justice and fairness require it, it states that the Inquiry may need to depart from the Practice Note.

26. Amongst other things, the Practice Note emphasises the importance of the Inquiry being conducted in a public and transparent way. The Inquiry will publish evidence unless there is a compelling reason not to do so.[5] Despite the Inquiry's commitment to transparency, it will sometimes make orders when it is necessary or appropriate to keep information private.[6]

27. The Practice Note sets out the Inquiry's approach to redaction. It explains that the purpose of redactions is to protect the identities of people where anonymity is sought, or is considered necessary by the Inquiry, and to protect the personal or confidential information of others. Redactions may also be appropriate to exclude evidence that is not relevant to the Inquiry's TOR, or in respect of privileged information.[7]

28. Where evidence is relevant to the TOR, the Practice Note states that the Inquiry may disclose that evidence to core participants, those granted leave to appear, and other witnesses where necessary.[8] The evidence provider will be advised before such evidence is disclosed or published and may apply for restriction order under section 15.[9] The procedure for an evidence provider to apply for a restriction order is also set out in the Practice Note.[10] The Three Faith-based Institutions are not evidence providers in relation to the applications at issue in this reasons decision.

29. The Practice Note also sets out the procedure for applying for anonymity.[11] Anonymity orders pertain to persons who are evidence providers. The purpose of anonymity is to protect the identity of people by excluding identifying information in appropriate cases, and decisions are

[5] Practice Note 4 (Section 15 Orders – Anonymity and Redactions) re-issued on 11 June 2020 at [4] [Practice Note 4].
[6] At [5].
[7] At [11].
[8] At [12].
[9] At [13].
[10] At [14] – [15].
[11] At [18].

made on case-by-case basis and taking into account the particular circumstances of the applicant.[12] None of the present applications relate to anonymity orders.

Suppression in civil proceedings

30. The law concerning suppression and non-publication orders in civil proceedings has recently been clarified by the Court of Appeal and the Supreme Court.[13]

31. The starting point is that the fundamental principle of open justice coupled with the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990 ("**NZBORA**") creates a "general rule of open justice"[14] or a "presumption of disclosure" in all aspects of civil court proceedings.[15] The Supreme Court has reiterated that open justice is "fundamental to the common law system of civil and criminal justice" and further:[16]

> …[I]t is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts.

32. There are, nevertheless, circumstances in which the principle of open justice can be departed from and the presumption displaced, but "only to the extent necessary to serve the ends of justice".[17]

33. There is no onus on the applicant for the non-publication order.[18] The Court of Appeal in *Y v Attorney-General* confirmed that prior cases which stated there was a threshold requirement for "extraordinary circumstances" or "exceptional circumstances" were incorrect or no longer correct statements of the law.[19] The question is simply "whether the circumstances justify an exception to the fundamental principle".[20] What the party seeking the order must show is specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but the standard, or threshold, is a high one.[21]

34. The power to order non-publication is discretionary.[22] The correct approach requires the court to strike a balance between open justice considerations and the interests of the party who seeks suppression.[23]

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[12] At [16] – [17].
[13] *Y v Attorney-General* [2016] NZCA 474 and *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
[14] *Erceg v Erceg,* above n 13, at [2] – [3].
[15] *Y v Attorney General*, above n 13, at [25] – [28].
[16] *Erceg v Erceg,* above n 13, at [2].
[17] At [3].
[18] *Y v Attorney-General,* above n 13, at [29] and *Erceg v Erceg,* above n 13, at [13] both citing with approval *ASB Bank Ltd v AB* [2010] 3 NZLR 426 (HC) at [14].
[19] *Y v Attorney-General*, above n 13, at [30].
[20] At [29] citing *ASB Bank Ltd v AB*, above n 18, at [14].
[21] *Y v Attorney-General,* above n 13, at [30] and [36] and *Erceg v Erceg,* above n 13, at [13].
[22] *Y v Attorney-General*, above n 13, at [23] – [24].
[23] At [31].

35. Ultimately, "the fundamental rule of the common law is that the administration of justice must take place in open court" and "a court can only depart from this rule where its observance would frustrate the administration of justice…". The Supreme Court has emphasised that the "proper administration of justice" must be construed broadly "so that it is capable of accommodating the varied circumstances of particular cases.[24]

Natural justice

36. An individual's right to natural justice is protected by s 27(1) of the NZBORA.

37. At a first-principles level, natural justice has two long-established limbs:[25]

> The two key principles of natural justice are that the parties be given adequate notice and opportunity to be heard (audi alteram partem) and that the decision maker be disinterested and unbiased (nemo debet esse judex in propria sua causa). The extent of the requirements of natural justice, however, depends on the circumstance and nature of the decision, assessed in light of any statutory provisions (see *Daganyasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141). At common law, the obligation to observe the principles of natural justice applies to administrative authorities as well as to judicial and quasi-judicial decision makers.

38. The relevant principle for the present applications is the obligation to give adequate notice and a reasonable opportunity to be heard. In *Ali v Deportation Review Tribunal*, Elias J (as her Honour then was) explained the nature of this duty as follows:[26]

> Fundamental to the principles of natural justice is the requirement that where the circumstances of decision making require someone affected by it be given an opportunity to be heard, that person must have a reasonable opportunity to present his [or her] case and reasonable notice of the case he [or she] has to meet.

39. The right to present one's case involves two separate but important aspects. First is the opportunity to present one's side of the story. Second is the opportunity to respond to material which, with adequate notice, might be rebutted. As Fisher J put it in *Khalon v Attorney-General*:[27]

> [A] party should normally be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted. The converse will generally be true if the risk of an adverse finding was always foreseeable, particularly if the challenge to the finding relates to the way in which the tribunal had exercised a value judgment rather than the completeness of the material which had been placed before the tribunal. The key elements are surprise and prejudice. Even where there is surprise, there could be no prejudice unless better

[24] *Erceg v Erceg,* above n 13, at [17] – [18] citing with approval the comments of McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (NSWCA) at 476 – 477.
[25] *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11].
[26] *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220 approved in *Q v Attorney-General* [2011] NZAR 625 (HC) and *Simes v Legal Services Agency* HC Hamilton CIV-2010-419-6, 13 July 2011.
[27] *Khalon v Attorney-General* [1996] 2 NZAR 458 (HC) at 466.

> notice might have allowed the affected party to do something about it. Those principles seem applicable whether the hearing is adversarial or inquisitorial.

40. The Commission must comply with the fundamental principles of natural justice as set out in section 14 of the Act:

> **14 Regulation of inquiry procedure**
>
> …
>
> (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.
>
> …

41. The content of the right to natural justice is flexible and "always contextual".[28] Recently, the Supreme Court observed that:[29]

> [24] As with all components of natural justice obligations, the extent of a decision- maker's obligation to inform interested parties of relevant information it has received, and to afford opportunities to comment on it, is intensely context-specific.

42. The natural justice obligations in this decision have arisen in the context of the Inquiry hearing evidence, rather than in relation to it making findings for the purposes of its final report. This context is relevant to its natural justice obligations.

[28] *Dotcom v United States of America* [2014] NZSC 24, [2014] NZLR 355.
[29] *Heinz Wattie's Ltd v Ministry of Business, Innovation and Employment* [2018] NZHC 2309, [2018] NZAR 1613 at [24] citing *Daganyasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

Submissions

43. The Inquiry received written submissions in advance of, and heard oral submissions at, the Procedural Hearing from each of the Three Faith-based Institutions, Counsel Assisting the Inquiry and Ms Sonja Cooper (counsel for survivor witness Ms Mary Marshall).

Application of GRO-B(5) and section 15 to deceased persons

44. The Three Faith-based Institutions unanimously took the view that the Inquiry should restrict the publication of allegations of abuse against deceased people either through specific orders under section 15 or because GRO-B(5) must be read as applying to persons both alive and deceased.

45. In Tautoko's submission, both the GRO and the ability to make non-publication orders under section 15 extend to persons who are deceased. Specifically, Tautoko submitted:

    a. support for its contention could be found in the recent Supreme Court decision in *Ellis v R,* where the Court has allowed an appeal to continue despite the death of the appellant;[30]

    b. the allegations against deceased persons were serious and therefore the natural justice concerns were heightened;

    c. that many of the deceased persons subject to allegations of abuse have living family members, many of whom are elderly and this should be taken into account by the Inquiry; and

    d. that if non-publication is not ordered, it is unclear what, if any, steps have been taken by the Inquiry to mitigate the impact on surviving whānau.[31]

46. Counsel Assisting the Inquiry's submissions were supported by Ms Cooper at the Procedural Hearing. Counsel Assisting submitted that as a matter of principle and construction of section 14 of the Act, natural justice obligations are not typically owed to deceased persons. Where no natural justice obligations arise, it is difficult to see a principled basis to prohibit all survivors from naming a deceased person they say abused them or failed to appropriately manage their complaints of abuse. Counsel Assisting's overall position was that GRO-B(5) does not ordinarily apply to deceased persons and the outcome in the *Ellis v R* appeal cannot reasonably lead to a conclusion that it does.[32]

47. Counsel Assisting submitted that, for several reasons, it would be prudent to exercise caution in drawing any inferences from *Ellis.* First, the Supreme Court has not yet given reasons for its decision. The experts in *Ellis* concluded that the application of various tikanga principles meant that it was important for the appeal to continue; however, it is not yet known how and to what extent that evidence will be applied by the Court in the context of the appeal. It was submitted that, at best, all that can be inferred from *Ellis* is that an interest of some form has

[30] *Ellis v R* [2020] NZSC 89.
[31] The Salvation Army also raised this concern in its submissions.
[32] *Ellis v R,* above n 30.

transcended the death of an individual at the fore of a proceeding such that an appeal can proceed.

48. Counsel Assisting also submitted that the application of relevant tikanga principles is factually dependent on the particular circumstances. Counsel noted that *Ellis*, a criminal appeal, was heard in a different context to the matters before the Inquiry. For instance, in *Ellis,* the focus was on the broader interests of justice, rather than the specific issue of natural justice or procedural fairness. As a result, relevant tikanga principles, including mana, hara, ea, whakapapa and whānaungatanga, will not necessarily be engaged in the same way.

49. Finally, Counsel Assisting the Inquiry cautioned that it is important not to divorce each individual principle from the matrix of interrelated tikanga concepts. Accordingly, when considering the question before the Inquiry, it cannot be assumed that the tikanga principles, considered in their entirety, would support the redaction of the names of deceased people who are criticised. Indeed, an argument could be made that it is important these names are heard in order to uphold the mana of the victims or that the Inquiry's process, in totality, is seeking to address hara in order to reach a state of ea. Consequently, Counsel Assisting submitted, it is important to adopt a balanced approach and ensure the relevant principles are viewed against the broader context being considered.

50. Counsel Assisting concluded that it may be appropriate for the Inquiry to decide that, as a starting point, the names of deceased people who are criticised will not be redacted. However, restriction orders over particular names may be granted on a case-by-case basis.

51. Ms Cooper submitted that, as a general approach, the Inquiry should not make non-publication orders over the names and identifying particulars of deceased persons alleged to be perpetrators of abuse. She highlighted that Ms Marshall continues to live with the impact of her abuse each and every day. Ms Cooper submitted that to make non-publication orders over Ms Marshall's experiences would run counter to her well-being and would not be a trauma-led and survivor-focused approach.

Specific applications made by Tautoko for non-publication orders

52. The applications made by Tautoko for non-publication orders in respect of certain aspects of survivor witness evidence scheduled to be heard at the Faith-based Redress Hearing were broken down into three categories.[33] These categories were persons, deceased or living, who were subject to allegations that they:

    a. committed abuse ("**category one**");

    b. covered up allegations of abuse or had knowledge of abuse occurring but took no steps to prevent it (**category two**"); or

    c. handled specific redress processes inadequately or improperly ("**category three**").

[33] Inquiries Act 2013, s 15(1)(a).

53. In addition to specific submissions in relation to each category, Tautoko also made two broader submissions:

    a. First, Tautoko submitted that a number of the applications for non-publication should be granted because the evidence in question is speculation and/or hearsay. By way of example, Tautoko drew our attention to a portion of the evidence of WITN0046001 where serious offending is alleged based on what the witness has been told. Tautoko accepts the Inquiry can receive hearsay evidence under section 19(a) of the Act but submitted the nature of this evidence reinforces the need for the protection of the individuals' identities in a public hearing.

    b. Secondly, Tautoko submitted a generous approach should be taken to its applications due to what it described as a limited time frame given to individuals and counsel to be advised of the intended evidence. Tautoko explained that the natural justice letters were provided on 11 and 12 November 2020, giving individuals subject to allegations approximately two weeks to respond.

Category one: allegations of abuse

54. Category one included the evidence WITN0113001, WITN0046001 and WITN0014001.

55. Tautoko's submissions in respect of the category one evidence were framed in the alternative and applied whether the person subject to the allegations was living or deceased:

    a. Tautoko's primary position was that evidence which fell into category one fell within GRO-B(5) and therefore non-publication should always occur as a matter of construction; or

    b. if GRO-B(5) did not apply, the Inquiry ought to grant section 15 non-publication orders over this evidence.

Category two: allegations of covering up or failing to prevent abuse

56. Category two included the evidence of WITN0113001 and WITN0025001.

57. Non-publication orders sought for this category concerned evidence about individuals – both living and deceased – who are subjects of serious allegations of wrongdoing other than abuse. These individuals are alleged to have covered up allegations of abuse, or to have had knowledge of abuse but took no steps to prevent it. Tautoko submitted non-publication orders were appropriate because:

    a. the allegations were serious and therefore the individual's natural justice rights were heightened;

    b. the allegations were hearsay and had no evidential basis; and

    c. the structure and public nature of the Faith-based Redress Hearing does not provide an opportunity for the individuals to respond to these allegations.

58. Tautoko argued there was little material distinction between alleged abusers who are not convicted of those allegations (who, in Tautoko's submission, are covered by GRO-B(5) whether they are living or deceased) and those alleged to have committed other serious acts, including covering up abuse. Tautoko emphasised the privacy interests of these individuals and natural justice considerations were just as important to allegations of serious misconduct as they were to allegations of abuse.

Category three: allegations of inappropriate handling of redress

59. Category three included the evidence of WITN0001001.

60. Tautoko submitted non-publication orders should be granted for individuals who are alleged to have handled specific redress processes inadequately or improperly. It was emphasised that these allegations will have serious impacts on those named individuals, some of whom are currently in positions of trust and spiritual leadership and who may be interacting with other victim survivors in relation to redress. Tautoko also submitted publication would impact any independent professional obligations the individual might have beyond their canonical roles.

Effect of a section 15 order on a survivor witness' oral evidence

61. The Anglican Church submitted that in circumstances where a section 15 order has been made requiring the redaction or non-publication of a person's name and identifying details or portion of evidence, or the GRO otherwise applies to require non-publication, the survivor witness to whom that order relates must be prohibited from saying that material in his or her oral evidence. This submission was supported by Tautoko and the Salvation Army at the Procedural Hearing.

62. In the Anglican Church's submission, significant unfairness will arise if a survivor witness is permitted to speak the restricted information in his or her oral evidence publicly because the named individual will not have a "proper opportunity to respond contemporaneously at the hearing". As questioning of survivor witnesses by counsel other than Counsel Assisting the Inquiry was not possible, the Anglican Church submitted that names and identifying details of persons criticised in the oral evidence and made available online be redacted from the witness statements and not mentioned by the witness during their oral evidence. It was submitted this approach would be consistent with GRO-C and the Practice Note.[34]

63. Ms Cooper also made submissions on this issue. She began by highlighting that whether a survivor witness can name an alleged perpetrator in a public hearing is a separate issue to whether that alleged perpetrator's name should be redacted from the Inquiry's record. She noted that although the two issues are interrelated and should be consistent where possible, the Inquiry may, in some cases, make different decisions about each issue because different considerations apply. In relation to the public hearings, Ms Cooper emphasised that it takes a great deal of bravery for a survivor to give evidence about their experiences, and it is

[34] Practice Note 4 at [11].

important to take into account the potential trauma that may be caused to survivors if they are not able to give evidence in a way that they are comfortable with.

64. Ms Cooper also submitted that decisions made in relation to the Faith-based Redress Hearing should be consistent with the approach taken at the State Redress Hearing. At that hearing, survivors were able to give public evidence including allegations against deceased persons. She drew our attention to the fact that some survivors have been abused in both State and Faith-based care, it would be confusing for them if they were able to name deceased people in one context but not the other.

65. Ms Cooper also opposed the suggestion that names of criticised individuals or organisations could be redacted temporarily until the criticised individual or organisation is given an opportunity to apply for a permanent restriction order. Ms Cooper submitted that such an approach would not be survivor-focussed because it is important that, as far as possible, survivors who choose to go through the very difficult experience of giving evidence at a public hearing should only have to share their account once.

Requirement for a natural justice letter

66. The Inquiry's practice to date has been to notify those who may have a natural justice entitlement to participate in a hearing. For example, this would include those within the core participant definition in s 17(2)(c) of the Act: people who "may be subject to explicit or serious criticism during the inquiry or in the report."

67. The Anglican Church submitted that such notification, by way of a natural justice letter, is required in relation to both written and oral evidence considered by the Inquiry. It submitted this is required because if the Inquiry reviews and considers evidence without the relevant responsive material, the Inquiry risks relying on incomplete or incorrect evidence which may cause it to reach erroneous or unfair conclusions.

68. The Anglican Church rejected the suggestion that the receipt of natural justice letters prior to the Inquiry publishing a report was sufficient. It submitted the natural justice concerns arise at the point the Inquiry is considering the evidence, as well as any later point prior to publication. It suggested that persons and entities criticised in survivor witness statements should be notified and given an opportunity to respond if the Commission is receiving the evidence for the purpose of making findings in relation to the criticism.

69. Counsel Assisting the Inquiry opposed the position taken by the Anglican Church. In Counsel Assisting's view, the previously adopted approach by the Inquiry is correct, namely that natural justice letters are only required prior to a witness giving oral evidence (as well as prior to the Inquiry publishing any report). Natural justice letters are not necessarily required when the Inquiry merely receives information from a witness that it may wish to then consider. The Anglican Church accepted at the hearing that the mere receipt of material in response to a section 20 notice would not trigger a requirement to issue a natural justice letter to individuals criticised in the relevant material.

70. No specific applications were made in relation to these submissions which require a decision and we take the matter no further.

Removing or redacting aspects of survivor evidence

71. Finally, the Anglican Church expressed concerns about evidence which it described as outside the scope of the Inquiry. For example, it queried whether Louise Deans was a vulnerable adult in the care of the Anglican Church when she was an adult training to be an ordained minister, and whether another witness who was in the care of the Anglican Church when they were a child living with a lay member of the Church and away from their own parents.[35]

72. In respect of this evidence, the Anglican Church submitted that "certain survivor witness evidence should be removed or redacted" where it is irrelevant or outside the scope of the Inquiry's TOR. It submitted that it was particularly unfair for a person to be criticised in evidence that falls into this category. The Anglican Church relied on the Practice Note in support of its position.[36]

73. Removal from the public record cannot, however, be what the Anglican Church is requesting given that this would violate the Public Records Act 2005. There is no power for the Inquiry to remove this evidence from its records in its entirety. Rather, we interpret its request as being for redaction only.

Discussion

74. At the outset, and with the exception of Sir Peter Trapski's application, we record that there was no evidence filed in support of the section 15 applications made by Tautoko and that the applications were not made directly by the individuals concerned or the family members. Nevertheless, we have proceeded on the basis of the information provided by counsel for Tautoko, with no technical point being taken as to lack of formalities regarding evidence in support. That is not to say, however, that this will be appropriate in all circumstances. In some instances, evidence may be required. In any event, the provision of supporting material, and the content of that material, may be considered in the assessment of an application under section 15.

Application of GRO-B(5) and section 15 to deceased persons

75. The Act sets out the legal framework in which the Inquiry must operate. This includes a wide power for the Inquiry to conduct its inquiry as it sees fit.[37] As discussed above, section 14(2) ensures the principles of natural justice apply to the Inquiry's decisions on procedure or conduct of the Inquiry as well as to the making of any adverse findings.[38]

76. For present purposes, natural justice obligations may arise in two ways:

[35] The name of this witness has been suppressed due to ongoing police investigations.
[36] Practice Note 4 at [11].
[37] Inquiries Act, s 14(1).
[38] Section 14(2).

a. First, an individual may have a natural justice entitlement to participate in a hearing for the purpose of responding to the criticism – for example if they meet the core participant definition of a person who has played, or may have played, a direct and significant role to the matters to which the inquiry relates, has a significant interest in a substantial aspect of the matters to which the inquiry relates, or may be subject to explicit or serious criticism during the Inquiry or in the report.

b. Secondly, an individual may have the right to be heard and given a reasonable opportunity to present his or her case in relation the Inquiry's decision on whether to exercise its discretion and make a non-publication order under section 15. A person may have relevant information they can provide to the Inquiry which will factor into the Inquiry's exercise of its discretion. For example, this could include medical records demonstrating the particular impact that publication would have on their health.

77. As a matter of practice, the Inquiry issues a natural justice letter to a person who is the subject of significant criticism in accordance with its natural justice obligations to that individual. Counsel for the Anglican Church noted that the GRO only refers to "criticism" and not "significant criticism". They submitted that there was no basis for drawing a distinction between degrees of criticism, except perhaps to the extent that that criticism must reach a de minimis threshold. However, "significant" does not imply a high threshold; it simply means material or not insignificant. Whether the threshold for a natural justice letter has been met will always depend on the nature of the particular criticism.

78. Upon receipt of a natural justice letter, an individual may seek a non-publication order from the Inquiry under section 15. As Tautoko did in this instance, a person may seek an interim non-publication order to allow them more time to adequately respond to the adverse comment. Permanent orders may also be sought as Sir Peter has done in this instance. In addition to seeking a non-publication order, a person may do one or more of the below:

    1. apply for core participant status;[39]

    2. apply to appear at the hearing;

    3. submit evidence in response; and/or

    4. request that Counsel Assisting the Inquiry put questions to the witness during the hearing to clarify that witness' evidence.

79. In many cases, the natural justice requirements in relation to any section 15 decision will be met because it will be the individual themselves who is seeking the order and that individual will be afforded a reasonable opportunity to respond to the natural justice letter.

80. Natural justice concerns may also arise, as has occurred in these proceedings, where it is a body or institution that is seeking the order on an individual's behalf.

[39] See Practice Note 2 (Core Participants) re-issued on 2 September 2020.

81. Each application will be considered on a case-by-case basis, taking into account the mandatory criteria in s 15(2) of the Act. It may be the case, for example, that greater time is needed to respond where a person is eligible to become core participant.

Deceased persons

82. Turning now to the question of deceased persons. The GRO does not explicitly apply to deceased persons. It is possible, however, that the Inquiry could make a non-publication order under section 15 in respect of deceased persons on a case-by-case basis taking into account the mandatory criteria in section 15(2).

83. As a starting point, a deceased person cannot be given notice nor be given an opportunity to be heard or present their case either regarding an exercise of the section 15 discretion or in relation to the substantive allegations.

84. If no obligations are directly owed to a deceased person, there remains the question of whether natural justice obligations may be owed to the deceased's surviving whānau. On the evidence and submissions before us, we have reached the view that natural justice obligations do not fit easily into this scenario.

85. We have concluded that in general, no natural justice obligations are owed to whānau in relation to adverse comments pertaining to deceased family members. We note this conclusion is factually dependent on the particular circumstances and supporting evidence provided. This is not to dismiss the possibility that criticism of a deceased family member may impact whānau.

86. We note the submissions of Counsel Assisting the Inquiry regarding the limitations on what can be inferred from the result in the *Ellis* decision. It cannot be assumed from that decision that tikanga principles would support redaction of the names of deceased people. Case-by-case consideration of deceased persons is also appropriate given that the application of relevant tikanga principles is factually dependent on the particular circumstances being considered.

Specific applications made by Tautoko for non-publication orders

87. We now turn to the specific matters which require a finding.

88. A number of the applications initially filed by Tautoko were resolved by agreement or were not pursued at the Procedural Hearing. The following reasons underpin the orders in the Results Minute.

Tina Cleary (WITN0113001)

89. Tina Cleary (WITN0113001) gave evidence on behalf of her father, Patrick Cleary, who is now deceased. Ms Cleary's witness statement includes three exhibits, each of which comprises a statement written by her father before he died.

90. Tautoko sought several orders under section 15 in relation to the evidence of Ms Cleary:

a. In the first instance, Tautoko sought orders prohibiting publication of the entirety of exhibits WITN0113003 and WITN0113004 (being two of the statements made by Mr Cleary).

b. If the Inquiry declined to prohibit publication of the entire exhibits, Tautoko sought orders prohibiting publication of:

i. specific paragraphs of those exhibits (or failing that, of the names of Fr Bliss (deceased), Fr Curtain (deceased) and Sir Peter Trapski); and

ii. the names of Fr Patrick Minto (deceased), Fr "Foxey" Maher (deceased), Fr "Goo" Johnson (deceased) and Jim Kebbell (referred to as Jim Kebbal).

91. Tautoko submitted the orders should be granted because:

a. the statements of Mr Cleary contain a range of serious allegations against a number of people (most of whom are deceased), including sexual and physical abuse against Mr Cleary, falsifying and destroying evidence and facilitating the movement of abusers overseas;

b. the exhibits contain what Tautoko described as speculative material and hearsay evidence (urging the Inquiry to consider the reliability of the assertions, taking into account principles of natural justice);

c. Fr Bliss and Fr Curtain are deceased and, relying on the decision in *Ellis v R,* it submitted natural justice obligations are owed to persons even after death;

d. Sir Peter Trapski has had a long and distinguished legal career which required specific consideration as to the impact of publication on him and his family; and

e. the desire for the survivor to tell their story unencumbered here is reduced given the unfortunate fact of Mr Cleary's death preceding the Faith-based Redress Hearing.

92. Save for the application in relation to Sir Peter Trapski, all of these were declined. As a starting point, we consider the wide-ranging section 15 orders sought by Tautoko in respect of this evidence would undermine the principle of open justice and risk prejudicing public confidence in these proceedings. For the same reason, the application for non-publication over large paragraphs in the exhibits were also declined. Mr Cleary's family were distressed at the suggestion that Mr Cleary's evidence may not be able to be given publicly and in the way that he envisaged.

93. For the reasons we have set out above, we do not accept Tautoko's submissions in respect of persons who are deceased. In relation to Fr Bliss, Fr Curtain, Fr Minto, Mr Maher and Fr Johnson there were no specific circumstances warranting non-publication and those applications were declined. We are satisfied that the balance in these circumstances favours publication.

94. The application for non-publication of Jim Kebbell's name was also declined. Mr Kebbell is alive but because he is not the subject of any criticism he has not been sent a natural justice letter. We do not consider non-publication is appropriate in these circumstances.

95. In relation to Sir Peter Trapski, who is still alive, Tautoko emphasised that he is now very elderly and has had a long and distinguished legal career which may be severely impacted by publication. Tautoko also urged the Inquiry to carefully consider the impact of publication on his whānau.

96. The application for interim non-publication orders over Sir Peter Trapski's name was granted for a period of 14 days. This interim order was extended by way of correspondence until such time as this reasons decision was issued. The principal reason for granting this application was because he had not at that stage, in our view, had a reasonable opportunity to respond to the natural justice letter he received (10 days before the Procedural Hearing). The interim non-publication order preserved the position while Sir Peter had adequate time to respond to the Inquiry's letter and to be heard in respect of the Inquiry's exercise of its discretion in granting a further interim or permanent order under section 15.

97. On 8 December 2020, we received Sir Peter Trapski's response to the Inquiry's letter and the allegations made in Ms Cleary's evidence. In an accompanying letter on the same date, counsel for Tautoko stated that they have received instructions from Sir Peter and the Society of Mary to seek a permanent section 15 order.

98. Counsel for Tautoko submitted that the response from Sir Peter provides relevant factual information that they consider establishes the grounds for a permanent non-publication order. They submit that the order is in the interests of justice because:

    a. the allegations are serious, not in the public domain and denied by Sir Peter;

    b. the evidence is weak because it is hearsay and speculative; and

    c. the impact of the order on Ms Cleary is limited whereas the impact on Sir Peter (including his health and privacy interests) is significant.

99. Sir Peter has now had a reasonable opportunity to respond to the natural justice letter and has done so in detail. In his four-page letter, Sir Peter denies the allegations made against him in the evidence of Ms Cleary, which he understood to mean that he may have accepted money to arrange for Alan Woodcock's removal from New Zealand to avoid criminal prosecution. He says that he has never had any discussions or correspondence with any rector of Silverstream about Alan Woodcock. Moreover, that he has never received any money from the Marists as alleged or otherwise. He says he has never had any discussion about Alan Woodcock with any Marist, except perhaps with Father Patrick Bearsley as set out in his response letter.

100. In his letter, Sir Peter also responds to the suggestions in media reports in 2004 that he helped to "cover up" the sexual offending of Alan Woodcock in 1994 by advising the Catholic Church to keep Woodcock's offending out of the public eye. He denies that he was involved in any cover up. He says that he was interviewed for a radio programme in 2004 where he gave his

account of the events in 1994. His explanation of these events was also published in the Dominion in 2004.

101. Sir Peter's letter also details his roles within the Catholic Church with regards to complaints of abuse. These include drafting the Catholic Church's first protocol on how the Church should respond to complaints of sexual abuse and sexual misconduct (later known as "*A Path to Healing"*), being a member of the Hamilton Sexual Abuse Protocol Committee that received, investigated and made recommendations to the Bishop of Hamilton regarding complaints of abuse, and being involved as a mediator in claims against Marist Brothers and a major claim against the Bishop of Christchurch.

102. In determining whether a permanent order should be granted preventing the publication of the identifying details of any person, the starting point is the general principle of open justice as recognised in section 15(2)(a). In relation to Sir Peter, there are no specific circumstances that outweigh the importance of open justice and that warrant permanent non-publication.

103. We acknowledge that Sir Peter says that he is in declining health and that this is a countervailing factor under section 15(2)(g). We also acknowledge that Sir Peter's privacy interests are relevant under section 15(2)(e). However, the criticisms relate to Sir Peter's conduct in a public and professional role - which includes being a member and chair of the Silverstream College Trust Board and giving advice to the Society of Mary in relation to a complaint against a priest (Alan Woodcock) while in that role – rather than to his conduct as a private individual. As such, the public interest is strongly engaged and any expectation of privacy in relation to this criticism is low.

104. Sir Peter has also spoken publicly about similarly serious allegations against him in the past in relation to the offending of Alan Woodcock.

105. Sir Peter has already received an interim non-publication order for the duration of Ms Cleary's live stream evidence so that it could not be viewed in real time as occurs with most other witnesses. There are no further opportunities for her to give this oral evidence live. While the allegations in the evidence given by Ms Cleary are serious, there is a risk of prejudice to public confidence in the Inquiry if a person of Sir Peter's role and status were to be granted a permanent non-publication order *because* of that role and status.

106. Any concern around the weakness or accuracy of the evidence can be addressed by Sir Peter submitting his response to the Inquiry as a witness statement with a signed statement of truth or seeking to become a core participant or otherwise appear at a hearing. It may very well be that his response will encourage others to come forward with further or supporting evidence. Sir Peter has been given a chance to respond and the public will have an opportunity to form a balanced view on the allegations.

107. We are satisfied the balance in Sir Peter's circumstances favours not granting the requested order.

<u>WITN0046001 – Mr G</u>

108. Tautoko sought non-publication orders in respect of the names and identifying details of two deceased individuals alleged to have abused Mr G, Br Benedict (deceased) and Fr Phil Roberts (deceased).

109. The submissions in respect of these two individuals largely mirrored those made in respect of all deceased persons subject to allegations of abuse or misconduct. As we have said above, we do not accept the submissions of Tautoko on this issue. Each application must be considered on a case-by-case basis, carefully weighing the factors and ultimately exercising discretion on balance.

110. In support of these applications, Tautoko submitted the allegations against Br Benedict were of serious sexual offending, the evidence is hearsay, GRO-B(5) should apply in any event and the order would not prevent Mr G from telling his personal story to the Inquiry. And in relation to Fr Phil Roberts, Tautoko noted that the allegations were of an indecent assault but submitted the evidence is hearsay, and in any event GRO-B(5) should apply. In Tautoko's submission, the order would not prevent Mr G from telling his personal story to the Inquiry because he does not allege he was abused by Fr Phil Roberts (the evidence involves an allegation relayed to Mr G by an old school friend, and the victim is now deceased).

111. After careful consideration of the factors outlined, we declined these applications. As we have recorded above, GRO-B(5) is restricted to living persons. Further, we do not accept there should be a blanket approach to either granting or declining section 15 orders in respect of adverse comments pertaining to deceased persons. It requires a case-by-case assessment. In respect of Br Benedict and Fr Phil Roberts, we consider the balance favours publication. The Inquiry accepts the hearsay nature of some evidence is a factor weighing against publication, but overall finds the principles of open justice prevail.

<u>WITN0025001 – Mr F</u>

112. Tautoko applied for non-publication orders over the names and identifying details of three individuals subject to allegations in the evidence of Mr F. The applications were sought in respect of Cardinal McKeefry (deceased), Fr Minto (deceased) and Br Henry Spinks.

113. The order in respect of Cardinal McKeefry was sought on the following grounds:

    a. the allegation that Cardinal McKeefry offered to move the abuser of Mr F's son is very serious and is one of a deliberate coverup by the highest levels of the Catholic Church;

    b. there is no evidential basis for the statement;

    c. the evidence is "double hearsay" (being the witness' account of what Br Wanden told him that Cardinal had told Br Wanden); and

    d. Cardinal McKeefry is deceased and has no opportunity to contest the allegations.

114. In respect of the order sought for Fr Minto, Tautoko submitted:

a. the allegation that Fr Minto knew about – and perhaps even observed – abuse perpetrated by Fr Durning is very serious and therefore the requirements of natural justice are heightened;

b. there is no evidential basis for the statement; and

c. Fr Minto is deceased and has no opportunity to contest the allegations.

115. Because Br Spinks is still living, Tautoko's submitted in support of his application:

a. the allegation that Br Spinks knew about abuse and assisted in moving an offender is limited in scope but serious;

b. he is in a fragile medical state and the stress of this allegation being made public would be serious; and

c. he is unable to properly exercise his natural justice rights.

116. We declined these applications. In relation to Cardinal McKeefry (deceased) and Fr Minto (deceased), there were no circumstances which the Inquiry considered tipped balance in favour of non-publication. While the hearsay nature of the evidence concerning Cardinal McKeefry is a factor against publication, it is insufficient to weigh against the principle of open justice. And in relation to Br Spinks, we were also satisfied the factors in favour of open justice outweighed those presented in favour of non-publication. Like Br Brandon, the Inquiry considers it has adequately discharged its natural justice obligations to Br Spinks and counsel for Tautoko has appropriately addressed the Inquiry on matters relating to his natural justice rights.

<u>WITN0014001 – Mary Marshall</u>

117. In relation to the evidence of Ms Mary Marshall, Tautoko sought a non-publication order over the name and identifying details of Sr Alphonsus.

118. Sr Alphonsus is referred to in an exhibit as the "head nun" who "exerted psychological control" over Mary Marshall.[40] Tautoko's submission was that Sr Alphonsus is very elderly and that this description may be distressing.

119. Counsel Assisting the Inquiry submitted the application should be declined on the basis that the principles of open justice and freedom of expression outweigh the factors articulated in favour of making non-publication orders.

120. On behalf of Ms Marshall, Ms Cooper supported those made by Counsel Assisting the Inquiry and emphasised the importance to Ms Marshall and many other survivors of being given an opportunity to identify the people that harmed them. She highlighted that allowing survivors to do so publicly may encourage other survivors of abuse in the Tautoko, particularly those who suffered abuse by the same perpetrator, to come forward and share their own experiences. She explained that this was a significant consideration for Ms Marshall in deciding whether to go through the difficult process of giving evidence at a public hearing.

[40] Exhibit WITN0014002.

We note that whether a witness can identify a person was not at issue in this hearing; the issue was whether the name of that person could be published.

121. Ms Cooper also considered that the allegation against Sr Alphonsus, namely that she exerted psychological control over Ms Marshall, is relatively benign. She noted that, unlike allegations of sexual or physical abuse which can cause objective reputational harm to the alleged perpetrator, the allegation against Sr Alphonsus is unlikely to cause reputational damage of a kind that warrants non-publication.

122. We agreed with the submissions of Counsel Assisting and Ms Cooper. Having carefully considered the relevant factors, on balance we consider non-publication would be an unjustifiable curtailing of the principles of open justice. The allegations are not serious in nature and in the context of this Inquiry we consider any impact would be mild and not above that normally incurred in an inquisitorial process. We declined the application accordingly.

WITN0001001 – Marc

123. Tautoko applied for non-publication orders over the name and identifying details of Br Brian Brandon who is named in the statement of a survivor, Marc. Tautoko advises that Br Brandon is ill and is unable to respond to the matters raised in the natural justice letter issued to him. This letter was provided to Tautoko on his behalf, at Tautoko's request. Tautoko advises that Br Brandon has not been shown the natural justice letter in light of concerns about the impact it will have on him and his health.

124. Br Brandon is a central figure in Marc's redress experience. When Marc originally made contact with the Catholic Church, he was asked if he would speak with Br Brandon who was the head of the Christian Brothers Oceania. Marc says he disclosed some, but not all, of the abuse to Br Brandon and although he had some very personal discussions with Br Brandon he did not feel safe enough to speak openly about the nature and extent of his abuse.

125. Marc goes on to describe further conversations with Br Brandon where he was made to feel like he was making up the abuse and that his allegations were difficult to believe. Br Brandon was also present at Marc's settlement negotiations with the Catholic Church.

126. The Inquiry understands the submissions made by Tautoko in respect of Br Brandon's health but considers that the balance favours publication. The factors in support of non-publication are outweighed by the principles of open justice and public confidence in the Inquiry. The Inquiry notes that all reasonable attempts were made to make Br Brandon aware of the adverse comments by way of adverse comment letter, through Tautoko, who have for all necessary purposes represented his interests before the Inquiry at the Procedural Hearing.

WITN0021001 – Gloria Ramsay

127. Tautoko applied for a non-publication order over the name and identifying material in relation to Monsignor David Tonks. Tautoko explained an order was sought because Ms Ramsay's evidence refers to a meeting with Monsignor Tonks in July 2014 about allegations of abuse.

She states that after the meeting she received an email from Monsignor Tonks saying nothing could be done.

128. The evidence subjects Mr Tonks to criticism that he did not take sufficient action in relation to a complaint. The original email contains material of a highly sensitive nature and, as a result, Ms Ramsay has accurately paraphrased relevant portions in her evidence in lieu of producing the original full email chain.

129. Responsibly, given the sensitivities, Tautoko did not seek to include the email chain or explore it with Ms Ramsay. However, Tautoko submitted that in circumstances where the full context would not be explained, the section 15 order should be granted.

130. In Tautoko's submission, the interests of justice favour non-publication because the impact on Monsignor Tonks will be significant. He has served the Diocesan community for many years and leads the Diocese's largest parish, comprising three schools and approximately 2500 students and their families.

131. A natural justice letter was sent to Monsignor Tonks with a reasonable opportunity to respond. We are satisfied the summary of the email in Ms Ramsay's evidence is accurate. The Inquiry has not been persuaded that the balancing exercise favours non-publication in respect of this evidence. The interests of open justice and the importance of maintaining public confidence in the integrity of the Inquiry outweigh the concerns expressed by Tautoko.

Effect of a section 15 on a survivor witness' oral evidence

132. As is clear from the Results Minute and [7] of this decision, in our view the Anglican Church's submission that a witness should be prohibited from giving their evidence in full before the Inquiry in circumstances where a section 15 order is granted is neither appropriate nor a correct interpretation of the legal framework.

133. We do not accept the Anglican Church's submission that its position is supported by [11] of the Practice Note. Paragraph [11] is concerned with redactions to documents before publication, to give effect to the powers of section 15.

134. Section 15 operates to restrict and/or prohibit public access to, or publication of, aspects of evidence before the Inquiry. It does not act as a barrier to the evidence a witness can give. In circumstances where a section 15 order has been made, the live stream of the hearing may need to be considered, and publication of the transcript and witness statement may need redaction in line with that order. These logistical steps do not affect the way a survivor witness gives his or her evidence to the Inquiry.

Removing or redacting aspects of survivor evidence

135. To the extent the Anglican Church submits certain evidence should be redacted under section 15 when the evidence is outside the scope of the Inquiry's TOR, we agree that [11] of the Practice Note is relevant.

136. There may be circumstances where the inquiry receives evidence that is out of scope and it is inappropriate to hear that evidence in public. No applications have been made in this regard

and so we do not consider this further. We make a general point, however, that it is important not to prejudge matters of scope. Survivor evidence needs to be heard first in order to decide whether it is within scope.

Conclusion

137. The application for non-publication of Sir Peter Trapski's name and identifying particulars was granted on an interim basis, initially for a period of 14 days and then until the date of this reasons decision, to allow him a reasonable opportunity to respond and/or make further submissions to the Inquiry. Sir Peter has now responded and the application for a permanent non-publication order is declined.

138. All other applications made by Tautoko under section 15 were declined.

139. By way of concluding comment, Tautoko made several requests to provide further evidence to the Inquiry in relation to witnesses but did not want this further evidence to be discussed with the relevant witness. In our Results Minute, we explained the proper process for such a request. We note, too, that it would be highly unusual for evidence to be filed in relation to a witness, but that evidence not made available to the witness for response. The proposed approach is contrary to the principles of natural justice by which the Inquiry is bound to comply.

Signed: 

Judge Coral Shaw
Chair

Signed: 

Dr Andrew Erueti
Commissioner

Dated: 24 February 2021

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