**SERIOUS CONCERNS ABOUT DIRECTION NOW BEING TAKEN IN ROYAL COMMISSION ON ABUSE IN CARE**

**From ROBERT MILLER**

***Executive Summary***

The primary objective of this document is to draw attention to the fact that, sometime in April, a decision was taken in Cabinet (I assume) to change the Terms of Reference of the Royal Commission on Abuse in Care. The specific change refers to *‘Narrowing the scope of our Terms of Reference by removing the requirement to provide forward-looking recommendations.’* This appears to limit the opportunity for the Royal Commission to make recommendations about structural changes to systems (including our systems of Justice) within which all the documented abuse was allowed to occur. This is a cause for serious concern, since this can be seen as every bit as important as the process of redress and reparations. Further grounds for concern are that the decision was not made known to me (as one who has made submissions to the Royal Commission) until 2 June, with only 9 working days before the deadline for receipt of submissions to a complicated form about the process of redress. As far as I know, there has been no public notification of the change of Terms of Reference, nor any public awareness or discussion of the reasons for this pre-emptive move to limit the scope of the Commission’s recommendations.

This Royal Commission, the process of redress and possible structural changes in its wake are of major national, indeed constitutional importance to Aotearoa New Zealand. There is no way within our legal framework for this to be validated, short of nation-wide discussion, and in the end, possibly a referendum. I therefore write to draw this to public attention, in the hope of starting such discussion.

A subsidiary objective (dealt with at the end of the document) is to make proposals about an alternative form of redress, reparations and ‘emotional healing’, in the aftermath of the Royal Commission’s reporting. Details of my proposal are not the primary issue here. What *is* important, is that this topic also be opened for public discussion outside the walls of the Royal Commission itself.

This document does not ask for individuals to be held to account for the abuse which has been documented, although that may be required. Its focus is solely on the need for profound structural changes resulting from the Royal Commission’s activities.

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[I] When Jacinda Ardern’s administration took over late in 2017, one of the first decisions to be announced was the setting up of the Royal Commission on Abuse in Care, a topic which had been on Jacinda’s mind for some time prior to her becoming Prime Minister. I have no doubt about the seriousness and sincerity of her intentions.

[II] It was set up as a Royal Commission, which puts it at a level higher than all parts of our justice system and judiciary, and above every government-of-the-day. This suggests that the outcome of the Royal Commission might include recommendations about reform of the justice system and the judiciary. No other body would be in a position to do that.

[III] Since then, serious questions have been raised, with false starts, and replacements of the heads of this commission. I remember an early comment, I think from barrister Sonya Cooper, who represents many of the abused individuals, that this Royal Commission, as it was set up, could not function in an independent manner: It was set up by the Crown, and was effectively *'the Crown investigating itself’*.

[IV] It is no doubt correct to say that no other body could have set up the Royal Commission*. Nonetheless, for the Royal Commission to make recommendations which would be acceptable to the general public requires that there should have been, from the beginning, international scrutiny of the Royal Commission’s activities by observers of impeccable credentials. In my view, it was a serious mistake, that there was no such international scrutiny.*To put this in context, even before the Royal Commission was envisaged, it was clear that some of the abuse met criteria for Crimes of Torture under International Law, and this was recognized by international bodies who had been sent to assess the situation in New Zealand.

[V] Most of the testimony we have heard so far - as I expected - is many horrific accounts of abuse, in state institutions of various sorts, and in religious institutions. The scale of the abuse has been rather startling: It is estimated that, between 1950 and 2000,  ~250,000 persons in state institutions and religious institutions have been subjected to significant abuse. *For a country whose population was a little over two million in 1950, and five million today, this is a huge number, and represents a disturbing stain on this country’s history.* All that testimony is now documented, and in the public domain, and it its good that it IS now in public; but this is not enough. It is necessary also to identify the persons and agencies who knew what was happening and turned a blind eye, and possibly some who were actively involved in directing the abuse. Further, it is necessary to analyze the structural weaknesses (for instance in judicial systems) which allowed this abuse to go on for so long, unchecked. There has been little on this so far, as far as I am aware.

[VI] However, towards the end of 2020, we heard from two fine barristers - Sonya Cooper and Frances Joychild - clear statements that the Crown Law Office and the Office of the Solicitor General bear grave responsibility for allowing what was allowed to take place.

[VII] *I should explain my own experiences which lead to my involvement and concern about this Royal Commission. I have been a patient with mental health problems, but that is far in the past. In my time in New Zealand, from 1977, I have been a close observer of the mental health scene, and as a result of these activities, have been involved in some very painful dealings with mental health officials. I still have ‘bruises’ to show for this, but in no way do these equate to the trauma experienced by those who have testified in the Royal Commission. My real strengths, I believe, as a former academic, is in collecting evidence, and meticulous scholarship and analysis of that evidence. My major weakness: I am very slow to react. I do not react until I have enough evidence to understand what is going on. I believe that now is such a time, and on a scale larger than anything I have attempted before. Now, I believe, is a time for wise, determined and resolute action; but this has to be collective action.*

[VIII] I have sent documents to the Royal Commission on two matters, one from the 1970s (Deep Sleep Therapy - especially at Cherry Farm hospital, north of Dunedin), and another more recent story, of an unnecessary death by suicide in the acute mental health ward of Wellington hospital in April 2015. My detailed knowledge of the latter story, and the profoundly unsatisfactory inquest, taught me a great deal about how crimes by state institutions are hidden.

[IX] The Royal Commission was remarkably sluggish in responding to my submissions – rather, it was completely ***un***responsive.

[X] Regarding my investigations into Deep Sleep Therapy, I had plausible well-researched hypotheses about what was going on, but I lacked decisive proof of those hypotheses. In my submission to the Royal Commission, I therefore suggested that it would be appropriate to hold careful discussions, well chaired, and recorded, in which a number of people who knew different parts of this story could share and analyze what they knew. I thought this would be more appropriate than offering to testify. There has been no response to this suggestion from the Royal Commission.

[XI] Late in 2020, when I heard the line that Sonya Cooper and Frances Joychild were taking, clearly aiming at highest levels of our judicial system, as bearing responsibility, I changed my mind, and wrote to the commission offering to testify.  There has again been no response to this.

[XII] In December 2020, an Interim Report on the Commission’s activities was released. At that time it was suggested that a major focus for the second half of the commission’s activities was the nature and process for redress for victims of abuse. *This emphasis puzzled me, and set alarm bells ringing. Focus on the actual abuse but not on the structures that allowed the abuse to occur might be seen as a way to divert attention from the higher levels of the state apparatus who bore responsibility.*

[XIII] At an unknown date in April, 2021 - as I now learn - a decision was taken to change the terms of reference for this Royal Commission.

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| |  | | --- | | In April the Minister of Internal Affairs announced changes to the Inquiry’s Terms of Reference which are:   * An extension to our final report deadline. The final report is now due to the Governor-General in June 2023, rather than January 2023. * Setting the due date of our Redress report to October 2021. * Narrowing the scope of our Terms of Reference by removing the requirement to provide forward-looking recommendations.   In May the Government announced its 2021 Budget and we are grateful for the Government’s ongoing financial commitment to the Inquiry for the next 2 years. | |

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I assume that this change in the Terms of Reference was decided in Cabinet, and received approval from the Governor General of New Zealand. I have no evidence that it was made public at that time, nor that it was raised in parliament. The third Bullet point, suggests that it is now official government policy, that there will be no structural changes as a result of this Royal Commission. *In my view that was a betrayal of the objective which led to setting up this Royal Commission.* I did not hear about this change in Terms of Reference until I received a message on 2 June (see below).

[XIV] On 4 May, 2021, I received an email from the Royal Commission, which will have gone to very many people. It asked for submissions on the manner that any redress to victims should take. Attached with the message was a large, complex and impressive form, with a large number of questions for respondents to reply to. Looking forwards, it is clear that this process could be very expensive, and for other reasons is obviously going to be of huge importance to Aotearoa-New Zealand**. The deadline for responding to this form was 16 June 2021.**

[XV]*My first thought was: The best initial step to redress is to ensure that ‘****the Truth, the Whole Truth & Nothing But the Truth****’ has been told. I use a legal phrase here, although this Royal Commission is above any legal or judicial body in this country. At present I am uncertain whether the ’truth' ever will be told in full – including uncovering the chains of responsibility which allowed such terrible abuse to go on for so long, unchecked.*

[XVI] *My second thought - as I scanned the list of questions -  was that the process of redress ventures on territory about the constitution of Aotearoa New Zealand, which is quite uncharted - and that is why the commission wants a very full process of consultation. This may be a sound move. To take the process to this level is perhaps inevitable, since it is clear that the Crown Law Office, the Solicitor General, and governments of all shades going back to 1950 are culpable.*

[XVII] *My third thought, on further reflection, was increasing concern about the intentions lying behind this form, and the envisaged process of redress. At the time of release of the Interim Report I was puzzled. Now, with release of this document and form about the redress process, I am more than puzzled.*

[XVIII]*I do not think I can express any consistent view until I have the correct context for my response, namely answers to my two areas of concern. Specifically, I do not feel I can respond in a more detailed way until I am assured that the full truth has been told (including full analysis of the chain of responsibility under which all this abuse occurred); and until I know what would be the constitutional status of the redress process, or in what ways that status would need to be changed.*

[XIX] *Underlying these concerns, is my impression that the incorrect ordering of the process (i.e. focus on redress before proper analysis of all the evidence has been concluded) indicates that the Prime Minister’s original, very worthy intentions are now being undermined by other players.  On a smaller scale I have seen at close quarters how such strategies work: Powerful agencies would prefer to reach out-of-court settlements (and pay top-dollar, if necessary), to avoid inconvenient truths coming out in court proceedings. I fear that what is unfolding now in this proposed redress process within the Royal Commission, is an attempt on very large scale, to ‘pay-off’ victims of abuse, who’s lives have been ruined, without holding to account those agencies of state (and of religious organizations) who bear responsibility, and continue to bear responsibility. It attempts to manage this issue without addressing the structures and endemic croneyism which allowed - and, as I know, still continues to allow - all this to happen. However, it is arguable that THIS is the real issue here.*

[XX] Historically, there are innumerable instances of cover-up of state crimes, orchestrated at many levels by the self-same state authorities. I give a few examples chosen for principles they illustrate:-

- 100 years of Neglect of the Treaty of Waitangi. This would not have been possible without implicit or explicit connivance by the judiciary of this country over the generations;

- The Troubles in Northern Ireland. Despite the Good Friday agreement, the healing after these Troubles is by no means complete. The point to which I draw attention is that torture of prisoners by British forces used what were called ’the Five Techniques’, gradually developed in the various small wars as the British empire wound down. Two points stand out here:- *First*, the five techniques were deliberately designed not to cause detectable physical damage to the victim, and so, supposedly, to evade requirements of the Geneva Conventions; *Second*, the details of the Five Techniques, were never put in writing, but were passed on by word of mouth, by the practitioners of these techniques; and this made it much more difficult to prove what had been happening, and who might have been responsible (although we can now guess this on fairly solid grounds). This story is not irrelevant to what happened in New Zealand. It is possible that some of the abuse in this country was authorized, or coordinated by military agencies off shore.

- The Hillsborough stadium disaster in my home city of Sheffield in April 1989, in which 96 people died, and many more were injured. Thirty years later, there is still a glaring lack of accountability. I choose this instance, because it involves two coronial inquests as well as other legal proceedings. The coronial service in New Zealand, as in Britain is something of an anomaly within out judicial system. Coroners have more discretionary power than in criminal courts, I understand, and are harder to challenge even than judges in criminal cases.

- In Britain, there has recently been a Royal Commission on abuse, similar in intent to that now on-going in New Zealand; but it seems to have ground to a halt. It is unclear why; it seems clear that higher powers wanted it to proceed no further. *New Zealand can, and should do better than this.*

- In the USA, over the past 15 years, there has been a crisis due to the overuse of new opioid derivatives. This has led to the unnecessary deaths, it is estimated, of about half a million persons. I quote from an article in Guardian, of 11 May, 2021 entitled:- '"*The crisis was manufactured’: inside a damning film on the origins of the opioid epidemic*” . This article ends with the following lines:- ‘*That’s what we deserve – the truth about what really happened,” says Gibney. “And once we get the truth, then I think we can move to reform a system that’s badly broken.”* The same applies within ourRoyal Commission

[XXI] On 2 June I received the message referred to in [XIII] above, including details of forthcoming hearings about what went on at Lake Alice, the most obvious and glaring example of criminal wrong-doing, never addressed by our justice system. The full text of the message on 2 June is easily available. The date 2 June for making public the change of terms of reference (as far as I know), left only 9 working days before the deadline for receipt of submissions via the Royal Commissions complicated form about redress.*This accelerated timing seems quite inappropriate.*

[XXII] What is occurring within the Royal Commission is secret. It is not a judicial process, but nonetheless, it breaches the fundamental principle of our justice system, that ‘*justice is done and is seen to be done*.’ We do not know - and cannot know - what secret evidence is being revealed from state archives, or what secret negotiations are occurring behind the scenes.

[XXIII]*If I, and many others, were to comply with the wishes of the Royal Commission, and send in completed versions of their complicated form about redress, we would, in effect be playing the game that those state authorities want us to play. We would be aiding their ploy, in my view, to bring this massive tragic farce to a conclusion, without change of the structures that let it happen.  However, it is exactly these structures, and the culture with which they are associated, which are the real issues.*

[XXIV] *It is my belief that it would be incorrect to respond in any way to the Royal Commission’s form concerning redress. That would indicate that respondents accepted the authority of the Royal Commission, when it is clear that it has grave shortcomings. It would amount to ‘playing the game’ those authorities want to be played. Decisions that would eventually be taken about redress (etc) would not be taken in a public way, and are likely to leave many issues unresolved, which will then continue to fester year after year.*

[XXIV] The fact that this IS a Royal Commission means that this is a time when our systems of justice might be changed. There may never again be a similar opportunity.*The message about redress from the Royal Commission gave a date of 16 June for responses to be received on their form. I believe there is a need to put together an alternative plan, and there is some urgency in putting together this alternative plan. As a start to****public****discussion, I therefore put forward three strands for redress-reparation-reconciliation.*

[XXV] *The first strand is****comprehensive, root-and-branch reform of our system of justice****. What do I mean by ‘root-and-branch’?*

*- The****‘root'****is our judiciary, the personnel who currently occupy the positions of judges (including notably, the coroners)*

*- the methods currently operating for selecting such persons for these positions.*

*- If individual members of the judiciary can be shown to have diverted legal proceedings from full consideration of evidence, or in other ways, they should be asked to consider their position.*

*- There is a procedure for asking members of the judiciary to recuse themselves in individual cases, for instance due to perceptions of bias or loss of independence. I have tried to use such a procedure in the recent inquest in which I was involved. To call for recusal of a judge does not require****proof****off bias or loss of independence, only the* ***appearance*** *of bias or loss of independence. Nonetheless, my request was completely rejected. I suggest that the provisions regarding recusal should be strengthened so that they can become more effective.*

*- The****‘branches’****extend everywhere. In very many areas, as we hear on the news on a daily basis, state actors in other areas are bending the laws and regulations under which they are supposed to operate; and many other organizations act in ways that break the law, in the knowledge that in the law courts, they are almost certain to avoid being held to account.*

*- This is how the ‘rule of law’ breaks down, a disturbing trend now seen internationally. It is at the highest level that this starts, and it is at that level where the problem has to be fixed as first priority.*

[XXVI] ***Reparations:-****Regarding reparations, I hear from one of the barristers closely involved with the Royal Commission, that there is urgency to reach some sort of settlement, since many of the victims are elderly, in frail health, and would like to see to comfort, solace and possibly compensation for all they have endured. I accept this point, and that there is some urgency; but this does not mean that the Commission’s process should roll ahead unchallenged.*

*- Regarding comfort and solace, the biggest single move to help victims of abuse is the strategy just mentioned - for those victims to see moving forward a profound and comprehensive reform of our system of justice.*

*- Beyond that, I believe that it would not be appropriate to go through all the trauma of legal proceedings to find out what happened to each of these persons, and to determine a quantum of reparations for each person. The number of persons involved is so large (~250,000), that the investigation would be endless; any decisions following this would be tedious; and, if subject to challenge, would  also be endless and tremendously expensive. Instead,****I suggest that legislation be passed for financial reparation somewhat along the lines of pensions for war veterans.***

[XXVII]*Given the first two strategies, and when the Royal Commission has finished its activities, there is, I believe, a need for a thoughtful, profound, and nation-wide process of ‘emotional healing’. The model I have for this is an event which occurred in Great Britain in the aftermath of World War I. Just before Christmas 1919, the Festival of Nine Lessons and Carols occurred for the first time in the setting of Kings College Chapel,  Cambridge. Since then, this event has been repeated many times in many cities, and not just in Britain. This festival of course fitted into Christian religious traditions of the time. This would not be appropriate in New Zealand today, since religious organizations are amongst those who have been responsible for the abuse. However, this setting can be broadened to be based on the traditions of spirituality and healing in all the diverse communities which now comprise Aotearoa New Zealand. This includes, of course, the traditions of the Tangata whenua (and it is Maori who numerically make up a large component of those who were abused in state care, or elsewhere); but also the Christian/Pakeha traditions, Pasifika, Islamic spirituality, Indian traditions, Chinese traditions, and no doubt other national groupings*.

[XXVIII] *Despite the radical nature of some my suggestions, I write as a loyal citizen of Aotearoa New Zealand, proud to be a part of this very remarkable nation, my adopted country; but, as our National Anthem has it, I strive to ‘****Make Our Country Good and Great.****’*

Robert Miller

15 June, 2021