IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-404-1487
[2026] NZHC 1295

UNDER	The Judicial Review Procedure Act 2016
BETWEEN	CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES (AUSTRALASIA) LIMITED Applicant
AND	ROYAL COMMISSION OF INQUIRY INTO HISTORICAL ABUSE IN STATE CARE AND IN THE CARE OF FAITH-BASED INSTITUTIONS First Respondent
AND	ATTORNEY-GENERAL Second Respondent

Hearing: 10 – 11 November 2025

Appearances: P T Rishworth KC, S P Jerebine KC, B R Prewett for Applicant
T M F Powell, R Harvey-Lane for First Respondent
J N E Varuhas, S Cvitanovich for Second Respondent

Judgment: 15 May 2026

JUDGMENT OF BOLDT J

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Introduction

[1] The Royal Commission of Inquiry into Abuse in Care (the Commission) was a towering achievement. It was, to quote the Prime Minister, the "largest, longest and most complex public inquiry ever held in New Zealand."[1] The Commission's 3,000-page final report, published in July 2024, revealed that in the second half of the 20th century, state and faith-based institutions abused and neglected children, young people and vulnerable adults in their care on an unimaginable scale. In an audio/visual presentation that accompanied the final report, the chair of the Commission, Dame Coral Shaw, observed that the inquiry had exposed an unthinkable national catastrophe. The report recorded:

> [4] Of the estimated 655,000 children, young people and adults in care from 1950 to 2019, it is estimated that up to 256,000 were abused and neglected. During the Inquiry period, 1950 to 1999, it is estimated around 510,000 people were in care and up to 200,000 were abused and neglected. The true number will never be fully known as records of the most vulnerable people in Aotearoa New Zealand were never created or were lost and, in some cases, destroyed.

[2] Dozens of institutions were implicated and some, like the Lake Alice Child and Adolescent Unit, were found to have engaged in widespread and systematic torture of vulnerable young people entrusted to their care. The Commission's report prompted a national reckoning with which New Zealand is still coming to terms.

[3] After decades of campaigning from survivors, the Commission began its life in February 2018, operating under draft terms of reference, as an inquiry into historical abuse in *state* care.[2] Nearly 500 survivors registered with the Commission between February and November 2018. Many detailed serious abuse while in the care of religious schools and other faith-based institutions. In November 2018, on the Commission's recommendation, the Government announced that the scope of the Commission would be expanded. The Commission's terms of reference were settled in November 2018,[3] and it was renamed the Royal Commission into Historical Abuse in State Care and in the Care of Faith-based Institutions.

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1 Christopher Luxon "Prime Minister apologises for abuse in care" (press release, 12 November 2024).

2 Inquiries (Royal Commission of Inquiry into Historical Abuse in State Care) Order 2018.

3 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018 [Terms of reference].

[4] Initially, the faith-based inquiry was confined to the Anglican and Catholic churches. In April 2022 the Commission announced it would expand its investigation into the Anglican Church; the broader inquiry was called the "Protestant and other faiths investigation". The Commission decided that in addition to the Anglican Church, it would investigate those faiths which had the largest number of abuse survivors registered with it. Those faiths were the Salvation Army, the Presbyterian and Methodist churches, the Exclusive Brethren (now called the Plymouth Brethren Christian Church), the Gloriavale Christian Community and the Jehovah's Witnesses. Of the faiths the Commission investigated, the Jehovah's Witnesses had the smallest number of registered survivors, at 24.

[5] This case is about the Jehovah's Witnesses who, at their request, I refer to as a faith rather than as a church. The Commission dedicated a 57-page standalone case study to the Jehovah's Witnesses as part of its final report.[4] The case study heavily criticised the faith in a number of respects.

[6] The faith tried, without success, to persuade the Commission to exclude it from the religions under investigation. In 2023 it brought judicial review proceedings which asserted the Commission was exceeding the terms of reference by inquiring into its activities. It argued it never assumed responsibility for the care of its members, or of anyone else. The faith does not run schools and does not administer institutions which provide care to others. In September 2023 the Commission's terms of reference were amended with the Jehovah's Witnesses in mind, making it clear a faith-based institution may assume responsibility for the care of an individual through an informal or pastoral care relationship.[5]

[7] The Jehovah's Witnesses maintained their challenge. In October 2023, this Court dismissed the application for judicial review.[6] In April 2024 the Court of Appeal

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4 *Jehovah's Witnesses Case Study* (Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions, June 2024) [case study].

5 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Amendment Order (No 2) 2023 [amendment order].

6 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* [2023] NZHC 3031 [High Court decision].

dismissed the faith's appeal against that decision.[7]

[8] The Court of Appeal observed that the Commission's inquiry into the faith was "likely at the margin of what [the terms of reference] contemplated",[8] but concluded it was open to the Commission to continue its inquiries. In dismissing its application for leave to bring a further appeal, the Supreme Court confirmed it remained open to the faith to challenge the Commission's final report.[9]

[9] In this proceeding, the Jehovah's Witnesses do just that. They argue the case study was directed to matters outside the terms of reference, breached the faith's right to natural justice, infringed its freedom of religion, and included numerous findings that were inaccurate and unfair. It asks for declarations to that effect, and an order that the case study be excised from the Commission's report.

[10] The Commission, as decision-maker, took no active part in the proceeding, and the burden of opposing the faith's application fell on the Attorney-General.

[11] In written submissions, the Jehovah's Witnesses did not shrink from asserting that the Commission was consciously biased against them. Among other things, they submitted the Commission had "work[ed] hard to perpetuate harmful misconceptions about the faith" and that the case study had the effect "and perhaps purpose" of presenting a distorted picture of their beliefs and practices. But early in oral argument, Mr Rishworth KC, on behalf of the Jehovah's Witnesses, expressly abandoned any suggestion the Commission had been motivated by ill-will, or had acted in bad faith.

[12] That retraction was appropriate. The parties placed a vast record, totalling well over 10,000 pages, before the Court. It was perhaps a hundred times larger than the case required. But the wide array of material I have considered confirms the Commission acted fairly and had only the sincerest of motivations throughout. It was

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7 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* [2024] NZCA 128, [2024] 2 NZLR 534 [Court of Appeal decision].

8 At [36].

9 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* [2024] NZSC 114 at [19].

concerned about the reports of abuse it had received and sought to grapple with those accounts in the interests both of survivors and of those who may be at risk of harm in the future.

[13] As I will discuss in more detail shortly, I have no hesitation in dismissing most of the faith's grounds of review. The Commission did not breach the faith's right to freedom of religion and it adhered appropriately to the rules of natural justice. The Court has only a very limited role when an applicant for judicial review asserts a commission of inquiry made unfair or inaccurate findings of fact.

[14] One issue requires more detailed attention. The Commission's powers to gather information and standing to present its report were derived from the terms of reference assigned to it by order in council. As the Court of Appeal affirmed, a commission of inquiry "like all administrative bodies and tribunals, only exercises the authority lawfully bestowed on it".[10] The Commission was obliged to ensure it remained within the scope of its terms of reference when conducting its inquiry and making its findings.

[15] In a nutshell, this was a commission of inquiry into abuse *in care*, not a general inquiry into abusive or harmful practices. By comparison with other faiths, it was uncommon for the Jehovah's Witnesses to assume responsibility for the care of others (indeed, they maintained they never did so). As a result, abuse in care was vanishingly rare in the Jehovah's Witnesses. The question in this case is whether, in light of that, the Commission's extensive criticisms of the faith were sufficiently grounded in the terms of reference.

Background

[16] The Jehovah's Witnesses challenge the standalone case study the Commission released about the faith. They do not challenge the Commission's uncontroversial references to the faith in the main report. The Commission's description of the faith and its structure, taken from volume 2 of the final report, provides a useful starting point:

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[10] Court of Appeal decision, above n 7, at [29].

> [621] The Jehovah's Witnesses organisation has been active in New Zealand since 1898, and according to the 2018 census, now has over 20,000 members in this country.
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> [622] The faith in Aotearoa New Zealand is divided into congregations. A congregation comprises publishers (also referred to as members). Some publishers serve as ministerial servants and Elders. In Aotearoa New Zealand around 228 individual Jehovah's Witness congregations are or have been registered on the Charities Register. In addition, there are charities that support the activities of the Jehovah's Witnesses at a national level, for example, New Zealand Association of Jehovah's Witnesses, which is also a registered charity.
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> [623] Directions and guidance on the faith's worldwide activities are overseen by the Governing Body based in New York. The Governing Body is a council of Jehovah's Witness Elders, or self-described "mature Christians" who look to Jehovah (God) and to Jesus Christ for direction in all matters and provide "unified theocratic direction to Branch and Country committee members worldwide". The size of the Governing Body has varied, from seven to 18 men, with all based in New York and voted in by existing Governing Body members. There are currently nine members. The faith considers that all baptised congregants, men and women, are "ministers" in the faith.
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> [624] The Governing Body supervises more than 90 branches worldwide. In each country or region, there is a Branch Office. The Branch Office is overseen by a Branch Committee. The Branch Office coordinates the religious activity of Jehovah's Witnesses in its country or geographical area. Although religious direction and guidance comes from its headquarters in New York, the Jehovah's Witnesses in Aotearoa New Zealand are coordinated by the Australasia Branch Office of Jehovah's Witnesses, from its head office in Sydney.
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> …
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> [627] Congregational responsibilities sit with Elders and ministerial servants. Only men are eligible for these roles. In 2023 there were around 1,576 Elders within Aotearoa New Zealand.

[17] It is unnecessary to examine the Jehovah's Witnesses' doctrinal beliefs, except to observe that it is a Christian faith which seeks to model itself on the way Christianity was practised in the first century AD. Adherents believe we are living in the end of days. A fundamental part of the faith is an expectation that members will proselytise, or seek to convert others to the faith, before it is too late. They refer to this practice as "witnessing". Many of us are familiar with being visited at home by Jehovah's Witnesses, who believe that by drawing us into their faith they will help us survive the imminent Armageddon and join God's Kingdom.

The abuse that was reported to the Commission

[18] The Commission received reports of several forms of abuse within the faith. In the case study it found there was "at least one case of sexual abuse in the care of the Jehovah's Witnesses during the inquiry period [1950 to 1999]",[11] though it suggested that barriers to disclosure and the faith's approach to record keeping mean that number was unlikely to reflect the true extent of abuse in care. The evidence also disclosed intra-familial sexual abuse and other abuse that was unrelated to the perpetrators' position in the faith.[12] But the fact the Jehovah's Witnesses do not run incidental activities like schools, Sunday schools, camps or youth groups meant instances of physical or sexual abuse *in care* were rare.

[19] Nonetheless, the Commission received numerous reports from former members who were concerned about psychological and emotional abuse within the faith.[13] These reports arose in large part from the way Jehovah's Witnesses interact with one another and with the secular world. The abuse included the way allegations of sexual abuse (for example among Jehovah's Witnesses or within families) were treated by those who held positions of authority in the faith.[14]

[20] The Commission explored the workings of the faith and the demands it makes on the lives of members. It heard that once a person joins the faith, they are taught to avoid close associations with non-members, who are considered part of "Satan's world".[15] Witnesses told the Commission that the imminence of Armageddon means members are encouraged to prioritise religious activities, such as meetings, Bible studies and witnessing at the expense of other activities. In addition, Jehovah's Witnesses are expected to adhere closely to the doctrines and teachings of the faith, and as part of that are expected to avoid premarital sex, adultery, homosexuality, drug use, excessive alcohol consumption and gambling.

[21] There can be severe consequences if a member strays from what the faith regards as the true path. Those who commit "gross sins" — for example sexual

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11 Case study, above n 4, at [138].
12 At [141].
13 At [139].
14 At [62]–[64] and [155]–[156].
15 At [114].

immorality or apostasy — may be brought before a group of elders who sit as a judicial committee. Those found to have sinned, and to be insufficiently repentant, can be disfellowshipped and removed from the congregation.[16]

[22] Witnesses told the Commission that remaining members are expected to have nothing further to do with members who have been disfellowshipped. In a practice widely referred to as "shunning", a disfellowshipped member can expect to be cut off from any further association with those who remain within the faith, including their family and friends.

[23] The practice of shunning and the fear former members said it instilled in them was discussed at length in the case study.[17] The Jehovah's Witnesses say shunning is an expression of love, aimed at protecting the congregation from undesirable influences and encouraging the former member to return to the fold. Nonetheless, the potential for emotional and psychological harm is self-evident. The Commission received numerous reports of the distress it caused. A former elder told the Commission that young people who are disfellowshipped and shunned often lose their entire support system, leading to feelings of isolation and in some cases suicidal thoughts.[18]

[24] Other aspects of the way the faith interacts with the wider world also caused distress to former members. For example, as is well-known, Jehovah's Witnesses are taught to decline blood transfusions, even if the consequences of refusal might be fatal. The faith teaches that parents should withhold consent on behalf of children too, even at the risk of their child's life. One former member told the Commission she knew her parents were prepared to allow her to die rather than permit a transfusion. She said her parents later coerced her into signing a medical directive refusing blood transfusions, which she signed because she was afraid of losing her home.[19]

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16 At [25].
17 At [102]–[111].
18 At [29].
19 At [88].

[25] Another practice the Commission examined closely was referred to as the "two-witness rule".[20] It is a policy within the faith, when elders conduct inquiries or sit on a judicial committee, that evidence from two or more witnesses is required before wrongdoing can be established. The rule has obvious implications for the reporting of sexual abuse by other Jehovah's Witnesses. Members spoke of being too afraid to report abuse within the faith because, like most sexual abuse, it occurred in private.

[26] One survivor, who described being sexually abused by the 19-year old son of an elder, reported the abuse to her mother, who reported it to elders. She said the elders blamed her for wearing seductive clothing. She was aged between five and eight at the time.[21]

[27] When it became clear the Commission intended to investigate them, the Jehovah's Witnesses engaged in a lengthy course of correspondence with the Commission endeavouring to dissuade it from doing so. In order to explain why they considered their activities to be outside the scope of the inquiry, it is necessary to explore the terms of reference and their evolution over time.

Terms of reference

[28] Clauses 9 and 10 of the terms of reference relevantly provide:[22]

> **Purpose and scope**
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> 9. The matter of public importance which the inquiry is directed to examine is the historical abuse of children, young persons, and vulnerable adults in State care and in the care of faith-based institutions.
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> 10. The purpose of the inquiry is to identify, examine, and report on the matters in scope. For matters that require consideration of structural, systemic, or practical issues, the inquiry's work will be informed not only by its own analysis and review but also by the feedback of victims/survivors and others who share their experiences. The matters in scope are:

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20 At [158]–[166].
21 At [98].
22 Terms of reference, above n 3.

10.1 The nature and extent of abuse that occurred in State care and in the care of faith-based institutions during the relevant period (as described immediately below):

(a) the inquiry will consider the experiences of children, young persons, and vulnerable adults who were in care between 1 January 1950 and 31 December 1999 inclusive.

…

10.2 The factors, including structural, systemic, or practical factors, that caused or contributed to the abuse of individuals in State care and in the care of faith-based institutions during the relevant period. The factors may include, but are not limited to:

(a) the vetting, recruitment, training and development, performance management, and supervision of staff and others involved in the provision of care:

(b) the processes available to raise concerns or make complaints about abuse in care:

…

(d) the process for handling and responding to concerns or complaints and their effectiveness, whether internal investigations or referrals for criminal or disciplinary action.

10.3 The impact of the abuse on individuals and their families, whānau, hapū, iwi, and communities, including immediate, longer-term, and intergenerational impacts.

[29] "Abuse" and "in the care of faith-based institutions" are defined in cl 17. In 2018, the relevant parts read as follows:

17. For the purpose of the inquiry, unless the context otherwise requires, the following definitions will apply:

17.1 Abuse means physical, sexual, and emotional or psychological abuse, and neglect, and—

(a) the term 'abuse' includes inadequate or improper treatment or care that resulted in serious harm to the individual (whether mental or physical):

(b) the inquiry may consider abuse by a person involved in the provision of State care or care by a faith-based institution. A person may be 'involved in' the provision of care in various ways. They may be, for example, representatives, members, staff, associates, contractors, volunteers, service providers, or others. The inquiry may also consider abuse by another care recipient.

…

17.4 In the care of faith-based institutions means where a faith-based institution assumed responsibility for the care of an individual, including faith-based schools, and—

(a) for the avoidance of doubt, care provided by faith-based institutions excludes fully private settings, except where the person was also in the care of a faith-based institution:

…

(c) as provided in clause 17.3(d) above, care settings may be residential or non-residential and may provide voluntary or non-voluntary care. The inquiry may consider abuse that occurred in the context of care but outside a particular institution's premises:

(d) for the avoidance of doubt, the term 'faith-based institutions' is not limited to one particular faith, religion, or denomination. An institution or group may qualify as 'faith-based' if its purpose or activity is connected to a religious or spiritual belief system. The inquiry can consider abuse in faith-based institutions, whether they are formally incorporated or not and however they are described:

(e) for the avoidance of doubt, 'abuse in faith-based care' means abuse that occurred in New Zealand.

[30] From the earliest stages of the Commission, the Jehovah's Witnesses were adamant the faith does not provide "care" to anyone. In September 2019, the Commission wrote to the Jehovah's Witnesses to advise that a forthcoming contextual hearing would include evidence from two experts who had participated in the equivalent Australian Royal Commission, and that their evidence would be of relevance to the faith. The Jehovah's Witnesses responded by letter and memorandum in October and November 2019, asserting that the faith does not assume the care of children or vulnerable adults, and as such that they "clearly fall outside the scope of the Commission's Terms of Reference".

[31] Nonetheless, in October 2020 the Commission served the Jehovah's Witnesses with a Notice to Produce relevant documents. The notice sought information about the number of children in the care of the faith, relevant policies and background, information about claims of abuse and information about redress. After more than a year of further correspondence, Mr Rishworth wrote to the Commission on

1 December 2021, observing:

> 11. Jehovah's Witnesses do not and never have sponsored any activities that have resulted in children being under its care, custody, supervision, control or authority. It has not operated or sponsored schools or residential care settings in New Zealand. Neither do Jehovah's Witnesses as a religious group provide or sponsor any activities that separate children from their parents such as crèches, playgroups, Sunday Schools, youth groups or clubs. Nor does it provide or sponsor any extra-curricular activity, such as choirs, camps, outings, sports, outdoor walks, parties, and smaller activities, weather for youths or adolescents or otherwise.
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> 12. Consequently, no children, young persons, or vulnerable adults have been placed in the care of any faith-based institution within the control, responsibility, or oversight of any entity used by Jehovah's Witnesses in New Zealand from 1950 to the present date. …

[32] Mr Rishworth acknowledged that the faith had identified four cases where elders were alleged to have engaged in non-familial sexual abuse. In three of the four cases it was clear there was no pastoral element to the abuse; the elder's family and the victim's family had been friends and the abuse occurred in a social setting. In the fourth there were insufficient records to determine the exact context. The Jehovah's Witnesses produced records of all four cases.

[33] In January 2022, the Commission issued Minute 16, which explained its approach to whether a person is in the care of a faith-based institution. It included the following passage:

> 15. A care relationship may also arise in many "pastoral care" situations in the faith-based context. For example, those with authority or power conferred by a faith-based institution may assume a trust-based relationship with a child or vulnerable adult. Where such a relationship is related to the institution's work or is enabled through the institution's conferral of authority, the child or vulnerable adult may properly be described as in the care of the faith-based institution. Examples may arise in the context of youth group activities (including day trips and camps); Bible study groups; Sunday school or children's church activities; day trips and errands; pastoral or spiritual direction, mentoring, training or counsel in groups or individually (including visiting congregation/faith community members in their homes, outside the institution's grounds, or elsewhere).

[34] There were extensive discussions between the Commission and the Jehovah's Witnesses during 2022 about the provision of additional information. The Commission issued a further Notice to Produce which indicated that its interest in the faith was wide-ranging. It sought information about Jehovah's Witnesses' belief

systems, including their beliefs about Armageddon, gender roles and gender identity, sexuality and conversion therapy, punishment including shunning, and marriage and divorce, including in relationships where domestic violence is present. The Commission sought information about the faith's doctrinal sources and how they interact with secular law.[23]

[35] The faith responded by asserting that the Commission's interest in it had strayed beyond the scope of the terms of reference. It noted the Commission appeared to assume a relationship of care between Jehovah's Witnesses and children, young persons and vulnerable adults in its congregations simply because they were members of the faith. They suggested the Commission risked infringing their right to freedom of religion by investigating their beliefs, doctrines and practices.

[36] Ultimately the Commission and the Jehovah's Witnesses agreed that representatives of the faith would meet with the Commission to answer its questions, and the second Notice to Produce was withdrawn. The Commission provided the faith with a series of witness statements it had received, most, if not all, of which were from former Jehovah's Witnesses. The faith responded that the abuse those statements detailed fell outside the terms of reference, as none suggested the abuse had arisen in a care setting.

[37] In January 2023, the Commission advised the faith by letter that the evidence disclosed three examples of what it regarded as "care relationships" involving Jehovah's Witnesses, namely:

(a) children or young people being in the care of adults from outside their family during witnessing activities;

(b) elders sometimes taking children or young people into their homes as part of the baptism process; and

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[23] As an example, the Commission asked whether the Jehovah's Witnesses' doctrines "come before adherence to certain legal rights (e.g. the New Zealand Bill of Rights Act 1990) or State-mandated processes".

(c) children or young people sometimes being in the care of elders for faith-related activities such as working bees.

[38] The Commission met with representatives of the faith on 8 March 2023. The Jehovah's Witnesses were surprised by some of the questions, which explored settings wider than the three examples the Commission had identified. After the meeting, the faith wrote to the Commission requesting an articulation of the activities now said to be within the scope of the terms of reference, together with copies of the relevant evidence, and an opportunity to provide factual information that might assist the Commission.

[39] The Commission responded on 27 March, indicating it was considering several other situations in which care might be said to arise. They included situations where an elder was left alone with a child or children while studying, and a suggestion the faith asserted an "elevated level of control over its members", including through its policies on shunning, education, health, sexuality and gender.

[40] The Commission questioned whether the "culture of the religion" may itself amount to a form of psychological or emotional abuse. It also suggested a care relationship might arise where survivors were discouraged from contacting Police because the abuse was being dealt with internally, and where elders knew of abuse within the congregation but took no or inadequate steps to protect other potential victims. The Commission asked whether the faith accepted that a care relationship would arise in the situations the Commission outlined in its letter.

[41] On the same day, the Jehovah's Witnesses filed judicial review proceedings. They initially pursued nine causes of action, but the principal complaint in all cases was that the Commission's inquiries went beyond what was permitted by the terms of reference, and that the faith should have been "released" from the Commission some time ago.

[42] After the proceeding was filed, but before it could be heard, the Commission published a significant minute, Minute 29, released in final form on 29 July 2023. It

included the following passages:[24]

> 59. The words of clause 17.4 [of the terms of reference] do not restrict the concepts of 'care' or 'assumed responsibility' in a formal or procedural sense, and the clause does not list particular types of care. The clause does extend the concept of care to include all schools (residential and non-residential), voluntary and non-voluntary care. Abuse is included not only in care situations, but if it occurs 'in the context of care'. Had Cabinet sought to confine the scope of care in the way suggested by the Jehovah's Witnesses, it would have been relatively easy to list the types of care identified by the Church as the basis for a definition. In contrast, the definition was left at a principled level.
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> …
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> 61. The Church submits there must be "some event such as an order, official decision, contract or self-referral" before someone can be said to be in the care of a Church. This is said to be based in part on an analogy with child protection law, where the Church says that parental autonomy is displaced only by "court orders on showing of cause, **or by consensual arrangements** which themselves reflect that autonomy, **such as placing children with other caregivers for a time**."
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> 62. This statement by the Church may in fact be consistent with the Inquiry's approach in Minute 16. An exemplar of pastoral care outlined in Minute 16 is where a parent chooses to place a child in the care of a priest or elder for a Church activity in reliance on the Church's conferral of authority on the priest/elder. This is consistent with the concept of a parent "placing children with other caregivers", as the Church put it.
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> 63. The text of the exclusionary clause ("fully private settings") also supports the interpretation in Minute 16, by making it clear that a private setting is out of scope only if "fully" private. The interpretation in Minute 16 does not extend to fully private settings, but rather is premised on a care relationship created through reliance on Church-conferred authority and a sufficient connection to Church activities.

[43] At around the same time, the Minister of Internal Affairs was briefed, including about matters that might compromise the Commission's ability to report by its deadline. The pending judicial review was identified as one source of risk. As a result, Cabinet decided to amend the terms of reference to make it clear that informal or pastoral care situations were within the terms of reference. On 7 September 2023 the Executive Council made a new order in council (the Amendment Order),[25] which added a new cl 17.4(ba). It reads:

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[24] Citations omitted, emphasis in original.

[25] Amendment order, above n 5.

> (ba) for the avoidance of doubt, a faith-based institution may assume responsibility for the care of an individual through an informal or pastoral care relationship. An informal or pastoral care relationship includes a trust-based relationship between an individual and a person with power or authority conferred by the faith-based institution, where such a relationship is related to the institution's work or is enabled by the institution's conferral of authority or power on the person

[44] Far from putting the matter beyond doubt, the Jehovah's Witnesses amended their claim, adding no fewer than eight further causes of action, all of which challenged the Amendment Order's legality.

[45] On 31 October 2023, Ellis J released a comprehensive decision dismissing all 17 grounds of appeal. The Judge held it would rarely be appropriate for the Court to limit a Royal Commission's work prior to the release of any report. She held the Commission was entitled to latitude in interpreting its own terms of reference, and that the Court should be cautious before interfering.[26]

[46] The Judge held that in interpreting the meaning of "in the care of a faith-based institution", it was open to the Commission to take a remedial, purposive approach. It would be justified in having regard to the way the general law deals with concepts of care and the assumption of responsibility.[27] She held it is not for the Court to determine whether certain evidence is capable of giving rise to a finding that individuals suffered abuse in the care of the faith, especially as the Commission had not yet reported, and accordingly had made no findings. At that stage of the inquiry, the Commission was only making inquiries, and it was possible it would conclude no relevant abuse had occurred.[28]

[47] As to the new causes of action, Ellis J held there was no merit at all in the faith's submission that the Executive Council was barred from amending the terms of reference.[29] The Amendment Order was made to avoid doubt, and to clarify the existing position. The Judge noted there was an "overwhelming public interest in the government being free to determine the scope of Royal commissions".[30] The eight

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26 High Court decision, above n 6, at [120] and [161].
27 At [161](b).
28 At [164].
29 At [198].
30 At [225].

causes of action under this heading (like the nine regarding compliance with the terms of reference) were different ways of saying the same thing. The Judge's conclusion that there was no obstacle to the Executive Council making the Amendment Order resolved all of them.

[48] The Jehovah's Witnesses appealed. The Court of Appeal's decision is of considerable importance to the current challenge.

Court of Appeal decision

[49] The Court agreed it is an important function of the High Court's supervisory jurisdiction to ensure commissions of inquiry confine themselves to the authority conferred by their terms of reference.[31] It noted the observations of the majority in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* that the Courts must be ready, if necessary, to ensure commissions of inquiry "keep within the limits of their lawful powers" and that those limits are found in the terms of reference.[32]

[50] The Court disagreed with Ellis J's conclusion that the Commission had sufficient latitude to determine the scope of its own jurisdiction. It observed:

> [29] … A commission, like all administrative bodies and tribunals, only exercises the authority lawfully bestowed on it, and the proper interpretation of the empowering instrument involves a question of law which it is the court's duty to determine.

[51] Nonetheless, the Court agreed that the Commission's inquiries, which were merely gathering information, did not of themselves exceed the scope of the terms of reference. The Court agreed the detailed definition of "in the care of faith-based institutions" in cl 17.4 demonstrated there were limits to what the Commission could inquire into and report on, but noted that those limits were framed using concepts that have elastic rather than prescriptive meanings. It continued:

> [33] … It is no doubt for this reason that the definition in cl 17.4 begins by establishing a general concept — "where a faith-based institution assumed responsibility for the care of an individual" — and then provides a series of elaborations "for the avoidance of doubt" in the sub-paragraphs that follow.

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31 Court of Appeal decision, above n 7, at [27].

32 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA) at 653.

> Two interrelated elements can be said to be involved in the definition, first that the individual be in "the care" of somebody else and secondly that given the role of that carer the institution itself has assumed the responsibility for the care. We also consider that the terms of reference focus more on situations where there is a degree of continuity or regularity of the care than one-off situations.

[52] The Court then addressed the Jehovah's Witnesses' challenge to the way the Commission proposed to apply the terms of reference to the faith's activities. It observed:[33]

> [36] We accept Ms Jerebine's submission for the Jehovah's Witnesses to the extent that the type of activities of the Jehovah's Witnesses the Commission identified may not have been the primary focus of the terms of reference. They are likely at the margin of what was contemplated. We accordingly see more strength in the arguments advanced by the Jehovah's Witnesses than the High Court Judge did. But we disagree with the proposition that the activities identified by the Commission — such as the witnessing activities — were, by definition, excluded from the scope of the Inquiry.
>
> …
>
> [38] Even if there was no suggestion that Jehovah's Witnesses had been involved in the abuse of children, this would not have excluded them in a jurisdictional sense. The Commission could still have sought information and evidence from the Jehovah's Witnesses, or otherwise inquired into their activities, and included reference to the Jehovah's Witnesses in a report if it assisted the Commission in addressing the matters covered by the terms of reference. For example, a faith-based institution may have been able to provide valuable assistance and evidence to the Commission precisely because there was *no* abuse arising in association with care that it provided. Moreover, the Commission could be assisted by evidence of the abuse of children, young persons and vulnerable adults by those associated with faith-based institutions when that did *not* occur in care settings. That information may still have been relevant to the Commission when identifying and reporting on the structural, systemic or practical factors that caused or contributed to the abuse of individuals in the care of faith-based institutions in accordance with the purpose and scope of the inquiry identified by cl 10 …

[53] The Court emphasised the premature nature of the faith's challenge.[34] The Commission was entitled to conduct inquiries with a view to determining whether the matters it identified were appropriately addressed as part of its report. The Court held the Commission had not taken any steps, at that investigative stage, which exceeded the terms of reference.[35]

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33 Emphasis in original.
34 Court of Appeal decision, above n 7, at [39].
35 At [46].

The case study

[54] Before turning to the way the Commission's report dealt with the Jehovah's Witnesses, it is notable that it decided to publish its findings in a standalone case study. It did not incorporate its observations about the faith into the wider final report. The Commission published a policy document which discussed when it might be appropriate to issue a case study. It provided:

> Our inquiries must address the matters in the Terms of Reference; respond to information from private sessions, investigations, written accounts and research; respond to areas of particular concern among survivors, survivors advocates and / or the public; and identify areas most likely to lead to meaningful recommendations.
>
> A case study can focus on a care institution, a setting, a particular theme or kaupapa, a systemic issue or a group of people/s. In selecting case studies within investigations, the Inquiry will apply the four general criteria above, and the following additional criteria:
>
> - Diversity of care settings and subject matter in each State and faith-based care setting investigation
> - The scope (including number and nature) of allegations of abuse, and whether the proposed case study could be an exemplar of abuse occurring in the setting
> - Whether a State or faith-based institution appears to have facilitated or failed to prevent abuse
> - The likely availability of evidence including witnesses and documentary material to enable close examination of what occurred
> - The extent to which there was accountability for alleged abuse
> - Recognition and representation of Māori based on Te Tiriti o Waitangi and its principles
> - National diversity — geographic range and ethnic, gender, social and cultural diversity should be represented
> - Recognition and representation of disproportionately impacted peoples, such as Māori, Pacific and people with disabilities
> - Representation, visibility and participation of people with disabilities, people with mental illness, women and girls, and the LGBQTI / rainbow community in the selection of themes, issues and institutions.

[55] The Commission published only six other case studies. The Jehovah's Witnesses were not in good company. The other studies concerned institutions where serious abuse was endemic, including Lake Alice, where torture was widespread, Marylands School (subtitled "Stolen Lives, Marked Souls"), Hokio Beach School and Kohitere Boys' Training Centre (subtitled "Cauldron of Violence"), and the Te Whakapakari Youth Programme (subtitled "A case study of State-funded violence and abuse of children and young people needing care and protection").

[56] The Jehovah's Witnesses were the only faith which was the subject of a dedicated report. Ms Jerebine KC submitted the inclusion of the faith among those other institutions necessarily implied some equivalence in the seriousness of the abuse the Commission had uncovered. And yet, as already noted, sexual and physical abuse of children or vulnerable victims in the care of the faith was virtually unheard of, by stark contrast with many of the other religions the Commission investigated.

[57] I agree that few, if any, useful comparisons can be drawn between the abuse the Commission identified within the faith and the abuse it uncovered at the other institutions. That fact alone, of course, does not mean the Commission was wrong to dedicate a standalone volume to the faith. Nonetheless, I suspect one of the principal reasons for writing separately about the faith was the fact the subject-matter was very different from the patterns of abuse at the other faith-based institutions the Commission investigated. The Commission's observations would not have fitted conveniently into the wider report.

[58] The case study is not long — it comprises 53 pages of text once contents and cover pages are excluded. The Jehovah's Witnesses subjected it to a granular attack, sometimes seeking to rebut the Commission's conclusions sentence by sentence. They argued the Commission's criticisms were wrong in almost every particular.

[59] Mr Rishworth and Ms Jerebine acknowledged the extensive authority which confirms it is not part of the Court's role to sit on appeal from the Commission, let alone as a peer reviewer or literary editor. Nonetheless, they contended their highly detailed challenge was justified. Even in the context of a commission of inquiry, factual findings may sometimes be set aside on judicial review. In *Re Erebus Royal*

Commission, the Privy Council observed that the Court is "disentitled to disturb findings of fact" unless (i) the procedure by which they were reached was unlawful, most notably if the affected party is given no opportunity to comment on the proposed adverse findings, (ii) the findings were unsupported by any probative evidence or (iii) the reasoning by which inferences were drawn is "self-contradictory or otherwise based upon an evident logical fallacy".[36]

[60] The Jehovah's Witnesses contended that all three of the exceptions described by the Privy Council were present in this case to a greater or lesser degree. They concentrated in particular on the second ground, arguing that many of the Commission's findings lacked any probative evidence to support them. They also sought to rely on breaches of their right to natural justice.

[61] I do not propose to reproduce large parts of the Commission's case study. Nonetheless, the summary that follows is unavoidably detailed, both to ensure readers have an overview of the report the faith seeks to challenge, and to provide context for the discussion that follows.

[62] The first eight paragraphs of the Executive Summary give the overall flavour of the case study, and the criticisms the Commission levelled:

> 1. The Jehovah's Witnesses have been active in Aotearoa New Zealand for over 100 years, with the movement growing significantly just prior to the Inquiry period. The Christian faith takes a literal interpretation of the Bible and relies on first century principles to set practice, policy and procedure.
>
> 2. Like many faiths there is a leadership hierarchy, with the Jehovah's Witnesses being globally led by a governing body, which provides direction and guidance to all congregations. The governing body is currently comprised of eight men in New York. Within congregations, power and authority sit with male Elders whose attributes for appointment are biblically based. During the Inquiry period, the faith exercised an elevated degree of influence over the daily lives of members, including how they spent significant portions of their time, the level of education they attained, their relationships and access to certain medical treatments. Two witnesses described themselves as being under the 'control' of the faith, a description the faith disputed.
>
> 3. Children and young people were in the care of the Jehovah's Witnesses during faith activities including door to door preaching or witnessing,

[36] *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 at 681.

pastoral support, working bees and other organised activities, and investigation and judicial committee processes. The faith contested whether these situations fell within the Inquiry's Terms of Reference, but the Inquiry is satisfied that children and young people were in the care of the faith in these situations for the reasons set out below.

4. Several factors within the faith increased the risk of abuse occurring during the Inquiry period, including the status of Elders and the power and influence they exercised, particularly over children and young people. The faith had high barriers to the disclosure of abuse, making it more difficult for individuals to disclose any abuse either to others within the faith or to secular authorities. These barriers included the inferior position of women within the faith, rigid disclosure processes, the fear of being shunned and the relative disconnection from non-Jehovah's Witnesses, all of which likely prevented or delayed victims from disclosing abuse. There was also inadequate vetting of Elders and insufficient training in preventing or responding to abuse.

5. The faith's approach to record-keeping did not provide an adequate basis for well informed risk-based decision making to ensure the safety of children and young people in the care of the faith. The lack of detail in records retained by the faith also inhibited the Inquiry's ability to assess the extent of abuse in the care of the faith because of the lack of detail about the nature of the relationships between Elders and abused children and young people.

6. Despite the high barriers to disclosure and the faith's inadequate approach to record keeping, the Inquiry heard from one person who was sexually abused in the care of the faith during the Inquiry period, with others experiencing psychological and emotional abuse during investigations and judicial committee processes.

7. The Inquiry concludes that the Jehovah's Witnesses took inadequate steps to prevent and respond to abuse in care during the Inquiry period. The policies, rules and standards relevant to child sexual abuse more broadly were primarily based on passages from the Bible and located across many different Jehovah's Witness publications. Processes for handling and responding to disclosures of abuse of any kind were outdated and ineffective, such as the requirement for two witnesses to child abuse. There was a lack of reporting to external authorities and inadequate consequences for abusers within the faith. These factors applied equally to abuse in care.

8. The Jehovah's Witnesses' approach to this Inquiry and to its activities was premised on the basis that no children or young people were ever in its care. The ongoing failure of the faith to recognise that children and young people were in its care gives the Inquiry concern about the faith's overall approach to the safety of children and young people in its care during the Inquiry period

[63] The Commission explained the purpose of the case study in chapter one. It consists of a single paragraph:

> 9. This case study considers the New Zealand Christian Congregation of Jehovah's Witnesses Australasia (at times referred to in this case study as "the faith" or the "Jehovah's Witnesses"), including:
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> › care provided by the faith alleged abuse in the care of the faith
>
> › factors increasing the risk of abuse in care during the Inquiry period
>
> › the steps the faith took to prevent and respond to the risk of abuse in care
>
> › barriers to disclosure that may have prevented disclosures of abuse and inhibited the Inquiry's ability to understand the nature and extent of abuse in care during the Inquiry period.

[64] Chapter two is entitled "Context". After describing the founding of the faith in the late 19th century and its growth in New Zealand after 1945, the Commission described the way the faith is governed.

[65] The chapter describes the role of elders, including their responsibility for shepherding congregations, organising witnessing activities, leading religious services, conducting Bible studies, providing pastoral care and overseeing judicial committees. The Commission noted that elders are appointed based on biblical qualifications, and members are taught that elders are divinely appointed. They hold significant power and authority within the faith. The Commission emphasised that all positions of leadership and authority within the faith are held by men.

[66] The Commission set out what it regarded as "relevant features of the faith". These included that being a Jehovah's Witness is considered a way of life, with members expected to adhere to all religious doctrines established by the governing body, and to be obedient and submissive to those in positions of authority, including elders. It outlined a series of key beliefs among Jehovah's Witnesses, including a strict interpretation of the Bible and reliance on first century Christian principles. It also observed that the faith's belief in the imminence of Armageddon creates a sense of urgency and fear among members, especially as membership of the faith is considered the pathway to salvation.

[67] The Commission observed that Jehovah's Witnesses are taught to maintain separation from, and are discouraged from associating with, those who are not members, and that the faith places considerable emphasis on door-to-door evangelism as a core activity.

[68] The case study described the practice of disfellowshipping and shunning. The Commission observed:[37]

> 29. Disfellowshipping and the consequent shunning can have severe and long lasting consequences for the individual. If an individual is disfellowshipped, an announcement is read aloud in the presence of the congregation stating that the individual is no longer a member of the congregation. Those who experienced shunning told the Inquiry it had a severe emotional or psychological impact on them and others they observed in the same position. One said the fear of being excommunicated was emotional and psychological abuse. Former Elder Shayne Mechen told the Inquiry, "when young people are disfellowshipped or shunned, their whole support system is taken away … Some leavers are so impacted by being separated from everything they know that they become suicidal."

[69] A common feature of the case study — one which attracted strong criticism from Ms Jerebine — was the verbatim reproduction of extracts from accounts provided to the Commission by survivors. Usually those extracts were included to illustrate a point the Commission was making. Often they went beyond personal experience and included sweeping generalisations about the faith. Ms Jerebine submitted that the obvious implication from the Commission's reproduction of extracts from witnesses' evidence without further comment is that the Commission accepted and adopted the witness's account.

[70] A good example came under the heading "Becoming a Jehovah's Witness" in chapter two. After noting that, as in any religion, members are either born into the faith or choose to join later in life, the Commission observed it had heard from some members who said they became Jehovah's Witnesses "during particularly vulnerable periods of their lives, for example when they had been recently widowed, or were in financial difficulty".[38] It continued:[39]

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37 Internal citations omitted.
38 Case study, above n 4, at [30].
39 Emphasis added.

31. Jasmine Grew described her family's pathway into the faith:

> "When I was two years old, my mother and father were cannabis smoking hippies when Jehovah's Witnesses knocked on their door … My mother was only 24, and a very vulnerable solo mum. It seemed inevitable that she would split up with my father, anyway. She was not working. Both my parents were susceptible to a convincing approach by a religious faith. **The Jehovah's Witnesses prey on people who are most vulnerable. They give false hope**. They provide the vulnerable with a community and a family and a sense of belonging … They work their way into your life, so the relationship becomes very tight. They also instill [sic] in you fear of the outside world. So, in anticipating becoming a solo parent, my mother knew she had children to protect. My father decided against becoming too involved in the religion and my mum said, 'Well I'm going,' and they split up over it. …"

[71] Ms Jerebine was strongly critical of the highlighted passage, submitting the Commission effectively endorsed Ms Grew's comment that the faith preys on the vulnerable, and gives false hope.

[72] The third chapter described the nature of the "care" provided by the faith. After observing that the Jehovah's Witnesses were different from most other faith-based organisations the Commission investigated because they do not run schools, children's homes or foster care services, the Commission noted the faith nonetheless provided other informal forms of care.[40] It identified four distinct forms, namely witnessing activities, pastoral support and care, working bees and other organised activities, and investigations and judicial committees.[41]

[73] Under the heading "Witnessing activities", the Commission noted it is a common practice to seek to convert members of the public, though it recorded the faith's position that participation is a matter of personal choice for members.[42] The faith acknowledged that children and young people often accompany their parents. The case study also recorded evidence that children were sometimes paired up with elders and adults from other families when witnessing.[43] The Commission devoted two pages to descriptions of witnessing activities, including the following passage:

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40 At [33].
41 At [36].
42 At [37].
43 At [38].

> 40. Jasmine Grew, like other children within the Jehovah's Witnesses, was required to actively participate in witnessing:
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> "Saturday morning is when the 'witnessing' happens. 'Witnessing' is when members knock on people's doors and attempt to convert them to the faith … For me knocking on doors as a child, with other JW adults, and later, as a teenager, was horrible. I was so embarrassed and used to pray that I would not see my friends from school … As little kids you have a little picnic lunch and children are always with an older member. Children start doing this when they are just toddlers. Jehovah's Witnesses use their children to win people over, so they can extend the conversation at the door. Children must say something during the witnessing procedure."

[74] The Commission quoted a former elder who told the inquiry that his weekends were consumed "doing JW activities". Another described extracurricular activities being frowned upon. The Commission observed that "these examples reflect the regular, scheduled and structured nature of witnessing, and the commitment to it by members, sometimes at the expense of other activities or hobbies."[44]

[75] The Commission recorded the faith's response that witnessing is not always scheduled or arranged and is therefore not a structured activity. It said members have the right to decide how much, when and how they participate, and noted that the faith had offered evidence from members that "their activity as Jehovah's Witnesses is voluntary".[45] The Commission recorded the faith's submission that it did not assume responsibility for the care of children during witnessing activities, and that if an elder happens to suggest that a child from outside his family accompany him, that activity is not part of the policy or practice of the faith.[46]

[76] The Commission rejected the faith's submissions and concluded the Jehovah's Witnesses did sometimes assume responsibility for children during witnessing activities, finding the assumption of responsibility "arose through its conferral of authority and trusted status on Elders, and the routine and regular actions of Elders and other adults and taking children and young people into their care, unsupervised, for witnessing."[47] That said, none of those who spoke to the Commission alleged they had been abused in the care of an elder while out witnessing.

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44 At [42].
45 At [43].
46 At [44].
47 At [46].

[77] Next, the Commission discussed pastoral care and support, observing that as part of that role, elders visited members' homes for matters such as Bible studies, pastoral oversight before baptism and pastoral support in their capacity as elders.[48] It said there was credible evidence that children and young people receiving pastoral care were at times alone in the care of elders.[49]

[78] It was in this context that the sole reported instance of sexual abuse in care occurred. The victim, described in the case study as Ms SC, told the Commission that as a teenager in the early 1980s she felt compelled to attend regular Bible studies at an elder's home. He would drive her home afterwards. On those trips home he sexually abused her on multiple occasions over a four to five month period.[50] While the faith denied that it had assumed care of Ms SC, the Commission found she was in the care of the faith at the time of the abuse.[51]

[79] The third form of "care" the Commission identified involved working bees and other organised activities. Jehovah's Witnesses meet and worship in buildings called Kingdom Halls, and during the inquiry period children and young people were often placed in the care of elders when members worked to clean and maintain the hall, met for organised sport and during gatherings for "fatherless children".[52] The faith strenuously denied that it assumed responsibility for children during these activities.[53] The Commission rejected that submission.[54] It heard that sometimes working bees involved only one elder working with numerous children, and that elders regularly organised activities for children of other Jehovah's Witnesses.

[80] Finally, the Commission discussed the role of elders when conducting investigations into other members, and when presiding over judicial committees. The Commission noted that every allegation of sexual abuse must initially be investigated by two elders to establish the facts, following which a judicial committee may be

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48 At [48].
49 At [49].
50 At [132].
51 At [134].
52 At [55].
53 At [59].
54 At [61].

established.[55] The Commission observed that during the initial investigation and the subsequent judicial committees, the elders were sometimes left alone with children or young people, and questioned them in the absence of their parents.[56] It found that the faith assumed responsibility for the care of children when elders interviewed them without parental support during judicial investigations or committee processes.[57]

[81] The fourth chapter was entitled "Risk factors and allegations of abuse in the care of the Jehovah's Witnesses in Aotearoa New Zealand". That chapter began with the following paragraph:[58]

> 71. Instances of child abuse within the Jehovah's Witnesses faith around the world are well-documented. This Inquiry received allegations of abuse in the care of the faith, although not in large numbers. The low number of allegations to this Inquiry should be assessed in light of the barriers to disclosure discussed below, *and the fact that the scope of this Inquiry is limited to abuse in care rather than any abuse within the faith.*

[82] The Commission spent chapter four explaining factors within the faith which might have increased the risk of abuse and presented barriers to disclosure. It noted that elders had significant power over members, particularly children and young people. It found that the power imbalance, especially between elders and girls or young women, heightened the risk of abuse.[59]

[83] This section of the case study also commented at length on the intrusive role the faith played in members' lives, including their being encouraged to inform on other members if they perceived them to be acting sinfully.[60]

[84] Witnesses described having only limited access to information, and the faith showing general disdain for higher education.[61] One was quoted as saying that the faith believes "jobs and education get in the way of JW meetings and other JW activities".[62] As part of that, the Commission discussed the Jehovah's Witnesses'

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55 At [63].
56 At [64].
57 At [70].
58 Internal citations omitted, emphasis added.
59 At [76].
60 At [81].
61 At [82].
62 At [83].

attitude to healthcare, notably the prohibition on receiving blood transfusions even at risk of death. It also noted the faith's hostility to homosexuality. It quoted one witness who said an elder told his mother the witness "has the demon of homosexuality and needs to be exorcised".[63] He said it was instilled in him from very young that his sexuality was a disease that required treatment.

[85] The Commission described witnesses' fear, if they did not remain faithful, of being destroyed when Armageddon came. The imminence of Armageddon meant nothing else except the faith was considered important.[64] The Commission quoted an anonymous witness who said:[65]

> I was taught that if I did not uphold the beliefs of the JW Church and adhere to its practices, I would almost certainly die at Armageddon ... I was taught that the world was ending and that if I upheld the tenets of the JW religion, then I would not be likely to die but would live forever, however this was not guaranteed either. Essentially I was indoctrinated from an early age … based on fear and coercion.

[86] The Commission addressed the risks associated with the fear of shunning at some length. It included numerous quotes from former members of the faith, many of whom expressed their fear and grief in powerful terms. One accused the faith of torturing members with the fear of the end of the world and the fear of the loss of family and friends that went with being disfellowshipped.[66]

[87] Another former member spoke of former Jehovah's Witnesses being "so impacted by being separated from everything they know that they become suicidal".[67] Yet another spoke of the pain of her own disfellowshipping, which included relatives and childhood friends ignoring her and walking away. The Commission reproduced her comment that the religion had destroyed her life. She said that if she had been a stronger person she would have taken her life long ago.[68] The Commission said it had "no doubt the fear of being shunned was a barrier to the disclosure of abuse in care and increased the risk of abuse occurring in the care of the faith".[69]

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63 At [89].
64 At [90].
65 At [80].
66 At [103].
67 At [107].
68 At [108].
69 At [111].

[88] On the issue of isolation from those outside the faith, the Commission quoted numerous witnesses who spoke of Jehovah's Witnesses being prohibited from accessing unapproved information and discouraged from associating with non-members, who they were taught were "wicked", and who would shortly die when Armageddon came.[70]

[89] The Commission noted the faith's denial that members were isolated and acknowledged it had produced evidence from numerous members who "live their lives fully integrated with society".[71] Jehovah's Witnesses attend mainstream schools, and children interact daily with classmates and teachers from outside the faith. It submitted that different experiences reflected different parenting choices. The Commission found isolation was not universal, but that "there was for some [members] a degree of disconnection or insularity from mainstream society".[72]

[90] Overall, the Commission found the power imbalance, the absence of women from positions of power in the faith and high levels of influence the faith exerts on members' lives all represented barriers to disclosure of abuse and limited the range of people to whom disclosure could be made. The same comment was made about the inflexible disclosure processes, fear of exclusion or shunning and the relative disconnection between members of the faith and those outside.[73]

[91] The case study then examined the evidence about actual instances of abuse in care. After detailing Ms SC's account, the Commission continued:[74]

> 135. In addition to this one case, other children and young people were sexually abused within the Jehovah's Witnesses faith, although not clearly in care situations as defined in this Inquiry. Most were abused by male family members who were also members of the faith. One was abused by a man that their family trusted, another witnessed his brother being sexually abused by a man that his family were friends with because they were also Jehovah's Witnesses.

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70 At [117].
71 At [120].
72 At [121].
73 At [92].
74 Footnotes omitted.

136. The faith supplied information relating to sexual abuse by four Elders:

    i. an allegation that an Elder took advantage of his position as an elder to abuse and rape a girl aged between 8 and 12 years old

    ii. an Elder developing an "inappropriate relationship" with a 15 year old girl

    iii. an Elder engaging in sexual activity with a 15 year old girl

    iv. an Elder removed from office for "inappropriate behaviour involving a minor".

137. The records supplied were limited and it is not possible to be certain whether the children were abused in the care of the faith. The faith maintains that none of these children were in its care, and the evidence does not permit any clear conclusions.

138. In summary, there is evidence of at least one case of sexual abuse in the care of the Jehovah's Witnesses during the Inquiry period. Because of barriers to disclosure and the faith's approach to record keeping, this is unlikely to reflect the number of people who suffered sexual abuse in the care of the faith during that period.

[92] The Commission noted that its terms of reference were not limited to sexual abuse, and that former Jehovah's Witnesses had made allegations of psychological and emotional abuse. Some was said to have occurred when they were undergoing judicial investigation and committee processes.[75] The Commission recorded that witnesses had described their experience of interrogation by elders as emotionally and psychologically abusive in and of themselves, particularly if they were seeking to disclose abuse.

[93] The Commission quoted one survivor who said she was taken into a back room with the elders, without any support, and that her mother did not know what was happening. She said the elders interrogated her and "were asking the worst questions you can imagine, for someone who was just 12 years old". She described the interview as a terrifying experience, which she considered as abusive as the sexual abuse itself.[76] Other witnesses described similar experiences. The Commission found there was "credible evidence that the practice of questioning children or young people, particular [sic] those who were victims of sexual abuse, during such investigations and judicial committee processes was inappropriate and emotionally or psychologically

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75 At [139].
76 At [140].

abusive".[77]

[94] The fifth chapter in the case study dealt with the steps the Jehovah's Witnesses had taken to prevent and respond to the risk of abuse in care. The Commission recorded that the faith had provided its congregations with scripturally based guidance about protecting children from sexual abuse and had instructed elders about how to respond when abuse was reported.[78] It noted that many religious institutions imposed significant barriers to the disclosure of abuse and reiterated its finding that there were a number of features of the Jehovah's Witnesses faith which "may have prevented or inhibited disclosures".[79]

[95] The Commission repeated its criticism of the judicial committee process and its insensitivity. It observed that the two-witness rule — a rule that forms part of the judicial framework within the faith — meant "in practice... an abuser would face no consequences unless they committed the abuse in front of another person or another witness came forward and reported similar conduct by the abuser".[80] It found the way the faith structured its processes for reporting abuse "may have allowed abusers to continue abusing" given the unlikelihood of there being two witnesses to the offence.[81] In another broad quote, reproduced without comment, the Commission reported a former elder as saying:[82]

> In my experience this is a faith that does not like scrutiny and is not transparent. Given that the members are so subservient it is the ideal playground for deviants, as the saying goes, 'a wolf in sheep's clothing'.

[96] The faith submitted there was no obstacle to victims reporting abuse to the Police, but the Commission found that in practice the faith did not suggest that course. It quoted a former elder as suggesting reporting was discouraged because the faith considered the Police to be "evil and under Satan's control".[83] The Commission noted it had not seen any evidence of the faith referring sexual abuse allegations to Police. It found:

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77 At [143].
78 At [141]–[151].
79 At [154].
80 At [160].
81 At [162].
82 At [166].
83 At [167]–[168].

> 169. Particularly because of this practice of rarely reporting abuse to police, being in the Jehovah's Witnesses sometimes gave abusers additional protection and a place to hide.

[97] The Commission concluded the main body of the case study with a detailed summary of the findings, as they related to the faith, of two overseas inquiries.[84] As their names suggested, the Royal Commission into Institutional Responses to Child Sexual Abuse (Australia) and the Independent Inquiry into Child Sexual Abuse (England and Wales) were set up to inquire into child sexual abuse (as opposed to physical, psychological and emotional abuse), and neither was restricted to abuse in care. Nonetheless, the Commission recorded, in that very different context, that both bodies had found sexual abuse of children to have been common within the Jehovah's Witnesses. The British inquiry found the Jehovah's Witnesses had the third highest number of sexual abuse victims after the Catholic and Anglican churches.[85]

[98] The Australian Commission found that eleven per cent of alleged perpetrators were elders or ministerial servants, and that three per cent were appointed as elders or ministerial servants *after* abuse was alleged against them. 40 per cent of alleged perpetrators were disfellowshipped, but of those, 57 per cent were later reinstated. 19 per cent were disfellowshipped more than once.[86] There was a general practice of not reporting the abuse to the Police. The faith defended that practice by saying that every case raised complex factors, including the victim's views, but also "what is the morally right thing to do?" and "what do the Scriptures say about the matter?"[87] The Australian Commission found the practice of not reporting abuse demonstrated a serious failure by the faith to ensure children were safe and protected.[88]

[99] The final section of the case study was a summary of the Commission's findings. It read:

> 203. The Inquiry finds that during the Inquiry period:
>
> a. Elders in the Jehovah's Witnesses held positions of power and had status and authority conferred on them by the faith.

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84 At 51–56.
85 At [202].
86 At [196].
87 At [197].
88 At [198].

b. The faith assumed responsibility for the care of children and young people placed in the care of Elders for witnessing activities, pastoral support and care, working bees and other organised activities, and investigations and judicial committee processes. The faith's assumption of responsibility for those children and young people flowed from its conferral of authority and trusted status on Elders, and the actions of Elders in taking children and young people into their care, unsupervised, in these contexts. In those situations, children and young people were in the care of the faith.

c. There is credible evidence that:

    i. sexual abuse occurred in the care of the Jehovah's Witnesses faith

    ii. the practice of Elders questioning children or young people who were victims of sexual abuse during investigations and judicial committee processes was inappropriate and emotionally or psychologically abusive.

d. There were factors that increased the risk of abuse in the care of the Jehovah's Witnesses, including:

    i. the status of leaders and the power imbalance between them and members of the faith in the context of elevated levels of influence within the faith

    ii. the barriers to the disclosure of abuse, including the place of females in the faith, the fear of exclusion and relative disconnection from the secular world

    iii. lack of vetting and training of Elders in child protection and abuse prevention.

e. The full extent of abuse in the care of the faith cannot be quantified for reasons including inadequate record keeping and the barriers to disclosure described above.

f. Steps taken by the faith to prevent and respond to abuse in care were inadequate. In particular:

    i. there was inadequate vetting and training of Elders in child protection and abuse prevention

    ii. the policies, rules, and standards relevant to child sexual abuse were from various separate directives from the governing body, across many different issues of different publications, all based primarily on passages from scripture

    iii. processes for raising, handling and responding to concerns or complaints of abuse in care were inadequate.

[100] The case study did not contain any recommendations. The only recommendations about the faith were found in the wider report. Among the Commission's 138 recommendations, it recommended that the heads of each of the faiths it investigated (including, for example, the Pope and the Archbishop of Canterbury) should acknowledge the abuse the Commission identified and make a

public apology. In the case of the Jehovah's Witnesses, the Commission recommended:[89]

> viii. the Governing Body of Jehovah's Witnesses should make a public apology and acknowledgement for the abuse and neglect in the care of Jehovah's Witnesses in New Zealand

[101] The Commission proposed that the Government establish a national care safety regulatory system, and that each of the eight faiths it investigated, including the Jehovah's Witnesses, should be part of what it called the "regulated population".[90]

Grounds of review

[102] The Jehovah's Witnesses pleaded three causes of action. I set them out here in the order in which they were argued, though that is not the order in which they appear in the statement of claim.

[103] Mr Rishworth argued the Commission, both in its investigative phase and the final report, breached the faith's rights under ss 13 and 15 of the New Zealand Bill of Rights Act 1990.[91] Those sections, set out in full below, respectively provide that everyone has the freedom of "thought, conscience, religion and belief", and the right to "manifest that person's religion of belief in worship, observance, practice or teaching". Mr Rishworth submitted that ss 13 and 15 require the state to avoid singling out particular religions for criticism.

[104] Mr Rishworth argued the Commission's inquiry into the Jehovah's Witnesses' beliefs, and its scrutiny of religious practices such as shunning, the two-witness rule and the prohibition on blood transfusions, represented an unjustified interference with the faith's rights under both sections. The Jehovah's Witnesses were the only faith whose religious beliefs were examined in detail. He submitted the Commission's

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89 *Whanaketia: Part 9 – The Future* (Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions, June 2024) at 81.

90 At [268].

91 The Amended Statement of Claim also pleaded that the Commission breached the faith's rights under ss 17, 19 and 20 of the Bill of Rights Act. Those sections respectively guarantee the right to freedom of association, freedom from discrimination on the grounds (among other things) of religion and the right of religious minorities to profess and practise their religion. The faith did not separately address those provisions in argument, and they add nothing to the submissions it made under ss 13 and 15.

findings and comments were non-neutral and pejorative, leading to the "unavoidable conclusion … that [the faith's] beliefs were objectionable and different, and therefore worthy of opprobrium".

[105] Next, Ms Jerebine argued the Commission breached the faith's right to natural justice. She submitted the Commission made numerous findings for which there was no probative evidence and that it gave the faith either no notice, or insufficient notice, of the adverse findings it proposed. She argued the Commission had disregarded the 126-page feedback document the faith produced in response to the draft case study, which contended that almost every paragraph of the draft either contained inaccuracies, exceeded the scope of the terms of reference, or both.

[106] In addition, Ms Jerebine contended the Commission had largely ignored the extensive body of evidence the faith tendered from current members. Those members rejected the criticisms levelled by the witnesses on whom the Commission relied. She submitted, as a result, that the Commission's criticisms of the faith were unfair and unbalanced.

[107] Finally, the Jehovah's Witnesses submitted that large parts of the case study fell outside the terms of reference. Among other things, the faith argued the Commission:

(a) Conducted a detailed inquiry into the Jehovah's Witnesses' beliefs and practices, rather than focusing solely on abuse that occurred while children, young people and vulnerable adults were in the care of the faith;

(b) Commented extensively on abuse that had occurred outside care settings, which the faith contended was therefore outside the scope of the terms of reference; and

(c) Considered events that fell outside the 1950–1999 inquiry period.

[108] As part of the argument that arose under this heading, counsel disagreed about which parts of the case study I am entitled to scrutinise on review. Mr Varuhas, for the Attorney-General, argued my role is limited to examining the Commission's formal findings, as set out in para [99] above, and not the underlying narrative.

[109] In addition, Mr Varuhas submitted that the extracts from the evidence of former members, which was often very general in nature and highly critical of the faith, should not be treated as though they carry the Commission's imprimatur. They represented nothing more than the opinions of the respective witnesses and should not be equated with formal findings.

[110] Ms Jerebine disagreed, arguing that, when read in context, those "hanging" quotations, which are among the most pejorative parts of the case study, were plainly adopted by the Commission, and form part of its description of the faith. She submitted those extracts are unbalanced and unfair, and frequently make damning comments on aspects of the faith that have little or no connection with the terms of reference.

Commissions of inquiry and judicial review

[111] It is common ground that the Court's role in reviewing the final report of a commission of inquiry is strictly limited. In *Re the Royal Commission to Inquire into and Report upon State Services*, North J observed:[92]

> A Commission of Inquiry is certainly not a Court of law. ... Nor is a Commission of Inquiry to be likened to an administrative tribunal entrusted with the duty of deciding questions between parties. There is nothing approaching a *lis*, a Commission has no general power of adjudication, it determines nobody's rights, its report is binding on no one.

[112] While inquiry reports do not affect the legal rights of participants, they may damage the reputation of those criticised. In *Re Erebus Royal Commission (No 2)*, the majority of the Court of Appeal, comprising Cooke, Richardson and Somers JJ, observed:[93]

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92 *Re the Royal Commission to Inquire into and Report upon State Services* [1962] NZLR 96 (CA) at 109.

93 *Re Erebus Royal Commission (No 2)*, above n 32, at 653.

> We must begin by removing any possible misconception about the scope of these proceedings. … This is not an appeal. Parties to hearings by Commissions of Inquiry have no right of appeal against the reports. The reason is partly that the reports are, in a sense, inevitably inconclusive. Findings made by the Commissioners are in the end only expressions of opinion. They would not even be admissible in evidence in legal proceedings as to the cause of a disaster. In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and to comply with any applicable rules of natural justice.

[113] In general, commissions of inquiry have a free hand in weighing the evidence they receive and making factual findings. But there are exceptions. As already noted, the Privy Council identified three in *Re Erebus Royal Commission*. It observed:[94]

> Throughout their consideration of this aspect of the inquiry … their Lordships have been at pains to remind themselves, as did the Court of Appeal, that in relation to findings of fact made by the Judge in his Report they are not exercising the functions of an appellate Court in the civil litigation where they would be entitled, while paying due deference to the advantages enjoyed by the trial Judge of seeing and hearing the witnesses give evidence in person, to make their own assessment of the weight of the evidence and to determine for themselves whether it is sufficient to justify the findings of fact that the trial Judge has made. As Courts whose functions in the instant case have been restricted to those of judicial review, both the Court of Appeal and this Board are disentitled to disturb findings of fact by the decision-maker whose decision is the subject of review, unless (1) the procedure by which such findings were reached was unlawful (in casu by failure to observe the rule of audi alteram partem) or (2) primary facts were found that were not supported by any probative evidence or (3) the reasoning by which the decision-maker justified inferences of fact that he had drawn is self-contradictory or otherwise based upon an evident logical fallacy.

[114] The Privy Council held it is sufficient if the finding is "based upon *some* material that tends logically to show the existence of facts consistent with the finding".[95] Similarly, in *Discount Brands Ltd v Northcote Mainstreet Inc* the Court of Appeal stressed the distinction between a finding which is not supported by any probative evidence and one where a Court, sitting on appeal, might consider that the weight of the evidence warrants a different conclusion:[96]

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94 *Re Erebus Royal Commission*, above n 36, at 681.

95 At 671. Emphasis added.

96 *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) at [58]. That decision was overturned on appeal — *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 — but the comment set out above was not affected.

> It is entirely one thing to weigh evidence which might go either way or even to incorrectly evaluate evidence. But it is quite another to make entirely insupportable findings. To find facts without evidence of this character is an abuse of power, and as such it ought to be within the scope of judicial review.

[115] Next, findings of a commission of inquiry may be set aside if they were reached following a material breach of natural justice. The Court of Appeal, and later the Privy Council, held that some findings of the Erebus Royal Commission — most notably the famous reference to Air New Zealand having engaged in "an orchestrated litany of lies" — were unsustainable. Both held they were unsupported by probative evidence and that the Commissioner had failed to give the airline the opportunity to respond to the allegation that its witnesses had colluded and lied.[97]

[116] Similarly, in *Campbell v Mason Committee*, Robertson J observed:[98]

> In the course of the submissions before me yesterday all counsel at times typified the passages complained of as being "critical of the plaintiffs", "prejudicial to the plaintiffs", "damning of the plaintiffs" and "damaging of their reputation". It is important that I stress that those are not in themselves reasons for the Court to consider granting relief. When an area as controversial and as divisive as the subject of the Committee's inquiry is scrutinised, it may well be that findings are and should be made which are damning, prejudicial and highly critical. The purpose of this proceeding is to ascertain whether such comments, conclusions or reports were made fairly — were made after the Committee had had the opportunity to hear and consider whatever the plaintiffs themselves might have wished to say on the particular issue. It would be unfortunate if there were to arise the misconception that the Courts will intervene to suppress a comment or finding simply because it is prejudicial or critical. The test is the quality of the procedure which was adopted in reaching that position not the nature of the assessment made.

[117] The requirement the inquiry provide advance notice of adverse findings and an opportunity to comment is now codified in s 14(3) of the Inquiries Act 2013. Section 14(3) provides:

> **14 Regulation of inquiry procedure**
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> …
>
> (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person—

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97 *Re Erebus Royal Commission*, above n 36, at 671.
98 *Campbell v Mason Committee* [1990] 2 NZLR 577 at 582.

> (a) is aware of the matters on which the proposed finding is based; and
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> (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.

[118] The final report of a commission of inquiry may be reviewed if it was materially affected by an error of law. *Peters v Davison* fell into that category.[99] In that case a significant legal error — that certain financial transactions were lawful when they were not — meant the Commission's principal conclusions, which cleared the Inland Revenue Department and Serious Fraud Office of neglect of duty and incompetence, were unsustainable. The Commissioner's criticisms of the plaintiff, the Rt Hon Winston Peters, were also set aside. The High Court ultimately made five declarations which had the effect, as it put it, of crossing out the words in the report that were written in reliance on the Commissioner's mistake.[100]

[119] Finally, and perhaps most importantly, the final report of a commission of inquiry may be reviewed if it goes further than the terms of reference permit. As the Court of Appeal confirmed when considering the earlier phase of the Jehovah's Witnesses' challenge, it is part of the Court's role to ensure commissions of inquiry remain within the limits of their powers, and those limits are set by the terms of reference. The Court observed:[101]

> [30] … The ultimate question is one of interpretation which involves the Court assessing the text of the terms of reference in light of their purpose and in their context. And here, the Order in Council is an elaborate document which expressly sets out its purpose and records the context in which it was made.

[120] It is impossible for any inquiry report to confine itself entirely within the four corners of the terms of reference. The report must be understandable, and the Commission will often have to explore and describe matters of background and context to set the scene for its findings. In doing so, it may have to describe events or practices which are unflattering or prejudicial. Extraneous observations are not objectionable on that ground alone. The critical question is whether they are made in furtherance of the terms of reference.

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99 *Peters v Davison* [1999] 2 NZLR 164 (CA).
100 *Peters v Davison* [1999] 3 NZLR 744 at [95]–[96].
101 Court of Appeal decision, above n 7.

[121] It may not always be clear-cut whether incidental observations provide necessary background and context for the Commission's central findings, or stray impermissibly from the terms of reference. Even a discursive and wide-ranging report will be lawful as long as the Commission remains focused on the questions the terms of reference direct it to answer. Provided it does so, it is not for the Court to tell the Commission how to write its findings. Commissioners should be afforded considerable latitude in deciding what to include and what to leave out. As the majority of the Court of Appeal observed in *Erebus*, with respect to the Commissioner's condemnation of the airline's evidence:[102]

> [The Commissioner submitted that] comments, however severe, on the veracity and motives of witnesses were incidental to the carrying out of the express terms. We accept unhesitatingly that what is reasonably incidental is authorised. ... and also that to some degree any Commission of Inquiry has the right to express its opinion of the witnesses, much as a Court or statutory tribunal has that right.
>
> But we think that it is a matter of degree. ... The issue now to be decided is whether the Commissioner had powers, implied as being reasonably incidental to his legitimate functions of inquiry into the causes and circumstances of the crash, to make assertions amounting to charges of conspiracy to perjure at the inquiry itself.
>
> In considering that issue the importance of not unreasonably shackling a Commission of inquiry has to be weighed. It is also material, however, that such a charge is calculated to attract the widest publicity, both national and international. It is scarcely distinguishable in the public mind from condemnation by a Court of law.

[122] In this case many, indeed most, of the criticisms the Commission levelled at the Jehovah's Witnesses concerned practices within the faith that had nothing to do with abuse in care. The central question in these proceedings is whether those findings — for example the Commission's criticisms of practices like shunning, and the way allegations of abuse *outside* the care context were handled — can be regarded as reasonably incidental to the discharge of the terms of reference. As the Court of Appeal observed, abuse that occurred away from care settings could still be relevant if it helped identify factors that caused or contributed to abuse in care.[103]

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102 *Re Erebus Royal Commission*, above n 32, at 666.

103 Court of Appeal decision, above n 7, at [38], reproduced at [52] above.

[123] Put simply, the Jehovah's Witnesses say the Commission's case study strayed far beyond its legitimate mandate. They submit the connection between the terms of reference and most of the Commission's criticisms was tenuous at best and could not be regarded as the kind of necessary or legitimate incidental observations that were required to enable readers to make sense of the case study. If the case study were shorn of the Commission's extraneous criticisms, the faith says there would be little left.

Did the case study breach the faith's right to freedom of religion?

[124] Sections 13 and 15 of the Bill of Rights Act provide:

> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> …
>
> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[125] The state's role in safeguarding freedom of religion is largely passive in nature. In *Mendelssohn v Attorney-General*, a case concerning a report into the affairs of the Centrepoint Community Growth Trust,[104] the Court of Appeal observed:[105]

> [14] … those provisions do not impose positive duties on the state, at least in any sense relevant to this case. Rather they affirm freedoms of the individual which the state is not to breach. The very nature of these rights and freedoms means that they are freedoms *from* state interference. These rights and freedoms are affirmed by a s 2 *against* acts of the various branches of the state (referred to in s 3) including the Executive branch. The freedoms in issue are in general within the category often referred to as negative freedoms, to use one part of Isaiah Berlin's famous categorisation (*Two Concepts of Liberty* (1958) recognised for instance by Lord Lester of Herne Hill QC and his co-authors in 8(2) *Halsbury's Laws of England* (4th ed reissue) para 105, n 2) in the particular context of religious freedom, Paul Rishworth, a leading New Zealand commentator, says simply that the duty of the branches of government and others bound by the Bill of Rights is not to interfere unreasonably with the individual's right to religious freedom. He concludes

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104 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA).
105 Emphasis in original.

> his discussion by emphasising the value of "autonomous institutions which are left to determine their own conception of 'the good'. That is what 'freedom of religion' in bills of rights is all about" (Grant Huscroft and Paul Rishworth, *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) at pp 228 and 254).

[126] In this case Mr Rishworth submitted the case study was dominated by hostile and pejorative comments about the faith. He argued the Commission lost its focus on the terms of reference and instead directed its criticisms at the faith itself, including the Jehovah's Witnesses' beliefs. For example, he submitted that quotes from a former member who described the faith as "prey[ing] on the most vulnerable" and giving "false hope" depicted it as predatory, and its beliefs as untrue.

[127] Mr Rishworth urged me to bear in mind that the faith is already widely misunderstood and is often the subject of ridicule in the secular world. He tendered extensive material to show that the Commission's findings were made against a background, in other countries, of state-sanctioned (or government instigated) repression. He submitted the case study portrays the faith in a manner that is unfair and inaccurate, depicting it as oppressive and peculiar. He said members regard the Commission's remarks as offensive and hurtful.

[128] Mr Rishworth sought to link the Commission's comments to the faith's rights under ss 13 and 15 by positing an affirmative duty of neutrality on the part of Crown institutions, including a Royal Commission discharging functions assigned to it by order in council. He submitted that duty requires the state to disavow any claim to truth in religious matters, meaning it may not make comments that are critical of individual faiths. It would be equally objectionable, on his analysis, for the state to offer official endorsement to the beliefs of any religion, or to single out a particular faith for favourable treatment.

[129] In support of his submission, Mr Rishworth drew my attention to several decisions of the European Court of Human Rights. Article 9 of the European Convention on Human Rights includes the right to "freedom of thought, conscience and religion", and the Court has affirmed a duty of neutrality on state parties on many occasions. Article 9 may be breached by comments, made by state bodies, which actively denigrate the practice of a faith.

[130] None of the cases Mr Rishworth cited assist in the current context. All concerned active steps by states to repress minority faiths. For example, in *Taganrog LRO v Russia*,[106] the state forced the dissolution of Jehovah's Witnesses congregations in Russia on the pretext that aspects of the faith, such as the instruction to members to refuse blood transfusions and military service, breached Russia's Suppression of Extremism Act. Domestic courts held the faith had "imposed its beliefs on Orthodox [Christian] believers".[107]

[131] Similarly, in *Tonchev v Bulgaria*, a municipal authority issued a circular that warned against the activities of three religious groups, the Jehovah's Witnesses, the Church of Jesus Christ of the Latter-Day Saints (the Mormons) and the Evangelical Protestant Churches in Bulgaria.[108] The circular described the three groups as "dangerous religious sects"; its criticisms included the use of a different translation of the Bible from that read in the Orthodox Church, and that their meetings might expose congregants to "psychological disorders".

[132] The European cases arose in conservative communities where the state was aligned with the established Church and actively sought to suppress smaller or insurgent denominations. The European Court's affirmation that states may not refer to religious communities in hostile, pejorative or derogatory terms[109] must be considered in that context. It has no application to the report of a Royal Commission charged with investigating faith-based institutions. Freedom from interference is not the same as freedom from criticism, provided the criticism is limited to matters in which the state has a legitimate interest, such as the health and welfare of its citizens.

[133] While the Commission recorded expressions of frustration and anger from former members of the faith, I do not agree the Commission strayed into criticism of Jehovah's Witnesses' religious beliefs. The doctrinal underpinnings of the faith were

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106 *Taganrog LRO v Russian Federation* ECHR 32401/10, 7 June 2022.

107 At [144]. The Russian Government directed similar comments at the Hare Krishna faith in a brochure entitled "Watch out for cults!" describing the Krishna movement as a "totalitarian cult" intent upon the "psychological manipulation" and "zombification" of the country's youth; see *Centre of Societies for Krishna Consciousness in Russia and Frolov v Russia* ECHR 37477/41, 23 November 2021.

108 *Tonchev v Bulgaria* ECHR 56862/15, 13 December 2022.

109 At [53]–[55].

of no interest to it, other than to provide context for the way the faith affects the everyday lives of its congregants. It was in that context that the Commission referred to the experiences of former members.

[134] Like any fact-finder, it was open to the Commission to reproduce extracts from the evidence it received. It also quoted verbatim from current members of the faith; for example, one extended paragraph included no fewer than seven extracts from statements given by members of the faith which explained how they were trained, organised and supervised when witnessing, and how satisfying they found it as an activity.[110] It was the Commission's own comments, in its own voice, which represented its findings and commentary.

[135] That said, I agree it may have been prudent to edit some parts of the statements from former members, most notably the reference to the Jehovah's Witnesses "giv[ing] false hope".[111] It is clear the faith does offer hope to many people. Whether it should be characterised as "false" was irrelevant to the Commission's task. Nonetheless, the statement was clearly attributed to the witness and set out in different font. Readers could be in no doubt that those were the witness's words, not the Commission's.

[136] Importantly, the Commission did not seek to characterise the beliefs of Jehovah's Witnesses as illegitimate or wrong. Unlike the state actors in the European cases, it had no interest in protecting or promoting the interests of "mainstream" faiths. The Commission's concerns lay entirely in the earthly realm.

[137] In that respect, the Commission's approach was consistent with that of the Court of Appeal in *Re J.*[112] In that case a three-year old child urgently required a blood transfusion; there was a risk he would die without one. His parents, Jehovah's Witnesses, sought to withhold consent on his behalf. The District Court, and then the High Court, made orders appointing the Director-General of Social Welfare as the child's guardian. In the event, the child recovered without a transfusion. Nonetheless,

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110 Case study, above n 4, at [45].
111 At [31].
112 *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134.

his parents appealed against the steps the state had taken to override their decision to withhold consent.

[138] The parents argued the lower courts' rulings had breached their rights under s 15, which extended to a right to raise their children in accordance with their beliefs and a right to allow those beliefs to inform decisions about medical treatment. The Court of Appeal rejected that submission, observing:[113]

> We define the scope of the parental right under s 15 of the Bill of Rights Act to manifest their religion in practice so as to exclude doing or omitting anything likely to place at risk the life, health or welfare of their children. In the present context that is consistent also, in the circumstances of this case, with giving effect to s 23 of the Guardianship Act by recognising the paramount interests of the child. It also avoids any approach casting an onus to be discharged in respect of the invasion of the parents' right before the right of the child can be secured. That is not appropriate for reconciling these competing rights.

[139] Applying *J* to the present case, I am satisfied the right to freedom of religion under s 13, and the right to practise religion under s 15, may never be used to excuse conduct that harms others. If practices within the faith are likely to cause physical or psychological harm to vulnerable members — whether that vulnerability arises because of age, sexuality or in any other way — then there is no obstacle to a state institution, like a commission of inquiry, examining those practices and making critical comment.

[140] Jehovah's Witnesses, like members of other faiths, are free to believe whatever they like. The state will not interfere with their right to do so, or their right to manifest their beliefs. But the moment the faith and its internal structures place others at risk, the state has a legitimate protective interest. The state is entitled to intervene where practices within a faith are deliberately harmful, but also in cases like *J*, where harm arises as a necessary incidental consequence of sincerely-held beliefs.

[141] There is nothing inherently objectionable about highly critical comments in the report of a commission of inquiry. As Robertson J observed in *Campbell v Mason Committee*, an inquiry report may well result in findings that are damning, prejudicial

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113 At 146.

and highly critical.[114] Criticism of religious institutions is difficult to avoid in an inquiry into abuse in faith-based care. The fact the Jehovah's Witnesses are a religious faith as opposed, for example, to a state institution, does not insulate them from critical comment.

[142] Against that background, there was nothing inherently objectionable in the Commission examining practices within the faith, such as disfellowshipping and shunning, which carry obvious potential for manipulation, coercion and psychological harm. The Commission's criticisms did not breach ss 13 and 15.

Did the Commission breach the faith's natural justice rights?

[143] The Jehovah's Witnesses' second main ground of challenge is a complaint the Commission breached their right to natural justice in formulating its findings. The breach is said to have taken a number of forms. The faith says the Commission gave it insufficient notice of its proposed adverse findings, failed to address the highly detailed feedback document it provided in response to the draft case study and infused the case study with non-neutral and pejorative comments about religious practices, such as shunning and the two-witness rule.

[144] As already noted, there is no doubt a failure to give an affected party notice of adverse comment, together with adequate opportunity to comment on the proposed criticisms before the report is finalised, may lead to the relevant findings being set aside on judicial review.[115] A failure to tell Air New Zealand of the nature of the findings the Commissioner proposed, along with the absence of any opportunity for the airline to comment on those proposed criticisms before they were finalised, was the principal reason the Erebus Royal Commission's findings of collusion and dishonesty were set aside.[116]

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114 *Campbell v Mason Committee*, above n 98, at 582.
115 See paras [115]–[117] above.
116 *Re Erebus Royal Commission*, above n 36.

[145] In April 2024 the Commission began providing the Jehovah's Witnesses with the documents it proposed to refer to in the case study, and that process continued until 17 May. The Commission gave the faith a full draft of the case study on 3 May 2024. It initially advised the faith that it had a fortnight — until 17 May — to provide any comment it wished to make. At the faith's request, the Commission allowed an extra weekend, extending the deadline for comment until 20 May.

[146] Ms Jerebine submitted that two weeks was simply not enough time for the faith to respond to the 62-page draft given the volume of evidence it contained and the nature of the criticisms the Commission proposed. The Jehovah's Witnesses say they identified errors, unsupported conclusions or matters outside the terms of reference in almost every paragraph.

[147] Despite the short time it was given, the Jehovah's Witnesses produced a highly detailed response. The faith's comments were submitted in table form. For the great majority of paragraphs, the faith proposed either new wording, deletions, or both. It explained the reasons for each proposed change in a separate column. The faith also proposed that extracts from the evidence of its own witnesses should also be included verbatim. For example, it proposed a paragraph in which a female member of the faith said that even though leadership roles in the organisation are assigned to men, she has "never felt oppressed, controlled or held back in any way". It asked the Commission to add, in numerous places, that the Court of Appeal had held the faith's activities were "likely at the margin of what was contemplated" by the terms of reference.[117] It pushed back firmly on the Commission's proposed criticism of practices such as shunning, describing it as a "theological practice" both outside the terms of reference and protected by ss 13 and 15 of the Bill of Rights Act.

[148] I agree the two weeks the Commission initially provided for comment on the draft was the absolute minimum the faith required to produce a meaningful response. The inquiry had been underway since 2018. Towards the end, it is plain there was something of a scramble to complete the final report, including the case study, in time for it to be presented to the Governor-General by the final reporting date of

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117 Court of Appeal decision, above n 7, at [36].

26 June 2024.[118] Had the faith been genuinely prejudiced by the two week period, there may have been grounds to find its right to natural justice had been breached.

[149] Nonetheless, having reviewed the faith's impressively comprehensive response, I am not persuaded the brevity of the response period caused any prejudice. It is plain the faith and its advisers worked extremely hard over that fortnight to explain why it considered many of the proposed findings were unfair, inaccurate, unsupported, outside the terms of reference, or some combination of the four. Ms Jerebine was unable to point to anything it had been unable to say because it had insufficient time.

[150] Ms Jerebine's next complaint is that the Commission disregarded most of the suggestions the faith made in its feedback document. It is true the Commission retreated from only a handful of its proposed criticisms. Indeed, the expanded use of verbatim extracts from evidence given by former members may have been a response to the faith's complaint that many criticisms lacked evidential support. Unsurprisingly, the Commission's description of the faith's rules and internal structures was more comprehensive and accurate following the feedback.

[151] The faith's response was tailored to the draft case study, but little of the material it included in its table was new. Its suggestions largely reflected information the Commission had already considered, and had either incorporated or declined to include. The Commission was not obliged to accept the faith's submissions, nor was it required to amend the draft in the way the faith suggested.

[152] While the Commission did not materially soften its criticisms between the draft and final case studies, it was not obliged to do so. The Commission was required — to paraphrase the Privy Council in *Erebus*[119] — to ensure the faith was not left in the dark about the criticisms the Commission proposed to make, and thus deprived of an opportunity to tender material which might have persuaded it to change its mind.

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118 The reporting date had already been extended three times.

119 *Re Erebus Royal Commission*, above n 36, at 671.

[153] In the published edition of this judgment I have redacted the eight paragraphs that follow. The Commission's draft case study was the subject of a suppression order under s 15 of the Inquiries Act. That order forbids the publication of any information contained within the draft case study. In the redacted paragraphs that follow, I identify some of the changes between the draft and final case studies and respond to the faith's submission that certain adverse findings appeared for the first time in the final case study depriving it of an opportunity to respond. I reject each of the faith's criticisms. In each case it was given clear notice of the proposed finding, and in one case the Commission softened or deleted some of the more pointed criticisms it proposed in its draft.

Paragraphs [154] – [161] redacted.

[162] The level of detail required to answer the faith's submissions on this issue provides a good example of its approach to the subject-matter of the case study. The case study is a relatively brief document, less than 60 pages long. It has sought to characterise the proceeding as an orthodox judicial review, but it seeks to challenge the Commission's findings in near-microscopic detail. It would be very rare even for a court sitting on appeal to involve itself in the nuances of the decision maker's drafting in the manner the faith asks me to do in this case. This judgment is longer than it otherwise would be, and has taken longer to produce, because of the faith's insistence on challenging every slight.

[163] I do not propose to traverse the detail of the faith's critique of the case study. It has attempted to draw the Court into the substance of almost every paragraph, including in many cases the Commission's acceptance and reliance on evidence from former members of the faith and its decision not to include contradictory evidence from current Jehovah's Witnesses.

[164] As already noted, findings of fact and the drafting of the report were the exclusive province of the Commission. Provided there was some evidence to support the Commission's findings, it is no part of the Court's function to revisit the facts found by the Commission or the way it expressed its observations. Even so, large parts of the faith's submissions in response to the draft case study were repurposed as

submissions in support of the judicial review. At times the faith's submissions overlooked the self-evident difference between a response to a natural justice draft — which is part of the primary fact-finding process — and submissions in support of judicial review, where the Court has no role in second-guessing the Commission's evaluation of the evidence it received.

[165] The faith is right to observe that the Commission frequently drew general conclusions based on the evidence of only a handful of former members. It was entitled to do so, even if that evidence was contradicted, as it often was, by extensive evidence tendered on behalf of the faith. That evaluative exercise is the Commission's function, not the Court's. The Commission acknowledged that experiences among Jehovah's Witnesses varied, and that not all the practices it criticised were universal, but it was open to it to accept the evidence of the former members as a general representation of life in the faith.

[166] Similarly, it was for the Commission to decide, from the vast body of evidence it heard, what to include in the case study and what to leave out. The case study was a relatively short document and the Commission was not obliged to rehearse the vast array of evidence it heard on each point before it set out its conclusions. As Robertson J put it in *Mason*, on review the Court is concerned with the quality of the procedure the Commission adopted, not the nature of the assessment it made.[120]

Did the case study go beyond the terms of reference?

[167] An insight into how far this proceeding has strayed from the proper limits of judicial review can be found in the size of the record the parties placed before the Court. Despite the vastness of the record, the faith's strongest ground of challenge requires reference only to the case study (under 60 pages) and the amended terms of reference (24 pages). The Commission was obliged to ensure its report, including the case study, remained within the limits of the powers conferred on it by the order in council.[121] The faith says the case study strayed well beyond the lawful scope of an inquiry into abuse in care.

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120 *Campbell v Mason Committee*, above n 98, at 582.

121 Court of Appeal decision, above n 7, at [27]–[29]. See paras [49]–[50] above.

[168] This is the second proceeding in which the Jehovah's Witnesses have sought to assert the Commission overstepped the limits of the order in council. In 2024 the Court of Appeal commented that the Commission's investigation into the faith was likely at the margin of what the terms of reference contemplated,[122] but concluded there was, at that stage at least, no basis to interfere. The Court noted the Commission was still in its inquiry phase and held there was no reason to restrict it from gathering information.[123]

[169] Nonetheless, the Court of Appeal sounded a note of caution. The narrow issue in that proceeding was whether the activities the Commission wished to investigate — the role of elders when presiding over judicial committees, when witnessing with children, while providing pastoral support and supervising children during working bees and similar activities — constituted "care" for the purposes of the terms of reference.[124] The Court held, especially in light of the insertion, in 2023, of cl 17.4(ba),[125] that those activities plainly fell within the terms of reference.[126]

[170] There would have been no cause for complaint if the case study had been confined to abuse in the limited areas where children and vulnerable adults found themselves in the care of the faith. But, as the summary set out above makes clear, the case study went far wider. The Commission's harshest criticisms concerned practices that can fairly be described as abusive, but had nothing to do with the provision of care.

[171] To put the faith's complaint in a nutshell, the Commission found abuse and the Commission found care, but it found almost no abuse *in* care. Even adopting the expanded definition of "care" from cl 17.4(ba), the Commission identified only a single instance, in the 50-year inquiry period, where a congregant was physically or sexually abused while in the care of an elder.[127]

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122 At [36], reproduced at [52] above.
123 At [38]-[40].
124 At [22]–[24].
125 See para [43] above.
126 Court of Appeal decision, above n 7, at [46].
127 See para [77] above.

[172] Instead of confining the case study to that narrow intersection between care and abuse, the Commission produced a far-reaching and powerful critique of the way the faith interacts with its members. The issue for the Court is whether it was entitled to do so.

[173] The purpose and scope sections of the terms of reference are set out at para [28] above, but key points bear repeating. The matter of public importance the inquiry was directed to examine was the "historical abuse of children, young persons and vulnerable adults … *in the care of* faith-based institutions".[128] It is common ground that congregants are not in the care of a faith-based institution simply because they are members of the relevant faith, no matter how pervasive its influence may be in their lives.

[174] Clause 17.4 provides that a person is in the care of a faith-based institution if the faith "assumes responsibility" for that person's care. Clause 17.4(ba) confirmed an assumption of responsibility may arise through an informal or pastoral care relationship. The Court of Appeal observed:[129]

> [33] … Two interrelated elements can be said to be involved in the definition, first that the individual be in "the care" of somebody else and secondly that given the role of that carer the institution itself has assumed the responsibility for the care. We also consider that the terms of reference focus more on situations where there is a degree of continuity or regularity of the care than one-off situations.

[175] The purpose of the inquiry was to "identify, examine and report on the matters in scope".[130] They, in turn, were set out in cls 10.1-10.5.[131] Clause 31 defined the matters on which the Commission was to report:

> 31. The inquiry will report and make general comments, findings, or both, on—
>
> (a) the nature and extent of abuse that occurred (as described in clause 10.1 above):[132]
>
> (b) the factors, including systemic factors, which caused or contributed to abuse (as described in clause 10.2 above):

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128 Terms of reference, above n 3, cl 9.
129 Court of Appeal decision, above n 7.
130 Terms of reference, above n 3, cl 10.
131 The relevant extracts are set out at para [28] above.
132 "The abuse", as defined in cls 9 and 10, means abuse *in the care* of faith-based institutions.

(c) the impact of the abuse on individuals and their families, whānau, hapū, iwi, and communities (as described in clause 10.3 above):

(d) the circumstances that led to individuals being taken into, or placed into care (as described in clause 10.4 above):

(e) the lessons learned and what changes were made to prevent and respond to abuse (as described in clause 10.5 above).

[176] At the risk of stating the obvious, the inquiry's focus was abuse in care. The other matters in scope, including the systemic factors contributing to abuse and the impact of abuse on the victims, presuppose proven abuse in care. Clause 31 also provides a definitive answer to Mr Varuhas's submission that only the Commission's formal findings, as summarised at the end of the case study, are amenable to scrutiny. The Commission was invited to make general comments as well as findings. Most of the case study was general comment. But as cl 31 confirmed, the legitimate scope of those comments, like the Commission's findings, was confined to the matters identified in the terms of reference.

[177] The Commission closely examined the forms of care the faith provided. Rejecting the faith's emphatic submission to the contrary, it found congregants were in the "care" of the faith in the four areas already described (witnessing, pastoral care, working bees and judicial committees). But with the exception of Ms SC, and of the distress and humiliation some witnesses felt when being interviewed by elders, it found no abuse in any of those four contexts.

[178] Nonetheless, the inquiry heard extensive evidence from former members who were traumatised by their experiences in the faith, some of whom were abused in non-care settings. It is difficult to escape the conclusion that the Commission did not want to remain silent about the serious matters the former members identified, even though the harm and ongoing risk they described arose overwhelmingly in situations where the faith had not assumed responsibility for anybody's care.

[179] The Commission sought to explain the near-total absence of evidence of abuse in care by suggesting there were barriers to disclosure which had discouraged victims from coming forward. I agree it was reasonable to assume Ms SC was not the only person abused in the care of the faith during the inquiry period, but there is no evidence that this faith, for all its faults, was one where abuse in care was systematic or common.

[180] Because the evidence reflected that children and vulnerable adults were rarely abused while in the care of the faith, the Jehovah's Witnesses were very different from the other faiths the Commission investigated. Nonetheless, they were the only faith the Commission made the subject of a standalone case study. I agree with Ms Jerebine that the way the document was presented, from the title page on,[133] would have encouraged readers to believe the case study was an examination of the faith as a whole. That perception was reinforced by the subject-matter of the study, which ranged well beyond abuse in care.

[181] Mr Varuhas seized on the Court of Appeal's comment that the faith "may have been able to provide valuable assistance and evidence to the Commission precisely because there was *no* abuse arising in association with the care it provided".[134] But that was not the purpose of the case study. The Commission did not single the faith out because it wished to hold it up as a model for others to emulate.

[182] Similarly, Mr Varuhas relied on the Court of Appeal's observation that abuse that did not occur in care settings might be relevant when identifying and reporting on "structural, systemic or practical factors that caused or contributed to [abuse in care] in accordance with the purpose and scope of the inquiry".[135] Once again, however, that was not why so much of the case study was devoted to abusive or harmful practices that occurred in non-care settings. The Commission's focus was on abuse and harm in general, not abuse in care.

[183] As already discussed,[136] the Commission had the implied power to make findings and observations that are reasonably incidental to its legitimate functions. The Court will always afford considerable latitude to a commission of inquiry in deciding what falls into that category. As the majority of the Court of Appeal observed in *Erebus*, it is important the Commission is not unreasonably shackled in preparing its report.[137] Provided there is a tenable link with the terms of reference, an inquiry

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133 The cover page simply read "JEHOVAH'S WITNESSES", followed by the words "case study" in much smaller type. The only reference to abuse in care was found in the Commission's logo.

134 Court of Appeal decision, above n 7, at [38]. Emphasis in original.

135 At [38].

136 See paras [120]–[121] above.

137 *Re Erebus Royal Commission*, above n 32, at 666. Set out at para [121] above.

report may make strong and pointed criticisms of evidence, witnesses and organisations.

[184] But the Jehovah's Witnesses case study was primarily concerned with matters other than abuse in care, perhaps the most important of which was the practice of shunning and the fear it instils in members of the faith. The Commission was also deeply troubled by the faith's intolerance towards homosexuality, its poor internal process for investigating and recording allegations of abuse, the degree to which many members felt compelled to distrust secular authorities and the patriarchal nature of its administration. I am satisfied the Commission's emphasis on harmful practices within the faith cannot fairly be described as incidental to an examination of abuse in care. Instead, the overriding impression an ordinary reader would draw from the case study is that the faith is controlling, oppressive and manipulative, and that it engages in practices that are emotionally and psychologically damaging.

[185] I accept the Commission attempted to link some of its stronger criticism with the terms of reference. For example, it characterised the fear of being shunned as a barrier to disclosure of abuse "because any such disclosure risked the loss of connection to family, friends and community."[138] But while the Commission made a strong case that shunning is a psychologically and emotionally damaging practice, none of the witnesses suggested anyone had been disfellowshipped or shunned for reporting abuse, let alone abuse in care.

[186] Even affording the Commission the widest possible latitude, it is impossible to characterise the central criticisms as incidental to an examination of abuse in care. The fact the faith rarely assumed responsibility for others meant abuse in care was also rare. At best, the Commission was able to say that *if* abuse in care were happening, certain features of the faith, like the fear of shunning, the two-witness rule and the faith's suspicion of secular authorities may have made disclosure more difficult.

[187] The issues canvassed by the case study would have been proper matters for criticism if this were a broad inquiry into abusive and harmful practices in the Jehovah's Witnesses faith. For example, if the terms of reference had been closer in

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138 Case study, above n 4, at [106].

scope to those of the United Kingdom and Australian inquiries, the faith would have had less cause for complaint. As it was, I agree the reproduction of the findings of the overseas inquiries would have reinforced the ordinary reader's impression that abuse in the faith is widespread, further obscuring the focus on abuse in care.

[188] I am satisfied the close examination of shunning and the other practices which so profoundly troubled the Commission were not included because they provided context for an examination of abuse in care. Rather, references to abuse in care were incidental to the Commission's wider discussion of harmful practices within the faith.

[189] It is impossible to criticise the Commission's motivation in setting out its concerns. It heard harrowing evidence from witnesses whose lives had been damaged. Their accounts disclosed an ongoing risk to the wellbeing of vulnerable members of the faith. For a Commission set up to investigate abuse, it is easy to understand its unwillingness to remain silent about the troubling practices it identified.

[190] Nonetheless, and despite the links the Commission sought to draw between its observations and the terms of reference, the case study was largely directed at subject-matter that fell outside the legitimate scope of the inquiry. The terms of reference required a focus on abuse in care. The Commission strayed beyond its lawful powers, meaning this ground of review must succeed.

Relief

[191] There was considerable argument about what relief might be appropriate if one or more of the grounds of review proved to be well-founded. Mr Varuhas argued that even if parts of the case study fall outside what the terms of reference permit, there is little the Court can do about it now. He stressed the extremely limited grounds on which this Court may interfere with the final report of a commission of inquiry. The Commission has presented its final report to the Governor-General and it has been tabled in Parliament. The Commission is now functus — the case study cannot be returned to it for further consideration.

[192] Mr Varuhas submitted, in any event, that the Commission's report affects no-one's rights. It is, by definition, an expression of opinion by the commissioners which the Government can consider, but which on its own changes nothing.

[193] The faith's amended statement of claim sought orders "quashing the unlawful parts of the case study and directing that the unlawful parts of the case study be redacted or removed", along with "a declaration that parts of the case study are unlawful".

[194] The reference to unlawful parts of the case study being redacted or removed was carried forward from the original statement of claim, which was filed in June 2024 before the final case study was published. Nonetheless, Ms Jerebine suggested it might be possible to direct the Department of Internal Affairs, which has residual oversight of the Commission's affairs and houses its website, to remove the case study and refrain from publishing it further.

[195] Mr Varuhas submitted, in effect, that the case study is a genie which cannot now be returned to its bottle. The Commission completed its work nearly two years ago. It is settled law that once a commission of inquiry has reported to the Government and Parliament there is little utility is seeking to quash its report (or a discrete part of it, as the faith seeks here). The report and the case study have long since entered the public domain. Writing jointly in *Peters v Davison*, Richardson P, Henry and Keith JJ observed:[139]

> The integrity and reputational elements [for a person criticised in an inquiry's report] relate directly to the practical utility of the remedy sought. In the normal course the plaintiff in judicial review proceedings wants one of two results: either the decision will be quashed or process stopped and no further official action will be taken, when the plaintiff aims to prevent an unwelcome exercise of power; or a direction will be given to require the power to be exercised on a different footing, particularly when the plaintiff is seeking a beneficial exercise of the official power. In the case of a commission of inquiry which has reported those consequences in general are not available. There is no continuing body which can take up the issues again and avoid the error of law or procedural fault which gave rise to the relief or which can respond to a ruling that part of the decision fell outside its powers.

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139 *Peters v Davison*, above n 99, at 186.

[196] Instead, the Court has tended to respond to reviewable errors in inquiry reports by issuing declarations which mark the illegality, but which leave the report itself intact. Richardson P, Henry and Keith JJ continued:

> There are, however, situations in which a declaration that an error of law has been made in the commission's final report does have real value. First, the Ministers and others involved in setting up the inquiry and in considering how to respond to the resulting report are informed by the Court judgment of that defect — as are the public at large. Such a Court ruling is of real practical value. … Second, where a court rules that a Commission has made a material error of law which damages reputation the plaintiffs gain the significant comfort of a ruling that the findings damning them are based on an error of law. In such cases the Court is not embarking upon a hypothetical exercise; rather judicial review is appropriate because its declaration will serve some useful purpose in protecting a private or public interest.

[197] Writing separately, Thomas J put the point more succinctly, observing that "[n]ecessarily, the only remedy likely to be appropriate is declaratory relief".[140] The practical effect of a declaration is that "the commission's report is to be read subject to the declarations which are made".[141]

[198] Later, when *Peters v Davison* returned to the High Court, Anderson and Robertson JJ rejected the submission that declarations would be futile, noting the public interest in the correctness and completeness of the report.[142] The Court isolated particular conclusions or findings in the report and declared that they were "by reason of error of law, invalid", and that the Commissioner's criticisms of Mr Peters were "invalid to the extent that they [were] founded upon the above described errors of law and invalid conclusions".[143] It observed that the effect of the declarations was "as if the words in the … report to which they relate have been crossed out".[144]

[199] In *Administrative Law in Aotearoa New Zealand*, Associate Professor Hanna Wilberg observes there is a school of thought, which in her view has much to commend it, that the remedies of quashing and declaratory relief are "practically

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140 At 203.
141 At 205.
142 *Peters v Davison*, above n 100, at [94].
143 At [95].
144 At [96].

fused".[145] The declarations in *Peters v Davison* are a good illustration. The original inquiry report was presented to Parliament and remains available to anyone who wishes to read it, but the practical effect of the declarations was to set much of it aside, and to inform readers that key passages were affected by errors of law.

[200] Relief in judicial review proceedings is discretionary, though in recent years the courts have emphasised that relief will usually be appropriate once a reviewable error is identified.[146] Mr Varuhas submitted I should nonetheless decline to order any relief even if I find the Commission exceeded its terms of reference. Aside from the suggested apology, the case study made no recommendations about the faith and did not identify or tarnish the reputations of any individuals associated with it. Mr Varuhas suggested the public interest now lies in healing and in affirming the dreadful experiences of abuse survivors, who may be retraumatised by a declaration that has the effect of setting the case study aside.

[201] I agree with Mr Varuhas that it would be impossible, almost two years after the Commission reported, to try to "quash" the case study or seek to restrict further publication. It is a freely available public document. Apart from anything else, when the Commission's final report was tabled in Parliament it was immediately published under the authority of the House of Representatives.[147] The Court may not order Parliament to delete, alter or suppress any part of its official record.

[202] Nonetheless, I do not agree that this is one of those relatively rare cases where relief should be refused. The Commission was entitled to investigate and report into the activities of the Jehovah's Witnesses only to the extent authorised by the terms of reference and the case study far exceeded its lawful scope. A declaration will serve to affirm the law and mark the proper limits of the terms of reference.

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145 Hannah Wilberg *Administrative Law in Aotearoa New Zealand* (4th ed, Hart Publishing, Oxford, 2025) at 316 citing Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis NZ, Wellington, 2018) at [5.04].

146 See *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112]. *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629 at [55].

147 (24 July 2024) 776 NZPD.

[203] A declaration that the Commission went beyond its lawful powers says nothing about the sincerity of the witnesses who described the emotional and psychological harm they suffered. It was the powerful nature of their evidence which prompted the Commission to stretch the scope of the case study beyond what the terms of reference permitted.

[204] As to the scope of the declaration, I am satisfied there would be no utility in trying to isolate the relatively few sections of the case study that fall squarely within the terms of reference. The Commission's main focus was on other matters.

[205] I declare that the whole of the Commission's "Jehovah's Witnesses" case study was unlawful as it exceeded the inquiry's terms of reference. This declaration does not affect any other part of the Commission's final report. For the avoidance of doubt, it does not affect the Commission's references to the Jehovah's Witnesses in volumes one and two.

Costs

[206] The parties asked me to reserve the question of costs and I am happy to do so. I encourage them to resolve the issue among themselves if they can. In case it is of assistance, however, I reiterate that the volume of material placed before the Court far exceeded what the case required and made the proceeding much more complex and time-consuming than it needed to be. I am satisfied the faith added unnecessarily to the expense of the proceeding. Among other things, it required no element of hindsight to understand that in a judicial review proceeding I should not have been invited to conduct a line-by-line critique of the text of the case study.

[207] Importantly, the faith's sole viable ground of review required little more than a straightforward comparison between the case study and the terms of reference. My strong preliminary view is that the proceeding and the steps within it are properly placed in category two, band B for costs purposes. In addition, while the faith is entitled to a contribution to its costs to reflect its success, it would be reasonable for its award to be reduced, perhaps by between a third and a half, to recognise that most of the grounds of challenge it advanced were unsuccessful.

[208] If the parties cannot agree, the faith, as the successful party, is to file a memorandum within 20 working days of the delivery of this judgment. The Attorney-General will then have a further 15 working days to file a memorandum in response. Neither memorandum is to exceed eight pages in length.

Boldt J

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