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**Dear Sir/Madam**

The Backbone Collective wishes to lodge a submission regarding the Terms of Reference for the **Royal Commission of Inquiry into Historical Abuse in State Care (the Inquiry)**

### **About the Backbone Collective**

Backbone believes that when violence against women and children happens, New Zealand needs a response system that has the greatest and most positive impact on as many cases as possible to reduce the immediate and long-term effects of the violence and abuse. Child protection is an integral part of that overall system.

Any system is only as strong as its weakest point – if one part of the system fails then the whole system fails. Therefore, we need multiple quality control mechanisms in place across all points of the system to ensure everything possible is being done to achieve the overall objective of keeping the victims/survivors safe and supporting them to rebuild their lives and of holding abusers to account.

Backbone believes women and children who have experienced violence and abuse are best placed to tell us where the system is and isn't working. New Zealand needs a safe and independent conduit through which their voices can be heard - where their views can be collected and analysed, and then used to identify where impactful and constructive improvements need to be made to improve the system response.

Backbone has been set up to enable women to safely and anonymously tell the Government, others in authority, and the public about how the 'system' responded to them when they experienced violence and abuse, and how they need it to respond in order to be safe and rebuild their lives. Backbone's mission is to help facilitate the continuous improvement of the system because we believe the system needs to be accountable for how it responds to its users. To encourage accountability of the state funded system responding to cases of violence and abuse, Backbone:

1. conducts secure, online surveys to collect anonymous feedback from as many women who have experienced violence and abuse as we can reach and presents the voices of women in a collective way so no individual can be identified

2. acts as a watchdog of the Government, the legal system and all agencies working within the response system by shining a light on specific issues that have bubbled up from communications we have had with Backbone members
3. tracks and reports on whether any action has been taken to address the problems identified in our reports.

Our reports can be found at <https://www.backbone.org.nz/reports/>

## Treaty of Waitangi

Backbone is committed to the principle of the rights of Māori as tangata whenua and believe the Te Tiriti o Waitangi principles of governance, sovereignty and equality should be reflected at all levels of the Inquiry. The Inquiry must be committed to ensuring that Māori tamariki, wahine, and tane can participate safely and equitably in the Inquiry. We are aware that Māori are at risk of experiencing institutional racism and inequitable treatment and outcomes in every part of the state system and it is critical that the Inquiry is designed and conducted in a way which ensures equity for Māori in all respects. Backbone supports calls from Maori that a separate stream be set up in the Royal Commission for Maori with their own panel of experts (including lived-experience) and advisory survivor roopu.

### Backbone recommends

That the Inquiry be conducted in accordance with the principles of Te Tiriti o Waitangi

## Definition of abuse

We believe that it is critical for the Inquiry to be clear from the outset about the definitions used. The terms used to describe violence and abuse in New Zealand are often confusing – different people use different terms and often ‘talk past each other’. For example:

‘Family Violence’ is an umbrella term used by the New Zealand Government in policy and practice over the past 15+ years to refer to the five most common forms:

1. violence among adult partners (intimate partner violence)
2. abuse/neglect of children by an adult
3. abuse/neglect of older people aged approximately 65 years and over by a person with whom they have a relationship of trust (elder abuse)
4. violence perpetrated by a child against their parent
5. violence among siblings

Children who have experienced violence and abuse while in state care have therefore suffered child abuse/neglect and therefore according to the above definition have experienced family violence. People often talk of, ‘family violence **and** child abuse’ which is technically incorrect as according to the above definition child abuse **is** family violence.

The most comprehensive definition of violence within the legislation is in sections 3 and 4 of the Domestic Violence Act 1995. Of note within these sections of the Act is that, ‘domestic violence, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship’. The Act is therefore clear that the physical, sexual and psychological abuse of children is an act of domestic violence.

We assume that children who are under the guardianship of the state and being cared for by state funded and managed caregivers are in a 'domestic relationship' with those caregivers and hence any violence or abuse perpetrated against children while in state care also comes within the definition of domestic violence.

Section 14 (1) (a) states: 'A child or young person is in need of care or protection within the meaning of this Part if the child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived'. However, that Act does not give any specific definition of those terms.

#### Backbone recommends

That the definitions of abuse in the draft Terms of Reference be expanded and strengthened to avoid confusion.

#### Definition of state care

The Inquiry's draft Terms of Reference state, 'An individual is in state care if the State has responsibility, whether directly or indirectly, for their care'. The Terms of Reference need to explicitly state that the definition of state care includes children who have been placed under the guardianship of the Court.<sup>1</sup>

The Court is an entity of the state and so any children who are 'wards of the court' must also be included in the Inquiry, regardless of who was caring for the child during the time the Court/the state held guardianship. Backbone has established that when children are made wards of the court, the Court usually appoints Oranga Tamariki to act as its agent. Generally, the agent is responsible for overseeing the safe care and wellbeing of the child or young person and carrying out specific roles as directed by the Court. The Court relies upon the agent to monitor and inform it of the circumstances of the child or young person. Decision making remains the prerogative of the Court.<sup>2</sup>

#### Backbone recommends

That children who are abused while under the guardianship of the Court (wards of the court) are included within the definition of children in state care.

#### Shared understanding about context for the Inquiry

The children who are subject to this Inquiry are likely to have experienced multiple forms of violence and abuse during their childhood and as adults. In New Zealand there is little or no shared understanding at a public level, across government departments or in the sectors that work in these areas about the dynamics, types of abuse and the lived experience of children who have been abused. The lack of shared understanding about the problem means these often go unchallenged and lead to unsafe interventions.

To assist all parties and participants in the inquiry develop a shared understanding, Backbone believes it is critical that the Terms of Reference recognise the lived experience of the children who

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<sup>1</sup> Prior to 2004 this was defined in the Guardianship Act 1968 and subsequently in Section 31 of the Care of Children Act 2004.

<sup>2</sup><https://practice.mvcot.govt.nz/policy/caring-for-children-and-young-people/key-information/custody-guardianship-and-wardship.html#null>

will be the subject of this Inquiry – before, during and after the time they were under the care of the state. For example:

- Abuse in state care - as discussed in the section above, it will be important to be clear from the outset what is meant by ‘abuse in state care.’
- Violence and abuse in their family or whanau – many children who come into state care will be suffering trauma as a result of violence and abuse in their family life.
- System abuse - Section 159 of the Oranga Tamariki Act is clear that a child or young person who is subject to any proceedings under Part 2 or Part 3A of the act will have a lawyer appointed to represent them. It is clearly stated in the Lawyer for Child Best Practice Guidelines<sup>3</sup> that, ‘The lawyer must be aware of, and actively manage, the risk of the child being exposed to systems abuse’. However, no definition is provided as to what is meant by ‘system abuse’.
- Cultural and racial abuse – Through the colonisation of Aotearoa, the loss of Māori land, language and culture great harm has been done to Māori. The child protection and justice sectors are critical areas where institutional racism towards Maori is experienced pervasively.
- Intergenerational abuse and trauma – it will be essential for the Inquiry to understand this form of abuse from the outset. Many of the adults who have abused their children, have themselves been directly abused and/or exposed to violence and abuse in their childhood. Because the effects of this abuse are not healed at the time, they carry on into the next generation – the abused child may grow up to become the abusive parent or a parent who struggles with support, resources, whanau connection or trust in the response system.

#### Backbone recommends

That some clear statements are included in the Terms of Reference to show these multiple forms of abuse that many children who are the subject to the Inquiry may have experienced and to ensure the panellists and all Inquiry participants are looking through a shared lens.

#### Timeframes of cases to be included in the Inquiry

Backbone cannot understand why the Inquiry timeframe ceases at the end of 1999. We appreciate that during the past 18 years respective Governments have put in place various new mechanisms in an attempt to prevent, identify and respond to cases of abuse in state care. However, Backbone is not aware that any retrospective evaluations, audits or other quality checks have been undertaken to determine how effective these new mechanisms have been. Backbone has heard of a number of recent cases of the abuse of children in state care. We believe it would be a major travesty to limit the Inquiry to examining the experiences of any individual in care of the state only until 1999. We fail to see why the Inquiry timeframes could not be extended to the present day. If new cases are reported to the Inquiry from the past 18 years that will provide some evidence that the system improvement have been effective. If, however cases are reported from the past 18 years the Inquiry will be in a position to ensure its findings and recommendations are robust and relevant to current practices and processes.

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<sup>3</sup>[https://gallery.mailchimp.com/78dd4a31ee758d41364cee18d/files/6d77379d-688b-420d-b4fc-80105dd46ed7/FINAL\\_FLS\\_lawyer\\_for\\_child\\_best\\_practice\\_guidelines\\_23.2.18.pdf](https://gallery.mailchimp.com/78dd4a31ee758d41364cee18d/files/6d77379d-688b-420d-b4fc-80105dd46ed7/FINAL_FLS_lawyer_for_child_best_practice_guidelines_23.2.18.pdf)

#### Backbone recommends

That the timeframe for the Inquiry be amended to be from 1 January 1950 to the present day.

#### Purpose and scope of the Inquiry

Many, if not most, instances of abuse of children in state care could be looked at in a simplistic way – one individual (a carer) abusing another individual (a child) who is in their care and the failing of other individuals (social workers, managers, lawyers etc) to identify the abuse and intervene.

However, Backbone is convinced that it is also critical that the Inquiry identifies the system failures – the failures of the model – that enabled the abuse to occur, that failed to identify abuse when it was occurring and failed to make changes to ensure such abuse never happened again. For example, for each case the Inquiry hears about it should ask, ‘Which parts of the system failed to keep this child safe?’ ‘Was the violence/abuse reported and if so did the system respond appropriately?’ ‘If the violence/abuse was not reported, why not?’ ‘Were there mechanisms for the child to safely report the abuse?’ ‘Where were the checks and balances built into the system to audit and monitor regardless of whether or not children made reports of abuse?’

The failings of individuals, problems with the model and failings of the system as a whole are inextricably linked - it is impossible to attribute responsibility for the failings at the feet of individuals when they are not working under a robust and effective system and vice versa.

The objective of the Inquiry should include identifying where the overall system needs to be strengthened, expanded or modified **as well as** specific changes to legislation, leadership, infrastructure, policy, practice guidelines/standards and/or quality management mechanisms to ensure children are kept safe while in state care.

Paragraph 5.5 of the draft terms of Reference talks of ‘the current settings available to prevent and respond to abuse’ and ‘standards that assist in preventing and responding to abuse’. Backbone believes the current wording on this point needs to be strengthened, for example, it is essential that the step of ‘identifying abuse’ is included in this paragraph. No one can respond to abuse unless there are mechanisms to identify the abuse in the first place.

As we said at the beginning of this submission, any system is only as strong as its weakest link. When dealing with complex social problems such as child protection it is critical that there are a range of independent checks and balances to ensure that any failures or problems are identified as soon as possible and responded to at an individual level **but** that at the same time changes are made to the system to ensure that the same problem doesn’t occur elsewhere.

Backbone appreciates that there are now some independent quality monitoring mechanisms in place that were not there when much of the historic abuse of children in state care occurred. We believe that it is critical that the Inquiry considers whether these are sufficient given the complexity of the system and the risk to New Zealand’s most vulnerable children.

#### Backbone recommends

That the Purpose and scope section be strengthened to ensure a focus of system failures and system improvements.

That paragraph 5.5 in the draft Terms of Reference be reworded to 'The current mechanisms and processes available to prevent, identify and respond to abuse in state care including legislation, policies, best practice guidelines/standards to ensure everything possible is done to prevent, identify and respond to abuse of children in state care.'

That a new point be added to section 5 of the draft Terms of Reference that 'Whether the current quality management and continuous improvement mechanisms are sufficiently robust to ensure any cases of abuse of children in state care are quickly identified, investigated and responded to.'

### The role of the Family Court must be included

The Chair of the Inquiry has asked for views on what constitutes state care. We note the definition used in the draft Terms of Reference is:

An individual is in state care if the State has responsibility, whether directly or indirectly, for their care. For the purpose of this Inquiry, state care does not include prisons, general hospital admissions or schools (other than residential special schools). However, the experience of an individual in these facilities may be considered if that individual was also in state care at the time.

Further, section 6 of the draft Terms of Reference says, 'the Inquiry may consider the circumstances that led to the decision to take or place someone into state care and the factors that may have contributed to the decision-making process involved.'

The New Zealand Family Court, and a range of professionals<sup>4</sup> working to the Family Court, play an integral and critical role in all cases of children in state care. It is their advice and their decision-making processes that puts each child into state care and approves the care plans for each child. It is the Family Court that makes the orders that the Chief Executive is to be made the guardian of a child ie that the child is to become a ward of the state and taken into state care. Were it not for the Family Court order the child would not be in state care so the Family Court's involvement and actions need to be under scrutiny by the Inquiry. Therefore, it would be impossible to examine the child protection system's involvement in the abuse of children in state care without also examining the Family Court's involvement.

The current joint protocol between Ministry of Justice and Department of Child, Youth and Family<sup>5</sup> came into force in July 2000. It is not clear whether there was a protocol that preceded this one that is now 18 years old. This protocol (and any earlier versions) is central to the Inquiry as it specifies the working interface between the two entities.

Backbone believes it is **critical** that the definition of state care and the scope of the Inquiry explicitly includes examination of the role the Family Court in these cases of abuse – not merely as 'circumstances that led to the decision' but as a key partner of Oranga Tamariki in all matters pertaining to children in state care.

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<sup>4</sup> Judges, Lawyers for Child, psychologists, social workers, and others

<sup>5</sup> <https://www.justice.govt.nz/assets/Documents/Publications/fc-joint-protocol-moj-cyf.pdf>

### Backbone recommends

That because in every case of a child in state care the Family Court has been a partner in the decision making to take or place someone into state care that individual professionals within the Family Court and the Family Court model/system itself is considered in all cases before the Inquiry.

## Other matters to be considered by the Inquiry

### Children's Rights

New Zealand children who are in the care of the state have specific rights enshrined in the legislation and in international conventions to which New Zealand is signatory. For example, New Zealand ratified the United Nations Convention on the Rights of the Child (UNCROC) in 1993. UNCROC requires governments to ensure that the best interests of the child must come first where decisions, laws or services involve children and includes the responsibilities of parents, governments, and children themselves to ensure the rights of children are met.<sup>6,7</sup> Of particular relevance to children in state care are:

**Article 3.1** - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

**Article 12.1** - States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

**Article 12.2** - For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

**Article 19.1** - States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

**Article 19.2** - Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

These and other rights are reflected in relevant New Zealand legislation – for example section 5 of the Oranga Tamariki Act and sections 6 and 9B of the Care of Children Act. A further document which guides children's rights in New Zealand is Te Tiriti O Waitangi which is the founding document that guides relationships between tangata whenua and tauwi.

<sup>6</sup> <https://www.unicef.org.nz/learn/our-focus-areas/child-rights>

<sup>7</sup> The first recommendation in a new report released by the New Zealand Children's Convention Monitoring Group in April 2018 is to 'Develop robust systems and processes to ensure that legislation incorporates, and is consistent with, the principles and provisions of the Children's Convention.'. Available at <http://www.occ.org.nz/assets/Uploads/Getting-It-Right-Building-Blocks-Apr-2018.pdf>



Backbone recommends

That the rights of children as defined in current and historical legislation and/or in international conventions are noted in the Inquiry Terms of Reference and a rights-based lens is used by the Inquiry panel.

The long term 'tail' of state responsibility

Many of today's abusive parents were abused as children while in state care. It is therefore critical for the Inquiry to clearly understand that if the state failed to keep a child safe when they were in state care, then when that child grows up to be a parent and then abuses their own children, the state is to some extent responsible for the abuse of the next generation. This is similar to the state's responsibility for children born with birth defects after one of their parents was exposed to Agent Orange in the Vietnam war.

Backbone recommends

That the Inquiry Terms of Reference are clear that the redress processes for individuals will need to include those abused as a result of the inter-generational flow on effect of children abused in state care, for example children who were abused by a parent(s) who had been abused in state care, who were taken into state care because of the inability of their natural parent who was a victim of state abuse to look after them. That the Inquiry notes that because of this these consequential victims are also victims of the abuse their parent(s) suffered while in state care.

Thank you for the opportunity to make this submission.

A handwritten signature in black ink, appearing to be 'Ruth Herbert' followed by 'Deborah Mackenzie'.

Ruth Herbert and Deborah Mackenzie  
Co Founders  
The Backbone Collective



## Appendix 1

### Care of Children Act 2004

#### **31 Application to court**

- (1) An eligible person may make an application to a court with jurisdiction under this section for—
  - (a) an order placing under the guardianship of the court a child who is not married, in a civil union, or in a de facto relationship:
  - (b) an order appointing a named person to be the agent of the court either generally or for any particular purpose.
- (2) In this section, **eligible person**, in relation to a child, means any of the following persons:
  - (a) a parent or guardian of the child:
  - (b) a grandparent or an aunt or an uncle of the child:
  - (c) a sibling (including a half-sibling) of the child:
  - (d) a spouse or partner of a parent of the child:
  - (e) the child himself or herself (who may apply without any litigation guardian):
  - (f) the chief executive:
  - (g) any other person granted leave to apply by the court.

Compare: 1968 No 63 s 10B

Section 31(1)(a): amended, on 1 July 2005, by [section 3](#) of the Care of Children Amendment Act 2005 (2005 No 5).

Section 31(2)(d): amended, on 1 July 2005, by [section 3](#) of the Care of Children Amendment Act 2005 (2005 No 5).