IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA701/2023
[2024] NZCA 128

BETWEEN	CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES (AUSTRALASIA) LIMITED Appellant
AND	ROYAL COMMISSION OF INQUIRY INTO HISTORICAL ABUSE IN STATE CARE AND IN THE CARE OF FAITH-BASED INSTITUTIONS First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing:	21 March 2024
Court:	Cooper P, Goddard and Cooke JJ
Counsel:	S P Jerebine and B R Prewett for Appellant S J M Mount KC, T M F Powell and R F Harvey-Lane for First Respondent A S Butler KC, J E L Carruthers, J N E Varuhas and R E R Gavey for Second Respondent
Judgment:	24 April 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the second respondent costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooke J)

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[1] The appellant, the Christian Congregation of Jehovah's Witnesses (Australasia) Ltd, is an Australian public company which describes itself as a conduit for religious direction to Jehovah's Witness congregations in Australia, New Zealand and the South Pacific (the Jehovah's Witnesses).[1] It appeals from a decision of the High Court dismissing a judicial review challenge to the activities of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (the Commission).[2] The High Court dismissed all 17 causes of action that had been advanced.

[2] On appeal the Jehovah's Witnesses focus on two key arguments: that the Commission had exceeded its terms of reference prior to their amendment in September 2023 by conducting inquiries into the Jehovah's Witnesses; and that the amendment was targeted at the Jehovah's Witnesses in breach of their rights under s 27 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and was promulgated with an improper purpose.

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1 We will refer to the appellant as the Jehovah's Witnesses in this judgment given its representation of the interests of the congregations.

2 *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 2985 [Results judgment]; and *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 judgment].

[3] As in the High Court, the appeal has been accorded urgency, and given priority over the Court's other work given that the scheduled report date for the Commission was 28 March 2024.[3] Before this Court the substantive opposition to the arguments advanced by the Jehovah's Witnesses was provided by the Attorney-General. The Commission abided the decision of the Court. Counsel for the Commission appeared at the hearing to provide assistance to the Court.

Background

[4] On 1 February 2018, a Royal Commission of Inquiry into Historical Abuse in State Care was established by Order in Council.[4] Its establishment arose from a number of calls for a public inquiry into historic abuse of children, young persons and vulnerable adults in State care, and followed a pattern of similar inquiries overseas.[5] At this stage, however, the inquiry only concerned abuse "in State care" as defined by the terms of reference.

[5] In May 2018, the Minister of Internal Affairs was presented with feedback on the terms of reference for the inquiry, which included suggestions that the scope of the inquiry should be extended to include abuse in care provided by faith-based institutions. Both the Anglican and Roman Catholic Churches had suggested that the inquiry would be enhanced if the terms of reference were extended in this way, and there was broad support for this from other faith-based institutions, non-state organisations and survivors of abuse. By further Order in Council, dated 12 November 2018, the terms of reference scheduled to the Order were amended to incorporate this change.[6]

[6] The terms of reference were later amended again, but at the time these proceedings were commenced the terms were those of 12 November 2018. The Order and the accompanying terms of reference were, and are, lengthy. The recitals included the following:

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3 Following the hearing, an extension was granted until 26 June 2024.

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

5 For examples, see the Australian Royal Commission into Institutional Responses to Child Sexual Abuse; and the Independent Inquiry into Child Sexual Abuse of England and Wales.

6 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018.

Whereas for a number of years, many individuals, community groups, and international human rights treaty bodies have called for an independent inquiry into historical abuse and neglect in State care and in the care of faith-based institutions in New Zealand:

Whereas historical abuse and neglect of individuals in State care or in the care of faith-based institutions warrants prompt and impartial investigation and examination, both to—

(a) understand, acknowledge, and respond to the harm caused to individuals, families, whānau, hapū, iwi, and communities; and

(b) ensure lessons are learned for the future:

[7] The matters of public importance were specified in the following way:

4 Matter of public importance that is subject of inquiry

The matter of public importance that is the subject of the inquiry is the historical abuse of children, young persons, and vulnerable adults in State care, and in the care of faith-based institutions.

[8] In describing the purpose and scope of the inquiry, the scheduled terms of reference included the following:

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:

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:

(c) the policies, rules, standards, and practices that applied in care settings and that may be relevant to instances of abuse (for example, hygiene and sanitary facilities, food, availability of activities, access to others, disciplinary measures, and the provision of health services):

(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.

10.4 The circumstances that led to individuals being taken into, or placed into, care and the appropriateness of such placements. This includes any factors that contributed, or may have contributed, to the decision-making process. Such factors may include, for example, discrimination, arbitrary decisions, or otherwise unreasonable conduct.

(a) With regard to court processes, the inquiry will not review the correctness of individual court decisions. It may, however, consider broader systemic questions, including the availability of information to support judicial decision making, and the relevant policy and legislative settings.

10.5 During the relevant period, what lessons were learned; and what changes were made to legislation, policy, rules, standards, and practices to present and respond to abuse in care.

…

10.7 The redress processes for individuals who claim, or have claimed, abuse while in care, including improvements to those processes.

[9] Various definitions were also set out in the terms of reference, including the following definition of "in the care of faith-based institutions":

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:

(b) for the avoidance of doubt, if faith-based institutions provided care on behalf of the State (as described in clause 17.3(b) above), this may be dealt with by the inquiry as part of its work on indirect State care:

(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.

[10] The Commission published a Pānui on its website advising how the Commission understood the terms of reference applied to faith-based institutions in April 2019. In September 2019, the Commission then wrote to the Jehovah's Witnesses indicating that it expected evidence at upcoming hearings concerning the experience of other inquiries overseas would include reference to the Jehovah's Witnesses. The Jehovah's Witnesses responded by advising the Commission that, in their view, the Jehovah's Witnesses had never assumed responsibility for the care of children, young persons, or vulnerable adults and that their activities fell outside the terms of reference. This was because the Church did not have any residential facilities, nor did it operate in any other way that involved the systematic care of such persons. This position was first taken in a letter from the Jehovah's Witnesses to the Commission in October 2019.

[11] The Commission nevertheless continued with its proposed investigations. In October 2020, it served a notice to produce documents on the Jehovah's Witnesses under s 20(a)(i) of the Inquiries Act 2013. In response, the Jehovah's Witnesses repeated their earlier argument that their activities fell outside the terms of reference, but they provided the requested documents without prejudice to their stance. On 2 September 2021 the Commission published a draft minute (Minute 16) on Faith-based Care which explained why the Commission did not accept the approach

contended for by the Jehovah's Witnesses. Minute 16 was issued in final form on 31 January 2022.[7] The Minute stated, inter alia:

> 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).

[12] That approach was consistent with the approach earlier described in an interim report by the Commission dated 4 December 2020,[8] and a redress report dated December 2021.[9] The parties nevertheless continued to exchange views. This included a meeting in March 2023. The differences between the parties were not resolved however, and these proceedings were filed on 27 March 2023 alleging that the Commission was exceeding its terms of reference by inquiring into the activities of the Jehovah's Witnesses.

[13] By Minute 29, dated 28 July 2023, the Commission further addressed the Jehovah's Witnesses' arguments.[10] That minute expanded upon the Commission's view of the terms of reference, including by reference to the evidence that the Commission had received during its inquiries. For example, in relation to the activity of "witnessing" — where members of the Jehovah's Witnesses go door-to-door to explain the faith to members of the wider community — the Commission referred to evidence it had received and said:

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7 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Minute 16: Faith-based care* (31 January 2022).

8 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Tāwharautia: Pūrongo o te Wā — Interim Report: Volume One* (4 December 2020) at 70–71.

9 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *He Purapua Ora, he Māra Tipu: From Redress to Puretumu Torowhānui — Volume One* (December 2021) at 46–48.

10 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions *Minute 29: The Christian Congregation of Jehovah's Witnesses* (28 July 2023).

> 84. Given the evidence summarised above, the Inquiry cannot accept the Jehovah's Witnesses' submission that the Church is wholly outside the terms of reference. The evidence of the former elders indicates, at least to a prima facie level, that children have been in the care of the Jehovah's Witness Church for the purpose of witnessing. The Church's assumption of responsibility for those children arises through the conferral of authority and trusted status on elders, and the routine actions of elders in taking children into their care, unsupervised, for witnessing. …

[14] Similar conclusions, or preliminary views, were expressed in relation to other church-based activities such as pastoral support and care, working bees and similar activities.[11]

[15] Around the time that Minute 29 was being finalised, the Minister of Internal Affairs received advice concerning the Commission's progress towards providing its report, including the implications of the judicial review challenge that had been commenced by the Jehovah's Witnesses. The Chair of the Royal Commission wrote to the Minister on 4 August asking her to consider further amending the terms of reference. The Minister was agreeable to this proposal and such an amendment was approved by Cabinet. On 8 September 2023, the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Amendment Order (No 2) 2023 (the Amendment Order) came into effect.[12] It amended cl 17.4 of the terms of reference to add the following sub-paragraph to the definition:[13]

> (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:

[16] The Jehovah's Witnesses nevertheless continued with this judicial review challenge, and by a second amended statement of claim, dated 21 September 2023, they added allegations that the amendment of the terms of reference was unlawful, including on the basis that the amendment was made for an improper purpose, and that

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11 At [86]–[99].

12 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Amendment Order (No 2) 2023, s 2.

13 Section 6.

it was inconsistent with the Jehovah's Witnesses' rights under s 27 of the Bill of Rights.

[17] The Commission was originally required to provide its report by 28 March 2024. The High Court heard the challenge as a matter of urgency and released a results judgment promptly on 25 October 2023, followed by reasons on 31 October 2023. Whilst Ellis J addressed a number of matters in her decision, when addressing the allegation that the Commission had exceeded its terms of reference prior to their amendment she placed emphasis on her analysis of a preliminary issue concerning the role of the Court in reviewing commissions of inquiry. She summarised her conclusions on that issue in the following way:[14]

> (a) the Royal Commission's interpretation of its own [terms of reference] is an area in which the Court should afford latitude to the Royal Commission and with which it should interfere with caution;
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> (b) in interpreting the meaning of "in the care of a faith-based institution" the Royal Commission would be justified in taking a remedial, purposive, approach and would also be justified in having regard to the way in which the general law deals with the concepts of care and the assumption of responsibility;
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> (c) it is not for the Court whether certain evidence is capable of giving rise to a finding that individuals have suffered abuse in the care of the Jehovah's Witnesses as an institution, particularly when the Royal Commission itself has not yet made any findings in that respect; and
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> (d) the general law suggests a number of ways or circumstances in which individuals held out by a religious institution as trustworthy figures of authority, and (in turn) the institution itself, might be found to have assumed responsibility for the care of young and vulnerable congregants.

[18] In relation to the alleged breach of s 27 of the Bill of Rights arising from the amendment, Ellis J held that this Court's decision in *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council* and the Supreme Court decision in *New Health New Zealand Inc v South Taranaki District Council* applied, and that the claim could not succeed.[15] For the same reasons, she held that the

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14 High Court judgment, above n 2, at [161].

15 At [215]–[220], citing *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 [*Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council* (CA)]; and *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 60, [2018] 1 NZLR 1041 [*New Health New Zealand Inc v South Taranaki District Council* (SC)].

improper purpose argument also could not succeed.[16] The claim for judicial review was accordingly dismissed.[17]

[19] On 22 November 2023 the Jehovah's Witnesses filed this appeal, which was again accorded urgency. At the hearing of the appeal, the Court was advised that an extension of time had been sought for the report. The reporting date has since been extended to 26 June 2024.[18]

[20] On appeal the Jehovah's Witnesses advance two central arguments:

(a) that the Commission had exceeded the scope of its terms of reference prior to their amendment in Minutes 16 and 29, and that this Court ought to grant declaratory relief as a consequence; and

(b) that the Amendment Order was targeted at the Jehovah's Witnesses in a manner that was inconsistent with the Jehovah's Witnesses' rights under s 27 of the Bill of Rights, and that also involved an improper purpose, with the result that this Court should determine that the Amendment Order is ultra vires.

Did the Commission exceed its terms of reference?

[21] The first argument advanced by the Jehovah's Witnesses is that, prior to the terms of reference being amended, the Commission exceeded its terms of reference by conducting inquiries into their activities. They accept that, following amendment, such inquiries would be within the terms of reference (subject to the second argument addressed below). But they seek declaratory relief in relation to the activities of the Commission prior to the terms of reference being amended.

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16 High Court judgment, above n 2, at [220].
17 At [226].
18 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Amendment Order 2024, s 4(2).

The argument

[22] The Jehovah's Witnesses argue that the High Court erred in concluding that deference should be accorded to the Commission in identifying the meaning of the terms of reference. It is well established that the Court's duty is to ensure that inquiries keep within the limits of their lawful powers.[19]

[23] The Jehovah's Witnesses say that Minutes 16 and 29 involved a misinterpretation of the terms of reference as they identified a significantly wider concept than the true meaning of being "in the care of faith-based institutions" provided in cl 17.4. On the true meaning, the faith-based institution must assume responsibility for the care which involved the institution taking over the care of children, young persons or vulnerable adults. The focus was on institutional care provided by the relevant bodies, initially limited to State-based care, but then extended to institutional care provided by faith-based organisations. The scope of the inquiry was narrower than similar inquiries conducted overseas as a consequence. The Jehovah's Witnesses never provided institutional care for children, young persons or vulnerable adults. There was no institutional structure, system, practice or policy by which individuals were taken into care. If no care was provided by an institution the Commission was not empowered to include that institution in its report, and it was not authorised to report on the abuse of children that did not occur in institutional care.

[24] The evidence referred to by the Commission, particularly in Minute 29, was not capable of supporting a finding of an assumption of responsibility for the care of children, young persons, or vulnerable adults in accordance with cl 17.4. The High Court erred in holding there was "almost a complete bar" to the Court reviewing the Commission's conclusions on that evidence.[20] The evidence before the Commission demonstrated that activities such as witnessing, pastoral support and care, working bees, and cleaning and maintenance involved activities under the authority of the parents of the relevant children, not the assumption of responsibility by the Jehovah's Witnesses for the institutional care of those children. Parental autonomy and responsibility is a fundamental aspect of the Jehovah's Witnesses faith.

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19 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA) at 626.

20 High Court judgment, above n 2, at [122].

[25] It was further argued that the High Court had erred by placing reliance on irrelevant tort law concepts, such as the concept of vicarious liability. They involved different considerations which were wrongly imported into the terms of reference by the High Court.

Assessment

[26] We begin by observing that there is some artificiality involved in the Court assessing the meaning of the terms of reference and determining whether the Commission acted within those terms prior to their amendment. That is particularly so when the amendment was expressed to remove the very doubt that the proceedings are said to have raised. We question the utility of the Court definitively addressing such matters and issuing declarations given the arguments have been overtaken by the amendment. That is a matter to which we return.

[27] We accept, however, that the court plays an important role in ensuring that commissions of inquiry confine themselves to the authority conferred by the terms of reference contained in the Order establishing them. In explaining the role of the court in relation to commissions of inquiry in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* this Court said:[21]

> 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 rights of appeal against the reports. The reason is partly that the reports are, in a sense, inevitably inconclusive. Findings made by Commissioners are in the end only expressions of opinion. … 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 comply with any applicable rules of natural justice.

[28] Such limits are set by the terms of reference. This approach has been reiterated in a number of authorities concerning commissions of inquiry, including other

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[21] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)*, above n 19, at 653 per Cooke, Richardson and Somers JJ (emphasis added). See also at 626 per Woodhouse P and McMullan J. Upheld on appeal in *Re Erebus Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662, [1984] AC 808 (PC).

decisions of this Court.[22] It is also the approach adopted in comparable jurisdictions overseas.[23] In *Peters v Davison*, a Full Court of this Court comprehensively addressed the reviewability of commissions of inquiry. In relation to challenges advanced before a commission has reported, the Court said:[24]

> *Judicial review during the course of the inquiry*
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> Decisions made by the commission during the course of the inquiry have been subjected to judicial review. There has been no suggestion that the commission is empowered to make erroneous decisions on questions of law during the course of its inquiry. … In considering the Court's jurisdiction Cooke P said [in *Fay Richwhite v Davison*] at p 524:
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> > "There is no doubt that if in his ruling the Commission had fallen into a material error of law, or had laid down a procedure transgressing the principles of natural justice, or had reached a decision not open to a reasonable tribunal, a judicial review remedy would be available."
>
> Underlying these judicial interventions during the course of commissions of inquiry is the obvious public interest that commissions of inquiry be conducted in accordance with the law.

[29] It follows that we do not agree with the High Court Judge that it is for a commission to authoritatively determine the scope of its own jurisdiction, or that the courts should defer to the views of the commission on that question. 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. The argument that latitude should be accorded to administrative bodies and tribunals when determining the scope of their jurisdiction involves shades of the *Chevron* doctrine which applies in the United States of America.[25] As Hammond J explained in this Court in *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd*, this doctrine does not apply in New Zealand law as "what the statute means is *always* a question of law for the Courts.

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22 See *Cock v Attorney-General* (1909) 28 NZLR 405 (CA); *In re Royal Commission on Licensing* [1945] NZLR 665 (CA) at 680 per Myers CJ; *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 258; and *Peters v Davison* [1999] 2 NZLR 164 (CA).

23 *Landreville v The Queen (No 2)* (1977) 75 DLR (3d) 380; *Ross v Costigan (No 2)* [1982] 41 ALR 337 at 351; and *Douglas v Pindling* [1996] AC 890 (PC) at 904.

24 *Peters v Davison*, above n 22, at 183 per Richardson P, Henry and Keith JJ (Thomas and Tipping JJ concurring) citing *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA) at 524.

25 *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984); and *United States v Mead Corp* 533 US 218 (2001).

Unless that approach is adopted the rule of law itself is subverted."[26] The Jehovah's Witnesses are accordingly entitled to expect that the Court will uphold the rule of law in relation to matters affecting them just as much as anybody else.

[30] We also accept that there may be limited value in drawing analogies with other fields of law such as the concept of vicarious liability in the law of tort when interpreting the terms of reference. Whilst there might be similarities that can be identified between the scope of the terms of reference and some tort concepts, any assistance can only be by way of analogy, and given there is some complexity arising in these other fields of law, we consider that they are more likely to be a distraction than of real assistance. 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.

[31] That is not to say that an error of law arose from the consideration of such material by the Commission or the High Court, however. A relevant analogy can be drawn. But we do not consider that resort to other fields of law provides any real assistance when interpreting the terms of reference.

[32] Despite the above two points, we do not accept the Jehovah's Witnesses' argument that the High Court erred in reaching the conclusion that the Commission did not exceed its terms of reference.

[33] The terms of reference provided a detailed definition of the expression "in the care of faith-based institutions" in cl 17.4. We accept the submission that this demonstrates that there were intended limits on what the Commission was to inquire into and report on. But the limits of the Commission's role are framed using concepts that have elastic rather than prescriptive meanings, and their application is highly dependent on the facts and circumstances. 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

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[26] *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [116] per Hammond J (emphasis in original). See also [113]–[118].

a series of elaborations "for the avoidance of doubt" in the sub-paragraphs that follow. 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.[27]

[34] Whether the institution has assumed responsibility for care in any particular situation will accordingly depend on the facts and circumstances. Even the mere presence of a child in the company of an adult may involve some implication of responsibility for that child, and if the adult has a responsible role within a faith-based institution it may be able to be said that the institution had assumed responsibility for the child, particularly if there is some regularity associated with the care involved. If abuse occurred in that setting, inquiring into it would be within the terms of reference.

[35] The terms of reference also make it plain that the care of an individual can be shared between the institution and other persons, such as parents. For example, cl 17.4(a) expressly contemplates shared responsibility by excluding "fully private settings, *except* where the person was also in the care of a faith-based institution".[28] Clause 17.4(c) also makes it clear that there need not be a residential component to the care, and that it can occur outside the institution's premises. So, these situations involve questions of degree. There are unlikely to be bright-line distinctions that can be drawn. For these reasons, the question whether a faith-based institution had assumed responsibility for the care of any particular child, young person, or vulnerable adult is highly circumstantial.

[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

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27 That is not to say that one-off situations could not be addressed.

28 Emphasis added.

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.

[37] There is also a significant misconception involved in the contention that the Jehovah's Witnesses' activities could be excluded from the scope of the inquiry as a result of these arguments. The function of the Commission is not to determine guilt or ascribe fault to particular institutions or persons. It is not pursuing allegations against any such institutions. Its function is to inquire and report upon a subject matter identified by the terms of reference, and make recommendations in relation to a matter of public interest.

[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 set out at [8] above.

[39] That is particularly so when a commission is in the inquiry phase. A commission of inquiry is entitled to pursue lines of inquiry to fulfil its functions. The position was described in the following way by the Privy Council in *Douglas v Pindling*:[29]

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[29] *Douglas v Pindling*, above n 23, at 904. See also *Mount Murray Country Club Ltd v Macleod* [2003] UKPC 53 at [27]; and *R (on the application of Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2023] EWHC 1702 (Admin) at [53].

> If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. The commission can do no more than pursue lines of inquiry that appear promising. These lines may or may not in the end prove productive.

[40] The New Zealand authorities have made a similar point, albeit sometimes describing the scope of investigative powers in more confined terms.[30] But the more confined description in some of the cases is partly explained by the scope of the particular inquiries that have been in issue. Where the inquiry is into a category of activity over a longer period of time, because of its broader impact, the lines of inquiry are likely to be less confined. This point is reiterated in the terms of reference for this inquiry:[31]

> 14. The inquiry may consider other matters that come to its notice in the course of its work, if it considers this would assist the inquiry in carrying out its functions and in delivering on its stated purpose.

[41] We do not consider that this clause itself could have authorised inquiries that clearly did not fall within the terms of reference. But it illustrates the broad nature of the Commission's intended inquiry.

[42] As the High Court Judge rightly emphasised, the present challenge has been advanced during the Commission's inquiry phase, and before the final report has been formulated. There are generally two ways in which a commission's exercise of powers or functions have been subject to judicial review. The first is a challenge to the exercise of investigative powers, and the second is a challenge to a report. But, in the present case, the Jehovah's Witnesses are not challenging any step the Commission has taken to date in the exercise of its statutory powers. Rather, they are effectively seeking a declaration excluding them from the Commission's inquiry. Whilst the release of minutes by the Commission could evidence an error of law, it is unlikely

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30 *In re Royal Commission of Licensing*, above n 22, at 680 and 683 per Myers CJ; *In re the Royal Commission to Inquire into and Report upon the State Services in New Zealand* [1962] NZLR 96 (CA) at 115–116; *In Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)*, above n 19, at 666 per Cooke, Richardson and Somers JJ; and *Re Erebus Commission; Air New Zealand Ltd v Mahon*, above n 21, at 671.

31 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018, sch.

that a challenge could be successfully advanced unless more clearly directed to the exercise of powers influenced by that error.

[43] Here the challenge would have needed to have been to the exercise of the Commission's investigative powers. The Jehovah's Witnesses have provided the information and evidence the Commission requested without prejudice to its contentions, including information that disclosed abuse of children by members of the Church. Had they not done so, and the challenge had been focused on such investigative powers, the difficulty with the argument now advanced would have been more clearly apparent. That is because the Commission was entitled to seek the kind of information held by the Jehovah's Witnesses to see if it provided assistance in addressing the issues raised by the Commission's terms of reference on the basis we have already discussed.

[44] A challenge could also have been advanced on the basis that the alleged error of law affected the contents of a proposed report. But the terms of reference were amended following the filing of these judicial review proceedings to provide, "for the avoidance of doubt", that the kind of matters the Commission had indicated were within the terms of reference are indeed to be covered. Given this amendment, there can be no doubt these matters are appropriately addressed in the Commission's report.

[45] The only theoretical possibility that then remains would be an argument that the Commission had acted unlawfully when initially obtaining information prior to the amendment, and that this material cannot now be used by the Commission in the report. However, Ms Jerebine confirmed that no argument to that effect is advanced by the Jehovah's Witnesses. And we struggle to see how such an argument could succeed in circumstances where the information is in the possession of the Commission and is relevant to the terms of reference as amended.

[46] In any event, we have reached the view that the Commission was entitled to pursue the lines of inquiry that it did, including for the very purpose of determining whether the matters it identified were appropriately addressed as part of its report. We are not satisfied that the Commission has taken any steps that exceeded its terms of reference. The amendment of the terms of reference puts the matter beyond doubt.

[47] For these reasons we reject the arguments advanced by the Jehovah's Witnesses concerning the terms of reference.

Was the Amendment Order ultra vires?

[48] The second main aspect of the Jehovah's Witnesses' appeal is the argument that the amendment to the terms of reference by the Amendment Order was unlawful. This is said to be for two interrelated reasons. First, it is argued that the Amendment Order was promulgated in breach of the rights of the Jehovah's Witnesses under s 27 of the Bill of Rights which relevantly provides:

> **27 Right to justice**
>
> …
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
>
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[49] Secondly, the Jehovah's Witnesses say that the Amendment Order was targeted at their judicial review claim and was accordingly promulgated for the improper purpose of defeating that claim.

The argument

[50] The Jehovah's Witnesses argue that the Amendment Order infringed their rights under s 27(2) and (3) of the Bill of Rights. They say the right in s 27(2) involves a guarantee that an applicant for judicial review is able to obtain a remedy to right any wrong that occurred before any validating legislation comes into effect.[32] The Amendment Order was inconsistent with this right as it prevents the Jehovah's Witnesses from obtaining meaningful relief to correct the Commission's misinterpretations of its terms of reference.

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[32] *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council* (CA), above n 15, at [94].

[51] The Amendment Order was not made by Parliament, and neither did it acknowledge the misinterpretations that had been identified, which were factors relied upon by this Court in *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council*.[33] The Order was executive action taken by the Crown targeting one faith-based institution by effectively enacting the Commission's challenged views into law.

[52] Similarly, the Jehovah's Witnesses say that s 27(3) of the Bill of Rights was engaged, as the Jehovah's Witnesses were litigating against the Crown-appointed Commission. The amendment prevented the Jehovah's Witnesses from obtaining meaningful relief in that challenge, and accordingly their proceedings were not heard in the same way as civil proceedings between private individuals.

[53] The Jehovah's Witnesses submit that these breaches of the rights in s 27 could not be justified under s 5 of the Bill of Rights in accordance with the test set out by the Supreme Court in *R v Hansen*.[34]

[54] In the alternative, the Jehovah's Witnesses argue that the Amendment Order was made for an improper purpose. The driver for making the Order was the Jehovah's Witnesses' application for judicial review. Reliance was placed on *R (Reilly) v Secretary of State for Work and Pensions (No 2)*, where it was held that the powers to legislate ought not be used to enact retrospective legislation designed to favour the executive in ongoing litigation before the courts.[35] Here, the Amendment Order was promulgated with a purpose of favouring the executive in ongoing litigation, and it was accordingly invalid. It was not promulgated to clarify the law prospectively albeit with consequential effect on the utility of litigation in the way described by the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council*.[36]

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33 *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council* (CA), above n 15.

34 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

35 *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2014] EWHC 2182, [2015] 2 WLR 309 at [328].

36 *New Health New Zealand Inc v South Taranaki District Council* (SC), above n 15, at [29] per Elias CJ, Glazebrook, O'Regan and Ellen France JJ.

[55] The Jehovah's Witnesses seek a declaration that the relevant parts of the Amendment Order are ultra vires the Inquiries Act and are otherwise unlawful and invalid.

Assessment

[56] We consider that the arguments advanced for the Jehovah's Witnesses mischaracterise both the rights guaranteed by s 27 of the Bill of Rights and the purposes for which the Amendment Order was made.

[57] Section 27(2) affirms the right to bring judicial review proceedings challenging the exercise of discretionary powers to ensure that they have been exercised lawfully. It is not a right to have the underlying substantive law fixed in the way that the applicant would like. Equally the right in s 27(3) is a right to sue the Crown in the same way as a private individual. It does not guarantee the content of the substantive law that is to be applied in such proceedings.

[58] There is no doubt, as Mr Prewett accepted for the Jehovah's Witnesses, that the Governor-General can establish terms of reference for a commission of inquiry as the Governor-General thinks fit, as reflected by s 7 of the Inquiries Act. That includes a power to amend the terms of reference, as is reflected in s 7(5) of the Inquiries Act. Mr Prewett also rightly accepted that such amendment powers could be exercised after judicial review proceedings had been determined in response to a judgment. But he argued that, during the period of time when the judicial review proceedings were on foot, the exercise of such powers in a manner adverse to the applicant would infringe the right guaranteed by s 27(2).

[59] We consider that this argument mischaracterises the s 27(2) right. A judicial review claim challenges particular decisions or exercises of power. The right in s 27(2) does not limit any subsequent decision or exercise of power unless the subsequent step seeks to validate, or otherwise immunise from challenge, the matters already under review. If it does affect the challenged matters, s 27(2) may need to be confronted. But when a power to amend the terms of reference is otherwise lawfully exercised, to so exercise it does not infringe the s 27(2) right simply because judicial review proceedings are on foot. To find that it did would involve a determination that

the applicant for judicial review is entitled to have the law substantively frozen in its favour, at least temporarily, by the simple technique of bringing such proceedings. This argument is wrong as a matter of principle.

[60] If any authority is needed for these conclusions it can be found in *New Health New Zealand Inc v Attorney-General*.[37] This decision followed the release of an earlier High Court judgment declining the application to judicially review measures requiring the fluoridation of drinking water supplies.[38] Before an appeal was heard against the first High Court judgment, new regulations were promulgated permitting the fluoridation of drinking water supplies. The applicants then commenced a further judicial review proceeding arguing that the passage of such regulations was unlawful and improper given the existence of the appeal.

[61] The second judicial review challenge was unsuccessful, with Kós J finding that both the legislative and regulation making powers could be exercised notwithstanding the existence of the appeal. He said:[39]

> [42] In the present context, I do not think the executive is … bound to stand idly by on the bank when a judicial contest about the legislative stream is being undertaken. The advent of such litigation does not render the legislative stream suddenly exclusive. Or dry up the otherwise available executive stream.
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> [43] The formulation of public policy is pre-eminently a legislative and executive act. Statutory power was conferred on the executive to determine [the] status of these compounds altogether apart from s 3 of the Act. Two streams, not one. The legislature has already declared the status of these compounds to a degree, but in a manner admitting argument. The executive is entitled to speak still. And certainly in a manner that is wholly prospective in effect.

[62] The argument was later advanced before the Supreme Court, who emphasised when rejecting it that the relevant regulations were prospective and not retrospective. The Court noted the concern with retrospective validation, but held:[40]

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37 *New Health New Zealand Inc v Attorney-General* [2015] NZHC 2138, [2015] NZAR.

38 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834.

39 *New Health New Zealand Inc v Attorney-General*, above n 37.

40 *New Health New Zealand Inc v South Taranaki District Council* (SC), above n 15, citing *R (Reilly) v Secretary of State for Work and Pensions (No 2)*, above n 35, at [90] (footnote omitted).

> [29] Here, where the purpose was to clarify the law prospectively, albeit with a consequential effect on the utility of the appellant's appeal, the same concern does not arise. Indeed, Lang J in *Reilly* considered that the "usual course" would be to prospectively amend the regulations to correct the earlier error.

[63] For these reasons we also consider that no support is found for the argument in the decision in *R (Reilly) v Secretary of State for Work and Pensions (No 2)*.[41]

[64] The Jehovah's Witnesses' argument is also inconsistent with the analysis of this Court in *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council*.[42] This Court held that even though the validating legislation was retrospective in that case the rights in s 27 were not ultimately infringed. One of the reasons provided in the majority judgment was that the rights of judicial review remained available to be exercised, albeit that certain forms of relief were no longer available.[43]

[65] That is also the position in the present case. The Jehovah's Witnesses' rights to bring judicial review proceedings have not been taken away. The Jehovah's Witnesses can exercise, and have exercised, their right to challenge the Commission's interpretation of the terms of reference before they were amended with these arguments fully advanced in both the High Court and this Court. They have sought only declaratory relief because there has been an amendment to the terms of reference, and their arguments cannot succeed in relation to the amended terms. But that has not removed their right to seek judicial review of the Commission for any reviewable decisions made prior to the amendment. As we have already indicated, we have doubts about the utility of granting any declaratory relief in such circumstances. But in any event we have considered the arguments and rejected them on their merits. The very fact that the Jehovah's Witnesses have appeared, and advanced these arguments, demonstrates that their right to do so has not been infringed.

[66] The above conclusions apply equally to the right in s 27(3). The Crown has enjoyed no special privileges in this litigation. All that it has done is exercise the

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41 *R (Reilly) v Secretary of State for Work and Pensions (No 2)*, above n 35.

42 *Mangawhai Residents' and Ratepayers' Association Inc v Kaipara District Council* (CA), above n 15.

43 At [188]–[189] per Harrison and Cooper JJ.

power to amend the terms of reference and with prospective effect only. The right to sue for matters prior to the amendment has not been taken away.

[67] For essentially the same reasons the improper purposes argument also fails. There is nothing improper in the Crown determining that it is appropriate to amend the terms of reference because there is a dispute about the proper meaning of the existing terms of reference that is before the courts. The uncertainties and delays arising from judicial review challenges of commissions of inquiry are a recognised phenomenon,[44] and it is legitimate for the Crown to respond to the adverse implications of litigation by amending the terms of reference. Equally, when amending the terms of reference there is nothing improper in the Crown adopting the views of the Commission when deciding what the scope of the inquiry should be. We accordingly see no basis for the improper purpose argument.

[68] Mr Prewett took us to passages of the Cabinet papers and surrounding documents and advanced the submission that the real purpose in amending the terms of references was to target the Jehovah's Witnesses, even to the point of submitting that some of the passages of those documents did not accurately identify the true purpose of the amendment.

[69] We do not accept that submission either as a matter of fact or law. The documents speak for themselves and identify the two interrelated purposes referred to at [67] above. The existence of the Jehovah's Witnesses' judicial review proceedings clearly provided an important part of the rationale for amending the terms of reference, and the amendment can be characterised as "targeting" those proceedings in that sense. But we do not accept that this means the amendment was illegitimate. As we have stated, seeking to eliminate the adverse implications of arguments about the meaning of the terms of reference that have reached the point of proceedings provides a proper reason to amend them, one way or the other, to resolve the dispute. And plainly it is open to the Crown to decide that it wants the Commission's report to address the full range of issues that the Commission has identified in its minutes. It could have done

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[44] In *Peters v Davison* [1999] 3 NZLR 744 at [3] the High Court noted that proceedings had been brought challenging the Commission in that case on 20 occasions over the three years of its inquiries.

so at the inception of the inquiry, and can do so at any subsequent time. It does not matter that the amendment reflected the Commission's preferred approach.

[70] We also do not accept the characterisation of these events as involving the Crown "targeting" the Jehovah's Witnesses. Rather, it is the Jehovah's Witnesses who have sought to single themselves out as a group who should be excluded from scrutiny by the Inquiry, and they have done so notwithstanding the evidence of abuse committed by members of the church. In the end all that has happened is that the Crown has acted to remove the uncertainty as a consequence of the point raised by the Jehovah's Witnesses.

[71] For these reasons we do not accept the Jehovah's Witnesses' arguments concerning s 27 of the Bill of Rights, or improper purpose.

Conclusion

[72] The appeal is dismissed.

[73] The second respondent is entitled to costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

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