

THE INQUIRY INTO HISTORICAL INSTITUTIONAL ABUSE

MODULE 15: KINCORA AND BAWNMORE

SUBMISSIONS ON BEHALF OF RICHARD KERR

1. Mr Kerr was resident in both Williamson House, Belfast and Kincora Boys Home, Belfast, and was sexually abused during his time in both institutions. He is a vulnerable individual who has suffered greatly at the hands of those charged with protecting him, and should be treated with the sensitivity that this deserves.
2. The allegations that he makes are among the most serious that could be made against agents of the state. Furthermore, allegations have been made consistently that agents of the state were aware of the abuse perpetrated at Kincora, and that the abuse was permitted to continue in order to protect senior public figures and in order to use the information to blackmail those abusers to provide information to the security forces and security services. Mr Kerr is concerned that these allegations are true and that the abuse he suffered was known to those in authority, including the security forces and security services, but was nevertheless permitted to continue.
3. Mr Kerr believed those allegations should also have been subject to the most rigorous and fearless scrutiny by the Inquiry, and was concerned at the approach of the Inquiry to survivors of abuse as well as the lack of powers over documents and witnesses. Due to his concerns he provided an affidavit in support of the judicial review taken by Gary Hoy seeking that the Inquiry be made compliant with Article 3 ECHR. That judicial review was

unsuccessful notwithstanding the that the Court of Appeal proceeded on the basis that Article 3 was engaged, as they determined that the obligations owed to Gary Hoy and those in his situation could be better determined after the Inquiry had completed its report.

4. Shortly prior to the Court of Appeal hearing Mr Kerr was invited to become a core participant to the Inquiry. Despite his concerns at the approach the Inquiry had taken to date he agreed in the hope that access to the core evidence bundle would allow him to provide valuable input to the Inquiry, and would inform him as to the level of knowledge the security forces and security services had about his abuse. Instead, and in stark contrast to the approach the Inquiry had maintained they would be required to adopt should any other survivor of abuse be granted legal representation (let alone core participant status), the Inquiry refused to permit Mr Kerr access to the majority of the documents making up the Core Bundle as provided to other Core Participants. Instead the Inquiry provided a bundle of some 740 pages, including duplications of documents, publicly available reports and transcripts of Mr Kerr's media interviews. He was provided with no documents touching on the knowledge of the security forces or security services with regards Kincora.
5. The Inquiry has now provided Mr Kerr with extracts from their draft report indicating that they intend to criticize him and permitting him an opportunity to make representations regarding those proposed criticisms.
6. These submissions will address those criticisms below. At the outset however it is fair to say that with the benefit of hindsight the decision of Richard Kerr to withdraw as a core participant appears to have been justified, particularly in light of the proposal to subject him to unfair and unwarranted criticism. The decision to conduct an examination of historical documents relating to him in order to identify what the Inquiry believes to have

been inconsistencies appears to have been conducted in a manner which failed to adequately consider the credibility or reliability of these records and in any event appears to have been unfair to Mr Kerr. It is fair to say that Mr Kerr has been disappointed by the Inquiry's approach, which appears to have subjected the accounts and records of the state and institutions to inadequate scrutiny. This is particularly disappointing given the serious allegations of collusion that surrounds Kincora, and particularly so given that the persistence of these rumours has ensured there is particular need for a comprehensive investigation in order to finally determine the truth of these matters.

7. In any event the criticisms of Mr Kerr are entirely unfair, unwarranted and inappropriate and should be removed from the HIA's final report in their entirety.

#### **Summary of Mr Kerr's Submissions**

8. In summary Mr Kerr submits that:
  - (i) Subjecting Richard Kerr to the criticisms contained amounts to a change of approach by the Inquiry which has not been justified or explained, and in relation to which he was not given any notice during the course of the hearings or at any point prior to the provision of the draft sections of the report to him. It is both unfair and unwarranted for the Inquiry to adopt this change of approach in his case.
  - (ii) The Inquiry has sought to criticize Richard Kerr for withdrawal as a core participant in circumstances where he did not have a proper opportunity to provide evidence to the Inquiry with the benefit of advance disclosure. This ensured that he was treated differently to other core participants and amounted to a change in approach to that which the Inquiry had previously insisted they would adopt without adequate explanation for that change of approach.

- (iii) The Inquiry could not have adequately have investigated the allegations of security force collusion and cover-up given that they failed to hear testimony from the three most notable individuals behind those allegations.
- (iv) In any event the Inquiry's approach to investigating allegations of collusion was manifestly flawed.
- (v) The Inquiry's procedures have ensured that the record-keeping of the state was not subjected to adequate scrutiny, with witnesses that were survivors of abuse given little time to consider or give properly informed evidence on state records.
- (vi) The Inquiry have included criticisms of Richard Kerr and recount allegations and difficulties from his childhood apparently without any need to do so.
- (vii) The Inquiry have accepted at face value the destruction or absence of records previously held by state agencies and have used this to conclude that the evidence does not support the account of individual witnesses such as Richard Kerr, when in fact the absence of such records could equally be indicative of collusive behavior.
- (viii) The Inquiry had insufficient evidence to reach the conclusions they have without having heard evidence from Richard Kerr. As a result they have reached erroneous conclusions based on inaccurate, incomplete and misleading information and evidence.
- (ix) The Inquiry appears to have adopted a similar flawed approach towards the three individuals who came forward to raise allegations of collusion in the abuse perpetrated at Kincora.

9. The result of the above factors is that the Inquiry has conducted an inadequate investigation into the allegations of collusion in to abuse at Kincora Boys Home, and have

sought instead to criticize a survivor of abuse who has been outspoken in his concern to ensure that those allegations are fully investigated.

10. Mr Kerr does not propose to give piecemeal evidence to the Inquiry through this submission, most notably because he has not been provided with an adequate core bundle that could permit him to make a full and properly informed statement. Nor has he or his legal representatives had the opportunity to consider the evidence of the majority of witnesses and particular witnesses on behalf of state agencies or institutions in circumstances where they have been provided with adequate disclosure of documents thereby ensuring that they could provide meaningful input and representation during that testimony.
11. The following is however notable from the proceedings at which Richard Kerr was represented and from the Inquiry's draft report.

#### **Inquiry decision to Scrutinise Richard Kerr's Accounts of Abuse**

12. The Inquiry noted that Richard Kerr had withdrawn as a core participant following their refusal to provide him with the disclosure he sought, and asserted that "*We have therefore had to assess his assertions on the basis of the material we have considered without having the benefit of whatever he might say to the Inquiry about these matters.*" It is not clear why the Inquiry concluded that they were required to assess the truth or otherwise of each of Richard Kerr's allegations in these circumstances. In any event their attempt to do so has clearly been based on insufficient information to reach a reliable assessment of the facts, and has resulted in the Inquiry reaching unwarranted, unreliable and irrational conclusions.

### **The Change in Approach of the Inquiry**

13. The Inquiry has for some time maintained that its approach would not be to determine whether specific instances of abuse occurred. This was a key factor in the decision of the Chairman on 4<sup>th</sup> November 2014 refusing to grant an award of legal representation to individual applicants.

14. In his determination of 4<sup>th</sup> November 2014 the chairman stated:

*“[8] In considering these applications it is essential to bear in mind three fundamental matters. The first is that the Inquiry is required to consider whether or not there were “systemic failings”. The second is that section 1(5) of the 2013 Act expressly forbids the Inquiry panel from ruling upon, and determining, any person’s civil or criminal liability. The third is that the Inquiry is not a trial, nor is it a series of trials, although to some the proceedings of the Inquiry may appear to resemble, or at least be an analogous in some way to, the proceedings of either a civil or criminal trial, but I must emphasise that such a perception is fundamentally misplaced. As will appear, many of the arguments put forward in support of the present applications are based either wholly or to a predominant extent upon this misplaced perception.*

...

*[10] In order to determine whether there were systemic failings on the part of an institution or the State the Inquiry has to consider all of the evidence gathered by it that it considers relevant, and this inevitably involves considering the allegations made by or against individuals or institutions. Whilst the Inquiry has to consider individual allegations in order to come to factual conclusions which in turn will inform whether we determine that there were systemic failings or not, this process does not require us to decide in the great majority of instances whether a particular fact has been established or not. In other words, it is generally unnecessary for the Inquiry to decide whether A or B is telling*

*the truth about a specific incident, because we are required to consider whether or not there were systemic failings. In the majority of instances these decisions will be made by the Inquiry on the basis of the findings we make in relation to the evidence of many individuals, as well as taking into account other matters such as the documents considered by the Inquiry, and what individuals other than applicants, and the institutions or governmental or public bodies may say, whether or not what they say amounts to a full, or a partial, acceptance of the existence of systemic failings or of specific circumstances.*

*[11] Nevertheless the Inquiry accepts that there may be some, although we believe not many, instances where acts or omissions alleged in respect of a single, or a very small number, of individuals or episodes may be of sufficient gravity to amount to a systemic failing if those allegations are accepted in whole or in part by the inquiry."*

15. That decision was upheld as lawful by the Court of Appeal in BP's Application precisely because of the fact that the Inquiry was determining systemic issues rather than whether individual instances of abuse took place.

16. In finding that the Inquiry's approach was not unlawful the Court of Appeal relied on the finding that "[21] ... *the inquiry's proper focus is on the question of systemic failures arising from a broad range of matters and from a wide body of evidence. The Inquiry is not expected to reach conclusions on every allegation.*

17. The Court of Appeal accepted that the HIA was

*"[33] ... not interested in every aspect of detail of allegations and does not engage in a trial of individual allegations; rather it is concerned at looking at the question whether there were systemic failures. Thus, a finding by the Inquiry that a systemic failure did occur does not necessarily involve an acceptance or a rejection of a specific allegation of abuse. The possibility of the non-acceptance or*

*rejection of a specific allegation does not mean that a witness is facing the kind of explicit or significant criticism which triggers the need for that person to have legal representation.*

...

[40] ... *Witnesses who were children resident in and subject to the institutions, such as the applicant, provide evidential material from which the inquiry must draw conclusions that play into the central question of whether there were systemic failings. Such witnesses are in a wholly different situation from core participants. The inquiry is not called on to make definitive findings on every individual specific complaint or allegation made by the witnesses who were relevant residents. Indeed, the inquiry's procedure and the framework of the inquiry are not designed to make definitive findings in respect of each allegation. What must be determined is whether the totality of the evidence leads the Inquiry to conclude that there were systemic failings. Indeed, to descend into the precise findings in relation to each and every contested allegation would require a different focus and procedure likely to considerably lengthen the Inquiry, increase its costs and would be liable to divert attention away from the wider question of systemic failings.*

...

[43] *If the Inquiry, notwithstanding the chairman's current view that there is no real likelihood of criticism, were subsequently minded to subject the applicant to criticism in its report, two issues would arise for consideration. Firstly, the question would arise whether it would be fair to do so when the Inquiry had decided not to provide legal representation against the background of an expressed view of the criticism was unlikely. The rejection or non-acceptance of an allegation would not itself constitute explicit or significant criticism of an individual for the purposes of Rule 5, particularly where, as here, the applicant would remain anonymized as would the alleged perpetrator X. If, as seems likely, the tribunal were to decide that it would not be fair in such circumstances to subject the applicant to the criticism then no criticism would be made.*

*[44] If notwithstanding its earlier view that criticism was unlikely, the Inquiry considered that notwithstanding its earlier view, it was now minded to move the stage of considering express criticism of the witness then Rule 14 of the Rules would come into play. If the Inquiry were minded to make adverse critical comments in relation to a non-core participant witness who was unrepresented before the Inquiry then the inquiry would be bound to fashion a procedure that was procedurally fair before any explicit criticism was made. Such a fair procedure would require a reconsideration of the question whether fairness required that the witness should be provided with legal representation.*

*[45] That situation has not arisen, may well never arise and, indeed, is unlikely to arise because of the approach taken to date by the Inquiry and because of the way in which it has approached the evidence of witnesses such as the applicant. However, the inquiry has not precluded itself and cannot preclude itself from reconsidering the issue of legal representation as matters develop. ... ”*

18. In Gary Hoy's Application [2016] NICA the Court of Appeal relied on the fact that the Inquiry was investigating systemic issues rather than purporting to conduct an Article 3 inquiry into allegations of abuse (para 30)
19. In contrast, the Inquiry has decided to adopt a change of approach in Richard Kerr's case despite the fact that he did not provide them with a witness statement and did not attend the Inquiry to give evidence. This has meant that the Inquiry had no opportunity to consider his testimony first-hand, nor has Mr Kerr had an opportunity to give evidence to address what the Inquiry believe to be inconsistencies in his accounts. Despite this background, the Inquiry's draft report purports to determine which of Mr Kerr's accounts are more likely to be true, and specifically addresses individual allegations of Mr Kerr's which they consider to be untrue.

20. This is all the more concerning in light of the fact that Mr Kerr was not invited to become a Core Participant on the basis that he may be subject to criticism by the Inquiry. Rule 5 (2) of the Inquiry Rules sets out the possible bases for designating a Core Participant:

*“(2) In deciding whether to designate a person, body, organisation or institution as a core participant, the chairperson must in particular consider whether —*

*(a) the person, body, organisation or institution played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;*

*(b) the person, body, organisation or institution has a significant interest in an important aspect of the matters to which the inquiry relates; or*

*(c) the person, body, organisation or institution may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.”*

21. The letter from the HIA inviting Mr Kerr to become a Core Participant stated:

*“The Chairman is aware that you act for Mr Kerr, and notes that on 16 February 2015 Mr Kerr swore an affidavit which was lodged by your firm in the judicial review application made by Gary Hoy. In this affidavit Mr Kerr set out in considerable detail various episodes of sexual abuse he suffered whilst a resident of Kincora.*

*The Chairman is also aware that on many occasions Mr Kerr has made comments to the press and media which suggest that he has information which is relevant to the Inquiry’s investigations.*

*The Chairman believes that Mr Kerr’s participation in the Inquiry’s investigations would be helpful and he has directed me to invite Mr Kerr to be a core participant in the Inquiry’s Module dealing with Kincora.”* **(letter from the HIA to KRW Law dated 28<sup>th</sup> April 2016)**

22. Mr Kerr was informed that he was being invited to become a Core Participant due to the *“significance of the allegations”* that he had made, and in particular the assertions he had

made with regards to being taken to various addresses where he engaged in sexual activity with other men. At no stage was he given an indication that his involvement as a Core Participant was sought due to the fact that he may be subject to criticism in the Inquiry Report. Nor was he informed that his allegations were deemed by the Inquiry to come within those rare instances where the treatment alleged were considered to be of sufficient gravity to amount to a systemic failing if accepted in whole or in part, and therefore required to be determined specifically by the inquiry. It is not clear why the Inquiry believes that these allegations do fall within this category given that they have accepted that Richard Kerr did suffer abuse during his time in care.

23. Richard Kerr did not in fact appear and give evidence before the Inquiry as a core participant witness. He was not at any point warned that, rather than focusing on systemic issues, the Inquiry were considering or intending to subject each allegation or account he had reportedly made to individual scrutiny, and intended to determine what they believed the truth of each such matter to be in their final report.
24. In any event, if the Inquiry proposed to criticize Richard Kerr in the manner proposed, fairness should have required that there be adequate disclosure of documents and adequate representation during the evidence of the witnesses before the Inquiry. The Inquiry in fact refused to provide such adequate disclosure, which rendered his legal representatives insufficiently informed in order to properly represent him before the Inquiry, thus forcing his withdrawal as a core participant.
25. Furthermore Richard Kerr is not anonymized, thus making the Inquiry's decision to criticize him personally all the more serious and requiring exceptionally good reasons to justify. Such justification is not contained in the draft Report.

26. If the Inquiry proposed to depart from their publicly maintained policy in respect of Richard Kerr then he should have been informed of this at the outset and permitted an opportunity to challenge that approach at a much earlier stage. The HIA Inquiry should also have provided reasoning to justify this approach. In the absence of such reasoning this change of attitude in the specific case of Richard Kerr gives the appearance of irrationality. In light of this background it is submitted that it cannot be procedurally fair or within the bounds of reasonableness to criticize Richard Kerr in the final report of the Inquiry.

### **The Inadequate Disclosure Provided to Richard Kerr as a Core Participant**

27. Notably in *BPs Application* the Applicant was not in fact seeking core participant status but had made allegations against a small number of individuals, including one individual who she gave evidence had abused her outside the home but when she was in the care of the Sisters of Nazareth. The Inquiry nonetheless made the case before the Court of Appeal that "*all relevant material*" in her case would run to "*several thousand pages*" should she be granted the legal representation sought.

28. In contrast Richard Kerr made allegations that he had been abused by a significant number of individuals, some of whom were unknown to him at the time. Former members of the security forces together with a high profile former associate of William McGrath who was also an intelligence source have made publicly reported statements that the security forces and services colluded in the abuse that was perpetrated on residents at Kincora, and enabled a cover-up of this abuse. The Inquiry accept that Mr Kerr was himself abused by agents or employees of the state during his time in the care of the state. The inquiry also state they have considered whether the Applicant had in fact been abused by Sir Maurice

Oldfield, the former head of the Security Services. Nonetheless the Chairman refused to provide him with more than the approximately 740 pages initially provided to him which was overwhelmingly made up of previous statements he had made together with previously public reports on Kincora, including duplicated documents. It is not clear why the Inquiry insisted that BP would require to be provided with “thousands of pages” despite the fact that she sought documents relating only to a small portion of the Module and was not seeking core participant status, yet in the case of Richard Kerr, who made much more wide ranging allegations, had raised concerns at collusion by the security forces and security services in his abuse, and who was offered the opportunity to become a core participant, was provided with less than one thousand. The difference between the proposed treatment of BP should she have been granted legal representation and Richard Kerr appears stark and unjustified.

29. The State bodies/agencies that were Core Participants to the Kincora Module of the Inquiry were provided with bundles that run to thousands of pages. This bundle manifestly did not contain the entirety of the documents that touch upon what various agencies of the State knew about the abuse perpetrated at Kincora and the individuals perpetrating that abuse, or when they knew it. Whilst these may be matters which were not in Mr Kerr’s knowledge they are important for understanding the significance and context of his evidence. The contents of these documents would have resulted in aspects of his evidence being of particular importance to determining whether or not there had been collusive behaviour, and would have informed him and his representatives on whether aspects of his evidence would be likely to meet particular scrutiny from either the Inquiry or from the legal teams representing those agencies of the State.

30. In order for Mr Kerr to have been properly represented as a core participant at the Inquiry he should have been provided with access to those documents touching on whether there was any state complicity in the abuse perpetrated at Kincora. These documents manifestly should have been regarded as documents which the Inquiry has gathered which were relevant to the issues on which Mr Kerr may have been able to assist the Inquiry. The failure to provide these documents made it impossible to provide representations on whether the absence of records themselves support a conclusion that there was state collusion and cover-up, or whether this was simply due to the passage of time.
31. In any event it amounts to a clear breach of the principle of equality that the security forces and security services represented as core participants have been provided with a bundle of documents that is 10 or 20 times greater than the volume of documents provided to Richard Kerr as a Core Participant survivor of abuse. In the context of an Inquiry that is investigating allegations that the security forces/security services knew that abuse was and would be perpetrated on the children in Kincora and covered this up this also appears inherently irrational and unreasonable.

### **The Failure to hear evidence from the key witnesses making allegations of Collusion**

32. Richard Kerr was concerned that collusion was a factor in his abuse, and in other abuse perpetrated at Kincora. Key to these concerns were the allegations made by Roy Garland, Colin Wallace and Brian Gemmell. In order to properly investigate these allegations the most basic investigation would require to hear evidence from these individuals. The Court of Appeal in Gary Hoy's Application for Judicial review clearly concluded that the Inquiry did not have the power to compel the attendance of witnesses in relation to matters of

national security. Nonetheless the Inquiry appears to continue to suggest that they did have such power but were declining to compel them as this was unnecessary. If that is the Inquiry's position it appears to be incorrect.

33. The approach of an Inquiry tasked with investigating allegations of collusion should have been to seek to identify whether there was any evidence to support those claims and to consider informed testimony on that evidence. That would have required the Inquiry to disclose relevant documents from the Core Bundle to Richard Kerr and thereby permit him to give properly informed testimony. It would also have required the Inquiry to treat historical records (or absence of them) with particular caution when assessing their accuracy and significance.
34. In any event the failure to hear evidence from these three individuals has prevented the Inquiry from having access to all the evidence necessary to investigate these allegations and reach conclusions on them. This submission makes the case that the inquiry has arrived at ill-informed and inaccurate conclusions in relation to Richard Kerr, basing their conclusions on inaccurate or misleading historical records without the benefit of testimony of the individual most able to provide an explanation.
35. The proceedings throughout the Kincora module appears to confirm that the Inquiry has adopted a similar approach towards Messrs Garland, Gemmill and Wallace. The result of this procedure cannot reasonably be used to dispel the concerns of state collusion that have persistently been associated with Kincora. That is particularly disappointing for Mr Kerr, who suffered abuse throughout his time in care and was desperate for this matter to finally be the subject of an effective investigation that could properly determine whether collusion

had been a factor in his abuse. The HIA Inquiry cannot reasonably be regarded as having been such an investigation.

### **Flawed Approach of the Inquiry Generally in Investigating Allegations of Collusion**

36. The Inquiry have adopted a flawed approach in their treatment of Richard Kerr. His decision to withdraw as a core participant further appears to have been a correct in light of similar flaws in the inquiry's approach throughout this module. Two examples in particular were noted from the short time Richard Kerr's representatives were present at Inquiry hearings.

- (i) The failure to make clear that the term "homosexual" was used at the time this abuse was first reported to refer to both consensual sexual activity between adult males and to the sexual abuse of minor males by adult males.**

37. It was revealed in the course of proceedings before the Inquiry that MI6 held a note relating to William McGrath in 1976 which described him as "bisexual" and Tara associates as being "homosexuals" and "sexual deviant". Counsel to the Inquiry suggested that the absence of any reference to child sex abuse in security service records to suggest that it was of importance that there was no evidence that MI6 were aware that McGrath was engaging in the abuse of children or paedophilia, or was likely to abuse children at Kincora (Day 205, pp. 31-33). This statement was based on the fact that homosexuality does not provide evidence of a predisposition to engage in child sexual abuse. However it appears that this conclusion is mistaken insofar as it does insufficient justice to the historical context of this term, which at the time was apparently used to (incorrectly) encompass the sexual abuse of minors in care. This is clear from the media reporting on Kincora in 1980 which referred to

“homosexual acts” and “homosexual prostitution” rather than child sexual abuse. The present Inquiry has itself appeared to have fallen into a similar trap (in paragraph 190) ] in using the term “homosexual acts” to refer to acts of child sexual abuse in relation to Stephen Waring. Whilst the use of this term in this manner is inaccurate, it is undeniable that the term was used in this manner at the time the abuse at Kincora was perpetrated. The failure to acknowledge this, and to present this record as evidence that the security services had no knowledge or information to suggest that William McGrath was abusing children in his care in 1976 was therefore incorrect and irrational.

**(ii) The Failure to Provide Witnesses with Advance Disclosure of Documents**

38. A key exercise for an Inquiry tasked with considering and determining allegations of collusion must be to scrutinize historical records in order to determine whether they are accurate, and whether the existence of documents (or absence of any records) can be regarded as determinative.
39. For the Inquiry to have properly considered the accuracy or otherwise of historical documents would have required them to obtain testimony from individuals on the accuracy of the records relating to them. Instead it was plain that in many instances the Inquiry provided inadequate advance disclosure to witnesses thereby depriving these witnesses of an effective opportunity to give informed evidence on the documents relating to their time in care.
40. The most glaring example of this failure was evidence in the testimony of **HIA199/R3** (See Day 209, pp. 58, 75 and 76) who was presented during his evidence with an inherently personal note from his mother relating to what was clearly a traumatic period in his life.

His testimony indicated that he had not in fact seen this note prior to that moment. This was manifestly inadequate as a procedure for obtaining best evidence, and it is difficult to see how such witnesses could be expected to give best evidence in such circumstances.

41. When Junior Counsel for Richard Kerr attempted to raise this approach in oral submissions the Chairman refused to hear these submissions and instead threatened his removal from the Chamber (Day 210, pp. 144-148).

42. The result of this procedure has been that the Inquiry will have been unable to properly consider or determine how accurate such documentary records are in the case of each individual. As the documents relating to Mr Kerr show, many of these historical records are incomplete, unreliable or misleading. The failure to obtain best evidence from each witness on their documentary records relating to their time in care has prevented a proper assessment of the evidence being undertaken, and will inevitably result in the Inquiry's findings being based on flawed and incomplete evidence.

43. That flawed approach has been clearly demonstrated in the approach taken to Richard Kerr.

#### **THE APPROACH OF THE INQUIRY IN RELATION TO RICHARD KERR'S PAST**

44. The Inquiry have made repeated reference to Richard Kerr's difficult past including allegations of criminal offences and alcohol abuse from a young age. This past highlights the failure of the state to properly care for and protect Richard Kerr, however no mention of that is made in this section of the Report, nor is it clear to what extent it appears elsewhere

in the Report. It is not therefore clear what relevance this has and in the absence of further explanation there appears no good reason to include this information in the Report. .

45. Similarly the evidence referred to by the Inquiry shows that Richard Kerr made multiple suicide attempts or attempts at self-harm (paras 172, 176). These instances should have given the Inquiry cause to identify what were clearly systemic failures in the care of Richard Kerr. In the absence of same it is not clear why the inquiry believed reference to these details required to be included, given that they publicise the most private and personal details of Richard Kerr's difficult past. In the absence of such reasons being provided there appears no good reason to include this information in the Report

#### **The Approach of the Inquiry in Considering Evidence on Richard Kerr in General**

46. The Inquiry has relied on the contents of historical reports, and in some cases the absence of such reports, to arrive at their conclusions. This approach is misguided and results in the Inquiry basing their conclusions on inaccurate, incomplete or misleading information. The reports cited by the Inquiry include the report by a social worker completed in 1979 purporting to discuss how well Richard Kerr settled into Kincora, where he first arrived in July 1975. The Inquiry has also sought to rely on psychiatric reports by Dr Clenaghan. In neither case does the Inquiry have Richard Kerr's evidence on these reports and as a consequence they have insufficient evidence on which to arrive at conclusions as to the accuracy of these reports. It is not clear why the Inquiry places such reliance on Dr Clenaghan's conclusions in particular given that he concluded that Richard Kerr suffered from "no deep depression", considered the fact that Richard Kerr had cut his wrist as an attempt to gain sympathy and avoid being sent to Borstal or Rathgael, and recommended observation for the "first week or so" should he be sent to either. Even on the limited

evidence before the Inquiry that conclusion appears to conflict with the reality of Richard Kerr's mental health in light of the injuries he is described as having inflicted on himself at paragraph 176 of the Report.

47. In any event the reliance on the absence of reports as a factor that indicates that Richard Kerr is unreliable fails to take into account the potential that the absence of records could indicate the existence of a cover-up. This is an accepted aspect of collusion generally as was acknowledged by the then Police Ombudsman Nuala O'Loan in the report on Operation Ballast published 22<sup>nd</sup> January 2007. This is one aspect of collusion that the Inquiry should have addressed. The apparent failure to do so ensures that it is unfair and unwarranted to criticize Richard Kerr for what they perceive as inconsistencies in his accounts based on the absence of historical records.

48. Similarly the fact that previous statements taken from Richard Kerr by the police did not contain allegations he later made in his affidavit should have led the Inquiry to examine whether there had been a failure to properly investigate the treatment he had suffered, and not automatically jump to the conclusion that this was evidence of Richard Kerr's unreliability. Previous police statements and reports contained what the officers themselves recorded and, in the absence of further evidence, cannot properly be used to determine the full extent of the abuse that Richard Kerr suffered prior to those statements being made. When these police statements were taken Richard Kerr was a young man who had been sexually abused by those in authority. These reports were recorded at a time when he had mistrust and indeed fear of those in authority including members of the security forces. Mr Kerr also had limited reading and writing skills, and therefore had little ability to influence what was actually recorded by the officers concerned. The Inquiry has engaged in unwarranted speculation as to why certain matters were or where not included in these

statements which has led the Inquiry to inappropriately jump to conclusions based on insufficient information for them to be regarded as valid or rational conclusions. If the Inquiry feels it must address these allegations individually it should make clear that they in fact have insufficient information before them to determine these issues.

49. Notably in relation to the Police Statement recorded from Richard Kerr in 1977 (KIN117629) Mr Kerr believes this to have been inaccurate and he believes this was the result of the police putting words into his mouth. Mr Kerr was at the time a vulnerable individual and the Inquiry had no evidence that those recording the statement took adequate procedures to ensure his interests were protected. Mr Kerr was at the time suffering from severe learning difficulties that included difficulty reading. The Inquiry themselves accept that the 1980 statement was incorrect insofar as it failed to state that William Edmonds had abused him. The statement taken by Sussex Police in 1982 was taken in circumstances where Richard Kerr felt scared and intimidated and did not trust the officers taking the statement. This should also be regarded as incomplete, inaccurate and misleading.
50. The Inquiry has referred in paragraphs 157-160 to an article published about the abuse suffered by Richard Kerr by *"a now defunct website calling itself exaronews.com (Exaro)"*. Richard Kerr instructs that the article is materially inaccurate. The Inquiry acknowledges that the accounts it provided were of *"limited value ... because they provide no detail to substantiate the allegations nor was it apparent how Richard Kerr came to recognize some of the individuals to whom he referred."* Nonetheless the Inquiry cites these allegations in detail and treats all the allegations as having come directly from Richard Kerr without evidence from either the publisher or Richard Kerr to confirm this.

51. In sum the Inquiry's treatment of documentary evidence in relation to Richard Kerr has been entirely flawed. This has further been reflected in the manner in which the Inquiry addressed matters from Richard Kerr's past.

### **Specifics from Richard Kerr's Past Addressed by the Report**

#### **Joseph Mains**

52. Reliance on the contents of historical police statements such as the 1980 statement (**KIN 108010**) taken from Richard Kerr will result in the Inquiry basing its conclusions on inaccurate, inadequate and misleading information. These statements contained what the author wanted them to contain and are not evidence of what Richard Kerr wanted them to contain. It is notable that the Inquiry accepts that Richard Kerr's statement did not include an account of any sexual abuse perpetrated by prison officer William Edmonds however the Inquiry accepts that he was abused by Edmonds, and Edmonds in fact admitted perpetrating some acts of abuse (para 192).

53. The reliance placed by the Inquiry on the letters that Richard Kerr was reported to have written to Joseph Mains during his time in Borstal as evidence that he had not sexually abused by him is misguided and based on inadequate information to reach that conclusion. The Inquiry did not before them an account from Richard Kerr of his motivation for writing these letters, or indeed his evidence on whether he did freely write them himself. The Inquiry has provided a copy of only one of these letters in the bundle received together with the Draft Report. This letter was written by Richard Kerr following a request by Joseph Mains that he do so. Richard Kerr had poor writing skills at this stage and was assisted in writing the letter by Mr Swann.

54. In fact the previous statements of Mr Swann and DC Scully considered by the Inquiry would support a conclusion that the authorities were or should have been aware of the real risk that Richard Kerr was being sexually abused by Joseph Mains at this stage. In fact Richard Kerr was being abused by him at this stage. For the Inquiry to deny this is misguided and wrong, particularly in circumstances where they manifestly have insufficient evidence to justifiably reach that conclusion.

### **The Death of Stephen Waring**

55. Richard Kerr maintains that Stephen Waring was sexually abused during his time in Kincora and believes that this was a material cause of his death. The draft Report does not refer to any investigation the Inquiry has conducted to conclude that Mr Waring was not in fact sexually abused during his time in Kincora. Nor had they sufficient evidence to reach a valid conclusion on what motivated Stephen Waring's behavior immediately before his death, particularly in the absence of evidence from Mr Kerr.

56. For the reasons already stated the Inquiry is wrong to attach significance to statements recorded by the police from Richard Kerr without hearing evidence from Richard Kerr on their contents. Their decision to do so has ensured they are acting on incomplete, inaccurate and misleading information.

57. Furthermore the reliance the Inquiry places on the Hughes Report appears misplaced for an Inquiry tasked with investigating abuse in circumstances where there have been allegations of collusion and cover-up. Merely because Stephen Waring was close to his brother does not mean that he inevitably would have told him of any sexual abuse he had suffered, and

the suggestion to the contrary is inherently irrational. Strikingly the Inquiry does accept that the evidence before the Hughes Inquiry suggested that Stephen Waring may have committed suicide but nevertheless feels confident enough to rely on that evidence to conclude that it suggests that that Richard Kerr was incorrect when he gave evidence in his affidavit that this had been related to sexual abuse he suffered during his time at Kincora.

58. Inexplicably the Inquiry rely on the evidence before the Hughes Inquiry to suggest that *“Stephen Waring may have committed suicide because he was drunk and did not wish to return to Rathgael, and that his tragic death had nothing to do with any homosexual activity as Richard Kerr has stated in recent years.”*

59. Richard Kerr’s affidavit plainly stated that he believed that Stephen Waring’s death was suicide motivated by the “abuse” he had suffered at Kincora, not due to consensual homosexual activity. In any event the Inquiry has not had the benefit of testimony from Richard Kerr on this issue and plainly has insufficient evidence to determine that Stephen Waring did not suffer sexual abuse during his time in Kincora, or to determine that such abuse was not a factor in his death.

60. The Inquiry sought to determine the reason for Stephen Waring’s death without hearing Richard Kerr’s evidence on this. They consequently had no way of properly determining the reasons he believes that Stephen Waring’s death was partly due to the abuse he suffered at Kincora. In the absence of this, the evidence before the Inquiry must be regarded as insufficient to reach a properly informed determination on this issue.

#### **Abuse Perpetrated by Prison Officer William Edmonds**

61. William Edmonds' account of his abuse of Richard Kerr should be regarded by the Inquiry as inaccurate and self-serving. The statement taken by Sussex Police in 1982 should be regarded as incomplete, inaccurate and misleading for the reasons set out above. The Inquiry should however have been able to determine the systemic failures towards Richard Kerr from the information available in relation to this abuse, that is that this was perpetrated by William Edmonds, a prison officer from his time in Borstal. It appears however that the Inquiry have sought to examine in detail these police statements taken from Richard Kerr and scrutinize them for inconsistencies. It is difficult to see what purpose this serves in determining systemic failure.

#### **Concerns in Relation to Richard Kerr's Time in Williamson House**

62. The Inquiry has cited a letter of 1979 in which the District Social Services Officer wrote to the Assistant Chief Probation Officer on 14 March 1979 to outline concerns at Mr Kerr's continued residence at Williamson House. Throughout this time Richard Kerr was a minor child who should have been protected by the authorities. The Inquiry does not appear to criticize these authorities for their failure to protect him, but rather cites in detail a number of allegations made in relation to Richard Kerr in circumstances where the necessity of this information is not clear. The Inquiry did not have an opportunity to consider Mr Kerr's evidence on this letter but in general he maintains these concerns were inaccurate and misplaced. In particular the allegation that there were concerns about the nature of his relationship with his sister is entirely false. It is not clear why the Inquiry believes it is necessary to reproduce such a scurrilous allegation within this report. These allegations in particular have the hallmarks of an attempt to smear Mr Kerr's character and should not be included in the Inquiry's report.

63. In fact when Mr Kerr was resident in hotels during this period there was even less scope for authorities to protect him from exploitation and abuse, a duty which remained on those charged with his care as a minor child. It is not clear why the Inquiry has made no adverse comment on the failure of state agencies to discharge their duties in this case, however the inclusion of these allegations in relation to Richard Kerr without making such a determination is unwarranted and unnecessary.

#### **Allegations relating to Dr Maurice Fraser**

64. For the avoidance of doubt Mr Kerr maintains he was examined by Dr Frazer and maintains he was photographed by him.

65. The Inquiry has considered Richard Kerr's public statements to this effect but has concluded that Mr Kerr is mistaken in his belief. In fact the Inquiry accepted that the evidence they considered had implied that he had undergone a psychological assessment by an educational psychologist on more than one occasion, but that they had been unable to identify any records of these assessments, and that all school records relating to Richard Kerr from this period had been destroyed. The Inquiry had apparently requested this information in a letter of 2<sup>nd</sup> December 2016 and were informed in a reply from the Education Authority Solicitors dated 21<sup>st</sup> September 2016 that all such records were destroyed in line with "applicable records management policy". A copy of that policy is not contained within the reply, nor is it clear whether the Inquiry has sought or obtained this.

66. In any event this clearly ensures that there is insufficient evidence for the Inquiry to dispel any possibility that Richard Kerr was seen by Dr Fraser, and the conclusion that "*all the*

*evidence suggests that Richard Kerr is mistaken in his belief that he was seen by Dr Fraser” is irrational and should be withdrawn.*

67. In any event the fact that there was no documentary evidence before the Inquiry confirming that these consultations took place is not definitive proof that they did not happen. Without hearing evidence from Mr Kerr on this point the Inquiry is acting on incomplete evidence and is not entitled to reach the conclusion they have.

### **Abuse Perpetrated on Richard Kerr at Williamson House**

68. The Inquiry did not hear evidence from Richard Kerr and as a result their criticism of him in relation to the allegations of abuse at Williamson House are based on incomplete, inaccurate and misleading information. The decision to engage in an exercise comparing statements taken from Richard Kerr by police at various times and speculating as to why particular details were or were not included is no basis on which to reach a determination as to whether incidents of abuse occurred. In any event it is not clear why the Inquiry has felt the need to reach a determination on these issues given the public position is that the Inquiry will only determine whether specific acts of abuse occurred where those acts themselves amounted to systemic issues. Considered in this light it appears unfair and irrational to criticize Mr Kerr. The pronouncement on what should or should not have embarrassed Mr Kerr, and the assumption that “*embarrassment*” was the only possible reason an incident of abuse would not have been recorded in a police statement taken from him is entirely inappropriate and unwarranted, particularly in circumstances where the Inquiry has not heard evidence from Mr Kerr himself.

**Abuse Perpetrated by William McGrath**

69. The Report seeks to draw attention, and thereby import some significance, to the fact that Richard Kerr included more detail in his account of the abuse perpetrated by William McGrath in his 2015 affidavit than he did in the statement recorded by Police in 1980. The Inquiry have already accepted that Mr Kerr's 1980 statement omitted details of abuse which they accept had in fact taken place, such as the abuse perpetrated by Prison Officer Edmonds.

70. It is not clear why the Inquiry has chosen to examine and determine the truth of the specifics of the abuse perpetrated on Richard Kerr by William McGrath. It is accepted that William McGrath was a serial sex abuser, and it is not clear why a determination of the specifics of these allegations is required by the Inquiry in order to identify systemic failings. In the absence of an adequate explanation for this the Inquiry's approach appears unfair and irrational.

**Inquiry's Overall Conclusions**

71. In light of the above submissions, the conclusions and criticisms in relation to Richard Kerr should be withdrawn in their entirety. In particular, in relation to the conclusions at paragraph 230:

- (1) The Inquiry has insufficient information on which to base this conclusion. Even without hearing evidence from Richard Kerr the evidence the Inquiry considered clearly did not exclude the possibility that he had been examined by Dr Fraser. This conclusion should not be included in the final report.

- (2) The Inquiry did not refer to any evidence that Richard Kerr asserted that Dr Fraser was responsible for his move from Williamson House to Kincora. Whilst the Inquiry may be entitled to conclude that he did not play such a role (and it is not clear to Richard Kerr that the Inquiry does have sufficient evidence to reach that conclusion) the phrasing of this conclusion so as to undermine the credibility of Richard Kerr makes it entirely unwarranted. This conclusion should not be included in the final report.
- (3) It is clear that there is information contained in some statements taken by the police from Richard Kerr that were not included in other statements taken by police from him. It is also clear that there was information contained in his 2015 affidavit for the Gary Hoy judicial review that did not appear in any previous police statement. The evidence considered by the Inquiry in relation to Mr Kerr highlights that incidents of abuse did occur notwithstanding that they were not included in a statement recorded by police. These inconsistencies are not evidence that Mr Kerr's accounts have changed or that abuse did not occur. Without hearing evidence from Mr Kerr there is clearly insufficient information for the Inquiry to arrive at an informed conclusion on this issue. In any event it is not clear why the Inquiry feels the need to include this comment and there appears to be no good reason for doing so. This conclusion should not be included in the final report.
- (4) The Inquiry has accepted that records relating to Mr Kerr's care and treatment have gone missing. The fact that evidence was not before the Inquiry that something did not take place does not amount to irrefutable evidence that something did not occur. In the absence of evidence from Mr Kerr the Inquiry has entirely insufficient evidence to reach a properly informed conclusion on this issue let alone to conclude that the evidence on it is irrefutable. Nor does the Inquiry have sufficient evidence of what happened Mr Kerr once he reached England to enable them to reach the conclusions set out. In any event, given the Inquiry's conclusions that (i) Mr Kerr was not trafficked to England; (ii) that

he did not travel there until he was eighteen; and (iii) that this period is outside the Inquiry's Terms of reference; the comments within the Report on what the Inquiry believe he did once he reached England are outside the scope of the Inquiry and should not have been included.

- (5) Given that the Inquiry have concluded that (i) Mr Kerr was not trafficked to England; (ii) that he did not travel there until he was eighteen; and (iii) that this period is outside the Inquiry's Terms of reference, the comments within their Report on whether it was his own decision to travel there are outside the scope of the Inquiry and should not be included in the final report. The letter of 20<sup>th</sup> March 1979 from the Assistant Chief Probation Officer is inaccurate and scurrilous, cannot be relied upon, and should not be set out in the Report. In any event the reference to Mr Kerr's background and behavior, the likelihood that he would return to borstal and the difficulties social services had with his behavior do not relate to systemic issues, are not necessary to include and should not be included in the final report.
- (6) The reference to the suggestion that Richard Kerr was likely to return to borstal should not have been included, and neither therefore should this sentence. For the same reasons cited in paragraphs (4) and (5) above the reference to him going of his own volition to live with his aunt in Preston should also not be included within the Report.
- (7) The Inquiry did not hear evidence from Richard Kerr. The conclusions as to why this had not appeared in previous statements taken by police are based entirely on speculation and are not merely ill-informed and irrational, but could also be regarded as offensive. These conclusions should be removed from the Report.
- (8) See (7) above.
- (9) The Inquiry did not hear evidence from Richard Kerr. These conclusions are based on speculation mixed with inaccurate, incomplete and misleading statements and are not

merely ill-informed and irrational, but could also be regarded as offensive. These conclusions should be removed from the Report.

(10) The Inquiry did not hear evidence from Richard Kerr. These conclusions are based on speculation mixed with inaccurate, incomplete and misleading statements and are ill-informed and irrational. The reference to such behavior is unnecessary. These conclusions should be removed from the Report.

(11) The Inquiry did not hear evidence from Richard Kerr. These conclusions are based on speculation mixed with inaccurate, incomplete and misleading statements and are not merely ill-informed and irrational, but could also be regarded as offensive. These conclusions should be removed from the Report.

(12) The Inquiry did not hear evidence from Richard Kerr and refused to provide him with any disclosure relating to potential collusion in the abuse at Kincora by the security forces or security services. His concerns that such collusion occurred were also based on the publicly reported accounts of Roy Garland, Colin Wallace and Brian Gemmell. The Inquiry did not hear oral evidence from any of these individuals. Given the speculative and irrational conclusions that the Inquiry have reached in relation to the abuse perpetrated on Richard Kerr he retains little confidence that the Inquiry has adequately investigated and can provide informed and conclusive answers to these concerns. Richard Kerr's conclusions on the reaction of the individuals concerned were based on his own impression of their reaction. The Inquiry has not heard this evidence from Richard Kerr and cannot rationally conclude that he has reached this conclusion "*without a shred of evidence*". In fact the Inquiry itself has arrived at this conclusion with insufficient evidence and this conclusion should be removed from the Report.

(13) The inquiry did not hear evidence from Richard Kerr and the fact that a full account of the abuse perpetrated upon him was not included in previous statements taken by the police does not provide evidence that they did not happen, nor is the Inquiry

properly able to determine why this information was not included without, as a minimum, hearing evidence from Mr Kerr. In fact Mr Kerr instructs that the Exaro article was materially inaccurate. The Inquiry itself has accepted that the Exaro website article carries little or no weight. There is no justification for the Inquiry to comment upon this article or to reach conclusions based on it. This conclusion should be removed from the final report.

(14) See (13) above. The Inquiry has not heard evidence from Richard Kerr and therefore had insufficient material to determine whether he went to England while a resident at Kincora. This conclusion should be removed from the final report.

(15) The absence of records is not determinative of this issue. The Inquiry has not heard evidence from Richard Kerr and therefore had insufficient material to determine this issue. This conclusion should be removed from the final report.

(16) The Inquiry did not hear evidence from Richard Kerr and refused to provide him with any disclosure relating to collusion in the abuse at Kincora by the security forces or security services. The fact that Richard Kerr did not identify Sir Maurice Oldfield in his February 2015 affidavit cannot be regarded as having any significance without hearing evidence from Richard Kerr on the reasons for this. This conclusion should be removed from the final report.

72. With respect to the conclusions at paragraph 232 and 233 the Inquiry did not hear evidence from Richard Kerr and plainly had insufficient material to reach these conclusions. The Inquiry have ignored the fact that there were inconsistencies between his earlier accounts of abuse, in circumstances where it is plain that abuse occurred that had not been included in police statements taken from Richard Kerr. The conclusion that those statements are to be relied upon to determine that Richard Kerr's later accounts are inconsistent and inaccurate is irrational, unreasonable and manifestly without justification.

73. In fact the Inquiry's approach has the effect of undermining a survivor of abuse and questioning the extent to which he was abused on the basis of manifestly inadequate evidence to justify those conclusions. In so doing they have departed from their stated policy not to determine individual allegations without any or adequate explanation for this departure. This is particularly unfair in circumstances where Richard Kerr does not benefit from anonymity before the Inquiry and was not warned at the outset of the Inquiry of the possibility that he would be subjected to criticisms on this basis.

74. Simultaneously the Inquiry appears to have failed to properly investigate whether there was any evidence to corroborate the allegations of collusion that had been publicly raised. The Inquiry failed to ensure that they heard evidence from the three key witnesses who come forward to make claims of such collusion, apparently subjecting their accounts to the same flawed approach adopted in relation to Mr Kerr. In these circumstances the conclusions of the Inquiry cannot properly be regarded as allaying public concern at these allegations of collusion in the abuse of children at Kincora.

**Ashley Underwood QC**

**Malachy McGowan BL**

**9<sup>th</sup> December 2016**