



17 March 2014

The Secretariat
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
SYDNEY NSW 2001

By email: solicitor@childabuseroyalcommission.gov.au

KINGSFORD
LEGAL CENTRE

Dear Madam/Sir,

ISSUES PAPER FIVE – CIVIL LITIGATION

Kingsford Legal Centre (KLC) welcomes the opportunity to respond to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) on Issues Paper 5 - Civil Litigation.

KLC is of the opinion that traditional legal and court processes do not deliver satisfactory results for survivors. Survivor-designed redress schemes can provide the opportunity for greater healing outcomes and wider benefits to the community than civil litigation.

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides general advice on a wide range of legal issues, including child sexual abuse, and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC's clients are economically and socially disadvantaged. Many KLC clients have experience in institutional care and are victims of sexual assault. We have had extensive contact with members of the Stolen Generation and acted in the Stolen Generations' case of Joy Williams.¹ KLC believes that the experiences of members of the Stolen Generations through court process are relevant to issues of civil litigation for survivors of child sexual abuse in institutions. It is through our experience providing advice to survivors that we base our recommendations to the Commission.

The experience of survivors and access to justice

Bringing a claim for damages in the civil courts is one way in which a person who suffered child sexual abuse in an institutional context may seek redress. However, in our experience, civil litigation is not an effective mechanism in providing redress to victims of child sexual abuse in institutional contexts.

A significant barrier to bringing a claim is access to legal advice. Most survivors continue to experience economic and social disadvantage due to the impact of the abuse in their lives. Survivors rarely have the resources to fund legal action themselves and rely on the services

¹ *Williams v Minister Aboriginal Land Rights Act 1983 no 2* [1999] NSWSC 84 26 August 1999.

provided by community legal centres (CLCs) and legal aid. CLCs, like KLC, do not have the resources to act for everyone who may have a claim.

KLC has also noted an increase in the number of people seeking legal advice from CLCs after giving evidence to the Commission. Unfortunately, there is not enough resources to provide advice and support to all people in this position.

Addressing the significant access to justice issues for survivors must be a crucial first step to improve the effectiveness of the civil litigation systems.

Benefits of civil litigation for survivors

In our experience, there are some limited benefits to redress through civil litigation. One of the most important of these is the public nature of the civil proceedings, which for some survivors is important to achieving justice.

However, matters which are successfully litigated are exceptional in nature, and for each matter that is resolved positively for the survivor, there are many hundreds, if not thousands of cases which could not be litigated due to access to justice issues, lack of evidence or procedural barriers. We are also concerned that people experiencing severely from the impact of abuse in their childhood may be least likely to be able to engage a lawyer and pursue a civil case.

While we support the right of any survivor to bring a matter to court through traditional legal processes, we also think that there should be a better, more survivor orientated scheme that offers a real alternative to civil litigation through a court process.

Problems with civil litigation for survivors

Civil litigation remains largely inaccessible to those sexually abused as a child in institutions. There are few free legal services for this very complex and technical area of law. Pursuing matters is extremely difficult for individuals with limited resources, who are taking action against institutions with significant resources.

The discrepancy between the number of successfully litigated matters in Australian Courts, and the overwhelming response of survivors giving evidence to the Commission indicates that civil litigation has failed as a way of providing redress, rehabilitation, restitution and justice for survivors.

Other barriers include:

- **The financial cost:** Civil litigation is very expensive, and survivors face the risk of an adverse costs order if they lose. This can be a powerful disincentive to individuals when they seek to take action against institutions.
- **Procedural difficulties:** The operation of limitation dates² are a huge barrier for potential litigants, and provide an initial hurdle which must be overcome before cases can be heard. This makes it very difficult for claimants to feel that they have a case worth pursuing, as they must first be granted leave through a costly legal process in itself to proceed. In other cases individual perpetrators may have no assets to meet a judgment. In some instances, it is difficult to commence litigation against religious and non-government institutions on the basis of vicarious liability. Such institutions may have assets held in charitable trusts and/or may be structured in such a way that it is difficult to ascertain which part of the organisation should be liable.

² Three years for personal injury, six years from the time of suffering for torts in NSW.

- **Evidentiary issues:** Potential claimants may seek to rely on the records kept by the institutions. However, these records may be non-existent, incomplete or not a true reflection of allegations and the institution's response. In this context the oral evidence of survivors is often discounted in the face of other written evidence considered contemporaneous. This reflects the experience of many members of the Stolen Generation that have litigated their matters.
- **The process:** The process requires survivors to revisit past traumas to satisfy evidence standards. This has the potential to be a re-victimising experience in itself. This is especially the case when the legal process does not adapt its processes to respond to the needs and experience of child sexual abuse survivors giving evidence in Court. This is exacerbated by the adversarial process of legal proceedings which can be particularly harrowing for victims subjected to cross-examination.
- **Time and delay:** The Court process is slow and many potential claimants may in fact not live long enough to see the matter resolved.

Sometimes litigants participate in alternative dispute resolution such as mediation or arbitration. Matters settled this way often have stringent confidentiality clauses are often attached to settlement agreements. Matters settled on a confidential basis can hinder transparency and do not contribute to the public's knowledge and understanding of abuse. It also hampers public accountability.

It should also be considered whether, given the significant barriers survivors face in bringing a matter to trial, settlement agreements are entered into by survivors to avoid the trauma of the trial process. This raises concerns that mediation occurs in a context where there is significantly more pressure on survivors to agree to a settlement due to the risks and trauma associated with litigation.

Arietta*

Arietta was repeatedly sexually assaulted by her uncle when she was 6 and 7 years old. The assaults happened in the family home, and increased in their severity over time. She did not disclose the assaults to anyone: she was too embarrassed to tell her family and too scared of her uncle. The assaults eventually stopped when her family moved to another part of Sydney.

Arietta was in her twenties when she saw her uncle again. Seeing her uncle brought back memories of the assault in an intensified way, as she was now a mother of a young daughter. She could not bear the memories any longer, and disclosed the assaults first to female family members, and later to a sexual assault counsellor and to the police.

The police charged her uncle with multiple counts of sexual assault. The Court found guilty him guilty and sentenced him to over 10 years' imprisonment. The police investigation and court processes, including appeals, took almost 2 years to be finalised.

Limitation periods restrict Arietta from bringing civil action against her uncle for the injuries he caused.

**Our client's name has been changed to protect their confidentiality.*

Alternatives to civil litigation

Compensation schemes

In an effort to counter the difficulties associated with civil litigation for survivors of child sexual abuse, specialist victims' compensation schemes also have been used to obtain compensation for survivors. KLC undertakes extensive victims' compensation work.

In NSW *Victims Rights and Support Act 2013* (VRSA) provides that victims of violence can apply to NSW Victims Services for compensation and financial support where they can show they suffered an injury. Survivors of child sexual abuse who have suffered a physical and/or psychological injury can apply for a recognition payment of up to \$10,000, depending on the type of sexual violence.

In our opinion the scheme as it currently operates significantly disadvantages survivors who were victims of multiple and prolonged child sexual abuse. This is due to the technical operation of the scheme which conflates acts as related, meaning that only one payment of compensation can be paid when the perpetrator and the victim are the same.³ While the Tribunal has discretion not to deem the acts as related (section 19(5) of the VRSA), in KLC's experience this is not routinely exercised for victims of multiple actions of child sexual assault. See for example, *Victims Compensation Fund Corporation v JM* [2011] NSWCA 89.

The current scheme in NSW also does not recognise exacerbating factors such as breaches of duty for people in care nor does it distinguish between harm experienced by adults or children. The amounts awarded by the scheme are grossly inadequate.

The current NSW victims' compensation scheme does not offer survivors of child sexual assault in institutions a specialist model which adequately recognises the specific nature of the violence against them. In our opinion it only offers an option to survivors, simply because civil litigation is such an inaccessible option. We believe that survivors of child sexual assault while in institutional care need a specialist model that specifically recognises the significance of abuse experienced as a child and the ongoing and systemic nature of the abuse.

Vanessa*

Vanessa came to KLC for advice after providing evidence to the Royal Commission. She wanted help to receive compensation. She has tried to get the help of lawyers at different times in her life but no one had been able to help as she was on a Centrelink income.

KLC examined Vanessa's statement to the Royal Commission which documented years of abuse at the hands of many different people. We talked to her about her options but she wanted to pursue victims' compensation as she wanted a resolution quickly and didn't want to go to Court.

The dilemma for KLC lawyers was the clearly inadequate nature of victims' compensation for the serious and systemic breaches of duty of care experienced by Vanessa. Furthermore, rules around 'related acts' meant that Vanessa may only be eligible for one payment of \$10,000 even if she was abused daily by the same person over many years.

**Our client's name has been changed to protect their confidentiality.*

While the majority of recommendations found in public inquiries conducted by Australian States and abroad⁴ indicate a preference to specialist compensation schemes over civil litigation, compensation payments may be significantly less than awards made at the conclusion of successful civil litigation. The fact that many such payments are made without prejudice and *ex gratia* is often seen as providing something of an amnesty for perpetrators, whose lack of accountability and public retribution can understandably be troubling for some survivors.

³ See *Victims Rights and Support Act 2013* section 19 (4)

⁴ These include but are not limited to Canada's *Restoring Dignity Report*, Ireland's *Ryan Report* (Commission to Inquire into Child Abuse), UK's *Waterhouse Inquiry*, etc.

Survivor designed redress schemes

KLC is of the opinion that traditional legal and court processes do not deliver what most survivors want from the legal system. Any legal response to child sex abuse must be designed to acknowledge and provide redress and restitution for harm. In this context it is important to consider whether survivor designed redress schemes offer a more effective way of providing healing, as well as providing wider benefits to the community more generally.

The 'Grandview Agreement'⁵ in Canada offers some insight into how a process of restitution and reparation could work if survivors are placed at the centre of the design.

The 'Grandview Agreement' was born out of a survivors group (the Group) that was formed after two women went public about the abuse they had experienced. The Group began to collectively formulate what they wanted in terms of a response to their experience. Formal negotiations were undertaken with the Ontario Government and after ten months the 'Grandview Agreement' was reached. Prior to the finalisation of the agreement the Government adopted interim measures such as counselling access and funding to the Group.

An explicit objective outlined in the Agreement was the need for 'healing and recognition, of self-fulfilment for its beneficiaries'⁶, and as a result the forms of redress it contain did not conform to those remedies that could have been obtained in a litigation model.

The 'Grandview Agreement' settled the individual cases of many women seriously abused while in institutional care. What was notable about the scheme was that it provided a wide range of remedies, many which would not have been possible through traditional forms of litigation. All the remedies that were put forward were put forward by the women themselves and the women were involved in directly speaking about their experiences. The reparations to those directly affected by abuse included financial compensation, education and training, therapy and an individual apology. Reg Graycar and Jane Wangmann note, for example, that the removal of tattoos received while they were at Grandview was particularly important for the women and formed a key part of the scheme but would not have formed part of a traditional compensation package awarded by a Court or imposed by a government framed scheme.⁷

The unique approach of the 'Grandview Agreement' was to allow the survivors themselves to shape any legal or restorative process and to determine the manner in which their voices were heard. In allowing the survivors to create the potential outcomes there were clearly both symbolic and practical outcomes that would not have been contemplated by a compensation order from a court or through a statutory scheme conceived by the Government alone.

As the Law Commission of Canada identified, survivors often want acknowledgement of the harm done and accountability for that harm, and may want a range of measures, such as an apology, access to specialist education and therapy, financial compensation, some means of memorialising their experiences, as well as a commitment to raising public awareness of

⁵ The Agreement arose following revelations in the 1990s from former child attendees of widespread sexual, psychological and physical abuse at the Grandview Training School for Girls. The school operated as a court ordered residential home for Indigenous and non-Indigenous girls aged between 12 and 18 years old. The bulk of the allegations concerning abuse occurred in the 1960s and 1970s.

⁶ Reg Graycar and Jane Wangmann 'Redress Packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution' *The University of Sydney Law School Legal Studies Research Paper No 07/50* July 2007 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001148 at p 8 – 9.

⁷ *Ibid*, p14.

institutional child abuse and preventing its recurrence.⁸ A survivor designed scheme offers the potential to meet these needs.

KLC strongly urges the Commission to contemplate and consider the role survivor-designed redress schemes could play in providing effective redress and healing for survivors of institutional harm. The scale and scope of the issues before the Commission require a response which moves beyond traditional legal avenues in order to ensure justice for survivors.

Conclusion

Many individuals who experienced child sexual abuse in institutional contexts are some of the most vulnerable members in Australian society, and their survival and search for justice must be supported by meaningful redress scheme that provides the potential of healing and justice.

In KLC's view, there is currently no civil litigation model in Australia equipped to deal with the complex issues and experiences of survivors. The overwhelming response to the Royal Commission in itself reveals that justice for survivors has not been achieved through current legal approaches.

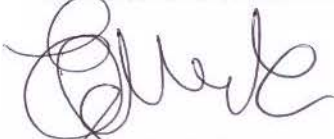
KLC is strongly of the opinion that the Commission should recommend funding for victims' survivors groups with the aim of developing survivor redress schemes. The Commission should consider how victim-designed schemes could operate as an alternative to civil litigation.

While every survivor should have the right to access litigation through the Courts if they wish, they should equally have the option of an alternative which is not adversarial in approach, and which aims to restore both dignity and healing. An approach like the 'Grandview Agreement' would provide a preferable model to any current system in Australia.


KLC remains at the disposal of the Commission's convenience should you wish to further discuss any part of this submission. We thank the Commission for its ongoing invaluable work and wish you every success in your future investigations.

Yours Sincerely,

KINGSFORD LEGAL CENTRE



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⁸ Law Commission of Canada (2000) *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Minister of Government Works and Public Services.