

17 March 2014

The Secretariat

Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5383
SYDNEY NSW 2001



By email: solicitor@childabusecommission.gov.au

KINGSFORD
LEGAL CENTRE

Dear Madam/Sir,

ISSUES PAPER FIVE – CIVIL LITIGATION

Kingsford Legal Centre (KLC) welcomes the Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) and 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 takes casework for many clients who, without our assistance, would be unable to afford a lawyer.

KLC also has a specialist employment 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 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 institutional child sexual abuse are similar to those of 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 experiences of survivors and access to justice

Bringing a claim through 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 could experience economic and social disadvantage due to the impact of the abuse in their lives. Survivors rarely have the resources to

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

provided by community legal centres (CLCs) and legal aid. CLCs 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 after giving evidence to the Commission. Unfortunately, CLCs do not have the resources to provide advice and support to all requesters.

Addressing the significant access barriers to the civil justice system is the first step to improve the effectiveness of the civil litigation systems.

Benefits of civil litigation for survivors

In our experience, there are several benefits of civil litigation. The most important of these is the public nature of the civil process, which is an important factor to achieve 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 of cases which could not be resolved due to access to justice issues, procedural barriers. We are also concerned that people experiencing sexual violence or impact of abuse are less likely to pursue a civil case.

While we support the right of survivors to bring a matter to court through traditional legal processes, we also think that there should be other options available. This offers a real alternative to civil litigation.

Problems

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.

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, reparation and justice for survivors.

Other barriers include:

- **The financial cost:** The financial cost of litigation is a significant barrier for survivors. Adverse costs orders if they lose. This can be a powerful disincentive when they seek justice.
- **Procedural difficulties:** The operation of limitation dates are a huge barrier for potential litigants. This makes it very difficult for claimants to feel that they have a case worth pursuing. In other cases individual perpetrators may be deceased, making judgment. In some instances, it is difficult to commence litigation against religious and non-profit organisations. These organisations may have assets held in charity trusts, or in a trust for a religious or charitable purpose. It is difficult 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:** The institution of legal proceedings for the resolution of allegations and the institution's response. In this context the oral evidence of survivors is often discounted in favour of contemporaneous written evidence. This reflects the experience of many members of the Stolen Generation that have litigated their claims.
- **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 narrowing for victims subjected to cross-examination.
- **Time and delay:** The legal process is often slow and many potential litigants do not live long enough to see the matter through.

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

It should be noted that settlement agreements are entered into by survivors to avoid 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*
<p>Arietta was raped by her uncle when she was 12 years old. The assaults happened in the family home, and increased in frequency as she grew older. She did not report the assaults until she was in her late thirties. The assaults eventually stopped when her uncle moved to another country.</p> <p>Arietta was in her twenties when she saw her uncle again. She was shocked to see him and did not bear the memories any longer, and disclosed the assault to her mother, a family member, and later to a sexual assault counsellor and to the police.</p> <p>The police charged her uncle with multiple counts of sexual assault. The Court found him guilty and sentenced him to over 10 years' imprisonment. The police investigation, including appeals, took almost 2 years to be completed.</p> <p>Limitations on the time for bringing claims for the injuries to her uncle's name has been a significant barrier to her seeking justice.</p>

Alternatives to civil litigation

Compensation schemes

In an effort to provide a more accessible and less traumatic way for survivors of child sexual abuse to seek redress, compensation schemes have been established. These schemes provide 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 Compensation Scheme (VCS) for compensation if they suffered an injury, psychological injury, or physical injury, which can apply for a recognition payment if the type of sexual violence.

In our opinion, victims of multiple and prolonged child sexual abuse. This is due to the technical operation of the scheme which conflates a 'related act' meaning that only one payment of compensation can be paid where the perpetrator and the victim are the same. While the Tribunal has discretion not to deem the acts as related (section 19 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 Corporation v JM* [2017] 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 better model which adequately recognises the specific nature of their violence against them. In our opinion it only offers a route to civil litigation if such an inaccessible option, we believe that survivors of child sexual assault who were in institutional care need special provisions to address the harm of abuse experienced as children and the specific nature of the trauma of the experience.

Vanessa*

Vanessa came to KLC for advice after providing evidence to receive compensation. She had been a victim of child sexual abuse and one had been a victim to help as she was on a Centrelink income.

KLC examined Vanessa's statement to the Royal Commission which documented years of abuse in the hands of many different people. 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 in serious and systemic breaches of duty of 'related acts' meant that Vanessa may only be eligible for compensation if abused daily by the same person for many years.

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

While the majority of States and abroad⁴ indicate a preference for litigation, compensation payments may be significantly less than awards made at the conclusion of successful litigation. In many such payments are made without prejudice and *ex gratia* is often provided as a combination of an amnesty for perpetrators, who lack of accountability and protection for 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 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. It is important to consider whether survivor designed redress schemes offer a more creative way of providing healing, as providing wider benefits to the community more directly.

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

The 'Grandview Agreement' was born out of a Survivors' Support Group formed after two women were published about the abuse they had experienced. The Group began to collectively formulate what they wanted. 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-forgiveness for its benefit', 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' provided a range of remedies, many which would not be available in litigation. All the remedies that were put forward were put forward by the women and the women were involved in directly talking about their experiences. Remedies to those directly involved by abuse included financial compensation, education and training, therapy and an individual apology. Reg Graycar and Jane Wangmann note that the women's packages included a range of remedies for the women and former staff that were not part of a traditional compensation package awarded by a Court or imposed by a government framed scheme.

The unique approach of the 'Grandview Agreement' was to allow the survivors themselves to design a legal or restorative process and to have their voice heard. It allowed survivors to create their own remedies, there were clearly both symbolic and practical outcomes that would not have been contemplated by a compensation scheme imposed by the Government alone.

As the Law Commission will find, survivors of child sexual abuse may want a public apology, access to counselling, and a commitment to prevent further harm.

⁵ Reg Graycar and Jane Wangmann 'Redress Packages for institutional child abuse: Exploring the Grandview Agreement' 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 [10].

⁷ Ibid, p14.

institutional child abuse
the potential to meet

KLC strongly urges the Commission to **contemplate and consider the role survivor-led redress schemes** could play in providing effective redress and healing for survivors of institutional child abuse, **including** a response which **recognises** beyond traditional legal avenues for survivors.

Conclusion

Many individuals who experience the most vulnerable members in Australian society, and their support must be supported by meaningful redress scheme that provides the potential of healing and justice.

In KLC's view, there is currently no **investigation model** and equipped to deal with the complex issues and experiences of survivors. The **overwhelming response to the Royal Commission** in itself reveals that **support for survivors has not been** legal approaches.

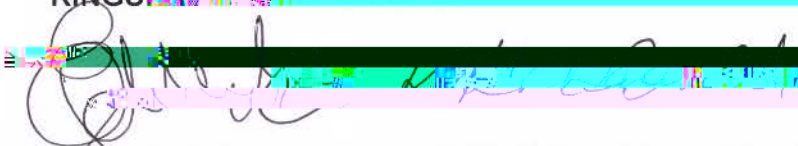
KLC is strongly of the opinion that the Commission should **work with survivors groups with the aim of developing survivor-led redress schemes** should **consider** litigation.

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 a more holistic approach, and which aims to restore** **balance, dignity and healing** **approach like** 'Grandview Agreement' would provide a preferred

KLC **respects** at **the** **Commission** **to** **discuss** any part of this submission. We thank the Commission for **its ongoing** **work** **and wish you every success in your future investigations.**

Yours Sincerely,

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⁸ Law Commission of Canada (2010) *Restoring Dignity: Responding to Child Abuse in Canadian*
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