

**Barnardos Australia**  
**Response to Royal Commission into Institutional Responses to**  
**Child Sexual Abuse**  
**Issues Paper 5 : Civil Litigation**

Barnardos Australia is responding to this Issues Paper 5 as an organisation which has been engaged in one situation involving civil litigation and found this method of redressing child sexual abuse to be extremely unhelpful to all parties - particularly the victims. We have subsequently aimed to find an approach to redress which focuses on the ongoing welfare of victims of child sexual abuse.

Barnardos believes a better system for redress is required than current civil litigation. In the situation referred to above, there was very significant problems with the procedure to waive the Statute of Limitations. We currently are not familiar with the issues of vicarious liability.

We recommend the establishment of a specialist body which could hear and assess allegations of sexual abuse without a time limitation and with a lower level of proof than the criminal courts. This body should award compensation in the same way as a community victim's compensation scheme. The body should work to support victims as individuals and prevent future abuse of children.

Barnardos Australia looks forward to a community 'consensus' on the most appropriate ways of recognising the impact of child sexual assault by organisations such as our own. We hope that this becomes a common standard. The recognition level should consider equity with child abuse compensation approaches available to all children in the community.

For these reasons, we welcome the findings of the Royal Commission.

### **Background**

Barnardos provides out of home care in NSW and the ACT and has looked after children in residential, foster and kin care over many decades. Many of these children have been sexually abused when in the care of their families. Barnardos Australia has been involved with a number of situations where victims have told us about sexual abuse while in our care. In the 1990s, one of these situations involved a group of clients who launched civil litigation for compensation.

The situation, described above, involved a small group home 'father'. We have always acknowledged that the abuse took place and the perpetrator was finally imprisoned. A claim

for compensation was made by the victims against Barnardos UK, our parent company at the time, and the Australian organisation was delegated to act on their behalf. The Australian Board was given legal advice that compensation should only be paid following a Court Order. This unfortunately 'forced' the victims to lodge a claim that the Statute of Limitations for compensation should be waived and this apparently required accusations of gross negligence which were problematic and involved extensive legal costs. The process was not only expensive but added to the stress experienced by victims. The Judge in the initial hearing ordered mediation however, in our view, this also did not lead to fair compensation as there were significantly different amounts of money accepted by the victims, and this appeared to damage relationships within the affected families.

As a result of this experience, Barnardos developed a redress package with elements that come into effect as soon as a victim's allegation is believed on the balance of probability (in contrast to the level of proof required by a Court). These approaches have been adopted over the past fifteen years, with the handful of individuals who have come forward with allegations. During this period, Barnardos has also maintained an 'after-care' service which is a point of contact for all who were child migrants or grew up in our homes up to the 1980s. An additional contact point is our active 'Old Boys and Girls' group which meets socially and puts past child migrants and early residents in touch with others. The Old Boys and Girls group also produce a newsletter. Importantly, representatives of Old Boys and Girls have frequently been members of our Board.

Our approach to redress includes:

- telling the victims they are believed, at the earliest opportunity
- offering an apology. This is at the highest management level of the Agency involving the Chief Executive
- offering counselling by a qualified independent psychologist of their choosing
- offering financial redress at a rate comparable to (the previous NSW victim's compensation scheme)
- if appropriate, offering compensation
- ongoing contact with the past clients of children's homes. Barnardos continues to offer venues in which Old boys and Girls can meet and we assist them to produce a magazine. We provide information such as original photographic material for significant events memorialising child migration and its effects
- we are committed to raising public awareness of institutionalising child abuse and preventing it in the future. We ourselves strive for 'best practice' in investigating abuse allegations and to improve standards to reduce the risks of abuse.

We are clear that it is critical that organisations avoid re-abusing victims by engaging in adversarial Court proceedings.

In relation to the particular questions raised by the Royal Commission:

**1. Issues of civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffer in institutional contexts**

**1.a and 1.b**

Not applicable to Barnardos.

Barnardos believes that all victims of sexual assault should be compensated equitably, not according to which organisations are legally accountable and able to pay.

We believe that it is essential to establish a ‘body’ which is able to take responsibility for all claims coming forward whether an organisation still exists or is able to pay.

**1.c *The circumstances in which institutions are liable for the criminal conduct of their employees***

Barnardos has previously been advised by lawyers that the principle of ‘non delegable duty of care’ applies to us in relation to child sexual abuse. We understand now that ‘vicarious liability’ may apply to foster care. The organisation may, therefore, be liable for even the criminal acts of its staff or carers.

It is the responsibility of institutions to ensure that their employees are not going to abuse children. However, the endemic nature of child sexual abuse means that, however good the standards and systems, it will occur where adults have access to children, such as in foster care.

Victims should be believed unless their case is implausible. This is important in order to stop ‘potential re-abuse of victims’ through the civil legal process. That is, organisations should believe victims unless their allegation is implausible because the extent of sexual abuse is now known to be relatively high and because it is hard to prove.

**1.d *The circumstances in which regulators are liable for failures of oversight or regulation***

We are assuming that “regulators” includes organisations like the licensing authority (State Department of Family and Community Services) and NSW Children’s Guardian and Children’s Commissioner (responsible for Working with Children’s Checks).

We believe that regulators should bear responsibility for failures of oversight or have in place adequate regulation. This may lead to more uniform and ‘best practice’ approaches to preventing child sexual assault.

To protect children, it is important to have a high level of accreditation and regular audits of welfare agencies in every Australian State and Territory. Governments should be liable for the standard of these services. We are aware that not all States in Australia currently have the same level of scrutiny in place for accreditation of child welfare institutions (including for foster care). In NSW, we believe that there is a threat to the ‘audit’ process conducted by the Office of the Children’s Guardian.

We are also conscious that even high functioning regulators are not yet fully effective in preventing sexual abuse of children. For example, in NSW there are limitations on how recording is made of a potential abuser who is not an employee of an agency. Barnardos has unsuccessfully attempted to report individuals who we believe may be potential abusers to the NSW Children’s Commissioner. However, as these people have not been our employees, no record has been made of these concerns. Barnardos believes that legal liability of regulators might ‘tighten up’ processes to identify paedophiles.

***1.e Limitation periods which restrict the time in which victims may sue and the circumstances in which limitation periods can be extended***

Barnardos believes that all time restrictions should be removed on the ability to raise a matter of sexual abuse. The nature of child sexual assault involves ‘redefinition’ of the situation in a victim’s mind perhaps because of changing social awareness and condemnation of sexual assault, shame or misplaced ‘responsibility’. It can therefore lead to long time delays before a victim comes forward and it would be unfair to disqualify these allegations. This long period of time means that staff members may be dead and records of poor quality. Nevertheless, claims should be made if the Court compensation process continues.

***1.f The requirements to bring a class action, if victims from the same institution wish to sue as a group***

This is an issue which only victims who have attempted a class action could adequately answer. The matter, described above, was based on a class action and we believe that it was a traumatic process for the group involved, but they also provided support to each other.

**1.g The existence of relevant records, locating them and retrieval costs**

Barnardos is aware of the considerable difficulties of maintaining high quality written material over time. Barnardos has been fortunate to have been able to retrieve records when required to do so, though quality varies. We have an open file policy for all ex-clients of our organisation.

Barnardos has attempted to address the problem of contemporary records through the use of electronic standardised systems called The Looking after Children Electronic System (LACES). This is a system used by us and other agencies in NSW over the past fifteen years. LACES is now being replaced by MyStory and we believe that it would be useful for the Royal Commission to recommend systems for record keeping.

Victims should not have to meet any costs in obtaining records. It should be their right to always have access to relevant records.

**1.h and 1.i The process of giving evidence and being subject to examination and cross examination and the process of proving that the victims injuries and losses were caused by abuse**

Barnardos does not believe that evidence from those making allegations should be heard in the civil courts. We believe that this is very traumatic for victims and a more supportive and therapeutic environment is needed which acknowledges the likelihood that abuse took place. This is especially the case as perpetrators may be dead and records from the past can be very poor.

This view has been incorporated in Barnardos current practice and we feel that this stops 're-abuse' of victims by having to recount their experiences when they feel powerless. Barnardos does not require evidence and we make a judgement on the 'balance of probability', see section C above for our reasons for this. Whilst this may appear weighed in favour of a person making an allegation, we believe that the any 'fraudulent allegations' which were compensated would be a small price to pay for stopping victims being re-traumatised by legal proceedings.

If a matter was disputed between an agency and someone making an allegation, a situation that has not occurred to us, we understand that there would need to be a process in place for resolving disputes. However, we do not believe a civil court with all the costs that are involved is the appropriate place, but rather a specialist body which is expert in the impact of sexual abuse.

### **1.j    *The way in which damages are assessed***

Barnardos has based its damages liability on NSW rates of sexual assault victim's compensation payments (prior to recent changes). We make no comments regarding the amount but believe there should be equity for compensating victims of sexual assault by strangers or family members, as well as those assaulted in foster care. Equity for children is critical as the life outcomes are the same.

The issue of **financial recompense** is clearly central to redress and has two components: firstly, money is essential to seek remediation services and, secondly, money socially recognises the wrong that has been done to an individual.

The need for financial redress must be balanced with our work for children's welfare, standards of service and advocacy work and the known criminal activity of child sexual abuse occurring even in quality children's services. Barnardos has no sponsoring body such as a church. We derive our funds from government grants for specific programs and donations. We must therefore balance, within a limited budget, our responsibility to past victims of sexual abuse with the prospect of not being able to provide adequate supervision of current children, many of whom have been abused, and our current policy to minimise the possibility of abuse.

At the extreme end of the argument about redress, there are claims that organisations should be put out of business and not be able to care for children. In some cases this may be appropriate. However, where agencies follow best practice and are accredited providers, the consequence of having to withdraw services or not put adequate funding into quality services is not good for children in the community who suffer significant abuse or neglect. Out of home care services are now largely the responsibility of non-Government agencies because they have proved far better at providing high quality services than Government services (Wood 2008).

### **1.k    *The cost of litigation and access to funding and legal services***

We believe that there may be better mechanisms than litigation to redress the issues of sexual assault in institutions and that access to such mechanisms should not be a cost to victims. Our experience is that the costs of civil litigation are too high for most victims of child sexual abuse as they have often had limited education and employment because of the way they have been treated. Lawyers that are paid for results can prolong the litigation process and results in income for them rather than the clients.

## ***2. Other elements of civil litigation systems that raise issues for the conduct of litigation***

Barnardos approach is guided by the view that child sexual abuse has significant ongoing traumatic effects in the life of victims, many of whom suffer lifelong difficulties. This is particularly true when the abuse was ongoing and carried out by persons in authority. We understand that the powerlessness of victims is further intensified by denial and dismissal of their allegations by organisations, and the pain this causes. Institutional abuse is therefore particularly important. Any redress has to consider both the original abuse and the institution's response to victims' allegations. It is our view that denial or inappropriate handling of sexual abuse allegations by children's institutions re-abuses the victims.

We do not believe that adversarial civil litigation is the appropriate way to redress sexual abuse in institutional contexts. Rather, a more considered review of both the abuse and the organisational response is needed.

## ***3. How well do early dispute resolution or mediation processes work as part of the civil litigation systems?***

Barnardos was ordered to mediation as part of the resolution of the matter described above and this was problematic.

The result of mediation, even with a mediator of very high repute, resulted in significantly uneven compensation. The most money by far went to one victim who only disclosed at the stage of compensation while his sisters, who had given evidence in the criminal matter, received far less. Later information suggests that there was significant family discord and dissatisfaction which came about because of the poor outcome and late disclosure. Further, much of the compensation was expended on their legal fees.

Rather we would want a non-adversarial situation in which victims did not have to undertake individualised mediation instigated by courts. An alternate system which is easier to access and involves no expense to those making allegations would be far preferable.

**4. What changes should be made to address elements of civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?**

Barnardos would like to see a system which was non-adversarial, especially in relation to the time frame in which claims need to be brought.

A body should be established to hear allegations, offer counselling integrated to the process and using a lower standard of proof and give individuals the benefit of the doubt. That body should liaise with agencies to determine, on a low threshold of proof, the likelihood of the abuse occurring. Compensation should be standardised in line with other community child sexual assault victims' compensation schemes. Insurance companies should not be involved with the process of determining guilt or levels of compensation. The focus of the agency should be in supporting very vulnerable people in reconciliation of their experiences and living as full a life as possible, as well as preventing future incidents of criminal behaviour by the abuser.

**5. Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages and financial compensation? Can these be obtained through civil litigation?**

This is properly a question for victims. However, as noted above, our experience is that victims want a guarantee that abuse will not happen to vulnerable children in the future. Such a goal cannot be obtained through civil litigation alone and underpins our view that a specialist body is needed to handle allegations of abuse which also works to prevent it. Barnardos has previously sent evidence to the Commission which indicates that, despite our using 'best practice' approaches to selection and supervision of carers, sexual abuse still occurs. Agencies such as ours utilise international and local research to inform our processes to protect children, and are only too aware that more needs to be known about prevention.

We believe that all victims should be entitled to damages and financial compensation, regardless of any other changes made to the process of handling child sexual assault in institutional settings.

References

Wood, J. J. (2008). Special Commission of Inquiry into Child Protection Services in New South Wales. Sydney, New South Wales Government.