

SUBMISSION IN RESPONSE TO
ISSUES PAPER 5
CIVIL LITIGATION
OF THE
ROYAL COMMISSION INTO INSTITUTIONAL CHILD
SEXUAL ABUSE
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INTRODUCTION

In 2009 I was subcontracted to CBERS Redress to assist applicants to the Redress WA Scheme. The work entailed listening to the person's story, presenting it in their own words, detailing perceived abuse, providing evidence to support the outcomes of the abuse in the applicant's life and counselling.

It was my determination applicants would experience this traumatic process in a supported environment and would have positive gains from the process in their everyday lives. To this end I incorporated all of the counselling techniques including psycho-education into the limited contact supported by the Scheme to achieve this outcome. In many cases this was successful. However, of those for whom this was not possible, there were two clients who needed further involvement to mitigate the outcomes from their abuse.

In these two instances positive outcomes were achieved by recommending the applicants pursue further compensation through the civil legal system. Despite the arms length approach employed by one of the institutions and the in-house approach employed by the other institution the process in itself enabled the two applicants to achieve more fulfilling outcomes. From this I am led to believe a multi-faceted approach for a survivor of abuse to achieve a practical and therapeutic outcome can include civil litigation.

The two applicant's approached Redress WA and for the first time spoke of their childhood experiences of abuse. I will briefly describe each of their stories. I have received verbal permission from them.

APPLICANT ONE

A 79 year old lady who I will call Susan approached CBERS Redress to tell of her story of when in care she was sexually assaulted by men then, when this terrified child had confided in the female Salvation Army officer that officer sexually abused her over a period of time. This child had been placed in the care of the Salvation Army as a Ward of the State. The conditions of her life in wardship, isolation from her family of origin for an extended period and the abuse she experienced was physical, sexual, emotional, verbal, psychological, emotional neglect, physical neglect, systems neglect, lack of education, isolation, provision of false information, religious abuse, excessive unpaid child labour, lack of preparation for leaving care and no follow up support. The consequences of this was immediate physical harm, psychological problems (anxiety, stress, depression) social difficulties, loss of opportunities, loss of connection and bonding with family members, physical ailments and problems with family and sexual relationships. Her life has been very difficult

This lady, 79 years old, feeling very vulnerable, was extremely brave in coming forward as her story had never been told. Over the next few months Susan experienced overwhelming grief and a pervading sense of powerlessness. Even after Redress WA had accepted her application and payment had been received the lady still continued to feel grief and powerlessness. I chose to suggest to her that she approach the Salvation Army for compensation.

I made this suggestion to extend out the process to gain therapeutic value not necessarily financial remuneration. I gained the knowledge that the Salvation Army conducted all claims

for compensation at arm's length through lawyers and I asked the lady to think about choosing a lawyer to support her.

Susan named a prominent lawyer who works in the civil rights area and I approached him to ascertain the cost. He kindly donated his time and only charged for the time his staff were involved.

There were delays and I stepped back from being involved other than supportive phone calls. Susan had a meeting with a young female lawyer and the office staff. Susan experienced kindness and support from them. The mediation was held by phone. At this time she met the lawyer whom she had requested. He was kindly, respectful, and courteous and explained how the mediation with Salvation Army lawyer in the Eastern States would be structured and what she might expect. The outcome had therapeutic value as Susan felt supported by her lawyer, a man, and Mr Philip Brewin the Salvation Army lawyer who Susan described as "if you ever wondered what a good father would be like then that was it".

Susan was very angry that she was offered such a paltry sum (\$10,000.00) and stated she and would return the written apology. I was pleased because this civil litigation had supplied an environment which she should have had when a child and she was feeling righteous anger not grief and powerlessness.

From that time to now this lady has gained a sense of independence and says "she is like a butterfly set free". These developments have taken time but I believe that in this case the outcome would not have been achieved without a multi-faceted approach of Redress WA, civil litigation and the kindness and empathy of people who assisted her.

APPLICANT TWO

Elizabeth (not real name) came to CBERS Redress at 63 years of age. Her childhood had been marred by a mother who, at will, placed her into care. When young she had been placed in the care of the Salvation Army at kindergarten level and again for three years. From 9 to 12 years old in a family for foster care and later, 14 to 16 years old at the Home of Good Shepherd where she was worked hard in the laundry for no reward, poor pay and no education.

Elizabeth didn't know if she had been a Ward of the State. At the home run by the Salvation Army she experienced insufficient food, general neglect, physical abuse, psychological abuse, inappropriate punishment and witnessed excessive punishment. At the foster home Elizabeth experienced repeated rapes by the father of the family. At the Home of Good Shepherd Elizabeth experienced deprivation of liberty, excessive workload, poor work conditions, unpaid labour and no preparation for leaving the home or after care.

The outcomes from her childhood are that Elizabeth experienced depression, anxiety and stress, problems with substance abuse, dysfunctional relationships, poor parenting abilities, avoidance issues, loneliness, repeated patterns of failure to protect herself and obsessive perfectionism,

Redress WA only accepted responsibility for the time Elizabeth spent in the care of the Salvation Army and the Home of Good Shepherd. By entering into the process of Redress WA Elizabeth told her story for the first time. This is confronting and traumatic, opening up

fears, grief, anger and the sense of powerlessness of the child. Redress WA's determination that Elizabeth was not a Ward of the State and Redress WA only had responsibility for her whilst Elizabeth was in recognised institutional care. Therefore the sexual abuse whilst in private foster care was not recognised.

Only one part of Elizabeth's experiences had been addressed leaving self-blame and only a small amount of recompense. I suggested to Elizabeth that she approach Towards Healing and the Salvation Army. In this case I felt her recompense did not leave her with a sense of justice having been done and there were further avenues to explore which may therapeutically assist her to move into a new stage of life without feeling powerless and guilty.

Elizabeth's experience with Towards Healing was not overtly successful. In the first interview Elizabeth did not feel welcome, the atmosphere was cold and she was told she was placed in the Home of the Good Shepherd to be kept out of gaol, to work hard and they had no responsibility to educate her. Her words were "he made me feel like a piece of garbage". A second interviewer came to her house. Elizabeth was left with the feeling that because she had managed to work hard and had a house there was no responsibility for how she had been treated. Elizabeth has received no recompense and no apology from the process of Towards Healing.

However, from the therapeutic angle I was proud of her because after the first interview Elizabeth made the decision not to use alcohol as a means of depressing her feelings. Using alcohol is a learned method of reducing or removing oneself from stress situations often used by adult survivors of child abuse. Elizabeth wrote a strong letter of protest to the Church at how she had been treated, hence the second interview occurring. And Elizabeth has maintained a position of self-protective power since and has taken this attitude into her life in other situations.

Elizabeth's experience with the Salvation Army process was more successful although held at arm's length through civil litigation with the Salvation Army employing a lawyer through the law firm Nevett Ford. Elizabeth conducted her mediation with Mr Philip Brewin and felt her issues were recognised, she was recognised and felt his sincere apologies and she received an amount of money (\$5,000.00) which confirmed the recognition.

From these stories I have drawn conclusions which I will factor into answering the questions raised in Issues Paper 5 with some comment finally.

1. It would appear some institutions and persons are using financial and legal means to remove themselves from holding responsibility for the abuse incurred within their institutions or by themselves.

My suggestion is that there is an overarching body to act as a 'Panel' whose members have knowledge of the occurrence of abuse, what abuse is in every context, an up-to-date awareness of the outcomes of abuse behaviourally, emotionally, physically, genetically, environmentally, the intergenerational effect of abuse and the ability to direct outcomes from institutions. The 'Panel' has access to all applicable records. The 'Panel' decides from previous experiences the level of recompense.

With regard to institutions. I understand the Roman Catholic Church of Australia does not exist and the Church has proven this in the Ellis case appeal despite the general appearance of there being an over-arching body. However, Cardinal Pell's recently published thoughts that the Church does bear some responsibility for the abuse experienced by children in entities that may currently not exist or are financially unviable or not incorporated does appear to have developed an awareness that this situation needs to change. Can it be legislated the Roman Catholic form an entity to provide recompense according to the 'Panel's' directive ? This construct would be applied to all institutions that may have operated independently but within an overarching context.

The 'Panel' would need to have legislative powers to demand recompense.

There should be no 'limitation period'.

A child who is abused in any form probably has developmental damage. This is being borne out by recent neuroscience research. Consequently a person who has an internal damaged, frightened child within their psyche may not feel safe enough to come forward with their truth until well into adulthood as in Susan's case.

The reverse also applies. The number of young people applying for Redress WA was low. This is probably not because the incidence of abuse lessened but the individuals have not become confident enough or aware enough to come forward yet.

If a 'Panel' is legislated to assess and proscribe recompense for childhood abuse in institutions class actions would not be necessary.

From the Redress WA experience obtaining relevant records, locating them and retrieval costs.

Search facilitators were initially supplied by the West Australian Government. I presume the costs of this were funded out of the allocated funds provided for redress. The system failed under the quantity requested. It would also appear that decades of records have been destroyed or, maybe in some indigenous cases of hospital records never kept.

The process of giving evidence and being subject to examination and cross-examination:

The prime consideration of all interviews is they should not be seen as only a legal process but it is of the utmost importance that they are seen as a therapeutic process within a legal framework.

Redress WA did not pretend to be a therapeutic reconciliation however, within the established structure the supportive sub-contractors with experience in the field were able to achieve successful outcomes without the applicants even considering this was occurring. Survivors generally have an instinctive repellent attitude to any thought that their lives should be influenced by a governing body again therefore interviews with applicants/survivors of abuse

need to be conducted by trained personnel who are aware of what constitutes abuse, the consequences of abuse, be able to test for psychological trauma, grief counselling, and be able to educate the survivor in many facets of psycho education thereby enabling the survivor to move forward in their lives if this is possible. The healing is in the relationship as well as in the legal framework.

The therapeutic value of well conducted interviews cannot be undervalued
They can ameliorate existing trauma.

Cross examination should not be permitted in the terms of court process as a formal, legal examination. If after due exploration there is doubt as to the claim the applicant should be interviewed in a mediated, therapeutic fashion.

I am not aware of one person who was seen to be falsely claiming abuse when interviewed personally for Redress WA. Establishment of correct records and familiarity of the 'Panel' with the environment at the time of abuse will make this judgement. This judgement should be open to discussion, not cross examination, with the survivor if there is sufficient doubt about the veracity of the claim.

Proving that the victim's injuries and losses were caused by the abuse.

There is sufficient well researched evidence carried out by reputable bodies proving the outcomes of childhood abuse. A survivor's life experiences are proof in itself. There may be questions of intergenerational trauma, genetic influences and environmental influences of the child's environment before being placed in care. However, the crux of the matter is that if these influences were not taken into consideration and help given then this is also abuse.

The way in which damages are assessed.

The assessments determined by Redress WA appeared to be influenced by the quality of an applicant's application. Consequently an applicant who was not supported probably was not aware of the outcomes of abuse. For example using drugs and alcohol to pacify traumatic memories is a flight reaction – a normal reaction using the most convenient method available for someone who has no normal socialisation survival skills such as fulfilling relationships or a correctly learned behaviour to handle stress and anxiety. The applicant would probably feel guilt and shame and hide this outcome on their application. Thus their assessment is compromised.

Some applicants approached lawyers to assist in their application to Redress WA. Redress WA did not allow lawyers to approach them directly. Some applications completed by lawyers fulfilled the need in the legal sense but fell short in the understanding, detailing and providing proof of the outcomes of the abuse the applicant had experienced. This affected the assessment outcome. The applicants who went to lawyers had to pay fees for this assistance where all other applicants took their total assessment home intact.

It should also be noted that some mental health practitioners who assisted in completing applications also had little understanding of the outcomes of child abuse.

Correctly handled interviews would contribute to good assessment. Guidelines need to be created for assessment thus ruling out personal bias which may also be an issue.

The cost of litigation and access to funding and legal services.

There have been already been two Royal Commissions into Child Abuse and three Redress schemes in Australia. The situations exists. Without funds being established at Commonwealth and State levels there will be no ongoing acknowledgement of currently abusive institutions or individuals within those institutions. This would be giving tacit approval to ongoing abusive situations by ignoring their existence and promulgate intergenerational traumatic abuse by not attempting to resolve existing issues.

3. How well do early dispute resolution or mediation processes work as part of the civil litigation systems for people who suffer child sexual abuse in institutional contexts.

As previously stated having a multi-faceted approach to resolving childhood abuse helped the above two applicants process their recovery from being adults with a frightened child reflected in their lives to being self-motivated and self-protecting individuals. Rather than solely looking at the issue from a legal perspective I consider it is the responsibility of a society to be responsible for allowing an approach which has incorporated in it a therapeutic value which may allow the individual to develop beyond their present experience. The development may not be lineal or the same as seen in these two applicants' cases but the events allowed change to occur.

However, Elizabeth's approach to Towards Healing was futile in that she felt "like a piece of garbage" after the first interview. The second interviewer suggested recompense responses but she received neither recompense or an apology. The first interviewer was judgemental of her childhood situation whilst the second interviewer appeared to be judgemental of her adult situation neither having anything to do with the fact that she was basically imprisoned and used as free labour for a period of time.

Yet I am aware of other residents of Home of Good Shepherd having been compensated. This situation would be avoided if qualified members of a 'Panel' had assessed the situation.

I have recently approached Towards Healing and they advise me they do not wish to have a counselling element involved in the interviews. The interviews are purely data collection. I am of the opinion that the style of contact made in these first interviews is vital to a good therapeutic outcome. However it appears Towards Healing is looking for proof rather than healing.

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

I, personally found it disturbing the Salvation Army conducted their recompense through a legal firm. However, the manner in which Mr Philip Brewin has conducted the mediation in these two instances has been exemplary and achieved a form of resolution with both applicants. The amount of compensation for Susan was not satisfactory. Susan found this amount insulting and the apology inappropriate in this circumstance.

The fact Mr Philip Brewin was respected and admired by both applicants even though their contact was conducted by mail and telephone shows the power of a skilled, empathetic mediator.

Susan's experience in the legal firm which assisted her was also exemplary. I am conscious that if an abused person is treated without skill and empathy the process of civil litigation could only exacerbate their condition.

I was impressed the legal firm Susan used explored how was I involved. It could have been the survivor was being encouraged to gain compensation to advantage another person.

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

It cannot be emphasised too highly that the abuse be sincerely acknowledged and sincerely apologised for. Most survivors of childhood abuse carry a deep ingrained perception that the abuse was their fault, they should have been different, and they feel a huge burden of shame. With Redress WA we were able to say from the outset "This was not your fault. You have nothing to be ashamed of. You were a child and this should never have happened to you" The responses to this were truly freeing for the survivor.

A survivor comes at enormous risk to their personal safety and exposes a story that most probably has never been told before to a stranger or even a person close to them. It is at this moment which is most powerful for change and moving forward with their lives. And a moment where they are vulnerable to having all their old expectations of life being fully realised yet again.

This is not just a legal situation it is a powerful time for change for a future different to the past. A future where their surroundings may not change but they may change how they view and work with their environment.

I believe if the civil litigation process is conducted with an empathetic, therapeutic attitude on both sides healing can take place. This healing contains financial compensation as well which must reflect the seriousness of the abuse.

The evolution from “The Stolen Generation” to “Repairing Broken Families”

My experience with working with Aboriginal applicants was twofold. Those who had achieved some style of assimilation into a white controlled society managed some positive growth out of their Redress WA experience. Their loss is the ‘loss of culture and country’. How this can be recompensed is also evolving through mediation and litigation.

However, there are some (many have had premature deaths) who had been betrayed time and again by the system and the demands of their families over the years who have struggled to meet society’s demands. The approach to this needs changing from “Stolen Generation” to “Repairing Broken Families”. I became aware of a deeply ingrained anger in this community which I see reflected in car stealing, imprisonment for driving without licences, throwing of stones, vehicle thieving, drunkenness and assault.

The people who are involved in these activities are third, fourth and fifth generations of people who were severely mistreated as children. These abused children survived without their culture, they developed a new culture which allowed child abuse to become a factor in their lives. There was no self-esteem, little education, no life skills, and no parenting skills because their parents all died young, poor housing and no understanding of managing a home. There is illness, alcohol and smoking, and poor diet and mental health issues. This has caused intergenerational trauma. There should be much thought put into how civil litigation can work with this appalling, growing situation, other than financial compensation.

A new style of mediation incorporating elements of justice reinvestment could be developed. It could be called societal reinvestment. A family, rather than receiving direct financial recompense, could be supported for several generations. This would need to be done with ongoing constant mediation meeting the needs of several generations. Not handouts but working with the family to create self respect and positive outcomes.

This is a difficult concept as it could be seen as ongoing interference. However only providing financial recompense through the current civil litigation system does not resolve the intergenerational inheritance. The approach for and attitude to recompense needs to evolve as it is embedded in several generations now.

Of course this situation does not occur only in the Aboriginal population therefore societal reinvestment could be a credible facet to mediation and litigation.

Adults who have experienced abuse as a child carry scars. There are no societal boundaries for survivors. Wealthy prominent people including lawyers may have overcome and met societal demands. Some of their scars can be loneliness, poor relationship skills, anxiety, and fear.

Some are homeless. Many have developed serious mental health issues. Many in the public domain do not believe this is an issue. I have heard men who went to Roman Catholic schools totally discount the occurrence of abuse and discount its importance. It is important civil litigation has a legitimate role. However, within the structure of civil litigation there needs to be therapeutic value. Retraumatization for a survivor is a very serious concern. It is possible those who applied to Redress WA were only a small part of the iceberg of abused children. There were some who did not want to raise the issue again for fear of what they would re-experience. For some it was a re-introduction to old patterns of coping such as alcohol and drugs.

An interview that is cold and clinical, a broken promise or a sense of being unimportant could lead to a survivor being retraumatized. Therefore I would encourage a process through a dedicated "Panel" rather than 'open slather' in the courts, multi faceted avenues for mediation and for staff trained in or have access to the knowledge of all aspects of abuse.