

MARK J. COHEN
Barrister-at-Law

**SUBMISSIONS TO THE ROYAL COMMISSION INTO
INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE**

ISSUES PAPER 5 - CIVIL LITIGATION

WENTWORTH CHAMBERS
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Introduction

This submission is advanced from two perspectives: my training and experience in practice at the NSW private Bar; and having the advantage of participating in and observing the conduct of such a public inquiry as this Royal Commission, by reason that I have acted as Counsel for Det. Chief Inspector Peter Fox of the NSW Police Force ("DCI Fox") in the Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle (the "Special Commission").

My purpose in providing this Submission is to record matters that struck me, in and about the hearings of the Special Commission, that appeared to be pertinent and important to victims of abuse who I was able to meet (and in some cases conduct formal cross-examinations on behalf of DCI Fox), and which may be of some utility to this Royal Commission and assist in informing its deliberations.

As this is a public Submission, I will make no specific reference to any person (even by way of pseudonym employed by the Special Commission), but will refer to matters that arise from various individual circumstances.

This Submission notes that the Royal Commission, by Issues Paper 5, is concerned to know how effective the civil litigation systems are, as they currently operate, in resolving claims for damages for child sexual abuse in institutional contexts.

The short answer would appear to be that such systems are, at best, a 'blunt instrument', which very often proves to be an engine of further harm to victims. At the metaphysical level it may be the case that for victims, damages in the orthodox way understood by lawyers practising in adversarial litigation, will provide little or no resolution to the sense of damage and loss they have experienced.

The world of civil litigation that victims must enter into, experience and outlast, if they are to succeed in any claim for damages, is most often one that is quite perplexing to them (indeed as it appears to be even to some practitioners).

While this is a common reaction able to be observed of many lay participants in the system of civil justice, it appears also to be a common (if not universal) reaction (at least so far as I have experienced) by victims of child sexual abuse that they assume that in being required to discharge the onus of proof imposed upon them as claimants, they are apt to be disbelieved in their testimony on yet another occasion but as adults. The fear of this phenomenon, whether or not well-founded, of being doubted in a fashion similar to that experienced when they were children at the time of the abuse, can lead to no claims being made at all. This commonly can arise even if the claims have all the attributes that might suggest a strong case for a court to find for the victim and make orders in their favour.

These Submissions will endeavour to explore why that may be, and tentatively, to suggest some possible reforms that seem to be apt to the conduct of civil litigation where claims of child sexual abuse may be made, especially when they come after many years, and possible decades, since the abuse occurred.

Issue 1: Are there elements of the civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?

Response: It may be said that many of the questions posed by the Issues Paper itself would found a substantial investigation and report by a body such as the Australian Law Reform Commission. Indeed, that body completed a four year investigation in 2000 concerning the federal civil justice system in Australia - see *Managing justice: A review of the federal civil justice system* (ALRC Report 89). There may be benefit in this Royal Commission reviewing the matters raised in that report, from the perspective of potential civil claimants arising from child sexual abuse.

Subject to that general observation, I refer to the individual questions raised as follows:

(a) institutions which cannot be sued - this is a matter of some complexity, relating to either lack of standing to sue a party with funds which may be associated with but not responsible for the individual causing the abuse and harm, such as the *John Ellis* situation; or because the entity may be insolvent or impoverished and any orders possibly obtained in litigation are apt to have recourse to few if any funds at the time of enforcement.

This would appear to be a situation that is best resolved either co-operatively by reason of insurers and re-insurers agreeing to establish an entity able to be the subject of claims; or by reason of government legislation providing a type of nominal defendant that might be funded by levies upon bodies (or their insurers) commonly found to be the source of abuse. The sufficiency of the fund would clearly be a matter for actuarial advice, but subject to it being established, would seem appropriate to be a national body.

(b) institutions without funds - I repeat the comments as for (a) above.

(c) institutional liability criminal conduct - it would appear most convenient to make such arrangements as for a claim upon the fund contemplated in (a) above, but subject to usual arrangements for that fund to have rights of indemnity against, and to seek restitution from, the relevant institution.

(d) liability of regulators for failures of oversight - this would seem to be a matter that is analogous to statutory schemes already conducted where a

regulatory failure arises, such as schemes for the compensation of victims of (for example) defaulting solicitors; or victims of insolvent entities providing goods and services, such as travel agents, real estate agents and building contractors. Many such models can be examined and it would seem likely that a scheme such as is contemplated in (a) above could be established, subject to it being actuarially sound. This would appear to be a useful avenue for further research by this Royal Commission for inclusion in its interim and/or final report.

(e) limitation periods - the period in which the facts and circumstances that might found a claim for child sexual abuse are able to be rendered legally certain and sufficient to found a claim, such that a cause of action may be said to have arisen and be fully constituted, as a matter of a simplifying (but not simplistic) assumption can be many decades.

The usual limitation period of 6 years for any personal claim appears too short. Some research may be available to the Royal Commission about such questions, but it would seem that if as a matter of policy a limitation period is required at all (which may be another question worthy of research), it ought to be a period of at least 25 years. This will require, of course, either amendment of state based limitation statutes; or perhaps preferably referral of such powers to the Commonwealth for one statute to be enacted for such purposes, in the fashion that occurred with the Corporations Act, when enacted in 2001.

(f) I advance no comment on this issue

(g) location of existing records and costs of retrieval - it is a matter of wide public disquiet (and in no way limited to the circumstances of a claim for damages for child sexual assault) that the mechanisms and costs of 'discovery' of documents in civil litigation have become antediluvian exercises with diminishing or little utility.

The consistent factor which arises with claims for child sexual assault is that they relate to events which have transpired many years, often decades, earlier. The likelihood is that documentary records will become fragmentary over such a period. The corollary is that the search for such records will need to extend over a wide area with commensurately high costs apt to be beyond the resources of the ordinary individual.

If the underlying policy objective of civil litigation discovery, in effect that 'each party puts their cards on the table', is not to be subverted in the fashion demonstrated by the experience of the *John Ellis* litigation (assuming as one must that the average claimant is of modest means and without the

professional training which Mr. Ellis himself had), the current system must change.

By way of example, the Equity Division of the Supreme Court of NSW has seen fit, in effect, to abolish discovery altogether, and requires parties (in the absence of leave) to put on their evidence without discovery. The facility to conduct discovery on a grant of leave by the Court, on early anecdotal evidence, is rare.

Such an approach in the circumstances of a claim for child sexual assault would result in claimants putting on their evidence by affidavit (including such documents as might be available being advanced by way of an exhibit), and any institution responding to the claim putting on their evidence in response. So much would be apt to reduce the cost burden otherwise that might arise.

A more thoroughgoing method might include requiring institutional respondents to give general discovery, that is to say, an obligation to produce every document in their possession relevant to the claim. It is likely, given the wide publicity and reach of this Royal Commission, that the institutions apt to be affected by such a requirement already have reviewed their files significantly and would be in a position to manage such a burden. Again, this is a policy question deserving of investigation, but would appear to be one which would serve the general public interest.

Whatever method is employed, it ought to turn on ensuring the cost burden is on the party (likely to be the institutional respondent), with the greater resources.

One further matter that arises for consideration, and which will require a policy change to existing practice, is that there ought not to be any ability for institutional respondents to claim privilege over statements arising in the confessional. That privilege has been the source of much abuse, including the suppression of relevant evidence of liability, and retains no continuing utility in the modern world.

(h) the process of giving evidence including oral examination and cross-examination - this, possibly, is the most difficult element of any instance of civil litigation for a claimant making allegations of child sexual abuse and seeking redress and consequential relief from a court or tribunal.

My experience of meeting and observing victims of child sexual abuse in and about the conduct of the Special Commission, is that without exception they have come to view the process of giving evidence about their experiences (whatever the format) as an occasion when the abuse is to be relived, and potentially a further occasion where they are to be disbelieved.

The difficulty that victims of child sexual assault have in confronting the process of the giving of evidence is profound, and the disturbance cause to them in their daily lives if they must undertake it, is neither to be doubted or underestimated.

In the circumstances of the Special Commission (as no doubt it must be with this Royal Commission) many witnesses testifying to the facts and circumstances of the abuse they suffered have done so publicly in camera or in private session, as a means to shielding them from the blaze of an intrusive media.

Such protection is valuable, as the media can often be interested in a focus upon a high-profile public figure, but can have the unintended (or merely uncaring) consequence of trampling upon the privacy and sensitivities of victims. Indeed, while the principle of open justice must be kept carefully in mind, there is much to be said for the conduct of civil litigation using such processes as in camera hearings in courts closed to the public.

There is also a difficulty in the reception of oral evidence in an adversarial context where the matter to be determined is whether findings can be made that child sexual abuse occurred and liability attaches to an institution in vicarious fashion.

The usual robust process of cross examination of a witness, exemplified by the practices of courts of common law when the testimony is taken from a victim of child sexual abuse, is apt to occasion a perception in the victim of yet more abuse at the hands of the authorities.

In my view such a reaction is widespread among victims. I recall a specific occasion in which in the company of DCI Fox during an adjournment of hearings of the Special Commission I had the opportunity to meet a number of victims of child sexual abuse who were attending the hearings as members of the public. During a discussion about the process of giving evidence one person indicated that they would 'rather drink poison' than step into a witness box to give oral evidence. Others participating in the discussion evidently shared the same view.

Clearly, one anecdote such as that is an insufficient basis upon which to base policy decisions about how oral evidence ought be received in claims of child sexual abuse. Yet my observation of such persons during the course of the public hearings of the Special Commission is that there is a profound distrust of the process by victims, almost invariably by reason of fear of being disbelieved on a further occasion.

Methods that might be employed to ameliorate the effects of such processes is the determination of liability on affidavit evidence only, with the safe-guard if that be needed that if further examination be required it may occur by the administration of interrogatories, and that further oral cross-examination occur only by leave. Further, such cross examination should occur only where at the time of application for leave the range of topics is identified and questioning thereafter occur only in accordance with such matters, and may not be conducted on a more wide-ranging basis, or at large.

Moreover, as an adjunct to that process occurring with either no or little invasive oral examination, a relaxed form of tender of tendency and coincidence ought be undertaken so that such information may be received as part of the claimant's evidence in chief.

My experience of the reception of evidence in the Special Commission has been the striking quantity of material that would amount to persuasive evidence of tendency and coincidence on the part of paedophiles in their offending against children. Accordingly, a more relaxed process than currently is to be found under ss. 97 & 98 of the *Evidence Act, 1995* is apt to be of value in obtaining evidence that assists such claims and reduces the need for invasive cross examination, with little to demonstrate that prejudice would be occasioned to perpetrators of child sexual abuse.

(l) proof of injury and losses - I repeat the comments in (h) above as to issues of facilitation of proof of injury. As to proof of losses, the current general law methods as to assessment of losses would appear appropriate, with any necessary amendments apt to be accommodated by rules of court.

(j) assessment of damages - the current general law methods as to assessment of damages would appear appropriate, with any necessary amendments apt to be accommodated by rules of court.

(k) cost of litigation and access to legal services - there is no simple answer to this question. The budgets of legal aid authorities are under significant pressure, and a further class of claims for assistance by victims of child sexual abuse is apt to grow. It would appear that this is an area for further research by the Royal Commission itself with recommendations properly to be made as to how mechanisms might be put in place to provide for such claims for assistance.

Issue 2: Are there other elements if the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? If so what are they and what issues do they raise?

Response: The matter that is apt to be of some difficulty is the question of which is the proper forum for the bringing of such claims.

Currently, such matters will most likely be matters of state or territory jurisdiction, as for example where abuse might have occurred in institutions conducted wholly within the confines of one state or territory.

Indeed, matters become more vexed when an offender (such as Fr. Denis McAlinden, the subject of much of the investigation by the Special Commission) has committed acts of child sexual abuse across a wide range of jurisdictions. In Australia, his crimes were committed in NSW and WA, but it is clear that his offending also extended to PNG, NZ and the Phillipines.

So far as Australia is concerned, it would seem that there is much to be said for the jurisdiction to be undivided and national. The conduct of jurisdictions such as that operating with respect to corporations matters may be a useful template, where all States and Territories referred their powers to the Australian Parliament, and an undivided national jurisdiction was brought into operation.

It is more problematic as to whether the exercise of such jurisdiction ought occur in a truly national setting, such as (say) a division of the Federal Circuit Court; or there may merely be the conferring of federal jurisdiction upon state based courts as occurs widely with the exercise of federal jurisdiction currently in state-based Australian courts.

Subject to policy questions being examined, it would appear that a national exercise of jurisdiction by a single body may be more fruitful. The national system of resolution of disputes concerning native title claims may be one model which can inform this question.

It would appear that a single jurisdiction, employing a consistent method of operation under uniform rules of procedure, is apt to avoid the production of inconsistent results across jurisdictions as can occur in state-based jurisdictions.

Issue 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?

Response: The examples which have come out of the Special Commission, based in large measure upon the early so-called 'protocol' adopted by the Australian Catholic Bishops Conference ("ACBC"), and which led to the successive iterations of the 'Towards Healing' programme, do not augur well for early dispute resolution or mediation processes where these are promulgated by the entities who are also apt to be liable for the instances of abuse.

To use a phrase that has become fashionable (although is not necessarily adequate to describe the entirety of this phenomenon), such processes are peculiarly vulnerable to 'regulatory capture'.

That is to say, the method of early dispute resolution or mediation used, often appears to be configured in such a way that the result is apt to be within the bounds of what the liable institution considers acceptable. The 'Towards Healing' process most recently abandoned by the ACBC in favour of the 'Truth Justice and Healing Council' established on 20 February 2013, is a case in point.

In short, the process needs to be independent of the entity that is the subject of claims. A process in which victims can be confident that their experience will not be the subject of intrusive and de-sensitised analysis and investigation, is really the process of mediation or alternative dispute resolution writ large.

On such a footing, such methods of resolving disputes about child sexual assault is apt to be of benefit to victims and productive of true restorative justice.

One method may be to have a formal framework under the auspices of (say) the Federal Circuit Court, with automatic referral to court-ordered mediation or alternative dispute resolution.

This has the immediate benefits of less formality; possibly lower cost; and most importantly the potential for victims to tell their story and obtain redress they consider appropriate before the need arises to confront the full rigour of publicly received oral evidence. It is also most likely to produce an outcome appropriate to be reduced to final formal orders by consent with least call upon public resources.

Issue 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?

Response: Save for one matter, I refer to the detailed answers given above in response to Issue 1, responsive to the context of relevant aspect of the practice and procedure of courts in civil litigation in so far as they appear to relate to claims for child sexual assault.

The single matter that need to be addressed is whether specific amendments are required to the requirements of the Evidence Act, 1995, in so far as it will apply to the basis upon which evidence in civil litigation concerning child sexual assault is received. Strict rules of evidence may have the effect of restricting the reception of necessary evidence in matters relating to child sexual abuse. By way of example, ought narrative forms of evidence from victims be permitted in civil litigation concerning child sexual abuse? I suggest, tentatively, that the answer to that question is: Yes.

The general question is of sufficient complexity that it could easily occupy a reference to a body such as the Australian Law Reform Commission. Such a reference might well be sought to be made by the Attorney-General given the likely extended time for which this Royal Commission is apt to run.

Alternatively, this might be a matter than productively can occupy the research unit of the Royal Commission itself. Certainly, further consideration of this matter is warranted. The continued application of the current form of the statutory provisions governing reception of evidence in claims for child sexual assault is apt to dissuade victims from making such claims rather than to assist them.

Issue 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?

Response: The short answer is that victims of child sexual abuse want forms of redress that satisfy them that they have been believed in their claims.

At the most abstract level, another anecdote from the conduct of the public hearings of the Special Commission informs this inquiry.

On another occasion during an adjournment from the reception of public evidence before the Special Commission, I had occasion to hear a victim of child sexual abuse indicate: 'I have been saying these things for years. Now they have to believe me'.

The context was the reception of evidence about one of the offending Catholic priests the subject of the Special Commission investigation. It was prompted by the reception into evidence of documents that demonstrated on a strong basis on the balance of probabilities that the priest had committed acts of child sexual abuse on many children, and that such conduct was known to the Catholic Diocese of Maitland-Newcastle during the whole course of his offending which likely commenced during the mid 1950s and continued until the early 2000s.

As the Royal Commission itself has discovered, the Catholic Archdiocese of Sydney took steps to have counsel acting for it in the *John Ellis* litigation assert to Mr. Ellis that his complaint was other than soundly based, when nonetheless the Archdiocese was in possession of materials that disclosed Mr. Ellis claims were likely able to be proved on the balance of probabilities to a high level of cogency.

It is such a phenomenon, that is to say that the claimant will be so exposed to a litigious form of 'total war' as part of the apparent forensic aim of so distracting a claimant that they merely give up in despair and withdraw the claim, which needs to be addressed in about demonstrating to victims of child sexual abuse that their claims will be received sensitively.

The civil litigation system has, as its *raison d'être*, a calculus that aims to reduce all damage to a quantum of money. This may not be the sole answer for victims of child sexual abuse. While there is an evident need for compensatory damages where losses accrue to a victim by reason of the psychological damage that can result - in a sense compensation for the loss of the chance of a normal life - this is not the sole answer to the proper redressing of their grievances.

This, of course, begs the question of what then will prove satisfactory?

That enquiry does not admit of easy answers.

One method of redress, albeit seemingly of the most modest dimensions, is for a method to be employed by which (in effect) the a court declares to the whole world that the victim has been believed, together with an express of the profound sorrow that must accompany such a declaration. To practitioners in orthodox civil litigation such a proposition is radical.

I have little doubt, from my observations of victims of child sexual abuse, that such a mechanism nonetheless would get such victims, as it were, most of the way home.

There is also the question of what can be done for the immediate families of victims of child sexual abuse, who in my experience likely suffer as much as the victims themselves. Such declarations as I have identified above would likely be much appreciated by this class of persons.

Doubtless there are other forms of redress that may suggest themselves from the evidence that is gathered by the Royal Commission.

In short, however, it is clear that both orthodox current forms of redress understood by civil litigation systems remain of utility, together with other novel forms of redress, of which that suggested above is one, are required to address this pernicious form of loss and damage that so many have suffered.

A handwritten signature in black ink, appearing to read 'Mark J. Cohen', with a stylized flourish at the end.

MARK J. COHEN
Wentworth Chambers
Sydney
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