

NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

ISSUES PAPER 5: Civil Litigation

INTRODUCTION

The New South Wales Bar Association welcomes the opportunity to provide a submission to the Royal Commission concerning Institutional Responses to Child Sexual Abuse in response to the release of *Issues Paper 5 – Civil Litigation*.

SPECIFIC QUESTIONS RAISED IN THE PAPER

Turning to the specific questions posed, the Association submits as follows.

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? For example:*
 - a) *some institutions cannot be sued because they are not incorporated bodies or they no longer exist or because decisions were made personally by an individual officeholder*

In some circumstances, in New South Wales, the historical use of unincorporated bodies has raised difficulties for claimants seeking compensation arising from institutional sexual abuse. There is, however, no jurisprudential error by the Court of Appeal in *Trustees of the Roman Catholic Church for the Diocese of Sydney and Pell v John Ellis* [2007] NSWCA 117. The principles of liability of unincorporated associations are well established and conventional. The Commission has been examining this issue and, in relation to Roman Catholic activities, Cardinal Pell has acknowledged in his statement to the Commission that there should be a legal entity capable of being sued. The number of other unincorporated bodies of religious, charitable or social organisations, for whom this is a relevant issue is not yet clear. Bringing proceedings against an incorporated body is unquestionably easier, but the existence of a corporate defendant alone is of no benefit to a plaintiff unless the incorporated body is liable for the wrong and has assets, or insurance, to cover its liability.

One central question for victims of past abuse is the capacity of the legislature to attribute responsibility for wrongs to an entity which may or may not owe them any independent duty of care at law. This poses a difficult problem.

As to the future, incorporation of major organisations with responsibility for care or supervision of children is a worthy aim for law reform. The NSW Bar Association would seek to be allowed to comment further once the position and proposals for reform become clearer.

- b) *some institutions do not hold assets from which damages could be paid, or they are not insured or their insurance status is unknown*
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Two problems are identified by this question: first, the absence of assets in the individual or the legal entity said to be liable for compensation; and, secondly, the absence of insurance that responds to a risk which arises out of the commission of an intentional tort. As to the second of those problems, most, if not all, policies of insurance either do not insure against, or exclude cover for, the assured's liability arising both directly and indirectly from the commission of an intentional tort. Generally speaking, as a matter of sound public policy, the common law will not allow a person to insure against intentional acts or crimes. Indirect liability arises either under the principle of vicarious liability for the acts of the intentional tortfeasor or through the personal negligence of the assured person or body. When such personal liability for negligence arises, in the context presently under consideration, it is usually because of a failure of the assured to act in the face of knowledge, either actual or constructive, of the commission of earlier acts of sexual abuse or of a proclivity for such conduct by those for whom the assured is responsible or over whom it has relevant supervision or control. Personal liability in negligence also arises in the context of failures on the part of institutions to devise, implement and maintain systems for the protection of children.

The Association would welcome a regime requiring institutions having the care of, or dealings with, children to hold apposite public liability insurance. It recognises the difficulty, however, in securing insurance in the private insurance market that would cover the risk.

- c) *the circumstances in which institutions are liable for the criminal conduct of their employees or other people;*
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In general terms, unless certain factors are present, institutions are not vicariously liable for the criminal conduct by persons employed or deployed by them. They may have, however, an independent duty to act, the breach of which gives rise to a discrete personal liability, rather than one deriving from the principle of vicarious liability: *State of New South Wales v Lepore* (2003) 212 CLR 511; *Withyman v State of New South Wales* (2013) NSWCA 10. The current constraints arise, at least in part, from a balancing of competing public policy principles.

The New South Wales Bar Association believes that any change to the current jurisprudence in this area requires careful consideration. There are risks that legislative change could have unforeseen ramifications in a common law system of compensation.

Any change may also affect insurance coverage and the potential repercussions of that ought to be borne in mind in relation to any reform proposals.

- d) *the circumstances in which regulators are liable for failures of oversight or regulation;*
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The liability of regulators with respect to sexual abuse in the institutional context will depend on many and varying factual circumstances, which are difficult to address in the abstract. Relevant factors include

the statutory framework (including the nature and scope of the power conferred by the statute and the purpose of its conferral), the nature of the activities undertaken by the regulator in the exercise of its powers, the question of liability attaching for a failure to exercise its statutory powers, and the scope and content of any common law duty imputed to it in the context of the powers conferred upon it.

In the abstract it is difficult to envisage the situations in which regulators of organisations or institutions involved in the care of children could be held liable for failures *within* those institutions. That is not to say that a failure to exercise regulatory powers, the exercise of which could have prevented sexually abusive conduct, could not give rise to a legal liability. Nor is it to say that exercising such a power in a way that places a person at risk of sexual abuse, of which the statutory body knew or ought to have known, might not also result in common law liability.

The law with respect to the liability of statutory authorities is well developed and already provides for liability to attach to such authorities in a legally principled way.

e) *limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended;*

There is a wide variety of limitation period regimes throughout Australia, but, in general, the usual limitation period for tortious claims is three years. Time may not run in respect of infants or those under disabilities, but even this is not universal if, for example, as in NSW, there is an adult who could have brought the proceedings on behalf of the infant or disabled person. There are provisions for extensions of time in most jurisdictions, but these vary widely from the very limited rights in Queensland to the far more liberal regime in South Australia. In general, however, it is very difficult and expensive to obtain an extension of time, more so if there is a substantial period of delay.

A 2009 survey by the Anglican Church found that the average time from abuse to first complaint was 23 years.¹ That generally accords with the anecdotal experiences of legal practitioners.

Not only does the claimant have to meet the specific statutory requirements for extension of time in the State or territory where the cause of action arose, but he or she must satisfy the Court that a fair, but not perfect, trial is still possible: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. Where significant witnesses are no longer available or records are lost or destroyed through the lapse of time, such factors can often preclude the grant of an extension of time to a deserving claimant,

While recognising the powerful reasons for the existence of limitation periods, the Association encourages close consideration by the Commission of the removal (or at least statutory extension) of limitation periods in cases of child sexual abuse in an institutional context. The particular vulnerability of children and their well-recognised reticence to report abuse mean that limitation periods (or at least those of the traditional three or six years) have a greater likelihood of defeating otherwise meritorious claims and of causing an injustice to plaintiffs in this class of case. The removal of limitation periods altogether (subject to abuse of process principles recognised by the High Court, in the context of limitation periods, in *Batistatos v. Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 227 ALR 425) is not without precedent. It has been done in New South Wales with respect to dust disease claims, in recognition of the fact that often those conditions develop undetected, or long after exposure to the

injurious agent. In cases of child sexual abuse, too, it is common that the victim does not recognise his or her damage or its connection with the abuse until many years later. To that extent, the two situations are similar.

The Association considers that the protection from having to meet allegations in respect of conduct many years earlier afforded to defendants by abuse of process principles, may be sufficient, of itself, in the context of child sexual abuse cases to strike a fair balance between the competing policy considerations in this important area of the law.

f) the requirements for bringing a class action, if victims from the same institution wish to sue as a group;

There are significant issues and challenges to any proposal for class action in cases of this nature. Each assault is different, and damages awarded against the perpetrator are assessed differently. The legislative schemes differ between States and territories. The pursuit of class objectives may not bring closure in the individual case or address the individual needs of the participants.

g) the existence of relevant records, locating them and retrieval costs;

There is a general benefit in establishing proper document retention policies, both for potential victims and for the protection of institutions.

The Association encourages consideration of a mandatory period for the retention of documents in relation to institutions involved in the care of children.

h) the process of giving evidence and being subject to examination and cross-examination

Relevant considerations, that must be balanced, include that: giving evidence and being cross-examined in the public gaze can be traumatic and stressful for many victims; and parties sued are entitled to know the truth and test the evidence to ascertain whether an allegation is true. Courts have power to restrict the access of the public in appropriate cases or to prohibit the publication of information which, for example, identifies the name, family or location of a person making a claim of abuse. These are important safeguards, which are generally effective, if adopted; there is, though, some variation in the way in which these concerns are addressed from jurisdiction to jurisdiction.

Increasingly, courts are inclined to prefer that lay witnesses' evidence substantially be put in writing, which might then be supplemented by much briefer oral evidence and cross-examination. Whilst not universal in the varying court systems, this does have the effect, when used, of greatly reducing the stress on those required to give evidence. Greater use of this as a tool

in these cases is accordingly commended. In the Association's view, however, it should not be used to replace oral evidence in-chief entirely. If it were to do so, the judge (or judge and jury) hearing the case would only see the plaintiff in cross-examination, which may paint a false picture of his or her evidence.

(i) proving that the victim's injuries and losses were caused by the abuse

The courts satisfactorily grapple with causation in relation to psychological injury and with the complexities of intervening and supervening events. There is no need to change the current methods of forensic enquiry or judicial determination in relation to this issue.

(j) the way in which damages are assessed

It is unsatisfactory that there are wide variations in the way in which damages for non-economic loss/general damages for pain and suffering and loss of amenities of life are assessed in different jurisdictions. That is more the case in circumstances where wrongdoings in a single case occur across multiple jurisdictions. A uniform or standardised scheme and method of assessment, would be appropriate.

In some jurisdictions there are caps on compensation for: a) economic loss; b) interest; or c) gratuitous services. The caps will inevitably result in under-compensation or differential compensation amongst victims of child sexual abuse.

The Ipp Inquiry recommended a 3% discount rate and a single set of principles for compensation. The various regimes for the assessment of damages across the different states and territories, due to the different jurisdictions going their own way in the various *Civil Liability Acts* and equivalent legislation, are a hotchpotch of common law modified differently by statute in every jurisdiction. Given that these matters are largely for State and territory law, a single recommended approach would seem appropriate.

k) the cost of litigation and access to funding and legal services

In the absence of legal aid in these cases, it has frequently fallen to the legal profession to provide access to justice for victims of child sexual abuse through "no win no fee" arrangements.

2. *Other elements that raise issues for conduct of litigation*

The Commission is directed to the Association's comments earlier in this submission.

3. *Early dispute resolution/mediation processes in civil litigation systems for people who suffer sexual abuse in institutional contexts*

Early dispute resolution and mediation processes work well generally. The overwhelming majority of cases never reach court.

The Association does not support a special tribunal for such claims. The Association supports the victims of such abuse having access to a court hearing before an independent judge (or judge and jury), as the final resort, if a matter cannot be resolved in the ordinary course of early dispute resolution.

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?*

The Association has no specific comment to make in respect of this question.

There have been considerable improvements and efficiencies achieved in recent years the system of civil litigation in NSW. Subject to broader issues involving applicable legal principle addressed earlier in this submission, the Association makes no comment on this issue but would wish to have the opportunity to comment further at a later stage on any specific proposals for reform that may be formulated by the Commission.

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

Apology

Human experience and expert views suggest that a genuine apology means a great deal to a victim. Apologies should be encouraged and can be part of a negotiated resolution; it is, however, hard to see how they could be made compulsory and remain genuine. .

Other forms of assistance

Interim awards of damages or early payments for medical assistance, counselling and so on are available in some, but not all, jurisdictions. A uniform or standardised scheme of such interim awards or early assistance is desirable.

The inadequacy of a compensation fund

The Association notes that there have been suggestions from institutions and survivor associations for the establishment of a national compensation fund for victims of abuse.²

The Association is concerned that statutory funds should not be used to replace or preclude common law remedies. If such a scheme is established, participation by victims should be optional, not compulsory. The common law, subject to the considerations referred to earlier in this submission, generally provides a more effective remedy, especially given some of the problems that have been experienced with compensation funds. The following examples are illustrative:

Victims Compensation Scheme NSW

In NSW, in 2013, the statutory compensation scheme set up for victims of crime was radically slashed, with maximum payments reduced from \$50,000 to \$15,000, with only nominal payments for legal assistance. There had been no increase to compensation payments, not even for inflation, in 25 years.

As of June 2011, the waiting period for a victims compensation decision was, on average, 25 months.

Compensation for Stolen Generations in Australia

The Association notes that the Australian Human Rights Commission's 1997 report, *Bringing Them Home*, made 54 recommendations regarding the treatment of the Stolen Generation; 34 addressing reparations, and 11 specifically addressing monetary compensation. In the report, the Commission also recommended the establishment of a National Compensation Fund.³ This proposal has faced a distinct absence of political will, with bills introduced in the Federal parliament on a number of occasions, but not proceeding.

The Association notes also that despite calls for a national compensation fund for Indigenous Australians that were part of the stolen generation, most Indigenous Australians who suffered grievous impacts to their lives, health and relationships, continue to go uncompensated.

The first member of the Stolen Generation to be awarded compensation was Mrs Valerie Linlow, in the NSW Victims Compensation Tribunal. Mrs Linlow was awarded \$35,000 in compensation.

In 2007, in the leading case of *Trevorrow v State of South Australia* (No. 5) [2007] SASC 285 (1 August 2007) Mr Bruce Trevorrow was awarded \$525,000 in damages for compensation for a lifetime of sorrow and pain, plus \$250,000 interest.⁴

Canada

In Canada, residential schools were run for First Nations peoples in the 19th and 20th century, the last school closing in 1983 or 1984. Children were often separated from their families, experienced physical and sexual abuse and lost their culture and language.⁵ In 2000, the Canadian government requested the Law Commission of Canada ("LCC") to investigate institutional child abuse.

Compensation became accessible for survivors via the Independent Assessment Process or the Common Experience Payment. Compensation was available up to \$275,000.00 for the most serious physical and sexual abuse. A further amount of up to \$250,000 could be sought for lost income due to the consequences of abuse, and up to \$15,000.00 for the cost of future care.⁶

The Common Experience Payment deadline passed in 2012.⁷ The Independent Assessment Process deadline also passed in 2012.⁸ The sustainability of the fund remains to be seen.

Findings of the Victorian Legislative Council Family and Community Development Committee Inquiry

The Victorian Committee Inquiry noted in its report, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013), that the approach of institutions to financial compensation 'often does not provide a clear explanation of the basis on which an organisation makes a financial payment, how the amount awarded is determined and obligations regarding confidentiality.'⁹

The Committee also noted that institutions 'rarely encourage participants in the process to seek independent legal advice before reaching an agreement that might affect their subsequent legal rights.'¹⁰

The Committee also noted that 'for many victims of criminal child abuse, the option of pursuing a claim through civil litigation is central to their desire for justice. Many told the Inquiry that civil litigation is not only an avenue to seek compensation, but also a form of acknowledgement and accountability for the harm they have suffered.'¹¹

However, no civil claims of criminal child abuse against religious organisations have been decided by the Victorian courts to date. Civil litigation in these cases is generally resolved through private settlements.¹²

Conclusion

The Association appreciates the opportunity to provide these comments to the Royal Commission. The Association would be pleased to have the opportunity to assist the Commission further.

31 March 2014

¹ The report analysed 191 alleged cases of child sexual abuse, reported from 17 dioceses throughout Australia between 1990 and 2008. See Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, (May 2009), at 5. Accessed at <http://www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf>

² For example, see CLAN, cited in 'Child sex victims call for compensation: Royal Commission,' *The Newcastle Herald*, 17 September 2013. Accessed at <http://www.theherald.com.au/story/1779811/child-sex-victims-call-for-compensation-royal-commission/>. This approach has also been supported by the Catholic Church, see Jane Lee, 'Catholic Church backs sex abuse compensation scheme,' *The Age*, 14 November 2013. Accessible at <http://www.theage.com.au/victoria/catholic-church-backs-sex-abuse-compensation-scheme-20131114-2xi2y.html>.

³ Australian Human Rights Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997, at Recommendation 15. Accessible at <http://www.humanrights.gov.au/publications/bringing-them-home-report-1997>

⁴ See the judgment on costs and interest: *Trevorrow v State of South Australia (No. 6)* [2008] SASC 4 (1 February 2008) (Gray J)

⁵ 'Residential Schools Canada: Alberta, NWT Bishops Latest To Apologize,' *Huffington Post Alberta Canada*, 24 February 2014. Accessed at http://www.huffingtonpost.ca/2014/02/24/residential-schools-canada_n_4848585.html

⁶ BisLaw Personal Injury Trial Lawyers, *Information for Survivors*. Accessed at <http://bislaw.ca/indian-residential-school-claims/information-for-survivors/>

⁷ Service Canada, *Common Experience Payment*, <http://www.servicecanada.gc.ca/eng/goc/cep/index.shtml>

⁸ Aboriginal Affairs and Northern Development Canada, *Independent Assessment Process*, <https://www.aadnc-aandc.gc.ca/eng/1100100015632/1100100015633>

⁹ Victorian Legislative Council Family and Community Development Committee Inquiry, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013) at xxxv. Accessed at http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Preliminaries.pdf

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, at xxxix.