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VACCA Submission in response to *the Royal Commission into Institutional Responses to Child Sexual Abuse* concerning Issues Paper 5 on *Civil Litigation*

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Executive Summary

The Victorian Aboriginal Child Care Agency (VACCA) welcomes the opportunity to make a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse concerning the *Civil Litigation Issues paper* and offers the following observations and issues, particularly as they pertain to the Victorian Aboriginal community in which we work.

Our perspective is particularly reflective of our Link Up program service experience and our knowledge of the difficulties many Aboriginal people face in deciding to take the civil litigation path. The burdens of civil litigation are financial, emotional and complex in nature and, particularly for people who have been sexually abused by the care system, present a major obstacle for those seeking justice, healing and restitution. It is therefore essential that systems are put in place to make the pursuit of justice, healing and restitution easier for victims.

For Aboriginal victims of sexual abuse in government care there are additional issues to be considered as most would see themselves as part of the Stolen Generations. Firstly, Stolen Generations members have already told their stories and their issues investigated through the *Bringing Them Home Report*. While the Federal Parliament has apologised and services have been provided there remains the issue of restitution and compensation. Some have sought restitution through the civil litigation process but many have found the process arduous and traumatic. Both the *Bringing Them Home Report (BTHR)* in 1997 and the *Healing: A Legacy of Generations Report* (by the Senate Legal and Constitutional References Committee) in 2000, recommended a funded non-adversarial tribunal process for Stolen Generations members seeking justice and compensation¹.

VACCA supports the submission and recommendations made in the Victorian Aboriginal Legal Service and Human Rights Law Centre submission to the Royal Commission and seek in

¹ Recommendations 14-20, HREOC (1997) *Bringing Them Home Report*, Canberra: Government Printers and Recommendations 7-9, Senate Legal and Constitutional References Committee (2000) *Healing: A Legacy of Generations Report*, Canberra: Government Printers.

our submission primarily to support their calls for significant reform in this area. We believe these reforms will assist those who suffered abuse as children to be justly compensated for the lifelong impacts they experience as a consequence of that abuse. We call on the Royal Commission to challenge the Victorian government, one of only two states yet to introduce a state redress scheme. We believe a well structured state redress scheme would provide a number of Aboriginal people abused through 'state care' with some justice with minimal trauma and alleviate many of the current impediments to people seeking compensation for the childhood abuses they suffered. We acknowledge the Parliamentary Inquiry explored this in their Inquiry and found the schemes in other jurisdictions lacking in certain areas. However, rather than recommend a scheme that addresses these inadequacies, they have recommended a review of the Victims Of Crime Assistance Tribunal (VOCAT). Our concern is that this may or may not be undertaken and as there are no timelines or terms of reference outlined, this will not assist our aging community who are sadly dying before they see any justice for the abuses they have suffered.

In response to the areas outlined in the Issues Paper, VACCA offers the following based on our experiences and understanding of these issues primarily as they relate to the Stolen Generations experience..

The elements of the civil litigations system outlined in the Issues paper form a number of barriers to Aboriginal people considering civil litigation. It is our experience in Victoria that there are few cases of civil litigation instigated by Aboriginal people abused through their "in care" experiences due to many of the issues outlined in the Issues Paper. Of great concern to us at VACCA is the additional trauma a client who elects to attempt civil litigation experiences as hurdle after hurdle is placed in their path to justice.

INSTITUTIONAL STATUS

VACCA is aware that some institutions cannot be sued directly because;

- They do not hold assets
- Not 'legal entities'
- No longer exist.

Some religious institutions do not have a legal framework where the clergy is seen as 'employed' by that institution and therefore do not have liability. This has been tested by the High Court in the case of John Ellis v Roman Catholic Church. Our view is that federal legislation may be required to change this state of affairs. The Victorian Parliamentary Inquiry Into the Handling of Child Abuse by Religious and Other Non Government Organisations made the following recommendations:

Addressing the legal identity of non-government organisations

- That the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements. (Recommendation 26.1, Part H) and
- That the Victorian Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures. (Recommendation 26.2, Part H)

Recommendation

That all institutions that provide care should be required to become incorporated and have adequate insurance so that in the event of abuse, victims can seek redress.

REGULATION

VACCA notes the Parliamentary Inquiry has recommended the establishment of independent statutory body to improve regulation of organisations charged with the care of children. Currently and historically it has been the state that has ultimate responsibility for the care of children removed from their families and of note is the lack of findings or recommendations in relation to the state's role or responsibility where abuses occurred and the monitoring or regulation of these agencies was lacking. VACCA believes the state has responsibility for regulation and monitoring of non government and religious organisations funded by it and where children have been abused, the state as the regulator must carry some liability for the failures in oversight that enabled these abuses to occur.

Recommendation

That the state government be held in part accountable for abuses that occurred in institutions where it held some regulatory function that it did not adequately monitor or regulate.

LIMITATIONS

The current Statute of Limitations with respect of Civil Litigation or application for compensation under the Victims of Crime Assistance Act 1996 (Vic) can lead to those who suffered sexual abuse as children may be unable to pursue action due to not actioning a claim within the time periods. It is difficult to comprehend the rationale for imposing these time limitations given that there is no statute of limitations on reporting sexual assault to police who can investigate and charge perpetrators decades after the assault was perpetrated. It is well known that survivors of childhood sexual abuse can take years to feel able to report their abuse, and often choose to do this once they have raised their own children and feel they are emotionally able to address these experiences– generally over the age of 40 – and thus are ‘out of scope’ due to the time limitations. Both the Bringing Them Home Report 1997 and the Betrayal of Trust Report 2013 call for no statute of limitations being imposed on those wishing to seek redress for abuse they experienced as children.

Recommendation

That the Victorian and Australian Governments abolish the Statute of Limitations as they apply to cases of sexual abuse.

RECORDS

Aboriginal people continue to struggle in accessing their records despite this being a significant recommendation for change from the BTHR Inquiry as per recommendation 22. In Victoria as part of the state government’s response to the recommendations in the Bringing Them Home Report, a Koori Records Taskforce was established within the Public Records Office of Victoria. This taskforce produced a report Wilam Nailing which among other recommendations, recommended the development of Common Access Guidelines to assist Stolen Generations to have better access to the range of records they require to assist them in re establishing their Aboriginal identity. Despite this report being completed in 2006, there are still major barriers for Aboriginal people accessing their records and there is still no effective common access for people to be assisted to gain all their records through one central agency.

Another issue of concern is that we are aware that when the Human Rights and Equal Opportunity Commission Inquiry into the Separation of Aboriginal Children from their Families was announced, a number of files were deliberately destroyed by a range of agencies concerned about the information held on these files and possible repercussions of this. Sadly we will never know what or how much information about the history of Aboriginal people was lost during this time.

Understandably, written records are required as part of the legal process. However, record keeping was often very poor and accessing records from both government and institutions is time consuming and complex. In terms of accessing records via Freedom of Information, it is often the case that privacy requirements inhibit what can be released to individuals. To access records via legal discovery requires evidence to substantiate the claim and thereby initiate the process, which can present potential litigants with a 'catch 22'. All the processes have the affect of protecting the institution rather than the person seeking justice.

Recommendation

That at a minimum, the institutions involved in the life of a client provide easy access to records through streamlined processes and by taking on any financial burden related to accessing records.

GIVING EVIDENCE AND PROVING CAUSATION

Victims of sexual abuse have been traumatised by their experiences. The complexity and length of the civil litigation process should not add to that trauma. Many of these people are older and often, such as in the case of Bruce Trevorrow, legal resolution may occur only to find that the person involved passes away soon after winning the case. Individuals seeking restitution require emotional support and shouldn't be subject to an arduous process that adds to their suffering, particularly through questioning in court.

Issues of 'burden of proof' and 'causation' are clearly impositions on people who are already traumatised by sexual abuse. Sexual abuse is very different to other areas of personal injury as it relates to events that occurred in the past and can be difficult to be exact on details

such as particular dates etc. All the factors mentioned in this submission suggest that issues of the burden of proof and the determining of causation of injury must be handled in a different way by the legal process when it comes to sexual abuse.

One of the reasons VACCA has recommended alternate means for Aboriginal people to seek justice and compensation is the further trauma caused by having to give evidence and prove that the abuses suffered in childhood are connected to the life issues people have suffered since the abuse. We know that the majority of Aboriginal people who were sexually abused in their childhood will not report their experiences to the police or attempt civil litigation due to their fear of not being believed and cross examined and belittled by a system where they have no power. One of the significant healing opportunities that this Royal Commission provides Aboriginal people with is the fact they will be heard and will be believed and they don't have to fear 'proving' their story (often at the hands of the 'white man'). The 'system' is still experienced by many Aboriginal people as insurmountable and that there is little point in putting yourself through the trauma of trying to have your word believed. VACCA acknowledges the trauma that those who have tried to have their sexual abuse and other childhood traumas including the trauma of removal and disconnection from land and culture addressed and sadly even when they win, they lose. Bruce Trevorrow died five months after winning his case in 2008.

Recommendation

That an alternative non adversarial tribunal process be established that enables a less traumatic and more expedient process for people who were sexually abused in their childhood.

The provision of culturally competent counselling services to support Aboriginal people seeking justice for being sexually abused in their childhood.

COMMUNITY ACCESS TO LEGAL KNOWLEDGE

One of the main hurdles for Aboriginal community members seeking civil litigation is a lack of awareness and understanding of the legal processes involved. Choosing the best process and approach requires having accessible legal information which explains the system and the options.

Recommendation

That Aboriginal legal services and Link Up services be provide with the funding required to deliver legal education at a community and individual level.

LEGAL REPRESENTATION

Access to legal representation for Aboriginal people is made difficult because of the costs involved, the time and complexity involved and, for some, a general mistrust of the legal system. The more complex the case, the more expensive the process and therefore seeking justice can be prohibitive. VACCA's view is that governments have a responsibility to enable restitution.

Recommendation

That Aboriginal legal services be funded so that Aboriginal victims of sexual abuse in institutions can be provided with free legal assistance.

Cultural Abuse

In the case of Aboriginal people who have suffered abuse at the hands of institutions it is essential to understand the impact of cultural abuse. Cultural abuse is a clear attack on identity and creates further vulnerabilities. The BTH Report clearly demonstrates the severity if disconnection from culture and community.

Recommendation

Cultural injury or cultural loss a head of damage within the civil litigation process.

CONCLUSION

In conclusion VACCA trusts that through the personal accounts that this Royal Commission is witnessing and the testimony and evidence given in the Public Hearings held, there is no room for any doubt that several hundred if not thousands of Aboriginal people have suffered horrific abuses including sexual abuse during their childhood while in the care of institutions. We know that for the majority of these people, they continue to suffer in a range of ways and so far have received little in the way of justice for the harm these experiences have caused. We believe that the 1997 Bringing Them Home Report made a number of valuable recommendations in regard to redress, however very few of these have been implemented in a way that effectively addresses people's loss, grief and trauma.

VACCA supports the recommendations made in relation to compensation (Recs 14-19) in the Bringing Them Home Report and respectfully suggests this Royal Commission give serious consideration to adopting these recommendations.

REFERENCES

Bringing Them Home Report (Human Rights and Equal Opportunities Commission Inquiry Into the Separation of Aboriginal Children From Their Families) 1997

Healing: A Legacy of Generations Report (by the Senate Legal and Constitutional References Committee) in 2000

Betrayal of Trust (Inquiry Into the Handling of Child Abuse By Religious and Other Non Government Organisations) Nov 2013