

# Response to Issues Paper No 5 – Civil Litigation

## Tasmanian Government

The Tasmanian Government believes that as far as possible all victims of Institutional child sexual abuse should be equally able to seek redress. The civil litigation system, even if reforms are implemented, will not provide an adequate remedy for the majority of the victims. Tasmania would prefer that greater emphasis and resources be directed to forms of redress that would be more equitably accessible.

The reasons that the civil litigation system will not provide adequate redress for the majority of victims of historical institutional abuse are basically summarised in point 1 of the Issues Paper. To follow is further comment on some of the matters mentioned in that point:

- i. Even if limitation periods are extended or abolished, in many cases the only potential defendant is the perpetrator of the abuse. The perpetrator may be dead and even if not is unlikely to have sufficient assets to pay damages and costs if the litigation is successful.
- ii. There are two ways that an institution may be a potential defendant. One is if the institution (the employer) could be held vicariously liable for the criminal conduct of the perpetrator of the abuse (the employee). Vicarious liability of an institution for historical abuse is unlikely as sexual abuse would not be within the scope of the perpetrator's terms of employment. In addition, in several cases the perpetrator may not fall within the category of employee.
- iii. An institution may also be a potential defendant if it is claimed that it was directly negligent for failing to remove a perpetrator from ongoing contact with children after allegations of abuse had been made to relevant persons. The problem that arises here is that the institution may not be a legal person capable of either being sued or being held liable for damages and costs or the institution may have ceased to exist. In addition, if the institution is capable of being sued, and is held liable, the institution may not hold sufficient assets or be covered by sufficient insurance to pay damages and costs.
- iv. Civil action by victims of historical child abuse may not be possible because of provisions in statutes of limitation. In Tasmania, if a child suffers an injury because of the negligence of another and the child is the custody of a parent who is not under a disability at the time of the injury there is no extension of the period of limitation beyond 3 years from the date of discoverability. The only exception to this is where the intended defendant is either the parent or a person in a close relationship with a parent (as defined) in which case time does not begin to run until the potential plaintiff is 25 years of age. The exception currently only applies to causes of action arising after 1 January 2005, although consideration is being given to allowing more general application of the exception.
- v. Limitation periods exist, in part, because of recognition that as time passes records are destroyed, witnesses relocate or die and memories may fade. If limitation periods are extended there will still be the problem of obtaining reliable evidence. In addition, if limitation periods are to be extended or abolished consideration will need to be given to such matters as whether the change is to apply to all victims of

child sexual abuse, whether institutional or other; all victims of any form of child abuse or all victims who are under a disability at the time the abuse (sexual or other) occurs.

- vi. Civil litigation is an adversarial process and a plaintiff must prove his or her case in open court. If settlement is not reached prior to hearing a plaintiff must face both the trauma of speaking publicly about intimate matters and the rigours of cross-examination. Victims, particularly those who have chosen to give evidence to the Royal Commission by way of private session, may not choose to undertake a public trial.
- vii. Civil litigation is expensive and if unsuccessful may result in a costs order against the plaintiff. Civil litigation is not generally funded by Legal Aid.

Points (i) to (iii) above all serve to narrow considerably the percentage of victims of historical child sexual abuse who could seek redress through the civil litigation. It is difficult to see how any changes could be made to prevent this narrowing, other than very radical changes which would distort the basic principles of the civil justice system, such as making an institution strictly liable for all employees, volunteers or associates on a retrospective basis.

Point (vi) above adverts to the fact that victims may prefer to not face the process of civil litigation and point (vii) emphasises that use of the civil litigation system will only be available to wealthier plaintiffs unless funds are set aside specifically for the purpose of funding actions by victims of historical institutional abuse. At present national partnership agreements relating to Legal Aid funding are being re-considered but in the present budgetary climate there is unlikely to be a substantial increase in overall funding and other competing priorities for funds.

For the reasons set out in the two paragraphs above Tasmania considers that more attention should be given to avenues of redress that can be accessed more equitably by all victims.

*Listen to the Children - Review of claims of abuse from adults in state care as children* published by the Ombudsman Tasmania in November 2004 is one example of how an alternative avenue of redress could operate.

Tasmania submits that any proposed reform to the civil litigations system should be scrutinised by a body with expertise in civil law which would consult widely with all stakeholders, including those outside the Royal Commission's terms of reference. This would allow for full consideration of the ramifications of proposed changes to avoid any unforeseen detrimental effects or potentially unequal treatment of prospective plaintiffs who are not victims of institutional child sexual abuse.

The Panel of Eminent Persons chaired by the Honourable David Ipp, which published its Review of the Law of Negligence in 2002 (Ipp Review), is an example that could be followed.

Tasmania also considers that, for greatest effect, any reform to the civil litigation system should be on a national basis by the adoption of model legislation as recommended by the expert committee.