ISSUES PAPER 5 – CIVIL LITIGATION
SA GOVERNMENT SUBMISSION TO
ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

Overview

The South Australian Government welcomes the opportunity to make a submission in response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) Issues Paper 5 – Civil Litigation.

This submission provides information about the State of South Australia’s ("the State") experience in responding to common law claims over the past decade. It also provides brief information about the ex gratia claims made against the State as a result of the Commission of Inquiry established in 2004 by the Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004 (SA) ("the CISC Inquiry").

The CISC Inquiry was established by the State Government in 2004 to inquire into:
- any allegations of sexual abuse of a person who was, at the time of the abuse, either a child in State care or a child on the APY lands;
- the death of children in State care;
- to report on whether there were failures on the part of the State in responding to matters that gave rise to the allegations;
- to report on whether adequate records were kept; and
- to report on any measures that should be implemented to provide assistance and support for victims of sexual abuse.

In 2008, the CISC Inquiry published its report, including its recommendations ("the CISC Inquiry Report").

In the past decade, the State has been served with over 160 sets of Court proceedings from former residents in State care seeking common law damages for abuse allegedly suffered in care. A substantial number of the court actions were issued in about March 2009, one year after the release of the CISC Inquiry Report.

The majority of these legal proceedings have resolved, principally through the payment of damages under a settlement reached between the plaintiff and the State, but also by the plaintiff or the deceased plaintiff’s estate discontinuing the action. The State has taken an approach which has encouraged the settlement of claims, and this is an important reason why no matter so far has proceeded to trial.

The State has also received a number of formulated claims (where proceedings have not been issued) from or on behalf of former residents in State care seeking common law damages. Of these, most have resolved by way of settlement by the payment of damages, by the payment of ex gratia compensation under the Victims of Crime Act 2001 (SA), or by the claimant or the claimant’s estate not proceeding with the claim.
The majority of allegations of abuse have involved sexual offences; however there have also been a substantial number of allegations involving other types of abuse (or breach of duty), including physical abuse, excessive or inappropriate punishment, neglect, or failure to educate and nurture. A small number of claims relate solely to non-sexual abuse. The dates of the allegations of abuse range from the 1940's to 2005.

In all but a very small number of claims, the claimant has been legally represented. The amounts paid in the settlements are, by the very nature of common law damages, not capable of precise mathematical calculation or referable to any set guidelines. The settlements take into account a number of factors, including but not limited to factors such as the nature and extent of the alleged abuse and the effect of the alleged abuse on the individual claimant.

The State responded to the large volume of complex litigation by assigning a team of dedicated solicitors, paralegals and investigators to assess the claims and to attempt their resolution. Funding and other arrangements were put in place to maximise the full and prompt collaboration of agencies such as the Crown Solicitor’s Office, the Department of Treasury and Finance, Families SA (now part of the Office for Child Safety within the Department for Education and Child Development), the Department for Education and Child Development, South Australia Police and the Department of Health. These agencies provide regular reports to Government about the progress of the litigation.

In response to Recommendation 40 of the 2008 CISC Inquiry Report, the Government considered possible redress schemes for victims of child sexual abuse for children in State care. The result of this was the Government releasing Guidelines in January 2010 to allow for applications to be made to the Attorney-General for an ex gratia compensation payment under the Victims of Crime Act 2001 (SA) for former residents in State care who experienced sexual abuse whilst in State care. These Guidelines were intended to offer an alternative to common law litigation for plaintiffs who had already issued proceedings or for other interested claimants. An application for ex gratia compensation might offer a means of redress to those whom the Attorney-General has been reasonably satisfied had been victims of sexual abuse whilst in State care, but who might have no actionable claim at common law or who may wish to avoid risks, costs and delays which may attend a common law action.

In the management of common law litigation, the South Australian Government has expressed on a number of occasions its intention to take a compassionate approach to the claims by victims of abuse in State care. For example, a former Attorney-General indicated that the Government would look sympathetically at an application for an extension of time where there was no insurmountable prejudice to the State. The State understands that the Royal Commission intends to issue a future Issues Paper on redress or ex gratia schemes. Further information on the South Australian ex gratia compensation scheme under the Victims of Crime Act 2001 (SA) will be provided in an across government submission when that Issues Paper is released.
Where the Office for Child Safety - Families SA may become aware, while children are in the Minister’s care, of allegations of sexual or other abuse, Families SA has protocols for the appointment of external solicitors to advise the Minister whether the child has any actionable cause of action against the alleged perpetrator or whether a claim may be made against the State for victims of crime compensation. In the small number of cases where a cause of action may lie against the State itself, Families SA ensures that an independent external solicitor and litigation guardian are appointed to protect the child’s interests.

Elements of Civil Litigation System which raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts

This discussion of issues arising out of the civil litigation system is of a general nature for the purpose of assisting the Royal Commission. It is not intended to be, and should not be taken as, a binding statement of the State’s position on any issue in any particular matter.

Lack of Corporate Entity to be Sued

The State is not aware of any instances in which plaintiffs have been unable to sue a State-run entity because it is unincorporated or has ceased to exist. The responsible entity has invariably come within the definition of “State of South Australia” under the Crown Proceedings Act 1992 (SA), or the State has accepted responsibility for that entity.

However in some instances plaintiffs have found it difficult to identify a religious entity which can be sued. In other cases, the religious entity no longer exists, which has frustrated the search for relevant documentation or witnesses. It has also meant that the State cannot realistically seek from that entity a fair and equitable contribution towards any damages payable to the plaintiff.

Other examples include where the plaintiffs in several actions against the State have alleged that abuse occurred at certain Church-run institutions during the mid-1950’s onwards. In one case, the institution was incorporated under the Associations Incorporation Act 1929-1935, and the religious order running the institution was incorporated as an unlisted, not for profit, public company limited by guarantee in another state. As the institution is now a defunct association, and the religious order has been unable to find any reference to insurance held by that entity, it has been impracticable for either the plaintiff to sue the entity, or for the State to join the institution to the proceedings.

Liability of the State for Criminal Conduct of Employees or Other People Engaged by Institutions

Direct liability in negligence of the State for harm suffered by a victim follows the usual common law principles of establishing the existence of a duty of care, breach of that duty of care, (for example, arising from failing to take all reasonable steps to avoid the child suffering reasonably foreseeable harm) and damage being suffered by the child which has been caused by, and is not too remote, from the State’s negligent act or omission.
In relation to other forms of liability, it seems clear that the Department does not owe any non-delegable duty of care to children for the intentional criminal conduct of others. This follows from the judgment of the High Court in *New South Wales v Lepore*\(^1\) in the context of a relationship of school and student.

There are differing views about whether the State is vicariously or strictly liable for the intentional criminal conduct of employees or other people engaged by institutions. *Prima facie*, criminal conduct of this sort could never satisfy the usual test of vicarious liability, i.e. that the conduct is undertaken "in the course of employment" or constituted an authorised (or even an unauthorized) way of performing the tasks for which the employee has been employed. Indeed, it has been described as the very "antithesis" of what employees are expected to do. However, in some common law jurisdictions the Courts have moved to the position of finding vicarious liability where there is a sufficient connection between the duties which the employee is engaged to perform and the nature of the criminal sexual abuse.

Typically, such a connection might be found, according to the Courts in the United Kingdom (U.K.), New Zealand and Canada, and Gleeson CJ in *Lepore*, to arise from the close connection between the scope of the employment duties of the perpetrator and the risk of harm to the vulnerable child. It is not, however, beyond doubt that this is the applicable test in Australia and the issue awaits final determination by the High Court.

In the case of the intentional criminal acts of foster parents and, *a fortiori*, the criminal acts of other members of a foster family, there is a persuasive argument that no vicarious liability attaches to the State. Again, there has been no authoritative judicial determination of this question in Australia, although Canadian and New Zealand courts have made determinations regarding vicarious liability relating to foster care situations.

**Limitation Periods**

Section 36 of the *Limitation of Actions Act 1936* (SA) enacts a bar to any proceedings claiming damages in respect of personal injuries if they are not commenced within three years after the cause of action accrued. In the case of infants, the time begins to run after they have reached the age of majority. On 15 April 1971, the age of majority was reduced from 21 to 18 years. Therefore, most of the historical child sexual abuse cases in South Australia are out of time.

There are very sound public policy reasons for the *Limitation of Actions Act 1936* (SA) as it brings the prospect of litigation to an end. These reasons are well described in the leading judgment of McHugh J in *Brisbane South Regional Health Authority v Taylor*\(^2\).

The rigour of the limitation period is alleviated by the Court's power in some matters, to extend the time within which proceedings may be brought pursuant to section 48 of the Act. There is the threshold question of the plaintiff satisfying the Court that he or she only ascertained a fact material to the proceedings in the 12 months prior to issuing the proceedings. Typically, plaintiffs have pleaded as a material fact, the obtaining of a psychiatric report diagnosing a psychiatric illness related back to the sexual abuse; or the receipt by the plaintiffs from their solicitor of a summary by the solicitor, of aspects of the findings of Commissioner Mullighan QC in the CISC Inquiry Report.

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\(^1\) (2003) 212 CLR 511

\(^2\) (1996) 186 CLR 541
It is then a matter for the exercise of the Court’s discretion as to whether to grant an extension of time if in all the circumstances of the case it is just to do so. Traditionally, the five factors considered are:

- the length of the delay in issuing proceedings;
- the reasons for the delay;
- the prejudice to the plaintiff if no extension of time is granted;
- the prejudice to the defendant if the extension of time is granted; and
- whether there was any conduct on the part of the defendant which has contributed to the delay.

The State has experienced considerable, and sometimes insurmountable, difficulties in assessing allegations of historical abuse because of the death or incapacity of key witnesses (including alleged perpetrators) and because of the loss of State and other records which may have provided corroboration of allegations or assisted the parties and the Court in assessing other issues, such as quantum.

The power to grant an extension of time has only existed since section 48 came into operation in May 1972. If a cause of action was already out of time before that date, (usually the case if the plaintiff had already turned 21 years of age by May 1969), the Court has no power to grant an extension of time. In these cases, plaintiffs have been referred to the ex gratia process under the Victims of Crime Act 2001 (SA), or their claims have been resolved for a relatively nominal sum.

Representative Actions

There is provision in the Supreme and District Court Rules for a representative action to be conducted where a common interest exists between members of a group in questions of law or fact to which the action relates (Rule 81). At one stage an application was made to the District Court of South Australia for a particular matter to be conducted as a representative action for a number of other actions involving abuse suffered in State care. The State’s view was that the particular matter was not truly representative of the other proposed actions in that the individual circumstances of each claim were not sufficiently similar to other claims for the representative action mechanism to be effective, in particular when considering issues of individual credibility, the State’s liability to that individual on the particular facts of the case and, secondarily, the particular damage suffered by each plaintiff. The Court refused the application. The State has actively considered using other mechanisms to deal with child sexual abuse litigation more efficiently, such as having certain questions of law answered by the Court which may have more general application to other claims.

Dealing with Historical Records and Difficulties with the Disclosure Process

Locating records, most of which are held at the State Records of South Australia, has been a major challenge in litigation matters. The retrieval and storage costs are considerable, especially if the litigation takes time to resolve. Many State records have been destroyed under lawful and properly approved processes. In other cases, it has been difficult on occasion to determine the reasons for destruction or to determine precisely what documents have been destroyed.

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3 Van Vliet v Griffiths (1979) 20 SASR 524
This issue was addressed and documented in the 2008 CISC Inquiry Report, as one of the terms of reference of that Inquiry was to determine and report on whether appropriate and accurate records were kept in relation to allegations of sexual abuse of a child in State care or the death of a child in State care; and whether any records relating to such allegations were destroyed or otherwise disposed of.

The records management issue for historical matters makes it difficult for the State to comply with the disclosure requirements set out in the District Court Rules i.e. identifying documents that have been in the power, possession and control of the State but which no longer are, and explaining when the documents were last in the State’s possession and why they no longer are so.

With respect to records retained by the State, General Disposal Schedules (GDS) No’s 27 and 32 were introduced to protect records of relevance (or likely relevance) by suspending any other disposal authority that would normally enable destruction of these records. Both these destruction schedules were issued under the State Records Act 1997 (SA).

GDS 27 came into effect on 25 January 2011 and applies to records that may be required for either:
- legal proceedings arising out of alleged abuse of former children whilst they were in State care; or
- the ex gratia application process for former residents in State care who experienced sexual abuse as children, pursuant to section 31 of the Victims of Crime Act 2001 (SA).

GDS 32 came into effect on 27 March 2013 and applies to any official records of South Australian Government agencies that may be required:
- for the purposes of the Royal Commission;
- for any subsequent actions by the South Australian Government; or
- to protect the rights and entitlements of stakeholders.

With respect to GDS 32, “Agency” is defined in section 3(1) of the State Records Act 1997 (SA), and specifically includes a ‘municipal or district council’.

Whilst the issue of locating historic files is problematic, retention of current records has been addressed as part of the CISC Inquiry Report recommendations, where in South Australia, the Office for Child Safety - Families SA have implemented a Records Disposal Schedule (RDS) for all client files that requires the longest term retention of client files. The RDS ensures that all client files must be retained for 105 years from a client's date of birth and client files relating to people of Aboriginal and Torres Strait Islander descent are kept permanently. Also, client files are increasingly being retained in electronic format. In the circumstance that a person who had been in care makes a disclosure of sexual abuse after leaving care, this information would be included in their departmental electronic and/or hard copy files and is retained in the State Records of South Australia archival repository as per the RDS.

The Process of Giving Evidence

As mentioned above, none of the over 160 legal proceedings issued against the State in the past decade has yet proceeded to trial and the majority have resolved. As a result, it is difficult to comment on issues relating to the process of witnesses giving evidence.
The ordinary rule is that, subject to any exception under the South Australia Supreme or District Rules or any direction of the Court, the evidence of a witness (including a plaintiff) “is to be taken orally in open Court” (District Court Rule 212). However, in an appropriate case, the Court would be flexible about the manner in which evidence can be received. It might be possible, for example, for a plaintiff’s evidence-in-chief to be set out initially in a written sworn statement or the Court could be closed for the giving of evidence (Section 69 of the Evidence Act 1929 (SA)). However, there would ordinarily be no restriction on rights of cross-examination, particularly in cases where credibility may be in issue.

Section 13 of the Evidence Act 1929 (SA) allows for special arrangements to be made for the taking of evidence from vulnerable witnesses.

Causation

The task of establishing whether there is a causal link between childhood abuse and subsequent psychological issues, loss of earning capacity, relationship difficulties, substance abuse and other issues, is far from straightforward. The task is made more difficult where the plaintiff, as is commonly the case, has also been subjected to abuse in other contexts (i.e. other than in State care) or has experienced other serious stressors during their life, including family breakdown, incomplete schooling, criminal history, substance abuse, relationship difficulties or abuse and other physical or psychological health issues. A common approach by examining psychiatrists has been to opine that the childhood abuse in State care may have been a contributing factor to the plaintiff’s ongoing issues but that it is not possible to be precise about the degree of that contribution or, indeed, to say whether any of the plaintiff’s subsequent difficulties would or would not have occurred but for the childhood abuse. In these circumstances, the traditional common sense “but for” test adopted by the High Court may not be able to be applied inflexibly.

Assessment of Damages

The advantage of common law damages is that they are intended, as far as money can be said to compensate a victim properly at all, to provide full compensation for any loss and damage sustained by the plaintiff as a result of the abuse. From the plaintiff’s perspective, therefore, if liability can be established, damages may be preferable to ex gratia compensation.

In addition, a common law judgment may provide public validation of a plaintiff’s complaint about abuse and a public message of disapproval of the perpetrator’s conduct. The restrictions on damages (e.g. a points scale for awards of pain and suffering) contained in the Civil Liability Act 1936 (SA), following the final report submission of the Law of Negligence Review conducted by the Honourable Justice David Ipp in 2002, are not applicable to most historical abuse cases as the restrictions on recovery were mainly introduced in May 2004 and do not apply retrospectively.

Civil Proceedings against the Alleged Offender

Proceedings against alleged perpetrators of abuse for contribution or indemnity (for example, under section 59 of the Civil Liability Act 1936 (SA) or its predecessor, section 27c of the Wrongs Act 1936 (SA)) pose particular practical difficulties. Many alleged offenders are dead, have been cleared by criminal proceedings or are impecunious.
Early Dispute Resolution and Mediation Processes

Alternative dispute resolution including mediation can be highly effective in resolving matters at an early stage. The State has engaged in informal settlement conferences in many matters and has put offers in correspondence, based on the best available evidence, even where a plaintiff may not have had a fully formulated claim or very much supporting evidence of psychological harm and treatment or of loss of earning capacity or any evidence from its own records corroborating the abuse. The State preferably would investigate what are sometimes complex and very old allegations as thoroughly as is reasonably possible; however a robust approach has frequently been taken to attempt to settle on the best reasonably available information before significant legal costs and time are expended.

Formal mediation has also been attempted and been successful.

Other Forms of Redress

The following further forms of redress have been provided by the State outside of litigation:

- An apology was given to victims of sexual abuse by former Premier Mike Rann in State Parliament in June 2008.

- A post-care service has been made available to victims, including counselling and financial advice and support, and assistance has been provided with accessing records through Freedom of Information provisions.

- The Government has adopted and implemented the bulk of the recommendations in the report of the CISC Inquiry conducted by Commissioner Mullighan QC. An annual report has been provided to Parliament setting out these Government actions. This includes the establishment of the ex gratia compensation under the Victims of Crime Act 2001 (SA) for former residents in State care who experienced sexual abuse whilst in State care.