

# SUBMISSION – ISSUES PAPER 5:

Civil Litigation

Royal Commission into Institutional  
Responses to Child Sexual Abuse

*Centre for Excellence*  
in Child and Family Welfare Inc.



100 Years  
1912–2012

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## Introduction

The Centre for Excellence in Child and Family Welfare ('the Centre') is the peak body for child and family welfare in Victoria, providing independent analysis, dialogue and cross-sectoral engagement to break down multi-causal factors that perpetuate disadvantage and vulnerability. Working alongside our 90 member organisations, the role of the Centre is to build capacity through research, evidence and innovation to influence change. The Centre and its member organisations collectively represent a range of early childhood, child, youth and family support services, and out of home care services, including kinship care, foster care and residential care.

The objects of the Centre include:

- To contribute to the wellbeing of children and young people and the support and strengthening of family life particularly where there is poverty and disadvantage.
- To promote leadership and excellence in child, youth and family services.
- To actively represent the interests of members to government and to the community, and to influence community expectations of support available to children and families.
- To develop and influence policies in child, youth and family welfare, including providing policy advice to government in respect of child, youth and family welfare.
- To promote ongoing research and evaluation in child, youth and family welfare.

The Centre for Excellence affirms the right of individuals to pursue civil litigation. However, due to inherent difficulties with the adversarial litigation process we see alternative approaches to redress as highly desirable.

This submission is framed around some identified assumptions regarding a just approach to civil litigation. These are followed by discussion of issues of concern, and recommendations.

The Victorian Parliament *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (Family and Community Development Committee, 2013) also addressed the issue of civil litigation and alternative approaches to social justice and redress. The recommendations of the Victorian Inquiry are brought to bear in responding to this Issues Paper.

Given that most statutory protective care is now provided in the homes of caregivers (see Page 7: *Out of home care – the current context*), in this submission we have preferred the term 'protective care' to 'out of home care'.

## Assumptions

- a. Individuals have a right to civil litigation regarding childhood sexual abuse in protective care.
- b. Litigation in an adversarial context is inherently stressful.
- c. A compassionate society should ensure that experiences of re-traumatisation through civil litigation regarding childhood sexual abuse are reduced as far as possible.
- d. An alternative redress scheme for sexual abuse and other forms of criminal child abuse is an essential complement to the civil litigation process if social justice is to be achieved.
- e. Participation in an alternative redress scheme should not remove the right to civil litigation.
- f. Litigants regarding child sexual abuse are entitled to a level of legal representation commensurate with that of organisations against which they seek claims.
- g. Additional funding is needed to provide the above legal representation.
- h. Litigation procedures need to take into account contemporary community-based protective care arrangements, where perpetrators of child abuse may not be directly engaged by the supervising community organisation.

## Issues of concern and changes needed

### Emotional cost to individuals

Civil litigation in any domain may be personally challenging, and requires considerable stamina at the best of times. Where individuals have experienced trauma and are seeking restitution for their emotional vulnerability, adversarial litigation may present extreme challenges. The process of giving evidence and being subject to examination and cross-examination is particularly stressful for victims of child sexual abuse, and the public airing of details of painful, degrading and exploitative sexual abuse in childhood can be deeply humiliating and re-traumatising. Individuals may be required to relive these experiences, often repeatedly, through a long process. The contest with the organisation allegedly responsible, the burden of proof for events that happened in private in childhood, and extended delays in resolution of the action, may all exacerbate trauma and militate against healing. Those in touch with victims who have conducted litigation for damages frequently report that victims regret this decision. It is a cruel irony that a process designed to administer justice to the most disadvantaged and vulnerable individuals in society may frequently cause further harm. A study to determine how often litigants have felt that the outcomes of civil litigation outweighed its challenges might be useful in hastening reform.

There is no way of knowing how many people may have wished to pursue civil litigation but did not have the stamina to pursue their claim to resolution, or were advised by lawyers that their chances of winning a payout were too limited to pursue a 'No win no pay' case. The civil rights of such people remain a concern.

Whether or not those who choose to litigate for damages are fully cognisant of the risk of further traumatisation, litigation is a civil right. We therefore support reform that may increase the chance of a just and more compassionate experience. Nevertheless, due to inevitable limitations to reform of adversarial processes, alternative means of providing social justice and redress are seen as highly desirable.

## Financial cost and access to legal services

The cost of litigation is a significant barrier to social justice for most victims of child sexual abuse. Few victims are in a position to pay for legal representation upfront. Some do this by considerable sacrifice, for example, jeopardising the security of their home. 'No win, no pay' schemes may compromise both the counsel's time for the action, and compensation remaining once legal fees are paid. Regardless of the means of funding legal action, individuals remain exposed to the risk of having to pay the opponents' legal fees if the case fails.

A just approach to legal representation for this most vulnerable group would be to provide greater access to Legal Aid. In order to finance this access, a civil litigation fund for victims of child sexual abuse in care might be developed involving mandatory contributions from both current providers of out of home care and government regulating bodies.

## Early dispute resolution or mediation processes as part of the civil litigation systems

Cases of institutional child sexual abuse listed for civil litigation are typically settled by mediation. This may obviate a protracted and traumatic adversarial battle between the victim and a more powerful institutional adversary. In reality, however, the mediation process is also typically adversarial, and the victims remain at a disadvantage. The mediation process frequently leads to settlements of relatively small amounts compared with what might have been possible in court. Settlements do not take into consideration the legal costs of achieving the payout, frequently resulting in individuals being left with inadequate compensation. Victims do not always appreciate their own full financial circumstances, including the extent of legal fees and the future burden of their additional living costs and limited income due to their injuries. Advocates for litigants have observed a tendency to settle for less than what is needed for a minimum quality of life, due to being exhausted and/or further traumatised by the process.

## Other legal issues

### *The requirements for bringing a class action, if victims from the same institution wish to sue as a group*

We understand that class actions are rarely a useful approach to claims for compensation, given the varying circumstances and experiences of victims of child sexual abuse in organisations.

### *Proving that the victim's injuries and losses were caused by the abuse, and the way in which damages are assessed*

This is a complex and difficult assessment. A broad-based approach to the assessment of damages is suggested, with capacity to ensure a minimum safe quality of life for individuals damaged by child sexual abuse through institutions.

Given the circumstances of childhood sexual abuse and the vulnerability of survivors, we contend that the victim rather than the organisation should receive the benefit of the doubt.

Where there is evidence that 'care' fell below acceptable standards, but there may have been multiple sources of psychological damage over the life course (eg abuse within the child's family; adult war service) a reasonable presumption would be that a degree of psychological injury pertains to the 'care' experience in childhood; compensation should be awarded accordingly.

The British system of litigation for negligence in care involves two separate professional experts: a psychologist or psychiatrist who assesses the impact on the client, and a social worker who assesses the quality of care provided by the organisation (Lane, 2011). This approach merits consideration.

## Reforms involving regulation of funded care providers

### *Institutions that cannot be sued because they are not incorporated bodies or they no longer exist, or because decisions were made personally by an individual officeholder*

The Victorian Inquiry (Family and Community Development Committee, 2013) identified this issue as of concern and recommended that all organisations that are approved and/or in receipt of government funding or other benefits (such as charitable status) should be incorporated as associations, such that they can be sued for dereliction of duty of care.

### *Institutions that do not hold assets from which damages could be paid, or are not insured or their insurance status is unknown*

The Victorian Inquiry (Family and Community Development Committee, 2013) recommended that all organisations that are approved and/or in receipt of government funding or other benefits should be adequately insured such that damages can be paid. Legislation should also ensure that liability for damages from past wrongs should transfer to an ongoing incorporated body when the auspice of an organisation is transferred, or the organisation is wound up.

### *The circumstances in which institutions are liable for the criminal conduct of their employees or other people*

The Victorian Inquiry (Family and Community Development Committee, 2013) recommended legislation to confirm that organisations have a non-delegable duty of care to ensure that all employees, associated religious personnel, and approved volunteers in organisations that receive funding or other government benefits are professionally selected, screened, supervised and monitored, such that organisations can be held responsible for dereliction of such duty of care. We support this.

### *The circumstances in which regulators are liable for failures of oversight or regulation*

We understand regulation and oversight of government funded or sanctioned care organisations to be a government responsibility, either at State or Federal level as determined by the approving body or funding source. Litigation should therefore be possible against governments for breach of this duty of care.

### *Limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended*

The experience of many victims of child sexual abuse indicates that decades frequently pass before many are able to come forward. We therefore submit that there should be no statute of limitations regarding action that can be taken in litigation or redress for such injury.

## Reforms regarding access to relevant records

A number of our member organisations that have provided out of home care have gone to considerable lengths to make case records available to past residents, and to support them in accessing these. However, a number of existing case records are not yet accessible. The records retrieval process is at times still unsupported, protracted, or unmanageable. In some cases, organisations did not keep adequate records, or records no longer exist.

We consider that record access should be free for individuals applying for their own records, and understand that it is rare for organisations to charge for this.

The *Heritage and Information Service* of MacKillop Family Services is a model of excellent practice within a continuing provider of protective care.

The national *Find and Connect Support Services* to Forgotten Australians and Child Migrants are an example of good practice in support, assistance and advocacy for individuals who are searching for their records and may seek redress.

Future improvements to ensure adequate access to care records should include sufficient resources being available for organisations to make records available to past clients. It will also require regulatory oversight:

- to ensure that present and future standards of case file recording and archiving are adequate, professional and respectful without being overly onerous or intrusive into the lives of children.
- to ensure that the release of case files to individuals takes place in a supported and dispassionate way.

### **Forms of redress in addition to, or instead of, damages or financial compensation**

Evidence tendered to the Victorian Inquiry indicated that for many people who have suffered child sexual abuse, acknowledgement of the wrong incurred is also critically important. For this reason, many individuals would like a formal and possibly public hearing where a judicial decision is clearly articulated. They may also want an apology from the responsible organisation; alternative avenues for justice may be better suited to providing this.

### **Alternatives of to civil litigation for redress for sexual abuse in care**

We advocate strongly for robust alternative redress schemes (the subject of the next Royal Commission Issues Paper).

### **Other issues – contemporary arrangements for statutory protective care**

#### ***Protective care delivered by for profit providers of protective care***

The recent entry of for profit businesses into the provision of state-sanctioned protective care involves new and untested paradigms for the provision of protective care in Australia. Civil litigation processes need to ensure that such companies can be sued for dereliction of duty of care in a similar way to not for profit organisations.

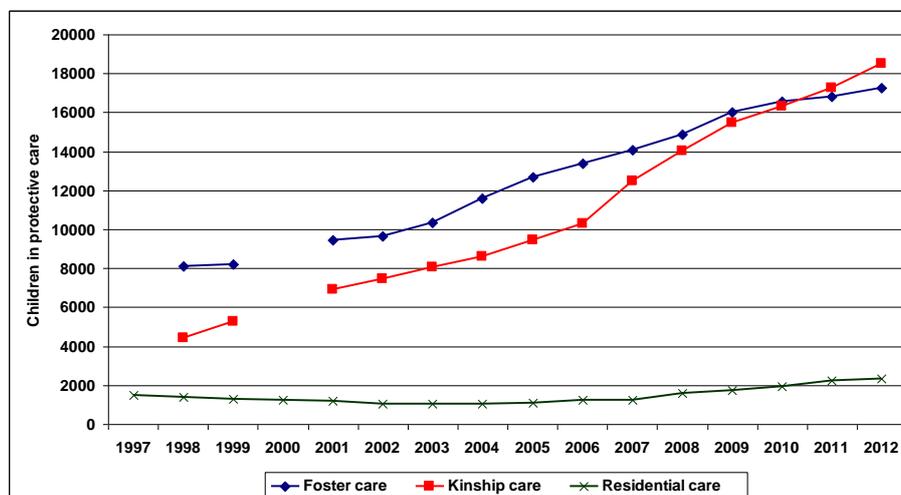
#### ***Out of home care – the current context***

As in our response to Issues Paper 4, we again draw the attention of the Commission to the radical change in the nature of ‘out of home care’ or protective care over the last two decades (Centre for Excellence in Child and Family Welfare, 2013). In 2011-2012, 91 percent of children in ‘out of home care’ were being cared for in what is known programmatically as ‘home-based care’, that is, kinship care or foster care. Forty-seven percent of children in ‘out of home care’ were in kinship care, and 44 percent in foster care. Only 5 percent were in residential care (AIHW, 2013). We therefore contend that ‘Out of Home Care’ should now be redefined as ‘Protective care’, as care is provided within the home of the caregiver (Figure 1).

All protective care, whether in foster families, within children’s kinship networks, or in residential care requires careful assessment for safety and suitability. Child Protection and possibly a non-government body then become legally responsible for monitoring, oversight and supervision of children in placement to ensure their safety and well-being.

Recommendations of the Royal Commission need to ensure that they are as relevant to the contemporary context of protective care as they are to promoting social justice for victims of historical child abuse.

**Figure 1 Australian children in protective care (AIHW data<sup>1</sup>)**



### *The community protective care environment and sexual abuse*

Home based care entails its own set of risks regarding child sexual abuse. In home-based care, particularly in kinship care, children are in contact with a range of members of the extended family of the carer and other community members – potentially a large number of people. While standards require that the caregiver and their immediate family to be formally assessed, many of these other people with whom a child has contact will have not been assessed for their suitability for contact with children; such assessment would be neither practicable nor necessarily indicated in view of the desirability of providing a measure of normal childhood experience. However in kinship care, children may be more exposed to family members who have abused children or been associated in some way with abuse of the child in the past, e.g. the child's father or mother, due to the close relationship between the carer and the child's parent (often a parent-child relationship). Parents on occasion live in with the caregiver or stay overnight. At the discretion of the supervising organisation and the designated caregiver, contact with family members or people in the community may or may not be directly supervised by the caregiver or another authorised person. This thus a more complex environment for monitoring and regulation than residential care. Mechanisms must still be in place to ensure that organisations responsible for the assessment and monitoring of home-based care arrangements are required to demonstrate whether they fulfilled their duty of care. This determination may be more challenging than where an alleged perpetrator of abuse is a staff member or approved volunteer of an organisation.

Children in protective care in the present and future need to have the same means of access to justice via litigation and other forms of redress for child sexual abuse as may obtain to adults who were institutional care in the past.

<sup>1</sup> The Australian Institute of Health and Welfare (AIHW) publishes annual reports regarding children in protective care in Australia. Figure 1 is drawn from AIHW data available online.

## Recommendations

### Reforms to the legal system

1. There should be no statute of limitations regarding action that can be taken in litigation or alternative redress processes to address child sexual abuse.
2. A case for redress or compensation should never be formally closed or 'settled', allowing for the possibility that more information coming to light may generate a further claim.
3. Compensation or redress decisions should be confidential but not secret: individuals should not be required to sign a pledge of secrecy.
4. Given that the adversarial system of the civil courts militates against a positive experience for litigants regarding child sexual abuse, priority should be given to reforming the process of giving evidence and being subject to examination and cross-examination.
5. In determining whether a victim's injuries and losses relate to institutional child sexual abuse, consideration should be given to the English system of litigation involving two separate professional experts.
6. Where there is evidence that 'care' fell below acceptable standards but there may have been multiple causes of psychological damage over the life course, the presumption should be made that a degree of injury pertains to the 'care' experience and compensation awarded accordingly.
7. In determining whether a victim's injuries and losses were caused by institutional child sexual abuse and there is evidence that 'care' fell below acceptable standards, the victim rather than the organisation should receive any benefit of the doubt.
8. Assessment of damages should take into account present and likely future living requirements including physical and mental health care and treatment, aids for daily living, secure housing, and access to community activities and facilities. Payments should include combinations of lump sum settlements and ongoing costs such as counselling or financial support.

### Funding of processes for redress litigation and compensation

9. Legal representation for victims of child sexual abuse should be available through Legal Aid without restrictions.
10. Legal representation should be available for volunteer caregivers (ie foster carers and kinship carers) subject to legal action regarding allegations of child sexual abuse subject to normal means tests.

### Civil litigation in the context of protective care in the community, ie 'home-based care'

11. Review of civil litigation processes should ensure that children in protective care in the future have the same access to litigation and other forms of redress for child sexual abuse as adults who have been in institutional care in the past.
12. Authorising governments should review policy regarding the parameters of Duty of Care for statutory protective services and providers of protective care in relation to sexual abuse by the designated caregiver and other persons in the child's protective care home environment.
13. Processes for review of allegations of abuse in care and poor quality of care in protective home-based care arrangements should ensure that they adequately address whether duty of care has been observed by supervising organisations and designated carers.

### Civil litigation in the current context of protective care practice

14. Authorising governments should review policy regarding the parameters of Duty of Care for statutory protective services and for profit providers of protective care in relation to sexual abuse by approved caregivers and other persons in the child's protective care home environment, to ensure its relevance to this new provider context.
15. Processes for review of allegations of abuse in care and poor quality of care in protective care by for profit providers should be reviewed to ensure that they adequately address duty of care by provider businesses and their approved carers.

### Reforms relating to the regulation of government-funded or otherwise sanctioned care providers

16. Legislative reform should confirm that organisations that receive government funding or other statutory benefits have a non-delegable duty of care to ensure that all employees, associated religious personnel, and approved volunteers are professionally selected, screened, supervised and monitored.
17. Incorporation as an association should be mandatory for all organisations that are approved and/or in receipt of government funding or other statutory benefits (such as charitable status), allowing them to be sued for dereliction of duty of care.
18. Organisations that are approved and/or in receipt of government funding or other statutory benefits should be adequately insured such that damages can be paid.
19. Legislation should ensure that liability for damages from past wrongs transfers to an ongoing incorporated body upon transfer of auspice of an organisation or when it is wound up.
20. Legislation should ensure that litigation against government bodies is possible for breach of the responsibility to regulate and oversee funded organisations.

### Access to records of care

21. A mechanism needs to be in place to ensure supported access to care records for individuals who wish to litigate in relation to child abuse.
22. A mechanism needs to be in place to ensure that present and future standards of case file recording and archiving are professional, respectful and adequate, without being overly onerous or intrusive into the lives of children.
23. Sufficient resources need to be made available for organisations to develop adequate archival storage and retrieval systems, where necessary by a grants scheme.

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