ISSUES PAPER 5 – CIVIL LITIGATION

Thank you for the opportunity to provide a submission in relation to the above Issues Paper. In this submission, we focus on the issue of access to civil litigation remedies for children and young people who are abused while in out of home care.

Children and young people who are abused while in care are a particularly vulnerable group, and face significant obstacles to accessing civil remedies, as they are generally completely dependent upon a statutory ‘parent’ to facilitate access to legal advice and assistance.

Government agencies with parental responsibility for children and young people have a positive duty to obtain independent legal advice for a child or young person regarding personal injury they sustain while in care. However, in practice it is not clear that children and young people are often supported to receive appropriate independent legal advice and assistance to pursue civil remedies in relation to sexual and other abuse suffered while in out of home care.

Obstacles to access to civil litigation remedies for children and young people in care.

Children and young people face a legal disability in relation to the conduct of legal proceedings, and are dependent upon adults, normally a parent, to commence proceedings on their behalf. Historically, statutory time limits for commencing proceedings were generally suspended until a child became an adult and could take their own proceedings. However, law reforms in relation to personal injury claims across Australia have affected this situation, with provisions varying between States and Territories, and plaintiffs facing additional procedural hurdles in commencing proceedings once they become adults.

In the ACT for example, pre-court procedures require a potential plaintiff to give notice to a potential defendant that they may pursue a legal case. Under s 51 of the Civil Law (Wrongs) Act 2002, the claimant is required to give written notice of their claim within nine months of the injury. If the claimant does not comply with these procedures, the respondent may, on application, have costs awarded in their favour. This requirement is not suspended for children and young people, as it is required that a parent lodge the notice on behalf of their child.

While generally these laws presume that a parent will safeguard the interests of their child in pursuing legal proceedings for personal injury, the situation is more complex for children and young people in care. In some cases, a child or young person may have a cause of action against the Government agency in relation to the abuse, as well as a claim against their abuser, for example, where the agency has breached its duty of care to the child or young person through a failure to respond adequately to a foreseeable risk of abuse or

---

1 Bennett v Minister of Community Welfare (1993) 176 CLR 408
harm in a placement. In such cases the statutory ‘parent’ is in a position of conflict of interest, where it is not in the agency’s interest to encourage a child or young person to pursue legal remedies against the agency.

Even where time limits and procedural requirements are able to be extended, a long delay in commencing proceedings may nevertheless damage the prospects of success of a claim, as physical and documentary evidence may be lost and the availability and reliability of witness evidence affected by the passage of time. Obtaining legal advice as soon as possible after the abuse is disclosed is likely to provide the best chance to preserve evidence and maintain the rights and entitlements of a child or young person. Receiving compensation earlier may also give a child or young person a better chance at recovery and opportunities for a more positive future.

Need for robust systems to ensure independent legal advice is received

Given the importance of obtaining timely legal advice, and the position of conflicting interests that a Government agency may face where a child or young person suffers abuse in care, it is critical that there are robust systems in place to ensure that independent legal advice is facilitated automatically in these situations, rather than relying on discretion and judgment of the Government agency.

Where allegations of abuse in care emerge, there are likely to be a range of concerns, and a need for urgent actions including referrals to police, which may result in involvement in criminal proceedings, possible relocation of a child or young person, and meeting their immediate needs for supports such as counselling and other assistance. While these more urgent needs should rightly be given priority, it is important that the civil legal rights of a child or young person are not overlooked in this situation.

In our view, child protection agencies should be required to have very clear policies and procedures which mandate the referral of a matter for independent legal advice (possibly to civil law specialists funded by legal aid) wherever there is an allegation of sexual or other abuse of a child or young person in out of home care. Children and young people should be assisted to attend appointments with an appropriate support person, and may require a separate representative or guardian ad litem to be appointed to represent their interests. These policies and procedures should also include requirements regarding record keeping and documentation of any evidence which may be needed for future proceedings, as well as guidelines requiring agencies to act as a model litigant in responding to any claims.

Compliance with these obligations could be encouraged through additional safeguards and monitoring, such as the requirement to notify an oversight agency such as, in the ACT, the Public Advocate, regarding allegations of abuse or personal injury in out of home care, and of referrals for legal advice.

Benefits of civil litigation remedies

Children and young people who experience abuse in out of home care are among the most vulnerable in society, often having been exposed to neglect or abuse in their birth family, and then a further failing of the system intended to help and protect them. While monetary compensation can never fully redress the damage that they have suffered, it may fund treatment that they require, and provide opportunities to create a better life for the future. Additionally, compensation can frequently serve as a tangible acknowledgement of the harm suffered by a child or young person. Accordingly, it is critical to ensure that these children and young people are supported to have access to independent legal advice and assistance to pursue their legal rights.

Further, we consider that if individuals and agencies were appropriately held to account for injury or harm caused to a child or young person in their care, those individuals and agencies may well pay greater attention to their obligations to keep children and young people safe. Enforcement of the civil rights of
children and young people is an important mechanism for improving oversight and accountability of the agencies and individuals entrusted with their care.

Again, we thank you for the opportunity to contribute to the Commission’s work on preventing sexual abuse of children and young people in out of home care, and look forward to reading your report on the issues canvassed in Issues Paper 5.

Yours sincerely

Alasdair Roy
Children & Young People Commissioner

17 March 2014