Royal Commission into Institutional Responses to Child Sexual Abuse

Redress and Civil Litigation Consultation Paper

SA Government Response
16 March 2015

Introduction

1. The South Australian Government welcomes the opportunity to make a submission to the Royal Commission on this subject. This submission supplements information previously provided in response to Issues Papers 5 and 7 as well as documents provided in response to various Notices to Produce.

Structural Issues (ch 2)

2. The Royal Commission seeks Governments' feedback on whether they favour a single national redress scheme or an alternative approach.

3. The State, in principle, supports the adoption of certain national 'consistent principles' for application to State redress schemes. However, the State would not support a single national redress scheme, or the creation of a State scheme to be utilised by both government and non-government institutions.

4. The State has already provided redress of various types to child sexual abuse victims who were in State care at the time of the abuse. Redress is *still available* to victims in the form of an *ex gratia* payments scheme, which remains open, with no end date, and the provision of counselling and other post-care services.

5. In view of the redress that has already been provided, and given that the State regards redress scheme payments as an *alternative* to civil litigation - and thus as necessarily involving both a lower standard of proof *and* a concomitant lower level of monetary payments, the State may not necessarily support all of the minimum standards which may be recommended by the Royal Commission. In relation to monetary payments, for example, the State would be unlikely to support 'minimum standards' of a $100,000 maximum payment and a $65,000 average payment if the applicable burden of proof was 'plausibility', that is that the decision-maker is "satisfied that the allegations are plausible and may be true"[1].

6. The State of South Australia is in a different position to those States that have not provided victims with an opportunity to tell their stories and/or obtain financial redress.

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *'Redress and Civil Litigation' Consultation Paper* dated January 2015 ("Consultation Paper"), p 170.

7. The State currently provides a redress scheme for survivors of child sexual abuse who sustained abuse whilst in State care ("children in State care"). There are no compelling reasons for removing that scheme and replacing it with another.

8. The State has provided redress for children in State care since 2004. In that year the State established the Children in State Care Inquiry ("CISC Inquiry") under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act* 2004 (SA). The CISC Inquiry conducted by Commissioner Mullighan[2]:

   - encouraged children in State care to come forward and provide written and oral information about the sexual abuse they had suffered, including by way of a private hearing with the Commissioner[3] and provided counselling to survivors; and

   - published its report on 31 March 2008, in which it summarised and acknowledged the evidence that survivors had provided to the Commissioner and made numerous recommendations.

9. Secondly, since publication of the CISC inquiry report in 2008, the State Government has implemented most of the report's recommendations, and further redress has been provided to survivors in that:

   - a 'post-care' service is available to survivors, including the provision of counselling, financial advice and support, and assistance with accessing records through the Freedom of Information Act process;

   - the former Premier Mike Rann made a formal apology to survivors on behalf of the State in State Parliament in June 2008; and

   - a Memorial to survivors has been erected in North Adelaide.

10. Thirdly, in January 2010 the State established and published Guidelines for an *ex gratia* payments scheme whereby survivors of child sexual abuse sustained in State care could apply for an *ex gratia* payment of up to $50,000 pursuant to s 31(2) of the *Victims of Crime Act 2001* (SA) ("VOC Act"). This redress scheme is still open. The Commissioner for Victims' Rights provides advice and support to applicants; and the State pays a contribution of $750 plus GST towards a survivor's legal fees in relation to any deed of discharge. The State notes that the Royal Commission has indicated in its Consultation Paper that a redress scheme for future abuse may be unnecessary if it makes recommendations that if adopted would make it more likely that survivors can recover damages at common law. The State's redress scheme applies both to past *and future* sexual abuse.

[2] A retired Judge of the Supreme Court of South Australia

[3] According to the CISC Inquiry report dated March 2008, p xii: "*The Commissioner conducted the hearings of 496 alleged victims of sexual abuse and 266 general or expert witnesses. Some people had more than one hearing. There were 809 hearings (in total) .. In addition, 448 individuals and organisations corresponded with the Inquiry or made a written submission in regard to child sexual abuse and/or the child protection system* ..".

11. Fourthly, in 2008 the State formally determined that it would take a compassionate approach to common law claims made by survivors of child abuse sustained whilst in State care. All common law claims which have been resolved to date have been finalised without proceeding to trial.

Direct Personal Response (ch 4)

12. The Royal Commission has set out various principles which it suggests should be incorporated into a redress scheme in order to ensure that the relevant institution provides the survivor with an effective direct personal response. The Commission considers that at a minimum a survivor should receive an apology from the institution, be given an opportunity to meet with a senior institutional representative and receive an acknowledgment of the abuse and its impact on them, and receive an assurance or undertaking from the institution that it will take steps to protect against further abuse of children.

13. The State's response is as follows:

- In general, where abuse is accepted by an institution that institution should acknowledge that the abuse occurred and should apologise to the survivor.

- Consistent with this, following the CISC Inquiry report in March 2008, the former Premier Mr Rann acknowledged the abuse suffered by survivors of child sexual abuse in State care and apologised to survivors in State Parliament in June 2008.

- It should be noted that most of the State institutions in which State care was provided, about which survivors gave evidence to the CISC Inquiry, no longer exist. If the relevant institutions still exist it should be for the survivor (subject to consideration or appropriate medical/counselling advice received by the survivor) to decide whether they wish to have contact with the institution.

Counselling and Psychological Care (ch 5)

14. South Australia is a leader in the provision of counselling and other services to survivors. A post-care service is available to adults whose lives have been affected by being placed in out-of-home-care, including foster care, residential care and care provided through other state or church based institutions, as a child. This includes survivors of sexual abuse while in State Care.

15. 'Post Care Support Services' is a South Australian Government funded full-time, free service provided by Relationships Australia (SA). Post Care Support Services provides assistance with:

- counselling and therapeutic services

- life skills

- parenting skills development

- identity and relationship
- accessing records
- searching for and assisting with reconnecting with family
- advocacy and support with accessing Centrelink and other related services
- accessing health and employment services and other community programs such as education support
- housing advocacy
- referrals to financial counselling and management.

16. In addition, Relationships Australia (SA) and Victim Support Services provide a free support service for survivors who wish to engage with the Royal Commission. Support is also provided for family members and/or employees of institutions or organisations where abuse occurred. Services offered are:

    - support and information to survivors about telling their story to the Royal Commission
    - face-to-face and telephone counselling
    - information about what to expect from the enquiry process
    - referrals to the Royal Commission and other agencies
    - support through legal processes
    - advocacy
    - pre and post support when giving evidence

17. These counselling and support services are provided on an 'as needs' basis and are not subject to limits. Both organisations are able to provide outreach services across many Adelaide metropolitan areas as well as regional areas, so a survivor can contact the organisation to arrange a suitable location to meet. The Victim Support Service also operates seven permanent regional services. The specialist Royal Commission Support works on Aboriginal land.

18. Referrals are also made by the Commissioner for Victims' Rights who, on request, assists survivors to apply for redress by *ex gratia* payment.

19. Although not a specialist service for survivors of abuse in institutions, the Rape and Sexual Assault Services provides services state-wide for victims of sex offences. This

organisation worked closely with the Anglican Church in setting up and operating victim-survivor support.

Information about these services is available via:

- Relationships Australia (SA) www.rasa.org.au P (freecall) 1800 188 118 E royalcommission@rasa.org.au
- Victim Support Service www.victimsa.org P 1800 842846 (1800 VICTIM) E info@victimsa.org.au

Monetary Payments (ch 6)

20. The South Australian Government's redress scheme for victims of abuse in State Care, the *ex gratia* scheme, provides that a person who suffered sexual abuse as a child whilst in State care may obtain a payment of up to $50,000. The average payment under this scheme to date has been $14,400.

21. The State is currently assessing options for increasing maximum and average payments under the *Victims of Crime Act 2001* (VOC Act) in line with the South Australian Government's policy announcement that it would increase the maximum payment to $100,000 (indexed annually).

22. The South Australian *ex gratia* scheme is an alternative to a claim for damages through the courts. The quantum of payments under the *ex gratia* scheme reflects the low burden of proof required when determining whether to make a payment to a person alleging to be a victim of sexual abuse while in State care.

Redress Scheme Processes (ch 7)

23. The State has provided written submissions in response to Issues Paper 7 - Statutory Victims of Crime Compensation Schemes ("Paper 7 Submissions").

Purpose of monetary payments

24. The purpose of monetary payments made through a redress scheme cannot be to fully compensate survivors for the abuse that they have suffered. Rather, payments are designed to assist survivors to recover from the effects of abuse and to advance their interests by providing an acknowledgement of injury and loss suffered and to provide survivors with an alternative to common law litigation because litigation can be distressing, lengthy and costly. This is consistent with the objects of the *Victims of Crime Act* to "*provide from public funds limited monetary compensation to victims" (*section 3*)*.

Eligibility for redress

25. In South Australia *ex gratia* payments may be made to any person who was sexually abused whilst in State care, including children placed in an institution or foster care, but excluding children who were adopted or subject to private care arrangements. There is currently no closing date for the scheme. Although the Guidelines restrict *ex gratia* payments to persons who have been sexually abused, an applicant may request a waiver of the Guidelines. Where a person has been subject to both sexual and physical abuse and/or neglect he or she may request that the Guidelines be waived and the *ex gratia* payment take into account the harm suffered as a result of all forms of abuse sustained whilst in State Care.

Application Process

26. The Royal Commission considers that a redress scheme should fund a number of support services and community legal centres to assist applicants to apply for redress[4].

27. In South Australia an application form, which is written in plain English, sets out the information required of a person wanting to apply for an *ex gratia* payment. The Guidelines explain every section of the application form and the information that should be included in the application. Applicants may obtain support and assistance in relation to their application from the Commissioner for Victims Rights and from Post Care Support Services. Details of the information and assistance available to survivors are published on the Attorney-General's Department website.

28. Although applicants are asked to provide copies of documents relevant to their claim with their application, the South Australian experience is that this rarely occurs. Accordingly, the State obtains the documentation necessary to determine the application from relevant Government agencies including SA Police, Department for Education and Child Development together with medical records and documentation held in relation to the CISC Inquiry. The State may also need to obtain further information from the survivor, undertake other investigations, and arrange further medical evidence. The information is then reviewed and collated and a decision made by the Attorney-General in relation to the application.

29 In these circumstances the State does not consider it necessary for funding to be provided for support services and community legal centres to assist applicants to apply for redress.

Standard of Proof, Reasons for Decision, and Review

30. The Royal Commission has suggested that the appropriate standard of proof in a redress scheme may be 'plausibility' (which "requires that the decision-maker must be satisfied that the allegations are plausible and may be true") or "a test of reasonable likelihood". The Royal Commission also suggests that survivors should be provided with a statement of decision[5].

[4] Consultation Paper pages 167 to 170
[5] Consultation Paper pages 170 - 173

31. In South Australia an *ex gratia* payment may be made where the Attorney-General is reasonably satisfied that the survivor suffered sexual abuse whilst in State care. The State's consistent position has been that redress scheme payments are an alternative to civil litigation. The State accepts that a redress scheme should involve a lower burden of proof and rigour for applicants than applies in a civil claim, but submits that as a result monetary payments should be lower. If the Royal Commission recommends that a redress scheme provide a significant increase in monetary payments, it would be reasonable that the scheme impose an increased evidentiary burden and a more rigorous claims process.

32. Consistent with the more flexible evidentiary burden and lower procedural rigour which applies to the *ex gratia* payments scheme, the scheme does not provide reasons for decision, and decisions are not reviewable.

Deeds of Release

33. As the *ex gratia* scheme in South Australia is provided as an alternative to litigation, it is the State's position that it is reasonable to require an applicant to sign a deed of release discharging the State from any further liability. There are strong policy reasons, consistent with the analogous principles at common law, for encouraging the finality of redress avenues, including the avoidance of inconsistent outcomes, the saving of duplication of effort and expense and the avoidance of witnesses being required to go through the experience of providing evidence more than once. The State recommends to applicants that they obtain legal advice before signing the discharge and pays up to $750 to enable independent legal advice to be obtained. It is not the State's usual practice to require applicants to give a confidentiality undertaking.

Funding Redress (ch 8)

34. The Royal Commission proposes that redress scheme funding should cover counselling and psychological care, monetary payments and administration costs.

35. At an average payment of $65,000, and adjusted to take account of amounts already spent on providing redress under past and current redress schemes, the cost in terms of Government funding of a reformed scheme for South Australia is estimated in the Consultation Paper to be $90 million.

36. The State is not in a position to comment on whether that sum is a realistic estimate, nor to comment on whether the estimate of the number of eligible claimants is accurate. Comparability of data across jurisdictions is also not possible.

37. The State notes that in a scenario where governments became funders of last resort, the Consultation Paper estimates the total cost to the State of South Australia to be $143 million.

38. The South Australian Government is not in a position to contemplate a funding commitment of this magnitude under either scenario.

39. The State does not accept that it would be appropriate for the Government to be the funder of last resort in South Australia beyond its present role under the victims of crime legislation to provide compensation to the wider community.

Civil Litigation (ch 10)

10.1 Introduction

40. The State refers to, but does not repeat here, what it has put to the Commission in its submission to Issues Paper 5 on Civil Litigation.

41. The State agrees that civil litigation can be an effective avenue for redress for some survivors of Institutional child sexual abuse because:

- Common law damages may more fully reflect, as far as it is possible for a sum of money to do so, the actual harm suffered by the survivor as a result of any abuse.

- A common law judgment may provide public validation of a plaintiff's complaint about the abuse and a public message of disapproval of the conduct of the perpetrator and/or the institution.

- If the litigation is not too remote from the occurrence of the abuse the public nature of litigation may influence the institution and similar institutions in improving practices for the protection of children.

42. In considering whether survivors of institutional child sexual abuse should, however, have specific measures addressed to their entitlement to common law damages or to the conduct of their matters in the Court, the State acknowledges that survivors may need a considerable time, and more time than is envisaged in the prescribed limitation period, to deal with and report abuse. The State also has acknowledged the particular vulnerability of children in its care and the State's responsibility for their welfare. However, the State does not support a different set of laws or rules for survivors of institutional child sexual abuse as opposed to those that apply to other classes of plaintiffs.

10.2 Limitation Periods

43. As South Australia's submission to Issues Paper 5 states, 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 damages actions for historical child sexual abuse in South Australia are out of time.

44. There are very sound public policy reasons for the *Limitation of Actions Act 1936* (SA). These reasons are well described in the leading judgment of McHugh J in *Brisbane South Regional Health Authority v Taylor*.[6]

45. The rigour of the limitation period is alleviated in South Australia by the Court's power to extend the time within which proceedings may be brought pursuant to section 48 of the Act. There is a threshold question of a 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 plaintiffs have obtained a summary from their solicitors of evidence given before Commissioner Mullighan QC and findings made as part of the CISC Inquiry. However, it should be noted that in cases of harm being suffered after May 2004 when amendments to section 48 came into effect, it has become more difficult to establish that a material fact has been ascertained[7].

46. A Court then has a discretion to grant an extension of time if in all the circumstances of the case it is just to do so. Traditionally, the main factors considered by a Court 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.

47. 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.

48. The retention of a limitation period is appropriate, tempered by a broad judicial discretion to extend time in appropriate circumstances. It is an appropriate means of fairly balancing the community's interest in seeing that survivors of child sexual abuse receive fair compensation and the community's interest in the early and just disposal of litigation.

49. It has been observed in the conduct of civil litigation that the quality of justice may be increasingly impaired the longer it takes for allegations of abuse to come to trial, in particular because:-

[6] (*1996) 186 CLR 541*
[7] *Ireland v Wightman* [2013] SASCFC 116

- relevant witnesses, for example those who might have corroborated the plaintiff's allegations or might have provided evidence about institution procedures or the knowledge, have died, become incapacitated or have no or an impaired recollection

- relevant personal information relating to the plaintiffs' and other relevant records, such as procedures and log books, have been lost or destroyed

- as the Institution may not have formally recorded either its knowledge about relevant matters or its procedures, that information may no longer be available in evidentiary form. What is more, the parties may not be aware of what evidence has been lost

- it may be difficult to determine the appropriate standard of care for the Institution at the relevant time, mindful that the Court has to apply historic standards of the day and not those of the present time.

50. The State accepts that, if no limitation period applied to claims for institutional child sexual abuse, a Court would still have an ability under its Rules or its inherent jurisdiction to stay a matter permanently if it concluded that its process would be abused due to there being no likelihood of a fair trial as a result of the delay in bringing proceedings. Such a fall-back position is necessary in any event in the interests of justice and of protecting the standing of the Court.[8]

51. However, whilst the impossibility of a fair trial due to delay may be a sufficient reason for a civil action to be stayed, there are other circumstances in which a common law action should not proceed due to delay and those circumstances are best assessed by a Court in the exercise of a broad discretion as to what "the justice of the case" requires. For example, an application for a stay on account of abuse of process does not necessarily take account of any responsibility of the plaintiff for the delay.[9] Although rare, it does happen that a plaintiff may be aware of his or her entitlement to bring common law action and may elect, with the benefit of legal advice, not to bring proceedings until or unless his or her individual circumstances change.[10]

52. The particular challenges faced by survivors of institutional child sexual abuse in being prepared to deal with and report abuse would likely be a relevant matter to a Court's exercise of its discretion to grant an extension of time. If not already a matter of judicial notice, it could reasonably be the subject of evidence led by the plaintiff. Consideration might be given to amending the *Limitation of Actions Act* to make this a factor which must be taken into account by a Court in considering whether the justice of the case requires an extension of time to be granted.

53. The State does not accept there is a need in South Australia to alter the limitation period to something which differs from other classes of litigants. If, however it was considered that the length of a limitation period should reflect the period within which the community reasonably expects a class of litigants should commence proceedings,

[8] *Batistatos v RTA* (NSW) (2006) 226 CLR 256, 264-5
[9] *Batistatos v RTA* (NSW) (2006) 226 CLR 256, 281
[10] *A,DC v Prince Alfred College Incorporated* [2015] SASC 12

some longer period may be warranted, cf. the longer limitation period in dust diseases legislation. The State would however not support any significant lengthening of the limitation period, or any removal of the limitation period.

10.3 Duty of Institutions

54. In relation to the liability of the State for criminal conduct of employees or other people engaged by institutions, South Australia's response to Issues Paper 5 submits that the issue of direct liability in negligence of the State for harm suffered by the 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 that has been caused by, and is not too remote from, the State's negligent act or omission.

55. South Australia submitted that, in relation to other forms of liability, the State does not owe any non-delegable duty of care to children for the intentional criminal conduct of others. This is consistent with the judgment of the High Court in *New South Wales v Lepore*[11] in the context of a relationship of school and student.

56. There are differing views about whether a State should be 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 unauthorised 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 vicarious liability arises where there is a sufficient connection between the duties which the employee is engaged to perform and the nature of the criminal sexual abuse.

57. This submission will address each of the three options for reform set out at page 219 of the Consultation Paper in turn:

10.3.1 An express duty for institutions to take reasonable care to prevent child sexual abuse of children in their care.

58. The State agrees that this is not a significant advance on the currently applicable duty of care under the law of negligence. The existence of a duty of care is not normally an issue, however the scope of any such duty may be. The State's position is that this is a matter best left to the normal development of the common law.

10.3.2 Vicarious liability - Reversible onus based on Victorian and Commonwealth Discrimination legislation.

[11] (2003) 212 CLR 511

59. As recent cases have reaffirmed,[12] the commission of sexual abuse is "far divorced" from the proper scope of what an employee is engaged to do in the course of his or her employment.

60. The State would point again to the possible pitfalls of attempting a legislative prescription of circumstances in which vicarious liability should apply and that it might be preferable to allow the matter to develop at common law on a case-by-case basis. For example, certain situations have been excluded from giving rise to vicarious liability where the only connection between the employment and the employed perpetrator was that the employment provided the perpetrator with the opportunity of access to children[13] and where the imposition of vicarious liability upon the institution for the acts of foster families may be inconsistent with the nurturing of an independent family environment.[14]

10.3.3 Strict Liability

61. The State does not accept that strict liability should be imposed on institutions. Further, if strict liability were recommended, or it was recommended that an onus be placed on an institution to prove that it took reasonable precautions to avoid children being sexually abused, then the potential prejudice of any extended time limitation would need to be addressed.

62. The State agrees with the observations at page 220 of the Consultation Paper that, if a broader duty were to be introduced, especially if combined with the removal or substantial extension of the applicable limitation period, changes might be considered to the extent of damages which might be sought in view of the difficulties inherent in assessing causation of loss or damage many years after the abuse. The State further submits that if any such significant changes were to be recommended they should not be recommended to be retrospective, particularly if a redress scheme is in place.

10.4 Identifying a Proper Defendant

63. As South Australia submitted in its response to Issue Paper 5, 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.

64. However in some instances plaintiffs have found it difficult to identify a non-government entity which can be sued. In other cases, a non-government entity no longer exists, which has frustrated the search for relevant documentation or witnesses. Other examples include where the plaintiffs in several actions against the State have also alleged that abuse occurred at certain non-government institutions during the mid-1950's onwards. In one case, the institution was incorporated under the *Associations*

[12] *A, DC v Prince Alfred College Inc.* [2015] SASC 12 at para [179]; *Withyman v State of New South Wales* [2013] NSWCA 10, at para [143]
[13] *Jacobi v Griffiths*, [1999] 2 SCR 570
[14] *B(KL) v British Columbia* (2003) 230 DLR (4th) 513 and *B(M) v British Columbia* (2003) 230 DLR (4th) 567; contra, *S v Attorney-General* [2--3] 3 NZLR 450

Incorporation Act 1929-1935, and the 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 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.

65. The State accepts that the difficulties in identifying an incorporated defendant or establishing that any insurer stands behind the proposed defendant may be a serious obstacle for survivors of non-government institutional child sexual abuse in obtaining redress. The State will consider any recommendations for legislative change that may be made to address these concerns.

10.5 Model Litigant Approaches

66. In South Australia, the role of the Crown as model litigant is set out in Legal Bulletin No. 2 (**LB2**). Legal Bulletins are issued by the Crown Solicitor from time to time for the information and benefit of public sector agencies. The current Legal Bulletin concerning model litigant obligations in the State was issued on 10 June 2011. It applies to the State of South Australia, Ministers, any separately incorporated agency or instrumentality of the Crown, any administrative unit of the public service and to private solicitors acting for the Crown. A copy of LB 2 is attached to this submission.

67. LB 2 requires not only honesty and compliance with the law, court rules, ethical obligations and the rules of professional conduct, but also requires propriety, fairness and compliance with the highest professional standards.

68. Further, LB 2 specifically recognises that court decisions in some types of litigation may affect the interests of many persons and that an obligation to consider the interests of the wider public may arise. The model litigant obligations do not, however, prevent the Crown from acting firmly and properly to protect its interests nor prevent legitimate steps being taken in pursuing litigation or in testing or defending claims.

69. The Royal Commission has suggested that governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims.[15]

70 In child sex abuse claims the South Australian Government has considered the evidence that the Royal Commission has obtained in relation to the approaches and actions taken by some government and non-government institutions to defend civil litigation involving child sexual abuse.

71. In South Australia, all such litigation is conducted by a small team of solicitors from the Crown Solicitor's Office. As noted earlier in this submission, the State has adopted an approach of dealing with claims of children who were sexually abused in State care by managing the litigation compassionately and dealing with time limits sympathetically where there is no insurmountable prejudice to the State. Claimants may also apply for

[15] Consultation paper, p232

ex gratia payments pursuant to the *Victims of Crime Act* 2001 as an alternative to litigation. A pro-active approach to the resolution of claims has enabled most claims to be resolved by way of a common law settlement or *ex gratia* payment. In South Australia, no claim against the State in relation to allegations of child sexual abuse has proceeded to trial.

STATE OF SOUTH AUSTRALIA

16 March 2015

Issued on 10 June 2011

LEGAL BULLETIN NO. 2

THE DUTIES OF THE CROWN AS A MODEL LITIGANT

When engaged in any form of litigation the Crown and its many instrumentalities and agencies have an obligation to act as a model litigant. The nature of that obligation has been stated clearly by the courts on many occasions. Those principles form part of the common law. In addition, section 7(2) of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* requires the Crown Solicitor to act as a model litigant for and on behalf of the State in proceedings under that Act.

Agencies involved in any form of litigation need to be mindful of their model litigant obligation and, where relevant, comply strictly with the obligation. Nevertheless, the duties of the Crown as a model litigant do not prevent it from properly defending matters and denying liability where appropriate. The model litigant obligation does not require the Crown to be a "soft touch" when it is sued. It is entitled to act firmly but fairly when engaged in litigation.

The model litigant obligation applies in precisely the same fashion to private lawyers acting for the Crown or an agency of the Crown as it does to the Crown Solicitor and the staff of the Crown Solicitor's Office. In other words, the fact that a private lawyer may be acting for the State or an agency in a particular matter does not remove or modify in any way the model litigant obligation.

The principles set out in this Bulletin have been endorsed by the Attorney General. He has made it very clear that he expects all agencies and the lawyers acting for them to comply with their model litigant obligation.

What is meant by the Crown in this context?

- The Crown includes
- the State of South Australia
- any Minister
- any separately incorporated agency or instrumentality of the Crown, eg the various statutory authorities and health units.
- any administrative unit (i.e. a department or attached office) of the public service, including SA Police. As these are not incorporated, they can only engage in litigation in the name of their Minister.

Why must the Crown be a model litigant?

The particular role of the Crown in litigation has long been recognised.

The Crown has been described as "*the fountain and head of justice and equity*": *Dyson v*

Attorney General [1911] 1KB 410 at 421. Put simply, this means that because the State has created the courts and the legal system it must set an example for the community which it leads and governs.

Lord Abinger in *Deare v Attorney General* (1835) 1 Y &C Ex. 197 at 208; 160 E.R. 80 at 85 stated -

> *"It has been the practice which I hope will never be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred."*

Probably the most frequently quoted statement of the principle is that of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342:

> "*The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.*
>
> *I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."*

Nature of the Obligation

The obligation to act as a model litigant may often require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations and the Rules of Professional Conduct and Practice. It requires that the Crown act with complete propriety, fairly and in accordance with the highest professional standards.

More specifically, the model litigant obligation requires that the Crown act honestly and fairly in handling claims and litigation by:

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

(b) paying legitimate claims without litigation;

(c) acting consistently in the handling of like claims and litigation;

(d) endeavouring to avoid litigation, wherever reasonably possible;

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by

(i) not requiring the other party to prove a matter which the Crown knows

to be true; and

(ii) not contesting liability if the Crown knows that the dispute is really about quantum (although that may be appropriate where there is a real dispute as to whether a breach of duty caused the damage alleged by a plaintiff);

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;

(g) not relying on technical defences unless the Crown's interests would be prejudiced by the failure to comply with a particular requirement;

(h) not undertaking and pursuing appeals unless the Crown believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the Crown pending proper consideration of the matter, provided that a decision whether to continue the appeal is made as soon as practicable;

(i) assisting the Court and opposing parties to understand the current state of the law by drawing the Court's attention to binding and persuasive relevant caselaw and other aids to statutory interpretation;

(j) being courteous and professional when dealing with witnesses, parties and their representatives;

(k) apologising where the Crown is aware that it or its lawyers have acted wrongfully or improperly.

The model litigant obligation does not prevent the Crown from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation or from testing or defending claims made.

In particular, the obligation does not prevent the Crown from:

(l) enforcing costs orders or seeking to recover costs;

(m) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;

(n) pleading limitation periods;

(o) seeking security for costs;

(p) opposing unreasonable or oppressive claims or processes;

(q) requiring opposing litigants to comply with procedural obligations;

(r) moving to strike out untenable claims or proceedings; or

(s) testing the credibility of a plaintiff or a witness and using lawful means to establish if a claim is fraudulent or exaggerated.

What do the model litigant principles mean in practice?

(a) Act fairly

- An overriding obligation that applies at all stages of the litigation process.

(b) Act consistently

- Do not treat citizens arbitrarily - you should not settle one claim and fight an identical claim. Similar claims must be treated similarly.

- The Crown should distinguish between different plaintiffs in class action or multiple plaintiff litigation, if proper basis for distinction exists eg different causes of action, different wrongdoers, different damage suffered by plaintiffs, differing degree of involvement by plaintiffs in underlying facts, etc.

(c) Avoid litigation

- Where it is relevant, always be open to Alternative Dispute Resolution at all stages of the litigious process.

- However, some cases involving the Crown often cannot be settled eg contempt of court or judicial review.

- Be clear on reasons for not wanting to settle claims.

(d) Pay legitimate claims

- Where liability is clear and no defences are available the Crown should pay.

- The guidelines do not require the Crown to accede to spurious, vexatious or dubious claims. The Crown should properly defend such claims.

(e) Minimise costs

- Truth in pleadings.

- Admit liability where appropriate.

- Deal with Matters in a timely fashion.

(f) Do not take technical defences

- Nevertheless, the Crown can and should plead defences properly open to it.

- The obligation arguably extends to technical points of litigation practice and procedure eg late service of documents where no prejudice will be suffered.

(g) Do not take advantage of claimant who lacks resources

- Do not issue applications without a proper purpose just to increase costs.

- Avoid litigation by paper warfare.

- Nevertheless, the Crown should seek to strike out unmeritorious claims. If the Crown fails to do so, the Crown may be embroiled in lengthy litigation over a number of years, culminating in a potentially lengthy and expensive trial.

(h) Do not appeal unless reasonable prospects for success or in public interest

The fair but firm principle

It has often said that the model litigant principle requires fairness but does not preclude firmness. As to firmness, a number of principles can be stated to guide the Crown in its conduct of litigation:

- There is nothing in the principles which precludes the Crown seeking to win cases.

- The Crown must properly maintain any claim to legal professional privilege and protect public interest immunity, especially in relation to sensitive documents such as Cabinet documents.

- The Crown should seek to set aside subpoenas where it is appropriate to do so. The Crown should generally claim costs for setting aside subpoenas and legal costs incurred in responding to subpoenas.

- The Crown can and should use the rules of the court to maximum but proper advantage. For example, in relation to costs and offers to settle.

It must also be recognised that in some types of litigation (eg native title and industrial relations claims) a decision by the court may affect the interests of many persons. In those circumstances the Crown may potentially have an obligation to take account of the interests of the wider public. That may sometimes require the Crown to draw the attention of the court to issues even where that may not be in the interests of any party to the proceedings.

Sometimes an opposing party adopts the tactic of making broad but non-specific assertions about the obligations of a model litigant so as to dissuade the Crown from properly defending its interests. Where that occurs the opposing party should be asked to specify the basis for their concern and their response should be tested against the policy set out in this Bulletin.

Behaviour not expected of a model litigant

As a result of the model litigant principles, there are a number of things the Crown should avoid in conducting its litigation:

- The Crown should not play litigation “fast and loose” nor adopt a “win-at-all-costs” strategy.

- The Crown should not use delaying tactics to extract a litigation advantage. Whilst experience suggests that certain time limits and orders are occasionally not complied with due to workload or oversight, such non-compliance should never be a deliberate strategy designed to frustrate an opponent or to secure a practical advantage.

- The Crown should not commence any legal proceedings for any ulterior or improper purpose.

- Maintain objectivity and professional independence. The right advice should always be given from a whole of Government perspective even if that is not what the client was hoping to hear. The client should be constructively assisted to understand why the advice was necessary.

- Avoid personality-driven litigation.

- Avoid oppression in litigation. Avoid flurries of interlocutory applications to scare plaintiffs into submission. “Fight fair”.

If you are in doubt about the scope of the model litigant obligation, seek advice from the Crown Solicitor's Office.

Greg Parker
Crown Solicitor