



9 March 2015

The Secretariat
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
SYDNEY NSW 2001

KINGSFORD
LEGAL CENTRE

By email: redress@childabuseroyalcommission.gov.au

Dear Madam/Sir,

Consultation Paper on Redress and Civil Litigation

Kingsford Legal Centre (KLC) welcomes the opportunity to respond to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Redress and Civil Litigation.

Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides general advice on a wide range of legal issues, including child sexual abuse, and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC's clients are economically and socially disadvantaged. Many KLC clients have experience in institutional care and are victims of sexual assault. We have had extensive contact with members of the Stolen Generation and acted in the Stolen Generations' case of Joy Williams.¹ KLC believes that the experiences of members of the Stolen Generations through court process are relevant to issues of civil litigation for survivors of child sexual abuse in institutions. It is through our experience providing advice to survivors that we base our recommendations to the Commission.

Redress schemes

KLC supports the creation of a redress scheme, as this will generally provide a better alternative to civil litigation. Successfully litigated matters are exceptional, and for each matter that is resolved positively for the survivor, there are many hundreds, if not thousands, of cases that could not be litigated due to access to justice issues, lack of evidence or procedural barriers.

¹ *Williams v Minister Aboriginal Land Rights Act 1983 no 2* [1999] NSWSC 84 26 August 1999.

People who have undergone extreme trauma as a consequence of abuse during their childhood years may be least likely to engage a lawyer and pursue a civil case. The discrepancy between the number of successfully litigated matters in Australian courts, and the overwhelming response of survivors giving evidence to the Commission indicates that civil litigation has failed as a way of providing redress, rehabilitation, restitution and justice for survivors.

We believe any redress scheme established should be a national and uniform scheme. A uniform scheme would ensure equal treatment of all survivors regardless of where they live or the institution they interacted with as a child.

If a redress scheme is to be established it needs to be adequately funded to meet the claims of existing survivors, as well as future survivors. It needs to be funded and underwritten by government with contributions from those institutions against which claims are made.

We also submit that the quantum of any monetary payments to survivors must be sufficient so as to adequately recognise the harm and wrong done to the individual survivor.

Direct personal response

Any redress scheme established must be survivor led. There needs to be flexibility in how the scheme responds to individual survivors and survivor groups. Suggestions by individual survivors and survivor groups for how they want redress should be listened to and, where possible, acted upon.

The 'Grandview Agreement'² in Canada is an example of a survivor led redress scheme. After two women went public about the abuse they had experienced at Grandview, a survivors' group was established, which collectively formulated what survivors wanted in terms of a response to their experience.

The reparations to those directly affected by abuse included financial compensation, education and training, therapy and an individual apology. The unique approach of the 'Grandview Agreement' was to allow the survivors themselves to shape any legal or restorative process and to determine the manner in which their voices were heard. For example, the removal of tattoos received while they were at Grandview was particularly important for the women and formed a key part of the scheme. Such an approach would not have formed part of a traditional compensation package awarded by a Court or imposed by a government-framed scheme.³

KLC believes that an Australian redress scheme should take a similarly open approach and think "outside the square". Individual survivors and survivor groups should be encouraged to put forward their own ideas for redress, not just in the design phase of the scheme but also after the scheme has been established.

Counselling and psychological care

Any redress scheme should include counselling and psychological care as a component of redress. As the psychological and emotional impact of childhood abuse can emerge and re-emerge throughout a person's life, survivors' access to counselling and psychological care should not be time limited in any way.

² The Agreement arose following revelations in the 1990s from former child attendees of widespread sexual, psychological and physical abuse at the Grandview Training School for Girls. The school operated as a court ordered residential home for Indigenous and non-Indigenous girls aged between 12 and 18 years old. The bulk of the allegations concerning abuse occurred in the 1960s and 1970s.

³ Reg Graycar and Jane Wangmann 'Redress Packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution' *The University of Sydney Law School Legal Studies Research Paper No 07/50* July 2007 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001148, p 14.

Although not opposed to the establishment of a trust fund as part of a redress scheme to hold funds to supplement existing services and filling service gaps, KLC believes that more funding should be provided through Medicare to adequately meet the counselling and psychological care needs of all survivors of childhood sexual assault.

In particular, specialist services need to be expanded and adequately funded to meet the counselling and psychological care needs of survivors of child sexual assault.

Redress scheme processes

It should be a fundamental requirement of any redress scheme that survivors are not re-traumatised by making them jump through unnecessary legal hoops. To this end KLC makes the following observations and recommendations.

- *Closing dates and time limits:* There should be no fixed closing date for or time limit on a redress scheme as this may mean eligible survivors will miss out on applying to the scheme.
- *Evidentiary requirements:* Evidentiary requirements should not be onerous and should recognise that for many survivors reporting the abuse would have involved interactions with the very institution where the abuse occurred. Survivors should feel respected and acknowledged and not made to feel they are not telling the truth. We do not support a prescriptive approach as to how evidentiary standards may be met. Survivors should be able to lodge any available evidence they have to establish their claim. The evidence from the Royal Commission should be considered on the public record and not something survivors need to establish or prove.
- *Burden of proof:* The burden of proof should be the civil standard of balance of probabilities and not the criminal standard of beyond a reasonable doubt.
- *Legal advice:* Funding should be provided to community legal centres to assist, advise and/or represent survivors who want to make a claim on the redress scheme.
- *Deeds of release:* KLC does not favour the use of deeds of release. If a deed of release is required, the redress scheme should require and pay for applicants to receive legal advice before accepting an offer.
- *Confidentiality clauses:* KLC does not support the use of confidentiality clauses in deeds of release that prevent survivors from discussing its contents. It is important that for reasons of both transparency and the process of healing that survivors who wish to, be able to continue to talk in an open way about their experiences without fear of litigation. As the Commission has highlighted silence and confidentiality in this area has a negative impact on preventing future abuse.

Civil Litigation

KLC supports the right of survivors to pursue civil litigation, although in our experience it is not an effective mechanism for providing redress to survivors.

Limitation periods

It is not uncommon for survivors of child sexual assault to come forward in their 40s and 50s, when they finally feel able to talk about their childhood experiences. It can take many more years for them to start think about the formal process of reporting the assaults to the police and/or commencing civil litigation. For these reasons, it is not uncommon for the police to

bring prosecutions, particularly in child sexual assault matters, more than 20 years after the offence. In these cases, however, the relevant legislation may arbitrarily rule out civil claims.

In light of this, KLC believes that time limits in all cases of child sexual assault should be removed across Australia. If a time limit is to remain in place, we believe that the existing exceptions regarding mental incapacity should be expanded or amended to include the impacts of sexual abuse including, trauma, shame, or fear.

Duty of institutions

Laws, including on vicarious liability, need to be reformed to prevent institutions blocking litigation and hiding their assets. In some instances, it has been difficult to commence litigation against religious and non-government institutions on the basis of vicarious liability. Such institutions may have assets held in charitable trusts and/or may be structured in such a way that it is difficult ascertain which part of the organisation should be liable.

Model litigant approaches

KLC supports the NSW Government's Guiding Principles for Government Agencies responding to Civil Claims for Child Sexual Abuse. We submit that non-Government institutions should adopt these model litigant guidelines.

There should be clear rules, guidelines and/or regulations around how settlement negotiations are conducted so as to minimise the possibility of re-traumatising the survivor.

We thank the Commission for its ongoing invaluable work and wish you every success in your future investigations.

Yours Sincerely,
KINGSFORD LEGAL CENTRE

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