CIVIL LITIGATION
SUBMISSION

This paper is submitted by the Royal Commission Working Group appointed by the Standing Committee of the General Synod of the Anglican Church of Australia to coordinate the Church's response to the Royal Commission. The submission responds to questions in **Issues Paper 5** entitled Civil Litigation issued by the Royal Commission into Institutional Responses to Child Sexual Abuse on 6 December 2013.

SUBMISSIONS

1. Are there elements of the civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?

It is acknowledged that the matters identified in sub paragraphs a. to j. of section 1 of Issues Paper 5 raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts. We believe that none of the issues identified is unique to the class of litigants who have suffered child sexual abuse. Some of those issues arise because of the lapse of time between the injury and the commencement of litigation. Similar problems are experienced by persons who suffer from diseases with long latency periods and people who suffer injury in infancy or early childhood but cannot commence proceedings until adulthood. Some issues arise because the plaintiffs have suffered traumatic physical and/or psychological injury. These issues, we note, are common to other kinds of claimants.

We comment below on some of the specific issues identified in section 1.

e. limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended

Not all defendants plead the expiry of a limitation period as a defence against claims of child sexual abuse. When they do, the law allows for limitation periods to be extended where specified criteria are met. The central issue is that the trial should be fair for all parties which is a question to be determined on the facts of each particular case. The existing law works satisfactorily and fairly.

f. the requirements for bringing a class action, if victims from the same institution wish to sue as a group

Even though there may be perceived psychological or pastoral advantages for victims of child sexual abuse to bring their actions together, there are significant legal impediments. It is doubtful that there is any advantage in bringing a class action where there have been multiple perpetrators in the one institution, especially over an extended period, because the normal requirements of proof of elements of the cause of action will result in the issues which are in common between the plaintiffs being insufficient to justify a class action, for example, different members of the class might have been abused by different categories of abuser such as employee, fellow member of the institution or visitor. Members of the class may have suffered different types or intensity of abuse and they may have suffered different types and degree of damage.

Class actions in general carry a potential for conflicts of interest amongst the class members. Cases brought by victims of child sexual abuse may raise their own particular conflicts. For example, it may be vital for some members of the class that the defendant acknowledges the wrongdoing and makes an apology whereas that may be of little or no importance to other members of the class. For some class members, financial considerations may be of primary importance whereas they may not carry the same weight for other members.

A difficulty with class actions is that they do not allow for defendants to respond to the individual pastoral needs of particular plaintiffs.

g. the existence of relevant records, locating them and retrieval costs

The processes of discovery of documents are designed to bring all relevant documents to light. A plaintiff's case is unlikely to depend solely on the existence of documents. Interrogatories can be administered, requiring the defendant to make all reasonable enquiries to provide relevant information. It is the usual expectation that a defendant bears the cost of locating documents and making enquiries to answer interrogatories. If a defendant objects on the ground of oppressiveness, the court must determine that objection as a matter of justice between the parties in the circumstances of the particular case.

h. the process of giving evidence and being subject to examination and cross-examination

Victims giving evidence in court may be re-traumatised by having to 'experience' the abuse all over again.

The process of giving an account of their abuse may cause 'flashbacks', where the adult experiences emotional reactions similar to those experienced when being abused as a child many years prior. Flashbacks may be extremely distressing and psychologically disabling and victims may lose their ability to sustain a coherent narrative and flashbacks may trigger

periods of serious depression. The court process itself may cause further distress.

Sometimes it is the case that, when they disclosed the abuse at the time it was occurring, victims were not believed by institution staff. Being cross-examined by a representative of the institution could cause child sexual abuse victims to feel they are disbelieved, thus re-experiencing the effects of the disbelief to which they were subjected at the time of the abuse.

However, the process of giving evidence and being subject to examination and cross-examination will be unavoidable when there is a genuine dispute as to whether the alleged abuse occurred or as to its effect.

k. the cost of litigation and access to funding and legal services

The high cost of litigation is an issue common to all litigants who sue or are sued in a personal capacity.

Cost of litigation can be limited by the judicious use of interlocutory processes such as discovery of documents, administration of interrogatories, the use of notices to admit facts and appropriate management of expert witnesses. Plaintiffs do not necessarily have to finance litigation themselves. Lawyers are permitted to institute litigation for clients on a contingency fee basis. Funding may be available from commercial litigation funders.

2. Are there other elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? If so, what are they and what issues do they raise?

The existing civil litigation system is not ideal for child abuse victims seeking redress from institutions. It can be costly and carries the possibility of re-traumatisation from the adversarial process.

Participating in the civil litigation process may cause extreme anxiety for child abuse victims. Additionally, the delay in reporting means that the victims' accounts of the abuse may be unclear or fragmented which may detrimentally affect the credibility of the accounts given in a court situation, especially under cross examination.

Any denial of liability by the institution, irrespective of the legal justification for that denial, may convey to the child sexual abuse victim the meaning that the institution is refusing to take responsibility for the abuse that the victim suffered. This may further traumatise the victim, since feeling unheard and possibly disbelieved, silenced or having the abusive behaviour minimised or misconstrued at the time of the abuse, was integral to the trauma of the original abuse.

3. How well do early dispute resolution or mediation processes work as part of the civil litigation systems for people who suffer child sexual abuse in institutional contexts?

Early dispute resolution and mediation processes have been highly successful both in substitution for and as part of the civil litigation system. Continuing use of these processes is very much encouraged.

4. What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?

A way forward may be to create a two-tiered system which caters for different needs. The first tier is a specialist body which seeks to provide healing and restoration through:

- an administrative, non-adversarial process;
- counselling as needed;
- opportunities for conciliation with institutions and, where appropriate, perpetrators who would have the opportunity to:
    - acknowledge the wrong they have done and the hurt they have caused and
    - apologise to survivors; and
- financial compensation paid on a fixed scale.

An appeal would lie to the relevant administrative appeals tribunal on the usual principles of administrative law.

There should be room in tier one for an institution to be directly involved in the processes of healing and restoration by providing counselling and other assistance.

Some of the rationale for tier one is addressed in sections 2 and 5 of this submission.

The second tier is the court system for those for whom damages are the paramount consideration. The civil litigation system could be modified in the following ways:

- A protocol could be introduced for examination of witnesses who allege they have suffered abuse to help protect them against the possibility of re-traumatization referred to above.
- Court-appointed counsellors with specialist skills to assist witnesses both before and after giving evidence could be provided.
- Courts could be empowered to receive relevant evidence from other cases in order to shorten the process. Such evidence might address issues such as:
    - who owned or controlled the institution at the relevant time;
    - who was charged with management;
    - who were the employees;

- the physical environment of the institution;
- policies and procedures in force in the institution;
- expert evidence of a general nature, such as the principles on which experts assess causation and damage.

Funding such a system is problematic. It is proposed that the establishment and administration of the body in the first tier be funded by government and the cost of counselling, compensation and other benefits provided to survivors be paid for by the relevant institution or its insurers. If a survivor seeks damages, then benefits already received under the first tier would be set off against any damages awarded.

To avoid difficulties of identifying an appropriate defendant, a possible solution is that each institution or Church body providing services to children be required to nominate a corporate entity which will respond to all claims. However, the effectiveness of this solution depends on the institution either having or having access to sufficient assets or the availability of affordable insurance cover. If these requirements are not met, the institutions might be forced to cease providing services to children which could be detrimental to the community.

Such a proposal raises significant issues such as the application of the law of vicarious liability and agency and, depending on how it is administered, may impose a regulatory burden which an institution is unable to bear. We therefore put the proposal with reservations and would welcome the opportunity for further consultation with the Royal Commission if it were minded to move in this direction.

5. Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages or financial compensation? Can these other forms of redress be obtained through civil litigation?

We believe that the existing civil litigation system is inadequate and could not be adjusted to resolve child sexual abuse claims fully. Pastoral care and assistance may be more suitable to address child sexual abuse victims' needs than pursuing court action.

Pastoral care and assistance schemes are more focussed on addressing the on-going needs of child sexual abuse victims rather than only providing them with monetary compensation.

In preference to lump sum payments, repayment of medical costs and provision of on-going counselling may be more beneficial to child sexual abuse victims. Giving genuine pastoral care and assistance ought to be the primary concern, when that is desired by the sexual abuse victim.

Payments under pastoral care and assistance schemes can be lower than those obtained from the civil litigation process because the evidentiary requirements for the claimants are less rigorous and the process is more flexible and speedier.

Monetary compensation is not the sole or even the primary focus for every child sexual abuse victim. Victims of child sexual abuse are able to accept that in some cases institutions were genuinely unaware of the abuse being perpetrated by their officeholders, employees, volunteers, fellow members of the institution, visitors and others. They do not necessarily seek to penalise the institution for the abuse that has occurred to them by the actions of an individual. It is important for such victims that wrongs are redressed by the institution acknowledging that the abuse has occurred, demonstrating that processes have been introduced to prevent sexual abuse of others and apologising appropriately. Some may feel that suing the relevant institution is the only way they can obtain redress for the wrongs they have suffered

It is important for some victims of child sexual abuse that every effort is made to ensure that the perpetrator is held to account.

Victims of child sexual abuse want, and deserve, a genuine apology from a person with recognised standing in the institution who is able to speak on behalf of the institution. Even if a court were to have the power to order a defendant to apologise, such an apology is unlikely to be accepted by the victim as being genuine.

Victims of child sexual abuse are entitled and often have a need to tell their story after the resolution of their claims. Deeds of release may be structured to prevent disclosure of the amount of compensation received but they should not prevent the victim from telling their story.

Dated: 17 March 2014