

ISSUES PAPER 5 – CIVIL LITIGATION

Legal Aid NSW submission

to the

Royal Commission into Institutional Responses to Child Sexual Abuse

March 2014

About Legal Aid NSW and our experience in child sexual abuse litigation

Legal Aid NSW welcomes the opportunity to make a submission to the issues paper on civil litigation. The Legal Aid NSW Civil Law practice provides legal advice, minor assistance, duty representation and casework services to people throughout Sydney and in 13 regional offices. We also fund a number of services provided by non-government organisations, including 36 community legal centres.

A grant of legal aid is not available for representation in a civil action for child sexual abuse. However, Legal Aid NSW does provide one-off civil law advice sessions in which legal questions regarding child sexual assault can arise. This general advice may typically include an overview of the legal avenues available to victims of sexual assault, including civil litigation, and an outline of the likely timeframes and costs involved. The advice session may also involve a referral to a private solicitor who may be willing to undertake civil litigation on a 'no win no fee' basis. Up until recently, Legal Aid NSW also provided assistance to claimants in victims compensation matters for people with a special disadvantage although we are no longer able to provide this service due to funding constraints.

Our responses to the questions posed in the issues paper are based on our experience providing legal advice to members of the community in legal advice sessions and our previous experience in working with clients with a special disadvantage to make a claim for victims compensation. This submission is also informed by our extensive experience assisting disadvantaged members of the community navigate the legal system.

While the focus of this issues paper is on the limitations of civil litigation and possible reforms to improve the effectiveness of the system, it is important to acknowledge some of the potential benefits of civil action. Some of these benefits, particularly in contrast to the criminal justice system, are set out by Annette Marfording in her paper *Access to justice for survivors of child sexual abuse*.¹

In civil proceedings the chances of the abuser being held liable are significantly higher since the burden of proof is only on the balance of probability. A significant benefit of civil action is that it will allow the victim to demand compensation for the injuries suffered directly from the perpetrator. Often the victim will have significant past and future expenses for medical care and counselling. Furthermore, the victim may have suffered a complete or partial loss of earning capacity as a result of the emotional injuries sustained. Non-pecuniary harm will include pain and suffering as well as loss of enjoyment of life. In addition, aggravated damages may be awarded as well as exemplary damages, which would serve both a punitive and a deterrent function. Perhaps more importantly, civil proceedings may have therapeutic benefits for the victim. They redress the powerlessness experienced during the abuse by allowing the victim a direct confrontation with the abuser. Some may see litigation as a means to achieve 'resolution' through retribution. A finding of liability publically vindicates the victim and demonstrates that the blame lies with the assailant, and not with the victim. In addition, litigation will increase public awareness of the incidence and long-term damage of child sexual abuse and demonstrate the option of taking legal action to other victims.

Further, civil litigation has the potential to award much higher damages than those that are available under a statutory compensation scheme.

The civil litigation system provides applicants with an important avenue through which to seek redress and compensation for child sexual abuse. There are however significant barriers to accessing the civil litigation system, particularly for disadvantaged people. We support measures that will make civil litigation more accessible but consider that there is also significant scope for an alternative redress scheme to provide victims with an option in addition to victims compensation and civil litigation.

Legal Aid NSW welcomes the opportunity to make this submission. If you would like to discuss its content further, please contact Dara Read, Solicitor, Legal Policy Branch, Strategic Policy and Planning Division on (02) 9219 5714 or at Dara.Read@legalaid.nsw.gov.au.

¹ Annette Marfording, 'Access to justice for survivors of child sexual abuse' (1997) 5 *Torts Law Journal*, 5-6

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?

Each of the elements of the civil litigation system outlined in the issues paper can present significant problems for people who commence civil proceedings to seek redress for sexual abuse in an institution. In our experience, the following matters are particularly relevant for clients who have sought legal advice from Legal Aid NSW.

The cost of litigation and access to funding and legal services

The Victorian Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations (the Victorian Inquiry) found that a 'lack of financial means' was one of the key barriers to litigation for victims of criminal child abuse in institutions.² In 2012–2013, 88.2% of people who applied for legal aid were on Centrelink benefits. Similarly, clients who approach Legal Aid NSW for legal advice will invariably face significant financial disadvantage. Most people who have approached legal aid for advice and decide to pursue a civil claim for child sexual abuse will approach a 'no win no fee' lawyer for representation. However, the risk of having to pay the other parties' costs should the civil action fail may deter some people from commencing civil litigation for child sexual assault.

The Betrayal of Trust Report highlights the potential for substantial inequality between parties in civil litigation and in negotiating settlements as a practical barrier to civil litigation. The Report notes that claims are often strenuously defended by non-government organisations with access to considerably more funds than individual applicants.³ The report also states that:⁴

Many victims told the Committee that they are not in a financial or emotional position to undertake civil litigation. For example, Ms Sandra Higgs, a victim in a criminal trial that stalled after the death of the accused priest, told the Committee that she did not pursue civil litigation because she was not in a financial position to do so. Many victims rely on lawyers willing to take on their case under a 'no win, no fee' basis. It is reasonable to assume that, however well motivated such practitioners may be to help victims, there will be practical limitations on how far they will be prepared or able to pursue cases.

Our solicitors have observed the practical limitations of private practitioners in the context of assisting clients with victims compensation matters for child sexual assault. In our experience, clients who have high and complex needs, particularly cognitive or mental health impairments, can face barriers when seeking assistance from private lawyers who may be more conscious of the time they are able to spend with each client and the expectations of their other fee paying clients. Similarly, matters that require solicitors to put a lot of time into collating relevant records

² Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 526

³ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 525

⁴ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 525

and evidence may not be conducive to the priorities of private practice. We anticipate that these limitations are even more pronounced in relation to civil litigation.

The Victorian Inquiry also found that:⁵

... victims rarely have the money needed for lengthy legal proceedings against a wealthy organisation. Some victims may also have dysfunction in their life that can weaken their apparent credibility and their ability to present evidence in a court of law. Others have missed out on learning the basic literacy skills needed to participate in legal action (the effects of abuse on the confidence, education and other aspects of victims' lives are discussed in Part B). Additionally, many of the complaints of criminal child abuse are historical and there are obvious evidential problems in proving matters relevant to events that occurred many years ago.

These observations are consistent with our experience in working with disadvantaged clients across a range of practice areas in New South Wales. For example, clients will often rely heavily on their lawyer to gather records through freedom of information or 'GIPA' applications and need significant support and assistance to identify relevant times and dates and set out relevant information in a meaningful way, such as in an affidavit.

We anticipate that there is significant unmet legal need in this area where legal aid organisations are not funded to provide a service and where it is not practical for private solicitors to meet this need. This legal need is exacerbated for clients with limited capacity or those whose lives are characterised by dysfunction or disadvantage, particularly given the complex nature of civil litigation.

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

Limitation periods present significant barriers for plaintiffs seeking redress for historical child sexual abuse and can significantly undermine their power in settlement negotiations. In NSW, the limitation period for a cause of action for personal injury was 'six years from the date on which the cause of action first accrued to the plaintiff or to a person through whom the plaintiff claims' until 1 September 1990. Section 18A of the *Limitation Act 1969* (NSW) provides that for a cause of action accrued after 1 September 1990, the limitation period for a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury is three years,⁶ although the limitation period is suspended for the duration of a plaintiff's disability.⁷

The reasons why victims of child sexual assault may face delays in commencing civil proceedings are many and varied, as outlined by Marfording in her paper on *Access to justice for survivors of child sexual abuse*:⁸

⁵ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 524

⁶ *Limitation Act 1969* (NSW), s 18A

⁷ *Limitation Act 1969* (NSW), s 52

⁸ Annette Marfording, 'Access to justice for survivors of child sexual abuse' (1997) 5 *Torts Law Journal*, 1

Many survivors of child sexual abuse will repress their painful memories or not recognise the link between their profound emotional injuries and their abuse until years after they have reached the age of majority. Often these injuries will not manifest themselves for decades after the victims were subjected to this heinous conduct. Once they become aware of what happened to them and how seriously it has affected them, the legal system adds a fresh wound to their plight: statutes of limitation impose time limits on the pursuit of civil actions with the result that access to the courts to sue their tormentors for compensation is effectively denied.

The Australian Lawyers Alliance submission to the Victorian Inquiry highlighted other reasons why victims of child abuse may not be in a position to comply with the limitation period:⁹

Victims are often too ashamed to disclose the truth. They may confuse a totally inappropriate relationship with a loving one. They may have been threatened, either directly or through their families, should they reveal the truth. They may be quite unaware of the extent of the damage done to them until much later. They may have attempted to put the abuse out of their minds whilst trying to get on with their lives as best they can.

As well as some victims feeling a sense of shame and self-blame about the sexual abuse, many victims fear being disbelieved especially if a long period has passed between the incident and disclosure.

The Betrayal of Trust Report concluded that 'on balance it is not in the public interest to allow perpetrators of abuse or culpable organisations to avoid the consequences of their actions. Such avoidance contributes to an ongoing risk to children...'¹⁰ The Report identifies a range of reasons why there is no public policy justification for the limitation of actions in cases of child abuse.¹¹ The Committee recommended that the Victorian Government should legislate to ensure that victims of criminal child abuse are able to issue civil claims relating to that abuse regardless of when the criminal child abuse occurred.¹² Legal Aid NSW supports this recommendation.

In NSW, legislation governing the Victim's Support Scheme provides that there is no limitation on the time that a victim of child sexual abuse is able to make an application for financial support or a recognition payment under the Act.¹³ A similar provision should apply in relation to civil litigation.

⁹ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 537

¹⁰ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 541

¹¹ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 541

¹² Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 538

¹³ *Victims Rights and Support Act 2013* (NSW), s 40(7)

The process of giving evidence and being subject to examination and cross-examination

The experience of giving evidence in civil proceedings can be an upsetting, difficult and confronting for victims of sexual assault. This experience can be made even more difficult in cases where the victim speaks English as a second language, has low levels of educational attainment or has any mental or cognitive impairment. Concerns about being subject to cross examination may deter some victims of child sexual assault from pursuing civil litigation. As highlighted above, clients who present as 'dysfunctional' in court may also have difficulty presenting their evidence and asserting their credibility in court.

Legal Aid NSW supports applicants in civil claims for child sexual abuse being able to make alternative arrangements to give evidence. Screens, audio-visual link and planned seating arrangements are allowed in NSW criminal proceedings pursuant to section 294C of the *Criminal Procedure Act 1986* (NSW) and similar provisions should apply in the civil jurisdiction. We also support arrangements being made to enable applicants to have a support person present when they are giving evidence, as provided for in criminal proceedings in NSW pursuant to section 294C of the *Criminal Procedure Act 1986* (NSW). Apprehended Violence Order proceedings are an example of these types of alternative arrangements being used effectively in non-criminal law matters in NSW.

We also consider that there is scope to investigate whether a victim support scheme, similar to the Witness Assistance Service that is available to victims of crime appearing in court in NSW, should be made available to applicants in civil proceedings.

Some institutions 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 recommended that:¹⁴

- The Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements.
- The Victorian Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.

Legal Aid NSW supports both of these recommendations and similar requirements being applied to non-government organisations in NSW. However, as these changes would benefit past victims, consideration could also be given to how any such reforms could be applied retrospectively to enable plaintiffs to seek redress for past sexual abuse.

¹⁴ Family and Community Development Committee, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 536

The existence of relevant records, locating them and retrieval costs

As we outlined above, identifying, locating and retrieving relevant records can be a very time consuming and involved process. The cost involved in this process may be prohibitive, particularly for victims facing financial disadvantage, where private solicitors are not willing or able to cover any disbursements for collecting relevant records. The Commissioners could consider introducing a system that requires government agencies and non-government agencies funded or given tax concessions by the government to waive retrieval costs for financially disadvantaged people.

Where records have not been kept and cannot be retrieved, this may undermine the strength of the case brought against the defendant. It may be difficult to address this issue in relation to historical matters, but the regulation of records management may prevent this being such a barrier for victims in the future.

How well do early dispute resolution or mediation processes work as part of the civil litigation brought by people who suffer child sexual abuse in institutional contexts? If so, what are they and what issues do they raise?

Legal Aid NSW does not have any direct experience participating in early dispute resolution or mediation processes as part of civil litigation for child sexual assault matters. However, in the course of conducting other civil litigation, we have found that early dispute resolution will often result in claims being settled in a more timely manner. This benefits the plaintiff because it reduces the time that proceedings take to be resolved, avoids the trauma of court proceedings and limits the costs involved for both parties. It can also include outcomes which are not usually the subject of court orders, such as apologies or an acknowledgement of the harm suffered by the plaintiff.

Early dispute resolution and mediation may be appropriate in some cases although we do not support early dispute resolution or mediation being a mandatory requirement for the plaintiff in civil proceedings relating to sexual assault. However, if the plaintiff chooses to participate in mediation with a view to exploring a possible settlement, the defendant should not be able to decline to participate in order to protract proceedings. Ideally, mediators involved in matters regarding child sexual abuse should receive specialist training and mediation models such as shuttle mediation should be available.

What change 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?

As we have suggested above, the following reforms may address some of the current barriers to accessing the civil litigation system:

- Exclude criminal child abuse from the operation of limitation periods
- Introduce legislation or practice directions to allow alternative arrangements to be made when victims of child sexual abuse give evidence in civil matters
- Establish a victim support scheme for people in contact with the civil litigation system

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?

Many victims of child sexual abuse emphasise the importance of having a formal acknowledgement or apology for the harm done to them. Some people may benefit if the court had the power to order a formal acknowledgement or apology from the defendant if they are found liable for child sexual abuse. Some successful plaintiffs may also have an interest in the court making orders about allowing the plaintiff access to relevant records or information about the period during which they were institutionalised. This may include photographs taken by the institution or letters received from the plaintiff's family and kept by the institution. This may be a form of redress that could assist their healing process.