



Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 5: Civil Litigation

Joint Submission of the Victorian Aboriginal Legal Service and
the Human Rights Law Centre

March 2014

www.vals.org.au

www.hrlc.org.au

Freedom. Respect. Equality. Dignity. Action.

Contact

Alister McKeich
Victorian Aboriginal Legal Service
273 High Street
Preston VIC 3072

T: + 61 3 9418 5999
F: + 61 3 9418 5900
E: amckeich@vals.org.au
W: <http://vals.org.au/>

Ben Schokman and Ashlea Hawkins
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450
F: + 61 3 8636 4455
E: ben.schokman@hrlc.org.au
W: www.hrlc.org.au

VALS wishes to acknowledge the support of
Angela Sdrinis in the preparation of this submission.

About the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (**VALS**) provides advice and representation to thousands of Aboriginal Victorians each year by:

- Providing legal advice, assistance and representation in areas of criminal, civil and family law
- Providing community legal education to increase the communities' knowledge of their rights and obligations before the law
- Promoting law reform to address the disadvantage suffered by the Aboriginal people and communities within the legal and justice systems
- Providing policy analysis and advice on measures to improve justice outcomes, including reducing the rate of imprisonment of Aboriginal people
- Advocating for the rights of Aboriginal people in contact with the justice system
- Building public awareness and understanding of issues confronting Aboriginal people and communities within the legal and justice system.

VALS is the only Victorian Organisation funded by the Australian Government under the Aboriginal and Torres Strait Islander Legal Services Program.

Follow us at <https://twitter.com/thevalsmob>

Join us at www.facebook.com/VictorianAboriginalLegalService

About the Human Rights Law Centre

The Human Rights Law Centre (**HRLC**) is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

Follow us at <http://twitter.com/rightsagenda>

Join us at www.facebook.com/pages/HumanRightsLawResourceCentre

Contents

Foreword	i
1. Executive Summary	1
2. Summary of Recommendations	2
3. Background and Context: The Aboriginal Experience in Victoria	7
3.1 Removal of Children from the Home	7
3.2 History of Child Sexual Abuse in the Aboriginal Context	7
3.3 Remedies Available to Abused Children	8
4. A Human Rights Framework	8
4.1 Relevance of Human Rights	8
4.2 Value of a Human Rights Framework	9
5. Relevant Human Rights Principles	10
5.1 Access to a Remedy and the Right to a Fair Trial	10
5.2 Non-Discrimination and Equality	15
5.3 A Children’s Rights Framework	15
5.4 Rights of Aboriginal and Torres Strait Islander Peoples	16
6. Current Barriers to Access to Justice	17
6.1 Access to Legal Advice and Representation	17
6.2 Access to Records	19
6.3 Complexity and Length of Litigation	21
6.4 Time Limitations for Bringing Legal Proceedings	22
6.5 Ensuring Access to a Remedy for Previous Violations	23
6.6 Reforming the Burden of Proof	25
6.7 Reforming How Damage is Proved	26
6.8 Statutory Cause of Action	27
6.9 Forms of Redress	28
6.10 Children’s Rights	28
6.11 Intergenerational Trauma	29
6.12 Incarcerated Aboriginal Persons	30

Appendix 1: Statement by Ricky Atkinson (separate document)

Foreword

It is with great interest I have been following the progress of the Royal Commission into Institutional Responses to Child Sexual Abuse. The institutionalisation of Aboriginal men and women has produced long-term, intergenerational effects on our families and communities here in Victoria, not least the effects of sexual abuse.

The impacts are wide ranging, and are seen across a number of social indicators – poor employment and education opportunities, lower mental and physical health, homelessness and increased contact with the justice system. At a core level, the institutionalisation of Aboriginal men and women, and the abuses they suffered – including sexual abuse – has led to the breakdown of the family unit and communities at large. It has also resulted in rates of Aboriginal children in out-of-home care to be far higher than non-Aboriginal children, thus putting the next generation at risk of further abuse.

Access to civil litigation is only one issue that needs to be addressed within the context of the greater story of colonisation and dispossession. However, it is with confidence that the Victorian Aboriginal Legal Service in partnership with the Human Rights Law Centre submit this response to Issues Paper 5: Civil Litigation. This submission covers a number of aspects and makes a number of recommendations which we are confident address the concerns raised on the issues by the Royal Commission.

To illustrate the recommendations, we have included in Appendix 1, a letter from a law firm to one of our Aboriginal clients, Ricky Atkinson. Ricky was removed as a boy, and sent into an institution, where he was repeatedly subject to sexual abuse. Once considered a prospect as a talented footballer, as a result of his abuse Ricky's life devolved into drug and alcohol abuse, poor mental health, anger problems and, subsequently, increased contact with the justice system.

With Ricky's permission we have reproduced the letter, as it clearly demonstrates the many barriers he faces in his pursuit of justice via the civil litigation process. It is clear that the current civil litigation process is grossly inadequate and does not fairly serve victims of sexual abuse. The situation is furthermore distressing to the victim, given that their abuses were experienced as children placed under the care of institutions that clearly failed in their responsibilities.

It is hoped that out of the Royal Commission real change is made, not only with regard to the civil litigation process but to a number of other aspects concerning justice and support for Aboriginal victims of child sexual abuse and institutionalisation.

Wayne Muir
Chief Executive Officer
Victorian Aboriginal Legal Service

1. Executive Summary

1. This joint submission by the Victorian Aboriginal Legal Service (VALS) and the Human Rights Law Centre (HRLC) addresses the matters raised in Issues Paper 5 of the Royal Commission into Institutional Responses to Child Sexual Abuse on the subject of civil litigation. This joint submission is made in the context of the experiences of Victorian Aboriginal peoples suffering child sexual abuse in various institutional settings.
2. In the particular context of child sexual abuse, there are many barriers preventing former state wards from accessing civil litigation. These include, among other things, difficulties accessing legal advice and representation, difficulties accessing records, time limitations, identifying persons responsible for child sexual abuse, a lack of equality of arms in the litigation process, and the standard of evidence required by claimants to establish civil claims.
3. These barriers to accessing justice raises a number of human rights issues, including the right to access a remedy, the right to a fair trial, principles of non-discrimination and equality, and specific rights that belong to children, and to Aboriginal peoples. The submission outlines relevant human rights principles and makes recommendations to ensure that all victims of child sexual abuse can access remedies for the violations of their human rights. The Royal Commission has an important role to play in respecting and promoting the human rights of past victims of child sexual abuse, as well as making recommendations to protect human rights by seeking to prevent future instances of child sexual abuse.

2. Summary of Recommendations

4. VALS and the HRLC make the following specific recommendations regarding overcoming barriers to civil litigation:

Recommendations regarding access to legal advice and representation

- Funding to Aboriginal legal services should be increased to address gaps in service delivery and poor levels of Aboriginal access to civil and family law justice in general.¹ Increased resourcing across the legal assistance sector would allow for more strategic approaches to legal need, including the expansion of individual casework.²
- Increased funding and resourcing should be provided to Aboriginal legal services as well as community legal centres and legal aid commissions to specifically address ongoing legal need around child sexual abuse claims. VALS and the HRLC refer to the conclusions outlined in the Report on Indigenous Funding and note that both mainstream and Aboriginal-specific programs are complementary and are both essential to meeting the needs of Aboriginal people.³
- In addition to funding for access to legal advice and casework services, additional funding should also be provided for community legal education to enable engagement with Aboriginal communities and to improve awareness of legal services for civil matters.⁴

Recommendations regarding access to records

In line with the recommendations made in the *Bringing them Home Report*:

- The destruction of records relating to the removal of children from their families should be prohibited by law.⁵

¹ Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria* Cairns: James Cook University, page 59.

² See Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria* Cairns: James Cook University, page 15.

³ Commonwealth Grants Committee (2001) *Report on Indigenous Funding*, para 53.

⁴ For example, The Report by the Access to Justice Taskforce, Attorney-General's Department (September 2009) *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Recommendation 6.5 recommends: "The Attorney-General's Department should work with Indigenous legal assistance providers, relevant non-legal services and communities to improve the provision of information to Indigenous Australians, including through direct contact, and building outreach services to connect existing services." VALS supports this recommendation, as it applies to the Victorian child sexual abuse context.

⁵ Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 21.

- Funding should be provided to all government record agencies to preserve and index records relating to the removal of children from their families.⁶
- The privacy of individuals should be a paramount consideration when preparing indexes and other finding aids.⁷
- Guidelines for access to records should be created.⁸
- The Victorian Government should institute traineeships and scholarships for the training of Aboriginal archivists, genealogists, historical researchers and counsellors.⁹
- Where records are held in institutions or private collections, including by churches and other non-governmental agencies, those records should be transferred to a body or organisation which can adequately preserve those records and create indexes.¹⁰

Additional recommendations:

- Fees should not be charged to obtaining documents that may be relevant to institutional child sexual abuse claims.
- Consideration should be given to additional measures to support claimants to provide oral evidence in support of child sexual abuse claims.

Recommendations regarding complexity and length of litigation

- Because of the difficulties in achieving justice through civil litigation, consideration should be given to the development of alternate redress schemes outside of the courts in order to facilitate a less traumatic experience for sexual abuse victims.
- Culturally sensitive health services (such as counselling) should be provided for Aboriginal and Torres Strait Islander sexual abuse victims throughout the civil litigation process.
- Consideration should be given to further measures that promote courts' understanding of the psychological difficulties of relating traumatic experiences.

⁶ Ibid. Recommendation 22a.

⁷ Ibid. Recommendation 22b.

⁸ Ibid. Recommendation 25.

⁹ Ibid. Recommendation 28.

¹⁰ Ibid. Recommendations 38a, 38b and 38c, combined.

Recommendations regarding time limitations

- There should be no limitation period applying to child sexual abuse claims.
- There should be no time limit on applying for victims of crime compensation for child sexual abuse should be excluded from the No time limits should That the Victorian Government consider amending the *Victims of Crime Assistance Act 1996* (Vic) to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings (Recommendation 27.1, Part H, *Betrayal of Trust*).

VALS and the HRLC note that recommendations to this effect were made in the *Betrayal of Trust* and *Bringing them Home* reports.¹¹

Recommendations regarding access to remedy

To overcome similar obstacles in the future, VALS and the HRLC support the following recommendations:

- That 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 (Recommendation 26.1, Part H, *Betrayal of Trust*).
- That 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 (Recommendation 26.2, Part H, *Betrayal of Trust*).

Recommendations regarding reforming the burden of proof

- Consideration should be given to shifting or sharing the burden of proof in civil claims relating to allegations of sexual abuse.
- In victims of crime compensation schemes, there should be minimal formality and bodies responsible for assessing claims should not be bound by the rules of evidence.¹²

¹¹ Victorian Parliament Family and Community Development Committee (November 2013) *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations*, Recommendation 26.3 and 27.1; Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 17.

¹² Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 17 provides “That the following procedural principles applied in the operations of the monetary compensation mechanism. ... 5. Minimum formality. 6. Not bound by the rules of evidence ...”.

Recommendations regarding reforming how damage is proved

- Consideration should be given to more appropriate and accessible ways to proving damage in child sexual abuse cases

Recommendations regarding statutory cause of action

- VALS and the HRLC support the recommendation that the Victorian Government undertake a review of the *Wrongs Act 1958* (Vic) and identify whether legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse (Recommendation 26.4, Part H).¹³ Such amendment should also include a clear statutory cause of action for breach of such a legal duty and the remedies available to victims.

Recommendations regarding forms of redress

- Where appropriate, financial compensation should be provided to victims of child sexual abuse.
- In addition to financial compensation, reforms should be considered to increase the availability of other remedies to be available to victims of child sexual abuse, such as (a) an acknowledgment and apology; (b) guarantees against repetition; (c) measures of restitution; and (d) measures of rehabilitation.

Specifically in relation to Aboriginal and Torres Strait Islander victims, apologies should be provided by:

- the Federal and/or State Government, where the sexual abuse occurred as a direct result of removal of a child from the home; and
- churches and other non-government agencies which played a role in the administration of the laws and policies under which Aboriginal children were forcibly removed.

¹³ Family and Community Development Committee (November 2013) *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations*, PP NO. 275.

Recommendations regarding children's rights

- Where a child is to be removed from the home, the identity of an appropriate legal guardian must be established to determine who owes the child a clear, strong duty of care to that child.
- Processes must be in place to ensure that Aboriginal children and young people are provided the adequate supports and legal education to understand their rights to pursue civil litigation if they are a victim of sexual abuse.

Recommendations regarding intergeneration trauma

- Funding should be made available to support Aboriginal families and communities of sexual abuse victims, in the areas of health and well-being, education and employment, and housing.
- The families and communities of sexual abuse victims pursuing civil litigation should be supported in areas such as health and well-being, and counselling, understanding that such abuse effects the family and community as a whole, and not just the victim.

Recommendations regarding incarcerated Aboriginal persons

- Incarcerated Aboriginal men and women should have increased access to legal information and education regarding their right to pursue civil litigation.
- Aboriginal Legal Services across Australia should be funded adequately to support and provide information to incarcerated Aboriginal men and women concerning their right to, and the avenues for, accessing justice concerning their sexual abuse in institutions.

3. Background and Context: The Aboriginal Experience in Victoria

3.1 Removal of Children from the Home

5. The removal of Aboriginal children into institutions and foster homes has been a huge contributor to the breakdown of traditional Aboriginal communities in the area now known as Victoria.¹⁴ The process of institutionalisation of Aboriginal people in Victoria has occurred under various laws and policies since the Port Philip Protectorate was established in 1838, and still continues today. According to a Child Welfare Report released in 2012, Victorian Aboriginal children are more than 15 times more likely to be placed in out of home care than non-Aboriginal children.¹⁵ The reasons for this statistic are varied and, in general, relate to poor social indicators.
6. Alongside a range of physical, mental, emotional and racial abuses, compounded by the loss of language, land, culture, family and community, Aboriginal men and women have experienced sexual abuse while institutionalised. This abuse occurred in missions and reserves, church run and non-government institutions such as children's homes and orphanages, and within the context of foster care.
7. Today, the Aboriginal Community in Victoria is confronted by a range of social inequalities, including high rates of imprisonment, high rates of suicide, poor health outcomes and a lack of education and employment opportunities, many of which can be attributed to removal of children from the home both historically and today.¹⁶

3.2 History of Child Sexual Abuse in the Aboriginal Context

8. The rates of sexual abuse for Aboriginal people institutionalised under past and present laws and policies have never fully been investigated. Perhaps the most reliable indicator of the extent of sexual abuse in Aboriginal communities while institutionalised is the evidence contained in the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, entitled *Bringing them Home*.¹⁷

¹⁴ The Victorian Government's Report, *Victorian Aboriginal Affairs Framework 2013-2018: Building for the Future: A Plan for 'Closing the Gap' in Victoria by 2031*, identified that 'A higher proportion of Aboriginal people in Victoria have been directly affected by the Stolen Generations than any other state or territory', p. 7.

¹⁵ Australian Government, Australian Institute of Health and Welfare, *Child Protection Australia 2011-2012*, p. 41-42.

¹⁶ The transition from children's homes into prison is not an uncommon story for both Aboriginal and non-Aboriginal former state wards. For example, of the 99 Aboriginal deaths in custody investigated during the 1991 Royal Commission, it was found that 43 were of people who had been removed as children. *Source: Reconciliation Australia Website. <http://www.reconciliation.org.au/>*

¹⁷ Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Bringing them Home)*.

9. *Bringing them Home* notes that nationwide, “almost one in ten boys and just over one in ten girls allege they were sexually abused in a children’s institution”, while “one in ten boys and three in ten girls allege they were sexually abused in a foster placement or placements.”¹⁸ The majority of these instances of alleged sexual abuse were not reported. Unfortunately, statistics for the rates of sexual abuse amongst Aboriginal children removed in Victoria are not available.
10. Further, it must be noted that the questions regarding sexual abuse were not included in the terms of reference of the *Bringing them Home* Inquiry, and therefore all information regarding sexual abuse was provided voluntarily by victims. It is therefore possible that the rates of sexual abuse in the Aboriginal context may be far higher than reported in *Bringing them Home*.

3.3 Remedies Available to Abused Children

11. Unlike some other States and Territories which have had various redress schemes for former state wards, civil litigation has been one of the only forms of recompense available to Aboriginal people who were sexually abused while in the care of an institution. Historically, however, Aboriginal people have experienced difficulties accessing justice through civil litigation.
12. In the particular context of child sexual abuse, there are many barriers preventing former state wards from accessing civil litigation. These include, amongst other things, difficulties accessing legal advice and representation, difficulties accessing records, time limitations, identifying persons responsible for child sexual abuse, guaranteeing equality of arms and the standard of evidence required to establish civil claims. These barriers are discussed further in this submission.

4. A Human Rights Framework

4.1 Relevance of Human Rights

13. The Royal Commission has an important role to play in ensuring the recognition of and respect for the human rights of victims of child sexual abuse. Human rights are fundamental rights and freedoms that belong to all people. Australia has ratified a number of key international human rights treaties that impose legal obligations on Australia to respect, protect and fulfil the human rights set out in those treaties.

¹⁸ *Ibid.*, pp 141-142.

14. In a federal system like Australia, these legal obligations apply to federal, state and local governments and all branches of government. Public or governmental authorities at all levels must act to respect, protect and fulfil human rights.¹⁹ The Royal Commission itself has an important role to play in respecting and promoting the human rights of past victims of child sexual abuse, as well as making recommendations to protect human rights by seeking to prevent future instances of child sexual abuse.

4.2 Value of a Human Rights Framework

15. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, demonstrates that a human rights approach to the development of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:
- (a) enhanced scrutiny, transparency and accountability in government;
 - (b) more participatory and empowering processes for policy development;
 - (c) better public service outcomes and increased levels of ‘consumer’ satisfaction; and
 - (d) “new thinking”, as the core human rights principles of dignity, equality, respect, fairness and autonomy help decision-makers “see seemingly intractable problems in a new light”.²⁰
16. There is strong evidence that the language and ideas of rights can secure positive changes not only to individual circumstances, but also to policies and procedures resulting in systemic change. Ensuring a human rights approach to the Royal Commission, including the development of this Issues Paper, will assist to develop laws and policies that ensure that victims of sexual abuse as children are able to access justice and that steps are taken to ensure that such acts do not take place in the future.

¹⁹ UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [4]. See also art 50 of the ICCPR and art 27 of the Vienna Convention on the Law of Treaties, which provides that a state party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

²⁰ See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

5. Relevant Human Rights Principles

17. Australia is a party to a number of international human rights treaties which create legal obligations to protect and promote the rights enshrined in those treaties. For the purposes of this Issues Paper on civil litigation, the rights that are most relevant include:
- (a) the right to access to a remedy;
 - (b) the right to a fair trial;
 - (c) the right to equality and non-discrimination;
 - (d) children's rights; and
 - (e) the rights of Aboriginal and Torres Strait Islander peoples.

5.1 Access to a Remedy and the Right to a Fair Trial

18. The right to an effective remedy and the right to a fair hearing are essential aspects of ensuring access to justice.
19. The right to an effective and, if possible judicial, remedy for violations of human rights is contained in various treaties to which Australia is a party, including article 2 of the International Convention on Civil and Political Rights (**ICCPR**). "Effective remedies" is a broad term, encapsulating a range of reparations that can be made to individuals whose rights have been violated. Such reparations may include:²¹
- restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.
20. In general, the availability of an effective remedy requires that "individuals be able to seek enforcement of their rights before national courts and tribunals".²²
21. The right to a fair hearing is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. Human rights considerations are of increasing relevance to the law governing the conduct of proceedings and to legal conceptions of what amounts to a fair trial or a just decision,²³ all of which are relevant constituents of effective access to justice.

²¹ UN Human Rights Committee, *General Comment 31*, above n **Error! Bookmark not defined.**, [6].

²² See, eg, CESCR, *General Comment 9: The Domestic Application of the Covenant*, [10], UN E/C.12.1998/24 (1998).

²³ See generally Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007).

22. The right to a ‘fair hearing’ is recognised and enshrined in article 14(1) of the ICCPR:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

23. The concept of a fair hearing contains various elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. At the very least, the minimum basic elements of the right to a fair hearing consist of:

- (a) equal access to, and equality before, the courts;
- (b) the right to legal advice and representation in certain circumstances;
- (c) the right to procedural fairness;
- (d) positive duties owed to vulnerable parties, such as self-represented litigants;
- (e) the right to an expeditious hearing;
- (f) the right to a competent, independent and impartial tribunal established by law;
- (g) the right to a public hearing; and
- (h) the right to have the free assistance of an interpreter where necessary.

The aspects of the right to a fair hearing that are most relevant to this Issues Paper are discussed in further detail below.

(a) Equal Access to and Equality before the Courts

24. The right to a fair trial requires that all persons must be granted, without discrimination, the right of equal access to the justice system.²⁴ The administration of justice must “effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice”.²⁵

25. Courts have determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.²⁶ This is inherently linked with notions of equality before the courts and may raise issues of court fees, complexity of procedure, a right to legal aid, awarding of costs and discrimination.

²⁴ See, eg, two recent decisions of the European Court, *Ciorap v Moldova* [2007] ECHR Application No 12066/02 (19 June 2007) and *Bakan v Turkey* [2007] ECHR Application No 50939/99 (12 June 2007), which confirmed that the right to a fair hearing includes a right of access to the courts as well as to legal aid and representation.

²⁵ United Nations Human Rights Committee, *General Comment No 32*, CCPR/C/GC/32, 23 August 2007, [9] (**General Comment No 32**). A general comment is an authoritative statement of the interpretation and application of a treaty provision by the body responsible for that treaty.

²⁶ Department for Constitutional Affairs, *Human Rights: Human Lives* (2006) <www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf> at 21 December 2006.

26. The UN Human Rights Committee (**HRC**), which is the committee that monitors compliance by states with the ICCPR, has consistently linked equal access to the courts to the notion of equality. The HRC has stated that “a situation in which an individual’s attempts to seize the competent jurisdictions of their grievances are systematically frustrated runs counter to the guarantees of Article 14(1)”.²⁷
- (b) Right to Legal Advice and Representation**
27. An essential element of a fair legal system is the ability to access legal assistance for the purposes of obtaining a fair hearing. Accessibility of the law depends on awareness of legal rights and of available procedures to enforce such rights. When access to legal assistance is not available, meritorious claims may not be pursued or may not be successful.²⁸ In many instances, “injustice results from nothing more complicated than lack of knowledge.”²⁹
28. In relation to civil matters, the right to a fair hearing does not impose an obligation on the state to provide free legal assistance in all matters. It does, however, require the state to make the court system accessible to everyone, which may itself entail the provision of legal aid. Indeed, the complexity of some civil matters may actually require legal aid to ensure a fair hearing.³⁰
29. According to the HRC’s recent General Comment 32 on article 14 of the ICCPR (**General Comment 32**), availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.³¹ The HRC encourages states to provide free legal aid in all types of cases where the individual cannot afford it, but observed that there may be situations where states are positively obliged to provide it.³²
30. The European Court of Human Rights (**European Court**) has held that while there is no obligation to grant legal aid in all disputes, States should be guided by principles of fairness.³³ States should ensure that a party in civil proceeding be able to participate effectively by being able to put forward arguments in support of his or her claims.
31. In obiter comments regarding legal aid funding, the HRC said in *Dudko v Australia* that while a state has a discretion to direct finite legal aid resources to meritorious matters, this discretion should be exercised having regard to factors including “the nature of the proceedings, the

²⁷ *Olo Bahamonde v Equatorial Guinea*, UN Doc CCPR/C/49/D/468/1991, [9.4].

²⁸ Victorian Law Reform Commission (**VLRC**), *Civil Justice Review Report 14*, 2008, 607.

²⁹ Chief Justice Murray Gleeson, ‘Conference Opening and Keynote Address’ (Speech delivered at the National Access to Justice and Pro Bono conference, Melbourne, 11 August 2006).

³⁰ Department for Constitutional Affairs, above n 26, 20. See also *Airey v Ireland* [1979] 6289/73 ECHR 3 (9 October 1979).

³¹ General Comment No 32, above n 25, [10].

³² *Ibid.*

³³ *Bobrowski v Poland* [2008] ECHR 64916/01 (17 June 2008).

powers of the appellate court, the capacity of an unrepresented party to present a legal argument, and the importance of the issue at stake in view of the severity of the sentence".³⁴

32. It is clear that, in certain civil cases, these factors will effectively require the provision of state-funded legal aid. For example, in *P C and S v UK*,³⁵ the European Court held that the failure to provide an applicant with a lawyer was a violation because, in the circumstances, legal representation was deemed to be indispensable. Lack of legal representation prevented the party from putting forward their case effectively because of the complexity, high emotional content and serious consequences of the proceedings.
33. Similarly, in *Golder v United Kingdom*,³⁶ the applicant was denied access to his solicitor to discuss the prospect of bringing a civil suit. This was held to violate his right to a fair hearing because although not preventing him from bringing a proceeding altogether, it did prevent him from commencing it at that time. The European Court held that the fair conduct of a civil proceeding is meaningless if one does not have the right to bring the proceeding in the first place and explained that the right to a fair hearing presupposes the right of access to the courts just as it presupposes the existence of the courts themselves.³⁷

(c) Costs of Litigation

34. An important aspect of ensuring equal access to justice is an applicant's ability to pay the associated costs of litigation and the discriminatory effect this has on disadvantaged members of the community. As Lord Bingham of the United Kingdom has said of the costs of litigation:³⁸

everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined ... [L]egal redress should be an affordable commodity.

35. According to the HRC's General Comment 32, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues with the right to a fair hearing.³⁹ The HRC has noted that:

in particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.⁴⁰

³⁴ *Dudko v Australia*, HRC, UN Doc CCPR/C/90/D/1347/2005 (29 August 2007).

³⁵ 56547/00 [2002] ECHR 604 (16 July 2002).

³⁶ 4451/70 [1975] ECHR 1 (21 February 1975).

³⁷ *Ibid.*

³⁸ Lord Bingham of Cornhill, *The Rule of Law* (the Sixth Sir David Williams Lecture delivered at Cambridge University on 16 November 2006) < <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf> > at 5 March 2009, 20-2.

³⁹ General Comment No 32, above n 25, [11]. See also, Communication No. 646/1995, *Lindon v Australia*, [6.4].

⁴⁰ General Comment No 32, above n 25, [11]. See also, Communication No 779/1997, *Aarela and Nakkalajarvi v Finland*, [7.2].

36. In *Kreuz v Poland*,⁴¹ the requirement to pay court fees was held to be a violation of art 6 of the ECHR because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not endow citizens with the right to free civil proceedings, the European Court said that the imposition of court fees must be balanced against the burden placed on the individual litigant.
37. In *Kijewska v Poland*,⁴² the applicant successfully argued that court fees approximately four times her monthly income were excessive and amounted to a breach of art 6 of the ECHR. The European Court held that:
- having regard to the importance of the right to a court in a democratic society ... the judicial authorities failed to secure a proper balance between the interest of the state in collecting court fees on the one hand, and the interest of the applicant in pursuing her civil claim on the other.
38. The imposition of substantial costs against a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. In *Aarela v Finland*,⁴³ the HRC held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. The HRC held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.

(d) Right to Procedural Fairness

39. The right to a fair hearing involves procedural guarantees as to the conduct of a hearing. Essentially, the right ensures litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party. In this regard, the right to equality before courts also requires “equality of arms” between the parties.
40. Bell J of the Supreme Court of Victoria held in *Ragg v Magistrates’ Court of Victoria and Corcoris* that the right to a fair hearing includes the right to equality of arms. Equality of arms requires that both parties “be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial”. In this case, equality of arms required that the defendant have adequate facilities to prepare a defence, which included access to relevant documents.⁴⁴

⁴¹ 28249/95 [2001] ECHR 398 (19 June 2001).

⁴² *Kijewska v Poland* [2007] ECHR Application No 73002/01 (6 September 2007). See also *Bakan v Turkey* [2007] ECHR Application No 50939/99 (12 June 2007), in which the European Court held that the considerable court fees payable by an applicant who had lost all of her income following the death of a relative (whose death was the subject of the legal proceedings) were a barrier to access to justice, in breach of the applicant’s right to a fair hearing.

⁴³ *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.

⁴⁴ *Ragg v Magistrates’ Court of Victoria and Corcoris* [2008] VSC 1.

5.2 Non-Discrimination and Equality

41. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties.⁴⁵ Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.⁴⁶
42. As discussed later in this submission, the over-representation of Aboriginal and Torres Strait Islander peoples in institutions, particularly out of home care, means that particular steps will need to be taken to ensure that Aboriginal and Torres Strait Islander peoples who were victims of child sexual abuse are able to access justice on an equal basis with others.

5.3 A Children's Rights Framework

43. Australia is a party to the UN Convention on the Rights of the Child (**CRC**). In addition to outlining the specific rights to be guaranteed to all children, the CRC is underpinned by four guiding principles, namely:
- (a) the best interests of the child;
 - (b) non-discrimination;
 - (c) the right to life, survival and development; and
 - (d) respect for the views of the child.
44. These guiding principles are the backbone to the CRC and instrumental to achieving all of the other rights. Given its subject matter, it is imperative that the Royal Commission have appropriate regard to children's rights in considering and formulating recommendations – both more broadly in the work of the Royal Commission and also in relation to this specific Issues Paper.
45. Perhaps most relevantly, article 3 of the CRC provides that when actions concerning children are undertaken the best interest of the child must be taken into account as a primary consideration. The 'best interests of the child' is a leading principle for the implementation of all the substantive articles contained in the CRC and requires governments (and other stakeholders) to review their actions for the impact on children.
46. The Committee on the Rights of the Child, the treaty body which oversees the implementation of the CRC, has identified that the principle of the best interests of the child requires particular attention in the context of Aboriginal children.⁴⁷ Any efforts to promote the rights of Aboriginal

⁴⁵ See, for example, arts 2 and 26 of the ICCPR; art 2 of ICESCR; art 2 of CEDAW; arts 2 and 5 of CERD; art 2 of CRC and art 5 of the CRPD.

⁴⁶ UN Human Rights Committee, *General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) at 146.

⁴⁷ General Comment No. 11, [30].

children must be informed by an understanding of and respect for culture, particularly given that the survival and development of Aboriginal children is intimately linked to their culture, beliefs and spirituality, as well as to access their land and its resources.⁴⁸

47. The Committee has also observed that consideration of the ‘best interests’ principle requires specific attention to be afforded to how the right relates to collective rights, cultural rights, and the need for the participation of the Aboriginal community, including children, in the development of legislation, policies and programs.⁴⁹

5.4 Rights of Aboriginal and Torres Strait Islander Peoples

48. In addition to the human treaties to which Australia is a party, Australia has also indicated its formal support for the UN Declaration on the Rights of Indigenous Peoples (**Declaration**).⁵⁰ The Declaration was adopted by the United Nations General Assembly in 2007 and is a landmark document that recognises the fundamental human rights of Indigenous peoples around the world on a wide range of issues.
49. While the Declaration is not, strictly, legally binding, it is a significant instrument that establishes a framework for the human rights that already exist in international law and their specific application to Indigenous peoples. In this respect, the Declaration has “significant moral force”⁵¹ and represents an important standard for the treatment of Indigenous peoples.
50. Australia’s endorsement of the Declaration represents an important acknowledgement of the fundamental human rights of Aboriginal and Torres Strait Islander peoples in Australia and the need for recognition of specific collective rights. Compliance with international human rights obligations is crucial in order to address the serious disadvantage and discrimination that is experienced by many Aboriginal and Torres Strait Islander peoples.

⁴⁸ UNICEF Digest No.11, above n 8, p.3.

⁴⁹ General Comment No. 11, [30]-[31].

⁵⁰ UN GAOR, 61st session, GA Res 61/295, UN Doc A/RES/47/1 (2007).

⁵¹ M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

6. Current Barriers to Access to Justice

51. In this section, VALS and the HRLC seek to address two key issues:
- (a) What can be done now to address and rectify past wrongs inflicted by child abusers?
 - (b) What strategies and safeguards can be adopted and implemented to prevent future harm to children?
52. In preparing these recommendations, VALS and the HRLC had reference to a number of publications, including:
- (a) Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Bringing them Home Report)*.
 - (b) Victorian Parliament Family and Community Development Committee (November 2013) *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations*, PP NO. 275 (**Betrayal of Trust**).
 - (c) Report by the Access to Justice Taskforce, Attorney-General's Department (September 2009) *A Strategic Framework for Access to Justice in the Federal Civil Justice System: (Access to Justice Report)*.
 - (d) Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria*, Cairns: James Cook University (**ILNP Report (Victoria)**).
 - (e) Commonwealth Grants Committee (2001) *Report on Indigenous Funding (Report on Indigenous Funding)*.⁵²
- (together, the **Reports**).
53. Where appropriate, VALS and the HRLC refer to the observations and recommendations outlined in the Reports.

6.1 Access to Legal Advice and Representation

54. As stated above, access to justice is an essential aspect of both the right to a fair hearing and the right to equality before the law. An essential element of a fair legal system is the ability to access legal assistance for the purposes of obtaining a fair hearing.
55. As matters presently stand, significant barriers exist which prevent victims of child sexual abuse from accessing justice. A key area of concern is access to legal assistance. For Aboriginal people and other marginalised groups, access to justice can prove both difficult

⁵² While the focus of the *Report on Indigenous Funding* predominantly relates to Health, Housing and Infrastructure, Education, Training and Employment, the general principles relating to indigenous access to funding can be applied more broadly to legal and other needs of indigenous communities.

and costly, resulting in victims essentially being 'locked out' of the civil litigation process. In relation to Aboriginal people, reasons for this might include prohibitive costs involved in engaging with a solicitor, a general mistrust of the legal or judicial system due to past experiences (such as incarceration), or simply an unwillingness or apprehension in undertaking a lengthy and complex litigation process.

56. To ensure there are no arbitrary barriers to justice, there is a clear need for adequate funding of Aboriginal legal aid and community legal centres to assist impecunious and disadvantaged litigants. Evidence throughout the Reports referred to by VALS and the HRLC shows that access to legal funding for civil matters in Aboriginal (and non-Aboriginal) communities is lacking both in Victoria and Australia-wide. The recent ILNP Report (Victoria) also confirmed that child protection is a significant area of legal need for Aboriginal peoples.⁵³
57. Referring specifically to the Aboriginal context, previous reports have recommended the provision of free legal advice to Aboriginal and Torres Strait Islander peoples removed from the home.⁵⁴ It is clear that limited funding for Aboriginal legal services prevents this recommendation from being implemented. Even with 'no win, no fee' personal injury cases, plaintiff's may be charged substantial disbursements prior to the conclusion of a claim.
58. Additionally, one of the barriers for Aboriginal people seeking to pursue a civil claim based on their sexual abuse is a lack of awareness and understanding of the litigation process, and the differences between litigation, compensation and redress. Therefore, there is an ongoing need for legal education within the Aboriginal community around issues such as litigation and compensation, and the legal avenues open for potential claimants.

⁵³ Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria* Cairns: James Cook University, para 20.3 and page 10.

⁵⁴ Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 17.

Recommendations regarding access to legal advice and representation

- Funding to Aboriginal legal services should be increased to address gaps in service delivery and poor levels of Aboriginal access to civil and family law justice in general.⁵⁵ Increased resourcing across the legal assistance sector would allow for more strategic approaches to legal need, including the expansion of individual casework.⁵⁶
- Increased funding and resourcing should be provided to Aboriginal legal services as well as community legal centres and legal aid commissions to specifically address ongoing legal need around child sexual abuse claims. VALS and the HRLC refer to the conclusions outlined in the Report on Indigenous Funding and note that both mainstream and Aboriginal-specific programs are complementary and are both essential to meeting the needs of Aboriginal people.⁵⁷
- In addition to funding for access to legal advice and casework services, additional funding should also be provided for community legal education to enable engagement with Aboriginal communities and to improve awareness of legal services for civil matters.⁵⁸

6.2 Access to Records

59. In line with principles of procedural fairness and in order to ensure equal participation and equality of arms between parties, all parties must have access to relevant records required to develop and argue their case.
60. Records are particularly important in proving institutional child sexual abuse cases because of the vulnerability of claimants and the fact that long periods of time often pass before legal action is taken to seek redress for the abuse.
61. It is VALS' experience that persons subjected to child sexual abuse often experience difficulties either 'proving' their Aboriginality, and/or accessing departmental or institutional records relating to their institutionalisation. In the context of child sexual abuse, it may be the case that a claimant could be required to provide records created by the very institution they

⁵⁵ Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria* Cairns: James Cook University, page 59.

⁵⁶ See Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria* Cairns: James Cook University, page 15.

⁵⁷ Commonwealth Grants Committee (2001) *Report on Indigenous Funding*, para 53.

⁵⁸ For example, The Report by the Access to Justice Taskforce, Attorney-General's Department (September 2009) *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Recommendation 6.5 recommends: "The Attorney-General's Department should work with Indigenous legal assistance providers, relevant non-legal services and communities to improve the provision of information to Indigenous Australians, including through direct contact, and building outreach services to connect existing services." VALS supports this recommendation, as it applies to the Victorian child sexual abuse context.

are wishing to sue. Non-Aboriginal victims of child sexual abuse no doubt face similar problems accessing records.

62. *Bringing them Home* provides in depth discussion about difficulties experienced by Aboriginal persons seeking access to records and makes detailed recommendations to overcome those hurdles.

Recommendations regarding access to records

In line with the recommendations made in the *Bringing them Home Report*:

- The destruction of records relating to the removal of children from their families should be prohibited by law.⁵⁹
- Funding should be provided to all government record agencies to preserve and index records relating to the removal of children from their families.⁶⁰
- The privacy of individuals should be a paramount consideration when preparing indexes and other finding aids.⁶¹
- Guidelines for access to records should be created.⁶²
- The Victorian Government should institute traineeships and scholarships for the training of Aboriginal archivists, genealogists, historical researchers and counsellors.⁶³
- Where records are held in institutions or private collections, including by churches and other non-governmental agencies, those records should be transferred to a body or organisation which can adequately preserve those records and create indexes.⁶⁴

Additional recommendations:

- Fees should not be charged to obtaining documents that may be relevant to institutional child sexual abuse claims.
- Consideration should be given to additional measures to support claimants to provide oral evidence in support of child sexual abuse claims.

⁵⁹ Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 21.

⁶⁰ Ibid. Recommendation 22a.

⁶¹ Ibid. Recommendation 22b.

⁶² Ibid. Recommendation 25.

⁶³ Ibid. Recommendation 28.

⁶⁴ Ibid. Recommendations 38a, 38b and 38c, combined.

6.3 Complexity and Length of Litigation

63. The length of time it can take to pursue redress for sexual abuse using civil litigation is often prohibitive for potential claimants. This is especially the case for older people who may feel that the effort to pursue a claim is beyond their energy. In the past, civil claims have had severe physical and psychological effects on the claimant, essentially re-traumatising the claimant via the repetitious nature of telling their story or, as stated above, due to the lack of records required to prove the claimants story.
64. Claimants may also experience 'litigation fatigue' in which the entire process may affect the health and well-being of the claimant and their family through the constancy of being involved in lengthy court processes.
65. Re-traumatisation may also arise via their story not being believed (again, especially in light of a lack of records) or being potentially 'disproven' in court, given that often sexual abuse victims, upon reporting any abuse as a child, were not believed by the institutional authorities at the time, or even punished and re-abused for daring to speak up. This then means that there may be a level of fear and apprehension in choosing to pursue a civil claim, as well as a physical and psychological health risk, due to the possibility of re-traumatisation.
66. It is also a common experience of abuse victims to have differing versions of the same story, and thus appearing to look untrustworthy or deceitful in a court of law. This is often the case with trauma and abuse victims, when telling and re-telling traumatic stories, in particular for those people who may not have documentation to support their story, such as photographs, pictures, reports or medical records.
67. Often the events surrounding their abuse are relied on memory, and also, given that in many cases for institutionalised people, the fact that they were often shifted around regularly from place to place can often lead to confusion in telling a story. This leads to dates, people, institutions and events becoming blurred. Again, this relates back to the necessity of accessing documents, not only to prove the victim's story, but also in assisting in piecing it together in the first place, and increases the costs of obtaining the documents, and the support of psychiatrists and medical professionals in confirming the written statements.

Recommendations regarding complexity and length of litigation

- Because of the difficulties in achieving justice through civil litigation, consideration should be given to the development of alternate redress schemes outside of the courts in order to facilitate a less traumatic experience for sexual abuse victims.
- Culturally sensitive health services (such as counselling) should be provided for Aboriginal and Torres Strait Islander sexual abuse victims throughout the civil litigation process.
- Consideration should be given to further measures that promote courts' understanding of the psychological difficulties of relating traumatic experiences.

6.4 Time Limitations for Bringing Legal Proceedings

68. Access to justice and equality before the law are two of the elements which underpin the right to a fair hearing. In some circumstances, arbitrary time limitations can operate to ensure that some individuals, or groups of individuals, are not able to access the courts on an equal basis.
69. It is VALS' experience that victims of child sexual abuse may not speak out about that abuse for many years. In addition, many individuals may not be aware of their right to seek remedies and the availability of legal services to assist. Current limitation periods therefore operate to prevent many victims accessing the civil litigation process.
70. In the Aboriginal context, the *ILNP Report (Victoria)* recognises there are a number of reasons for delay in accessing assistance, support and advice:

Indigenous people may avoid or 'put off' getting help or otherwise dealing with civil or family law problems because the problem in question might seem 'too hard', they may be reluctant to engage with the legal system and legal matters, they may feel shame, fear repercussions or believe that their situation will not be dealt with in confidence.⁶⁵

⁶⁵ Schwartz, M., Allison, F. and Cunneen, C (2013) *The Civil and Family Law Needs of Indigenous People in Victoria* Cairns: James Cook University, page 203.

Recommendations regarding time limitations

- There should be no limitation period applying to child sexual abuse claims.
- There should be no time limit on applying for victims of crime compensation for child sexual abuse should be excluded from the No time limits should That the Victorian Government consider amending the *Victims of Crime Assistance Act 1996* (Vic) to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings (Recommendation 27.1, Part H, *Betrayal of Trust*).

VALS and the HRLC note that recommendations to this effect were made in the *Betrayal of Trust* and *Bringing them Home* reports.⁶⁶

6.5 Ensuring Access to a Remedy for Previous Violations

71. A key issue in seeking redress for past wrongs is determining who to sue. Without knowledge of the identity of the persons responsible for child sexual abuse, it is impossible for victims to access a remedy.
72. It is clear that some of the non-governmental organisations and other institutions responsible for children, either:
- cannot be sued;
 - hold no assets; and/or
 - are not legal entities for the purposes of litigation.

Case Study 1: The Trustees of the Roman Catholic Church v Ellis & Anor⁶⁷

John Ellis was engaged as an altar server in the Roman Catholic parish known as Christ the King at Bass Hill. He claimed that in the period from 1974 to 1979 he was sexually abused by the assistant parish priest.

In 2004, the assistant parish priest died and his estate left no assets against which the Ellis could recover damages. Also in that year Ellis brought a common law claim against the Trustees of the Roman Catholic Church for the Archdiocese of Sydney and against His Eminence Cardinal George Pell, Archbishop of Sydney, in relation to the abuse he had suffered. The Trustees were appointed under the Roman Catholic Church Trust Property Act 1936, a New South Wales Act which establishes

⁶⁶ Victorian Parliament Family and Community Development Committee (November 2013) *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations*, Recommendation 26.3 and 27.1; Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 17.

⁶⁷ [2007] NSWCA 117.

a trust that holds all the property of the Catholic Church in this State.

The trial judge in the Supreme Court initially found that the trust could be sued by Ellis in relation to the abuse and granted him an extension of time to allow him to pursue his claim. In its appeal the trust conceded that an arguable case had been established that the abuse had occurred. However, it alleged that the Catholic Church did not exist in New South Wales as a legal entity.⁶⁸

The Trust told the Court that although it held all of the Church's property, and had so at the time that Ellis alleged he was abused, it was not responsible for the conduct of any member of the clergy. The trust submitted that, in effect, the Church could not be sued as, in law, it did not exist.

The Court of Appeal agreed with the Trust, and Ellis' case was dismissed entirely. The Court also ordered that he pay the legal costs of the church and Cardinal Pell, against whom his claims pertaining to responsibility were also dismissed.

Case Study 2: *JGE v The Portsmouth Roman Catholic Diocesan Trust (United Kingdom)*⁶⁹

JGE, a female placed in care for two years when she was 6 ½, alleged that Father Baldwin sexually abused and assaulted her. JGE also alleged that the Diocesan Trust was vicariously liable for Father Baldwin's conduct, and her resulting injuries. JGE argued that the Diocesan Trust operated and/or was responsible for churches in the diocese and that the abuse perpetrated by Father Baldwin was committed in the course of his employment duties.

The defendants denied that Father Baldwin abused or assaulted the claimant. In addition they argued that although it was admitted that the parish church was part of the Roman Catholic Diocese of Portsmouth, the Trust never managed, operated or was responsible for the church; this was the responsibility of the parish priest. By extension, the defendants denied that Father Baldwin was in service of the Trust; instead, he was at all times following his vocation and calling as a priest, the holder of an office not an employee.

Despite the defendants' submissions, the Court held that the relationship between Father Baldwin, his Bishop, and the Trust was akin to employment within the meaning which an ordinary person would apply. For this reason, it was just and fair to impose vicariously liability on the Trust.

⁶⁸ *Ellis v Pell* [2006] NSWSC 109 (3 March 2006).

⁶⁹ [2012] EWCA Civ 938 (12 July 2012).

Recommendations regarding access to remedy

To overcome similar obstacles in the future, VALS and the HRLC support the following recommendations:

- That 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 (Recommendation 26.1, Part H, *Betrayal of Trust*).
- That 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 (Recommendation 26.2, Part H, *Betrayal of Trust*).

6.6 Reforming the Burden of Proof

73. Problems associated with the burden of proof can pose a significant barrier to obtaining justice in child sexual abuse civil litigation claims.
74. As previously outlined, reports such as *Bringing them Home* provide startling statistics as to the high rates of sexual abuse amongst Aboriginal communities. The overrepresentation of Aboriginal and Torres Strait Islander peoples in institutions, particularly out of home care, means that particular steps need to be taken to ensure that Aboriginal and Torres Strait Islander people who were victims of child sexual abuse are able to access justice on an equal basis with others.
75. One option to consider is shifting or sharing the burden of proof in civil claims relating to allegations of child sexual abuse, based on the likelihood that if a person was institutionalised, they experience an increased likelihood of having suffered abuse.
76. Under this approach, the victim would bear the onus of proving that the abuse happened and the institutional respondent would bear the onus of proving that it took reasonable steps to prevent the abuse.
77. Such a 'shift' would not constitute a 'reversal' of the onus of proof. It would recognise that the complainant in these types of cases is best placed to explain how they have been treated, but the institutional respondent is best placed to explain the steps taken to prevent abuse.

Recommendations regarding reforming the burden of proof

- Consideration should be given to shifting or sharing the burden of proof in civil claims relating to allegations of sexual abuse.
- In victims of crime compensation schemes, there should be minimal formality and bodies responsible for assessing claims should not be bound by the rules of evidence.⁷⁰

6.7 Reforming How Damage is Proved

78. As matters presently stand, the onus on proving the damage caused by child sexual abuse rests on the person alleging that the abuse occurred. It is often difficult for people to present evidence to establish that, on the balance of probabilities, particularly psychological or other damage was caused by the particular abuse. This is especially the case where the victim has suffered other abuse, disadvantage and intergenerational trauma.
79. Consideration should be given to more appropriate and accessible ways to proving damage in child sexual abuse cases.

Case Study 3: *Trevorrow v The State of South Australia (No 5)*⁷¹

While touted in the media as a ‘Stolen Generations’ compensation success story, the claim brought by Bruce Trevorrow against the State of South Australia did not centre on his removal or subsequent abuse, but a technicality, that he was unlawfully removed.

Trevorrow was able to establish he sustained injuries, including depression and other psychological damage, due to being brought up in a foster home, when his siblings who were brought up with their birth family, had led reasonably ‘normal’ lives.

Justice Gray concluded that had Trevorrow remained with his family he would not have suffered the injuries that he sustained. Accordingly, Trevorrow was awarded \$450,000 in exemplary damages and \$75,000 in respect of misfeasance in public office and false imprisonment.

Five months after the decision of Justice Gray was handed down, the State of South Australia unsuccessfully appealed the decision.⁷²

⁷⁰ Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 17 provides “That the following procedural principles applied in the operations of the monetary compensation mechanism. ... 5. Minimum formality. 6. Not bound by the rules of evidence ...”.

⁷¹ [2007] SASC 285.

⁷² *State of South Australia v Lampard- Trevorrow* [2010] SASC 56 (22 March 2010).

Recommendations regarding reforming how damage is proved

- Consideration should be given to more appropriate and accessible ways to proving damage in child sexual abuse cases

6.8 Statutory Cause of Action

80. The difficulties in accessing an effective remedy in cases concerning historical acts have been highlighted in several recent cases.⁷³ It is VALS' and the HRLC's view that the substantive abuse and removal often becomes secondary in civil litigation because successful civil litigation often relies on claimants having to use technical, 'ancillary' legal arguments.
81. These difficulties highlight the need for a legal guardian to be clearly established by law for children who are removed from home. Historically, it has often been the case that children removed from the home are unable to establish the identity of a legal guardian who has responsibility for their care. Where issues arise, these children are unable to seek legal redress from a guardian.

Recommendations regarding statutory cause of action

- VALS and the HRLC support the recommendation that the Victorian Government undertake a review of the *Wrongs Act 1958* (Vic) and identify whether legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse (Recommendation 26.4, Part H).⁷⁴ Such amendment should also include a clear statutory cause of action for breach of such a legal duty and the remedies available to victims.

⁷³ In particular, VALS draws attention to three recent civil proceedings, involving Valerie Linow (New South Wales), Bruce Trevorrow (South Australia) and Neville Austin (Victoria). These cases each involved the identification, reliance and exploitation by the respective plaintiffs on "loopholes" in their cases. For example, improper removal process and denial of access to family letters, rather than the actual removal and subsequent abuse suffered while institutionalised.

⁷⁴ Family and Community Development Committee (November 2013) *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations*, PP NO. 275.

6.9 Forms of Redress

As outlined, all victims of child sexual abuse should be entitled to seek a remedy and for appropriate reparations. Previous reports have identified that compensation alone may not necessarily be an appropriate remedy for children removed from the home.⁷⁵

Recommendations regarding forms of redress

- Where appropriate, financial compensation should be provided to victims of child sexual abuse.
- In addition to financial compensation, reforms should be considered to increase the availability of other remedies to be available to victims of child sexual abuse, such as (a) an acknowledgment and apology; (b) guarantees against repetition; (c) measures of restitution; and (d) measures of rehabilitation.

Specifically in relation to Aboriginal and Torres Strait Islander victims, apologies should be provided by:

- the Federal and/or State Government, where the sexual abuse occurred as a direct result of removal of a child from the home; and
- churches and other non-government agencies which played a role in the administration of the laws and policies under which Aboriginal children were forcibly removed.

6.10 Children's Rights

82. As outlined previously, the UN Convention on the Rights of the Child is underpinned by four guiding principles, namely:

- (a) the best interests of the child;
- (b) non-discrimination;
- (c) the right to life, survival and development; and
- (d) respect for the views of the child.

(together, the **CRC Principles**).

83. Given the direct impact that child sexual abuse has on a range of children's rights contained in the Convention on the Rights of the Child, VALS and the HRLC strongly submit that all actions taken to ensure that past victims can access justice – and to take steps to ensure that child sexual abuse does not occur in the future – must be strongly guided by the CRC Principles.

⁷⁵ Commonwealth of Australia (1997) *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Recommendation 3.

84. Aboriginal children in Victoria are more than 15 times more likely to be placed in out-of-home care than non-Aboriginal children. Furthermore, Aboriginal young people are also at a higher risk of detention and contact with the justice system than their non-Aboriginal counterparts. As such, Aboriginal children are therefore potentially at a greater risk of sexual abuse in an institutionalised environment.
85. Support is then required not only for those Aboriginal young people who are at risk, or have been victims of sexual abuse in a modern context, but also to ensure that children and young people who are seen to be at risk are supported via a worker, counsellor or via adequate training for carers to ensure that the risks of sexual abuse are minimised as greatly as possible.

Recommendations regarding children's rights

- Where a child is to be removed from the home, the identity of an appropriate legal guardian must be established to determine who owes the child a clear, strong duty of care to that child.
- Processes must be in place to ensure that Aboriginal children and young people are provided the adequate supports and legal education to understand their rights to pursue civil litigation if they are a victim of sexual abuse.

6.11 Intergenerational Trauma

86. Recent studies concerning intergenerational trauma demonstrate that the effects of child sexual abuse are not simply carried by the victim, but their family and community as well. This has been exemplified in Aboriginal families and communities in Victoria whereby the high rates of current Aboriginal children in out-of-home care can be attributed to their parent's removal as well.
87. Studies show that those people who were removed and suffered sexual, and other, abuses may have far lower outcomes across a range of indicators, including mental and physical health, employment and education opportunities and housing. Within the Aboriginal community, these low social indicators are compounded by the legacy of colonisation and dispossession.
88. As such, it is VALS and the HRLC's view that the families and communities of sexual abuse victims should be supported by the Victorian State Government in dealing with the effects of sexual abuse, especially those who are pursuing civil litigation. This will help to break the cycle of intergenerational harm that the removal and subsequent abuses, including sexual abuse, that continues to affect Aboriginal communities in Victoria today.

Recommendations regarding intergenerational trauma

- Funding should be made available to support Aboriginal families and communities of sexual abuse victims, in the areas of health and well-being, education and employment, and housing.
- The families and communities of sexual abuse victims pursuing civil litigation should be supported in areas such as health and well-being, and counselling, understanding that such abuse affects the family and community as a whole, and not just the victim.

6.12 Incarcerated Aboriginal Persons

89. As is the case in all States and Territories, Victoria has high rates of imprisonment for Aboriginal persons. This in turn creates a barrier to accessing justice via the civil litigation process, and also restricts access to support for incarcerated persons. There is an urgent need for increased legal support for incarcerated Aboriginal persons to access justice and legal information regarding their right to pursue civil litigation.
90. There are direct links between institutionalisation and removal and subsequent incarceration. The Royal Commission into Aboriginal Deaths in Custody revealed that, of the 99 deaths that were investigated, 44 had been removed as children. The high rates of removal amongst incarcerated Aboriginal men and women would indicate high rates of childhood sexual abuse.

Recommendations regarding incarcerated Aboriginal persons

- Incarcerated Aboriginal men and women should have increased access to legal information and education regarding their right to pursue civil litigation.
- Aboriginal Legal Services across Australia should be funded adequately to support and provide information to incarcerated Aboriginal men and women concerning their right to, and the avenues for, accessing justice concerning their sexual abuse in institutions.

4 May 2010

Mr R A Atkinson
[REDACTED]

Dear Mr Atkinson

Your potential civil action regarding State Care

We refer to previous correspondence and confirm that we have received Counsel's advice in the above matter.

We are of the opinion that you will be unable to bring a claim in relation to the wrongful removal from your family, however you may be able to take action in relation to the assaults perpetrated upon you whilst in care.

In Victoria, as opposed to the Northern Territory and the other States, removals were done by Courts. The removal application would be brought before a Magistrate and as such, there was a legal basis for the removal. As your removal was subject to an order of the Court, there is no basis for a "wrongful" removal claim. The removal may well have been morally wrong, but it did have a legal basis under the laws which applied at the time. Therefore we must focus on the assaults you suffered.

Based upon our research and the information you have provided to us regarding these historical assaults, there are 2 possible ways you may be entitled to compensation:

1. State Redress Scheme

Through a State Redress Scheme for those adults who, as children, were abused and/or neglected in State care.

../2

Mr R A Atkinson
4 May 2010

As previously discussed, unfortunately to date Victoria has not yet joined Western Australia, Tasmania and Queensland in introducing a State Redress Scheme to recognise the injuries suffered by those who were raised in institutional and other out of home care.

As it currently stands, the Victorian Government's view is that survivors of state care should be seen on a case by case basis through the Court system. However, the Redress Scheme in Western Australia, Tasmania and Queensland has provided eligible applicants with an alternative to pursuing a claim through the court process that is less traumatic, less costly and results in a quicker settlement.

If the State of Victoria ever introduces such a Redress Scheme in the future, this may be your preferred avenue to receive recognition for the injuries you suffered. We are prepared to keep your file open and pursue such a Redress Scheme claim if the scheme is introduced in Victoria should you instruct us to do so.

If you wish to add your voice to those campaigning for a Victorian Redress Scheme, we suggest you contact Care Leavers Australia Network (CLAN) on 1800 008 774 or alternatively write or meet with the South West Coast District MP Denis Napthine and enquire as to what is being done to advocate for redress for survivors of abuse in care.

2. Civil Claim

You may be entitled to initiate a civil claim for damages and recover compensation from the offender/s. We have sought Counsel's advice in relation to any potential prosecution of your civil claim and Counsel has highlighted a number of difficulties. These difficulties include:

- Adequate identification of the persons who are responsible for the conduct against you and whether or not those persons are alive. Also determining whether or not the institutions are responsible for the actions of those persons;
- If those persons are alive, whether they have any assets against which you can recover damages and compensation;
- Whether you would succeed with an application for an extension of time under the Limitation of Actions Act. Generally any claim for damages must be made within three (3) years from the date of the assault or injury. You would need to prove that there was some material fact that you were not aware of and which you have become aware of in the last 12 months or that you did not obtain knowledge of the relationship between the assaults and your injury until sometime in the last six (6) years to enable you to obtain an extension of time;
- Given that you sought advice from [REDACTED] some twelve (12) years ago in relation to this same matter, it appears that you have had knowledge of the relationship between the assaults and your injury for more than six (6) years.

Mr R A Atkinson
4 May 2010

We therefore believe you may have difficulty in being granted an extension of time for the Statute of Limitations;

- The inability to locate [REDACTED] or any of her colleagues to obtain a report and/or any information about your treatment; and
- The significant time frame that has lapsed between the assaults and a potential claim will also cause greater difficulty in gathering evidence to support your case.

The only way we may be able to overcome the problem of an extension of time and time limits for your claim, is if you take concerted action to get this matter moving immediately.

If you would like us to explore further the possibility of a civil claim on your behalf, certain steps will need to be taken as a matter of urgency and you should contact us as soon as possible to discuss this further.

We note that we have had some difficulty contacting you in the past and would appreciate if you could provide us with a current residential address and telephone number.

We look forward to hearing from you.

