

13 March 2014-03-13
CCYPD/14/128

Justice Peter McClellan
Chair
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

Dear Justice McClellan

Thank you for the opportunity to provide a submission to the Royal Commission's *Issues Paper 5 – Civil Litigation*. We note this is the first of three papers the Royal Commission has indicated it will release in relation to issues specifically relating to civil litigation and redress/compensation schemes.

The recent report by the Victorian Parliament's Family and Community Development Committee entitled *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations* analyses many of the questions raised in this Issues Paper. The report notes:

The importance of civil litigation for victims of criminal child abuse was strongly emphasised in the evidence provided to the Committee. Many victims saw civil litigation not only as an avenue to seek compensation, but also as a form of acknowledgement and accountability for the harm they have suffered.

However, there are significant practical and evidentiary barriers that can prevent victims of child abuse from pursuing civil litigation against organisations. (p 519)

The Commission for Children and Young People supports this conclusion by the Committee. We support reform both at the state and national level to remove obstacles which currently preclude or discourage survivors of childhood sexual abuse from commencing civil proceedings. We also acknowledge that for many survivors, remedies other than proceedings in civil courts will be the preferred mechanism for seeking compensation and other redress for the harms they have suffered. We look forward to being able to contribute our ideas on alternative compensation schemes when the Royal Commission releases its further issues papers.

In terms of removing some of the obstacles to civil litigation, we note the recommendations included within the *Betrayal of Trust* report provide a strong foundation for beginning this reform process. In particular we note the following recommendations:

Recommendation 26.1

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 26.2

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 26.3

That the Victorian Government consider amending the *Limitation of Actions Act 1958* (Vic) to exclude criminal child abuse from the operation of the limitations period under that Act.

Recommendation 26.4

The Committee recommends 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.

We look forward to the Victorian Government's response to these recommendations and believe the Royal Commission should consider making similar recommendations on a national level.

In addition to these recommendations, we believe the Royal Commission should consider the following issues:

Strict liability for some entities

The Betrayal of Trust report explains:

The Committee determined that there are two options for legislative change that would legally require organisations to take reasonable care to protect children from abuse by members of their organisation. The two possible options for reform are:

- legislating non-delegable duty of care in the Wrongs Act. For example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care
- a provision regarding vicarious liability in the Wrongs Act based on the examples in the Victorian and Commonwealth discrimination legislation.

Both options could extend the duty of care to putting in place appropriate employment controls and adopting effective practices in risk management and prevention . (p 552)

These options are designed to encourage organisations to take reasonable precautions to protect children from abuse. In addition to considering these proposals we would encourage the Royal Commission to consider whether there are some organisations which should be held to an even higher standard of care. For example, children in the care of the state are particularly vulnerable to abuse and exploitation. If a child in care is sexually abused whilst in care, the child should be able to access compensation and support and the state should not be able to resist paying compensation on the basis that they took reasonable precautions to prevent the abuse. Similarly it might be appropriate to expect that religious organisations are held to a high standard of care in their interactions with children given the special place of trust they hold in the lives of their members.

Broad reforms

The terms of reference for the Betrayal of Trust Parliamentary Inquiry did not extend to abuse within families or other non-institutional contexts. We note the Royal Commission's terms of reference are also limited. However, we would encourage the Commission to propose reforms which could be applied more broadly. So for example, any proposed reforms to statute of limitations legislation should not be limited to abuse which occurs within an institutional context. Children who have experienced abuse within their own families and communities are, like children who were abused within institutional contexts, also highly vulnerable and often unable to even consider commencing civil action long after the abuse has occurred.

Enhanced court procedures

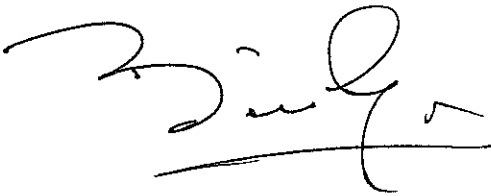
The Royal Commission provides an important opportunity to consider how court processes and procedures can be enhanced to better support victims of sexual abuse to bring matters to court when they wish to do so. Some areas which would be worthy of particular attention are:

- Examining what best practice procedures would be for victims of child sexual abuse cases including the creation of special lists and specialist training for judges and court staff to reduce the risk of re-traumatising victims.
- Establishing procedures for the appointment of litigation guardians for children who are abused whilst in the care of the State and imposing an obligation on State authorities to ensure the legal rights of children in care to seek damages are protected. Such processes would be particularly important where a child is sexually abused whilst in care and a state authority is the guardian of the child.
- Examining procedures to better enable cases of institutional abuse to be heard together (class action) rather than as separate cases.
- Establishing specialist legal aid criteria or services to better enable victims of abuse to decide if they wish to commence civil litigation and to represent those who choose to do so.

In addition to the written submission, I would be pleased to answer any questions the Commission has, or to provide any further information you may require.

If you would like to discuss any of these issues in more detail, please contact myself on tel: (03) 8601 5886 or at Bernie.Geary@ccyp.vic.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bernie Geary', with a horizontal line underneath.

Bernie Geary OAM
Principal Commissioner