SHINE LAWYERS

RIGHT WRONG.

Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

Submission of Shine Lawyers
July 2021

1. Introduction

Shine Lawyers are pleased to provide this submission to the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (Inquiry).

This submission will mainly address Question 21 of the Information Paper[1] regarding the experience of victim-survivors bringing civil claims.

2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia and New Zealand.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors of abuse in both claims for redress and at common law. Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

Neerkol Group Litigation
The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, operated by the Sisters of Mercy.

Nudgee Orphanage Group Litigation
This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

Brisbane Grammar Sexual Abuse Litigation
This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

St Paul's Sexual Abuse Group Litigation
The claim involved some 25 former students of St Paul's School in Brisbane who were subjected to sexual abuse during their school years.

Scriven v Toowoomba Preparatory School
This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

[1] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, Information Paper, Released 13 May 2021.

Australian Defence Force

Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Shine Lawyers worked closely with the legal representatives of the Australian Defence Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal Responses.

SMA v John XXIII College

Shine Lawyers represented a college student in this matter against John XXIII College. Our client was sexually assaulted by another student away from the college after an organized residential college drinking event. She was awarded damages for the assault and the manner in which the College dealt with her complaint. Exemplary damages were awarded.

Plaintiff A and B v Bird; Plaintiff C v Bird; Plaintiff D v Bird

Shine lawyers represented two children and their mothers for abuse suffered by the girls at the hands of the father of the owner of the Child Care Centre they attended. The decision assisted further with clarification on vicarious liability for volunteers. The plaintiffs were awarded exemplary damages.

3. Submission

Child abuse has a profound and lasting impact on a survivor's life. Every day our clients show enormous courage coming forward to tell their story of abuse. It also requires courage to seek to hold institutions who wronged them in unspeakable ways accountable particularly when the institution responsible is the State. In our observation, the response of the Tasmanian Government to child sexual abuse in institutional settings as reflected in its conduct responding to civil claims, has fallen short of community expectations.

For decades, the statute of limitations was a barrier to survivors of child sexual abuse pursuing civil claims for damages. Tasmania eventually enacted changes lifting the limitation period, allowing the appointment of a proper defendant and reversing the onus of proof. These reforms were long overdue for survivors who had already waited many years to pursue justice for the wrongs committed against them in Government institutions in Tasmania. Regrettably, the enactment of these changes alone did not mean survivors had an unobstructed path towards justice. Inadequate responses to civil claims causing further roadblocks for survivors include:

- delays obtaining relevant records and in the conduct of civil claims
- unnecessarily adversarial approach to civil claims
- undercurrent implication that survivors ought to pursue redress rather than a civil claim; and
- the lack of a collaborative framework to respond to civil claims against the State.

We offer comments to this Inquiry from our perspective as legal representatives of child sexual abuse survivors in every civil litigation jurisdiction within Australia against both public and private

institutions. We hope our views assist the Inquiry to understand the current conduct of the Government, its agencies and officials when responding to civil claims for child abuse and the impact this has on victim-survivors. We make some proposals for the consideration of the Inquiry with a view to seeing some improvement in the way claims are managed to minimise trauma on victim survivors and their families.

4. Delays obtaining records

Removing barriers to civil claims in Tasmania was significant but unfortunately survivors then went on to experience further delays and difficulties when the Tasmanian Government was required to respond to claims.

The Child Abuse Royal Commission Response Unit within the Department of Justice is responsible for 'responding to information requests from the Scheme Operator for departmental information relating to claims.'[2] The Third Annual report indicates the Unit provided information to the National Redress Scheme within the statutory timeframe which is 8 weeks or 4 weeks for an urgent request.[3]

Unfortunately in civil claims however, it takes many months for survivors to be provided copies of information about themselves held in a departmental file, sometimes in excess of a year. This indicates a lack of sensitivity and respect towards survivors pursuing justice. We acknowledge the work required to collate, redact if necessary and provide these documents to a survivor. However the delays currently experienced are unacceptable by any measure and is clearly avoidable in light of the States reported compliance with National Redress Scheme statutory timeframes. Survivors have already experienced abuse, suffered for most of their lives and waited for legal barriers like limitation periods to be removed. They ask only for records about themselves, records which they ought properly to have access to. The relevant agencies should be properly resourced to facilitate provision of these records within 8 weeks.

Our clients have also been impacted by difficulties encountered by legal representatives of the State obtaining documents. Take for example, our client Brian.[4] Brian was physically and sexually abused at Ashley Boys Home and also suffered sexual abuse in foster care as a ward of the state. In January 2021, over a year after notifying of his claim, the following was received from the legal representative of the State:

> *As part of the process of working through this matter and other child welfare abuse in care matters it has become apparent that legislative change will likely be needed to solve information sharing issues that have arisen. These legislative issues arise due to a number of things including sections 16 and*

[2] Tasmanian Government, *Third Annual Progress Report and Action Plan 2021*, Department of Justice, December 2020, p7.
[3] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s25.
[4] A pseudonym

> *103 of the Children, Young Persons and Their Families Act 1997 and provisions within the Youth Justice Act.*
>
> *The effect of the above is that at present I cannot obtain the information I need in order to properly consider this matter.*
>
> *I had been hopeful that these issues may have been able to be resolved legislatively in the later part of last year however that was not been able to be accomplished due to issues of policy that have arisen and which require greater consideration and which include how we deal with information which has specific secrecy provisions attached to it and who that will be able to be provided to.*
>
> *I do not anticipate that legislation to address this issue will be able to be considered further now until around March 2021.*

By March 2021, the State indicated materials were "still being located and provided as part of its investigations." Our client Peter's[5] claim was also delayed by the State with reference to s103 of the *Children, Young Persons and Their Families Act 1997.*

5. Delays responding to civil claims

The State was ill-prepared to appropriately respond to civil claims for child abuse. In some instances we notified the State of our client's claims and it took many months to even be given a specific point of contact who would be responsible. When the State were initially notified of some claims, the notice bounced around between different officers and departments who responded variously with comments such as "we don't know who looks after these claims". In one instance, those involved had bizarrely chosen to forward a civil claim to the Director of Public Prosecutions. An officer from the DPP commented saying "I am in DPP, why have I got this?" when we contacted them to progress the claim. We were left no option but to raise complaints with the Ministers office directly. Such misadventures though inappropriate matter-handlers unnecessarily delays civil claims for victim-survivors and increases their legal costs.

Additional hurdles were encountered by our client Trevor[6] when pursuing his claim after being raped at the Ashley Boys Home in the 1970's. The State were notified of Trevor's claim in March 2019. It took seven months for the State to first respond in any way acknowledging receipt of his claim. By March 2020, no substantive response to the claim was received and the State indicated it would communicate with the Minister about this and other claims for guidance. In October 2020, the State indicated a new legal representative would have carriage of the claim. That new representative requested we resend all of the material previously served on the State so it could

[5] A pseudonym
[6] A pseudonym

be considered. It can be seen from Trevor's circumstances that the State made no genuine effort to engage with his claim until approximately 18 months after it was made.

In the case of our client Brian, mentioned above, the State were notified of the claim in October 2019 however various delays obtaining documents by the Department meant the Department would not agree to obtain medical assessment until June 2021. A delay of some 20 months between making a claim and agreement to medico-legal consultation is manifestly unacceptable and reflects inaction or worse on behalf of the State and its agents.

Had the State taken action in response to recommendations 96 to 99 of the Royal Commission,[7] the delay and additional distress caused to our clients, and no doubt many others, might have been avoided. See below for further discussion of these recommendations.

6. Obstructive and uncompassionate behaviour

In addition to the concerns raised above, our client Brian faced further inappropriate behaviour by representatives of the State when the State demanded to know why he had not reported his abuse to police. Brian was also asked why a claim had not been made against the individual perpetrator of his abuse, a question asked of other survivors as well.

The reasons survivors might not wish to discuss abuse with law enforcement are well known. These include fear one will not be believed, having to re-live the abuse by describing it repeatedly and a lack of trust or cultural safety in the presence of law enforcement. The implication from the State that a survivor ought to report abuse to police or otherwise have their credibility in question is inconsistent with the State's obligation to be a model litigant. It is also inconsistent with an informed understanding of the impact of abuse on a person.[8]

There are also many reasons a survivor may not institute a civil claim against an individual perpetrator of abuse and choose instead to focus a civil claim on the responsible institution. Pressuring survivors to pursue a claim against an individual perpetrator is also inconsistent with a survivor-focused and trauma informed approach to litigation. It indicates an unnecessarily adversarial approach and may be a deliberate attempt to delay proper consideration of a survivor's civil claim against a Government institution. The State took such an approach in the case of our client Phyllis[9] who experienced further upset and distress when the State asked why she had not taken legal action against the individual perpetrator of her abuse.

Another example of an unnecessarily adversarial approach to civil claims for child sexual abuse may be seen in the handling of our client Margaret's[10] claim. Margaret experienced extreme,

[7] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017), Recommendations.
[8] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017), Volume 4, Identifying and disclosing child sexual abuse.
[9] A pseudonym
[10] A pseudonym

horrific abuse in foster homes as a ward of the state and she participated in a private session with the Royal Commission. The State refused to respond to requests to participate in an informal settlement discussion or otherwise engage in the issues surrounding the claim for over a year and Margaret was forced to bring court proceedings.

Margaret had received an inadequate payment in resolution of her claim brought prior to the limitation period being lifted in Tasmania. Even after the *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019* came into effect, the State continued to apply pressure on Margaret to agree that the prior payment she received was 'sufficient compensation.' Only months later did the State agree to set aside the prior Deed by consent avoiding the need to pursue a contested application in Court. Resisting setting aside the Deed always lacked merit and our client should not have been put through the additional distress.

7. National Redress Scheme

Further, in Margaret's matter, an inappropriate suggestion was made by the State that Margaret pursue an application with the National Redress Scheme rather than prosecuting a civil claim. At best this indicates some misapprehension by representatives of the State that the National Redress Scheme should be substituted for civil claims. At worst, it could be seen as the State deliberately applying pressure upon a vulnerable survivor not to pursue their just claim or as a deliberate delay tactic.

In numerous other matters we have observed some unspoken, undercurrent suggestion that survivors ought properly to choose to pursue redress rather than civil claims against the State. In many instances the repeated and abhorrent nature of the abuse, element of negligence and the cap on payments available under the National Redress Scheme,[11] makes a Redress application inappropriate. It is inappropriate for the State to suggest it.

The clients mentioned above are a small sample of a great many survivors of sexual abuse we represent who have experienced these shortcomings by the State in the conduct of civil claims. After struggling already for most of their lives, pursuing a claim against the State replicates the inherent power imbalance experienced by children who have been abused. Children who are abused experience total powerlessness, have no control over decisions being made by the State about their lives or control over their own safety. The delays and unnecessarily adversarial approach displayed by the State in the response to civil claims replicates these circumstances and causes avoidable harm to already vulnerable survivors.

Sadly, the contrast between the behaviour of private institutions responding to civil claims for abuse in Tasmania and behaviour of the State could not be clearer. Our experience representing survivors of child abuse in private institutions in Tasmania is that institutions are responsive to

[11] The maximum payment available is $150,000, falling short of recommendation 19 of the *Royal Commission into Institutional Responses to Child Sexual Abuse (Redress and Civil Litigation Report 2015)* that the maximum payment be $200,000.

requests for records and responses to claims made. We also observe private institutions to have turned their attention to how to manage claims appropriately, consistently amongst survivors and in a way that minimises further distress. Surely the expectation on government should be for the highest possible standards in accordance with the Royal Commission's recommendations.

8. Model litigant guidelines and beyond

The State ought to be a moral exemplar in all its conduct connected with civil claims for child sexual abuse. It should display outstanding moral conduct, even when faced with difficult or demanding circumstances. In our view, the conduct of the State, in the above examples and many others, falls well short of a moral exemplar, despite the existence of the Model Litigant Guidelines in Tasmania.[12]

We suggest the State be required not only to observe the Model Litigant Guidelines but additionally to document their consideration of the requirements within the Guidelines at each stage of a claim. This should include documentation of consideration by any counsel engaged by the state. We also suggest better consequences be imposed when failures under the Guidelines are established.

The Royal Commission made the following recommendations:

> *96. Government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.*
>
> *97. The guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessarily adversarial responses to claims.*
>
> *98. The guidelines should include an obligation on the institution to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.*
>
> *99. Government and non-government institutions should publish the guidelines they adopt or otherwise make them available to claimants and their legal representatives.*

[12] https://www.crownlaw.tas.gov.au/__data/assets/pdf_file/0012/469875/Model-Litigant-Guidelines.pdf ; https://www.lpbt.com.au/wp-content/uploads/2018/06/Model-Litigant-Policy-Guidelines-final-230217.pdf/

Other jurisdictions have adopted guidelines giving effect to recommendations 96 to 99 which complement the use of Model Litigant guidelines.[13] Such guidelines assist by creating some consistency in civil claims against the government institutions and include things such as working towards joint medical assessments, providing prompt responses and working towards avoiding litigation. Having a clear claim handling process ensures there is no need for plaintiff lawyers to reinvent the wheel each time a claim is made and allows us to assure our clients of some degree of predictability and assist them understanding the likely steps in their claim. While each claim is necessarily considered on its merit, the additional element of consistency and predictability is an important element avoiding retraumatisation of already vulnerable people.

The absence of guidelines in Tasmania also impacted our client Margaret who shared her story in the media.[14] In this and other media stories in May 2020, the Attorney-General the Hon Elise Archer is quoted as saying the government were "actively progressing work on processes to manage the significant increase in child abuse claims." We raised our concern regarding a lack of a proper collaborative out-of-court process for the management of civil claims for child sexual abuse in Tasmania. The Attorney-General is quoted to have indicated such a process was under consideration:

> *when finalised, these processes will be shared with relevant legal firms to ensure claims can be managed as efficiently as possible.*[15]

At the time of writing, we are not aware of any process being implemented however we remain willing to be consulted in the creation of such a process. The adoption of guidelines and a collaborative approach to responding to civil claims would make a real difference to survivors in Tasmania and would result in a more compassionate and sensitive way of dealing with survivors. We expect the Inquiry will see no difficulty recommending Tasmania take these steps to ensure Tasmania begins complying with recommendations 96 to 99.

9. Conclusion

It is disappointing that the Tasmania Government were not prepared to receive and manage civil claims for child abuse avoiding the unnecessary distress its actions had on victim-survivors.

It is curious that the Hon Elise Archer, Attorney-General and Minster for Justice in Tasmania should express her concerns about delays in processing applications by the National Redress

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[13] See NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Abuse; Whole of government guidelines for responding to civil litigation involving child sexual abuse (QLD); Common Guiding Principles – child sexual abuse civil claims (Victoria); Western Australia Government Whole of Government Guiding Principles for Responding to Civil Litigation Involving Child Sexual Abuse (WA); Guiding Principles for Commonwealth entities responding to civil claims involving allegations of institutional child sexual abuse (Cth).
[14] https://www.abc.net.au/news/2020-05-28/child-abuse-victim-seeks-compensation-from-tasmanian-government/12292052; https://www.abc.net.au/news/2020-05-01/sex-abuse-historic-claims-lodged-against-tasmanian-government/12201640;
[15] Ibid.

Scheme[16] in the face of manifestly excessive delays responding to civil claims by the Tasmanian Department of Justice. In our view, all survivors deserve better in terms of the timeliness their claims are responded to whether they chose the civil claim path or Redress Scheme.

It is disappointing that Tasmania declared the following:

> *The Tasmanian Government has completed the implementation of recommendations made under the Redress and Civil Litigation Report.*[17]

when it had not created guidelines for the consideration of civil claims for institutional abuse as have been created in other jurisdictions and by private institutions. Existing Model litigant guidelines are necessary however could be improved upon and complemented by specific guidelines for managing civil claims. There is no reason Tasmania should fall so far short in comparison to other states.

However it is not too late to implement a shift in approach which gives effect to the Royal Commission's recommendations and better serves survivors of abuse in Tasmanian government institutions.

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact [redacted], National Practice Leader – Abuse Law at [redacted] or on 13 11 99.

[16] Tasmanian Government, *Third Annual Progress Report and Action Plan 2021*, Department of Justice p7
[17] Tasmanian Government, *Second Annual Progress Report and Action Plan 2020*, Department of Justice p20.