12 December 2018

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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: LACSC@parliament.qld.gov.au

Dear Committee Secretary,

CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT BILL 2018 ("the Bill")

I am a solicitor with substantial experience in acting for forgotten Australians including those who have been severely injured.

It is said that:

> "The main objective of the Bill is to amend the *Civil Liability Act* 2003 (CL Act) in response to recommendations 91-94 of the Redress and Civil Litigation Report of the Royal Commission into Institutional Responses to Child Sexual Abuse. It made recommendations for improving the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse wishing to pursue a claim for civil damages for personal injury arising from the abuse."

Further to what is already proposed in the Bill, the Bill also presents an ideal opportunity to consider and address a shortcoming in section 11A *Limitation of Actions Act* 1974 ("the Act") in the respects outlined below. The issue in question is delay by a sexually abused claimant in commencing court proceedings and the alleged effect of prejudice to a defendant. In my view, in this area there is room to further improve the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse.

The inherent powers of the court

Section 11A(1) of the Act abolished the limitation period in Queensland for an action for damages relating to personal injuries resulting from the sexual abuse of a child. Section 11A(5) preserves, inter alia, any inherent, implied or statutory jurisdiction of a court – for example the court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

In my submission, in the context of what amounts to a "fair trial" there needs to be a balance struck between fairness to a defendant and fairness to a plaintiff - particularly where extreme sexual abuse is alleged. In my view it would be manifestly unfair to conclude too readily that a fair trial is not possible, for example in cases where key witnesses have died but defendants with ample prior notice of claims have had ample opportunity to obtain detailed signed statements from those witnesses long before they died.

One instance of sexual abuse of a child is horrific enough, but where (for example) a child has endured being sexually molested on hundreds of occasions in an orphanage by individuals and groups of persons the matter is, in my view, so grave that special consideration needs to be afforded to the victim in terms of what constitutes a fair trial.

The "burdensome effect" of delay in commencing court proceedings is one major consideration, however the gravity of the matters alleged should also be a major consideration. Fairness to the defendant should be an important consideration, however fairness to the *victim* should be an equal consideration.

Often it is the very conduct of the defendant or defendants, eg the depraved sexual abuse of a child or permitting it to occur, and the resulting psychological damage which have caused the victim to delay in bringing or pursuing a personal injuries claim. The defendant should not be permitted to take advantage of this. A child whose right to freedom from sexual and psychological torture was betrayed by the defendant should not be re-tortured by an insensitive or inflexible legal system.

Children who have been:

1. institutionalised; and

2. poorly educated, or not educated at all, in the institution; and

3. left illiterate or barely literate by the institution; and

4. abused sexually at the institution;

5. and, as a result of the above matters, subjected to a horrific torment which will endure for life

are very unlikely to be equipped to go out into the world and have the:

(a) insight;

(b) communication and interaction skills;

(c) emotional strength; and

(d) financial capacity,

required in order to commence and maintain stressful, often complex, and expensive court proceedings against the resources of the *mighty institutions* which failed them in the first place.

In my experience, during a claim for damages the abused child is in effect punished all over again by "the system." They are forced to re-live the abuse, and are subjected to a legal process that very few of them understand through no fault of their own. In my view, forgotten Australians deserve our support.

In my submission, section 11A(5) of the Act (see below) should be followed by a new subsection, (6), to read as set out in red on the next page:

"(5) This section does not limit—

(a) any inherent, implied or statutory jurisdiction of a court; or

(b) any other powers of a court under the common law or any other Act (including a Commonwealth Act), rule of court or practice direction.

Example: This section does not limit a court's power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

(6) The gravity of the matters alleged by the plaintiff and the injury or injuries alleged must be taken into account by the court in deciding whether to summarily dismiss or permanently stay proceedings.

Example: Proceedings by a plaintiff who has suffered extreme sexual abuse (including prolonged abuse or abuse by a group of persons) should not be dismissed on the ground of prejudice unless the prejudice to the defendant's prospects of a fair trial is severe."

As stated by His Honour Justice Rothman in *Anderson v The Council of Trinity Grammar School [2018] NSWSC 1633*:

- "... there is no requirement that the trial be perfect." (paragraph 81)
- "It is an assessment of the interests of justice that requires the Court to determine whether the plaintiff's claim can be determined justly and/or fairly." (paragraph 123)
- "Many cases are decided upon incomplete facts and, even without any substantial lapse of time, key witnesses can die suddenly or become unavailable: *Estate Judd v McKnight; Gammage v Estate Judd, Channell v Estate Judd; McKnight v Estate Judd (No 2) [2018] NSWSC 462 at [116]* and the cases cited therein." (paragraph 124)

In my view, such remarks are not only well made but should be supported by the legislative change that I've proposed above.

Financial resources

If the financial viability of the religious and government institutions involved in claims or potential future claims arising from sexual abuse in childhood institutions are said to be under threat from a surge in claims, where is the evidence? What are the statistics?

I am currently acting in a civil claim for damages arising from the prolonged and depraved abuse of a young child at a Queensland orphanage. To date:

a) the State of Queensland has refused to attend mediation because it does "not see any benefit from a mediation";

b) one of the religious body defendants has not responded to my request that it attend mediation;

c) the State of Queensland and the religious body defendants spent a total of $16,500 on *one* psychiatric report. By comparison, my client's own psychiatric report cost a mere $880; and

d) one of the religious body defendants has, despite request, failed to offer any evidence of its financial capacity to meet a possible judgment against it.

Clearly there is little point in a claimant, sexually abused as a child, seeking, at great personal expense in a civil claim for damages, a measure of "justice" if the institutional defendant hides in the shadows cast by its cleverly cloaked assets and secret trusts.

The institutions do not "make it easy" for abuse victims. My experience is exactly the opposite. Taking every legal point possible is hardly a compassionate approach, and it does nothing to avoid re-traumatising the abuse victim unnecessarily (sometimes for many years).

Sexual abuse victims need support – not further obstacles.

The Queensland government is presented with an historic opportunity to be a world leader in recognising grave injustices of the past and doing something tangible about it.

In my view, the legislative change I've proposed above:

1. acknowledges the gravity of what many sexually abused children have endured; and

2. provides sexually abused claimants with a more flexible legal environment in which to seek a fair and just outcome from a civil claim for damages.

Yours faithfully
Chris Kohler