



# **WIRRINGA BAIYA**

## **ABORIGINAL WOMEN'S LEGAL CENTRE INC.**

Wirringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or have been victims of violence.

17 March 2014

Royal Commission into  
institutional Responses to  
Child Sexual Abuse

By email: [solicitor@childabuseroyalcommission.gov.au](mailto:solicitor@childabuseroyalcommission.gov.au)

Dear Sir/Madam,

### **Royal Commission Issues Paper 5 – CIVIL LITIGATION**

#### **Our service**

Wirringa Baiya Aboriginal Women's Legal Centre (Wirringa Baiya) is a New South Wales statewide community legal centre for Aboriginal women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault

Although our service is available to both Aboriginal and Torres Strait Islander women, children and young people close to 99% of our clients are Aboriginal. For this reason throughout this submission we will refer to the issues and needs of Aboriginal women and their communities.

Please note that we have a great deal of experience working with victims of child sexual assault but the large majority of our clients were abused by family members and friends, and thus not in an institutional context. Our experience is mostly with assisting women and children bringing an application for victims compensation through the NSW victims support scheme (previously the Victims Compensation scheme). This process is of course separate from civil litigation. We note that the Royal Commission intends to have a separate discussion paper about "statutory victims' compensation schemes and schemes or processes established by governments or institutions to offer compensation and/or services" and we look forward to making a significant submission to that discussion paper.

In short, we have very limited experience assisting clients pursue a civil claim, however we would like to make some discrete comments about our experience working with Aboriginal victims of violence who have been sexually assaulted as children that are relevant to this discussion paper.

We would also like to note that the recommendations made by the Commission and the suggestions contained within this submission are *not* directed towards to rights and interests of people sexually abused in familial settings. We would like to see justice for all survivors of child sexual abuse and to see the community achieve this through proper focus on survivors and a mindfulness of their rights.

### **Question 1: Elements of the civil litigation system**

We are not in a position to respond to the many issues raised in this question, but we can say that based on our experience survivors take many years, sometimes their whole lifetime to disclose child abuse. Survivors face enormous challenges in disclosing abuse and we have many clients who have carried the secret of child sexual abuse into their old age. In some cases clients have suppressed the memories with alcohol and drugs. For some this leads to criminal activity and incarceration. The triggers for disclosures are varied, and include:

- recovery from and dealing with addictions
- treatment for psychological conditions such as depression or anxiety
- other members of the family disclosing
- media coverage of high profile members of the community: talking about child sexual abuse; being accused of committing child sexual abuse; or disclosing that they were a victim of child sexual abuse
- Aboriginal community healing programs
- information about the impact of sexual assault
- finding a physically and emotionally safe place to disclose.

As undoubtedly the Royal Commission is discovering, the impact of child sexual assault on an individual is profound. Many of our clients who have sought victims compensation have been assessed by clinical psychologists. Frequently the clinical diagnoses includes:

- Post-traumatic stress disorder
- Anxiety disorders
- Depressive disorders and suicidal ideation
- Substance abuse

Substance abuse can lead to criminal activity and thus entry to the criminal justice system and incarceration. In some cases poor self-esteem leads victims to unhealthy intimate relationships, which become violent and compound a victim's trauma.

The devastating psychological impact affects an individual's ability to be educated, seek employment and parent and care for children. This in turns leads to further disempowerment, significant economic disadvantage and sometimes the intervention of the child protection system.

Many of our clients who have suffered child sexual assault say they struggle on a weekly basis to survive and be a parent (or grandparent), and maintain a household, let alone think about pursuing a civil claim for the harm the abuse caused them. It is only when they reach a safe place in their life that they can even begin to think about their legal remedies.

### **Time Limits**

Consequently time limits are a huge impediment to the many victims of child sexual assault we work with if they want to make a civil claim for damages.

#### ***Recommendation***

It is our strong view that there needs to be a general exception to the *Limitation Act 1969* for all victims of child sexual assault, irrespective of whether there was institutional responsibility or not, to pursue civil litigation.

### **Records**

In our victims compensation matters we are often seeking records for our clients from both government and non-government agencies. We are frequently struck by the poor record keeping of many agencies, both government and non-government. Too often there is little reference to disclosures of violence that clients are adamant they have made. In some cases there is no record that our client was even a client of the agency, despite the agency verbally acknowledging that she was.

In other situations records have been destroyed, or simply lost. We have had the recent experience of assisting a woman in her 40s seeking to locate her wardship file from the NSW Department of Family and Community Services. Despite a number of searches and review by the Information and Privacy Commission of NSW the Department to date has not been able to locate the client's file.

#### ***Recommendation***

It our recommendation that all agencies both government and non-government should keep records relating to child clients for a minimum of fourteen years past their 18<sup>th</sup> birthday. Consideration should also be given to a requirement that some agencies, particularly government agencies, never destroy the records of a child, especially if it relates to child sexual assault or child abuse.

It is worth noting here that recent changes to the victims compensation scheme in NSW now requires a victim to have reported the violence to a government agency in order to pursue an application for victims compensation (now called victims support). This requirement is particularly harsh for victims of child sexual assault, especially those members of the Aboriginal community for whom there are many sound reasons that make them reluctant to report to government agencies. We will have more to say about this requirement in the discussion paper about redress and victims compensation schemes.

**Recommendation**

It is also our view that consideration should be given to comprehensive training and development of practice standards in relation to record keeping for all agencies that work with children.

**Giving evidence**

Our experience with victims compensation applications is that many women find giving evidence about their experiences of violence and abuse overwhelming, and fraught with a number of challenges. It is worth noting that making an application for victims compensation does not subject the client to examination and cross-examination. In the absence of a police statement our clients in the past have provided a detailed statutory declaration about the abuse they suffered to be provided to the Assessors at Victims Services. Most of our clients have found this a very difficult process and in some cases have chosen to draft their statement over a period of many weeks.

For many re-telling the story causes significant anxiety and can re-traumatise them, so it is critical they have immediate access to support and counseling. For some it is a very cathartic process, despite the anxiety and distress it induces. However, our clients are grateful that it is done in a safe and supportive environment. Many clients have said that if they had to give evidence in a court setting and be subjected to cross-examination they would not go ahead with it.

It is our view that much can be learned from other jurisdictions that enable the pre-recording of a victim's evidence, as is the case with child sexual assault victims in European countries such as Norway and Austria (see a discussion in "Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system" [www.justice.govt.nz/publications/global.../a/...child...in.../file](http://www.justice.govt.nz/publications/global.../a/...child...in.../file)).

Indeed we suspect much can be learned from those countries that use an inquisitorial rather than an adversarial legal system as a more effective system to seek truth.

**Recommendation**

It is our view that the following should also be considered for civil litigation matters brought by victims of child sexual assault:

- Evidence of a victim should be pre-recorded off-site in an supportive and comfortable space. This space should be culturally safe for the Aboriginal community.
- Psychologists and support people should be with the victim at the time of giving evidence
- The perpetrator/and or representatives of the institution should not be in the room, or even observing when the victim is actually giving evidence

- Questions from the defendant should be agreed to by both the victim's solicitor and the judge, and should have the sole purpose of establishing facts, and not to confuse or intimidate the victim.
- Questions should be put to the victim by an independent person, such as the judge or a court appointed psychologist.
- Intermediaries should be used to assist certain victims to give evidence. Intermediaries should be used for victims who are particularly vulnerable because of their age, disability, cognitive impairment or mental health. (The use of intermediaries is now common place in child sexual assault prosecutions in the United Kingdom and the Crown Prosecution Services have develop guidelines, see: [http://www.cps.gov.uk/consultations/csa\\_consultation.html](http://www.cps.gov.uk/consultations/csa_consultation.html))

### **Cost of litigation**

We are not in a position to comment on the detailed costs of litigation other than to state our general understanding that any type of civil litigation is costly, if it is complex and lengthy in process. We note that currently, and it has been the case for some time, that is very difficult to get a grant of legal aid for such litigation. We know of very few law firms that are prepared to do such matters pro bono. Access to legal services generally is even more difficult for women living in rural and remote areas.

Community legal centres, which are significantly under-resourced to provide generalist legal services, let alone specialised civil litigation, simply do not have the resources both in terms of staff and expertise to run such matters. Civil litigation by its very nature is time consuming and resource intensive. Such claims as a matter of course require counsel to be briefed. So unless counsel is prepared to provide a service pro bono, our clients would require a grant of legal aid to cover counsel fees.

The threat of a costs orders, if unsuccessful, naturally looms large for any plaintiff in civil litigation. Once again a grant of legal aid would need to be made to provide some indemnity to a client if unsuccessful.

### **Question 2**

It is also our observation that the sheer length of time many civil litigation matters drag on for is a significant challenge for many victims. This prolongs the trauma and discourages victims from maintaining or pursuing any action.

Given that many victims of child sexual assault may not initiate a claim until they are much older we also have concerns about the limitations of what can be pursued by a claimant's estate if the victim/claimant dies before the matter is finalised.

**Recommendation**

We think that the *Law Reform (Miscellaneous Provisions) Act 1944* should be amended so that the estate can seek exemplary damages and damages for loss of earning capacity and loss of earnings.

**Question 3**

We assume that this question is referring to alternate dispute resolution (ADR) being used before a claim is filed. Based on our experience of mediation and ADR in other civil law jurisdictions, it is only effective for claimants who on the face of the matter have an extraordinarily strong case and have very strong evidence, which would lead a defendant to admit liability from the outset. Given the lapse of time in many cases we are concerned that the majority of victims would not have evidence to substantiate liability at the outset of a matter.

We are currently assisting a woman who was sexually abused while in the care of the Catholic Church, make a complaint to the Royal Commission. This client in 2013 made a 'Toward Healing' complaint to the Catholic Church Professional Standard's Office. Unfortunately records relating to the school she attended were lost in a fire, and the institution she was boarding at maintained that they have no record that she was even there. This client found the process demoralising and demeaning. She had no independent support throughout the process (unfortunately she contacted us after this process was finalised). It is interesting to note that during this process the Royal Commission was not mentioned to her at her meeting with the representatives of the Catholic Order, nor in any correspondence to her from the Professional Standard's Office.

**Question 4: Recommendations for changes**

It would seem to us that the discussion paper has flagged the many barriers for people commencing proceedings in civil litigation. We have only been able to comment on some of them, and make some recommendations.

Unless the Commission wishes to recommend restructuring the entire basis of tort law, and moving away from an adversarial system, we would recommend a completely alternative scheme for survivors of child sexual abuse such as a redress or restorative justice scheme. We look forward to making a significant submission to the future discussion paper on redress schemes.

It is also our view that Courts hearing such claims have the power to issue orders for institutions to review and change their practice and provide the appropriate training.

**Question 5**

Based on our experience, victims of child sexual assault generally seek:

- acknowledgment of the abuse they have experienced
- an unreserved apology
- financial compensation for the trauma and the impact on their ability to be educated and seek employment
- financial compensation for the impact that the damage to the victim had on the victim's family. (For example: a client of our Centre who was sexually abused in an institutional setting wants financial assistance to help her, her husband and children to heal as a family through healing sessions)
- systemic change
- training for front line workers of all agencies that work with children to understand the signs and indicators of child sexual abuse
- broad and ongoing community education about child sexual assault that is both age appropriate and culturally appropriate
- more funding for frontline support services working with survivors

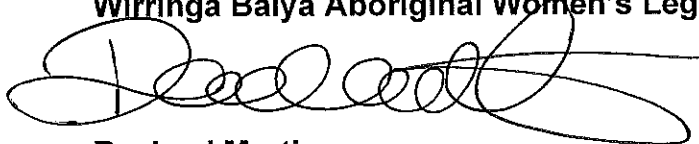
It is of course hoped that the Royal Commission will make a number of recommendations about the systemic changes necessary and the training and resources required.

Thank you for considering our submission. We would be happy to be contacted about any of the recommendations contained within this submission.

Please note that this submission was a joint effort of all members of staff at our Centre. However, the contact person for any questions is Rachael Martin, principal solicitor who can be contacted by email at [Rachael\\_Martin@clc.net.au](mailto:Rachael_Martin@clc.net.au) or telephone: 02 – 9569 3847.

Yours faithfully,

**Wirringa Baiya Aboriginal Women's Legal Centre**



**Rachael Martin**  
**Principal Solicitor**