



23 March 2015

Justice Policy
Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: justice.policy@agd.nsw.gov.au

KINGSFORD
LEGAL CENTRE

Dear Madam/Sir,

Discussion Paper on limitation periods in civil claims for child sexual assault

Kingsford Legal Centre (KLC) welcomes the opportunity to respond to the Discussion Paper on limitations in civil claims for child sexual assault.

Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides general advice on a wide range of legal issues, including child sexual abuse, and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC's clients are economically and socially disadvantaged. Many KLC clients have experience in institutional care and are victims of sexual assault. We have had extensive contact with members of the Stolen Generation and acted in the Stolen Generations' case of Joy Williams.¹ KLC believes that the experiences of members of the Stolen Generations through court process are relevant to issues of civil litigation for survivors of child sexual abuse in institutions. It is through our experience providing advice to survivors that we base our submission.

General comments on civil litigation in child sexual assault matters

KLC supports the right of survivors of child sexual assault to pursue civil litigation and acknowledges that there are benefits to some survivors in pursuing this course of action. One of the most important of these is the public nature of the civil proceedings, which for some survivors is important to achieving justice.

However, in our experience it is not an effective mechanism for providing redress to survivors. Successfully litigated matters are exceptional, and for each matter that is resolved positively for the survivor, there are many hundreds, if not thousands, of cases that could not be litigated due to access to justice issues, lack of evidence or procedural barriers.

People who have undergone extreme trauma as a consequence of abuse during their childhood years may be least likely to engage a lawyer and pursue a civil case. The

¹ *Williams v Minister Aboriginal Land Rights Act 1983 no 2* [1999] NSWSC 84 26 August 1999.

discrepancy between the number of successfully litigated matters in Australian courts, and the overwhelming response of survivors giving evidence to the Royal Commission into Institutional Responses to Sexual Abuse (the Royal Commission) indicates that civil litigation has failed as a way of providing redress, rehabilitation, restitution and justice for survivors.

Clearly some of the contemplated amendments to the Limitations Act 1969 (NSW) will alleviate or remove some of these barriers to pursuing civil litigation. Yet other restrictions, barriers and disincentives will still operate to prevent claims being brought or prevent a successful outcome for the plaintiff at court.

Amending the limitation period

It is not uncommon for survivors of child sexual assault to come forward in their 40s and 50s, when they finally feel able to talk about their childhood experiences. It can take many more years for them to start thinking about the formal process of reporting the assaults to the police and/or commencing civil litigation. For these reasons, it is not uncommon for the police to bring prosecutions, particularly in child sexual assault matters, more than 20 years after the offence. In these cases, however, the Limitations Act arbitrarily rules out civil claims.

Arietta*

Arietta was repeatedly sexually assaulted by a neighbour when she was 9 years old. The assaults happened in the family home, and increased in their severity over time. She did not disclose the assaults to anyone: she was too embarrassed to tell her family and too scared of her neighbour. The assaults eventually stopped when her family moved to another part of Sydney.

Arietta was in her twenties when she saw her former neighbour again. Seeing him brought back memories of the assault in an intensified way, as she was now a mother herself. She could not bear the memories any longer, and disclosed the assaults first to the police.

The police charged her former neighbour with multiple counts of sexual assault. The Court found him guilty and sentenced him to over 10 years' imprisonment. The police investigation and court processes, including appeals, took almost 2 years to be finalised.

Limitation periods restrict Arietta from bringing civil action against her uncle for the injuries he caused.

**Our client's name has been changed to protect their confidentiality.*

In light of this, KLC believes that time limits in all cases of child sexual assault should be removed, and that consideration should be given to removing the limitation in all cases of sexual assault.

Recommendation

1. *the Limitations Act 1969 (NSW) should be amended to remove all limitation periods on commencing civil claims for child sexual assault.*

The “disability exception”

The provisions of the Limitation Act suspend the running of the limitation period while a person is “under a disability”. The definition of “under a disability” includes the person being incapacitated or substantially impeded due to disease or any impairment of his or her physical or mental condition.

In KLC's experience, the “disability exception” does not adequately capture the array of legitimate reasons for extended delay in bringing civil litigation in cases of child sexual

assault. Nor does it recognise that the reason for delay is closely bound up with the cause of action itself. Many survivors may have a mental health condition but not have a formal diagnosis. It is also not clear whether certain mental health conditions, such as Post Traumatic Stress Disorder, are regarded as being “under a disability”.

For this reason, we believe that the removal of the limitation period in cases of child sexual assault is a more effective and fair way of recognising the particular circumstances of survivors of child sexual assault. However, if a time limit is to remain in place, we believe that the existing exceptions regarding mental incapacity should be expanded to include the impacts of sexual abuse including trauma, shame, or fear.

Recommendation

2. *If a limitation period is to be retained in civil claims for child sexual assault, the definition of “incapacitated person” should be amended to include the impacts of sexual abuse, including trauma, shame and fear.*

Special limitation period for some children

The special limitation period provisions for child survivors assaulted by a parent, guardian or close associate of their parent or guardian purport to recognise and overcome the particular barriers they face in commencing litigation.

While KLC acknowledges the life-long devastating impact that sexual (or any kind of) abuse by a relative or associate of the family can have on a child, we do not believe it is useful or fair to make distinctions between survivors of child sexual assault depending on who abused them. Sexual abuse in an institutional setting can be just as devastating as within the family environment. The focus should be on the commonalities of survivors, not on the location of the abuse or the relationship of the perpetrator to the child.

Of course, an extended limitation period is futile where the parent, guardian or close associate has no savings or assets to pay the survivor. In many, if not most, cases individual perpetrators do not have significant assets.

In many cases, however, institutions have significant assets. The failure to extend the special limitation period to survivors of the criminal actions of institutional employees, volunteers, or religious personnel essentially protects these institutions from otherwise meritorious claims and blocks survivors’ access to justice.

Removal of limitation periods in child sexual assault claims will also remove this distinction between survivors based on who abused them. However, if a limitation period is to be retained, KLC recommends that the special limitation period provisions for minors be extended to all child victims of sexual assault, regardless of who assaulted them.

Recommendation

3. *If a limitation period is to be retained in civil claims for child sexual assault, the special limitation period provisions for minors should be extended to all child victims of sexual assault, regardless of who assaulted them.*

Retrospectivity

The removal of the limitation period, or alternatively the expansion of the “disability exception”, in cases of child sexual assault will have very limited impact if it is not retrospective. An amendment that applies only from the date of its commencement will not

benefit any of the survivors giving evidence to the Royal Commission. The benefits of any amendments to survivors may not begin to accrue for at least 12 years after the legislative amendments come into effect (when certain defendants would have otherwise been able to raise the expiry of the 'long-stop' limitation period as a defence).

Under the current legislative arrangements, determining when a cause of action commences, when it expires and any applicable exceptions is complex. Amendments to the Limitation Act mean different rules apply depending on when the act of violence occurred, the nature of the perpetrator, and when the survivor became aware they had a cause of action. Any further amendments that run from the date they come into affect will result in further unnecessary and unfair complexity in the law, making it more difficult for people to know their rights.

For these reasons, a human rights approach to any amendments beneficial to survivors of child sexual assault should be retrospective and apply to all survivors regardless of when they were sexually assaulted and by whom. This should apply to all survivors who have not already brought claims, or whose claims were judicially determined at an interlocutory stage, without the substantive merits of their cases being heard.

Recommendation

4. *Amendments to the Limitations Act that are beneficial to survivors of child sexual assault should be retrospective and apply to all survivors regardless of when they were sexually assaulted and by whom.*

Model litigant principles

KLC supports the NSW Government's Guiding Principles for Government Agencies responding to Civil Claims for Child Sexual Abuse, in particular Principle 10 that declares that State agencies should not generally rely on a statutory limitation period as a defence.

If a limitation period is to be retained in cases of child sexual assault, KLC believes that non-Government institutions should be required to adopt similar model litigant principles. One way this might be achieved, is to make their adoption a condition of funding agreements between the NSW (or Commonwealth) Government and the institution concerned.

Recommendation

5. *If a limitation period is to be retained in civil claims for child sexual assault, non-Government institutions should be required to adopt model litigant principles that include a commitment not to rely on the expiration of a limitation period as a defence.*

The ultimate bar

KLC does not support the retention of the 'ultimate bar' which prevents claims from being brought more than 30 years after the cause of action accrued, despite any 'disability exception' that might otherwise have applied.

As stated above, it often takes more than 30 years for a survivor of child sexual assault to disclose what happened to them and to feel sufficiently strong enough to seek legal advice and pursue civil litigation. In our experience, survivors of sexual abuse during childhood are likely to have myriad other problems and challenges during adulthood. In addition to the usual responsibilities of making a living and raising children, they may be experiencing family conflict and breakdown, domestic violence, drug and alcohol abuse, and long term unemployment. Coping with these more immediate and pressing problems will usually take

precedence over pursuing claims arising out of their childhood. Civil litigation may not be feasible unless and until these problems have been sufficiently resolved and this may take many decades.

Recommendation

6. *Regardless of whether a limitation period is retained in civil claims for child sexual assault, the 'ultimate bar' should be removed in cases of child sexual assault.*

Statutory redress schemes

Although KLC welcomes any amendments to the Limitations Act that would make it easier for survivors of child sexual assault to commence and succeed at civil litigation, we believe that the NSW Government needs to do more to assist survivors to obtain redress, rehabilitation, restitution and justice.

If the NSW Government is genuinely committed to the rights of survivors of child sexual assault, any beneficial amendments to the Limitations Act should be accompanied by amendments to the Victims Rights and Support Act 2013 and the provision of adequate funding to services that assist survivors of child sexual assault.

In particular, the NSW Government needs to consider:

- Increasing the amount of recognition payments so that it adequately recognises the harm and wrong done to the individual survivor.
- Amending evidentiary requirements of the Victims Support Scheme so that survivors may lodge any available evidence they have to establish their claim, including from the Royal Commission into Institutional Responses to Child Sexual Abuse.
- Removing or extending all time limits in cases of sexual assault.
- Providing more funding to specialist services which support and treat survivors of child sexual assault.
- funding community legal centres to assist, advise and/or represent survivors who want to make a claim on the Victims Support Scheme.

Recommendation

7. *Amendments to the limitation period in civil claims for child sexual assault should be accompanied by improvements to the statutory compensation scheme and increased funding of services that assist survivors of child sexual assault.*

Please do not hesitate to call us on (02) 9385 9566 if you would like to discuss the content of our submission further.

Yours Sincerely,
KINGSFORD LEGAL CENTRE



Emma Golledge
Acting Director



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