Director
Child Abuse Royal Commission Response Unit
Department of Justice

Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019

To whom it may concern:

Thank you for conducting a Public Consultation process for this bill and the opportunity to make a submission. As a survivor of abuse I request redaction of personal identifying details.

The bill is essential for Tasmania's compliance with the important reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, in particular ensuring access to justice for victims and survivors of institutional abuse. The bill achieves this by putting an end to inappropriate legal defences which the Royal Commission found should never have existed in the first place, and have always caused harm.

The bill also creates a provision to allow victims and survivors who have been locked into unfair past settlements as a result of those inappropriate legal defences to have an avenue to have those past settlements set aside. This is consistent with similar legislation rolling out in other States and Territories across Australia.

Similar legislation has been in place in some jurisdictions for almost three years now and has not resulted in a 'flood of litigation' in those jurisdictions. It is safe and sensible legislation. The effect of the legislation in the jurisdictions where it already exists has simply been that institutions have been motivated to negotiate more fairly and reasonably with survivors in renegotiating those past unfair settlements. This is simply as it should be.

<u>How should financial reparations for survivors of abuse be properly calculated?</u>

It should be based on evidence. For example, doctors submit a report as to the survivor's diagnosis, prognosis and recommended treatment plan. This gives an indication of the health care costs the survivor faces.

As well, the survivor can submit evidence regarding likely loss of earnings. When a child is abused it usually causes interruption to their schooling and education – quite simply, it is difficult for a child to focus on academic learning when the child is focused on trying to avoid or to survive the next assault. Therefore, child abuse may often lead to under-education and subsequent under-employment, with the obvious associated economic loss. There are long-established routine methods for calculating these amounts.

When the evidence has been gathered, and the institution has had the opportunity to consider and respond to the evidence, then the quantum of the survivor's actually real losses is known – ie the amount that the survivor has lost over time due to under-employment, and the amount the survivor has had to spend on health care/treatment for their injuries and some other areas of damages where applicable.

This is the amount of reparations that is fair and reasonable that the victim/survivor should receive.

So how were reparations calculated by institutions who hid behind the time-limits defence?

Randomly, with no consideration of the evidence, and in a context of intimidating the victim.

Institutions usually ignored any semblance of an evidence-based process, simply telling victims they were "out of time" and therefore by law were denied the right to undertake any process of having their evidence properly tested or of properly calculating fair reparations.

Institutions made up numbers that had no basis in reality, they were low numbers, and they were presented to victims on a 'take it or leave it' basis. Worse still, institutions subjected victims to significant duress by threatening that if the victim did not accept the offer, the institution would pursue the victim for the institutions' legal costs, often claimed to be in the many tens of thousands of dollars, and many times more than the reparations offered.

This is, and always was, reprehensible conduct by institutional leaders, betraying the core values of their institution. It was an organisational double standard that has, quite rightly, shocked most grassroots members of the institutions to learn what their leadership has been perpetrating in the name of the institution.

It is time to put an end to that reprehensible conduct and it is time to replace it with moral conduct; conduct consistent with the stated values of the institutions, and conduct consistent with community expectations. IE fair reparations based on an assessment of the evidence.

Didn't we already deal with this issue in Tasmania a couple of years ago?

No, not yet. The Tasmanian Government, to their credit, have removed the time limits defence from the statute books (*Limitation Amendment Act 2017*). That reform means that any victim or survivor coming forward, *who has not previously come forward*, now has the right to access justice, to have their evidence properly tested and to participate in an evidence based process of calculating fair and accurate reparations; not be told "you're out of time".

However, that reform did not address the issue of the victims of abuse who reported their abuse and sought justice, only to have the time limits defence used against them by institutions and were then bullied into unfair settlements. Without legislation such as that proposed by this current bill, those survivors will remain forever trapped in those inappropriate and unjust settlements – forever trapped by the time limits defence that the Royal Commission found to have always been an injustice and has said should be abolished.

Is it consistent with the Royal Commission recommendations to create a right for victims/survivors to set aside past unfair settlements?

Yes. Recommendation 85 of the Royal Commission's *Redress and Civil Litigation Report* states:

> *"…governments should introduce legislation to remove **any** limitation period….[relating to child abuse]"*

Without this bill, the limitation period in Tasmania has not yet been removed from the cohort of victims who remain cruelly locked into past settlements. Those settlements are the fruit of the poisoned tree. The Royal Commission has said that ***any*** limitation period be removed.

Recommendation 86 further states:

> *"…governments should ensure that the limitation period is removed with **retrospective** effect…"*

While survivors remain cruelly locked into **past** settlement (those settlements being the poisoned fruit resulting from the inappropriate use of the time limits defence and not being based on any genuine assessment of the evidence as to what would be fair reparations in each case) then the removal of time limits has not had full retrospective effect.

Passing this bill is essential for compliance with Royal Commission recommendations.

What about the National Redress Scheme? How does this bill fit in with that?

The Royal Commission has always been very clear in its intent that the delivery of justice relies on governments and institutions providing two parallel pathways: one is the National Redress Scheme (NRS) and the other is removal of unfair obstacles to seeking evidence-based full compensatory damages. Survivors then determine which pathway is right for them.

By its own terminology, the NRS does not pay *compensation* for the abuse, it pays a 'recognition payment'. The NRS openly states that the payment in no way takes the role of being compensation or reparations (although it requires any person accepting a 'recognition payment' to waive their legal rights to pursue full compensatory damages).

The NRS was established to provide a less stressful pathway for those survivors for whom seeking full compensatory damages may not be a viable option. For example, some survivors may today struggle to produce the requisite evidence to pursue full compensatory damages. This is through no fault of the survivor but is a consequence in many instances of such things as the passage of time since the abuse, as well as the conduct of institutions, such as institutions changing name or structure, institutions destroying records, etc.

But for survivors who do have the capacity to submit evidence seeking full compensatory damages, the Royal Commission is clear that governments and institutions must clear the path of all inappropriate obstacles (such as time limits defences, denying liability, etc).

The Royal Commission's position has always been clearly expressed that the delivery of justice demands that both pathways be implemented simultaneously. This is to avoid the situation where victims/survivors get inappropriately 'rail-roaded' into participating in the NRS simply because they have no effective legal alternative.

Such a scenario could threaten the legitimacy of the NRS, such as by the NRS losing public confidence or the NRS being subject to legal challenge, such as being invalid due to duress. It is in the best interest of all stakeholders – survivors, governments, institutions and the community – that this bill be passed and the integrity of the NRS be maintained by providing survivors with genuine and legitimate alternatives, free from duress.

In fact, the Royal Commission specifically state, at Recommendation 46, that the NRS should not commence until *after* the reforms on time limits and duty of institutions (recommendations 85 – 95) have been implemented:

> *"Those who operate the redress scheme should specify the [commencement] date as being the date on which the Royal Commission's recommended reforms to civil litigation in relation to limitation periods and the duty of institutions commence"*

However, the NRS has already commenced operation and yet these State reforms (time limits and duty of institutions) are not yet fully implemented.

This is not the Tasmanian Government's fault, it is simply a (probably unavoidable) consequence of the difficulty in coordinating the timing of the implementation of State reforms with the timing of the Federal Government's implementation of a scheme as complex as the NRS. The Tasmanian Government have, quite rightly, taken time to review and consider all of the issues in constructing this bill, because it is important to get it right.

Recommendation 46 highlights the urgency with which the Tasmanian Parliament should now pass this bill into legislation to ensure compliance with Royal Commission Recommendations.

This bill presents Members of both Houses of the Tasmanian Parliament with a wonderful opportunity to be an active and lasting part of history, an opportunity to work together to implement the reforms of the Royal Commission to the benefit of all Tasmanians.

Yours sincerely

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2 August 2019