



Abuse in Care

Royal Commission of Inquiry

Issues paper: Redress (civil litigation)

Issue

The Royal Commission is required under its Terms of Reference to:

- identify, examine and report on the redress and rehabilitation processes for individuals who claim, or who have claimed, abuse while in the care of the state, in the care of a faith-based institution, or in the care of other agencies or bodies for which the Crown was directly or indirectly responsible from 1 January 1950 to 31 December 1999
- consider what improvements can be made to those processes
- give appropriate recognition to Māori interests, acknowledging the disproportionate representation of Māori in care.

The term 'redress' refers to actions that set right, remedy or provide reparations for harms or injuries caused by a wrong, such as abuse. Redress takes many forms, including apologies and monetary compensation.

A person who has experienced abuse while in care who wishes to seek redress has several potential options available to them. One of these options is to bring a claim for damages against the institution, the Crown, and/or the perpetrator of the abuse in the courts.

The Royal Commission wishes to know how effective or useful the civil litigation systems are in resolving claims for damages for abuse experienced while in care.

A survivor may wish to seek redress through the courts rather than less formal mechanisms - such as the Historic Claims Unit process operated by the Ministry of Social Development - for a variety of reasons.

Survivors pursuing claims through the courts will face difficulties of a legal, financial, and/or psychological nature, but for Māori there are additional challenges.

The Royal Commission is inviting submissions from those who have been involved in civil litigation in relation to abuse while in care whether as a plaintiff/claimant, defendant, a legal representative of a party, a member of the plaintiff/claimant's family or whānau, or professional on their experiences together with suggestions for how the process could be improved and made more effective.

The Royal Commission acknowledges the disproportionate numbers of Maori in care and, as the inquiry is underpinned by Te Tiriti o Waitangi, the Royal Commission particularly seeks to hear from Māori regarding their experiences engaging in the legal process

The information that you provide will be used to inform the Public Hearing that the Royal Commission will hold in March 2020 on civil litigation. This issues paper and public hearing is part of a wider inquiry that the Royal Commission is conducting into redress; there will be opportunities in future to comment on other aspects of redress, such as the redress schemes or processes established by the Ministry of Social Development, or the Catholic Church to offer compensation.

Submissions

The Royal Commission is particularly interested in receiving submissions from interested individuals, and government and non-government organisations on the following:

1. Equal and effective access to justice: legal representation - the Royal Commission is interested to learn from individuals who have experienced abuse while in care and who wish to bring a claim for damages against the Crown or institution and their experiences with obtaining legal advice and assistance, and in particular:
 - a. Survivor's experiences in locating and identifying lawyers who have some experience or understanding of the complexity of issues, particularly if the survivor has a disability or is living in smaller provincial or rural communities
 - b. The level of awareness and understanding that survivors have of the legal process, the availability of other claims processes, the challenges that they might face in bringing the civil claim and the likelihood of achieving a successful outcome
 - c. Challenges and difficulties encountered in the process of applying for and/or obtaining legal aid.

2. Equal and effective access to justice: the challenges of litigation - there are aspects of the current civil litigation system that raise issues for the conduct of litigation brought by persons who have experienced abuse while in care. The Royal Commission is interested in hearing more about how the following – and any other related - matters impact on the conduct of civil litigation and how these might be addressed:
 - a. Institutions who cannot be sued because they no longer exist, or are unincorporated bodies
 - b. The financial position of some organisations or the extent to which they hold insurance, which means that they are not able to pay damages
 - c. The impact of statutory limitation periods and how these are applied by the courts in cases involving historical abuse
 - d. Tactics or strategies that the Crown or legal representatives of faith-based institutions and other organisations may have engaged in - including tactics aimed at discrediting the claims of survivors because of their disability and/or ethnicity - which made it difficult or unsafe for survivors to commence or continue the litigation
 - e. Challenges in establishing a duty of care, breach and causation
 - f. The extent to which, and the circumstances in which the Crown can be held liable for the actions or failings of third parties

- g. The extent to which organisations can be held liable for the actions of their employees, where the actions fall outside the terms of their employment
 - h. The approach of Crown agencies and other organisations to resolving civil claims through out of court processes, including settlement of claims and confidentiality agreements
3. Equal and effective access to justice: Te Tiriti o Waitangi – As the number of Māori in care is disproportionate when compared with non-Māori, the Commission seeks to hear from Māori regarding their experiences engaging in the legal process
 4. Access to relevant information - The Royal Commission is interested to know about the experience of survivors and their legal representatives in accessing and retrieving information relating to their claim, including information which relates to the time that they spent in the institution and which might support their claim of abuse, including through requests under the Official Information Act and Privacy Act.
 5. Well-being of survivors – the nature of the civil litigation process is that it can be stressful and take an emotional toll on claimants and their families and whānau. The Royal Commission is interested in hearing submissions on measures that could be taken to protect the well-being and safety of survivors, family and whānau as they go through the process
 6. The impact of abuse on families and whānau - the civil litigation system does not allow for consideration of the impacts - including the intergenerational impacts -that the abuse has on the family and whānau of the person who experienced abuse while in care. The Royal Commission is interested in receiving suggestions on wider collective harms that arise from abuse can be considered by the courts when deciding redress
 7. Adequate, prompt and effective redress – the Accident Compensation Act (the ACA) prevents individuals who have experienced abuse while in care from receiving compensation for any personal injury through civil litigation. The Royal Commission is interested to receive submissions that refer to situations where the ACA prevented a person from bringing civil proceedings or where the person’s circumstances meant that the ACA was found not to apply (for example, the injury was not covered by the ACA because the harm occurred before 1974 or the injury was not a personal injury for the purposes of the ACA)

8. Adequate, prompt, and effective redress- pursuing civil litigation does not always provide the claimant with effective or adequate redress. This is partially because court ordered redress is limited to monetary compensation in the form of damages. The courts also do not recognise the full range of abuse that a person in the care of the state, in the care of a faith-based institution, or in the care of other agencies or bodies might experience. For example, damages are not available for the harm a person experiences as a result of being removed from their family and whānau, including losing their sense of identity, culture, language, and belonging, and family and whānau connection. As a result, we are seeking:
- a. Suggestions for how claimants can access forms of redress other than monetary compensation (such as assistance with accessing education, employment training, locating families and counselling)
 - b. Submissions that provide options on how claimants can receive redress for a wider range of harm than that which is currently available through the courts.

Submissions should be made by **Thursday 12 December 2019**, preferably electronically, to contact@abuseincare.org.nz, or in writing to:

Submissions on Issues Paper

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