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your ref:
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By Email: jaclyn.symes@parliament.vic.gov.au

Dear Attorney-General

Corrections Act and Survivors of Historical Child Abuse

We write to draw your attention to provisions of the *Corrections Act 1986* (Vic) which we believe have the unintended consequence of unfairly disadvantaging survivors of historical child abuse.

Overview

Part 9C of the *Corrections Act 1986* (Vic) ('the Act") provides for the quarantining of all or part of a civil award of damages (of over $10,000) to a prisoner for at least 12 months in respect of claims made against the State of Victoria. Any agreement between the State and a prisoner to settle a claim has no effect until being approved by a court.[1] Any damages awarded are paid into a prisoner compensation quarantine fund pending the Secretary to the Department of Justice and Community Safety publishing a notice to victims of criminal acts of the prisoner to seek further information and potentially claim upon the fund.[2] During the period of quarantining, the prisoner is unable to access the funds.

Part 9C of the Act was introduced in 2008 by the *Corrections (Amendment) Act 2008* (Vic). Further amendments were introduced by the Justice Legislation Amendment (Serious Offenders and Other Matters) Act 2019, which substituted section 104P(2) of the Act.[3]

Section 104P of the Act states that Part 9C applies to claims made by or on behalf of prisoners "arising from and in connection with the prisoner's detention while on remand if the prisoner is subsequently sentenced to a term of imprisonment, whether or not that sentence was imposed for the offence in respect of which the prisoner was remanded in custody".

The intent of the amendment, being to assist victims of crimes to access funds, was outlined during the second reading speech to the Bill amending 104P(2) of the Act:

[1] S104S *Corrections Act 1986* (Vic)
[2] S104V & Division 4 *Corrections Act 1986* (Vic)
[3] http://www5.austlii.edu.au/au/legis/vic/num_act/jlaoaoma201945o2019687/

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> *"A Prisoner Compensation Quarantine Fund only applies to compensation paid for injuries suffered by sentenced prisoners. Recent cases have rightly raised concerns about the operation of these laws including the complexity of accessing the funds by victims of crimes. The Bill will address these concerns by extending the operation of the Prisoner Compensation Quarantine Fund to include compensation paid to unconvicted prisoners who are on remand at the time of the incident, but who are subsequently convicted and sentenced to imprisonment. This will ensure victims of crime have greater access to the fund."*[4]

However, Part 9C of the Act has the presumably unintended consequence of quarantining prisoner compensation where the prisoners in question are survivors of historical child abuse.

Unfortunately, in our experience, and as has been borne out by countless testimonies to the Royal Commission into Institutional Responses to Child Sexual Abuse, many of those who offended – children as young as 17 years old – were brutally abused, including being raped, at Pentridge, having being sent there as very young offenders. At times they were sent to Pentridge by Ministerial order when they ought to have been serving a Youth Training Centre Order. These young offenders were among society's most vulnerable and disadvantaged, sent into the care of the State for protection – as wards of the State and under Youth Training Centre and Supervision Orders. They are now some of the most psychologically damaged of our clients by reason of the abuse they endured. It must not have been the intention of the legislature in enacting Part 9C of the Act to quarantine funds of these survivors who suffered horrific child abuse.

Case Law

There has been limited judicial consideration of Part 9C of the Act generally.

In 2017, Keogh J found that Part 9C did not apply to a prisoner who had received a pardon in respect of an offence for which he had served a term of imprisonment, and in doing so noted that *"Part 9C operates to cause very significant interference with the common law rights of a prisoner."*[5]

In an unreported decision in late 2020, the Supreme Court of Victoria held that Part 9C applies to claims made by former prisoners who have suffered historical institutional child abuse.[6]

Application

Part 9C does not automatically entitle victims of crime access to quarantined funds. Despite the legislative intent, there are often obstacles to their recovery, including the expiration of the relevant statute of limitations period. In addition, the legal fees involved in bringing the victim's claim can be significant and consume a large amount of any available compensation.[7]

In our experience, many survivors of historical institutional child abuse have criminal records, particularly those who were in State care as children. The effect of Part 9C of the Act is to

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[4] https://hansard.parliament.vic.gov.au/?IW_INDEX=Hansard-2018-1&IW_FIELD_TEXT=SpeechIdKey%20CONTAINS%20(16-10-2019_assembly_1910161250)%20AND%20OrderId%20CONTAINS%20(0)&LDMS=Y

[5] *Goodenough v State of Victoria* (2017) VSC 543 @ 10

[6] The decision was unpublished but see: https://www.angelasdrinislegal.com.au/25-september-2020-prison-abuse-and-the-quarantine-of-compensation.html

[7] Osborne, Kirsty, "Prisoner compensation claims" [2018] PrecedentAULA 46; (2018) 147 Precedent 35

penalise such abuse survivors for their criminal records, which are often related to, or caused by, the abuse, by quarantining all of, or that portion of, their settlements for historical child abuse that relates to abuse suffered in remand or in a penal setting as children.

In some situations, our clients suffered institutional abuse in State-run facilities such as Turana and Baltara, and then suffered further abuse as children in prison settings, such as when on remand or in detention at Pentridge. When such claims settle, it is necessary to apportion the settlement sum so that it comprises a) a component for the payment of damages for the civil wrong(s) suffered by the abuse survivor when s/he was a prisoner within the meaning of The Act; b) a component for the payment of damages for the civil wrong(s) suffered by the abuse survivor when s/he was not a prisoner; c) a component for the payment of existing and future medical costs; and d) a component for legal costs.[8]

A further issue for survivors of historical child abuse with settlements subject to Part 9C of the Act is delay in payment. As stated above, the award of damages requires court approval, with the amount, or apportioned amount, of any award of damages to a prisoner in respect of a civil wrong being paid to the Secretary to the Department of Justice and Community Safety immediately after the damages are awarded.[9] Where payments are apportioned between institutional and prison abuse, abuse survivors are not given access to any of the monies until approval of the settlement by the Court, and then need to await the 12-month quarantining period in respect of the quarantined funds.

We also consider there is uncertainty in relation to the application of s104P where clients are on remand and then subsequently imprisoned, sometimes years later, in relation to unrelated offences.

For example, we act for a client who was on remand to Pentridge when allegedly sexually and physically abused, and was subsequently imprisoned in respect of completely unrelated offences some years later. The lawyers for the State have argued that the offence which sent our client on remand, and subsequent imprisonment, do not need to be for the same offence given section 104P of the Act provides that the quarantine fund applies to a claim arising out of a period of remand if the prisoner is subsequently sentenced to a term of imprisonment, whether or not that term of imprisonment is in respect of the offence for which the prisoner was on remand. This has the harsh consequence that our client’s settlement monies are likely to be quarantined, even though he was only on remand at Pentridge when abused as a child, because he was convicted of unrelated criminal offences and imprisoned in his adult life.

We respectfully submit that the unintended effect of Part 9C of the Act on historical institutional abuse survivors is that it effectively punishes them and treats them less favourably than abuse survivors without criminal records, and denies them timely access to settlement sums.

The Corrections Act and Part 9C of the Act have retrospective application. However, the provisions did not even exist when our clients and other abuse survivors were abused as children in Pentridge. The Act is therefore adding unnecessary complexity and unnecessary barriers to recovery of compensation by survivors of historical child sexual abuse, which stands in marked contradiction to the government's commitment to enabling victims of historical abuse to finally obtain compensation on just terms, as supported by reforms to the *Limitations of Actions Act* 1958 (Vic) – to remove time limits for claims involving child abuse, and to allow revisits of past

[8] See also S104T *Corrections Act 1986* (Vic)
[9] S104V *Corrections Act 1986* (Vic)

judgments or settlements when it is just and reasonable to do so – together with the suite of reforms since the handing down of the Betrayal of Trust Report following the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations.

A potential reform we respectfully consider your Department could canvas would be to exclude survivors of historical institutional abuse from the application of Part 9C of the Act, by amending the *Limitations of Actions Act 1958* (Vic). We consider that such a reform would be consistent with the nature of recommendations of the Betrayal of Trust Report and the Royal Commission into Institutional Responses to Child Sexual Abuse.

Analogous Reform

We note that the *Civil Liability Amendment (Child Abuse) Bill 2021* (NSW) recently introduced to the NSW Parliament, proposes reform to retrospectively ensure that Part 2A of the *Civil Liability Act 2002* (NSW), which deals with personal injury claims by offenders in custody, does not apply, and is taken never to have applied, to child abuse-related injuries. Historically, the provisions in Part 2A have operated to restrict damages awards for child abuse in New South Wales where the abuse occurred in custody, by limiting the damages recoverable for personal injury sustained in custody, even where that injury was the result of child abuse in custody prior to 2018.

Whilst Victoria does not have this restriction on damages for offenders in custody in terms of civil liability, we consider the *Corrections Act* provisions above are similarly unjust, in terms of discriminating between abuse that took place in custody and abuse that did not, and require immediate review with a view to reform.

Conclusion

We look forward to receiving your response and would welcome the opportunity to discuss the above further.

Yours sincerely,

Penny Savidis

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