SHINE LAWYERS

RIGHT WRONG.

LA LSIC - FORCED ADOPTIONS INQUIRY
SUBMISSION NO. 42
RECEIVED 04 MARCH 2020

4 February 2020

The Committee Manager
Legislative Assembly Legal and Social Issues Committee
Parliament House of Victoria
BY EMAIL: forcedadoptionsinquiry@parliament.vic.gov.au

Dear Committee Members

Inquiry into Responses to Historical Forced Adoptions in Victoria

We refer to the Victorian Legislative Assembly's 'Inquiry into Responses to Historical Forced Adoptions in Victoria' and the call for submissions from interested parties that address the broad terms of references that have been put to the committee.

Shine Lawyers is one of the largest personal injury law firms in Australia and have extensive experience in personal injury litigation. This currently includes acting on behalf of and providing advice to mothers and children who were directly affected by historical forced adoptions in Victoria. Given our representation of people directly affected by forced adoptions we have an understanding of the injurious affects this practice has had on people such as our clients. Our work on behalf of these citizens also puts us in a position to understand the legal barriers being used to deny appropriate acknowledgement of, and compensation for, the injuries they have sustained.

In preparing this submission we have examined the barriers to civil justice that our clients are currently facing, barriers which exacerbate the feelings of powerlessness and humiliation these people felt at the time they were subjected to the forced adoption practices. We make two particular submissions as to legislative amendments that could be made to reduce these barriers to allow quicker, more dignified access to justice.

13 11 99 shine.com.au

Shine Lawyers Pty Ltd
ABN 86134702757

PO Box 18
DANDENONG VIC 3175001

DX 17510 DANDENONG VIC

Level 6, 277 William Street
MELBOURNE VIC 3000

Phone (03) 9616 4200

Barriers to claims made by mothers whose children were forcibly adopted

Inquiries such as this will usually hypothesise about whether statutory or private redress schemes are an appropriate mechanism to acknowledge and compensate those affected by systemic practices that have caused harm. We echo the statement at Paragraph 11.27 of the *Commonwealth Contribution to Former Forced Adoption Policies and Practices* Report that where such schemes have been implemented in the past they have fallen short of victim expectations regarding the handling of their complaint and the compensation awarded for their injuries. Whilst we believe that the recommendation made in that report for the implementation of a grievance mechanism and the availability of redress (Recommendation 12) is a form of access to justice that some affected citizens may prefer to utilise, we strongly endorse the second part of that recommendation that access to or compensation received through such a mechanism not be conditional on waiving rights to legal action.

The ability of an injured person to seek redress for their loss of earning capacity, payment of their medical needs and compensation for their pain and suffering is a right all Victorians have. The use of civil litigation and the Victorian Courts to attain justice is, although daunting, a cathartic experience to those have been harmed at the hands of another. To 'have your day in Court' is to be able to put forward your story, put forward your evidence in support of that story and seek to be vindicated in the eyes of the law and independently of the institutions, government or private, that perpetrated the wrong.

Our submission proceeds on the basis that the ability to bring a civil claim must be maintained. Our suggestions are to remove two barriers to justice that we believe cause further harm to those attempting to 'have their day in Court'. We believe these two changes are appropriate responses that the Victorian Government should make in light of the lifelong effects the forced adoption practices has had on those people

Each of the proceedings we have brought on behalf of our clients affected by the forced adoption practices have been defended. These claims have been made against public hospitals and private agencies that facilitated the adoptions.

Leaving aside arguments as to the nature of, or consent to, the adoptions taking place, two issues, one a procedural step which characterises the nature of compensation that could be sought, the second an issue whether the Courts have jurisdiction to hear the case at all, have been raised in most of these cases.

Use of the Limitation of Actions Act 1958 (Vic)

The first issue, that which affects whether the Courts are able to hear and decide on the case, is an issue raised in the Commonwealth equivalent of this inquiry, that of the use of the Statute of Limitations legislation.

Some defendants, including the public hospitals, are defending our clients' claims on the basis that they are statute barred due to the operation of the *Limitation of Actions Act 1958* (Vic) ("the LAA").

Part IIA of the LAA provides that a claim for personal injury must be commenced within 3 years of the date of injury (or, in the case of person under a disability at the time their cause of action arose, 6 years from when they ceased to be under that disability). Failing to institute proceedings within that period results in the plaintiff being barred from prosecuting proceedings in relation to their injury.

The regularity of the practice of forcibly adopting out children of, particularly, underage and/or unwed mothers, a practice which occurred between the late 1950s to the mid-1970's according to the Senate Enquiry Report, left those affected as believing that there was no recourse or right to challenge the practice.

Given that most women affected by the practice were;

- under the age of 21 years;
- were ostracised by their families;
- criticised by those who knew of their "immorality" for falling pregnant outside the accepted norms; and
- treated by those who were to care for them through their pregnancies and the delivery of their children as lesser people,

the probability, and financial ability, to seek legal advice at the time of their forced adoption must have approached nil.

The ability of an affected child to know or understand the practice that led to them to be adopted is, similarly, a significant obstacle to seeking advice or prosecuting a claim.

Such defences in the claims we are conducting have asserted that because our clients haven't brought their claims within the timeframes outlined above that they are forever barred from having their cases heard, let alone have any chance of proving that their adoptions were forced upon them illegally and to be compensated for such an inhumane yet common practice.

In 2012, the Commonwealth report into forced adoptions policies and practices urged the states to examine the statutory limitations to actions to ensure those affected by these practices were not hindered in their ability to prosecute such claims to bring the responsible organisation to account. It was recommended that such a legal technicality should not be used, in and of itself, to further damage an applicant seeking justice.

We emphasise that the process of overcoming such an argument is costly, time consuming and will usually subject the applicant to additional excessive scrutiny. Given what we have outlined above regarding the circumstances our clients and other affected people were in at the time they were subjected to these practices, we don't believe, and submit that it should not be, possible for a defendant to eliminate a claimant's rights on this basis alone.

In July 2015, this Parliament enacted the *Limitation of Actions Amendment (Child Abuse) Act 2015.* This removed the limitation periods that applied to proceedings in respect of claims that relate to death or personal injury resulting from child abuse. Although we note that nothing in this legislative amendment limited the Supreme Court's (or other Victorian courts') inherent jurisdiction to decide whether a defendant is unfairly compromised in their ability to defend a claim due to the passing of time and consequent loss of evidence or witnesses, it has allowed those effected by historical child abuse to seek recompense without firstly having to risk the termination of their rights on a technical legal point alone.

We urge the Committee to recommend the removal of the Statute of Limitations as a bare technical defence to a claim available to a defendant organisation in relation to alleged forced adoptions. We believe it be to a justified Government response to this issue that will reduce the potential of further suffering of our clients affected by the practice, an acknowledgment of the vulnerable situations they were in when subjected to the practice and necessary to enable proper acknowledgement and compensation for the lifelong loss they have suffered as a result.

The significant injury test and Defendant appeals to the Medical Panel

As with most personal injury claims that are made under the *Wrongs Act 1958* (Vic) ("the Act"), our clients are required to prove that they have suffered a significant injury as a result of the actions they were subjected to in order to be able to claim compensation for their pain and suffering.

Given our client's claims are generally based on the psychiatric injuries that they have suffered as a result of their forced adoptions, they must be shown to have a suffered a whole person impairment of 10% or more when assessed in accordance with the *Guides to the Evaluation of Psychiatric Impairment for Clinicians* ("the GEPIC") in order to be considered to have a significant injury in accordance with the Act.

In order to do this we must have our clients' assessed by an appropriate medico-legal psychiatrist qualified to provide such an assessment.

The Act provides that, once this assessment is served on a defendant along with particulars detailing the allegations being made against that party, the defendant then has the ability to refer the assessment for review by the Medical Panel. The Medical Panel will provide a binding assessment of the plaintiff's impairment which will in turn decide whether the plaintiff has the ability to seek compensation for pain and suffering.

For most clients, no matter the basis of their allegations in negligence, the process of being assessed and then being forced to revisit the initial assessment with a Medical Panel is a stressful process. For those with psychiatric injury the process regularly sees an escalation in symptoms and the desire to withdraw from the process. This additional trauma caused by

having the severity of their injuries challenged and being forced to again validate the legitimacy of their injuries is significant and engenders in them a feeling that they are again being marginalised.

We urge the Committee to recommend the removal of this procedural barrier to those affected being fully compensated for the trauma and loss they have suffered, no matter how it may rate in accordance with the GEPIC.

Certain categories of injury or circumstances resulting in injury are exempted by the Act from the requirement to prove that the injury is significant before being able to claim compensation for pain and suffering.

Section 28LC (2) of that Act excludes claims where the injury is as a result of:

- an intentional act done with intent to cause death or injury or that is sexual assault of other sexual misconduct;
- claims made as a result of a motor vehicle accident or industrial accident; and
- claims concerning asbestos-related injuries.

We submit that injuries caused to a mother or child as a result of forced adoption practices are suitable to be added to this subsection as injuries which do not require proof of having suffered a significant injury before being eligible for pain and suffering compensation.

Further, Section 28LF (1)(ca) deems that "psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth" as a significant injury. "Loss of a child" is not defined by the Act. We believe an alternative method available to remove the significant injury barrier is to include forced adoption as "an injury to the mother or the foetus or the child before, during or immediately after the birth" and that the "loss of child" be defined to include the forced adoption of the child.

No matter the method, we urge the Committee to recommend the removal of the significant injury test as a barrier to justice and source of further harm that those injured by the forced adoption practices currently face.

Conclusion

The ability for the people we now act for in these cases to come forward has been difficult. The effects of the practice on them is lifelong and for a long time they were ignored, belittled or told that it was the best thing for them and their children. The apologies made by Federal and State Parliaments, those made by welfare institutions and religious organisations and made on behalf of public hospitals involved in forced adoption practices has provided some acknowledgement of their individual and collective losses.

However, to allow the usual barriers placed before plaintiffs in personal injury litigation to be used against a group of people such as this is to allow a former injustice to solidify and further damage those affected.

We urge the Committee to recommend:

- the removal of the limitation of actions defence in the same way as it was for survivors of sexual abuse; and
- the removal of the requirement to prove a significant injury has been suffered as a result of the forced adoption.

We believe both changes can be implemented easily without destroying the ability of a defendant to have a fair trial and are appropriate responses to allow better access to justice to those harmed by the practice.

Yours faithfully

[redacted]

Emma Hines
General Manager Victoria
SHINE LAWYERS

[redacted]

Cameron Tout
Senior Associate | Legal Practice Manager
SHINE LAWYERS