T R A N S C R I P T

LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Responses to Historical Forced Adoptions in Victoria

Melbourne—Wednesday, 10 March 2021

MEMBERS

Ms Natalie Suleyman—Chair
Mr James Newbury—Deputy Chair
Ms Christine Couzens
Ms Emma Kealy
Ms Michaela Settle
Mr David Southwick
Mr Meng Heang Tak

WITNESS

Cameron Tout, Senior Associate and Legal Practice Manager, Shine Lawyers

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The CHAIR: I acknowledge the traditional owners of the land on which we are meeting. I pay my respects to their elders past and present, and the Aboriginal elders of other communities who may be here today. I declare open the public hearings for the Legal and Social Issues Committee's inquiry into responses to historical forced adoptions in Victoria.

My name is Natalia Suleyman, I'm the member for St Albans and the Chair of the Committee. To my right is Michaela Settle MP, the Member for Buninyong, David Southwick MP, Member for Caulfield, Christine Couzens MP, the Member for Geelong and Meng Heang Tak MP, the Member for Clarinda. All evidence taken by this committee is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and say the same things—including on social media or any other platforms—this privilege may not be protected.

All evidence given today is being recorded by Hansard and you will be provided with a proof version of the transcript as soon as it's available. Any transcripts, PowerPoint presentations or handouts will be placed on the Committee's website unless confidentiality has been requested. The Committee is interested in hearing about your experience of forced adoption, and in particular if there's any issues, services, and most importantly, any outcomes you would like to see in the inquiry. I now invite you to provide a brief opening statement to the committee which will be followed by questions from the committee members. And please state your name for the record.

Mr TOUT: Yes, no worries. So my name's Cameron Tout, I'm the special counsel and practice manager at Shine Lawyers, Melbourne office. Thank you for inviting me here. As I said before, it seems strange that it's been 12 months since we wrote those submissions all that time ago. I start by saying, I understand that many of the victims of forced adoption have been before you and given evidence. And I think most powerfully their experiences are best described by them, so I don't intend to go through what they've been through and what they were subjected to. Similarly, there've been a number of inquiries, committees, apologies into forced adoption practices historically and so I've prepared on the basis that I won't go through what they were subjected to, what we know, what's been proven or what's been shown previously.

So Shine Lawyers, as far as I'm aware, in Victoria we're the only firm that is acting on behalf of victims of forced adoption. We currently have about 15 clients—predominantly mothers, some children. We regularly receive feedback from these clients to say that although there have been apologies, although there has been Commonwealth funding for counselling, that they come to us because they feel like there's something left undone, or some justice that hasn't quite come out of the process so far. I don't want to rehash my submissions and just reread them, but I thought I'd sort of explain them a bit better or expand upon them in some way. But what those submissions really focused on was two significant barriers that each of the people we help are meeting. And there are a few cases that have progressed the furthest, and these are sort of the recurring themes we're seeing.

The first one is in relation to limitation of actions. So limitation of actions provides that there's a set period of time that a claim can be brought. And if a claim is brought outside that time, a defendant will raise the Limitation of Actions Act to say that the claim can't progress any further. It won't go to a hearing, it has to be stopped then and there. Because we're dealing with incidents that happened between 1958 and early 1970s, the limitation for these types of claims—public liability claims generally—is three years. So in most cases these claims are effectively somewhere between 50 and 63 years out of date. Not all defendants are raising the limitations but in every case that I've seen so far it has been raised by at least one of the defendants. So in my submissions—in my written submissions—I took the stance that we feel like being able to raise a limitation defence is unjust in these circumstances.

We're dealing with people who—talk about the mothers, were generally under twenty-one years old when these things happened. They were regularly ostracised from their families, subjected to criticisms for being unwed and pregnant, treated as outcasts by family, they were hidden from community, neighbours, et cetera. Financial ability to seek any advice was essentially non-existent. So the story I hear—and I'm sure you've heard it a number of times through this—is that what they were told at the time of giving birth, and shortly thereafter, was that there was no option. This was what had to happen. And they weren't given the options, they felt like they

had no option but to give up the baby. And ones that do say, 'Well I did resist it,' they were ultimately put under enormous duress.

And again, I won't rehash what's likely been said before, but some of the things they were told were utterly incomprehensible today, as to why they should not keep, why they needed to adopt out their baby. So the Commonwealth report into forced adoptions back in 2012 made a recommendation that the states look to avoid allowing the legal technicality such as a limitation date to be a barrier to seeking justice and in turn do further damage to those affected. So I think my submissions really bat along the same line. In Victoria, we've fairly recently had the amendment to the Limitation of Actions Act to do with child abuse victims, to remove that limitation date. And so given the circumstances of particularly the mothers and the children at the time this happened, what they were subjected to, their situation, there are some parallels as to their powerlessness at the time.

It's only in the last 10 years or so been acknowledged that this was happening and then to say that they can't bring their claim because it's been too long since it happened, we think is unjust, in those circumstances. The child abuse amendment didn't remove the court's inherent ability to say a defendant can't defend the claim. Sorry, to say the defendant can't defend the claim adequately because evidence has been lost over time. So the court still holds that power, but what this amendment did was mean that this initial barrier to a plaintiff being able to bring the claim was removed and the burden of proof then fell on the defendant to say, 'Well the time that has passed now means that we can't defend this claim properly or adequately.'

So we believe that a similar amendment to the Limitation of Actions Act is appropriate for the mothers and children who were subjected to forced adoption practices between well, you know, 1958 to the early seventies when they were regularly occurring.

The second part of my submission—or Shine's submission—had to do with the significant injury test. So under the Wrongs Act, in order to bring a claim for pain and suffering you need to show you have a significant injury. And what that entails for particularly this class of client is a psychiatric impairment of 10 per cent or more in accordance with something called the Guides to the Evaluation of Psychiatric Impairment for Clinicians. And if a plaintiff doesn't meet that threshold, they don't have the ability to bring that claim at all for pain and suffering. The conversations—and I've had direct feedback from some psychiatrists who were engaged to do these assessments is that those guides that are used, they're perfectly fine if the injury happened two, three, four, five, six years ago.

When you're dealing with someone who was injured 50 to 65 years ago, being able to say that this is the impairment that resulted from the adoption and disentangle that from everything that might've happened in the last 50 to 65 years is near impossible. Psychiatric injuries are cumulative and stripping them out is very difficult to do. So we don't think the significant injury test, we think it's almost an unfair barrier for something that happened so long ago. The significant injury test and the process also has the ability for—where a plaintiff has been assessed as meeting this significant injury threshold—where a defendant can then refer it to a medical panel. So they're a medical tribunal, and they redo the assessment. And essentially what they say goes. If they say it meets the threshold it's accepted, if they say it doesn't then they fall below it, they can't bring the claim for pain and suffering anymore.

And the problem or the commentary I've had from clients who have been through that process—sorry I should go back a step. It's on the defendant to make that referral to the medical panel. So in cases where—I won't name names—but a claim's brought against a particular defendant for their involvement in the forced adoption, the client who felt very powerless all that time ago at the hands of this organisation gets to this stage of the process and then they feel like effectively they are being challenged as to what effect this injury or the forced adoption has had on them. And again, they feel powerless about it. And it makes them question whether they want to go ahead with it anymore, whether they should go ahead with it. Whether all the problems I've talked about using these guides—for an injury that happened so long ago—is just really going to make matters worse for them, not better.

So there are two parts of the Wrongs Act which apply to significant injury certificates and when they're required.

There are two parts that say, 'In certain circumstances they're not required.' Section.28-LC provides there are certain categories of injury—or the manner of injury, where this process isn't required. The person can just

bring their claim for pain and suffering. An example is intentional torts, so your sexual abuse cases for example. In s.28-LF of the Wrongs Act there's an additional provision which says that where there is an injury to a mother due to the loss of a child—either before, during or immediately after birth—that they don't need to get a significant injury certificate. And that's commonly used in say medical negligence type cases. The loss of a child isn't defined in the Act. So there are two sections of the Act where we think that this sort of scenario could easily be fit into to avoid the need for these mothers and these children to go through the significant injury process and sort of further, in some ways almost damage them.

But I mean there's nothing worse than telling a mother of a forced adoption that the psychiatrist can't assess their injury properly, despite the fact we know how horrible it would be to lose a child, or they're being sent to the medical panel. I mean that's the worst advice I think I ever give because it just seems almost nonsensical to them, and then to me sometimes as well.

In the written submission I only touched upon a redress scheme as being a possibility and although I think there is a place for it, I feel like there is a place for it but not at the expense of them being able to—a forced adoption victim—being able to bring a claim through court. But there are categories of victims where, particularly because of the passage of time, evidence is lost. And the worst ones are the adoptee, where they come and talk to me and they've got all the records.

I mean I can see all the common factors, I can see the same hospitals, I can see the same unwed mothers homes that the mum went to, can see the same agency, I can even see the same worker who witnessed the signature on the adoption form, but the mother's passed away. And so the evidence around what they went through at the time and whether it was forced or not is lost. And that might be despite a letter that was written that says, 'This is what I was subjected to and this is what happened, and this is why you're adopted.' Or a relative who says, 'Your birth mother told me this is what she went through.' All that evidence is really lost and it can't be used in court proceedings. So there is a category of people where, that is a category of people where I believe something like a redress scheme would enable some access to justice despite the problems with evidence law and being able to bring the claim through the courts.

The other class of people are those mothers who still feel almost the same way, or still believe what they were told back then. And the idea of going through court is just as traumatic as not doing anything at all. So I think there is a place for it, but the two biggest barriers that we give advice on are the Limitations Act and that barrier that it causes, and the significant injury process. And the problems with both the assessment and the appeal process, going through the medical panel. I believe that's all I've got, and I don't know if I've gone over time, I'm very sorry.

The CHAIR: No you're fine, thank you. Now this gives the Committee members an opportunity for questions. Michaela?

Ms SETTLE: Unintended consequences, that's something I've learnt in this business. With regards to the removal of the statute of limitations—forgetting a consequence being that people would be sued—can you perceive any way that this could go wrong in legislation, and has anything gone wrong in the 2015 removal of it for sexual abuse survivors?

Mr TOUT: Not that I know of. And there's certainly been some court judgments where the defendant has said that chief witnesses—or even the defendant, in an institutional setting—the perpetrator has passed away. And so our ability to defend the claim has been lost. So with the inherent jurisdiction of the court, and despite the removal of limitation today, there was an application in a particular case that comes to mind where the defendant made that application. And said, 'Despite that we can't proceed and the claim should be stopped.' And that application was successful, so the court believed in those circumstances it was unjust on the defendant to try to defend a claim with key evidence and key witnesses missing.

In the cases that I've got, where particularly the—or where the mother is still alive, and still able to give evidence, it's almost the last piece of the puzzle in these cases because the adoption process is so, or was, probably more paper heavy now but back then there was still a lot of paperwork created, went through the County Court. There are still a lot of documents that we can get a hold of, and the main facts about when it happened, where it happened, where the adoption took place, who witnessed the signature, et cetera—coupled with the mother's evidence—means a lot of that evidence has been retained. And we've had some conferences with defendants where they say the witness, which is say a social worker, we've tracked them down. They're

still alive, they can give evidence. So the difficulty I foresee would be in cases where a main witness to an adoption consent or to the affidavits that were put into court where that witness is no longer with us, that would be more difficult for a plaintiff because the court's inherent jurisdiction will be, 'Is the defendant at such a disadvantage that they can no longer defend this claim properly,' and if the justice is no longer served.

Ms SETTLE: I'm no lawyer but it seems to me when they're—perhaps if we're talking around, you know, one of the big agencies for example, how do you establish force and isn't it easy for the big agency to say, 'Well that was Bloggs who was looking after the woman at the time' - - -

Mr TOUT: Yes.

Ms SETTLE: - - - rather than an institutional responsibility for the forced nature of it, how do you establish that?

Mr TOUT: Yes, that's a good question. That comes down to things like vicarious liability as well. And there are and there will be arguments about whether or not the actions of an employee fall within the scope of their employment. So, is the agency responsible? I mean that is a theme, and it's a common theme. Not raised by all of them, under all of the agencies that we're dealing with.

But at the other end of the scale, where we have been told, well, the witness is still alive. And the response is, it was the best thing for them. Some of these thoughts are still with them. That it was the best thing for them, despite everything we know. So, it's not an easy thing to prove. I mean, it relies on memories. It relies on memories from a very long time ago.

Ms SETTLE: Yes.

Mr TOUT: If a court were weighing it up, they would weigh up whether or not the testimony, particularly of the mother, whether or not their recollection of what happened that day is going to be more reliable than the memory of the witness who did this multiple times for the taking of witness - - -

Ms SETTLE: It's sort of the test of force. I mean, we have heard from some people that they were, you know, physically restrained. So, those records sit there. But what is force when you're just coerced and coerced and given an opioid before you sign the documents, or, like, how do you - how do we - - -

Mr TOUT: Yes. So, I mean, I guess that the difference would be between enforce and duress. So, enforced would be physically forced, or psychologically forced. A step down from that is duress. And that's the basis of a number of our claims. So, it is the duress a feeling that there is no other option, that you have no choice but to do this.

And, I mean, some of the stories I've heard is, if you don't sign this, you can't go home. If you don't sign this, your baby will be in foster care until they're 18. So, in those situations it may not be force as defined, but it would be duress. Duress without being provided advice about the other options that are open. So, yes, a number of our cases rely on an allegation of duress. What were they put under, without it being to the extent of forced, but under duress, to sign this paperwork, to not return the signed revocation within the 30 days.

I note that's where we sit with a lot of these cases.

Ms SETTLE: But then it's just he said she said.

Mr TOUT: And a lot of our cases—and a lot of cases end up being like that. And sexual assault cases are very similar, and it comes up to a weighing of evidence. Does the judge or does the jury accept what the mother says, do they think that's reliable evidence? Or do they accept what the witness to the signature says? Or something like that.

Ms SETTLE: Would you be able to take, you know, you said, you see the same signatures in the same organisations. Can you take that, like, prior convictions, can you say - - -

Mr TOUT: Yes - - -

Ms SETTLE: - - - I'm representing Lady A, but I can tell you that - - -

Ms COUZENS: There's 30 others exactly the same.

Mr TOUT: That are exactly the same. So, I mean that would fall within propensity evidence. Which technically speaking, isn't admissible. And in fact, there was a very good article in the Age on Saturday by Rachel Doyle, senior counsel, about workplace sexual harassment. And she was talking about propensity evidence. If I allege that so and so did this to me, and it's my word versus their word, should that evidence be allowed? To say that, well, this person has a history of it, or this is their propensity. So, you know what I mean, it's probably a very nuanced question, a very vexed question, as to whether or not that propensity evidence should be allowed in.

Ms SETTLE: Given it's institutional, I would have thought that it should. I get it when you're protecting someone's prior—but if it's institutional, then no.

Mr TOUT: Well, yes, and it comes into the exception to the rule, sort of thing. If there was 30 people in a row that say this particular person witnessed my signature, and this was the duress I was put under, and then there's one who says, no, I did it willingly, does that affect the ability to bring that propensity evidence. So, it's very nuanced.

Propensity evidence tends not to be admissible in most circumstances. Which, sort of goes to what I was saying about the redress scheme as well. We see the hallmarks, we see the same institutions, organisations, the same signatures on the affidavits and on the witness to the consent form.

And without the mother, that could have been anything. That could be it was forced, or it wasn't forced. They're the hardest cases I advise on, because I can say, and I can see the fingerprints of what happened. As in, the mother was the right age and was in the right time frame, but that crucial bit of evidence as to the experience of the person who was being talked to, who was being told what their options were, or what their options weren't, it's lost.

So, yes. It would make life easier if propensity evidence was allowed. But it certainly wouldn't be—it wouldn't take what we have to go through to prove what we need to prove in one of these cases.

Ms SETTLE: Yes.

The CHAIR: Okay. Christine, you had a question?

Ms COUZENS: Yes, thanks Cameron. And you've answered a few of the questions that I had. And just in that discussion around courts being involved, it sounds to me like it would be more traumatic for that mum to go through a court system where, you know, it's based on he said she said sort of stuff. But anyway, I mean, that's just a comment from me, just - - -

Mr TOUT: Well, I can say that—and this is not all of the clients, certainly some of them feel like that is a big barrier.

Ms COUZENS: Yes.

Mr TOUT: We don't actually take that last step and step into a court room. For some of them it's very cathartic. And some of them have said, we'll just continue until I get to that point, because I want to tell my story, just as some of the mothers coming in here have said that to me as well—I just want to tell my story. I want it to be believed that this is what I went through. Sorry, I interjected there.

Ms COUZENS: No, that's fine.

Mr TOUT: That wasn't the question.

Ms COUZENS: No. Thank you for that comment. I suppose the only other thing I was interested in—so, you've got 15 clients in relation to historical forced adoptions. Are they referred to you by the agencies out there that are working in this space? Or are they just coming to you off their own bat? And given that, is there any form of counselling involved when they're sitting down telling you their story?

Mr TOUT: So, no. We don't get referrals from any outside agencies.

Ms COUZENS: Okay.

Mr TOUT: So, big ones like VANISH is one I'm sure you've heard of.

Ms COUZENS: Yes.

Mr TOUT: And—so, no. We don't get any referrals. It started with two particular—three particular clients, three particular mothers, who came to us and I think it was just not long after the apologies.

Ms COUZENS: Okay.

Mr TOUT: And it started with them. And from there, I mean there has been some media around a couple of those mothers in particular, which has driven enquiries. Some of them are other mothers of forced adoptions that have put someone else that they know in contact with us. So, in terms of counselling, I believe it was the Commonwealth—Public Commonwealth Apology was free access to counselling.

Ms COUZENS: Yes.

Mr TOUT: And not everyone has taken advantage of it, and it's something I'm very conscious of. And I think every interview with a potential new client that I speak to starts with, 'I'm going to let you tell your story. It's probably, maybe the first time you've spoken about it for 50 years, and I don't want you to relive it or re-traumatise yourself, and we can stop at any time'.

Because I've had some people who have despite the warning, and despite the suggestion we break it up, they push on through, and then I get it—I can get a phone call or make a phone call a week later, and they're very much worse for wear as a result of talking about it again. So, there is counselling out there. How well known it is I'm not sure, I think it tends to be those who are involved in the movement around forced adoptions early on that went and saw the - went and heard the apology, they're involved in groups like VANISH. They tend to be the ones who do utilise it and know about it and utilise it.

There are plenty of mothers and children out there and some of the ones I've spoken to who probably didn't know any of this was going on in the background, and therefore haven't accessed it. And hopefully, I've talked them into—they are accessing it, or at least speaking to their own doctor to access appropriate help.

Ms SETTLE: Okay, great. Thank you.

Mr SOUTHWICK: Can I just ask a very quick one?

The CHAIR: Go on, David.

Mr SOUTHWICK: Sorry. In terms of a national redress scheme, and I know that you'll probably give a long answer to this, but could we model a national redress—sorry, a redress scheme like the national redress scheme for child abuse? Would that be a simple way - - -

Mr TOUT: It—the national redress scheme for child sexual abuse—it has its critics.

Mr SOUTHWICK: Yes.

Mr TOUT: And I think one of the big criticisms I hear out of it—there's a couple of criticisms I hear, but I mean one of them is that everyone is categorised by the nature of the offence that was committed to them. And it's things like, is it penetration and was it coupled with abuse outside of that, for example. And the conversation that flows with it is very much related to what that offence is and not what the outcome is for the victim.

I mean, it certainly has its positive parts, and for some people it is the way to go. They don't want to see a lawyer. They don't want to go to court. They don't want to see the person they've accused of performing these acts on them. And for some people, that is the way to feel some sort of redress or some sort of justice out of it. And the sexual assault redress scheme has an independent mediator - - -

Mr SOUTHWICK: Yes.

Mr TOUT: - - - mediator isn't the right word. But someone independent of the parties who correspond with each other.

Mr SOUTHWICK: Yes.

Mr TOUT: And so, there'll be, say, for example, an apology from the institution, a written apology that comes through the independent body to the victim, as well as assessing what compensation they're entitled to. The concerns with the scheme—one is the categorisation as being almost the sole manner of assessing injury or assessing compensation, and we can miss the different effects on different people.

The other problem that has been raised is where, in terms of the advice given, or something signed off by the applicant to say I will go and get legal advice before I sign this. It's a tick and flick. And for some people, particularly in that scheme, if they get under a redress scheme an offer for $50,000 or $70,000 and they see that, their eyes light up and they sign off and say, yes, I've sought advice, and then shut themselves off to being able to get advice or to understand whether or not they have a common law claim. They're bound by that. So, that's another sort of criticism. The national scheme would be a good starting point - - -

Mr SOUTHWICK: Yes.

Mr TOUT: - - - for a redress scheme, but I think there are tweaks to it that can be made for people who go through it to feel like they're being better heard, better understood, better compensated as a result. I think there is a way—I think there is a need for it.

The CHAIR: Well, thank you very much Cameron - - -

Mr TOUT: Thank you.

The CHAIR: - - - for presenting to us today. The next steps will be that we'll continue to deliberate on all the evidence. That will take part in the final report that will be handed to parliament before 1 July. And if you'd like to keep up to date with the committee's progress, there's information on the web page - - -

Mr TOUT: Yes.

The CHAIR: But also, you're more than welcome to reach out to the secretary or any committee members. Again, thank you very much for your evidence today, and on that note, that concludes the Committee's meeting for today. Thank you.

Mr TOUT: Thank you.

Ms SETTLE: Thank you.

Mr SOUTHWICK: Thank you.

Mr TAK: Thank you.

Ms COUZENS: Thank you.

Witness withdrew.