

# REDRESS AND CIVIL LITIGATION REPORT



**Royal Commission**  
into Institutional Responses  
to Child Sexual Abuse



ISBN 978-1-925289-28-2

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# REDRESS AND CIVIL LITIGATION

Report



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# Preface

## The Royal Commission

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The Letters Patent provided to the Royal Commission require that it ‘inquire into institutional responses to allegations and incidents of child sexual abuse and related matters’ (see Appendix A). In carrying out this task, the Royal Commission is directed to focus on systemic issues, be informed by an understanding of individual cases, and must make findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse on children when it occurs. The Royal Commission does this by conducting public hearings, private sessions and a policy and research program.

## Public hearings

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A Royal Commission commonly does its work through public hearings. We are aware that sexual abuse of children has occurred in many institutions, all of which could be investigated in a public hearing. However, if the Royal Commission were to attempt that task, a great many resources would need to be applied over an indeterminate, but lengthy, period of time. For this reason the Commissioners have accepted criteria by which Senior Counsel Assisting will identify appropriate matters for a public hearing and bring them forward as individual ‘case studies’.

The decision to conduct a case study is informed by whether or not the hearing will advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes so that any findings and recommendations for future change that the Royal Commission makes will have a secure foundation. In some cases the relevance of the

lessons to be learned will be confined to the institution the subject of the hearing. In other cases they will have relevance to many similar institutions in different parts of Australia.

Public hearings are also held to assist in understanding the extent of abuse that may have occurred in particular institutions or types of institutions. This enables the Royal Commission to understand the way in which various institutions were managed and how they responded to allegations of child sexual abuse. Where our investigations identify a significant concentration of abuse in one institution, the matter may be brought forward to a public hearing.

Public hearings are also held to tell the story of some individuals, which assists in a public understanding of the nature of sexual abuse, the circumstances in which it may occur and, most importantly, the devastating impact that it can have on some people’s lives.

## Private sessions

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When the Royal Commission was appointed, it was apparent to the Australian Government that many people (possibly thousands) would wish to tell us about their personal history of child sexual abuse in an institutional setting. As a result, the Commonwealth Parliament amended the *Royal Commissions Act 1902* to create a process called a ‘private session’.

A private session is conducted by one or two Commissioners and is an opportunity for a person to tell their story of abuse in a protected and supportive environment. Many accounts from these sessions will be recounted in a de-identified form in later reports.

## Policy and research

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The Royal Commission has an extensive policy and research program that draws upon the findings made in public hearings, survivor private sessions and written accounts, as well as generating new research evidence.

Issues papers, roundtables and consultation papers are used by the Royal Commission to consult with government and nongovernment representatives, survivors, institutions, regulators, policy and other experts, academics and survivor advocacy and support groups. The broader community has an opportunity to contribute to our consideration of systemic issues and our responses through our public consultation processes.

The Royal Commission considers and draws upon the significant body of information identified through our activities. This enables us to develop recommendations in response to our Terms of Reference.

## This report

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As set out by the Letters Patent, any report published prior to our final report, which is required to be submitted to the Governor-General by 15 December 2017, will be considered an interim report.

However, this report contains the Royal Commission's final recommendations on redress and civil litigation. It is based on laws, policies and information current as at 30 June 2015.

This report addresses part of paragraph (d) of the Letters Patent, which requires the Royal Commission to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

The Royal Commission has examined the extent to which 'justice for victims' has been, or can be, achieved through previous and current redress processes and civil litigation systems.

This report contains recommendations in relation to the provision of effective redress for survivors through the establishment, funding and operation of a single national redress scheme and the provision of a direct personal response to survivors by institutions. This report also contains recommendations for reforms to civil litigation systems to make civil litigation a more effective means of providing justice for survivors.

The Royal Commission is investigating criminal justice issues (including processes for referral for investigation and prosecution) and support services separately. We will report in relation to them in later reports.

# Executive summary

## Introduction

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The Letters Patent provided to the Royal Commission into Institutional Responses to Child Sexual Abuse require that it ‘inquire into institutional responses to allegations and incidents of child sexual abuse and related matters’.

Under paragraph (d) of the Terms of Reference we are given in the Letters Patent, we are required to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

From an early stage, the Commissioners agreed to endeavour to make recommendations on redress and civil litigation by the middle of 2015.

The Royal Commission has now formed concluded views on the appropriate recommendations on redress and civil litigation to ensure justice for survivors.

By reporting as early as possible on these issues, we are seeking to give survivors and institutions more certainty on these issues and enable governments and institutions to implement our recommendations to improve civil justice for survivors as soon as possible.

Our concluded views have been informed

by the significant input we have obtained on redress and civil litigation from a broad range of sources, including private sessions, public hearings, issues papers, private roundtables, expert consultations and information obtained under summons.

On 30 January 2015, the Royal Commission published the *Consultation paper: Redress and civil litigation* (the Consultation Paper). We received a wide range of submissions in response to the Consultation Paper. From 25 to 27 March 2015, all six Commissioners sat for the public hearing on redress and civil litigation. At that hearing, invited organisations and individuals spoke to their written submissions to the Consultation Paper and responded to questions asked by Commissioners and Counsel Assisting.

Responses to the Consultation Paper and the public hearing have helped to inform our final recommendations on redress and civil litigation, which are contained in this report.

## Our approach

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In Chapter 2, we discuss a number of issues that are significant for our approach to redress and civil litigation.

## Why redress is needed

Our case studies and private sessions to date leave us in no doubt that many people, while children, were injured by being subjected to child sexual abuse in institutions or in connection with institutions. In some cases, their injuries are severe and long lasting. People can be affected by these injuries for the rest of their lives.

Because of the nature and impact of the abuse they suffered, many victims of child sexual abuse have not had the opportunity to seek compensation for their injuries that many Australians generally can take for granted. While it cannot now be made feasible for many of those who have experienced institutional child sexual abuse to seek common law damages, there is a clear need to provide avenues for survivors to obtain effective redress for this past abuse.

All Australian governments recognised this need by establishing this Royal Commission and giving us Terms of Reference that require and authorise us to inquire into matters including what institutions and governments should do to address or alleviate the impact of institutional child sexual abuse, including in particular in ensuring justice for victims through the provision of redress by institutions.

## Justice for victims

A number of survivors, and many survivor advocacy and support groups, have highlighted the importance to survivors of ‘fairness’ in the sense of equal access to redress for survivors and equal treatment of survivors in redress processes. They regard equal access and equal treatment as essential elements if a redress scheme is to deliver justice.

Equality in this sense does not prevent recognition of different levels of severity of abuse or different levels of severity of impact of abuse. However, it does mean that the availability and type or amount of redress available should not depend on factors such as:

- the state or territory in which the abuse occurred
- whether the institution was a government or non-government institution
- whether the abuse occurred in more than one institution
- the nature or type of institution
- whether the institution still exists
- the assets available to the institution.

We accept the importance to survivors of equality in this sense. We accept that many survivors and survivor advocacy and support groups will not consider any approach to redress that we recommend to be capable of delivering ‘justice’ unless it seeks to achieve equality or fair treatment between survivors.

### **Recommendation**

1. A process for redress must provide equal access and equal treatment for survivors – regardless of the location, operator, type, continued existence or assets of the institution in which they were abused – if it is to be regarded by survivors as being capable of delivering justice.

## Current failings

In our view, the current civil litigation systems and past and current redress processes have not provided justice for many survivors.

We have heard from survivors, survivor advocacy and support groups and others about the many difficulties that survivors experience in seeking redress or damages through civil litigation.

Individual experiences of inadequate or unobtainable redress should be placed in the broader context of a social failure to protect children. There was a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused. Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution they were part of, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society.

We are satisfied that our society's failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse. It also highlights the importance of improving the capacity of the civil litigation systems to provide justice to survivors in a manner at least comparable to that of other injured persons so that those who suffer abuse in the future are not forced to go through the experiences of those who have sought redress to date.

## Focusing on our Terms of Reference

Our Terms of Reference are both broader and narrower than the reach of most current and previous redress schemes.

We are required to examine what institutions and government should do to address, or alleviate the impact of, child sexual abuse in institutional contexts. The range of institutions and institutional contexts is generally far broader than the range of institutions covered by government redress schemes. In contrast, the requirement that we examine child sexual abuse in an institutional context gives us a narrower focus than most government and non-government institution redress schemes have had.

Our Letters Patent require and authorise us to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters in institutional contexts. Commissioners have determined that our recommendations on redress must be directed to recommending the provision of redress for those who suffered child sexual abuse in an institutional context.

We recognise that, in particular instances, other unlawful or improper treatment, such as physical abuse or neglect, or emotional or cultural abuse, may have accompanied the sexual abuse. The matrix we recommend in Chapter 7 for assessing monetary payments allows for consideration of these related matters where they have accompanied sexual abuse. The matrix also allows for consideration of additional factors, including the nature of the institution and whether the victim was a ward of the state.

We do not accept that our Letters Patent allow us to consider redress for those who have suffered physical abuse or neglect, or emotional or cultural abuse, if they have not also suffered child sexual abuse in an institutional context. Also, we do not accept that our Letters Patent allow us to consider redress for all of those who were in state care, who were child migrants or who are members of the Stolen Generations, regardless of whether they suffered any child sexual abuse in an institutional context.

## Past and future abuse

Our Terms of Reference require us to consider both past and future institutional child sexual abuse. We use ‘past child sexual abuse’ to refer to child sexual abuse that has already occurred or that occurs between now and the date that any reforms we recommend to civil litigation commence. We use ‘future child sexual abuse’ to refer to child sexual abuse that occurs on or after the date that the reforms to limitation periods that we recommend in Chapter 14 and to the duty of institutions in Chapter 15 commence.

A number of submissions in response to the Consultation Paper argued that our recommendations on redress should apply to future abuse as well as to past abuse.

Commissioners consider that attempting to prescribe a detailed redress scheme to apply to future abuse, potentially stretching decades into the future, is not now warranted or appropriate. It is not possible to assess what demand there might be for such a scheme given that we cannot identify the likely incidence of future institutional child sexual abuse or to what extent our

recommendations on civil litigation reforms will be implemented and lead to a reduction in the number of survivors who seek redress independently of civil litigation.

It is also not possible to identify what survivors of future abuse might expect from a redress scheme because we do not know how any civil litigation reforms might lead to substantially different outcomes through civil litigation. A redress scheme is likely to impose administrative costs in its establishment and ongoing operation. Commissioners accept that these costs should not be imposed on an ongoing basis, potentially for decades, if the demand for and adequacy of the scheme are unknown.

We have concluded that we can best meet the requirements of our Terms of Reference in respect of addressing or alleviating the impact of future abuse through our recommendations on reforms to civil litigation in Part IV of this report. These reforms, if implemented, will make civil litigation a far more effective means of providing justice for survivors. They are also likely to encourage institutions to continue to offer redress in a manner that remains attractive to survivors as an alternative to civil litigation.

## Children

Some children, or parents or guardians on their behalf, will wish to seek redress or compensation for institutional child sexual abuse while the victim is still a child. It is unlikely that there will be many applications to a redress scheme that are made by or on behalf of those who are still children because children are more likely to be

able to obtain compensation through civil litigation. However, there is no reason why children could not be accommodated within the structures and approaches we recommend for redress in this report.

## Ensuring our recommendations can be implemented

We are acutely aware of the need to make recommendations that can and are likely to be implemented.

We have to balance a number of factors, including:

- the requirement of survivors that the redress scheme be ‘fair’, in the sense of affording equal access and equal treatment for survivors
- the need to accommodate actions taken to date in relation to redress and compensation
- a recognition that survivors have many different needs, only some of which can or should be met through redress
- the need to develop an approach that can be effective for a broad variety of institutions that now, or may in the future, face allegations of institutional child sexual abuse.

We consider that our recommendations are more likely to be acted upon if we strike the right balance between detail and flexibility, where flexibility is consistent with achieving justice for victims. We also consider that we must take account of the affordability of what we recommend and the current positions of governments, to the extent they are known.

## Data and modelling

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Until we published the Consultation Paper, there was very little publicly available data on redress and compensation paid to victims of child sexual abuse in institutions in Australia. To continue to address this gap and to improve our understanding of redress outcomes to date, we have updated the data we collected from a number of sources and published in the Consultation Paper, often under summonses or notices to produce.

We obtained claims data under notice from governments, Catholic Church Insurance, and The Salvation Army Australia (Eastern and Southern Territories). The data cover claims of child sexual abuse resolved in the period from 1 January 1995 to 31 December 2014. The data cover claims resolved through litigation, out-of-court settlement and otherwise. We have also obtained claims data from insurers that we anticipated would have exposure for institutional child sexual abuse from clients in the faith-based, community and not-for-profit sectors.

The claims data are analysed as follows:

- number of claims by year of resolution (Table 3 and Figure 1 in Chapter 3)
- compensation in real dollars (2014) by year of claim resolution, including the mean (or average), median, minimum and maximum payments, and in 20 per cent payment bands (Table 4 and Figures 2 and 3 in Chapter 3).



We obtained data on key elements of the following government redress schemes:

- Redress WA and WA Country High School Hostels ex gratia scheme
- Queensland ex gratia scheme
- Tasmanian Abuse in Care ex gratia scheme
- South Australian payments under *Victims of Crime Act 2001* (SA).

We obtained data of particular relevance to redress and civil litigation from our private sessions held between 7 May 2013 and 3 March 2015. The private sessions data are analysed as follows:

- abuse by number of institutions (Table 10 in Chapter 3), which shows how many private session attendees reported abuse in one institution, two institutions and three or more institutions
- abuse by institution type (Table 11 in Chapter 3), which shows the types of institutions in which private session attendees reported they were abused.

We have also obtained updated actuarial modelling from Finity Consulting Pty Ltd (Finity).

In the Consultation Paper and in Finity's initial actuarial report, Finity estimated an indicative number of claimants for a redress scheme in the vicinity of 65,000, Australia wide. For this report and in Finity's updated actuarial report, Finity has reduced this

estimate from 65,000 claimants nationally to 60,000 claimants nationally. Finity's reduced estimate of claimants reflects the additional information we received from our private sessions (up to 5 March 2015) and on the Queensland redress scheme.

## Redress elements and principles

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### Elements of redress

We are satisfied that the elements of appropriate redress for survivors are:

- a direct personal response by the institution if the survivor wishes to engage with the institution, including an apology, an opportunity for the survivor to meet with a senior representative of the institution and an assurance as to the steps the institution has taken, or will take, to protect against further abuse
- access to therapeutic counselling and psychological care as needed throughout a survivor's life, with redress to supplement existing services and fill service gaps so that all survivors can have access to the counselling and psychological care that they need
- monetary payments as a tangible means of recognising the wrong survivors have suffered.



### **Recommendation**

2. Appropriate redress for survivors should include the elements of:
  - a. direct personal response
  - b. counselling and psychological care
  - c. monetary payments.

## Recognising existing support and other services

Given our focus on survivors of institutional child sexual abuse and the availability of many existing support and other services to broader groups, we remain satisfied that it is preferable for us to address support services (apart from those services that are required to help applicants to apply for redress) separately from redress.

The Royal Commission is conducting a separate project to investigate how adequate support services are in meeting survivors' needs. We are not now making any recommendations about support services in our recommendations on redress and civil litigation.

However, it is important to recognise the range of existing support services because:

- it should be acknowledged that a redress scheme is not necessarily the best, or even an appropriate, mechanism for meeting all the various needs that survivors may have
- existing support services are highly valued by many survivors
- some elements of redress (particularly counselling and psychological care) overlap with the services provided by some existing support services and general public programs
- nothing that we recommend in the area of redress and civil litigation is intended to reduce resources for, or divert effort from, existing support services.

### **Recommendation**

3. Funders or providers of existing support services should maintain their current resourcing for existing support services, without reducing or diverting resources in response to the Royal Commission's recommendations on redress and civil litigation.

## General principles for providing redress

The following general principles should guide the provision of all elements of redress:

- redress should be survivor-focused – redress is about providing justice to the survivor, not about protecting the institution's interests

- there should be a ‘no wrong door’ approach for survivors in terms of gaining access to redress – regardless of whether survivors approach a scheme or an institution, they should be helped to understand all the elements of redress available and to apply for those elements they wish to seek
- all redress should be offered, assessed and provided having appropriate regard to what is known about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular, and to the cultural needs of survivors. All of those involved in redress, particularly those who might interact with survivors or make decisions affecting survivors, should have a proper understanding of these issues and any necessary training
- all redress should be offered, assessed and provided having appropriate regard to the needs of particularly vulnerable survivors and ensuring that access to redress can be obtained with minimal difficulty and cost and with appropriate support or facilitation if required.

### **Recommendation**

4. Any institution or redress scheme that offers or provides any element of redress should do so in accordance with the following principles:
- a. Redress should be survivor focused.
  - b. There should be a ‘no wrong door’ approach for survivors in gaining access to redress.
  - c. All redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors.
  - d. All redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors.

## Direct personal response

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Many survivors of child sexual abuse in an institutional context have told us how important it is to them, and their sense of achieving justice, that the institution makes a genuine apology to them, acknowledges the abuse and its impacts on them and gives a clear account of steps the institution has taken to prevent such abuse occurring again. Many survivors also want an opportunity to meet with a senior representative of the institution to tell their story. They want a senior representative of the institution to understand the impacts of the abuse on them.

Some survivors have had positive experiences when engaging with the institution in which they were abused; others have not. It is clear from many of our private sessions that this direct personal response from the institution can be a very important step in providing redress for a survivor.

A personal response can only come from the institution. An apology and acknowledgment from the institution, or a meeting with senior representatives of the institution, must involve the institution itself.

## Principles for an effective direct personal response

The following principles are appropriate for an effective direct personal response:

- Re-engagement between a survivor and institution should only occur if, and to the extent that, a survivor desires it. Some survivors will want to re-engage with the institution in which they were abused. Other survivors may not want to engage or interact with the institution at all.
  - Institutions should make clear what they are willing to offer and provide by way of direct personal response. They should ensure that they are able to provide what they offer. Further harm may be caused to survivors when institutions are unclear about what they are willing to provide or fail to provide what they offer.
  - At a minimum, all institutions should offer and provide on request by a survivor:
    - an apology
    - an opportunity to meet with a senior representative of the institution
    - an assurance as to steps taken to protect against further abuse.
- These are three elements of any direct personal response that our work indicates are essential. Every institution should be able to provide at least this level of response.
- In offering direct personal response, institutions should try to be responsive to survivors' needs. There is no 'one size fits all' approach to an appropriate personal response. Institutions should recognise the diversity of survivors and their needs in terms of a direct personal response. They should be responsive to those needs where possible.
  - Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response. Some institutions currently offer a broad range of services to survivors, including:
    - assistance with gaining access to records
    - family tracing and family reunion
    - memory projects
    - collective forms of direct personal response such as memorials, reunions and commemorative events
    - culturally appropriate collective redress for Aboriginal and Torres Strait Islander survivors.
  - Direct personal responses should be delivered by people who have received some training about the

nature and impact of child sexual abuse and the needs of survivors. Institutional staff may also require cultural awareness or sensitivity training to support particular survivor groups.

- Institutions should welcome feedback from survivors about the direct personal response they offer and provide. This will help to ensure that the direct personal response is as effective as possible in meeting survivors' needs and expectations.

### **Recommendation**

5. Institutions should offer and provide a direct personal response to survivors in accordance with the following principles:
  - a. Re-engagement between a survivor and an institution should only occur if, and to the extent that, a survivor desires it.
  - b. Institutions should make clear what they are willing to offer and provide by way of direct personal response to survivors of institutional child sexual abuse. Institutions should ensure that they are able to provide the direct personal response they offer to survivors.
  - c. At a minimum, all institutions should offer and provide on request by a survivor:
    - i. an apology from the institution
    - ii. the opportunity to meet with a senior institutional representative and receive an acknowledgement of the abuse and its impact on them
    - iii. an assurance or undertaking from the institution that it has taken, or will take, steps to protect against further abuse of children in that institution.
  - d. In offering direct personal responses, institutions should try to be responsive to survivors' needs.
  - e. Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response.
  - f. Direct personal responses should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors, including cultural awareness and sensitivity training where relevant.
  - g. Institutions should welcome feedback from survivors about the direct personal response they offer and provide.

## Interaction between a redress scheme and direct personal response

An appropriate personal response can only be provided by the institution and cannot be provided through a redress scheme independent of the institution. For survivors who seek a direct personal response but who do not wish to have any further contact with the institution, a redress scheme should facilitate the provision of a written apology, a written acknowledgement and/or a written assurance of steps taken to protect against further abuse. The redress scheme's facilitation would take the form of conveying the survivor's request for these forms of direct personal response to the institution.

Some survivors who wish to re-engage with the institution may not wish to conduct all of their part of the re-engagement themselves; they may wish to have an intermediary or representative to act for them or to support them in their re-engagement with the institution. Institutions should accept a survivor's choice of intermediary or representative to either engage with the institution on behalf of the survivor or act as a support person for the survivor.

### Recommendations

6. Those who operate a redress scheme should offer to facilitate the provision of a written apology, a written acknowledgement and/or a written assurance of steps taken to protect against further abuse for survivors who seek these forms of direct personal response but who do not wish to have any further contact with the institution.
7. Those who operate a redress scheme should facilitate the provision of these forms of direct personal response by conveying survivors' requests for these forms of direct personal response to the relevant institution.
8. Institutions should accept a survivor's choice of intermediary or representative to engage with the institution on behalf of the survivor, or with the survivor as a support person, in seeking or obtaining a direct personal response.

## Counselling and psychological care

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The effects of child sexual abuse on mental health functioning have been well documented. These effects are many and varied and affect survivors in many ways including:

- at the individual level: mental health and physical health
- at the interpersonal level: emotional, behavioural and interpersonal capacities
- at the societal level: quality of life and opportunity.

Many survivors will need counselling and psychological care from time to time throughout their lives. Survivors' needs for counselling and psychological care should be singled out from the broader range of needs and addressed through redress as a necessary part of ensuring justice for victims.

## Principles for counselling and psychological care

The following principles are appropriate for the provision of counselling and psychological care:

- Counselling should be available throughout a survivor's life. The trauma associated with sexual abuse is not a specified medical condition that can be cured at a specific point in time so that it will not reoccur.
- Counselling should be available on an episodic basis. Counselling is not necessarily needed continuously throughout a survivor's life.
- Survivors should be allowed flexibility and choice. Different groups of survivors have differing needs in terms of counselling and psychological care. Survivors also have differing needs at an individual level.
- There should be no fixed limits on services provided to a survivor. The needs of survivors are complex and varied and there should be no fixed limit on the number of counselling sessions available to a survivor per episode of care.
- Without limiting survivor choice, psychological care should be provided by practitioners with the right capabilities to work with clients with complex trauma.
- There should be suitable ongoing assessment and review. For good clinical outcomes, and to appropriately target limited resources, a suitable process of initial assessment and ongoing review is required for each episode of counselling or psychological care.

- Counselling and psychological care should be available through redress for family members if it is necessary for the survivor's own treatment and there are no other sources of funding available.

We are satisfied that a public register should be established so that survivors, or those who are assisting them to gain access to counselling and psychological care, can identify practitioners who have been accepted by the relevant professional bodies as having appropriate capabilities to provide counselling and psychological care to survivors.

Practitioners should be accepted as having appropriate capabilities to provide counselling and psychological care to survivors if they demonstrate that they:

- are willing to work with clients with complex trauma
- have adequate experience in working with clients with complex trauma
- have adequate training relevant to working with clients with complex trauma.

The adequacy of a practitioner's experience and training should be assessed against guidelines or requirements determined by those who we recommend be involved in the design and implementation of the public register.

The public register we recommend is not intended to, and should not, limit the range of professionals who could provide care. Professionals who have or obtain appropriate capabilities through experience and training, whether they are psychologists, social workers, occupational therapists, psychiatrists or other mental health providers, should be eligible for inclusion on the public register.

## Recommendations

9. Counselling and psychological care should be supported through redress in accordance with the following principles:
  - a. Counselling and psychological care should be available throughout a survivor's life.
  - b. Counselling and psychological care should be available on an episodic basis.
  - c. Survivors should be allowed flexibility and choice in relation to counselling and psychological care.
  - d. There should be no fixed limits on the counselling and psychological care provided to a survivor.
  - e. Without limiting survivor choice, counselling and psychological care should be provided by practitioners with appropriate capabilities to work with clients with complex trauma.
  - f. Treating practitioners should be required to conduct ongoing assessment and review to ensure treatment is necessary and effective. If those who fund counselling and psychological care through redress have concerns about services provided by a particular practitioner, they should negotiate a process of external review with that practitioner and the survivor. Any process of assessment and review should be designed to ensure it causes no harm to the survivor.
  - g. Counselling and psychological care should be provided to a survivor's family members if necessary for the survivor's treatment.
  
10. To facilitate the provision of counselling and psychological care by practitioners with appropriate capabilities to work with clients with complex trauma:
  - a. the Australian Psychological Society should lead work to design and implement a public register to enable identification of practitioners with appropriate capabilities to work with clients with complex trauma
  - b. the public register and the process to identify practitioners with appropriate capabilities to work with clients with complex trauma should be designed and implemented by a group that includes representatives of the Australian Psychological Society, the Australian Association of Social Workers, the Royal Australian and New Zealand College of Psychiatrists, Adults Surviving Child Abuse, a specialist sexual assault service, and a non-government organisation with a suitable understanding of the counselling and psychological care needs of Aboriginal and Torres Strait Islander survivors
  - c. the funding for counselling and psychological care under redress should be used to provide financial support for the public register if required
  - d. those who operate a redress scheme should ensure that information about the public register is made available to survivors who seek counselling and psychological care through the redress scheme.

## Current services and service gaps

There are many services that currently provide counselling and psychological care to survivors.

Most members of the general population will access mainstream services as an initial point of contact to help them to address their psychosocial needs, whether or not these issues are associated with childhood sexual abuse. These services include in-patient, out-patient and community-based mental health services; alcohol and drug rehabilitation services; and primary health services.

The Australian Government supports two primary health care initiatives that may be of particular use to survivors, principally through funding under Medicare. The Australian Government also supports specialist psychiatric services by providing unlimited funding through Medicare for these services.

There are many specialist services, most of which are government funded. Specialist services include sexual assault services, which provide specialised and targeted therapeutic care for victims of sexual assault; support services for adults who, as children, were in out-of-home care, including Former Child Migrants; and Aboriginal and Torres Strait Islander organisations, which provide support targeted at Indigenous people, particularly members of the Stolen Generations.

Some institutions provide counselling and psychological care as part of the redress they provide to survivors.

Despite the existence of many services that currently assist survivors with counselling and psychological care, key gaps are as follows:

- resource limitations of specialist services, particularly specialist sexual assault services
- restrictions on access to Medicare, including the need for ‘an assessed mental disorder’, a GP referral and Mental Health Treatment Plan; the focus on shorter-term interventions; and the charging of gap fees
- limits on the number of Medicare-funded services – in particular, the limit of 10 individual sessions per calendar year under the Better Access initiative or 12 individual sessions per calendar year under the Access to Allied Psychological Services program
- gaps in expertise, including where practitioners do not have the right capabilities to work with clients with complex trauma
- gaps in services for specific groups, including for survivors in regional and remote areas and Indigenous survivors.

## Principles for supporting counselling and psychological care through redress

The following principles should inform how the provision of counselling and psychological care to survivors can best be supported through redress:

- Redress should supplement existing services rather than displace or compete with them. It may be counterproductive to the quality and choice of counselling and psychological care available to survivors to put pressure on governments to redirect funding from existing services into a stand-alone counselling scheme provided through redress.



- Redress should provide funding, not services. A redress scheme should not establish its own counselling and psychological care service for survivors. By providing funding, a redress scheme can support flexibility and choice for survivors.
- Redress should fund counselling and psychological care as needed by survivors. Funding should be provided to service providers when survivors need care rather than as a lump-sum component of a monetary payment to individual survivors.

Our recommendations about funding the counselling and psychological care element of redress are in Chapter 10.

### **Recommendation**

11. Those who administer support for counselling and psychological care through redress should ensure that counselling and psychological care are supported through redress in accordance with the following principles:
  - a. Counselling and psychological care provided through redress should supplement, and not compete with, existing services.
  - b. Redress should provide funding for counselling and psychological care services and should not itself provide counselling and psychological care services.
  - c. Redress should fund counselling and psychological care as needed by survivors rather than providing a lump sum payment to survivors for their future counselling and psychological care needs.

## Service provision and funding

We are of the view that greater public funding for the provision of counselling and psychological care for survivors is warranted. There may be factors other than their experience of institutional child sexual abuse that contribute to survivors' needs for counselling and psychological care throughout their lives.

While we are of the view that a dedicated, stand-alone Australian Government scheme would meet survivors' needs for counselling and psychological care, we acknowledge this is not the only way to meet survivors' needs. We are satisfied that some changes to Medicare, supported by funding through redress to fill gaps, will be sufficient to meet the needs of survivors overall.

As a result of our consultations, we have concluded that the Australian Government should implement the following changes to the Better Access program in order to make it more effective for survivors:

- the limit of 10 sessions per year should be removed so that survivors are eligible for an uncapped number of sessions of counselling and psychological care
- the range of therapies available to survivors under Medicare funding should be expanded to accommodate longer-term therapies where the treating practitioner is satisfied that short-term cognitive behaviour treatment is not appropriate to treat a survivor's trauma.

While these changes are not as extensive as those we raised in the Consultation Paper, we are satisfied that the barriers that most significantly prevent Medicare from being adequate to provide effective counselling and psychological care for many survivors are:

- the limit on the number of sessions available to survivors
- the limited range of therapies covered under Medicare.

These changes to Medicare should apply to survivors of institutional child sexual abuse who are assessed as eligible for redress through a redress scheme. Of course, we would have no objection if the Australian Government wished to make these changes apply generally to all Medicare-funded counselling and psychological care services and not just services for survivors.

### **Recommendations**

12. The Australian Government should remove any restrictions on the number of sessions of counselling and psychological care, whether in a particular period of time or generally, for which Medicare funding is available for survivors who are assessed as eligible for redress under a redress scheme.
13. The Australian Government should expand the range of counselling and psychological care services for which Medicare funding is available for survivors who are assessed as eligible for redress under a redress scheme to include longer-term interventions that are suitable for treating complex trauma, including through non-cognitive approaches.

We are satisfied that, even with our recommended changes to Medicare, additional funding will still be required to ensure that survivors' needs for counselling and psychological care are met.

We accept that some survivors may not be making full use of existing counselling and psychological care services, particularly those funded through Medicare, because they are unaware that the services are available or because they are unable or unwilling to obtain the required GP diagnosis and referral. We consider that funding for counselling and psychological care through redress could be used to improve survivors' access to Medicare.

Funding through redress could also be used:

- to pay for any reasonable gap fees charged by practitioners if survivors are unable to afford these fees
- to supplement existing services by exploring with state-funded specialist services whether funding could be provided to increase the availability of services and reduce waiting times for survivors
- to address gaps in expertise and geographical and cultural gaps
- as an essential last resort, to fund counselling and psychological care for survivors whose needs for counselling and psychological care cannot otherwise be met.

We make recommendations about the implementation of a trust fund for counselling and psychological care in Chapter 10.

## Recommendation

14. The funding obtained through redress to ensure that survivors' needs for counselling and psychological care are met should be used to fund measures that help to meet those needs, including:
- a. measures to improve survivors' access to Medicare by:
    - i. funding case management style support to help survivors to understand what is available through the Better Access initiative and Access to Allied Psychological Services and why a GP diagnosis and referral is needed
    - ii. maintaining a list of GPs who have mental health training, are familiar with the existence of the redress scheme and are willing to be recommended to survivors as providers of GP services, including referrals, in relation to counselling and psychological care
    - iii. supporting the establishment and use of the public register that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors and who are registered practitioners for Medicare purposes
  - b. providing funding to supplement existing services provided by state-funded specialist services to increase the availability of services and reduce waiting times for survivors
  - c. measures to address gaps in expertise and geographical and cultural gaps by:
    - i. supporting the establishment and promotion of the public register that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors
    - ii. funding training in cultural awareness for practitioners who have the capabilities to work with survivors but have not had the necessary training or experience in working with Aboriginal and Torres Strait Islander survivors
    - iii. funding rural and remote practitioners, or Aboriginal and Torres Strait Islander practitioners, to obtain appropriate capabilities to work with survivors
    - iv. providing funding to facilitate regional and remote visits to assist in establishing therapeutic relationships; these could then be maintained largely by online or telephone counselling. There could be the potential to fund additional visits if required from time to time
  - d. providing funding for counselling and psychological care for survivors whose needs for counselling and psychological care cannot otherwise be met, including by paying reasonable gap fees charged by practitioners if survivors are unable to afford these fees.

## Monetary payments

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A monetary payment is a tangible means of recognising a wrong that a person has suffered. A redress scheme for survivors should include a monetary payment.

### Purpose of monetary payments

The purpose or meaning of ‘ex gratia payments’ is not always easy to identify.

It is important to identify and clearly state the purpose of ex gratia payments in a redress scheme because:

- it helps claimants, institutions and other participants to understand the purpose of the scheme
- it informs choices about the processes that should be adopted for the scheme
- it helps claimants to understand what any payment they are offered is meant to represent and to assess whether or not they should accept any payment.

We are satisfied that monetary payments under redress should not attempt to be fully compensatory or to replicate common law damages. We are also satisfied that terms such as ‘recognition’ and ‘acknowledgement’ are likely to best express the purpose of monetary payments.

The purpose of a monetary payment should have some connection with the amount of the monetary payment. Given the amounts of the monetary payments we recommend, we are satisfied that the purpose of monetary payments for the redress scheme we recommend is properly described as being to provide a tangible recognition of the seriousness of the hurt and injury that a survivor has suffered.

#### **Recommendation**

15. The purpose of a monetary payment under redress should be to provide a tangible recognition of the seriousness of the hurt and injury suffered by a survivor.

### Monetary payments under other schemes

The monetary payments we recommend will be assessed or understood in the context of what has gone before. We provide summary data on Australian state government redress schemes; non-government institution schemes of Towards Healing, the Melbourne Response and The Salvation Army Australia procedures; statutory victims of crime compensation schemes; and overseas schemes such as the Irish Residential Institutions Redress Scheme. The claims data also provide information about monetary payments to date.

These schemes have assessed monetary payments on a range of bases and provided a range of minimum, maximum and average payments. Almost all of these schemes cover types of abuse other than sexual abuse, including physical abuse and neglect.

## Assessment of monetary payments

There is a tension between the need for fairness, equality and transparency for survivors – and indeed for institutions – and an individualised approach to assessing monetary payments. We are satisfied that fairness, equality and transparency should be favoured and that a matrix should be used to determine ranges of monetary payments.

We are satisfied that the matrix should assess the severity of the abuse and the severity of the impact of the abuse. We also consider that an additional factor should allow for the inclusion of additional values to recognise the following elements:

- whether the applicant was in state care at the time of the abuse – that is, as a ward of the state or under the guardianship of the relevant Minister or government agency
- whether the applicant experienced other forms of abuse in conjunction with the sexual abuse – including physical, emotional or cultural abuse or neglect
- whether the applicant was in a ‘closed’ institution or without the support of family or friends at the time of the abuse
- whether the applicant was particularly vulnerable to abuse because of his or her disability.

The matrix we recommend is set out in Table ES1.

**Table ES1: Matrix for assessing monetary payments under redress**

Factor	Value
Severity of abuse	1–40
Impact of abuse	1–40
Additional elements: <ul style="list-style-type: none"> <li>• state care</li> <li>• other abuse</li> <li>• closed institution</li> <li>• relevant disability.</li> </ul>	1–20

The matrix we recommend will need to be further developed, with detailed assessment procedures and guidelines, in accordance with our discussion of the factors and with the benefit of expert advice and actuarial modelling.

## Recommendations

16. Monetary payments should be assessed and determined by using the following matrix:

Factor	Value
Severity of abuse	1–40
Impact of abuse	1–40
Additional elements	1–20

17. The 'Additional elements' factor should recognise the following elements:

- a. whether the applicant was in state care at the time of the abuse – that is, as a ward of the state or under the guardianship of the relevant Minister or government agency
- b. whether the applicant experienced other forms of abuse in conjunction with the sexual abuse – including physical, emotional or cultural abuse or neglect
- c. whether the applicant was in a 'closed' institution or without the support of family or friends at the time of the abuse
- d. whether the applicant was particularly vulnerable to abuse because of his or her disability.

18. Those establishing a redress scheme should commission further work to develop this matrix and the detailed assessment procedures and guidelines required to implement it:

- a. in accordance with our discussion of the factors
- b. taking into account expert advice in relation to institutional child sexual abuse, including child development, medical, psychological, social and legal perspectives
- c. with the benefit of actuarial advice in relation to the actuarial modelling on which the level and spread of monetary payments and funding expectations are based.

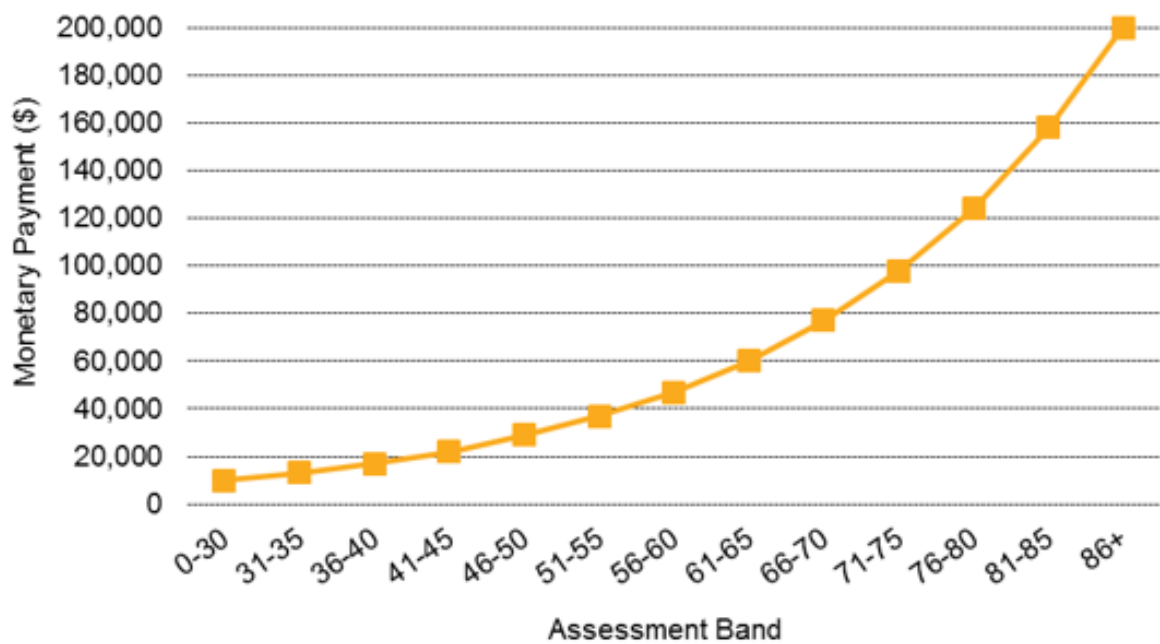
## Amounts of monetary payments

We are satisfied that the appropriate level of monetary payment under redress is a maximum payment of \$200,000 and an average payment of \$65,000. We consider that the higher maximum payment is appropriate to allow recognition of the most severe cases, taking account of both the severity of the abuse and the severity of the impact of the abuse.

For the purpose of looking at a possible distribution of payments, the total number of eligible survivors who will make a claim for payment under a redress scheme has been estimated to be 60,000.

Figure ES1 shows the possible spread of payments when the maximum payment is set at \$200,000 and the average payment is \$65,000.

**Figure ES1: Possible payment spread assuming a maximum payment of \$200,000 and average payment of \$65,000**



We consider that, with this level of maximum payment, \$65,000 is the appropriate average payment. It allows for a greater relative proportion of total payments to be directed to those more seriously affected by abuse than a higher average payment of \$80,000 would allow while still being higher than the median payment shown in recent years in the claims data and higher than average (and in some cases maximum) payments under previous government redress schemes.

We are satisfied that \$10,000 is an appropriate minimum payment. It is large enough to provide a tangible recognition of a person's experience as a survivor of institutional child sexual abuse while still ensuring that a larger relative proportion of total payments is not directed to those who have been less seriously affected by abuse.

We have published Finity's updated actuarial report in conjunction with this report. It can be found on the Royal Commission's website.

### **Recommendations**

19. The appropriate level of monetary payments under redress should be:
  - a. a minimum payment of \$10,000
  - b. a maximum payment of \$200,000 for the most severe case
  - c. an average payment of \$65,000.
20. Monetary payments should be assessed and paid without any reduction to repay past Medicare expenses, which are to be repaid (if required) as part of the administration costs of a redress scheme.
21. Consistent with our view that monetary payments under redress are not income for the purposes of social security, veterans' pensions or any other Commonwealth payments, those who operate a redress scheme should seek a ruling to this effect to provide certainty for survivors.

## Other payment issues

### Availability of payments by instalments

Survivors may experience difficulties when they receive lump-sum payments that are much larger than the amounts of money they are used to handling. However, many survivors want to receive a lump-sum payment. It is not clear to us that many survivors would opt to receive their monetary payment in instalments. We also accept that providing the option for payment by instalments would result in extra administrative costs for the scheme. However, we are not opposed to the option of payment by instalments being made available by a redress scheme, particularly if there is demand for it from survivors.

### **Recommendation**

22. Those who operate a redress scheme should give consideration to offering monetary payments by instalments at the option of eligible survivors, taking into account the likely demand for this option from survivors and the cost to the scheme of providing it.

### Treatment of past monetary payments

Many survivors have already received redress through previous and current government and non-government redress schemes, including statutory victims of crime compensation schemes. Some survivors have received monetary payments through civil litigation. We continue to be satisfied that those who have already received monetary payments should remain eligible to apply under a new scheme, provided that any previous payments are taken into account.



### **Recommendations**

23. Survivors who have received monetary payments in the past – whether under other redress schemes, statutory victims of crime schemes, through civil litigation or otherwise – should be eligible to be assessed for a monetary payment under redress.
24. The amount of the monetary payments that a survivor has already received for institutional child sexual abuse should be determined as follows:
  - a. monetary payments already received should be counted on a gross basis, including any amount the survivor paid to reimburse Medicare or in legal fees
  - b. no account should be taken of the cost of providing any services to the survivor, such as counselling services
  - c. any uncertainty as to whether a payment already received related to the same abuse for which the survivor seeks a monetary payment through redress should be resolved in the survivor’s favour.
25. The monetary payments that a survivor has already received for institutional child sexual abuse should be taken into account in determining any monetary payment under redress by adjusting the amount of the monetary payments already received for inflation and then deducting that amount from the amount of the monetary payment assessed under redress.

## Redress structure and funding

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Many submissions in response to the Consultation Paper expressed views about the structure through which redress should be provided and how redress should be funded. Many of those who spoke at the public hearing also addressed these issues.

### Redress scheme structure

We are satisfied that a redress scheme must involve many institutions, both government and non-government, in order to be effective.

Providing redress through many separate redress schemes would not achieve equal access or equal treatment for survivors because some survivors would be entitled to redress through a number of schemes and others would only be entitled to redress through one scheme (or possibly no scheme if the institution no longer existed or had insufficient assets).

Governments are likely to face many claims for redress that concern abuse in government-run institutions. Finity’s estimation of claims against governments range from 26 per cent of claims in the Australian Capital Territory to 41 per cent of claims in the Northern Territory.

We are satisfied that governments should establish a redress scheme. It is difficult to imagine that governments would be willing to participate in a scheme or schemes that are not operated by governments. Governments have extensive experience of operating large-scale schemes that are reasonably comparable to the redress scheme we recommend.

We have no doubt that the best structure for providing redress is through a single national redress scheme established by the Australian Government.

Survivors and survivor advocacy and support groups overwhelmingly continue to support a single national redress scheme established by the Australian Government, as do many non-government institutions. It is unlikely to be less complex for the eight states and territories to establish separate schemes than for the Australian Government to establish a national scheme.

The governments of New South Wales and Victoria have expressed a willingness to participate in discussions or negotiations about a single national redress scheme. The views of the governments of Queensland and Western Australia are not known. If a referral of power is required for the Australian Government to establish a single national redress scheme then negotiations for potential referrals of power could commence at least with those states that are willing to participate.

There will be a cost in adequately establishing and administering a single national redress scheme. Generally, it seems likely that a larger scheme will be able to achieve the greatest efficiency in administration costs because of its scale. It is not clear to us why the costs of establishing a new national bureaucracy would exceed the costs of establishing eight separate new or expanded bureaucracies at state and territory level.

Commissioners recognise that a single national redress scheme is likely to require significant national negotiations and that these negotiations are likely to take some time. However, we are satisfied that a single national redress scheme would achieve better outcomes than those that could be achieved from separate state and territory schemes and far better outcomes than those that could be achieved if non-government institutions are left without government leadership to try to implement effective redress schemes on their own. We are satisfied that this approach is necessary to successfully deliver an effective redress scheme that provides justice for survivors.

### **Recommendation**

26. In order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.

While we are strongly of the view that a single national redress scheme established by the Australian Government is the most effective structure for providing redress in a manner that ensures justice for survivors, we also recognise that redress must be made available as soon as possible.

If the Australian Government is not willing to establish a single national redress scheme, we accept that state and territory schemes, involving government and non-government institutions, are the next best option and are significantly preferable to schemes operated by individual institutions or groups of institutions.

### **Recommendation**

27. If the Australian Government does not establish a single national redress scheme, as the next best option for ensuring justice for survivors, each state and territory government should establish a redress scheme covering government and non-government institutions in the relevant state or territory.

We consider that the redress scheme or schemes should be established and ready to start accepting applications from survivors as soon as possible. Although the timetable set out below is fairly ambitious, we consider it to be reasonable:

- all governments should consider our recommendations and how they would implement them during the remaining months of 2015
- throughout 2016, the Australian Government or state and territory governments should lead and/or participate in negotiations for the establishment of a redress scheme or schemes
- in the first half of 2017, the redress scheme or schemes should be established and should prepare and implement the systems and procedures that are necessary to begin inviting and accepting applications.

### **Recommendations**

28. The Australian Government should determine and announce by the end of 2015 that it is willing to establish a single national redress scheme.

29. If the Australian Government announces that it is willing to establish a single national redress scheme, the Australian Government should commence national negotiations with state and territory governments and all parties to the negotiations should seek to ensure that the negotiations proceed as quickly as possible to agree the necessary arrangements for a single national redress scheme.

30. If the Australian Government does not announce that it is willing to establish a single national redress scheme, each state and territory government should establish a redress scheme for the relevant state or territory that covers government and non-government institutions. State and territory governments should undertake national negotiations as quickly as possible to agree the necessary matters of detail to provide the maximum possible consistency for survivors between the different state and territory schemes.

31. Whether there is a single national redress scheme or separate state and territory redress schemes, the scheme or schemes should be established and ready to begin inviting and accepting applications from survivors by no later than 1 July 2017.

Regardless of whether there is a single national redress scheme or separate state and territory redress schemes, we consider that there should be an advisory council to advise on the establishment and operation of the scheme or schemes. If there are separate state and territory redress schemes, a national advisory council should:

- help to encourage consistency and to share experiences
- identify and resolve any common problems in implementation across the different schemes.

### **Recommendations**

32. The Australian Government (if it announces that it is willing to establish a single national redress scheme) or state and territory governments should establish a national redress advisory council to advise all participating governments on the establishment and operation of the redress scheme or schemes.

33. The national redress advisory council should include representatives:

- a. of survivor advocacy and support groups
- b. of non-government institutions, particularly those that are expected to be required to respond to a significant number of claims for redress
- c. with expertise in issues affecting survivors with disabilities
- d. with expertise in issues of particular importance to Aboriginal and Torres Strait Islander survivors
- e. with expertise in psychological and legal issues relevant to survivors
- f. with any other expertise that may assist in advising on the establishment and operation of the redress scheme or schemes.

## **Funding required for redress**

Funding for redress would need to be sufficient for the counselling and psychological care and monetary payments elements of redress as well as the administration costs of the redress scheme. The scheme would also need to take account of amounts already spent on providing redress to the extent that these would reduce funding requirements under a new scheme.

Our actuarial advisers have conducted modelling of the funding needs across states and territories. They have estimated the breakdown between government-run institutions and non-government-run institutions.

The modelling of funding requirements is based on an average monetary payment of \$65,000, which is the average payment we recommend. The monetary payment amounts below have been adjusted to take account of amounts already spent on providing redress under past and current redress schemes.

Table ES2 shows the total estimated cost by jurisdiction and by government (including the Australian Government and the relevant state or territory government) and non-government institutions.

**Table ES2: Estimated total costs for redress by jurisdiction and government-run and non-government-run institutions**

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
<b>Number of estimated eligible claimants (total 60,000)</b>									
Government	7,150	5,290	2,950	2,300	1,150	590	290	240	19,960
Non-government	14,730	10,690	5,520	4,110	2,650	1,160	840	340	40,040
<b>Total</b>	<b>21,880</b>	<b>15,980</b>	<b>8,470</b>	<b>6,410</b>	<b>3,800</b>	<b>1,750</b>	<b>1,130</b>	<b>580</b>	<b>60,000</b>
<b>Counselling and psychological care (\$ million)</b>									
Government	39	29	16	13	6	3	2	1	110
Non-government	81	59	30	23	15	6	5	2	220
<b>Total</b>	<b>120</b>	<b>88</b>	<b>47</b>	<b>35</b>	<b>21</b>	<b>10</b>	<b>6</b>	<b>3</b>	<b>330</b>
<b>Monetary payments adjusted for past payments (average \$65,000) (\$ million)</b>									
Government	442	327	145	65	67	8	18	15	1,086
Non-government	880	644	333	258	160	73	42	22	2,414
<b>Total</b>	<b>1,322</b>	<b>971</b>	<b>478</b>	<b>323</b>	<b>227</b>	<b>81</b>	<b>60</b>	<b>37</b>	<b>3,500</b>
<b>Administration (\$ million)</b>									
Government	21	16	9	7	3	2	1	1	60
Non-government	44	32	17	12	8	3	3	1	120
<b>Total</b>	<b>66</b>	<b>48</b>	<b>25</b>	<b>19</b>	<b>11</b>	<b>5</b>	<b>3</b>	<b>2</b>	<b>180</b>
<b>TOTALS (\$ million)</b>									
Government	503	372	170	84	77	13	21	17	1,256
Non-government	1,005	735	380	293	183	83	49	25	2,754
<b>GRAND TOTAL</b>	<b>1,508</b>	<b>1,107</b>	<b>550</b>	<b>378</b>	<b>260</b>	<b>96</b>	<b>70</b>	<b>42</b>	<b>4,010</b>

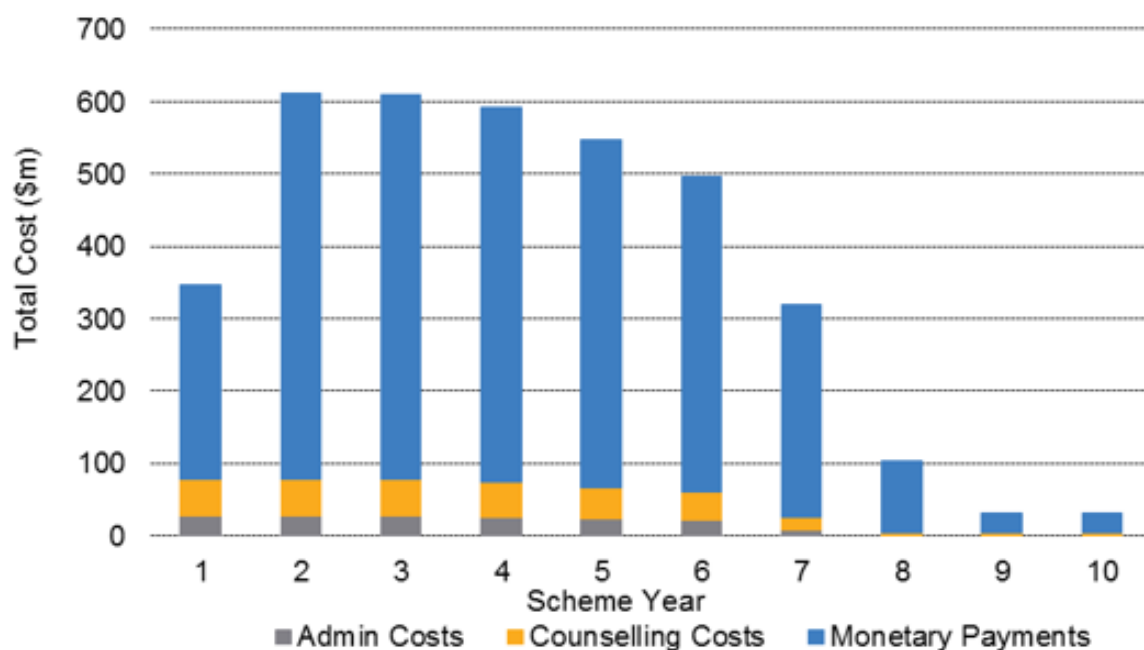
Due to rounding, numbers presented in this table may not add up precisely to the totals provided.

The Australian Government may need to make funding contributions for:

- government-run institutions, if the Australian Government ran an institution or under its broader social or regulatory responsibilities
- non-government run institutions, under its broader social or regulatory responsibilities.

Clearly the total funding would not be required immediately upon establishment of a scheme. Our actuarial advisers have modelled a possible pattern of claims and funding requirements, as set out in Figure ES2.

**Figure ES2: Estimated annual cost of the scheme over the first 10 years**



This modelling of annual funding needs is based on the estimate of 60,000 eligible claimants.

## Who should fund redress?

### Initial principles

We are satisfied that the following initial principles provide the correct starting point for funding redress:

- the institution in which the abuse occurred should fund the cost of redress
- where a survivor experienced abuse in more than one institution, the costs of funding redress should be apportioned between the relevant institutions, taking into account the relative severity of the abuse in each institution and any other features relevant to calculating a monetary payment
- where the institution in which the abuse occurred no longer exists but was part of a larger group of institutions or where there is a successor to the institution, the group of institutions or the successor institution should fund redress.

We acknowledge that some submissions to the Consultation Paper opposed or expressed reservations to the proposition that the institution in which the abuse occurred should fund redress. However, flexibility in implementing funding for redress should allow governments to take into account the ongoing viability of institutions, particularly not-for-profit institutions with no real assets or fundraising base, and the implications of including community service organisations that are solely or largely government funded.

### **Recommendations**

34. For any application for redress made to a redress scheme, the cost of redress in respect of the application should be:
  - a. a proportionate share of the cost of administration of the scheme
  - b. if the applicant is determined to be eligible, the cost of any contribution for counselling and psychological care in respect of the applicant
  - c. if the applicant is determined to be eligible, the cost of any monetary payment to be made to the applicant.
  
35. The redress scheme or schemes should be funded as much as possible in accordance with the following principles:
  - a. The institution in which the abuse is alleged or accepted to have occurred should fund the cost of redress.
  - b. Where an applicant alleges or is accepted to have experienced abuse in more than one institution, the redress scheme or schemes should apportion the cost of funding redress between the relevant institutions, taking account of the relative severity of the abuse in each institution and any other features relevant to calculating a monetary payment.
  - c. Where the institution in which the abuse is alleged or accepted to have occurred no longer exists but the institution was part of a larger group of institutions or where there is a successor to the institution, the group of institutions or the successor institution should fund the cost of redress.

## **Broader responsibilities of governments**

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution they were part of, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. The broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse. In addition to this broader social responsibility, governments may also have responsibilities as regulators and as guardians of children.

It is clear from the state government redress schemes to date that governments recognise that they have broader responsibilities beyond government-run institutions, including responsibilities that arise from their regulatory and guardianship roles. The Australian Government's submissions in our public hearing on the Retta Dixon Home in Darwin indicate that the Australian Government also recognises that it has responsibilities that extend beyond its own institutions.

We are satisfied that governments have a greater responsibility for providing redress than that which relates to abuse in government-run institutions alone. However, we are also satisfied that governments' greater responsibility does not allow a precise calculation of degrees or percentages of relative responsibility for abuse in non-government institutions between the non-government institution and the relevant government or governments.

## Funder of last resort

There will be cases where institutions in which abuse occurred no longer exist and they were not part of a larger group

of institutions or there is no successor institution. There will also be cases where institutions that still exist have no assets from which to fund redress.

Funding for redress for survivors of abuse in these institutions will need to come from elsewhere. Leaving these survivors without access to the redress that is available to others would fall short of the requirement in our Terms of Reference of 'ensuring justice for victims'.

The community is entitled to look to governments to meet an identified community need from their revenue sources rather than impose the obligations of one institution either on another institution or on individual survivors.

We are satisfied that governments should act as funders of last resort on the basis of their social, regulatory and guardianship responsibilities discussed above.

Table ES3 shows our actuarial advisers' estimates of the adjustments to the government and non-government shares of the estimated total costs for redress if governments were to act as funders of last resort.



**Table ES3: Estimated total costs for redress by jurisdiction and government-run and non-government-run institutions adjusted for governments as funders of last resort**

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	TOTAL
<b>Number of estimated eligible claimants (total 60,000)</b>									
Government	10,370	7,250	4,190	3,120	1,740	850	490	290	28,300
Non-government	11,510	8,730	4,280	3,290	2,060	900	640	290	31,700
<b>Total</b>	<b>21,880</b>	<b>15,980</b>	<b>8,470</b>	<b>6,410</b>	<b>3,800</b>	<b>1,750</b>	<b>1,130</b>	<b>580</b>	<b>60,000</b>
<b>Counselling and psychological care (\$ million)</b>									
Government	57	40	23	17	10	5	3	2	156
Non-government	63	48	24	18	11	5	4	2	174
<b>Total</b>	<b>120</b>	<b>88</b>	<b>47</b>	<b>35</b>	<b>21</b>	<b>10</b>	<b>6</b>	<b>3</b>	<b>330</b>
<b>Monetary payments adjusted for past payments (average \$65,000) (\$ million)</b>									
Government	651	454	225	118	106	24	31	18	1,629
Non-government	671	517	253	205	122	56	29	19	1,871
<b>Total</b>	<b>1,322</b>	<b>971</b>	<b>478</b>	<b>323</b>	<b>228</b>	<b>80</b>	<b>60</b>	<b>37</b>	<b>3,500</b>
<b>Administration (\$ million)</b>									
Government	31	22	13	9	5	3	1	1	85
Non-government	35	26	13	10	6	3	2	1	95
<b>Total</b>	<b>66</b>	<b>48</b>	<b>26</b>	<b>19</b>	<b>11</b>	<b>5</b>	<b>3</b>	<b>2</b>	<b>180</b>
<b>TOTALS (\$ million)</b>									
Government	740	516	261	144	120	32	35	21	1,869
Non-government	769	591	289	233	139	64	34	21	2,141
<b>GRAND TOTAL</b>	<b>1,508</b>	<b>1,107</b>	<b>550</b>	<b>378</b>	<b>260</b>	<b>96</b>	<b>70</b>	<b>42</b>	<b>4,010</b>

Due to rounding, numbers presented in this table may not add up precisely to the totals provided.

By comparing Table ES3 with Table ES2, we can identify the estimated cost of the funder of last resort responsibility across each state and territory. Table ES4 shows the total estimated costs for funder of last resort funding for redress by jurisdiction.

**Table ES4: Estimated funder of last resort costs for redress by jurisdiction**

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	TOTAL
<b>Number of estimated eligible claimants requiring funder of last resort funding</b>									
Claimants	3,220	1,960	1,240	820	590	260	200	50	<b>8,340</b>
<b>Total cost of funder of last resort funding (\$ million)</b>									
Cost	237	144	91	60	43	19	15	4	<b>613</b>

The estimated total cost of funding redress is \$4.01 billion. If governments – both the Australian Government and state and territory governments – agree to be funders of last resort then, under the modelling, the estimated cost of last resort funding is \$613 million or some 15.3 per cent of the total cost of funding redress. We consider that an additional share of total costs of this sort of magnitude is a fair and reasonable amount to expect governments to pay given their social, regulatory and guardianship responsibilities discussed above.

### **Recommendations**

36. The Australian Government and state and territory governments should provide ‘funder of last resort’ funding for the redress scheme or schemes so that the governments will meet any shortfall in funding for the scheme or schemes.
37. Regardless of whether there is a single national redress scheme or separate state and territory redress schemes, the Australian Government and each state or territory government should negotiate and agree their respective shares of or contributions to ‘funder of last resort’ funding in respect of applications alleging abuse in the relevant state or territory.

## **Implementation of the recommended funding arrangements**

Particularly in the interests of ensuring that what we recommend can be implemented, we are satisfied that governments should be allowed flexibility to enable adequate funding for redress to be secured efficiently.

We consider that the following principles should provide guidance to the redress scheme operator – either the Australian Government or the relevant state or territory government that is establishing a redress scheme – in implementing funding for redress, although they are not intended to be prescriptive:

- Non-government institutions that are expected to be the subject of a number of claims for redress could be invited to participate with the redress scheme operator in developing the redress scheme and in funding its administration costs from the start.
- Other non-government institutions could participate in the scheme if and when either they or the scheme receive an application for redress that concerns abuse in that institution. They could pay a reasonable fee for use of the redress scheme if and when a relevant application for redress is received.
- Government and non-government institutions should fund the cost of their own eligible redress claims in accordance with the requirements of the redress scheme operator. The requirements could provide for case-by-case contributions by institutions with few claims or regular contributions with provision for adjustment from time to time by institutions with many claims. Any legislation that establishes a redress scheme could also provide recovery rights against institutions.

- The Australian Government and each state or territory government should negotiate their respective funding contributions. Where either the Australian Government or the relevant state or territory government ran a government institution, the funding responsibility will be clear. However, the governments will need to negotiate their respective shares of funder of last resort funding and for any institutions that were run by both the Australian Government and a state or territory government. Particularly in the territories and also in some states, the Australian Government may have, or may have had, particular regulatory responsibility for some children. In these cases, the Australian Government's contribution to funder of last resort funding may be higher than in other cases.
- Each government should determine how to raise the funding it requires to provide its funding contributions to redress.
- Governments should determine whether or not to require particular non-government institutions or particular types of non-government institutions to contribute funding for redress. Governments may have a range of legal mechanisms, including legislation and funding agreements, through which they could impose obligations on institutions. Some governments may prefer to involve all non-government institutions in a redress scheme, while others might prefer to focus on the institutions with the most claims, accepting that this would probably increase the funding required from governments as funder of last resort. Governments could also take into account the extent to which particular non-government institutions rely on government funding for their operations and any implications this might have for their contributions to funding the redress scheme. Governments could also take into account the affordability of redress for particular non-government institutions and the value to the community of ensuring that they continue to provide services for children.
- Governments that have previously provided redress for abuse experienced in non-government institutions may wish to seek from non-government institutions a contribution to last resort funding if those governments have already funded some redress obligations that would otherwise fall to the non-government institutions.

### **Recommendations**

38. The Australian Government (if it announces that it is willing to establish a single national redress scheme) or state and territory governments should determine how best to raise the required funding for the redress scheme or schemes, including government funding and funding from non-government institutions.
39. The Australian Government or state and territory governments should determine whether or not to require particular non-government institutions or particular types of non-government institutions to contribute funding for redress.

## Trust fund for counselling and psychological care

The single national redress scheme, or each state and territory redress scheme, should establish a trust fund to receive the funding for counselling and psychological care that has been paid under redress and to manage and apply that funding to meet the counselling and psychological care needs of those found eligible for redress under the relevant redress scheme.

Those who fund redress, including as the funder of last resort, should be required to pay an actuarially-determined estimate of the cost of future counselling and psychological care services to be provided through redress to the relevant trust fund, either directly or via the redress scheme.

We consider that the trust fund, or each trust fund, should be governed by a corporate trustee with a board of directors that includes representatives of the interests of survivors and funders. This will encourage transparency and accountability, as well as informed input, in the governance of the fund.

### Recommendations

40. The redress scheme, or each redress scheme, should establish a trust fund to receive the funding for counselling and psychological care paid under redress and to manage and apply that funding to meet the needs for counselling and psychological care of those eligible for redress under the relevant redress scheme.
41. The trust fund, or each trust fund, should be governed by a corporate trustee with a board of directors appointed by the government that establishes the relevant redress scheme. The board or each board should include:
  - a. an independent Chair
  - b. a representative of: government; non-government institutions; survivor advocacy and support groups; and the redress scheme
  - c. those with any other expertise that is desired at board level to direct the trust.
42. The trustee, or each trustee, should engage actuaries to conduct regular actuarial assessments to determine a 'per head' estimate of future counselling and psychological care costs to be met through redress. The trustee, or each trustee, should determine the amount from time to time that those who fund redress, including as the funder of last resort, must pay per eligible applicant to fund the counselling and psychological care element of redress.

## Redress scheme processes

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For a redress scheme to work effectively for all parties, its processes must be efficient. The processes must be focused on obtaining the information required to determine eligibility and calculate monetary payments and then making that determination and calculation fairly and in a timely manner.

### Eligibility for redress

An effective redress scheme must clearly define eligibility under the scheme. Eligibility refers to the criteria that determine whether a person is able to obtain redress through the scheme. We have already recommended that survivors who have received monetary payments in the past be eligible to be assessed for a monetary payment under redress. We recommend the following additional criteria for eligibility:

- the survivor should be eligible to apply to a redress scheme if he or she was sexually abused as a child in an institutional context
- the survivor should be eligible if the sexual abuse occurred, or the first incidence of sexual abuse occurred, before the cut-off date, which is the date on which the Royal Commission's recommended reforms to civil litigation in relation to limitation periods and the duty of institutions commence.

## Recommendations

43. A person should be eligible to apply to a redress scheme for redress if he or she was sexually abused as a child in an institutional context and the sexual abuse occurred, or the first incidence of the sexual abuse occurred, before the cut-off date.
44. 'Institution' should have the same meaning as in the Royal Commission's terms of reference.
45. Child sexual abuse should be taken to have occurred in an institutional context in the following circumstances:
  - a. it happens:
    - i. on premises of an institution
    - ii. where activities of an institution take place or
    - iii. in connection with the activities of an institutionin circumstances where the institution is, or should be treated as being, responsible for the contact between the abuser and the applicant that resulted in the abuse being committed
  - b. it is engaged in by an official of an institution in circumstances (including circumstances that involve settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk
  - c. it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.
46. Those who operate the redress scheme should specify the cut-off 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.
47. An offer of redress should only be made if the applicant is alive at the time the offer is made.

## Duration of a redress scheme

We remain satisfied that a redress scheme should not have a fixed closing date and that, if applications to the scheme reduce to a level where it would be reasonable to consider closing the scheme, it could be closed. However, this should only happen after the closing date has been given widespread publicity and at least a further 12 months has been allowed for applications to be made.

### **Recommendation**

48. A redress scheme should have no fixed closing date. But, when applications to the scheme reduce to a level where it would be reasonable to consider closing the scheme, those who operate the redress scheme should consider specifying a closing date for the scheme. The closing date should be at least 12 months into the future. Those who operate the redress scheme should ensure that the closing date is given widespread publicity until the scheme closes.

## **Publicising and promoting the availability of the scheme**

A key feature of an effective redress scheme is a comprehensive communication strategy.

This strategy should ensure that the availability of the scheme is widely publicised and promoted.

Particular communication strategies are needed for people who might be more difficult to reach.

### **Recommendations**

49. Those who operate a redress scheme should ensure the availability of the scheme is widely publicised and promoted.

50. The redress scheme should consider adopting particular communication strategies for people who might be more difficult to reach, including:

- a. Aboriginal and Torres Strait Islander communities
- b. people with disability
- c. culturally and linguistically diverse communities
- d. regional and remote communities
- e. people with mental health difficulties
- f. people who are experiencing homelessness
- g. people in correctional or detention centres
- h. children and young people
- i. people with low levels of literacy
- j. survivors now living overseas.

## Application process

The application process for redress should be as simple as possible while obtaining the information necessary to assess eligibility and determine the amount of any monetary payment. A scheme may require additional material or 'evidence' and additional procedures to determine the validity of claims if it has higher maximum or average payments available. A scheme should fund a number of support services and community legal centres to help applicants to apply for redress.

### Recommendations

51. A redress scheme should rely primarily on completion of a written application form.
52. A redress scheme should fund support services and community legal centres to assist applicants to apply for redress.
53. A redress scheme should select support services and community legal centres to cover a broad range of likely applicants, taking into account the need to cover regional and remote areas and the particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.
54. Those who operate a redress scheme should determine whether the scheme will require additional material or evidence and additional procedures to determine the validity of applications. Any additional requirements should be clearly set out in scheme material that is made available to applicants, support services and others who may support or advise applicants in relation to the scheme.
55. A redress scheme may require applicants for redress to verify their accounts of abuse by statutory declaration.

## Institutional involvement

Decisions about redress should be made by a body that is independent of the institutions. The scheme should provide any institution that is the subject of an allegation with details of the allegation. It should seek from the institution any relevant records, information or comment. If an allegation is made against a person who is still involved with the institution, the institution may have to act on the allegation independently of any issues of redress.



**Recommendation**

56. A redress scheme should inform any institution named in an application for redress of the application and the allegations made in it and request the institution to provide any relevant information, documents or comments.

## Standard of proof

We are satisfied that the standard of proof for a redress scheme should be lower than the common law standard of proof. In all of the circumstances, we are satisfied that ‘reasonable likelihood’ should be the standard of proof adopted for the redress scheme. Although in many cases it may make little difference whether the standard is plausibility or reasonable likelihood, we consider that reasonable likelihood can be applied as a higher standard than plausibility.

**Recommendation**

57. ‘Reasonable likelihood’ should be the standard of proof for determining applications for redress.

## Decision making on a claim

We consider that the most effective and efficient way to ensure that decision making in a redress scheme is informed by the appropriate range of skills is by using expert advice in developing the detailed assessment procedures and manuals to accompany the matrix for assessing monetary payments. This will enable administrative decision makers to apply the factors consistently across claims, with the benefit of the expert advice reflected in the procedures and manuals.

**Recommendation**

58. A redress scheme should adopt administrative decision-making processes appropriate to a large-scale redress scheme. It should make decisions based on the application of the detailed assessment procedures and guidelines for implementing the matrix for monetary payments.

## Offer and acceptance of offer

Once a decision has been made on an application, the applicant should be provided with a statement of decision. We consider that the time that is given to applicants to apply for a review of the offer should be three months and that an offer should remain open for acceptance for a period of one year. These time limits strike a balance between providing applicants with sufficient time to consider an offer and providing the redress scheme and institutions with certainty as to outcome of the application.

### Recommendations

59. An offer of redress should remain open for acceptance for a period of one year.
60. A period of three months should be allowed for an applicant to seek a review of an offer of redress after the offer is made.

## Review and appeals

We are satisfied that a process of internal review for applicants is necessary and appropriate. We are also satisfied that, if redress schemes are established administratively, they should be subject to oversight by the relevant jurisdiction's ombudsman through the ombudsman's complaints mechanism. Whether an external review and appeal process is necessary or appropriate will depend on the nature of the redress scheme.

### Recommendations

61. A redress scheme should offer an internal review process.
62. A redress scheme established on an administrative basis should be made subject to oversight by the relevant ombudsman through the ombudsman's complaints mechanism.

## Deeds of release

We have heard very different views on whether or not a deed of release should be required. Although we appreciate that this will disappoint many survivors and survivor advocacy and support groups, we are satisfied that deeds of release should be required under redress. On balance, we do not consider that it will be sufficient to require any payments under redress to be offset against any common law damages.

We recognise the difficulties many survivors have faced in dealing directly with representatives of the institution in which they were abused, particularly when being presented with deeds of release

under time pressure and, in some cases, without the opportunity to obtain independent advice and with little or no knowledge of what others in comparable positions had been offered or paid.

The independent redress scheme that we recommend is very different. If our recommendations are implemented:

- applicants will not need to deal directly with the institution in which they were abused
- the scheme will be open-ended and applicants will not face pressure from the scheme or the institution to make and resolve their claims quickly
- the monetary payments under the scheme will be assessed in accordance with transparent and consistent criteria and the applicant will be given sufficient information to understand how their eligibility and the amount of any monetary payment were determined
- the applicant will be able to seek a review of any monetary payment they are offered
- when making their application and in deciding whether to accept an offer of redress from the redress scheme, applicants will be supported by support services paid for by the redress scheme.

In these circumstances, if an applicant accepts the monetary payment they are offered, we consider it reasonable to require the applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse.

We also consider that the redress scheme must fund, at a fixed price, a legal consultation for the applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases.

#### **Recommendations**

63. As a condition of making a monetary payment, a redress scheme should require an applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse by executing a deed of release.
64. A redress scheme should fund, at a fixed price, a legal consultation for an applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases.
65. No confidentiality obligations should be imposed on applicants for redress.

## Support for survivors

A redress scheme should offer counselling during the scheme. Counselling should be available during the time that survivors are assisted with the application, when the application is being considered and when the offer is made and the applicant is considering whether or not to accept the offer. A redress scheme should also offer a limited number of counselling sessions for family members, particularly in cases where survivors are disclosing their abuse to their families for the first time in the context of the redress scheme.

### Recommendations

66. A redress scheme should offer and fund counselling during the period from assisting applicants with the application, through the period when the application is being considered, to the making of the offer and the applicant's consideration of whether or not to accept the offer. This should include a session of financial counselling if the applicant is offered a monetary payment.
67. A redress scheme should fund counselling provided by a therapist of the applicant's choice if it is specifically requested by the applicant and in circumstances where the applicant has an established relationship with the therapist and the cost is reasonably comparable to the cost the redress scheme is paying for these services generally.
68. A redress scheme should offer and fund a limited number of counselling sessions for family members of survivors if reasonably required.

## Transparency and accountability

A redress scheme should be transparent and accountable, including by:

- making its processes and time frames as transparent as possible
- allocating a particular contact officer to each applicant so that the contact officer can answer any questions the applicant has
- operating a complaints mechanism and welcoming any complaints or feedback
- publishing data, at least annually, about applications and their outcomes.

## Recommendation

69. A redress scheme should take the following steps to improve transparency and accountability:

- a. In addition to publicising and promoting the availability of the scheme, the scheme's processes and time frames should be as transparent as possible. The scheme should provide up-to-date information on its website and through any funded counselling and support services and community legal centres, other relevant support services and relevant institutions.
- b. If possible, the scheme should ensure that each applicant is allocated to a particular contact officer who they can speak to if they have any queries about the status of their application or the timing of its determination and so on.
- c. The scheme should operate a complaints mechanism and should welcome any complaints or feedback from applicants and others involved in the scheme (for example, support services and community legal centres).
- d. The scheme should provide any feedback it receives about common problems that have been experienced with applications or institutions' responses to funded counselling and support services and community legal centres, other relevant support services and relevant institutions. It should include any suggestions on how to improve applications or responses or ensure more timely determinations.
- e. The scheme should publish data, at least annually, about:
  - i. the number of applications received
  - ii. the institutions to which the applications relate
  - iii. the periods of alleged abuse
  - iv. the number of applications determined
  - v. the outcome of applications
  - vi. the mean, median and spread of payments offered
  - vii. the mean, median and spread of time taken to determine the application
  - viii. the number and outcome of applications for review.

## Interaction with alleged abuser, disciplinary process and police

Past and current redress schemes have adopted different approaches to whether and how they interact with the alleged abuser, institutional disciplinary processes and the police. If any alleged abusers are, or may be, still working or otherwise involved with the institution, the institution should pursue its usual investigation and disciplinary processes when it receives advice from the scheme about the allegations. The scheme must comply with any legal requirements to report or disclose the abuse. A scheme should also seek to cooperate with any reasonable requirements of the police.

### Recommendations

70. A redress scheme should not make any 'findings' that any alleged abuser was involved in any abuse.
71. A redress scheme may defer determining an application for redress if the institution advises that it is undertaking internal disciplinary processes in respect of the abuse the subject of the application. A scheme may have the discretion to consider the outcome of the disciplinary process, if it is provided by the institution, in determining the application.
72. A redress scheme should comply with any legal requirements, and make use of any permissions, to report or disclose abuse, including to oversight agencies.
73. A redress scheme should report any allegations to the police if it has reason to believe that there may be a current risk to children. If the relevant applicant does not consent to the allegations being reported to the police, the scheme should report the allegations to the police without disclosing the applicant's identity.  
Note: The issue of reporting to police, including blind reporting, will be considered further in our work in relation to criminal justice issues.
74. A redress scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants.
75. A redress scheme should encourage any applicants who seek advice from it about reporting to police to discuss their options directly with the police.

## Interim arrangements

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In this report, we recommend that a single national scheme – our preferred structure – or separate state and territory redress schemes be established and ready to begin inviting and accepting applications from survivors by no later than 1 July 2017. We recognise that some survivors will wish to seek redress before 1 July 2017 and that institutions will continue to need to respond to claims in this period. We also recognise the possibility that our recommendations may not be implemented, either nationally or in some states or territories.

We seek to give some guidance to institutions on how they should offer and provide redress while any national scheme or state and territory schemes are being implemented or if such arrangements are not implemented.

However, we must emphasise that we anticipate that these arrangements are very unlikely to be adequate or appropriate for ensuring ‘justice for victims’. Most significantly:

- They are unlikely to achieve the level of consistency or independence – both real and perceived – that is required if survivors are to consider they are capable of delivering justice.
- They are unlikely to achieve the level of coverage they require to be capable of delivering justice to survivors – rather than only some survivors – and they are unlikely to be adequately funded, at least in respect of some institutions.

That is, there may be no redress arrangements for institutions that no longer exist or do not have sufficient assets to meet redress claims.

- They are likely to be more expensive and burdensome for institutions to establish and operate without economies of scale or the benefits of government leadership. Apart from being less efficient for institutions generally, the additional costs may adversely affect the level of redress that some institutions are able to offer.

We are also satisfied that options for individual institutions – particularly non-government institutions – to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.

## Independence

A single national redress scheme or state and territory redress schemes would ensure that decision making on redress is independent of the institutions that the abuse occurred in. Until these structures are implemented, institutions will need to seek to achieve independence in decision making on any redress claims that they receive.

In the absence of a government-run redress scheme, it is likely to be difficult and comparatively expensive for institutions to achieve the necessary reality and appearance of independence.

## Recommendations

76. Institutions should seek to achieve independence in institutional redress processes by taking the following steps:
- a. Institutions should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim.
  - b. If feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions.
  - c. Institutions should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues.
  - d. Institutions should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 5 concerning meetings and meeting environments.
  - e. Processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.
77. Institutions should ensure that the required independence is set out clearly in writing between the institution and any person or body the institution engages as part of its redress process.

## Cooperation on claims involving more than one institution

A single national redress scheme or state and territory schemes would ensure that a survivor's experiences of institutional abuse could be assessed in one redress process, even where the survivor had experienced abuse in more than one institution. Until these structures are implemented, institutions will need to seek to achieve a similar outcome in decision making on any redress claims that they receive.



### **Recommendation**

78. If a survivor alleges abuse in more than one institution, the institution to which the survivor applies for redress should adopt the following process:

- a. With the survivor's consent, the institution's redress process should approach the other named institutions to seek cooperation on the claim.
- b. If the survivor consents and the relevant institutions agree, one institutional process should assess the survivor's claim in accordance with the recommended redress elements and processes (with any necessary modifications because of the absence of a government-run scheme) and allocate contributions between the institutions.
- c. If any institution no longer exists and has no successor, its share should be met by the other institution or institutions.

## Elements and principles of redress in interim arrangements

Institutions should be able to adopt the elements of redress and the general principles for providing redress that we recommend in Chapter 4.

Through their redress processes, institutions should undertake to meet survivors' needs for counselling and psychological care. Institutions would also need to ensure that a survivor's need for counselling and psychological care is assessed independently of the institution.

The purpose of monetary payments we recommend in Chapter 7 can apply to interim arrangements for redress and the matrix can give some guidance to decision makers under interim arrangements on how they should assess claims. However, the matrix should be accompanied by detailed assessment procedures and guidelines in order to achieve consistent assessments across claims and the recommended average and maximum monetary payments are unlikely to apply readily to interim arrangements.

### **Recommendations**

79. Institutions should adopt the elements of redress and the general principles for providing redress recommended in Chapter 4.
80. Institutions should undertake, through their redress processes, to meet survivors' needs for counselling and psychological care. A survivor's need for counselling and psychological care should be assessed independently of the institution.
81. Institutions should adopt the purpose of monetary payments recommended in Chapter 7 and be guided by the recommended matrix for assessing monetary payments.

## Redress scheme processes in interim arrangements

The redress scheme processes we recommend are designed to work for the large-scale redress scheme or schemes we recommend. Some of the redress scheme processes we recommend should assist institutions in implementing interim arrangements.

The features of the large-scale independent redress scheme or schemes we recommend enable us to conclude that it is reasonable to require an applicant to grant a release in such a scheme. However, many of these features will not be present, or will not be present to the same degree, in any interim arrangements. We cannot be satisfied that it would be reasonable to require an applicant to grant a release under interim arrangements.

### **Recommendations**

82. In implementing any interim arrangements for institutions to offer and provide redress, institutions should take account of our discussion of the applicability of the redress scheme processes recommended in Chapter 11.
83. Institutions should ensure no deeds of release are required under interim arrangements for institutions to offer and provide redress.

## Possible structures

It is clear that, while there is a willingness among a number of institutions to consider cooperative arrangements, there are also very substantial barriers to establishing these arrangements. We do not discourage them. However, unless governments join any cooperative effort, at least for claims of abuse in government-run institutions, then a cooperative structure is likely to have limited application.

Options for non-government institutions to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.

## Alternatives to interim arrangements

Given the likely cost and complexity of establishing viable interim arrangements, we consider that alternatives might be reasonable if the Australian Government or state and territory governments accept our recommendations and are working to establish a single national redress scheme or separate state and territory redress schemes that can begin to receive applications from 1 July 2017.

### **Recommendation**

84. If the Australian Government or state and territory governments accept our recommendations and announce that they are working to establish a single national redress scheme or separate state and territory redress schemes, institutions may wish to offer smaller interim or emergency payments as an alternative to offering institutional redress processes as interim arrangements.

## Civil litigation

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In Australia, the process for obtaining civil justice for personal injury is by an award of damages through successful civil litigation. Redress schemes may provide a suitable alternative to civil litigation for some or even many claimants, but they do not offer monetary payments in the form of compensatory damages obtained through civil litigation.

In considering possible reforms to civil litigation systems, we have focused on the issues that appear to be particularly difficult for survivors. In focusing on issues of particular significance for survivors, it may be possible to improve the capacity of the civil litigation systems to provide justice to survivors and in a manner at least comparable to that of other injured persons.

## Limitation periods

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Limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation.

We are satisfied that current limitation periods are inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse.

We recognise that there are benefits to all parties if civil proceedings are determined as close as possible to the time the injury is alleged to have occurred. However, we are satisfied that the limitation period for commencing civil litigation for personal injury related to child sexual abuse should be removed and that the removal should be retrospective in operation.

It seems to us that the objective should be to allow claims for damages that arise from allegations of institutional child sexual abuse to be determined on their merits. It is also desirable that national consistency be sought in this area.

We acknowledge that institutions may face additional claims as a result of the removal of limitation periods with retrospective effect. However, we are satisfied that limitation periods have worked great injustices against survivors for some time. We consider that institutions' interests are adequately protected by the need for a claimant to prove his or her case on admissible evidence and by the court's power to stay proceedings in the event that a fair trial is not possible. Institutions can also take steps to limit expensive and time-consuming litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims.

Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers.

We consider that state and territory governments should implement our recommendations to remove limitation periods as soon as possible. Our recommendations on the duty of institutions and identifying a proper defendant (recommendations 89 to 95) may take longer to implement. However, our recommendations to remove limitation periods should be implemented without delay.

## Recommendations

85. State and territory governments should introduce legislation to remove any limitation period that applies to a claim for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child.
86. State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past.
87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.
88. State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that they be implemented before our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.

## Duty of institutions

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A survivor will have a clear cause of action against the perpetrator or perpetrators of the abuse in the intentional tort of battery. Causes of action against an institution are considerably more difficult. Difficulties arise because civil litigation against the institution seeks to have the institution found liable for the deliberate criminal conduct of another person.

There are three possible approaches to the liability of institutions:

- an action in negligence based on an institution's breach of a duty of care owed to the child. The child must prove the existence of the duty and its breach. The breach must have caused the damage. The duty is a duty to take reasonable care in the circumstances. What is 'reasonable' is determined by reference to the standards that applied at the time the duty is alleged to have been breached
- vicarious liability of the institution for torts committed by its employees while acting in the course of their employment. In Australia, vicarious liability has been limited to apply only to the acts of 'employees'. The current approach of Australian law is that child sexual abuse will not be found to have occurred 'in the course of employment'
- an action for breach of the institution's non-delegable duty to ensure that a third party takes reasonable care to prevent harm. This is a duty to ensure that reasonable care is taken by relevant others. It is somewhat similar to vicarious liability, but it applies to

the acts of independent contractors as well as employees. Australian law has not imposed a non-delegable duty on an institution for the criminal acts of an employee or member.

The leading Australian case, *New South Wales v Lepore* (discussed in Chapter 15), decided by the High Court in 2003, has left the law on vicarious liability and non-delegable duties in a somewhat uncertain state.

It is now apparent that in both the United Kingdom and Canada the law has accepted that an institution will be vicariously liable for the criminal acts of its members or employees that cause harm to children either because the act causing harm was so closely connected to the employee's employment that it is fair and just to hold the employer liable or because in the operation of its enterprise the employer has created or significantly increased the risk of their employee causing harm.

In Australian cases, some judges would have imposed vicarious liability or found a non-delegable duty in such circumstances, although these positions have not received majority support.

To our minds it is time that Australian parliaments moved to impose liability on some types of institutions for the deliberate criminal act of a member or employee of the institution as well as for the negligence of that member or employee.

We believe it would be reasonable to impose liability on any residential facility for children, any school or day care facility, any religious

organisation or any other facility operated for profit that provides services for children that involve the facility having the care, supervision or control of children for a period of time. We do not believe that liability should be extended to not-for-profit or volunteer institutions generally – that is, beyond the specific categories of institutions identified. To do so may discourage members of the community from coming together to provide or create facilities that offer opportunities for children to engage in valuable cultural, social and sporting activities.

We have come to this conclusion only after careful and detailed consideration of the issues. We have been influenced by the decisions of the courts in which strict liability has been recognised. If the law makes a solicitor liable for the criminal act of his clerk and the dry cleaner liable for the criminal act of his employee, could it be argued that it is not appropriate for institutions to be liable for the criminal abuse of a child when in their care? If the protection of an individual's property is an important priority of the common law, the protection of children should at least have the same priority. In our opinion the community would today expect that the care of children should attract the highest obligation of the law.

There may be some in the community who believe that a change of this nature should be left to the High Court to determine. We do not agree with that view. Given how the law has developed in the United Kingdom and Canada, and given the support for imposing liability that has been expressed by some Australian judges, it seems to us very likely – if not inevitable – that, in the absence of legislative action, the courts will recognise and impose this liability. If the courts do this

through the development of the common law, the liability will apply retrospectively to abuse that has already occurred. This is the position in the United Kingdom. In our opinion this would not be appropriate.

If the change is made by statute, the injustices that may arise if the change is left to the common law can be avoided. In particular, the burden that retrospective change would impose on insurers or institutions that will not have insured against this liability can be avoided.

If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend, relevant institutions would face potentially large and effectively new liability for abuse that has already occurred, potentially over many previous decades. If it were even possible to obtain insurance for retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred.

An argument sometimes raised against imposing strict liability on a party is that it removes any incentive for the party that might be liable to prevent the event from occurring. That is, if a party will be liable for the event even if it has taken all possible steps to prevent the event then there is no incentive for it to take any steps to prevent the event.

This argument is misconceived. If an institution takes steps to prevent abuse, it will reduce its potentially liability. The

more effective those steps are at preventing abuse, the more the institution's potential liability will be reduced. It is true that, even if the institution adopts best practice in every respect in relation to abuse, under strict liability it will still be liable for any abuse that does in fact occur. However, the effectiveness of its practices will ensure that this liability is considerably lower than it would be if the institution took no steps to reduce abuse. Any insurer that provides insurance for a strict liability is also likely to require that the institution take all reasonable steps to prevent abuse.

We consider that the statutory duty should apply to institutions that operate the following facilities or provide the following services and should be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:

- residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
- day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
- disability services for children
- health services for children
- any other facility operated for profit that provides services for children that involve the facility having the care, supervision or control of children for a period of time
- any facilities or services that are operated or provided by religious organisations, including activities

or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.

We are satisfied that the duty should not apply to foster care or kinship care. We recognise that children in these forms of care can be at high risk of experiencing child sexual abuse. However, the institution that arranges foster care or kinship care does not have the degree of supervision or control of the foster care or kinship care home environment to justify the imposition of a non-delegable duty. We are carrying out extensive work in relation to out-of-home care and we will make recommendations to address risks in foster care and kinship care, including in relation to the selection and supervision of carers and the monitoring of care placements, through this and our other work.

We are also satisfied that the duty should not apply to community-based not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities.

An institution's 'members or employees' should be defined broadly to include persons associated with the institution, including officers, office holders, employees, agents and volunteers. The definition should include persons contracted by the institution. It should also include priests and religious associated with the institution.

Regardless of whether a non-delegable duty is legislated, we are satisfied that the onus of proof should be reversed. That is, institutions should be liable for child sexual abuse by their members or employees unless the institution proves it took reasonable steps to prevent abuse. We are satisfied that the reverse onus of proof should apply prospectively only and not retrospectively.

We consider that reversing the onus of proof would be reasonable for all institutions, including those to which a non-delegable duty (if adopted) would not apply. We consider it reasonable to require institutions that administer foster care and kinship care, and community-based not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities, to prove that they took reasonable steps to prevent abuse.

The steps that are reasonable for an institution to take will vary depending upon the nature of the institution and the role of the perpetrator in the institution. For example, more might be expected of a commercial institution than a community-based voluntary institution. Similarly, more might be expected of institutions in relation to their employees than their contractors.

We recognise that introducing a new duty and reversing the onus of proof may lead to increased insurance premiums for institutions. However, legal duties are important for prescribing the standard that the community requires of institutions.



## Recommendations

89. State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.
90. The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:
- a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
  - b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
  - c. disability services for children
  - d. health services for children
  - e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
  - f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.
91. Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.
92. For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.
93. State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.

## Identifying a proper defendant

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Survivors and their legal advisers have had difficulties in finding a proper defendant to sue. A survivor will always have a cause of action against the perpetrator of the abuse, but survivors may wish to sue the institution in which they were abused.

Much of the discussion of difficulties in finding the proper defendant to sue has focused on the absence of an incorporated body, particularly for some faith-based institutions. The same difficulty will arise whenever the assets of any institution are held in a manner that makes those assets unavailable in a civil action that a survivor brings. This may be because, like various religious bodies, the assets of an institution are held in a trust.

We are satisfied that survivors should be able to sue a readily identifiable church or other entity that has the financial capacity to meet claims of institutional child sexual abuse. We are satisfied that the difficulties for survivors in identifying a correct defendant when they are commencing litigation against unincorporated religious bodies, or other bodies where the assets are held in a trust, should be addressed.

We consider that state and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages for institutional child sexual abuse where the institution in question is alleged to have an associated property trust, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- the property trust is a proper defendant to the litigation
- any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

We are satisfied that governments should consider whether they fund any unincorporated bodies – either directly or indirectly, including through funding local government – to provide children’s services. If they do, they should consider requiring them to maintain insurance that covers their liability in institutional child sexual abuse claims.

## Recommendations

94. State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:
- a. the property trust is a proper defendant to the litigation
  - b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.
95. The Australian Government and state and territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children's services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.

## Model litigant approaches

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Australian courts have long recognised that governments are expected to act as model litigants. The Australian Government and some state and territory governments have adopted written model litigant policies. Some states and territories have gone further in adopting principles for how they will handle civil litigation in relation to child sexual abuse claims.

The Productivity Commission has recently concluded that model litigant rules should not be extended to non-government litigants where there are power imbalances between the parties. While there might be no harm in non-government institutions choosing to comply with model litigant principles in responding to civil claims for institutional child sexual abuse, these principles may not be sufficiently specific to help institutions, and their lawyers, to respond more appropriately to such claims.

Both governments and non-government institutions that receive or expect to receive civil claims for institutional child sexual abuse would benefit from adopting more specific guidelines for responding to claims for compensation that concern allegations of child sexual abuse. Victoria's *Common guiding principles for responding to civil claims involving allegations of child sexual abuse* and New South Wales's *Guiding principles for government agencies responding to civil claims for child sexual abuse* provide useful models to consider. Institutions that adopt such guidelines should publish the guidelines or otherwise make them available to claimants.

## **Recommendations**

96. Government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.
97. The guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessarily adversarial responses to claims.
98. The guidelines should include an obligation on the institution to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.
99. Government and non-government institutions should publish the guidelines they adopt or otherwise make them available to claimants and their legal representatives.

# Recommendations

## Justice for victims

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1. A process for redress must provide equal access and equal treatment for survivors – regardless of the location, operator, type, continued existence or assets of the institution in which they were abused – if it is to be regarded by survivors as being capable of delivering justice.

## Redress elements and principles

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2. Appropriate redress for survivors should include the elements of:
  - a. direct personal response
  - b. counselling and psychological care
  - c. monetary payments.
3. Funders or providers of existing support services should maintain their current resourcing for existing support services, without reducing or diverting resources in response to the Royal Commission's recommendations on redress and civil litigation.
4. Any institution or redress scheme that offers or provides any element of redress should do so in accordance with the following principles:
  - a. Redress should be survivor focused.
  - b. There should be a 'no wrong door' approach for survivors in gaining access to redress.
  - c. All redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors.
  - d. All redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors.

## Direct personal response

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5. Institutions should offer and provide a direct personal response to survivors in accordance with the following principles:
  - a. Re-engagement between a survivor and an institution should only occur if, and to the extent that, a survivor desires it.
  - b. Institutions should make clear what they are willing to offer and provide by way of direct personal response to survivors of institutional child sexual abuse. Institutions should ensure that they are able to provide the direct personal response they offer to survivors.
  - c. At a minimum, all institutions should offer and provide on request by a survivor:
    - i. an apology from the institution
    - ii. the opportunity to meet with a senior institutional representative and receive an acknowledgement of the abuse and its impact on them
    - iii. an assurance or undertaking from the institution that it has taken, or will take, steps to protect against further abuse of children in that institution.
  - d. In offering direct personal responses, institutions should try to be responsive to survivors' needs.
  - e. Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response.
  - f. Direct personal responses should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors, including cultural awareness and sensitivity training where relevant.
  - g. Institutions should welcome feedback from survivors about the direct personal response they offer and provide.
6. Those who operate a redress scheme should offer to facilitate the provision of a written apology, a written acknowledgement and/or a written assurance of steps taken to protect against further abuse for survivors who seek these forms of direct personal response but who do not wish to have any further contact with the institution.
7. Those who operate a redress scheme should facilitate the provision of these forms of direct personal response by conveying survivors' requests for these forms of direct personal response to the relevant institution.
8. Institutions should accept a survivor's choice of intermediary or representative to engage with the institution on behalf of the survivor, or with the survivor as a support person, in seeking or obtaining a direct personal response.

## Counselling and psychological care

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9. Counselling and psychological care should be supported through redress in accordance with the following principles:
  - a. Counselling and psychological care should be available throughout a survivor's life.
  - b. Counselling and psychological care should be available on an episodic basis.
  - c. Survivors should be allowed flexibility and choice in relation to counselling and psychological care.
  - d. There should be no fixed limits on the counselling and psychological care provided to a survivor.
  - e. Without limiting survivor choice, counselling and psychological care should be provided by practitioners with appropriate capabilities to work with clients with complex trauma.
  - f. Treating practitioners should be required to conduct ongoing assessment and review to ensure treatment is necessary and effective. If those who fund counselling and psychological care through redress have concerns about services provided by a particular practitioner, they should negotiate a process of external review with that practitioner and the survivor. Any process of assessment and review should be designed to ensure it causes no harm to the survivor.
  - g. Counselling and psychological care should be provided to a survivor's family members if necessary for the survivor's treatment.
  
10. To facilitate the provision of counselling and psychological care by practitioners with appropriate capabilities to work with clients with complex trauma:
  - a. the Australian Psychological Society should lead work to design and implement a public register to enable identification of practitioners with appropriate capabilities to work with clients with complex trauma
  - b. the public register and the process to identify practitioners with appropriate capabilities to work with clients with complex trauma should be designed and implemented by a group that includes representatives of the Australian Psychological Society, the Australian Association of Social Workers, the Royal Australian and New Zealand College of Psychiatrists, Adults Surviving Child Abuse, a specialist sexual assault service, and a non-government organisation with a suitable understanding of the counselling and psychological care needs of Aboriginal and Torres Strait Islander survivors
  - c. the funding for counselling and psychological care under redress should be used to provide financial support for the public register if required
  - d. those who operate a redress scheme should ensure that information about the public register is made available to survivors who seek counselling and psychological care through the redress scheme.

11. Those who administer support for counselling and psychological care through redress should ensure that counselling and psychological care are supported through redress in accordance with the following principles:
  - a. Counselling and psychological care provided through redress should supplement, and not compete with, existing services.
  - b. Redress should provide funding for counselling and psychological care services and should not itself provide counselling and psychological care services.
  - c. Redress should fund counselling and psychological care as needed by survivors rather than providing a lump sum payment to survivors for their future counselling and psychological care needs.
12. The Australian Government should remove any restrictions on the number of sessions of counselling and psychological care, whether in a particular period of time or generally, for which Medicare funding is available for survivors who are assessed as eligible for redress under a redress scheme.
13. The Australian Government should expand the range of counselling and psychological care services for which Medicare funding is available for survivors who are assessed as eligible for redress under a redress scheme to include longer-term interventions that are suitable for treating complex trauma, including through non-cognitive approaches.
14. The funding obtained through redress to ensure that survivors' needs for counselling and psychological care are met should be used to fund measures that help to meet those needs, including:
  - a. measures to improve survivors' access to Medicare by:
    - i. funding case management style support to help survivors to understand what is available through the Better Access initiative and Access to Allied Psychological Services and why a GP diagnosis and referral is needed
    - ii. maintaining a list of GPs who have mental health training, are familiar with the existence of the redress scheme and are willing to be recommended to survivors as providers of GP services, including referrals, in relation to counselling and psychological care
    - iii. supporting the establishment and use of the public register that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors and who are registered practitioners for Medicare purposes
  - b. providing funding to supplement existing services provided by state-funded specialist services to increase the availability of services and reduce waiting times for survivors



- c. measures to address gaps in expertise and geographical and cultural gaps by:
  - i. supporting the establishment and promotion of the public register that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors
  - ii. funding training in cultural awareness for practitioners who have the capabilities to work with survivors but have not had the necessary training or experience in working with Aboriginal and Torres Strait Islander survivors
  - iii. funding rural and remote practitioners, or Aboriginal and Torres Strait Islander practitioners, to obtain appropriate capabilities to work with survivors
  - iv. providing funding to facilitate regional and remote visits to assist in establishing therapeutic relationships; these could then be maintained largely by online or telephone counselling. There could be the potential to fund additional visits if required from time to time
- d. providing funding for counselling and psychological care for survivors whose needs for counselling and psychological care cannot otherwise be met, including by paying reasonable gap fees charged by practitioners if survivors are unable to afford these fees.

## Monetary payments

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15. The purpose of a monetary payment under redress should be to provide a tangible recognition of the seriousness of the hurt and injury suffered by a survivor.

16. Monetary payments should be assessed and determined by using the following matrix:

Factor	Value
Severity of abuse	1–40
Impact of abuse	1–40
Additional elements	1–20

17. The ‘Additional elements’ factor should recognise the following elements:

- a. whether the applicant was in state care at the time of the abuse – that is, as a ward of the state or under the guardianship of the relevant Minister or government agency
- b. whether the applicant experienced other forms of abuse in conjunction with the sexual abuse – including physical, emotional or cultural abuse or neglect

- c. whether the applicant was in a 'closed' institution or without the support of family or friends at the time of the abuse
  - d. whether the applicant was particularly vulnerable to abuse because of his or her disability.
- 18. Those establishing a redress scheme should commission further work to develop this matrix and the detailed assessment procedures and guidelines required to implement it:
  - a. in accordance with our discussion of the factors
  - b. taking into account expert advice in relation to institutional child sexual abuse, including child development, medical, psychological, social and legal perspectives
  - c. with the benefit of actuarial advice in relation to the actuarial modelling on which the level and spread of monetary payments and funding expectations are based.
- 19. The appropriate level of monetary payments under redress should be:
  - a. a minimum payment of \$10,000
  - b. a maximum payment of \$200,000 for the most severe case
  - c. an average payment of \$65,000.
- 20. Monetary payments should be assessed and paid without any reduction to repay past Medicare expenses, which are to be repaid (if required) as part of the administration costs of a redress scheme.
- 21. Consistent with our view that monetary payments under redress are not income for the purposes of social security, veterans' pensions or any other Commonwealth payments, those who operate a redress scheme should seek a ruling to this effect to provide certainty for survivors.
- 22. Those who operate a redress scheme should give consideration to offering monetary payments by instalments at the option of eligible survivors, taking into account the likely demand for this option from survivors and the cost to the scheme of providing it.
- 23. Survivors who have received monetary payments in the past – whether under other redress schemes, statutory victims of crime schemes, through civil litigation or otherwise – should be eligible to be assessed for a monetary payment under redress.
- 24. The amount of the monetary payments that a survivor has already received for institutional child sexual abuse should be determined as follows:
  - a. monetary payments already received should be counted on a gross basis, including any amount the survivor paid to reimburse Medicare or in legal fees

- b. no account should be taken of the cost of providing any services to the survivor, such as counselling services
  - c. any uncertainty as to whether a payment already received related to the same abuse for which the survivor seeks a monetary payment through redress should be resolved in the survivor's favour.
25. The monetary payments that a survivor has already received for institutional child sexual abuse should be taken into account in determining any monetary payment under redress by adjusting the amount of the monetary payments already received for inflation and then deducting that amount from the amount of the monetary payment assessed under redress.

## Redress structure and funding

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### Redress scheme structure

26. In order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.
27. If the Australian Government does not establish a single national redress scheme, as the next best option for ensuring justice for survivors, each state and territory government should establish a redress scheme covering government and non-government institutions in the relevant state or territory.
28. The Australian Government should determine and announce by the end of 2015 that it is willing to establish a single national redress scheme.
29. If the Australian Government announces that it is willing to establish a single national redress scheme, the Australian Government should commence national negotiations with state and territory governments and all parties to the negotiations should seek to ensure that the negotiations proceed as quickly as possible to agree the necessary arrangements for a single national redress scheme.
30. If the Australian Government does not announce that it is willing to establish a single national redress scheme, each state and territory government should establish a redress scheme for the relevant state or territory that covers government and non-government institutions. State and territory governments should undertake national negotiations as quickly as possible to agree the necessary matters of detail to provide the maximum possible consistency for survivors between the different state and territory schemes.

31. Whether there is a single national redress scheme or separate state and territory redress schemes, the scheme or schemes should be established and ready to begin inviting and accepting applications from survivors by no later than 1 July 2017.
32. The Australian Government (if it announces that it is willing to establish a single national redress scheme) or state and territory governments should establish a national redress advisory council to advise all participating governments on the establishment and operation of the redress scheme or schemes.
33. The national redress advisory council should include representatives:
  - a. of survivor advocacy and support groups
  - b. of non-government institutions, particularly those that are expected to be required to respond to a significant number of claims for redress
  - c. with expertise in issues affecting survivors with disabilities
  - d. with expertise in issues of particular importance to Aboriginal and Torres Strait Islander survivors
  - e. with expertise in psychological and legal issues relevant to survivors
  - f. with any other expertise that may assist in advising on the establishment and operation of the redress scheme or schemes.

## Redress scheme funding

34. For any application for redress made to a redress scheme, the cost of redress in respect of the application should be:
  - a. a proportionate share of the cost of administration of the scheme
  - b. if the applicant is determined to be eligible, the cost of any contribution for counselling and psychological care in respect of the applicant
  - c. if the applicant is determined to be eligible, the cost of any monetary payment to be made to the applicant.
35. The redress scheme or schemes should be funded as much as possible in accordance with the following principles:
  - a. The institution in which the abuse is alleged or accepted to have occurred should fund the cost of redress.
  - b. Where an applicant alleges or is accepted to have experienced abuse in more than one institution, the redress scheme or schemes should apportion the cost

of funding redress between the relevant institutions, taking account of the relative severity of the abuse in each institution and any other features relevant to calculating a monetary payment.

- c. Where the institution in which the abuse is alleged or accepted to have occurred no longer exists but the institution was part of a larger group of institutions or where there is a successor to the institution, the group of institutions or the successor institution should fund the cost of redress.
36. The Australian Government and state and territory governments should provide ‘funder of last resort’ funding for the redress scheme or schemes so that the governments will meet any shortfall in funding for the scheme or schemes.
  37. Regardless of whether there is a single national redress scheme or separate state and territory redress schemes, the Australian Government and each state or territory government should negotiate and agree their respective shares of or contributions to ‘funder of last resort’ funding in respect of applications alleging abuse in the relevant state or territory.
  38. The Australian Government (if it announces that it is willing to establish a single national redress scheme) or state and territory governments should determine how best to raise the required funding for the redress scheme or schemes, including government funding and funding from non-government institutions.
  39. The Australian Government or state and territory governments should determine whether or not to require particular non-government institutions or particular types of non-government institutions to contribute funding for redress.

## Trust fund for counselling and psychological care

40. The redress scheme, or each redress scheme, should establish a trust fund to receive the funding for counselling and psychological care paid under redress and to manage and apply that funding to meet the needs for counselling and psychological care of those eligible for redress under the relevant redress scheme.
41. The trust fund, or each trust fund, should be governed by a corporate trustee with a board of directors appointed by the government that establishes the relevant redress scheme. The board or each board should include:
  - a. an independent Chair
  - b. a representative of: government; non-government institutions; survivor advocacy and support groups; and the redress scheme
  - c. those with any other expertise that is desired at board level to direct the trust.

42. The trustee, or each trustee, should engage actuaries to conduct regular actuarial assessments to determine a 'per head' estimate of future counselling and psychological care costs to be met through redress. The trustee, or each trustee, should determine the amount from time to time that those who fund redress, including as the funder of last resort, must pay per eligible applicant to fund the counselling and psychological care element of redress.

## Redress scheme processes

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### Eligibility for redress

43. A person should be eligible to apply to a redress scheme for redress if he or she was sexually abused as a child in an institutional context and the sexual abuse occurred, or the first incidence of the sexual abuse occurred, before the cut-off date.
44. 'Institution' should have the same meaning as in the Royal Commission's terms of reference.
45. Child sexual abuse should be taken to have occurred in an institutional context in the following circumstances:
- a. it happens:
    - i. on premises of an institution
    - ii. where activities of an institution take place or
    - iii. in connection with the activities of an institution

in circumstances where the institution is, or should be treated as being, responsible for the contact between the abuser and the applicant that resulted in the abuse being committed
  - b. it is engaged in by an official of an institution in circumstances (including circumstances that involve settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk
  - c. it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.
46. Those who operate the redress scheme should specify the cut-off 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.
47. An offer of redress should only be made if the applicant is alive at the time the offer is made.

## Duration of a redress scheme

48. A redress scheme should have no fixed closing date. But, when applications to the scheme reduce to a level where it would be reasonable to consider closing the scheme, those who operate the redress scheme should consider specifying a closing date for the scheme. The closing date should be at least 12 months into the future. Those who operate the redress scheme should ensure that the closing date is given widespread publicity until the scheme closes.

## Publicising and promoting the availability of the scheme

49. Those who operate a redress scheme should ensure the availability of the scheme is widely publicised and promoted.
50. The redress scheme should consider adopting particular communication strategies for people who might be more difficult to reach, including:
  - a. Aboriginal and Torres Strait Islander communities
  - b. people with disability
  - c. culturally and linguistically diverse communities
  - d. regional and remote communities
  - e. people with mental health difficulties
  - f. people who are experiencing homelessness
  - g. people in correctional or detention centres
  - h. children and young people
  - i. people with low levels of literacy
  - j. survivors now living overseas.

## Application process

51. A redress scheme should rely primarily on completion of a written application form.
52. A redress scheme should fund support services and community legal centres to assist applicants to apply for redress.
53. A redress scheme should select support services and community legal centres to cover a broad range of likely applicants, taking into account the need to cover regional and remote areas and the particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.

54. Those who operate a redress scheme should determine whether the scheme will require additional material or evidence and additional procedures to determine the validity of applications. Any additional requirements should be clearly set out in scheme material that is made available to applicants, support services and others who may support or advise applicants in relation to the scheme.
55. A redress scheme may require applicants for redress to verify their accounts of abuse by statutory declaration.

## Institutional involvement

56. A redress scheme should inform any institution named in an application for redress of the application and the allegations made in it and request the institution to provide any relevant information, documents or comments.

## Standard of proof

57. 'Reasonable likelihood' should be the standard of proof for determining applications for redress.

## Decision making on a claim

58. A redress scheme should adopt administrative decision-making processes appropriate to a large-scale redress scheme. It should make decisions based on the application of the detailed assessment procedures and guidelines for implementing the matrix for monetary payments.

## Offer and acceptance of offer

59. An offer of redress should remain open for acceptance for a period of one year.
60. A period of three months should be allowed for an applicant to seek a review of an offer of redress after the offer is made.

## Review and appeals

61. A redress scheme should offer an internal review process.
62. A redress scheme established on an administrative basis should be made subject to oversight by the relevant ombudsman through the ombudsman's complaints mechanism.



## Deeds of release

63. As a condition of making a monetary payment, a redress scheme should require an applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse by executing a deed of release.
64. A redress scheme should fund, at a fixed price, a legal consultation for an applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases.
65. No confidentiality obligations should be imposed on applicants for redress.

## Support for survivors

66. A redress scheme should offer and fund counselling during the period from assisting applicants with the application, through the period when the application is being considered, to the making of the offer and the applicant's consideration of whether or not to accept the offer. This should include a session of financial counselling if the applicant is offered a monetary payment.
67. A redress scheme should fund counselling provided by a therapist of the applicant's choice if it is specifically requested by the applicant and in circumstances where the applicant has an established relationship with the therapist and the cost is reasonably comparable to the cost the redress scheme is paying for these services generally.
68. A redress scheme should offer and fund a limited number of counselling sessions for family members of survivors if reasonably required.

## Transparency and accountability

69. A redress scheme should take the following steps to improve transparency and accountability:
  - a. In addition to publicising and promoting the availability of the scheme, the scheme's processes and time frames should be as transparent as possible. The scheme should provide up-to-date information on its website and through any funded counselling and support services and community legal centres, other relevant support services and relevant institutions.
  - b. If possible, the scheme should ensure that each applicant is allocated to a particular contact officer who they can speak to if they have any queries about the status of their application or the timing of its determination and so on.

- c. The scheme should operate a complaints mechanism and should welcome any complaints or feedback from applicants and others involved in the scheme (for example, support services and community legal centres).
- d. The scheme should provide any feedback it receives about common problems that have been experienced with applications or institutions' responses to funded counselling and support services and community legal centres, other relevant support services and relevant institutions. It should include any suggestions on how to improve applications or responses or ensure more timely determinations.
- e. The scheme should publish data, at least annually, about:
  - i. the number of applications received
  - ii. the institutions to which the applications relate
  - iii. the periods of alleged abuse
  - iv. the number of applications determined
  - v. the outcome of applications
  - vi. the mean, median and spread of payments offered
  - vii. the mean, median and spread of time taken to determine the application
  - viii. the number and outcome of applications for review.

## Interaction with alleged abuser, disciplinary process and police

70. A redress scheme should not make any 'findings' that any alleged abuser was involved in any abuse.
71. A redress scheme may defer determining an application for redress if the institution advises that it is undertaking internal disciplinary processes in respect of the abuse the subject of the application. A scheme may have the discretion to consider the outcome of the disciplinary process, if it is provided by the institution, in determining the application.
72. A redress scheme should comply with any legal requirements, and make use of any permissions, to report or disclose abuse, including to oversight agencies.
73. A redress scheme should report any allegations to the police if it has reason to believe that there may be a current risk to children. If the relevant applicant does not consent to the allegations being reported to the police, the scheme should report the allegations to the police without disclosing the applicant's identity.

Note: The issue of reporting to police, including blind reporting, will be considered further in our work in relation to criminal justice issues.

74. A redress scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants.
75. A redress scheme should encourage any applicants who seek advice from it about reporting to police to discuss their options directly with the police.

## Interim arrangements

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76. Institutions should seek to achieve independence in institutional redress processes by taking the following steps:
  - a. Institutions should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim.
  - b. If feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions.
  - c. Institutions should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues.
  - d. Institutions should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 5 concerning meetings and meeting environments.
  - e. Processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.
77. Institutions should ensure that the required independence is set out clearly in writing between the institution and any person or body the institution engages as part of its redress process.
78. If a survivor alleges abuse in more than one institution, the institution to which the survivor applies for redress should adopt the following process:
  - a. With the survivor's consent, the institution's redress process should approach the other named institutions to seek cooperation on the claim.
  - b. If the survivor consents and the relevant institutions agree, one institutional process should assess the survivor's claim in accordance with the recommended redress elements and processes (with any necessary modifications because of

the absence of a government-run scheme) and allocate contributions between the institutions.

- c. If any institution no longer exists and has no successor, its share should be met by the other institution or institutions.

79. Institutions should adopt the elements of redress and the general principles for providing redress recommended in Chapter 4.
80. Institutions should undertake, through their redress processes, to meet survivors' needs for counselling and psychological care. A survivor's need for counselling and psychological care should be assessed independently of the institution.
81. Institutions should adopt the purpose of monetary payments recommended in Chapter 7 and be guided by the recommended matrix for assessing monetary payments.
82. In implementing any interim arrangements for institutions to offer and provide redress, institutions should take account of our discussion of the applicability of the redress scheme processes recommended in Chapter 11.
83. Institutions should ensure no deeds of release are required under interim arrangements for institutions to offer and provide redress.
84. If the Australian Government or state and territory governments accept our recommendations and announce that they are working to establish a single national redress scheme or separate state and territory redress schemes, institutions may wish to offer smaller interim or emergency payments as an alternative to offering institutional redress processes as interim arrangements.

## Limitation periods

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85. State and territory governments should introduce legislation to remove any limitation period that applies to a claim for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child.
86. State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past.
87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.

88. State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that they be implemented before our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.

## Duty of institutions

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89. State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.
90. The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:
- a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
  - b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
  - c. disability services for children
  - d. health services for children
  - e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
  - f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.
91. Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.
92. For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.

93. State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.

## Identifying a proper defendant

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94. State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:
- a. the property trust is a proper defendant to the litigation
  - b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.
95. The Australian Government and state and territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children's services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.

## Model litigant approaches

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96. Government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.
97. The guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessarily adversarial responses to claims.
98. The guidelines should include an obligation on the institution to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.
99. Government and non-government institutions should publish the guidelines they adopt or otherwise make them available to claimants and their legal representatives.







# PART I OUR APPROACH

# 1 Introduction

## 1.1 Terms of Reference

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The Letters Patent provided to the Royal Commission into Institutional Responses to Child Sexual Abuse require that it ‘inquire into institutional responses to allegations and incidents of child sexual abuse and related matters’.

In carrying out this task, the Royal Commission is directed to focus its inquiries and recommendations on systemic issues but also recognise that its work will be informed by an understanding of individual cases. The Royal Commission must make findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse on children when it occurs.

Under paragraph (d) of the Terms of Reference we are given in the Letters Patent, we are required to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

This requires consideration of the extent to which justice is, or has been, achieved in terms of both criminal justice and civil justice for those who suffer institutional child sexual abuse.

We are examining a range of criminal justice issues through our Criminal Justice Project.

In terms of civil justice, redress and civil litigation have emerged as issues of great importance both to those who have suffered institutional child sexual abuse and to institutions. Many survivors have raised these issues in private sessions and we have examined them in a number of case studies.

In this report, we generally use ‘survivor’ rather than ‘victim’ to refer to those who suffer child sexual abuse in an institutional context. However, we acknowledge that ‘victim’ may be appropriate in addition to, or instead of, ‘survivor’ in some places.

## 1.2 Recommendations

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From an early stage, the Commissioners agreed to endeavour to make recommendations on redress and civil litigation by the middle of 2015.

The Royal Commission has now formed concluded views on the appropriate recommendations on redress and civil litigation to ensure justice for survivors.

By reporting as early as possible on these issues, we are seeking to give survivors and institutions more certainty on these issues and enable governments and institutions to implement our recommendations to improve civil justice for survivors as soon as possible.

Our concluded views have been informed by the significant input we have obtained on redress and civil litigation from a broad range of sources, as discussed in section 1.4 below.

## 1.3 Redress and civil litigation

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In this report, we distinguish between monetary payments in the form of compensatory damages obtained through civil litigation and monetary payments made under redress schemes. While both civil litigation and redress processes can result in monetary payments, the monetary payments obtained under each process generally are intended to achieve quite different purposes and require the satisfaction of quite different criteria. We use 'redress' in this report to mean redress obtained outside of civil litigation.

During 2014 we published separate issues papers on civil litigation, redress schemes and statutory victims of crime compensation schemes. We wished to obtain detailed input on each of these topics. We also recognised that some stakeholders would have particular interest in only one or two of these topics.

However, we are satisfied that these issues need to be considered together. Our consideration of what is required for adequate redress is informed by our assessment of the effectiveness of civil litigation as a mechanism for providing justice for victims and vice versa. Redress and civil litigation need to be considered together because they offer alternative avenues through which survivors may seek justice.

Both survivors and institutions need to be able to assess options for redress and civil litigation together. Potential claimants need to know their options in order to make an informed choice about whether to pursue litigation or to participate in an

available redress scheme. Institutions need to understand likely civil litigation outcomes and costs in order to assess the value of alternative approaches through redress and their likely success.

For these reasons, this report contains recommendations on both redress and civil litigation.

## 1.4 What we have done to date

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### Private sessions

When the Royal Commission was appointed, it was apparent to the Australian Government that many people (possibly thousands of people) would wish to tell the Royal Commission about their personal history of sexual abuse in an institutional setting when they were a child. As a consequence, the Commonwealth Parliament amended the *Royal Commissions Act 1902* to create a process called a 'private session'.

A private session is conducted by one or two Commissioners and is an opportunity for a person to tell their story of abuse in a protected and supportive environment. At 30 June 2015, the Royal Commission had held 3,704 private sessions and 1,563 people were waiting for one.

Written accounts are an alternative method for people affected by child sexual abuse to tell us of their experiences. At 30 June 2015, the Royal Commission had received 4,760 written accounts.

Many survivors have told the Royal Commission in private sessions or written accounts about their experiences in seeking compensation or redress through civil litigation, redress schemes or other avenues. These are an important source of information for us in understanding survivors' experiences of redress and civil litigation and what survivors consider is necessary to give them justice.

## Public hearings

At 30 June 2015, the Royal Commission had held 28 public hearings or 'case studies'.

The decision to conduct a case study is informed by whether or not the hearing will advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes so that any findings and recommendations for future change that the Royal Commission makes will have a secure foundation.

In many of the 28 case studies to date, we have heard evidence relevant to redress and civil litigation. We also held a public hearing on redress and civil litigation as part of our consultation process, which is discussed below. We refer to these case studies throughout this report. Our findings on individual case studies are published in separate reports. These are available on the Royal Commission's website.

## Consultations

We have conducted a wide range of public and private consultations on redress and civil litigation.

## Issues papers

At 30 June 2015, the Royal Commission had published eight issues papers on topics relevant to its Terms of Reference.

The issues papers most relevant to our work on redress and civil litigation are:

- *Issues paper 2 – Towards Healing*
- *Issues paper 5 – Civil litigation*
- *Issues paper 6 – Redress schemes*
- *Issues paper 7 – Statutory victims of crime compensation schemes.*

Interested parties are able to give us their views on issues raised in the issues papers by making submissions to issues papers. We have received a wide range of submissions to each issues paper. Some survivors have used submissions to tell us of their relevant experiences. We have also heard from a broad range of governments, regulators, institutions, survivor advocacy and support groups, academics and other interested parties. These submissions are an important source of information that has helped us to understand the many different perspectives on the issues raised.

Most of the submissions we receive in response to issues papers are published on the Royal Commission's website unless:

- the author has expressly requested that their submission not be published
- the Royal Commission has made the decision not to publish a submission. The Royal Commission generally makes the decision not to publish a submission for procedural fairness reasons – for example, the submission may refer

to an institution or make allegations about a person that are of such a nature that it would not be fair to publish the submission without giving that institution or person an opportunity to respond.

Table 1 lists the submissions we have received for each of the issues papers relevant to our work on redress and civil litigation and the number of these submissions that are published on our website.

**Table 1: Submissions on relevant Royal Commission issues papers**

Issues paper	Date closed	No of submissions received	No of submissions published
2. Towards Healing	4 September 2013	57	23
5. Civil litigation	17 March 2014	47	41
6. Redress schemes	2 June 2014	108	86
7. Statutory victims of crime compensation schemes	30 June 2014	49	44
<b>TOTAL</b>		<b>462</b>	<b>389</b>

## Private roundtables

Between September and November 2014, after our issues papers process on redress and civil litigation had concluded, we convened nine days of private roundtables. The private roundtables were conducted by the Chair of the Royal Commission, The Hon. Justice Peter McClellan AM, and Commissioner Robert Fitzgerald AM.

These private roundtables allowed for more focused consultations with invited participants on key issues in redress and civil litigation. They also provided a forum for participants to directly exchange views with each other.

In the private roundtables we heard from a wide range of participants, including survivor advocacy and support groups, governments, faith-based organisations, community service organisations, lawyers, insurers, actuaries and academics.

The private roundtables were not public events. We made clear to participants that the roundtables were not open to the public and that we would not publish any recordings or transcripts of them. Where we refer to the discussions at private roundtables in this report, we do not reference any individual contributions.

We consider that the private roundtables were of great value to us in testing and refining our views. We particularly appreciate the time that participants gave in preparing for and attending the roundtables and the generosity and goodwill of their contributions to the discussions.

## Expert consultations

In addition to the private roundtables, we conducted some more targeted consultations with experts on particularly technical topics. These included consultations with the Insurance Council of Australia and some of their members and with experts on counselling and psychological care.

Again, we consider that the expert consultations were of great value to us. We appreciate the time that participants gave to them and the generosity and goodwill of their contributions.

## Consultation Paper

On 30 January 2015, the Royal Commission published the *Consultation paper: Redress and civil litigation* (the Consultation Paper). The Consultation Paper set out the issues we had considered to that date. On some issues the way forward seemed fairly clear, while on other issues there were a range of options presented. We invited submissions on the issues raised in the Consultation Paper.

Submissions to the Consultation Paper were originally due by Monday, 2 March 2015. The Royal Commission received a number of requests for extensions from individuals and organisations in order to provide an appropriate response to the complex and interconnected issues within the Consultation Paper. Therefore, we extended the time for submissions to 9 March 2015.

The Royal Commission received a wide range of submissions in response to the Consultation Paper from a broad range of governments, regulators, institutions, survivor advocacy and support groups, academics and other interested parties.

We also provided an online comment form, which allowed individuals or organisations to provide short-form comments on specific aspects of the Consultation Paper as an alternative to making a formal submission.

Some survivors have used submissions and the online comment form to tell us of their personal stories and relevant experiences with redress schemes or civil litigation.

The formal submissions and comments have helped us to develop our thinking and to reach our conclusions and final recommendations on redress and civil litigation.

Most of the submissions we received in response to the Consultation Paper are published on our website. However, we did not publish submissions if:

- the author expressly requested that their submission not be published
- the Royal Commission made the decision not to publish a submission. The Royal Commission generally makes the decision not to publish a submission for procedural fairness reasons – for example, the submission may refer to an institution or make allegations about a person that are of such a nature that it would not be fair to publish the submission without giving that institution or person an opportunity to respond.

Comments received through the online comment form have not been, and will not be, published.

**Table 2: Submissions to the Consultation Paper**

Consultation Paper	Date closed	No of submissions received	No of submissions published
Redress and Civil Litigation	9 March 2015	275	192

## Public hearing

On 25 March 2015, the Royal Commission began a public hearing on redress and civil litigation. The public hearing ran for three days. The public hearing enabled us to invite organisations and individuals to speak to their written submissions to the Consultation Paper and to respond to questions from Commissioners and Counsel Assisting.

All six Commissioners sat for this public hearing. All Commissioners were involved in finalising the Consultation Paper and it was important that all Commissioners had the opportunity to hear oral submissions from those who were invited to speak at the public hearing and to ask questions of them. All Commissioners have determined the Royal Commission's conclusions and recommendations on redress and civil litigation as set out in this report.

It was not possible to invite everyone who had made a submission to speak at the public hearing. It was not possible even to invite all those who expressed a particular wish to speak. In issuing invitations to speak at the public hearing, we selected organisations and individuals with the intention of ensuring that those listening to the public hearing would hear from a broad range of perspectives, including:

- governments
- survivor advocacy and support groups
- groups with particular expertise in issues of importance to Aboriginal and Torres Strait Islander survivors
- the largest faith-based institutions
- other institutions that provide services to children
- people with expertise in counselling and psychological care
- legal organisations
- the Insurance Council of Australia
- individuals who have had particular involvement in the operation of a redress scheme.

Those invited to speak at the public hearing were not asked to give sworn evidence.

The hearing was open to the public and broadcast on the Royal Commission's website.

The transcripts of the public hearing are available on the Royal Commission's website.

We refer to what we were told at the public hearing throughout this report.

We provided an online comment form for anyone who wished to comment on any of the matters raised during the public hearing. The comments we received have been taken into account in preparing this report.

## Research projects

The Royal Commission has an extensive external research program. However, most of our research on redress and civil litigation has been conducted in-house and through consultations.

We commissioned one external research project that was particularly relevant to our work for redress on counselling and psychological care. We engaged the University of New South Wales to carry out a rapid evidence review, incorporating systematic review principles, to identify what existing research and other evidence tells us about the availability, modality and effectiveness of existing support services available to child and adult survivors of child sexual abuse. The research also looked at these issues in institutional contexts. It focused primarily on services that provide therapeutic psychosocial support to survivors.

We have used the draft report of this research project, including to identify primary sources referenced in this report. Although the report has not been published to date, we acknowledge the contribution that the research project has made to our work.

We also commissioned the University of New South Wales to undertake a scoping study of the existing broader support services network. This scoping study was designed to help us understand the broader (including non-therapeutic) support services that are currently available for survivors across Australia. Information was sought on the type of services offered, the eligibility criteria and any associated fees. The scoping study was undertaken in a relatively short period of time and relied upon public information available on the internet. It was not designed to identify every single service or the level and quality of services provided. This scoping study was published on our website in conjunction with the Consultation Paper.

## Obtaining information under summons

The Royal Commission has powers to issue summonses and Notices to Produce specified documents or data.<sup>1</sup>

For our work on redress and civil litigation up to publication of the Consultation Paper, we used these powers to obtain data and documents on:

- child sexual abuse claims resolved between 1 January 1995 and 30 June 2014 by the governments and institutions to which summonses or notices were issued
- government redress schemes
- statutory victims of crime compensation schemes.

The data included de-identified records of the assessment of each application that was made to the Western Australian



Government's redress scheme, Redress WA. These data were particularly useful for the actuarial advice we obtained, which was published in conjunction with the Consultation Paper.

Some data obtained under other notices have also been of use to us in relation to redress and civil litigation.

We published a range of data in the Consultation Paper.

Since publishing the Consultation Paper, we have issued further summonses and Notices to Produce to obtain data on:

- child sexual abuse claims resolved between 1 July 2014 and 31 December 2014 by the governments and institutions to which summonses or notices were previously issued
- child sexual abuse claims resolved between 2000 and 2014 from a number of insurers
- sampling of applications from the previous Queensland and Tasmanian government redress schemes
- South Australia's statutory victims of crime compensation scheme from 1 July 2014 to 31 December 2014.

We have updated the data analysis we provided in the Consultation Paper to include the additional data we have received. The data has also been taken into account in the updated actuarial advice we have commissioned.

Our analysis of the data we obtained is set out in Chapter 3.

## Actuarial advice

We have engaged Finity Consulting Pty Limited (Finity) to give us actuarial advice on designing and funding redress. Ms Estelle Pearson, a Principal and Managing Director of Finity, led this work.

We published Finity's initial actuarial report in conjunction with our Consultation Paper so that all interested parties could understand the detail of the actuarial advice that had informed the relevant parts of the Consultation Paper.

Finity has continued to give us actuarial advice for the purposes of this report. Finity's updated actuarial report to us will be published in conjunction with this report.

We discuss the material changes in the modelling between the initial and updated actuarial reports in Chapter 3.

### 1.5 Final steps

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As set out by the Letters Patent, any report published before our final report, which is required to be submitted to the Governor-General by 15 December 2017, will be considered an interim report.<sup>2</sup>

However, this report on redress and civil litigation contains the Royal Commission's final recommendations on redress and civil litigation.

The Royal Commission will watch with interest the consideration of the recommendations in this report. The Royal Commission may hold a public hearing before the end of 2017 to examine the implementation of the recommendations and progress on achieving justice for victims through the provision of redress and civil litigation.

Commissioners wish to thank all interested individuals, governments and non-government organisations that have contributed to the extensive consultation processes that the Royal Commission has undertaken in relation to redress and civil litigation.

## 2 Our approach

### 2.1 Why redress is needed

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Our case studies and private sessions to date leave us in no doubt that many people, while children, were injured by being subjected to child sexual abuse in institutions or in connection with institutions. In some cases, their injuries are severe and long-lasting. People can be affected by these injuries for the rest of their lives.

In Australia, people are entitled to seek damages for personal injuries they suffer caused by the deliberate or negligent act of another person. Compensable injuries include both the physical and psychological injuries caused by the other person's deliberate or negligent act.

In spite of the severity of the injuries many survivors have suffered, many survivors have not sought or obtained compensation.

It is clear from our inquiries that the very nature of the injury done to victims of institutional child sexual abuse works against survivors' ability to seek damages under the existing avenues available to those who suffer personal injuries.

There is now clear evidence that it is likely to take many survivors years, even decades, to disclose their experience of sexual abuse as a child. There is also an increasing understanding of the devastating impacts of child sexual abuse and how these may work against survivors' ability to disclose the abuse even to those who are closest to them.

There is also the difficulty, particularly for children and young adults, in identifying the connection between the abuse they

have suffered and its psychological impacts on them. While connections between the experience of child sexual abuse and drug and alcohol addictions, the experience of mental health issues and emotional and interpersonal difficulties are now well understood and documented by medical professionals, they are not necessarily apparent to, or even suspected by, those who experience child sexual abuse. It may be years or decades before they gain any insight into the connections between the child sexual abuse they suffered and the difficulties they experience in their adult lives. By the time they make the connections, the institution may no longer exist or have any assets.

For those who experience child sexual abuse in an institutional context, there is also the possibility of a significant and continuing power imbalance between the survivor, even as an adult, and the institution. Many of the institutions are large and authoritative organisations in the community. While litigation often involves an imbalance in size and resources between the parties, the long-term impacts of child sexual abuse leave many survivors much less able to confront institutions through the legal system and they remain at great risk of re-traumatisation.

The law's reluctance to impose on an institution liability for criminal acts committed by those associated with it creates an additional barrier for those who experience child sexual abuse in an institutional context. While the perpetrator of child sexual abuse should always be liable for the abuse, the law does not currently require the institution to be liable for injuries that the perpetrator causes unless the institution itself was at fault.

Our inquiries have shown how widespread and long-lasting child sexual abuse has been in a number of prominent institutions that have offered to care for children. We are in no doubt that, as between those who as children were victims of institutional child sexual abuse and the institution in connection with which the abuse occurred, the victims' interests must be preferred.

Because of the nature and impact of the abuse they suffered, many victims of child sexual abuse have not had the opportunity to seek compensation for their injuries that many Australians generally can take for granted. While it cannot now be made feasible for many of those who have experienced institutional child sexual abuse to seek common law damages, there is a clear need to provide avenues for survivors to obtain effective redress for this past abuse.

The reality is that there is a significant group of people in our community who have been damaged by their sexual abuse in an institution and for whom there has been an inadequate response by both institutions and government. Public recognition of their suffering and a just response to their loss can only come if the Australian Government accepts a role in ensuring that there is a national response to the problem.

All Australian governments recognised this need by establishing this Royal Commission and giving us Terms of Reference that require and authorise us to inquire into matters including what institutions and governments should do to address or alleviate the impact of institutional child sexual abuse – in particular, what should be done to ensure justice for victims through the provision of redress by institutions.

Our inquiries confirm for us that Australian governments were correct to identify the need for redress in our Terms of Reference. In this report, we recommend how redress should be provided so as to ensure justice for victims.

## 2.2 Justice for victims

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Under our Terms of Reference, the recommendations we make on redress and civil litigation must be focused on:

- what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts
- ensuring justice for victims through the provision of redress by institutions.

'Justice' is a broad term. However, in the context of our Terms of Reference and in relation to civil rather than criminal justice, the term 'justice' focuses on the provision of redress to address or alleviate the impact on survivors of institutional child sexual abuse.

In Australia the process for obtaining civil justice for personal injury is by an award of damages through successful civil litigation. One issue we have inquired into is whether civil litigation is an effective way for survivors to obtain compensation and to address or alleviate the impact on them of institutional child sexual abuse and what reforms might be needed to make it more effective. We consider reforms to civil litigation in Part IV.

As a result of our inquiries, we are satisfied that civil litigation is not an effective way for all survivors to obtain redress that is adequate

to address or alleviate the impact on them of institutional child sexual abuse. This is clearly the case in past institutional child sexual abuse, where there are large groups of survivors, including many Forgotten Australians, Former Child Migrants and members of the Stolen Generations, who suffered child sexual abuse in residential institutions and who have not obtained redress or have not been satisfied with the redress they have obtained.

It is clear to us from the very many accounts we have heard from survivors in private sessions and through submissions to issues papers and the Consultation Paper that many survivors do not consider that justice has been, or can be, achieved for them through existing civil litigation systems or through previous or existing redress schemes that some governments and non-government institutions offer.

We acknowledge that justice is an inherently individual and subjective experience. Some survivors have told us that nothing could repair the impact of institutional child sexual abuse on their lives, that no amount of money could compensate them adequately for the abuse they suffered and that no apology or support could give them back their lost childhoods or make up for the damage in their adult lives.

Many survivors have told us about measures that they have found beneficial and that in some cases have provided them with a sense of justice, acknowledgment and recognition. These measures included:

- personal apologies for the abuse
- recognition and acknowledgment that the abuse occurred through public apologies and memorials
- monetary payments
- counselling

- practical assistance with matters such as employment, housing, literacy, and drug and alcohol addictions
- support for survivor networks and reunions
- culturally sensitive forms of collective or community supports that lessen the impact of abuse on survivors' families and broader communities.

Another element stands out from what we have heard from many survivors and survivor advocacy and support groups.

A number of survivors, and many survivor advocacy and support groups, have highlighted the importance to survivors of 'fairness' in the sense of equal access to redress for survivors and equal treatment of survivors in redress processes.

For example, the Care Leavers Australia Network (CLAN), in supporting a national redress scheme, stated:

It is and always has been CLAN's position that the only way to ensure justice and equity for all Australian Care Leavers is to provide a National Independent Redress Scheme (NIRS) for ALL Australian Care Leavers ...

... if a National Redress Scheme was introduced it would mean uniformity across the country eliminating the inequality between states and past providers. The redress schemes that have operated in the past all had their flaws and allowed for inequality between Care Leavers ... If a national redress

scheme was introduced it would eliminate the injustice that occurred and all [sic – allow] for all Care Leavers to be treated equally.<sup>3</sup>

Similarly, CLAN’s submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry conducted in 2010 sought a redress scheme that would achieve ‘universality, consistency, fairness, accessibility and equality’.<sup>4</sup>

The Alliance for Forgotten Australians also emphasised the importance of consistency and fairness, stating:

The inconsistencies and disparities between different redress schemes are unfair and has created confusion in the minds of many Forgotten Australians and their families ...

To address these deficiencies, and to ensure a consistent and fair framework for redress, a national scheme is needed ...<sup>5</sup>

In its submission in response to the Consultation Paper, the Coalition of Aboriginal Services in Victoria reported on the outcomes of its ‘Yarning Circle’ consultations and stated that the primary reasons for supporting a national scheme for redress included ‘to ensure redress provided was equitable and did not differ depending on the institution or state involved’.<sup>6</sup>

A number of those who spoke at the public hearing referred to the importance of fairness and equity in the provision of redress to survivors.<sup>7</sup>

Dr Humphreys CBE, OAM, representing the Child Migrants Trust, told the public hearing:

Previous redress initiatives by governments and institutions have produced a patchwork response, which many child migrants have experienced as discriminatory and unfair.<sup>8</sup>

Survivors and survivor advocacy and support groups have repeatedly told us that they regard equal access and equal treatment as essential elements if a redress scheme is to deliver justice.

Equality in this sense does not mean that different levels of severity of abuse, or different levels of severity of impact of abuse, would not be recognised. However, it does mean that the availability and type or amount of redress available should not depend on factors such as:

- the state or territory in which the abuse occurred
- whether the institution was a government or non-government institution
- whether the abuse occurred in more than one institution
- the nature or type of institution
- whether the institution still exists
- the assets available to the institution.

We accept the importance to survivors of equality in this sense. We accept that many survivors and survivor advocacy and support groups will not consider that any approach to redress that we recommend is capable of delivering ‘justice’ unless it seeks to achieve equality or fair treatment between survivors.

### **Recommendation**

1. A process for redress must provide equal access and equal treatment for survivors – regardless of the location, operator, type, continued existence or assets of the institution in which they were abused – if it is to be regarded by survivors as being capable of delivering justice.

## 2.3 Current failings

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In our view, the current civil litigation systems and past and current redress processes have not provided justice for many survivors.

The effects of child sexual abuse on mental health functioning have been well documented.<sup>9</sup> These effects are many and varied and affect survivors in many ways:

- at the individual level: mental health and physical health
- at the interpersonal level: emotional, behavioural and interpersonal capacities
- at the societal level: quality of life and opportunity.<sup>10</sup>

What survivors have told us confirms the severe and sometimes lifelong impact that institutional child sexual abuse can have across all of these areas of life.

As stated in the Consultation Paper, all Commissioners have been affected by the accounts they have heard from individual survivors in our private sessions that bear witness to the devastating impacts of abuse.<sup>11</sup>

We have continued to hear from survivors, survivor advocacy and support groups and others about the many difficulties survivors experience in seeking redress or damages through civil litigation.

In the Consultation Paper, we stated that the difficulties are many and varied and in some cases insurmountable.<sup>12</sup> Understandably, many survivors cannot or do not wish to engage with the institution in which they were abused, yet there is no independent mechanism through which they can seek redress. For some survivors, the institution in which they were abused no longer exists and there is no successor institution they can approach for redress. Some institutions have not offered any redress to those who suffered abuse in the institution. Some have also strongly defended any attempted civil litigation. Some survivors have sought to commence civil litigation but have been advised that it was too late for them to sue.

Even where survivors have obtained redress or damages, in many cases it is not of a kind or in an amount that they consider 'just'. While some government redress schemes have offered redress to broad groups of survivors, many survivors have told us that they consider the redress

provided was completely inadequate. Survivors have given evidence in a number of our case studies about the monetary payments they were offered and their opinions of them. Many survivors have told us that they considered the amounts available as monetary payments were far too low and the process for calculating them was unfair or difficult to understand.

For example, in Case Study 5 on boys' homes run by the Salvation Army in New South Wales and Queensland, EG gave evidence about the payment he received under the Queensland redress scheme. He said:

The Government chucked us away in this hell hole, and made me miss out on a childhood, all for \$14,000.<sup>13</sup>

Many survivors told us they were very unhappy when the Western Australian Government reduced the maximum payment under Redress WA from \$80,000 to \$45,000. The Western Australian Government increased the initial budget for Redress WA but reduced the maximum payment when it became evident during the assessment process that a higher than expected proportion of applicants would be assessed as having suffered very severe abuse.<sup>14</sup> Most of the survivors who gave evidence in Case Study 11 on Christian Brothers institutions in Western Australia were very critical of the reduction in the maximum payment from \$80,000 to \$45,000. For example, Mr John Hennessey gave the following evidence:

I was disappointed when the new government came in and halved the money available to be paid. The previous government had

committed to it. This was yet another betrayal.

The money I got was not adequate.<sup>15</sup>

Where civil litigation has settled, many survivors have told us that the settlement payments were inadequate and that legal technicalities forced them to accept these settlements without ever having their claims determined on their merits.

In some cases, survivors have been poorly treated when they have sought redress or pursued civil litigation. This interaction with the institution in which they were abused has been the source of further trauma and distress to them.

We recognise that any new arrangements for redress and civil litigation for survivors must take account of:

- government redress schemes, which have covered a variety of types of abuse and a variety of types of institutions and have offered varying forms of redress
- non-government institution redress schemes, which have covered a variety of types of abuse and have offered varying forms of redress
- statutory victims of crime compensation schemes, through which some survivors have obtained some forms of redress
- redress that some survivors have obtained through civil litigation (usually through settlement rather than a contested hearing on liability and damages).



The government schemes have differed from each other. The non-government institution schemes have differed from each other and from the government schemes. The statutory victims of crime compensation schemes are all different, some of them have changed over time and they have differed from the government schemes and non-government institution schemes. Outcomes obtained through civil litigation have varied widely. Some monetary payments have been in the order of fully compensatory common law damages and others have been closer to nominal amounts to bring litigation to an end.

While there is little consistency in the actions taken to date, we do not seek to criticise any government or institution for seeking to take action on these issues. We recognise that many survivors and survivor advocacy and support groups criticise the particular actions that have been taken. Some criticisms are well founded. However, it is also the case that some governments and many non-government institutions have not established any specific redress schemes and some survivors have not been offered any avenues through which to seek redress for the abuse they suffered.

In these circumstances, the actions taken to date by some governments and some non-government institutions to provide redress need to be recognised for the contribution they have made to individual lives. They are a useful source of information for interested parties and for us in recommending an effective approach to redress.

Many submissions in response to the Consultation Paper agreed with the discussion in the Consultation Paper about current failings of civil litigation and redress.

For example, the Ballarat Centre Against Sexual Assault and Ballarat Survivors Group submitted:

Civil litigation has shown to be an inconsistent, and consequently unfair process for many of the institutional abuse survivors who have spoken about having high legal fees that are factored into the payments offered, reducing the final payouts. Some survivors also reported that they were promised high figure outcomes by lawyers, which, after a lengthy process have not [sic – been] achieved, leading to further disappointment. Generally most report that they felt that they had very little control of the process, which contradicts recommended practice for working with survivors of institutional abuse.<sup>16</sup>

The Salvation Army Australia submitted:

The Salvation Army agrees that the civil litigation system is not suited to achieving the survivors' sense of justice, particularly because important elements of justice include recognition by way of personal and public apologies, ongoing counselling, ongoing practical assistance and support.<sup>17</sup>

The Child Migrants Trust submitted:

It is painfully obvious that the present framework of State and faith based redress schemes does not provide a fair, equitable or easily accessible basis for all the many different, potential applicants for redress.<sup>18</sup>

We are satisfied that many survivors will not be able to seek or obtain justice through the avenues currently available to them for seeking redress or compensation.

Individual experiences of inadequate or unobtainable redress make a powerful argument for addressing current failings. However, it is also clear to us that the scale of the problem, particularly for past abuse, makes these arguments compelling.

A picture is emerging for us that, although sexual abuse of children is not confined in time – it is happening today – there was a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused.

The societal norm that ‘children should be seen but not heard’, which prevailed for unknown decades, provided the opportunity for some adults to abuse the power that their relationship with the child gave them. When the required silence of the child was accompanied by an unquestioning belief by adults in the integrity of the carer for the child – whether they were a youth worker, teacher, residential supervisor or cleric – the power imbalance was entrenched to the inevitable detriment of many children. When, amongst adults who are given the power, there are people with an impaired psychosexual development, a volatile mix is created.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility

of our entire society. Society’s values and mechanisms that were available to regulate and control aberrant behaviour failed. This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions. It is confirmed by the development in recent years of significantly increased regulatory control by government over many institutions that provide for children and the development of education programs and mechanisms by which problems can more readily be brought to attention.

In its submission in response to the Consultation Paper, *Broken Rites* stated that it did not dispute the observations about current failing in the Consultation Paper, but:

we consider that the failings are understated ... The history has to be considered in the context of government powers ... A key factor is the responsibilities accepted by the states for the welfare, protection and education of those children who were citizens ...<sup>19</sup>

We are satisfied that our society’s failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse. It also highlights the importance of improving the capacity of the civil litigation systems to provide justice to survivors in a manner at least comparable to that of other injured persons, so that those who suffer abuse in the future are not forced to go through the same experiences as those who have sought redress to date.

## 2.4 Focusing on our Terms of Reference

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Our Terms of Reference are both broader and narrower than the reach of most current and previous redress schemes.

We are required to examine what institutions and government should do to address, or alleviate the impact of, child sexual abuse in institutional contexts. Our Terms of Reference define ‘institution’ and ‘institutional context’ as follows:

**institution** means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:

- i. includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and
- ii. does not include the family.

**institutional context:** child sexual abuse happens in an **institutional context** if, for example:

- i. it happens on premises of an institution, where activities of

an institution take place, or in connection with the activities of an institution; or

- ii. it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or
- iii. it happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.

The range of institutions and institutional contexts is generally far broader than the range of institutions covered by government redress schemes (although we recognise that statutory victims of crime compensation schemes cover all relevant crimes regardless of the circumstances or context in which they occur).

Government redress schemes in Australia and overseas have generally covered residential institutions and sometimes foster care. Our Terms of Reference include non-residential schools; child care services; all the activities of large and small faith-based organisations; small associations, clubs, and voluntary associations; and all of the residential and other out-of-home care services.

The institutions included in our Terms of Reference vary enormously in size, assets, locations, type of operations and services, levels of regulation and oversight, and sophistication of their management and governance practices and the like. Their histories, including their histories of child sexual abuse and their experience in receiving and responding to allegations of child sexual abuse, will also vary enormously.

In contrast, the requirement that we examine child sexual abuse in an institutional context gives us a narrower focus than most government and non-government institution redress schemes have had. Our Terms of Reference acknowledge that child sexual abuse ‘may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect’. They also allow us to consider what should be done to address, or alleviate the impact of, ‘child sexual abuse *and related matters* in institutional contexts’ (emphasis added). Some current redress schemes focus on sexual abuse. The South Australian Government redress scheme carried out through its statutory victims of crime compensation scheme applies only to sexual abuse.

However, most previous and current redress schemes cover at least sexual and physical abuse. Some also cover emotional abuse or neglect.

In the Consultation Paper, we indicated that our Terms of Reference make it more complex for our deliberations to cover actions taken to date under current or former redress schemes.<sup>20</sup> This is because almost all of these schemes have had coverage both broader (in terms of types of abuse covered) and

narrower (in terms of types of institutions covered) than our Terms of Reference.

Our discussion of the narrower aspect of our Terms of Reference – that we focus on sexual abuse and not other forms of abuse – received attention in a number of submissions and at the public hearing.

A number of those who spoke at the public hearing urged us to recommend redress for all types of abuse and neglect or for broad groups such as Forgotten Australians, care leavers or members of the Stolen Generations, regardless of whether they were abused.

For example, Ms Walsh, representing Micah Projects in Queensland, told the public hearing:

The biggest issue around redress is the eligibility and whether or not physical and emotional abuse can be incorporated as related matters because of the extent to which sexual abuse occurred in institutions, that it did impact on many people beyond just the people who were victims of a direct sexual abuse act. The separation of emotional and physical abuse from sexual abuse is something that is quite traumatic for people in thinking through or having the hope that they had expressed around what the Royal Commission would do about what is justice for them ...<sup>21</sup>

Ms Singh, representing the Coalition of Aboriginal Services in Victoria, told the public hearing:

What we are asking for, firstly, in consideration, is recognition of

cultural abuse as a distinct head of redress within any civil redress scheme's ambit, something that is considered in addition to and equal to sexual, physical and emotional abuse. It is the coalition's view that if we're going to be providing any real sense of healing or justice for Aboriginal children who were removed and then abused within institutions, we need to look at the very reason behind their removal, which is the fact that they were Aboriginal.

... We would be looking at a model that says that the very fact of institutionalisation of Aboriginal children is grounds for some sort of redress and attention.<sup>22</sup>

Ms Carroll OAM, representing the Alliance for Forgotten Australians, told the public hearing:

Survivors of all forms of institutional abuse must be supported, not only those who experienced sexual abuse.

The impact of institutional abuse on children, regardless of whether there was an overlay of other forms of abuse, which add immeasurably to their vulnerability, are now well documented ... Even without the devastating and compounding overlay of sexual, physical and emotional abuse, the facts remain that children brought up in institutional care suffered loss of family, loss of identity, faced issues of esteem and other dimensions of harm, such as diminished trust, shame, guilt and humiliation, and

that's not mentioning matters of lack of education and life opportunities.<sup>23</sup>

Ms Sheedy OAM, representing CLAN, told the public hearing:

We want redress for all care leavers who suffered abuse while in the child welfare system. For care leavers, this is not just about sexual abuse. The lives of care leavers have been greatly diminished by the pain and suffering they experienced as children growing up in institutions, the loss of their childhoods, in many instances, was complete.<sup>24</sup>

Mr Pocock, representing Berry Street, told the public hearing:

[The redress scheme] has to enable all forms of abuse to be assessed, because this would actually be true to the very principles that the Commission has outlined for redress. The Commission itself has outlined that our approach to redress has to be survivor led ...<sup>25</sup>

Mr Razi, representing the Aboriginal Legal Service of Western Australia, told the public hearing:

We submit that other forms of violence should be included [in] any redress scheme. While it is not directly in the Commission's terms of reference to consider physical abuse, it is relevant to the Commission as a related matter. We believe that it is impossible to discuss a culturally appropriate and community sensitive redress

scheme without recognising the need of any scheme to include physical abuse, emotional abuse and psychological abuse.

Amongst other reasons, of which there are many, there are victims of sexual abuse who would feel more comfort coming forward as victims relating only to the physical aspects of their abuse ...<sup>26</sup>

A number of submissions in response to the Consultation Paper also submitted that the Royal Commission's recommendations should extend to recommending redress for those who, as children, suffered physical or emotional abuse or neglect but not sexual abuse in an institutional context.<sup>27</sup> The New South Wales Bar Association submitted '[i]t would be arbitrary and, in our view, irrational to exclude physical abuse' from a redress scheme.<sup>28</sup>

Our Letters Patent require and authorise us to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters in institutional contexts. Commissioners have determined that our recommendations on redress must be directed to recommending the provision of redress for those who suffered child sexual abuse in an institutional context.

We recognise that, in particular instances, other unlawful or improper treatment, such as physical abuse, neglect or emotional or cultural abuse, may have accompanied the sexual abuse. The matrix we recommend in Chapter 7 for assessing monetary payments allows for consideration of these related matters where they have accompanied sexual abuse. The matrix also allows for

consideration of additional factors, including the nature of the institution and whether the victim was a ward of the state.

We do not accept that our Letters Patent allow us to consider redress for those who have suffered physical abuse, neglect or emotional or cultural abuse if they have not also suffered child sexual abuse in an institutional context. Also, we do not accept that our Letters Patent allow us to consider redress for all of those who were in state care, who were child migrants or who are members of the Stolen Generations, regardless of whether they suffered any child sexual abuse in an institutional context.

This approach is reflected in our recommendations on eligibility for redress in Chapter 11.

We appreciate that this approach will disappoint a number of those who have participated in our consultation processes to date, some survivor advocacy and support groups and some of the broader groups of those who experienced institutional care. Consultations throughout our work on redress have made it clear to Commissioners that many survivors identify as members of broader groups, including Forgotten Australians, Former Child Migrants and members of the Stolen Generations.

Some of our recommendations on a direct personal response by the institution, if implemented, may benefit those who are not survivors but who seek to engage with the institution. For example, residential institutions might make any improved processes for obtaining records, yearbooks and photographs available not only to survivors but to all former residents.

Further, we do not discourage those who establish a redress scheme for survivors of institutional child sexual abuse from also providing redress for persons who have suffered other forms of institutional abuse or neglect but not institutional child sexual abuse or for particular groups regardless of particular experiences of abuse.

## 2.5 Past and future abuse

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Our Terms of Reference require us to consider both past and future institutional child sexual abuse in considering what institutions and governments should do to address, or alleviate the impact of, institutional child sexual abuse.

We use ‘past child sexual abuse’ to refer to child sexual abuse that has already occurred or that occurs between now and the date that the reforms to limitation periods that we recommend in Chapter 14 and to the duty of institutions in Chapter 15 commence. We use ‘future child sexual abuse’ to refer to child sexual abuse that occurs on or after the date that these reforms to civil litigation commence. However, the precise date is less important than the concept.

As noted above, we are satisfied that civil litigation is unlikely to provide an effective avenue for many survivors to obtain redress that is adequate to address or alleviate the impact on them of sexual abuse. We discuss civil litigation in Part IV.

Many survivors and survivor advocacy and support groups have told us that many of the difficulties that survivors have encountered in trying to obtain adequate redress to date through redress schemes or civil litigation

have arisen from the power imbalance between institutions and survivors. The elements of that imbalance are obvious. The nature of the trauma survivors suffer because of the abuse creates a significant power imbalance. Many survivors have also told us that, without a strong legal position, they have had to go ‘cap in hand’ to institutions and accept whatever an institution was willing to offer, no matter how inadequate the survivor considered it to be.

If the reforms to civil litigation that we recommend are adopted, they may contribute to a substantial change in this power balance. The broader work of the Royal Commission and its contribution to a better public understanding of the occurrence and impact of child sexual abuse is also likely to contribute to this change.

We appreciate that, no matter what reforms might be made to civil litigation, some survivors of future child sexual abuse will not wish to undertake civil litigation. Redress processes may remain the preferred option for some survivors of future child sexual abuse. Institutions may also prefer to offer specific redress processes as an alternative to settling individual civil proceedings.

We also appreciate that it may be too difficult for some survivors to seek redress or pursue civil litigation, both for past abuse and for future abuse.

In the Consultation Paper, we stated that a redress scheme for future abuse may be unnecessary if we make recommendations that are adopted that make it more likely that survivors can recover damages at common law, and if we make recommendations under other parts of our



Terms of Reference that aim to minimise the occurrence of future abuse. We suggested that it might also be difficult to identify with confidence now what survivors may seek far into the future.<sup>29</sup>

A number of submissions in response to the Consultation Paper submitted that our recommendations on redress should apply to future abuse as well as to past abuse.<sup>30</sup> Mr McIntyre, representing the Northern Territory Stolen Generations Aboriginal Corporation, told the public hearing that institutional child sexual abuse is still occurring in out-of-home care in the Northern Territory and that many Aboriginal children are still being removed from their parents under the Northern Territory's child protection system.<sup>31</sup>

Some submissions in response to the Consultation Paper submitted that there may be reduced need for a redress scheme for future abuse if civil litigation is reformed, that reformed civil litigation is likely to provide better outcomes for victims of future abuse or that a greater emphasis on civil litigation is appropriate for future abuse.<sup>32</sup>

Commissioners accept that, regrettably, it is unlikely that institutional child sexual abuse can be completely eliminated or that there will be no victims of institutional child sexual abuse in the future. We also accept that some survivors will never wish to undertake civil litigation. However, we consider that attempting to prescribe a detailed redress scheme to apply to future abuse, potentially stretching decades into the future, is not now warranted or appropriate.

It is not possible to assess what demand there might be for such a scheme, either

from the perspective of identifying the likely incidence of future institutional child sexual abuse or from the perspective of identifying to what extent the recommended civil litigation reforms will be implemented and lead to a reduction in the number of survivors who seek redress independently of civil litigation.

It is also not possible to identify what survivors of future abuse might expect from a redress scheme because we do not know how any civil litigation reforms might lead to substantially different outcomes through civil litigation. A redress scheme is likely to impose administrative costs in its establishment and ongoing operation. Commissioners accept that these costs should not be imposed on an ongoing basis, potentially for decades, if the demand for and adequacy of the scheme is unknown.

We have concluded that we can best meet the requirements of our Terms of Reference in respect of addressing or alleviating the impact of future abuse through our recommendations on reforms to civil litigation in Part IV of this report. These reforms, if implemented, will make civil litigation a far more effective means of providing justice for survivors. They are also likely to encourage institutions to continue to offer redress in a manner that remains attractive to survivors as an alternative to civil litigation.



## 2.6 Children

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The delay in reporting of child sexual abuse is now well known. Many survivors will not disclose their abuse until adulthood.<sup>33</sup> Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse. Men took longer than women to disclose abuse.<sup>34</sup>

However, we also know that some children disclose abuse and their disclosures are acted upon.

In Case Study 2, we examined YMCA NSW's response to Jonathan Lord's sexual abuse of 12 children. We heard evidence that some of Lord's victims disclosed the abuse at the time it was occurring and the disclosures were reported to police.<sup>35</sup> In Case Study 6, we examined the responses of the Catholic Education Office, the Diocese of Toowoomba and a Catholic primary school in Toowoomba to disclosures about the conduct of Gerard Byrnes, a teacher at the school. We heard evidence that some of Byrnes' victims disclosed the abuse at the time it was occurring and the disclosures were reported to the school.<sup>36</sup> In Case Study 12, we examined the response of an independent school in Perth to concerns raised about the conduct of a teacher. We heard evidence that one of the teacher's victims disclosed the abuse as a young adult of 18 or 19 years of age and reported it to the police. Other victims were still children attending the school.<sup>37</sup>

Therefore, it is possible that some children, or parents or guardians on their behalf, will wish to seek redress or compensation for institutional child sexual abuse while the victim is still a child.

In the Consultation Paper we stated that we did not think it likely that there would be many applications to a redress scheme made by or on behalf of those who are still children.<sup>38</sup> In particular, we considered that children are more likely to be able to obtain compensation through civil litigation. They will almost always be within time limitations to commence proceedings, even under the limitation periods that currently apply in civil litigation. In some cases, the occurrence and circumstances of the abuse may already have been proved through a criminal conviction. We also considered that children are more likely to receive larger payments, even by way of settlement, through civil litigation than might be available through a redress scheme.

We referred to Case Study 6, in which we heard evidence that parents of some of the victims engaged solicitors and sought compensation for their children. Some commenced civil litigation. The Diocese of Toowoomba invited families of the victims to participate in a mediation process, regardless of whether they had commenced any proceedings. Many, but not all, of the families elected to participate. At the date of the hearing, more than \$2.25 million had been paid in damages, costs and administration fees to nine victims and some family members in relation to Byrnes' offences. We heard evidence of one settlement in the amount of \$350,000 plus costs.<sup>39</sup>

We also referred to Case Study 12, in which we heard evidence that the independent school in Perth reached settlements with the five victims and negotiated ex gratia payments to their parents after the offending teacher was convicted for the abuse.<sup>40</sup>

A number of submissions in response to the Consultation Paper supported the idea that any redress scheme should be available to children. Some submissions argued that the barriers to children's participation in civil litigation mean that civil litigation may not be a better option for children than redress or that children or their advocates should be able to choose between redress and civil litigation.<sup>41</sup>

While we continue to think it unlikely that many applications to a redress scheme would be made by or on behalf of children, we see no reason why children could not be accommodated within the sorts of structures and approaches we are recommending for redress.

Children, or parents or guardians on their behalf, could apply for redress, including referral for any direct personal response from the institution and assessment for eligibility for counselling and psychological care and a monetary payment. A child's counselling and psychological care needs are likely to be different from those of an adult survivor, but there is no reason why they could not be supported through a redress scheme. If a child or young adult is assessed for a monetary payment, an assessment of the impact of the abuse might have to be predictive of the likely impact rather than an assessment of the actual impact from a position of hindsight. This is comparable to elements of damages assessments that are routinely undertaken in civil litigation and could be accommodated within a redress scheme.

## 2.7 Ensuring our recommendations can be implemented

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We are acutely aware of the need to make recommendations that can and are likely to be implemented.

We have to balance a number of factors, including:

- the requirement of survivors that the redress scheme be 'fair' in the sense of affording equal access and equal treatment for survivors
- the need to accommodate actions taken to date in relation to redress and compensation
- a recognition that survivors have many different needs, only some of which can or should be met through redress
- the need to develop an approach that can be effective for a broad variety of institutions that now, or may in the future, face allegations of institutional child sexual abuse.

We also recognise that a number of previous inquiries have recommended that redress schemes be introduced and some of these recommendations have not been implemented.<sup>42</sup> We consider that our recommendations are more likely to be acted upon if we strike the right balance between detail and flexibility, where flexibility is consistent with achieving justice for victims. We also consider that account has to be taken of the affordability of what we recommend. Funding is fundamental to any effective redress arrangement.

In the Consultation Paper, we recognised that the positions of governments would be particularly important on some issues. Some governments made written submissions in response to the Consultation Paper and some governments also spoke at the public hearing. The current positions of governments, to the extent they are known, are also factors we need to take into account.

# 3 Data and modelling

## 3.1 Introduction

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In the Consultation Paper, we reported on our analysis of some of the data we had then obtained on existing redress schemes and civil litigation.<sup>43</sup>

We stated that many survivors and survivor advocacy and support groups have told us how difficult it has been for survivors to assess whether the redress they have been offered is fair or consistent compared with what the institution has offered other survivors or what survivors more generally have received.<sup>44</sup> Some survivors have told us they had no information about the fairness or comparability of the redress they were offered other than what a representative of the institution might have told them.

Until we published the Consultation Paper, there had been very little publicly available data on redress and compensation paid to victims of child sexual abuse in institutions in Australia. Some information about payments made under previous government redress schemes has been published, although it is not always easy to find. With the possible exception of the government redress schemes, it is not clear that governments or institutions have had much information about payments other than under their own schemes or processes.

To address this gap, and to improve our understanding of redress outcomes to date, we collected data from a number of sources, often under summonses or Notices to Produce.

The data we collected do not attempt to cover every claim made. We sought data only from those institutions that we

anticipated had received a relatively large number of claims and that would have data on an aggregated basis reasonably readily available. There are obvious omissions – for example, the data do not include data from any faith-based organisations other than Catholic organisations and The Salvation Army Australia or from non-government recreation or sports institutions. There may also be some gaps in the data provided by the parties to whom notices were issued.

We also analysed and reported on data from private sessions. These data give us information about the institutional spread of claims and the number of institutions in which individual survivors have reported suffering child sexual abuse.

We have obtained further data since publication of the Consultation Paper. In particular, the analysis in this chapter now includes:

- data sought from insurers who we anticipated would have exposure for institutional child sexual abuse from clients in the faith-based, community and not-for-profit sectors – these data are included in the claims data
- claims data for the period from 1 July 2014 to 31 December 2014, which was sought from those parties from whom we had previously obtained and reported claims data – these data are included in the claims data
- data from additional private sessions held between 1 September 2014 and 3 March 2015 – these data are included in the private sessions data.

Since the Consultation Paper was published we have also obtained further data for the purposes of the actuarial modelling we have commissioned. For the actuarial modelling conducted for the Consultation Paper, we sought data from Western Australia on applications to Redress WA. For the actuarial modelling conducted for this report, we have also sought data from both Queensland and Tasmania of a sampling of 10 per cent of claims across the different levels and rounds of their government redress schemes. These data allow our actuarial advisers to model a hypothetical spread of abuse severity based on the severity scores for those applications that involved allegations of sexual abuse. In this way the advisers determined a hypothetical spread of severity.

Due to rounding, numbers presented in this chapter may not add up precisely to the totals provided.

## 3.2 Sources of data

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### Claims data

In September and October 2013, the Royal Commission sought data under notice from each state and territory government, the Australian Government, Catholic Church Insurance (CCI) and the Eastern and Southern Territories of The Salvation Army on claims of child sexual abuse resolved in the period from 1 January 1995 to 31 December 2010. Further notices were issued in August and September 2014 to the same parties seeking the same data on claims resolved in the period from 1 January 2011 to 30 June 2014. A schedule of the notices issued is at Appendix C.

All parties to whom notices were issued provided claims data for the period 1 January 1995 to 30 June 2014.<sup>45</sup> We published the analysis of these data in the Consultation Paper.

After publication of the Consultation Paper, the Royal Commission sought additional claims data from the same parties for the period 1 July 2014 to 31 December 2014 in order to complete the claims data for the year 2014.<sup>46</sup>

In March 2015, notices to produce or summonses were issued for claims data to a number of insurers – IAG, EIG-Ansvar, Allianz, Suncorp and Victorian Managed Insurance Authority – for claims in the period from 1 January 2000 to 31 December 2014.

The data that we sought cover all claims resolved, including claims resolved through litigation, out-of-court settlement or otherwise. The wording of the notices is set out at Appendix D.

The methodology used and assumptions made in analysing the claims data are in Appendix E.

### Other Catholic Church data

A number of datasets are available on claims made against the Catholic Church. The claims data include all of CCI's data.

However, redress was also provided by other parts of the Catholic Church. Those parts were not included in the claims data obtained from CCI. Therefore, they have not been included in the claims data analysis.

The Royal Commission obtained under summonses or notices the Catholic Church data on redress and civil litigation discussed below.

## Towards Healing data

Data on Towards Healing were obtained under notice from the Catholic Church.

The summons for Towards Healing data sought details on the redress outcome for each complaint between 1997 and 2013. Redress was defined broadly to include:

- monetary compensation by way of lump sum or periodic payment
- financial support for therapeutic or medical consultations or treatment
- apology or acknowledgement
- assurance regarding cessation of an accused's position or role within an institution.

The Towards Healing data include more than 800 claims with known compensation amounts.

## Melbourne Response data

The Royal Commission obtained under notice data from the Archdiocese of Melbourne and the Independent Commissioner for the Melbourne Response, counselling data from Carelink and all claims from CCI relating to the Melbourne Response since it began in October 1996 up to 31 March 2014. These datasets are collectively referred to as 'the Melbourne Response data'.

The Melbourne Response data includes more than 300 claims with known compensation amounts.

## Christian Brothers data

The Provincial of the Congregation of Christian Brothers produced data in response to a summons dated 25 June 2013.

The summons requested details of each individual claim for compensation or redress made against any past or present province of the Congregation of Christian Brothers within Australia since 1 January 1980 in respect of an allegation of child sexual abuse by any consecrated Christian Brother or other member of the Congregation of Christian Brothers within Australia.

The Christian Brothers data include more than 450 claims with known compensation amounts.

## Marist Brothers data

The Provincial of the Marist Brothers produced data in response to a summons dated 2 August 2013.

The summons requested details of each individual claim for compensation or redress made against any past or present province of the Marist Brothers within Australia since 1 January 1980 in respect of an allegation of child sexual abuse by any consecrated Marist Brother or other member of the Marist Brothers within Australia.

The Marist Brothers data include more than 50 claims with known compensation amounts.

## Government redress schemes data

The states of Western Australia, Queensland, Tasmania and South Australia operated state-run redress schemes. The Royal Commission obtained data on government redress schemes under separate notices to Western Australia, Queensland, Tasmania and South Australia. A schedule of the notices issued is at Appendix F.

Data were required on the numbers of applications made, the number of compensation offers made, the number of compensation offers accepted and the total and average amount of compensation made. The wording of the notices to each jurisdiction is set out at Appendix G.

Data were obtained from Western Australia on applications made under Redress WA. Data from a representative sample of applications from the Queensland and Tasmanian government redress schemes were also obtained.

Updated data on South Australia's statutory victims of crime compensation scheme from 1 August 2014 to 31 December 2014 were received in response to a notice to produce.

A brief description of the government redress schemes that have operated in Western Australia, Queensland and Tasmania is at Appendix H.

## Statutory victims of crime compensation schemes data

Notices were issued to each state and territory seeking data on the numbers of claims and payments made in respect of child sexual abuse through their statutory victims of crime compensation schemes.<sup>47</sup>

## Private sessions data

The Royal Commission has analysed information collected from private sessions held between 7 May 2013 and 3 March 2015. The information was voluntarily reported; it is not necessarily representative of all those affected by child sexual abuse in an institutional context because it relates to those people who have chosen to come forward to the Royal Commission. Given the long delay associated with abuse occurring and being disclosed, the private sessions data are likely to underrepresent more recent abuse.

## Case studies data

In a number of the case studies held to date, the Royal Commission has received evidence about data on redress claims and payments.

The relevant evidence is set out at Appendix I.

### 3.3 Analysis of claims data

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The methodology used and assumptions made in analysing the claims data are at Appendix E. These claims data do not include any claims resolved through government redress schemes.

This analysis is for all data received as at June 2015. The total number of claims resolved between 1 January 1995 and 31 December 2014 for which we have data was 3,174.

Table 3 and Figure 1 appear on the next two pages. They show the distribution of claims by the year the claim was resolved.

Of the 3,174 claims for which we have data, 278 did not have a reported year of resolution. They are not included in Table 3 or Figure 1.

**Table 3: Number of claims by year of resolution**

Year claim resolved	Frequency	Per cent
1995	21	0.7
1996	27	0.9
1997	109	3.8
1998	71	2.5
1999	80	2.8
2000	49	1.7
2001	65	2.2
2002	97	3.3
2003	112	3.9
2004	127	4.4
2005	161	5.6
2006	125	4.3
2007	158	5.5
2008	183	6.3
2009	245	8.5
2010	273	9.4
2011	254	8.8
2012	342	11.8
2013	224	7.7
2014	173	6.0
<b>TOTAL</b>	<b>2,896</b>	<b>100.0</b>



**Figure 1: Number of claims by year claim resolved**

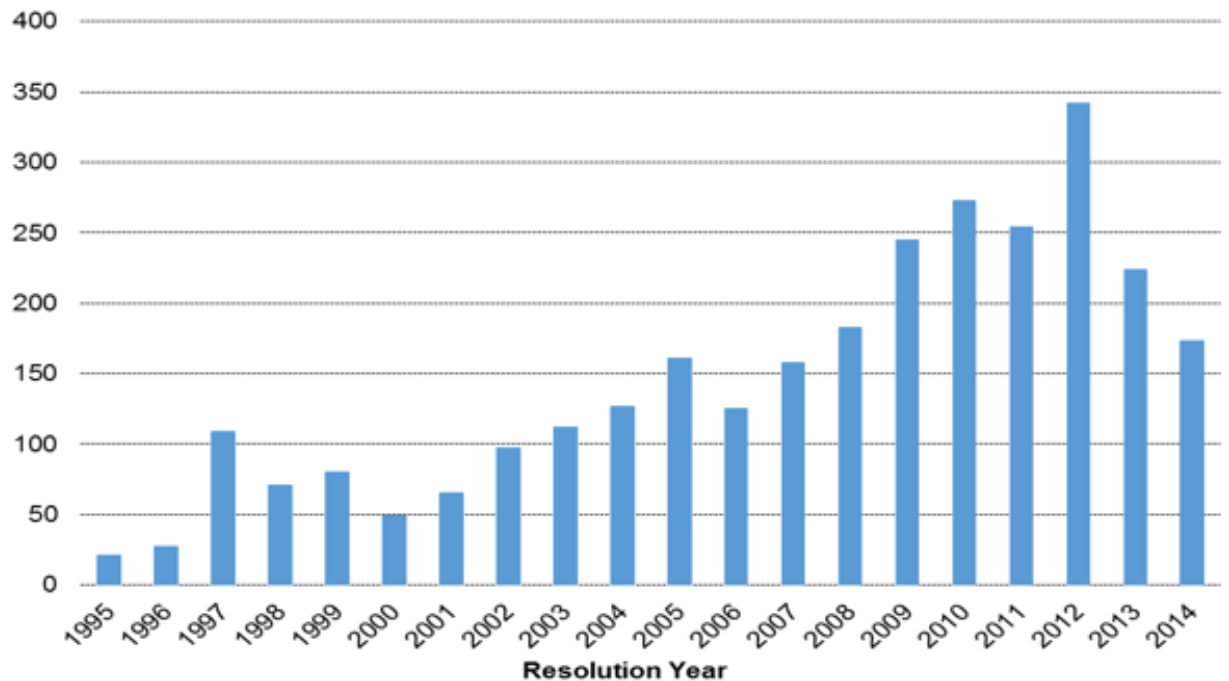


Table 4, ‘Compensation in real dollars (2014) by year of claim resolution’, appears on page 115.

The dollar values contained in the data produced to the Royal Commission have been adjusted for inflation to the 2014 value (real 2014 dollars). The Australian Consumer Price Index history published by the Australian Bureau of Statistics was used for this adjustment.

The payments across all claims resolved are illustrated in Table 4 and Figure 2 below. The columns in Table 4 show the mean and median amounts; ‘quintile’ bands of 20 per cent, 40 per cent, 60 per cent and 80 per cent; and an additional band at 90 per cent.

The mean (or average) compensation paid is the sum of all claim amounts divided by the number of claims. If in a given year there are any significantly large amounts paid on particular claims, this will cause the mean to be higher than in other years.

The median is the middle value in the list of payment amounts. This means that 50 per cent of claims are below this amount and 50 per cent of claims are above this amount. Across all claims for all years, the mean compensation paid was \$82,220 and the median was \$45,297.

The bands of 20 per cent, 40 per cent, 60 per cent, 80 per cent and 90 per cent are a way of understanding the range of payments made – that is, for the 20 per cent band, 20 per cent of the payments lie below this compensation amount (in real 2014 dollars) and 80 per cent lie above it. Ninety per cent of all compensation payments were at or under \$178,038 (in real 2014

dollars), but the top 10 per cent of payments ranged from \$178,038 to \$4,069,897 (in real 2014 dollars).

Where no information was provided on the compensation paid for a claim, this claim has not been included in the data. For example, in 1998 there were 71 claims, but the amount of compensation paid is only known for 69 of those claims.

Figure 2 illustrates the quintile bands of payment in bands of 0–20, 20–40, 40–60, 60–80 and 80–100 per cent. Figure 3 illustrates the mean and median payment lines, which generally diverge most significantly when there are any significantly large payments in the year. In general, the median is between \$40,000 and \$60,000 across these years of data.

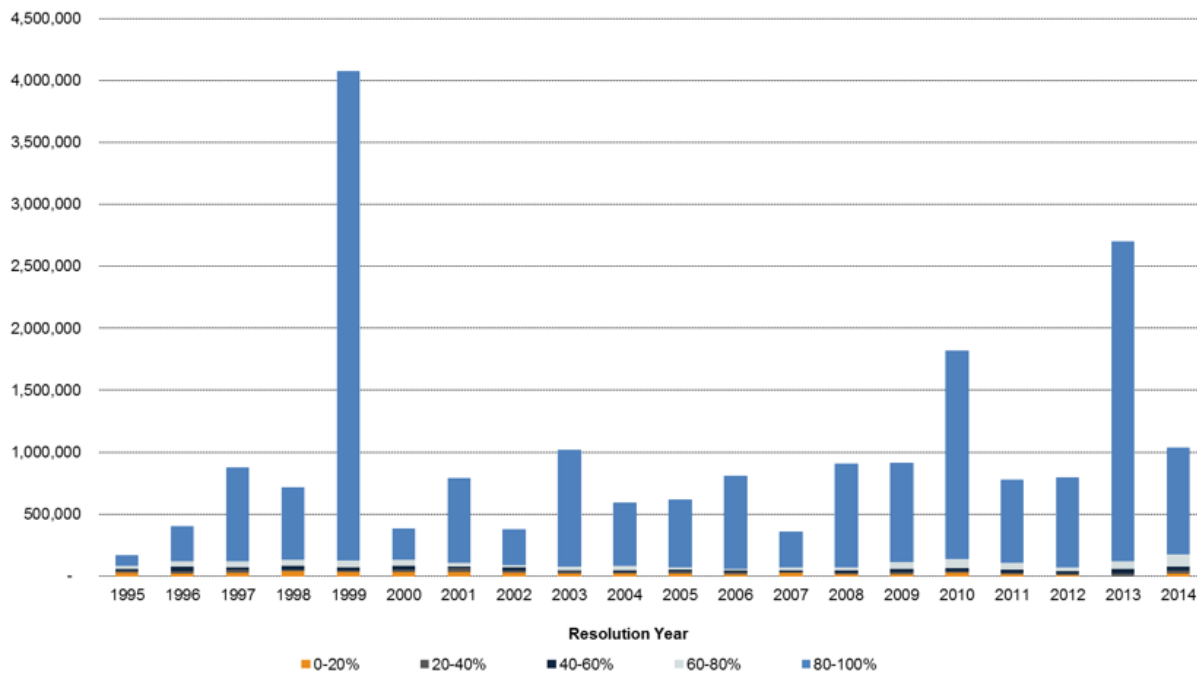
Some trends can be seen in the data:

- more claims were resolved from 2009 onwards
- jurisdictions were more likely to resolve claims at the end of the 2000s and early 2010s than earlier years (however, this may be driven by the fact that more claims were submitted).

**Table 4: Compensation in real dollars (2014) by year of claim resolution**

Year	Number of claims with known compensation	Mean	Median	Minimum	Maximum	20%	40%	60%	80%	90%
1995	20	56,949	50,331	0	164,760	26,362	49,428	57,666	82,380	116,321
1996	26	79,096	48,687	0	399,550	23,973	43,951	79,910	124,660	175,802
1997	102	87,065	61,745	0	876,383	31,868	55,582	71,704	123,176	175,277
1998	69	122,628	63,264	0	711,721	39,540	54,565	86,988	134,436	316,320
1999	77	134,387	58,700	0	4,069,897	36,003	46,960	70,441	125,228	172,188
2000	49	80,141	60,741	0	379,630	37,963	53,148	83,519	136,667	151,852
2001	62	94,594	63,571	0	789,228	35,772	64,389	78,698	107,315	186,013
2002	94	72,116	58,245	0	357,744	27,833	48,708	73,061	90,457	139,837
2003	108	72,107	42,037	0	1,017,176	25,362	40,280	47,468	77,983	149,186
2004	126	61,640	39,677	0	588,548	22,484	33,065	46,290	83,323	138,871
2005	156	59,816	38,717	0	615,519	25,811	38,717	51,622	70,981	129,056
2006	121	72,998	42,332	0	806,636	18,615	37,229	46,847	62,049	150,483
2007	155	66,824	37,229	0	353,105	26,741	36,465	48,620	71,715	182,326
2008	179	58,807	43,553	0	901,910	19,784	29,792	46,550	69,825	116,376
2009	243	89,222	51,636	0	912,239	17,212	34,424	57,374	114,747	269,656
2010	273	105,217	55,637	0	1,813,758	27,818	44,509	66,764	139,092	222,547
2011	254	74,234	41,066	0	773,710	16,119	29,469	53,730	110,683	188,054
2012	340	62,026	38,946	0	796,315	11,945	21,235	42,470	74,323	159,263
2013	224	97,517	41,728	0	2,696,109	0	25,924	62,218	124,436	217,763
2014	173	116,418	55,711	0	1,031,775	22,900	50,331	80,529	176,157	302,307

**Figure 2: Quintiles of real compensation (2014 dollars) by year of claim resolution**



**Figure 3: Mean and median of real compensation (2014 dollars) by year of resolution**



## 3.4 Government redress schemes data

Data on key elements of the government redress schemes, particularly number of payments and amounts and spread of payments, are set out below.

A brief description of the government redress schemes operated in Western Australia, Queensland and Tasmania is at Appendix H.

### Redress WA and WA Country High School Hostels ex gratia scheme

Table 5 shows payments made under Redress WA.<sup>48</sup>

**Table 5: Payments under Redress WA (not adjusted for inflation)**

Payment level	Number of payments made	Total amount paid (\$)
1 – \$5,000	859	4,295,000
2 – \$13,000	1,813	23,569,000
3 – \$28,000	1,477	41,356,000
4 – \$45,000	1,063	47,835,000
<b>TOTAL</b>	<b>5,212</b>	<b>117,055,000</b>

Assuming that payments under Redress WA were paid in 2010, the total amount paid is equivalent to around \$130.3 million in 2014 dollars. The average payment is equivalent to around \$25,000 in 2014 dollars. Some 82 payments were made to deceased estates. Some \$23 million was spent on administering the scheme, including on counselling costs, advice and assistance with applications. More detailed information on the administrative costs of Redress WA is at Appendix J.

Table 6 shows payments made under the Country High School Hostels ex gratia payment scheme.<sup>49</sup>

**Table 6: Payments under Country High School Hostels ex gratia scheme (not adjusted for inflation)**

Payment level	Number of payments made	Total amount paid (\$)
1 – \$5,000	2	10,000
2 – \$20,000	28	560,000
3 – \$45,000	60	2,700,000
<b>TOTAL</b>	<b>90</b>	<b>3,270,000</b>

## Queensland ex gratia scheme

Table 7 shows data provided on the Queensland ex gratia scheme.<sup>50</sup>

**Table 7: Payments under Queensland ex gratia scheme (not adjusted for inflation)**

Level 1 (payment amount set at \$7,000)	Applications made: 10,218 Payments offered: 7,453 Number of payments made: 7,168 Value of payments made: \$50,186,205
Level 2 payments (up to an additional \$33,000)	Applications made: 5,416 Payments offered: 3,492 Number of payments made: 3,531 (included deferred Level 1 payments to applicants who were unsuccessful for Level 2 payments): 1,455 – additional \$6,000 1,254 – additional \$14,000 616 – additional \$22,000 167 – additional \$33,000 Value of payments made: \$47,174,097

Total expenditure of the Queensland ex gratia scheme is shown in Table 8.<sup>51</sup>

**Table 8: Total expenditure of the Queensland ex gratia scheme (not adjusted for inflation)**

Item	Amount (\$)
Level 1 payments	50,186,205
Level 2 payments	47,174,097
Legal fees	3,468,750
Funeral assistance	179,025
Application assistance	43,802
Medicare Australia bulk payment	510,000
Administration	8,600,000
<b>TOTAL</b>	<b>110,161,880</b>

## Tasmanian Abuse in Care ex gratia scheme

Table 9 shows payments made under the Tasmanian Abuse in Care ex gratia scheme.<sup>52</sup>

**Table 9: Payments under Tasmanian Abuse in Care ex gratia scheme (not adjusted for inflation)**

Round	Claims	Payments made	Amount paid	Average payment
1 (2003–2004)	364	247	\$9,400,000	\$38,056
2 (2005–2006)	514	423	\$14,600,000	\$34,515
3 (2007–2010)	995	784	\$25,300,000	\$32,270
4 (2011–2013)	541	394	\$5,500,000	\$13,959
<b>TOTAL</b>	<b>2,414</b>	<b>1848</b>	<b>\$54,800,000</b>	<b>\$29,653</b>

## South Australian payments under Victims of Crime Act

South Australia provided the following data at 31 December 2014 on ex gratia payment applications under the *Victims of Crime Act 2001 (SA)* made by persons who were sexually abused while in state care:

- 167 applications have been received
- 96 offers have been made
- 85 offers have been accepted
- total payments of \$1,198,500 have been made
- the average payment is approximately \$14,100 (not adjusted for inflation).<sup>53</sup>

## 3.5 Private sessions data

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The following analysis is based on data from private sessions held between 7 May 2013 and 3 March 2015.

Table 10 sets out data on institutions reported by private session attendees. Table 10 shows how many private session attendees reported abuse in one institution, how many private session attendees reported abuse in two institutions and how many private session attendees reported abuse in three or more institutions. Table 11 sets out data on the types of institutions in which private session attendees reported they were abused.

**Table 10: Cases of abuse by number of institutions**

Total	Abuse in one institution		Abuse in two institutions		Abuse in three or more institutions	
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
2,974	2,385	80	442	15	147	5



**Table 11: Cases of abuse by institution type**

Institution type or activity	Number	Per cent	Categorical percentage
Out-of-home care: residential home: government	378	10.6	35.7
Out-of-home care: residential home: non-government, secular	102	2.9	
Out-of-home care: residential home: non-government, faith-based	793	22.3	
Out-of-home care: foster care / kinship care: government	75	2.1	7.7
Out-of-home care: foster care / kinship care: non-government, secular	8	0.2	
Out-of-home care: foster care / kinship care: non-government, faith-based	2	0.1	
Out-of-home care: foster care / kinship care: type unknown	188	5.3	
Education day and boarding school: government	217	6.1	27.4
Education day and boarding school: non-government, secular	21	0.6	
Education day and boarding school: non-government, faith-based	740	20.8	
Religious activities: places of worship	515	14.5	14.9
Religious activities: clergy training facility	9	0.3	
Religious activities: other	6	0.2	
Recreation, sports and hobbies: government	7	0.2	3.8
Recreation, sports and hobbies: secular (includes scouts and guides)	88	2.5	
Recreation, sports and hobbies: faith-based	7	0.2	
Recreation, sports and hobbies: sporting and other	32	0.9	
Health and allied: hospital and rehabilitation: government	43	1.2	1.8
Health and allied: hospital and rehabilitation: non-government, secular	5	0.1	
Medical practitioners	10	0.3	
Health and allied: other	6	0.2	
Juvenile justice / detention: police	5	0.1	2.0
Juvenile justice / detention / corrective institutions	64	1.8	
Juvenile justice / detention / immigration detention	4	0.1	
Child care centre based care: government	9	0.3	0.9
Child care centre based care: non-government, secular	20	0.6	
Child care: non-government, faith-based	2	0.1	

Supported accommodation: government	9	0.3	0.5
Supported accommodation: faith-based	7	0.2	
Supported accommodation: other	1	0.0	
Arts and cultural	3	0.1	0.1
Social support services: government	2	0.1	0.9
Social support services: non-government, secular	2	0.1	
Social support services: non-government, faith-based	27	0.8	
Other	146	4.1	4.4
Unknown	10	0.3	
<b>TOTAL</b>	<b>3,563</b>	<b>100</b>	<b>100</b>

## 3.6 Updated actuarial modelling

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As discussed in Chapter 1, we have engaged Finity Consulting Pty Ltd (Finity) to give us actuarial advice on designing and funding redress.

We published Finity's initial actuarial report in conjunction with our Consultation Paper so that all interested parties could understand the detail of the actuarial advice that had informed the relevant parts of the Consultation Paper.

Finity has continued to give us actuarial advice for the purposes of this report. Finity's updated actuarial report to us will be published in conjunction with this report.

In the Consultation Paper and in Finity's initial actuarial report, Finity had estimated an indicative number of claimants for a redress scheme in the vicinity of 65,000, Australia wide.<sup>54</sup> The figure of 65,000 was used for the purposes of looking at a possible distribution of payments and for modelling the costs of funding redress.

For this report and in Finity's updated actuarial report, Finity has reduced this estimate from 65,000 claimants nationally to 60,000 claimants nationally. The figure of 60,000 is used in this report for the purposes of looking at a possible distribution of payments, which we discuss in Chapter 7, and modelling the costs of funding redress, which we discuss in Chapter 10.

Finity's reduced estimate of claimants reflects the additional information received

from our private sessions (up to 5 March 2015) and information on the Queensland redress scheme.

The key changes from the updated private session information include:

- A higher proportion of abuse is reported to have originated in Western Australia and Queensland. Therefore, Finity's extrapolation of the Western Australian and Queensland redress scheme volumes has reduced slightly, as Finity now considers that Western Australia and Queensland have a larger proportion of claimants.
- A higher proportion of abuse is reported to have occurred in residential care. Therefore, Finity's estimate of the level of 'coverage' of the Western Australian and Queensland schemes has also increased, reducing Finity's estimates of national volumes.

The key contribution of the Queensland redress scheme data is that, while Finity had previously estimated the number of Queensland participants who had experienced sexual abuse (as opposed to physical or emotional abuse alone), we have now obtained detailed information on the number of 'Level 2' participants who reported sexual abuse under the Queensland redress scheme. These figures are at the lower end of the range that Finity had originally estimated and therefore this reduces Finity's estimate of national sexual abuse volumes.



PART II  
WHAT REDRESS  
SHOULD BE  
PROVIDED



# 4 Redress elements and principles

## 4.1 Elements of redress

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In the Consultation Paper, we suggested that the elements of appropriate redress for survivors are as follows:

- **Direct personal response:** a response that an institution provides directly to a survivor if the survivor wishes to engage with the institution. When a survivor requests it, all institutions would be required to offer and provide to the survivor an apology, an opportunity for the survivor to meet with a senior representative of the institution and an assurance about the steps that the institution has taken, or will take, to protect against further abuse. An institution may offer any other forms of direct personal response they are able to offer that might be of assistance to survivors of abuse at the institution. Responses might include spiritual support or forms of direct assistance outside of the redress scheme.
- **Counselling and psychological care:** therapeutic counselling and psychological care should be available to survivors when they need it throughout their lives. Redress should supplement existing services and fill service gaps so that all survivors can have access to the counselling and psychological care that they need.
- **Monetary payments:** monetary payments should be available to survivors as a tangible means of recognising the wrong they suffered. The amount of a

monetary payment offered to a survivor should be determined by assessing the relative severity of the abuse, the relative severity of the impact of the abuse and other relevant factors. However, it must be recognised that the monetary payments under redress are not intended to be fully compensatory and they will not equate to common law damages.<sup>55</sup>

Many submissions in response to the Consultation Paper supported these elements of redress.

We are satisfied that a direct personal response, counselling and psychological care and monetary payments are the elements of appropriate redress for survivors.

These elements of redress are discussed in detail in chapters 5 (Direct personal response), 6 (Counselling and psychological care) and 7 (Monetary payments) below.

A number of submissions in response to the Consultation Paper argued in favour of including additional elements of redress. For example, Bravehearts supported broader elements of redress including advocacy; medical assistance; housing, education and employment services; and a 'Gold Card' program.<sup>56</sup> Other submissions that supported the inclusion of broader services included the submissions of Open Place, Relationships Australia and Kelso Lawyers.<sup>57</sup> Relationships Australia also submitted that the elements of redress should recognise the importance of case management for survivors.<sup>58</sup>

These submissions raise the issue of how we recognise existing support services. We discuss this below.

A number of submissions to the relevant issues papers recommended to us the value of international human rights law in identifying appropriate redress.<sup>59</sup> In particular, submissions discussed the potential relevance of the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (the van Boven principles), adopted by the General Assembly of the United Nations in 2005.<sup>60</sup>

A number of submissions in response to the Consultation Paper also supported the van Boven principles and our reference to them.<sup>61</sup>

The van Boven principles outline victims’ rights to:

- equal and effective access to justice
- adequate, effective and prompt reparation for harm suffered
- access to relevant information concerning violations and reparation mechanisms.<sup>62</sup>

The van Boven principles highlight that remedies are not limited to monetary payments and can include the five forms of reparation set out in Table 12 below.<sup>63</sup>

**Table 12: Five forms of reparation outlined in the United Nations van Boven principles**

<b>Restitution</b>	Should, whenever possible, restore the survivor to the original situation they were in before the abuse occurred.
<b>Compensation</b>	Should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.
<b>Rehabilitation</b>	Should include medical and psychological care as well as legal and social services.
<b>Satisfaction</b>	Should include, where applicable, any or all of a number of measures, relevantly including the following: <ul style="list-style-type: none"> <li>• effective measures aimed at the cessation of continuing abuse</li> <li>• verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations</li> <li>• public apology, including acknowledgement of the facts and acceptance of responsibility</li> <li>• judicial and administrative sanctions against persons liable for the abuse</li> <li>• commemorations and tributes to the victims.</li> </ul>



<b>Guarantees of non-repetition</b>	<p>Should include, where applicable, any or all of a number of measures, relevantly including the following:</p> <ul style="list-style-type: none"> <li>• ensuring that all proceedings abide by standards of due process, fairness and impartiality</li> <li>• providing continuing education and training</li> <li>• promoting codes of conduct and ethical norms</li> <li>• reviewing and reforming laws contributing to or allowing violations.</li> </ul>
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Apart from restitution, these elements would be achieved through the elements of redress we have identified. ‘Compensation’, as used in the van Boven principles, is not a reference to common law damages.

‘Restitution’, as used in the van Boven principles, refers to the restoration of a survivor to the original situation they were in before the violation occurred. If the violation involved taking someone’s land, restitution would require the return of the land. However, for survivors of institutional child sexual abuse this type of restoration is not possible because no form of redress can undo a survivor’s experience of that abuse and its impact. Survivors who seek to be restored to their original situation, in so far as money can do this, would need to seek common law damages through civil litigation.

### **Recommendation**

2. Appropriate redress for survivors should include the elements of:
  - a. direct personal response
  - b. counselling and psychological care
  - c. monetary payments.

## 4.2 Recognising existing support and other services

Survivors and survivor advocacy and support groups have told us that survivors have many different needs. Survivors may need assistance with housing, education and employment; drug and alcohol issues; dental issues; and a range of other medical needs. What is needed varies considerably between individual survivors.

Some of these needs may be addressed through general public programs. There are also a number of support services, often funded by governments, that provide a range of services to particular groups such as Forgotten Australians, Former Child Migrants or members of the Stolen Generations.

In responding to the Consultation Paper, a number of survivor advocacy and support groups objected to the approach proposed in the Consultation Paper that these broader support and other services not be included as part of redress.

For example, in its submission in response to the Consultation Paper, the Alliance for Forgotten Australians (AFA) stated:

AFA is disappointed that the Commission has rejected calls for legal and social services to be elements of what it sees as an appropriate redress system. The Consultation Paper clearly states that it does not intend that resources be diverted from social services to services that are included in its proposed redress scheme – however AFA is deeply concerned that this may be the unintended consequence of omitting social services from the essential components of a redress scheme.<sup>64</sup>

We recognise that some survivor advocacy and support groups have called for the inclusion of support and other services in redress in conjunction with advocating redress schemes that apply generally to Forgotten Australians or care leavers, regardless of whether they have experienced institutional child sexual abuse, or to all forms of abuse and neglect. If a redress scheme were to apply more broadly than to those who experienced institutional child sexual abuse then it might be more appropriate to include broader support services in any consideration of redress. However, as discussed in Chapter 2, we accept that our Terms of Reference require us to focus on survivors of institutional child sexual abuse.

In most cases, it is difficult to identify a clear connection between a survivor's experience of institutional child sexual abuse and broader needs for assistance with matters such as housing, education and employment; drug and alcohol issues; and dental and other medical needs. The needs may arise more from the experience of being in a residential institution than from suffering sexual abuse. People who were in residential institutions as children but who did not experience sexual abuse may also need assistance with these matters. Indeed, other members of the community who have not experienced institutional child sexual abuse and have not been in any form of state care may also need assistance with these matters.

General public programs, such as Medicare, and more specialist support services help to meet these broader needs that survivors as well as persons who have not experienced institutional child sexual abuse may have. Some are available across the community, while others are targeted at care leavers or particular groups of care leavers such as Forgotten Australians, Former Child Migrants or members of the Stolen Generations. Other services target victims of sexual assault, including child sexual assault in an institutional context.

Many survivors and survivor advocacy and support groups have told us of the considerable support survivors receive from existing support and other services. Many survivors value these services very highly. The Commissioners have been impressed by the dedicated work of many organisations, working with limited resources, for people who for various reasons are disadvantaged.

Given our focus on survivors of institutional child sexual abuse and the availability of

many existing support and other services to broader groups, we remain satisfied that it is preferable for us to address support services, apart from the support services required to assist applicants to apply for redress, separately from redress. In Chapter 11, we discuss and make recommendations about the support services that should be provided to applicants to assist them in applying for redress.

The Royal Commission is conducting a separate project to investigate how adequate support services are in meeting survivors' needs. We are not now making any recommendations about support services in our recommendations on redress and civil litigation. Our separate project on support services will examine the adequacy of existing support services in meeting the needs of survivors and others affected by institutional child sexual abuse, including survivors' family members and broader communities. It will consider whether any recommendations should be made on increasing or otherwise changing existing support services.

However, it is important to recognise the range of existing support services because:

- it should be acknowledged that a redress scheme is not necessarily the best, or even an appropriate, mechanism for meeting all the various needs that survivors may have
- existing support services are highly valued by many survivors
- some elements of redress (particularly counselling and psychological care) overlap with the services that some existing support services and general public programs provide
- nothing that we recommend in relation to redress and civil litigation is intended to reduce resources for, or divert effort from, existing support services.

We have focused primarily on providing redress for survivors themselves rather than for their families or broader communities that might also be affected by the abuse. We acknowledge the needs of 'secondary victims' of institutional child sexual abuse. These secondary victims include family members of victims who are now deceased, in some cases as a result of suicide. These needs will also be considered further through our separate work on support services.

#### **Recommendation**

3. Funders or providers of existing support services should maintain their current resourcing for existing support services, without reducing or diverting resources in response to the Royal Commission's recommendations on redress and civil litigation.

## 4.3 General principles for providing redress

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It is very clear to us from the work of the Royal Commission to date in private sessions, case studies and our consultations on redress and civil litigation that the process for providing redress is fundamental for survivors. How survivors feel they were treated and whether they were listened to, understood and respected are likely to have a significant impact on whether they consider that they have received ‘justice’.

Throughout our consultations on redress, some interested parties have submitted that we should adopt ‘restorative justice’ or ‘therapeutic jurisprudence’ as our approach to redress. Some submissions in response to the Consultation Paper submitted that we should adopt these concepts.<sup>65</sup>

There is no single restorative justice theory or agreed definition of ‘restorative justice’.<sup>66</sup> One author gives a simple definition of restorative justice as ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’.<sup>67</sup>

Restorative justice processes are often seen as allowing the stakeholders involved in an injustice to ‘have an opportunity to discuss its effects on people and to decide what is to be done to attempt to heal those hurts’.<sup>68</sup> The intention of restorative justice practices is to promote victim wellbeing and offender rehabilitation. The values of restorative justice have been identified as including:

- empowerment
- respectful listening
- equal concern for all stakeholders
- accountability
- respect for fundamental human rights.<sup>69</sup>

Therapeutic jurisprudence considers the impact that the law and the legal system can have on an individual’s psychological and physical wellbeing. It has been characterised as ‘emotionally intelligent justice’.<sup>70</sup> Therapeutic jurisprudence explores the impact not only of law and legal processes but also of ‘legal institutions and legal actors upon the wellbeing of those affected by them’.<sup>71</sup>

There is no agreed definition of ‘therapeutic jurisprudence’.<sup>72</sup> However, its potential relevance to redress for survivors is indicated by its advocacy of ‘consideration of the impact of legal processes on psychological wellbeing, rather than simply the adjustment of legal rights’.<sup>73</sup>

We have not adopted the terminology of ‘restorative justice’ or ‘therapeutic jurisprudence’. The terms have different meanings and no agreed definition. However, their focus on the importance of processes for empowerment, respect and psychological wellbeing means that they may be of value in this area. We refer to the importance of processes where they are particularly relevant below. Those involved in designing or administering redress processes may benefit from study or training in these fields.

We also consider that certain principles should apply generally across all elements of redress. Although these principles may seem obvious, it seems to us to be worth stating them, particularly given that we have heard

enough to know that they have not always been applied in the past.

In the Consultation Paper we proposed the following general principles to guide the provision of all elements of redress:

- redress should be survivor focused – redress is about providing justice to the survivor and not about protecting the institution’s interests
- there should be a ‘no wrong door’ approach for survivors in gaining access to redress – regardless of whether survivors approach a scheme or an institution, they should be helped to understand all the elements of redress available and to apply for the types of redress they wish to seek
- all redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors. All of those involved in redress, and particularly those who might interact with survivors or make decisions that affect survivors, should have a proper understanding of these issues and any necessary training
- all redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors. It should be ensured that survivors can get access to redress with minimal difficulty and cost and with appropriate support or facilitation if required.<sup>74</sup>

Many submissions in response to the Consultation Paper supported these general principles. Some submissions urged us to adopt additional general principles.

For example, the Australian Psychological Society (APS) submitted that, while it endorses the principles stated in the Consultation Paper:

two additional and overarching principles have been identified which the APS strongly believes should underpin any redress (or civil litigation) process or system:

1. minimising the likelihood of re-traumatisation for the victim/survivor as a result of undergoing a redress process
2. the perception of justice and procedural fairness in the resolution of ongoing effects of trauma.<sup>75</sup>

Kimberley Community Legal Services agreed with the general principles in the Consultation Paper and stated:

Additionally, we submit that the following principles should also be adopted to ensure that the principles of fairness and equality are achieved:

- Impartiality throughout the process;
- Transparency of the process including that: the guidelines / criteria must be publicly available from the outset; any changes to these must be clearly documented and notified;

- The processes for assessment should be fully and clearly described; survivors should receive updates about the processing of their application; and
- Substantive decisions should be capable of being reviewed on the merits; overall progress should be reported on publicly.<sup>76</sup>

The Law Council of Australia also submitted that the general principles should include specific reference to the provision of legal assistance as part of the provision of ‘appropriate support’ under the fourth principle, so that the fourth principle would read:

all redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable people. It should be ensured that survivors can get access to redress with minimal difficulty and cost and with appropriate support, **including legal assistance**, or facilitation if required.<sup>77</sup> [Emphasis in original.]

The Ballarat Centre Against Sexual Assault and Ballarat Survivors Group submitted:

Designers of the process need to be aware of not replicating power imbalances – it should be a rights based system which is guided by experience, knowledge and understanding of working with people who have experienced sexual assault trauma.

Funding for a support person should be established with a clear role to explain/translate and work with the survivor in any of the steps along the way, as the trauma brain has difficulties taking in and understanding information. As survivors report, this should ideally be one person assisting the survivor rather than a multitude of people with various roles, so as not having to repeat the story to various people and to promote trust and a sense of safety.<sup>78</sup>

We consider that the principles proposed in the Consultation Paper adequately capture the need to minimise or avoid re-traumatisation. Matters that relate to the operation of a redress scheme and the assistance that should be available for survivors are discussed in Chapter 11.

The Salvation Army Australia submitted:

The Salvation Army Australia notes that these principles are expressed at a high level. Institutions would be assisted by the Royal Commission providing practical examples as to how those principles should apply.

Further, in considering the practical application of these principles, The Salvation Army encourages the Royal Commission to record and report on any positive experiences of survivors who have used the currently available processes for redress.<sup>79</sup>

Where relevant, we have included practical examples and positive experiences, particularly concerning direct personal response in Chapter 5 and redress scheme processes in Chapter 11.

### **Recommendation**

4. Any institution or redress scheme that offers or provides any element of redress should do so in accordance with the following principles:
  - a. Redress should be survivor focused.
  - b. There should be a 'no wrong door' approach for survivors in gaining access to redress.
  - c. All redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors.
  - d. All redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors.

# 5 Direct personal response

## 5.1 Introduction

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We are satisfied from our inquiries that a direct personal response should be a key element of effective redress.

Many survivors of child sexual abuse in an institutional context have told us how important it is to them and their sense of achieving justice that the institution:

- makes a genuine apology to them
- acknowledges the abuse and its impacts on them
- gives a clear account of steps it has taken to prevent such abuse occurring again.

Many survivors also want an opportunity to meet with a senior representative of the institution to tell their story. They want a senior representative of the institution to understand the impacts of the abuse on them.

Some survivors have had positive experiences when engaging with the institution in which they were abused; for others the experience has been negative. It is clear from many of our private sessions that this direct personal response from the institution can be a very important step in providing redress for a survivor.

The importance of this process was also reflected in evidence given in public hearings. Ms Emma Fretton, a survivor of abuse at Northside Christian College in Queensland, gave evidence in Case Study 18:

I didn't actually want the money. I wanted an apology, but I never got one.<sup>80</sup>

Ms Jennifer Ingham, a survivor of abuse by a priest in the Diocese of Lismore in New South Wales, gave evidence in Case Study 4:

when I received [the personalised letter of apology from the Bishop] it was very – it was very empowering ... to the point where it had made such a difference to me that I actually wanted to ring and tell him personally, 'Thank you for that letter.'<sup>81</sup>

It will be obvious that a personal response can only come from the institution. A scheme that provides monetary payments and support for counselling and psychological care can operate independently of the institutions involved, but an apology and acknowledgment from the institution or a meeting with senior representatives of the institution must involve the institution itself.

We recognise that it is not possible to require or regulate for a 'genuine' apology from an institution. The quality of any direct personal response for survivors will depend upon whether the institution is genuine in its desire to assist the survivor. This may in turn depend upon the adequacy of the institution's understanding of child sexual abuse and its impacts on survivors. For representatives of institutions, the process of engaging with survivors by offering and providing a direct personal response – if done well – will bring them a greater understanding of survivors' experiences and the impact on survivors of institutional abuse.

There will be survivors who will not want any form of direct contact or engagement with the institution. We discuss below



mechanisms through which survivors could obtain a response – for example, a written apology and acknowledgment from the institution – without being required to have any direct contact with the institution. We also discuss the principles that we are satisfied are appropriate in formulating an institution’s personal response to a survivor.

Some survivors have other needs beyond counselling and lump-sum monetary payments. Some institutions have already taken steps to meet those needs. Those steps should be understood as part of the direct personal response from the institution outside of any more structured ‘redress scheme’. They include:

- providing financial assistance to pay for drug and alcohol, employment or education programs
- providing assistance to obtain institutional records
- providing assistance to find lost family and facilitate reunions
- providing a copy of any relevant publications (such as yearbooks) and reproductions of photographs
- providing ‘pastoral care’, in the sense of spiritual guidance, support or re-engagement with a faith-based institution
- providing opportunities for collective redress, such as memorials and commemorative events, newsletters and reunions
- providing case management to assist survivors to gain access to available support services.

## 5.2 Principles for an effective direct personal response

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Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on appropriate principles for direct personal response. On the whole, the attendees supported the principles we suggested. These principles were refined in response to the consultations and were set out in the Consultation Paper.<sup>82</sup> We invited submissions on the proposed principles for an effective direct personal response.

Many submissions in response to the Consultation Paper supported the proposed principles. We are now satisfied that they are the appropriate principles for providing an effective direct personal response to survivors.

### Re-engagement between a survivor and institution should only occur if, and to the extent that, a survivor desires it

In the Consultation Paper, we discussed the importance of survivors retaining control of the choice as to whether, and how, they re-engage with an institution.<sup>83</sup>

We noted that some survivors will want to re-engage with the institution in which they were abused. Other survivors may not want to engage or interact with the institution at all. For example, as one survivor said in a private session:

I’m happy to take their money but I will never talk to them about what they have done to me.

A number of submissions in response to the Consultation Paper agreed that survivors will have different views on whether they wish to pursue re-engagement with an institution. In its submission in response to the Consultation Paper, referring to its ‘Yarning Circle’ consultations, the Coalition of Aboriginal Services in Victoria stated:

In response to whether or not survivors would wish to reengage with the institution, the majority of participants in attendance replied ‘no’ expressing that this experience could potentially do more harm than good and only serve to further exacerbate existing trauma. However, a smaller number of participants did say they might like to reengage with the institution in an effort to bring closure and utilise the experience as an opportunity to reconnect with family and fellow survivors.<sup>84</sup>

In the Consultation Paper, we noted that in private sessions, public hearings and submissions survivors have consistently reported that it is important that any interaction they have with the institution after they disclose their abuse should occur only if they wish for it to occur and in the way they wish it to occur.<sup>85</sup>

A number of survivor advocacy and support groups have told us how important it is that these choices remain with the survivor. It addresses the power imbalance that was inherent in the relationship between the survivor and the institution when the abuse occurred. For example, Ms Davis, representing Survivors Network of those Abused by Priests Australia told the public hearing:

Direct personal response should be available to those that want it in the form that they want it. But the survivor, not the institution, should be in control.<sup>86</sup>

Many institutions have also supported the proposals that any direct personal response should be survivor-led and that survivors should be able to choose whether and how they wish to re-engage with the institution.

Ms Hywood, representing the Anglican Church of Australia, told the public hearing:

we are also aware that some survivors feel unable to engage with the institution at which they were abused and we understand and respect that. Therefore, we do support the principle that a survivor of abuse should have the right to choose if, how and when they engage with the institution and, most importantly, that participation in any redress process should cause them no further harm or distress.<sup>87</sup>

### Institutions should make clear what they are willing to offer and provide by way of direct personal response and they should ensure that they are able to provide what they offer

In the Consultation Paper, we stated that a key aspect of any direct personal response that is provided to survivors is that institutions ensure they are clear about what they can, and in some cases cannot, provide.<sup>88</sup>

Through our public hearings, private sessions and consultations, many survivors have told us how disappointed they were after their attempts to re-engage with the institution. The reasons for their disappointment vary, but in a number of instances the disappointment arose from a lack of clarity about what the institution was offering or from the institution failing to provide what it had promised.

For example, in Case Study 10 on The Salvation Army Australia (Eastern Territory), JE, a survivor, gave evidence that, after he disclosed his abuse, the institution refused him a meeting with representatives of the institution, even though its website indicated that such a meeting would be offered. In his evidence, JE linked the institution's failure to provide what was offered on its website with its failure to provide him with adequate care in the past. JE gave evidence that he was subsequently offered a meeting, but he felt that 'the meeting was only offered after I blasted them for not following their policies'.<sup>89</sup>

This example and the many other accounts we have heard illustrate the harm that may be caused when institutions are unclear about what they are willing to provide or fail to provide what they offer to survivors.

A number of submissions in response to the Consultation Paper from survivor advocacy and support groups agreed that there was a need for clarity from institutions on the direct personal response they are prepared and able to offer to survivors. For example, the Alliance for Forgotten Australians (AFA) submitted:

Institutions should make clear what they are willing to offer and provide by way of direct personal response.

They should ensure that they are able to provide what they offer.<sup>90</sup>

A clear understanding of what an institution will offer as part of a direct personal response will assist survivors in making an informed decision about whether they will re-engage with the institution. In its submission in response to the Consultation Paper, Care Leavers Australia Network (CLAN) stated:

Furthermore, as mentioned in the consultation paper each [institution] should make clear what direct personal response they offer so that the individual can make an informed decision before they decide to start that process.<sup>91</sup>

**At a minimum, all institutions should offer and provide on request by a survivor an apology; an opportunity to meet with a senior representative of the institution; and an assurance as to steps taken to protect against further abuse**

As a result of our inquiries, we are satisfied that the following three elements of any direct personal response are essential:

- receiving an apology from the institution
- the opportunity to meet with a senior institutional representative and receive an acknowledgement of the abuse and its impact on them
- receiving an assurance or undertaking from the institution

that it has taken, or will take, steps to protect against further abuse of children in that institution.

Many survivors will wish to seek other responses from the institution. However, it would seem that every institution should be able to provide at least this level of response. None of these elements should be beyond the resources or capacity of any institution to provide, at least so long as the institution or an identifiable successor to the institution exists.

## Apologies

In the Consultation Paper we discussed what we had learned about the potential value of genuine apologies to survivors and the factors that contribute to making an apology effective.<sup>92</sup>

Survivors have told us, particularly in private sessions, about the importance of receiving a genuine apology from the institution and in some cases the perpetrator. These accounts are consistent with the research on the importance and impact of apologies for survivors and their importance in the healing process. According to Eldridge and Still:

The hopes of adult survivors of child sexual abuse are often very similar and reflect a desire for the offender to accept responsibility in a way that facilitates a letting-go process for the survivor.<sup>93</sup>

Canadian research on the therapeutic needs of survivors of institutional child abuse supports this, noting:

[S]urvivors need to receive apologies from those responsible for wrongdoing. A separate study into the therapeutic effects of court and non-court based processes used to resolve claims of sexual abuse made very similar findings ... Specifically, 'respondents consistently highlighted the desire to be heard, to have their abuse acknowledged and their experience validated, and to receive an apology'.<sup>94</sup> [References omitted.]

Much of the institutional child sexual abuse revealed to the Royal Commission has, at its heart, a power imbalance between the perpetrator and the victim. When the survivor seeks redress, there is often the same power imbalance between the institution and the survivor. Apologies should be carefully made to ensure that they do not reinforce any power imbalance. Eldridge and Still write:

The apology should be for the survivor's well-being, not just a device to make the offender feel better. If it is truly for the survivor, then care needs to be taken that there are no hidden messages within it that enable the offender to maintain power and control.<sup>95</sup>

Apologies can go some way toward redressing this power imbalance by empowering the survivor. Lazare writes:

[W]hat makes an apology work is the exchange of shame and power between the offender and the offended. By apologizing, you take the shame of your offense and

redirect it to yourself. You admit to hurting or diminishing someone and, in effect, say that you are really the one who is diminished – I’m the one who was wrong, mistaken, insensitive, or stupid. In acknowledging your shame you give the offended the power to forgive. The exchange is at the heart of the healing process.<sup>96</sup>

It is important for institutions, as the ‘wrongdoer’, not to dictate the agenda for making apologies, as this will simply reinforce any power imbalance.

Alter writes that there are two types of apologies that survivors usually want:

- a personal, private apology where the perpetrator directly apologises to the survivor on an interpersonal, one-on-one level. This is usually given face to face or by personal letter
- an official, public apology addressed to the individual or the group harmed. The apology’s delivery is more formal and calculated, held at a public forum and almost always set down in some permanent form or official public record.<sup>97</sup>

Apologies by institutions, whether they are government or non-government, are an important and necessary form of redress for many survivors of institutional child sexual abuse. For example, when explaining its recommendation that the Queensland Government and responsible religious authorities issue a formal apology to children in Queensland institutions who experienced significant harm, the Commission of Inquiry

into Abuse of Children in Queensland Institutions (the Forde inquiry) reported:

Accountability for the harm done cannot be characterised as a legal issue only; the government and religious organisations must also accept moral and political accountability. The approach to reparation must include the engagement of survivors in the design of the redress process, provision of independent advice to victims regarding the redress options available to them, respect for and sensitivity towards them when conducting these processes, and a recognition of the power imbalance between victims and institutions.<sup>98</sup>

The Royal Commission is aware of a number of examples of public apologies issued by non-government institutions for abuse of children in their care. These include apologies by the Christian Brothers;<sup>99</sup> Bishop Wright of the Catholic Diocese of Maitland-Newcastle;<sup>100</sup> Bishop Morris of the Catholic Diocese of Toowoomba;<sup>101</sup> The Salvation Army Australia (Eastern Territory);<sup>102</sup> and the Anglican Church of Australia.<sup>103</sup>

Some survivor and advocacy groups have called for public apologies from all institutions that have been responsible for the care of children and where abuse has occurred. For example, Ms Sheedy, representing CLAN, told the public hearing:

CLAN has been advocating over many years for formal apologies from every religious organisation, all charities, State governments and the

police in all States. We would like to see this apology issued from a single national platform, such as Parliament House in Canberra. Each organisation should say sorry to those children who were abused in their orphanages and children's homes, but the apology should also be to the nation because these organisations collectively failed in their duty of care to these children.<sup>104</sup>

Some survivors told us they have sought, and welcomed, public apologies, while other survivors have expressed dissatisfaction with public apologies. As discussed in the Consultation Paper, government apologies may concern not just government-run institutions but also government regulation or oversight of non-government institutions and issues of broader public policy.

We have heard a variety of views from survivors about the value and effectiveness of these apologies.

We have heard from survivors who, having received the same form of private apology or having heard the same public apology, have reacted very differently.

Ms Robin Kitson, an Aboriginal survivor of abuse at Parramatta Training School for Girls in New South Wales, gave evidence in Case Study 7 that the various apologies she had heard or received did not mean anything to her because she did not think they demonstrated any real understanding of her experience:

I went to Sorry Day. I went to Forgotten Australians apology in Canberra. I have received letters from a number of support networks

but I look at them and think, 'What does it all mean?' Well, it means nothing to me. It's not worth the paper it is written on. What are people sorry for? They were not even around. They do not know what the stories are. If they provided more explanations and did something let people know why they were saying sorry, then okay. But they did not tell the true story of why they were saying sorry.<sup>105</sup>

In contrast, Ms Jennifer Ingham gave evidence in Case Study 4 about the letter of apology she received:

I received a formal letter of apology from Bishop Jarratt. I have realised now how important it is to myself and my siblings. Bishop Jarratt apologised unreservedly for the *'unconscionable and disgraceful conduct of a priest who betrayed every standard of decency and of the spiritual and moral trust expected of him'* and *'of the singular failure of concern and pastoral care when you most needed to be believed and helped'*. He said *'we can't undo the past but the church must make drastic change. Those responsible must be accountable.'* And they must.<sup>106</sup> [Emphasis in original.]

While it is clear that individual survivors will respond differently to apologies, whether public or private, there is guidance available to assist institutions in making their apologies as effective as possible.

The New South Wales Ombudsman has published *Apologies: A practical guide* (2nd ed), which identifies the 'six Rs' as

fundamental elements of the content of an apology:

- recognition
- responsibility
- reasons
- regret
- redress
- release.<sup>107</sup>

While the Ombudsman’s guide is directed to all sorts of apologies and not particularly to apologies for institutional child sexual abuse as a form of direct personal response, a number of these elements may assist institutions to make more effective apologies.

The Ombudsman suggests that the recognition element of apologies ought to comprise three components:

- a description of the wrong that is the subject of the apology
- a clear and unequivocal recognition that the action or inaction was wrong
- an acknowledgment of the harm upon the affected person.<sup>108</sup>

As discussed in the Consultation Paper, survivors have raised these elements of an apology during private sessions and case studies. Many survivors have said that, although they received an apology from the institution, they considered it meaningless because it failed to acknowledge or recognise the abuse or the harm done to them. For example, JF, who gave evidence in Case Study 10 about abuse at The Salvation Army’s Indooroopilly Boys’ Home in Queensland, said that he considered the written apologies he was offered ‘totally inadequate’:

I didn’t feel like either Major Cox or the Committee genuinely acknowledged what had happened to me while I was in the care of The Salvation Army. I didn’t feel that the ‘sorry’ meant anything. You can say ‘sorry’ for anything. I would have appreciated it if they’d tried to really engage with me, and made an effort to understand what I’d gone through. That would have meant more to me than the word ‘sorry’ in a letter.<sup>109</sup>

JE, who also gave evidence in Case Study 10 about abuse while in a Salvation Army institution, said of his letter of apology:

The letter advised me that the Committee had considered my statement, and said they were ‘very sorry that your experiences at Riverview were so unpleasant.’ To me, it sounded like a letter that you get from a hotel when you complain about the room. I did not consider it an adequate apology, not by a long shot.<sup>110</sup>

JE gave evidence that he felt an adequate apology needed to indicate that the institution understood what the survivor had experienced and that they acknowledged the subsequent harm it had caused:

‘We’re sorry.’ It doesn’t mean anything. Let them address each individual case like they actually read it and like they know about it and they put themselves in your shoes for five minutes and can apologise for various parts of the process of what happened to me



when I stayed there, when I escaped from there, and through the suffering that I went through in the application process, because that's reliving the whole abuse all over again, let me tell you.<sup>111</sup>

For an apology to be of value to some survivors, it must adequately describe the wrong for which the apology is being given. However, we acknowledge that there is a balance to be struck in this process. Particularly in a written apology, some survivors do not want a detailed account to be given of particular incidents of their abuse or its impacts. Providing too much detail may cause further harm.

For some survivors, it may be important that the person giving the apology is well informed about the survivor's experience and is not someone who is simply signing a letter without having any personal knowledge of the survivor.

DG, a survivor of abuse by a Marist Brother, gave evidence in Case Study 4 on Towards Healing that he was not satisfied with the letter of apology offered to him, in part because he did not feel that the person giving the apology – the new Provincial of the Marist Brothers, Brother Thompson – had a genuine understanding of DG's experience:

The letter acknowledged that the Brothers accepted the substantial truth of my allegations of abuse and apologised to my family and me for the pain and suffering caused by Brother Foster and the handling of my allegations. It noted that a more sensitive and pastorally caring approach could have been taken.

Overall, though, I thought the apology was pretty hollow and I was over it all by that stage. Basically, the letter made an apology for this and that, and I thought, 'I don't even know who you are, and it doesn't really mean that much to me.' To me, Brother Thompson was apologising for something he probably knew very little about. I thought it was rather worthless.<sup>112</sup>

One of the strongest themes that emerges from survivors' experiences of apologies is the importance they place on the institution taking responsibility for the wrong and for the harm caused. The New South Wales Ombudsman describes the taking of responsibility as good practice but also notes that it is what people affected expect from an apology.<sup>113</sup>

As discussed in the Consultation Paper, the failure of institutions to take full responsibility for the wrong and/or for the harm caused by making a partial apology can significantly limit the effectiveness of the apology.<sup>114</sup> The New South Wales Ombudsman describes partial apologies as those which are 'mere expressions of regret, sympathy, sorrow or benevolence' but which do not admit responsibility.<sup>115</sup>

The Royal Commission has heard from a number of survivors during public hearings who spoke of their disappointment with apologies that failed to take responsibility. Mr Tommy Campion, a survivor of abuse in the North Coast Children's Home in New South Wales, gave evidence in Case Study 3 about his views of an apology offered by Bishop Slater of the Anglican Diocese of Grafton:



Well, you know, there was no apology there. He didn't – nothing was admitted. He's just saying he was saddened, his heart goes out, and just 'Please accept my apology', but it doesn't say anything about the church, that the church was to blame for the abuse of the children or that they had run the home. So it's not any sort of apology to me.<sup>116</sup>

Ms Emma Fretton, a survivor of abuse at Northside Christian College in Queensland, gave evidence in Case Study 18 that she hoped the apology she sought would be:

Not just an apology; acknowledgment, not only for me but for all those other girls and boys. An acknowledgment, what they know. A sorry – anyone can say sorry, but I actually want acknowledgment that the school admits to their wrongdoing, that the church admits to their wrongdoing.<sup>117</sup>

We received a number of submissions in response to the Consultation Paper from survivors and survivor advocacy and support groups that expressed dissatisfaction with apologies that they considered to be inadequate.

For example, in its submission in response to the Consultation Paper, Micah Projects stated:

For many apologies have been received and what is important is that apologies are for the wrong doing of the institution rather than

an acknowledgement of the pain and suffering of a victim/survivor. Whilst the latter requires recognition it is not the purpose of the apology. Most apologies have been crafted by lawyers which creates a sense of protecting the institution rather than a real acknowledgment of failure and responsibility for the legacy of criminal behavior, neglect and abuse of children whilst in care of governments, religious authorities/ or secular organisations.<sup>118</sup>

In some circumstances, an effective apology will include an explanation of the reasons for or cause of the problem.<sup>119</sup> The New South Wales Ombudsman notes that apologies should not excuse or justify the problem and that care should be taken when delivering this component of apologies:

It is totally inappropriate to say '*I am sorry but ...*' followed by an explanation as to why what was done was correct or justified. What is more appropriate is to say '*I am sorry because ...*'.<sup>120</sup> [Emphasis in original.]

Ms Helen Gitsham, the mother of one of the children abused while in the care of St Ann's Special School in South Australia, gave evidence in Case Study 9 about an apology that the Archbishop of Adelaide offered to affected families. She gave evidence that the families were concerned that the Archbishop did not provide any detail about how the children had been left so vulnerable to abuse in the institution:

I am aware that Archbishop Wilson apologised to families at this

meeting ... I am also aware that many families raised questions about the church's failure to deal with the situation ... but no information was given by the archbishop which went beyond what I already knew.<sup>121</sup>

As discussed in the Consultation Paper, providing reasons in an apology is a matter that needs to be considered very carefully in each individual case.<sup>122</sup> Reasons may be more accurate and appropriate where the apology relates to more recent events, including, for example, an apology for initial failures in the institution's response to allegations of abuse.

Throughout our consultation process we have heard that, as part of the apology, some survivors may seek an explanation or recognition of systemic issues that led to abuse occurring. For example, Dr Chamley, representing Broken Rites, told the public hearing:

My experience is that the apology has often been very generic and the discussion that has taken place in mediations ... [focuses] on what happened to the victim and about the perpetrator themselves. It doesn't focus on the systemic nature of what went on within the organisation of often perpetrators being moved around, hidden, not referred to police, these sorts of things. I think in an overall apology that might be given, if that's what a person wants, the institution should be prepared to make those statements as to what they actually did here.<sup>123</sup>

The New South Wales Ombudsman refers to regret as a key component of an effective apology. The Ombudsman describes the 'regret' component of the 'six Rs' as 'an expression of sincere sympathy, sorrow, remorse and/or contrition', noting that the 'content, form and means of communication of an apology is very important as it can indicate the level of sincerity of the apologiser'.<sup>124</sup>

Many survivors have told us that they consider the apologies they received from institutions to be insincere. Some survivors have told us that they would not consider any apology they were offered by the institution to be sincere.

Some survivors are willing to accept that an institutional apology is sincere. For these survivors, an apology that expresses regret after giving appropriate 'recognition' and taking appropriate 'responsibility' may be most likely to be regarded as sincere.

The New South Wales Ombudsman suggests that the 'redress' component of an apology should include a statement of the action that the institution has taken, or intends to take, to address the issue. It may include an assurance or undertaking that it will not happen again.<sup>125</sup>

Obviously, the Royal Commission is using the term 'redress' in a much broader sense than this. Here, however, this component of an apology picks up on another one of the forms of redress we are proposing as the essential minimum forms of direct personal response that institutions should offer – that is, giving an assurance as to the steps the institution has taken, or will take, to protect against further abuse.

Some survivors have told us they have valued the assurances given in written apologies they received from the institution. Other survivors have told us there was not enough detail given in the assurances. It is fairly clear that assurances that will be regarded as valuable by some survivors will be regarded as inadequate or unhelpful by other survivors.

For survivors who seek both a written apology and an assurance of steps taken, or to be taken, it seems sensible to include both in the one letter of apology.

The New South Wales Ombudsman describes a request for forgiveness or release from blame or the reconciliation of a relationship as being an optional, but important, component of a full apology.<sup>126</sup>

During public hearings the Royal Commission has learnt of many apologies offered to survivors by the relevant institutions. In offering apologies, some institutions, particularly faith-based institutions, have also sought the forgiveness of the victim.

For example, the national written apology issued by the Congregation of Christian Brothers in 1993 stated:

We cannot change the past. We cannot take away the hurt. We can express our heartfelt regret for the failings of the past and we can, on behalf of our predecessors, beg the forgiveness of those who suffered.<sup>127</sup>

As with other aspects of apologies, not all survivors will respond positively to requests for forgiveness and some may be traumatised by a request for forgiveness. It may be that not all of the New South Wales

Ombudsman's 'six Rs' need to be present for an apology to be effective. What an apology ought to contain in order to be effective will vary from person to person. It is most likely to be effective if it is responsive to the survivor's needs.

According to Carroll:

Research has shown that what is considered to be a 'good enough' apology depends on which of these components needs to be present to meet the psychological needs of the recipient. In turn, this is influenced by the recipient's perception of the seriousness of the harm, the level of responsibility they attribute to the wrongdoer and the perceived wrongfulness of the behaviour with reference to the principle that was violated.<sup>128</sup>

The Royal Commission has heard that, for many survivors, the apology that the institutions have offered to them can have a significant impact. Depending on the content, framing and delivery of the apology, the impact can be either positive, resulting in beneficial healing outcomes for the survivor, or negative, potentially resulting in further harm.

Some of those who spoke at the public hearing referred to the positive impact a genuine apology can have for survivors.

For example, Mr Dommett, representing the National Stolen Generations Alliance, told the public hearing:

We believe that there needs to be a genuine apology which goes along with any settlement of any claim,

and it needs to be personally provided.

Where we have supported survivors through the common law system to get a pay out, one of the most enduring parts for them is the personal apology that they receive from the representative of the organisation or the government, and I think that that heartfelt apology is an important part of a person's journey of healing.

It assists people to provide closure and it also allows people who have been victimised for a lot of their life to actually get a sense of being believed. One of the biggest issues that we find is that people just don't feel that they have ever been believed by anyone.<sup>129</sup>

Mr Bates, representing Scouts Australia, told the public hearing:

Survivors should be given a genuine, oral and written apology. They should be given an opportunity to engage with those representatives, to tell their story. They need to hear that they are believed.<sup>130</sup>

In our view, receiving an apology from an institution will be a critical element of an effective direct personal response for many survivors. While a genuine apology cannot be regulated, institutions should provide a meaningful and sincere apology to any survivor who wishes to receive an apology. Any apology should at least include the three components of recognition suggested by the Ombudsman, namely:

- a description of the wrong that is the subject of the apology
- a clear and unequivocal recognition that the action or inaction was wrong
- an acknowledgment of the harm upon the affected person.<sup>131</sup>

### Meetings with senior institutional representatives

As discussed in the Consultation Paper, many survivors have told us that they wanted to meet in person with a senior representative of the institution.<sup>132</sup> Many survivors felt that a meeting afforded them an opportunity to 'tell their story' to a person in authority and also to receive a personal apology from a representative of the institution. In particular, the desire to meet with *senior* representatives of the institution was a strong theme that emerged from public hearings, submissions and private sessions.

Of course, these meetings can be the best opportunity for offering a personal, face-to-face apology to a survivor. Survivors have given us many examples of apologies that institutional representatives have offered during meetings. Some of those apologies were accepted and some were not.

Generally speaking, survivors have told us they wanted the person they were meeting with to be senior within the institution; they wanted them to be sincere and genuine; and they wanted to feel respected in their interaction with them.

Survivors have told us they want a senior representative to attend the meeting because they believed it was important

for someone with authority or status to hear what they had to say about how the institution had failed them; and that they felt it was a sign of respect that the institution send a senior figure to meet with them.

For example, Ms Ingham, a survivor of abuse by a Catholic priest, gave evidence in Case Study 4 that:

the bishop is, in my perception ... the head of that diocese. I can't go any higher, and I wanted the person who was responsible – he's not responsible for what happened to me ... But he is the leader of that church and I wanted respect, to tell the person who was the very leader, so that I felt that I was valued and respected and heard.<sup>133</sup>

Some survivors reported feeling angry or upset when they were offered meetings with institutional representatives who were not 'senior' within the organisation. For example, Ms Ingham gave the following evidence:

[I was told] that his calendar prevented availability until the end of June 2013 [and that] 'he is past the age of retirement and bishops retire much later than others, and he needs assistance in challenging tasks, hence the responsibility put to Chris for the facilitation.' This angered and confused me. I felt I deserved the respect to have Bishop Jarrett present and I needed answers from him. Instead the Chancellor Christopher Wallace would be present. With no disrespect to Chris Wallace's position within the church, he was

only a deacon and a layperson. I thought that my case was important enough to bring in the most senior person of the diocese to the facilitation but clearly was not.<sup>134</sup>

Survivors reported feeling positive about meetings that they felt were with a senior institutional representative and where the representative made them feel respected and supported.

As part of their internal processes or procedures for responding to complaints of child sexual abuse, a number of institutions already have a component that involves a meeting between the survivor and representatives of the institution.

For example, the Catholic Church's Towards Healing process includes provision for a facilitated meeting between the complainant and the Church Authority.<sup>135</sup> The purpose of the meeting with the survivor is described as follows:

The primary purpose of a facilitated meeting ought to be pastoral. Many victims have said that one of the most important aspects of the process is that they have been listened to by the Church. Meeting with the victim demonstrates that they are important and their complaint is important. It shows respect for them, when their experience of abuse has been one of disrespect and violation. The meeting with the Church Authority therefore often plays an important part in promoting healing. Apologies can be offered, and the Church Authority is in a position to express empathy with the pain of the victim.<sup>136</sup>

In a submission in response to an issues paper, the Anglican Church of Australia indicated that a number of its dioceses have pastoral care and assistance schemes in place that, among other things, provide survivors with an ‘opportunity to tell their story to a senior officer of the institution’<sup>137</sup> and give the institution the ‘opportunity to offer a genuine apology by a senior officer of the institution’.<sup>138</sup> It submitted that this feature is one of a number of elements that make the schemes effective in responding to both survivor and institutional needs.<sup>139</sup> In its submission in response to the Consultation Paper, the Anglican Church of Australia stated that a direct personal response will ‘commonly involve a meeting with a senior officer of the Anglican Church (usually a Bishop)’.<sup>140</sup>

In submissions in response to the Consultation Paper and during the public hearing, a number of institutions agreed that it was important to ensure that a survivor can meet with a senior representative of the institution.

For example, Mr Bates, representing Scouts Australia, told the public hearing:

We support the view that survivors of child sexual abuse in an organisational context should have the opportunity to meet with a senior representative of the organisation, in our case, the Chief Commissioner or the Chairman.<sup>141</sup>

As discussed in the Consultation Paper, feeling ‘respected’ during a meeting with institutional representatives was important to many survivors.<sup>142</sup> Meeting with a senior representative from the institution was one

key factor in survivors feeling that they were being shown respect by the institution.

For some survivors, other factors were also relevant. For example, a number of survivors raised the wearing of uniforms by institutional representatives when attending meetings with survivors. Some survivors thought wearing uniforms was respectful, whereas others considered wearing uniforms to be inappropriate. Other factors, including the location of the meeting and ensuring that the survivor has the opportunity to bring a support person, can also affect the success of the meeting.

In submissions in response to the Consultation Paper and at the public hearing, a number of institutions agreed that there was a need for meetings to be run in a respectful and responsive manner.

For example, Lieutenant Colonel Reid, representing The Salvation Army Australia, told the public hearing:

Wherever a survivor is willing, we wish to meet with him or her. We would want to meet with them in their place of choosing, and we always want to be sensitive to how we dress – that is, should we be uniformed, should we not. We want to listen to their experience and understand what they want us to hear.<sup>143</sup>

Having regard to the seriousness of the matter, we remain satisfied that it is important that, in offering, arranging, and holding meetings with survivors, institutional representatives are aware of these factors and actively consider and manage them

in a way that gives both parties the best possible opportunity to ensure the meeting is constructive and positive. It may be that at least some of these factors should be discussed with the survivor or the survivor's support person before the meeting so that any concerns can be addressed before the meeting takes place.

### Assurances and undertakings

Our inquiries indicate that, for many survivors, their families and the wider community, receiving reassurances or undertakings from institutions is an important part of any redress process.

As discussed above, the New South Wales Ombudsman suggests that a fundamental element of the content of an apology is a statement of the action that the institution has taken, or intends to take, to address the issue and possibly an assurance or undertaking that it will not happen again.<sup>144</sup>

Some survivors have told us they have valued the assurances given in written apologies they received from the institution. Other survivors have told us there was not enough detail given in the assurances.

In submissions in response to the Consultation Paper, we heard a range of views on the level of detail that should be given in the assurances. For example, Adults Surviving Child Abuse stated:

Broad information as to the nature of such steps should be included. This is because in the absence of such information the assurance could appear as mere rhetoric.

Reference to specific measures will also serve as affirmation, record, and thus partial safeguard of their introduction and implementation for the institutions themselves.

Detailed enumeration of such measures should, however, be avoided in the communication of apology. This is because fine grained description of procedural mechanisms could overshadow and dilute the direct apology to the survivor and the acknowledgment of the harm they have suffered as an individual. The communication as a whole should be succinct; survivors can be advised of how they can access further details of measures to protect children from potential abuse.<sup>145</sup>

It is apparent that assurances regarded as valuable by some survivors will be regarded as inadequate or unhelpful by other survivors.

In its submission in response to the Consultation Paper, Bravehearts stated:

From a Bravehearts perspective, we consider these elements critical. As an organisation that has advocated for victims rights for over 18 years, a continual theme we are told by survivors is the importance of ensuring that these organisations don't harm future children under their care.

It is critical that any assurance made moving forward to a victim is more than [sic – than] just a commitment to adopt more stringent policies and



procedures. Policies and procedures alone are just words on a page.

There must be a commitment from the Institution from the top down that they will address the cultural issues, and training and education gaps which have been demonstrated time and again in the Royal Commission Public Hearings to have failed victims.<sup>146</sup>

Some institutions have also supported the provision of assurances as an element of an effective direct personal response. For example, Mr Mell, representing YMCA Australia, told the public hearing:

The YMCA believes that being able to assure survivors that we are doing everything possible to ensure the protection of children now is an important and integral part of the redress process.<sup>147</sup>

As discussed in the Consultation Paper, for survivors who seek both a written apology and an assurance of steps taken, or to be taken, it seems sensible to include both in the one letter of apology.<sup>148</sup> Survivors who seek a meeting with a senior institutional representative might wish to discuss the steps the institution has taken or intends to take during the meeting, either instead of or in addition to any assurances and undertakings given in the written apology.

In some cases, survivors might be seeking particular assurances or undertakings about their abuser and whether he or she continues to have any access to children. For example, in its submission in response to the Consultation Paper, Micah Projects stated:

Many times individual survivors also want to be assured that the perpetrators of sexual abuse are not still in positions of trust. Institutions should find ways to inform victims of the status of perpetrators within the institution.<sup>149</sup>

Similarly, Ms Hywood, representing the Anglican Church of Australia, told the public hearing:

In our experience, a survivor often welcomes ... an assurance that the perpetrator has been dealt with and that steps have been put in place to assure them that similar abuse won't happen again.<sup>150</sup>

Institutions will have to consider whether and to what extent these assurances or undertakings can be given, particularly if an investigation or disciplinary process is underway.

We remain satisfied that assurances from institutions that steps have been taken to prevent future instances of child sexual abuse will be an important element of a direct personal response for some survivors.

### In offering direct personal response, institutions should try to be responsive to survivors' needs

As the previous discussion indicates, we are satisfied that there is no 'one size fits all' approach to an appropriate personal response. The information that survivors provided in private sessions, public hearings and submissions strongly suggests that, to properly respond to survivors' needs,



institutions need to engage sensitively with survivors and be prepared to listen to what they say about what they need to assist them to heal.

As discussed in the Consultation Paper, as part of this process institutions must recognise the diversity of survivors and what direct personal response they might need.<sup>151</sup> They must remain open to receiving information from survivors about what they want. Institutions should actively seek to identify the needs of survivors of abuse in the relevant institution and should be responsive to those needs where possible.

A number of survivor advocacy and support groups supported a responsive and individualised approach to the direct personal response offered to survivors. For example, in its submission in response to the Consultation Paper, the Alliance for Forgotten Australians stated:

In offering direct personal response, institutions should try to be responsive to survivors' needs; there is no 'one size fits all' approach to an appropriate personal response.<sup>152</sup>

A number of institutions also supported the proposal that it is important for institutions to be responsive to survivors' needs throughout direct personal response. For example, Lieutenant Colonel Reid, representing The Salvation Army Australia, told the public hearing:

We've learnt from survivors' both good and bad experiences in the past. We take the lead from survivors ... We work with survivors or their advocates or

representatives on the form and content [of apologies]. We want this to be collaborative and we want it to be meaningful.<sup>153</sup>

We have been told that survivors' needs may vary at different stages of the direct personal response. In their joint submission in response to the Consultation Paper, the National Stolen Generations Alliance, Bringing Them Home and Connecting Home stated:

Connecting Home has found that it is important that an ongoing effective direct personal support response is required following the apology and payment of a claim. Whilst the completion of the claim and apology provides an instant feeling of closure of the matter, our experience has been that post the exchange of paper work and the receipt of payment, the survivor is left with a void of not knowing how to continue next on their journey.<sup>154</sup>

Similarly, in their submission in response to the Consultation Paper, the Anglican Church of Australia stated:

In some cases being responsive to survivors' needs will involve an on-going process over a considerable time.<sup>155</sup>

It is likely that, in some cases, institutions will not be able to meet the expectations or desires of some survivors. This may be because they do not have the resources available to deliver the redress that is requested. Resource limitations may be financial in some instances, while in other cases institutions may lack the appropriate skill set or expertise to be able to deliver

what is being sought. In these cases, institutions should communicate clearly and respectfully with survivors. They should be open to exploring alternatives with survivors and, where relevant, with third-party support services.

An example of where institutions may be able to meet the needs of some survivors is by responding to requests to rename buildings or other facilities that have been named in honour of former staff or patrons who are later named as abusers. Similarly, institutions could consider requests to remove statues or other memorials honouring those later named as abusers. Survivors have told us in private sessions of the continuing distress these honours can cause them.

In its submission in response to the Consultation Paper, the Commission for Children and Young People Victoria stated:

In circumstances where survivors raise issues regarding the naming of buildings or other facilities, or the placement of statues [sic – statues] or other memorials honouring an individual who has later been named as an abuser, the institution should find ways to remove such recognition in acknowledgment of the distress caused.<sup>156</sup>

## Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response

As discussed in the Consultation Paper, some institutions currently offer a broad range of services to survivors that go beyond the three elements of direct personal response we have identified as a minimum requirement for all institutions – that is, an apology, a meeting with a senior institutional representative and an assurance or undertaking about steps taken to protect against future abuse – and that are separate from counselling and monetary payments discussed in chapters 6 and 7.<sup>157</sup>

These services include needs-based financial assistance; memorials, reunions and support groups; family tracing services and family reunions; and pastoral care.

A number of submissions in response to the Consultation Paper supported the continued provision of this broader range of responses by institutions.<sup>158</sup> Many survivors have told us that these forms of direct personal response have assisted them.

For example, in their joint submission in response to the Consultation Paper, the National Stolen Generations Alliance, Bringing Them Home and Connecting Home stated:

It would also be important that organisations already involved in direct personal responses to survivors are given the ability to continue to offer forms of direct

personal response that are culturally appropriate and complement the process of redress and enhance the survivor's [sic – survivor's] journey towards healing such as those with [sic – which] Connecting Home provide.<sup>159</sup>

We are satisfied that institutions that currently offer a broader range of direct personal response should continue to do so where possible.

As discussed in the Consultation Paper, to some extent other elements of redress may replace some forms of direct personal response that some individual institutions currently offer.<sup>160</sup> For example, some institutions currently provide counselling and psychological care for survivors. These may no longer be required if counselling and psychological care are provided through a redress scheme, as we recommend in Chapter 6.

Similarly, monetary payments provided through a redress scheme should generally replace monetary payments provided directly by the institution.

However, it is important to emphasise that a number of survivors have told us about the value of receiving financial assistance, often paid directly to a third party, to address urgent or particular needs. In many cases, they related these needs to their experience of being in residential institutions, although not necessarily to any experience of institutional child sexual abuse. Any redress scheme should not discourage this direct engagement where it is within the capacity of the institution.

Examples of more formal schemes or arrangements that have provided needs-based payments include the following:

- The Forde Foundation in Queensland provides financial support to persons who were in institutional care in Queensland when they were children. It provides funding for medical and dental services, education and personal development, among other things.
- In Case Study 11, evidence was given about the Western Australian Institutions Reconciliation Trust, which was established as part of a settlement of a class action against the Christian Brothers. The trust made lump-sum monetary payments to ex-residents of the relevant institutions for serious sexual abuse. It also provided ex-residents with needs-based financial assistance under a range of categories, including therapy, retraining, literacy classes, family reunification, housing and accommodation and emergency relief.
- In Case Study 11, evidence was given about the Christian Brothers Ex-Residents & Students Services. The organisation provided ex-residents of the relevant institutions with a broad range of services and funding, including counselling, family tracing services, funding for family reunification expenses, adult education, advocacy and referrals and small no-interest loans.

In each of these examples, financial assistance is or was available to former

residents of residential institutions, regardless of whether the person had experienced any institutional abuse.

Many survivors have also told us of less formal arrangements under which they have received emergency or needs-based financial assistance from institutions as part of, or in connection with, the institution's response to their allegations of institutional child sexual abuse.

Survivors' needs for other forms of direct personal response are unlikely to be affected by a redress scheme that offers monetary payments and counselling. Some examples of particular needs that institutions could meet through a direct personal response are discussed below.

### Gaining access to records

Our inquiries have shown that many survivors have a great need to gain access to personal records. These records may help them to understand and reclaim their identities and histories. Generally, the need for assistance in obtaining records is most pressing for those who were in residential institutions, particularly Forgotten Australians, Former Child Migrants and members of the Stolen Generations.

In some cases, people seek records because of their experience of institutional child sexual abuse. For example, they may need records to support a claim for redress or for litigation for institutional child sexual abuse. In other cases, they seek records not because they experienced institutional child sexual abuse but because they are seeking records of their childhood in residential

institutions or, less often, in foster care. As discussed in the Consultation Paper, there are formal arrangements to help people to obtain records. For example:

- Anglicare Australia recently launched a project to assist people who were in Anglican institutions to identify which Anglican agency or diocese has taken over the functions of an Anglican institution that has ceased to exist.<sup>161</sup>
- The Christian Brothers, the Sisters of Mercy and the Poor Sisters of Nazareth have developed a Personal History Index to assist Former Child Migrants who were placed in Catholic residential institutions to find their personal details, trace their families and locate any records held about them.<sup>162</sup>
- The New South Wales Government recently announced that the Department of Family and Community Services will aim to make care records available as soon as possible by doubling its resources to clear the backlog of applications from survivors.<sup>163</sup> This announcement was made in connection with Case Study 19 on Bethcar Children's Home and also in response to Case Study 7 on the Parramatta Training School for Girls and the Institution for Girls in Hay.

A number of submissions in response to the Consultation Paper and some of those who spoke at the public hearing described difficulties they experienced in seeking and obtaining access to survivors' records, particularly for survivors who were in residential institutions.

For example, Ms Carroll, representing the Alliance for Forgotten Australians, told the public hearing:

Compounding these matters remains the issue of access to records. Accessibility and transparency of records access remains, at best, patchy across Australia. Some States do it better than others, but we are still struggling to get a consistent and transparent response from all the jurisdictions. To roadblock record access perpetuates system abuse.<sup>164</sup>

Mr Allen, representing Kimberley Community Legal Services, told the public hearing:

One aspect that troubles us, or has troubled our clients, is providing full access to personal records. WA would call them native welfare files for the majority of our clients.

Our concern is that the inability to provide or obtain full access to these files not only hampers the preparation of responses to redress schemes in this State but also for the commencement of civil action, because insufficient evidential material is able to be obtained to file and then to sustain an action.<sup>165</sup>

The Royal Commission is examining survivors' access to records and it is possible that we will make recommendations on this issue. At this stage, we note that assisting survivors to gain access to their records is one of the forms of direct personal response that institutions can offer and provide and that it is likely to be of assistance to some survivors.

## Family tracing and family reunion

Some survivors, particularly Former Child Migrants and members of the Stolen Generations, have told us that they have received assistance to trace family members as well as further support and financial assistance to facilitate family reunions.

In its submission in response to the Consultation Paper, the Child Migrants Trust stated:

Obviously, the most significant problem facing most child migrants relates to tracing and engaging their families, who usually reside overseas in a different continent.<sup>166</sup>

A number of support services assist people to trace and reunite with family. They include the Child Migrants Trust, the Forde Foundation in Queensland and services operating Link-Up programs.

As discussed in the Consultation Paper and above, some institutions have also provided this assistance.<sup>167</sup>

Survivors may particularly benefit from financial support for facilitating family reunions as part of a direct personal response if the support they seek is not available to them through support services such as the Child Migrants Trust, the Forde Foundation and Find and Connect.

## Memory projects

As discussed in the Consultation Paper, we have been told that 'memory projects' may be important to some survivors.<sup>168</sup> The term

‘memory projects’ refers to activities that record and publicly communicate survivors’ experiences – for example, through yearbooks, photo albums and collections of survivors’ accounts of their experiences. For some survivors, this type of redress can help to give them a voice while also placing their personal account of their experiences on the public record.

According to Daly, survivors may see memory projects as a form of redress because they not only inform members of the general public but also remember, validate and vindicate victims.<sup>169</sup>

In its submission in response to the Consultation Paper, the Commission for Children and Young People Victoria stated:

There may also be a desire for memory projects which record and publicly communicate survivors’ experiences, such as through yearbooks, photo albums and collections of survivors’ accounts of their experiences. This process enables the survivors to have a voice and place their account on the public record.<sup>170</sup>

Memory projects may be conducted outside of individual institutions, but some institutions may find that survivors seek support and assistance in conducting these projects on behalf of former residents of a particular institution or group of institutions.

### Collective forms of direct personal response

With the exception of public apologies and some memory projects, the various forms

of direct personal response discussed above focus on individual survivors’ needs and wishes. However, some survivors and a number of survivor advocacy and support groups have told us that some identifiable groups of survivors have collective needs or desires and seek collective forms of direct personal response for their group.

As discussed in the Consultation Paper, some survivors have told us that they identify with specific groups of other survivors and some survivors identify as part of multiple groups. Some of these groups are well known and include Forgotten Australians, Former Child Migrants and the Stolen Generations.<sup>171</sup> Other groups may form around shared experiences of being former residents of a particular residential institution. Some of these groups seek forms of collective redress, including memorials or plaques to mark important sites, commemorative events, group reunions and collective or group healing therapies.

There may also be a wish for broader community involvement as part of survivors’ healing, which might be met through collective forms of direct personal response. In its submission in response to the Consultation Paper, Micah Projects stated:

Collective responses also can play a significant role in the reconciliation and healing process. Whilst the consequence of sexual and other forms of abuse is a very personal experience often resulting in post-traumatic stress on a psychological level, a significant moral and ethical injury has occurred within communities, where institutions entrusted to care and protect vulnerable children have failed,

covered up and betrayed not only the individual but the community as a whole. Collective processes can begin a journey of moral repair for victim/survivors and the community together, which creates opportunity for healing and reconciliation.<sup>172</sup>

## Memorials

As discussed above, a key part of direct personal response for many survivors is feeling that their experiences have been recognised and acknowledged. Some survivors wish to have a symbolic acknowledgement of their experiences in the form of a permanent memorial or plaque, usually at a significant or important site and most commonly at the site of the relevant institution.

Daly reports that memorials (and other forms of collective redress, including commemorative activities and media and memory projects) have a range of objectives and functions:

They seek to remember, validate and vindicate victims. They encourage new formats for victim 'voice' and new ways to communicate experiences of institutional abuse. They promote new relational histories of institutional abuse and policy wrongs that include survivors, officials and carers, and societal 'on-lookers'. They bring an understanding of institutional abuse to a wider audience of new participants (family members of survivors and other society members), and they celebrate the potential for individual, communal, and societal change.<sup>173</sup>

In 2001, the Senate Community Affairs References Committee, in its report *Lost Innocents: Righting the Record – Report on child migration*, recognised the importance of memorialisation and recommended, among other things, that:

the Commonwealth and State Governments, in conjunction with the receiving agencies, provide funding for the erection of a suitable memorial or memorials commemorating former child migrants, and that the appropriate form and location(s) of such a memorial or memorials be determined by consulting widely with former child migrants and their representative organisations.<sup>174</sup>

The Australian Government responded by endorsing the 'concept of a memorial(s) to former child migrants in commemorating the contribution child migrants have made to Australia'<sup>175</sup> supported by a \$100,000 contribution toward implementing the memorials. A number of memorials recognising child migrants were established.<sup>176</sup>

As discussed in the Consultation Paper, the Royal Commission has heard from a number of survivors and groups of survivors who have advocated for permanent memorials to be erected as part of collective redress outcomes for people who identify as being a part of a group of survivors.<sup>177</sup>

In Case Study 7, the Royal Commission heard evidence of abuse at the Parramatta Training School for Girls and the Hay Institution for Girls. A memorial plaque was erected at the site of the Hay Institution for Girls in 2007.<sup>178</sup> Following the hearing in Case Study 7, the New South Wales Government announced



that it would establish ‘an active place of recognition at the Parramatta Girls Home to pay tribute to the children who experienced sexual and physical abuse at this site’.<sup>179</sup>

In private sessions, a number of survivors also said that memorials or plaques were potentially something they would like the Royal Commission to recommend. Some survivors suggested that there should be a memorial dedicated to children who died in care as a result of abuse or neglect. At least one survivor suggested that a memorial also commemorate adults who died (including as a result of suicide) due to abuse or neglect they suffered as children in care. Some suggested that a memorial be established specifically to remember children who experienced institutional child sexual abuse.

A number of submissions in response to the Consultation Paper supported the contention that memorials play an important role for survivors. For example, the Commission for Children and Young People Victoria stated:

For those survivors who identify as part of a specific group, there may be a wish for a collective form of direct personal response such [as] memorials or plaques at important sites.<sup>180</sup>

In its submission in response to the Consultation Paper, Micah Projects stated:

After the National Apology to Forgotten Australians and Former Child Migrants the National Museum and National Library were provided with funding for a National Exhibition and Oral History. It is important that processes like this

are not simply one off, and that more localized and regional responses across Australia to have historical accounts of this part of Australia’s history as a public acknowledgment of the lives of Forgotten Australians and former Child Migrants as the child protection system. Many people would like to see public exhibitions of institutions, their history and the legacy on the lives of many Australia families be funded and maintained in local communities.<sup>181</sup>

Ms Walsh, representing Micah Projects, told the public hearing that memorials can provide ‘recognition that abuse has happened in civic environments as well as faith communities’.<sup>182</sup>

### **Reunions and commemorative events**

Reunions and commemorative events can have an important function in recognising the experience of a group of survivors. The Senate Community Affairs References Committee Inquiry into Children in Institutional Care (the Forgotten Australians inquiry) recognised the importance of reunions for ex-residents of institutions.<sup>183</sup> Many survivors who have spoken to us confirmed this.

We have heard from survivors that reunions are often initiated by a survivor or group of survivors but are sometimes supported by the relevant institution, either financially or in some other way – for example, by sending representatives along to speak to survivors and hear their stories. It is this financial and other support that could be provided as a form of direct personal response.



For example, in Case Study 5, FP gave evidence about the support for reunions that he received from The Salvation Army:

I'd just really like to thank The Salvation Army for what they have been doing for us for this reunion. It's been a big thing ... If I want something, I ring Sydney and speak to the head officers ... and I say, 'Okay, I have a function on such and such a day. I need a certain amount of cash' – sometimes around \$250, or whatever. There's no hesitation, whatsoever. They're only too happy to help us. So we go forth. And the reunion's going quite strongly.<sup>184</sup>

However, it should also be recognised that reunions or commemorative events, while of benefit to some survivors, may be only a small part of what some survivors need through direct personal response. In a confidential submission in response to the Consultation Paper, the partner of a survivor stated:

Many Institutions have a once a year Reunion Day for their Care Leavers, and the staff consider that is sufficient to 'look after them'. Which obviously it isn't.<sup>185</sup>

### **Collective redress for Aboriginal and Torres Strait Islander survivors**

The Royal Commission has heard from many Aboriginal and Torres Strait Islander survivors through public hearings, private sessions, community meetings and submissions in response to issues papers.

The Royal Commission acknowledges that many Aboriginal and Torres Strait Islander

survivors were also subjected to policies of forced removal from their families and resultant dislocation from their kin, country and culture. The impact of institutional child sexual abuse is often compounded by these factors and can be devastating not only to the individual survivor but also to broader family groups and communities. The impact of intergenerational trauma is best understood when considered in the context of Aboriginal society and culture:

Aboriginal people are a collective society, aunts have the role of mothers, uncles of fathers and children are raised knowing the relationship they have to each and every member of their family and 'mob' or tribal clan. In schools even today, many Aboriginal kids have their cousins and relations as their best friends and grow up with an understanding of this unspoken connection they have to their extended family and community. When Aboriginal people were removed from their families and placed in out of home care, not only their connection to their family was disrupted, but their connection to their community was and they grew up with a sense of disconnection from family, community, land, culture, language etc. This is cultural abuse and all those disconnected in this way suffer from trauma, now entrenched through generations of removals – intergenerational trauma. Those that suffered sexual abuse in addition to this cultural abuse have yet another layer of trauma to work through.<sup>186</sup>

It is because of this context that additional forms of direct personal response need to be considered for Aboriginal and Torres Strait Islander survivors. The Victorian Aboriginal Child Care Agency informed the Royal Commission that:

Collective redress and traditional healing is crucial to Aboriginal people's healing as it provides for reconnection to that which was taken when they were removed.

Cultural and other abuses have damaged the spirit of an Aboriginal person ... no amount of mainstream counselling will heal the spirit, only reconnection and collective healing opportunities on country will achieve this.<sup>187</sup>

The importance of Aboriginal spirituality and collective belonging has long been recognised in the literature as being a critical component to identity and, consequently, to healing after trauma.<sup>188</sup>

As discussed in the Consultation Paper, a number of survivor advocacy and support groups, recognising this context and its impact on Aboriginal and Torres Strait Islander survivors, have called for collective redress in the form of traditional healing for these survivors.<sup>189</sup> The Royal Commission has been told that collective redress and traditional healing for Aboriginal and Torres Strait Islander people would provide a range of benefits, including:

- reducing isolation that individuals within the group experience
- providing an opportunity to learn about colonisation and disconnection, resulting in better

understandings of their own identity and reassuring them that 'they are not going mad'

- providing opportunities to reconnect with their spirit
- reconnecting with all that they have lost.<sup>190</sup>

A desire for some form of collective redress has been a key theme emerging from Aboriginal and Torres Strait Islander survivors' accounts. The Royal Commission has heard that, for many Aboriginal and Torres Strait Islander survivors, collective redress delivered through traditional healing models is a beneficial and welcome alternative or addition to some of the general redress outcomes.

A number of Aboriginal and Torres Strait Islander survivors and Aboriginal and Torres Strait Islander advocacy and support groups have told us that some Aboriginal and Torres Strait Islander survivors wish to access group-based, or collective, healing models.<sup>191</sup> For this group, the need to reconnect with culture, family and community is deeply associated with the impacts of historical disenfranchisement, isolation and abuse and is a critical aspect of redress.

In its 2009 report on Aboriginal and Torres Strait Islander healing and the establishment of the Aboriginal and Torres Strait Islander Healing Foundation, the Aboriginal and Torres Strait Islander Healing Foundation Development Team identified that many of the problems prevalent in Aboriginal and Torres Strait Islander communities today 'have their roots in the failure of Australian governments and society to acknowledge and address the legacy of unresolved trauma'.<sup>192</sup> It found:

The research demonstrates that there is an overwhelming need among Aboriginal and Torres Strait Islander people for services that are designed and run by communities to address the underlying causes of dysfunction in a manner that is holistic, safe and culturally appropriate.<sup>193</sup>

This includes addressing the broader family and community context that is relevant for many Aboriginal and Torres Strait Islander people:

Participants in the consultation process agreed that healing is a spiritual journey that requires initiatives to assist in the recovery from trauma and addiction and reconnection with family, community and culture.<sup>194</sup>

Following the release of the 2009 report, the Australian Government helped to fund the establishment of the Healing Foundation, an independent national organisation to support the emotional wellbeing of Indigenous people, with a particular focus on members of the Stolen Generations. The Healing Foundation runs Indigenous healing programs across Australia. From its recent experience and research, it has stated that:

cultural and traditional practices act as a pathway to healing for Aboriginal and Torres Strait Islander peoples and communities. Improved social and emotional wellbeing appears to be an outcome of the renewal of cultural practices that builds cultural and community

strength and personal identity with pride and dignity.<sup>195</sup>

The need to consider a more flexible, responsive approach to the needs of Aboriginal and Torres Strait Islander people has been recognised, particularly in the context of members of the Stolen Generations. For example, in 2007 a report prepared for the Office for Aboriginal and Torres Strait Islander Health in the Australian Government Department of Health and Ageing recommended that:

[Bringing Them Home] services should adopt a flexible approach to service delivery that extends beyond the mainstream clinical counselling model. This includes conducting group activities in community settings ... services should [also] liaise closely with Stolen Generations organisations to ensure that services meet the needs of these groups' members.<sup>196</sup>

In 2012, the Australian Government Department of Health and Ageing recognised in *Handbook for counsellors: Social and emotional wellbeing program* that 'counselling is just one type of healing activity that may be provided to clients, with alternative supports including yarning circles, healing camps, outreach services and case management'.<sup>197</sup>

As discussed in the Consultation Paper, a 'holistic' approach to healing, which considers health in a much broader context than that adopted in Western health models, is prominent in literature around Aboriginal healing, both in Australia and internationally.<sup>198</sup> 'Blended healing', which

combines traditional therapeutic services such as counselling with traditional healing and other cultural practices, is recognised by the Healing Foundation to be an element of a good-quality healing program. Following a recent review that the Healing Foundation commissioned of international literature on Indigenous cultures and healing, the foundation stated that there were recurring themes in international Indigenous healing settings that suggested:

healing takes time, cultural approaches are blended with other healing traditions, there is a central spiritual component to healing, programs are better delivered by people of the same cultural group, program staff need support of the emotional strain in healing, there is substantial diversity among people needing healing, and healing programs must first do no harm.<sup>199</sup>

There is research that supports the view that services and supports for Aboriginal and Torres Strait Islander people who have experienced child sexual abuse should be based on:

- a recognition of the central importance of extended family and community relationships
- the ongoing impact of intergenerational trauma and historical injustices
- the effects of socio-economic disadvantage.<sup>200</sup>

Other factors identified as leading to more effective support services for Aboriginal and Torres Strait Islander people who have experienced child sexual abuse include:

- cultural competence and understanding of Indigenous world views
- the option for Aboriginal and Torres Strait Islander people to see an Indigenous worker if preferred
- recognition of the interconnectedness of individuals
- extended family and community in the lives of Aboriginal and Torres Strait Islander people
- partnership and involvement with Aboriginal and Torres Strait Islander communities in developing and delivering child sexual abuse support services.<sup>201</sup>

Research is increasingly focusing on healing programs for Indigenous people who have experienced child sexual abuse and their families and communities.<sup>202</sup> Evaluation of healing programs is still at an early stage. It is unclear how effective these programs are.<sup>203</sup>

In a Canadian context, Castellano writes:

Holistic approaches to maintaining and restoring health have been advocated by Aboriginal people for many years. This means attending to physical, mental, emotional and spiritual dimensions of persons, across the life cycle for children, youth, adults and elders. It means addressing social and environmental conditions including education, housing, and a compromised natural environment. Holistic thinking is now being embraced in approaches to population health and recognition that determinants of health lie outside of the conventional medical domain, but practice is still firmly rooted in the

medical model of treatment. The spiritual dimensions of healing remain mysterious and neglected.<sup>204</sup>

For Indigenous people:

[Traditional healing involves] creating opportunities for Aboriginal people to come together, where possible on country and reconnect. It involves spending time together, often with elders (healers) and connecting with their spirit.<sup>205</sup>

In addition to cultural healing programs, the Royal Commission is aware that there have been suggestions for other forms of collective redress to respond to the needs of Aboriginal and Torres Strait Islander survivors. Suggestions have included calls for Aboriginal and Torres Strait Islander language revival programs, day trips to or on country and the transfer of institutional land back to Aboriginal and Torres Strait Islander people.<sup>206</sup>

We have been told that the way to best deliver traditional healing to Aboriginal and Torres Strait Islander communities is to work with organisations that service those communities and with members of the community themselves. The Victorian Aboriginal Child Care Agency has advocated for better resources and funding support for community-controlled health centres, which 'have a major role to play in incorporating spirituality, bush medicine and traditional healers in their healing practices'.<sup>207</sup>

For institutions to support Aboriginal and Torres Strait Islander survivors who want to access traditional healing and collective redress options, one option could be to work to develop relationships with support organisations and to consider funding

assistance to deliver the appropriate services to this group as a form of direct personal response.

Many submissions in response to the Consultation Paper, and a number of those who spoke at the public hearing, discussed the specific needs of Aboriginal and Torres Strait Islander survivors, including responding to trans-generational trauma and the need for culturally safe healing programs.

Mr Dommett, representing the National Stolen Generations Alliance, told the public hearing:

We believe that there needs to be a recognition of the transgenerational impact of the trauma that people who were sexually abused as children have brought into their families and their children and their grandchildren and their great-grandchildren. It's a very sad fact of affairs that there are more Aboriginal children in care today than there were at any point in history of the Stolen Generations, so the transgenerational trauma that has come through that community has been life-defining and is going to be life-defining for future generations if it is not addressed.<sup>208</sup>

In its submission in response to the Consultation Paper, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) stated:

NATSILS strongly agrees with the need for cultural healing programs and funding assistance to facilitate a

direct personal response to Aboriginal survivors as a group. It is important to recognise the wider ripple effects of individual instances of institutional child sex abuse and the intergenerational effects of institutional child sex abuse. It is also important to acknowledge and address the reality that within many Aboriginal communities and for many Aboriginal victims/survivors, institutional child sex abuse is intimately connected to broader historical disenfranchisement, isolation and abuse as committed by state and non-state institutions, and the historical lack of accountability of such institutions. This is particularly so for those members of the Stolen Generations.<sup>209</sup>

We have been told of the importance of collective redress for Aboriginal and Torres Strait Islander survivors.<sup>210</sup>

Mr Allen, representing Kimberley Community Legal Services, told the public hearing:

We say collective redress is an important focus to meet the needs of clients, especially in the Kimberley, as many continue to live in communities or in situations where they have ongoing contact with perpetrating agencies, and we cite the example of church-run missions, for which the church is still an integral part in those communities.

We also note and reflect on the low level of applicants from the Kimberley, and collective redress in

some part addresses that low level of engagement. The issues of shame, of reluctant individuals, of uncertain and ongoing relationships with perpetrating bodies, in our submission, all combine to reduce the likelihood of a survivor of sexual abuse in the Kimberley reporting that either to the police or to the Royal Commission.

If redress is addressed collectively, we have some confidence that that will involve and encourage individuals to come forward collectively. Significant work needs to be done around that, but it is a way of alleviating that barrier.<sup>211</sup>

In addition to discussing forms of direct personal response that may be particularly suitable to meet particular needs of Aboriginal and Torres Strait Islander survivors, a number of submissions in response to the Consultation Paper and some of those who spoke at the public hearing also commented on methods for service delivery and funding.

For example, in responding to a question about points the Royal Commission should be attentive to in considering a culturally safe approach, Mr Gee, representing the Coalition of Aboriginal Services in Victoria, told the public hearing:

Our elders and those people in our community who are giving healing to those who have suffered from abuse and removal, such as Aunty Lorraine Peeters and others, they hold a particular form of cultural expertise and knowledge that we

cannot get from Aboriginal psychologists like myself or other non-Aboriginal psychologists. They are particular blessings and transmission of cultural knowledge to people that is culturally appropriate, and we can't get that in individual counselling. So that's another area of what I would say is culturally important or culturally appropriate – that the right people do those healing programs.<sup>212</sup>

It must also be recognised that the first principle we recommend for offering and providing a direct personal response – that re-engagement between a survivor and an institution should only occur if and to the extent that a survivor desires it – also applies to collective redress. That is, each survivor must retain the choice as to whether or not they wish to participate. In its submission in response to the Consultation Paper, NATSILS stated:

However, while NATSILS agrees that flexibility is required to ensure that different and culturally appropriate forms of 'personal responses' are available for survivors, it is also important that the individual survivor retain the choice. For example, if a number of Aboriginal survivors who suffered abuse at a particular institution wish for a collective personal response in the form of traditional healing, this should not mean that each and every Aboriginal survivor from that institution should be required to participate. Individual survivors must retain the choice about how they wish to receive a personal response from the relevant institution.<sup>213</sup>

Some Aboriginal and Torres Strait Islander survivors may also prefer to use services that are not targeted at Aboriginal and Torres Strait Islander communities, particularly if they do not want their experience of abuse to be known about in their community.

**Direct personal responses should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors, including cultural awareness and sensitivity training where relevant**

If the direct personal response that is provided by an institution is to be meaningful and effective for survivors, it is important that survivors feel that the care or support is genuine, empathic and sincere.

The Royal Commission has heard from survivors in private sessions, public hearings and submissions that, in some instances, re-engaging with the institution has been a difficult, even traumatic, experience because of the lack of understanding that institutional personnel have demonstrated.

As discussed in the Consultation Paper, some survivors described situations where they felt that the institution's representatives said things that were inappropriate.<sup>214</sup> For example, in Case Study 10 on The Salvation Army, JD gave evidence that an institutional representative referred to her own granddaughter during a meeting and in a subsequent letter. JD gave evidence that:

I didn't like how [the institutional representative] referred to her own granddaughter. I thought that was



inappropriate and she was personalising it or making it about her.<sup>215</sup>

Other survivors reported that during meetings institutional representatives made them feel ‘rushed’ or as though there was a process they were being pushed through. For example, in Case Study 4 on Towards Healing, Ms Joan Isaacs gave evidence that:

As soon as I finished [telling my story, the institutional representative] said, ‘*Now we’ll move on to the agenda of apology*’ and I said, ‘*No, I don’t want to move on to the apology. I have told you all what happened to me and I want you ... to tell me how you felt listening to me*’ ...<sup>216</sup> [Emphasis in original.]

In submissions in response to the Consultation Paper, some survivor advocacy and support groups have given further examples of conduct during meetings that some survivors have found re-traumatising. For example, AFA stated:

AFA is aware of many instances of very poor personal responses to survivors of abuse – with institutions cutting short meetings, verbally attacking the support people brought to the meeting by the survivor, and even falling asleep during the meeting.<sup>217</sup>

Other survivors reported concerns ranging from the set-up and seating arrangement of rooms for meetings to whether the representatives wore institutional uniforms or attire.

Many survivor advocacy and support groups supported the proposal that the institutional representatives who engage with survivors as part of direct personal response should have appropriate training. For example, in its submission in response to the Consultation Paper, Victim Support Service stated:

In order to ensure that there is no inadvertent re-traumatising of victims, representatives from institutions supporting survivors to deliver personal responses to institutions should undertake training in complex-trauma and the effects of child sex abuse.<sup>218</sup>

Some institutions have also agreed that institutional representatives should receive training and education about the nature and impacts of child sexual abuse. For example, Ms Whitwell, representing YMCA Australia, told the public hearing:

For us, this means that those providing a direct response to survivors and those engaged in the provision of redress should, at a minimum, have a foundational level of knowledge and understanding about the impacts of child abuse and also be trained in trauma-informed approaches.<sup>219</sup>

Some submissions to the Consultation Paper also discussed potential benefits of appropriate training on the culture of institutions as well as the quality of the direct personal response provided to survivors. For example, the Commission for Children and Young People Victoria stated:

This training can have a positive impact on the culture of the



institution, flavouring support services to be more effective and prevent re-traumatization of the vulnerable people using them.<sup>220</sup>

Similarly, in its submission in response to the Consultation Paper, NATSILS stated:

NATSILS is in agreement with the Commission that the quality of any direct personal response will depend, in part, on the institution's understanding of child sexual abuse and its impact on survivors. NATSILS therefore agrees and strongly supports appropriate training for senior representatives of institutions who are likely to be involved in providing direct personal responses to survivors.<sup>221</sup>

Throughout our consultations, a number of survivor advocacy and support group representatives have told us that they believe that anyone who is providing support to survivors should receive trauma-informed care training.

The Mental Health Coordinating Council, the peak body for community mental health organisations in New South Wales, cites Bloom in describing 'trauma-informed care and practice':

[Trauma-informed care and practice] is grounded in and directed by a thorough understanding of the neurological, biological, psychological and social effects of trauma and interpersonal violence and the prevalence of these experiences in persons who receive mental health services. It

involves not only changing assumptions about how we organise and provide services, but creates organisational cultures that are personal, holistic, creative, open and therapeutic. A trauma-based approach primarily views the individual as having been harmed by something or someone: thus connecting the personal and the socio-political environments.<sup>222</sup> [Reference omitted.]

In describing the positive impact that trauma-informed practice can have on the culture of an organisation, the council states:

Transformational outcomes can happen when organisations, programs, and services are based on an understanding of the particular vulnerabilities and/or triggers that trauma survivors experience (that traditional service delivery approaches may exacerbate) so that these services and programs can be more supportive, effective and avoid re-traumatisation.<sup>223</sup>

In the Consultation Paper, we stated that, at that stage, we considered that trauma-informed care training for institutional representatives who interact with survivors may well help to ensure that they have a good understanding of child sexual abuse and its impacts.<sup>224</sup> It can also ensure that they do not do any further harm. However, we also stated that it was not clear to us that this is the only form of suitable training or that it is sufficiently widely available and affordable for it to be recommended as a minimum requirement. It remains our view that trauma-

informed care training may be of considerable assistance, but we are not satisfied that it is the only form of suitable training.

In the Consultation Paper, we also discussed whether, in addition to educating institutional staff who deal with survivors about the nature and impacts of child sexual abuse and training on how to appropriately respond to survivors, these staff may require training to support particular survivor groups.<sup>225</sup> For example, it has been suggested that institutional staff who are providing direct personal response to Aboriginal and Torres Strait Islander survivors, particularly in circumstances where the institution was responsible for significant numbers of Aboriginal and Torres Strait Islander children, should receive cultural awareness or sensitivity training to ensure that they are able to engage appropriately with these survivors, their families and broader communities. This training would appear to be appropriate, particularly for institutions that have a number of Aboriginal and Torres Strait Islander survivors.

In response to the Consultation Paper and at the public hearing, a number of survivor advocacy and support groups supported the proposal that institutional representatives who are involved in delivering a direct personal response to a survivor should receive appropriate training and education, including training and education on cultural awareness. For example, Mr Gee, representing the Coalition of Aboriginal Services, told the public hearing:

We do agree with a recent submission that we have read from the Aboriginal Legal Service from

Western Australia that emphasised the need for institutional representatives to receive appropriate trauma and culturally informed training prior to engagement with survivors, as a matter of safety.<sup>226</sup>

We are satisfied that it is important, particularly for survivors but also for institutions, that institutional representatives who are involved in delivering a direct personal response have the skills necessary to interact with survivors in a way that ensures that the direct personal response does no further harm. Direct personal response, when sought by a survivor, should provide a positive contribution to healing for the survivor.

### [Institutions should welcome feedback from survivors about the direct personal response they offer and provide](#)

Institutions that provide direct personal response should continuously work to ensure that the direct personal response they offer is as effective as possible in meeting survivors' needs and expectations.

As discussed in the Consultation Paper, one way of doing this is to encourage and welcome feedback from survivors who have sought or obtained direct personal response from the institution.<sup>227</sup> Feedback may enable an institution to improve its processes and services to better meet survivors' needs by identifying particular areas that could be improved through staff training or the allocation of other resources.

In addition to improving existing services, seeking and receiving feedback could assist an institution to identify any additional survivor needs that it might be able to meet. In these instances, where institutions have the resources to do so, they should consider whether there are other specific services they are able to offer that survivors might find of use – for example, services for survivors’ family members or the broader community. Providing services for the broader community might be particularly important in some Aboriginal and Torres Strait Islander communities where the impact of institutional sexual abuse has been community wide.

Institutions should also consider seeking the advice of survivor advocacy and support groups from time to time or on an ongoing basis to help to ensure that the direct personal response they offer and provide is as effective as possible.

A number of submissions in response to the Consultation Paper supported this principle. For example, Micah Projects stated:

[Direct personal response] is an area of work, which requires more

attention, and the direct involvement of people who have experienced abuse as children in institutions, foster care and detention centers with church representatives could provide direction for how processes could be offered in the future.<sup>228</sup>

In its submission in response to the Consultation Paper, the Commission for Children and Young People Victoria stated:

Institutions should be open to hearing feedback to ensure their direct personal response is as effective as possible in terms of improvement of processes and services such as staff training and resource allocation or the identification of additional needs.<sup>229</sup>

We are satisfied that institutions should welcome feedback from survivors about the direct personal response they offer and provide and that this feedback can be an important source of information to ensure the direct personal response is as effective as possible for survivors.

## Recommendation

5. Institutions should offer and provide a direct personal response to survivors in accordance with the following principles:
- a. Re-engagement between a survivor and an institution should only occur if, and to the extent that, a survivor desires it.
  - b. Institutions should make clear what they are willing to offer and provide by way of direct personal response to survivors of institutional child sexual abuse. Institutions should ensure that they are able to provide the direct personal response they offer to survivors.
  - c. At a minimum, all institutions should offer and provide on request by a survivor:
    - i. an apology from the institution
    - ii. the opportunity to meet with a senior institutional representative and receive an acknowledgement of the abuse and its impact on them
    - iii. an assurance or undertaking from the institution that it has taken, or will take, steps to protect against further abuse of children in that institution.
  - d. In offering direct personal responses, institutions should try to be responsive to survivors' needs.
  - e. Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response.
  - f. Direct personal responses should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors, including cultural awareness and sensitivity training where relevant.
  - g. Institutions should welcome feedback from survivors about the direct personal response they offer and provide.

### 5.3 Interaction between a redress scheme and direct personal response

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An appropriate direct personal response can only be provided by the institution and cannot be provided through a redress scheme that is independent of the institution.

It has been suggested that, if an independent redress scheme is established to determine appropriate counselling, psychological care and monetary payments, the scheme might also facilitate the provision of the direct personal response.

Some survivors may seek a written apology but may wish to have no further contact with the institution. In these circumstances, an independent redress scheme may be able to convey a survivor's request to the institution so that they do not need to have any further contact with it.

As discussed in the Consultation Paper, this process would only work if a survivor sought a written apology, a written acknowledgment and/or a written assurance of steps taken to protect against further abuse.<sup>230</sup> Any other forms of direct personal response would require direct contact between the survivor and the institution or between an intermediary who is supporting or acting for the survivor and the institution. In these cases, a redress scheme could help survivors to pursue a direct personal response by giving survivors a choice between:

- having their details, or the details of their intermediary, passed on to the institution with a request that the institution contact them directly

- being given the contact details of the relevant person in the institution so that the survivor or their intermediary can initiate contact with the institution.

Apart from this, a redress scheme would not have any further role in the offer or provision of a direct personal response or the range or quality of direct personal response offered or provided.

Any option for seeking direct personal response through a redress scheme should not preclude a survivor from choosing to approach an institution directly, either themselves or through an intermediary.

As discussed in the Consultation Paper, this limited interaction between an independent redress scheme and the provision of direct personal response was discussed during our private roundtables and was generally supported by participants.<sup>231</sup> Some participants expressed concern that simply providing survivors with institutional contact details so that they could initiate contact if they wished to re-engage with the institution could potentially result in further trauma if institutional staff were not appropriately trained to respond to survivors. It was also indicated that it would be important that, when a redress scheme refers a survivor to the institution, the scheme could rely on information that the institution provides about what direct personal response it was able to offer.<sup>232</sup>

In the Consultation Paper we invited submissions on the interaction between a redress scheme and direct personal response.<sup>233</sup>

A range of views were expressed in submissions in response to the Consultation Paper.

Some submissions supported the position that a redress scheme should not be involved in providing direct personal response. For example, knowmore submitted:

We support the principle that an independent redress scheme should not be involved in the direct provision of appropriate personal responses to survivors by institutions.

It is our view that the issues raised in the consultation paper about re-traumatisation and the consistency and reliability of institutional responses underscore the need for survivors to have access to independent support and advocacy, as well as the importance of trauma-informed approaches by institutions.<sup>234</sup>

Other submissions supported the position that a redress scheme should play a role in providing a direct personal response. For example, Victim Support Service stated:

In order to ensure that the interaction is survivor led, all preliminary contact should be facilitated through the National Redress Scheme, and not through the survivor having to approach the institution.<sup>235</sup>

Victim Support Service recommended:

That such a scheme includes the establishment of a liaison office in each state and territory to facilitate communication between survivors and institutional representatives.

Any direct interaction between survivors and institutional representatives to take place only at the express wish of the survivor.<sup>236</sup>

Some submissions that supported the involvement of a redress scheme as an intermediary in the provision of direct personal response suggested this would allow the scheme to have a monitoring or compliance function in assessing the effectiveness of the response. For example, AFA submitted:

AFA believes that the institutions responsible for the 'care' of the Forgotten Australians will need external support to improve their poor record of listening actively to feedback from survivors about their direct personal responses. The Redress Scheme could have a formal role in providing this support to ensure real change comes from reflection on feedback from survivors.<sup>237</sup>

Similarly, Women's Legal Services NSW submitted:

- a redress scheme should offer to facilitate the provision of the direct personal response but also not preclude the option of direct approach to the institution; and
- the redress scheme should interact with the institution sufficiently to ensure that the principles for an effective direct personal response are adhered to. Asking victims for feedback about the direct personal response could be part of monitoring this aspect of redress.<sup>238</sup>

During the public hearing, some representatives of institutions discussed their current approaches to providing direct personal response through intermediaries. Mr Bates, representing Scouts Australia, told the public hearing:

We also understand that at times a survivor may prefer to remain anonymous or refrain from direct contact. In cases such as these, Scouts has, in the past, reached out to a survivor through a third party, such as the police, or an approved victim support program. This is a process which could be formalised in cases where survivors do not wish direct contact but would benefit from receiving an acknowledgment and apology in written form.<sup>239</sup>

In responding to a question about intermediaries, Mr Condon, representing The Salvation Army Australia, told the public hearing that survivors would not be precluded from using intermediaries to approach The Salvation Army Australia and that it would be a matter of choice for each survivor.<sup>240</sup>

We are satisfied that a redress scheme should facilitate the provision of a written apology, a written acknowledgement and/or a written assurance of steps taken to protect against further abuse for survivors who seek these forms of direct personal response but who do not wish to have any further contact with the institution. The redress scheme's facilitation would take the form of conveying the survivor's request for these forms of direct personal response to the institution.

We do not believe that it is necessary or appropriate for a redress scheme to be required to provide more than this level of

facilitation of the provision of a direct personal response or to oversee the provision of a direct personal response. A redress scheme will already have a significant responsibility in receiving and assessing claims, determining monetary payments and supporting the provision of counselling and psychological care through redress. As discussed above, effective direct personal responses may take many forms and may involve relatively contained interactions between a survivor and the institution or many interactions on an ongoing basis. We consider that there would be a substantial risk to the effective and efficient operations of a redress scheme if the scheme were required to have any greater role in facilitating direct personal response than the one we recommend.

However, we recognise that some survivors, although they wish to re-engage with the institution, may not wish to conduct all of their part of the re-engagement themselves and that they may wish to have an intermediary or representative act for them or support them in their re-engagement with the institution. Some survivors may require this representation or support only in early stages of their re-engagement, while others may require ongoing representation or support.

We are satisfied that institutions should accept a survivor's choice of intermediary or representative to engage with the institution on behalf of the survivor or to act as a support person. This can be understood as both an application of the first general principle for providing redress (that redress should be survivor focused) and of the first principle for offering and providing a direct personal response (that re-engagement between a survivor and an institution should only occur if, and to the extent that, a survivor desires it).

## **Recommendations**

6. Those who operate a redress scheme should offer to facilitate the provision of a written apology, a written acknowledgement and/or a written assurance of steps taken to protect against further abuse for survivors who seek these forms of direct personal response but who do not wish to have any further contact with the institution.
7. Those who operate a redress scheme should facilitate the provision of these forms of direct personal response by conveying survivors' requests for these forms of direct personal response to the relevant institution.
8. Institutions should accept a survivor's choice of intermediary or representative to engage with the institution on behalf of the survivor, or with the survivor as a support person, in seeking or obtaining a direct personal response.



# 6 Counselling and psychological care

## 6.1 Introduction

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Through private sessions, public hearings and submissions, many survivors of child sexual abuse in an institutional context have told us of their need for counselling and psychological care and of their experiences in seeking this care. Many survivors who came to private sessions have also made use of the counselling services that are available through the Royal Commission.

It is clear that many survivors will need counselling and psychological care from time to time throughout their lives. At times, a survivor may need very intensive therapy and support. At other times, a survivor may go for years without needing counselling or psychological care. Some survivors will need more counselling and psychological care, including psychiatric care, than others. Some may not seek any care, regardless of need.

In the Consultation Paper, we suggested possible principles under which counselling and psychological care should be provided and possible principles under which it should be provided through redress.<sup>241</sup> We also outlined some options for how counselling and psychological care could be provided through redress – for example, through reforms to Medicare; a stand-alone government scheme; or a redress scheme trust fund.

We sought submissions in response to the issues raised, including the principles and our discussion of existing services and service gaps.<sup>242</sup> We particularly sought the views of the Australian Government and state and territory governments on options for expanding the public provision

of counselling and psychological care for survivors. We also sought submissions on the relative effectiveness and efficiency of the options we discussed in meeting survivors' needs.

Many submissions in response to the Consultation Paper addressed issues in relation to counselling and psychological care. These issues were also discussed during the public hearing, including by an expert panel with representatives from the Australian Psychological Society (APS), the Australian Association of Social Workers, the Victorian Aboriginal Child Care Agency (VACCA) and Adults Surviving Child Abuse (ASCA).

Submissions and those who spoke at the public hearing overwhelmingly supported the proposal that funding for counselling and psychological care should be provided through redress. The possible principles for providing counselling and psychological care and the possible principles for providing it through redress were also broadly supported.

The counselling and psychological care discussed in this chapter is long-term therapeutic counselling and psychological care. Some submissions in response to the Consultation Paper discussed the need for counselling and support services to assist survivors in the process of applying for redress. These are discussed in Chapter 11.

Survivors have told us that they have a range of needs and that counselling and psychological care will be only one of those needs. As discussed in Chapter 4, the Royal Commission is conducting a separate project to investigate the adequacy of support services in meeting survivors'

needs. We do not seek to address broader support services here.

We recognise the potential connections between adequate support services and counselling and psychological care. For example, it may be difficult for survivors to participate fully in ongoing counselling and psychological care if they do not have stable accommodation or have significant unmet medical needs. Further, support services can provide a pathway to entering counselling and psychological care. In its submission in response to the Consultation Paper, the Child Migrants Trust stated:

Often, clients seeking help in relation to family tracing subsequently become engaged in counselling focussed on historical abuse only after a trusting relationship has been established. Family restoration services are sometimes viewed as less stigmatising than counselling, and operate as a gateway to the Trust's therapeutic work for those who might not otherwise seek help or even recognise the stigma as pain, which is often overwhelming.<sup>243</sup>

## 6.2 The need for counselling and psychological care

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### The impact of child sexual abuse

As discussed in the Consultation Paper, the effects of child sexual abuse on mental health functioning have been well documented.<sup>244</sup> It is now clearly established

that there is a link between experiences of child sexual abuse and a range of psychological problems and mental health issues throughout survivors' lives.<sup>245</sup> These effects are many and varied and affect survivors in many ways:

- at the individual level: mental health and physical health
- at the interpersonal level: emotional, behavioural and interpersonal capacities
- at the societal level: quality of life and opportunity.<sup>246</sup>

This link can be demonstrated not only for people who have been diagnosed with a clinical mental health disorder; it also exists for people who do not meet clinical diagnostic criteria for a mental illness but who nonetheless experience symptoms associated with trauma – for example, anxiety and depression.<sup>247</sup>

Child sexual abuse victimisation is strongly associated with a range of issues around health and wellbeing across the lifespan. Adults with child sexual abuse histories have been found to have a higher risk of mental health problems such as depression, anxiety, substance abuse and self-harm when compared with the community as a whole.<sup>248</sup> Some survivors require intensive psychiatric care, sometimes throughout their lives, including in inpatient mental health facilities.

A recent study states:

Although these impacts vary widely amongst individuals in both degree and composition, disruptions generally fall into three main areas:

- intrapersonal problems such as compromised sense of self-worth, deep feelings of guilt and responsibility for the assault;
- relational impairments including impaired relationships, trust and intimacy difficulties;
- and, disturbances in affect, such as depression, anxiety, anger and post-traumatic stress.<sup>249</sup> [References omitted.]

The impacts of child sexual abuse can sometimes be fatal:

A number of studies indicate that sexual victimisation, both in childhood and beyond, is a significant risk factor for suicide attempts and for (accidental) fatal overdoses among both men and women.<sup>250</sup>

What survivors have told us in private sessions, public hearings and submissions confirms the findings in the academic literature. Survivors told us in private sessions and public hearings about the severe and sometimes lifelong impact that institutional child sexual abuse can have across all of these areas of life.

We have been given many examples of the severe impacts that untreated trauma of institutional child sexual abuse has had on survivors. We have had a number of private sessions with relatives of victims of institutional child sexual abuse who have committed suicide. Their relatives have told us of the terrible impact that the abuse had on the victims and the ongoing impact that the abuse and victims' suicides has had on their families.

Survivors' accounts in private sessions support the research which shows that, when compared with the general population, survivors may have a higher risk of experiencing during their life:

- lower levels of community participation
- social isolation and homelessness
- lower earnings and socio-economic status and difficulty maintaining employment
- imprisonment.<sup>251</sup>

Survivors have also given evidence in a number of case studies about the serious and life-long impact of abuse.

Survivors from the Parramatta Training School for Girls and the Institution for Girls in Hay gave evidence in Case Study 7 about the effect that institutional abuse has had on their lives. They gave evidence that:

- they still experience ongoing psychological trauma and almost all of them had considered or attempted suicide at least once<sup>252</sup>
- some became homeless after they left the institution<sup>253</sup>
- employment prospects were few and many now receive a disability or other pension<sup>254</sup>
- their relationships with their families have suffered and a number of them feel they have been poor role models for their children.<sup>255</sup>

One survivor also gave evidence of how institutional abuse adversely affected her connection with her community. Ms Mary Farrell-Hooker, who identified as Aboriginal, said that institutional care had isolated her from her culture.<sup>256</sup>

## Psychological and neurobiological explanations

Medical researchers continue to explore connections between childhood abuse and atypical brain development – a phenomenon that can result in an increased risk of psychopathology.<sup>257</sup>

The trauma literature also identifies early onset trauma as having a particular impact on the developing brain, especially when the trauma is prolonged, repetitive and unrepaired.<sup>258</sup> According to Wall and Quadara:

Where early care-giving relationships are dysfunctional, either as a source of trauma or an inability to nurture and protect a child, the child's developmental competencies in the areas of sense of self, agency, communication, and interpersonal relationships can be negatively impacted, thereby setting the scene for many of the problems associated with complex trauma.<sup>259</sup> [Reference omitted.]

There can also be dramatic impacts in development – for example, a reduction in a child's capacity to learn as a result of impairments in working memory and severe reductions in concentration and attention as part of hypervigilance.<sup>260</sup>

Other research demonstrates that complex trauma influences attachment, working memory and other areas of functioning and psychological life. As Tarczon states:

A brain conditioned to be easily triggered into a stress response is likely to become highly responsive to substances and behaviours that

provide short-term relief; which helps to explain a neurological and psychological basis of many traumatised people's dependence on alcohol. The complex problems that can manifest for child sexual abuse survivors can be understood as a person's best efforts to cope with the effects of these harmful external events ...<sup>261</sup> [References omitted.]

Neurological changes associated with dementia can lead to rekindling of traumatic memories in old age. Clark and Duncanson state:

When dementia progresses, recent memories peel away (like the outer skins of an onion). The person becomes 'feelings-based' and past memories are 'triggered' by people, smells, noises and other stimuli. Unfortunately past trauma can be 'relived' when memories or feelings are triggered. As approximately one in four girls and one in six boys have been sexually abused, there is good reason to suggest that this trauma can be triggered and repeatedly relived by the individual. This is especially so with dementia as it progresses and the armour developed to cope with trauma breaks down.<sup>262</sup>

## Resilience and protective factors

There is much literature on the negative long-term effects for people who were sexually abused as children.<sup>263</sup> However, the Royal Commission also recognises that not all survivors will face difficult adjustments in their future as a consequence. When

discussing traumatic events, every individual reacts differently. It is also important to recognise the role of resilience.<sup>264</sup>

In addition to individual resilience, the way that abuse impacts on a child will also be affected by many other aspects of their life and the circumstances at the time it occurred, including:

- the child's individual characteristics and make-up
- their care-giving experiences and family and social support
- the various aspects of their school, community and society that protect them or put them at risk.<sup>265</sup>

Accordingly, the impact of abuse immediately and in the long term varies according to the individual and their circumstances. There are numerous factors at play on the individual, interpersonal and societal level that will affect the severity of each survivor's trauma and their psychosocial needs.

## How counselling and psychological care can help

As discussed in the Consultation Paper,<sup>266</sup> recent evidence suggests that not only can child sexual abuse cause substantial long-term damage but also the effects can be cumulative and increase in severity over time if left unaddressed.<sup>267</sup>

Research shows that the mental health impacts of child abuse require specialist and long-term care.<sup>268</sup>

Counselling relies on brain plasticity

for effectiveness. Through counselling, practitioners try to facilitate cognitive, behavioural, emotional and psychological change. Evidence in the field of neurobiology demonstrates that counselling can positively stimulate neurotransmitters and therefore provide some repair to the damage that trauma has caused. The process causes new neurons and neuronal networks to develop. These neurons and neuronal networks impact on different brain systems and contribute to positive outcomes.<sup>269</sup>

Studies have shown that counselling can help those who have experienced child sexual abuse to:

- understand their abuse history
- understand the dynamics of child sexual abuse in new ways
- authenticate their experiences
- challenge and change longstanding guilt-based beliefs of responsibility and culpability when practitioners help participants to view their vulnerabilities and limitations when they were children within the abusive context that an older, more physically powerful and psychologically dominant offender created
- understand themselves, including their emotions, reactions, behaviours and beliefs, in deeper ways and learn to connect to the self and to the body in new and positive ways.<sup>270</sup>

A recent study about the aspects of counselling that facilitate healing from child sexual abuse found that counselling contributed to healing of participants in three important ways:

- by helping them to understand the assaults and their impacts in new ways
- by facilitating a change in their intrapersonal relationships
- through the relationship with their practitioner.<sup>271</sup>

Wallin states:

The success of therapy, especially with [clients] who have been traumatized, hinges on our ability to accurately read and effectively modulate their levels of physiological arousal as well as their needs for (and fears of) relational engagement. This requires a focus on the body, nonverbal experience, and the nuances of the therapeutic interaction.<sup>272</sup>

We have heard from some survivors that they have had bad experiences of counselling and psychological care, where they did not feel that the practitioner understood them or their needs. For some survivors, this has discouraged them from seeking any further counselling. Some survivors report being further traumatised by the counselling they received. Health professionals who do not have adequate understanding and skills to treat complex trauma-related problems may cause survivors to be re-traumatised.<sup>273</sup>

Survivor advocacy and support groups and practitioners have also told us that some survivors have attended counselling that has been more damaging and re-traumatising than positive. Instances of negative counselling have also been studied empirically. Particular difficulties arise where practitioners have not let the client lead

and where they have, for example, asked for details of abuse when the client was not comfortable discussing these or stopped the client from giving details that the client wanted to give.<sup>274</sup>

We have heard through private sessions of survivors' disappointment in a health care system that seeks to reduce their suffering to a set of symptoms to be 'cured' through short-term interventions and in practitioners who have not taken an interest in the cause of their trauma. We have heard from survivors, survivor advocacy and support groups and professionals in psychology and social work that this symptoms-based approach to diagnosis and care is not appropriate to respond to the complex trauma-related needs of survivors.

Survivor advocacy and support groups and practitioners have told us that it is very important that practitioners who work with survivors have appropriate capabilities, including trauma-specific training and relevant experience, to work with survivors. We discuss this further below as a principle for providing counselling and psychological care for survivors.

## Other forms of healing

Some survivors and survivor advocacy and support groups have expressed support for healing services that are outside of Western medical models of counselling and psychological care. These services can range from drop-in centres and support groups to Aboriginal and Torres Strait Islander traditional healing practices.

We have been referred to international research that supports the role of culture

in healing trauma. Research conducted by the Canadian Aboriginal Healing Foundation (AHF) found that a combination of cultural interventions, group-based activities and individual counselling was the most successful way to approach healing for Indigenous groups across Canada. The AHF was established in 1998 in response to the legacy of physical and sexual abuse that First Nations peoples suffered in Canada's Indian Residential School System. The AHF found that there were three types of activities common to most successful healing programs. These activities focused on:

- 'Reclaiming History', which included learning about institutional removal and its impacts on individuals, families and communities
- 'Cultural Interventions', which involved activities that supported people to reconnect with their culture, language, history, spirituality and traditional ceremonies
- 'Therapeutic Healing', which included a wide range of both traditional and Western therapies such as counselling that facilitated recovery from trauma such as sexual abuse.<sup>275</sup>

Some of those who spoke at the public hearing submitted that it is important to recognise Aboriginal healing programs. For example, Ms McIntyre, representing VACCA, told the public hearing:

The complex multi-layered traumas experienced by Aboriginal survivors require a broader interpretation of 'counselling and psychological support' to enable cultural healing

programs like Red Dust and the Marumali program to be funded and available to survivors

... there is a need for cultural healing that goes beyond what a culturally informed non-Aboriginal counsellor can provide, beyond what an Aboriginal counsellor can provide – the healing that only an Aboriginal elder can provide. At the current time there is no ability to purchase these services via Medicare, and it is of great concern that the Commonwealth Government seems to be suggesting that the current service platform is sufficient. It is not.<sup>276</sup>

We support the provision of services that survivors find useful. We support the continued provision of any existing support services (including any services provided through direct personal response). Institutions could also support additional services through direct personal response where survivors seek them, as discussed in Chapter 5. Of course, survivors who receive monetary payments could also choose to spend some of the payment on any alternative therapies or services they find useful.

We recognise that many survivors value and gain assistance from a range of support services. However, we are satisfied that redress should be directed towards funding counselling and psychological care.



## 6.3 Principles for counselling and psychological care

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In the Consultation Paper, we suggested possible principles for the provision of counselling and psychological care to best meet survivors' needs.<sup>277</sup> The principles were:

- Counselling should be available throughout a survivor's life.
- Counselling should be available on an episodic basis.
- Survivors should be allowed flexibility and choice.
- There should be no fixed limits on services provided to a survivor.
- Psychological care should be provided by practitioners with the right capabilities to work with clients with complex trauma.
- There should be suitable ongoing assessment and review.
- Counselling and psychological care should be available through redress for family members if it is necessary for the survivor's own treatment and there are no other sources of funding available.

These principles were developed through consultation with a number of survivor advocacy and support groups, institutions, governments and academics during our private roundtables and expert consultations.

Many submissions in response to the Consultation Paper, and some of those who spoke at the public hearing, supported these principles.

During the public hearing, we heard from an expert panel comprising:

- Dr Roufeil, representing the APS, which is the national professional body for psychology in Australia
- Ms Wilkinson, representing the Australian Association of Social Workers, which is the national professional body for social work and social workers in Australia
- Ms McIntyre, representing VACCA, who has expertise in the therapeutic needs of Aboriginal survivors
- Dr Kezelman AM, representing ASCA, which is a national organisation that provides a range of support services to survivors of child sexual abuse.

In their submissions in response to the Consultation Paper, three of the organisations represented on this expert panel stated their support for the principles as follows:

The APS notes the seven principles for counselling and psychological care provided in the Consultation Paper. The APS endorses all seven principles ...<sup>278</sup>

The [Australian Association of Social Workers] is in full agreement with the principles for counselling and psychological care identified in the consultation paper ...<sup>279</sup>

VACCA supports the majority of the principles raised in the consultation paper. Our views may differ on how these principles are enacted or implemented.<sup>280</sup>



A number of survivor advocacy and support groups also supported the principles. For example, in its submission in response to the Consultation Paper, the Alliance for Forgotten Australians (AFA) stated:

AFA supports the proposed principles for the provision of counselling and psychological care.<sup>281</sup>

Some institutions also supported the principles. For example, Ms Cross, representing the Uniting Church in Australia, told the public hearing:

We support the need for survivors to have lifelong episodic counselling and psychological care as part of a redress scheme. We've not yet done too much work, but we do believe there needs to be flexibility around what we mean by 'psychological care'. Many survivors that we've met with have told us about other things that would be important for them, particularly things like peer support, et cetera, so the whole definition of what 'psychological care' should be – many survivors say, 'We've had enough counselling. We don't want any more.'<sup>282</sup>

The fourth organisation represented on the expert panel at the public hearing – ASCA – supported the principles but also stated:

the principles on which effective psychological services associated with the redress scheme are based need to be the principles of trauma-informed practice. In this context, while the principles outlined in the redress report ... comprise a valuable starting point, they require

important and explicit supplementation in order to comply with the more specific and far-reaching principles of the trauma-informed paradigm.<sup>283</sup>

In its submission in response to the Consultation Paper, ASCA submitted that each of the possible principles we proposed should be amended to require them to be trauma-informed. For example, ASCA submitted that the principle that counselling and psychological care should be available throughout a survivor's life should be amended to read:

Trauma-informed counselling by practitioners educated and trained in service responses to clients who experience complex trauma-related issues should be available throughout a survivor's life.<sup>284</sup>

We agree that counselling and psychological care should be appropriate to meet the needs of survivors of complex trauma. We also recognise ASCA's clinical expertise in this field. However, we are concerned to ensure that survivors are allowed flexibility and choice, which is one of the principles discussed below.

We believe that survivors should be assisted to find practitioners with the necessary capabilities through the development of a public register, discussed below. As research and evidence regarding what constitutes best practice in meeting the needs of complex trauma survivors continues to develop, this can be reflected in the public register process we recommend below. However, we do not wish to limit survivors to using only services that are regarded as, or describe themselves as, 'trauma-informed'.

## Counselling should be available throughout a survivor's life

The trauma associated with sexual abuse is not a specified medical condition that can be cured at a specific point in time so that it will not reoccur. Therefore, counselling and psychological care should be available to survivors when they need it throughout their lives.

The delay in reporting of child sexual abuse is now well known. Many survivors will not disclose their abuse until adulthood.<sup>285</sup> Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse. Men took longer to disclose abuse than women.<sup>286</sup> For example, in the Royal Commission's *Interim report*, we reported on Arthur's experience as follows:

Arthur went on to build a career and a family, but never told anyone about his abuse until 2011 when he was 65 years old and stumbled across the CLAN (Care Leavers Australia Network) website by accident.<sup>287</sup>

Research also indicates that not all survivors will develop symptoms immediately; it is important to be alert to 'sleeper effects' – problems can possibly emerge at later stages in life or be triggered by significant life events.<sup>288</sup> What we have heard in private sessions confirms this.

Consistently with post-traumatic stress disorder (PTSD) and complex PTSD more generally, survivors often find that symptoms emerge for the first time later in life. For example, survivors may experience anxiety and flashbacks when their own children

reach the age they were when they were abused. Similarly, many survivors who have come to private sessions and who are in the older age group have told us they are experiencing symptoms of depression, nightmares and sleep disturbance as they confront impending institutionalisation associated with ageing, increased health needs and possible hospitalisation or residential aged care.

'Treatment readiness' is considered a key factor for success in most counselling and psychological care. That is, in order for treatment to be successful, the survivor must be ready and willing to engage in the difficult process of facing what happened to them as a child and the impact it had on their life. They must also commit to the sometimes difficult task of changing often entrenched ways of thinking and responding to life events and interactions with others. They also need to be ready to attempt to build a trusting and therapeutic relationship with their therapist. Some survivors will not reach this level of readiness until later in life. In Case Study 11 on Christian Brothers institutions in Western Australia, VI, a survivor, gave the following evidence:

I think I was ready to have counselling by this time. I guess you really have to be ready to do it. You just can't force counselling on anyone.

When I went through Redress, I was in my 50s. I was much more settled and I was able to focus on myself more and dealing with these things.

These sessions with [the counsellor] really helped me. They brought back all the memories, and lots of things

started triggering the memories of what had happened to me. The process was very, very confronting because of this.<sup>289</sup>

## Counselling should be available on an episodic basis

While there is a need for counselling to be accessible throughout a survivor's life, it is not necessarily needed continuously. A survivor may not need any counselling for decades and then require intensive therapy and support for many months, perhaps following a decision to disclose the abuse or where they experience a significant life event, as discussed in the preceding principle on lifelong access to counselling and psychological care.

The episodic nature of counselling needs means that these needs cannot be predicted accurately for individual survivors, including by the survivors themselves.

## Survivors should be allowed flexibility and choice

Different groups of survivors, such as children, care leavers and Aboriginal and Torres Strait Islander people, have different needs for counselling and psychological care. Survivors also have different needs at an individual level. Survivors and survivor advocacy and support groups have told us of the importance of finding the appropriate practitioner and type of service to provide a survivor's counselling and psychological care.

We have been given examples of situations where services and individual practitioners

have met the needs of some survivors, while others have not valued those services and practitioners. Some survivors have told us they valued counselling services provided by the institution in which they were abused, while others have not wanted to use services with any connection to the institution.

Some survivors have preferred to gain access to counselling and psychological care through specialist sexual assault services. Others have preferred to go through broader support services for groups such as Forgotten Australians, Former Child Migrants or members of the Stolen Generations. In other cases, survivors have preferred to consult their own private practitioner and rely on funding available through Medicare to help pay for these services. Some survivors value group therapies, while others prefer individual counselling.

Research also supports the view that flexible and individually focused care is a very important factor in the care of people with complex trauma. According to Wall and Quadara, the nature of victimisation is such that there is variation in the type and intensity of abuse, and its impact is affected by factors such as the victim's relationship to the abuser and the age and developmental stage of the victim.<sup>290</sup> They continue:

Because each victimisation experience can be so vastly different and result in different symptoms or degrees of need, it is important that care can be attuned to the level and type of need of that person.<sup>291</sup>

There is research to suggest that those who have experienced child sexual abuse

benefit from being allowed to choose the model of service delivery and evidence-based treatment model that best suits their needs.<sup>292</sup> This is consistent with the broader literature on patient decision making and treatment outcomes, which shows that sharing decisions about treatment choice between health providers and patients leads to positive outcomes.<sup>293</sup>

Accordingly, survivors should be given information to enable them to choose between evidence-based counselling options provided by properly capable professionals, including information on the options available through existing support services.

Children and young people are also likely to have different treatment needs from adult survivors, and their parents will often be making decisions on their behalf. The evidence suggests that, for children, the choice of treatment should depend on the symptoms the child is experiencing.<sup>294</sup> Some adjunct treatments may also positively affect primary treatment outcomes. For example, different therapies to reduce intrusive memories and assist emotional regulation are increasingly used to complement psychotherapeutic approaches.<sup>295</sup>

Counselling and psychological care supported through redress should be flexible enough to meet the needs of child survivors and young adults. It should also assist parents or guardians to make choices that best meet their children's therapeutic needs.

## No fixed limits on services provided to a survivor

We have heard mixed views on what constitutes an appropriate number of counselling sessions to be offered to a survivor, at least initially. Some participants in our private roundtables and expert consultations believed that the current practice of 10 hours or 10 sessions was sufficient, whereas others were of the view that many more sessions should be allowed because of the time it takes to build trust and rapport with survivors who have experienced complex trauma.

The research literature suggests that effective intervention with those who have experienced child sexual abuse 'requires services to offer skilled, longer-term work that can respond to clients' complex needs in a multi-faceted and flexible way'.<sup>296</sup>

Research conducted to assess what duration, intensity and number of sessions produce optimal outcomes has focused on particular groups of those who have experienced child sexual abuse and has not yet provided consistent results for all those who have experienced child sexual abuse.<sup>297</sup>

The needs of survivors are complex and varied. Some survivors may need very few sessions per episode of care, while others may need many. This difference can be related to the complexity of the psychological issues being treated and also the time it takes for each individual to build rapport with a therapist. Research suggests that decisions about treatment length and the number of interventions should be based on each individual's progression through therapy.<sup>298</sup>

Research shows that building a trusting relationship between the therapist and client, even if that takes months or years, is a prerequisite to addressing traumatic memories or applying any technique.<sup>299</sup> According to Breckenridge, Salter and Shaw:

people who have been abused will have many defences in place that work well for their survival but often against their ability to undertake (therapeutic) work quickly.<sup>300</sup>

In its submission in response to the Consultation Paper, ASCA stated:

It is important to acknowledge that it is inappropriate to engage with an adult survivor of institutional child sexual abuse in the absence of ability to offer them the long term support they may need. This is also because lack of follow-through could be perceived as ‘another’ rejection or result in feelings of abandonment. As trustworthiness is a core principle of trauma-informed practice, it is essential that survivors can be assured of availability of expert psychological support at any point they may need it in the future. It is likewise essential that availability of such services, within an acceptable timeframe is guaranteed.<sup>301</sup>

We are satisfied that, while there should be regular assessment and review to ensure that services are provided based on need, as discussed below, there is no evidence that supports the imposition of a fixed limit on the number of counselling sessions available to a survivor per episode of care.

## Without limiting survivor choice, psychological care should be provided by practitioners with appropriate capabilities to work with clients with complex trauma

As discussed above, we have heard accounts of survivors receiving counselling that was damaging and re-traumatising.

The literature suggests that general training in child sexual abuse is inadequate.<sup>302</sup> Also, a number of survivor advocacy and support groups, practitioners and experts told us that they consider general qualifications in counselling and psychology to be inadequate for treating survivors.

A number of representatives at our private roundtables and expert consultation emphasised the need for improving the capabilities and skills of professionals working with survivors. A number of survivor advocacy and support groups, practitioners and experts also told us that counselling and psychological care for survivors should be provided by trauma-informed services.

Wall and Quadara state:

People experiencing complex trauma have a very strong need to feel safe. Healing and recovery is stage-based and emphasises establishing safety first. The trauma literature recognises core stages for treatment and recovery. These are: stabilisation or establishing safety; processing trauma – the exploration and reintegration of traumatic memories into a personal narrative; and the positive reconnection with others.<sup>303</sup> [References omitted.]

In *'The last frontier': Practice guidelines for treatment of complex trauma and trauma informed care and service delivery*, Dr Kezelman and Dr Stavropoulos define trauma-informed services as follows:

Trauma-informed services are 'informed about, and sensitive to, trauma-related issues'. They do not directly treat trauma or the range of symptoms with which its different manifestations are associated. The *possibility* of trauma in the lives of all clients/patients/consumers is a central organizing principle of trauma-informed care, practice and service-provision. This is irrespective of the service provided, and of whether experience of trauma is known to exist in individual instances.<sup>304</sup> [Emphasis in original; references omitted.]

They go on to describe a trauma-informed service as one that:

- Commits to and acts upon the core organising principles of *safety, trustworthiness, choice, collaboration* and *empowerment*
- Has reconsidered and evaluated *all components of the system* 'in the light of a basic understanding of the role that violence plays in the lives of people seeking mental health and addictions services'
- Applies this understanding 'to design service systems that accommodate the vulnerabilities of trauma survivors and allows services

to be delivered in a way that will avoid inadvertent retraumatization and ... facilitate consumer participation in treatment'

- Requires ('to the extent possible') close 'collaborative relationships with other public sector service systems serving these clients and the local network of private practitioners with particular clinical experience in 'traumatology'.<sup>305</sup> [Emphasis in original; references omitted.]

Consistent with the principle of supporting flexibility and choice, no particular model of care should be prescribed. However, professionals should be encouraged to obtain appropriate capabilities to best treat survivors with complex trauma through appropriate training, including in trauma-specific approaches.

Further, survivors and their referring general practitioners or support services should be helped to find practitioners who have appropriate capabilities.

In the Consultation Paper, we suggested that professionals could be accredited as having appropriate capabilities and then be listed on a database so that they could be easily identified.<sup>306</sup>

A number of submissions in response to the Consultation Paper strongly supported this, as did some of those who spoke in the public hearing. Dr Kezelman, representing ASCA, told the public hearing:

Of critical importance are the knowledge, skills and training of

practitioners and services working with survivors, with the risk of re-traumatisation high when inadequate or when funding constraints necessitate precipitous termination of a therapeutic process and relationship.

Accordingly, all four organisations support a robust training and accreditation process and the development of a database of accredited practitioners which is well marketed and accessible.<sup>307</sup>

In the Consultation Paper we suggested that there could be a consortium of accreditors – for example, APS, the Australian Association for Social Workers, ASCA and a specialist sexual assault service.<sup>308</sup>

Some submissions stated that an organisation representing Aboriginal survivors’ needs should also be included in the accrediting process. This was also raised at the public hearing by Ms McIntyre, representing VACCA, who said:

while VACCA is not opposed to this [accreditation process], Aboriginal people will need to have significant input into how this will look from a cultural perspective, as the trauma-informed approach [sic] used by many Aboriginal elders is a lived experience approach, and not from training or textbooks, and should at minimum have equal value to the academic approach.<sup>309</sup>

We are satisfied that a public register should be established so that survivors, or those who are assisting them to gain

access to counselling and psychological care, can identify practitioners who have been accepted by the relevant professional bodies as having appropriate capabilities to provide counselling and psychological care to survivors.

We are no longer using the language of ‘accreditation’ because of its particular usage in health settings. We do not refer to ‘registration’ for similar reasons.

We consider that a practitioner should be accepted as having appropriate capabilities to provide counselling and psychological care to survivors if the practitioner demonstrates that they:

- are willing to work with clients with complex trauma – which is demonstrated at least in part by their application to be included on the public register
- have adequate experience in working with clients with complex trauma
- have adequate training relevant to working with clients with complex trauma, including training in use of a range of therapies that may be suitable for clients with complex trauma.

The adequacy of a practitioner’s experience and training should be assessed against guidelines or requirements determined by those who we recommend be involved in the design and implementation of the public register.

The design and implementation of the public register should be led by APS, as the national professional body for psychology



in Australia. Counselling and psychological care are also provided by a range of qualified professionals who are not psychologists and will need to meet the needs of a range of survivors, so the public register should be designed and implemented in consultation with representatives of:

- the Australian Association of Social Workers
- the Royal Australian and New Zealand College of Psychiatrists
- ASCA
- a specialist sexual assault service
- a non-government organisation with expertise in the counselling and psychological care needs of Aboriginal and Torres Strait Islander survivors.

Representatives of these bodies should develop guidelines or requirements for the experience and training that will be considered adequate for the purposes of being included on the public register. This information should be made available to practitioners who may wish to seek to be included on the register.

In its submission in response to the Consultation Paper, APS expressed its willingness to lead the development of an accreditation process as follows:

The APS would be pleased to work with other professional associations and specialist services to develop a competency-based accreditation process and maintain a database of appropriately qualified health professionals. The APS currently operates a 'Find a Psychologist' service and holds lists of providers

for particular government programs. The APS also has the capacity and experience to deliver national online training, practice certificates and webinars that might support an accreditation process.<sup>310</sup>

The public register we recommend is not intended to, and it should not, limit the range of professionals who could provide care. Professionals who have or obtain appropriate capabilities through experience and training, whether they are psychologists, social workers, occupational therapists, psychiatrists or other mental health providers, should be eligible for inclusion on the public register.

### Suitable ongoing assessment and review

For good clinical outcomes, and to appropriately target limited resources, a suitable process of initial assessment and ongoing review should be in place for each episode of counselling or psychological care that a survivor receives.

The process of assessment and review should take into account the complex needs of survivors. For example, we have heard from survivor advocacy and support groups, practitioners and experts that survivors:

- may have difficulty building rapport with people in authority, including medical practitioners
- may have difficulty articulating the impact of the abuse on their lives
- should be assessed by professionals with appropriate capabilities to work with trauma victims in



order to minimise the risk of re-traumatisation and further harm.

Throughout our consultations, we met with survivor advocacy and support groups, practitioners and experts on what might be a suitable assessment process to determine the counselling and psychological care needs of survivors. There was general support for the process where a treating therapist develops a treatment plan that is appropriate to the needs of the survivor, identifies goals for treatment and incorporates reviews to assess progress.

Differing opinions were expressed as to whether independent or external review is required. For example, in its submission in response to the Consultation Paper, APS stated:

As indicated in the Consultation Paper, there will need to be suitable ongoing assessment and review of counselling and psychological care provided as part of redress. The APS suggests blocks of counselling sessions (e.g., 10 sessions) for which goals are jointly established and progress against these goals regularly reviewed in a way that is acceptable to survivors. It is acknowledged that at the beginning of some sets of care, the objectives of treatment may be as simple as establishing an effective therapeutic alliance, with more symptom-specific goals developed over time. It is recommended that the review process include a mix of joint practitioner–client review and occasional external review. The process surrounding the

independent review should be developed with input from survivors so that it avoids jeopardising the therapeutic relationship or re-traumatisation; it is nevertheless a vital quality control strategy and an important protection for survivors.<sup>311</sup>

Dr Kezelman, representing ASCA, told the public hearing:

ASCA also recommends ongoing assessment and review which meets standards and adheres to trauma-informed principles as well as practice-based evidence methodology. This process needs to be realistic and not overly bureaucratic or expensive or intrusive of the therapeutic space.<sup>312</sup>

During our consultations with experts, an experienced practitioner suggested that the treating therapist should conduct the initial assessment and reviews as required, with random auditing of those therapists.<sup>313</sup>

Discussion in our consultations established that at least some statutory victims of crime compensation schemes gave responsibility to the treating therapist for assessment and review of counselling provided under those schemes. Those who participated in our consultations and who were familiar with the operation of the schemes told us that this did not cause difficulties. However, we note that these schemes generally operate with a fixed limit of available sessions, although more may be provided in particular circumstances.

Some institutions agreed that there was a need for assessment and review.

For example, in its submission in response to the Consultation Paper, the Truth, Justice and Healing Council stated:

It will be important to ensure as part of the counselling or care arrangements that regular reviews are undertaken to ensure that the counselling or care is having a beneficial effect. In the Archdiocese of Melbourne, Carelink undertakes a review after 10 sessions with the external counsellor or other practitioner.<sup>314</sup>

In its submission in response to the Consultation Paper, YMCA Australia stated:

We consider that any ongoing assessment and review of a survivor's psychological care plan should be conducted by the providing therapist, unless otherwise agreed or requested by the survivor and therapist.<sup>315</sup>

The Salvation Army Australia submitted that, if institutions are to pay for counselling and psychological care, there should be processes in place to ensure that the counselling and psychological care is reasonably necessary and relationships of dependency are not created between the therapist and the survivor. It stated:

Likewise, if the institution takes on the responsibility for paying for the counselling services over a protracted period of time, then the redress model should build in some mechanism for review as to the effectiveness and efficiency of meeting the survivors' needs and

whether or not ongoing payments, say direct disbursements or reimbursements of counselling fees, is appropriate ...

It is important, however, that counselling provided is reasonably necessary and conducted in such a manner as to avoid creating a relationship of dependency between the counsellor and the survivor. Ensuring the accountability of counselling providers is important. This may be achieved by way of a periodic assessment of the ongoing needs of a survivor, and the treatment being provided to them, by an objective, suitably qualified professional to ensure that relationships of dependency are not created.<sup>316</sup>

We are satisfied that assessment and review by the treating practitioner will generally be sufficient to ensure treatment is effectively targeted to meet survivors' needs and that limited resources are used effectively. If those who administer the funding of counselling and psychological care through redress have concerns about a particular practitioner or about the counselling and psychological care that is being provided to a particular survivor, it should negotiate with the treating practitioner, and the survivor if necessary, to agree to a suitable assessment or review process. This might involve review by another practitioner or discussion between the treating practitioner and another practitioner. Any assessment or review process should be designed to ensure that it causes no harm to the survivor.

## Services for family members if necessary for survivor's treatment

We have heard from a number of survivors in private sessions that they have benefited from their partners and other family members receiving counselling, often in connection with the survivor disclosing the abuse to family members.

Where counselling is required for family members, existing services, including Medicare funding, may be sufficient to meet their needs.

In the Consultation Paper, we suggested that it is also important to target limited resources to the needs of survivors.<sup>317</sup> It may be that some counselling and psychological care for family members could be funded through redress if it is necessary for the survivor's own treatment and there are no other sources of funding available (for example, through Medicare or other support services).

We recognise that there may be a greater need to include family members in therapy for survivors who are still children. Some research suggests that the inclusion of (non-offending) caregivers contributed positively to treatment outcomes for children and young people.<sup>318</sup> Research also shows that interventions with children and young people who have been sexually assaulted needs to incorporate inclusive, holistic and systemic understandings of a child or young person's familial environment. This research locates the family as central to the therapy rather than as an adjunct to it.<sup>319</sup>

In its submission in response to the Consultation Paper, APS said that, in order to

make best use of limited resources, survivors should have priority for counselling and psychological care under redress. However, it also submitted that children will often need family involvement to achieve positive therapeutic outcomes. It said:

The APS strongly supports the need for non-offending parents/caregivers of child survivors to be able to access counselling and psychological care as part of the redress scheme. Best practice in the delivery of care to child survivors includes not only working with the child but also with the parents or caregivers.<sup>320</sup>

A research study that reviewed children who had experienced child sexual abuse nine years after their therapeutic treatment reported that outcomes for children were linked to family functioning.<sup>321</sup> Research has also shown that initial caregiver emotional support at the time of abuse discovery predicted resilience in child and adolescent victims of sexual assault.<sup>322</sup> These findings suggest that counselling and psychological care for survivors who are still children at the time of counselling may be more effective if it includes a focus on therapeutic counselling practice that involves the child's primary caregivers.

We are satisfied that counselling and psychological care through redress should focus on survivors but should include counselling and psychological care for a survivor's family members if that is necessary for the survivor's treatment.

## Recommendations

9. Counselling and psychological care should be supported through redress in accordance with the following principles:
  - a. Counselling and psychological care should be available throughout a survivor's life.
  - b. Counselling and psychological care should be available on an episodic basis.
  - c. Survivors should be allowed flexibility and choice in relation to counselling and psychological care.
  - d. There should be no fixed limits on the counselling and psychological care provided to a survivor.
  - e. Without limiting survivor choice, counselling and psychological care should be provided by practitioners with appropriate capabilities to work with clients with complex trauma.
  - f. Treating practitioners should be required to conduct ongoing assessment and review to ensure treatment is necessary and effective. If those who fund counselling and psychological care through redress have concerns about services provided by a particular practitioner, they should negotiate a process of external review with that practitioner and the survivor. Any process of assessment and review should be designed to ensure it causes no harm to the survivor.
  - g. Counselling and psychological care should be provided to a survivor's family members if necessary for the survivor's treatment.
10. To facilitate the provision of counselling and psychological care by practitioners with appropriate capabilities to work with clients with complex trauma:
  - a. the Australian Psychological Society should lead work to design and implement a public register to enable identification of practitioners with appropriate capabilities to work with clients with complex trauma
  - b. the public register and the process to identify practitioners with appropriate capabilities to work with clients with complex trauma should be designed and implemented by a group that includes representatives of the Australian Psychological Society, the Australian Association of Social Workers, the Royal Australian and New Zealand College of Psychiatrists, Adults Surviving Child Abuse, a specialist sexual assault service, and a non-government organisation with a suitable understanding of the counselling and psychological care needs of Aboriginal and Torres Strait Islander survivors
  - c. the funding for counselling and psychological care under redress should be used to provide financial support for the public register if required
  - d. those who operate a redress scheme should ensure that information about the public register is made available to survivors who seek counselling and psychological care through the redress scheme.

## 6.4 Current services and service gaps

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There are many government and non-government generalist and specialist services and practitioners that provide counselling and psychological care to those who have experienced child sexual abuse, including survivors of institutional child sexual abuse. As discussed in the Consultation Paper, we consider that it is important to recognise the range of existing services, both to help identify where there are gaps that might need to be filled through redress and to be clear that any expansion in services should build on existing services rather than displace or compete with them.<sup>323</sup>

### Current services

#### Mainstream services

Many people go to mainstream services to seek assistance to address their psychosocial needs, such as mental health or substance abuse issues, whether or not these issues are associated with childhood sexual abuse. Mainstream services include:

- in-patient hospital-based mental health services
- out-patient and community-based services
- non-crisis mental health services
- alcohol and drug rehabilitation and treatment services
- primary health services.

There is a higher prevalence of child sexual abuse history amongst clients of

mainstream mental health and alcohol and other drugs services than can be found in the general population.<sup>324</sup>

A number of non-government organisations also operate mainstream services that provide initial points of contact for mental health services. Most of these services receive significant government funding and endorsement. Well-known examples of these services are Lifeline and beyondblue. A list and description of these services is at Appendix K.

The Australian Government supports two primary health care initiatives that may be of particular use to survivors, principally through funding under Medicare:

- The Better Access initiative is for people with an assessed mental disorder.<sup>325</sup> To be eligible, patients must be referred by their general practitioner (GP) or in certain circumstances by a psychiatrist or paediatrician. The GP must complete a detailed mental health assessment and prepare a Mental Health Treatment Plan before referring the person to a Medicare approved provider, such as a Medicare registered psychologist. Up to 10 individual and 10 group sessions are available per calendar year. A review by the GP is required after six sessions. The sessions are free if the Medicare-approved provider bulk bills; otherwise, the patient must pay the difference between the scheduled Medicare fee and the fee that the provider charges.
- The Access to Allied Psychological Services (ATAPS) program is similar

to the Better Access initiative in that access to a psychologist requires a GP referral and there must be a review after six sessions.<sup>326</sup>

However, ATAPS is designed to offer psychological intervention to certain categories of people who are more vulnerable than those in the general population to experiencing mental health disorders and who cannot afford care. For example, target groups of particular relevance to survivors include Aboriginal and Torres Strait Islander people, care leavers and Former Child Migrants, and people at risk of homelessness. ATAPS offers up to 12 individual sessions (with periodic reviews) and up to 12 group sessions per calendar year at no cost.

The Australian Government also supports specialist psychiatric services by providing unlimited funding through Medicare for these services. Some survivors with serious mental disorders will require care by a psychiatrist. However, most survivors may not need the specialist services of a psychiatrist. Survivors who receive care from a psychiatrist are likely to have to pay a gap fee that covers the difference between the Medicare rebate and the fees charged by the psychiatrist. In most cases, this gap fee is larger for psychiatrists than for other practitioners who provide psychological care.

## Specialist services

Specialist services are designed to support particular groups of people with specific needs. These types of services have overlaps and interactions with mainstream services and the

broader support services network for those who have experienced child sexual abuse.

Specialist services may also provide social support, information and resources outside of the therapeutic context to help those who have experienced child sexual abuse to recover and to raise public awareness of the specific health and/or welfare issues they aim to address.

There are many specialist services, most of which are mainly government funded.

The main categories of specialist services are:

- **Sexual assault services:** These services provide specialised and targeted therapeutic care for victims of sexual assault. They are generally recognised for their extensive skills and expertise in working with survivors. Because of limited funding and resources, priority may be given to people who have most recently been sexually assaulted; however, adult survivors of child sexual abuse represent approximately one-quarter of their clients.<sup>327</sup> In most cases, services are provided free of charge. Service providers receive funding from government departments, usually from the state or territory department that is responsible for health and community services. Medium- to long-term face-to-face counselling is normally available along with immediate crisis support. Some sexual assault services may also offer practical support services to assist survivors with certain

aspects of their lives (for example, emergency housing relief, court preparation and advocacy). A list and description of these services by state or territory is at Appendix L.

- **Support services for adults who, as children, were in out-of-home care:** These services provide a range of support services, including counselling and psychological care. They are targeted at adults, including Former Child Migrants, who were in institutional or other out-of-home care when they were children. Generally, these services receive government funding. A list and description of these services by state or territory is at Appendix M.
- **Aboriginal and Torres Strait Islander organisations:** These services provide support targeted at Aboriginal and Torres Strait Islander people, particularly members of the Stolen Generations. These services generally receive funding from the Australian Government and the relevant state or territory government. They operate with specialised capabilities and particular expertise in providing services in a culturally sensitive manner. As discussed in Chapter 5, the Healing Foundation runs Aboriginal and Torres Strait Islander healing programs across Australia.<sup>328</sup> Link-Up organisations in most states and territories provide a range of services to members of the Stolen Generations and their families. Link-Up organisations provide counselling and support for people who are in the process of obtaining family and personal records and

seeking family reunions. There are also some sexual assault services that operate exclusively for Aboriginal and Torres Strait Islander women and children.

Counselling is also a feature of state and territory statutory victims of crime compensation schemes. In general, eligible victims are entitled to face-to-face counselling for a specified number of sessions. In some cases, additional sessions may also be provided. These services are provided without charge to the victim.

### Services associated with existing redress schemes

Some institutions provide counselling and psychological care as part of the redress they provide to survivors. These services are discussed as part of direct personal response in Chapter 5.

### Service gaps

It is clear from the description of current services above that there are many government and non-government services that currently assist survivors with counselling and psychological care.

However, we have heard from survivors, survivor advocacy and support groups, practitioners and experts that existing services are not fully meeting survivors' needs.

Our consultations through private roundtables, expert consultations, submissions in response to the Consultation Paper and at the public hearing suggested that access to and delivery of counselling



and psychological care for survivors should be improved.

We are satisfied from our inquiries that the key gaps in existing services that prevent them from adequately meeting survivors' needs for counselling and psychological care are as follows.

### Resource limitations of specialist services

We have been told that the specialist sexual assault services that provide counselling and psychological care to survivors of sexual assault are some of the best-regarded services available. They provide quality, long-term care that is sensitive to the complex trauma that survivors suffer.

However, we have also been told that adult survivors who wish to use these services may be faced with long waiting periods before a counsellor is able to see them. In some cases, some services may not be able to support victims of past assaults if their funding agreements require them to focus on addressing the needs of recent victims of sexual assault. In those situations, crisis care (including forensic care) and short-term counselling models are prioritised.<sup>329</sup>

For example, in New South Wales, sexual assault services may not have sufficient staff to meet demand. New South Wales Health policy states that, when sexual assault services are required to prioritise service provision (due to demand, understaffing or both), historical childhood sexual abuse is to be given the lowest priority and recent sexual assault of children and adults the highest priority. This results in a situation where sexual assault services, at current

staffing levels, may be able to provide only limited one-to-one counselling and therapy to adult survivors.<sup>330</sup>

### Restrictions on access to Medicare

The funding provided through Medicare for counselling and psychological care under the Better Access initiative and the ATAPS program could operate as an effective minimum level of service provision for survivors. For some survivors, the number of sessions available through these programs may be sufficient or at least a good start in meeting their needs for counselling and psychological care.

However, we have been told that the requirements of these programs create difficulties for some survivors for the following reasons:

- The Medicare programs are available only to persons who have 'an assessed mental disorder'. Child sexual abuse is not a recognised mental disorder.<sup>331</sup> We have been told that the symptom-based approach to diagnosing a mental disorder creates barriers for some survivors. Many survivors will present with a range of symptoms that meet some of the diagnostic criteria for a mental disorder – for example, anxiety, depression or PTSD. However, some survivors may not be able to articulate the impact of the trauma from their abuse or the extent of their symptoms sufficiently enough to demonstrate that they meet enough criteria in order to be diagnosed with a mental disorder.



- The Medicare programs are available only on referral by a GP and require the GP to prepare a Mental Health Treatment Plan. We have been told that some survivors are not comfortable disclosing their abuse history to a GP in order to get a diagnosis or a referral. We have been told that some survivors do not want to disclose their abuse history to their GP because they do not want to be 'pathologised' in this way and risk having every aspect of their health viewed through the lens of their experience of abuse. Where survivors do not disclose their history of abuse to their GP, the GP may be less likely to diagnose a mental disorder.
- The Medicare programs tend to focus on symptoms to be treated through shorter-term interventions. While these types of interventions are well supported by the evidence as being effective for some counselling and psychological care needs, they may not be adequate for the complex trauma that many survivors experience. The orientation manual for practitioners using the Better Access initiative acknowledges that the Better Access initiative may not meet the needs of clients with chronic and particularly complex mental health conditions.<sup>332</sup>
- The Medicare programs cover the cost of the scheduled fee for the service provided. If practitioners do not bulk bill, survivors may have difficulty in paying gap fees and may therefore not be able to consult those practitioners.

In their submissions in response to the Consultation Paper and during the public hearing, a number of survivor advocacy and support groups and those with expertise in counselling and psychological care agreed that these elements of Medicare create difficulties for many survivors.

A member of the expert panel, Dr Kezelman, told the public hearing that the members of the expert panel agreed in relation to Medicare:

were [Medicare] to be utilised to expand existing services and potentially fund specialist services, that the requirement for a diagnosis, the current restriction on session numbers and the inappropriate requirement for a GP gatekeeper [should] be removed.<sup>333</sup>

In its submission in response to the Consultation Paper, APS described some of the difficulties it stated arise from the requirement that a person have an assessed mental disorder in order to gain access to the Medicare programs as follows:

Survivors can experience a range of psychological symptoms over time that may or may not reach a clinically diagnostic threshold; for example, symptoms may include issues related to attachment, trust and guilt that impact on survivors' relationships and their ability to engage with society, as well as significant mental illnesses such as anxiety, depression and complex post-traumatic stress disorder (PTSD). Some survivors will have issues with misuse of substances. Active treatment is still

warranted where survivors do not meet diagnosis for conditions such as PTSD or major depression but are nevertheless disabled or distressed by symptoms.<sup>334</sup>

Medicare, through the Better Access program, currently supports short-term cognitive behavioural therapy (CBT), for which there is a strong evidence base. However, Dr Kezelman told the public hearing that short-term CBT-type treatment is not always appropriate to treat the complex trauma caused by child sexual abuse.<sup>335</sup>

At the public hearing, in responding to a question about the availability of research supporting the effectiveness of trauma-informed therapeutic interventions, Dr Kezelman undertook to provide us with relevant recent research.<sup>336</sup> After the public hearing, Dr Kezelman referred us to literature relevant to the effectiveness of different types of therapies.

While we recognise the strong evidence base for the efficacy of cognitive treatment approaches generally, the reporting of best practice research may understate the efficacy of non-CBT treatments. Van de Kolk referred to three avenues for treating trauma and recognised that no single approach will fit everybody.<sup>337</sup> He particularly explored the efficacy of a number of treatments that do not rely on cognitive approaches.<sup>338</sup>

Another study discussed the difficulty of comparing different types of trauma treatments when studies are of quite different sizes, meta-analysis can lack transparency and some meta-analyses and reviews use non-contemporary treatment methods.<sup>339</sup>

Dr Kezelman also told us that there is substantial clinical opinion among leading complex trauma therapists that, for trauma to be resolved effectively, there is a need for non-cognitive interventions. This is based on the understanding that trauma can affect the brain in such a way that trauma memories are not only verbally or cognitively encoded. For example, trauma can affect the body and can be pre-verbal or non-verbal.

It seems that at least some survivors could benefit from treatments other than CBT. Other treatments could include therapies such as those that:

- focus on developing a safe and trusting relationship between the survivor and their counsellor or therapist as the catalyst for change<sup>340</sup>
- increase survivors' awareness of the body's physical reactions to trauma and engage body awareness in the recovery process – for example, sensorimotor work<sup>341</sup>
- help survivors regulate their emotions through physical therapies.<sup>342</sup>

## Gaps in expertise

There appear to be at least three gaps in 'expertise' in this area:

- **Capabilities of practitioners:**  
As discussed above, not all practitioners have appropriate capabilities to work with clients with complex trauma. We have not been told that there is a shortage of capable practitioners (other than in some regional and remote areas);

rather, we have heard that it can be difficult for GPs or survivors to recognise the need to find a capable practitioner and then to find a practitioner who has appropriate capabilities.

- **Capabilities of mainstream services:** As discussed above, many survivors will first seek help through mainstream services such as mental health or drug and alcohol services. A number of survivor advocacy and support groups, practitioners and experts told us of the importance of a ‘no wrong door’ approach. Under this approach, mainstream services need to be better at recognising survivors and their needs. They need to be able to ensure that those needs are addressed in the mainstream service, if appropriate, or that the survivor is referred to another more appropriate service.
- **Capabilities of survivors:** Gaining access to appropriate counselling and psychological care can be a complex business. A number of survivor advocacy and support groups have told us that many survivors need assistance in identifying what is available, assessing what might be most useful for them (including, perhaps, support services provided outside of the counselling and psychological care) and gaining access to the most useful services.

Some of those who spoke at the public hearing agreed that these gaps in expertise exist. For example, Dr Roufeil, representing APS, told the public hearing:

There is an issue of survivors struggling to find practitioners who have the appropriate knowledge, skills and experience to work in an effective and respectful manner and there are simply not enough services that can provide effective clinical care.<sup>343</sup>

### Gaps in services for specific groups

A number of survivor advocacy and support groups, practitioners and experts have told us that there are gaps in the availability of appropriate services, particularly for survivors living in regional and remote areas. They have also told us that there are gaps in the availability of practitioners with adequate cultural awareness to enable them to provide appropriate services for Aboriginal and Torres Strait Islander survivors, culturally and linguistically diverse survivors and survivors with disabilities. These gaps may be compounded in regional and remote areas.

We have also heard of a shortage of appropriate services for women experiencing mental health problems during the perinatal period as a result of their experiences of child sexual abuse. The Australian Child and Adolescent Trauma and Grief Network notes there is strong evidence that mothers who have experienced potentially traumatic events (including child sexual abuse) are at greater risk of a range of mental health problems during the perinatal period, including depression, anxiety and substance abuse disorders.<sup>344</sup>

Similarly, we have heard of a shortage of appropriate services for men – in particular, services to assist men to manage anxieties

associated with becoming a father, such as fear of becoming an abuser themselves or not being able to develop healthy attachments with their children due to their experience of abuse.

## 6.5 Principles for supporting counselling and psychological care through redress

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In the Consultation Paper, we set out some possible principles that could inform how the provision of counselling and psychological care to survivors can best be supported through redress.<sup>345</sup> The principles are:

- Redress should supplement existing services rather than displace or compete with them.
- Redress should provide funding, not services.
- Redress should fund counselling and psychological care as needed by survivors.

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on some of these proposed principles. We also consulted a number of experts and practitioners on the principles. In the Consultation Paper, we invited submissions on the principles and some of them were also the subject of comment at the public hearing.

We are satisfied that the principles discussed below should inform how the provision of counselling and psychological

care to survivors can best be supported through redress.

### Redress should supplement existing services

It is clear that there are many existing services and means of obtaining counselling and psychological care. It is also clear that many survivors gain great assistance from these services.

Any expansion of counselling and psychological care, or funding or support for counselling and psychological care, through redress should build on these existing services rather than displace or compete with them.

While it might be possible to establish a stand-alone scheme to provide or fund counselling and psychological care for survivors of institutional child sexual abuse, this may cause survivors to miss out on the considerable expertise as well as the diversity, flexibility and choice that is available through the existing services and means of obtaining counselling and psychological care.

It also needs to be recognised that the Australian Government and the state and territory governments provide much of the funding for existing services (including Medicare). These governments are also likely to be significant funders of any redress scheme, as discussed in Chapter 10. It may be counterproductive to the quality and choice of counselling and psychological care available to survivors to put pressure on governments to redirect funding from existing services into a stand-alone scheme. However, in their submissions in response

to the Consultation Paper and during the public hearing, no government identified this as a risk.

Counselling and psychological care through redress should be designed to supplement existing services, primarily by filling service gaps.

### Redress should provide funding, not services

Consistent with the principle of supplementing existing services and filling service gaps, counselling and psychological care through redress should be supported by providing funding, not services. That is, a redress scheme should not establish its own counselling and psychological care service for survivors.

By providing funding rather than services, the principle supports flexibility and choice for survivors rather than requiring them to attend a particular service.

Given the gaps in expertise and the geographical and cultural gaps that have been identified, support for counselling and psychological care could also involve providing financial support for appropriate training programs or programs to facilitate the provision of counselling and psychological care in regional and remote areas. That is, while some gaps might best be filled by funding the counselling and psychological care provided to survivors, other gaps might best be filled by improving the availability of appropriate counselling and psychological care.

### Redress should fund services as needed by survivors

Funding for counselling and psychological care should be provided to service providers as survivors need that care rather than as a lump-sum component of a monetary payment to individual survivors.

In civil litigation, a plaintiff who needs counselling and psychological care as a result of a personal injury caused (intentionally or negligently) by the defendant is entitled to recover damages for the cost of the plaintiff's past and future counselling and psychological care.

An allowance could be made for counselling and psychological care by providing an addition to the monetary payments that are available through redress. However, we consider that a different approach is more likely to meet survivors' needs.

Survivors will not have the same level of need for counselling and psychological care. Also, the needs of many survivors will be episodic and unpredictable. Survivors may not be aware of the extent of support they may require throughout their lives and they may not have the means to set aside funds for this purpose.

Given that the counselling needs of survivors may be lifelong and episodic, providing funding to service providers as survivors need care will ensure that funding is available when counselling and psychological care is needed, even if it is needed in circumstances that the survivor did not anticipate.

## Institutions should fund counselling and psychological care

Our Terms of Reference refer to the ‘provision of redress by institutions’. We have identified counselling and psychological care as an element of redress. Therefore, as a starting point, institutions, including government and non-government institutions, should fund its provision. Also, survivors and survivor advocacy and support groups have told us that it is particularly important to some survivors that redress be funded by the institutions that were responsible for the abuse.

Some institutions supported the principle that institutions should fund counselling. For example, in its submission in response to the Consultation Paper, the Truth, Justice and Healing Council stated:

However the counselling or care is made available, the institution in which the abuse occurred should fund it.<sup>346</sup>

In the Consultation Paper, we noted that the Australian Government and the state and territory governments provide much of the funding for existing services.<sup>347</sup> These governments should also be significant funders of redress, because they operated many institutions and because they have broader social and regulatory roles.

We suggested that it might be necessary to recognise government funding of

existing services outside of redress so as to be consistent with the principle of supplementing existing services and not displacing or competing with them.<sup>348</sup> This approach might require a redress scheme to look primarily to non-government institutions to provide the funding to supplement services and fill service gaps through redress. However, as noted above, no government has submitted that, if it were to contribute to the funding of counselling and psychological care for survivors through redress, it would reduce its current funding for existing counselling and psychological care services. We see no need, therefore, to exclude government funding through redress for counselling and psychological care.

A redress scheme is likely to operate most efficiently if the funding institutions – both government and non-government – are required to contribute an amount per survivor for counselling and psychological care once the survivor is assessed as eligible under a redress scheme and when any monetary payment is made. The amounts that these institutions pay would be pooled and used as required to supplement existing services and to fill service gaps to meet survivors’ needs for counselling and psychological care. Funder of last resort funding is also likely to be required for counselling and psychological care services. This is discussed further in Chapter 10.

We make recommendations about funding redress, including the counselling and psychological care element of redress, in Chapter 10.

### **Recommendation**

11. Those who administer support for counselling and psychological care through redress should ensure that counselling and psychological care are supported through redress in accordance with the following principles:
  - a. Counselling and psychological care provided through redress should supplement, and not compete with, existing services.
  - b. Redress should provide funding for counselling and psychological care services and should not itself provide counselling and psychological care services.
  - c. Redress should fund counselling and psychological care as needed by survivors rather than providing a lump sum payment to survivors for their future counselling and psychological care needs.

## 6.6 Service provision and funding

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### Position in the Consultation Paper

In the Consultation paper, we set out three options that might be suitable for ensuring that survivors' needs for appropriate counselling and psychological care are met. These options were:

- significant reforms to Medicare to better meet survivors' needs
- the establishment of a stand-alone government scheme to provide counselling and psychological care to survivors
- the establishment of a redress trust fund.<sup>349</sup>

The first two options envisaged expanded public provision of counselling and psychological care, with the possibility of non-government institutions contributing funding. The third option envisaged provision of funding for counselling and psychological care through a redress scheme.

We consulted on these options as we developed them through our private roundtables and other consultations. In the Consultation Paper, we particularly sought:

- the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors
- submissions on the relative effectiveness and efficiency of the options in meeting survivors' needs.<sup>350</sup>



A number of submissions in response to the Consultation Paper commented on the options, as did some of those who spoke at the public hearing.

We are now satisfied that survivors' needs for appropriate counselling and psychological care can be met through a combination of:

- some particular reforms to Medicare
- funding provided through redress to supplement existing services and to fill service gaps.

## Expanded public provision of counselling and psychological care

As discussed in the Consultation Paper, existing public provision of counselling and psychological care for survivors could be expanded by:

- reforming Medicare to make it more effective in meeting survivors' needs
- establishing a stand-alone government scheme to provide counselling and psychological care to survivors.<sup>351</sup>

As discussed above, the Medicare Better Access initiative and ATAPS programs, while of considerable value to some survivors, have requirements that create difficulties for other survivors. In particular, some survivors may not be able to get the counselling and psychological care they need through Medicare funding because:

- they may not present in a way that enables their GP to diagnose them as having 'an assessed mental disorder'

- they may not be comfortable disclosing their history of abuse to their GP and this may also make diagnosis of a mental disorder less likely
- the Medicare programs focus more on shorter-term interventions and they may not provide a sufficient number of sessions for some survivors
- they may not be able to afford to pay gap fees that some practitioners charge
- they may wish to be treated by a practitioner who works for a state or territory specialist sexual assault service. This treatment is not funded by Medicare. Although survivors would not be charged for using these specialist sexual assault services, they may face lengthy waiting periods and limited availability because of the resource constraints on the services. If Medicare funding was available to the services, they should be able to expand the services they can provide and reduce waiting periods.

In the Consultation Paper, we discussed the following possible reforms to the existing Medicare programs to address these difficulties for survivors:

- the need for a diagnosis of 'an assessed mental disorder' by a GP, or for any GP referral, could be removed and replaced by a requirement that the survivor has been assessed as eligible for redress under a redress scheme – that is, eligibility or need would be assumed on the basis that the person had experienced institutional child sexual abuse



- eligible survivors could then be eligible for funding of an uncapped number of sessions of counselling or psychological care
- a separate Medical Benefits Schedule item number could be allocated for counselling and psychological care provided to eligible survivors. The item number would allow a higher scheduled fee to be paid to practitioners for sessions with eligible survivors. The item number would be available to practitioners only if they do not charge the survivor any gap fee
- to help eligible survivors to use state or territory specialist sexual assault services if that is their preference, exemptions could be made under section 19(2) of the *Health Insurance Act 1973* (Cth) to enable the government-funded sexual assault services to claim Medicare rebates for providing counselling and psychological care to this group
- if there was concern to ensure that enhanced Medicare benefits were available only if the practitioner was assessed as having appropriate capabilities to work with survivors, they could be made available only to practitioners who had undergone a capability assessment.<sup>352</sup>
- The exemptions that would be needed to make Medicare funding available for counselling and psychological care by specialist sexual assault services could be similar to arrangements that are in place for Aboriginal Community Controlled Health Services and some remote state and territory government health clinics. Those arrangements enable those services to claim Medicare funding under the Better Access initiative for services provided by practitioners who are employed by or contracted to the service.
- APS provides capability assessments for psychologists under the child ATAPS scheme and the Children with Autism and other Pervasive Developmental Disorder initiative as well as for eligibility to provide pregnancy support counselling. APS also assessed eligibility for delivery of the psychological therapy items under Medicare from 2006 to 2010, when national registration of practitioners commenced.

These reforms would not be novel. The following precedents are relevant:

- Some groups, such as children with autism, people with chronic health conditions and women who require pregnancy counselling support, have been given special access to counselling and psychological care through Medicare.

We acknowledged in the Consultation Paper, and we continue to acknowledge now, that this approach would require counselling and psychological care to be made available through Medicare based on a person's status as an eligible survivor and not only on need.<sup>353</sup> A person would be an eligible survivor if they applied to a redress scheme and the redress scheme accepted that they had suffered child sexual abuse in an institutional context.

Before we published the Consultation Paper, we undertook detailed consultations with the Australian Government on possible

reforms to Medicare. In the Consultation Paper we quoted from the Australian Government's response as follows:

A fundamental principle of Medicare is equal and universal access to medical services based on clinical need. While it is certainly not the case that all Medicare items are available to all Australians, limitations on access to items are based on clinical considerations and, relevantly, not by consideration of the cause of the condition.

However, the Scheme [put forward by the Royal Commission for discussion] proposes creating a set of 'no-cost to patient' Medicare items for counselling or psychological treatment for survivors of child sexual abuse, eligibility for which is restricted based on where that abuse occurred. It is the Department's view that this may be seen by the public as undermining the principle of universality of access under the Medicare system and using Medicare to give more favourable treatment to those accepted through the redress scheme.<sup>354</sup>

The second option for expanded public provision of counselling and psychological care for survivors was establishing a stand-alone government scheme. We stated in the Consultation Paper that a case could be made to publicly fund the provision of counselling and psychological care by setting up a stand-alone Australian Government scheme for survivors of child sexual abuse in an institutional context.<sup>355</sup>

In the Consultation Paper, we described some stand-alone Australian Government schemes that provide special access to counselling and psychological services.<sup>356</sup> These were the Balimed scheme, which was established to support those affected by terrorism events, and the Department of Veterans' Affairs treatment cards – namely, the 'Gold Card' and the 'White Card'. We also described the Victorian Government Bushfire Psychological Counselling Voucher Program.

While a stand-alone government scheme would provide for survivors based on where the abuse occurred – that is, survivors of child sexual abuse in an institutional context – it would not interfere with the principle of universality under Medicare.

In the Consultation Paper, we identified some possible advantages and disadvantages of expanding Medicare or establishing a stand-alone government scheme.<sup>357</sup>

Expanding Medicare appeared to have the following advantages:

- it would avoid creating a stand-alone administration for counselling and psychological care for survivors
- it would make use of Medicare's extensive existing infrastructure
- Medicare should be familiar to most, if not all, survivors and should be reasonably easy for them to use.

Establishing a stand-alone government scheme appeared to have the following advantages:

- although it would require a stand-alone administration, the Australian Government already has extensive

experience in establishing and running comparable programs

- it would make use of the Australian Government's existing infrastructure and expertise
- many survivors and survivor advocacy and support groups have indicated they support the proposal that the Australian Government establish a single national redress scheme, so survivors should welcome an Australian Government scheme for counselling and psychological care.

We identified that both options might attract the possible objection that they may place the increased funding burden on the Australian Government (and therefore taxpayers) rather than on institutions.<sup>358</sup> However, we also stated that there does not seem to be any reason why institutions could not contribute to the cost of either option. In relation to Medicare, we discussed the *Health and Other Services (Compensation) Act 1995* (Cth) arrangements as a possible model for legislating to introduce a requirement for institutions to pay an actuarially-determined estimate of the cost of future counselling and psychological care. A similar approach could be adopted to obtain funding contributions from institutions for a stand-alone government scheme.

In its submission in response to the Consultation paper, the Australian Government was not supportive of reforming Medicare or establishing a stand-alone scheme. It stated:

A core principle of the Medicare scheme is to provide universal support for individuals seeking

access to medical services based on need rather than the cause of the condition. This provides a strong and non-discriminatory foundation for access to publicly supported health care. It is difficult to identify guiding principles that would support a separate scheme for victims of child sexual abuse, but not standalone schemes for victims of other types of trauma (or for survivors of child sexual abuse that did not occur in institutions falling within the Royal Commission's terms of reference).<sup>359</sup>

We continue to doubt that anyone would object to counselling and psychological care being made more readily available to all survivors of child sexual abuse or, indeed, other complex trauma and not just to survivors of child sexual abuse in an institutional context. However, we also appreciate that this would involve a much larger group of eligible people and a greater demand for services.

We are of the view that greater public funding for the provision of counselling and psychological care for survivors is warranted. There may be factors other than their experience of institutional child sexual abuse that contribute to survivors' needs for counselling and psychological care throughout their lives.

In his submission in response to the Consultation Paper, Professor Parkinson AM stated:

treating child sexual abuse is not like treating a cancer or any other form of bodily injury or disease

which is located in a particular place and has known effects. If a person were physically injured as a result of some tortious behaviour within an institutional care environment, there would be no difficulty in making the institution liable to meet the costs of treatment of the injury. The difficulty with child sexual abuse however is in working out cause-and-effect. Many of the children who were abused were in institutional care as a result of removal from parents or because a parent, usually a single mother, was unable to look after them. For some of these children there may well have been traumagenic effects arising out of the circumstances that led them into the orphanage or children's home, and traumagenic effects from the absence of being raised by a loving mother and father.<sup>360</sup>

Professor Parkinson told the public hearing:

It is absolutely appropriate for the institutions to take a large amount of the responsibility ... but in terms of the costs of counselling and therapy, I suggest it should be shared with society.<sup>361</sup>

While we are of the view that a stand-alone scheme would meet survivors' needs for counselling and psychological care, we acknowledge this is not the only way to meet survivors' needs. We are satisfied that some changes to Medicare supported by funding through redress to fill gaps will be sufficient to meet the needs of survivors overall.

Those who spoke as part of the expert panel at the public hearing supported the idea of building on the existing Medicare system to better meet the needs of survivors. Dr Roufeil, representing APS, told the public hearing:

We have the scaffolding in place to develop a world-class response to survivors. Australia has the experienced practitioners able to deliver effective care, and a national structure through Medicare that can provide the infrastructure to enable rapid implementation across the country. There is a precedent for such a model with the response to the bushfires in Victoria. There is also a precedent for the use of Medicare to expand service delivery in specialist services. Doing this will greatly enhance the existing service capacity.<sup>362</sup>

Similarly, Ms Wilkinson, representing the Australian Association of Social Workers, told the public hearing:

We believe the Medicare system is an excellent platform on which to build this new service system or this response to survivors of institutional child abuse. We don't endorse the need to create a new system. We think the principle of Medicare universality can be protected and is not compromised if we have an extension or a modification to work with a particular client group and, as Louise [Roufeil] says, there are examples of that happening with the bushfires in Victoria.

There are other models, of course, through the Department of Veterans' Affairs but the Medicare one is well known, it is not stigmatised. We have people already working in that system and we believe that it is the appropriate platform from which we can build a new service response.<sup>363</sup>

As a result of our consultations, including with the relevant experts, we have concluded that the Australian Government should implement the following changes to the Better Access program in order to make it more effective for survivors:

- the limit of 10 sessions per year should be removed so that survivors are eligible for an uncapped number of sessions of counselling and psychological care
- the range of therapies available to survivors for Medicare funding should be expanded to accommodate longer-term therapies where the treating practitioner is satisfied that short-term CBT treatment is not appropriate to treat a survivor's trauma.

While these changes are not as extensive as those raised in the Consultation Paper, we are satisfied that the limit on the number of sessions available and the limited range of therapies covered under Medicare are the barriers that most significantly prevent Medicare being adequate to provide effective counselling and psychological care for many survivors. We acknowledge that, if the limit on the number of sessions is removed, it may be appropriate within Medicare arrangements to specify points at which ongoing treatment should be assessed or reviewed. Any requirements for assessment or review should be designed to ensure that they cause no harm to the survivor.

We consider that some of the difficulties some survivors have in meeting the requirement for a GP diagnosis and referral can be addressed, at least in part, through assistance provided to survivors as part of redress, which we discuss further below.

These changes to Medicare should apply to survivors of institutional child sexual abuse who are assessed as eligible for redress through a redress scheme. Of course, we would have no objection if the Australian Government wished to apply these changes generally to all Medicare-funded counselling and psychological care services and not just services for survivors.

### **Recommendations**

12. The Australian Government should remove any restrictions on the number of sessions of counselling and psychological care, whether in a particular period of time or generally, for which Medicare funding is available for survivors who are assessed as eligible for redress under a redress scheme.
13. The Australian Government should expand the range of counselling and psychological care services for which Medicare funding is available for survivors who are assessed as eligible for redress under a redress scheme to include longer-term interventions that are suitable for treating complex trauma, including through non-cognitive approaches.

## A redress scheme trust fund to fill gaps

The third option discussed in the Consultation Paper was the creation of a redress scheme fund to supplement existing services and to fill service gaps.<sup>364</sup> This fund would ensure that survivors' needs for counselling and psychological care are met.

As discussed in the Consultation Paper, the Forde Foundation is an example of a charitable trust fund.<sup>365</sup> It was established by the Queensland Government some years in advance of the Queensland redress scheme. The Forde Foundation provides financial support to persons who were, as children, in institutional care in Queensland. It gives financial support for services including medical and dental services, education and personal development. It also provides funding to Lotus Place and other non-government organisations that deliver community-based support services for survivors, including counselling. Of course, a trust fund established for counselling and psychological care in redress would have much narrower purposes than the Forde Foundation because it would not extend to cover the other services that the Forde Foundation supports.

As discussed above, we are satisfied that a redress scheme should not seek to operate its own counselling service, as this would not facilitate survivor choice.

We are satisfied that, even with our recommended changes to Medicare, additional funding will still be required to ensure that survivors' needs for counselling and psychological care are met.

In its submission in response to the Consultation Paper, the Australian

Government stated in relation to counselling and psychological care:

It may be that awareness of existing services, or survivors' confidence in those services, can be improved. The Commonwealth welcomes the views of the Royal Commission on whether lack of awareness or confidence present a barrier to full utilisation of existing services and, if so, how that might best be addressed.<sup>366</sup>

We accept that some survivors may not be making full use of existing counselling and psychological care services, particularly those funded through Medicare, because they are unaware that the services are available or because, as discussed above, they are unable or unwilling to obtain the required GP diagnosis and referral.

We consider that funding for counselling and psychological care through redress could be used to improve survivors' access to Medicare. This could involve the following actions:

- funding case management style support to help survivors to understand what is available through the Better Access initiative and ATAPS and why a GP diagnosis and referral is needed
- maintaining a list of GPs who have mental health training, are familiar with the existence of the redress scheme and are willing to be recommended to survivors as providers of GP services, including referrals, for counselling and psychological care

- supporting the establishment and use of the public register, as we recommend above, that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors and who are registered practitioners for Medicare purposes.

We note the advice of the Royal Australian College of General Practitioners, which has told us that recommending particular GPs has the potential to disrupt existing GP-patient relationships. We agree that survivors who are able and willing to obtain the required GP diagnosis and referral from a GP with whom they have an existing GP-patient relationship should do so. However, we are concerned to improve access to services for survivors who are unable or unwilling to do so, including those survivors who do not have an existing relationship with any GP. These survivors are at risk of not receiving the counselling and psychological care they need because of difficulties they experience in obtaining the required GP diagnosis and referral.

Survivors who need assistance in obtaining the required GP diagnosis and referral could be given the details of any nearby GPs who have completed the training required to obtain access to the specific mental health care Medical Benefits Scheme items under the Better Access initiative, who are familiar with the existence of the redress scheme and who are willing to be recommended to survivors as providers of GP services in relation to counselling and psychological care.

Funding through redress could also be used to pay for any reasonable gap fees that practitioners charge if survivors are unable to afford these fees.

Funding through redress could also be made available to supplement existing services by exploring with state-funded specialist services whether funding could be provided to increase the availability of services and reduce waiting times for survivors. This might be most effective where there are particularly well-regarded specialist services that are well located for a number of survivors who require counselling and psychological care. We note that state and territory governments that made submissions in response to the Consultation Paper did not express any objection to this suggestion.

Funding through redress could be used to address gaps in expertise and geographical and cultural gaps by:

- supporting the establishment and use of the public register, as we recommend above, that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors
- providing funding for training in cultural awareness for practitioners who have the capabilities to work with survivors but have not had the necessary training or experience in working with Aboriginal and Torres Strait Islander survivors
- providing funding for rural and remote practitioners, or Aboriginal and Torres Strait Islander practitioners, to obtain appropriate capabilities to work with survivors
- providing funding to facilitate regional and remote visits to assist in establishing therapeutic relationships. These could then be maintained largely by online or telephone counselling. There could



be the potential to fund additional visits if required from time to time.

As an essential last resort, funding through redress should also fund counselling and psychological care for survivors whose needs for counselling and psychological care cannot otherwise be met.

In the Consultation Paper, we discussed this option of providing funding for counselling and psychological care through redress by way of a trust fund.<sup>367</sup> We remain of the view that a trust fund is the best structure through which to hold and apply these funds.

While the redress scheme itself might be required for only so long as it continues to receive applications, funding for counselling and psychological care must be available for the remainder of eligible survivors' lives. The fund must therefore have the capacity to continue even if the redress scheme ends. It is also necessary that the funding be quarantined from the more immediate needs of the redress scheme to make monetary payments and to fund its administration.

While we appreciate that this approach would involve the administrative burden and additional costs of establishing a trust fund alongside a redress scheme, it is most likely to provide access to counselling and psychological care in a way that is consistent with the principles identified above in section 6.3. A trust fund would also provide transparency and accountability for the institutions that contribute funding and for the survivors whose counselling and psychological care needs are to be supported from the fund.

A trust fund would need to be funded by institutions – both government and non-government. Institutions should be required to pay an actuarially-determined estimate of the cost of future counselling and psychological care services to the trust. Rather than having to assess the likely needs of each individual, the actuarial assessment would determine a 'per head' estimate of future costs.

We appreciate that this arrangement would leave the risk of underfunding initially with the trust fund, then with contributing institutions and ultimately with survivors if there were insufficient funds to meet survivors' needs for counselling and psychological care. Any risk of overfunding would lie with the institutions. This risk can be mitigated by frequent adjustments to the actuarial modelling, at least initially, as the scheme collects information on usage and cost patterns.

In the Consultation Paper, we discussed the potential risk that funding of counselling and psychological care through redress might undermine existing services.<sup>368</sup>

In particular, we noted the Australian Government and the state and territory governments provide much of the funding for existing services and they may also be significant funders of any redress scheme. We noted it would be counterproductive to the quality and choice of counselling and psychological care available to survivors to put pressure on governments to redirect funding from existing services into a stand-alone trust fund. However, we also recognised that a scheme for counselling and psychological care might not be adequately funded if it had to rely mainly or exclusively on the contributions of non-government institutions.



In their submissions in response to the Consultation Paper the Australian Government and some state and territory governments discussed the existing services they provide or fund.

The New South Wales Government stated that, while it intends that any New South Wales survivor should already be able to access counselling through its Victims Support Scheme, it supports further consideration being given to expanding existing services through Medicare or a stand-alone Australian Government scheme and seeking financial contributions towards counselling from the institutions where the abuse occurred.<sup>369</sup> It also submitted that consideration could be given to providing a package of practical supports alongside monetary payments, including counselling and 'practical assistance with employment, housing, literacy, family reunions, drug and alcohol treatment, funeral expenses and dental and medical needs'. However, it submitted that this would inevitably affect the amount available to fund monetary payments.<sup>370</sup>

The Tasmanian Government described its Abuse in State Care Support Service, which provides up to \$2,500 per survivor for goods and services to assist with education, employment, counselling, family connection and medical and dental services. The

Tasmanian Government stated that it will consider the appropriate means of extending those types of services to survivors of institutional child sexual abuse.<sup>371</sup>

The Northern Territory Government stated that it supports the expansion of the public provision of counselling and psychological care for survivors but noted the difficulties with regional and remote area service delivery.<sup>372</sup>

Governments that made submissions in response to the Consultation Paper or at the public hearing did not express any concern that contributions to a trust fund would require them to divert resources from existing services that they fund.

We are satisfied both governments and non-government institutions should provide funding for counselling and psychological care through redress.

The recommendation below addresses the measures that might help to meet survivors' needs for counselling and psychological care through redress. We discuss and make recommendations about the implementation of the trust fund for counselling and psychological care in Chapter 10.

## Recommendation

14. The funding obtained through redress to ensure that survivors' needs for counselling and psychological care are met should be used to fund measures that help to meet those needs, including:
- a. measures to improve survivors' access to Medicare by:
    - i. funding case management style support to help survivors to understand what is available through the Better Access initiative and Access to Allied Psychological Services and why a GP diagnosis and referral is needed
    - ii. maintaining a list of GPs who have mental health training, are familiar with the existence of the redress scheme and are willing to be recommended to survivors as providers of GP services, including referrals, in relation to counselling and psychological care
    - iii. supporting the establishment and use of the public register that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors and who are registered practitioners for Medicare purposes
  - b. providing funding to supplement existing services provided by state-funded specialist services to increase the availability of services and reduce waiting times for survivors
  - c. measures to address gaps in expertise and geographical and cultural gaps by:
    - i. supporting the establishment and promotion of the public register that provides details of practitioners who have been identified as having appropriate capabilities to treat survivors
    - ii. funding training in cultural awareness for practitioners who have the capabilities to work with survivors but have not had the necessary training or experience in working with Aboriginal and Torres Strait Islander survivors
    - iii. funding rural and remote practitioners, or Aboriginal and Torres Strait Islander practitioners, to obtain appropriate capabilities to work with survivors
    - iv. providing funding to facilitate regional and remote visits to assist in establishing therapeutic relationships; these could then be maintained largely by online or telephone counselling. There could be the potential to fund additional visits if required from time to time
  - d. providing funding for counselling and psychological care for survivors whose needs for counselling and psychological care cannot otherwise be met, including by paying reasonable gap fees charged by practitioners if survivors are unable to afford these fees.

# 7 Monetary payments

## 7.1 Introduction

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A monetary payment is a tangible means of recognising a wrong that a person has suffered.

Civil justice for personal injury caused by another person's negligent act is usually achieved in Australia by an award of an amount of money by way of damages obtained through successful civil litigation. Damages are intended to compensate the successful claimant for loss or injury by placing the claimant, as nearly as possible, in the position that he or she would have been in had the breach of duty not occurred. However, common law damages require the claimant to prove the existence of a duty of care, breach of the duty, causation of the injury or loss and the extent of injury or loss.

Redress payments are typically characterised as 'ex gratia' payments – that is, payments made regardless of whether there is a legal liability to make a payment. Ex gratia payments can be offered under particular criteria or schemes, such as existing or previous redress schemes. They are typically not intended to be fully compensatory and they are often not based on any detailed assessment of a claimant's individual injury, loss or needs.

Many survivors have told us that they do not consider the amount of monetary payments made under past or current redress schemes to be adequate. However, a number of survivors have told us how they benefited from receiving payments, not just for the money itself but also for its meaning to them. For example, in the Royal Commission's *Interim report*, we reported on Sharon's experience as follows:

In 2010, Sharon received \$55,000 from the Tasmanian State Government Redress Scheme. She said the payment meant a great deal to her. 'They believed me, and I'd never been believed before. That was the first time.'<sup>373</sup>

We are satisfied that a redress scheme for survivors should include a monetary payment.

In the Consultation Paper, we particularly sought submissions on:

- the purpose of monetary payments
- the assessment of monetary payments, including possible tables or matrices, factors and values
- the average and maximum monetary payments that should be available through redress
- whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme
- the treatment of past monetary payments under a new redress scheme.<sup>374</sup>

Due to rounding, numbers presented in this chapter may not add up precisely to the totals provided.

## 7.2 Purpose of monetary payments

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### Position in the Consultation Paper

In the Consultation Paper, we discussed the issues that arise in considering the purpose of a monetary payment under redress.<sup>375</sup> We also provided some examples of the stated purposes of various existing and former redress schemes.<sup>376</sup> A number of submissions in response to the Consultation Paper and some of those who spoke at the public hearing discussed the purpose of monetary payments.

As discussed in the Consultation Paper, if a survivor wishes to obtain a monetary payment that is as fully compensatory for their loss as possible, civil litigation is the appropriate avenue for them to consider pursuing.<sup>377</sup> As a society, we do not compel a defendant to compensate a claimant unless the defendant's legal liability for the claimant's injury or loss has been proved to the standard required in civil litigation.

A redress scheme is more suited to providing ex gratia monetary payments. These do not require proof of legal liability and they do not require that all interested parties participate in legal proceedings. Also, claimants do not have to prove any element of a claim, including causation or the extent of a claimant's injury or loss, to the standard required in civil litigation. The trade-off is usually that only a much lower, often capped, amount of money is available as an ex gratia payment.

However, the purpose or meaning of ex gratia payments is not always easy to

identify. They may involve a sense of moral responsibility or an element of being in some way indirectly responsible (but not legally liable) for a detriment that has been suffered. In circumstances where a serious allegation is made against a third party (for example, where an allegation of child sexual abuse is made to the institution against the alleged perpetrator), the third party making the payment (the institution) may not be able or willing to acknowledge the truth of the allegation or any responsibility.

Identifying and clearly stating the purpose of ex gratia payments in a redress scheme is important in:

- helping claimants, institutions and other participants to understand the purpose of the scheme
- informing choices about the processes that should be adopted for the scheme, including the level of verification required for claims and whether alleged perpetrators or institutions should be given any opportunity to participate
- adopting guidelines or scales for quantifying monetary payments under the scheme
- helping claimants to understand what any payment they are offered is meant to represent
- helping claimants to assess whether or not they should accept any payment they are offered and helping them to assess any conditions imposed on accepting the offer (for example, any requirement to give a deed of release).

The purpose or meaning of ex gratia payments, and their quantification, may

also have implications for claimants who receive social security or veterans' pensions or other payments. Generally, payments for past or future economic loss will affect social security and veterans' payments, while payments more in the nature of recognition of pain and suffering may not. Rulings can be sought from the Commonwealth in advance to determine how payments under a scheme will be treated, but the purpose and quantification of the payments to be offered may be important in seeking these rulings.

## Discussion

A number of submissions in response to the Consultation Paper agreed that monetary payments under redress are not intended to be fully compensatory and that this needs to be clear in the redress scheme.

For example, in its submission in response to the Consultation Paper, the Child Migrants Trust stated:

To avoid unrealistic expectations, it is vital the national redress scheme fully explains the differences between civil litigation and redress processes; particularly the levels of payment awarded and differing burdens of proof required.<sup>378</sup>

Mr Pocock, representing Berry Street, told the public hearing:

Our view is even at the upper end of payments outlined in the discussion paper, those payments, even at the upper end do not constitute compensation. We need, in our view, to stop thinking about those payments as compensation,

because real compensation for having suffered the sexual abuse that Commissioners would have heard about through private sessions is not an average payment of \$65,000 or \$85,000 – that's not compensation. The payments in the redress scheme, in our view, are payments that should be there to acknowledge the harm that has been caused and provide some measurable expression from institutions that they do truly regret what has happened.<sup>379</sup>

In its submission in response to the Consultation Paper, The Salvation Army Australia stated:

The purpose of monetary payments may be varied. In The Salvation Army Eastern Territory's scheme, the purpose of monetary payments is a recognition of past abuse and the payment is made by way of an ex-gratia sum. In this respect the ex-gratia payments made by the Eastern Territory do not represent monetary payments in the form of compensation by placing the survivor back in the position he or she would have been in had the abuse not occurred.<sup>380</sup>

In its submission in response to the Consultation Paper, the Northern Territory Government submitted that monetary payments under redress should not be calculated in the same way as common law damages because this would place an unrealistic burden on a scheme designed to assess a large number of claims and would make the scheme unaffordable.<sup>381</sup>

We are satisfied that monetary payments under redress should not attempt to be fully compensatory or to replicate common law damages. The common law has extensive rules and requirements around evidence and proof of each element of a common law claim. The purpose of a redress scheme is to provide an alternative to common law. Compensation at common law is unlimited and large damages awards can be made; it would not be fair to provide for such large payments in the form of monetary payments under redress without requiring a claimant to comply with common law requirements for proving their claim. Equally, a redress scheme would offer no real alternative to common law if it simply replicated common law requirements.

At our private roundtables, a number of survivor advocacy and support groups told us of the sorts of things that survivors might wish to use their redress payments for. Some survivors may need to pay off debts or pay medical expenses; some may need to secure more stable housing; and some would like to provide assistance to their families, who they feel have also been substantially affected by their abuse. We have been told that survivors seek a payment in an amount that will positively impact on the quality of life of survivors, many of whom have struggled to cope with adverse physical and mental health conditions as a consequence of their abuse.<sup>382</sup> A 'token' amount would not provide any sense of justice to many survivors.

In their submissions in response to the Consultation Paper, a number of survivor advocacy and support groups confirmed that monetary payments might help to meet survivors' needs.

For example, the Alliance for Forgotten Australians (AFA) submitted that one of the purposes of monetary payments should be the 'provision of resources to overcome survivors' missed opportunities' and stated:

AFA believes that a key rationale for a monetary payment is the very practical reality that Forgotten Australians have missed opportunities in life as a result of the abuse they experienced in 'care' and so some financial payment is appropriate to enable them to build a fulfilling life (similar to the rationale for monetary payments in Redress WA).<sup>383</sup>

The Northern Territory Stolen Generations Aboriginal Corporation submitted that 'Monetary Compensation will assist in rebuilding lives'.<sup>384</sup>

In its submission in response to the Consultation Paper, the Child Migrants Trust stated:

Ex gratia payments [must be] at a level that is meaningful to recipients in acknowledging the severity and lifelong impact of historical institutional sexual abuse ... It is significant that the redress scheme would become available when most former child migrants have limited incomes in the latter stages of their lives.<sup>385</sup>

In its submission in response to the Consultation Paper, Angela Sdrinis Legal stated:

It is also important that victims get a cash payment where possible. Many

victims of abuse have been forced to survive on low incomes or on pensions. A lump sum can allow them, sometimes for the first time, to put money aside for a rainy day or to buy things that they have never been able to previously afford.<sup>386</sup>

Many survivors and survivor advocacy and support groups have told us that the amount of monetary payments should be meaningful, in the sense that they provide a means to make a tangible difference in survivors' lives.

For example, in its submission in response to the Consultation Paper, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) stated:

NATSILS agrees that monetary payment is an appropriate form of redress as a tangible means of recognising the wrong survivors have suffered. However, NATSILS does not have a firm view on what level the maximum payment should be set at. What is important is that monetary payments are 'meaningful' for survivors and capable of making a 'tangible difference in their lives'.<sup>387</sup>

In responding to a question about the purpose of monetary payments, Ms Hudson, representing the CREATE Foundation, told the public hearing:

We have found through our research that young people exiting care have had very poor educational outcomes for some young people. Some people – actually, a high percentage of people – have been

in homelessness and have experienced a reliance upon welfare. An investment in their life to help them assist to transition to a better life, to access good educational outcomes or employment outcomes, would be a wonderful use for this money, but also to address their additional psychological harms that have happened as a result of the abuse in care.<sup>388</sup>

We also received online comments from a number of survivors during the public hearing about what a monetary payment might mean to them. For example, one survivor told us:

Many say it is not about the money, at my age it's all about the money, money that had I had an education I would be better off than living on a pension.

Some submissions stated that one of the purposes of monetary payments under redress should be for the institution to take responsibility for the harm caused and change its practices in the future.

In its submission in response to the Consultation Paper, AFA submitted:

AFA believes that it is not possible to pay enough to compensate someone for the lifelong suffering inflicted by childhood abuse in an institution. Any payment will be a token for the survivor. However, it can and must be set at a level which has a real impact on the institution which is paying the compensation.



... AFA strongly recommends that the Royal Commission ensure that its recommendations on the amount of monetary payments to survivors will have sufficient financial impact on the institutions to act as a powerful incentive to improve their practices to minimise the risk of future abuse of children in their care.<sup>389</sup>

AFA further submitted that a purpose of monetary payments should be to provide 'a financial incentive to the institutions to prevent future abuse of children in their care' and stated:

AFA believes that the Report misses another important purpose for monetary payments as part of a redress scheme – we believe that monetary payments must also serve the purpose of providing sufficient financial burden on the institution to act as in [sic – an] incentive [to] work vigorously to improve their future performance to minimise the risk of further abuse of children in their care.<sup>390</sup>

We consider that the risk of further abuse will be better minimised through other work of the Royal Commission, including the reforms we recommend to civil litigation in Chapter 15 and our ongoing work on prevention, regulation, oversight and criminal justice reforms.

While some institutions may feel a financial burden as a result of the monetary payments we recommend, the extent of the burden is likely to depend upon the financial resources of the institution and the number of claims

it responds to. We do not consider that the size of monetary payments should be varied depending on the institutions' assets, because this would prevent the scheme from providing equal access and equal treatment for survivors. We also recognise that, in some cases, funding for redress, including monetary payments, will come from a party other than the institution in which the abuse occurred, particularly if that institution no longer exists or has insufficient assets to make redress payments.

In their submissions in response to the Consultation Paper, many survivor advocacy and support groups indicated that monetary payments can provide acknowledgment and recognition of the abuse. For example, Care Leavers Australia Network (CLAN) stated that the aim of a redress scheme in providing monetary payments is to 'provide recognition and acknowledgement of what they [survivors] have been through'.<sup>391</sup>

Some institutions expressed their views on the purpose of monetary payments in similar terms. For example, in its submission in response to the Consultation Paper, Scouts Australia stated:

Any amount [of monetary payment] will to some extent be arbitrary and should not be seen as compensation but as practical recognition of the suffering as a consequence of criminal activity.<sup>392</sup>

We are satisfied that terms such as 'recognition' and 'acknowledgement' are likely to best express the purpose of monetary payments. How useful or adequate monetary payments might be to meet survivors' needs will depend on the



size of the payment, the needs of the particular survivor and the way in which the survivor chooses to use their payment.

In the Consultation Paper, we suggested that the purpose of a monetary payment should have some connection with the amount of the monetary payment.<sup>393</sup> For example, a smaller payment might more readily be accepted as an ‘acknowledgement’, while a larger amount might be expected as a ‘tangible recognition of the seriousness of the hurt and injury’ suffered.

The average and maximum amounts of the monetary payments we recommend below are higher than in previous or current government redress schemes in Australia. We also understand them to be generally consistent with or higher than redress payments that non-government institutions currently make.

Given the amounts of the monetary payments we recommend below, we are satisfied that the purpose of monetary payments for the redress scheme we recommend is properly described as being to provide a tangible recognition of the seriousness of the hurt and injury that a survivor has suffered.

#### **Recommendation**

15. The purpose of a monetary payment under redress should be to provide a tangible recognition of the seriousness of the hurt and injury suffered by a survivor.

## 7.3 Monetary payments under other schemes

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### Introduction

As stated in the Consultation Paper, we recognise that the monetary payments we recommend will be assessed or understood in the context of what has gone before.<sup>394</sup>

In the Consultation Paper we set out information about the calculation and amount of monetary payments provided under the following:

- previous and current state government redress schemes
- some non-government institution schemes
- statutory victims of crime compensation schemes
- the Irish Residential Institutions Redress Scheme
- the claims data.<sup>395</sup>

This detailed information is now in Appendix N to this report. It has been updated where relevant. A summary of the information is set out below.

## State government schemes

The three former state government redress schemes in Tasmania, Queensland and Western Australia offered support services as well as monetary payments. However, the focus was on monetary payments. The South Australian Government currently provides a redress scheme through its statutory victims of crime compensation scheme.

Table 13 provides an overview of the former redress schemes and the current South Australian government redress scheme. The South Australian data are current as at 31 December 2014.

**Table 13: Australian state government redress schemes**

State	Minimum payment (\$)	Maximum payment (\$)	Average payment (\$)	Total number of payments	Amount spent on redress payments (\$)
Tasmania	5,000	60,000	30,000	1,848	55 million
Queensland	7,000	40,000	13,000	7,168	96 million
Western Australia	5,000	45,000	23,000	5,302	120 million
South Australia	None	50,000	14,100	85	1,198,500

## Non-government institution schemes

A number of non-government institutions have established redress schemes or processes. Three well-known schemes that have been considered in case studies to date are the Catholic Church's Towards Healing and Melbourne Response and The Salvation Army redress procedures.

Table 14 provides an overview of these non-government institution schemes. The data for Towards Healing and the Melbourne Response are current as at 30 June 2014. The data for The Salvation Army redress procedures are current as at December 2014.

**Table 14: Claims and payments made under Towards Healing, Melbourne Response and The Salvation Army redress procedures**

Claims		Towards Healing	Melbourne Response	Salvation Army procedures
Period	1995–1999	14	59	13
	2000–2004	205	65	23
	2005–2009	338	49	287
	2010–2014	314	24	182
	Unknown	10	113	1
Total number		881	310	506
Total payment		\$42.5 million	\$12.0 million	\$25.8 million
Average payment		\$48,300	\$38,800	\$51,000

## Statutory victims of crime compensation schemes

All states and territories have established statutory schemes that allow victims of crime to apply for and receive a monetary payment, as well as counselling and other services, from a dedicated pool of funds. A victim of institutionalised child sexual abuse may apply for redress under these schemes if they meet the eligibility requirements.

Some schemes, such as those in New South Wales, Victoria, Queensland and the Australian Capital Territory, focus on providing services and financial reimbursement to assist in covering expenses. The lump-sum monetary payment available is lower and could be thought of as a symbolic gesture, acknowledging that the claimant has been the victim of a violent crime.<sup>396</sup>

Other schemes, such as those in Western Australia, South Australia, Tasmania and the Northern Territory, focus primarily on lump-sum monetary payments. The lump-sum amount is intended to compensate for pain and suffering, loss of enjoyment of life, loss of income, and treatment expenses. In the Northern Territory, a schedule of compensable injuries is used to determine the amount of compensation.<sup>397</sup>

The current state and territory maximum lump-sum payments are shown in Table 15.

**Table 15: Maximum lump-sum payments under state and territory victims of crime compensation schemes**

State / territory	Maximum lump sum payment to primary victim
New South Wales <sup>398</sup>	\$15,000
Victoria	\$60,000
Queensland	\$75,000
South Australia	\$50,000
Western Australia	\$75,000
Tasmania	\$50,000
Australian Capital Territory	\$50,000
Northern Territory	\$40,000

South Australia is considering increasing its maximum payments from \$50,000 to \$100,000,<sup>399</sup> although at the date of the public hearing on redress and civil litigation a decision had not been made on the increase or whether it would apply to the redress scheme that South Australia operates through its statutory victims of crime compensation scheme.<sup>400</sup>

## Irish Residential Institutions Redress Scheme

A number of submissions to issues papers suggested that the Irish Residential Institutions Redress Scheme might be a good redress model to consider. Some submissions to the Consultation Paper also referred to the Irish scheme in favourable terms. For example, Bravehearts discussed the Irish scheme in some detail in its submission in response to the Consultation Paper.<sup>401</sup>

As at 17 December 2014, some 15,547 payments had been made under the Irish Residential Redress Scheme.<sup>402</sup> Around 85 per cent of claimants were awarded amounts below €100,000 (around \$140,000 in Australian dollars based on January 2015 exchange rates). Almost half of claims (48.3 per cent) were assessed as being redress band II, meaning their weighting was scored at between 25 and 39 out of a possible 100 and they were awarded between €50,000 and €100,000 (between \$70,000 and \$140,000 in Australian dollars based on January 2015 exchange rates).

The average value of awards up until 17 December 2014 was €62,237 (\$88,000) and the largest award was €300,500 (\$423,000).

**Table 16: Payments under the Irish Residential Institutions Redress Scheme, 2003 to 2014<sup>403</sup>**

Redress band level	Range of payment	Number receiving payments in this range	Proportion of all recipients (%)
I	Up to €50,000	5,643	36.3
II	€50,000–€100,000	7,507	48.3
III	€100,000–€150,000	2,069	13.3
IV	€150,000–€200,000	280	1.8
V	€200,000–€300,000	48	0.3
<b>TOTAL</b>		<b>15,547</b>	<b>100.0</b>

## Monetary payments in the claims data

As discussed in Chapter 3, the Royal Commission obtained data from all states and territories, the Australian Government, Catholic Church Insurance (CCI), the Eastern and Southern Territories of The Salvation Army and a number of insurers about claims of institutionalised child sexual abuse resolved in the period from 1 January 1995 to 31 December 2014.

These data include a mix of payments made in claims that were:

- pursued through civil litigation
- made under non-government institution redress schemes
- otherwise directly made to the relevant government (but not through a government redress scheme) or institution.

The data include 2,896 claims which have a reported year of resolution for the period from 1 January 1995 to 31 December 2014. They provide a useful picture of monetary payments made in response to claims from all sources by governments and institutions that could reasonably be expected to have received the most claims.

These data revealed that the average payment over that period was \$82,220 in 2014 dollars. That figure is derived by dividing the total number of payments by the total amount paid. However, this average is skewed by a small number of very large payments. The median payment – that is, the middle point for which 50 per cent of payments were higher and 50 per cent were lower – was \$45,297.

**Table 17: Range of all payments made between 1995 and 2014 (adjusted to 2014 dollars)**

Percentage of claims	Payment
20% of payments were below	\$19,961
40% of payments were below	\$37,331
50% of payments were below	\$45,297 (median)
60% of payments were below	\$55,637
80% of payments were below	\$107,315
90% of payments were below	\$178,038

In Table 17, the bands of 20, 40, 50, 60, 80 and 90 per cent are a way of understanding the range of payments made. For the 20 per cent band, 20 per cent of the payments lie below this compensation amount (in real 2014 dollars) and 80 per cent lie above it. Ninety per cent of all compensation payments were at or under \$178,038 (in real 2014 dollars), but the top 10 per cent of payments ranged from \$178,038 to \$4,069,897 (in real 2014 dollars).

We have reviewed the details of some of the claims that resulted in payments in the top 10 per cent of claims – that is, amounts over \$178,038 (in real 2014 dollars). Generally, these claims involved significant injuries, arising in circumstances where there appear to have been reasonable bases to argue that the institution owed a duty of care and had breached it.

These large amounts, even if reached by agreement, are more likely to represent what a court might award as common law damages.

## 7.4 Assessment of monetary payments

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### Position in the Consultation Paper

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on approaches to assessment of monetary payments. There was strong support for a table or matrix that took account of the severity of the abuse and the impact of abuse. There was also recognition that there may be other aggravating factors that should be considered.

A number of survivor advocacy and support groups recognised that many survivors have competing concerns: on the one hand, they tell us survivors do not want to feel like they are being judged against each other in a ‘meat market’ of injuries; on the other hand, they tell us survivors want the range and severity of experiences of abuse to be recognised. Some survivor advocacy and support groups acknowledged that these competing concerns cannot be resolved. They favoured a table or matrix that would provide a transparent assessment process that survivors could understand.

In the Consultation Paper, we stated that we then had no fixed view on what form a table or matrix should take.<sup>404</sup> For the purposes of the Consultation Paper, we put forward the table or matrix shown in Table 18 for comment.<sup>405</sup>

**Table 18: Possible table/matrix for assessing severity of abuse, severity of impact and distinctive institutional factors**

Factor	Value
Severity of abuse	1–40
Impact of abuse	1–40
Distinctive institutional factors	1–20

A number would be determined for each of the above factors (that is, the greater the severity of abuse, the higher the number in the range of 1 to 40). A total number for the three factors would be added to determine the payment level.

As discussed in the Consultation Paper, the consequences for people who are abused may not be proportionate to the severity of their abuse.<sup>406</sup> For some survivors, what may be considered to be a relatively modest level of abuse may have severe or even catastrophic consequences. The appropriate response through a monetary payment under redress must be determined having regard to both the severity and the consequences of abuse for the individual.

In the Consultation Paper we discussed each of the factors in more detail and invited submissions on the assessment of monetary payments, including possible tables or matrices, factors and values.

## Discussion

### Use of a matrix or table

Many submissions in response to the Consultation Paper, including submissions from survivor advocacy and support groups and institutions, supported an assessment mechanism that is transparent, consistent and fair.

For example, in its submission in response to the Consultation Paper, Kimberley Community Legal Services stated:

We submit clear and transparent guidelines to assess monetary payments are necessary for any future redress scheme. These guidelines will help accord survivors their human rights and provide credibility to the totality of the reparations package offered to survivors of childhood abuse.

In this respect we note the matrix on page 147 of the Consultation Paper aligns with such principles. Guidelines are likely to provide a transparent set of principles against which claims may be properly prepared and subsequently assessed, however some discretion will also be required to avoid some situations resulting in injustice.<sup>407</sup>

In its submission, Tuart Place proposed a model that included:

Transparent assessment mechanisms are informed by a matrix of factors and linked to a standardised schedule of monetary payments. The same matrix and schedule is available to complainants/applicants and is provided across all institutions responding to abuse complaints.<sup>408</sup>

In his submission, Mr O'Connell, Commissioner for Victims' Rights in South Australia, stated:

Maims tables, matrices, point scales are intended to assist both the applicant and the assessor. They should help the applicant identify an approximate sum with his or her 'personal' or other injury (harm or hurt), so manage expectations, and to comprehend the basis for any offer. They should also guide decision-making and mitigate the adverse [sic] of assessor bias (such as stereotyping), misunderstanding or misconceptions, and serve as a yard-stick to hold decision-makers to account on review of their

decisions. It is also important that processes, including decision-making, are visible (transparent) to those affected, primarily victims ...

No assessment tool is perfect – each has been tried in Australia under state-funded compensation and other schemes. It is important that clarity is provided to the victim–applicant, and in particular that redress is clearly distinguished from civil litigation/civil damages. Victims' expectations need to be managed, otherwise there is risk that they will feel they have been betrayed yet again by an 'institution'.<sup>409</sup>

In its submission, the Truth, Justice and Healing Council stated:

The Council supports a capped scheme that has a table or matrix that takes account of the severity of the abuse and the impact of the abuse. A capped scheme with such a table or matrix is an important way of ensuring that all claimants are subject to consistent entitlements and that the same set of considerations are taken into account in the making of determinations.<sup>410</sup>

A number of submissions in response to the Consultation Paper also suggested that some degree of individual flexibility is required.

For example, in its submission in response to the Consultation Paper, Bravehearts stated:

It is [sic – our] position that whichever assessment approach is



adopted, it is essential that there be flexibility for consideration of exceptional or individual needs or circumstances.<sup>411</sup>

In its submission, Micah Projects stated:

we believe that any redress scheme should ... respond to the needs of survivors and be flexible enough to deliver justice as negotiated by individual claimants.<sup>412</sup>

Micah Projects also listed the following as a 'negative element' of redress schemes:

Monetary payments are often set amounts that have been pre-determined by the government rather than properly assessed in consideration of the individual circumstances of the survivor.<sup>413</sup>

In its submission in response to the Consultation Paper, CLAN stated:

Whilst we are well aware that some sort of assessment process like a table or matrix will need to be utilised, CLAN urges those creating it to understand the need to be able to individually assess people also. The aim of a Redress Scheme is not to de-individualise Care Leavers by scoring their applications in a mechanical manner, it is to provide recognition and acknowledgement of what they have been through. Therefore while we give qualified support to the introduction of a basic assessment process involving a table or matrix scoring system, we also endorse the view that whatever

system is adopted needs to be open to individual assessment within these levels of scoring and be transparent.<sup>414</sup>

In its submission, The Salvation Army Australia supported the matrix, including severity of abuse, severity of impact and distinctive institutional factors. It stated:

The Salvation Army Australia Eastern Territory's experience also suggests that the matrix should not be used as a blunt instrument and there must be a discretion to take into account unique or special features of any claim that arise.<sup>415</sup>

In its submission, Kimberley Community Legal Services stated:

For former residents of missions and government run dormitories and the Stolen Generations, trauma from abuse is often felt not only by the individuals who directly experienced the abuse, but by whole communities. Consequently, payments based only on a fixed scale may not reflect the expectations of individual claimants or the aspects of shared experiences. We acknowledge flexibility is less desirable in this part of a redress scheme, however the tension we see may largely be resolved by a higher baseline payment, higher maximum payments and raising average amounts. The provision of general discretionary powers under a redress scheme would also temper perverse outcomes from a more rigid approach.<sup>416</sup>

In its submission, Slater and Gordon Lawyers stated:

We consider that the matrix approach identified by the Commission represents a reasonable and fair way of ensuring a transparent monetary payment, which takes account of a survivors' [sic] experience. We agree with the factors identified by the Commission as to severity of abuse and severity of impact.

... There is a balance to be struck between flexibility and transparency. We respectfully suggest that care should be taken to avoid an inflexible 'table of maims' approach – of the kind which have historically operated in some workers' compensation schemes – to assessing severity of abuse or impact.<sup>417</sup> [References omitted.]

There is a tension between the need for fairness, equality and transparency for survivors – and, indeed, for institutions – and an individualised approach to assessment. We are satisfied that fairness, equality and transparency should be favoured and that a matrix should be used to determine ranges of monetary payments. There is capacity to recognise individual experiences in each of the factors under the matrix, particularly in severity of impact. Those who wish to seek a detailed and individualised assessment of their experiences and the damage they have suffered would need to seek common law damages.

## Severity of abuse

As discussed in the Consultation Paper, while the seriousness of every kind of child sexual abuse must be acknowledged, it has long been recognised that certain abusive acts can be more severe to the child and can increase the likelihood of adverse outcomes in life.<sup>418</sup>

A review of empirical studies published in 1993 found that the following characteristics of the abuse experience are likely to lead to a greater number of adverse psychosocial symptoms for survivors:

- penetrative abuse (oral, anal or vaginal penetration)
- use of force
- high frequency of sexual contact
- long duration
- having a close relationship with the perpetrator(s).<sup>419</sup>

Other intervening variables, such as the number of perpetrators, the time that elapses between the end of the abuse and assessment of the abuse and the survivor's age during the time of abuse and assessment, may also lead to a higher number of adverse symptoms in adulthood. However, the review indicated that there are still too few studies to make a clear finding.<sup>420</sup>

A study published in 2009 suggests that the following factors should be considered in measuring the severity of the abuse:

- age of victim at the time of first sexual assault
- intensity of the abuse (for example, penetrative or non-penetrative)

- duration of the abuse (for example, were there multiple occurrences over a long period of time)
- the existence of multiple perpetrators
- use of physical force or coercion.<sup>421</sup>

Most redress schemes that have used tables or matrices have provided for an assessment of the relative severity of the abuse.

Many written submissions in response to the Consultation Paper and a number of those who spoke during the public hearing supported the inclusion of an assessment of the severity of the abuse in assessing monetary payments.

### Severity of impact of abuse

As discussed in the Consultation Paper,<sup>422</sup> research has also found a connection between child sexual abuse and a wide variety of impacts in adulthood that may affect the survivor's psychological and social functioning, physical health and interpersonal relationships.<sup>423</sup> However, the impact of abuse on survivors varies greatly between survivors. For example, aside from the severity of the abuse experience, the lack of support at the time of disclosure and the survivor's personal outlook in life and coping style may also increase the survivor's psychosocial symptoms.<sup>424</sup>

Research has found that, although the impact of abuse varies widely in both degree and composition:

disruptions generally fall into three main areas:

- intrapersonal problems such as compromised sense of self-worth, deep feelings of guilt and responsibility for the assault;
- relational impairments including impaired relationships, trust and intimacy difficulties;
- and disturbances in affect, such as depression, anxiety, anger and post-traumatic stress.<sup>425</sup> [References omitted.]

In the Consultation Paper, we stated that the 'impact of abuse' element of assessment would be intended to measure the relative severity of the disruptions that child sexual abuse has caused to the survivor's life.<sup>426</sup>

We also recognised that, for any children or young adults who are being assessed through a redress scheme, this assessment of the impact of the abuse might have to be predictive of the likely impact rather than the actual impact from a position of hindsight. This is comparable to elements of damages assessments that are routinely undertaken in civil litigation and could be accommodated within a redress scheme.

In the Consultation Paper, we noted that some survivors had told us that focusing on severity of impact punishes those who have done well in their lives in spite of their abuse.<sup>427</sup> However, we stated that this element of the assessment is intended to reflect a survivor's greater need for assistance because of how disruptive the abuse has been on the remainder of their life up to the time of assessment.

A number of submissions in response to the Consultation Paper commented on the inclusion of severity of impact in the assessment of monetary payments.

For example, in its submission in response to the Consultation Paper, CLAN commented on the possible matrix in the Consultation Paper:

we are not opposed to a table or matrix such as this, however we have had a lot of feedback concerning the impact of abuse playing a large role in redress assessment. As already mentioned in the consultation paper, many Care Leavers do feel that if they have been able to cope better than others with the abuse they have endured then they are punished under the assessment process of the Redress Scheme.

**Most Care Leavers have told us that they feel redress should be based more so on what happened to them rather than the impact of the abuse.** It must also be remembered that all those who went through the ‘care’ system are scarred in one way or another, some of these scars may be more visible than others but it doesn’t mean they are not there. As such CLAN propose, if ‘Severity of Impact’ is used in an assessment table, then its value be lowered so it is not worth as much as the ‘Severity of abuse’, and that when severity of impact is assessed it is done so carefully and comprehensively, even if it involves follow up with some, by

those well versed in Care Leaver issues.<sup>428</sup> [Emphasis in original.]

A number of institutions also commented on this issue, expressing a variety of views. For example, in its submission in response to the Consultation Paper, the Uniting Church in Australia stated:

The Uniting Church notes that some survivors may have experienced severe abuse and may not outwardly exhibit severe impacts from that abuse. It will be important for the Scheme to communicate with survivor organisations and individuals to ensure acceptance of the matrix approach, so that survivors who are not exhibiting evidence of severe impacts do not feel penalised because they are seen as ‘coping relatively well’ despite their abuse.<sup>429</sup>

In its submission in response to the Consultation Paper, CCI stated:

In its assessment of sexual abuse claims, CCI focusses largely on the impact and effects of that abuse. Experience and psychiatric/psychological learning suggest strongly that some victims can suffer grievously from abuse of comparatively modest severity, and vice versa. CCI suggests that monetary payments should primarily reflect the impact and consequences of the abuse.<sup>430</sup>

In its submission, the New South Wales Government stated:

NSW notes that there are arguments for and against assessing payment amounts by reference to severity of impact (as opposed to the nature of the abuse). NSW has no settled position on these issues. Arguments for including consideration of severity of impact include:

- a scheme focused on the nature of the abuse alone could create anomalies, for example, a person who suffers one serious incident could receive a significantly higher payment than a person who experiences a pattern of less serious incidents which cumulatively cause serious ongoing impairment, and
- evidence about the current-day impacts of abuse may be more readily accessible to survivors than evidence about the nature of the abuse itself, especially for survivors of historical abuse.

Arguments against including consideration of severity of impact include:

- this could require survivors to provide significant additional information, leading to a more complex application process. A simpler process may reduce consistency of outcomes but could be speedier and less traumatic for survivors.
- this could increase the discretionary nature of

payments, with potentially increased administrative costs and applications for review (NSW's shift from the Victims Compensation Scheme, which considered severity of impact, to the Victims Support Scheme in 2013, which did not, significantly reduced processing times).

If severity of impact was excluded from the assessment of monetary payments, the need for greater assistance for those who suffer greater impacts could perhaps be addressed separately through a 'support package' of various types of practical assistance.<sup>431</sup>

In its submission, Slater and Gordon Lawyers stated:

As to severity of impact, particular care is necessary. Although any child can be a victim of child sexual abuse, it has been our experience that child sexual abuse particularly afflicts the vulnerable.

... There is a complex relationship between social exclusion, vulnerability and child sexual abuse. Teasing out cause and effect in these circumstances can be very difficult in a civil litigation context, where it is necessary to prove on a more probable than not basis that specific damage is connected to its alleged cause. We consider a redress scheme affords the opportunity to take a more liberal approach to this problem.<sup>432</sup>

We are satisfied that it is appropriate to include severity of impact of abuse in assessing monetary payments and we consider that it should be given equal weight with severity of abuse. This factor allows for recognition that the impact of abuse on survivors varies greatly between survivors and it allows for a more individualised assessment. It also recognises the potentially lifelong impact of child sexual abuse on survivors.

### Distinctive institutional factors

In the Consultation Paper, we suggested that there may be some distinctive institutional factors that exacerbate the impact of institutional child sexual abuse.<sup>433</sup>

For example, many children placed in long-term institutional care were already severely disadvantaged before being placed into care, having suffered either abuse in a familial context or the deprivation that accompanies being in a dysfunctional family. This may mean that they were particularly vulnerable to abuse and susceptible to greater damage as a result of further abuse in an institution.

The Western Australian Government considered such variables in developing the ratings system on which they based payments for Redress WA. A 'compounding factors' rating was included as a domain of abuse and neglect. It was intended to show the extent to which children entered care already fragile/damaged (it was assumed that institutional maltreatment was exacerbated by the child's poor circumstances).

Redress WA's assessment matrix also included 'ameliorating factors', which took

into account the extent to which the victim had the social support of family and/or friends at the time of the harm.<sup>434</sup>

As discussed in the Consultation Paper, the differences in types of institutions may influence how institutional abuse affects a child.<sup>435</sup> A distinction might be drawn between 'closed' and 'open' institutions. In a 'total' or 'closed' institution, such as a 24-hour-a-day residential care facility, the three spheres of life – sleeping, playing and working – are conducted in the same place. The child may be subject to a single authority and more or less isolated from contact with anyone from the outside world.<sup>436</sup> Children who are abused in such contexts may effectively be trapped and unable to seek any help, thus exacerbating the trauma. Abuse perpetrated by an owner or sole authority figure in an institution or in foster care may also potentially have a more damaging impact on the victim.

A number of submissions in response to the Consultation Paper expressed uncertainty about what this factor might mean or include. Some institutions were concerned that monetary payments might vary according to the institution in which the abuse occurred.

In its submission in response to the Consultation Paper, the Anglican Church of Australia stated:

The principles for assessment of monetary payments must be uniform irrespective of which institution is involved and where the abuse occurred ...

The meaning of the term ‘distinctive institutional factors’ referred to in the Consultation Paper is unclear. Further, it would be unsatisfactory for the monetary payment to vary according to the institution in which the abuse occurred. This would potentially undermine the acceptance of a redress scheme by survivors.<sup>437</sup>

Some submissions suggested that this factor could allow for the regulatory and guardianship responsibilities of governments to be recognised.

In its submission in response to the Consultation Paper, the Uniting Church in Australia stated:

Assessment of payment amount should acknowledge the responsibilities of governments as well as institutions. Where governments had oversight of the institutions and were responsible for the welfare of children (for example, wards of the state) those government authorities should accept their responsibility for placing the child into the care of institutions.<sup>438</sup>

A number of submissions from survivor advocacy and support groups raised the issue of cultural abuse of Aboriginal and Torres Strait Islander victims and expressed the view that this should be recognised as a distinct form of abuse in addition to sexual, physical and emotional abuse.

In its submission in response to the Consultation Paper, the Coalition of Aboriginal Services, reporting on the outcome of its

‘Yarning Circle’ consultations, stated:

We believe for Aboriginal children removed from their families and communities, placed in institutions where they were forced to reject their identity and their culture, left them extremely vulnerable to institutional sexual abuse.

At a minimum participants felt very strongly that being part of the Stolen Generations and suffering from cultural abuse must be taken into account when calculating payments under the Distinctive Institutional factors. Further there was a view that for Aboriginal survivors there should be a separate calculation altogether, in recognition of the fact that cultural abuse is distinctive to Aboriginal people and has contributed significantly to their vulnerability ...

We believe that cultural abuse should be considered as a [sic] distinct from and equal to other forms of abuse, such as sexual, physical and emotional abuse.<sup>439</sup>

In its submission, the Uniting Church in Australia stated:

For it to be fully effective, [a matrix] may need to take account of:

- Cultural considerations, particularly regarding Indigenous survivors and their diverse communities; and
- Other forms of neglect and abuse, not just sexual abuse.<sup>440</sup>



In its submission, Northcott Disability Services stated:

Northcott views that there has been insufficient exploration in the consultation paper as to what the concept of ‘institutional factors’ may mean when determining the rating of a person’s claim for monetary payment when that person was abused in a disability service.

The consultation paper appears to present a view that children who were in certain types of institution were automatically more likely to be adversely impacted by sexual abuse due to their history of past trauma. This may be so; however what is not covered is the fact that some children may have been made vulnerable to abuse because of their disability. In these cases, it is the child’s disability more so than the nature of the institution which interplays with the overall impact of the abuse on the adult survivor. A more holistic assessment may be more appropriate – in fact this could apply to all survivors and not just those with disability.<sup>441</sup>

Some submissions in response to the Consultation Paper proposed different matrices with additional factors. We think these generally correspond to matters that we would consider within the context of what we have called ‘distinctive institutional factors’.

For example, in its submission in response to the Consultation Paper, Broken Rites proposed that the matrix could be varied to:

- lower the maximum values of ‘severity of abuse’ and ‘severity of impact of abuse’ to 35
- lower the maximum value of distinctive institutional factors to 15
- include an additional factor of ‘separation from family’ with a maximum value of 15.

Broken Rites stated:

An important factor that often is either not recognised or is under-recognised is that for children who experienced sexual abuse whilst in out of home care, some had already been traumatised by being separated from their family and sometimes, then separated from siblings. We would like this to be recognised and responded to ...<sup>442</sup>

In responding to a question about the ‘separation from family’ factor, Dr Chamley, representing Broken Rites, told the public hearing:

it seems to me what was presented [in distinctive institutional factors] didn’t factor in this impact of separation which, for many of the men I meet and have dealt with has been so profound, because they through their whole life have had no experience of family. They have lived as loners for all of their life with only drinking mates, never involved in a relationship with a person of the same sex or the other sex; never knowing what it was like to have the joy and the responsibility of raising family and those sorts of things. I was hoping



that we might recognise that in some way.<sup>443</sup>

In its submission in response to the Consultation Paper, Micah Projects proposed a matrix that would lower the maximum values of ‘severity of abuse’ and ‘severity of impact of abuse’ to 30 and then have the ‘statutory responsibility’, ‘institution’ and ‘aggravation’ factors with maximum values of 20, 10 and 10 respectively.<sup>444</sup>

In response to a question about the proposed ‘statutory responsibility’ factor, Ms Walsh, representing Micah Projects, told the public hearing:

For people in out-of-home care, this is the point, that they were removed from their family by the State and that they were placed in an institution where abuse occurred and that that is the combination of physical, emotional and sexual abuse.<sup>445</sup>

In response to a further question, Ms Walsh told the public hearing that, if a claimant was removed from his or her family by the state and they experienced abuse, they should automatically receive the additional 20 per cent value.<sup>446</sup>

In responding to questions about the ‘institution’ factor, Ms Walsh told the public hearing that it would apply to claimants who were abused in institutions where ‘there is a lot of evidence about the widespread nature of abuse, the particular practices of that institution, the extent of sexual abuse, for example ...’<sup>447</sup> In responding to a question about the ‘aggravation’ factor, Ms Walsh told the public hearing:

Many people have been trying for many years to get justice and the responses have been varied to, ‘We don’t believe you.’ ‘It’s not true.’ And there’s evidence to the contrary that has been even brought out through the Commission. There are some people who believe that that should be recognised in how long it’s taken for people to seek justice and the inadequacies of the response.<sup>448</sup>

In its submission in response to the Consultation Paper, the Child Migrants Trust proposed the following alternative matrix:

- **Severity and duration of abuse:** this factor would assess a description and context of the assaults (for example, penetration and use of physical force, grooming and threats, and witnessing assaults on other children) and would be weighted at 40 per cent
- **Relationship with the perpetrator and institution:** this would assess the nature of the relationship with the child, statutory responsibility for care and safety and institutional culture of abuse and serial offenders. This factor would be weighted at 15 per cent
- **The child’s context and experience, or aggravated damages:** this would assess the age and vulnerability of the child; the immediate impact within the institution (for example, isolation from peers and bullying); previous experiences of sexual assault; loss of family, including separation from siblings; compounding factors such as other

forms of abuse and deprivation; and the absence of any external support of safety. This factor would be weighted at 15 per cent

- **Lifelong impact and loss of opportunity:** this would assess relationship and attachment difficulties; parenting or physical health problems related to institutional trauma; mental health factors (for example, depression, anxiety, post-traumatic stress disorder and other diagnosed disorders); substance abuse and other recognised self-destructive effects of sexual assault, including low self-esteem and loss of hope; and impact on employment opportunities (for example, problems with authority). This factor would be weighted at 20 per cent
- **Compounding factors including secondary abuse:** this would assess denial of the abuse by institutions; examples of contemporary abuse of power (for example, refusal to release records); and evidence of protection of perpetrators' interests over those of the victim. This factor would be weighted at 10 per cent.<sup>449</sup>

A number of submissions supported the inclusion of additional payments based on the culpability of the institution. For example, in addition to Micah Project's proposed 'aggravation' factor and the Child Migrants Trust's proposed 'Compounding factors including secondary abuse' factor, the submission in response to the Consultation Paper by Angela Sdrinis Legal stated:

an additional payment should be made available based on the

'culpability' of the institution similar to the [Defence Abuse Response Taskforce] scheme which allowed for an extra payment based on the way in which the Defence force had dealt with a complaint.

In other words, the capacity to be awarded an additional payment which would be akin to 'punitive damages' would be an important factor in some claimants determining whether or not to litigate. For many victims, litigation is attractive because a successful claim for damages proves that the institution was at fault.<sup>450</sup>

Some submissions opposed an increase in monetary payments for institutional culpability. For example, on 'distinctive institutional factors', CCI stated:

While in the subsequent commentary, there seems to be no reference to this constituting any form of punitive damages, CCI is nonetheless concerned about the consideration of the factors which might contribute to 'distinctive institutional factors'.

Any suggestion that some form of 'punishment' of the institution or its members is included under this heading would render any insurance cover inoperative for that section, leaving the institution financially exposed.<sup>451</sup>

We are satisfied that it is not appropriate to include any consideration of the institution's culpability, either at the time of the abuse or

in later responses to the abuse. If this were to be a consideration, it would be necessary to provide for adversarial processes in the scheme so that an institution could dispute allegations against it, potentially through an adversarial hearing. This approach is not consistent with the redress scheme processes that many survivors and survivor advocacy and support groups have supported and that we recommend in Chapter 11. If any survivor wishes to pursue compensation for an institution's culpability, they will need to do this through civil litigation.

We are satisfied that this distinctive institutional factor and the guidelines supporting its assessment should allow additional values to be included to recognise:

- whether the applicant was in state care at the time of the abuse – that is, as a ward of the state or under the guardianship of the relevant Minister or government agency
- whether the applicant experienced other forms of abuse in conjunction with the sexual abuse – including physical, emotional or cultural abuse or neglect (noting that this should not overlap with physical force or coercion to the extent this is already included in assessing the severity of the abuse)
- whether the applicant was in a 'closed' institution or without the support of family or friends at the time of the abuse
- whether the applicant was particularly vulnerable to abuse because of his or her disability.

We understand some survivors may experience a more severe impact of abuse where some of these elements were present. We are satisfied that they should be separately recognised in the matrix, albeit with a lower maximum value than the 'severity of abuse' and 'severity of impact of abuse' factors. However, we recognise that, in further developing the matrix and the detailed guidelines supporting it, it will be important that there is no direct double-counting across the three factors.

## Conclusion

We are satisfied that the matrix we put forward as a possibility in the Consultation Paper achieves the appropriate balance between fair, consistent and transparent assessment (on the one hand) and recognition of the individual's experiences and their impact (on the other hand).

The 'distinctive institutional factors' might better be named 'additional elements' or something similar. That might best be settled finally when the elements included in it are developed more fully.

By adding these additional elements, the matrix as set out in the Consultation Paper becomes the matrix set out in Table 19.

**Table 19: Matrix for assessing monetary payments under redress**

Factor	Value
Severity of abuse	1–40
Severity of impact of abuse	1–40
Additional elements	1–20
<ul style="list-style-type: none"><li>• State care</li><li>• Other abuse</li><li>• Closed institution</li><li>• Relevant disability</li></ul>	

As discussed in the Consultation Paper, the matrix will need to be accompanied by detailed assessment procedures and manuals so that those who administer a redress scheme will be able to apply the factors consistently across claims and consistently with any actuarial modelling that the level of monetary payments is based on.<sup>452</sup> A failure to ensure that the assessment is consistent with funding expectations may result in an underfunded scheme or significant pressure to reduce payment levels.

The matrix we recommend will need to be further developed, along with the detailed assessment procedures and guidelines, in accordance with our discussion of the factors and with the benefit of expert advice on institutional child sexual abuse, including child development, medical, psychological, social, Aboriginal and Torres Strait Islander and legal perspectives.

## Recommendations

16. Monetary payments should be assessed and determined by using the following matrix:

Factor	Value
Severity of abuse	1–40
Impact of abuse	1–40
Additional elements	1–20

17. The 'Additional elements' factor should recognise the following elements:

- a. whether the applicant was in state care at the time of the abuse – that is, as a ward of the state or under the guardianship of the relevant Minister or government agency
- b. whether the applicant experienced other forms of abuse in conjunction with the sexual abuse – including physical, emotional or cultural abuse or neglect
- c. whether the applicant was in a 'closed' institution or without the support of family or friends at the time of the abuse
- d. whether the applicant was particularly vulnerable to abuse because of his or her disability.

18. Those establishing a redress scheme should commission further work to develop this matrix and the detailed assessment procedures and guidelines required to implement it:

- a. in accordance with our discussion of the factors
- b. taking into account expert advice in relation to institutional child sexual abuse, including child development, medical, psychological, social and legal perspectives
- c. with the benefit of actuarial advice in relation to the actuarial modelling on which the level and spread of monetary payments and funding expectations are based.

## 7.5 Amounts of monetary payments

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### Position in the Consultation Paper

#### Roundtables

As discussed in the Consultation Paper, through our private roundtables we consulted a number of survivor advocacy and support groups, institutions, governments and academics on what amounts of monetary payments should be offered.<sup>453</sup> There was strong support for a scheme where payments are offered at different levels or tiers to reflect the severity of the abuse, the impact of abuse and other aggravating factors, as discussed above.

It was clearly very difficult for many participants in our private roundtables to nominate a maximum amount for monetary payments. We were told that, for some survivors, even a very modest amount could be life-changing, while for others the €300,000 offered under the Irish Residential Institutions Redress Scheme would be too low and there should be no cap on monetary payments.

Many participants grappled with the issue of affordability, recognising that a scheme is unlikely to be implemented if the estimated total amount of funding that is required for monetary payments appears to be unaffordable. On the other hand, justice will not be achieved unless survivors are satisfied that the monetary payment amounts are reasonably fair.

We made it clear in the Consultation Paper that we then had no fixed view on what the payments should be.<sup>454</sup>

#### Actuarial advice

In the Consultation Paper, we reported on the actuarial advice we obtained from Finity Consulting Pty Ltd (Finity) on:

- the number of eligible survivors who may make a claim for a payment under a redress scheme
- possible distributions of payments across possible maximum payment levels.<sup>455</sup>

We noted that it is extremely difficult to make these estimates and to model possible distributions. This is because:

- there is no precedent for a redress scheme that covers such a broad range of institutions
- there is a lack of data on the number of people exposed to abuse in an institutional context.<sup>456</sup>

We published the Finity actuarial report to us in conjunction with the Consultation Paper so that all interested parties could understand the detail of the actuarial advice that has informed our work on monetary payments and funding. The report was published on the Royal Commission's website.

In order to estimate the number of likely claimants, Finity analysed data on the number of claimants to previous state redress schemes as well as estimates on the number of children who have suffered sexual

abuse in institutions. While Finity's estimates were based on a number of uncertain assumptions, Finity estimated an indicative number of claimants in the vicinity of 65,000 Australia wide. This figure was used for the purpose of looking at a possible distribution of payments. (For the purpose of modelling funding of redress, claimant numbers of 45,000 and 85,000 were also modelled.)

We noted that the way claimants are distributed along the payment scale would depend upon the severity, impact and distinctive institutional factors of the abuse assessed in applications and the adequacy and rigour of the assessment process.<sup>457</sup> Again, we noted that this is very difficult to estimate and that Finity had modelled a hypothetical spread of abuse severity based on the severity scores for applications to Redress WA that involved allegations of sexual abuse.<sup>458</sup>

For the Consultation Paper we commissioned actuarial modelling of the following possibilities, each with a minimum payment of \$10,000 and:

- a maximum payment of \$100,000
- a maximum payment of \$150,000
- a maximum payment of \$200,000.

For each of these maximum payment levels, our actuarial advisers modelled how payments could be distributed to achieve average payments of \$50,000, \$65,000 or \$80,000.

We noted that monetary payments at these levels would be higher than the amounts available under previous state government redress schemes at the minimum amount of \$10,000; the maximum amounts of \$100,000,

\$150,000 or \$200,000; and the average amounts of \$50,000, \$65,000 or \$80,000.<sup>459</sup>

We also noted that it was not intended that the levels of monetary payments modelled would be affected by any deduction that is necessary to repay past Medicare expenses.<sup>460</sup> That is, the amounts would be the amounts that survivors actually receive. If the scheme was required to make a payment to the Health Insurance Commission for past Medicare expenses, we anticipated that the scheme would negotiate a 'bulk payment' arrangement whereby it could pay an amount per claim to the Health Insurance Commission without affecting the amount of the monetary payment to a survivor. We noted that these arrangements were put in place for both the Queensland and Western Australian government redress schemes.

We noted also that the modelled maximum payment levels were not so high that they should have implications for claimants who receive social security or veterans' pensions or other payments.<sup>461</sup> They do not exceed common law damages awards for non-economic loss and so they would not provide, or be intended to provide, 'compensation' for past or future economic loss.

## Redress, damages and victims of crime compensation

In its submission in response to the Consultation Paper, Slater and Gordon Lawyers said that compensation should be assessed in accordance with common law principles and that heads of damage available at common law should be incorporated in the matrix approach that the Royal Commission identified.<sup>462</sup>

As discussed in the Consultation Paper and above, we remain satisfied that redress payments should not be calculated in the same way as common law damages.<sup>463</sup> Calculating damages at common law requires detailed evidence of causation and extent of loss or damage. Such a process would not be achievable in a redress scheme designed to assess many claims. Further, calculating monetary payments in the same way as common law damages would be likely to make the redress scheme unaffordable.

Civil litigation remains available for those who wish to seek damages under common law. We discuss this further in Part IV below. A redress scheme is intended to make redress available to many survivors who would not be able to bring common law claims. If those survivors were to receive payments as if they had brought successful common law claims, the cost of funding the scheme would be likely to be unaffordable for governments and non-government institutions or at least unaffordable without significantly affecting other services and programs.

Some interested parties have asked why those who have suffered institutional child sexual abuse should be eligible for monetary payments that are higher than payments available to, say, victims of crime under statutory victims of crime compensation schemes.

In its submission in response to the Consultation Paper, the Tasmanian Government stated:

Tasmania is reluctant to create a special class of victims. Reform of statutory victims of crime schemes to accommodate claims for

historical child sexual abuse has the capacity to address many of the Royal Commission's observations in relation to the elements of appropriate redress, but more importantly will not create a class of survivors based on whether abuse occurred in an institution.<sup>464</sup>

We are satisfied that higher payments under a redress scheme for survivors are appropriate.

This is not an argument about who has suffered the worst impacts as a result of criminal behaviour. Some crimes covered by the statutory victims of crime compensation schemes may have terribly severe impacts on the victims. In some cases, those impacts may be greater than those experienced by some survivors of institutional child sexual abuse. For example, some cases of intra-familial child sexual abuse may have more severe impacts than some cases of institutional child sexual abuse.

However, a redress scheme for survivors recognises that institutions have a degree of responsibility for the harm done to survivors. The responsibility may not be a legal liability (although in some cases it may be), but there is a moral and social responsibility to address the harm done. This is the case for government and non-government institutions. Governments may also have an additional level of responsibility because of their roles as regulators of institutions and government policies that encouraged or required the placement of children in institutions. Again, this may not be a legal liability, but the moral or social responsibility to address the harm done remains.



The Law Council of Australia, in its submission in response to *Issues paper 7 – Statutory victims of crime compensation schemes*, stated:

The case for a separate category of redress schemes in the case of abuse which occurs in an institutional context is the arguable culpability of the organisation or institution in failing to protect the victims of abuse, the degree of vulnerability of the victims and the community's expectation that organisations charged with the fiduciary, moral and ethical obligation to care and provide a safe environment for children uphold those duties to the highest extent possible.<sup>465</sup>

These considerations of responsibility or culpability do not arise in the context of statutory victims of crime compensation schemes. These schemes seek to recognise that someone has been a victim of a crime and provide them with publicly funded support and a monetary payment to help them to recover from the crime. They do not seek to acknowledge that the relevant government or state has any responsibility for the commission of the crime or the harm suffered.

We remain satisfied that a redress scheme for survivors that merely matches the payments available under statutory victims of crime compensation schemes would fail to recognise the role and responsibility of governments and institutions in providing redress for survivors of institutional child sexual abuse.

## Discussion

While some submissions noted that interested parties had not obtained their own actuarial assessment and so could not confirm or dispute the modelling presented in the Consultation Paper, submissions did not generally dispute the use of modelling based on an indicative number of claimants in the vicinity of 65,000 Australia wide – although the updated Finito actuarial report has now estimated the number of claimants to be 60,000.

Many submissions did not express views on the amounts of monetary payments that should be recommended, although many interested parties submitted that, if a redress scheme is to be a satisfactory alternative to civil litigation, payments should be at the higher rather than the lower end of the monetary scale.

In its submission in response to the Consultation Paper, Kimberley Community Legal Services stated:

recommendations regarding the maximum payment should be far higher than the maximum currently contained in the Consultation Paper (\$200,000.00). This is a particularly sensitive point because the Commission's aim is to remain focused on the survivors, rather than engage in unnecessary compromise.<sup>466</sup>

Some submissions from survivor advocacy and support groups reported on the views of their members. For example, in its submission in response to the Consultation Paper, the Child Migrants Trust stated that,

among the Former Child Migrants they consulted:

There was general support for the middle model presented within the Consultation Paper, with a ceiling set at \$150k for the most severe abuse, and median payments of \$65k. These were considered significant rather than merely token responses and not unreasonable given the length of time it has taken governments to accept their responsibility.<sup>467</sup>

In its submission in response to the Consultation Paper, CLAN reported on its survey of members as to what they believe is a fair amount of redress. CLAN stated that the responses from 367 participants were as follows:

- \$0–\$50,000 – 1%
- \$50,000–\$100,000 – 11%
- \$100,000–\$250,000 – 18%
- \$250,000–\$500,000 – 9%
- \$500,000–\$1,000,000 – 3%
- \$1,000,000+ – 2%
- Never Enough – 11%
- No Response – 36%
- Unsure – 9 %<sup>468</sup>

A range of views on the amounts of monetary payments were expressed in submissions from institutions in response to the Consultation Paper.

The Anglican Church of Australia submitted:

[Our Royal Commission Working Group] cannot yet express a view on the amount of the maximum payment that should be available

through a redress scheme. Before any particular maximum amount is determined, further research and consultation should occur.

Whatever maximum cap is recommended by the Royal Commission the overall cost of providing redress should remain the same ...

If the overall cost of monetary payments is too high it may jeopardise the viability of some institutions which currently provide valuable services to children and the broader community.<sup>469</sup>

In its submission, Anglicare WA stated:

Anglicare WA does not have a strong position on the actual amounts that should be available to survivors; although we note that the current costs of living make even \$65 000 seem quite modest. Anglicare WA advocates that the amount needs to be sufficient for applicants to feel that the institution is taking responsibility for the abuse and that it should reflect in some way the severity of the trauma experienced.<sup>470</sup>

In its submission, Berry Street supported an average payment of \$65,000 and stated:

We note that the modeling [sic] prepared for the Commission assumes a minimum payment of \$10,000. Berry Street believes that this level of payment is too low for a minimum payment and

recommends \$20,000 as the minimum payment. Our preferred parameters would include a minimum payment of \$20,000, average payment of \$65,000 and a maximum payment of \$150,000.<sup>471</sup>

In its submission, the Truth, Justice and Healing Council stated:

While noting that ... the cost of payments under the scheme will be affected by where the average payment sits rather than by where the maximum payment is set, the Council considers that a maximum of around the Commission's middle figure of \$150,000 is likely to reflect community standards and expectations concerning redress.<sup>472</sup>

In its submission, the Uniting Church in Australia stated:

On the basis that any entitlements under a redress scheme will take into account previous payments already made to a survivor, and that all parties relevant to the claim will be assessed at the same time, the Uniting Church supports a range of payments to a maximum payment of \$200,000. This range signals to claimants and the wider community acknowledgement of the seriousness of the impact of child sexual abuse.

Some state schemes have used minimum payment amounts; other schemes, including the Irish scheme and some state victim of crime schemes, do not. The Uniting Church does not have a view on a minimum payment, except to query

whether setting a minimum is compatible with operating an assessment matrix of the type proposed by the Commission.<sup>473</sup>

A number of submissions supported a minimum payment. Some submissions connected a minimum payment to a scheme that would provide redress for broader groups, such as those in care, rather than for those who had experienced institutional child sexual abuse.

In its submission in response to the Consultation Paper, Kimberley Community Legal Services stated:

there is a strong case for a higher common experience or baseline payment than what is outlined in the Consultation Paper to more accurately reflect both the experiences and reasonable expectations of our clients and other survivors.

Our clients' experiences of childhood abuse are felt both individually and collectively, and the impacts are pervasive. A significant common experience payment would ensure clients who underreport abuse, or who are traumatised by abuse experienced by others as well as themselves, receive recognition of the collective *and* the individual nature of traumatic events. This reflects our experience working with Redress WA where clients frequently received less than they were entitled to because they were reluctant to fully divulge past abuse.<sup>474</sup> [Emphasis in original.]

## Conclusion

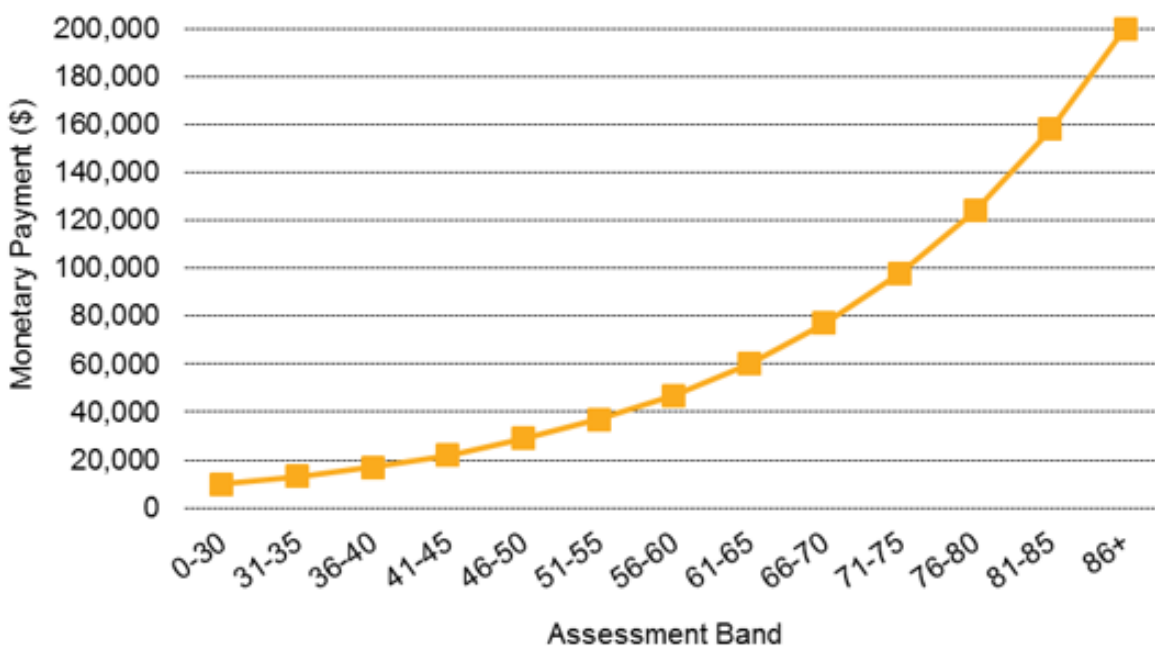
We are satisfied that the appropriate level of monetary payments under redress is a maximum payment of \$200,000 and an average payment of \$65,000. We consider that the higher maximum payment is appropriate to allow recognition of the most severe cases, taking account of both the severity of the abuse and the severity of the impact of the abuse.

We consider that, with this level of maximum payment, \$65,000 is the appropriate average payment. It allows for a greater relative proportion of total payments to be directed to those more seriously affected by abuse than a higher average payment of \$80,000 would allow, while still being higher than the median payment shown in recent years in the claims data and higher than average (and in some cases maximum) payments under previous government redress schemes.

We are satisfied that \$10,000 is an appropriate minimum payment. It is large enough to provide a tangible recognition of a person’s experience as a survivor of institutional child sexual abuse without directing a larger relative proportion of total payments to those less seriously affected by abuse.

Our actuarial advisers have updated their modelling of these payment levels. Figure 4 and Table 20 show the possible spread of payments when the maximum payment is \$200,000, the average payment is \$65,000 and the minimum payment is \$10,000.

**Figure 4: Possible payment spread assuming a maximum payment of \$200,000 and average payment of \$65,000**



**Table 20: Possible payment spread assuming a maximum payment of \$200,000 and average payment of \$65,000**

Scheme participant information			Hypothetical payment level (\$)
Assessment value	Proportion of participants (%)	Cumulative proportion (%)	
0–30	7	7	10,000
31–35	5	11	13,000
36–40	6	17	18,000
41–45	9	27	23,000
46–50	9	35	30,000
51–55	9	45	39,000
56–60	9	54	49,000
61–65	9	63	63,000
66–70	9	73	79,000
71–75	10	83	100,000
76–80	8	91	126,000
81–85	6	96	159,000
86+	4	100	200,000
<b>TOTAL / AVERAGE</b>	<b>100</b>		<b>65,000</b>

As was noted with the modelling presented in the Consultation Paper, the modelling is of figures that are estimates based on incomplete and imperfect data.<sup>475</sup> Great caution should be taken in interpreting the numbers. As with previous schemes, there is always the risk that the number of claimants or the spread of payments (or both), as modelled, may not be what actually occurs.

## Recommendations

19. The appropriate level of monetary payments under redress should be:
  - a. a minimum payment of \$10,000
  - b. a maximum payment of \$200,000 for the most severe case
  - c. an average payment of \$65,000.
20. Monetary payments should be assessed and paid without any reduction to repay past Medicare expenses, which are to be repaid (if required) as part of the administration costs of a redress scheme.
21. Consistent with our view that monetary payments under redress are not income for the purposes of social security, veterans' pensions or any other Commonwealth payments, those who operate a redress scheme should seek a ruling to this effect to provide certainty for survivors.

## 7.6 Other payment issues

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### Availability of payments by instalments

As discussed in the Consultation Paper, some survivor advocacy and support groups have told us about the difficulties that some survivors may experience in receiving lump-sum payments that are much larger than the amounts of money they are used to handling.<sup>476</sup> Comparatively large lump-sum payments may create particular difficulties in communities, including Aboriginal and Torres Strait Islander communities, where survivors may come under pressure from other community members to share the payment or to spend it in ways that the survivor does not want to spend it.

However, we have also been told that many survivors want to receive a lump-sum payment, that they wish to determine how to manage and spend it themselves and that they may require the full amount for a major purchase or expense.

In the Consultation Paper, we noted that a redress scheme could provide an option for monetary payments to be paid to survivors in instalments rather than as a lump sum.<sup>477</sup> However, we also noted that this would involve additional administrative costs for the scheme. We particularly sought submissions on whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme.

Many submissions supported the proposal that survivors be offered the option of receiving their payments by instalments. A number of submissions also stated that the survivors' wishes should be respected and that survivors should not be required to receive monetary payments by instalments.

For example, in its submission in response to the Consultation Paper, AFA stated:

AFA believes that a small number of people may choose this option; however it must not be mandated.

It is important to avoid paternalistic judgements of the capacity of people who have survived abusive childhoods to make decisions in their own best interests. Removing control over a lump sum can constitute financial abuse. A lump sum payment may be the first time a survivor has had the resources to be the best person they can be. Even the most damaged person can show wisdom, insight, generosity and pragmatism.<sup>478</sup>

AFA recommended:

That survivors be granted the respect to make decisions in their own best interests about management of a [sic] lump sum redress payments, with support from expert advisors specifically trained to work sensitively with survivors of childhood trauma. A choice of receiving a payment in instalments should be offered but must not be mandatory.<sup>479</sup>

In its submission in response to the Consultation Paper, Anglicare WA stated:

While such a strategy has the potential to foil humbugging and other complications presented by a large payment, we believe this option should be presented to

recipients to assist them in managing their money. The decision to initiate instalments should always rest with the recipient.<sup>480</sup>

Some submissions referred to the particular difficulties that Aboriginal and Torres Strait Islander survivors might experience in receiving lump-sum payments.

For example, in its submission in response to the Consultation Paper, NATSILS stated:

The risk of losing any compensation received by Aboriginal people due to demands made by family and community members is real and should be considered in setting up such a scheme.

On this basis NATSILS submits that there should be flexibility around how payments are made. Among other options, this should include the option of direct payments to be made to rent or mortgages or assistance in setting up separate accounts to manage payments. Provision should also be made for individuals to have access to financial management advice. This will mean that greater resources are required to support those who need such advice, particularly in remote areas.

On the other hand, some survivors may wish for a lump sum payment and to be in a position to make decisions about managing and using the money themselves. NATSILS is of the view that successful applicants under a redress scheme should have a *choice* to decide

between a lump sum payment and payments by instalments (subject to any issues regarding legal capacity).<sup>481</sup> [Emphasis in original.]

In its submission, the Northern Territory Government stated:

The Northern Territory also adopts the position expressed ... [in the Consultation Paper] to the effect that some survivors may experience difficulties managing or handling large lump-sum payments. In remote communities family obligations are often paramount and the particular needs of the survivor, and their long term wellbeing, may not be best addressed by the provision of lump sum payments. The Northern Territory notes that payment by instalment would be a way of mitigating the risks associated with lump sum payments generally. However, there are also countervailing disadvantages with respect to instalment payments, and the issue is complex. For example, an instalment payment scheme would need to ensure the payee is not subject to taxation that would not otherwise be applied to a lump sum compensation payment, and it is generally accepted that there are psychological benefits in receiving lump sum payments, including because the recipient is then empowered to apply their money as they see fit.<sup>482</sup>

A number of submissions in response to the Consultation Paper commented on why

survivors might not want to be paid by instalments.

For example, the Northern Territory Stolen Generations Aboriginal Corporation submitted:

We do not support payments by instalments. One off payments will go some way to allow[ing] for immediate needs to be met but more importantly understanding many of our members are frail and aged.<sup>483</sup>

In its submission in response to the Consultation Paper, Tuart Place reported on its consultations with care leavers. Its submission reported that almost all of those consulted said that they would prefer a lump sum payment. It said:

Comments by focus group participants suggest that a lack of trust in authorities would be a major impediment to applicants' opting to receive financial redress in instalments. Many participants expressed fears, such as that they might die before receiving all the instalments, or that the rules of the scheme could be changed, and authorities might decide to cut off their instalments part-way through.<sup>484</sup>

A number of submissions referred to the potential costs to the redress scheme of providing the option for payments by instalments. Some suggested alternative mechanisms or emphasised the importance of providing access to financial counselling and advice.



For example, Survivors Network of those Abused by Priests Australia submitted:

An option for payment by installments [sic] is absolutely necessary to provide flexibility to those survivors who do not wish to or cannot manage a lump sum. However the redress scheme itself does not have to manage the installment [sic] payments and could outsource this role to a low cost but secure financial services supplier.<sup>485</sup>

CLAN submitted:

CLAN support the idea of instalment payments for those who would prefer to receive their redress in that manner. However we also realise that this may place extra costs and undue burden on a Redress Scheme to be administered in this way. We suggest that a more feasible option may be that for each applicant who is awarded a monetary payment they must speak to a financial counsellor at least once before receiving their payment. Those who may require more ongoing assistance to manage their payments may have numerous sessions with the financial counsellor to ensure they are using their redress payments in the way most suitable for them. Whilst there are many Care Leavers equipped enough to deal with handling large sums of money, we have heard from many others that they would find it difficult to manage it on their own and they are worried they would spend it in a way not conducive to their own wellbeing.<sup>486</sup>

Similarly, Bravehearts submitted:

large lump-sum payments may cause some difficulties for some survivors. However, Bravehearts does recognise that payment by instalment brings with it additional issues, including increased administration costs.

We would advocate that for large lump-sum payments consideration be given to a trustee or other arrangements to support survivors who may benefit from assistance to manage the money.<sup>487</sup>

In its submission, Broken Rites stated:

Our experience tells us that if some applicants are to get the maximum personal benefit and satisfaction out of receiving and then using lump sum money, they will need expert advice, guidance and assistance.<sup>488</sup>

Broken Rites also referred to the option of a form of public trusteeship being available for survivors who wish to have another party manage the monetary payment for them.<sup>489</sup>

In its submission in response to the Consultation Paper, Anglicare WA stated:

Anglicare WA believes that at the point of an offer of a sum of redress, applicants should also receive an offer of financial counselling or support. Again, the decision to accept such support should always rest with the recipient.<sup>490</sup>

A confidential submission in response to the Consultation Paper supported the use of financial counsellors similar to those that farmers in receipt of drought assistance money use. Rural financial counsellors are used to help with farm planning and debt reduction.<sup>491</sup>

It is not clear to us that many survivors would opt to receive their monetary payment in instalments. We also accept that providing the option for payment by instalments would result in extra administrative costs for the scheme. In Chapter 11 we discuss the provision of support services, including financial counselling, through the redress scheme before a monetary payment is made. We consider that these support services are more likely to be used by more survivors and would be of more potential benefit to them in making considered decisions about the use of their monetary payments than the option of payment by instalments. However, we are not opposed to a redress scheme making the option of payment by instalments available, particularly if there is any demand for it from survivors.

#### **Recommendation**

22. Those who operate a redress scheme should give consideration to offering monetary payments by instalments at the option of eligible survivors, taking into account the likely demand for this option from survivors and the cost to the scheme of providing it.

## Treatment of past monetary payments

As discussed in the Consultation Paper, many survivors have already received monetary payments through previous and current government and non-government redress schemes, including statutory victims of crime compensation schemes.<sup>492</sup> Some survivors have received monetary payments through civil litigation, generally through settlements rather than following a contested hearing on liability and damages. Some survivors have received monetary payments through both of these mechanisms or through more than one redress scheme.

In our consultations there has been general support for the principle that those who have already received monetary payments should remain eligible to apply under a new redress scheme, provided that any previous monetary payments are taken into account. This appears to be the approach most likely to achieve ‘fairness’ between survivors in the sense that survivors and survivor advocacy and support groups overwhelmingly advocate.

In its submission in response to the Consultation Paper, CCI submitted:

It is likely then that insurance protection for determinations made on re-opened old settlements will not be available, leaving many non-government institutions vulnerable to settlements.

In cases where insurers have indemnified policyholders in the original settlements, those insurers are likely to not provide any additional contribution where the original

legal liability has been extinguished by an apparently valid settlement. An obligation on an insurer to make a further settlement can only be created through a legal liability to do so, hence triggering the standard form public liability policy. Of course, that legal liability can only be created through either common law or statute.<sup>493</sup>

We recognise that insurers may choose not to pay any additional amount for a monetary payment under redress where a survivor has received a monetary payment in the past and has entered into a settlement and signed a release. However, there is no certainty that insurers will respond to redress claims in any event. We do not consider that those who have entered into settlements in the past for payments that are sufficiently low, and where they would be eligible for a 'top-up' under redress, should be excluded from monetary payments under redress.

Some submissions in response to the Consultation Paper raised the issue of how deeds of release that survivors had entered into in the past should be treated. Some submissions suggested that we should recommend that all existing deeds of release be set aside, generally or for the purposes of redress.<sup>494</sup> We are satisfied that deeds of release should be disregarded for the purposes of redress. A survivor who has signed a deed of release in respect of the relevant abuse in the past should still be entitled to apply under the new redress scheme provided that any previous monetary payments are taken into account.

In the Consultation Paper we stated that we were satisfied that monetary payments

already received for the relevant institutional abuse should be taken into account.<sup>495</sup> Many submissions in response to the Consultation Paper agreed with this.

We continue to be satisfied that monetary payments already received for the relevant institutional abuse should be taken into account.

In the Consultation Paper we stated that it should be reasonably straightforward to compare previous monetary payments against monetary payments available under a new scheme to determine whether any 'top-up' is appropriate.<sup>496</sup> If the scope of a previous payment is unclear and it cannot be determined that it relates to the same abuse that a survivor is applying to the scheme for then the survivor should receive the benefit of the doubt and there should be no deduction for the previous payment. Previous payments that relate to the abuse would need to be treated on a 'gross' basis and not net of any deductions such as legal fees or Medicare reimbursements.

It may be more difficult to determine eligibility for counselling and psychological care, particularly if a substantial settlement has been paid in civil litigation. This is because such a settlement would be expected to cover all future medical expenses. It may be appropriate for the scheme to provide guidance to potential claimants on whether any previous monetary payment would exclude them from eligibility for counselling and psychological care under the scheme (in addition to any monetary payment).

Applicants will need to be asked for, and will need to provide, information about any previous redress or compensation they have

received. However, we have seen situations where survivors have difficulty accurately recalling previous redress or compensation they have received. Subject to addressing any privacy concerns by obtaining applicants' consent, the redress scheme may be able to negotiate arrangements with prior government redress schemes to confirm any redress the applicant has already received. Information about any redress or compensation already paid could also be sought from the relevant institution.

In the Consultation Paper we stated that it seemed likely that the following approach would be appropriate:

- past payments received under redress schemes should be adjusted for inflation and then deducted from any proposed monetary payment
- past payments under civil litigation, including through settlements, should be adjusted for inflation and then deducted from any proposed monetary payment
- past payments under statutory victims of crime compensation schemes should be adjusted for inflation and then deducted from any proposed monetary payment.<sup>497</sup>

A number of submissions in response to the Consultation Paper expressed views on how past payments should be dealt with under a redress scheme.

A number of survivor advocacy and support groups submitted that the net, and not the gross, amount of past payments should be taken into account – that is, after the payment of legal fees and any Medicare reimbursements.

In its submission in response to the Consultation Paper, Open Place stated:

the previous payment calculation should only include the amount that the Forgotten Australian has actually received. This is the payment amount with the lawyers' fee and the Medicare reimbursement removed.<sup>498</sup>

In its submission, Slater and Gordon Lawyers stated:

Earlier compensation payments must be viewed in the same 'compensatory' context as any new redress scheme. That is to say, any prior transaction costs should be deducted from previous 'gross' payments delivered as survivors should not be penalised for having incurred legal costs fighting defendants and their use of inappropriate legal tactics.<sup>499</sup>

Some submissions also raised potential areas of uncertainty and the need for clear communication with potential applicants about how previous payments will be taken into account under a redress scheme.

In its submission, the Salvation Army Australia stated:

The Salvation Army submits that the past monetary payments made to survivors in the nature of ex-gratia payments or in settlement of litigated proceedings should be taken into account in any new redress scheme to avoid any 'double dipping'. However, there will need to be very clear guidance to

survivors and institutions as to what payments will be taken into account and how those payments will be taken into account. For example, the costs of counselling services or other forms of assistance may be difficult to quantify if the survivor has had a long association with the institution.<sup>500</sup>

In our view, monetary payments already received for the relevant institutional abuse should be taken into account.

We continue to be satisfied that the redress scheme should take into account previous monetary payments on a gross basis – that is, including any amount paid for reimbursement to Medicare and the applicant’s legal fees.

We are satisfied that monetary payments that survivors have already received should not include the cost of services provided to the survivor, such as counselling or services that might now be considered as part of a direct personal response. That is, the monetary payments already received are only monetary payments, not services ‘in kind’.

We are also satisfied that, if the scope of a previous payment is unclear and it cannot be determined that it relates to the same abuse for which a survivor is offered a monetary payment under redress, the survivor should receive the benefit of the doubt and there should be no deduction for the previous payment or that part of it that might not relate to the same abuse.

We appreciate that it may not be easy to determine whether a previous payment

relates to the same abuse, particularly where the previous payment has been made under a redress scheme or other arrangement that included forms of abuse other than institutional child sexual abuse. This may be further complicated if an applicant to the new redress scheme is entitled to receive a higher monetary payment under the matrix we recommend because forms of abuse other than institutional child sexual abuse can be taken into account as ‘additional factors’. However, we are satisfied that the benefit of the doubt in these circumstances should favour the survivor.

We also agree that the detailed treatment of previous monetary payments must be made very clear to potential applicants to the redress scheme, particularly so that they can make an informed decision as to whether or not they wish to put themselves through the application process if payments they have already received might significantly diminish any further monetary payment that might be available under the redress scheme. Of course, some survivors might wish to apply to a redress scheme, even if they do not consider they will be eligible for any monetary payment, so that they can seek access to counselling and psychological care under redress. But it will be important to ensure that survivors have sufficient information to form a realistic view of whether any monetary payment might be available to them after taking into account previous monetary payments they have received.

We remain satisfied that, once the amounts of the past payments to be taken into account in determining any monetary payment are identified, the following approach is appropriate:

- past payments received under redress schemes should be adjusted for inflation and then deducted from any proposed monetary payment
- past payments under civil litigation, including through settlements, should be adjusted for inflation and then deducted from any proposed monetary payment
- past payments under statutory victims of crime compensation schemes should be adjusted for inflation and then deducted from any proposed monetary payment.

### **Recommendations**

23. Survivors who have received monetary payments in the past – whether under other redress schemes, statutory victims of crime schemes, through civil litigation or otherwise – should be eligible to be assessed for a monetary payment under redress.
24. The amount of the monetary payments that a survivor has already received for institutional child sexual abuse should be determined as follows:
  - a. monetary payments already received should be counted on a gross basis, including any amount the survivor paid to reimburse Medicare or in legal fees
  - b. no account should be taken of the cost of providing any services to the survivor, such as counselling services
  - c. any uncertainty as to whether a payment already received related to the same abuse for which the survivor seeks a monetary payment through redress should be resolved in the survivor’s favour.
25. The monetary payments that a survivor has already received for institutional child sexual abuse should be taken into account in determining any monetary payment under redress by adjusting the amount of the monetary payments already received for inflation and then deducting that amount from the amount of the monetary payment assessed under redress.







PART III  
HOW REDRESS  
SHOULD BE  
PROVIDED

# 8 Structure and funding – introduction

## 8.1 How redress should be provided

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In this part we discuss how redress should be provided.

The issues of:

- the structure through which redress should be provided
- how redress should be funded
- the processes through which a redress scheme should operate
- what arrangements should apply in the interim while the structure and funding arrangements are being implemented

are all connected with each other.

While the direct personal response element of redress is to be provided directly by the institution in which the abuse occurred, issues arise as to how the elements of counselling and psychological care and monetary payments should be implemented and funded.

We discussed these issues in sections 2.6 (Possible structures for redress) and 5.6 (Options for service provision and funding of counselling and psychological care) and in chapters 8 (Funding redress) and 9 (Interim arrangements) of the Consultation Paper. We sought submissions on all of them. We summarise below the position on each issue discussed in the Consultation Paper.

In Chapters 9 and 10 of the Consultation Paper, we address the issues of structure and funding. In Chapter 9 of this report, we set out in some detail key responses

we received to the Consultation Paper on structure and funding, focusing particularly on the views of government, leading survivor advocacy and support groups and key non-government institutions and other interested parties. In Chapter 10 of this report, we discuss structure and funding and make recommendations on them.

In chapters 11 and 12 of this report, we discuss redress scheme processes and interim arrangements, respectively, and make recommendations on them. In Chapter 5 we discuss and make recommendations on the extent to which the redress scheme should facilitate the provision of a direct personal response.

## 8.2 Structure in the Consultation Paper

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In the Consultation Paper, we discussed potential advantages and disadvantages of relying on separate redress schemes implemented by individual institutions.<sup>501</sup> We concluded that this approach had a number of shortcomings. Further, we concluded:

To achieve equal or fair treatment between survivors and to ensure that survivors do not have to apply to the institution in which they were abused or make more than one application for redress, it is necessary to devise a structure for redress that provides an independent ‘one-stop shop’ for survivors – that is, it requires all institutions to participate in one redress process.

It is apparent that governments must participate in the redress process to meet claims of survivors abused in government institutions. Beyond this, however, it is likely that substantial government leadership will be required to establish a redress process in which governments and non-government institutions will participate. This is apart from government accepting a role as funder of last resort.<sup>502</sup>

We then considered whether a single national redress scheme or state and territory schemes should be preferred. We concluded as follows:

when comparing a single national redress scheme with separate state and territory redress schemes, at present the following has become apparent:

- The ideal position for survivors would be a single national redress scheme led by the Australian Government and with the participation of state and territory governments and non-government institutions.
- The ideal position will be difficult to reach if the Australian Government does not favour it.
- The ideal position will also be difficult to reach if the state and territory governments do not favour it.
- If the ideal position is not favoured or reasonably achievable, each state or territory could establish a

single redress scheme for the state or territory, with the participation of relevant governments (the Australian Government will need to participate in some schemes) and non-government institutions.

- The state and territory schemes could be established in accordance with the principles that the Royal Commission recommends. These principles would operate as a national framework or principles to achieve reasonable national consistency across the elements of redress (that is, direct personal response, counselling and psychological care and monetary payments) and redress scheme processes.
- If there are to be state and territory schemes, there may be benefit in establishing a national advisory body to share information, encourage consistency, advise on implementation and discuss any concerns raised about particular schemes. This body could include government, non-government institution and survivor representatives.<sup>503</sup>

In calling for submissions in response to the Consultation Paper, we particularly sought the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternative approach.<sup>504</sup>

There is also the issue of the structure through which the counselling and psychological care element of redress should be provided. In Chapter 6 of this report we discuss and make recommendations on reforming Medicare to better meet the needs of survivors through the public provision of counselling and psychological care. Another option that was discussed in the Consultation Paper was the creation of a trust fund as part of a redress scheme to hold funds to be used to supplement existing services and fill service gaps to ensure that survivors' needs for counselling and psychological care are met. We discuss this issue and make recommendations on it in Chapter 10 of this report.

### 8.3 Funding in the Consultation Paper

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In the Consultation Paper, we discussed the possible funding needs for redress based on modelling that our actuarial advisers conducted.<sup>505</sup> We also discussed options for how these funding needs could be met.<sup>506</sup>

Our Terms of Reference refer to the 'provision of redress by institutions'. In the Consultation Paper, we stated that a reasonable starting point for funding redress may be that the institution in which the abuse occurred should fund the cost of:

- counselling and psychological care, to the extent it is provided through redress
- any monetary payment
- administration in determining the claim.

We know that some survivors experienced abuse in more than one institution. Where a redress scheme determines to the required standard of proof that abuse occurred in more than one institution, we suggested in the Consultation Paper that it might be reasonable to expect that the costs described above should be apportioned between the relevant institutions, taking account of the relative severity of the abuse in each institution and any other features relevant to calculating a monetary payment.

We know that some institutions in which abuse is alleged to have occurred no longer exist. Where those institutions were part of a larger group of institutions or where there is a successor to those institutions, we suggested in the Consultation Paper that it might be reasonable to expect the larger group of institutions or the successor institution to fund the costs described above.<sup>507</sup>

We discussed the broader social responsibilities of governments, as well as governments' responsibilities that arise from their regulatory and guardianship roles.<sup>508</sup> We also identified the need for a 'funder of last resort' to fund redress in cases where the institutions in which abuse occurred:

- no longer exist and were not part of a larger group of institutions or there is no successor institution
- still exist but have no assets from which to fund redress.<sup>509</sup>

We discussed the possible options for who might fulfil the funder of last resort role – that is, the institutions that fund redress (both government and non-government) or governments or some combination of the two.<sup>510</sup>

We also provided some possible principles for guiding implementation of redress, noting that it seems that some flexibility is likely to be needed to allow adequate funding for redress to be secured efficiently and with appropriate recognition for what has already been done.<sup>511</sup>

In calling for submissions in response to the Consultation Paper, we particularly sought the views of the Australian Government and state and territory governments and institutions on appropriate funding arrangements, appropriate funder of last resort arrangements and the level of flexibility that should be allowed in implementing redress schemes and the funding arrangements.<sup>512</sup>

## 8.4 Redress scheme processes in the Consultation Paper

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As discussed in the Consultation Paper, for a redress scheme to work effectively for all parties, its processes must be efficient. They must be focused on:

- obtaining the information required to determine eligibility and calculate monetary payments
- making that determination and calculation fairly and in a timely manner.<sup>513</sup>

Redress scheme processes, and the way in which the scheme is administered, must be sensitive, transparent and survivor-centred so that they minimise any risk of re-traumatisation and maximise the benefit of redress.

In the Consultation Paper, we discussed a number of key redress scheme processes. We drew on previous and current redress schemes for examples of effective and less effective processes. We called for submissions on any aspects of redress scheme processes and particularly sought submissions on:

- eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included
- the appropriate standard of proof
- whether or not deeds of release should be required.<sup>514</sup>

## 8.5 Interim arrangements in the Consultation Paper

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As discussed in the Consultation Paper, many survivors and institutions have urged us to make recommendations about redress and civil litigation as quickly as possible.<sup>515</sup> Many survivors are anxious to obtain justice and the practical benefits it should bring. Some institutions have acknowledged that their current approaches are not adequate and they have indicated a willingness to receive guidance from us as to how they should change them.

We recognised in the Consultation Paper that, no matter how quickly we reported on redress and civil litigation, our recommendations would inevitably take some time to implement.<sup>516</sup> We also recognised the possibility that our recommendations may not be implemented, either nationally or in some states or territories.<sup>517</sup>

In these circumstances, we stated that it seems likely that additional recommendations might be required to guide institutions as to how they should provide redress while any national or state and territory arrangements are being implemented or if those arrangements are not implemented.

As discussed in the Consultation Paper, we expected that individual institutions should be able to adopt the principles and approaches we recommend generally and some or many institutions might combine together to provide an interim scheme for redress.<sup>518</sup>

We considered that institutions might also need additional guidance on issues such as:

- the need for decision making on any redress claims to be independent of the institution
- the need for institutions to cooperate on claims that involve abuse in more than one institution
- how individual institutions can best meet survivors' ongoing counselling and psychological care needs.

We also discussed possible structures that institutions could adopt to offer redress more effectively than through individual institutional redress schemes. However, we acknowledged in the Consultation Paper that such structures may have limited application if governments do not participate in them.<sup>519</sup>

We concluded that, based on what we had then heard, options for non-government institutions to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.

In calling for submissions to the Consultation Paper, we particularly sought the views of survivors, survivor advocacy and support groups and institutions as to whether there were other issues on which direction or guidance might be required for interim arrangements.<sup>520</sup> We also invited submissions on the additional principles for interim arrangements and the possible structures that institutions could adopt.<sup>521</sup>

# 9 Structure and funding – what we have been told

## 9.1 Introduction

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In the Consultation Paper, we invited submissions on issues of structure and funding for redress. We particularly sought the views of:

- the Australian Government and state and territory governments on the preferred structure for providing redress
- the Australian Government, state and territory governments and institutions on how redress should be funded.<sup>522</sup>

Many of the submissions and online comment forms that we received in response to the Consultation Paper commented on these issues. Because of the importance of these issues, we set out below in some detail the key responses we received, focusing particularly on the views of government, leading survivor advocacy and support groups and key non-government institutions and other relevant parties.

Although views on structure and funding are likely to be closely linked, we have divided the responses below into the two topics: structure and funding.

We first set out the views of governments to the extent that they are known from submissions in response to the Consultation Paper and the public hearing.

The Australian Government addressed the issues of structure and funding in its submission in response to the Consultation Paper. In its covering letter,

the Australian Government Solicitor stated that the submission ‘encapsulates the Commonwealth’s position on the question of redress at this time’. The Australian Government did not speak at the public hearing.

State and territory governments responded to the Consultation Paper as follows:

- the New South Wales Government provided a written submission
- the Victorian Government provided a written submission and spoke to its submission at the public hearing
- the Queensland Government did not provide a written submission or speak at the public hearing
- the Western Australian Government provided a letter noting the content and considerations of the Consultation Paper
- the South Australian Government provided a written submission and spoke to its submission at the public hearing
- the Tasmanian Government provided a written submission and spoke to its submission at the public hearing
- the Australian Capital Territory Government did not provide a written submission or speak at the public hearing
- the Northern Territory Government provided a written submission.

After setting out the views of governments, we will discuss the views of survivor advocacy and support groups and then key non-government institutions and other interested parties.

## 9.2 Submissions on structure

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### Government views

#### Australian Government

The Australian Government submitted that it 'is strongly of the view that the institutions in which child sexual abuse occurred should bear responsibility for providing redress to survivors of that abuse'.<sup>523</sup>

The Australian Government stated a number of concerns about a national redress scheme, as follows:

- 'seeking to establish a single national redress scheme would be extremely complex and would require significant time and resources to establish. This is likely to be frustrating to survivors of child sexual abuse and to undermine community confidence in the outcomes of the Royal Commission's work'<sup>524</sup>
- 'a national scheme would require protracted and complex negotiations with the State and Territory governments (as well as other stakeholders)'<sup>525</sup>
- victims of crime schemes and health services that are part of the redress model are, or are likely to be, delivered by states and territories, and '[d]etermining a redress scheme for child sexual abuse that operates in a consistent manner nationally, over the top of existing state and territory

measures, will require significant negotiation with and between those jurisdictions'<sup>526</sup>

- the source of legislative power for the Australian Government to operate a national redress scheme is uncertain and, while states and territories could refer power to the Commonwealth, 'this could again be expected to require complex and protracted negotiations before national uniformity was achieved'<sup>527</sup>
- new systems, structures and processes would be required to implement a national redress scheme. A new bureaucracy, including frontline staff, primary and reviewing decision makers and enforcement officers, would be required. 'The establishment of these arrangements would be time-consuming, further frustrating survivors and the broader community' and would likely 'overlap with, or at least duplicate, state or territory based victims of crime and similar administrative units'.<sup>528</sup>

The Australian Government's submission suggests that the Australian Government does not currently support a single national redress scheme.

#### State and territory governments

The New South Wales Government stated in its submission:

The NSW Government has announced that it is examining options for a redress scheme. NSW would be open to discussing with



other jurisdictions the potential for a national scheme, including contributions from Commonwealth, state and territory governments and non-government organisations. NSW acknowledges the potential benefits for survivors of a national scheme, including consistency of approach and less complexity for survivors.

Given that survivors are ageing and have immediate needs, any redress scheme would most meaningfully assist survivors if it is put in place relatively quickly.<sup>529</sup>

In its submission, the Victorian Government referred to the report of the Family and Community Development Committee of the Victorian Parliament *Betrayal of trust: inquiry into the handling of child abuse by religious and other non-government institutions* (the Betrayal of Trust report) and stated:

Recommendation 28.1 from *Betrayal of Trust* suggested a government-run Victorian redress scheme for victims of child abuse in an institutional context. The Victorian Government has previously indicated – both publicly and in discussions with the Royal Commission – that it is progressing work on options for a Victorian redress scheme in response to this recommendation.

In the near future, the Victorian Government intends to release a public consultation paper on redress that canvasses options relating to possible scheme models

and the scope and operation of a potential Victorian scheme.<sup>530</sup>

The Deputy Secretary of the Victorian Department of Justice and Regulation told the public hearing that the Betrayal of Trust report recommended a redress scheme model that would be an extension of the Victorian Victims of Crime Tribunal arrangements.<sup>531</sup> The Deputy Secretary confirmed that it would be a state-based scheme<sup>532</sup> and that it would apply to those abused in Victorian institutions and not to Victorian residents who were abused in institutions in other jurisdictions.<sup>533</sup> In responding to a question on how that work would fit in with a national scheme, the Deputy Secretary told the public hearing:

We are progressing this work notwithstanding our acknowledgment that the Royal Commission and a number of institution and victims groups would prefer a national scheme. We are mindful, however, of the circumstances of other jurisdictions and some of the discussions that have been engaged in at some of those public roundtables ...

This work will be of use in the Victorian context, as we have been examining a number of the issues that the Royal Commission draws out in its consultation paper. If, in the event that a national scheme or some sort of national arrangement cannot be progressed for whatever reason, we would argue that the work that the Victorian Government and a number of our departments are working with us on in that

regard – this is not just Department of Justice and Regulation – that such work could then be utilised in the establishment of a Victorian scheme.<sup>534</sup>

In responding to a further question on whether that means that the Victorian Government has not turned against participating in a national scheme, the Deputy Secretary told the public hearing:

I think our submission made it clear that we would be willing to engage with the Royal Commission and with other governments in the discussion of a national scheme, if that be the preferred method ... but should that not be practical, feasible or supportable by all jurisdictions, then we do have an obligation to implement the parliamentary committee of inquiry's recommendations.<sup>535</sup>

The Deputy Secretary also agreed that the Victorian Government would accept, if possible, that there should be consistency of response, regardless of the institution and its geographical location.<sup>536</sup> Further, the Deputy Secretary told the public hearing that the only point of difference between Victoria's consideration of a redress scheme and the Consultation Paper is that the Betrayal of Trust report recommended that the Victorian Government use the existing Victorian Victims of Crime Tribunal as a forum for the redress scheme.<sup>537</sup>

The Deputy Secretary told the public hearing that the Victorian Government's consultation paper might be available either very late in 2015 or early in 2016.<sup>538</sup>

In response to the question 'Does Victoria support a national scheme?', the Deputy Secretary told the public hearing:

Victoria would be prepared to engage in discussion with respect to a national scheme, recognising that there would be advantages to a national scheme from the perspective both of organisations and victim/survivor groups, for all of the reasons that the Royal Commission has articulated in the consultation paper, but again, as I noted earlier, if that proves not to be practicable or feasible, we do feel obliged to continue with the work in the context of our own Victorian scheme.<sup>539</sup>

The South Australian Government stated in its submission:

The State, in principle, supports the adoption of certain national 'consistent principles' for application to State redress schemes. However, the State would not support a single national redress scheme, or the creation of a State scheme to be utilised by both government and non-government institutions.<sup>540</sup>

The South Australian Government also referred to its ex gratia payments scheme, which it stated '*is still available*' (emphasis in original) and 'remains, open, with no end date'.<sup>541</sup> The South Australian Government stated in its submission:

The State currently provides a redress scheme for survivors of

child sexual abuse who sustained abuse whilst in State care ... There are no compelling reasons for removing that scheme and replacing it with another.<sup>542</sup>

The Crown Solicitor for South Australia told the public hearing that the South Australian position is:

first of all, that whilst the government would clearly consider any recommendations made, would actively consider any recommendations made, in the nature of the scheme and the way in which this area has been dealt with in South Australia, at the moment there would not be the support, as expressed, for common law changes in relation to this area, and whilst the government would consider and work through any recommendations, it doesn't support a movement away, from South Australia's perspective, from the State-based scheme that is currently in place.<sup>543</sup>

The Crown Solicitor was asked if there was a difficulty if South Australia stands aside from a more generous scheme in that the government would be offering less in terms of a monetary payment than private institutions are prepared to provide.<sup>544</sup> The Crown Solicitor told the public hearing:

One would need to see what recommendations were made in relation to such a scheme ... The position in South Australia, although the average payment at the moment is some \$14,500 in relation

to the redress scheme, the maximum payable is \$50,000. Your Honour would be aware from the written submissions that have been put in that there's an indication that, firstly, it is seen as being consistent with the amounts which are payable under the victims of crime legislative scheme in South Australia. There's currently consideration being given to increasing the victims of crime payments from \$50,000 to \$100,000 as the maximum ... but that is something which will be, as a question of policy, looked at as to whether that would apply to any redress scheme as well ...

In those circumstances, those sorts of dollars are not inconsistent, as I understand, with a range which the Commission has dealt with in its consultation paper. I accept that in our submissions we don't accept that an average should be in the order of \$65,000, but that's something that we're looking at, your Honour, and we'll take into account any recommendations which are made.<sup>545</sup>

The Crown Solicitor further confirmed that the increase in maximum payments from \$50,000 to \$100,000 is being considered in relation to the *Victims of Crimes Act 2001* (SA) and not specifically in relation to the ex gratia payment under the redress scheme.<sup>546</sup> In responding to a question as to whether the increase would or would not cover the redress scheme, the Crown Solicitor told the public hearing:

That will be a question of policy and that will, in part, be informed by, perhaps, recommendations which are made by this Commission.<sup>547</sup>

The Tasmanian Government stated in its submission:

Tasmania notes the Royal Commission's position that equality for survivors may be aided through a single national redress scheme and accepts that the redress schemes already conducted by some states (South Australia, Queensland, Western Australia and Tasmania) differed significantly from one another. The State supports a general principle that survivors should as far as possible be equally able to seek redress.

However it is the State's view that the question of whether or not equity can be achieved by a single national scheme remains academic in the absence of a commitment by the Australian Government to support such a scheme. As the consultation paper notes to establish a national redress scheme there will be a need for either the assertion of an appropriate constitutional head of power by the Australian Government or referrals of power by all states to the Australian Government. To date the Australian Government has not indicated a willingness to adopt such a course, nor have the states indicated agreement to refer powers to the Commonwealth.<sup>548</sup>

The Tasmanian Government also expressed concern that:

the administrative costs to government, in comparison to the cost of direct payments and other benefits to survivors, of a nationally run scheme will be disproportionately high and diminish the funding available to meet claims.<sup>549</sup>

The Tasmanian Government proposed an alternative structure for providing redress using existing state and territory victims of crime schemes. It submitted:

The State believes that existing state and territory victims of crime schemes could be reviewed and reformed to provide appropriate redress to survivors of historical institutional child sexual abuse as well as providing the vehicle for ongoing provision of redress. This would need to occur on a nationally consistent basis in order to achieve the desired equality and consistency for survivors and institutions alike.

Some of the benefits of using existing victims of crime schemes are:

- ease of access through a common point for all survivors of child sexual abuse
- acknowledgment that the harm done to survivors was a crime
- administrative efficiencies by utilising and expanding upon an existing services and structures [sic]

- equity between all survivors of child sexual abuse regardless of whether the abuse occurred in a family or institution
- transparent and robust assessment processes.<sup>550</sup>

The submission also identified as a further benefit of using victims of crime schemes the ability to provide future victims of child sexual abuse with an ongoing redress scheme.<sup>551</sup>

The Tasmanian Government's submission identified a number of reforms to the Tasmanian victims of crime scheme that would be needed in order for it to be used for redress.<sup>552</sup>

The Tasmanian Government's submission stated:

Tasmania is reluctant to create a special class of victims. Reform of statutory victims of crime schemes to accommodate claims for historical child sexual abuse has the capacity to address many of the Royal Commission's observations in relation to the elements of appropriate redress, but more importantly will not create a class of survivors based on whether abuse occurred in an institution.<sup>553</sup>

The Tasmanian Government's submission also stated:

To achieve national consistency the State's view is that the Royal Commission might assist state[s] and territories by recommending a set of guiding principles

incorporating the effective elements of redress to shape legislative reform to existing state and territory victims of crime schemes.<sup>554</sup>

The Director of Strategic Legislation and Policy in the Tasmanian Department of Justice spoke to the Tasmanian Government's submission at the public hearing.

The Director told the public hearing that Tasmania favours a redress scheme to civil action<sup>555</sup> and that:

in the absence of any commitment by the Commonwealth to establish a national scheme, our preferred position is that we build on our existing victims of crime compensation scheme.<sup>556</sup>

The Director told the public hearing that the Tasmanian Government thinks there are significant benefits to building on the existing victims of crime scheme as follows:

It would provide a consistent framework for survivors of child sexual abuse to access redress. It's more equitable. We wouldn't seek to distinguish between types of child sexual abuse. We could address past and ongoing abuse issues into the future. It also characterises the behaviour of perpetrators as criminal, and that may be important for some survivors of these acts.

For government, it is also about building on current administrative infrastructure, and that can provide us with some benefits. It may be

easier to access for victims. As we've heard over the last few days, there are often very complicated arrangements within non-government organisations and their structures, so it would provide an open door for victims.<sup>557</sup>

The Director also told the public hearing about further work that would be required to implement redress through the victims of crime scheme, including cooperating with non-government organisations on funding, re-engagement and apology processes and for information sharing.<sup>558</sup> The Director told the public hearing:

Non-government cooperation is vitally important for us, for two reasons. We need to develop a sustainable model and we need to ensure that institutions can contribute to the costs of running that. We also recognise that many survivors want responsibility for the things that happened to them attributed to those organisations or people that were directly responsible.<sup>559</sup>

In responding to a question on whether, in modifying the victims of crime scheme and anticipating that institutions would contribute or participate in some way, any practical impediments are foreseen, the Director said:

It is probably early to say, but in any sort of area of law reform, at the end of the day an Act of Parliament is the law, but we know that we can't achieve law change by just pushing ahead with legislative

reform without engaging with people. So it is really early days, but we would be looking at recovery provisions and those sorts of things.<sup>560</sup>

The Northern Territory Government's submission stated:

Subject to the final recommendations of the Royal Commission and joint agreement by relevant parties in relation to the development of a national redress scheme, the Northern Territory would support, in-principle, the establishment of a single national scheme funded by weighted contributions from institutional bodies, according to the number of victims residing in institutions under the administration, or former administration, of the liable body.<sup>561</sup>

The Northern Territory Government's submission identified the following advantages of a national scheme:

- it would ensure that there is no variation between the levels of redress available in each jurisdiction
- the establishment and administration of a national scheme could achieve efficiencies of scale, which 'is particularly relevant for the Northern Territory, which is a small jurisdiction with limited capacity and a relatively small number of potential claimants'
- it would 'provide for greater ability to coordinate contributions by non-government institutions of their share of funding. The Northern

Territory has limited capacity to either coordinate or compel non-government institutions for this purpose’

- ‘a national scheme would be in the best interests of victims and would provide uniformity and consistency of approaches and funding levels, as well as a greater level of independence from the institutions in which the abuse is alleged to have taken place, therefore reducing the risk of potential conflicts of interest’.<sup>562</sup>

The Northern Territory Government also ‘notes that the development of a national scheme would require extensive consultation with other jurisdictions and the non-government sector’.<sup>563</sup>

The Northern Territory Government’s submission described the role of the Commonwealth in administering the Northern Territory as follows:

The Northern Territory was administered by the Commonwealth between 1911 and 30 June 1978. At all times during that period it remained part of the Crown in right of the Commonwealth with no separate judicial personality. The Commonwealth was responsible during that period for the affairs of the Northern Territory, including child welfare and institutional based care matters. From 1 July 1978 there was established a separate body politic under the Crown by the name of the Northern Territory of Australia. Only acts and omission

occurring after that date are attributable in law to the new body politic.<sup>564</sup> [References omitted.]

## Summary of government views

In summary, government views, as currently expressed, are as follows:

- the Australian Government does not favour a single national redress scheme
- the governments of New South Wales, Victoria and the Northern Territory are willing to participate in discussions or negotiations about a single national redress scheme
- if a national scheme is not adopted, the Victorian Government will respond to the relevant recommendation in the Betrayal of trust report, consulting on a state-based redress scheme that may be an extension of its Victims of Crime Tribunal arrangements
- the South Australian Government favours using its statutory victims of crime compensation scheme, but only for government institutions
- the Tasmanian Government favours using its statutory victims of crime compensation scheme, with appropriate reforms, for all child sexual abuse claims
- the views of the governments of Queensland, Western Australia and the Australian Capital Territory are unknown.

## Survivor advocacy and support group views

Survivors and survivor advocacy and support groups overwhelmingly expressed continued support for a single national redress scheme in their submissions and online comments in response to the Consultation Paper and at the public hearing.

For example, in its submission in response to the Consultation Paper, Survivors Network of those Abused by Priests (SNAP) Australia submitted:

It is vital the Royal Commission recommend a single independent national redress scheme.

The refusal of successive state and federal governments to adequately address this issue in the past, despite being provided detailed information of the widespread and criminal sexual violence being committed with impunity against Australia's children, is a national disgrace.<sup>565</sup>

Ms MacIsaac, representing Broken Rites, told the public hearing that Broken Rites believed:

it should be a national redress scheme to provide the needs for abuse victims. Such a scheme will require participation by the Australian Government and the State governments and Territories ...<sup>566</sup>

In its submission in response to the Consultation Paper, Bravehearts stated:

Bravehearts supports a nationally run redress scheme for survivors of sexual assault in institutional care. It is our position that such an approach could provide greater transparency and consistency in the process of providing compensation for survivors.<sup>567</sup>

In its submission in response to the Consultation Paper, the Coalition of Aboriginal Services in Victoria stated in relation to the outcomes of its 'Yarning Circle' consultations:

there was a clear view that a National Scheme was preferable to either the State or Institution establishing the scheme. However, participants also thought that it was critical for both the State and Institutions to take responsibility and contribute to the National Scheme ... The primary reasons for a National Scheme were ease of access for those who had been abused in more than one state, the need to ensure the processes were as easy as possible for survivors to access and to ensure redress provided was equitable and did not differ depending on the institution or state involved.<sup>568</sup>

In its submission, the Child Migrants Trust stated:

A national redress scheme would help to ensure that the present unacceptable variation in the range of both provision and payments would be significantly reduced. This would be a major step forward, especially for those for whom



recent provision has been extremely limited.<sup>569</sup>

Dr Humphreys, representing the Child Migrants Trust, told the public hearing:

Previous redress initiatives by governments and institutions have produced a patchwork response, which many child migrants have experienced as discriminatory and unfair. It is one of the strongest arguments for a national redress scheme.<sup>570</sup>

Ms Carroll, representing the Alliance for Forgotten Australians, told the public hearing:

All advocacy and support groups note with great regret and dismay the Australian Government's essentially negative and almost dismissive response to the establishment of a national redress scheme, which was raised in the consultation paper.

Just as the national apologies were bipartisan, we now call on both sides of the national parliament to make a national redress scheme a bipartisan matter.<sup>571</sup>

In its submission in response to the Consultation Paper, Care Leavers Australia Network (CLAN) confirmed its continuing support for a national independent redress scheme.<sup>572</sup>

Ms Sheedy, representing CLAN, told the public hearing:

We propose the establishment of a national independent redress

scheme to enable fair and equitable access to redress for all Australian care leavers. Past providers and governments that operated orphanages, children's homes and other institutions should contribute to this national scheme, but they should have no say in how the redress is managed.<sup>573</sup>

Ms Hudson, representing CREATE Foundation, told the public hearing that the Foundation recommends that:

a nationally consistent redress scheme is required. This is to ensure equitable processes for all survivors of abuse in care, regardless of the State or institution in which it occurred. You shouldn't be further abused because you live in Tasmania rather than Queensland, rather than New South Wales.<sup>574</sup>

Dr White, representing Tuart Place in Western Australia, told the public hearing:

The hopes of many survivors have been dashed by yesterday's announcement that the Federal Government does not support the idea of a national redress scheme ...

It is certainly the view of Tuart Place that a national redress scheme represents the gold standard and would be the most desirable option. It would rectify the inequities in our present situation in which the availability and level of redress depends on the particulars of where abuse occurred.

However, our primary message is that whatever forms of redress are offered to abuse survivors, it is paramount that the processes themselves inflict no further harm ...

If there is to be no national redress scheme, there is still great value in developing a set of national standards and best-practice principles to inform the work of State governments and institutions wanting to provide an appropriate response to victims of child abuse in institutional settings.<sup>575</sup>

In its submission in response to the Consultation Paper, Kimberley Community Legal Services stated that it 'strongly supports the implementation of a legislated national redress scheme'. It listed a number of benefits of a national scheme, including that it would:

- be better placed to influence key Commonwealth agencies and to obtain financial commitments from government and non-government institutions
- be more likely to be adequately resourced
- be more accessible for survivors through a single application process and consistent criteria and standards and easier for survivors to navigate
- ensure consistency in the approach to survivors who have already obtained redress.<sup>576</sup>

Similarly, in its submission in response to the Consultation Paper, the Aboriginal Legal Service of Western Australia stated:

[The Aboriginal Legal Service] supports the Commission's preliminary view that the ideal position would be for the establishment of a single national redress scheme led by the Australian government and with participation of state and territory governments and non-government institutions. This approach best reflects the goals of ensuring equality of access for survivors, independence and consistency. As the Commission highlights, this ideal position will be dependent on federal government and state/territory government support. ALSWA also agrees that if such a national scheme cannot be established the Commission should recommend a national framework to maximise consistency between any different state and territory schemes.<sup>577</sup>

When pressed at the public hearing following publication of the Australian Government's submission, some survivor advocacy and support groups continued to urge the Royal Commission to recommend a single national redress scheme, while others contemplated state and territory schemes as a fall-back option.

For example, in responding to a question about what should be recommended if the Commonwealth Government will not, at least initially, be a party to a national scheme, Ms Cuskelly, representing CLAN, told the public hearing:

CLAN don't have a fall-back position for the Federal and State Governments. We are very firm that the Federal Government should and

can take leadership in this matter, that they need to call the States together, take leadership. They do have the capacity, if they have the commitment, to coordinate a national scheme. It is complex and we do recognise that, but then the childhoods of all these people and the lives that they lead are quite complex, and we expect that the Federal Government, in the end, will just have to consider and take these responsibilities seriously. CLAN are not prepared to advocate for an alternative.<sup>578</sup>

Ms Davis, representing SNAP Australia, was asked: 'If there is no national scheme, where do you think we should go?'<sup>579</sup> In responding to this question, Ms Davis told the public hearing:

I think there just has to be. I think we have to demand that there be a national scheme. I think that what the governments were saying this morning to survivors was that they would prefer us to suffer in silence, to not reveal their shortcomings, to not make them face their financial responsibilities. That's just not acceptable to survivors. I think that you will see survivors banding together and insisting that this is what we need.

There are too many problems with what is being currently done. The current system is inappropriate to the needs of survivors. If our needs for recovery are met – and this should be about recovery as much as anything else, because we've been denied so much of our lives – if we

can recover, we can at least enjoy the benefit of what is left to us.<sup>580</sup>

In responding to a question on what would be Broken Rites' preferred option if a national scheme is not going to happen, Dr Chamley, representing Broken Rites, told the public hearing:

I would say that the next is to have schemes that are State-based but involve the State government and the various parties, but I wouldn't give up. Commonwealth Governments can change their mind. People like me can go to the United Nations and start to manoeuvre. People can be brought into the country who would support what the Commission wants to see achieved and begin to advocate and they have got high profiles. I just think we are at the beginning of a process.<sup>581</sup>

In response to a question about an alternative to a national approach or scheme given the Commonwealth's present position, Ms Hudson, representing CREATE Foundation, told the public hearing:

We do have a national framework for child protection and we do have national standards. We do have a national Children's Commissioner. There is a national system already existing, so this should naturally sit within that framework. I can't see why there should be a difference, and obviously, this is drawing upon resources, but there is already a commitment by COAG to addressing many of these areas, so it should sit within the framework.<sup>582</sup>

In response to a further question on CREATE Foundation's position if the Commonwealth continues to say no to a national approach or scheme, Ms Hudson told the public hearing:

From our point of view, and agreeing with the others, there are States who are responsible. If the Commonwealth says no, we would still wish to see that. As you would have heard over the last couple of weeks, the States are inconsistent with their policies and procedures and how they apply them. The outcomes for children in care should be consistent and they should be a good life, but unfortunately, it's not. To have a system that is framed from its outset to delivering inconsistency would seem at odds with what we're trying to achieve.<sup>583</sup>

Some survivor advocacy and support groups supported a national redress scheme, to be administered by state and territory governments. For example, in its submission in response to the Consultation Paper, the Victim Support Service stated:

The Scheme ought to be administered by each state and territory via a state liaison office who would facilitate information sharing between the states, give equal access to victims regardless of current location and the location of the abuse, and provide a protective barrier between survivors and institutions.<sup>584</sup>

Ms Sloan, representing the Victim Support Service in South Australia, told the public hearing:

Firstly, like many who have already spoken today, we strongly endorse a national redress scheme for both past and future abuse survivors. We believe that a national redress scheme needs to be complex trauma informed and survivor driven, underpinned by a national legislative framework to ensure consistency, and should be administered by State and Territory governments.<sup>585</sup>

In their submissions in response to the Consultation Paper, some survivor advocacy and support groups and legal advisers supported a national scheme but accepted that state and territory government schemes with arrangements to secure national consistency would be a 'second-best' option.<sup>586</sup>

In its submission in response to the Consultation Paper, the Coalition of Aboriginal Services in Victoria stated in relation to the outcomes of its 'Yarning Circle' consultations:

Discussion ensued about the potential length of time it may take to establish the National Scheme and the group felt that perhaps there could be two schemes, the state as an interim scheme until the National scheme could be established.<sup>587</sup>

Other survivor advocacy and support groups and legal advisers expressly opposed state and territory government schemes. For example, in its submission in response to the Consultation Paper, CLAN stated:

There are many difficulties and downfalls for survivors should the

Royal Commission recommend state and territory schemes. One of the biggest difficulties CLAN foresees is that the states who have already implemented schemes, albeit inadequate ones, will not reopen or institute another scheme. There have been many people who missed out on these schemes either due to eligibility issues or missing the deadline. The whole point of having a [national independent redress scheme] is to create a level playing field where everybody is treated in a fair and just manner.<sup>588</sup>

CLAN also submitted that state and territory schemes would force the many survivors who were abused in state or territory institutions to return to their abusers to seek redress. CLAN stated:

If the Royal Commission did make a recommendation for state and territory Redress Schemes CLAN believes that we would be in no better position than what we are in now.<sup>589</sup>

Ms Sheedy, representing CLAN, told the public hearing:

we do not want to see the State government manage this scheme. They were our legal guardians when we were children and turned a blind eye to decades of abuse and cruelty occurring in the institutions they licensed.<sup>590</sup>

In its submission in response to the Consultation Paper, Kimberley Community Legal Services submitted that it would not

consider a state-based scheme operated by the Western Australian Government to be suitable, including because of the experiences with previous Western Australian redress schemes.<sup>591</sup>

## Non-government institution and other views

A range of views were expressed by non-government institutions and other interested parties in written submissions in response to the Consultation Paper and at the public hearing.

A number of institutions and other interested parties supported a national scheme.

In its submission in response to the Consultation Paper, the Uniting Church in Australia stated:

The Uniting Church is supportive of a single national scheme which would meet the needs of survivors. We acknowledge that past support for survivors has been inconsistent and incomplete, and has caused anger and frustration for survivors. Some survivors (and perpetrators) move between institutions and jurisdictions. Survivors ask for equal access and equal treatment, regardless of where the abuse took place.<sup>592</sup>

In its submission, Scouts Australia stated:

Scouts Australia supports a national redress scheme and is keen to be part of a program which may bring

better relief and healing to survivors/victims of child sexual abuse with minimal bureaucratic process and stress.<sup>593</sup>

In its submission, Northcott Disability Services stated:

Northcott's preferred model for a redress scheme, of those tabled in the consultation paper, is a single national scheme which provides equity between states and territories and allows supports to be carried with a person if they move.<sup>594</sup>

In its submission, Berry Street stated:

In advocating for a national redress scheme it is important to acknowledge the importance and need for Commonwealth contributions towards a redress scheme. The Commonwealth, in its role with Child Migrants and Child Endowment payments, also has a duty of care responsibility to create and contribute to a redress scheme. The Commonwealth has a leadership responsibility to ensure that all survivors of institutional sexual abuse are not disadvantaged by virtue of having experienced abuse in one State or Territory jurisdiction rather than another. This is consistent with the survivor focus contained within the Royal Commission terms of reference, terms of reference that all States and Territories assisted to develop and agreed.<sup>595</sup>

Mr Pocock, representing Berry Street, told the public hearing:

our view is it needs to be a national scheme. The Commonwealth Government needs to be on the hook and supporting the scheme, and the most important thing that the Royal Commission can do at this point in time is stay the course and keep advocating and recommending a national scheme.<sup>596</sup>

In response to a question about a preferred model if the Commonwealth refuses to participate in a national scheme, Mr Pocock told the public hearing:

Our preferred model then would have to be consistent State and Territory schemes which agencies like Berry Street were, by legislation, compelled to participate in and to contribute to financially based on the number of claims that relate to Berry Street.<sup>597</sup>

In its submission in response to the Consultation Paper, Goodstart Early Learning stated:

Goodstart supports a single, national redress scheme led by the Australian Government, as an alternative avenue to, (and not a replacement for), civil litigation, for survivors of past child abuse.

- For a multitude of reasons, including the imperatives of transparency, fairness, credibility, minimising barriers to making a claim, and

minimising re-traumatisation of survivors, Goodstart believes an externally administered national scheme is superior to the concept of regulated individual institutional schemes.

- Uniformity is desirable. Goodstart believes a single mandatory national scheme is the best approach in ensuring the opportunity to achieve greater consistency of outcomes between survivors and preventing duplication of structures and costs between jurisdictions. A single national scheme would also simplify the administration of multi-institutional and multi-jurisdictional claims, which is in the best interests of survivors ...<sup>598</sup>

Mr McConnel, representing the Law Council of Australia, told the public hearing that the Council supports ‘the development of a national redress scheme which provides a consistent procedure to facilitate redress for survivors’.<sup>599</sup> Mr McConnel also told the public hearing:

the Law Council submits that the degree of national interest and the commonality that has been demonstrated between cases of sexual abuse occurring and an institutional setting warrants consideration of a national Commonwealth response.<sup>600</sup>

Mr Morrison SC, representing the Australian Lawyers Alliance, told the public hearing:

We support a national uniform accessible and just redress scheme and we support one which would be primarily administrative at first instance, though with legal rights of review ...

The initial Commonwealth response is disappointing ...<sup>601</sup>

A number of institutions supported a national scheme but also discussed state and territory government schemes as an alternative option.

For example, in its submission in response to the Consultation Paper, the Truth, Justice and Healing Council stated:

the Council favours what the Royal Commission has described as the ideal position, namely, a single national redress scheme led by the Australian Government and with the participation of state and territory governments and non-government institutions ... it is important that any scheme be developed first and foremost with claimants in mind. A uniform national scheme will best achieve that ...

If the ideal position is unachievable, the Council would favour another option canvassed by the Commission, namely, the establishment by each state and territory of a uniform redress scheme for the state or territory, with the participation of relevant governments and non-government institutions based on models already in existence for harmonised

state-based legislation. If this option were to be adopted it would be important that, so far as practicable, the uniform model mirror the principles the Commission recommends. Otherwise, fair and consistent treatment of claimants would be jeopardised and institutions operating across jurisdictions would face a considerable cost burden in meeting the different requirements of different schemes.<sup>602</sup>

In response to a question on what the Council's position would be if the Commonwealth Government does not sponsor a national scheme, Mr Sullivan told the public hearing:

A number of things. It is surprising, to say the least, that the Commonwealth Government initiated the calling of the Royal Commission and yet the Commonwealth Government so quickly has discounted itself from one of the most fundamental issues we have to address. You would think that any government that was setting up a Royal Commission of this nature would know that a possible redress scheme would be one option.

I think that conversation needs to continue, because as we see it, you've had a response at a level within the Commonwealth bureaucracy. It will be interesting to know what the current government of the Commonwealth thinks.

Secondly, this is a social issue for Australia. We've heard, as you've heard, that child sexual abuse is not limited to institutional care, although these are the terms of reference. We're talking about something that, as a country, we're at least trying to address at one level, which requires, therefore, governments, as our representatives, to address this issue and to consider ways in which equity and equal opportunity to redress for every person who has been abused in an institution is effected correctly.

At the moment, regardless of its faults, at least since 1997 in the Catholic Church there's been a redress scheme. You've already announced in your opening that there are some institutions who have provided no redress. So unfortunately, it depended on the year, your address, your postcode, the institution, the willingness of the governors of that institution. Surely, that is a social issue that governments much [sic: must] address.<sup>603</sup>

Mr Condon, representing The Salvation Army Australia, told the public hearing:

I want to say the Salvation Army is deeply disturbed, disappointed and distressed at the Commonwealth Government's response in not committing to a national redress scheme. We believe that the Commonwealth should be involved and lead the way in a national response to redress.



We do not want the survivors to be put in the middle of any political process, and they should not be expected to wait until the political wheels turn.

In the absence of the Commonwealth, we would be open to explore a cooperative redress scheme with other faith-based organisations, institutions, in conjunction with the State and Territory governments as we are able.<sup>604</sup>

In its submission in response to the Consultation Paper, YMCA Australia stated:

YMCA Australia supports the establishment and implementation of a national redress scheme, however the structure of the YMCA in Australia could be suited to either a national scheme or a state and territory scheme. Given the clear challenges in achieving the necessary Commonwealth and state/territory agreement required to implement a national scheme, YMCA Australia would not oppose the establishment of a state/territory scheme provided the scheme was consistently applied and implemented across jurisdictions according to a common set of principles and practice ...

We also acknowledge the clear feedback from the majority of survivors and from many institutions that a national scheme is preferred and seen as the only appropriate option.

Should the establishment of separate state and territory schemes be recommended, the implementation of a National Framework supported by agreed principles will be critical to ensuring consistency and equity across jurisdictions.<sup>605</sup>

Mr Mell, representing YMCA Australia, told the public hearing:

we support a national scheme in which the Commonwealth participates with institutions as the primary contributors.<sup>606</sup>

In answer to a question on whether they see any theoretical impediments to exploring the option of building on existing victims of crime compensation schemes with institutional contributions, Ms Whitwell, representing YMCA Australia, told the public hearing, 'That's certainly a possibility',<sup>607</sup> and Mr Mell told the public hearing:

I think so. I think the other aspect to it which the YMCA movement is keen about, though, is to ensure there is a consistency in the approach across Australia, but I think they're aspects that could be managed within a scheme where we link with State-based schemes as well.<sup>608</sup>

In its submission in response to the Consultation Paper, PeakCare Queensland submitted:

PeakCare supports an independently administered national redress scheme in which prospective claimants have access

to a user-friendly gateway to a fair and equitable redress scheme covering the one or more Commonwealth, state or territory government, or non-government provided institutions in which the person alleges they experienced, or are experiencing, abuse or neglect as a child ...

The challenges of achieving this arrangement are acknowledged ...

Should state and territory administered schemes eventuate, independence of the process from government or non-government providers remains a priority, as do equitable outcomes. PeakCare supports the establishment of a national mechanism to coordinate and monitor equitable, consistent application and assessment processes and outcomes for redress schemes.<sup>609</sup>

Some institutions supported state and territory based schemes.

For example, in its submission in response to the Consultation Paper, the Lutheran Church of Australia submitted:

A State-based structure, where all necessary support structures, including legal frameworks, would provide the greater flexibility to provide continuous support to survivors over a longer period of time, including access to civil litigation if required, similar to the existing Victim Compensation Tribunals ...

A State-based redress scheme would benefit from structures already in place that could be built upon thus generating enhanced benefits across a wider community and maximising the efficient use of resources ...

We therefore support a State-based redress approach based on principles and guidelines established at a national level.<sup>610</sup>

Similarly, in its submission in response to the Consultation Paper, the Australian Baptist Ministries stated:

Of the possible structures for providing redress we agree that a common national scheme would be the optimum approach. However as the paper suggests this could be difficult to achieve. We would be very supportive of a national standard established on the basis of the recommendations of the Royal Commission that each state or territory implemented, involving both government and non-government institutions ...<sup>611</sup>

Some institutions discussed the option of joint schemes supported by state or territory governments but not operated by them.

In particular, in its submission in response to the Consultation Paper, the Anglican Church of Australia stated:

[Our Royal Commission Working Group] considers an effective model for the delivery of redress is through a universal joint scheme for government and non-government

institutions and survivors that contains the following features:

- a. institutions in each jurisdiction to establish a corporate vehicle along the lines of the Financial Ombudsman Service **(the Scheme)**
- b. the applicable State or Territory government to provide the necessary legislative underpinnings for the Scheme
- c. the Scheme through its constitution and policies and procedures to give effect to the mandated elements and principles of redress such as outlined in this submission
- d. the Scheme to be implemented by its officers (where an institution does not have an accredited scheme or where a survivor does not wish to deal with an institution), or by accredited institutions (where an institution satisfies the criteria set by the Scheme in its own redress processes)
- e. the operation of the Scheme to be subject to regular audit to ensure delivery conforms to the mandated elements and principles of redress.<sup>612</sup>  
[Emphasis in original.]

In response to a question on whether the Anglican Church's submission proposes state-based schemes rather than a Commonwealth provided and managed national scheme, Mr Blake, representing the Anglican Church of Australia, told the public hearing:

I don't think we have any particular preference. We recognise legal and maybe political difficulties with a Commonwealth scheme. We are after an outcome that will lead to consistent outcomes, be it Commonwealth, a State-based scheme or an institutional with State-based assistance.<sup>613</sup>

Ms Hywood, representing the Anglican Church of Australia, told the public hearing:

[Any redress scheme] must be consistent. It must provide consistent outcomes for survivors, irrespective of which institution is involved or where the abuse occurred. Survivors must be treated in the same manner where their abuse and impact is similar.<sup>614</sup>

## 9.3 Submissions on funding

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### Government views

#### Australian Government

In relation to funding redress, the Australian Government submitted:

Responsibility for providing redress should lie with the institution that failed to protect the individual survivors. The Commonwealth invites the Royal Commission to make recommendations that institutions must accept the legal, financial and moral responsibility for failing to protect children. Such recommendations would be a clear message to those (and other) institutions that they have no choice, for the future, but to prioritise the safety and well-being of the children entrusted to their care.

While any reparation payment would generally be intended to be restorative for the survivor rather than punitive of the institution, survivors may find the redress process intrinsically lacking or unsatisfying if the institution in question is divorced from it.

Having regard to that principle, the Commonwealth does not see itself as having a role as ‘funder of last resort’.<sup>615</sup> [Reference omitted.]

The Australian Government also submitted that, depending on the design of the redress

scheme, a funder of last resort role would not be necessary. It submitted:

For example, where the scheme operates to provide redress payments for abuses suffered prior to a fixed date, those claims should be quantifiable and capable of apportionment against the institutions against which findings of abuse (to whatever standard of proof is considered appropriate) have been made. The solvency of the institutions and the resources available to them could be factored in when the maximum payment figure available to any given victim is set. This is a more sustainable and principled model rather than requiring any party to underwrite the scheme, and would not be vulnerable to the criticism that one group of child sexual abuse survivors were being privileged over other survivors, in options for seeking recourse and redress.<sup>616</sup>

#### State and territory governments

The New South Wales Government’s submission did not directly address the questions of funding and funder of last resort. It stated:

The design of any redress scheme will need to consider: ...

- the sustainability of the scheme, including the level of recognition payments that will provide effective redress while being financially

- sustainable, acknowledging the potential costs to the State of implementing other recommendations of the Commission, and the financial impact on NGOs, including the potential impacts on NGO services providers' ongoing capacity to partner with Government in the delivery of key community services.<sup>617</sup>

The Victorian Government's submission did not address the issues of funding and funder of last resort and the Victorian Government's representatives did not address these issues in the public hearing.

In its submission, the South Australian Government stated:

At an average payment of \$65,000, and adjusted to take account of amounts already spent on providing redress under past and current redress schemes, the cost in terms of Government funding of a reformed scheme for South Australia is estimated in the Consultation Paper to be \$90 million.

The State is not in a position to comment on whether that sum is a realistic estimate, nor to comment on whether the estimate of the number of eligible claimants is accurate. Comparability of data across jurisdictions is also not possible.

The State notes that in a scenario where governments became funders of last resort, the

Consultation Paper estimates the total cost to the State of South Australia to be \$143 million.

The South Australian Government is not in a position to contemplate a funding commitment of this magnitude under either scenario.

The State does not accept that it would be appropriate for the Government to be the funder of last resort in South Australia beyond its present role under the victims of crime legislation to provide compensation to the wider community.<sup>618</sup>

During the public hearing, the Crown Solicitor for South Australia discussed the increase in maximum payments from \$50,000 to \$100,000 that is currently under consideration for the South Australian statutory victims of crime compensation scheme.<sup>619</sup> He did not otherwise comment on funding issues.

In its submission, the Tasmanian Government said that it would prefer to reform its statutory victims of crime scheme to accommodate claims for historical child sexual abuse. In relation to funding, it stated:

The Tasmanian Government resists the Royal Commission's observations that governments ought to be funder of last resort and notes the Royal Commission's observations that institutions' liability for monetary payments and ongoing costs are very important to survivors of institutional child sexual abuse to reflect the wrong that they have suffered. The State's view is

that appropriate mechanisms for recovery from perpetrators and institutions are essential to the operation and viability for governments to extend the existing victims of crime scheme to allow for claims of past abuse. One option the State would consider is requiring non-government institutions to contribute to a fund to cover claims of child sexual abuse relating to those institutions.<sup>620</sup>

During the public hearing, the following exchange took place between the Chair of the Royal Commission and Ms Vickers, the Director of Strategic Legislation and Policy in the Department of Justice, representing the Tasmanian Government:

THE CHAIR: That leads me to the next question. Let's assume there are problems – perhaps the institution has no money or has ceased to exist. Would it be contemplated that government would, nevertheless, fund the scheme to provide appropriate redress for the people who have come from those institutions?

MS VICKERS: I think the government doesn't accept that it is absolutely the funder of last resort, but clearly it may be in some situations, particularly if we're characterising some of the behaviours that are perpetrated as essentially criminal conduct. That fits within a framework of criminal injuries compensation model.

THE CHAIR: You know, of course, that the numbers that we've

proffered in the discussion paper are more than you might have contemplated under your schemes previously?

MS VICKERS: Certainly.

THE CHAIR: Is that a problem?

MS VICKERS: I think that would be a matter that the government would have to consider. We run a scheme which has various caps. We currently have caps and limits on the victims of crime compensation scheme. Those matters would all need to be reviewed in the course of any changes to our legislation and model.<sup>621</sup>

In relation to funding, the Northern Territory Government stated:

The Northern Territory considers that the scheme should be funded by the institution in which the abuse occurred, whether this is a government or non-government institution. Contributions to the scheme should be mandatory for all non-government institutions, although it is presently unclear how this requirement would be enforced. Where a government and non-government institution bear joint or several liabilities for the payment of compensation, both should contribute in proportions determined by the administrator of the scheme. A national and singular approach to the administration of the scheme would assist in reducing the potential for disagreement

concerning apportionment of funding.

On the basis of the constitutional arrangements described earlier in this submission, the Northern Territory maintains the position that the Commonwealth Government is responsible for contributing funding for victims residing in Commonwealth-administered institutions in the Northern Territory prior to self-government on 1 July 1978.

The methodology for calculating contributions would be most appropriately developed through a national working group comprised by the Commonwealth, the states and territories, and peak non-government organisations. A cap on overall scheme funding and jurisdictional contributions should be developed as part of that process.

Where compensation has previously been paid by a government or non-government institution through a redress scheme or victim compensation arrangement, this should be taken into account when calculating the share of funding obligations.<sup>622</sup>

The Northern Territory Government also noted:

a key challenge in the design and implementation of a redress scheme is to strike an equitable balance between the provision of monetary payments to survivors of institutional child sexual abuse that

provides adequate recompense to victims and the ability of governments and private institutions to conduct their programs and activities without excessive and potentially disabling cost burdens.<sup>623</sup>

In its submission, the Northern Territory Government also commented on the actuarial modelling presented in the Consultation Paper as follows:

The Northern Territory notes that the actuarial report provided by Finity Consulting Pty Limited states that it is not possible to estimate the number of participants and quantum of costs of a theoretical national redress scheme with any certainty. Accordingly, the Northern Territory is unable at this stage to make any useful estimate of the likely cost to the Northern Territory of participating in such a scheme. However, the Northern Territory notes the average monetary payment to claimants under the actuarial models appears to be high compared to average payments under former and existing redress schemes.

The Northern Territory reserves the right to further interrogate and verify the actuarial data, methodology and assumptions in relation to estimated liabilities for this jurisdiction at a later date. This includes assumptions in relation to weightings for Indigenous and remote service delivery in this jurisdiction.<sup>624</sup>

The views of the governments of Queensland, Western Australia and the Australian Capital Territory on the questions of funding and funder of last resort are unknown.

## Survivor advocacy and support group views

A number of survivor advocacy and support groups commented on funding issues in their submissions in response to the Consultation Paper.

A number of survivor advocacy and support groups supported the initial principles for funding redress suggested in the Consultation Paper. Some suggested other parties that they submitted should contribute to funding redress.

For example, Bravehearts submitted:

A national redress scheme should be proportionally funded though Commonwealth and State Governments, as well as Churches and institutions. In creating such a scheme, contributions should be assessed with respect to liability and responsibility and ability to pay and funds available.<sup>625</sup>

The Ballarat Centre Against Sexual Assault and Ballarat Survivors Group submitted:

The institutions that received tax-free status in the past, and government funding to run schools, should clearly be involved in the funding. For example the Catholic schools in the 1970s were show [sic

– shown] to be 50% federal funded, 35% state funded and 15% funded by the parents. They therefore would have a responsibility for accountability for that funding and the assumed care that they had for the children.<sup>626</sup>

The Centre Against Sexual Violence submitted:

Institutions where abuse has occurred should be held accountable financially and bear a significant cost of a redress scheme.<sup>627</sup>

Micah Projects submitted:

Micah Projects supports an approach in which the Australian Government, the State and Territory Governments, Religious, Secular and Non-government organisations contribute to the Redress Scheme based on the claims against them.<sup>628</sup>

CLAN submitted:

Each Past Provider should be responsible for funding the Redress Scheme proportionally to the number of Orphanages, Children's Homes and other Institutions that they ran and the number of children they accommodated. Similarly the State Governments should be responsible for funding in accordance with the amount of Homes/Institutions they ran, as well as the foster care placements they oversaw, and those children who were placed in mental institutions



and abused whilst in their care. CLAN also believe that individual foster carers who abused children in their 'care' need to be made accountable. Whilst we are aware this can present many difficulties we do feel for justice's sake that it needs to be considered and taken into account also.<sup>629</sup>

Relationships Australia submitted:

We support dedicated funding that is independent of government election cycles and changing fiscal priorities. We also favour a funding model that isolates redress funding from mainstream government programs.<sup>630</sup>

The Coalition of Aboriginal Services in Victoria reported on its 'Yarning Circle' consultations, reporting that participants 'thought it was critical for both the State and Institutions to take responsibility and contribute to the National Scheme'.<sup>631</sup>

The CREATE Foundation submitted:

CREATE agrees that a reasonable starting point for funding redress may be that the institutions in which the abuse occurred should fund the cost of:

- Counselling and psychological care, to the extent it is provided through redress;
- Any monetary payment; and
- Administration in relation to determining the claim.<sup>632</sup>

The South Eastern Centre Against Sexual Assault submitted:

The Government should fund the redress scheme. I suggest that they take away the tax exempt [sic – exempt] status from the religious institutions which would provide additional income. Another solution would be to levy a tax on all institutions with an income over a certain amount which would leave the small institutions still able to function.<sup>633</sup>

Victim Support Service in South Australia recommended a three-tiered model for funding a national redress scheme:

- the primary liability lies with the perpetrator and so, where the perpetrator is convicted, the perpetrator's assets should be seized for redress
- institutions should be required to make a contribution to the scheme, with a base contribution plus additional contributions based on the amount and severity of the failings of the institution
- a portion of the victims of crime compensation fund in each state could be diverted to fund the national redress scheme.<sup>634</sup>

Victim Support Service submitted that the use of the victims of crime compensation fund would have the advantage of ensuring that all who breach the laws of Australia would contribute to the ongoing care and compensation of survivors of institutional child sexual abuse.<sup>635</sup>

A number of survivor advocacy and support groups commented on the discussion in the Consultation Paper about the broader responsibilities of government.

The Alliance for Forgotten  
Australians submitted:

[The Alliance for Forgotten  
Australians] agrees with the  
observations in the Consultation  
Paper about the high level of  
responsibility held by governments  
due to their diverse responsibilities  
– for funding and regulating out of  
home care, running their own  
institutions and assuming  
guardianship of children when  
the parents care is deemed to  
be inadequate.<sup>636</sup>

Broken Rites submitted:

One broad area that has not  
received the attention that it  
warrants would include questions  
about the historical role of  
governments in the child abuse saga  
and also their role into the future.  
We acknowledge that there are  
constitutional issues here with state  
governments having retained  
powers and responsibilities in  
respect of child welfare, child  
protection etc. What is clear is that  
the performance of state  
governments has been anything but  
exemplary and even today, these  
governments struggle. We  
acknowledge that some state  
governments have operated redress  
schemes and we are of the view  
that all should have done so. Given  
the fact that these governments  
always had a fiduciary duty of care,  
it is our view that they must  
become significant contributors and  
the funder of last resort.

It is clear that the broad community  
has been shocked and amazed by  
the findings of the Commission to  
date it would expect its elected  
representatives to do the right thing  
by survivors. If this is not a  
government responsibility then who  
is responsible?<sup>637</sup>

Dr Humphreys, representing the Child  
Migrants Trust, discussed the Australian  
Government's responsibility for child  
migration and told the public hearing:

In relation to former child migrants,  
post-apology issues of redress and  
restitution, for the most part,  
remain the responsibility of  
Commonwealth governments. We  
cannot stand by, it seems to me, at  
this important stage and see  
governments fail to accept their  
responsibility to Britain's child  
migrants, former child migrants and  
their families.

Administrations change and policies  
dating from 70 years ago seem hard  
to understand within a more  
humane society today, but there are  
compelling arguments for the  
Federal Government to accept  
responsibility for child migration  
and all its devastating consequences  
for those children, now adults.<sup>638</sup>

SNAP Australia submitted:

In addition to the reasons listed for  
governments being held responsible  
for abuse within government  
institutions as well as non  
government institutions which they

fund or regulate, governments are also responsible for the failings of police and court systems to investigate and convict perpetrators, and any reoffending that results.<sup>639</sup>

The CREATE Foundation submitted:

CREATE supports the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. The broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse.<sup>640</sup>

Women's Legal Services NSW supported the proposition in the Consultation Paper about the social failure to protect children and discussed states' obligations under international human rights laws to support its conclusion that it is 'incumbent upon government to fund redress and to also determine whether or not to require non-government institutions to fund a redress scheme'.<sup>641</sup>

In their submissions in response to the Consultation Paper a number of survivor advocacy and support groups commented on who should be 'funder of last resort'.

Bravehearts submitted that all governments and institutions should contribute to the scheme and stated:

An advantage of such an approach is the ability to compensate victims where institutions have ceased to exist if larger financially viable

institutions contributed an additional 10% or otherwise suitably determined figure of their claims to cover gaps.<sup>642</sup>

SNAP Australia submitted:

SNAP believes governments should assume the responsibility of funder of last resort ...

It is less desirable to spread this responsibility to non government institutions as well, as this opens up the overused excuse of these institutions being unfairly targeted ...

SNAP would not like to see non government institutions have any excuse to claim to be victims, as they are very likely to do if asked to contribute on behalf of survivors for whom they have no direct responsibility.<sup>643</sup>

CLAN submitted:

Additionally, due to the states enhanced role in the care system, CLAN recommend that they take up the responsibility of being the funder of last resort as well as extra administrative costs.

It must be remembered that although many churches and charities ran Orphanages and Children's Homes, they did so under the systems the state governments created. The state was responsible for licensing and inspecting these organisations and the Homes. They

provided funding to many of these past providers and they also sent many state wards who were under their guardianship to be ‘cared’ for in these private Homes.

**The state governments need to take ownership of their entire role in the abuse and maltreatment that Care Leavers received, not just for the Homes that they ran.**<sup>644</sup>

[Emphasis in original.]

The Centre Against Sexual Violence submitted:

The Australian Government needs to take responsibility for any shortfall in funding for institutions that no longer exist or do not have adequate funds available for a national redress scheme.<sup>645</sup>

Micah Projects submitted:

- That the Australian Government fund the administration of the scheme recognising that the Australian Government should provide leadership in facilitating a Redress Scheme for past practices and inadequate policies including Immigration, payment of child endowment to institutions rather than families, inadequate response to poverty and income support for vulnerable families.
- The states and territories are a funder of last resort where institutions no longer exist.<sup>646</sup>

The CREATE Foundation submitted:

CREATE agrees with arguments supporting governments assuming responsibility as ‘funders of last resort’ on the basis of governments’ social, regulatory, and guardianship involvement. The extent to which governments might take on some or all of the responsibility for funding of last resort might depend in part upon actions they have already taken on redress.

CREATE believes that in cases where an institution no longer exists, and it was not part of a larger group of institutions or there is no successor institution, governments must step up to support those who society, and its systems for the protection of children, has failed.<sup>647</sup>

Victim Support Service submitted that the institutional contributions in its model – which also provided for contributions from perpetrators and the victims of crime compensation fund – would have the advantage of ensuring that all victims could benefit, including those who were abused in institutions that no longer exist or retain assets.<sup>648</sup>

Each of the National Aboriginal and Torres Strait Islander Legal Services and the Aboriginal Legal Service of Western Australia stated:

[The submission does not] have any specific comments in regard to funding arrangements other than to emphasise that it agrees with the view that governments (both

federal and state) should be the 'funder of last resort' on the basis that governments have a degree of responsibility as 'regulators of institutions and for government policies that encouraged or required the placement of children in institutions'.<sup>649</sup>

Of relevance to the discussion in the Consultation Paper about how the structure and funding for redress should be implemented, Micah Projects submitted:

- That the Australian Government begin to work on the policy settings and legislation required to work with the States and Territories ...
- That support and advocacy groups with adult survivors of sexual abuse and related matters have a formal role in the development of the Redress Scheme.<sup>650</sup>

## Non-government institution and other views

Some non-government institutions commented on the actuarial modelling in the Consultation Paper, particularly to the effect that they had not obtained their own modelling and could not comment on the modelling reported in the Consultation Paper. For example, the Truth, Justice and Healing Council noted the actuarial modelling and submitted that it was not in a position to comment on the actuarial calculations on which the estimated funding figures were based.<sup>651</sup>

A number of institutions and other parties commented on the initial principles for funding redress suggested in the Consultation Paper. Some supported the principles, some suggested other parties that they submitted should contribute to funding redress and others raised concerns about the impact that funding redress might have on some institutions.

For example, the Salvation Army Australia submitted:

The Salvation Army accepts that it is primarily responsible for funding the redress scheme in respect of the claims made against it (as it always has) and the monetary payments available under its scheme/s.<sup>652</sup>

The Anglican Church of Australia submitted:

[Our Royal Commission Working Group] accepts that the relevant diocese or agency of the [Anglican Church of Australia] should fund the various elements of redress for survivors who satisfy the eligibility requirements including the connection with the [Anglican Church of Australia].<sup>653</sup>

The Uniting Church in Australia submitted that governments and institutions with responsibility for individuals at the time they experienced abuse should fund the cost of redress. It submitted:

The Uniting Church believes that responsibility must be shared between the non-government institution providing a service and

the government that has mandated, funded, regulated, and/or referred a child into that service.<sup>654</sup>

The Lutheran Church of Australia submitted:

the funding of the scheme by small institutions with a low risk profile, should be on a case-by-case basis. ...

No funding arrangement should include any process that puts at risk the viability of any institution being a party to the scheme or being able to continue to operate. To this end we recommend a clear and fair process that does not disadvantage small entities to the extent of the entity ceasing to exist due to the financial burden of contributing to any financial regime.<sup>655</sup>

Australian Baptist Ministries supported the proposal that the institution in which the abuse occurred should fund redress.<sup>656</sup>

YMCA Australia submitted:

YMCA Australia supports the principle that through a redress scheme, institutions should fund the cost of counselling and psychological care, a monetary payment and administrative costs. This should also be the case where a larger group of related institutions fund the costs associated with institutions that no longer exist. This may be particularly relevant for organisations such as the YMCA in Australia where members of the federation of YMCAs may no longer exist, but where the current

federation accepts responsibility for ensuring redress is appropriately funded through participation in a national or state/territory-based scheme.<sup>657</sup>

Anglicare WA submitted:

Anglicare WA believes that the burden of payment for any Redress scheme should fall directly to the institutions and governments to whom claims apply. While it may be impossible to accurately project such costs, any alternative model must be mindful not to either unduly burden an organisation that has led to a small number of claims or to benefit institutions facing large volumes of claims through a contributory scheme.<sup>658</sup>

Berry Street submitted that it supports the funding principles outlined in the Consultation Paper, 'including that the non-government institutions should be required to fund redress that relates to approved claims arising from the institution'.<sup>659</sup>

Goodstart Early Learning submitted:

It is Goodstart's view that the costs in relation to any individual claim, including counselling and psychological care, administration of the claim, and any monetary payment determined by the scheme, should be borne by the institution (including Government Institutions where applicable), in which the abuse occurred (or on a pro-rated basis where more than one institution is involved).<sup>660</sup>

The Australian Lawyers Alliance submitted that there should be a levy on institutions (including governments), either proportionate to abuse claims in the past or prospectively.<sup>661</sup>

The Law Council of Australia submitted:

Ideally, the scheme should be Commonwealth funded, with appropriate arrangements to enable the scheme to recover payments from institutions or State/Territory governments ...

The availability of insurance cover will be an important consideration in the scheme design.<sup>662</sup>

Professor Parkinson submitted in relation to insurance:

It is probable that most other churches and faith-based organisations, as well as [sic – as] secular organisations, have had insurance cover through the commercial insurers. Many of those insurers will be subsidiaries of overseas multinational corporations.

The [Consultation Paper] identifies the likely cost of the redress scheme in the billions of dollars. I may have missed something, but I could not find anywhere a discussion of how the insurance companies might be asked to contribute to this sum. ...

If they are not required to participate, then they are unfairly 'off the hook' for a liability for which they have contracted.<sup>663</sup>

Some institutions expressed a number of concerns about institutions funding redress. In particular, Scouts Australia submitted:

A decision that a monetary amount should be paid by way of retrospective liability and in recognition of the obvious and horrendous injury suffered by a victim/survivor will require State or Commonwealth legislation. The funding of such contributions, especially in the context of a community based volunteer organisation which is not asset rich, should be seen as a community responsibility for which the community should all contribute through our taxes. ...

If significant funding for a national redress [sic – redress] scheme were sought from organisations such as ours it would inhibit the education of future generations and frankly make things worse not better. Young people will be at greater risk.<sup>664</sup>

Scouts Australia further submitted:

If organisations are to be made retrospectively liable for new levels of compensation it will be a very significant cost, and could cause closure of the organisation. At the very least such retrospective liability would lead to a significant curtailment of programs. If mandated redress payments by community organisations such as ours are beyond the financial and operational framework which is currently in place, the funds will not

be available. Not only is such retrospective liability inequitable it will hurt those most in need of our programs.

While it is difficult to calculate the possible costs of such a scheme we can however say that even a modest uptake from previously unidentified claimants would mean that branches would be unlikely to be able to afford any significant contribution to such a scheme.

The blunt question is: should the provision of such retrospective compensation be at the expense of current and future program delivery to future generations? The financial capacity, in our case and that of similar organisations, is simply not large enough to provide compensation on a retrospective basis and maintain ongoing program delivery for the future education of our youth.<sup>665</sup>

Scouts Australia further submitted:

If the scheme is to be truly *ex gratia* it is clear that institutions can make their own decision as to funding. If on the other hand the scheme grants a right to funding which is well outside of the historical legal framework the community as a whole through the tax system should make such payments.

In any event, before an institution is made retrospectively liable for a redress payment there should be a clear basis on which the institution

should be said to have been responsible in the sense that it did not take reasonable steps to protect the children in its care.

There is a significant difference between an institution providing full time residential care for a child and say a community sports or youth organisation providing volunteer programs for youth development.

Where organisations are run on a commercial basis or semi-commercial basis, as opposed to a genuine not-for-profit basis, a further distinction needs to be made. Therefore it is very difficult to envisage a scheme, other than a government funded scheme, which can genuinely provide compensation for people who have been offended against in this context. Clearly an organisation which is running on a commercial or semi-commercial basis has a higher threshold in relation to its obligations to provide training, support and mechanisms of control than a genuine not-for-profit organisation run by volunteers. These types of differences need to be considered.<sup>666</sup>

Mr Bates, representing Scouts Australia, told the public hearing:

While working to stamp out any opportunity for abuse, Scouts has for decades also sought to ensure that if youth members were abused by the criminal activity of any leader, there was adequate insurance cover. This



was and is intended to provide compensation to the youth members within the legal framework with which Scouts operates.<sup>667</sup>

Mr Bates further told the public hearing:

We hope that the Commission can consider ways that perpetrators also contribute to any redress scheme that is established. In our submission, we urge that any redress scheme should treat all survivors of abuse equally regardless.<sup>668</sup>

In a further exchange during the public hearing, Mr Bates told the public hearing that Scouts Australia is a federation, with each state Scouts body separately incorporated. Mr Bates said there were no significant assets and that Scouts rely on membership, donations and grants.<sup>669</sup> There was also a discussion of the Scouts' insurance.<sup>670</sup>

Northcott Disability Services submitted:

the scheme must be fair for all survivors, including those who were abused in institutions which no longer exist or who were abused in institutions which may not take a conciliatory approach to claims brought against them. As such, the better approach to funding redress may be through establishment of an insurance scheme into which all existing entities which have historically provided care or services to children make payment. This could also see greater access to redress for survivors as it would likely lead to fewer cases of institutions defending against claims.<sup>671</sup>

Northcott Disability Services further submitted:

there will be need to consider what is fair and workable. Without removing the need for the redress scheme to be survivor-focused, it is a reality that some institutions may not be able to afford to continue operations if the redress for survivors becomes too costly. An unintended consequence of a scheme which fails to take this into account could be the loss of critical services to people across the community.<sup>672</sup>

A number of online comment forms in response to the Consultation Paper commented that governments should not fund redress and that the responsibility should lie with the institutions in which the abuse occurred.

Some institutions and other parties commented on the broader role of governments discussed in the Consultation Paper.

For example, Ms Cross, representing the Uniting Church in Australia, told the public hearing:

We do believe there's a need for governments to be contributors to the monetary payments, particularly in recognition of their role as decision makers and regulators of the system which placed children into our care.<sup>673</sup>

YMCA Australia submitted that it agrees that governments have broader social responsibilities in ensuring the appropriate

provision of redress considering their role in regulating and funding institutions to provide services for children and young people.<sup>674</sup>

Some institutions and other parties made submissions as to who should be the funder of last resort for redress.

The Centre for Excellence in Child and Family Welfare submitted:

The Centre supports the Royal Commission option that government should be the funder of last resort where an institution no longer exists, as this appears to be the only option for survivors to achieve justice through redress.<sup>675</sup>

The Truth, Justice and Healing Council submitted that it would not agree with the suggestion in the Consultation Paper that governments might negotiate with, or require, non-government institutions to contribute to funding of last resort.<sup>676</sup>

In responding to a question on the Truth, Justice and Healing Council's position on funder of last resort, Mr Sullivan told the public hearing:

The Commission would be aware that we have put in a previous submission on this where we have suggested that the best way, or an innovative way, of dealing with this would be that all institutions that participate in the redress scheme – government, non-government, church, private – are insured, and that there is a levy on that insurance and the levy becomes a funding pool for being the fund of last resort.<sup>677</sup>

The Salvation Army Australia also supported the proposal that the Commonwealth or state governments act as funders of last resort.<sup>678</sup>

The Anglican Church of Australia submitted that the funder of last resort should be government – either the Australian Government or the government of the jurisdiction where the institution existed. It stated:

It would not be appropriate for institutions to fund redress for survivors who were not abused in their institutions. One of the important functions of government is to provide community services which otherwise would not be available. In this respect the government would be acting on behalf of the community and in a role similar to paying compensation for crimes.<sup>679</sup>

The Uniting Church in Australia supported the suggestion that government should be the funder of last resort. It supported the Consultation Paper's observation that 'governments have had a substantial role in regulating and overseeing institutions providing children's services in Australia, including institutions that are not government run, as governments have for many decades had legal guardianship of children in state care'.<sup>680</sup>

The Lutheran Church of Australia submitted:

Where it is not possible to identify a direct historical party to any claim, the funder of last resort should be the State government in which the named institution was originally registered and operated.<sup>681</sup>

Australian Baptist Ministries supported the proposal that governments should be funder of last resort.<sup>682</sup> It agreed that the failure to protect children is a broader societal issue and submitted:

It is also difficult to justify why a non-government institution ought to be responsible for abuse that occurred in another unrelated institution.<sup>683</sup>

YMCA Australia submitted that it supports the consideration of governments as funder of last resort.<sup>684</sup>

Anglicare WA submitted:

all action possible must be taken to minimise the need for such funding. The report cites numerous situations that may precipitate a need for such arrangements; Anglicare WA believes the logical funder of last resort is the Commonwealth Government.

We are also keen to ensure that the funder of last resort truly remains a matter of last resort and does not become a tool of institutions to defray their costs to the taxpayers of Australia.<sup>685</sup>

Berry Street submitted:

It is also important to acknowledge the role of Commonwealth contributions towards a redress scheme. The Commonwealth, in its role with Child Migrants and Child Endowment payments, also has a specific duty of care responsibility

to contribute to a redress scheme. The Commonwealth and State and Territory Governments have a responsibility to act as a funder of last resort where institutions have ceased to exist or have no capacity to meet redress payments. Any agency that declares that it is not able to meet redress payments should be excluded from government contracts for service provision.<sup>686</sup>

Goodstart Early Learning submitted:

Goodstart supports the proposal that government fulfil the 'funder of last resort' role in respect of past claims.<sup>687</sup>

The Australian Lawyers Alliance submitted:

In respect of an institution which has wholly ceased to exist (with no related or successful [sic – successor] organisations) or with a genuine incapacity to meet payments, there would need to be a proportionate levy on all contributing institutions, so that government alone does not bear the whole burden.<sup>688</sup>

The Law Council of Australia submitted:

The Commonwealth should be funder of last resort, to ensure that survivors of abuse in institutional settings can obtain redress, regardless of whether an institution continues to exist or is solvent or impecunious.<sup>689</sup>

During the public hearing, Mr McConnel, representing the Law Council of Australia, referred to the Commonwealth's submission that it should not have the role of funder of last resort and said:

The Law Council response is that the Commonwealth should be a funder of last resort to ensure that survivors of abuse in institutional settings can obtain redress, regardless of whether the institution continues to exist or is solvent or impecunious. The Law Council is concerned that many survivors would miss out on redress if the Commonwealth was not in that position of funder of last resort.

To that end, we note that the Commonwealth has demonstrated the ability to develop and support a redress scheme, which is done through the Defence Abuse Response Taskforce ...

Furthermore, the Law Council submits that the degree of national interest and the commonality that has been demonstrated between cases of sexual abuse occurring and an institutional setting warrants consideration of a national Commonwealth response.<sup>690</sup>

The Actuaries Institute submitted:

Governments need to be the funder of last resort, and as a matter of practicality the Australian Government may have to pick up more than its fair share of the last resort funding.<sup>691</sup>

Some institutions commented on the discussion in the Consultation Paper about how the structure and funding for redress should be implemented.

The Actuaries Institute submitted:

There is one important point that we think has been omitted from the funding discussion (and the actuarial report). The Commission assumes that if a non-government entity runs an institution on behalf of, funded by or authorised by government, the non-government entity will be responsible for the funding.

We think this is unlikely to be the outcome in practice. The degree of responsibility of governments in these situations will mean that financial responsibility for redress will not be fully transferred to the non-government operator.

We suggest that the Commission needs to be clear about this point. Otherwise the indications of funding responsibility are misleading.<sup>692</sup>

The Lutheran Church of Australia submitted:

the funding of the scheme by small institutions with a low risk profile, should be on a case-by-case basis.

Where such institutions receive notification of a claim against them, they could be required to file a deposit/guarantee with the scheme in relation to that claim to offset administrative charges and towards

any monetary payment pending settlement.<sup>693</sup>

Australian Baptist Ministries submitted:

[Australian Baptist Ministries supports] the principles for the implementation of the redress scheme. As an organisation that has had a limited number of claims we would warmly support the principal [sic] that if and when, the Baptist church, or the scheme, receive an application for redress relating to a Baptist institution, we would engage with the scheme with the understanding that there would be a reasonable fee for use of the redress scheme.<sup>694</sup>

YMCA Australia submitted that it supports the principles for implementation and stated:

Of particular relevance to federated structures such as the YMCA is an approach which would enable the participation in a national or state/territory-based scheme that was reflective of the applications for redress received that related to each independent member of the federation. In the event that an application was received which relates to a YMCA Association that no longer exists, the National Council of YMCAs represented by YMCA Australia may be the appropriate entity to respond on behalf of the federation as a whole.<sup>695</sup>

In relation to institutional representation in designing the scheme, Northcott Disability Services submitted:

Northcott welcomes the suggestion in the consultation paper that institutions likely to see a high number of claims brought to them should be involved in the redress scheme design process, without negating the principle of redress being victim-centred and the redress scheme being about the interests of victims rather than institutions. It is our view, however, that for disability service providers the ability to estimate the number of claims likely to be brought is complicated by factors such as: the high number of small organisations that may each have a few claims but may collectively represent a great many; the features of the client group meaning both that vulnerability to sexual abuse is higher and that access to the means to make a claim is lower.

As such, our view is that a peak representative should be appointed to the design work, in whatever form this working group takes. As our view is that a national scheme is the preferred structure for this scheme, a national peak would be the most appropriate body to represent our sector.<sup>696</sup>

# 10 Structure and funding – discussion and conclusions

## 10.1 Introduction

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This chapter discusses:

- the structure that should be used to deliver the counselling and psychological care and monetary payments elements of redress
- the funding needs for the counselling and psychological care and monetary payments elements of redress and the administration costs of the redress scheme
- how these funding needs should be met.

The direct personal response element of redress is to be provided directly by the institution in which the abuse occurred. In Chapter 5 of this report we discuss and make recommendations on the extent to which the redress scheme should facilitate the provision of a direct personal response. The direct personal response element of redress is to be funded directly by the institution in which the abuse occurred. Therefore, it is not included in the funding needs discussed in this chapter.

Our Terms of Reference authorise and require us to direct this part of our inquiries to making recommendations that will ensure ‘justice for victims’. As we conclude in Chapter 2, a process for redress must provide equal access and equal treatment for survivors if survivors are to regard it as being capable of delivering justice. The structure for redress should therefore be designed to achieve equal access and equal treatment for survivors.

The issues of structure and funding are closely

linked. The recommended structure and funding arrangements need to work together so that the counselling and psychological care and monetary payments elements of redress are funded efficiently and effectively. They also need to be capable of being implemented if they are to be adopted.

Recognising the range of views expressed in submissions in response to the Consultation Paper and during the public hearing, the issues concerning the structure for providing redress require consideration of:

- which institutions should participate in a redress scheme in order for it to be effective
- who should establish a redress scheme
- what is the best scale for a redress scheme.

The issues to be considered concerning funding are:

- the amount of funding that might be needed, drawing on the modelling conducted by our actuarial advisers, Finity Consulting Pty Limited (Finity)
- who should be responsible for funding redress
- who should provide ‘funder of last resort’ funding when other funding is not available.

Finally, there is a need to identify how the recommended structure and funding arrangements should be implemented. This includes the issue of an effective structure for providing the counselling and psychological care element of redress.

## 10.2 Structure

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### Which institutions should participate in a redress scheme?

We are satisfied that a redress scheme must involve many institutions in order to be effective.

Equal access or equal treatment for survivors would not be achieved by providing redress through many separate redress schemes. This is because some survivors would be entitled to redress through a number of schemes and others would only be entitled to redress through one scheme (or possibly no scheme if the institution no longer existed or had insufficient assets). This would create particular inequities if some survivors could obtain multiple monetary payments while other survivors were eligible for only one payment. The total payments would not necessarily reflect the overall severity of the abuse and its impact on the survivor.

As discussed in the Consultation Paper, a number of survivors were abused at more than one institution.<sup>697</sup> If a redress scheme does not cover many institutions, it is likely that these survivors would need to apply to each institution separately for redress. These survivors would have to complete multiple applications and assessment processes. The private sessions data in Chapter 3, Table 10, suggest that the number of survivors who were abused at more than one institution is one in five. Of the 2,974 private sessions analysed, 442 survivors (15 per cent of the total) gave accounts of abuse at a second institution and a further 147 survivors (5 per cent of the total) gave accounts of abuse at three or more institutions.

It is also unlikely that the objectives of equal access and equal treatment for survivors can be achieved by providing redress through many separate redress schemes, because these objectives require common application and assessment processes.

In this report, we are recommending the elements of redress; the principles under which redress should be provided, including principles for counselling and psychological care; and the basis on which monetary payments should be determined. However, equal access and equal treatment in the redress offered to survivors will not be sufficiently achieved simply by adopting these recommendations.

While these recommendations provide significant guidance for the key parameters of redress, there are many matters of detail to be determined within a scheme. These matters of detail will affect the making, assessment and determination of applications. They will therefore affect equality of access and treatment.

For example, in Chapter 7 we recommend a matrix for determining the amount of monetary payments and the minimum, maximum and average payments that should be available. However, we know that, for these measures to work fairly and equitably for survivors, they must be accompanied by detailed guidelines that deal with matters such as how each element of the matrix is to be assessed.

We obtained under notice scheme documents used in administering each of the past state government redress schemes. Each of these schemes had guidelines or supporting materials. For example, in connection with Case Study 11 on Christian



Brothers institutions in Western Australia, we obtained the documents that governed the operation of Redress WA. There are detailed manuals that set out:

- how applications are to be assessed
- how the requirements for eligibility and evidence are to be applied
- the assessment model to be applied
- how each element of the model is to be evaluated or assessed
- various other matters required to assess and determine applications.<sup>698</sup>

Any redress scheme that seeks to treat applications fairly and equally in accordance with consistent criteria will require detailed and extensive documentation to guide decision making.

As Ms Hywood, representing the Anglican Church of Australia, told the public hearing:

The severity of abuse and its impact are the principal relevant factors in determining a monetary payment. To ensure consistency, all institutions participating in whatever form of redress scheme is adopted must agree to how the combination of these factors contributes to the calculation of the monetary payment.<sup>699</sup>

Even if separate redress schemes adopted the matrix for determining amounts of monetary payments and the minimum, maximum and average payments we recommend, they would only be able to offer equal access and equal treatment for survivors if they also adopted:

- common requirements for applications
- support services to assist survivors in applying to the scheme
- detailed guidelines for assessing applications under the matrix
- approaches to calculating contributions for counselling and psychological care.

Without these common elements, survivors who suffered comparable abuse with comparable impacts but in different institutions or locations might receive materially different redress.

In its submission in response to the Consultation Paper, The Salvation Army Australia stated:

the matrix alone is not sufficient. The use of the matrix requires the collection of relevant information for the purpose of determining whether a relevant event or incident occurred. The terms used in a matrix need to be clearly defined and understood by those persons applying the matrix. There must be best practice record keeping for the survivors' files in relation to the application of the matrix, the sums offered and the manner in which the institution and the survivor reach an agreement.<sup>700</sup>

Further, unless separate redress schemes were to deal with a sufficiently large number of applications, the maximum and average payments we recommend might not be applicable to them. Also, the approach to funding counselling and psychological care



we recommend might not result in sufficient funding being available to support those who obtain redress through the scheme.

The South Australian Government submitted that it would not support a state scheme that would be used by both government and non-government institutions.<sup>701</sup> However, we are satisfied that a redress scheme must involve both government and non-government institutions in order for it to be effective.

This is essentially for the same reasons as already discussed above. That is, if governments and non-government institutions run separate redress schemes, some survivors may be entitled to participate in more than one scheme, while other survivors will only be entitled to participate in one scheme. Many survivors have given us accounts of their being abused in both government and non-government institutions. For example, many survivors have told us in private sessions of their experiences of abuse in successive placements in government and non-government residential institutions or in government and non-government residential institutions and in government foster care placements.

It is clear that both government and non-government institutions are likely to face many claims for redress. Finity has provided an estimation of how its estimate of 60,000 eligible claimants would be divided between government and non-government institutions by state and territory as follows.

**Table 21: Estimated claims between government claims and non-government claims**

State or territory	Government claims	Non-government claims
New South Wales	7,150 (33%)	14,730 (67%)
Victoria	5,290 (33%)	10,690 (67%)
Queensland	2,950 (35%)	5,520 (65%)
Western Australia	2,300 (36%)	4,110 (64%)
South Australia	1,150 (30%)	2,650 (70%)
Tasmania	590 (34%)	1,160 (66%)
ACT	290 (26%)	840 (74%)
Northern Territory	240 (41%)	340 (59%)
<b>TOTAL</b>	<b>19,960 (33%)</b>	<b>40,040 (67%)</b>

The estimation set out in Table 21 suggests that, in each state and territory, governments (namely, the Australian Government and the relevant state or territory government) are likely to be responding to at least 26 per cent of claims. Most states and territories will be likely to be responding to more than 30 per cent of claims. The estimate of government claims is as high as 41 per cent in the Northern Territory.

There is also the issue of governments' regulatory responsibilities. As discussed below, governments have responsibilities as regulators and as guardians of some children.

Government-run redress schemes in Australia have provided government-funded redress for survivors of abuse in government and non-government institutions. To some extent, the fact that governments have provided redress to those abused in non-government institutions recognises governments' regulatory responsibilities for child protection, particularly for children in state care.

For example, in responding to questions during the public hearing, the Crown Solicitor for South Australia confirmed that the existing South Australian redress scheme covers those abused while in the care of the state, including those who were placed in private institutions while in the care of the state.<sup>702</sup>

In responding to a question about the coverage of the Tasmanian Government's redress scheme, the Director of Strategic Legislation and Policy in the Tasmanian Department of Justice said that the scheme covered children who were wards of the state and not just those who were abused in state-run institutions.<sup>703</sup> The Director was asked:

Was the decision taken to include non-government organisations that were funded to provide that care because the State took responsibility because of the child protection arrangement?

The Director answered: 'Primarily, yes.'<sup>704</sup>

Both the Queensland redress scheme and Redress WA also provided redress to survivors who were abused in government and non-government institutions.

If governments were to establish redress schemes that were separate from non-government institutions' schemes but offered redress to those abused in government and non-government institutions, the unfairness and inequity of separate schemes would be compounded. Those abused in government institutions would be limited to the government scheme alone, while those abused in non-government institutions would be eligible for redress under both schemes. Further, the relevant government's need for such a scheme to be affordable might lead to inadequate redress being offered to those abused in government institutions (and to those abused in non-government institutions from which redress could not be obtained).

We consider that governments' financial contributions in recognition of their regulatory and broader responsibilities are best applied in the interests of survivors as 'funder of last resort' funding, which we discuss below. It is sufficient to note here that government funding for redress in respect of non-government institutions is likely to lead to unequal access and unequal treatment for survivors unless it is provided through a combined government and non-government redress scheme.

For these reasons, we are satisfied that a redress scheme must involve many institutions, both government and non-government, in order to be effective.

## Who should establish a redress scheme?

We are satisfied that governments should establish the redress scheme.

No government has submitted that a redress scheme should be created independently from governments but that governments should contribute to it. It is difficult to imagine that governments would be willing to participate in a scheme or schemes not operated by governments.

Governments have extensive experience of operating large-scale schemes that are reasonably comparable to the redress scheme we recommend. The Australian Government and the governments of Queensland, Western Australia, South Australia and Tasmania have current or very recent experience in operating large-scale redress schemes for institutional abuse, including sexual abuse.

Further, each state and territory government operates a statutory victims of crime compensation scheme. The Australian Government and each state and territory government operate schemes that provide counselling and psychological care, either directly or through funding services. Governments also have extensive experience in a range of other compensation and regulatory schemes.

These schemes demonstrate that governments have the ability to establish and operate these schemes. They are able to propose legislation, or adopt administrative arrangements, to give them the functions and powers necessary for their operations.

Government schemes are also, inevitably, likely to be more transparent and accountable than non-government schemes. Parliamentary scrutiny and, if it applies, administrative law provide mechanisms to oversee governments' operations and to hold them to account.

We acknowledge that some survivor advocacy and support groups have expressed strong opposition to the proposal that state and territory governments should operate redress schemes, either generally or in particular cases. This is because:

- survivors who were abused in government-run institutions may find it difficult to approach that government to seek redress
- some survivors have been dissatisfied with redress schemes that have been operated by the relevant government in the past.

However, we consider that a government-run redress scheme will be more independent of any particular institution in which abuse occurred than schemes operated by individual institutions (whether government or non-government) or by non-government institutions. In Chapter 12 we propose that institutions should endeavour to achieve sufficient independence in their interim arrangements for redress to build survivors' confidence. However, we recognise the limitations of such independence. While some institutions have indicated a willingness to adopt independent mechanisms, it is not necessarily easy to achieve both the appearance and reality of independence to a level sufficient to give survivors confidence that:

- the process is genuinely independent of the institution
- their applications are being determined on their merits and not with regard to the financial interests of the institution.

Given the greater transparency and accountability referred to above, the

combination of government and non-government participants and the scale of a likely scheme, we are satisfied that a government-run redress scheme will be sufficiently independent of particular government-run institutions to achieve the appearance and reality of independence.

All governments are already active in child protection policy. In addition to their establishment and support of this Royal Commission, all governments participated in the adoption of the national framework and standards for child protection. Further, governments have extensive interaction with many if not all of the institutions that are likely to face claims for redress, including through policy, regulatory and funding arrangements.

Finally, governments may be able to use some of their existing administrative structures in the operation of a redress scheme. In particular, as discussed above, some governments favour or are considering using their statutory victims of crime compensation schemes, or parts of them, to provide redress.

Finity’s modelling suggests that a redress scheme might expect to be dealing with most redress claims in the second to seventh years of its operation. The modelling suggests that claims would be higher in the second to fourth years and then begin to decline. However, if we assume that annual claims might be as much as 20 per cent of the total number of claims modelled for the relevant state or territory, those numbers would compare with the current number claims determined under statutory victims of crime compensation schemes as follows.

**Table 22: Comparison of possible numbers of annual claims for redress and numbers of claims determined in recent years under statutory victims of crime compensation schemes**

State or territory	Annual redress claims (20% of claims as approximate number of annual claims)	Annual victims of crime applications determined
New South Wales	4,376	4,358 (2012–13)
Victoria	3,196	6,611 (2013–14)
Queensland	1,694	1,787 (2013–14)
Western Australia	1,282	1,897 (2012–13)
South Australia	760	988 (2013–14)
Tasmania	350	287 (2012–13)
ACT	226	85 (2013–14)
Northern Territory	116	512 claims received (2011–12)
<b>TOTAL</b>	<b>12,000</b>	

The approximate number of modelled claims for redress that could be expected on an annual basis in the earlier years of a redress scheme does not appear to be out of proportion to the annual numbers of applications that are currently determined by statutory victims of crime

compensation schemes. Of course, it would be a matter for governments to determine whether it would be more efficient to use some of the administrative arrangements that are already established for these statutory victims of crime schemes to provide redress. In some cases, it might be more efficient to use some of these existing arrangements. In other cases, new arrangements might be preferred.

We see no difficulty in governments determining which approach is to be preferred, subject to ensuring that the redress scheme is implemented and operates as we recommend. In particular, the existing schemes, if used, should be limited to providing some of the ‘back office’ operations of a redress scheme. Whether the redress scheme is administered through a new agency or through using existing schemes, we consider that the redress scheme must include:

- its own branding for ease of recognition by survivors
- its own application forms and application processes
- proper arrangements for assisting survivors when they apply for redress and supporting survivors while their application is being determined
- detailed guidelines for assessing applications under the matrix for monetary payments
- a process for determining contributions for and the funding of counselling and psychological care through redress.

However, we emphasise that statutory victims of crime schemes should only be used for ‘back office’ operations. We do

not consider that redress for survivors can or should be equated to general victims of crime compensation.

As discussed in Chapter 7, we are satisfied that payments under a redress scheme for survivors should be higher than payments under statutory victims of crime compensation schemes. The Tasmanian Government submitted that it is reluctant to create a special class of victims or survivors and that it wished to provide the same level of redress for survivors of child sexual abuse regardless of whether the abuse occurred in a family or an institution.<sup>705</sup>

However, as discussed in Chapter 7, a redress scheme for survivors recognises that institutions have a degree of responsibility for the harm done to survivors. The responsibility may not be a legal liability (although in some cases it may be), but there is at least a moral or social responsibility to address the harm done. This is the case for government and non-government institutions. Statutory victims of crime compensation schemes do not involve these considerations of responsibility.

## What is the best scale for a redress scheme?

If governments establish redress schemes, the remaining issue is whether it is better to have a single national redress scheme established by the Australian Government or whether a separate scheme in each state and territory, established by the relevant state or territory government, is to be preferred.

We have no doubt that the best structure for providing redress is through a single national redress scheme established by the Australian Government.

As discussed above, submissions to the Consultation Paper and the public hearing confirm that survivors and survivor advocacy and support groups overwhelmingly continue to support a single national redress scheme established by the Australian Government. Many non-government institutions also support this.

Clearly, the Australian Government will be a necessary participant in a redress scheme or schemes. In its submission in response to the Consultation Paper, the Australian Government argued that institutions should accept the legal, financial and moral responsibility for failing to protect children. As the Chair of the Royal Commission said in opening the public hearing:

we welcome the Commonwealth's view that institutions must accept the legal, financial and moral responsibility for failing to protect children. This will, of course, extend to the Commonwealth accepting responsibility for any children who were not protected while in the care of the Commonwealth Government.<sup>706</sup>

The Australian Government's submission raised four broad concerns about a single national redress scheme.

First, it claimed that a single national redress scheme would be extremely complex and would require significant time to negotiate and establish.

Some of those who spoke at the public hearing responded to this concern. For example, Mr Razi, representing the Aboriginal Legal Service of Western Australia,

told the public hearing '[r]egardless of how a redress scheme is operated it will be complex'.<sup>707</sup>

Mr Strange, representing knowmore, told the public hearing:

It has been noted that to establish a national redress scheme would be complex and time consuming and certainly that's correct, but that's not an unusual position that governments and policy makers must face and we urge that work continues towards finding the solution that best delivers the outcome that survivors need ...<sup>708</sup>

In its submission in response to the Consultation Paper, Northcott Disability Services commented on the discussion in the Consultation Paper that a national scheme would require 'the agreement and participation of all governments, which may be difficult to achieve'. Northcott Disability Services referred to the National Disability Insurance Scheme as 'a significant example of all jurisdictions cooperating to deliver a national scheme'. Northcott Disability Services also submitted that, as the National Disability Insurance Scheme is of a much larger scale than redress would be and is a permanent scheme, it should not be assumed that a national redress scheme would take as long to implement.<sup>709</sup>

We are satisfied that it is unlikely to be less complex for the eight states and territories to establish separate schemes. The eight states and territories would need to negotiate and reach agreement on the many matters of detail discussed above to ensure that the state and territory schemes

were sufficiently consistent to offer fair and equitable redress to survivors. It is difficult to see how they could more easily achieve this necessary level of consistency without Australian Government leadership.

Secondly, the Australian Government submission suggested that the Commonwealth might require a referral of powers from the states in order to establish a single national redress scheme and that this would add to the complex and protracted negotiations.

Some of those who provided written submissions to the Consultation Paper or who spoke at the public hearing referred to the issue of Commonwealth legislative power.

For example, Mr McConnel, representing the Law Council of Australia, told the public hearing:

The Commonwealth has submitted that a complication for the national scheme would be identifying the source of legislative power to operate such a scheme. Our response is that while we acknowledge that there is no obvious head of power, it is possible for States and Territories to refer powers to the Commonwealth and, in this instance, it appears that the New South Wales Government has indicated a willingness to embark on discussions towards that end. Other States and Territories have either not adopted a position or have not provided a submission on that point.

We consider that the Commonwealth should engage in

consultation with the States and Territories and work towards a national redress scheme.<sup>710</sup>

In its submission in response to the Consultation Paper, the Australian Lawyers Alliance stated:

There are advantages and disadvantages in a single national scheme. It would be slow to implement and require the referral of powers by states and territories. However, the alternative is a model which individual states and territories may or may not follow or implement only in part, creating great difficulty for those abused across jurisdictions and making injustice widespread between victims.<sup>711</sup>

The Royal Commission has not attempted to form its own view on the Commonwealth's legislative power in relation to these issues. While there may be relevant treaties and other international obligations, and while some of the relevant non-government institutions are likely to be corporations, we acknowledge that the Commonwealth may require a referral of powers from the states in order to enact any necessary legislation to support a single national redress scheme. Of course, the need for and scope of any referral of powers will depend on the scope and nature of the particular legislation proposed.

In any event, given that the governments of New South Wales and Victoria have expressed a willingness to participate in discussions or negotiations about a single national redress scheme and the views of the governments of Queensland



and Western Australia are not known, negotiations on potential referrals of power could commence at least with those states that are willing to participate.

Thirdly, the Australian Government's submission suggested that a single national redress scheme would overlap with existing state and territory statutory victims of crime compensation schemes and counselling and psychological care services.

Generally, state and territory statutory victims of crime compensation schemes already provide for recovery of any statutory victims of crime compensation that has been paid if a claimant later recovers other compensation for their injuries. We recommend that past payments, including statutory victims of crime compensation, be taken into account in monetary payments under a redress scheme. These approaches should eliminate any duplication or 'double dipping' in relation to monetary payments.

Further, the counselling and psychological care provided under the redress scheme that we recommend would not overlap with state and territory counselling and psychological care services, whether they are provided through statutory victims of crime compensation schemes or otherwise. This is because we recommend counselling and psychological care be provided through redress in a manner that will fill gaps in existing services and not duplicate or replace existing services.

Fourthly, the Australian Government's submission suggested that a single national redress scheme would involve significant cost and new bureaucracy.

Commissioners agree that the cost of establishing and administering a redress scheme should be minimised to an extent that is consistent with providing an effective redress scheme for survivors. As much as possible of the available funding should be directed to making monetary payments and providing counselling and psychological care to survivors rather than to administration. However, it will also be essential that sufficient funds are made available to give survivors adequate assistance and support to enable them to seek redress effectively without causing them any further trauma, to the extent it can be avoided.

There will be a cost involved in adequately establishing and administering a single national redress scheme. In modelling the cost of funding redress, Finity has allowed for an administrative cost of \$3,000 per scheme participant.<sup>712</sup> This is similar to the cost of administration per person in Redress WA and the Tasmanian Government's redress scheme, after allowing for inflation.

Generally, it seems likely that, because of its scale, a larger scheme will be able to achieve the greatest efficiency in administration costs. There may not be much difference on a per-claim basis in the costs of establishing and administering a single national redress scheme when compared with individual state and territory schemes. However, given the numbers of estimated eligible claimants for the smaller jurisdictions, as calculated by Finity, those jurisdictions might struggle to achieve significant economies of scale. In particular, Finity estimated that, of the total 60,000 estimated eligible claimants, some 1,750 would make claims for abuse in Tasmanian institutions, some 1,130 would make claims for abuse in Australian Capital



Territory institutions and some 580 would make claims for abuse in Northern Territory institutions.<sup>713</sup>

In any event, it is not clear to us why the costs of establishing a new national bureaucracy would exceed the costs of establishing eight separate new or expanded bureaucracies at state and territory level.

As discussed above, governments may be able to use some of the administrative structures in their statutory victims of crime compensation schemes to operate a redress scheme. Whether or not it would be more efficient to do so would be a matter for the governments concerned. But such mechanisms should be able to be used, if desired, in implementing a single national redress scheme in the relevant state or territory. This may be particularly desirable in light of the Australian Government's concerns about the complexity and cost of a single national redress scheme and the preference or willingness of some state and territory governments to consider using their existing schemes.

Again, as discussed above, we see no difficulty in governments determining which approach is to be preferred, subject to ensuring that the redress scheme is implemented and operates as we recommend. In particular, the existing schemes, if used, should be limited to providing some of the 'back office' operations of the single national redress scheme. Whether the redress scheme is administered through a new agency or by using existing schemes, we consider that the single national redress scheme must include:

- national branding for ease of recognition by survivors
- national application forms and application processes
- nationally consistent arrangements for the provision of assistance to survivors in applying for redress and in supporting survivors through the determination of their application
- national guidelines for assessing applications under the matrix for monetary payments
- a nationally consistent approach to determining contributions for and the funding of counselling and psychological care through redress.

There is also a concern that national institutions or institutions that operate in more than one state or territory may face additional costs if they are required to participate in a number of redress schemes, perhaps at state and territory level, rather than a single national scheme.

In its submission in response to the Consultation Paper, YMCA Australia supported a national redress scheme and stated:

we also note the significant administrative burden on federated organisations such as the YMCA in Australia if we were to participate in numerous stand-alone redress schemes.<sup>714</sup>

Commissioners recognise that a single national redress scheme is likely to require significant national negotiations and that these negotiations are likely to take some time. However, we are satisfied that the outcomes of a single national redress scheme will be better than those of

separate state and territory schemes and will be far better than what could be achieved if non-government institutions are left without government leadership to try to implement effective redress schemes on their own. We are satisfied that this approach is necessary to successfully deliver an effective redress scheme that provides justice for survivors.

#### **Recommendation**

26. In order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.

### Implementation of the recommended structure

While we are strongly of the view that a single national redress scheme established by the Australian Government is the most effective structure for providing redress in a manner that ensures justice for survivors, we also recognise that redress must be made available as soon as possible.

If the Australian Government is not willing to establish a single national redress scheme, we accept that state and territory schemes, involving government and non-government institutions, are the next best option and they are significantly preferable to schemes operated by institutions or groups of institutions.

#### **Recommendation**

27. If the Australian Government does not establish a single national redress scheme, as the next best option for ensuring justice for survivors, each state and territory government should establish a redress scheme covering government and non-government institutions in the relevant state or territory.

We consider that the Australian Government should determine and announce by the end of 2015 whether or not it is willing to establish a single national redress scheme. If it announces that it is willing to do so, national negotiations should proceed as quickly as possible to agree the necessary arrangements between the Australian Government and state and territory governments.

If the Australian Government does not announce that it is willing to establish a single national redress scheme by the end of 2015, the states and territories should move as quickly as possible to establish a government-run redress scheme for government and non-government institutions in each state and territory. State and territory governments should undertake national negotiations as quickly as possible to agree the necessary matters of detail to provide the maximum possible consistency for survivors between the different state and territory schemes.

If some state or territory governments are not ready to participate in national negotiations then, at the very least, the governments of New South Wales and Victoria, as the largest jurisdictions which are already working on redress schemes, should endeavour to develop consistent redress schemes. These schemes should then be adopted by other states and territories. This would be a particularly significant improvement in the current situation given that New South Wales and Victoria have not previously offered access to broad government redress schemes.

We consider that the redress scheme or schemes should be established and ready to start accepting applications from survivors as soon as possible. The timetable set out below is fairly ambitious, but we consider it to be reasonable:

- All governments should consider our recommendations and how they would implement them during the remaining months of 2015.
- Throughout 2016, the Australian Government or state and territory governments should lead and/or participate in negotiations for the establishment of a redress scheme or schemes.
- In the first half of 2017, the redress scheme or schemes should be established and should prepare and implement the systems and procedures necessary to begin inviting and accepting applications.

### **Recommendations**

28. The Australian Government should determine and announce by the end of 2015 that it is willing to establish a single national redress scheme.
29. If the Australian Government announces that it is willing to establish a single national redress scheme, the Australian Government should commence national negotiations with state and territory governments and all parties to the negotiations should seek to ensure that the negotiations proceed as quickly as possible to agree the necessary arrangements for a single national redress scheme.
30. If the Australian Government does not announce that it is willing to establish a single national redress scheme, each state and territory government should establish a redress scheme for the relevant state or territory that covers government and non-government institutions. State and territory governments should undertake national negotiations as quickly as possible to agree the necessary matters of detail to provide the maximum possible consistency for survivors between the different state and territory schemes.
31. Whether there is a single national redress scheme or separate state and territory redress schemes, the scheme or schemes should be established and ready to begin inviting and accepting applications from survivors by no later than 1 July 2017.

Regardless of whether there is a single national redress scheme or separate state and territory redress schemes, we consider that there should be an advisory council to advise on the establishment and operation of the scheme or schemes. If there are separate state and territory redress schemes, a national advisory council should help to encourage consistency, share experiences and identify and resolve any common problems in implementation across the different schemes.

The advisory council should include representatives:

- of survivor advocacy and support groups
- of non-government institutions, particularly those that are expected to be required to respond to a significant number of claims for redress
- with expertise in issues affecting survivors with disabilities
- with expertise in issues of particular importance to Aboriginal and Torres Strait Islander survivors
- with expertise in psychological and legal issues relevant to survivors
- with such other expertise as may assist in advising on the establishment and operation of the redress scheme or schemes.

### **Recommendations**

32. The Australian Government (if it announces that it is willing to establish a single national redress scheme) or state and territory governments should establish a national redress advisory council to advise all participating governments on the establishment and operation of the redress scheme or schemes.

33. The national redress advisory council should include representatives:

- a. of survivor advocacy and support groups
- b. of non-government institutions, particularly those that are expected to be required to respond to a significant number of claims for redress
- c. with expertise in issues affecting survivors with disabilities
- d. with expertise in issues of particular importance to Aboriginal and Torres Strait Islander survivors
- e. with expertise in psychological and legal issues relevant to survivors
- f. with any other expertise that may assist in advising on the establishment and operation of the redress scheme or schemes.

While we think it most likely that legislation will be required, we do not propose to recommend that the scheme be established by legislation or what that legislation might contain.

In his submission in response to the Consultation Paper, Professor Parkinson expressed concern that a scheme set up by statute would be ‘bureaucratic and relatively cold’ and that the application of administrative law principles could lead to loss of the therapeutic focus of a redress scheme. He suggested that a scheme could be set up cooperatively by contract between governments and institutions, with institutions having some ongoing ownership of the process so that they do not ‘wash their hands’ of the responsibility for abuse, other than by funding payments.<sup>715</sup>

However, some non-government institutions may seek that governments establish any redress scheme under legislation or with other mechanisms to ensure that non-government institutions can be satisfied of the independence and efficiency of the scheme.

For example, the Truth, Justice and Healing Council submitted that it would be desirable for the national scheme or state and territory schemes to be established by legislation in order to ensure independence from institutions, including government institutions.<sup>716</sup>

During the public hearing Mr Condon, representing The Salvation Army Australia, expressed concern about redress being funded through a state-run body without institutions having any control over the body. In responding to questions, Mr Condon agreed that some form of statutory corporation that allowed non-government

institutions to share in the governance of the scheme might work.<sup>717</sup>

As discussed in the Consultation Paper, there are models for redress schemes that are not established by legislation.<sup>718</sup> Previous government redress schemes in Australia have not been established by legislation. However, they have involved only one party (the relevant government) offering redress and they have not had to maintain the confidence of non-government parties that are not only participating in the scheme but also contributing substantial funding to it. The Financial Ombudsman Service is established largely by contract, although it is supported by legislation and its members are only non-government organisations and not governments.

While legislation is likely to be required and desired, regardless of whether the structure implemented is a single national redress scheme or state and territory schemes, we accept that this should be left to the relevant governments to negotiate, including with non-government institutions and with input from the advisory council.

We do not propose to recommend a fixed duration of the single national redress scheme or state and territory schemes.

Various suggestions on the duration of the scheme were made in submissions in response to the Consultation Paper and at the public hearing. For example, Ms MacIsaac, representing Broken Rites, told the public hearing that the scheme should be able to operate for at least 25 years.<sup>719</sup> The Northern Territory Government submitted that the scheme should not operate for longer than 10 years and should be subject to review after five years.<sup>720</sup> Professor Parkinson submitted

that the responsibility for responding to claims for redress should revert to institutions after five years, due to the costs of the scheme and the decline in claims, although institutional responses would still draw on features of the scheme.<sup>721</sup>

As we discuss in Chapter 11, we are satisfied that a redress scheme should not have a fixed closing date because of the significant difficulties it would create for survivors. As discussed in Chapter 11, we consider that a scheme could be closed if applications to the scheme reduce to a level where it would be reasonable to consider closing the scheme, provided that at least 12 months' notice of the closing date is given and widely publicised. Again, we consider that this should be determined by the relevant government or governments that establish the scheme, with input from the advisory council.

## 10.3 Funding required for redress

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### Modelling

Our actuarial advisers, Finity, have conducted modelling of the funding needs across states and territories, divided between government and non-government institutions. As discussed in Chapter 3, this modelling has been updated since it was presented in the Consultation Paper. As was the case with the modelling presented in the Consultation Paper, the detail underpinning the modelling presented here is set out in the updated Finity actuarial report, which we are publishing in conjunction with this report. The updated Finity actuarial report is published on the Royal Commission's website.

The modelling presented here reflects an average monetary payment of \$65,000, as we have recommended in Chapter 7. It also takes account of amounts already spent on providing redress, to the extent that these would reduce funding requirements under a new scheme. As we recommend in chapters 7 and 11, past monetary payments should be taken into account under a new scheme. This requires that an adjustment be made for them to reflect lower future funding needs.

The modelling is also based on the updated estimate of 60,000 eligible claimants. Sensitivity analysis to show the impact on costs if there are fewer (40,000) or more (80,000) eligible claimants is set out in the updated Finity actuarial report.

The modelling in this chapter distinguishes between government-run and non-government-run institutions. Australian Government funding contributions may be relevant to:

- government-run institutions if the Australian Government ran an institution or under its broader social or regulatory responsibilities discussed in this chapter
- non-government-run institutions under its broader social or regulatory responsibilities discussed in this chapter.

Due to rounding, numbers presented in this chapter may not add up precisely to the totals provided.

## Funding for counselling and psychological care

Finity has estimated the total cost of providing counselling and psychological care to survivors and the total cost per jurisdiction, as set out in Table 23. Finity has also estimated the breakdown in counselling and psychological care costs between those relating to abuse in government-run institutions and those relating to abuse in non-government-run institutions.

**Table 23: Estimated costs of counselling by jurisdiction and government-run and non-government-run institutions**

Location	Government (Australian and state or territory) institutions (\$ million)	Non-government institutions (\$ million)
New South Wales	39	81
Victoria	29	59
Queensland	16	30
Western Australia	13	23
South Australia	6	15
Tasmania	3	6
Australian Capital Territory	2	5
Northern Territory	1	2
<b>TOTAL</b>	<b>110</b>	<b>220</b>

We have used the estimates in Table 23 to represent the funding that would be required for counselling and psychological care under redress. This is the total cost of counselling and psychological care and it does not take into account existing publicly provided counselling and psychological care that survivors use, as discussed in Chapter 6. Further, it does not take account of the likely impact of the implementation of our recommendations to extend the funding for counselling and psychological care available to survivors through Medicare.

Therefore, the additional cost of counselling and psychological care under redress may be less than the costs modelled here. Given the comparatively small costs involved, the extent of the current service gaps discussed in Chapter 6 and the uncertainty about the extent to which the existing public provision of counselling and psychological care is meeting the needs of some survivors, we are satisfied that the estimates in Table 23 should not be further adjusted for the purposes of the discussion here. The funding will also need to be sufficient to cover the administration costs of the trust, which also supports making no further adjustment here.

## Funding for monetary payments

Finity has estimated the total cost of providing monetary payments to survivors and the total cost per jurisdiction, as set out in Table 24. Finity has also estimated the breakdown in monetary payments between those relating to abuse in government-run institutions and those relating to abuse in non-government-run institutions.

This modelling is based on an average monetary payment of \$65,000.

**Table 24: Estimated costs of monetary payments by jurisdiction and government- and non-government-run institutions**

Location	Government (Australian and state or territory) institutions (\$ million)	Non-government institutions (\$ million)
New South Wales	465	957
Victoria	344	695
Queensland	192	359
Western Australia	150	267
South Australia	75	172
Tasmania	38	75
Australian Capital Territory	19	55
Northern Territory	16	22
<b>TOTAL</b>	<b>1,297</b>	<b>2,603</b>

The amounts in Table 24 are estimates of the total costs without taking into account amounts already spent on providing redress. As we recommend in chapters 7 and 11, past monetary payments should be taken into account under a new scheme. Therefore, an adjustment must be made so that the figures reflect lower future funding needs. Table 25 sets out estimates with an estimated adjustment for past monetary payments.



**Table 25: Estimated costs of monetary payments by jurisdiction and government-run and non-government-run institutions, adjusted for past monetary payments**

Location	Government (Australian and state or territory) institutions (\$ million)	Non-government institutions (\$ million)
New South Wales	442	880
Victoria	327	644
Queensland	145	333
Western Australia	65	258
South Australia	67	160
Tasmania	8	73
Australian Capital Territory	18	42
Northern Territory	15	22
<b>TOTAL</b>	<b>1,086</b>	<b>2,414</b>

## Funding for administration

Finity has estimated the cost per application of administering a redress scheme. Finity has also estimated the breakdown in administration costs between those relating to abuse in government-run institutions and those relating to abuse in non-government-run institutions. Based on the estimated number of claims per jurisdiction, the total cost of administration per jurisdiction is shown in Table 26.

**Table 26: Estimated administrative costs by jurisdiction and government-run and non-government-run institutions**

Location	Government (Australian and state or territory) institutions (\$ million)	Non-government institutions (\$ million)
New South Wales	21	44
Victoria	16	32
Queensland	9	17
Western Australia	7	12
South Australia	3	8
Tasmania	2	3
Australian Capital Territory	1	3
Northern Territory	1	1
<b>TOTAL</b>	<b>60</b>	<b>120</b>

## Total costs for redress

Table 27 shows the total estimated cost by jurisdiction and by government-run and non-government-run institutions for:

- counselling and psychological care
- monetary payments, adjusted for past monetary payments
- administration costs.

As noted above, the total costs shown in Table 27 are based on modelling that estimates 60,000 eligible claimants. Sensitivity analysis to show the impact on costs if there are fewer (40,000) or more (80,000) eligible claimants is set out in the updated Finity actuarial report.

**Table 27: Estimated total costs for redress by jurisdiction and government-run and non-government-run institutions**

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
<b>Number of estimated eligible claimants (total 60,000)</b>									
Government	7,150	5,290	2,950	2,300	1,150	590	290	240	19,960
Non-government	14,730	10,690	5,520	4,110	2,650	1,160	840	340	40,040
<b>Total</b>	<b>21,880</b>	<b>15,980</b>	<b>8,470</b>	<b>6,410</b>	<b>3,800</b>	<b>1,750</b>	<b>1,130</b>	<b>580</b>	<b>60,000</b>
<b>Counselling and psychological care (\$ million)</b>									
Government	39	29	16	13	6	3	2	1	110
Non-government	81	59	30	23	15	6	5	2	220
<b>Total</b>	<b>120</b>	<b>88</b>	<b>47</b>	<b>35</b>	<b>21</b>	<b>10</b>	<b>6</b>	<b>3</b>	<b>330</b>
<b>Monetary payments adjusted for past payments (average \$65,000) (\$ million)</b>									
Government	442	327	145	65	67	8	18	15	1,086
Non-government	880	644	333	258	160	73	42	22	2,414
<b>Total</b>	<b>1,322</b>	<b>971</b>	<b>478</b>	<b>323</b>	<b>227</b>	<b>81</b>	<b>60</b>	<b>37</b>	<b>3,500</b>
<b>Administration (\$ million)</b>									
Government	21	16	9	7	3	2	1	1	60
Non-government	44	32	17	12	8	3	3	1	120
<b>Total</b>	<b>66</b>	<b>48</b>	<b>25</b>	<b>19</b>	<b>11</b>	<b>5</b>	<b>3</b>	<b>2</b>	<b>180</b>
<b>TOTALS (\$ million)</b>									
Government	503	372	170	84	77	13	21	17	1,256
Non-government	1,005	735	380	293	183	83	49	25	2,754
<b>GRAND TOTAL</b>	<b>1,508</b>	<b>1,107</b>	<b>550</b>	<b>378</b>	<b>260</b>	<b>96</b>	<b>70</b>	<b>42</b>	<b>4,010</b>

As noted above, Australian Government funding contributions may be relevant to:

- government-run institutions if the Australian Government ran an institution or under its broader social or regulatory responsibilities discussed in this chapter
- non-government-run institutions under its broader social or regulatory responsibilities discussed in this chapter.

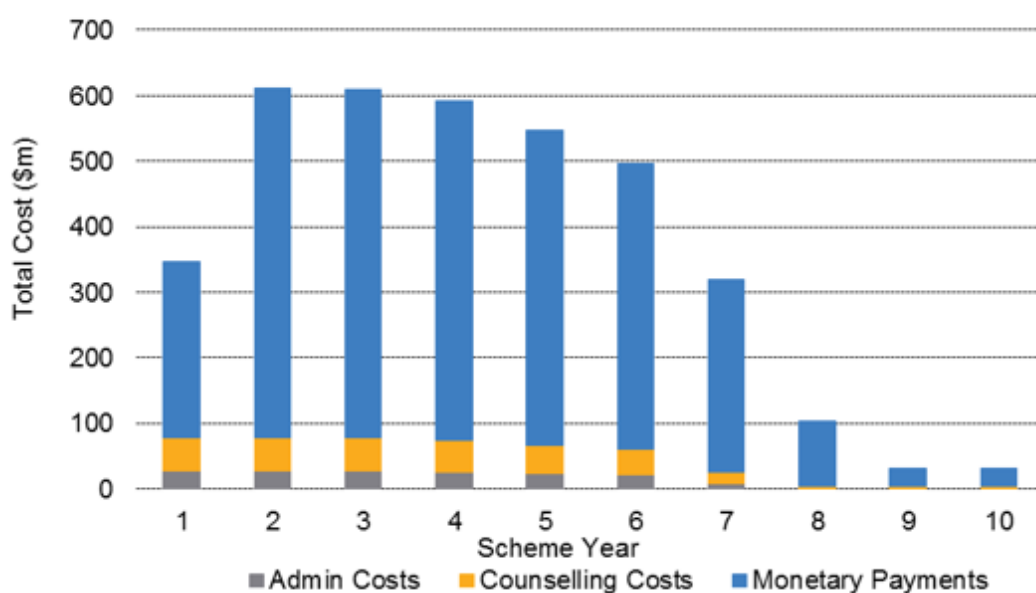
## Annual costs

Clearly the total funding will not be required immediately upon establishment of a scheme. While funding needs might be highest in the earlier years of a scheme, total costs and therefore funding needs will be spread over a number of years.

It is difficult to estimate the likely timing of applications for redress and the flow of funds required to meet them in a scheme with no fixed closing date. Previous government schemes have had closing dates, so they do not provide useful precedents for predicting the rate of claims. It might be expected that there will be larger number of claims in the first two years of the scheme, because those who have previously sought redress and those who have been waiting for a scheme would be expected to make their applications during that time. Claim numbers may then taper off gradually over the next following years.

Our actuarial advisers have modelled a possible pattern of claims and funding requirements, as shown in Figure 5.

**Figure 5: Estimated annual cost of the scheme over the first 10 years**



As noted above, this modelling of the funding needs is based on the estimate of 60,000 eligible claimants.

## 10.4 Who should fund redress?

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### Initial principles

We are satisfied that the initial principles we identified in the Consultation Paper provide the correct starting point for funding redress. Redress should cover the costs of:

- counselling and psychological care, to the extent it is provided through redress
- any monetary payment
- administration of the redress scheme.<sup>722</sup>

The principles identified in the Consultation Paper are:

- that the institution in which the abuse occurred should fund the cost of redress
- where a survivor experienced abuse in more than one institution, the costs of funding redress should be apportioned between the relevant institutions, taking account of the relative severity of the abuse in each institution and any other features relevant to calculating a monetary payment
- where the institution in which the abuse occurred no longer exists but the institution was part of a larger group of institutions or where there is a successor to the institution, the group of institutions or the successor institution should fund redress.

There was widespread support in submissions in response to the Consultation Paper for the proposition that the institution in which the abuse occurred should fund redress. This was the position of the Australian Government, many survivors, many survivor advocacy and support groups and many non-government institutions. Where those submitting online comment forms commented that governments should not fund redress, we did not take these comments to mean that governments should not fund redress for abuse that occurred in government-run institutions. Rather, we understood these comments to be directed to the issue of who should be the funder of last resort.

A number of submissions supported the proposal that the cost be apportioned across relevant institutions where a survivor experienced abuse in more than one institution. Further, a number of submissions supported the proposition that successor institutions or a larger group of institutions should fund the cost of redress for claims in respect of institutions that no longer exist.

However, we acknowledge that some submissions opposed or expressed reservations on the proposition that the institution in which the abuse occurred should fund redress.

As set out in detail in Chapter 9, in its submission in response to the Consultation Paper, Scouts Australia submitted:

[Funding redress,] especially in the context of a community based volunteer organisation which is not asset rich, should be seen as a

community responsibility for which the community should all contribute through our taxes.<sup>723</sup>

Scouts Australia submitted that funding redress could cause closure of the organisation. It asked whether the provision of redress should be at the expense of current and future program delivery for children.<sup>724</sup> Scouts Australia also submitted that a distinction should be made between not-for-profit institutions and institutions that are run on a commercial or semi-commercial basis.<sup>725</sup>

Northcott Disability Services submitted that some institutions may not be able to afford to continue their operations if redress becomes too costly. This could lead to the loss of critical services across the community.<sup>726</sup> The Lutheran Church of Australia also submitted that funding arrangements for redress should not put at risk the viability of any institution and expressed concern for small entities.<sup>727</sup>

We acknowledge the concerns raised by Scouts Australia, Northcott Disability Services and the Lutheran Church of Australia, among

others. However, we also acknowledge the overwhelming support of survivors and survivor advocacy and support groups in particular, and also of many other parties, for the proposition that the institutions in which the abuse occurred should be primarily responsible for funding redress.

We discuss below how flexibility in implementing funding for redress should allow governments to take account of the ongoing viability of institutions, particularly not-for-profit institutions with no real assets or fundraising base, and the implications of including community service organisations that are solely or largely government funded.

We note that some submissions stated that governments should contribute to the cost of redress for survivors of abuse in non-government institutions. In particular, the Uniting Church in Australia submitted that the government should share the responsibility for abuse in a non-government institution where the government had 'mandated, funded, regulated, and/or referred a child into that service'.<sup>728</sup> We discuss the role of governments below.

## Recommendations

34. For any application for redress made to a redress scheme, the cost of redress in respect of the application should be:
- a. a proportionate share of the cost of administration of the scheme
  - b. if the applicant is determined to be eligible, the cost of any contribution for counselling and psychological care in respect of the applicant
  - c. if the applicant is determined to be eligible, the cost of any monetary payment to be made to the applicant.
35. The redress scheme or schemes should be funded as much as possible in accordance with the following principles:
- a. The institution in which the abuse is alleged or accepted to have occurred should fund the cost of redress.
  - b. Where an applicant alleges or is accepted to have experienced abuse in more than one institution, the redress scheme or schemes should apportion the cost of funding redress between the relevant institutions, taking account of the relative severity of the abuse in each institution and any other features relevant to calculating a monetary payment.
  - c. Where the institution in which the abuse is alleged or accepted to have occurred no longer exists but the institution was part of a larger group of institutions or where there is a successor to the institution, the group of institutions or the successor institution should fund the cost of redress.

## Broader responsibilities of governments

The breakdown in funding requirements between government and non-government institutions in the modelling set out earlier in this chapter takes account only of whether or not an institution was run by a government.

However, as we discussed in the Consultation Paper, there are other bases on which governments could be considered responsible for institutions and conduct within them.<sup>729</sup>

As discussed in Chapter 2, a picture is emerging for us that there has been a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused.

The societal norm that ‘children should be seen but not heard’, which prevailed for unknown decades, provided the opportunity for some adults to abuse the power that their relationship with the child gave them. When the required silence of the child was accompanied by an unquestioning belief by adults in the integrity of the carer for the child the power imbalance was entrenched to the inevitable detriment of many children.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society’s values and mechanisms that were available to regulate and control aberrant behaviour failed. This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions. It is confirmed by the development in recent years of significantly increased regulatory control by government over many institutions that provide for children and the development of education programs and mechanisms by which problems can more readily be brought to attention.

In addition to this broader social responsibility, governments may also have responsibilities as regulators and as guardians of children. In some cases these responsibilities may be legal responsibilities, potentially leading to legal liability.

Governments in Australia have for many decades regulated a number of institutions,

including residential institutions, other forms of out-of-home care and schools. More recently, governments have also regulated child care and other forms of out-of-school-hours care as well as other providers of children’s services.

The nature and extent of government regulation has varied over time. To determine the precise legal duties of governments that arise from their regulatory roles, there would need to be a detailed case-by-case examination of the regulations that applied at the particular time in question and a consideration of the sometimes changing legal principles and legislation as to the potential liability of regulators. It would also depend upon the particular facts of the case. However, it is clear that, for many decades, governments have had a substantial role in regulating and overseeing institutions providing children’s services in Australia, including institutions that are not government run.

Further, governments have for many decades had legal guardianship of state wards or children in state care. Many of these children were placed in residential institutions or in other forms of out-of-home care. In our private sessions and case studies we have heard accounts of abuse from many former state wards. Again, to determine the precise legal duties of governments that arise from their guardianship roles, there would need to be a detailed case-by-case examination of the relevant legislation and the particular facts of the case. However, it is also clear in this case that governments have had substantial responsibilities for children in institutions, including institutions that are not government run.

Many of the responsibilities for regulating institutions and for guardianship of children lay with state governments. However, the Australian Government also has relevant responsibilities of this nature. For decades the Australian Government had particular responsibility for the territories and also particular responsibilities for Aboriginal and Torres Strait Islander people, including Aboriginal and Torres Strait Islander children, especially in the territories.

The Australian Government had some involvement in the child migrant program. We have heard accounts of abuse from a number of Former Child Migrants, including in Case Study 11 on four Christian Brothers former institutions in Western Australia. The Australian Government continues to have some responsibility for its own operations that involve children, such as the Australian Defence Force academies and immigration detention facilities.

In Case Study 17, which concerned the sexual abuse of children at the Retta Dixon Home in Darwin between 1946 and 1980, the Australian Government accepted responsibility for children in the home. Counsel for the Commonwealth told the public hearing in Case Study 17:

Thank you, your Honour. You asked yesterday at the closing whether the Commonwealth accepts that it was the guardian of these children in this home, and the answer in many cases would have been yes. The Commonwealth recognises that the children who were removed from their parents in accordance with Commonwealth legislation and placed in an institution like the Retta Dixon Home were effectively under

the guardianship of the Commonwealth, and that it had a general responsibility towards all the children in the home.

The Commonwealth Government accepted that it had responsibility for the care, welfare, education and advancement of those children, and a Commonwealth official was the legal guardian of those children. The Commonwealth retained responsibility until 1978, which was the time of self-government.<sup>730</sup>

In making oral submissions in Case Study 17, counsel for the Commonwealth said:

The statement that I made during the course of the hearing stands, your Honour, in relation to the Commonwealth's responsibility for these children. The Commonwealth has indicated, and maintains, a preparedness to participate in a redress discussion. That redress discussion will, of course, need to extend to children in like positions, if those children are identified, so that it's uniform and appropriate.<sup>731</sup>

State government redress schemes in Australia to date have been funded solely by the relevant state governments, even though these schemes covered non-government-run institutions. (The Australian Government solely funded the Defence Abuse Response Taskforce, but that scheme only covered abuse in Australian Government run institutions.)

As discussed above, the redress schemes that have operated in Queensland, Western Australia, South Australia and Tasmania



covered abuse in government and non-government institutions.

It is clear from the state government redress schemes to date that governments recognise that they have responsibilities that are broader than those for government-run institutions, including responsibilities that arise from their regulatory and guardianship roles. The Australian Government's submissions in Case Study 17 on the Retta Dixon Home in Darwin indicate that the Australian Government also recognises that it has responsibilities that extend beyond its own institutions.

We are satisfied that governments have a greater responsibility for providing redress than that which relates to abuse in government-run institutions alone. Submissions we have referred to above, which argued for governments to contribute to the cost of redress for survivors of abuse in non-government institutions where governments were guardians of the children or regulators of the institutions, have merit.

However, we are also satisfied that governments' greater responsibility does not allow a precise calculation of degrees or percentages of relative responsibility for abuse in non-government institutions between the non-government institution and the relevant government or governments. Such a calculation would require a detailed case-by-case examination of at least the circumstances of the child, the institution and the relevant regulatory regime of the sort that would be undertaken in civil litigation involving both the institution and the government or governments. The likely cost and time of conducting such a detailed examination on a case-by-case basis

could not be justified in the context of a redress scheme.

By not undertaking such an assessment, the non-government institutions that fund redress could be regarded, at least in some cases, as funding more than their share of redress. For example, a non-government institution that fully funds a redress claim by a survivor who was a ward of the state placed in a residential institution regulated by the state will bear the full cost of the redress claim without any part being apportioned to the relevant government as guardian of the child and as regulator of the institution.

However, funding for redress must be as practical and efficient as possible or all of those who fund redress will have to pay disproportionately high administration costs. This will be to no-one's advantage. We appreciate that there is an element of 'rough justice' in this, but we are satisfied that government and non-government institutions should meet the full cost of redress claims for abuse that occurred in the relevant institutions. Governments' responsibility will be met if, and only if, governments also accept responsibility as funders of last resort.

## Funder of last resort

There will be cases where institutions in which abuse has occurred no longer exist and they were not part of a larger group of institutions or there is no successor institution. There will also be cases where institutions that still exist have no assets from which to fund redress.

Funding for redress for survivors of abuse in these institutions will need to come from elsewhere. Leaving these survivors without access to the redress that is available to others would fall short of the requirement in our Terms of Reference of ‘ensuring justice for victims’.

In the Consultation Paper, we identified the possible options for who might fulfil the ‘funder of last resort’ role, being the institutions that fund redress (both government and non-government) or governments or some combination of the two.<sup>732</sup>

Many submissions in response to the Consultation Paper supported the proposal that governments should be funders of last resort. Some submissions argued that this role should be filled by the Australian Government, the relevant state or territory government or both governments. Some submissions argued that all institutions that fund redress, both government and non-government, should share the funder of last resort responsibility, either directly or through indirect mechanisms.<sup>733</sup>

Some submissions proposed that perpetrators of the abuse should also contribute to funding redress<sup>734</sup> and some proposed that all offenders could contribute to funding redress,<sup>735</sup> although it is not clear whether they intended that this funding would reduce the contributions of institutions or provide last resort funding.

Some submissions proposed that insurers should provide funding for redress.<sup>736</sup> It is not clear to us that institutions generally have had applicable insurance cover in the past that is now fairly readily identifiable,

with an insurer that is not insolvent and does not have low limits on coverage. As discussed in Chapter 11, we do not wish to discourage insurers from responding to redress claims. However, we do not see insurance as likely to provide funding for redress that is additional to what would otherwise be institutions’ contributions. That is, if institutions have relevant insurance and they respond to claims for redress, this would reduce the institutions’ contributions rather than be an additional source of funding.

For example, we would not expect that Catholic Church entities would fund all eligible claims for redress concerning abuse in Catholic institutions and that Catholic Church Insurance would then provide additional funding for other redress claims. Rather, it would be a matter for resolution between the relevant Catholic Church entities and Catholic Church Insurance as to whether insurance would meet any part of the Catholic Church entities’ funding responsibilities.

Relevant insurance coverage might be of assistance if it responds to redress claims against institutions that no longer exist or do not have the assets from which to fund redress. In these circumstances, if the insurer funded the relevant redress claims on behalf of the insured institution, funder of last resort funding would not be needed for these claims.

In its submission in response to the Consultation Paper, the Australian Government submitted that, depending on the design of the redress scheme, a funder of last resort role would not be necessary. It submitted:

For example, where the scheme operates to provide redress payments for abuses suffered prior to a fixed date, those claims should be quantifiable and capable of apportionment against the institutions against which findings of abuse (to whatever standard of proof is considered appropriate) have been made. The solvency of the institutions and the resources available to them could be factored in when the maximum payment figure available to any given victim is set. This is a more sustainable and principled model rather than requiring any party to underwrite the scheme, and would not be vulnerable to the criticism that one group of child sexual abuse survivors were being privileged over other survivors, in options for seeking recourse and redress.<sup>737</sup>

We understand this to mean that the funding that is available from institutions that are able to pay redress should be spread across all eligible applicants for redress, including applicants whose claims are against institutions that do not exist or do not have the assets necessary to pay redress. That is, all eligible applicants would receive monetary payments but at a lower amount than would apply if funder of last resort arrangements were in place.

This effectively means that the survivors themselves become funders of last resort in that they receive only a portion of the monetary payment they would otherwise have received. Given that administration costs would remain the same, if counselling and psychological care is to be adequately funded for all eligible applicants then the

monetary payments might need to be quite substantially reduced.

We do not agree with the Australian Government's submission that this is a 'more sustainable and principled model'. More importantly, we do not see that an approach that requires eligible survivors to cross-subsidise each other to fill gaps where institutions no longer exist or cannot fund redress could reasonably be considered to provide 'justice for victims', as required under our Terms of Reference.

The community is entitled to look to governments to meet an identified community need from their revenue sources rather than impose the obligations of one institution either on another institution or on individual survivors. The Royal Commission believes that responsible government involves governments accepting this responsibility.

We are satisfied that governments should act as funders of last resort on the basis of their social, regulatory and guardianship responsibilities discussed above.

Finity has estimated the adjustments to the government and non-government shares of the estimated total costs for redress if governments were to act as funders of last resort.

Table 28 shows the total estimated costs for redress by jurisdiction and by government-run and non-government-run institutions adjusted to show costs where governments act as funders of last resort. It can be compared with Table 27, which shows the total estimated costs without the adjustment for governments acting as funders of last resort.

**Table 28: Estimated total costs for redress by jurisdiction and government-run and non-government-run institutions adjusted for governments as funders of last resort**

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	TOTAL
<b>Number of estimated eligible claimants (total 60,000)</b>									
Government	10,370	7,250	4,190	3,120	1,740	850	490	290	28,300
Non-government	11,510	8,730	4,280	3,290	2,060	900	640	290	31,700
<b>Total</b>	<b>21,880</b>	<b>15,980</b>	<b>8,470</b>	<b>6,410</b>	<b>3,800</b>	<b>1,750</b>	<b>1,130</b>	<b>580</b>	<b>60,000</b>
<b>Counselling and psychological care (\$ million)</b>									
Government	57	40	23	17	10	5	3	2	156
Non-government	63	48	24	18	11	5	4	2	174
<b>Total</b>	<b>120</b>	<b>88</b>	<b>47</b>	<b>35</b>	<b>21</b>	<b>10</b>	<b>6</b>	<b>3</b>	<b>330</b>
<b>Monetary payments adjusted for past payments (average \$65,000) (\$ million)</b>									
Government	651	454	225	118	106	24	31	18	1,629
Non-government	671	517	253	205	122	56	29	19	1,871
<b>Total</b>	<b>1,322</b>	<b>971</b>	<b>478</b>	<b>323</b>	<b>228</b>	<b>80</b>	<b>60</b>	<b>37</b>	<b>3,500</b>
<b>Administration (\$ million)</b>									
Government	31	22	13	9	5	3	1	1	85
Non-government	35	26	13	10	6	3	2	1	95
<b>Total</b>	<b>66</b>	<b>48</b>	<b>26</b>	<b>19</b>	<b>11</b>	<b>5</b>	<b>3</b>	<b>2</b>	<b>180</b>
<b>TOTALS (\$ million)</b>									
Government	740	516	261	144	120	32	35	21	1,869
Non-government	769	591	289	233	139	64	34	21	2,141
<b>GRAND TOTAL</b>	<b>1,508</b>	<b>1,107</b>	<b>550</b>	<b>378</b>	<b>260</b>	<b>96</b>	<b>70</b>	<b>42</b>	<b>4,010</b>

Again, the total costs shown in Table 28 are based on modelling that assumes an estimate of 60,000 eligible claimants. Sensitivity analysis to show the impact on costs if there are fewer (40,000) or more (80,000) eligible claimants is set out in the updated Finity actuarial report.

By comparing Table 28 with Table 27, the estimated cost of the funder of last resort responsibility can be identified across each state and territory. Table 29 shows the total estimated costs for funder of last resort funding for redress by jurisdiction.

**Table 29: Estimated funder of last resort costs for redress by jurisdiction**

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	TOTAL
<b>Number of estimated eligible claimants requiring funder of last resort funding</b>									
Claimants	3,220	1,960	1,240	820	590	260	200	50	<b>8,340</b>
<b>Total cost of funder of last resort funding (\$ million)</b>									
Cost	237	144	91	60	43	19	15	4	<b>613</b>

The estimated total cost of funding redress is \$4.01 billion. If governments – both the Australian Government and state and territory governments – agree to be funders of last resort, under the modelling the estimated cost of last resort funding is \$613 million or some 15.3 per cent of the total cost of funding redress. We consider that an additional share of total costs of this sort of magnitude is a fair and reasonable amount to expect governments to pay given their social, regulatory and guardianship responsibilities discussed above.

### **Recommendations**

36. The Australian Government and state and territory governments should provide ‘funder of last resort’ funding for the redress scheme or schemes so that the governments will meet any shortfall in funding for the scheme or schemes.
37. Regardless of whether there is a single national redress scheme or separate state and territory redress schemes, the Australian Government and each state or territory government should negotiate and agree their respective shares of or contributions to ‘funder of last resort’ funding in respect of applications alleging abuse in the relevant state or territory.

## **Implementation of the recommended funding arrangements**

Many submissions in response to the Consultation Paper did not comment on the level of flexibility that should be allowed in implementing redress schemes and funding arrangements.

On funding more generally, the Actuaries Institute submitted:

There is one important point that we think has been omitted from the funding discussion (and the actuarial report). The Commission assumes that if a non-government entity runs an institution on behalf of, funded by or authorised by government, the non-government entity will be responsible for the funding.

We think this is unlikely to be the outcome in practice. The degree of responsibility of governments in these situations will mean that financial responsibility for redress will not be fully transferred to the non-government operator.

We suggest that the Commission needs to be clear about this point. Otherwise the indications of funding responsibility are misleading.<sup>738</sup>

To the extent that the Actuaries Institute is raising a concern about non-government institutions that are entirely or substantially reliant on government funding, we recognised this issue in the Consultation Paper when we suggested as one of the possible principles for implementation that governments could determine whether or not to require non-government institutions

or particular types of non-government institutions to fund a redress scheme. In particular, we suggested that governments could take into account the extent to which particular non-government institutions rely on government funding for their operations and any implications this might have for their participation in a redress scheme.<sup>739</sup>

To the extent that the Actuaries Institute is raising a concern about the recognition of broader responsibilities of governments, these are discussed above.

The concerns raised by Scouts Australia and other institutions as to the affordability of redress, and the substantial reliance of some community service organisations on government funding, confirm to us that governments should be allowed flexibility in establishing and funding redress.

Particularly in the interests of ensuring that what we recommend can be implemented, we are satisfied that governments should be allowed flexibility to enable adequate funding for redress to be secured efficiently.

Where we refer to the ‘redress scheme operator’ below, we mean either the Australian Government or the relevant state or territory government that is establishing the redress scheme.

We consider that the following principles should provide guidance to the redress scheme operator in implementing funding for redress, although they are not intended to be prescriptive:

- Non-government institutions that are expected to be subject to a number of claims for redress could be invited to participate with

the redress scheme operator in developing the redress scheme and in funding its administration costs from the start.

- Other non-government institutions could participate in the scheme if and when either they or the scheme receive an application for redress for abuse in the relevant institution. They could pay a reasonable fee for use of the redress scheme if and when they receive a relevant application for redress.
- Government and non-government institutions should fund the cost of eligible redress claims relating to them in accordance with the requirements of the redress scheme operator. These could provide for case-by-case contributions for institutions with few claims or regular contributions, with provision for adjustment from time to time, for institutions with many claims. Any legislation establishing a redress scheme could also provide recovery rights against institutions.
- The Australian Government and each state or territory government should negotiate their respective funding contributions. Where either the Australian Government or the relevant state or territory government ran a government-run institution, the funding responsibility will be clear. However, the governments will need to negotiate their respective shares of funder of last resort funding and for any institutions that were run by both the Australian Government and a state or territory government. The Australian Government may

have, or may have had, particular regulatory responsibility for some children in the territories and in some states. In such cases, the Australian Government's contribution to funder of last resort funding may be higher than in other cases.

- Each government should determine how to raise the funding it requires to provide its funding contributions to redress.
- Governments should determine whether or not to require particular non-government institutions or particular types of non-government institutions to contribute funding for redress. Governments may have a range of legal mechanisms, including legislation and funding agreements, through which they could impose obligations on institutions. Some governments may prefer to involve all non-government institutions in a redress scheme. Others might prefer to focus on the institutions with the most claims, accepting that this would probably increase the funding that governments must contribute as funder of last resort. Governments could also take into account the extent to which particular non-government institutions rely on government funding for their operations and any implications this might have for their contributions to funding the redress scheme. Governments could also take into account the affordability of redress for particular non-government institutions and the value to the community of ensuring that they continue to provide services for children.
- Governments that have previously provided redress for abuse in non-government institutions may wish to seek from non-government institutions a contribution to last resort funding if those governments have already funded some redress obligations that would otherwise fall to the non-government institutions.

We appreciate that survivors, survivor advocacy and support groups and non-government institutions may have strong views on the participation of non-government institutions in funding redress. We consider that the advisory council should be consulted on proposed arrangements but that ultimately the practicalities of funding redress should be determined by the relevant governments. No government should have an incentive to too easily excuse any non-government institution from contributing to the funding of redress given that the relevant government or governments would need to meet any shortfall in funding. However, the cost of obtaining some contributions may be greater than the contributions themselves. Governments should be allowed the flexibility to implement the funding arrangements for redress with an eye to practicality and minimising unnecessary administration costs.

### **Recommendations**

38. The Australian Government (if it announces that it is willing to establish a single national redress scheme) or state and territory governments should determine how best to raise the required funding for the redress scheme or schemes, including government funding and funding from non-government institutions.
39. The Australian Government or state and territory governments should determine whether or not to require particular non-government institutions or particular types of non-government institutions to contribute funding for redress.



## 10.5 Trust fund for counselling and psychological care

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As discussed in Chapter 6, we consider that funding for counselling and psychological care should be available through redress to do such things as:

- improve survivors' access to Medicare
- pay reasonable gap fees if survivors are unable to afford them
- supplement existing state-funded specialist services
- address gaps in expertise and cultural gaps
- fund counselling and psychological care for survivors whose needs for counselling and psychological care cannot otherwise be met.

As discussed in Chapter 6, we consider that the funding for counselling and psychological care through redress should be paid into a trust fund and should be managed and applied to meet survivors' needs for counselling and psychological care. This will enable the funding for counselling and psychological care to remain available for the remainder of eligible survivors' lives even if the redress scheme is closed, as discussed in section 11.3.

The single national redress scheme, or each state and territory redress scheme, should establish a trust fund to receive the funding for counselling and psychological care paid under redress and to manage and apply that funding to meet the needs for counselling and psychological care of those found eligible for redress under the relevant redress scheme. The funding will also need

to be sufficient to cover the administration costs of the trust.

Those who fund redress, including as the funder of last resort, should be required to pay an actuarially-determined estimate of the cost of future counselling and psychological care services that are to be provided through redress to the relevant trust fund, either directly or through the redress scheme.

Rather than having to assess the likely needs of each individual, the actuarial assessment would determine a 'per head' estimate of future counselling and psychological care costs to be funded through redress. The trustee of the trust fund should ensure that actuarial assessments are conducted regularly and that the 'per head' contributions are adjusted in accordance with the assessments. Particularly in the early years of the trust, until the trust has better data on the needs of eligible survivors, the actuarial assessments should be conducted more frequently – perhaps annually or bi-annually.

The fund will receive contributions from institutions – both government and non-government – responsible for providing redress and it will be responsible for managing and applying funds to meet the needs of survivors. Both survivors and funders will have an interest in ensuring the funds are raised, managed and applied appropriately.

We consider that the trust fund, or each trust fund, should be governed by a corporate trustee with a board of directors that includes representatives of the interests of survivors and funders. This will encourage



transparency and accountability, as well as informed input, in the governance of the fund. The trust fund, or each trust fund, should be governed by a board of directors appointed by the relevant government. The board, or each board, should have an independent Chair and it should include a representative of:

- government
- non-government institutions
- survivor advocacy and support groups
- the redress scheme

and those with other expertise as desired at board level to direct the trust.

### **Recommendations**

40. The redress scheme, or each redress scheme, should establish a trust fund to receive the funding for counselling and psychological care paid under redress and to manage and apply that funding to meet the needs for counselling and psychological care of those eligible for redress under the relevant redress scheme.
41. The trust fund, or each trust fund, should be governed by a corporate trustee with a board of directors appointed by the government that establishes the relevant redress scheme. The board or each board should include:
  - a. an independent Chair
  - b. a representative of: government; non-government institutions; survivor advocacy and support groups; and the redress scheme
  - c. those with any other expertise that is desired at board level to direct the trust.
42. The trustee, or each trustee, should engage actuaries to conduct regular actuarial assessments to determine a 'per head' estimate of future counselling and psychological care costs to be met through redress. The trustee, or each trustee, should determine the amount from time to time that those who fund redress, including as the funder of last resort, must pay per eligible applicant to fund the counselling and psychological care element of redress.

# 11 Redress scheme processes

## 11.1 Introduction

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For a redress scheme to work effectively for all parties, its processes must be efficient and focused on:

- obtaining the information required to determine eligibility and calculate monetary payments
- making that determination and calculation fairly and in a timely manner.

As discussed in the Consultation Paper, redress scheme processes, and the way in which the scheme is administered, must be sensitive, transparent and survivor-centred so that they minimise any risk of re-traumatisation and maximise the benefits of redress.<sup>740</sup>

Redress scheme processes will have a significant impact on the application of a scale of payments and the overall cost of monetary payments under redress. Accordingly, redress scheme processes must be settled in close alignment with actuarial assessments of scheme costs and the sustainability of scheme funding.

Previous and current redress schemes provide many examples of effective and less effective processes. These have been taken into account in developing our proposed approach.

In the Consultation Paper, we discussed a number of key redress scheme processes and proposed approaches for some of them.<sup>741</sup> We developed these approaches through our private roundtable consultations with a number of survivor advocacy and

support groups, institutions, governments and academics.

In the Consultation Paper, we invited submissions on any aspects of redress scheme processes. We particularly sought submissions on:

- eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included
- the appropriate standard of proof
- whether or not deeds of release should be required.<sup>742</sup>

Many submissions in response to the Consultation Paper commented on redress scheme processes. The approaches we proposed were, on the whole, supported in submissions and during the public hearing, although a range of views were expressed, particularly on some aspects of redress scheme processes.

Our recommendations on redress scheme processes in this chapter take account of all of our consultations on redress and civil litigation as well as what we have learned about people's experiences with previous redress schemes. We have sought to recommend redress scheme processes that accommodate both:

- survivors' preferences for straightforward administrative processes that are timely and fair
- the need to ensure a level of robustness commensurate with the level of monetary payments we recommend in Chapter 7.

## 11.2 Eligibility for redress

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An effective redress scheme must clearly define eligibility for the purposes of the scheme. ‘Eligibility’ refers to the criteria that determine whether a person is able to obtain redress through the scheme.

Eligibility criteria must be clearly set out in the documents that govern a redress scheme so that:

- potential applicants can make an informed decision about whether or not they are eligible to apply for redress
- redress scheme administrators can determine eligibility for redress through the scheme in a fair, consistent and transparent manner.

We identified in the Consultation Paper that the key elements to consider for eligibility are:

- the types of institutions included
- the connection between the institution and the abuse
- the type of abuse included
- any cut-off date by which the abuse must have occurred
- whether those who have already received redress may apply.<sup>743</sup>

Some submissions in response to the Consultation Paper raised queries about other elements of eligibility, including:

- whether the applicant must be alive at the time of making an application
- the age of the applicant at the time of the sexual abuse
- whether there would be any citizenship or other requirements

- whether ‘secondary victims’ could apply.<sup>744</sup>

We are satisfied that an applicant must be alive in order to apply for and receive redress. It is important that the survivors themselves are able to give an account of their experience of institutional child sexual abuse and its impact on them so that their application can be properly assessed. We accept that priority should be given to determining the applications of applicants who are seriously ill or elderly, so that the chance of them being alive and able to receive their redress payment is maximised. We also consider that, if the applicant is seriously ill or elderly and requests an interim payment, the scheme should be able to make an interim payment of \$10,000 – being the minimum payment we recommend in Chapter 7 – to any applicant who the scheme accepts is eligible for redress before it fully assesses their application and determines the amount of their monetary payment.

In terms of the age of the applicant at the time of the sexual abuse, our Terms of Reference define ‘child’ to mean a child within the meaning of the Convention on the Rights of the Child of 20 November 1989. For the purposes of the Convention, a child means every human being below the age of 18 years unless, under the law that applies to the child, majority is attained earlier. An applicant for redress must have been below the age of 18 years at the time the institutional child sexual abuse for which they seek redress occurred.

We see no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of application for redress.

In relation to ‘secondary victims’, as discussed in Chapter 4, we have focused on providing redress for survivors themselves rather than for their families or broader communities that might also be affected by the abuse. The needs of ‘secondary victims’ will be considered further through our separate work on support services. We do not recommend that a redress scheme should provide redress to anyone who is not themselves a survivor of institutional child sexual abuse.

## Types of institutions included

In the Consultation Paper, we suggested that the redress scheme should cover abuse in all of the entities that are included within the definition of ‘institution’ in our Terms of Reference.<sup>745</sup>

Our Terms of Reference define ‘institution’ as follows:

***institution*** means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:

- i. includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children,

including through their families; and

- ii. does not include the family.

In the Consultation Paper, we acknowledged that this definition is very broad.<sup>746</sup> However, we stated that we had not heard anything that suggests to us that any particular entities or types of entities that are included in the definition of ‘institution’ should be excluded from the coverage of a redress scheme.<sup>747</sup>

The majority of submissions in response to the Consultation Paper supported this definition.<sup>748</sup> No submissions suggested that this definition is too broad or that it would inadvertently cover entities that should not be part of a redress scheme.

As discussed in the Consultation Paper, there must in fact be an institution involved in the arrangement in which the abuse is said to have occurred.<sup>749</sup> In its submission in response to the Consultation Paper, the CREATE Foundation stated that the redress scheme should include all types of abuse in out-of-home care, including all home-based care arrangements.<sup>750</sup>

We are satisfied that a redress scheme should cover abuse in foster care and kinship care, because these out-of-home care arrangements are organised and overseen by institutions. However, we remain satisfied that a redress scheme should not cover abuse in voluntary foster care or kinship care arrangements where those arrangements have not been organised or overseen by an institution.

## Connection between the institution and the abuse

In the Consultation Paper, we stated that it is also necessary to consider the degree of connection required between the institution and the abuse in order for a survivor to be eligible for a redress scheme.<sup>751</sup>

Our Terms of Reference define child sexual abuse as occurring within an institutional context if:

- it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or
- it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where [we] consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or
- it happens in any other circumstances where [we] consider that an institution is, or should be treated as being, responsible for adults having contact with children.

In the Consultation Paper, we suggested that the abuse covered by a redress scheme should be abuse that the institution can reasonably be said to be responsible for.<sup>752</sup>

We suggested that this might include all abuse committed in a closed, residential institution, including peer-on-peer abuse.<sup>753</sup> However, it may not include all peer-on-peer abuse on day school premises – for example, if the abuse occurred on school premises out of school hours or during school holidays. Similarly, an institution cannot reasonably be said to be responsible for instances of family or stranger abuse committed on institutional premises or abuse committed by a stranger while a child is in foster care.

We suggested that a satisfactory approach might be that abuse should be included for redress if:

- it happens on premises of an institution, where activities of an institution take place or in connection with the activities of an institution in circumstances where the institution is, or should be treated as being, responsible for the contact in which the abuse was committed between the abuser and the applicant
- it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk
- it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.<sup>754</sup>

Many submissions in response to the Consultation Paper supported the proposition that eligibility for the scheme should involve establishing a connection of this type.<sup>755</sup>

Some submissions from survivor advocacy and support groups suggested that the level of connection required should be lower. For example, Victim Support Service submitted:

The threshold to make an application should only be an association with the institution where the alleged abuse took place. If an applicant has reached this threshold, then their application should be admitted for assessment by the redress scheme.<sup>756</sup>

Some submissions from institutions suggested that the connection we put forward in the Consultation Paper was too broad or too vague.<sup>757</sup> For example, the Anglican Church of Australia (ACA) stated:

[the ACA should not be] responsible for any child sexual abuse that occurs on its premises when a licensee or other person is undertaking an activity on its premises, such as in the case of a community or business activity operating independently out of a church hall ...

[including] paid employees and volunteers [as distinct from clergy] is too wide and would inevitably encompass situations where the abuse occurs in circumstances completely unrelated to any responsibility of that person.<sup>758</sup>

In his supplementary submission in response to the Consultation Paper, Professor Parkinson provided a document setting out 'gradations of responsibility for child sexual abuse in institutions'.<sup>759</sup> This document lists 18 different contexts in which abuse could occur with some connection to an institution. The list moves from the contexts in which Professor Parkinson submits an institution is most responsible for the abuse to the contexts in which Professor Parkinson submits an institution is not or should not be responsible for the abuse. For example, contexts 1, 10 and 17 are as follows:

1. A manager in the organisation knew that a child had been abused and failed to take the appropriate steps to protect that child or other children from the perpetrator thereafter. ...
10. An organisation, by its culture, practices and modes of operation, created the circumstances in which children were at greater risk of abuse than they would otherwise have been in a more healthy and risk-minimising organisation. ...
17. The sexual abuse was perpetrated by a person who was a volunteer with the organisation, and who may have gained access to the abused child in part because of that role, but the abuse did not occur in the context of any activity or service run by the organisation.<sup>760</sup>

Professor Parkinson told the public hearing:

I wrote this partly in response to the idea that the institution should have the entirety of the liability and that the community, through Medicare, should have none. I don't think that's right ... because there are gradations of responsibilities. It is absolutely appropriate for the institution to take a large amount of the responsibility ... but in terms of the costs of counselling and therapy, I suggest it should be shared with society.<sup>761</sup>

In responding to a question about the point at which he believes abuse should be considered entirely outside of an institution's responsibility, Professor Parkinson told the public hearing it was beyond point 15 – that is, where abuse occurred in the following context:

15. An organisation ran an activity or service, and took reasonable steps, judged by current standards, to reduce the risk of child sexual abuse in that activity or service.<sup>762</sup>

In many applications for redress, the connection between the institution and the abuse will be clear and straightforward – for example, where a teacher abuses a student on school premises. However, we recognise that a redress scheme is also likely to receive applications that raise various possible connections that are not clear or straightforward. We consider that the best approach is to give the redress scheme the sort of guidance – albeit appropriately

narrowed – that we have been given in our Terms of Reference as to institutional context. If the redress scheme receives a number of applications that raise similar factual scenarios that are not clear or straightforward, it can develop more detailed guidelines to ensure the applications are treated consistently. Given the nature and purpose of redress, we also consider that borderline cases should be resolved in favour of the applicant.

We remain satisfied that abuse should be included for redress if:

- it happens on premises of an institution, where activities of an institution take place or in connection with the activities of an institution in circumstances where the institution is, or should be treated as being, responsible for the contact between the abuser and the applicant that resulted in the abuse being committed
- it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk
- it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.

## Type of abuse included

In the Consultation Paper we stated that, having regard to our Terms of Reference, it would not be appropriate for us to consider making recommendations about redress for physical abuse or neglect that is unrelated to sexual abuse.<sup>763</sup>

We also stated that we were satisfied from what we had heard in private sessions and case studies that physical abuse and neglect may accompany sexual abuse and make it worse, particularly in residential institutions.<sup>764</sup> We referred to our discussion on monetary payments and stated that we considered that physical abuse that accompanies sexual abuse may affect the severity of the abuse and that this should be taken into account in assessments under a redress scheme.<sup>765</sup>

As discussed in Chapter 2, our discussion in the Consultation Paper suggesting that we focus on sexual abuse and not other forms of abuse received attention in a number of submissions and at the public hearing.

As set out in Chapter 2, Commissioners have determined that our recommendations on redress must be directed to recommending the provision of redress for those who suffered child sexual abuse in an institutional context. We do not accept that our Letters Patent authorise us to recommend redress for those who have suffered physical abuse or neglect, or emotional or cultural abuse, if they have not also suffered child sexual abuse in an institutional context.

We continue to recognise that, in particular instances, other unlawful or improper treatment, such as physical abuse or neglect

or emotional or cultural abuse, may have accompanied the sexual abuse. The matrix we recommend in Chapter 7 for assessing monetary payments allows for consideration of these related matters where they have accompanied sexual abuse.

## Cut-off date by which the abuse must have occurred

In the Consultation Paper, we stated that we had heard a range of views regarding whether a redress scheme should apply to past and future occurrences of abuse.<sup>766</sup> We reported that, on balance, most of those who expressed views in our consultation processes at that stage had advocated redress being available for future occurrences of abuse, not just for past occurrences of abuse.<sup>767</sup>

We referred to a submission from the Actuaries Institute that an option that is 'more likely to be sustainable' would be to limit the period of abuse that a redress scheme covers to:

Any past abuse of living persons, where the first episode of abuse occurred prior to the trigger date [that is, the cut-off date]. If abuse occurred both before and after the trigger date, then it will be covered. Any case where the first episode of abuse occurs after the trigger date would not be part of the scheme.<sup>768</sup>

We stated that, on balance, we were inclined to think that this was the best approach. We stated that we were not suggesting that the only avenue for seeking redress for any future occurrences of abuse should be



civil litigation. Rather, it was not clear that the particular form of redress or redress scheme we recommend for past abuse will be necessary or adequate for future occurrences of abuse.<sup>769</sup>

In the Consultation Paper, we invited submissions on this issue.<sup>770</sup>

Submissions in response to the Consultation Paper expressed a range of views on whether there should be a cut-off date for a redress scheme. It remains the case that many of those who addressed this issue in their submissions argued that the redress scheme should apply to future abuse as well as to past abuse.

In Chapter 2 we discuss this issue and our reasons for continuing to be satisfied that the redress scheme should cover past abuse and not future abuse. We consider that the cut-off date for the redress scheme should be the date on which the reforms we recommend to limitation periods in Chapter 14 and to the duty of institutions in Chapter 15 commence. If these reforms commence on different dates then the cut-off date for the redress scheme should be determined by reference to the latest commencement date. These dates might be different in different states and territories.

## Whether those who have already received redress may apply

In Chapter 7 we discuss and make recommendations on the issue of whether those who have already received redress should be eligible to apply to a new redress scheme. As discussed in Chapter 7, in our consultations there has been general

support for the principle that those who have already received monetary payments should remain eligible to apply under a new redress scheme, provided that any previous monetary payments are taken into account. This is the approach we recommend in Chapter 7.

In the Consultation Paper, we stated that we were satisfied that monetary payments already received for the relevant institutional abuse should be taken into account.<sup>771</sup> As we discuss in Chapter 7, many submissions in response to the Consultation Paper agreed with this. We continue to be satisfied that monetary payments already received for the relevant institutional abuse should be taken into account.

As we discuss in Chapter 7, it may not be easy to determine whether a previous payment relates to the same abuse, particularly where the previous payment has been made under a redress scheme or other arrangement that included forms of abuse other than institutional child sexual abuse.

We are satisfied that the recommendations we make in Chapter 7 will achieve a sensible approach that gives the benefit of the doubt to the survivor.

As we discuss in Chapter 7, the detailed treatment of previous monetary payments must be made very clear to potential applicants to the redress scheme, particularly so that they can make an informed decision on whether or not they wish to put themselves through the application process if payments they have already received might significantly diminish any further monetary payment that might be available under the redress scheme. Of course, some survivors might

wish to apply to a redress scheme, even if they do not consider they will be eligible for any monetary payment, so that they can have access to counselling and psychological care under redress. However, it will be important to ensure that survivors have sufficient information to form a realistic view of whether any monetary payment might be available to them given their particular circumstances in relation to previous monetary payments.

As we discussed in the Consultation Paper, applicants will need to be asked for, and will need to provide, information about any previous redress or compensation they have received.<sup>772</sup> However, we have seen examples of situations where survivors have difficulty accurately recalling previous redress or compensation or who do not have accurate records. Subject to addressing any privacy concerns by obtaining applicants' consent, the redress scheme may be able to negotiate arrangements with prior government redress schemes to confirm any redress the applicant has already received. Information about any redress or compensation already paid should also be sought from the relevant institution.

## Recommendations

43. A person should be eligible to apply to a redress scheme for redress if he or she was sexually abused as a child in an institutional context and the sexual abuse occurred, or the first incidence of the sexual abuse occurred, before the cut-off date.
44. 'Institution' should have the same meaning as in the Royal Commission's terms of reference.
45. Child sexual abuse should be taken to have occurred in an institutional context in the following circumstances:
  - a. it happens:
    - i. on premises of an institution
    - ii. where activities of an institution take place or
    - iii. in connection with the activities of an institutionin circumstances where the institution is, or should be treated as being, responsible for the contact between the abuser and the applicant that resulted in the abuse being committed
  - b. it is engaged in by an official of an institution in circumstances (including circumstances that involve settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk
  - c. it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.
46. Those who operate the redress scheme should specify the cut-off 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.
47. An offer of redress should only be made if the applicant is alive at the time the offer is made.

## 11.3 Duration of a redress scheme

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Whether a redress scheme is open-ended or has a fixed closing date has significant implications for survivors who may be eligible for the scheme and for those responsible for funding and administering the scheme.

In the Consultation Paper we suggested that a scheme should not have a fixed closing date.<sup>773</sup> We also suggested that, if the number of applications dwindles to the point where the need for the continued operation of the scheme is questioned, it may be that the scheme can be closed.<sup>774</sup> However, this should only occur after the closing date has been given widespread publicity and at least a further 12 months has been allowed for applications to be made.

Generally, submissions in response to the Consultation Paper supported an open-ended redress scheme.

In the Consultation Paper, we identified that a redress scheme may be finite or ongoing.<sup>775</sup> Previous and current redress schemes provide examples of both. The Queensland and Western Australian government schemes were each finite, as was the Tasmanian Government scheme, except that it was extended several times to allow additional rounds of applications. Statutory victims of crime compensation schemes are ongoing, although some impose time limits on applications from the date of the crime. Non-government institution redress schemes, such as Towards Healing, tend to be ongoing, although some smaller non-government institution redress schemes have operated for fixed times only.

The main argument against having a fixed closing date is that eligible survivors may miss out on redress because they do not find out about the scheme until after the closing date, when it is too late for them to apply. We have heard from a number of survivors and survivor advocacy and support groups that this was a problem with Redress WA. The Western Australian Government recognised this issue to some extent when it established a further scheme for those who were abused while they were resident in country high school hostels and had not realised that they were eligible to apply under Redress WA.<sup>776</sup>

In the public hearing, Ms Aldrick, representing Tuart Place, said:

In terms of recommendations, I would like to see Redress WA reopened without a time limit, because, as we said in our submission, we now know that some of the most seriously abused people missed out on the scheme.<sup>777</sup>

In the Consultation Paper, we stated that, although there was an extensive communication strategy to promote the availability of Redress WA, a number of survivors and survivor advocacy and support groups had told us that survivors may be particularly difficult to reach and some survivors may not appreciate that a scheme is available to them.<sup>778</sup> In particular, although Redress WA targeted remote Aboriginal communities through its communication strategy, we have been told that a number of survivors in these communities did not realise that they might be eligible for Redress WA until other community

members received payments, by which time applications had closed and it was too late for them to apply.<sup>779</sup>

Submissions in response to the Consultation Paper from survivor advocacy and support groups and legal services that supported or represented applicants to redress schemes stated that many potential applicants missed out on schemes due to their fixed closing dates, and this had an effect on communicating the availability of the scheme.<sup>780</sup>

For example, the Public Interest Advocacy Centre (PIAC) submitted:

PIAC agrees with the Royal Commission's conclusion that there should be no fixed closing date for the operation of the redress scheme ... PIAC appreciates that certainty can be provided by the imposition of a limitation period. However, given the proven long-term impact of child sexual abuse, with damage manifesting in a range of problems for the individual many years after the acts were perpetrated, a limitation period for the redress scheme would undoubtedly lead to injustice.<sup>781</sup> [Reference omitted.]

We also identified that there are other difficulties with having a fixed closing date. Many survivors may find it difficult to describe their abuse sufficiently for the application process in the time allowed. Some survivors may not be ready to discuss their abuse for the purposes of a redress scheme at that time. Further, because of these difficulties, there may be many applications still to be completed in the

lead-up to the fixed closing date. This can place considerable pressure on survivors and support services given that they are trying to complete applications to ensure that survivors' claims are put before the redress scheme in adequate detail for them to be fairly and properly assessed.

In its submission in response to the Consultation Paper, the Aboriginal Legal Service of Western Australia (ALSWA) stated in relation to Redress WA:

Another significant issue was the trauma experienced by applicants in telling their accounts of abuse. Further the stress and trauma experienced by ALSWA staff who were required to repeatedly listen and record accounts of abuse over many months could not be overlooked.<sup>782</sup>

We acknowledged that open-ended schemes may be considerably more difficult for those who fund and administer them. Having finite government schemes in Western Australia and Queensland enabled claims to be assessed and monetary payments to be determined in accordance with scheme budgets (including the increased budget for Redress WA). It also enabled all claims to be determined over a reasonably short period of time. This is likely to have improved consistency and fairness between survivors. Finite schemes may also encourage more efficient administration and reduced administrative costs.

However, given what we know about how long it may take survivors to disclose their abuse, it could be expected that a redress scheme would need to be available for some

20 or more years after the last occasion of abuse it is intended to cover.<sup>783</sup> Of course, when a redress scheme opens, it could also be expected that many survivors will be ready and waiting to apply. This is particularly the case with groups such as the Forgotten Australians, Former Child Migrants and the Stolen Generations, which have participated in inquiries, have prominent advocacy and support groups and in many cases have been pursuing redress for abuse that occurred well over 20 years ago. Other survivors may need some years before they are ready to apply.

Some submissions in response to the Consultation Paper supported our suggestion that, if the number of applications dwindles to the point where the need for the continued operation of the scheme is questioned, it may be that the scheme can be closed. This suggestion received some support from a range of survivor advocacy groups, institutions and legal service groups.<sup>784</sup>

We remain satisfied that a redress scheme should not have a fixed closing date and that, if applications to the scheme reduce to a level where it would be reasonable to consider closing the scheme, it could be closed but only after the closing date has been given widespread publicity and at least a further 12 months has been allowed for applications to be made.

#### **Recommendation**

48. A redress scheme should have no fixed closing date. But, when applications to the scheme reduce to a level where it would be reasonable to consider closing the scheme, those who operate the redress scheme should consider specifying a closing date for the scheme. The closing date should be at least 12 months into the future. Those who operate the redress scheme should ensure that the closing date is given widespread publicity until the scheme closes.

## 11.4 Publicising and promoting the availability of the scheme

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A key feature of an effective redress scheme is a comprehensive communication strategy. This strategy should ensure that the availability of the scheme is widely publicised and promoted.

As discussed in the Consultation Paper, much can be learned from the communication strategies that previous government schemes used, although it may be necessary to update strategies to include wider use of social media. A mix of mass, niche and direct marketing might be considered.<sup>785</sup>

Some survivors are likely to be difficult to reach. An effective communication strategy should target hard-to-reach groups. Some groups may be reached best by promoting the scheme to survivor advocacy and support groups, other support services and community legal centres.

The Royal Commission acknowledges that communication strategies need to be tailored to overcome any barriers that particular groups within the community may face.

Particular communication strategies could be considered for people who might be more difficult to reach. For example, specific materials and content could be created to engage with:

- Aboriginal and Torres Strait Islander communities
- people with disability
- culturally and linguistically diverse communities
- regional and remote communities
- people with mental health difficulties
- people who are experiencing homelessness
- people in correctional or detention centres
- children and young people.

In the Consultation Paper, we suggested that careful consideration should be given to how best to reach these groups.<sup>786</sup> Redress WA and the Queensland redress scheme may provide useful examples to consider.

A number of submissions in response to the Consultation Paper supported the proposal that the needs of these groups be considered. Some submissions stated that it will be important to develop culturally appropriate or culturally competent material, particularly for Aboriginal and Torres Strait Islander communities.<sup>787</sup>

Some submissions suggested that other groups might also need special consideration. For example, PIAC submitted:

Low levels of literacy among our most disadvantaged clients also limits the effectiveness of [mainstream methods] of communication. To allow survivors to access redress in a fair and equal way, it is critical that the communication strategy is tailored to raising awareness of the scheme in these groups.<sup>788</sup>

Care Leavers Australian Network (CLAN) submitted:

Another group of Care Leavers that require special attention are those who are living overseas. CLAN has many members who now reside in other countries as they have told us that it was too difficult for them to stay in Australia after what our country has put them through. This group of individuals must not be forgotten or left at a disadvantage if a redress scheme is instituted.<sup>789</sup>

These groups could also be considered in the development of a communications strategy.

As stated in the Consultation Paper, some survivors may not be reached through these strategies.<sup>790</sup> However, having no fixed closing date for a redress scheme will remove some of the urgency in reaching all survivors quickly to promote the availability of the scheme and allow them sufficient time to apply. This will allow more survivors, including survivors who might not be in contact with support groups or services, to be reached through word of mouth.

Some survivor advocacy and support groups submitted that they will need funding to support communication strategies that rely on their networks or outreach services. For example, in its submission in response to the Consultation Paper the Alliance for Forgotten Australians recommended:

That survivor organisations be adequately funded on an ongoing basis to ensure they can maintain networks of communication to support access to a redress scheme by isolated people.<sup>791</sup>

ALSWA submitted:

sufficient funding should also be provided to enable ALSWA staff to visit remote communities and provide accessible and culturally appropriate information to community members in relation to the scheme.<sup>792</sup>

We agree that a redress scheme will need to ensure that the communication channels it relies on to publicise and promote the availability of the scheme are adequately resourced to perform this role.

### **Recommendations**

49. Those who operate a redress scheme should ensure the availability of the scheme is widely publicised and promoted.
50. The redress scheme should consider adopting particular communication strategies for people who might be more difficult to reach, including:
  - a. Aboriginal and Torres Strait Islander communities
  - b. people with disability
  - c. culturally and linguistically diverse communities
  - d. regional and remote communities
  - e. people with mental health difficulties
  - f. people who are experiencing homelessness
  - g. people in correctional or detention centres
  - h. children and young people
  - i. people with low levels of literacy
  - j. survivors now living overseas.



## 11.5 Application process

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As we reported in the Consultation Paper, survivors and survivor advocacy and support groups have overwhelmingly called for the application process for redress to be as simple as possible to minimise the risk of re-traumatisation.<sup>793</sup> This approach was strongly supported in submissions in response to the Consultation Paper, including from survivor advocacy and support groups, institutions and legal groups.<sup>794</sup>

As discussed in the Consultation Paper, an application process must obtain the information necessary to assess eligibility and determine the amount of any monetary payment.<sup>795</sup> It should do this as efficiently as possible and in a manner that ensures that applicants have a good opportunity to put forward the best application they can. However, a scheme may require additional material or ‘evidence’ and additional procedures to determine the validity of claims if it has higher maximum or average payments available.

In the Consultation Paper, we suggested that the basic application process should rely primarily on completion of a written application form.<sup>796</sup> The form should be designed and tested before it is used to ensure that it is as simple as possible while seeking all of the necessary information.<sup>797</sup>

We also stated that the scheme should fund a number of support services and community legal centres to assist applicants to apply for redress. This was done in both the Western Australian and Queensland government schemes. The support services and community legal centres that are

chosen should cover a broad range of likely applicants, taking into account the need to cover regional and remote areas, and to take account of particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.

Submissions in response to the Consultation Paper strongly supported the suggestion that the scheme fund support services and community legal centres to assist applicants to apply for redress. For example, the CREATE Foundation submitted that applicants should be supported to lodge an application and that the support should include ‘technical, financial, and emotional’ support.<sup>798</sup> The Australian Lawyers Alliance submitted:

Many victims will need assistance to present and do themselves justice. There will need to be some form of advocacy mechanism, not necessarily by lawyers.<sup>799</sup>

Ms McIntyre, representing the Victorian Aboriginal Child Care Agency, told the public hearing:

I think it is significantly important to have support services available through the Aboriginal community to support people in the application process.<sup>800</sup>

We discuss support for survivors who are interacting with the redress scheme further in section 11.12.

As discussed in the Consultation Paper, despite the use of service providers to assist applicants, Redress WA reported considerable variability in the quality of written applications.<sup>801</sup> It seems likely that

some applications were not adequately completed because of time pressures. Having no fixed closing date for a redress scheme should reduce these difficulties. Further, the scheme should ensure that it communicates clearly and regularly with the service providers so that there is no doubt as to what is required.

In the Consultation Paper, we identified that there is an issue as to whether the fees lawyers can charge, where survivors retain their own lawyers to assist them in applying for redress, should be capped.<sup>802</sup> Some submissions in response to the Consultation Paper commented on this issue and a range of views were expressed. For example, Micah Projects submitted:

We do not support community legal centres referring survivors to private law firms for this assistance because this may mean that significant legal fees are deducted from any payment that is made to the survivor.<sup>803</sup>

Bravehearts submitted that it believes capped legal fees should be provided for under a redress scheme.<sup>804</sup> In its submission, PIAC proposed a scheme for the provision of legal assistance to survivors. It proposed that the scheme fund an intermediary to coordinate, train and supervise pro bono lawyers to assist survivor applicants throughout the redress process.<sup>805</sup>

We are not satisfied that we have sufficient grounds to recommend capped fees or to recommend that private sector lawyers be included or excluded from the scheme. Our preference is for the scheme to ensure that it funds sufficient advocacy and support services, including community legal services,

to support survivors in applying for redress. If survivors wish to retain private sector lawyers, this should be their decision and it should occur at their own expense. Some survivors might prefer to use private sector lawyers, particularly if those lawyers have already represented them to their satisfaction in previous civil litigation or redress applications.

In the Consultation Paper, we discussed the approach that Redress WA adopted where each applicant was contacted by telephone to give them an opportunity to add to the account they had given in their application and to answer any queries that Redress WA had about their application.<sup>806</sup> Redress WA reported that the telephone conversations were critical in balancing out the varying quality of the initial applications, although some applicants found the telephone calls distressing and traumatising.<sup>807</sup>

We suggested that this difficulty might be best addressed by working with service providers to ensure that they understand what is required in application forms. Given that applications will be determined on the basis of information provided in the application form, it is in applicants' interests to submit forms only when they are as complete as reasonably possible. Again, not having a fixed closing date for the scheme should assist. Some submissions in response to the Consultation Paper commented on this issue and suggested that the scheme should work closely with service providers to ensure that they understand what is required. This should reduce the need for further contact with survivors.<sup>808</sup>

In the Consultation Paper, we reported that some survivor advocacy and support groups

had suggested that every applicant should be given an oral hearing so that they have an opportunity to tell their story.<sup>809</sup> We suggested that conducting a hearing for each application may substantially slow down the determination of applications and increase administrative costs. Some survivors and survivor advocacy and support groups have also reported bad experiences of hearings that were part of redress schemes.

We suggested that there may need to be some provision for oral hearings where the written application process is unable to ensure that the applicant's case has been fairly and adequately made. However, we concluded that, unless an applicant has insurmountable difficulties in completing a written application even with the assistance of available support services, an oral hearing should not be needed for applications to be fairly and properly assessed and determined.<sup>810</sup>

A number of submissions in response to the Consultation Paper identified potential advantages in relying on written applications.<sup>811</sup> For example, the Child Migrants Trust submitted:

[Written applications] allow for professional help to record the statement and develop insights and understanding into outcomes of historical abuse to present a more compelling case.<sup>812</sup>

The Child Migrants Trust also commented that written applications may cause problems for some applicants, particularly where they have literacy problems or low self-esteem in formal processes. However, it suggested that these problems can

usually be addressed, with time, through professional support services.<sup>813</sup>

Some community legal services and institutions argued that survivors should be given a choice whether to make a written or an oral application. For example, Women's Legal Services NSW expressed support for a written application, stating that the prospect of giving oral evidence is too overwhelming for some survivors. However, it also supported the proposal that an oral hearing should be available for cases where a written application is not possible or where the applicant's case cannot be fully made without oral evidence.<sup>814</sup> Another confidential submission referred to written applications being more convenient for survivors who live in rural or remote areas.<sup>815</sup> Some submissions referred to the benefits of oral hearings and the positive experiences that some applicants have had through oral hearings.<sup>816</sup>

We are satisfied that written applications are generally likely to make the scheme as simple as possible and should minimise the risk of re-traumatisation. We are also satisfied that they are likely to improve the consistency of decision making and be more efficient.

However, we consider that the redress scheme should have the discretion to require additional material or 'evidence' and additional procedures to determine the validity of claims. The redress scheme should be able to require oral hearings as an additional source of material or 'evidence' to determine the validity of claims, particularly as the scheme will have higher maximum and average payments available than have been offered under previous government redress schemes.

The scheme might wish to require medical reports, including psychological or psychiatric reports, in addition to or instead of oral hearings. For example, reports might assist decision makers if the application suggests that the abuse the applicant suffered has had a severe impact on the applicant. The scheme might also wish to consider the outcome of any disciplinary investigations before determining an application if the abuse is recent or fairly contemporary and the alleged perpetrator is still involved with the institution.

The circumstances in which a scheme may require additional material or 'evidence' or additional procedures should be clearly set out in scheme material that is available to applicants, support services and others who may support or advise applicants on the scheme. This is important for transparency and consistency and to ensure that applicants can understand what might be required of them for the scheme to determine their application. For example, some additional requirements might apply only for those applications that might be assessed at the medium to higher levels of severity under the table or matrix rather than for all applications.

The redress scheme should also consider actuarial advice in developing any requirements for additional material or 'evidence' or additional procedures and identifying the circumstances in which the additional requirements will apply. The additional requirements should complement the matrix for assessing monetary payments and the detailed guidelines behind it. Both the matrix and additional requirements should be designed to achieve the average payment and

the spread of payments that the redress scheme is intended to deliver.

In the Consultation Paper, we noted that the Western Australian and Queensland government schemes required applicants to verify their accounts of abuse by statutory declaration.<sup>817</sup> We stated that we saw no harm in requiring applicants to verify their accounts of abuse, including the impact of the abuse, by statutory declaration, particularly as service organisations can help applicants to understand the nature and effect of a statutory declaration.<sup>818</sup> Further, if an applicant has a copy of a previous application they have made for redress, or another document in which they have recorded an account of the abuse and its impact, we see no difficulty in the application process allowing them to attach the previous account along with any supplementary information the applicant wishes to provide and also verifying that account by statutory declaration.

Some submissions in response to the Consultation Paper commented on these issues and generally supported the use of accounts used in previous schemes.<sup>819</sup> Some submissions expressed some concerns about the requirement for a statutory declaration being re-traumatising. We are not satisfied that requiring a declaration that the application is true is unreasonable, particularly given the potential amount of monetary payments and counselling and psychological care available through redress. We consider the support services that are helping applicants to apply for redress should be able to minimise the risk of a statutory declaration being re-traumatising.

### **Recommendations**

51. A redress scheme should rely primarily on completion of a written application form.
52. A redress scheme should fund support services and community legal centres to assist applicants to apply for redress.
53. A redress scheme should select support services and community legal centres to cover a broad range of likely applicants, taking into account the need to cover regional and remote areas and the particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.
54. Those who operate a redress scheme should determine whether the scheme will require additional material or evidence and additional procedures to determine the validity of applications. Any additional requirements should be clearly set out in scheme material that is made available to applicants, support services and others who may support or advise applicants in relation to the scheme.
55. A redress scheme may require applicants for redress to verify their accounts of abuse by statutory declaration.

## **11.6 Institutional involvement**

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As we reported in the Consultation Paper, many survivors and survivor advocacy and support groups have told us that they consider that decisions about redress, particularly the determination of any monetary payment, must be made by a body independent of the institutions in which the abuse occurred.<sup>820</sup> A number of institutions have also called for independent decision-making processes to be established, although some have expressed reservations about the need for independence and the timeliness of decision making in an independent scheme.

The structure for redress that we recommend in Chapter 10 envisages independent decision making ideally by a single national redress scheme operated by the Australian Government or, failing that, by separate state and territory schemes operated by the relevant state or territory government. Of course, these schemes would not be independent of the government or governments that are involved in establishing and administering them.

In the Consultation Paper, we stated that we had not heard any complaints about a lack of independence in the previous government redress schemes run in Tasmania, Western Australia and Queensland that were comparable with the complaints made about some non-government institutions' schemes.<sup>821</sup> (There have been complaints about other aspects of the previous

government redress schemes, but not their independence.) We suggested that it seemed likely that this approach would provide sufficient independence to address the concerns that survivors and survivor advocacy and support groups raise.<sup>822</sup>

However, as we stated in the Consultation Paper, independent decision making does not mean that there should be no role for the institution. It is apparent that the scheme should provide any institution that is the subject of an allegation with details of the allegation and should seek from the institution any relevant records, information or comment. The institution may also indicate that it accepts the allegations, although it would still be necessary for the redress scheme administrators to determine the abuse and impact in accordance with the scheme's decision-making processes.

A number of submissions in response to the Consultation Paper commented on what role institutions should have in the redress scheme. Some submissions argued that institutions should be required to provide records or other relevant information. For example, the CREATE Foundation submitted:

[The scheme] should have the power to seek any relevant records, information or comment from institutions subject to an allegation ... and compel institutions to comply with orders for information and other requests as deemed necessary.<sup>823</sup>

Angela Sdrinis Legal submitted:

The institution should be required to provide information on previous

complaints regarding the alleged perpetrator (in a form where all prior complainants are de-identified) and to provide an explanation as to how any prior complaints were dealt with.<sup>824</sup>

We are not satisfied that a redress scheme should have the power to compel the production of documents or other information from institutions. A redress scheme is not designed to be adversarial and the institution will not be a 'respondent' to a redress application in the conventional sense.

We envisage a process where the redress scheme informs the institution of the application and requests the institution to provide any relevant information, documents or comments. Institutions may wish to inform the scheme that they accept the allegations, which might most likely be based on previous allegations against the named abuser or in respect of the particular facility at the relevant time. Institutions may also be well placed to confirm or challenge the presence of the applicant and alleged abuser at the institution at the relevant time. The institution might also have relevant information about other allegations against the alleged abuser and about any previous redress or compensation provided to the applicant for the alleged abuse.

In the Consultation Paper, we stated that it seemed to us to be particularly important that institutions should be provided with details of the allegations to ensure that institutions are aware of abuse that is alleged to have occurred in connection with their operations.<sup>825</sup> Many institutions have already dealt with many allegations. Some

institutions have told us that they had no allegations of abuse made against them; however, we have heard allegations made against them in private sessions. It does not seem to us to be desirable that institutions not know as early as possible about any allegations involving them that are made through a redress scheme. In particular, if an allegation is made against a person who is still involved with the institution, the institution may have to act on the allegation independently of any issues of redress.

Some submissions in response to the Consultation Paper agreed that notifying an institution of applications is important. For example, YMCA Australia submitted:

We also agree that a balance needs to be achieved between independent decision-making and the involvement of the institution. While it is clear that the provision of direct personal response to survivors must actively involve the institution, it is also important in terms of ensuring the institution can understand and address past failures in policy and practice in order to implement appropriate preventative strategies.<sup>826</sup>

We remain satisfied that it is particularly important that institutions should be provided with details of the allegations to ensure that institutions are aware of abuse that is alleged to have occurred in connection with their operations. This is important both in respect of any named alleged abuser and more generally in respect of the institutions policies and procedures.

### **Recommendation**

56. A redress scheme should inform any institution named in an application for redress of the application and the allegations made in it and request the institution to provide any relevant information, documents or comments.

## 11.7 Standard of proof

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The standard of proof determines the degree to which a decision maker must be satisfied of an allegation in order to accept it as true. Current and previous redress schemes have adopted different standards of proof, although there is debate about how different they are in practice.

As we reported in the Consultation Paper, in our private roundtables we considered the following possible standards of proof:

- the balance of probabilities, which is the standard of proof that generally applies in civil litigation. It requires that the matters alleged must be more probable than not in order to be accepted as true
- the higher civil standard of proof discussed by Dixon J in *Briginshaw v Briginshaw*,<sup>827</sup> which requires that, the more serious an allegation, the more 'reasonably satisfied' of its truth the decision maker must be before it can be accepted as true



- plausibility, which requires that the decision maker be satisfied that the allegations are plausible and may be true.<sup>828</sup>

In the Consultation Paper, we also referred to other possible standards of proof, particularly the standard of ‘reasonable likelihood’.<sup>829</sup> The Senate Community Affairs References Committee recommended a ‘reasonable likelihood’ standard of proof when it recommended that the Australian Government establish a national reparations fund for victims of abuse in institutions and out-of-home care settings.<sup>830</sup> A standard of reasonable likelihood would be higher than plausibility but lower than the balance of probabilities.

Submissions in response to the Consultation Paper and some of those who spoke at the public hearing expressed a variety of views as to what standard of proof should be adopted for a redress scheme.

Some interested parties supported the civil standard of proof, being balance of probabilities.

For example, in his submission in response to the Consultation Paper, the South Australian Commissioner for Victims’ Rights stated:

The criminal burden of beyond reasonable doubt is too high. Reasonable belief seems too low given – assuming there is no sense of litigation woven into the scheme. In a few cases those accused might assert that the civil balance of probabilities is too low. That said, balance of probabilities is the test for most state-funded victim compensation schemes. If victims

are being asked to compromise, then the scheme, including the burden of proof, should complement the compromise.<sup>831</sup>

The Truth, Justice and Healing Council also submitted that claims should be determined on the balance of probabilities.<sup>832</sup> When asked why the Council thinks the balance of probabilities is the appropriate standard, Mr Sullivan, representing the Council, told the public hearing:

We’ve thought long and hard about it, and these are the issues that were coming up in our discussion. Firstly, we were advised that, generally speaking, where you do use something like the balance of plausibility, the payment levels in that scheme are relatively low. It is encouraging to see the thinking of the Commission that at least the average payment in this scheme can be as high as 80,000. That’s not relatively low given, particularly, what you’ve heard from government officials about what their victims of crime schemes deliver.

Secondly, you heard from Mr Gleeson yesterday about the notion that a balance of probabilities is actually a standard of proof where institutions are saying to the individual, ‘We believe you; we believe that what happened did happen.’ As opposed to saying, ‘We think that what happened may have happened.’ We have been advised that it is a very important point in regard to the area of sex abuse that we’re talking about.



Thirdly, since 1997 the two, if you like, redress schemes that have been run within the church have been based on the balance of probabilities and in a vast majority of cases the victims' stories have been believed.<sup>833</sup>

Mr Gleeson, an independent commissioner under the Melbourne Response, told the public hearing:

It has been my experience over almost 20 years that it is possible to balance the application of the Briginshaw standard with a fair and compassionate approach to applicants ...

One consideration that I offer up is that an apology based on a lighter standard of proof than the Briginshaw standard runs the risk of being less meaningful and therefore of less benefit to the victim than an apology based on the higher standard. The two standards that have been raised for consideration in the consultation paper are the standard of plausibility and the standard of reasonable likelihood, in addition to reference to the other standards.

The standard of plausibility is described in the consultation paper at page 170 as a satisfaction 'that the allegations are plausible and may be true.' The standard of reasonable likelihood is described at page 170 as higher than plausibility but lower than balance of probabilities.

As both of those standards are lower than the balance of probabilities, they contemplate that a claim would be accepted even if it is more likely than not that the abuse did not occur.

I hasten to add that it is my experience that there have been very, very few complaints that are not genuine and accurate, but we're addressing a proposed adjustment or a proposed system that has a different approach to that which I've experienced. I would respectfully observe that the consultation paper appropriately identifies the importance of belief and being believed. There is a reference at page 132 to a person who says, 'At last I was believed.' There is a risk, I believe, that if a plausibility standard, for example, is adopted in any new system, that the implicit message conveyed to a successful applicant is, 'We believe you may have been abused.'

Under the Melbourne Response with its Briginshaw standard, 97 per cent of applicants have been able to say quite legitimately, 'I've been believed. I've been believed that I was abused.'<sup>834</sup>

In responding to questions, Mr Gleeson agreed that he had not discussed the Briginshaw test with victims.<sup>835</sup>

Some others who spoke at the public hearing were asked whether a lower standard of proof, such as plausibility, might not meet the needs of survivors to be believed.

Mr Gardiner, representing Open Place, referred to what Mr Pocock, representing Berry Street, had told the public hearing. Mr Pocock referred to the Royal Commission's private sessions and said:

My understanding is that of those many thousands of people, you believe them. So why do you believe them? I think you believe them because it's plausible, because you have sat with people and listened to them and what they have had to tell you is plausible. So if we need to look for evidence of what the evidence test should be, we need look no further than this Royal Commission and the work that it has already done.<sup>836</sup>

Mr Gardiner, representing Open Place, told the public hearing:

I would probably want to refer to the transcript from Mr Pocock's presentation this morning. I think the notion of, 'We believe you, we listened to you, we acknowledge you, we believe you' he talked with the Commissioners about the private sessions, where people leave those private sessions without proof but knowing that they have been believed.

We believe plausibility is the right approach ...<sup>837</sup>

Similarly, Mr Dommett, representing the National Stolen Generations Alliance, told the public hearing:

I would disagree with that [that a

survivor will feel not as believed if there is a lower standard of proof]. I think the belief isn't necessarily at that level. I tend to think that the belief is if a person was at the institution and as a result of being able to prove that they were there – which is a lower burden – that provided the support services are put in place and that there is some compensation, particularly in terms of an apology, then I think the belief would be just as great. I think the difficulty between the belief and the fact of proof is that proving that you were sexually abused can be incredibly difficult but, more than that, it can be incredibly traumatising. So, yes, you may be believed eventually, but it may have cost you unbelievable costs in terms of your own personal esteem and any sense of worth that you have managed to build up over your time of not being institutionalised; so I think it's a cost benefit.<sup>838</sup>

Representatives of the Anglican Church of Australia told the public hearing that, while plausibility is the appropriate standard where the alleged perpetrator has died or cannot be identified, if the alleged perpetrator is alive and denies the abuse then a higher standard should apply and a disciplinary process should be completed first before redress is considered.<sup>839</sup>

In the Consultation Paper, we acknowledged that, the higher the amount of monetary payments available, the more reasonable it might be for a scheme to adopt a higher standard of proof.<sup>840</sup> However, we also recognised that the monetary payments

we were considering did not, and were not intended to, provide compensation equivalent to common law damages.<sup>841</sup> We also noted that, if a scheme has higher maximum or average payments available, it could require additional material or ‘evidence’ and additional procedures to determine the validity of claims without adopting a higher standard of proof as such.<sup>842</sup>

We also set out another argument against adopting a standard of proof used in civil litigation: past experience suggests that, even if a scheme purports to apply the civil standard of proof, it seems that a lower standard is actually applied, at least in determining whether or not the abuse occurred.<sup>843</sup> Often there is no ‘witness’ other than the applicant and there is no other ‘evidence’ against which an applicant’s allegation of abuse can be balanced. The decision for the decision maker is, essentially, simply whether or not, or to what extent, they believe the applicant’s allegations. We suggested that this may be best reflected in a plausibility test or a test of reasonable likelihood. Of course, more ‘evidence’ may be needed to determine the severity of the impact of the abuse, including material such as medical evidence and psychological or psychiatric reports.

We stated that, if a scheme adopts a civil standard of proof, it would need to adopt a process that allowed the rebutting or testing of the applicant’s allegations. This may require contested hearings. We also stated that, because we do not propose that a scheme should attempt or purport to make any finding that any named person was involved in any abuse, there is no need to adopt the standards of proof applied in civil litigation.

While the average and maximum monetary payments we recommend in Chapter 7 – that is, \$65,000 and \$200,000 respectively – are more than the amounts available under some redress schemes, they clearly do not attempt, and are not intended, to replicate common law damages. The purpose of monetary payments and the factors identified for assessing amounts under the matrix, discussed in Chapter 7, do not reflect the purpose of damages at common law or all the various heads of damage available at common law.

We do not accept that survivors generally require a decision to be made on the Briginshaw standard, or even the balance of probabilities, in order to feel that they have been believed. Of course, any survivor who placed particular value on having a higher standard of proof applied to their claim could pursue civil litigation instead of redress.

We also remain sceptical of whether schemes that purport to apply higher standards of proof really do apply such standards or if they have any real meaning or any work to do in determining applications where there is no ‘witness’ other than the applicant and there is no other ‘evidence’ against which an applicant’s allegation of abuse can be balanced.

Some submissions in response to the Consultation Paper supported this view. For example, Kelso Lawyers submitted:

We agree with the consultation paper that the standard of proof is best set at the level of ‘plausibility’; and that in government schemes where it has been set at, or

interpreted to be, the civil standard, in practice the plausibility standard has generally been applied – perhaps due to the beneficial nature of the legislation that creates such schemes.<sup>844</sup>

We remain satisfied that the standard of proof for a redress scheme should be lower than the common law standard of proof.

A number of submissions in response to the Consultation Paper and a number of those who spoke at the public hearing supported a ‘plausibility’ standard of proof.

For example, Ms Carroll, representing the Alliance for Forgotten Australians, told the public hearing that adopting plausibility as the standard could make a difference for some survivors, particularly those who are confused or who are in their 80s or older and may have difficulty remembering details of the institution they were in as a child.<sup>845</sup>

Slater and Gordon Lawyers submitted:

We consider that the ‘plausibility’ standard would be appropriate. That is, having regard to all materials and information, the relevant decision maker must be satisfied that the claim of abuse has the appearance of reasonableness.<sup>846</sup> [Reference omitted.]

Similarly, Angela Sdrinis Legal submitted:

A plausibility test should be applied both in terms of proving eligibility but also in establishing that abuse occurred. To apply a test ‘on the balance of probabilities’ would

mean that many genuine victims would be locked out and would in part defeat the purpose of having a redress scheme if the ordinary civil burden of proof was applied.<sup>847</sup>

A number of submissions referred to difficulties survivors may face with higher standards of proof. For example, the Australian Psychological Society submitted that a plausibility standard would provide the following advantages for survivors:

- avoidance of the re-traumatisation of the victim/survivor;
- no need for a victim/survivor to provide evidence (or for an alleged perpetrator to contest it unless charged separately);
- negates the need to prove that injury/damage occurred, which should not be the primary concern (the primary concern is that the abuse occurred); and
- places the judgement on the event (institutional abuse) rather than the victim (and their individual level of vulnerability or resilience).<sup>848</sup>

The Australian Psychological Society further submitted:

Furthermore, applying the rule of plausibility assuages associated issues that commonly arise in claims of child abuse which include: the often long time lapses between an abuse event and its disclosure, as well as between disclosure and resolution; the difficulty

determining a causal link between the experience of abuse and any possible long term impact of abuse; as well as the absence of a physical or psychological injury at the time of reporting (if indeed it was reported at all).<sup>849</sup>

The Director of Strategic Legislation and Policy in the Department of Justice, representing the Tasmanian Government, told the public hearing:

We also accept that we may need to consider the current burden of proof provisions within our Victims of Crime Compensation Act. It is currently at the balance of probabilities, but we're aware and, as you know, we've run a redress scheme in the past where plausibility was considered more appropriate in those sorts of matters.<sup>850</sup>

A number of institutions also supported a standard of plausibility. For example, The Salvation Army Australia submitted:

there should be a very low standard of proof, a plausibility test indeed if the redress scheme is to also focus on healing and restoration for the survivor.<sup>851</sup>

Ms Whitwell, representing YMCA Australia, told the public hearing:

We believe that applying standards of plausibility and reasonableness when assessing the claims of survivors is the most appropriate way of having a process that is non-adversarial and supportive of survivors.<sup>852</sup>

Ms Cross, representing the Uniting Church in Australia, told the public hearing:

In relation to redress scheme processes, we believe that broad criteria for eligibility should be established. We support plausibility as the appropriate standard of proof. We do not believe that survivors should need to go through contested processes which inevitably occur the more that we move to probability or some other standard of proof apart from plausibility.<sup>853</sup>

The Centre for Excellence in Child and Family Welfare also submitted that a higher standard of proof poses many obstacles for survivors of institutional child sexual abuse.<sup>854</sup>

In its submission in response to the Consultation Paper, the Law Council of Australia stated:

The Law Council adopts no position on the standard of proof at this stage of consultation, noting that it will depend in part on the amount of funding for a redress scheme, the size of the cap and the goals of the redress scheme ...

The Law Council notes that the LIV [Law Institute of Victoria] has supported lowering the standard of proof respectively to either the standard of plausibility (which has been adopted under the DART [Defence Abuse Response Taskforce] scheme); or reasonable likelihood, as recommended by the Senate Community Affairs References Committee. These

standards are regarded by the LIV and LSNSW [the Law Society of New South Wales] as appropriate, given the likelihood of lower levels of compensation available, the lack of reference to the harm caused to the complainant/survivor and the low-disputation experience under existing schemes.<sup>855</sup>

Some submissions in response to the Consultation Paper and some of those who spoke at the public hearing supported a 'reasonable likelihood' standard of proof.

For example, the Australian Lawyers Alliance submitted:

We would suggest that because the amounts available would inevitably be substantially less than reasonable compensation under common law rights, an appropriate measure may be that recommended by the Senate Community Affairs References Committee of 'reasonable likelihood' as the standard of proof. This places the onus higher than plausibility but lower than the balance of probabilities, which is the standard utilised for litigation.<sup>856</sup> [Reference omitted.]

In responding to a question about why the Australian Lawyers Alliance views reasonable likelihood at the appropriate standard, Mr Morrison SC told the public hearing:

What we were trying to do, in going for that lower measure, was to recognise that a redress scheme does not offer anything like full compensation, and the rigours

which are required at common law to establish the balance of probabilities and to do so after application of the various hurdles, particularly limitation, the Brisbane South hurdles, seemed to us to suggest that reasonable likelihood, recommended as it was by the Senate committee, was an appropriate test on which to go forward, because there will be plenty of cases where there is very limited information available, as we heard earlier records have gone missing but, on the face of it, the evidence is reasonably compelling that the abuse occurred.

After all, that was sufficient in many of the cases under Towards Healing for the Catholic Church itself to accept responsibility. It applied something like that test itself, at least after the trauma of the Ellis case, in any event. We would suggest that was a reasonable way forward for the redress scheme. Common law liability, however, should retain the traditional balance of probabilities test.<sup>857</sup>

Mr Razi, representing ALSWA, told the public hearing that ALSWA supports reasonable likelihood as the standard of proof for redress because:

it balances evidentiary burdens on victims with the need for accountability. If the standard is as high as the common law standard, the evidentiary hurdles mean that victims don't come forward. On the other hand, if the standard is too low then this also is not in the

interests of the victim because it becomes difficult for the scheme to acknowledge, for want of a better expression, the truth of the abuse.

From our experience with Redress WA, validation is the key aspect of any remedy and if the standard is too low then the scheme would be at pains to offer substantive validation of the wrong.<sup>858</sup>

The standard of proof adopted for redress may have an impact on insurance and insurers' willingness to participate in or support redress payments by the institutions they insure.

In its submission in response to the Consultation Paper, Catholic Church Insurance (CCI) submitted:

It is CCI's view that a 'plausibility test' will be insufficient to satisfy insurers on the establishment of legal liability and hence, the application of indemnity under normal public liability policies. We believe the '*balance of probabilities*' test would be an absolute minimum requirement for indemnity to be available.

In the absence of an adequate standard of proof, it is likely insurers will deny indemnity leaving policyholders unprotected for settlements made within the Redress Scheme and few, if any, avenues of appeal against that decision. ...

Again, the Royal Commission's consideration must include the

extent to which insurers can be confident that the process delivers an outcome which satisfies some minimum standards for the application of insurance policies. An additional complexity is that minimum standards will vary from insurer to insurer and in many cases, it will come to a question of how much determination an individual insured institution will have to pursue matters against insurers.

The Royal Commission should ensure its minimum standards are adequate for insurers, in the absence of which there is likely to be a significant financial burden on policyholders in meeting those settlements themselves.<sup>859</sup>  
[Emphasis in original.]

CCI's submission suggests that any standard below the common law standard of proof would be insufficient for insurers. We have already stated above that we are satisfied that the standard of proof for a redress scheme should be lower than the common law standard of proof. We discuss the position of insurers further below in section 11.11 in relation to deeds of release.

In all of the circumstances, we are satisfied that 'reasonable likelihood' should be the standard of proof adopted for the redress scheme. Although in many cases it may make little difference whether the standard is plausibility or reasonable likelihood, we consider that reasonable likelihood can be applied as a higher standard than plausibility. Although the monetary payments we recommend do not attempt to replicate common law damages, they are higher than,

say, the monetary payments available under the Defence Abuse Response Taskforce scheme, which applied a standard of plausibility.

Given that the monetary payments we recommend are substantial, allowing the scheme to require additional material or 'evidence' and additional procedures to determine the validity of claims, as we discuss above in section 11.5, may be more important than the standard of proof as such.

### **Recommendation**

57. 'Reasonable likelihood' should be the standard of proof for determining applications for redress.

## 11.8 Decision making on a claim

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In the Consultation Paper, we stated that a redress scheme structure that provides for independent decision making by either a national scheme or separate state and territory schemes should provide sufficient independence of decision making from the institution in which the abuse occurred.<sup>860</sup> A number of submissions to the Consultation Paper and a number of those who spoke at the public hearing supported the need to ensure independence in decision making from the institution.<sup>861</sup> Other than as set out in Chapter 9 and discussed in Chapter 10, generally they did not dispute that a government-run scheme would provide sufficient independence.

In the Consultation Paper, we stated that the previous government redress schemes in Western Australia and Queensland provide examples of administrative decision-making processes within large-scale schemes.<sup>862</sup> We suggested that an approach that provides for levels of delegation, with assessments of more serious abuse or impact to be determined by more senior staff, seemed appropriate.<sup>863</sup> Submissions in response to the Consultation Paper have not disputed the appropriateness of such an approach.

In the Consultation Paper, we reported that, through our consultations to that point, there had been strong support for a mix of expertise in decision making.<sup>864</sup> We stated that a mix of legal, medical, psychosocial and similar skills, including experience in issues relating to institutional child sexual abuse, was likely to ensure that properly informed decisions are made.<sup>865</sup>

Submissions in response to the Consultation Paper continued to support a mix of expertise. For example, the CREATE Foundation submitted:

Any state or territory managed redress scheme must include a majority of independent expert representatives in the decision-making-processes.<sup>866</sup>



Similarly, Berry Street submitted:

decision making process should bring together knowledge and experience including legal, psychosocial, trauma informed, cultural and medical.<sup>867</sup>

The Australian Lawyers Alliance submitted:

Decision-makers will need legal training, and will need to be independent of institutions and government, as should the review process. We would support as little legal formality as possible, with most claims being primarily determined on paper applications. It will be necessary and desirable in many cases for there to be medical input prior to determination in order to do justice to victims. Such medical review should be done without expense to the victim and should assist the decision-maker.<sup>868</sup>

We remain satisfied that the mix of skills in decision making under the redress scheme should be designed to ensure that matters that require assessment under the matrix for determining monetary payments can be properly understood by drawing on appropriate expertise.

We consider that the most effective and efficient way to ensure that decision making in a redress scheme is informed by the appropriate range of skills is through the use of expert advice in developing the detailed assessment procedures and manuals to accompany the matrix for assessing monetary payments. This will enable administrative decision makers to apply the factors consistently across claims, with the benefit of the expert advice reflected in the procedures and manuals.

It should be rare that decisions on individual claims need to be made using a full mix of skills. We prefer an administrative approach to decision making as being more suitable for a large-scale scheme. It should be guided by expert advice, as described above, and it should provide for levels of delegation in which more senior staff make assessments of more serious abuse or impact. A redress scheme might also wish to establish a process for expert review of a sample of claims from time to time to ensure that decision making is consistent and the matrix and accompanying detailed assessment procedures and manuals are appropriately applied across claims.

### **Recommendation**

58. A redress scheme should adopt administrative decision-making processes appropriate to a large-scale redress scheme. It should make decisions based on the application of the detailed assessment procedures and guidelines for implementing the matrix for monetary payments.

## 11.9 Offer and acceptance of offer

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In the Consultation Paper, we stated that most current and previous redress schemes that we have considered appear to have adopted reasonably straightforward processes for informing applicants of decisions and allowing them to accept or reject offers.<sup>869</sup>

For example, in the Redress WA scheme, once decisions were made, the scheme sent to the applicant a Notice of Decision, Statement of Decision, letter of apology from the Western Australian Government and offer of payment. Applicants were asked to formally accept or reject the offer. If they accepted the offer, they were asked to provide bank account details for the deposit of the payment. If an applicant refused the offer or could not be found, the amount offered was set aside as ‘unclaimed money’ so that it remained available if the applicant accepted the offer at a later date or could be found.<sup>870</sup>

We suggested that it seemed appropriate that, once a decision has been made that an applicant is eligible for redress and the size of any monetary payment to be offered has been determined, the applicant should be provided with a statement of decision. The statement should contain sufficient information for the applicant to understand the determination of eligibility and the amount of any monetary payment while minimising the risk of re-traumatisation. We stated that the applicant should also receive:

- written notice of the amount of any monetary payment

- advice about other forms of redress (for example, direct personal response and counselling and psychological care) and how they can be obtained
- the next steps that are available to the applicant.

A number of submissions in response to the Consultation Paper supported this approach. For example, YMCA Australia submitted:

An approach which would provide survivors with a clear statement of the decision regarding a monetary payment, including appropriate information about the process used to determine a monetary amount, should be supported. We recognise that it is important for survivors to understand the process clearly and in particular, to know that a process of determination has been applied transparently and consistently.<sup>871</sup>

Dr Wangmann also noted the importance of written decisions that outline the rationale for decision making. She submitted:

Each claimant should be provided with a written decision detailing the outcome of their application and the reasons for the decision. It is not sufficient for a claimant to simply receive an ‘outcome’ letter which advises whether the application was successful or unsuccessful and the amount awarded (if any). Attention must be paid to the need to provide meaning to any financial payment. Whilst it is agreed that any written decision should only contain sufficient information to explain the

decision and the award to minimise the risk of re-traumatisation, a written decision should still be able to be individualised so that claimants know that it is personal to them, that their application has been read, listened to and assessed. This does not necessarily require extensive detail ...

The importance of a written decision is perhaps most clearly seen when certain harms are not compensable under a redress scheme – while a smaller monetary payment would make it clear to an applicant that not all the harms were recognised, the capacity and scope for a written decision to recognise a harm but also explain why it is not compensable under the terms of a particular scheme would appear to be respectful and informative to applicants.<sup>872</sup>  
[References omitted.]

In the Consultation Paper, we stated that we see potential benefit in the scheme encouraging (and paying for) applicants to have an additional consultation with their support service or community legal centre before deciding whether or not to accept the offer.<sup>873</sup> This session should support the applicant not only in deciding whether or not to accept the offer but also in considering what use they wish to make of any monetary payment, whether and how they wish to seek any direct personal response and whether they currently need counselling and psychological care.

A number of submissions in response to the Consultation Paper supported this approach. For example, Anglicare WA submitted:

Anglicare WA believes that at the point of an offer of a sum

of redress, applicants should also receive an offer of financial counselling or support. Again, the decision to accept such support should always rest with the recipient.<sup>874</sup>

Micah Projects stated:

We note the suggestion that funding be given to community legal centres to provide survivors with legal advice in relation to any payment offered through a redress scheme. We support this suggestion on the basis that the community legal centres provides the advice with no cost to the survivor and that the community legal centres does not refer the matter to a private law firm.<sup>875</sup>

As discussed in section 7.6, a number of those who discussed the option of receiving monetary payments by instalments also discussed the importance of successful applicants having access to financial counselling and advice or other support services. We consider that the redress scheme should offer financial advice and that all successful applicants should be encouraged to have a session with a support service – either with a financial counsellor or with another support service that has assisted them in applying for redress – to make as careful a decision as possible about whether to accept the offer and, if they do accept, how they want to make use of the money so that it is of as much benefit as possible to them personally. We have included financial counselling in recommendation 66 as part of our discussion of support for survivors in section 11.12.

In the Consultation Paper, we suggested that offers should remain open for acceptance for at least three months.<sup>876</sup> We suggested that, if applicants seek a review of their offer, the period for acceptance of the amended or confirmed offer should commence again once the review is completed. If an applicant has not accepted or sought a review of their offer within the three months (or any longer period allowed), the offer should be treated as rejected, subject to any reasonable explanation from an applicant as to why more time should be allowed.

Few submissions commented specifically on whether three months is a sufficient period of time for the applicant to consider the offer. Some submissions suggested that a longer period of time might be required for some applicants or should be provided for all applicants.

The Women's Legal Services NSW stated:

We support the proposal that an offer be made and open for 3 months for acceptance and that free legal advice be made available to applicants prior to acceptance.

In our experience, difficulties arise if applicants become unwell, or cannot be found between making a claim and the offer being made to them. In these circumstances, provision should be made to hold the offer made to them in trust, so that it can be claimed at a later date.<sup>877</sup>

Berry Street stated:

We can also see no reason to impose a three-month time limit on accepting an offer of a redress payment and recommend a longer period of up to 12 months.<sup>878</sup>

We consider that the time to apply for a review of the offer should remain limited to three months with extensions, if required and allowed, due to an applicant's particular circumstances. As we discuss in relation to deeds of release in section 11.11 below, we consider that an offer should remain open for acceptance for a period of one year. These recommended time limits strike a balance between providing applicants with sufficient time to consider an offer and providing the redress scheme and institutions with certainty as to outcome of the application.

### **Recommendations**

59. An offer of redress should remain open for acceptance for a period of one year.

60. A period of three months should be allowed for an applicant to seek a review of an offer of redress after the offer is made.

## 11.10 Review and appeals

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In the Consultation Paper, we reported that whether or not redress schemes offer review and appeals processes appears to depend in large part on how they are established. If a scheme is established by legislation, it will typically allow external review on administrative law grounds and it may well provide for further reviews and appeals.<sup>879</sup> If a scheme is established administratively, it is more likely to allow for internal reviews of decisions and otherwise may be subject to general review and oversight mechanisms such as through state ombudsmen.

We suggested that one approach may be that a redress scheme should offer internal review to the applicant only and not to the institution or any alleged perpetrator.<sup>880</sup> An applicant should be able to request a review of any decision that they are not eligible for the scheme or the determination of the amount of any monetary payment (including the determination of any deductions for past payments).

We suggested that the most senior decision makers, as a panel, should decide any internal review, with legal and medical advice or expertise available.<sup>881</sup> Applicants should be offered the opportunity for an oral hearing, particularly if they have been determined to be ineligible for the scheme.

We suggested that it may be appropriate to leave external review or appeal rights for the decision of those establishing the scheme. As discussed in Chapter 10, we do not attempt to prescribe how a redress scheme should be implemented. In the Consultation Paper, we suggested that any external

review or appeal rights should be reasonably appropriate to the scheme, depending on whether it is established under legislation, administratively, by contract or through some combination of these measures.

In their submissions in response to the Consultation Paper, some survivor advocacy and support groups supported the proposal that review or appeals should be allowed. For example, the Survivors Network of those Abused by Priests Australia submitted:

The ability to access an external or internal review or appeal any determination of redress is vital if survivors are expected to trust a redress scheme.

Most survivors have more than enough experience of being in a position of powerlessness with no right of appeal, and with no-one providing oversight to those we feel are exploiting us.<sup>882</sup>

A number of those who made submissions differed on whether review should be internal or external to the scheme.

For example, Professor Parkinson submitted:

I would also be concerned if the scheme were to be governed by administrative law principles, with rights of review of the decision in relation to a redress claim by a court or tribunal. While this has advantages in terms of fairness and due process, much will be lost in terms of the therapeutic focus of such a scheme. The redress scheme should not be like Social Security

based upon complex legislation, defined entitlements and detailed procedural manuals.<sup>883</sup>

Women's Legal Services NSW submitted:

We support the availability of internal review and accept the suggestion that external appeal rights should be determined at the time of establishing the scheme.<sup>884</sup>

Kelso Lawyers supported both internal and external review options, submitting:

When dealing with the number of claims that will no doubt come before any redress scheme once it is established, it is inevitable that mistakes will be made in some decisions. If claimants are to see the scheme as fair, they should be able to ask for a review where they feel their experiences have not been adequately understood ...

In the experience of Kelso Lawyers, an internal review mechanism has proved to be a quick and inexpensive means of correcting the vast majority of errors in first instance decisions. Under the *Victims Rights and Support Act 2013* (NSW) the process is as simple as sending an email to Victims Services requesting an internal review of the decision. The process allows for further evidence and submissions to be provided, and for review on the merits.

While the internal review process has been highly effective in the NSW victims' compensation

scheme, there has still been the occasional need to appeal to NSW Civil and Administrative Tribunal (NCAT). Appeals to NCAT have mainly been necessary where the Department as a whole had adopted a wrong interpretation of the law, or applied policies too inflexibly. The Tribunal has thus far proved to be a just, quick, and cheap means of maintaining the accountability of the scheme. ...

Kelso Lawyers suggests that a similar model should be provided in any redress scheme recommended by the Royal Commission.<sup>885</sup>

Similarly, Angela Sdrinis Legal submitted:

Both the claimant and the institution should have the right to seek a review. In the first instance there should be an internal review conducted on the papers. The parties should have 30 days to request a reconsideration. Should either party still be dissatisfied with the outcome there should be an appeals process to an independent tribunal. The Administrative Appeals Tribunal (AAT) is well placed to review disputed claims.<sup>886</sup>

YMCA Australia supported the proposal that a process of review and appeal should be available for survivors, particularly using existing mechanisms or structures such as ombudsmen or administrative tribunals.<sup>887</sup> YMCA Australia further submitted:

It will be important that a process of review and appeal is clearly

articulated to survivors, is easily accessible, timely and that appropriate support and advice is provided to survivors to enable their engagement with a review process.<sup>888</sup>

We are satisfied that a process of internal review for applicants is necessary and appropriate. Review improves decision making and will encourage consistency and fairness across the redress scheme. We are also satisfied that, if established administratively, redress schemes should be made subject to oversight by the relevant jurisdiction's ombudsman through the ombudsman's complaints mechanism.

Whether an external review and appeal process is necessary or appropriate will depend on the nature of the redress scheme. As we have not sought to prescribe a particular structure or mechanism for implementing a single national redress scheme or separate state and territory schemes in Chapter 10, we cannot here prescribe any particular form of external review. We consider that any appropriate external review and appeal processes should be determined by the government establishing the particular redress scheme and they should be in keeping with the mechanisms used to establish the scheme.

#### **Recommendations**

61. A redress scheme should offer an internal review process.

62. A redress scheme established on an administrative basis should be made subject to oversight by the relevant ombudsman through the ombudsman's complaints mechanism.

## 11.11 Deeds of release

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In the Consultation Paper, we stated that, in submissions to our issues papers and in our consultations at that stage, we had heard many views from survivors, survivor advocacy and support groups, institutions, governments and academics about whether and when deeds of release might be appropriate.<sup>889</sup> We had also heard evidence in a number of case studies about the use of deeds of release in the past.<sup>890</sup>

We reported that some interested parties had argued that survivors should never be asked to give up their common law rights to sue unless they have attained an outcome on the merits of their claim through civil litigation. Other interested parties had argued that a deed of release gives finality and certainty to the matter for both the survivor and the institution. Some interested parties had argued that, provided a survivor has the option to accept or reject any offer under a redress scheme, it is not unreasonable for them to provide a deed of release if they choose to accept the offer.

In our private consultations, some survivor advocacy and support groups suggested that whether or not it would be reasonable to require survivors to give a deed of release before

accepting a monetary payment might depend upon the size of the monetary payments. Some participants had suggested that the size of payments available under government redress schemes were too small to justify a deed of release, whereas it might be fair to require a deed if monetary payments were to be significantly higher.

The Actuaries Institute submitted that if the 'redress scheme is to be most efficient, affordable and sustainable, then there should be no option to pursue civil litigation'.<sup>891</sup> They submitted that, when a no-fault scheme (which they said is similar in principle to a redress scheme) and a common law entitlement coexist, history suggests that costs tend to increase beyond expectations.<sup>892</sup>

In the Consultation Paper, we stated that our view at that time was that, at the very least, if no deed of release is required then an applicant should be required to agree that the value of any redress should be offset against any common law damages and that, if common law damages are obtained (either through a settlement or a judgment), the applicant will cease to be eligible for any counselling and psychological care through redress.<sup>893</sup>

However, we also stated that it was not clear to us that this approach would go far enough.

We also suggested that another option, short of simply requiring a deed of release, might be to require a deed of release but include in its terms a power to apply to set it aside in certain cases – for example, if significant new evidence came to light as to the institution's liability for the abuse that is alleged.

If a deed of release is required, we stated that we considered that the scheme should fund, at a fixed price, a legal consultation for the applicant before the applicant decides whether or not to accept the offer of redress and sign the deed of release.

As to confidentiality, we stated that we anticipated that there should be no confidentiality obligation imposed on survivors, whether through a deed of release or otherwise. The scheme would be subject to any relevant privacy obligations.

Many submissions in response to the Consultation Paper expressed views on whether or not deeds of release should be required.

A number of interested parties submitted that a redress scheme should not require deeds of release because it would not offer common law damages. Some suggested that survivors should not be asked to give up their common law rights to sue unless they have attained an outcome on the merits of their claims through civil litigation.

The Australian Lawyers Alliance submitted:

Given that any redress scheme is unlikely to offer anything approaching the true value of common law compensation, it seems to us that it would be an injustice to require a deed of release.<sup>894</sup>

Similarly, Berry Street submitted:

Berry Street does not support a requirement for a deed of release. This would be inconsistent with the purpose and levels of the payments;



which are not intended to provide compensation but a tangible acknowledgment of a wrong and that harm has occurred.<sup>895</sup>

Mr Pocock, representing Berry Street, told the public hearing:

if we accept, as we should, that paying people \$60,000 or \$70,000 on average is not compensation for having been sexually abused, then it flows from that that there should be no deed of release. Why should victims and survivors of sexual abuse have to sacrifice their right to pursue civil litigation against perpetrators and institutions in order to receive a payment which is not compensation? Why, again, should survivors and victims of these crimes have to sacrifice their rights?<sup>896</sup>

A number of submissions in response to the Consultation Paper and a number of those who spoke at the public hearing expressed support for deeds of release. Some common arguments emerge in these submissions.

A number of interested parties referred to the importance of finality as an argument in favour of requiring deeds of release. For example, the South Australian Government discussed the redress scheme it offers under its statutory victims of crime compensation scheme and submitted:

As the *ex gratia* scheme in South Australia is provided as an alternative to litigation, it is the State's position that it is reasonable to require an applicant to sign a deed of release discharging the

State from any further liability. There are strong policy reasons, consistent with the analogous principles at common law, for encouraging the finality of redress avenues, including the avoidance of inconsistent outcomes, the saving of duplication of effort and expense and the avoidance of witnesses being required to go through the experience of providing evidence more than once.<sup>897</sup>

Some institutions referred to the benefit of finality for institutions if deeds of release are required. For example, Mr Blake QC, representing the Anglican Church of Australia, told the public hearing:

We think the advantage, at least from the church, is that they know that in the absence of extraordinary circumstances their commitments will have been finalised.<sup>898</sup>

Some institutions referred to the benefit of finality for institutions and survivors if deeds of release are required. For example, the Uniting Church in Australia submitted:

It is in the interest of all the parties who are acting in good faith to be clear as to when a particular process of negotiation has reached a conclusion. The end of a negotiation for redress gives certainty to the parties and allows the survivor to move on to further stages of their recovery. Some survivors have said that it has been helpful to them to be able to 'sign off' on this stage of their journey through the use of documentation.

In the interim period it is appropriate that there be some form of documentation in which both parties declare that, having worked through the process in good faith, they consider that the redress process has been concluded. Whether this is called a Deed of Release or some other name, the only objective is to indicate that the parties intend to pursue no other action in relation to the matter ...<sup>899</sup>

Some interested parties also referred to the benefit of finality for survivors if deeds of release are required. For example, Professor Parkinson submitted:

From a psychological point of view, (and I must acknowledge that I am not qualified in this area) I think there is value in having closure. A redress payment which ends the claim against the institution will bring a form of closure at least in relation to the monetary aspects of the issue. That may have some value in terms of healing and being able to move on. There is no unfairness involved as long as the possible end points of a redress claim, including a Deed of Release, are in view at the beginning.<sup>900</sup>

However, some survivor advocacy and support groups and some institutions submitted that there is no benefit for survivors in finality achieved through requiring deeds of release. For example, SNAP Australia submitted:

Claims that deeds of release offer the benefits of certainty and finality to survivors are ludicrously self serving. A deed of release provides certainty to the institution, not the survivor. A survivor can benefit from finality only if they perceive they have been treated fairly, otherwise it is oppressive. Finality and certainty are not delivered by being forced to sign a deed of release under duress, for inadequate recompense, and while denied any other option.<sup>901</sup>

In responding to a question about whether the survivor benefits from finality through a deed of release, Ms Carroll, representing the Alliance for Forgotten Australians, told the public hearing:

I don't know that it brings any sort of closure to a Forgotten Australian.<sup>902</sup>

Mr Pocock, representing Berry Street, told the public hearing:

There is no evidence that providing people with a payment and getting them to sign a deed of release provides the victims with any finality. It might provide the institution with some finality, but there is no evidence that it ever provides the survivor with any form of closure or finality.<sup>903</sup>

Some interested parties submitted that, in the absence of a deed of release, monetary payments under redress could be used to fund civil litigation concerning the same institutional child sexual abuse that was considered through the redress scheme. For example, the Australian Baptist

Ministries submitted:

There does need to be some safeguard so that any payment is not seen to be a fund for future civil litigation.<sup>904</sup>

Similarly, Professor Parkinson told the public hearing:

Another concern is the possibility that if deeds of release are not required, that the amount of money provided under a redress scheme would become seed funding for litigation which is irresponsible and is unlikely to succeed, and then the survivor is much worse off than they would otherwise be.<sup>905</sup>

In responding to a question about whether survivors would use redress money to fund a civil action, Ms Carroll, representing the Alliance for Forgotten Australians, told the public hearing:

I think if someone wants to use that money to go to court, so be it, but I doubt that – and people have said today that it is not about the money, and in some cases it is not about the money, but it is the only thing that churches and charities and governments particularly can do to say sorry.<sup>906</sup>

Some interested parties submitted that redress should be an alternative to a common law claim, referring to arguments of efficiency and sustainability similar to those raised by the Actuaries Institute that we referred to in the Consultation Paper. For example, the Uniting Church in Australia submitted:

If survivors wish to pursue litigation or alternative schemes, that should be their choice. However, in order to maintain the efficiency of the court and redress systems, and the effective targeting of funding, the Uniting Church believes that a survivor should access one or the other system, rather than both. However, a prior unsuccessful civil claim should not prevent access to the redress scheme. It is standard for redress schemes in this area to require survivors to waive the right to pursue civil action.<sup>907</sup>

CLAN submitted:

Lastly, when considering deeds of release CLAN are of the opinion that although they are undesirable, they may be the necessary trade off in order to encourage the establishment of a Redress Scheme. Deeds of release ask Care Leavers to relinquish their right to sue those who are responsible for their abuse. Many church and charitable internal Redress Schemes which have been in operation require this. CLAN are vehemently opposed to deeds of release being used in this way. Not only are many amounts that Care Leavers receive through these sorts of schemes minimal, but the way in which they are run are far from impartial or independent.<sup>908</sup>

Some interested parties submitted that insurers would be unlikely to extend coverage to those they insure, or otherwise participate in redress, if deeds of release were not required.

For example, in its submission in response to the Consultation Paper, CCI submitted:

CCI firmly believes that a Deed of Release which extinguishes the underlying legal liability must be required under the Redress Scheme process.

CCI offers the observation from an insurance perspective that it most unlikely that any insurer would agree to indemnify their insured against such a payment unless the underlying legal liability was extinguished, so that the claim can be definitively dealt with and there remains no need for an on-going reserve to be maintained by the insurer in respect of that claim. Put another way, it is not reasonable, feasible nor practical to expect an Insurer to fund a settlement process (involving the payment of a significant sum) without achieving finality. Insurers generally would find the concept of allowing a claimant to first recover a significant amount from the Redress Scheme and then run a second (civil) claim based on the same underlying facts quite contrary to the fundamental principles of insurance and, most likely, would not support their insured clients in that process.<sup>909</sup>

Similarly, Professor Parkinson submitted:

There needs to be a way of tying in the commercial insurance companies to the redress scheme ...

The incentive for insurance companies to meet a redress claim

would probably need to come from obtaining a deed of release. Indeed, unless legislation required insurance companies, which had taken premiums to cover the relevant risk, to make payments under the redress scheme irrespective of liability, it is difficult to see any other way in which they could be made to participate. If they are not required to participate, then they are unfairly 'off the hook' for a liability for which they have contracted.<sup>910</sup>

Submissions generally supported an approach that requires payments under redress to be offset against any common law damages as an alternative to requiring deeds of release.<sup>911</sup>

On balance, we do not consider that requiring any payments under redress to be offset against any common law damages will be sufficient. Although we appreciate that this will disappoint many survivors and survivor advocacy and support groups, we are satisfied that deeds of release should be required under redress.

We do not accept the argument that survivors should never be asked to give up their common law rights to sue unless they have attained an outcome on the merits of their claim through civil litigation. Deeds of release are typically used in settling civil litigation and not after a determination of the merits of the claim.

We are not persuaded that survivors receive any benefit from a deed of release (other than securing the monetary payment to which it relates). However, we are satisfied that the benefit to institutions, including in

increasing the likelihood that their insurers will respond, is worthwhile.

We see redress as providing an alternative – rather than an addition – to civil litigation. The need for a redress scheme arises because, as many survivors and survivor advocacy and support groups have told us, many survivors cannot or do not wish to seek justice through civil litigation. For them, a deed of release will be of no practical impediment. For those survivors who wish to pursue civil litigation, this option remains available as an alternative but not an addition to redress. In Part IV we recommend reforms that should assist some survivors of past abuse to pursue civil litigation.

We recognise the difficulties many survivors have faced in dealing directly with representatives of the institution in which they were abused, being presented with deeds of release under time pressure and in some cases without the opportunity to obtain independent advice, and with little or no knowledge of what others in comparable positions had been offered or paid.

The independent redress scheme that we recommend is very different. If our recommendations are implemented:

- applicants will not need to deal directly with the institution in which they were abused
- the scheme will be open-ended and applicants will not face pressure from the scheme or the institution to make and resolve their claims quickly
- the monetary payments under the scheme will be assessed in accordance with transparent and

consistent criteria and the applicant will be given sufficient information to understand the determination of eligibility and the amount of any monetary payment

- the applicant will be able to seek a review of any monetary payment offered
- applicants will be supported in making their application and in deciding whether to accept an offer of redress from the redress scheme by support services paid for by the redress scheme.

In these circumstances, if an applicant accepts the monetary payment they are offered, we consider it reasonable to require the applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse.

As discussed above in section 11.9, we have extended the time we recommend that offers should remain open from three months to one year. This extended time will allow an applicant who has received an offer of redress more time in which to consider and, if desired, obtain advice on pursuing a common law claim before they choose whether or not to accept the offer of redress and grant the required releases.

The scheme must fund, at a fixed price, a legal consultation for the applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases.

Submissions in response to the Consultation Paper generally supported this approach.<sup>912</sup> The Public Interest Advocacy Centre submitted that a one-off legal consultation

may not be sufficient for certain cases and that, depending on the amount of material involved and the complexity of the claim, more than one appointment may be required before the applicant can be properly advised.<sup>913</sup>

We do not consider that the legal consultation funded by the redress scheme should be intended to assess and advise on the merits of any potential common law claim. Survivors who wish to consider pursuing a common law claim should seek their own legal advice on the claim's merits – and the time for which we recommend that offers of redress remain open is sufficient to allow this. The legal consultation funded by the redress scheme should focus on ensuring that the survivor understands the deed of release; the implications for the survivor of granting the releases; and the alternative avenues that might be available to the survivor.

A number of submissions argued for including in the deed of release a power to apply to set it aside. For example, drawing on the exception to the rule against 'double jeopardy' in some criminal proceedings, the South Australian Commissioner for Victims' Rights submitted that an application to set aside a deed could be allowed if there was 'fresh and compelling evidence' that was not reasonably available to either the applicant or the redress authority at the time of the offer.<sup>914</sup> The difficulty with this approach is that:

- the redress scheme will not have 'evidence'
- there will have been no adversarial process or hearing
- the redress scheme will not be conducting investigations into the institution beyond the matters necessary to determine the applicant's eligibility for redress and to assess any monetary payment.

We are not satisfied that it is possible to identify clear criteria for setting aside a deed in certain limited circumstances that would not risk undermining the effect of deeds generally.

As to confidentiality, many submissions argued that no confidentiality obligations should apply to applicants. We are satisfied that there should be no confidentiality obligation imposed on survivors. The redress scheme itself would be subject to any relevant privacy obligations.

### **Recommendations**

63. As a condition of making a monetary payment, a redress scheme should require an applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse by executing a deed of release.
64. A redress scheme should fund, at a fixed price, a legal consultation for an applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases.
65. No confidentiality obligations should be imposed on applicants for redress.

## 11.12 Support for survivors

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In the Consultation Paper we stated that previous government and non-government institutional redress schemes have generally provided support and assistance for applicants seeking redress.<sup>915</sup> Although some survivors have told us they were unhappy with the particular support that was provided, we stated that it was clear to us that support is necessary and should be provided.

Many submissions in response to the Consultation Paper supported the proposal that support and assistance be provided to applicants seeking redress.<sup>916</sup>

We remain satisfied that a redress scheme should fund a number of counselling and support services and community legal centres to assist applicants to apply for redress. In the Consultation Paper, we stated that these services should be chosen based on their ability to cover a broad range of likely applicants and their needs, including regional and remote applicants, Aboriginal and Torres Strait Islander applicants, applicants with disabilities and so on.<sup>917</sup>

A number of submissions in response to the Consultation Paper supported this approach. For example, ALSWA submitted:

ALSWA submits that funding to community legal centres should include funding to Aboriginal and Torres Strait Islander Legal Services such as ALSWA to provide culturally appropriate legal assistance and support to Aboriginal clients who wish to lodge a claim under a new scheme.<sup>918</sup>

In its submission in response to the Consultation Paper, the Coalition of Aboriginal Services reported on the outcomes of its 'Yarning Circle' consultations and stated:

Participants highlighted the importance of having access to emotional, legal and financial support throughout their redress journey. It was recognised that no matter how uncomplicated and 'easy' the application process was, the likelihood of experiencing some level of trauma was high and there was an absolute need to ensure culturally sensitive supports were in place to assist applicants throughout the process.<sup>919</sup>

We also remain satisfied that a redress scheme should offer counselling during the scheme, from assistance with the application, through the period when the application is being considered to the making of the offer and during the applicant's consideration of whether or not to accept the offer. A reasonable number of counselling sessions should be allowed per applicant, with capacity to allow further counselling if required and with provision for telephone counselling support and the like.

A number of submissions in response to the Consultation Paper supported this approach. Some submissions also submitted that flexibility and choice should be allowed so that survivors can select their own counsellor to support them through the application process. For example, Kelso Lawyers submitted:

All survivors engaging with the redress scheme must have access



to specialist counselling services, or funding support for their own therapist if they prefer.<sup>920</sup>

We consider that a redress scheme should fund counselling provided by a therapist of the applicant's choice:

- if the applicant specifically requests it
- where the applicant has an established relationship with the therapist
- where the cost is reasonably comparable to the cost the redress scheme is paying for these services generally.

We also received submissions that argued that counselling should be available to family members. For example, the CREATE Foundation stated in its submission in response to the Consultation Paper:

CREATE agrees that counselling support should be available for applicants throughout the redress process, and include support for an applicant's family, particularly where survivors are disclosing their abuse to their family for the first time as part of the redress scheme.<sup>921</sup>

Similarly, YMCA Australia submitted:

Given the significant impact that seeking redress can have not only on the individual survivor, but also on their partner/family members, we also consider the provision of support services for partners and families as significant during this period.<sup>922</sup>

We remain satisfied that a redress scheme should offer a limited number of counselling sessions for family members, particularly in cases where survivors are disclosing their abuse to their family for the first time in the context of the redress scheme or where the application process causes particular distress to the applicant, which in turn creates a need for counselling for their family members.

### **Recommendations**

66. A redress scheme should offer and fund counselling during the period from assisting applicants with the application, through the period when the application is being considered, to the making of the offer and the applicant's consideration of whether or not to accept the offer. This should include a session of financial counselling if the applicant is offered a monetary payment.
67. A redress scheme should fund counselling provided by a therapist of the applicant's choice if it is specifically requested by the applicant and in circumstances where the applicant has an established relationship with the therapist and the cost is reasonably comparable to the cost the redress scheme is paying for these services generally.
68. A redress scheme should offer and fund a limited number of counselling sessions for family members of survivors if reasonably required.



## 11.13 Transparency and accountability

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In the Consultation Paper, we stated that many survivors and survivor advocacy and support groups expressed concern about what they see as a lack of transparency and accountability in redress schemes to date.<sup>923</sup> We had heard accounts of survivors not being provided with information about how schemes operate; and some survivors' applications not being handled in accordance with the scheme's published processes and guidelines.

A number of submissions in response to the Consultation Paper expressed concerns about transparency and accountability in past schemes.<sup>924</sup> Some submissions stated that the principles of transparency and accountability should be embedded in redress scheme processes.<sup>925</sup>

In the Consultation Paper, we also stated that we had heard concerns about the lack of information available to survivors on amounts of redress payments.<sup>926</sup> We had been told of the difficulties that survivors face in determining whether or not to accept what they are offered when they may have no information about monetary payments generally other than what an institutional representative tells them.

We sought to address the lack of data by obtaining and analysing the data set out in Chapter 3 of the Consultation Paper. We have also obtained updated data, which we discuss in Chapter 3 of this report. These data have helped us to get a better understanding of past monetary payments, but they are not comprehensive in their coverage.

In the Consultation Paper, we suggested that a redress scheme should take the following steps to improve transparency and accountability:

- In addition to publicising and promoting the availability of the scheme, the scheme's processes and time frames should be as transparent as possible. The scheme should provide up-to-date information on its website and through any funded counselling and support services and community legal centres, other relevant support services and relevant institutions.
- If possible, the scheme should ensure that a particular contact officer is allocated to each applicant so that the contact officer can answer any questions the applicant has about the status of their application or the timing of its determination and so on.
- The scheme should operate a complaints mechanism and should welcome any complaints or feedback from applicants and others involved in the scheme (for example, support services and community legal centres).
- The scheme should give funded counselling and support services and community legal centres, other relevant support services and relevant institutions any feedback it receives about common problems that have been experienced with applications or institutional response and include any suggestions on how to improve applications or responses or ensure more timely determinations.

- The scheme should publish data, at least annually, about:
  - the number of applications received
  - the institutions to which the applications relate
  - the periods of alleged abuse
  - the number of applications determined
  - the outcome of applications
  - the mean, median and spread of payments offered
  - the mean, median and spread of time taken to determine the application
  - the number and outcome of applications for review.<sup>927</sup>
- operating a complaints mechanism and welcoming any complaints or feedback
- publishing data, at least annually, about applications and their outcomes (with due regard to client confidentiality).<sup>928</sup>

Similarly, YMCA Australia submitted:

YMCA Australia supports an approach to a redress scheme that embeds principles of transparency and accountability as a priority. We recognise that transparency of information, process and decision-making is critical for survivors to effectively engage with a process of redress and to have confidence and trust in that process. The measures described in the consultation paper (p. 175) are an appropriate basis for improving transparency and accountability.<sup>929</sup>

A number of submissions in response to the Consultation Paper supported these steps. For example, the CREATE Foundation submitted:

CREATE agrees with the principles outlined by the Royal Commission to ensure transparency and accountability by:

- making its processes and timeframes as transparent as possible
- allocating each applicant to a particular contact officer who they can speak to with any queries

We remain satisfied that the redress scheme should take these steps to improve transparency and accountability.

## **Recommendation**

69. A redress scheme should take the following steps to improve transparency and accountability:

- a. In addition to publicising and promoting the availability of the scheme, the scheme's processes and time frames should be as transparent as possible. The scheme should provide up-to-date information on its website and through any funded counselling and support services and community legal centres, other relevant support services and relevant institutions.
- b. If possible, the scheme should ensure that each applicant is allocated to a particular contact officer who they can speak to if they have any queries about the status of their application or the timing of its determination and so on.
- c. The scheme should operate a complaints mechanism and should welcome any complaints or feedback from applicants and others involved in the scheme (for example, support services and community legal centres).
- d. The scheme should provide any feedback it receives about common problems that have been experienced with applications or institutions' responses to funded counselling and support services and community legal centres, other relevant support services and relevant institutions. It should include any suggestions on how to improve applications or responses or ensure more timely determinations.
- e. The scheme should publish data, at least annually, about:
  - i. the number of applications received
  - ii. the institutions to which the applications relate
  - iii. the periods of alleged abuse
  - iv. the number of applications determined
  - v. the outcome of applications
  - vi. the mean, median and spread of payments offered
  - vii. the mean, median and spread of time taken to determine the application
  - viii. the number and outcome of applications for review.

## 11.14 Interaction with alleged abuser, disciplinary process and police

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In the Consultation Paper, we stated that past and current redress schemes have adopted different approaches to whether and how they interact with the alleged abuser, institutional disciplinary processes and the police.<sup>930</sup> Some schemes have referred allegations to the relevant police force, in some cases at the request of the survivor.

Our view at the time the Consultation Paper was released was that a scheme should not attempt or purport to make any ‘findings’ that any alleged abuser was involved in any abuse.<sup>931</sup> The scheme would simply assess the validity of a survivor’s application by applying a standard of proof that was likely to be lower than the standard applied in civil litigation. We stated that there may be no need to involve any alleged abuser in the scheme assessment and decision-making processes.<sup>932</sup>

We stated that, if any alleged abusers are, or may be, still working or otherwise involved with the institution, the institution should pursue its usual investigation and disciplinary processes when it receives advice from the scheme about the allegations.<sup>933</sup> This should not require any involvement of the scheme other than by providing the allegations to the institution. However, we suggested that the scheme might wish to consider the outcome of any disciplinary investigations before determining an application if the abuse is recent or fairly contemporary and

the alleged perpetrator is still involved with the institution.<sup>934</sup>

Clearly, the scheme must comply with any legal requirements to report or disclose the abuse. These requirements may vary from state to state and schemes will need to obtain advice on what is required of them.

In the Consultation Paper, we stated that the scheme should comply with any requirements, and make use of any permissions, to report to other oversight agencies – including for the purposes of Working with Children Checks – if any alleged abuser is, or may be, still working in children’s services but not with the relevant institution.<sup>935</sup>

Aside from complying with any legal requirements to report or disclose the abuse, we suggested that the way a scheme should interact with police may depend on the preferences of police in the relevant state or territory and on any relevant recommendations we make through our work on criminal justice.

We stated that, at that stage, we considered that a scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants.<sup>936</sup> A scheme should comply with police requirements by delaying any scheme processes if they would otherwise interfere with an active police investigation.

A number of submissions in response to the Consultation Paper expressed views on the interaction of a redress scheme with an alleged abuser, institutional disciplinary processes and the police.

A number of submissions commented on whether a scheme should attempt or purport to make any ‘findings’ that any alleged abuser was involved in any abuse.

Some submissions argued that a redress scheme should make findings that a named person was involved in abuse. For example, the Truth, Justice and Healing Council submitted:

The Council is concerned that the redress scheme proposed by the Royal Commission would not make findings that any named person was involved in abuse, as part of determining eligibility for redress. This approach creates the risk that redress will be awarded in circumstances where the claim is untested and the accused person, if alive, does not have the opportunity to refute allegations. While every step must be taken to avoid trauma to claimants in the claims process, the redress scheme must accord procedural fairness to persons accused and to the relevant institution. The accused person and the institution must have the allegations put to them and be given the opportunity to test the allegations and to respond to them. The redress determination will necessarily reflect an assessment of whether the abuse took place as alleged, and it seems impossible that this assessment could fairly occur without considering and determining whether a particular person was involved in abuse.<sup>937</sup>

Some submissions argued that a redress scheme should not make findings that a

named person was involved in abuse. For example, the Australian Psychological Society submitted:

The redress system should support a process where there is no need to identify, prosecute or establish the guilt of the offender, as per the recommendation of the Victorian inquiry.<sup>938</sup> [Reference omitted.]

We are satisfied that the redress scheme should not attempt or purport to make any ‘findings’ that any alleged abuser was involved in any abuse. Making findings would require an adversarial and legalistic process that is inconsistent with the redress scheme structure and processes we recommend. We are satisfied that the benefits of the administrative scheme or schemes we recommend significantly outweigh the benefits of the sorts of schemes that would be necessary to allow adverse findings to be made against alleged abusers.

We consider that a reasonable compromise is to allow the redress scheme to defer determining an application if the institution advises that it is undertaking internal disciplinary processes concerning the abuse the subject of the application. However, the redress scheme should not defer determining an application if the internal disciplinary process does not proceed in a reasonable time frame.

The redress scheme should have the discretion to consider the outcome of the disciplinary process, if the institution provides it, in determining the application. If the redress scheme considers the outcome of the disciplinary process and it is adverse to the applicant’s application, the redress scheme should give the applicant an

opportunity to comment on it or to provide further information.

Many submissions supported the proposal that the redress scheme should report allegations to the proper authorities. For example, the Child Migrants Trust submitted:

Acknowledging that many former child migrants seek a response beyond monetary payment to address their sense of injustice, the redress scheme needs a clear a [sic] protocol for referral of criminal matters.<sup>939</sup>

PeakCare Queensland submitted:

Certainly the scheme and in turn any institution subject to a claim should comply with legal requirements to report or disclose abuse should the alleged abuser still be associated with the institution.<sup>940</sup>

The CREATE Foundation stated:

The scheme should adopt a mandatory reporting policy and comply with any legal requirements to report or disclose the abuse.<sup>941</sup>

The Truth, Justice and Healing Council submitted:

Of course, the redress scheme should be compliant with the mandatory reporting requirements in force in the jurisdiction concerned. This may require redress processes to be put on hold pending the outcome of any police investigations.<sup>942</sup>

In response to a question as to how the Truth, Justice and Healing Council sees the relationship between police investigations and redress working, Mr Sullivan, representing the Council, told the public hearing:

We're really picking up the experience of what has happened since 1997 with Towards Healing and other matters, that when individuals in the process choose to go down another pathway, like an alternative dispute resolution pathway, the redress process stops. So in the case of where individuals go to the police or where there's an obligation on the part of officials of that institution to go to the police, we would suggest that the redress scheme stops until that process has had its course. At the end of the day, with child sex abuse, your first port of call should be the police.<sup>943</sup>

In its submission in response to the Consultation Paper, Micah Projects stated:

Information sharing between the redress scheme, the police and other regulatory bodies should be a significant element of any redress scheme that is established for survivors of institutional child sexual abuse.<sup>944</sup>

We remain satisfied that a redress scheme should comply with any requirements, and make use of any permissions, to report to other oversight agencies – including for the purposes of Working with Children Checks – if any alleged abuser is, or may be, still working in children's services but not with the relevant institution.

In their submission in response to the Consultation Paper, the Ballarat Centre Against Sexual Assault and Ballarat Survivors Group stated that a redress scheme should consider a survivor's views on reporting the allegations to the police:

Guidance regarding reporting should be that it occurs if a survivor wants to report – it should be discussed in all instances, and offers of support through that process. This does not include alleged perpetrator [sic] who are currently involved with children.<sup>945</sup>

In our view, if a redress scheme receives allegations of abuse against a person in an application for redress and the scheme has reason to believe that there may be a current risk to children – for example, because the scheme is aware that the person is still working with children – the scheme should report the allegations to police. Our present view is that, if the applicant does not consent to the allegations being reported to police in these circumstances then the scheme should report the allegations to the police without disclosing the applicant's identity.

However, this matter has not yet been the subject of detailed consideration or consultation. We will consider further the issue of reporting to police – including 'blind reporting' where the survivor's identity is not disclosed – in our work on criminal justice issues. Until we complete our consideration of this issue, and subject to any recommendations we make in relation to it, we are satisfied that blind reporting should continue in circumstances where an applicant for redress does not consent to the allegations being reported to police.

We are also satisfied that a redress scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants. A scheme should comply with police requirements by delaying any scheme processes if they would otherwise interfere with an active police investigation.

We examined the Melbourne Response in Case Study 16 and will report on it shortly. An issue arose in Case Study 16 as to the advice the independent commissioners gave some applicants on the police process.<sup>946</sup> The advice provided to some applicants discouraged them from going to the police.<sup>947</sup>

We are satisfied that, even if administrators or decision makers in a redress scheme are independent from the relevant institution, they should never give advice to applicants about likely outcomes of a report to police. Giving such advice will always be inconsistent with their function and potentially confusing for applicants who, understandably, see them as being in a position of authority.

A redress scheme should encourage any applicants who seek advice from it about reporting to police to discuss their options directly with the police. Ideally, the redress scheme should ask the relevant police force for contact details for reporting so that it can ensure it is in a position to give this information to applicants who seek this advice. The applicants can then make direct contact with appropriate specialist police investigators.

## Recommendations

70. A redress scheme should not make any 'findings' that any alleged abuser was involved in any abuse.
71. A redress scheme may defer determining an application for redress if the institution advises that it is undertaking internal disciplinary processes in respect of the abuse the subject of the application. A scheme may have the discretion to consider the outcome of the disciplinary process, if it is provided by the institution, in determining the application.
72. A redress scheme should comply with any legal requirements, and make use of any permissions, to report or disclose abuse, including to oversight agencies.
73. A redress scheme should report any allegations to the police if it has reason to believe that there may be a current risk to children. If the relevant applicant does not consent to the allegations being reported to the police, the scheme should report the allegations to the police without disclosing the applicant's identity.  
Note: The issue of reporting to police, including blind reporting, will be considered further in our work in relation to criminal justice issues.
74. A redress scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants.
75. A redress scheme should encourage any applicants who seek advice from it about reporting to police to discuss their options directly with the police.



# 12 Interim arrangements

## 12.1 Introduction

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In Chapter 10, we recommend that a single national scheme – our preferred structure – or separate state and territory redress schemes be established and ready to begin inviting and accepting applications from survivors by no later than 1 July 2017.

We recognise that some survivors will wish to seek redress before 1 July 2017 and that institutions will continue to need to respond to claims in this period. We also recognise the possibility that our recommendations may not be implemented, either nationally or in some states or territories.

In this chapter, we seek to give guidance to institutions on how they should offer and provide redress while any national scheme or state and territory schemes are being implemented or if such arrangements are not implemented.

However, we must emphasise that we anticipate that these arrangements are very unlikely to be adequate or appropriate for ensuring ‘justice for victims’.

Most significantly:

- they are unlikely to achieve the level of consistency or independence – both real and perceived – that is required if survivors are to consider they are capable of delivering justice
- they are unlikely to achieve the level of coverage required to be capable of delivering justice to survivors – rather than only some survivors – and they are unlikely

to be adequately funded, at least in respect of some institutions. That is, there may be no redress arrangements for institutions that no longer exist or do not have sufficient assets to meet redress claims

- they are likely to be more expensive and burdensome for institutions to establish and operate without economies of scale or the benefits of government leadership. Apart from being less efficient for institutions generally, the additional costs may adversely affect the level of redress that some institutions are able to offer.

We also remain satisfied that options for individual institutions – particularly non-government institutions – to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.

We discuss below:

- our decision that we should recommend interim arrangements, taking account of the different views expressed on this issue in submissions in response to the Consultation Paper
- the importance of independence and cooperation and how they should be achieved
- how our recommended elements of and principles for redress should be adopted or modified for interim arrangements
- how our recommended redress scheme processes should be adopted or modified for interim arrangements

- possible joint structures that institutions might wish to adopt
- possible alternatives to interim arrangements.

implemented, or if such arrangements are not implemented ...<sup>949</sup>

## 12.2 Recommending interim arrangements

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In their submissions in response to the Consultation Paper, a number of survivor advocacy and support groups and institutions expressed support for interim arrangements and for our suggestion in the Consultation Paper that we recommend additional principles to guide institutions. A number of institutions also made submissions about their current or intended approaches.

For example, Bravehearts submitted:

we would support the establishment of interim processes or ‘core guidelines’ that can be immediately implemented by Institutions, both government and non-government to provide both immediacy and some level of transparency and consistency around redress for survivors.<sup>948</sup>

The Alliance for Forgotten Australians (AFA) identified 10 principles relating to independence, training, cooperation and the like, and supported them as follows:

AFA supports the proposed principles for an interim redress scheme operated by the institutions while any national or state and territory arrangements are being

Some institutions submitted that they are already taking steps to change their current approaches to redress. A number of institutions said they were willing to consider or adopt any principles recommended by the Royal Commission.

The Anglican Church of Australia submitted that, in the period between the Royal Commission making its recommendations and their implementation, institutions should review their redress schemes in light of the issues outlined in the Consultation Paper.<sup>950</sup>

Australian Baptist Ministries fully supported the proposition that institutions adopt the Royal Commission’s recommended principles and approaches.<sup>951</sup>

YMCA Australia submitted that it supports the principles in the Consultation Paper and listed eight principles.<sup>952</sup>

Some survivor advocacy and support groups were opposed to interim arrangements or raised a number of reservations about their likely success, particularly on their ability to overcome the difficulties with institutions themselves administering redress.

Relationships Australia submitted:

While we support timely establishment of a redress scheme, we urge the Royal Commission to keep the rights and needs of survivors at the centre of its focus. Therefore we would not support the

implementation of a scheme that considers timeliness or affordability as a greater or equal consideration when compared to quality and completeness.<sup>953</sup>

The Survivors Network of those Abused by Priests Australia submitted that the approach in the Consultation Paper is sensible but is based on the assumption that institutional officials wish to help survivors when this is not the experience of survivors 'even today'.<sup>954</sup>

Care Leavers Australia Network submitted:

Whilst it seems most likely that interim arrangements would not be a national or cohesive scheme, there must be something better established than having past providers continue to administer their own schemes. Even if the Royal Commission were to release recommendations, guiding principles and a framework for Past Providers to utilise, it would not be an ideal situation. The same issues of impartiality, transparency and independence would still be there. Just because certain groups require a speedier approach does not mean that they should suffer a negative experience and outcome than may have otherwise been achieved had they waited for a [national independent redress scheme] to be established.<sup>955</sup>

AFA submitted:

AFA is concerned that the institutions in which children have

been abused may struggle to apply these principles to a redress scheme; their inherent conflict of interest will complicate their role in such an interim arrangement. Further, we believe that specialist support services will be called upon to provide a higher level of support for survivors to access an interim scheme operated by the institutions themselves than a national scheme operated by governments.<sup>956</sup>

Micah Projects submitted that the Royal Commission should undertake an audit of current practice, processes and payments since the Royal Commission has been in progress. It submitted that it was concerned that interim responses are being implemented within the same framework that has been found to be inadequate.<sup>957</sup>

knowmore submitted:

on the basis of our experience working with clients, we strongly agree with the observation made in the consultation paper that options for non-government institutions to adopt effective and co-operative approaches to redress, in the absence of government leadership and participation, appear limited. In this context, we would note that despite the proceedings of the Royal Commission over the last two years, **knowmore** continues to see significant inconsistencies within branches of the same institution (such as acrossdioceses [sic], orders or territories) as to how redress issues are approached.<sup>958</sup> [Emphasis in original. Reference omitted.]

A number of institutions also expressed reservations about the difficulties created by interim arrangements for survivors and the difficulties institutions would face in seeking to implement satisfactory arrangements without leadership from governments.

The Truth, Justice and Healing Council submitted:

Because the redress structure the Royal Commission is proposing will take some time to implement, the Catholic Church is giving consideration to modifying its present redress arrangements based on the principles for redress schemes outlined by the Royal Commission. However, the Council acknowledges that any interim arrangement will be far less satisfactory for survivors of abuse than an independent national scheme.<sup>959</sup>

The Salvation Army Australia noted the Royal Commission's rationale for recommending interim arrangements but submitted:

The Salvation Army is not supportive of interim arrangements if it is going to involve confusion or uncertainty for the survivors. It would prefer that it continue its own arrangements until a final resolution is concluded, particularly if any redress scheme is to be operated by the Commonwealth or State governments external and independent of the institutions.<sup>960</sup>

Professor Dutney, representing the Uniting Church in Australia, told the public hearing:

our submission outlines our overall support for a national redress scheme and commits to ensuring that our own processes are aligned as much as possible with the concepts and principles put forward by the Commission.

We do note that there are some matters where we require further guidance, particularly for interim arrangements. These aren't exclusive to the Uniting Church. In particular, we anticipate practical difficulties in the absence of a mandated infrastructure that a government-run redress scheme would offer.<sup>961</sup>

In response to a question as to how far off the Uniting Church would be, in the absence of a national redress scheme or state and territory redress schemes, from being able to achieve consistent or equitable outcomes for survivors of abuse within Uniting Church institutions nationally, Professor Dutney told the public hearing:

I would like to believe that we could achieve consistency across the Uniting Church. We would struggle with the issue of independence in dealing with survivors, although, as Ms Cross has pointed out, there are steps that we can take, and will take, to try to negotiate that. But while I have confidence in the goodwill of our institutions, the obstacles that would be put in place of getting consistency by a failure of government to provide that legislative framework are very large indeed and ought not to be underestimated.<sup>962</sup>

The Centre for Excellence in Child and Family Welfare submitted:

The Centre is concerned that interim arrangements would not provide for a redress scheme that was consistent, fair and just, nor a one stop shop for survivors in the same way as a national scheme. It may be more confusing to have parallel schemes and processes being considered locally and nationally for survivors and institutions.<sup>963</sup>

We agree that there are likely to be significant shortcomings in any interim arrangements for survivors and also for institutions. As we emphasised in the introduction to this chapter, we anticipate that these arrangements are very unlikely to be adequate or appropriate for ensuring ‘justice for victims’.

However, we consider that it is not desirable to leave institutions without guidance on how they should offer or provide redress (other than a direct personal response) and survivors without guidance on what they should expect from institutions. Through our private sessions, public hearings and consultation, we have learned a great deal about the provision of redress directly by institutions now and in the past. We consider that there is benefit in our drawing on this knowledge to recommend how institutions can improve their direct provision of redress in the future. While we acknowledge that this approach will be very far from ideal, we can at least take the opportunity to try to make things better than they are or have been.

## 12.3 Independence and cooperation

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### Independence from the institution

#### Position in the Consultation Paper

In the Consultation Paper, we acknowledged that many survivors have told us how important it is to them that decision making on redress is independent of the institutions in which the abuse occurred.<sup>964</sup>

Of course, a single national redress scheme or state and territory redress schemes will ensure that decision making on redress is independent of the institutions in which the abuse occurred. However, until a national scheme or state and territory schemes are implemented, institutions will need to seek to achieve independence in decision making on any redress claims that they receive.

In the Consultation Paper, we suggested that independence should be considered at the stages of:

- the survivor making a claim
- determining to the required standard of proof whether or not the survivor was abused
- determining the amount of any monetary payment to be offered
- determining what counselling or psychological care should be offered or supported.<sup>965</sup>

As discussed in Chapter 5, some survivors do not want to have any contact with the

institution in which they were abused. We suggested that, ideally, a survivor should be able to make a claim for redress and receive any support needed to pursue their claim without having to engage with the institution or have any dealings with its representatives.

Decision making on the allegations of abuse and redress to be offered should also be independent of the institution to reduce the risk of bias or the appearance of bias.

We also suggested that it might be easier for institutions that receive a number of claims to achieve independence in these processes. These institutions could create an ongoing process and engage third parties with appropriate expertise and training to administer and make decisions on redress claims. It might be unrealistic to expect institutions that receive very few claims to establish an independent process on an ongoing basis. Those institutions are perhaps more likely to join with larger institutions and make use of their administrative and decision-making processes or engage independent advisors as decision makers on an ad hoc basis.

In the Consultation Paper, we stated that it seemed likely that institutions would need to consider the following in seeking to achieve independence in an institutional redress process:

- they should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim

- if feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions
- institutions should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues
- institutions should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 5 of this report concerning meetings and meeting environments
- processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.<sup>966</sup>

We suggested that institutions would need to fund their redress processes while ensuring that the administration of the processes remained independent of the institutions.<sup>967</sup> It may be important for institutions to ensure that the required independence of the process is set out clearly in writing between the institution and any person or body they engage to administer their redress process, whether on an ongoing or ad hoc basis, and that they and the persons they engage scrupulously observe that independence.

## Submissions in response to the Consultation Paper

A number of submissions in response to the Consultation Paper referred to the importance of any interim arrangements being independent of the institution. These included submissions from survivor advocacy and support groups and from institutions.

AFA identified and supported a number of principles from the Consultation Paper, including the following principles on independence:

- Decision making should be sufficiently independent of institutions to reduce the risk of bias
- Survivors should be able to make a claim for redress and receive any support needed to pursue their claim without having to engage with the institution or its representatives
- Institutions which receive a small number of claims can join with a larger institution which is more able to set up an independent process
- Institutions should provide information on the application process, including online so that survivors do not need to approach the institution to make a claim
- Administration of receiving and determining a claim should be independent.<sup>968</sup>

Care Leavers Australia Network submitted:

It is of the utmost importance that any interim arrangement which is established should be run by an independent entity. The abusive past providers cannot be trusted to be impartial, and Care Leavers should not be expected to relive their abuse to their abusers.<sup>969</sup>

Both the National Aboriginal and Torres Strait Islander Legal Services and the Aboriginal Legal Service of Western Australia submitted that they agree determinations 'should be made by a person or persons who are independent of the institution and who are appropriately trained in regard to child sexual abuse and, where appropriate, in relation to specific issues affecting Aboriginal survivors of institutional child sexual abuse'.<sup>970</sup>

In response to a question about what the Truth, Justice and Healing Council sees as the way forward if the Commonwealth does not support a national redress scheme, Mr Sullivan told the public hearing:

We have said quite regularly that it is our policy position that the days of the church doing its own investigation itself are over. We need an independent process, and if it can't be established within the initiative and motivation of governments, we have to get creative about that.<sup>971</sup>

In response to a further question, Mr Sullivan said the creativity would lead to 'an independent process'.<sup>972</sup>

Berry Street submitted:



Berry Street supports all of the principles outlined in the [Consultation Paper] on establishing independent redress processes with structural separation from institutions. The Berry Street Board has endorsed this approach and the agency is in the process of replacing its current internal process with an external and independent redress scheme.<sup>973</sup>

YMCA Australia also submitted:

YMCA Australia also supports an organisational approach to redress which seeks to establish a governance and decision-making structure that is independent from the organisation, a structure with which survivors can engage directly if they choose. While the establishment of such a structure may be costly for individual organisations, YMCA Australia may be supportive of a cooperative arrangement with other 'like' organisations in circumstances and within parameters that aligned with organisational values and characteristics. We anticipate the role of such a structure may be to:

- act as an initial and direct point of contact for survivors in making their application for redress;
- consult directly with the survivor about the elements of direct personal response, the provision of counselling and psychological care and other support services which may be required;

- formulate a care plan outlining the above elements;
- determine the amount of monetary payment offered;
- act as a primary point of contact for the survivor throughout the process of redress;
- receive any complaints or feedback from survivors about the process; and
- make recommendations to the organisation about improvements to the process of redress.<sup>974</sup>

Ms Whitwell, representing YMCA Australia, told the public hearing:

While not yet formalised, our intended approach to redress will be supported by a number of principles which I'd like to talk through now.

Firstly, we know that our approach to redress must be survivor focused, and for us this means that the best interests of survivors will be central to what we do, and that the rights and choices of survivors in the process of redress will be supported and respected. We also know that we need to ensure that our approach is transparent, accountable and subject to independent oversight. It is important that we develop a means by which independent decision making and oversight of redress can occur. We know that an independent structure or mechanism that sits outside of the YMCA may provide this.



Not only is this important in terms of transparency and accountability, but we also know this will be important for those survivors who do not wish to contact the YMCA directly. We are currently exploring models of how we might implement such a structural mechanism and whether this might be something that we could do in a cooperative arrangement with other like organisations.<sup>975</sup>

Some submissions that discussed interim arrangements did not support independence from the institution. In its submission in response to the Consultation Paper, Tuart Place stated:

It is noted that the Royal Commission prefers a model in which the determination of any monetary payment is made independently of the institution in which the abuse occurred. However, in our experience, there are advantages to monetary payments' [sic] being assessed, offered, and paid directly by the institution responding to historic abuse complaints.<sup>976</sup>

Tuart Place submitted that this was particularly the case with a religious or other non-government organisation. Tuart Place proposed a model that would allow institutions, rather than an external scheme, to determine monetary payments, with transparent assessment mechanisms, facilitated face-to-face meetings, funded legal representation for applicants and an independent appeal panel for cases where the monetary payment is not agreed.<sup>977</sup>

## Case Study 16 on the Melbourne Response

The Melbourne Response provides an example of an ongoing institutional redress process that adopted some independent decision-making elements. We examined the Melbourne Response in Case Study 16 and will report on it shortly.

For the purposes of considering interim arrangements for redress, the following issues of independence identified in Case Study 16 are relevant:

- the independence of the independent commissioners under the Melbourne Response in circumstances where they are instructed by the solicitors for the Archdiocese of Melbourne<sup>978</sup>
- the independence of Carelink, which was set up as an independent body with a promise of confidentiality, in circumstances where it receives legal advice from the solicitors for the Archdiocese of Melbourne<sup>979</sup>
- the independence of the compensation panel under the Melbourne Response in circumstances where it receives administrative support from the solicitors for the Archdiocese of Melbourne.<sup>980</sup>

We discuss these arrangements in detail in our report on Case Study 16. It seems clear to us that, where there are lawyers responsible for administering a redress scheme, they should not be the same lawyers as those acting for the relevant institution. The potential for conflict

and the difficulty of maintaining confidentiality are obvious.<sup>981</sup>

Another issue that we consider in Case Study 16 is the appropriateness of the Archdiocese of Melbourne appointing Professor Ball as the public face for clinical services provided to survivors of abuse in the Archdiocese when it knew that Professor Ball had provided treatment to priests in the Archdiocese and had been engaged by lawyers to give expert evidence in criminal proceedings against priests who had been charged with child sex abuse offences.<sup>982</sup> As we discuss in our report on Case Study 16, notwithstanding Professor Ball's qualifications and expertise, it is almost inevitable that a survivor would experience concern at his appointment.<sup>983</sup>

Our examination of the Melbourne Response makes clear to us the importance of considering both the reality and the appearance of independence. Institutions should be very mindful of how their arrangements appear to survivors. In circumstances where there is a power imbalance between the institution and the survivor, perceptions matter a great deal.

The information we obtained for Case Study 16 on the costs of the Melbourne Response is also relevant. The Archdiocese of Melbourne provided us with information about the annual costs of running the Melbourne Response scheme and the annual amounts that had been paid to victims of child sexual abuse through the scheme. These are set out in detail in our report on Case Study 16.<sup>984</sup>

While it is difficult to make any direct comparisons, the 'other expenditures'

reported – which include legal fees and the costs of the independent commissioners, counsel assisting, the compensation panel and employee and administrative costs, including those of Carelink – suggest that the Melbourne Response is an expensive scheme to operate. These 'other expenditures' – which can fairly be regarded as administration costs – are about the same as the combined costs of compensation payments and Carelink and other medical consultation, counselling and treatment costs.<sup>985</sup>

## Discussion and conclusions

In considering independence in interim arrangements for redress, two key points emerge from our examination of the Melbourne Response:

- independence – both real and apparent – is difficult to achieve, particularly given survivors' understandable concerns about the involvement of the institution
- independence is likely to be expensive, particularly when considered on a per claim basis.

We have no doubt that independence from the institution is very important for building trust and confidence with survivors and for minimising the risk of re-traumatisation. This is an important reason for favouring a government-run redress scheme for government and non-government institutions.

In Chapter 10 we discuss the likely efficiencies in administration costs of establishing and administering larger government-run redress schemes,

particularly a single national redress scheme. As the costs of administering the Melbourne Response suggest,<sup>986</sup> it seems very likely that the cost of establishing and administering independent arrangements for individual institutions will be far higher on a per claim basis than the costs of establishing and administering a large-scale government redress scheme.

In the absence of a government-run redress scheme, it is likely to be difficult and comparatively expensive for institutions to achieve the necessary reality and appearance of independence.

We remain satisfied that institutions should seek to achieve independence in an institutional redress process by taking the following steps:

- they should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim
- if feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions

- institutions should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues
- institutions should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 5 in relation to meetings and meeting environments
- processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.

If institutions are able to establish a process for receiving and determining claims that is independent of the institution, it will also be important that the required independence of the process is set out clearly in writing between the relevant institution and any person or body the institution engages as part of the redress process. The institution and any person or body engaged must scrupulously observe that independence. No person or body should be engaged on the basis that they are 'independent' if they also provide other services – such as legal advice – to the institution.

## Recommendations

76. Institutions should seek to achieve independence in institutional redress processes by taking the following steps:
- a. Institutions should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim.
  - b. If feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions.
  - c. Institutions should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues.
  - d. Institutions should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 5 concerning meetings and meeting environments.
  - e. Processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.
77. Institutions should ensure that the required independence is set out clearly in writing between the institution and any person or body the institution engages as part of its redress process.

## Cooperation on claims that involve more than one institution

### Position in the Consultation Paper

In the Consultation Paper, we stated that a single national redress scheme or separate state and territory schemes would ensure that a survivor's experiences of institutional abuse could be assessed in one redress process, even where the survivor had experienced abuse in more than one institution.<sup>987</sup> We stated that this is an important feature of a 'one-stop shop' for redress, because it ensures fairness and equal treatment for survivors and minimises the number of occasions on which they have to tell their stories.<sup>988</sup>

We suggested that it seemed clear that any structures we recommend for redress should be designed to achieve a 'one-stop shop'.<sup>989</sup> Until these structures are implemented, institutions will need to seek to achieve a similar outcome in decision making on any redress claims that they receive.

This issue will clearly arise where a survivor alleges abuse in more than one institution. In these circumstances we suggested that, with the survivor's consent, the institution's redress process should approach the other named institutions to seek cooperation on the claim. If the survivor consents and the relevant institutions agree, one process should assess the survivor's claim in accordance with the redress processes and the matrix and monetary payments we recommend and allocate contributions between the institutions. If any institution no longer exists and has no successor, their share should be met by the other institution or institutions.

We suggested that institutions could agree either that one of their redress processes will assess and determine the claim and allocate contributions or that their redress processes will conduct these steps jointly. Any process that institutions follow should seek to minimise the risk of re-traumatising the survivor.

If a survivor does not allege abuse in more than one institution, we suggested that the institution's redress process may need to confirm with the survivor whether or not they have experienced abuse in another institution. This is important, because a table or matrix and monetary payments that are designed for a 'one-stop shop' approach work on the basis that all of the survivor's experiences of institutional abuse are assessed at the one time. If a survivor is assessed more than once, even for different experiences of institutional abuse, this may result in overpayment and in survivors being treated unequally.

If a survivor confirms that they have experienced abuse in another institution, we

suggested that the cooperative approaches discussed above should be pursued. Alternatively, if the survivor has already received redress for the abuse experienced in another institution, that redress should be taken into account, as discussed in chapters 7 and 11. Otherwise, we suggested that the institution's redress process could be followed on the basis that the survivor experienced institutional abuse only in that institution.

### Submissions in response to the Consultation Paper

Some submissions in response to the Consultation Paper commented on the possibility of cooperation between institutions. Some institutions discussed cooperation more in the context of the possibility of ongoing cooperation in the absence of government-run redress schemes rather than cooperation on an ad hoc basis to determine a particular application for redress.

Both the National Aboriginal and Torres Strait Islander Legal Services and the Aboriginal Legal Service of Western Australia submitted that they agree with cooperation on claims involving more than one institution. However, they highlight 'the importance of ensuring that the institution that is predominantly responsible for the redress process is able to ensure that processes are culturally appropriate for Aboriginal survivors'.<sup>990</sup>

Micah Projects submitted that it does not support the proposal that non-government organisations undertake a cooperative approach in isolation from government as part of an interim arrangement.<sup>991</sup>

## Discussion and conclusions

We discuss ongoing cooperation in the absence of a government-run redress scheme in section 12.6 below.

We remain satisfied that, if a survivor alleges abuse in more than one institution, with the survivor's consent the institution's redress process should approach the other named institutions to seek cooperation on the claim. If the survivor consents and the relevant institutions agree, one process should assess the survivor's claim in accordance with the redress elements and processes we recommend (with any necessary modifications because of the absence of a government-run scheme, as discussed below) and allocate contributions between the institutions. If any institution no longer exists and has no successor, their share should be met by the other institution or institutions.

The institutions could agree either that one of their redress processes will assess and determine the claim and allocate contributions or that their redress processes will conduct these steps jointly. Any process that is followed should seek to minimise the risk of re-traumatising the survivor.

If a survivor does not allege abuse in more than one institution, the institution's redress process may need to confirm with the survivor whether or not they have experienced abuse in another institution.

We agree that the institutional redress process that assesses the survivor's claim should ensure that the processes are culturally appropriate for Aboriginal survivors.

### **Recommendation**

78. If a survivor alleges abuse in more than one institution, the institution to which the survivor applies for redress should adopt the following process:
- a. With the survivor's consent, the institution's redress process should approach the other named institutions to seek cooperation on the claim.
  - b. If the survivor consents and the relevant institutions agree, one institutional process should assess the survivor's claim in accordance with the recommended redress elements and processes (with any necessary modifications because of the absence of a government-run scheme) and allocate contributions between the institutions.
  - c. If any institution no longer exists and has no successor, its share should be met by the other institution or institutions.

## 12.4 Elements and principles of redress

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Institutions should be able to adopt the elements of redress and the general principles for providing redress that we recommend in Chapter 4.

The direct personal response element of redress that we recommend in Chapter 5 must come from the institution. Therefore, it is unaffected by the absence of a government-run redress scheme. The counselling and psychological care and monetary payment elements of redress are likely to require some modification in the absence of a government-run redress scheme. We discuss these modifications below.

The general principles for providing redress should apply to all elements of redress, whether they are offered or provided by a government-run redress scheme or by an institution.

### Counselling and psychological care

In the Consultation Paper, we referred to the option for supporting the provision of counselling and psychological care through redress by creating a trust fund to supplement existing services and fill service gaps to ensure that survivors' needs for counselling and psychological care are met.<sup>992</sup> The trust fund would operate as part of a 'one-stop shop' in a national redress scheme or state and territory redress schemes. Institutions would contribute an amount per eligible survivor, which would be

pooled and used to supplement existing services and fill service gaps.

We stated that this approach would not be available in the absence of a 'one-stop shop' redress scheme.<sup>993</sup> Institutions may not have the number of claims necessary to allow contributions to be pooled efficiently. Individual institutional trust funds may have little capacity to supplement existing services or fill service gaps.

We suggested that, given the concerns that some survivors express about counselling services operated by institutions, it may be unlikely that many survivors would wish to use these services to meet their counselling and psychological care needs.<sup>994</sup>

In the Consultation Paper, we suggested that, as an interim arrangement, perhaps the best that institutions could do is to undertake, through their redress processes, to meet survivors' needs for counselling and psychological care.<sup>995</sup> This could be done by assisting survivors to gain access to suitable public services or by funding counselling and psychological care where public services are inadequate or not available.

We stated that institutions would also need to ensure that a survivor's need for counselling and psychological care is assessed independently of the institution.<sup>996</sup> It may be that institutions should simply accept the advice of a survivor's treating practitioner as to what the survivor needs.

We suggested that, if a 'one-stop shop' redress scheme was later established, with a survivor's consent the institution may be able to negotiate to then make a payment into the trust fund so that the survivor's

ongoing counselling and psychological care needs are supported through the redress scheme instead of by the institution.<sup>997</sup>

A number of submissions in response to the Consultation Paper referred to the importance of providing counselling in interim arrangements. For example, the Centre Against Sexual Violence submitted:

In the interim, it is imperative that counselling services which have supported those affected by the Royal Commission be continued until a redress scheme is implemented. This will allow for the continuation of essential counselling, advocacy and support needed by survivors.<sup>998</sup>

The Australian Lawyers Alliance submitted that interim arrangements ‘must necessarily depend upon the availability of funding but at least medical and counselling services could be made freely available pending the redress scheme starting to operate fully’.<sup>999</sup>

Other submissions referred to the importance of decisions about counselling being independent of the institution. For example, AFA supported the following principle:

Institutions to accept the treating practitioner’s assessment of the need for counselling and fund this where public services are not available ...<sup>1000</sup>

Both the National Aboriginal and Torres Strait Islander Legal Services and the Aboriginal Legal Service of Western Australia submitted that they agree that ‘it is vital

that the institution does not itself make determinations about the appropriate level of counselling and psychological care and institutions should endeavour to provide as much support as possible to enable survivors to access appropriate services’.<sup>1001</sup>

It remains our view that, as an interim arrangement, the best that institutions can do is to undertake, through their redress processes, to meet survivors’ needs for counselling and psychological care. This could be done by assisting survivors to gain access to suitable public services or by funding counselling and psychological care where public services are inadequate or not available.

Institutions should also ensure that a survivor’s need for counselling and psychological care is assessed independently of the institution. It may be that institutions should simply accept the advice of a survivor’s treating practitioner as to what the survivor needs.

We do not consider this to be a desirable approach to meeting survivors’ needs for counselling and psychological care. It is another reason for preferring a large-scale redress scheme that can more confidently undertake to meet these needs on an ongoing basis across a larger number of survivors.

## Monetary payments

In the Consultation Paper, we referred to difficulties that might arise in interim arrangements because the table or matrix and levels of monetary payment we were considering were designed for a ‘one-



stop shop' approach to redress.<sup>1002</sup> That is, they work on the basis that all of the survivor's experiences of institutional abuse are assessed at the one time. If a survivor is assessed more than once, even for different experiences of institutional abuse, this may result in overpayment and in survivors being treated unequally.

The purpose of monetary payments we recommend in Chapter 7 can apply to interim arrangements for redress.

The matrix can give some guidance to decision makers on how they should assess claims under interim arrangements. However, as discussed in chapters 7 and 10, the matrix should be accompanied by detailed assessment procedures and guidelines in order to achieve consistent assessments across claims. Interim arrangements adopted by individual institutions or groups of institutions are very unlikely to be able to achieve the necessary detail, including expert advice, or the necessary consistency.

The average and maximum monetary payments we recommend in Chapter 7 are also unlikely to apply readily to interim arrangements. While the maximum monetary payment can still provide guidance by indicating that \$200,000 is not too high an amount to be offered for a 'worst case', many institutions may never have a 'worst case' and it is quite possible that no institution will face the spread of claims modelled in Chapter 7 that leads to the average payment of \$65,000. Some institutions may face a higher average payment if they have a greater share of claimants with higher severity values assessed under the matrix. Other institutions may face a lower average payment. Some institutions may receive only one eligible application and there is no certainty as to where that claim would fall on the scale between the minimum payment of \$10,000 and the maximum payment of \$200,000.

The average and maximum monetary payments, and to a lesser extent the matrix, are designed to work for the large-scale redress scheme or schemes we recommend in Chapter 10. They can provide only limited guidance for interim arrangements by individual institutions or groups of institutions.

### **Recommendations**

79. Institutions should adopt the elements of redress and the general principles for providing redress recommended in Chapter 4.
80. Institutions should undertake, through their redress processes, to meet survivors' needs for counselling and psychological care. A survivor's need for counselling and psychological care should be assessed independently of the institution.
81. Institutions should adopt the purpose of monetary payments recommended in Chapter 7 and be guided by the recommended matrix for assessing monetary payments.

## 12.5 Redress scheme processes

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The redress scheme processes we recommend in Chapter 11 are designed to work for the large-scale redress scheme or schemes we recommend in Chapter 10.

However, some of the redress scheme processes we recommend should assist institutions in implementing interim arrangements. In particular:

- the eligibility criteria we recommend should apply, although some criteria will not be relevant to some institutions
- the arrangements should not have any fixed closing date
- the institutional involvement we recommend should apply, although it would need to be set out very clearly in arrangements between the independent administrators or decision makers and the institution so that it did not compromise the reality or appearance of independence
- the standard of proof we recommend should apply
- arrangements for decision making on a claim could apply, although it might be difficult to obtain the mix of skills in decision making unless an institution receives many applications. Obtaining the mix of skills may add significant amounts to the cost of administering the interim arrangements
- institutions should apply the process for offering redress and for accepting an offer we recommend
- institutions should be able to apply the internal reviews we recommend although this might depend on who is engaged as a decision maker and whether there is anyone more 'senior' to conduct the review
- some elements of the transparency and accountability we recommend could be applied, such as providing up-to-date information on a website, welcoming any complaints or feedback from applicants and perhaps publishing data if many claims are received (and if the data can be published without identifying individual applicants)
- institutions should apply the level of interaction with the alleged abuser, the institution's disciplinary process and the police that we recommend.

Some elements of the application process could apply, although institutions may have to consider whether they are likely to receive a sufficient number of applications to put in place application form processes and support service arrangements. Some institutions might prefer to adopt or retain an interview or investigative approach. The benefits of an administrative process involving a written application form are likely to be more relevant for a large-scale redress scheme rather than for interim arrangements for individual institutions or groups of institutions.

Whether deeds of release should be a condition of receiving a monetary payment is a difficult issue. As discussed in section 11.11, the features of the redress scheme we recommend – including its independence from the institutions, the transparency and consistency of the determination of eligibility

and amounts of monetary payments, the availability of reviews and the level of support provided to applicants – enable us to conclude that it is reasonable to require an applicant to grant a release under the redress scheme we recommend.

However, many of these features will not be present, or will not be present to the same degree, in any interim arrangements. We cannot be satisfied that it would be reasonable to require an applicant to grant a release under interim arrangements.

Two other matters that are worth emphasising arose from Case Study 16 and our examination of the Melbourne Response.

For all elements of interim arrangements, it is important that there be settled procedures. An example from Case Study 16 is the need for settled procedures on whether applicants can bring a lawyer or support person to a hearing or meeting.<sup>1003</sup> Having settled procedures will avoid applicants being given inconsistent information or being uncertain as to the procedures and the support they can use.

There is a particular need for clarity on reporting complaints to the police and what applicants are told about reporting to police.<sup>1004</sup> As discussed in section 11.14, administrators or decision makers in a redress scheme should never give advice to applicants about likely outcomes of a report to police. Giving such advice will

always be inconsistent with their function and potentially confusing for applicants who, understandably, see them as being in a position of authority. This applies even if the redress scheme is independent from the institution, but it will have added importance in interim arrangements that are still closely associated with the institution, where there is a greater risk of a real or perceived lack of independence.

Finally, institutions might benefit from seeking input from survivor advocacy and support groups in establishing and operating any interim arrangements. In its submission in response to the Consultation Paper, AFA recommended ‘that the Royal Commission propose a formal role for survivor groups in an ongoing dialogue with the institutions about how an interim redress scheme operates’.<sup>1005</sup>

Institutions should consider seeking input or advice from survivor advocacy and support groups on any interim arrangements, although the possible burden on survivor advocacy and support groups must be recognised. The structure we recommend in Chapter 10 provides for the input of survivor advocacy and support groups through the national redress advisory council. It may not be realistic to expect that survivor advocacy and support groups could provide input or advice to the many institutions or groups of institutions that establish separate interim arrangements, as this would be far more burdensome than participating in one national advisory council.

### Recommendations

82. In implementing any interim arrangements for institutions to offer and provide redress, institutions should take account of our discussion of the applicability of the redress scheme processes recommended in Chapter 11.
83. Institutions should ensure no deeds of release are required under interim arrangements for institutions to offer and provide redress.

## 12.6 Possible structures

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### Position in the Consultation Paper

In the Consultation Paper, we suggested that, in the absence of a national redress scheme or state and territory redress schemes, there might be structures that institutions could adopt to offer redress more effectively than through individual institutional redress schemes.<sup>1006</sup>

We referred to our discussion of the need for relevant institutions to seek to cooperate with each other where a survivor claims to have experienced abuse in more than one institution. We stated that there is no legal impediment to institutions establishing cooperative arrangements on an ongoing basis rather than on an ad hoc basis as particular claims require cooperation.<sup>1007</sup>

However, we acknowledged that some institutions had then told us that cooperation was unlikely in the absence of government leadership or direction.<sup>1008</sup> Institutions may have quite different histories and philosophies and they may have different attitudes towards responding to institutional child sexual abuse. They may also have very different claims histories. In some cases, some institutions may effectively be competitors and ongoing cooperation may be unlikely.

We stated that unless governments join any cooperative effort, at least for claims of abuse in government-run institutions, then a cooperative structure may have limited application.<sup>1009</sup>

We suggested that some level of coordination might be achieved through an independent entity offering a redress process on a fee-for-service basis.<sup>1010</sup> The entity could receive and assess claims for member institutions and could be authorised to apportion claims across members where a claim involves more than one member institution. In order to offer an effective redress process, the entity would need to adopt the principles and approaches we recommend generally as well as any relevant additional principles for institutions.

We referred to the Financial Services Ombudsman as an example of this sort of approach.<sup>1011</sup> We suggested that some governments might consider requiring non-government institutions that provide particular types of children's services or receive particular government funding to participate in such an approach. This would be comparable to the requirement that underpins

the Financial Services Ombudsman, which is that financial service providers participate in an approved dispute resolution service.

Again, however, we stated that such an approach may have limited application if governments do not participate, at least for claims of abuse in government-run institutions.<sup>1012</sup>

We concluded that, based on what we had heard at that time, options for non-government institutions to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.<sup>1013</sup>

### Submissions in response to the Consultation Paper

A number of submissions from survivor advocacy and support groups expressed reservations about cooperation between institutions in offering redress. As noted above, Micah Projects submitted that it does not support the proposal that non-government organisations undertake a cooperative approach in isolation from government as part of an interim arrangement,<sup>1014</sup> suggesting instead:

[The Royal Commission could] facilitate a process for all churches and institutions, with other stakeholders [to] come together to develop an implementation plan that could be presented to government.<sup>1015</sup>

Care Leavers Australia Network submitted:

The suggestion in the consultation paper of an independent entity offering a redress process on a fee for service basis seems more desirable than [sic] placing it back in the hands of the past providers.<sup>1016</sup>

In submissions in response to the Consultation Paper and at the public hearing, a number of institutions addressed the possibility of cooperative arrangements.

In responding to a question about whether the Truth, Justice and Healing Council would seek to establish an independent process exclusively for survivors of abuse in Catholic institutions or whether it sees cooperative processes being established between institutions, Mr Sullivan told the public hearing:

Well, you know, as is our spirit in this process, we are not in a position to hector anybody about a set of results ...

However, firstly, we would want a scheme which was independently administered so that redress can be independently determined and the church components pay for it.

Secondly, if that redress scheme can be available for others, we would be open to the conversation, but very mindful of the fact that other organisations may not want to align with the Catholic Church, given our history.<sup>1017</sup>

As noted above, in its submission in response to the Consultation Paper, The Salvation Army Australia stated it

is 'not supportive of interim arrangements if it is going to involve confusion or uncertainty for the survivors. It would prefer that it continue its own arrangements until a final resolution is concluded'.<sup>1018</sup>

Mr Condon, representing The Salvation Army Australia, told the public hearing:

In the absence of the Commonwealth, we would be open to explore a cooperative redress scheme with other faith-based organisations, institutions, in conjunction with the State and Territory governments as we are able.

The Salvation Army is concerned that there should be no delay in working towards appropriate redress schemes. In the absence of any other scheme, we want to ensure that survivors can participate in our restorative justice process which builds on the ongoing knowledge we are learning from the Royal Commission hearings from all the institutions and its redress consultation process and important feedback we are learning from survivors.<sup>1019</sup>

In responding to questions, Mr Blake, representing the Anglican Church of Australia, told the public hearing that the Anglican Church was able to contemplate a scheme where it joins with government in contributing to and ensuring an effective scheme, but it could also contemplate working with other institutions that are separate from government to achieve a consistent approach through a voluntary

scheme and with no difficulty as to the institutions that seek to come together.<sup>1020</sup>

In its submission in response to the Consultation Paper, the Uniting Church in Australia stated:

Suggested interim funding arrangements proposed by the Royal Commission require institutions to act without governments. This arrangement does not recognise the significant proportion of obligation of government agencies' responsibility for the welfare of children, particularly those placed by government agencies in non-government out-of-home care services.<sup>1021</sup>

Ms Cross, representing the Uniting Church in Australia, told the public hearing:

The Uniting Church is committed to exploring the implementation of interim redress arrangements within the church, as well as to explore ways with other institutions. Some of the difficulties we anticipate are trying to set up interim arrangements which will provide for independence in administration and decision making, where there's a lack of infrastructure for consistent assessment between institutions, and the support for survivors and consistent support for survivors to engage in those processes. Of course, an added difficulty to be explored is whether insurers will support interim arrangements without the benefit of some

legislative framework. As I said, there's much work to be done in that area of interim arrangements.<sup>1022</sup>

In response to a question as to whether the Uniting Church would be able to cooperate with other institutions in an interim arrangement so that it combined together with other churches, Ms Cross told the public hearing:

we absolutely believe that needs to be explored fully. We're very open to the exploration. We're not sure where that journey will end, given the complexity of the lack of a legislative framework in which it would occur and the complications of the various insurance arrangements.

We have considered and had some very early conversations about this in some areas – not nationally but certainly in some jurisdictions. The notion of having some independent assessment seems quite doable, albeit lots of work to still do to work all that out, but that seems quite doable.

The whole question of then, though, decision making around quantum, that becomes more complex, but we'll continue that journey.<sup>1023</sup>

In responding to further questions, Ms Cross told the public hearing that there had not yet been discussions between institutions as to the matrix to be used for assessing monetary payments.<sup>1024</sup>

In response to a further question concerning whether an interim arrangement between institutions would be an arrangement between the national bodies of those institutions or state based, Ms Cross told the public hearing:

We're not far enough down the road to be confident of thinking that that might be possible at either level. Clearly, at a national level it is more complex than at a state level where there's at least likely to be quite a lot of relationships already in place between the various institutions that would support continued cooperation. So we need to do way more work to sort that one out.<sup>1025</sup>

In response to a question as to whether the Uniting Church in Australia had had any discussions with any governments about the cooperative arrangement between the church and governments, Ms Cross told the public hearing:

I'm not aware of any outside of some conversations in Queensland, in fact, where there have certainly been conversations at the officer level. It has been complex because of change of government in Queensland and there has been certainly a raising of awareness with the incoming government about these matters, but there's not been further conversation other than that.<sup>1026</sup>

As discussed above, in its submission in response to the Consultation Paper, YMCA Australia stated that it 'may be supportive of

a cooperative arrangement with other “like” organisations in circumstances and within parameters that aligned with organisational values and characteristics’.<sup>1027</sup>

Ms Whitwell, representing YMCA Australia, told the public hearing:

It is important that we develop a means by which independent decision making and oversight of redress can occur. We know that an independent structure or mechanism that sits outside of the YMCA may provide this.

Not only is this important in terms of transparency and accountability, but we also know this will be important for those survivors who do not wish to contact the YMCA directly. We are currently exploring models of how we might implement such a structural mechanism and whether this might be something that we could do in a cooperative arrangement with other like organisations.

We know that we need to have a nationally consistent approach and, as already mentioned, as a federated structure, we have many different YMCAs across the country and it will be important that our approach to redress is nationally consistent to ensure that our response is fair and equitable to all survivors, regardless of where the abuse may have occurred.<sup>1028</sup>

In response to a question as to whether YMCA is open to cooperation between

institutions, Mr Mell, representing YMCA Australia, told the public hearing:

Very much so. Also, there’s a business case to do that as well, of course, in terms of whatever scheme there is in place, or whatever approach, there’s a cost associated with it and if there is an opportunity to link with other agencies, then there’s an opportunity to reduce our costs.<sup>1029</sup>

Northcott Disability Services said that it was willing to participate in interim arrangements but also stated that guidance or resources will be required. It submitted:

If it is the recommendation of the Royal Commission that organisations voluntarily adopt an interim redress scheme while the national scheme is established, Northcott will willingly participate. In order to do so and to do a good job, the following guidance or resources will be required:

- Avenues for workforce skills development, in receiving claims, assessing claims and providing trauma-informed complaints handling techniques – this may be able to be delivered through state/territory government agencies such as Ombudsman, Public Advocate, etc;
- Access to appropriate specialist legal advice – this is something we may be able to procure through our existing



relationships which provide us with pro bono support, but given the specialisation other firms may need to be approached. At a sector level this will require planning and funds;

- Designated roles within our organisation, as well as support for all staff to provide ‘no wrong door’ entry for survivors wishing to make a claim.<sup>1030</sup>

## Discussion and conclusions

It is clear that, while there is a willingness among a number of institutions to consider cooperative arrangements, there are also very substantial barriers to establishing these arrangements.

We do not discourage these arrangements. However, nothing that we have been told in submissions in response to the Consultation Paper or during the public hearing causes us to doubt the views we expressed in the Consultation Paper.

In particular, unless governments join any cooperative effort, at least for claims of abuse in government-run institutions, then a cooperative structure is likely to have limited application.

While many institutions may be willing to cooperate, their different histories and philosophies, attitudes towards responding

to institutional child sexual abuse and claims histories make cooperation difficult and perhaps unlikely in the absence of government leadership or direction. There is also the difficulty of a lack of resources or expertise across many institutions.

Although cooperative arrangements, once established, should be more efficient and cost-effective for institutions on a per claim basis, the difficulties of establishing them may result in significant time and costs being devoted to negotiating for cooperation without any certainty that a successful outcome will be reached.

The most straightforward way to achieve cooperative arrangements may be for an independent entity that is not an institution to establish a redress process that is consistent with our recommendations and that offers to receive and assess claims for member institutions on a fee-for-service basis. If the independent entity has no association with any particular institution or group of institutions, it might be sufficiently independent to be acceptable to more institutions.

However, we are in no position to recommend that any particular entity offer such a service and it is not clear whether such a service could be operated successfully on a commercial basis. Again, such a service is likely to have a limited application if governments do not participate, at least for claims of abuse in government-run institutions.

## 12.7 Alternatives to interim arrangements

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A number of survivor advocacy and support groups and some institutions suggested alternatives to the interim arrangements discussed in the Consultation Paper.

Some interested parties suggested that interim payments should be available, although it is not clear on what basis these would be made.

Kimberley Community Legal Services suggested interim or early payments be available under a redress scheme as follows:

Regarding interim arrangements for potential claims and claimants, we believe a future redress scheme which allows for early access to monetary compensation payments in cases of hardship will be more effective for our client base.

For example, situations in which claimants are suffering from a terminal illness and will not be able to claim in the future would justify an early release.<sup>1031</sup>

The Survivors Network of those Abused by Priests Australia submitted that 'it would be appropriate [as an interim measure] to make an interim pool of emergency funding available to those most in need'.<sup>1032</sup>

The Ballarat Centre Against Sexual Assault and Ballarat Survivors Group described interim measures that are occurring in the Ballarat diocese, including funding

for medical care, grocery vouchers and transport to the support group or counselling. They submitted that '[i]n the context of the church's wealth, this money is minimal, but the benefits to the survivors are significant'.<sup>1033</sup>

As an alternative to interim arrangements for redress, the Lutheran Church of Australia submitted:

In the interim, we propose that the current access to civil litigation with parties being encouraged to seek settlement without recourse to the courts, be encouraged.

Survivors should have access to legal advice to ensure they have independence of input into the negotiation process and protection from institutional pressure. Legal representation also provides advocacy on behalf of the survivor.<sup>1034</sup>

Scouts Australia submitted:

It is important that any interim arrangements entered into do not prejudice the rights of either the survivor or the institution. As such any voluntary payment made by way of interim redress should be taken into account in any final calculation of redress.<sup>1035</sup>

Given the likely cost and complexity of establishing viable interim arrangements, we consider that alternatives might be reasonable if the Australian Government or state and territory governments accept our recommendations and are working to

establish a single national redress scheme or separate state and territory redress schemes, to begin receiving applications from 1 July 2017.

In these circumstances, we consider that it would be reasonable for institutions to make smaller interim or emergency payments to applicants. If necessary for the institution, these payments could be offset against monetary payments determined under a redress scheme, although it might be preferable for institutions to treat these interim or emergency payments as a form of direct personal response.

Further, if institutions adopt guidelines for responding to claims for compensation in relation to allegations of child sexual abuse, as we recommend in Chapter 17, it would also be reasonable to expect that survivors for whom interim or emergency payments are not sufficient and who cannot or do not wish to wait for a redress scheme (which would begin receiving applications from 1 July 2017) would pursue justice through making a civil claim in accordance with the institution's guidelines.

#### **Recommendation**

84. If the Australian Government or state and territory governments accept our recommendations and announce that they are working to establish a single national redress scheme or separate state and territory redress schemes, institutions may wish to offer smaller interim or emergency payments as an alternative to offering institutional redress processes as interim arrangements.



# PART IV CIVIL LITIGATION



## 13 Civil litigation – introduction

In Australia the process for obtaining civil justice for personal injury is by an award of damages through civil litigation. Redress schemes may provide a suitable alternative to civil litigation for some or even many claimants, but they do not offer monetary payments in the form of compensatory damages that are available through civil litigation.

We discussed possible civil litigation reforms in Chapter 10 of the Consultation Paper. In the Consultation Paper, we stated that what we had then learned suggested that civil litigation is unlikely to provide an effective avenue for all survivors to obtain redress adequate to address or alleviate the impact on them of institutional child sexual abuse.<sup>1036</sup> This is perhaps most clearly the case for past institutional child sexual abuse, where there are large groups of survivors, including many Forgotten Australians, Former Child Migrants and members of the Stolen Generations, who suffered child sexual abuse in residential institutions and who have not obtained redress or have not been satisfied with the redress they have obtained.

We also stated that it was clear to us from the very many accounts we had then heard from survivors in private sessions and through submissions to issues papers that many survivors do not consider that justice has been or can be achieved for them through existing civil litigation systems or through previous or existing redress schemes that some governments and non-government institutions offer.

What we have heard since the Consultation Paper was published, through private sessions, case studies and submissions in

response to the Consultation Paper, has confirmed these views. In Chapter 2, we concluded that, for many survivors, existing civil litigation systems and redress schemes do not provide, and have not in the past provided, effective avenues to seek or obtain justice in the form of compensation or redress that is adequate to address or alleviate the impact on survivors of sexual abuse.

However, we also recognised in the Consultation Paper that some survivors had obtained substantial payments by pursuing civil litigation.<sup>1037</sup> Generally, the payments came from settlements. As discussed in Chapter 7, we reviewed the details of some of the larger claims in the claims project data. These claimants received payments in the top 10 per cent of claims – that is, amounts over \$178,038 (in real 2014 dollars). Generally, these claims involved significant injuries, arising in circumstances where there appear to have been reasonable bases to argue that the institution owed a duty of care and had breached it. These large amounts, even if reached by agreement, are more likely to represent what a court might award as common law damages.

In *Issues paper 5 – Civil litigation*, we sought submissions on a range of elements of civil litigation systems. The submissions we received gave many examples of the difficulties that survivors experience in seeking to commence or pursue civil litigation under the existing civil litigation systems.

In the Consultation Paper and in this report, we focus on the topics that appear to have a particularly adverse effect on survivors. We have distilled these topics from what

we have heard in private sessions, public hearings and submissions and also taking into account significant issues that arise from the institutional context of the abuse.

Again, we acknowledge that there are other difficulties survivors may face, including legal costs, difficulties in bringing class or group actions and the burden of giving evidence and being subject to cross-examination. However, these difficulties may be shared by many people who suffer personal injuries and consider commencing civil litigation. For some matters, particularly legal costs, complaint mechanisms are already available.

In the Consultation Paper we invited submissions on the following areas of civil litigation:

- the options for reforming limitation periods and whether any changes should apply retrospectively
- the options for reforming the duty of institutions and whether any changes should apply retrospectively
- how to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts
- whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed
- whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims
- whether any changes may have

adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them.<sup>1038</sup>

We have focused on the topics of limitation periods, duty of institutions, identifying a proper defendant and principles for managing litigation. Our recommendations for reform in these areas are most likely to improve the capacity of the civil litigation systems to provide justice to survivors. In this way it may be possible to ensure that survivors have reasonable access to civil litigation as an avenue for justice that is comparable to that of other injured persons.

As discussed in Chapter 2, many survivors and survivor advocacy and support groups have told us that many of the difficulties survivors have encountered in trying to obtain adequate redress to date through redress schemes or civil litigation have arisen from the power imbalance between institutions and survivors. Many survivors have also told us that, without a strong legal position, they have had to go ‘cap in hand’ to institutions and accept whatever an institution was willing to offer, no matter how inadequate the survivor considered it to be. If the reforms we recommend to civil litigation are adopted, they may contribute to a substantial change in the power balance between institutions and survivors.

In the following chapters, we discuss in detail the following issues:

- limitation periods
- the duty of institutions
- identifying a proper defendant
- model litigant approaches.



We appreciate that, even if our recommended reforms to civil litigation are implemented, some survivors of institutional child sexual abuse – whether past or future – will not wish to pursue a civil claim.

Our recommendations on limitation periods, identifying a proper defendant and model litigant approaches, if implemented, will assist those who wish to bring civil litigation in the future for both past and future institutional child sexual abuse. Our recommendations on the duty of institutions, if implemented, will assist those who wish to bring civil litigation in the future for sexual abuse they suffer as a child in an institutional context after the recommendations are implemented.

However, perhaps more importantly, our recommendations on the duty of institutions, if implemented, should change the behaviour of institutions and encourage the prevention of institutional child sexual abuse in the future. As we discuss in Chapter 15, legal duties are important for defining the standard of care that the community requires of institutions. Changes to the content of the duty owed by institutions do more than provide an additional or more certain avenue for victims of abuse to seek compensation after institutional child sexual abuse has occurred; they are critical measures for preventing institutional child sexual abuse occurring in the first place.

# 14 Limitation periods

## 14.1 Introduction

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Limitation periods are the time limits within which legal proceedings must be commenced. They are set out in legislation in each state or territory in Australia. The legislation is sometimes referred to as the 'statute of limitations'.

Through private sessions, public hearings and submissions, many survivors, survivor advocacy and support groups and academics have told us that limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation.

Most limitation periods that apply under state legislation for personal injury actions are three years. For a child who is injured, these periods usually do not commence until the child turns 18 years of age. Commencement may be further delayed by other factors, including if the claimant does not have knowledge of essential elements of the claim.

However, given what we know about the average length of time that victims of child sexual abuse take to disclose their abuse, standard limitation periods are fairly clearly inappropriate for survivors. A survivor said to us in a private session, commenting on the limitation period:

The statute is designed for someone who has tripped over in K-Mart, it is not designed for victims of child sexual abuse.

Although state and territory legislation often allows limitation periods to run from a time later than when the injury itself occurred or

to be extended by a court's exercise of discretion, the existence of limitation periods creates significant barriers for many survivors.

They create the risk of lengthy litigation – sometimes years of litigation – about whether or not the claim can be brought. This involves substantial legal costs without any consideration of the merits of the case. Many survivors and survivor advocacy and support groups have told us that this risk is enough to prevent many survivors from commencing civil litigation.

## 14.2 Existing limitation periods

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Limitation periods are prescribed by state and territory legislation. That legislation typically determines the limitation period for a particular action depending on the nature of that action – for example, an action for damages for personal injury or an action based on some other tortious claim. Survivors who seek to commence civil litigation against institutions will be subject to the limitation periods that apply to personal injury actions.

While all states and territories make some provision for extending their basic limitation periods in some circumstances, there is great variety in the particular provisions across Australia. In his submission in response to *Issues paper 5 – Civil litigation*, Associate Professor Mathews submitted:

[t]here is no uniform approach across Australia and the laws differ substantially. ... This complexity

complicates matters for plaintiffs generally, and even more so for those in child sexual abuse claims. It also makes it difficult to synthesise even basic propositions.<sup>1039</sup>

Key elements in the various limitation periods can be summarised as follows:

- **Length of limitation period:** Most jurisdictions have set the relevant limitation period at three years.
- **When the limitation period commences:** In some jurisdictions, the limitation period begins from the time of the tortious conduct (for example, the sexual abuse), while in others it begins from when the claimant first knows of the injury or from when the claimant could have known of the injury.
- **Application to children:** In most jurisdictions, the limitation period does not begin until the child turns 18. In some states, this applies only if the child did not have a parent or guardian, although there is a further extension if the child had a 'close relationship' with the defendant or the defendant was a 'close associate' of the child's parent or guardian.
- **Suspension for a disability:** All jurisdictions provide for suspending, or lengthening, the limitation period to account for periods when the claimant was under a disability, although they differ in what they recognise as a relevant disability.
- **Circumstances of extension:** All jurisdictions provide for the limitation period to be extended, but the circumstances in which

this may be done vary significantly between jurisdictions.

- **Whether there is a 'long stop':** Some jurisdictions include a 'long stop' provision that applies an absolute time bar. For example, the limitation period might be three years from when the claimant first knows of the injury, but it is subject to a 'long stop' of 12 years from the date of the abuse.

A detailed description of relevant current limitation periods in each jurisdiction is in Appendix O to this report.

## 14.3 Limitation periods and institutional child sexual abuse

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### Barrier to commencing proceedings

Many survivors, survivor advocacy and support groups, lawyers and academics have told us that the existence of limitation periods acts as a significant barrier to survivors being able to commence civil litigation. They have told us that, although state and territory legislation often allows limitation periods to run from a time later than when the sexual assault itself occurred or to be extended by a court's exercise of discretion, the existence of limitation periods may still create significant barriers for survivors.

Many survivors who consider pursuing civil litigation would already be well outside the basic limitation period for personal injury

claims. Some might have good grounds to support an application for an extension of time; however, many may be advised that their claims are too late.

A number of survivors have told us in private sessions that they have been given legal advice that they cannot commence civil litigation because of the relevant limitation period.

In Case Study 7 on the Parramatta Training School for Girls and the Institution for Girls in Hay, we heard evidence that some survivors had tried to start civil claims for damages against the State of New South Wales but that these claims did not go ahead, mainly because of limitation period issues and the cost of litigation.

One witness, Ms Wendy Patton, said she contacted Gerard Malouf & Partners in 2005 and started a claim. Until then, she felt she could not face talking publicly about her experiences, as she was disempowered and ashamed. She said that her claim eventually failed because it was outside the statute of limitations on child sexual abuse and she could not afford the court costs to continue to trial.<sup>1040</sup>

The report of Case Study 7 also summarised relevant evidence about a possible group claim as follows:

In 2007, Gerard Malouf & Partners represented a group of around 40 plaintiffs in a claim against the State. The group sought compensation for abuse sustained in the State's care. Ms Chard and Ms Robb were both involved in this claim.

However, it never went ahead because the lawyers advised that it would be unsuccessful under the statute of limitations ...

Ms Stone said she was contacted by Gerard Malouf & Partners to join a 2007 class action against the State relating to the Hay Institution. However, her file was transferred in 2008 and she could not get in contact with her new lawyer.

Ms Stone then contacted Shine Lawyers in 2012, but they told her that she could not file a claim as her limitation period had closed.<sup>1041</sup> [References omitted.]

## Impact of limitation periods on proceedings

Survivors who commence proceedings against institutions face the risk that the institutions will raise the limitation period issue and object to any extension.

These preliminary issues may take considerable time – even years – to resolve and may involve substantial legal costs.

In Case Study 11, we heard evidence of the various proceedings that Slater and Gordon commenced on behalf of a number of claimants who were former residents in the Congregation of Christian Brothers Western Australian institutions.

In August 1993, proceedings were commenced in New South Wales on behalf of some 240 claimants who sought damages from the Christian Brothers and

other defendants for physical, sexual or psychological abuse at the institutions in the 1950s, 1960s and early 1970s. In November 1993, similar proceedings were commenced in Victoria for 23 claimants who lived in Victoria.<sup>1042</sup> Slater and Gordon commenced the proceedings in New South Wales and Victoria so that it could avoid the Western Australian limitation laws.<sup>1043</sup> At the time, the limitation period in Western Australia was six years from the date of the tort (meaning six years from the date of the abuse) and could not be extended.<sup>1044</sup> In January 1994, the defendants applied to the Supreme Court of Victoria for orders that the Victorian proceedings be stayed or ‘cross-vested’ – meaning transferred – to the Supreme Court of Western Australia. In June 1994, the Supreme Court of Victoria ordered that the proceedings be transferred to Western Australia.<sup>1045</sup>

In August 1994, after the transfer of the Victorian proceedings to Western Australia, Slater and Gordon applied to the Supreme Court of Western Australia for orders that that Court would apply the procedural laws of Victoria, including the Victorian limitation period. The judge in Western Australia dismissed the applications and ordered that Western Australian procedural laws should apply to the proceedings. This had the effect that the Western Australian proceedings could not continue.<sup>1046</sup> An application for special leave to appeal to the High Court was refused.

The New South Wales proceedings were still on foot. Further preliminary matters concerning the appropriate defendant were dealt with during 1995.<sup>1047</sup>

The limitations issue was not determined

in New South Wales. Rather, various interlocutory matters were argued and the proceedings were then settled in mid-1996 by the establishment of a trust fund of \$3.5 million for payments to claimants. There was provision for limited lump-sum payments and other needs-based payments. In addition, \$1.5 million was paid towards Slater and Gordon’s legal costs and disbursements. The Christian Brothers’ legal costs and disbursements totalled about another \$1.1 million.<sup>1048</sup>

The summary of events reflects the difficulties survivors can face. From 1994 to 1996, these various proceedings involved interlocutory, or preliminary, hearings in New South Wales, Victoria and Western Australia; one appeal to the New South Wales Court of Appeal; and three applications for special leave to appeal to the High Court of Australia. The underlying claims of abuse were not heard or determined on their merits on any of these occasions.<sup>1049</sup>

We heard evidence from a number of survivors, some of whom had participated in the Slater and Gordon proceedings. Mr Clifford Walsh gave the following evidence:

What I couldn’t understand is how the Christian Brothers could raise a limitation defence. We were kids. It seemed to me that we couldn’t do anything about the abuse when it was happening, and by the time we were able as a group to do something about it, in particular being in the right mental state to do so, we were told it was too late. We were just being abused all over again.<sup>1050</sup>

In Case Study 19 on the Bethcar Children's Home in New South Wales, we heard evidence about the impact of limitation periods in litigation brought against the State of New South Wales.

In 2008, 15 former residents of Bethcar Children's Home commenced proceedings against the state in the District Court of New South Wales. They sought damages for sexual and other abuse that they alleged they had suffered whilst residents at Bethcar. The proceedings were finally resolved nearly six years later, in February 2014, following a mediation in late 2013.

In this period, the substance of the claims of sexual and other abuse was not heard or determined on its merits by the Court. Rather, both the claimants and the State took various interlocutory steps and filed procedural motions during this period.

The limitation issue was litigated in the following steps. In February 2009, the plaintiffs' solicitors filed a notice of motion seeking a declaration that at all material times each of the plaintiffs was under a disability within the meaning of section 52 of the *Limitation Act 1969* (NSW) (thereby suspending the running of time under that Act) and in the alternative that the limitation period be extended.<sup>1051</sup>

In 2011, the State filed affidavits for the purposes of defending the plaintiffs' motion. The affidavits were sworn by an investigator retained by the State's solicitors. They referred to a number of witnesses who were deceased, a number who were alive but unavailable to give any evidence at all and a number who were alive but unable to give relevant evidence.

In February 2012, the State filed a notice of motion seeking a permanent stay of the proceedings.<sup>1052</sup> The State's counsel described the rationale for the application as follows:

The rationale for such an application is that the effluxion of time since the events giving rise to the plaintiffs' claims has resulted in the deterioration of evidence upon which the State would otherwise have relied in its defence of the substantive proceedings, with the consequence that a fair hearing is no longer possible.<sup>1053</sup>

The plaintiffs' motion was fixed for hearing later in February 2012, but this hearing date was vacated to allow the plaintiffs to put on evidence in reply to the State's affidavits and so that both the plaintiffs' limitation period motion and the State's permanent stay motion could be heard together.<sup>1054</sup>

The plaintiffs filed their evidence in reply to the State's affidavits in May 2012 and the two motions came on for hearing in the District Court on 12 November 2012. The motions were heard over three days, at the end of which they were stood over part heard.<sup>1055</sup>

The State's solicitors formed the view that it had become increasingly clear during the course of the hearing that the judge would find in favour of the plaintiffs on the limitation motions.<sup>1056</sup> Instructions were sought to withdraw the limitation defence and, in December 2012, the State withdrew that defence.<sup>1057</sup>

In summary, the resolution of the limitation period issue took more than three years.

It was ultimately resolved by the State withdrawing its limitation defence without the limitation period issue being determined by the Court. There was no hearing or determination of the merits of the case by a court during the almost six years in which the litigation was on foot.

We will publish our report on Case Study 19 shortly.

In Case Study 8 on Towards Healing, we heard evidence about Mr John Ellis's successful application to extend time to commence proceedings against Cardinal George Pell, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, and Father Aidan Duggan in 2004 in the Supreme Court of New South Wales.

Mr Ellis sought an extension of time under one of the exceptions in the *Limitation Act 1969* (NSW), which allowed an extension if a 'material fact' relating to the cause of action was unknown until after the expiration of the limitation period. Mr Ellis also had to persuade the Court that it was 'just and reasonable' to extend the time, which required consideration of whether there was any prejudice to the defendants that would make a fair trial of the plaintiff's action not possible.

Acting Justice Patten found that Mr Ellis did not have the means of knowing the nature and extent of the personal injury caused by Father Duggan's alleged sexual abuse – which he accepted was a 'material fact' – until Mr Ellis's consultation with a counsellor in September 2001. His Honour extended the limitation period for the causes of action pleaded against the Trustees but dismissed the action against Cardinal Pell on the basis that he was not a proper defendant.

While finding that the Trustees and Archbishop would be prejudiced if time was extended, his Honour held that the evidence established that there could be a fair trial of the action. Although some evidence may be lost because of the passage of time, there would nevertheless be people who could attest to Mr Ellis's service as an altar boy some 30 years previously and to the systems, if any, in place at Bass Hill and elsewhere to protect persons such as altar boys from the sort of conduct alleged against Father Duggan.<sup>1058</sup>

Apart from the consideration of these issues in case studies, the following three cases provide further examples of how limitation periods may be dealt with in institutional child sexual abuse matters and the competing considerations that may arise in determining whether or not to grant an extension of time.

## Hopkins v Queensland

An extension of time was refused in *Hopkins v Queensland*<sup>1059</sup> in the District Court of Queensland in 2004.

The claimant, born in 1974, alleged that, between 1984 and 1987, she was sexually abused by the foster father who the Queensland Department of Families had placed her with. She argued that the department was negligent and in breach of statutory duty for not removing her from the foster family in 1986 after she made a complaint to a child care officer about 'emotional abuse'. The claimant suffered the abuse as a child, so the limitation period expired in 1998 – six years after she turned 18 years of age.<sup>1060</sup> However, she commenced her claim in 2003.



The judge who heard the motion (McGill DCJ) declined to extend the limitation period. Under the relevant Queensland legislation, a court 'may' extend time if 'a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant' and there is evidence to establish the right of action.<sup>1061</sup> Time can only be extended to one year after the material fact comes within the applicant's means of knowledge.

The claimant argued that it was only in 2003 that she became aware, from a psychiatric report, of the psychiatric injury she had suffered and it was only in 2002 that she had obtained her departmental file from the Department of Families and so became aware that department employees possessed information that ought to have caused them to remove her from her foster placement.

McGill DCJ held that neither of these were 'material facts'. In relation to the psychiatric report, his Honour said that the claimant had suffered, and was aware of, symptoms, including depression and flashbacks to the abuse, from the time of the abuse<sup>1062</sup> and that the claimant was aware, or should have been aware, that these symptoms were persisting and sufficiently serious to justify a claim for damages.<sup>1063</sup> The report indicated the particular psychiatric condition these symptoms represented, but the judge said that, of itself, this was not material.<sup>1064</sup>

In relation to the departmental file, the judge said that the claimant was already aware of much of the information in the file.<sup>1065</sup> Regarding the information that the claimant had not been previously aware of, his Honour said that the fact that the

department had this information was 'material' but not 'decisive', because, on the standards of 1986, it would have been unlikely to be reasonable for the department to remove the claimant from her foster father on the basis of such information.<sup>1066</sup>

His Honour also said that, even if the requirement relating to 'a material fact of a decisive character' had been satisfied, it would not have exercised its discretion to extend the limitation period because of 'real prejudice to the defendant in being required now to defend this action'.<sup>1067</sup> His Honour referred to the difficulty the department had experienced in locating the child care officers who had dealt with the claimant's case and how the officers who could be located recollected few details of the claimant.<sup>1068</sup>

His Honour said that, if an extension were granted, the focus of the case would be likely to be on 'what was the appropriate standard of care, and what responses were dictated by that standard at the relevant time'.<sup>1069</sup> The fact that 'the passage of time can make it more difficult properly to apply the standards of the time when assessing questions of negligence' pointed against granting an extension.<sup>1070</sup>

Finally, his Honour said the passage of time would also make it very difficult to assess whether any failure of the department caused the applicant's psychiatric condition or if this condition would have appeared anyway.<sup>1071</sup>

In this case, the claimant gave evidence that the reason that she had not made earlier complaints to police or commenced proceedings earlier was that, as a coping mechanism, she had been trying to avoid



thinking about the abuse. His Honour said that ‘any understandable reluctance of the plaintiff to pursue this matter earlier’ was not a factor that the extension of time provisions were intended to overcome.<sup>1072</sup>

## Rundle v Salvation Army (South Australia Property Trust)

The Supreme Court of New South Wales granted an extension of time in *Rundle v Salvation Army (South Australia Property Trust)*<sup>1073</sup> in 2007.

The claimant, who was born in 1952, had been put into the care of The Salvation Army (South Australian Property Trust) and placed at a boys’ home. He alleged that he was sexually assaulted there between 300 and 400 times in the period 1960 to 1965 by an officer of the property trust and other boys.

Although the claim was commenced in the Supreme Court of New South Wales, South Australian law applied. Because the alleged assaults occurred when he was a child, the limitation period expired three years after he turned 21 years of age.<sup>1074</sup> This meant that the limitation period expired in 1976.<sup>1075</sup> The claimant commenced his claim in 2003. He argued that The Salvation Army was negligent in its supervision of the boys’ home, vicariously liable for the sexual assaults and in breach of a fiduciary duty to him.

The judge (Simpson J) granted an extension of the limitation period. Under the relevant South Australian legislation, a court could extend time to one year after the time when the claimant became aware of ‘facts material to [his or her] case’ so long as ‘in all the circumstances of the case it is just’ to

grant the extension. The legislation directed attention to what the claimant *did* know and not what he or she *should have* known.

Her Honour accepted as ‘material facts’ that the claimant’s capacity for work had been reduced by 60 to 70 per cent because of his psychiatric disability, that the correct entity to sue was The Salvation Army (South Australian Property Trust) and that certain personality features of the applicant amounted to a disability caused by his experiences at the boys’ home.<sup>1076</sup> The applicant only became aware of these facts within the year before he commenced his claim.<sup>1077</sup> Her Honour said it did not matter that from an earlier stage he may have ‘had a sense of grievance which he thought should be resolved by a monetary compensation’ because any such sense was different from actual awareness of material facts.<sup>1078</sup>

As for whether it was just to grant an extension of time, the Court held that the test to apply was whether the delay made the chances of a fair trial unlikely.<sup>1079</sup> Justice Simpson said that it was ‘not insignificant’ that The Salvation Army had undertaken extensive investigations but was unsuccessful in seeking the claimant’s high school records or information about his employment history and had had only limited success in investigating individuals that the claimant had named.<sup>1080</sup>

However, her Honour was concerned that two solicitors for The Salvation Army had given misleading impressions in failing to refer to significant information they had in fact been able to obtain.<sup>1081</sup> Her Honour also said that, in a future trial, The Salvation Army’s inability to obtain material would

be relevant to the assessment of credibility and evidence.<sup>1082</sup> Her Honour concluded that The Salvation Army was not ‘precluded from mounting an adequate defence’ and therefore she extended time.<sup>1083</sup>

The New South Wales Court of Appeal dismissed The Salvation Army’s appeal, holding that the first instance judge did not make any error in assessing whether granting an extension was just.<sup>1084</sup> The case later settled.

## A, DC v Prince Alfred College Incorporated

An extension of time was refused on various grounds in *A, DC v Prince Alfred College Incorporated*<sup>1085</sup> in the Supreme Court of South Australia in February 2015.

The plaintiff alleged that, as a 12-year-old boarder at the college in 1962, he was sexually abused by a housemaster of the boarding house, Dean Bain, on a number of occasions at the school and elsewhere for a period of up to eight months. The plaintiff claimed that the college was liable for consequent personal injury, loss and damage.<sup>1086</sup>

There was a dispute about whether the plaintiff would be granted an extension of time to bring the claim. The plaintiff’s claim was lodged on 4 December 2008.<sup>1087</sup> Although there had been several amendments to the *Limitation of Actions Act 1936* (SA) since 1962, on the face of section 36 of the Act the plaintiff’s claim had to be commenced within three years of attaining the age of 21 years (17 July 1970).<sup>1088</sup>

The plaintiff pursued various arguments as to why his cause of action did not arise until later than 1970 and why time should be extended.

The plaintiff relied on a section of the Limitation of Actions Act that allows an extension of time if the plaintiff could show that he was under a legal disability. If a legal disability could be shown then the time for bringing the action would be extended by the length of the period or periods during which the disability existed (although not for more than 30 years from when the right to bring the action arose).<sup>1089</sup> The plaintiff argued that time for bringing the action started from when he was diagnosed with post-traumatic stress disorder in August 1996; therefore, the time could be extended for up to 30 years from that date.<sup>1090</sup>

The judge (Vanstone J) did not find that the plaintiff suffered from post-traumatic stress disorder from 1996. Instead, the Court favoured evidence that the disorder had been with the plaintiff for many years, in varying degrees of intensity, since 1962 and that it had not occurred within the 12 months or so before August 1996 (as required by the Act).<sup>1091</sup>

In the alternative, the plaintiff argued that the Court should use its general power under the Limitation of Actions Act to extend the time if there were material facts to the plaintiff’s case that were not known (and that the action was commenced within 12 months after ascertainment of those facts by the plaintiff) or where the plaintiff’s failure to commence the action resulted from representations or conduct of the defendant.

The plaintiff argued that the following

two facts were not known to him before December 2007:

- His treating psychiatrist expressed the opinion that the plaintiff would not make a full recovery
- Bain had been convicted in 1954 for gross indecency, seven years before he was employed by the college.<sup>1092</sup> The plaintiff said he did not learn this until during the sentencing of Bain in the District Court in December 2007.<sup>1093</sup>

The plaintiff also argued that, by encouraging the boarders never to speak of Bain's wrongdoing, the defendant's conduct caused the plaintiff to suppress the trauma of Bain's abuse for several decades. The plaintiff also claimed that the defendant's failure to provide counselling and its failure to report Bain to the police resulted in the plaintiff's failure to disclose the abuse and to take legal action earlier.<sup>1094</sup>

In relation to the material facts said not to be known by the plaintiff, her Honour accepted that the plaintiff only appreciated the permanency of his illness in December 2007 from his psychiatrist's prognosis and that this was material to the case because of its effect on the issue of damages recoverable by the plaintiff against the defendant.<sup>1095</sup> Her Honour did not accept that the plaintiff did not know about Bain's conviction before December 2007 because it was discussed openly in Bain's trial in October 2007, which the plaintiff attended.<sup>1096</sup> Her Honour was not satisfied that the failure to institute the action in a timely manner was caused by the conduct of the defendant.<sup>1097</sup>

Finally, in considering whether to exercise

the general power to extend the time under the Limitation of Actions Act, the court must be satisfied that 'in all the circumstances of the case it is just' to do so.<sup>1098</sup> Justice Vanstone was not satisfied that the court should grant the extension of time in circumstances in which it found that the plaintiff had delayed commencing proceedings since 1996. Her Honour found that, at that time, the plaintiff had explored the possibility of suing the school and had only sued Bain.<sup>1099</sup> Her Honour also found actual prejudice to the defendant because of the death or ill health of a number of the critical witnesses and that there had been much loss of evidence and materials since 1996, when the plaintiff could have brought his claim.<sup>1100</sup>

The plaintiff has sought leave to appeal this decision to the Full Court of the Supreme Court of South Australia.

## 14.4 Competing considerations

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Limitation periods may be justified on a number of grounds. Limitation periods may:

- prevent and discourage people with claims from 'sleeping on their rights' and encourage them to institute proceedings as soon as it is reasonably possible to do so
- avoid the difficult questions of proof – for example, in relation to missing documentary trails or the weak recollections of witnesses – that arise when a long period of time elapses between the injury and determination of the claim

- prevent oppression to a defendant by allowing an action to be brought long after the circumstances giving rise to it have passed
- create certainty by recognising the status quo that presently exists between parties and give certainty to a potential defendant that a possible case against it is closed.<sup>1101</sup>

Limitation periods may also be justified as providing some certainty to insurers. In some cases, these assertions are appropriate. In many personal injury cases, it will be desirable to resolve claims quickly – not just to give the defendant certainty and to ensure evidence is not lost but also to ensure that the claimant receives any damages as soon as possible so that the claimant can take steps to make good their injury or loss.

However, in some circumstances, limitation periods operate unreasonably to deny claimants' access to justice.

As discussed in the Consultation Paper, the delay in a survivor's capacity to report child sexual abuse, particularly when it occurs in an institutional context, is now well known.<sup>1102</sup> Many survivors are unable to disclose their abuse until well into adulthood.<sup>1103</sup> Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse. Men took longer than women to disclose abuse.<sup>1104</sup> These delays are not surprising. It is common for survivors who were abused in an institutional context to tell us that they were unable to report the criminal acts of a person who had authority over them. Their compromised psychological position often means they wrongly blame themselves for

the abuse and are grossly embarrassed and ashamed, all of which make it difficult for them to tell anyone about the abuse for many years.

When survivors are able to disclose their abuse, their first needs may be counselling and psychological care and the assistance provided through various support services. They might also wish to report to police and consider options for seeking justice through the criminal law. It cannot be assumed, or expected, that considering whether to commence civil litigation will be their first priority.

If a claimant does not know that they may have a claim or they face substantial psychological barriers in disclosing the essential elements of their claim, it makes little sense to talk of them 'sleeping' on their rights.

Even if the limitation period is relaxed, the interests of the defendant are protected by the court's jurisdiction to stay proceedings if any delay has made the chances of a fair trial unlikely.<sup>1105</sup>

The court's jurisdiction to stay proceedings was the subject of evidence in Case Study 19 on the Bethcar Children's Home, as indicated above. We will publish our report on Case Study 19 shortly.

## 14.5 Options for reform

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In our private roundtables and other discussion, we consulted a number of survivor advocacy and support groups, institutions, governments, academics and insurers on possible reforms to civil litigation.

On the whole, attendees supported reform of limitation periods.

A range of views were expressed in the submissions to *Issues paper 5 – Civil litigation* and in our private roundtables and consultations. While some submissions argued that limitation periods should be retained and opposed increased discretion for courts to extend them, many submissions and attendees at our consultations argued that limitation periods should be removed altogether, including retrospectively. Others argued that limitation periods should be retained but they should be made much longer than they are currently.

The key issues that we identified in the consultation process were:

- Should the limitation period for claims for damages for personal injury involving allegations of criminal child sexual abuse be removed altogether or retained but extended to better reflect the time survivors take to disclose their abuse?
- Should any changes apply prospectively only or retrospectively?

The Consultation Paper outlined two options for reform:

- removing the limitation period altogether
- substantially extending the limitation period.<sup>1106</sup>

In the Consultation Paper we particularly sought submissions on the options for reforming limitation periods and whether any changes should apply retrospectively.<sup>1107</sup>

## Victorian reforms to limitation periods

### Exposure draft Bill

The Consultation Paper gave an overview of the Victorian Government's response at that time to the Parliament of Victoria's Family and Community Development Committee report, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (the Betrayal of Trust report) in relation to limitation periods.<sup>1108</sup> The committee recommended that limitation periods for criminal child abuse should be abolished.<sup>1109</sup> It also considered that the removal of limitation periods should apply retrospectively.<sup>1110</sup>

The Victorian Government accepted the recommendations of the committee and on 24 October 2014 the Department of Justice of Victoria released an Exposure Draft for the Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 (Vic). The purpose of the draft Bill was 'to amend the *Limitation of Actions Act 1958* to remove limitation periods that apply to actions in respect of causes of action that relate to death or personal injury resulting from criminal child abuse'.<sup>1111</sup>

The exposure draft Bill proposed that changes should apply to physical and sexual abuse. It defined 'criminal child abuse' as follows:

**criminal child abuse** means an act or omission in relation to a person when the person is a minor –

- a. that is physical or sexual abuse; and

- b. that could, at the time the act or omission is alleged to have occurred, constitute a criminal offence under the law of Victoria or the Commonwealth.

The exposure draft Bill proposed that a new section 27P be inserted into the *Limitation of Actions Act 1958* (Vic) titled 'No limitation period for certain actions'. The section would allow an action for personal injury founded on criminal child abuse to be brought at any time. The section made it clear that this removal of the limitation period would apply both prospectively and retrospectively, since the provision 'applies whether the act or omission alleged to have resulted in the death or personal injury occurs before, on or after the commencement of section 5 of the *Limitation of Actions Amendment (Criminal Child Abuse) Act 2014*'.<sup>1112</sup>

For claims by dependants of a deceased survivor, the exposure draft Bill proposed a limitation period of three years from the date the claim was discoverable, with no long-stop period.<sup>1113</sup>

## Amending Act

The Victorian Government introduced the Limitation of Actions Amendment (Child Abuse) Bill 2015 into the Legislative Assembly of the Victorian Parliament on 24 February 2015. The amending Bill was passed by both Houses of Parliament in March and April 2015.<sup>1114</sup> The *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) will come into operation on 1 September 2015 if it is not proclaimed to commence before that date.<sup>1115</sup>

Like the exposure draft Bill, the amending Act entirely removes the limitation period for bringing relevant claims. New section 27P will allow an action for personal injury founded on death or personal injury resulting from physical abuse or sexual abuse (and related psychological abuse) of a minor to be brought at any time.<sup>1116</sup> Section 27P will apply to actions regardless of whether or not the action was subject to a limitation period at any time in the past.<sup>1117</sup>

The Victorian Attorney-General informed the Legislative Assembly that the Bill was slightly different from the exposure draft Bill that had been published for consultation.<sup>1118</sup> The difference between the exposure draft Bill and the amending Act as passed is the nature of the abuse to which the extension of time relates. In the exposure draft Bill, 'child abuse' was defined as physical or sexual abuse that could constitute a criminal offence under the law of the Victoria or the Commonwealth. Under the amending Act, there is no definition of 'child abuse'. Instead, the amending Act will insert a new section 27O(1). It will have the effect that no limitation period will apply to a cause of action if the action:

is founded on the death or personal injury of a person resulting from –

- i. an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and
- ii. psychological abuse (if any) that arises out of that act or omission.<sup>1119</sup>

The explanatory memorandum accompanying the amending Bill stated that this section would allow the court to determine what is ‘physical abuse’ or ‘sexual abuse’ by reference to the ordinary meaning of those words. The explanatory memorandum stated that this might be informed by the work of the Family and Community Development Committee’s Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations and the work of this Royal Commission. It also stated that the meaning of ‘psychological abuse’ is to be determined by the court in the same manner and that the relevant amendments do not apply to psychological abuse that does not arise from an act or omission that is physical abuse or sexual abuse that the action is founded on.<sup>1120</sup> For claims by dependants of a deceased survivor, the limitation period will be three years from the date the claim is discoverable, with no long-stop period.<sup>1121</sup> New section 27Q will apply to actions regardless of the date of death of the deceased and regardless of whether or not the action was subject to a long-stop limitation period at any time in the past.<sup>1122</sup>

The judicial discretion to dismiss or stay proceedings where there is unfairness to the defendant has been expressly retained in the amending Act by insertion of the new section 27R:

**27R Interaction with other powers of court**

Nothing in this Division limits –

- a. in the case of the Supreme Court, the court’s inherent jurisdiction, implied

jurisdiction or statutory jurisdiction; or

- b. in the case of a court other than the Supreme Court, the court’s implied jurisdiction or statutory jurisdiction; or
- c. any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

Example

This Division does not limit a court’s power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.<sup>1123</sup>

## Consideration of reforms to limitation periods in New South Wales

On 20 January 2015, the Department of Justice of New South Wales released a discussion paper titled *Limitation periods in civil claims for child sexual abuse* to seek community views on how the *Limitations Act 1969* (NSW) operates in relation to claims for child sexual abuse and whether any amendments are required. This was not available in time for us to discuss it in the Consultation Paper.

The discussion paper set out options to amend the *Limitations Act 1969* (NSW) as follows:



- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>a. removing limitation periods from causes of action based on child sexual abuse</li> <li>b. reversing the presumption, so that limitation periods only apply to causes of action based on child sexual abuse if the defendant is able to demonstrate that the proceedings could have been commenced earlier;</li> <li>c. clarifying that the statutory exception for 'disability' includes psychological distress caused by child sexual abuse;</li> <li>d. removing the operation of limitation periods to causes of action based on child sexual abuse in circumstances where there is a criminal conviction based on the same or substantially similar facts; or</li> <li>e. amending the post-2002 provisions relating to minors so that all minors are subject to the same exception, regardless of the characterisation of the perpetrator.<sup>1124</sup></li> </ul> | <ul style="list-style-type: none"> <li>a. Applies to claims of misconduct of a sexual nature (including, without limitation, sexual assault) that occurred while the claimant was a minor;</li> <li>b. Applies to claims of assault or battery that occurred while the claimant was a minor; and</li> <li>c. Is expressly retrospective, in that it applies 'whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period'.<sup>1126</sup></li> </ul> |
|---|--|

Option A involves a very similar approach to that adopted in the Victorian reforms.

The discussion paper described advantages of option A as follows:

- a. The amendment would be simple to apply;
- b. There would be no need for plaintiffs to provide proof of their psychological injury at an interlocutory stage, which has the potential to reduce the risk of retraumatisation to plaintiffs;
- c. The amendment would avoid legal costs being incurred on contested limitation period defences, although the overall impact on the costs of litigation is difficult to predict with certainty;

Submissions were due by 10 March 2015. They have not yet been published.<sup>1125</sup>

The discussion paper described option A as completely removing the application of the Limitation Act from a defined class of claims. It stated that the option was based on legislation in British Columbia in Canada that:



- d. This option may increase the fairness of settlement negotiations and encourage defendants to focus on the merits of the case.<sup>1127</sup>

The discussion paper also described some disadvantages of option A. One disadvantage was said to be that option A would make it easier to bring claims for historical abuse. These cases might be significantly more difficult for defendants to properly defend and for courts to properly decide.

However, the discussion paper also discussed factors that would mitigate these risks, such as the capacity of defendants to apply to the court to stay or strike out the proceedings because a fair trial is not possible. Further, the discussion paper stated that removing the limitation period would not change the fundamental requirement that plaintiffs prove all the elements of the relevant tort on the balance of probabilities in order to bring a successful substantive claim.<sup>1128</sup>

The discussion paper identified other potential impacts of reform, including that there may be some increase in the number of claims commenced or litigated, some increase in successful claims and some increase in legal costs and/or damages as a result of the increase in claims. There may be the indirect impact of a potential increase in insurance premiums, which may therefore affect the accessibility of insurance for smaller non-government organisations that provide services to children.

However, the discussion paper stated that the number of additional claims may be affected by other disincentives to litigation such as identifying the correct defendant, establishing liability, finding sufficient evidence, an

impecunious defendant and the potentially traumatising impact of adversarial litigation on plaintiffs. Further, an increased number of claims would not necessarily result in an increased number of successful claims because the legislative amendment would not alter the defendant's level of responsibility; it would only ensure the case could be heard. There may also be a saving of legal costs because parties would not incur the costs of arguing the limitation point.<sup>1129</sup>

## Extension to the limitation period

In our roundtable consultations, we queried whether the limitation period should be removed altogether or whether there should be some balance struck between the interests of both the survivor and institution in having any proceedings brought as soon as possible and the known delays in reporting or disclosing.

A possible example of how an extension to the limitation period could be framed is as follows:

- set a basic limitation period of 12 years from the time the survivor turns 18 years of age
- after 12 years (that is, after the survivor turns 30 years of age), the claim could proceed unless the institution defendant establishes actual prejudice in defending the proceedings
- include an absolute bar or 'long stop' of 30 years from the time the survivor turns 18 years of age so that a survivor could not bring civil action against an institution after the survivor turns 48 years of age.

## 14.6 What we have been told

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Some submissions in response to the Consultation Paper supported the option of extending the limitation period.<sup>1130</sup> However, a significant majority of submissions supported the removal of limitation periods.<sup>1131</sup>

Many of the submissions to the Consultation Paper supported the Victorian reforms to limitation periods.

For example, Care Leavers Australian Network (CLAN) submitted:

CLAN wholeheartedly supports the recent Victorian amendments regarding their limitations laws and the civil litigation system. We urge the Royal Commission to recommend that all other states follow in Victoria's footsteps regarding limitations laws.

We are of the firm belief that limitation periods need to be reformed and perhaps completely removed when considering matters of child sexual abuse and that these amendments should apply retrospectively. CLAN does not feel that any of the arguments put forward for the justification of limitation periods are enough to outweigh an individual's right to justice and compensation for the abuse they suffered as a child. Australia should follow in the footsteps of other countries around the world and abolish limitation periods for child abuse cases.<sup>1132</sup>

Bravehearts submitted:

Bravehearts supports recommendations in the *Betrayal of Trust* Inquiry in Victoria that civil limitation periods be abolished in relation to criminal child abuse matters, and specifically child sexual assault. ...

Survivors of child sexual assault face enormous barriers in disclosing. The impacts of child sexual assault typically mean that the victim does not disclose until they feel safe to do so, and this frequently does not occur until some time has passed.

Having been, in many cases, completely disempowered by an offender, the psychological consequences of child sexual assault have far reaching consequences: shame and guilt can often mean that survivors are unable to disclose until parents have passed away; many survivors are simply not ready to disclose as they may still be processing the psychological trauma and impacts of the sexual assault; and victims may experience post-traumatic stress disorder (essentially this means that a victim is aware of the harm they experienced but disassociate themselves from any reminders of the traumatic event, including litigation). Even if a survivor is aware of the possibility of legal action they may decide that to take such action would revive traumatic memories and may even be destructive and therefore delay proceeding with the matter. ...

Given the key characteristics of childhood sexual assault (silence, secrecy, shame and delayed disclosure) it is not appropriate for limitation periods to apply to proceedings related to criminal child abuse matters, such as child sexual assault and associated damages. It is equally inappropriate for limitation periods to apply where the respondent(s) is an institution, an employee of the institution, or Government and the claim is one of negligence in relation to child sexual assault, as where the respondent is themselves the alleged perpetrator.<sup>1133</sup>

The Australian Lawyers Alliance referred to the Victorian exposure draft Bill and submitted:

This approach, similar to that of British Columbia, has very considerable advantages. The trauma and expense of litigation to obtain an extension of time or establish a disability is removed.<sup>1134</sup>

The Australian Lawyers Alliance further submitted that the Victorian reforms should apply to the following causes of action:

In our view, sexual or physical abuse or associated psychological injury should be included. Sheer physical abuse can lead to devastating trauma and there is ample evidence of this in cases such as *Rundle*. Beatings, deprivation of food and warmth in an orphanage were clearly at least as causative of psychological injury as anything

else. Separating out sexual and physical injury would be wholly inappropriate in these circumstances, as would any attempt to exclude the psychological consequences of either sexual or physical abuse. There does seem to us to be a case for excluding pure psychological injury (without sexual or physical abuse) since the difficulties of proof, uncertainties of diagnosis and risk of injustice to defendants seem to us to outweigh the advantages of that further change.<sup>1135</sup>  
[Reference omitted.]

The Australian Lawyers Alliance also submitted that the reform should be retrospective in operation.<sup>1136</sup>

In his submission in response to the Consultation Paper, Associate Professor Mathews submitted:

In each State and Territory, time limits should be removed for civil claims arising from acts constituting institutional child sexual abuse, and this should apply retrospectively, in line with the approach adopted by Canadian jurisdictions, by Victoria's *Limitation of Actions Amendments (Criminal Child Abuse) Bill 2015*, and as suggested by Option A of the 2015 New South Wales *Discussion Paper on Limitation periods in civil claims for child sexual abuse*.<sup>1137</sup>

Associate Professor Mathews submitted that the primary advantage of this reform would be to provide survivors of institutional child sexual abuse with access

to civil courts to bring a claim for damages. Access could not be unfairly delayed or blocked by a defendant's reliance on legal technicalities despite the substantive merits of the claim.<sup>1138</sup> He submitted that there were further advantages of removing the limitation period, including the increased likelihood of claims being settled at an early stage, promoting model litigant practice by governments and securing parity with the pending Victorian legislation across jurisdictions.<sup>1139</sup>

Some submissions to the Consultation Paper proposed other options for reform, such as limitation periods based on discoverability and longer extension periods than current legislation provides.<sup>1140</sup>

The Tasmanian Government in its submission in response to the Consultation Paper referred to its reforms to limitation periods in 2004 to make it easier for persons suffering latent disease to take action by providing a limitation period for personal injury that commences on the 'date of discoverability'.<sup>1141</sup>

The Director of Strategic Legislation and Policy in the Department of Justice, representing the Tasmanian Government, told the public hearing:

As the Commission would probably know, governments over time have responded to calls for reform in relation to limitations. Many of us here and on the Commission would recall the work based on his Honour David Ipp's report into the law of negligence. Most of that work was brought about by an insurance crisis and also later by victims of dust disease and latent diseases.

In considering that work, Tasmania changed its law and introduced new provisions in relation to limitations. We have provisions where we have three years from the date of discoverability, and there are also long stop provisions and provisions in relation to children or minors under a disability.

I really only raise that today to say that at the time these provisions were being considered through the work of his Honour David Ipp, at that point the Tasmanian government considered it inappropriate to restrict reforms just to a class of victims, and at the time, many would recall, there was a lot of pressure in relation to asbestosis and dust diseases, but our government had recognised that there were other types of latent injuries that existed in the community and they ought to be included, such as post-traumatic stress disorder, injuries that were being suffered by the survivors of sexual abuse, and that is clearly on the record in Hansard.

So we accept that this work now is moving reform for our government in terms of limitations. We don't believe that we have the law perfectly right and obviously as we move forward in this process we are conscious that we may need to make further reforms to address particular victims or people wishing to pursue civil law actions.

We're currently watching with interest some of the developments – we know that Victoria have tabled some law reform and we are interested to see how they will proceed over time.<sup>1142</sup>

In its submission in response to the Consultation Paper, the Law Council of Australia proposed the following as a model limitation period:

- a. a special limitation period for child sexual abuse survivors (including that the period could be extended to three years after the relevant facts become discoverable);
- b. no long-stop periods; and
- c. that time should not run for a minor or a disabled person until they cease to be a minor or under a disability.

If such measures were adopted consistently across Australia they should operate prospectively as well as retrospectively.<sup>1143</sup>

In its submission in response to the Consultation Paper, The Salvation Army Australia supported the Law Council of Australia's model.<sup>1144</sup>

In its submission in response to the Consultation Paper, the Truth, Justice and Healing Council proposed an alternative model limitation period as follows:

- The limitation period should expire 25 years after the claimant attained his or her majority; and

- The period be capable of being extended on the application of the claimant, unless the defendant was able to satisfy the court that the granting of the extension would result in significant prejudice to the defendant.<sup>1145</sup>

In responding to a question as to why the Council proposed a 25-year extension, Mr Sullivan, representing the Council, told the public hearing:

It hasn't been a simple issue to settle on, and that's partly what I'm saying, that nothing is set in stone here. We've looked at it this way and it is important: insurers do like limitation periods, and we were looking at this as a public policy issue rather than a church issue. We were trying to address what would be a public policy structure, and we thought the engagement of insurers in this whole exercise needs to be certain. They would require limitation, unless things change, and then if they change, their reinsurers may readjust, and so on. That's one area of advice we've received.<sup>1146</sup>

Some submissions supported an extension of the limitation period but were against any change applying retrospectively. For example, the Anglican Church of Australia stated:

[Our Royal Commission Working Group] supports the reform of limitation periods to provide a greater period of time for survivors to commence civil litigation. This reform would recognise the

significant delay for survivors in coming to terms with their abuse and deciding to commence civil litigation.

There are significant difficulties in making any changes to limitation periods retrospective. These difficulties include prejudice for institutions where, through the loss of records and/or the unavailability of relevant witnesses, they will be unable to obtain a fair trial. At the very least there should be an opportunity for the court to refuse an extension of the limitation period, or to dismiss proceedings, where there is actual prejudice such that the institutions is unable to obtain a fair trial.<sup>1147</sup>

The Uniting Church in Australia stated:

The Uniting Church believes that any limitation period should be long enough to ensure justice for all parties, with particular weight being given to the interests of survivors given the power imbalances that they have experienced. Any limitation period must accommodate when the survivor is ready to articulate the harm experienced, which could be longer than the fixed times suggested.

The Uniting Church's position is that there is no need for any changes to limitation periods to apply retrospectively, as all cases of past child sexual abuse will be part of the redress scheme.<sup>1148</sup>

Some submissions expressed concerns about there being any reform of limitation periods for child sexual abuse.<sup>1149</sup>

For example, in its submission in response to the Consultation Paper, the Insurance Council of Australia stated that reform to limitation periods, particularly retrospective reform, presents difficulties for the insurance industry as follows:

Any retrospective removal or extension of limitation periods could lead to circumstances in which a relevant insurer may be exposed to claims from a policyholder for which it has not collected sufficient premium. This is because the basis on which the insurer priced the insured's liability risk would not have factored in the increased risk of liability exposure any retrospective changes to limitations periods would bring.

Similarly, a retrospective change to limitation periods would also create challenges for insurers in relation to prudential management. If a significant number of claims are made against an insurer as a result of legislative adjustment, this could have a substantial impact on the capital position of an insurer, that, having priced policies and reserved funds to meet claims based on existing limitation periods, finds itself having under-reserved and under-priced the underwritten risk. This effect would also flow through to the reinsurers of these insurers.<sup>1150</sup>

During the public hearing, Mr Whelan, representing the Insurance Council of Australia, was asked about the consequences of the Victorian reforms to remove the limitation period with retrospective effect for the insurance industry across Australia. In responding to the questions, Mr Whelan told the public hearing:

It will have variable effects on different insurers depending on their exposure. As you know, not all policies necessarily cover child molestation or sexual molestation as part of their standard policy and, if they did, in many cases, they were as an adjunct to the standard policy, so it will vary by individual insurers, but we would all take note of those decisions by the Victorian courts and will need to adjust our thinking going forward.

The concern of the industry generally is not so much about prospective changes ... It's the retrospective situation, where the assumptions that policies were built on and premiums were struck and capital was allocated, and so on, are what drives how the insurers manage their business and if they are changed on the insurer – such as the statute of limitations or the duty of care and so on – that has a demonstrable effect on their position, because they have to rethink about their position in terms of their capital and their provisioning for those sorts of claims, because they weren't taken into account in their original premiums. Therefore, adequate

premiums were not collected to take care of that risk.<sup>1151</sup>

In responding to further questions, Mr Whelan told the public hearing that, if changes are retrospective, insurers and reinsurers might have to increase premiums to compensate for claims that were not adequately funded and that any increases would be likely to be charges within the class of business, such as for institutions caring for children.<sup>1152</sup>

In response to a further question as to whether he accepts that some people may see institutions carrying a burden through insurance as an appropriate social outcome, Mr Whelan told the public hearing:

Yes. The only caveat I would add to that is that there is a concern about the cost and affordability of insurance going forward and the accessibility of that insurance. Any concern I would have would be about whether those costs start to make certain institutions unable to take out that sort of insurance, the costs associated with those specific requirements around child abuse or sexual molestation within the policy, and that accessibility for some institutions to be able to take that cover out and also whether the insurance companies going forward will continue to have an appetite to underwrite that risk.<sup>1153</sup>

In responding to further questions, Mr Whelan agreed that any flow-on effects are undetermined and they cannot be determined before they happen.<sup>1154</sup>



In the Consultation Paper, we identified that, if limitation periods are removed altogether, there would be a risk that defendants may be required to defend proceedings without having evidence that would have been available to them previously and in circumstances where the trial could not be fair.<sup>1155</sup>

In his submission in response to the Consultation Paper, Associate Professor Mathews submitted that, if limitation periods were removed:

Courts would still possess a sufficient residual control on these claims. Courts have the sufficient experience and expertise to implement natural controls on litigation of unfair claims, especially where due to the passage of time and the loss of evidence a defendant has been made unable to defend their case; this is embodied in the common law, and a legislative provision could explicitly embody this (see the Victorian Bill, s 4 inserting s 27R).<sup>1156</sup> [Reference omitted.]

## 14.7 Discussion and conclusions

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We are satisfied that current limitation periods are inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse. The real issue is whether current limitation periods should be extended or removed, or reformed in some other way.

We note that the New South Wales discussion paper referred to above discusses reform options other than removing the limitation period and sets out advantages and disadvantages of them. However, the other options do not seem to us to be likely to overcome many of the hurdles that survivors face in commencing litigation.

For example, the limitation point might still be raised as a barrier to commencing litigation or to continuing to a hearing on the merits under option B (reversing the presumption so that limitation periods only apply to causes of action based on child sexual abuse if the defendant is able to demonstrate that the proceedings could have been commenced earlier) or option C (clarifying that the statutory exception for ‘disability’ includes psychological distress caused by child sexual abuse).

Option D (removing the operation of limitation periods to causes of action based on child sexual abuse in circumstances where there is a criminal conviction based on the same or substantially similar facts) provides only some survivors with relief from limitation periods. Many perpetrators of child sexual abuse are not convicted of criminal offences. In some cases the perpetrator is dead or unable to be tried.

Option E (amending the post-2002 provisions relating to minors so that all minors are subject to the same exception – currently if the abuser was a parent, guardian or ‘close associate’ of the child, then the limitation period will permit the child to bring proceedings between the ages of 25 and 37 years, depending on when the cause of action is actually discoverable) provides an extension of time, but it is unlikely to be adequate for many survivors.



We recognise that there are benefits to all parties if civil proceedings are determined as close as possible to the time the injury is alleged to have occurred. For successful plaintiffs, the sooner they can obtain damages for their injury and loss, the better the outcome is for them. For defendants and insurers, the matter is resolved sooner and with certainty. For all parties, conducting proceedings that are proximate to the conduct means that the available evidence is likely to be at its best.

Notwithstanding these considerations, we are satisfied that the limitation period for commencing civil litigation for personal injury related to child sexual abuse should be removed and that the removal should be retrospective in operation.

There is now clear evidence that it is likely to take many survivors years, even decades, to disclose their experience of sexual abuse as a child. There is also an increasing understanding of the devastating impacts of child sexual abuse and how these may work against a survivor even being able to disclose the abuse to a family member or friend, let alone seek legal advice and commence proceedings. There is little evidence that survivors of child sexual abuse are 'sleeping on their rights'.

It seems to us that the objective should be to allow claims for damages that arise from allegations of institutional child sexual abuse to be determined on their merits. The claimant has no incentive to delay commencing proceedings. The claimant will still need to prove their case through admissible evidence. The defendant will be protected from unfair proceedings as a result of the passage of time by preserving the court's power to stay proceedings.

It is also desirable that national consistency be sought in this area. We have discussed above the complex litigation that has arisen where different states have had very different limitation periods and different powers to extend them. Victoria has enacted legislation that removes the limitation period with retrospective effect. That option is under consideration in New South Wales. If we were now to recommend a lesser change than provided by the Victorian legislation, we would be encouraging national inconsistencies to continue. We would do this if we thought there was real merit in taking a different approach, but we are satisfied that there is no such merit.

If current limitation periods were extended rather than removed, there would still be a risk of discouraging claimants from commencing proceedings. Although extending the limitation period would probably reduce the risk, there would still be a risk of lengthy and expensive interlocutory proceedings if defendants raise a limitation defence. This might be a particular risk if the limitation period was to turn on notions of 'discoverability' or reverse presumptions and the like rather than simply being extended for a number of years. Defendants in settlement negotiations could still use even extended limitation periods to reduce a settlement if the claim was outside the extended period.

We acknowledge that removing the limitation period with retrospective effect will have an impact on some insurers and reinsurers. However, it is not clear to us that, in the past, institutions generally have had insurance cover with an insurer that remains solvent or provided adequate coverage. The evidence available to us does not indicate

that there is likely to be any significant impact on insurance or reinsurance.

We acknowledge that institutions may face additional claims if limitation periods were removed with retrospective effect. However, we are satisfied that limitation periods have worked great injustices against survivors for some time. We consider that institutions' interests are adequately protected by the need for a claimant to prove his or her case on admissible evidence and by the court's power to stay proceedings in the event that a fair trial is not possible. Institutions can also take steps to limit expensive and time-consuming litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims.

Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers. This was the approach taken in the Victorian Act.

We appreciate the changes we support will allow institutions to apply for a stay of proceedings. This may cause delay and extra

expense for some plaintiffs. We consider that this is a necessary and acceptable risk: the courts' powers to prevent unfair trials should not be limited. Both the survivor and the institution are entitled to a fair trial.

The Victorian Act and the reforms being discussed in New South Wales apply considerably more broadly than to claims that arise from institutional child sexual abuse. While our recommendations relate to institutional child sexual abuse, we have no objection to state and territory governments providing for wider changes. However, if change is made we are firmly of the view that it should be consistent across jurisdictions.

We consider that state and territory governments should implement our recommendations to remove limitation periods as soon as possible. Our recommendations on the duty of institutions and identifying a proper defendant in chapters 15 and 16 respectively may take longer to implement. However, our recommendations to remove limitation periods should be implemented without delay.

### **Recommendations**

85. State and territory governments should introduce legislation to remove any limitation period that applies to a claim for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child.
86. State and territory governments should ensure that the limitation period is removed with retrospective effect and regardless of whether or not a claim was subject to a limitation period in the past.
87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.
88. State and territory governments should implement these recommendations to remove limitation periods as soon as possible, even if that requires that they be implemented before our recommendations in relation to the duty of institutions and identifying a proper defendant are implemented.

# 15 Duty of institutions

## 15.1 Introduction

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A survivor will have a cause of action against the individual perpetrator or perpetrators of the abuse in the intentional tort of battery. Battery, which includes sexual assault, involves harmful or offensive contact with another's body.<sup>1157</sup> The contact must be intentional.<sup>1158</sup> The litigation is relatively uncomplicated: the survivor is required to prove that the relevant act occurred and resulted in damage.

An action against an institution is far more complex. Survivors must establish that:

- the institution owed them a duty of care and the breach of that duty caused their damage; or
- the institution is vicariously liable for the perpetrator's acts.

The problem for survivors who sue an institution arises from the fact that any claim is founded upon the deliberate criminal act of the perpetrator. The law in Australia has been reluctant, in the absence of a negligent act of the institution, to make the institutions liable for the deliberate criminal act of one of its members or employees.

## 15.2 Existing duty of institutions

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There are three possible approaches to the liability of institutions:

- an action in negligence based on an institution's breach of a duty of care owed to the child. The child must

prove the existence of the duty and its breach. The breach must have caused the damage. The duty is a duty to take reasonable care in the circumstances. What is 'reasonable' is determined by reference to the standards that applied at the time the duty is alleged to have been breached

- vicarious liability of the institution for torts committed by its employees while acting in the course of their employment. In Australia, vicarious liability has been limited to apply only to the acts of 'employees'. The current approach of Australian law is that child sexual abuse will not be found to have occurred 'in the course of employment'
- an action for breach of the institution's non-delegable duty to ensure that a third party takes reasonable care to prevent harm. This is a duty to ensure that reasonable care is taken by relevant others. It is somewhat similar to vicarious liability, but it applies to the acts of independent contractors as well as employees. Australian law has not imposed a non-delegable duty on an institution for the criminal acts of an employee or member.

A number of submissions to *Issues paper 5 – Civil litigation* referred to the lack of clarity in some of these approaches and the uncertainty of their application.

## Negligence

The tort of negligence involves the failure of a person who owes another a duty of care to exercise reasonable care in a way that causes harm to another. There are three elements:

- the defendant must have owed the injured person a ‘duty of care’
- the defendant must have breached that duty by failing to exercise the care that a reasonable person in the same circumstances would have exercised
- the harm the injured person suffered must have been caused by that failure to exercise reasonable care.<sup>1159</sup>

A person who suffered sexual abuse as a child could make a claim in negligence against an institution if that person can show that the institution should have taken reasonable steps to prevent the abuse but did not. However, in Australia, there are very few cases in which a claim in negligence for child sexual abuse has proceeded to judgment in court. The majority of cases either settle or fail. As a consequence, the effectiveness of relying on the tort of negligence for institutional child sexual abuse claims is somewhat unclear. The present uncertainties are confirmed by considering each of the three elements set out above.

The first element is that the defendant owed a duty of care to the claimant. There are many relationships between a defendant and a claimant where there is no doubt that a duty of care is owed. The relationship fits into a well-established category of relationships recognised by the law as giving

rise to a duty of care. For example, it is beyond doubt that a school student is owed a duty of care by his or her school and teachers.<sup>1160</sup>

However, uncertainty can arise outside of the well-established categories. The test for the existence of a duty of care is whether, first, it was reasonably foreseeable that there was a risk of harm to the class of persons that included the claimant; and, secondly, whether the relationship between the claimant and defendant involved ‘salient features’ that warrant the imposition of a duty of care.<sup>1161</sup>

What these salient features are depends on the facts of an individual case.<sup>1162</sup> If a claim in negligence is made against a government agency with responsibility for child protection and child placements, for example, the court must consider factors such as:

- the legislation governing the agency and its powers
- the degree of control the agency exercised over the risk of the harm that occurred
- the degree of vulnerability of those who depend on the exercise of the agency’s powers
- the consistency of the alleged duty of care with the terms, scope and purpose of the statutory scheme.<sup>1163</sup>

Agencies have been found to owe a duty of care to state wards and other vulnerable children in some cases<sup>1164</sup> but not in others.<sup>1165</sup>

Outside of the school–pupil and agency–ward contexts, it is unclear in what situations

a duty of care will be owed in a child sexual abuse claim. For example, there do not appear to have been any cases in Australia where it has been decided that a religious organisation that was not a religious school owed a duty of care to a child who was abused.<sup>1166</sup>

Where a duty of care is held to be owed, a claimant must also establish that the defendant has breached that duty. Before a duty of care will have been breached, the risk of injury to the claimant must have been reasonably foreseeable.<sup>1167</sup> A claimant must also prove that a reasonable person in the position of the defendant would have taken precautions in response to the risk and the defendant failed to take those precautions.<sup>1168</sup>

To determine what a reasonable person would have done, all the relevant circumstances must be considered, including:

- the magnitude of the harm that could occur
- the probability of the risk materialising
- how practicable or onerous measures to combat the risk would have been
- any responsibilities the defendant might have that could conflict with taking precautions.<sup>1169</sup>

Importantly, the precautions a reasonable person would have taken depend on the standards to which reasonable people would have been held *at the time* of the alleged negligence: 'The reasonableness of measures of protection must be judged according to the prevailing standards of the

day.'<sup>1170</sup> It may be harder for a claimant to prove breach of a duty of care in relation to institutional child sexual abuse if the breach occurred at a time when the risk and prevalence of institutional abuse, and the seriousness of the harm caused by abuse, were not as well understood or recognised as they are now. Knowledge of a potential problem will inform the reasonableness of the response, if any.

The third element of the tort of negligence is that the breach of duty has caused the claimant's damage. This requires both that the injury must have been *factually* caused by the breach of duty and that, as a *normative* question, legal responsibility for the injury should be attributed to the tortfeasor – that is, the person who committed the act that causes the injury.<sup>1171</sup>

A breach of a duty of care will have factually caused an injury if, 'but for' the breach, the injury would not have occurred, although the common law and legislation each recognise that there may be situations where this test is not appropriate and a more complicated one is necessary.<sup>1172</sup> Legal responsibility will be attributed to the defendant if the general type of harm that occurred was reasonably foreseeable by the defendant.<sup>1173</sup>

In claims made for child sexual abuse, the injury usually suffered is 'psychiatric harm'.<sup>1174</sup> In the context of a claim for negligence, a claimant typically would have to prove both that the defendant's breach of duty led to the abuse or allowed the abuse to continue and that the abuse caused that psychiatric harm.<sup>1175</sup>

Thus, in *TC v New South Wales*, where the Department of Community Services failed

to undertake all reasonable investigations of abuse allegations and delayed in obtaining a psychiatric assessment, the Supreme Court of New South Wales nonetheless held that causation was not established. This was because, if those breaches had not occurred, the department still would not have taken action to remove the child in question and so stop the abuse.<sup>1176</sup>

The decision in *SB v New South Wales*<sup>1177</sup> provides an example of how the elements of duty and breach were dealt with in one case. A former state ward, SB, sued the State of New South Wales in the Supreme Court of Victoria. She had been sexually abused by her natural father when she was left with him by the then Department of Youth and Community Services after being removed from her foster father, who had abused her. She argued that the department breached its duty of care to her when deciding to restore her to her father by failing to take into account her vulnerable status or to assess her father's capacity or will to meet her needs.<sup>1178</sup> She also argued the department did not adequately monitor her situation and did not take the necessary action to protect her and advance her welfare.<sup>1179</sup>

The Court gave detailed reasons about why the department owed SB a duty of care.<sup>1180</sup> It concluded that the duty was owed because of:

- the claimant's status under court order as a ward of the state
- her known vulnerability following the disclosure of her foster father's abuse
- the department's substantial degree of control over the risk to the plaintiff

- the compatibility of the duty with the statutory scheme governing the department since the duty would serve to promote the department's standards and the legislative objects.<sup>1181</sup>

The Court held that the department breached its duty to the claimant when, having restored her to her father, it failed to remove her or insist on access to her despite being aware of her vulnerability and despite suspecting that her father was abusing her.<sup>1182</sup> The department considered that there was nothing to be done because the claimant would soon turn 18 and no longer be a ward, but the Court found this view to be unjustified.<sup>1183</sup>

However, the Court held that the department did not breach its duty when it restored the claimant to her father in the first instance. This had occurred in urgent circumstances where her foster family had insisted she leave immediately and the department had few options for placing her. Further, the departmental policy at the time was that a ward should be restored to his or her natural parent unless minimum, not optimal, standards of care could not be met.<sup>1184</sup>

Another example of a claim in negligence for institutional abuse is *S v The Corporation of the Synod of the Diocese of Brisbane*.<sup>1185</sup> In this case, the claimant, S, had been a boarder in a school run by the Corporation of the Synod of the Anglican Diocese of Brisbane. It was accepted that a boarding master had sexually abused the claimant in 1990. The claimant argued that the corporation failed to create and maintain proper systems to take care of the boarders.

Particularly, she argued that the headmaster failed to recognise and act on complaints and that other employees of the corporation failed to sufficiently voice their concerns. The case was decided by a civil jury, so no written reasons were given, but the jury accepted that the corporation failed to take reasonable care in at least one of these ways.

## Vicarious liability

According to the doctrine of vicarious liability, an employer will be liable for torts committed by employees acting 'in the course of employment'. Importantly, vicarious liability does not require a claimant to show that the employer has committed any wrong; rather, the employer is required to pay damages to compensate a victim for an employee's wrong if certain requirements are met.

Under Australian law, a person (the employer) will be vicariously liable for another's tort if:

- the person who committed the tort was an 'employee' of the employer (and not, for example, an independent contractor)
- the tort was committed in the 'course of employment'.<sup>1186</sup>

Both requirements can create difficulties for survivors of child sexual abuse.

Employees do not include 'independent contractors'<sup>1187</sup> and are unlikely to include volunteers.<sup>1188</sup> The Court of Appeal of the Supreme Court of New South Wales left open 'whether a priest in the Roman

Catholic Church who is appointed to a parish is an employee in the eye of the law or otherwise in a relationship apt to generate vicarious liability in his superior'.<sup>1189</sup>

Identifying what is, and what is not, within the course of employment creates particular difficulties. Chief Justice Gleeson has explained 'in the course of employment' in the following way:

The limiting or controlling concept, course of employment, is sometimes referred to as scope of employment. Its aspects are functional, as well as geographical and temporal. Not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment. And the fact that wrongdoing occurs away from the workplace, or outside normal working hours, is not conclusive against liability.<sup>1190</sup>

The line between what is within and what is outside of the course of employment can be difficult to draw. Decisions are sometimes difficult to reconcile. Some examples determined by the courts but which do not relate to child sexual abuse are as follows:

- A law firm's managing clerk who fraudulently conveyed a client's property to himself was acting in the course of employment because his firm authorised him to act in a class of matter including that sort of conveyancing transaction.<sup>1191</sup>



- A barmaid who threw beer and a glass into a patron's face, arguing that he provoked her, was not acting in the course of employment.<sup>1192</sup>
- A garage hand whose job was to shunt cars but who was expressly prohibited from driving them was acting in the course of employment when he drove one vehicle and collided with another vehicle.<sup>1193</sup>

In claims for child sexual abuse, an employer may be liable for an employee's negligence in failing to investigate and guard against a perpetrator's abuse (this issue was left to the civil jury in *S v Corporation of the Synod of the Diocese of Brisbane* discussed above). However, more commonly in institutional abuse cases it may be argued that an employer is vicariously liable for sexual abuse committed by the perpetrator, who happens to be an employee.

In *New South Wales v Lepore*<sup>1194</sup> (*Lepore*), different views were taken as to whether the sexual abuse of a child can be conducted in the course of employment. A clear statement of the relevant legal principles, preferably by parliament, is required.

### New South Wales v Lepore; Samin v Queensland; Rich v Queensland

In *Lepore*, one plaintiff sued the State of New South Wales and two sued the State of Queensland. The plaintiff argued that the respective states were vicariously liable for sexual abuse perpetrated by teachers in state primary schools. The teachers were clearly employees of the relevant State, so the dispute was as to whether the sexual

abuse could be said to have occurred in the course of employment.

Six judges considered whether the states could be vicariously liable in this way. The seventh judge, McHugh J, did not consider the issue. Instead, his Honour accepted that the school authorities owed non-delegable duties to the students that could be breached if the students were sexually abused by their teachers.

The six judges who considered vicarious liability stated a number of different tests to determine whether a tort is in the course of employment:

- Gleeson CJ asked whether there was 'sufficient connection' between what the employee was employed to do and the tortious conduct.<sup>1195</sup>
- Gaudron J suggested that the relevant question was whether 'the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred'.<sup>1196</sup>
- Gummow and Hayne JJ emphasised that '[i]t is the identification of what the employee was actually employed to do and held out as being employed to do that is central to any inquiry about course of employment'.<sup>1197</sup>
- Kirby J, approving developments in the law in Canada and the United Kingdom, stated the applicable tests as whether the employment 'materially and significantly enhanced or exacerbated the risk of [the tort]'; whether there is a significant connection between the

creation or enhancement of the risk and the wrong that it occasions within the employer's enterprise; and whether the conduct may 'fairly and properly be regarded as done [within the scope of employment]'.<sup>1198</sup>

- Callinan J did not state a clear test.

The six judges who considered vicarious liability also examined the more specific question as to whether sexual abuse can be 'conduct in the course of employment':

- Gleeson CJ said that it could: 'there are some circumstances in which ... persons associated with school children ... have responsibilities of a kind that involve an undertaking of personal protection, and a relationship of such power and intimacy, that sexual abuse may properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers'.<sup>1199</sup>
- Gaudron J said that it could: it was possible 'that by acquiescing in the teacher's use of the storeroom for the purposes of chastisement or, even, in having a secluded room which might be so used the State of New South Wales is estopped from contending that the teacher was not acting as its servant, agent or representative in doing what he did in that room'.<sup>1200</sup>
- Gummow and Hayne JJ effectively said that it could not. They said that an employer can be vicariously liable for an intentional tort, but only in two narrow circumstances: when the tort was committed in the

intended pursuit of the employer's interests or in the intended performance of the employee's contract of employment; or where the tort was committed in the apparent pursuit of the employer's business or apparent execution of the employee's authority.<sup>1201</sup> They said that '[w]hen a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way. ... [To hold the State responsible] would strip any content from the course of employment and replace it with a simple requirement that the wrongful act be committed by an employee'.<sup>1202</sup>

- Kirby J said that it could: sexual assault was 'arguably inherent in close intimacy between adults and vulnerable children that may arise in the specific circumstances of a school setting'.<sup>1203</sup>
- Callinan J said that under no circumstances could sexual abuse fall within the course of employment: 'deliberate criminal Conduct is not properly to be regarded as connected with an employee's employment: it is the antithesis of a proper performance of the duties of an employee'.<sup>1204</sup>

Vicarious liability for the sexual abuse by employees has not been considered by the High Court since *Lepore*. However, *Lepore* has been applied by the lower courts in *Withyman v State of New South Wales and Blackburn*<sup>1205</sup> (*Withyman*) and *A, DC v Prince Alfred College Incorporated*.<sup>1206</sup>

## Withyman v State of New South Wales and Blackburn

Mr Withyman had a behavioural disorder and attended a special care school in country New South Wales.<sup>1207</sup> Mr Withyman's case was that between March and October 2003, after he had turned 18, there was a consensual sexual relationship between him and Ms Blackburn, a teacher at the school.<sup>1208</sup> He argued that the termination of this relationship caused him significant psychological harm and damage for which the State was vicariously liable as employer of Ms Blackburn.<sup>1209</sup> He was unsuccessful in the first instance and appealed the decision to the New South Wales Court of Appeal.

On the issue of the vicarious liability of the State, the appeal was conducted on the basis that the relevant principles were to be found in the judgment of Gleeson CJ in *Lepore*.<sup>1210</sup>

Mr Withyman argued that Ms Blackburn's duties included the emotional development of students in circumstances that invested the student–teacher relationship with a high degree of power and intimacy, and that the students were vulnerable and had special needs.<sup>1211</sup> This was said to fall within the sufficient connection test put forward by Gleeson CJ.<sup>1212</sup> This argument was rejected by the Court of Appeal. Allsop P (with whom Meagher and Ward JJA agreed) stated:

No attempt was made in evidence to focus in detail upon the duties of a teacher such as Ms Blackburn in building emotional bonds with students. It can be accepted that Ms Blackburn's teaching style had a degree of gentle, forgiving familiarity with her students. That, however, is not a factor that promotes a risk of sexual intercourse.<sup>1213</sup>

As the requisite connection had not been established, the State was not vicariously liable for Blackburn's sexual misconduct. Allsop P stated:

That the children at the school were or may have been more emotionally vulnerable than ordinary school students may perhaps be accepted. But the enterprise of teaching and guiding the young, even using gentle and forgiving familiarity does not create a new ambit of risk of sexual activity. Sexual activity is as divorced and far from the gentle caring teacher's role as it is from the stern, detached disciplinarian's. The connection and nexus was not such as to justify imposition on the State for Ms Blackburn's, apparently out of character, sexual misconduct. The school did not create or enhance the risk of such by her duties.<sup>1214</sup>

## A, DC v Prince Alfred College Incorporated

The plaintiff alleged that when he was a 12-year-old boarder at Prince Alfred College in 1962, a housemaster of the boarding house, Dean Bain, sexually abused him on a number of occasions at the school and elsewhere for a period of up to eight months. The plaintiff claimed that the college was liable for consequent personal injury, loss and damage:

- because the college owed him a non-delegable duty of care
- because it breached its duty of care in employing Bain and failing to have in place adequate systems to protect the plaintiff from Bain; or

- because it was vicariously liable for Bain's conduct.<sup>1215</sup>

With respect to vicarious liability, Vanstone J stated that she was being guided by the judgment of Gleeson CJ in *Lepore*, noting that this was in accordance with the approach of the New South Wales Court of Appeal.<sup>1216</sup>

The plaintiff argued that the Bain's employment responsibilities established the 'close connection' between the abuse and his employment in the boarding house. These responsibilities included supervising the evening and bedtime routines of year 8 boarders (showering, going to bed, telling bedtime stories) and also socialising with boarders and fostering close relationships.<sup>1217</sup>

Vanstone J, however, stated that the plaintiff had proceeded on the 'fallacious' assumption that in carrying out his duties the things Bain did were that which he was required to do.<sup>1218</sup> There was evidence before her Honour that the prefects were primarily responsible for supervising the boarders in the boarding house and that other housemasters had not undertaken some of the supervisory tasks that Bain undertook. Her Honour concluded that 'there is simply insufficient evidence of a reliable nature about Bain's designated role – as opposed to assumed role – upon which to base a conclusion that what he did was done in the course of employment'.<sup>1219</sup>

Applying *Allsop P* in *Withyman*,<sup>1220</sup> Vanstone J went on to state that in any event 'although it may be accepted that when rostered on duty overnight Bain had a role which involved responsibility for and overall supervision of the boarding house,

that is very far from amounting to a duty to engage in intimate physical behaviour with a student'.<sup>1221</sup>

On this basis Vanstone J concluded that, even if she were 'to assume that Bain acted in accordance with the defendant's instructions in these activities, it would make no difference to my conclusion that the defendant is not vicariously liable for Bain's abusive conduct'.<sup>1222</sup>

As noted earlier, the plaintiff seeks to appeal the decision in this case.

## Non-delegable duty

A 'non-delegable duty' in tort law imposes an obligation on a person or corporation not merely to exercise reasonable care but also, where the performance of that duty of care is entrusted by the person or corporation to another, to ensure that reasonable care is taken by the other person or corporation.<sup>1223</sup> Although a non-delegable duty imposes obligations beyond the duty to exercise reasonable care oneself, it does not impose an absolute duty to prevent all harm to a third party.

Before the decision of the High Court in *Leighton Contractors Pty Ltd v Fox*<sup>1224</sup> (*Leighton*), the High Court was divided about whether a 'non-delegable duty' merely imposed a duty that had to be exercised personally and could not be delegated or whether it instead imposed a duty to ensure 'that reasonable care is taken'. In *Leighton*, the High Court unanimously adopted the second meaning.

The different positions were evident in the judgments in *Lepore*. Gleeson CJ, Gaudron, Kirby and Callinan JJ were of the opinion that non-delegable duties should be understood as having the first meaning. Only McHugh J and Gummow and Hayne JJ preferred the second meaning.

McHugh J said that ‘the duty to take reasonable care requires the education authority to ensure that the supervision of the children is carried out with reasonable care’.<sup>1225</sup> His Honour described the duty as one to ‘take reasonable care to ensure that the pupil is so supervised that he or she does not suffer harm’.<sup>1226</sup>

Gummow and Hayne JJ stated: ‘[a] duty to ensure that reasonable care is taken is a strict liability. There is a breach of the duty if reasonable care is not taken, regardless of whether the party that owes the duty has itself acted carefully.’<sup>1227</sup>

Gummow J had earlier said, in *Scott v Davis*, that ‘the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty’.<sup>1228</sup>

Notwithstanding their agreement on the fundamental elements of a non-delegable duty, McHugh J and Gummow and Hayne JJ disagreed on the issue of whether a non-delegable duty imposes responsibility for intentional wrongdoing by another. Gummow and Hayne JJ were of the

opinion that accepting that a breach of a non-delegable duty could occur through another’s intentional tort or intentional criminal conduct would involve an extension of the law of non-delegable duty that should be rejected.<sup>1229</sup>

McHugh J differed. His Honour said that it makes no difference whether another’s failure to take reasonable care occurs through negligence or through a criminal assault: ‘[t]he duty of the State was to take reasonable care for the safety of the plaintiff, and the assault by his teacher breached the duty to take reasonable care of him.’<sup>1230</sup>

Gleeson CJ accepted that the commission of an intentional tort could found liability for breach of a non-delegable duty. However, consistent with his view of the fundamental elements of the duty, this could only occur where there was a ‘failure to exercise reasonable care to prevent foreseeable criminal behaviour’.<sup>1231</sup> While Gaudron, Kirby and Callinan JJ did not consider this issue in detail, their analyses are compatible with the reasoning of Gleeson CJ. However, given that Gleeson CJ took an understanding of non-delegable duty that has been overtaken by the decision in *Leighton*, it is difficult to know what weight should now be given to this view.

Accordingly, the law is not clear as to whether a non-delegable duty can make a person liable for another’s *intentional* tort.

## 15.3 Overseas approaches to vicarious liability

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### Canadian approach

Vicarious liability is imposed more broadly in Canada than it is in Australia.

First, Canada does not restrict vicarious liability to the employer/employee relationship.<sup>1232</sup> The test is whether the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate.<sup>1233</sup> The courts have held that a bishop can be vicariously liable for a priest's sexual abuse of a child,<sup>1234</sup> but foster parents who sexually abused a child in their care were found to be too far removed from the government to justify holding the government vicariously liable for the abuse.<sup>1235</sup>

Secondly, Canada has moved away from a requirement that the tort be in the 'course of employment' towards a broader 'enterprise risk' theory of liability.

In *Bazley v Curry*,<sup>1236</sup> a non-profit organisation operated residential care homes for treating emotionally troubled children. An employee of the organisation sexually abused children at one of the homes. One of the children later sued the organisation for the employee's sexual assaults. The Supreme Court held that the organisation was vicariously liable for the sexual abuse. It said:

The employer puts in the community an enterprise which

carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.<sup>1237</sup>

The test is whether there is a 'significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires' (emphasis in original).<sup>1238</sup> In order for the employer to be vicariously liable, the enterprise and employment must *materially* enhance the risk in the sense of significantly contributing to it.<sup>1239</sup>

In *Bazley v Curry*, the Court identified five factors relevant to determining this question:

- the opportunity that the enterprise afforded the employee to abuse his or her power
- the extent to which the wrongful act may have furthered the employer's aims
- the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise
- the extent of power conferred on the employee in relation to the victim
- the vulnerability of potential victims to wrongful exercise of the employee's power.<sup>1240</sup>

The test of material enhancement of risk by the employment enterprise is much broader than the ‘course of employment’ test applied in Australia, but it can be difficult to apply.

This is apparent from the decision in *Jacobi v Griffiths*.<sup>1241</sup> The judgment in *Jacobi v Griffiths* was delivered on the same day as *Bazley v Curry*. The Supreme Court divided (4:3) on how to apply the test to a non-profit club that had the objective of promoting the health, social, educational, vocational and character development of children such as through after school and Saturday recreational activities on club premises and occasional outings. The program director of the club sexually abused the claimants and other children.

The majority held that vicarious liability was not established. Although the director’s job was to develop a positive rapport with children, no relationship of intimacy was actually encouraged by the club. In fact, the abuse occurred off club premises outside club hours – a practice that the club had prohibited.<sup>1242</sup> The majority said:

[The director] took advantage of the opportunity the Club afforded him to make friends with the children. His manipulation of those friendships is both despicable and criminal, but whatever power [the director] used to accomplish his criminal purpose for personal gratification was neither conferred by the Club nor was it characteristic of the type of enterprise which the [club] put into the community.<sup>1243</sup>

However, the minority found that:

- the club encouraged mentoring of children by adults in circumstances where no other adults were present
- the club’s goal of providing ‘behaviour guidance’ authorised the development of trusting and intimate relationships and therefore increased the risk of abuse
- the club positively encouraged the development of these intimate relationships
- there was significant power conferred on the employee in relation to victims
- the potential victims were vulnerable, particularly since they were ‘troubled adolescents’
- while the abuse occurred away from club premises, it did occur following the employee’s ‘careful plan of entrapment’, which he carried out while working in his job.<sup>1244</sup>

## United Kingdom approach

The law in the United Kingdom has long recognised that vicarious liability may exist outside the employer/employee relationship.<sup>1245</sup> The recent approach of the courts is to ask whether the defendant and the tortfeasor ‘stand in a relationship which is sufficiently analogous to employment’<sup>1246</sup> or are in a relationship ‘akin to employment’.<sup>1247</sup>

In *Various Claimants v Catholic Child Welfare Society*,<sup>1248</sup> the claimants had been sexually abused as children in a Roman Catholic residential school. They sought to sue a lay Roman Catholic Order – the Brothers of the Christian Schools, members of which had



been perpetrators. The Supreme Court held that it was enough ‘that the relationship between the teaching brothers and the institute was sufficiently akin to that of employer and employees to satisfy’ the requirement that there be a relationship between tortfeasor and defendant apt to possibly generate vicarious liability.<sup>1249</sup>

The Court said:

In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with [local Roman Catholic organisations], but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute’s rules.

The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far

from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.

Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of the employer and its employees.<sup>1250</sup>

In *E v English Province of Our Lady of Charity*,<sup>1251</sup> the Court of Appeal considered whether a Roman Catholic bishop could be vicariously liable for sexual abuse committed by a priest in a children’s home operated by a Roman Catholic order of nuns. A majority of the Court held that the bishop–priest relationship was akin to an employer–employee relationship and accordingly capable of giving rise to vicarious liability.

Lord Justice Ward asked ‘whether the relationship of the bishop and [the priest] is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable’.<sup>1252</sup> His Lordship said that the relationship was sufficiently close because of:

- the residual control the bishop retained to supervise the priest
- the highly organised character of the Roman Catholic Church
- how the priest’s role was wholly integrated into the organisational structure of the church’s enterprise
- the priest not being like an entrepreneur but being required by canon law to reside in the parochial house close to his church, like



an employee making use of the employer's tools of trade.<sup>1253</sup>

Lord Justice Davis referred to the bishop's capacity for control over the priest through his power to remove and transfer the priest. He emphasised that the priest was appointed and entrusted to further the bishop's religious aims and purposes.<sup>1254</sup>

Lord Justice Tomlinson dissented. His Honour did not think that it was appropriate to transpose concepts such as enterprise or benefit into the question of what relationships could generate vicarious liability.<sup>1255</sup>

Davis LJ said of the differing views:

[t]he divergence of viewpoints [between Ward and Tomlinson LJ] seems to be fashioned by competing attitudes as to the extent to which, as a matter of policy, an innocent defendant should (without fault) be made to bear responsibility for the wrongful acts of another.<sup>1256</sup>

The United Kingdom courts have also taken a much broader view than the Australian courts as to the conduct that is in 'the course of employment'.

In *Lister v Hesley Hall Ltd*<sup>1257</sup> (*Lister*), former boarding house residents sued the employer of the warden who had sexually abused them. The decision confirms that, in the United Kingdom, the 'course of employment' is capable of including sexual abuse. Four of five of the Law Lords approved a 'close connection' test for determining what will be in the course of employment but gave 'four different versions' of this test.<sup>1258</sup>

The Supreme Court of the United Kingdom has said:

[i]t is not easy to deduce from the *Lister case*... the precise criteria that will give rise to vicarious liability for sexual abuse. The test of 'close connection' approved by all tells one nothing about the nature of the connection.<sup>1259</sup>

The Supreme Court has recently clarified what the close connection test involves. In *Various Claimants v Catholic Child Welfare Society*,<sup>1260</sup> drawing on the Canadian approach discussed above, the Court said:

Starting with the Canadian authorities a common theme can be traced through most of the cases ... Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

These are the criteria that establish the necessary 'close connection' between relationship and abuse. ... Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.<sup>1261</sup>

## 15.4 Options for reform

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In the Consultation Paper, we noted that many of the submissions to *Issues paper 5 – Civil litigation* argued that the circumstances in which an institution could be liable for institutional child sexual abuse should be clarified and expanded.<sup>1262</sup>

In addition to support for the Canadian and United Kingdom approaches to vicarious liability discussed above, a number of the submissions supported the recommendations made by the Parliament of Victoria Family and Community Development Committee in its report *Betrayal of trust: inquiry into the handling of child abuse by religious and other non-government institutions*.

The committee made a finding that:

Because perpetrators of criminal child abuse in organisational settings derive their credibility from their association with the organisation, there is a need to recognise the legal obligation of organisations to reasonably ensure the safety of children who come into contact with their members. This includes implementing effective employment controls and adopting best practice in relation to risk management and prevention.<sup>1263</sup>

Based on that finding, the committee recommended:

That the Victorian Government undertake a review of the *Wrongs Act 1958* (Vic) and identify whether

legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse.<sup>1264</sup>

The committee put forward two possible options for reform:

- legislating a non-delegable duty of care in the Wrongs Act – for example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care
- including in the Wrongs Act a provision regarding vicarious liability based on the examples in the Victorian and Commonwealth discrimination legislation.<sup>1265</sup>

The reference to ‘Victorian and Commonwealth discrimination legislation’ is a reference to the *Equal Opportunity Act 2010* (Vic) and to the *Sex Discrimination Act 1984* (Cth). This legislation essentially reverses the onus of proof. If an employee or agent commits a relevant breach, the employer or principal is taken to have also committed the breach unless the employer or principal proves that it took reasonable precautions to prevent the employee or agent from committing the breach.

The Victorian Government has responded to the committee’s recommendation with support in principle.<sup>1266</sup> In the public hearing on redress and civil litigation, the representative of the Victorian Government told us that the government was going to consider civil litigation issues, including the recommendations of the committee on

vicarious liability, in a paper it will release either late this year or early next year.<sup>1267</sup>

In the Consultation Paper, we referred to discussion in our private roundtables and other consultations with survivor advocacy and support groups, institutions, governments, academics and insurers.<sup>1268</sup>

In these meetings, we put forward three possible options:

- Institutions could be limited to a duty to take reasonable care to prevent child sexual abuse of children in their care. This is the present position.
- Institutions could be made liable for child sexual abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent this abuse. This approach reverses the onus of proof, so that the institution is liable for the abuse unless it can prove that the steps it took to prevent abuse were reasonable in the circumstances.
- Institutions could be made liable for child sexual abuse committed by their employees or agents. This would establish absolute liability, so that institutions would be liable for the abuse regardless of any steps they had taken to prevent it.

In the Consultation Paper, we reported that there was some support for the third option of absolute liability, but in our consultations participants generally favoured the second option of the reverse onus of proof.<sup>1269</sup>

We stated that the third option of absolute liability would be more straightforward for

survivors.<sup>1270</sup> A survivor would need to prove that they were abused by an employee or agent of the institution, but they would not need to prove that the institution's conduct caused or allowed the abuse to occur or that the institution could or should have taken steps to prevent the abuse.

However, we also recognised that absolute liability would be considerably more onerous on institutions in that it would not require any fault or failing on the part of the institution.<sup>1271</sup> If abuse occurred then, even if an institution had taken every action possible to prevent abuse, the institution would be liable. This might suggest that, if an absolute duty were to be favoured, it may be appropriate to apply it only to a fairly narrow range of institutions. For example, it might be reasonable to apply an absolute duty to residential institutions, but it might not be reasonable to apply it to foster care agencies. It might be reasonable to hold foster care agencies liable if they fail to adopt and apply adequate policies and procedures, but it might not be reasonable to hold them liable in the absence of any fault or failing on their part given that they do not control the foster home environment.

We also discussed the issue of whether any change in the duty of institutions should apply prospectively only or retrospectively.<sup>1272</sup>

We noted that applying a new duty to institutions that applies to past conduct may not be appropriate, regardless of which option is preferred.<sup>1273</sup> It is likely to expand significantly institutions' potential liability. It is also not clear why, if this approach was adopted, it would be necessary or efficient to invest in establishing a redress scheme or schemes, because any redress schemes

might be undermined by the much more ready availability of compensation through civil litigation. Institutions might face significant difficulties in trying to produce documents and witnesses to give evidence about their past practices, which potentially relate to periods a number of decades ago, in order to attempt to discharge the reverse onus of proof.

We also noted the risk that survivors might have their expectations raised unrealistically, particularly as the ‘reasonable precautions’ required of an institution would reflect what was reasonable at the time the abuse occurred, not what would be accepted as reasonable today.<sup>1274</sup>

We suggested that, if a broader duty were to be favoured in combination with the removal or substantial extension of the limitation period and if these changes were to be made retrospective, it may be necessary to consider whether the damages available to a claimant should be limited.<sup>1275</sup> For example, damages could be limited to the categories of non-economic loss and the cost of any future counselling and psychological or psychiatric care. This might avoid some of the difficulties inherent in assessing causation of loss or damage many years after the abuse.

## 15.5 What we have been told

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In the Consultation Paper we particularly sought submissions on the options for reforming the duty of institutions and whether any changes should apply retrospectively.<sup>1276</sup>

In submissions in response to the Consultation Paper, there was little support

for the first option, which maintains the present position without an accompanying option, such as reversing the onus of proof or imposing absolute liability on institutions.

Consistent with our private roundtables and other consultations, a number of submissions to the Consultation Paper favoured the second option – reversing the onus of proof.<sup>1277</sup> Some submissions stated that reversing the onus of proof had the potential to promote good governance and risk mitigation by institutions because they would have to put in place rigorous checks and balances to ensure that, if called upon, they can discharge the onus.<sup>1278</sup>

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted:

NATSILS favours the second option, namely that institutions are liable for child sexual abuse committed by their employees or agents unless the institution can prove it took reasonable precautions to prevent this abuse. This option is fair and reasonable to both survivors and institutions but also serves to encourage institutions to actively adopt child safe processes and procedures.<sup>1279</sup>

In the public hearing, Mr Morrison SC, representing the Australian Lawyers Alliance, was asked whether, if the onus of proof was reversed, it would prove difficult for institutions to discharge the obligation of proving that they exercised reasonable care. He said:

In some quite old cases that might be so, but even in Rundle, for

example, which was a case from the early 1960s, there was evidence around. ...

My suspicion is it might make some difference but not an enormous difference, because it doesn't, on the face of it, appear that too many cases fail on the evidentiary hurdle.<sup>1280</sup>

Some submissions supported the third option of absolute liability but noted that it would be considerably more onerous on institutions. Some suggested that reversing the onus of proof would be a good compromise. Some submissions suggested that absolute liability might be so onerous to institutions as to have some undesirable consequences.

For example, knowmore submitted:

Absolute liability sends a zero-tolerance message to institutions and should encourage institutions to adopt highly proactive, risk-averse and robust preventative measures. However, several issues also arise here. First, while risk averse behavioural changes are highly desirable in most instances, there may be some unintended consequences. For example, institutions might further under-report abuse or even actively deter children from disclosing abuse (there being more at stake); institutions might stop employing men in child-related employment or avoid providing crucial services or activities to children or specific groups of vulnerable children, such

as children with a disability, that give rise to unmanageable risks; or governments might take legislative steps to sever their responsibility over (and liability for) children in need of care and protection.

Secondly, institutions might not be able to obtain, at reasonable rates, insurance cover for absolute liability, unless proactive, risk-averse and robust preventative measures can be demonstrated to insurers. Thirdly, despite the threat of absolute liability and benevolent motivations, some institutions will simply lack the financial and staffing capacity to adopt highly proactive, risk-averse and robust preventative measures, thereby enabling them to obtain insurance; or guidance on such measures might be lacking, as found by the Victorian Committee.<sup>1281</sup> [References omitted.]

Some submissions favoured imposing an absolute liability on certain institutions but favoured a reverse onus of proof for other types of institutions. For example, in its submission in response to the Consultation Paper, Kelso Lawyers suggested:

[Absolute liability] should be applied to as broad a selection of institutions as possible, and should at least include those institutions that offer to accommodate children over night on premises controlled by the institution – residential institutions as described in the Consultation Paper.

For institutions responsible for abuse where a child has not spent a night on their premises, reversing the onus of proof so that institutions must demonstrate that they took all reasonable precautions to prevent abuse would be appropriate. Liability for such institutions should be presumed in the case of abuse by any person the child comes into contact with through that institution, unless the institution has taken active steps to prevent that person from having contact with children.<sup>1282</sup>  
[Reference omitted.]

The Survivors Network of those Abused by Priests (SNAP) Australia submitted:

The current approach to vicarious liability and duty of care/negligence is confusing. If clarified, this could function as a mechanism to force institutions to take their child protection responsibilities seriously.

SNAP supports reform to specifically include within the scope of vicarious liability all the major roles, such as priests and other religious, that have been exploited or might be expected to be exploited by sexual predators.

SNAP supports institutions being held absolutely liable for child sexual abuse by their employees or agents in certain circumstances, such as residential care or boarding schools, and in all other circumstances liable unless able to prove they took reasonable

precautions to prevent abuse. An institution exhibiting a culture of minimising, ignoring or covering up child sexual abuse should result in absolute liability.<sup>1283</sup>

Some submissions opposed subjecting different institutions to different duties. For example, the Truth, Justice and Healing Council supported the reverse onus of proof but submitted that such a change must apply 'to all institutions, both non-government and government'.<sup>1284</sup>

Other submissions argued that absolute liability be imposed on some types of institutions. For example, knowmore submitted that absolute liability should be imposed only on institutions that:

- a. receive government funding (e.g. public authorities, public and private schools);
- b. provide services or conduct activities that, according to evidence-based research, are accepted to pose high level risk of children being sexually abused (e.g. out-of-home care, especially residential care and foster care, boarding schools, immigration detention, juvenile justice centres);
- c. cater to or care for vulnerable groups of children, according to evidence-based research (e.g. children in care, children with disability and Aboriginal and Torres Strait Islander children); and

- d. have demonstrated systemic, cultural failure (e.g. some religious organisations).<sup>1285</sup>  
[Reference omitted.]

In his submission in response to the Consultation Paper, Professor Parkinson submitted that institutional liability should not include liability for the actions of volunteers. He submitted:

Regrettably, much of the abuse that does occur in institutional settings is result [sic] of abuse by volunteers; however the risks involved in extending a form of vicarious liability to volunteers in my view outweigh the benefits of ensuring a more comprehensive coverage to provide civil compensation for victims.

As Andrew Leigh, the federal MP and former ANU Professor of Economics, has shown in his book *Disconnected*, there has been a significant loss over many years in the social capital that comes from community organisations. There has been a massive decline over the last century in regular church attendance, involvement in organisations such as Rotary or the Lions, and other forms of community engagement. This has coincided with greatly increased levels of family breakdown. The consequences for the health of the community as a whole have been serious.

I would be very concerned indeed if the result of attempting to provide better remedies for victims of child sexual abuse – a very laudable

objective – were to drive voluntary organisations out of providing the facilities for children which are so important in the community. An example of this would be the various sports organisations that exist in every community providing multiple age-based teams and which are the major providers of sport for children and young people. Churches also are in the vanguard of providing important services to the community in terms of mothers and toddlers playgroups, holiday activity camps and the like. If the fear of liability drives out volunteers and voluntary organisations, then the whole community will be much the worse for it.<sup>1286</sup>

Some submissions opposed legislating circumstances in which an institution will owe a survivor a duty of care and supported allowing the common law to develop the duty on a case-by-case basis. For example, the South Australian Government submitted:

The State would point again to the possible pitfalls of attempting a legislative prescription of circumstances in which vicarious liability should apply and that it might be preferable to allow the matter to develop at common law on a case-by-case basis. For example, certain situations have been excluded from giving rise to vicarious liability where the only connection between the employment and the employed perpetrator was that the employment provided the



perpetrator with the opportunity of access to children and where the imposition of vicarious liability upon the institution for the acts of foster families may be inconsistent with the nurturing of an independent family environment.<sup>1287</sup>  
[Reference omitted.]

Some submissions supported the adoption of the Canadian and the United Kingdom approaches to vicarious liability in Australia.

For example, submissions from the Australian Lawyers Alliance and the NSW Bar Association commended the ‘close connection’ approach to vicarious liability adopted in Canada and the United Kingdom as the way forward for law reform of the duty of institutions for child sexual abuse.<sup>1288</sup>

Mr Morrison SC, representing the Australian Lawyers Alliance, told the public hearing:

The Commissioners will be aware of the various Supreme Court of Canada decisions in *Bazley* and in *Jacobi*, the House of Lords decision in *Lister*, and what was most recently said by Lord Phillips, speaking for the Supreme Court in England, the successor to the House of Lords, in *Catholic Child Welfare Society v Various Claimants* and the *Institute of the Brothers of the Christian Schools & Ors*.

The close connection test, which was espoused there, seems to us to offer a way forward and it is not very different from what was said in the High Court in *Lepore* by Chief Justice Gleeson. The problem in that

case is that there was what was described in the Supreme Court in England as a bewildering variety of analysis. That would be the understatement. The majority of four gave four different reasons for leaving Mr Lepore’s claim alive and remitting it to the Court of Appeal to re-determine, but the close connection test, at least as espoused in *Lister* or as espoused in the various claimants’ case, would seem to us to be the way forward.<sup>1289</sup>

Mr Morrison also told the public hearing:

The High Court ultimately did not decide the limits of vicarious liability in *Lepore*. In fact, the Chief Justice expressly said that he limited his comments to the particular circumstances, which was a teacher in a government school. He wasn’t dealing with the wide range of things, although he discussed the Canadian and the House of Lords decisions in some detail.

The common law in Australia hasn’t had a case since 2003 to further develop along the lines that the law has developed in Canada and in England and Wales.

My suspicion – my hope – would be that the overseas developments would be followed in the High Court, but I would be rather hoping that the Royal Commission would anticipate that development because it would not be inconsistent with what was said by



the majority in Lepore; rather, it would be a simple extension of the approach that the Chief Justice was discussing and, to put that test into words, I think, would not be beyond the capacity of careful legal drafting.<sup>1290</sup>

Some submissions in response to the Consultation Paper opposed any reforms to the duty of institutions being retrospective.<sup>1291</sup> For example, the Tasmanian Government submitted:

The State does not support a new duty on institutions in respect of past conduct. Retrospectivity in relation to a duty will significantly expand an institution's potential liability and institutions will inevitably face considerable prejudice to proceedings when trying to produce evidence to discharge their onus for an action that arises decades ago.<sup>1292</sup>

Some submissions cautioned against legislative reform because of the effects they said it would have on the accessibility of insurance.

The Insurance Council of Australia submitted:

Institutions, businesses or organisations whose activities involve children are, from an insurance perspective, a high underwriting risk. Children, because of their age, level of development and experience in life, are more vulnerable to injury or abuse. As such, institutions that provide care

and services to them are already subject to a more onerous standard of care and supervision than other service providers and organisations that do not have any direct association with children.

For example, a 'reasonable' level of supervision schools and their employees are required to have of their students is higher than the level of supervision a business or manager is required to have over their office employees.

Consequently, public liability premiums for these institutions are likely to be substantially higher than other institutions to reflect this more onerous duty of care and the increased liability exposure this brings.

Given the high underwriting risk, some insurers in the Australian market have elected not to offer insurance in this segment of the market.

For insurers who do provide liability insurance to these institutions, liability coverage for sexual abuse committed by employees (or people in the institution's control) is typically excluded in the standard policy and only provided as an 'extra' form of coverage for which an insured must pay additional premium. ...

Expanding the circumstances in which institutions could be found liable for institutional child abuse

could further increase the underwriting risk and uncertainty for insurers who operate in this sector of the insurance market – and this would be reflected in higher insurance premiums.

It is in the interests of the community and institutions that insurance coverage for this kind of risk is available and affordable.<sup>1293</sup>

During the public hearing, an exchange took place between the Chair of the Royal Commission and Mr Whelan, representing the Insurance Council of Australia, as follows:

THE CHAIR: The common law and the rules that establish liability, be they common law or statute, have been used for all time as a means of imposing discipline upon the behaviour of individuals and institutions in the community; I think that's accepted, isn't it?

MR WHELAN: Mmm-hmm.

THE CHAIR: The underwriting then of insurance to insure the individual or the institution is a way of endeavouring to provide financial stability in the community when there is a transgression of the duty that the institution or individual owes; is that correct?

MR WHELAN: Yes.

THE CHAIR: For the insurance industry that really becomes a question of the dollars, 'What do you want?' And you then say, 'How much will it cost?'

MR WHELAN: Yes.

THE CHAIR: And although, if you change the rules, obviously, there may be a change in the premium structure, it's a community question as to whether or not that is a good thing having regard to the change which you may get in institutional or individual behaviour.

MR WHELAN: Yes.

THE CHAIR: Now, looking forward, as I think you point out, it is just a question of what is the cost of providing the insurance which the institutions may need in the context in which we are talking.

MR WHELAN: Yes.

THE CHAIR: I don't think there is any suggestion that the insurance industry would entirely walk away from the sector, is there?

MR WHELAN: Yes, that's right.

THE CHAIR: Can you tell me, then, in light of that, do you know of the experience in England since the Supreme Court changed some of the rules?

MR WHELAN: Regrettably, no, judge. We have begun some inquiries there, but it may be early days in terms of the implications for insurance. This will take some time to flow through to actual cases ...<sup>1294</sup>

## 15.6 Discussion and conclusions

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### Rationale for the imposition of institutional liability

As discussed above, our thinking about reform of this area of the law has developed through our issues papers, roundtable consultations, the Consultation Paper and submissions to it, and the public hearing.

Following the public hearing, Commissioners have given further consideration to whether we should recommend that state and territory governments should introduce legislation to create vicarious liability in institutions for the criminal act of sexual assault by their members or employees. We have also considered whether, as an alternative, legislation should be introduced to impose a non-delegable duty on institutions.

Throughout our consultations, the discussion was always informed by an understanding of the approach that had been taken to this issue by the Australian High Court and in Canada and England. In general, although in *Lepore* in the Australian High Court the majority effectively rejected any change in the law, the minority judges, McHugh<sup>1295</sup> and Kirby<sup>1296</sup> JJ, and in part Gleeson CJ,<sup>1297</sup> accepted that, always depending on the facts of a particular case, an institution may be liable to a child for the damage occasioned by the criminal act of sexual abuse.

The starting point for the discussion is a recognition that, as with all of the principles developed by the common law, the choice

for the judges requires them to establish a position in respect of a matter of ‘policy’. The question can be framed in many ways, but in essence it is whether the court believes it to be appropriate to adopt a particular policy position. It may be justified for one or a number of reasons.

As Lord Macmillan stated in *Donoghue v Stevenson*, ‘[t]he conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life’.<sup>1298</sup>

Similarly, Justice McHugh has said:

Law is a social instrument – a means, not an end. As society changes, so must the instruments which regulate it. The unprecedented rate of change in Australian society in recent years has meant many of the rules of law and, indeed, the wider principles that lie at the back of them are unjust or inefficient. Moreover, rapid change means that conflicts arising from novel situations and which call for adjustments by the judicial process are often not covered by the existing rules. If law is to serve its purpose, its rules and principles must be periodically examined and, if necessary, amended.<sup>1299</sup>

In 1999 in *Bazley v Currie*<sup>1300</sup> the Supreme Court of Canada observed that courts were increasingly being confronted by issues of vicarious liability in situations where no clear precedent existed to guide them.<sup>1301</sup> The Court determined that if, after examining the authorities, there were no cases that

‘unambiguously determine[d]’ whether liability should lie, the next step was to ‘determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability’.<sup>1302</sup>

The Court indicated that ‘vicarious liability has always been concerned with policy’,<sup>1303</sup> but to focus on policy was not to diminish the importance of principle. The Court said:

in areas of jurisprudence where changes have been occurring in response to policy considerations, the best route to enduring principle may well lie through policy. The law of vicarious liability is just such a domain.<sup>1304</sup>

In the search for appropriate principle, the Court said:

[u]nderlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer’s enterprise creates or exacerbates.<sup>1305</sup>

In the Supreme Court’s view, ‘[v]icarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires’ (emphasis in original).<sup>1306</sup>

The Court found a duty of care in *Bazley v Currie*. The Court identified two key policy considerations.

The first was the provision of a just and practical remedy for harm suffered; the Court recognising that ‘[t]he idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law’.<sup>1307</sup> Compensation should be effective and fair. Vicarious liability improves the chance that a victim can recover against a solvent defendant.<sup>1308</sup> It was said to be fair in that, when risks introduced by the employer materialise and cause injury despite the reasonable efforts of the employer, the person or organisation that creates the risk bears the loss.<sup>1309</sup> This position is buttressed by the fact the employer is often in the best position to spread loss through mechanisms such as insurance and higher prices.<sup>1310</sup>

The second consideration was deterrence of future harm. The Court was of the view that imaginative and efficient administration and supervision can reduce the risks introduced by the employer in conducting their enterprise.<sup>1311</sup>

In *Jacobi v Griffiths*,<sup>1312</sup> the Supreme Court reiterated those considerations.

In that case, however, the majority determined that policy considerations, and prior authority, weighed against the imposition of liability. The majority stated:

The ‘enterprise risk’ rationale holds the employer vicariously responsible because, however innocently, it introduced the seeds of the potential problem into the community, or aggravated the risks that were already there, but only if its enterprise *materially* increased the risk of the harm that happened.

Once materiality is established under the ‘strong connection’ test, the imposition of no-fault liability is justified under the second phase of the analysis, as set out in [*Bazley v Currie*] by policy considerations, including in particular:

- a. Compensation; and
- b. Deterrence.<sup>1313</sup>  
[Emphasis in original.]

In that case the majority stated that the policy considerations of compensation and deterrence need to be balanced with a measure of fairness to employers and adherence to legal principle, as, standing alone, those considerations will generally favour the imposition of liability.

The courts have been constrained by these competing social objectives.<sup>1314</sup> In *Jacobi v Griffiths*, involving as it did a non-profit recreational organisation dealing with children, the majority were concerned that, if liability were imposed, similar organisations may be concerned that despite the taking of reasonable precautions and through no fault of their own they are liable for unforeseen criminal activity. In these circumstances ‘the *rational* response of such organizations may be to exit the Children’s recreational field altogether’ (emphasis in original).<sup>1315</sup> The majority stated that courts should not be blind to societal ramifications.<sup>1316</sup> Where the policy justifications are weak, such as in the situation of an organisation that does not conduct its business for profit, the majority believed that an employer is entitled to insist that the strong connection test should be applied firmly.<sup>1317</sup>

The Supreme Court of Canada continues to apply the policy considerations informing the doctrine of vicarious liability identified in

*Bazley v Currie* and *Jacobi v Griffiths*.

In *Doe v Bennett*,<sup>1318</sup> the Court found a diocesan episcopal corporation vicariously liable for the sexual abuse committed against a number of boys by a priest. The Court stated:

Vicarious liability is based on the rationale that a person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration.<sup>1319</sup>

In *Blackwater v Plint*,<sup>1320</sup> the Supreme Court held both Canada and the United Church of Canada vicariously liable for the abuse committed against children by a dormitory supervisor working in an Indian residential school. Aboriginal children had been taken from their families pursuant to the Indian Act and sent to the school. The Court stated:

Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires. ... The fact that wrongful acts may occur is a cost of business. The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence.<sup>1321</sup> [References omitted.]

A similar position has emerged in the United Kingdom. In *Lister*,<sup>1322</sup> a number of judges of the House of Lords referred favourably to decisions of the Supreme Court of Canada in *Bazley v Currie* and *Jacobi v Griffiths*<sup>1323</sup> The clearest statement is made by Lord Millet, who said that vicarious liability was 'best understood as a loss-distribution device'.<sup>1324</sup> His survey of the academic writing on the topic revealed:

[The writings ] are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact, the employer ought to be liable ... He is liable only if the risk is one which experience shows is inherent in the nature of the business.<sup>1325</sup>

Lord Millet considered that this proposition formed the 'unspoken rationale' of the principle of vicarious liability that liability is confined to torts committed in the course of employment.<sup>1326</sup> He held that liability in that case was in accordance with both principle, as discerned from the cases, and the underlying rationale of the doctrine:

Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in

close proximity to them and occupying a position of trust.<sup>1327</sup>

The Canadian approach has been accepted by only one judge of the Australian High Court. In *Lepore* Kirby J stated that he found the enterprise risk approach of the Canadian Supreme Court persuasive, noting its foundation in the idea that profit-making enterprises should bear the cost of the risks those operations introduce or exacerbate.<sup>1328</sup> Kirby J considered that the same analysis could be applied to an organisation such as a public school: as schools benefit the community through the benefits they provide students, the broader tax-paying community should bear the cost of any risks established as closely associated with their operation.<sup>1329</sup> His Honour said that the issue of liability should be examined from the perspective of the victims.<sup>1330</sup>

Kirby J considered that the Canadian and English courts, in establishing the 'close connection' test, had not departed from precedent but had 'merely developed and elaborated the traditional approach'.<sup>1331</sup> His Honour favoured this broader 'connection' analysis. He concluded that sexual assault could be said to occur in the course of employment; the risk of sexual assault was 'arguably inherent in close intimacy between adults and vulnerable children that may arise in the specific circumstances of a school setting'.<sup>1332</sup>

More recently in *Various Claimants v Catholic Child Welfare Society*,<sup>1333</sup> Lord Phillips identified that, since *Lister*, the concept of risk had begun to permeate the decisions of UK courts in relation to the doctrine of vicarious liability, both within and outside of the sexual abuse context.<sup>1334</sup>

This can be seen in the decision of the Court of Appeal in *Maga v Archbishop of Birmingham & Anor*<sup>1335</sup> (*Maga*), in which the Birmingham Archdiocese was held to have been vicariously liable for the sexual abuse of a boy by a priest. Lord Phillips recognised that, in the leading judgment in *Maga*, Lord Neuberger MR had held that both the *Lister* ‘close connection’ test and the Canadian ‘material increase of risk test’ had been satisfied.<sup>1336</sup>

It is important in our consideration of these issues that Lord Phillips observed that changes had occurred in the way that society responded to the sexual abuse of children. Child sexual abuse is now recognised as a ‘widespread evil’ and legislation had been amended to facilitate the screening of persons who work with young people.<sup>1337</sup> He stated that whilst it was said in *Lister* that cases of sexual abuse by an employee should be approached in the same way as other cases in the vicarious liability context:

None the less the courts have been tailoring this area of the law by emphasising the importance of criteria that are particularly relevant to this form of wrong. In this way the courts have succeeded in developing the law of vicarious liability so as to ensure that a remedy for the harm caused by abuse is provided by those that should fairly bear that liability.<sup>1338</sup>

In his survey of the authorities Lord Phillips recognised that a ‘common theme’ emerged, that theme having its genesis in the Canadian decisions of *Bazley v Currie* and *Jacobi v Griffiths*. He expressed that theme in the following way:

Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.<sup>1339</sup>

The establishment of a relationship with an element of protection is also a factor that some judges have identified as relevant to the imposition of liability.

In *Lister*, Lord Clyde observed that in the case ‘where the employer has been entrusted with the safekeeping or the care of some thing or some person and he delegates that duty to an employee ... it may not be difficult to demonstrate a sufficient connection between the act of the employee, however wrong it may be, and the employment’.<sup>1340</sup>

Similarly, in *Lepore Gleeson* CJ said:

When the specific responsibilities of an employer relate in some way to the protection of person or property, and an intentional wrongful act causes harm to person or property, then the specific responsibilities of a particular employee may require close examination.<sup>1341</sup>



Other judges have identified that particular organisations operate to create relationships that have particular qualities, or create particular risks, that might favour the imposition of liability for harm caused by the employee of an organisation of that class.

As discussed above, in *Lister* Lord Millet identified that particular types of organisations, such as boarding schools, contain within them an inherent risk that sexual assault may be committed against a resident by an employee with authority over them.<sup>1342</sup> Similarly Lord Hobhouse of Woodborough stated that there is a class of cases ‘where the employer, by reason of assuming a relationship to the plaintiff, owes to the plaintiff duties which are more extensive than those owed by the public at large’.<sup>1343</sup> Schools were an example of an institution where this ‘special relationship’ might be found.<sup>1344</sup> An employer’s liability derives from their ‘voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant’.<sup>1345</sup>

In *Lepore*, Gummow and Hayne JJ recognised that the judgments of Lord Millet and Lord Hobhouse in *Lister* ‘ha[d] strong echoes of non-delegable duties’.<sup>1346</sup> This approach has been adopted by some judges to impose liability on employers for the deliberate criminal acts of their employees.

In *Commonwealth v Introvigne*, Mason J, in the negligence context, held that a school authority owes ‘a duty to ensure that reasonable steps are taken for the safety of children, a duty the performance of which cannot be delegated’.<sup>1347</sup>

Mason J took the same approach in *Kondis v State Transport Authority*.<sup>1348</sup> In that case his Honour acknowledged that the concept of a non-delegable duty had been criticised for departing from the basic principles of negligence. However, it was appropriate to impose a more stringent duty when the classes of cases in which this duty had been recognised were examined.<sup>1349</sup> His Honour stated:

The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances ... The school authority undertakes special responsibilities in relation to the children whom it accepts into its care ... In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.<sup>1350</sup>

McHugh J decided *Lepore* on the basis that New South Wales owed a non-delegable duty of care to a pupil in a state-run school. McHugh J held that the State was liable ‘even if the teacher intentionally harms the pupil’.<sup>1351</sup> The State could not ‘avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a criminal offence’.<sup>1352</sup> His Honour stated that the High Court had previously held that a duty will be non-delegable ‘whenever a person has undertaken the supervision



or control of, or has assumed a particular responsibility for, the person or property of another in circumstances where the person affected might reasonably expect that due care would be exercised'.<sup>1353</sup> In *Commonwealth v Introvigne* the Court had recognised that the duty that a school authority owed to a pupil was non-delegable.<sup>1354</sup> However, the duty was not an absolute duty to prevent harm; it was a duty 'to take reasonable care to ensure that the pupil is so supervised that he or she does not suffer harm'.<sup>1355</sup>

*Lepore* was an appeal from a decision of the New South Wales Court of Appeal.<sup>1356</sup> A majority of that Court had also sourced the liability of the State of New South Wales in the non-delegable duty owed by a school authority to a pupil. Mason P acknowledged that in cases such as the one before them policy arguments could be mounted both for and against the imposition of liability.<sup>1357</sup> However, his Honour recognised that, in many areas of tort law, the person who introduces the risk incurs a duty to those who might be injured and referred to the deterrent effect the imposition of liability might have.<sup>1358</sup> His Honour quoted Professor Swanton, who said:

the argument against imposing liability on the master for wilful or even selfish wilful torts, based on unfairness to the master, loses force when it is remembered that *all* vicarious liability is strict in any event; that few employers bear the cost of accident losses personally ... and that, though the master may be morally innocent, so too is the plaintiff, and thus the contest is between two equally innocent parties.<sup>1359</sup> [Emphasis in original.]

Mason P held that the State's non-delegable duty stemmed from the fact that children were entrusted into the virtually exclusive care of the educational authority during school hours and on school grounds. His Honour considered that there were no compelling policy reasons for the scope of that duty not to extend to protecting the pupil from intentional as well as negligent wrongs committed by those put in charge of pupils.<sup>1360</sup>

Davies AJA agreed with Mason P<sup>1361</sup> and added:

Under the law of torts, in a case where there is a non-delegable duty of care, the principal is responsible for acts and omissions of an agent which result in a failure on the part of the principal to take reasonable care for the safety and well-being of the person to whom the duty of care is owed. I agree with the President that it matters not that the act or omission on the part of the agent may have been an intentional and unauthorised act of the agent, provided that it resulted in a failure on the part of the principal to fulfil its duty.<sup>1362</sup>

## A new statutory duty

From this discussion it is now apparent that in both the UK and Canada the law has accepted that an institution will be vicariously liable for the criminal acts of its members or employees that cause harm to children because either:

- the act causing harm was so closely connected to the tortfeasor's

employment that it is fair and just to hold the employer liable

- in the operation of its enterprise the employer has created or significantly increased the risk of their employee causing harm.

In Australia, although Kirby J would have imposed vicarious liability, this has not, or at least, as yet been generally accepted. However, McHugh J, Mason P and Davies AJA would impose liability finding a non-delegable duty. Whether Mason J would extend the doctrine to a deliberate criminal act is unclear.

To our minds it is time that Australian parliaments moved to impose liability on some types of institutions for the deliberate criminal acts of members or employees of the institution as well as for the negligence of those members or employees.

Although the duty has previously been discussed as a concept of 'absolute liability', it is more appropriate to describe it, as Gummow and Hayne JJ did in *Lepore* as one of 'strict liability'. An institution should be liable for damage occasioned by an accident or event that is the result of a failure to exercise reasonable care. That failure extends to both negligent and deliberate acts.

A non-delegable duty is a personal duty borne by the institution. It cannot be delegated. Where this duty is recognised, the institution must ensure that reasonable care is taken by those to whom it entrusts the performance of its duty of care. Sexual abuse of a child is the deliberate act of the perpetrator. It is the antithesis of the taking of reasonable care. Where a person associated with an institution fails to take

reasonable care of a child in the care and control of that institution, by that person committing a criminal act against the child a strict liability regime will impose liability on the institution for that failure.

To our minds it would be reasonable to impose liability on any residential facility for children, any school or day care facility, any religious organisation or any other facility that is operated for profit that provides services for children and that involves the facility having the care, supervision or control of children for a period of time. We do not believe that liability should be extended to not-for-profit or volunteer institutions generally – that is, beyond the specific categories of institutions identified. To do so may discourage members of the community from coming together to provide or create facilities that offer opportunities for children to engage in valuable cultural, social and sporting activities.

We believe, as did Mason P and Davies AJA and as is inherent in McHugh J's decision, that policy considerations require that outcome. It would ensure that compensation is available for harm and provide a capacity for institutions to spread their loss through mechanisms such as insurance. The deterrent effect of the imposition of liability and the discipline it would impose on the management of institutions would be the most effective means by which a community could endeavor to ensure the safety of children in the care of another.

We have only come to this conclusion after careful and detailed consideration of the issues. We have been influenced by the decisions of the courts in which strict liability has been recognised. If the law

makes a solicitor liable for the criminal act of his clerk<sup>1363</sup> and the dry cleaner liable for the criminal act of his employee,<sup>1364</sup> could it be argued that it is not appropriate for institutions to be liable for the criminal abuse of a child when in their care? If the protection of an individual's property is an important priority of the common law, the protection of children should at least have the same priority. In our opinion the community would today expect that the care of children should attract the highest obligation of the law.

As Lord MacNaghten said in *Lloyd v Grace Smith & Co*, when referring to the solicitor's clerk:

Who is to suffer for this man's fraud? The person who relied on Mr Smith's accredited representative, or Mr Smith, who put this rogue in his place and clothed him with his own authority?<sup>1365</sup>

The principle in relation to property was recognised centuries ago when, in *Hern v Nichols*, Sir John Holt said 'somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger'.<sup>1366</sup> In our opinion, it is time the same principle applied to the care of children.

Arguments that this would be unfair, favouring the individual to the detriment of the institution, lose their force when it is recognised that choice is one between two innocent parties – the survivor and the institution. However, in determining the institutions on which the liability should be imposed, we have distinguished

between particularly high-risk institutions and institutions that are operated for profit (on the one hand); and other-not-for-profit institutions (on the other hand). This recognises the costs that the liability will impose on institutions, including through the cost of insurance.

We consider it undesirable to impose the liability on not-for-profit institutions that are not providing particularly high-risk services because the risk of liability, or the cost of insuring against it, may force them to cease providing services and activities for children. Many community-based not-for-profit or volunteer institutions offer opportunities for children to engage in cultural, social and sporting activities.

There may be some in the community who believe that a change of this nature should be left to the High Court to determine. We do not agree with that view. Given how the law has developed in the United Kingdom and Canada, and given the support for imposing liability that some Australian judges have expressed, it seems to us very likely – if not inevitable – that, in the absence of legislative action, the courts will recognise and impose this liability. If the courts do this through the development of the common law, the liability will apply retrospectively to abuse that has already occurred. This is the position in the United Kingdom. In our opinion this would not be appropriate.

If the change is made by statute, the injustices that may arise if the change is left to the common law can be avoided. In particular, the burden that retrospective change would impose on insurers or institutions that will not have insured against this liability can be avoided.

If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend in Chapter 14, relevant institutions would face potentially large and effectively new liability for abuse that has already occurred, potentially over many previous decades. Even if it were possible to obtain insurance in respect of retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred.

An argument sometimes raised against imposing strict liability on a party is that it removes any incentive for the party that might be liable to prevent the event occurring. That is, if a party will be liable for the event even if it has taken all possible steps to prevent the event then there is no incentive for it to take any steps to prevent the event.

This argument is misconceived. If an institution takes steps to prevent abuse, it will reduce its potential liability. The more effective those steps are at preventing abuse, the more the institution's potential liability will be reduced. It is true that, even if the institution adopts best practice in every respect in relation to abuse, under strict liability it will still be liable for any abuse that does in fact occur. However, the effectiveness of its practices will ensure that this liability is considerably lower than it would be if the institution took no steps to reduce abuse. Any insurer that provides insurance in respect of a strict liability is also likely to require that the institution take all reasonable steps to prevent abuse.

In response to our Terms of Reference, we have framed the recommended duty by reference to child sexual abuse. However, governments could apply the duty more broadly to include acts such as criminal physical or psychological abuse that causes damage to a child.

We consider that the statutory duty should apply to institutions that operate the following facilities or provide the following services. The duty should be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:

- residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
- day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
- disability services for children
- health services for children
- any other facility operated for profit that provides services for children that involve the facility having the care, supervision or control of children for a period of time
- any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.

We are satisfied that the duty should not

apply to foster care or kinship care. We recognise that children in these forms of care can be at high risk of experiencing child sexual abuse. However, the institution that arranges foster care or kinship care does not have the degree of supervision or control of the foster care or kinship care home environment to justify the imposition of a non-delegable duty. We are carrying out extensive work in relation to out-of-home care, including foster and kinship care. We will make recommendations to address risks in these forms of care, including in relation to the selection and supervision of carers and the monitoring of care placements, through this work. Some of our recommendations in other areas, such as in working with children checks, will also help to address risks in foster and kinship care.

Furthermore, as discussed below, we recommend that the reverse onus of proof apply to foster care and kinship care. We consider that this change will help to encourage higher standards of governance and risk mitigation in institutions that provide foster care and kinship care.

We are also satisfied that the duty should not apply to community-based not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities. As discussed above, these institutions are not providing particularly high risk services and we do not want the risk of liability, or the cost of insuring against it, to force them to cease providing services and activities for children.

We referred above to institutions being liable for the deliberate criminal acts or negligence of their ‘members or employees’.

An institution’s ‘members or employees’ should be defined broadly to include persons associated with the institution, including officers, office holders, employees, agents and volunteers. It should include persons contracted by the institution. It should also include priests and religious associated with the institution.

We do not consider that including volunteers will unreasonably discourage people from volunteering. The liability is imposed on the institution and not the volunteer. We consider it appropriate that institutions that operate the facilities or services we have identified be liable for abuse committed while a child is under the care, supervision or control of the institution, regardless of whether it is committed by a volunteer or by a person with a different association with the institution. Institutions should take all necessary steps to prevent abuse that might arise from the involvement of volunteers in the institution’s care, supervision or control of children, just as they should take those steps in relation to employees and others.

## Reversing the onus of proof

Regardless of whether a non-delegable duty is legislated, we are satisfied that the onus of proof should be reversed. That is, institutions should be liable for child sexual abuse by their members or employees unless the institution proves it took reasonable steps to prevent abuse. We are satisfied that the reverse onus of proof should apply prospectively only and not retrospectively.

We consider that an institution’s ‘members or employees’ should include officers, office holders, employees, agents and volunteers.

It should include persons contracted by the institution. It should also include priests and religious associated with the institution.

We are satisfied that institutions should be in a good position to prove the steps they took to prevent abuse. The institution generally should have better access to records and witnesses capable of giving evidence about the institution's behaviour than plaintiffs are likely to have. Reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers.

We consider that reversing the onus of proof would be reasonable for all institutions, including those to which a non-delegable duty (if adopted) would not apply. We consider it reasonable to require institutions that administer foster care and kinship care, and community-based not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities, to prove that they took reasonable steps to prevent abuse.

The steps that are reasonable for an institution will vary depending upon the nature of the institution and the role of the perpetrator in the institution. For example, more might be expected of a commercial institution than a community-based voluntary institution. Similarly, more might be expected of institutions in relation to employees than contractors.

We recognise that introducing a new duty and reversing the onus of proof may lead to increased insurance premiums for institutions. However, legal duties are important for prescribing the standard that the community requires of institutions. The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented. Changes to the duties of institutions do more than provide an additional or more certain avenue for victims of abuse to seek compensation after institutional child sexual abuse has occurred. Changes to the duties of institutions are critical measures for preventing institutional child sexual abuse occurring in the first place.

## Recommendations

89. State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.
90. The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:
- a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
  - b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
  - c. disability services for children
  - d. health services for children
  - e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
  - f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.
91. Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.
92. For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.
93. State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.



# 16 Identifying a proper defendant

## 16.1 Introduction

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In private sessions, public hearings and submissions, many survivors and survivor advocacy and support groups have told us of the difficulties survivors and their legal advisers have had in finding a proper defendant to sue. Many submissions to *Issues paper 5 – Civil litigation* and the Consultation Paper raised difficulties that survivors may face in trying to identify a defendant against whom to commence civil litigation.

A survivor will always have a cause of action against the perpetrator of the abuse. However, in some cases the perpetrator may have limited, or no, assets. If they are deceased, their estate may have been distributed. In some cases, a survivor might not be able to identify the perpetrator with any certainty. At least in these circumstances, survivors may wish to sue the institution in which they were abused.

Much of the discussion of difficulties in finding the proper defendant to sue has focused on the absence of an incorporated body, particularly for some faith-based institutions.

However, in some cases the difficulties for survivors may arise not so much from the absence of an incorporated body at the time the abuse occurred but from the passage of time between the occurrence of the abuse and the survivor wishing to commence civil litigation. Incorporation does not guarantee that an entity will survive for any particular period of time. Incorporated entities can be deregistered and wound up. There is no guarantee that they will survive as long as the natural persons associated with them.

Also, incorporation does not guarantee that an entity will have any assets to meet the claim. Indeed, incorporation has historically been a means of *limiting* liability by protecting assets outside of the corporation. Similarly, assets held on trust may be protected by the terms of a trust, regardless of whether they are held by an incorporated entity or by a natural person as trustee.

## 16.2 Scope of the problem

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An entity can be sued only if it has a distinct 'legal personality', meaning that it has legal rights, liabilities and duties, including the ability to sue and be sued. It is well established that natural persons, corporations and some other bodies such as governments and statutory bodies have legal personality.

By contrast, however, the law does not treat unincorporated associations as legal persons. Unincorporated associations are voluntary combinations of persons with a common object or purpose.<sup>1367</sup> They differ widely in size, nature and other characteristics – a former Chief Justice of Australia described their variety as 'infinite'.<sup>1368</sup> Common examples of unincorporated associations include many religious groups and sporting or other special interest clubs.

It is well established in Australia that an unincorporated association lacks distinct legal personality and therefore cannot sue or be sued.<sup>1369</sup> For example, if a claimant was abused in an unincorporated sports club or a church congregation, the claimant could not name the club or congregation as a defendant to civil litigation.



There are a number of ways in which entities may incorporate. Many commercial entities are likely to adopt a corporate structure by incorporating under Part 2A of the *Corporations Act 2001* (Cth). Once they do so, the corporation exists as a legal entity distinct from its shareholders or directors.<sup>1370</sup>

Associations that are small in scale and engage in non-profit or non-commercial activities may incorporate under the various state Association Incorporation Acts.<sup>1371</sup> They may then sue and be sued, although, of course, they may have few if any assets.

Some associations are specifically given corporate identity by statute. For example, it is common for state legislation to incorporate the trustees of major Christian denominations to assist those denominations in holding property despite changes in church membership.<sup>1372</sup>

Absent any one of these forms of incorporation, under Australian law an association of persons, regardless of its size or assets, will not have legal personality that renders it capable of being sued.

We have heard evidence of the difficulties of identifying the correct defendant in a number of our case studies.

In Case Study 8 on Towards Healing, we heard evidence about the civil litigation concerning Mr John Ellis's allegations of abuse he suffered at the hands of Father Aidan Duggan, who was an Assistant Priest at the Christ the King Catholic Church at Bass Hill in the Archdiocese of Sydney at the time of the abuse.

Mr Ellis could not sue the Catholic Archdiocese of Sydney because it was an

unincorporated association.<sup>1373</sup> In 2004, Mr Ellis began legal proceedings against three defendants:

- the Archbishop of Sydney at the time of the proceedings – Cardinal George Pell
- the Trustees of the Roman Catholic Church for the Archdiocese of Sydney
- Father Duggan.<sup>1374</sup>

Father Duggan died soon after the proceedings were commenced. Mr Ellis did not continue the proceedings against his estate.<sup>1375</sup>

The Trustees were incorporated under New South Wales legislation: the *Roman Catholic Church Trust Property Act 1936* (NSW).

In *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*,<sup>1376</sup> the Court of Appeal of the Supreme Court of New South Wales held that the trustees could not be vicariously liable for the abuse of Mr Ellis because:

- the legislation establishing the trustees as a corporate entity only gave the trustees a limited role in holding property, with no responsibility for ecclesiastical, liturgical and pastoral activities<sup>1377</sup>
- as a matter of fact the trustees played no role in the appointment or oversight of priests at the relevant times.<sup>1378</sup>

The Court held that the Cardinal could not be legally liable for the abuse of Mr Ellis because he was not Archbishop of Sydney at the time the abuse occurred and he

could not inherit any legal liability of his predecessor.<sup>1379</sup>

In Case Study 8, we heard evidence from representatives of the Catholic Church that the estate of Archbishop James Freeman, who was Archbishop of Sydney at the time of the abuse, was a possible appropriate defendant that Mr Ellis could have sued.<sup>1380</sup> However, evidence was given that the Archdiocese of Sydney followed its legal advice and did not provide information to Mr Ellis's lawyers about who the proper defendant in the proceedings should have been.<sup>1381</sup>

In Case Study 11 on Christian Brothers institutions in Western Australia, we heard evidence of the difficulties that the solicitors for the claimants faced in identifying the proper defendants to claims for abuse. The abuse was alleged to have occurred in the 1950s, 1960s and 1970s. The legal proceedings were commenced in 1993.<sup>1382</sup>

The Court of Appeal of the Supreme Court of New South Wales held that the Archbishop of Perth could not be liable for the abuse, either as a natural person or as the incorporated corporation sole.<sup>1383</sup> The Court held that there could not be any successor liability between the previous archbishop at the time the abuse occurred and the current archbishop at the time of the litigation; and that the corporation sole was responsible only for holding land and not for operating the institutions.<sup>1384</sup> The possible liability of the Trustees of the Christian Brothers, which was incorporated under New South Wales legislation, was not determined by a court and the proceedings settled in 1996.<sup>1385</sup>

In Case Study 13, we heard evidence that the Marist Brothers would use the 'Ellis

judgment' to defend any litigation brought against the Trustees of the Marist Brothers, which was incorporated under New South Wales legislation.<sup>1386</sup>

In Case Study 3, a number of claimants made claims against the Anglican Diocese of Grafton for abuse at the North Coast Children's Home in New South Wales. We heard evidence that the diocese's lawyers informed the claimants' lawyers that the Anglican Diocese of Grafton was not a separate legal entity and they sought the claimants' lawyers' advice as to 'which individuals or office bearers you would seek to hold liable for any alleged misconduct'.<sup>1387</sup> We also heard evidence that the management committee that ran the North Coast Children's Home at the time of the alleged abuse was not incorporated.<sup>1388</sup>

The Corporate Trustees of the Diocese of Grafton was incorporated under New South Wales legislation – the *Anglican Church of Australia Trust Property Act 1917* (NSW) – for the purposes of holding property for the Anglican Church in the Diocese of Grafton.<sup>1389</sup> Litigation against them could be expected to have raised the same difficulties that Mr Ellis experienced in trying to sue the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, discussed above. Most of the claims were settled in 2007.<sup>1390</sup> The issue of a proper defendant was not considered by any court.

In Case Study 16, we heard evidence about the Melbourne Response, including the experience of people who had engaged in the Melbourne Response process or otherwise sought redress from the Catholic Archdiocese of Melbourne. We heard evidence from Mrs Christine Foster about the Foster family's

experiences of the Melbourne Response and subsequent civil litigation.

The Foster family decided to discontinue with the Melbourne Response process. In 2002 the Fosters issued civil proceedings against the Roman Catholic Trusts Corporation for the Diocese of Melbourne (and five other defendants) in the Supreme Court of Victoria.<sup>1391</sup>

In his evidence Archbishop Hart, Archbishop of Melbourne and one of the defendants to the proceedings brought by the Fosters, said he effectively gave his lawyer instructions to take all defences that were open to the Church in defending the matter.<sup>1392</sup> He said that he was dependent on his legal advisers; however, his lay reading was that it did not seem right to him that he and the Roman Catholic Trusts Corporation were legally liable for the crimes committed by Father Kevin O'Donnell.<sup>1393</sup>

Archbishop Hart gave evidence that he is of the view that the Catholic Church in Australia should provide victims of child sexual abuse with an entity to sue – a view that he formed in 2012 or 2013.<sup>1394</sup> He said that the Archdiocese of Melbourne has made this recommendation.<sup>1395</sup> Archbishop Hart also gave evidence that, if civil proceedings were brought against the Archdiocese of Melbourne in the future, he would make sure there was an entity to sue.<sup>1396</sup>

Many of the submissions we received in response to *Issues paper 5 – Civil litigation* expressed concern that the absence of legal personality of unincorporated associations, particularly faith-based institutions, made it impossible to sue those associations. In the submissions to issues paper 5 we were

not provided with examples of difficulties in suing because of a lack of an appropriate corporate defendant in situations involving unincorporated associations other than faith-based institutions.

It may be that the issue has arisen in relation to faith-based institutions for reasons such as the following:

- Faith-based institutions may appear to be, and may conduct themselves as if they are, legal entities – for example, by speaking in the name of ‘the church’.
- The institutions still exist decades after the alleged abuse, when a survivor may wish to sue.
- The institutions may have, or appear to have, significant assets.
- The perpetrator may well have taken a vow of poverty and given their assets to ‘the church’, making them unsuitable as a defendant if there will be no assets from which they could meet any judgment against them.

In these circumstances, it may not be surprising that survivors do not understand why they cannot sue ‘the church’ or any other incorporated entity associated with it.

There is no doubt that the same problem could arise in relation to any unincorporated body, but a lack of incorporation may not be the most significant problem that faces a potential claimant. In particular, a lack of assets may be a far greater hurdle for any claimant than identifying who to name as a defendant.

If abuse occurs in the context of small, temporary, informal unincorporated

associations of natural persons who come together around a shared interest in perhaps a sporting or cultural activity, a survivor's best, and sometimes only, prospects for civil litigation may well be the perpetrator.

## 16.3 Options for reform

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In the Consultation Paper we particularly sought submissions on:

- how to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts
- whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed.<sup>1397</sup>

### Unincorporated religious bodies

In the Consultation Paper, we stated that it seemed reasonably clear that the difficulties for survivors in identifying a correct defendant when they are dealing with unincorporated religious bodies should be addressed.<sup>1398</sup>

We stated that, given that the benefit of succession in relation to property ownership

is conferred on a number of religions and religious bodies by state and territory legislation, it may be appropriate for that state and territory legislation to be amended to provide that any liability of the religion or religious body that the property trust is associated with for institutional child sexual abuse can be met from the assets of the trust and that the trust is a proper defendant to any litigation involving claims of child sexual abuse for which the religion or religious body is alleged to be liable.<sup>1399</sup>

A private member's Bill to amend property trust legislation in relation to the Roman Catholic Church was introduced into the Legislative Council of the New South Wales Parliament by Mr Shoebridge MLC in March 2014. The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill lapsed on prorogation of the New South Wales Parliament in September 2014.<sup>1400</sup> It has not been reintroduced.

The explanatory note to the Bill stated that the New South Wales Court of Appeal has held that property held on trust under the *Roman Catholic Church Trust Property Act 1936* for the use, benefit or purposes of the Roman Catholic Church in New South Wales cannot be used to satisfy legal claims associated with sexual abuse by Roman Catholic clergy, officials or teachers.<sup>1401</sup>

The object of the Bill stated in the explanatory note was to amend the *Roman Catholic Church Trust Property Act*:

- (a) to allow a person suing a member of the Church's clergy, a Church official or a Church teacher in relation to sexual abuse to join the following as defendants in those proceedings (and to make them liable for any damages awarded):
  - (i) the body corporate established by the Act to hold property on trust for the dioceses in which the relevant abuse allegedly occurred,
  - (ii) the trustees that make up that body corporate,
  - (iii) if the regulations so provide, any body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* by which the relevant member of the clergy, official or teacher was employed or that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part, and
- (b) to allow a person who is owed a judgment debt in respect of civil liability arising as a result of sexual abuse by a member of the Church's clergy, a Church official or a Church teacher to recover the debt from any of the following (as an alternative to pursuing the clergy member, official or teacher concerned):
  - (i) the body corporate established by the Act to hold property on trust for the dioceses in which the relevant abuse allegedly occurred,
  - (ii) the trustees that make up that body corporate,
  - (iii) if the regulations so provide, any body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* by which the relevant member of the clergy, official or teacher was employed or that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part, and
- (c) to suspend the operation of the *Limitation Act 1969* for 2 years in relation to such causes of action that would otherwise be out of time.<sup>1402</sup>

The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill provides an example of how difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts might be addressed.

In the Consultation Paper we observed that some religions or denominations might prefer to solve the problem in different ways. For example, the state or territory legislation could:

- provide for an entity to be established in the nature of a ‘nominal defendant’ that is to be a proper defendant to any claims of child sexual abuse that the religion or any of its religious bodies is alleged to be liable for
- require that that entity meet any claims, including from the assets of the relevant property trusts if required.<sup>1403</sup>

The necessary outcome of any approach would seem to be that survivors should be able to sue a readily identifiable church entity that has the financial capacity to meet claims of institutional child sexual abuse.

We stated that it might also be appropriate that states and territories should ensure that their policies require them not to enact similar legislation to give otherwise unincorporated bodies the benefit of succession unless they are satisfied that adequate provision is made to ensure that the assets associated with the unincorporated bodies will remain available for meeting any damages awards, at least for child sexual abuse.<sup>1404</sup>

## Other unincorporated bodies

In the Consultation Paper we identified that there is a further question as to whether it is necessary to go further than religious bodies that have the benefit of state or territory legislation.<sup>1405</sup>

As discussed above, difficulties may arise for survivors not so much from the absence of an incorporated body at the time the abuse occurred but from the passage of time between the occurrence of the abuse

and the survivor wishing to commence civil litigation. Incorporation does not guarantee that an entity will survive for any particular period of time or that it will have any assets to meet a claim.

Many of the submissions we received to *Issues paper 5 – Civil litigation* supported the relevant recommendation of the Parliament of Victoria Family and Community Development Committee in its report *Betrayal of trust: inquiry into the handling of child abuse by religious and other non-government institutions*. The committee relevantly recommended:

That the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements.<sup>1406</sup>

In the Consultation Paper, we suggested that it might be reasonable for state and territory governments to require that certain children’s services that are authorised or funded by the government be provided only by incorporated entities and that those entities be insured.<sup>1407</sup> For example, non-government schools, out-of-home care services and out-of-school-hours care services are generally authorised or funded by state and territory governments.

## 16.4 What we have been told

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Many submissions in response to the Consultation Paper supported the option of reforming faith-based property trust legislation.<sup>1408</sup>

For example, the Victim Support Service (VSS) submitted:

VSS notes that one of the most prevalent issues for survivors seeking civil redress is the absence of an appropriate defendant in the case of some religious institutions. It is unacceptable that some institutions can evade their legal responsibilities because they are not part of an entity that can be sued.

In order to rectify this injustice and ensure that all institutions can be held responsible for their actions, VSS recommends that the proposal in the Consultation Paper at p. 224 be retrospectively adopted, whereby a statutory property trust is a proper defendant where a more appropriate defendant cannot be found.<sup>1409</sup>

In its submission in response to the Consultation Paper, Berry Street stated:

We also support legislative reform to ensure churches and other institutions have to provide a legal entity that can be sued. As important as these reforms are the power in-balance [sic] between survivors and institutions is profound, complex and driven by factors beyond restrictions for commencing proceedings or identifying a legal entity to sue.<sup>1410</sup>

Some submissions in response to the Consultation Paper expressed a view that the problem of finding a proper defendant to sue has arisen particularly in relation to the Roman Catholic Church<sup>1411</sup> and that

reforms to property trust legislation should be made to the various Acts in the states and territories that establish or maintain property trusts for the Roman Catholic Church and its various orders.<sup>1412</sup>

The Australian Lawyers Alliance submitted:

Given that the status of the Roman Catholic Church was created at its own request by acts of the state and territory legislatures, it should be recommended that the various acts be amended to make the trustees liable along the lines of the legislation currently before the NSW Legislative Council in *The Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012*.

Other churches and institutions do not generally appear to raise the same difficulties involved in the peculiar structure of the Roman Catholic Church and it is to that Church that specific amendments of state and territory legislation is required. Should any other significant institution lack an identifiable body to be sued, then the state or territory should similarly legislate protection. ...

However the principal need for amendment is in respect of the Roman Catholic Church in all states and territories and the amendment is relatively simple, as has been indicated in the NSW Legislative Council discussion on the amendment bill.<sup>1413</sup>



Like the Australian Lawyers Alliance, Angela Sdrinis Legal submitted that the Roman Catholic Church Property Amendment (Justice for Victims) Bill is an example of how a property trust should be compelled to meet any claim for damages for child sex abuse.<sup>1414</sup>

Some submissions opposed or expressed concerns about changing property trust legislation.<sup>1415</sup>

The Anglican Church of Australia submitted:

A proposal to make assets of property trusts available to meet claims of child sexual abuse creates complex legal difficulties. Those trusts are in many instances for specific religious charitable purposes, the assets of which, under the current law, are not available to meet such claims.<sup>1416</sup>

In its submission in response to the Consultation Paper, the Truth, Justice and Healing Council stated:

The Council opposes the suggestion at p.224 of the Consultation Paper that amendment of the legislation providing for statutory property corporations for religious organisations may be required to provide that any liability of the religious body that the property trust is associated with for institutional child sexual abuse can be met from the assets of the trust. Trust corporations established under the law for religious institutions act as trustee for a wide variety of works of the church or

religion with which they are associated. In many cases the trust corporations have no responsibility for, or relationship with, the abuse which has occurred.<sup>1417</sup>

There was some support for the proposal that institutions be required to provide a defendant to meet claims.<sup>1418</sup> Some religious bodies submitted that they are already doing this in practice<sup>1419</sup> or agreed that religious bodies should put forward a defendant that can be sued where there is child sexual abuse.<sup>1420</sup> No submissions identified relevant precedents that might inform any necessary legislation.

In its submission in response to the Consultation Paper, the Truth, Justice and Healing Council stated:

Consistently with what it said in its submission responding to Issues Paper No.5, *Civil Litigation*, the Council supports the enactment of legislation in the states and territories imposing a requirement on an unincorporated association which appoints or supervises people working with children to establish or to nominate a body corporate to be the proper defendant to any claims of child sexual abuse brought against the association.

The identity and corporate structure of the body corporate should be left to the institutions to determine in accordance with their internal structures, provided that the body corporate has sufficient assets or is appropriately insured or



indemnified. The legislation should apply equally to all institutions and not interfere with the right of religious institutions to arrange their affairs according to their norms or beliefs but instead should simply provide that there be an identifiable body corporate that is appropriately insured or indemnified. ...

The Council notes that the Royal Commission's Consultation Paper seems to suggest that only religious bodies should be subject to the requirement to establish or nominate a body corporate. The paper says at p.224 that imposing a requirement for incorporation and insurance on small, and perhaps temporary, unincorporated associations may deter people from forming them, with potential loss to the community of the various sporting, cultural and other activities they provide. While understanding this point, the Council would be opposed to any change to the law that singled out Church institutions for special treatment.<sup>1421</sup>

In its submission in response to the Consultation Paper, Catholic Church Insurance (CCI) discussed the option of requiring a nominal defendant and stated:

CCI notes the suggestion (Chapter 10.4 page 224) that a new corporate entity might be established by particular institutions as a 'nominal defendant', which could then be sued by the victims of

sexual abuse. CCI cautions about this approach and suggests that there is an insurance risk in such a process.

A 'nominal defendant' corporation which is incorporated many years after the relevant insurance policy was established, would, in all likelihood, not be entitled to indemnity under a typical public liability policy. Accordingly, the relevant insurer would not be obliged (or entitled) to indemnify that 'nominal defendant' against any claim. Certainly, there could be no 'legal liability' resting upon that subsequently incorporated entity for sexual abuse committed by a perpetrator years or decades earlier.

Further, the cost of obtaining insurance cover for the nominal defendant in the future might be prohibitively expensive, if indeed cover was available in the commercial insurance market at all. While cover might be available on a 'claims-made' basis, we suggest the retroactive date of such a policy would be sufficiently restrictive to exclude historic claims.<sup>1422</sup>

In its submission in response to the Consultation Paper, the Anglican Church of Australia stated:

[Our Royal Commission Working Group] accepts that each diocese and agency of the ACA should ensure that there is a corporation or a nominal defendant which can be sued where there is child sexual

abuse. A condition for an institution providing services to children should be that there is adequate insurance for child sexual abuse by its officials. Further consultation with the insurance industry will be required to determine whether such insurance cover will be available to all institutions.<sup>1423</sup>

In its submission in response to the Consultation Paper, the Uniting Church in Australia stated:

The Uniting Church supports the principle that institutions must publicly identify a legal entity which is capable of suing and being sued. ... The Uniting Church believes that one legal structure should not be imposed on all institutions so that organizations can continue to express their understanding about how their community should be organized while still providing for certainty for defendants.

These approaches reflect an awareness of the need for a variety of ways in which a proper defendant can be identified. They are examples of the flexibility that is required and they are worthy of careful consideration by the Uniting Church.<sup>1424</sup>

In the Consultation Paper we questioned whether it was necessary to go further with reforms than religious bodies that have the benefit of state or territory legislation.

In its submission in response to the Consultation Paper, the Law Council of

Australia identified the problems involved in suing religious organisations with reference to the decision of *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* and Case Study 8.<sup>1425</sup> It stated:

It is not considered appropriate that such legislative reform should apply to small, temporary, informal unincorporated associations or 'clubs' formed to pursue a shared interest in sporting, cultural or other interests. In such organisations it is more likely to be possible to identify and pursue individual perpetrators of child sexual abuse for civil liability than in faith-based organisations.

Faith-based associations may also be distinguished from 'club' type associations for the reasons set out at page 223 of the consultation paper, including that:

- a. faith-based associations will often behave as a legal entity;
- b. it is more likely to exist for the long term;
- c. its associated bodies will frequently have significant assets in property trusts and enjoy the benefit of succession; and
- d. individual perpetrators within the organisation may have few assets of their own, so that civil suit against them will be pointless.<sup>1426</sup>

In the Consultation Paper we sought examples of difficulties in suing because of a lack of an appropriate corporate defendant in situations involving unincorporated associations other than faith-based institutions.<sup>1427</sup>

The only example given in a submission was that given by Slater and Gordon Lawyers. In that case, the plaintiffs are said to have experienced some difficulty because one of the secular institutional defendants raised in its defence that it was not the proper defendant. Slater and Gordon Lawyers submitted:

We wish to draw the Commission's attention to the Fairbridge litigation.

One of the defendants in that litigation is the Fairbridge Foundation, a secular organisation which the claimants assert ran the school and had the care of its child residents. However, its defence denies this allegation and instead nominates a multiplicity of individuals, groups of individuals, and institutions (other than itself) which it says had the running of the school and the charge of children at various times. Its representatives have even referred in open Court to this raising an 'Ellis question'.<sup>1428</sup> [References omitted.]

In a judgment delivered in February 2014 deciding interlocutory proceedings on a separate issue,<sup>1429</sup> Justice Garling described the Fairbridge Foundation's proper defendant defence as follows:

Insofar as the Defence raises matters of substance, the first is

contained in its defence in answer to the allegation that it stood in loco parentis to, and had control of the care, supervision, welfare and education of, each of the plaintiffs and group members, where it pleads that:

'From 1937 to 1974, it was the trustee of a charitable trust for the relief of poverty, and the advancement of education, and in this capacity, pursuant to successive agreements with the Fairbridge Society (Incorporated) of the United Kingdom, had no control in relation to the care, supervision, welfare and education of the children at the Fairbridge Farm School at Molong.'

It pleads that it acquired the property at Molong upon which the Fairbridge Farm was conducted, but held the property in trust for the objects of its Memorandum of Association.

The Defence then refers to and pleads details of, agreements entered into between the Fairbridge Foundation and the Fairbridge Society (UK) in 1938 and 1949, which agreements are pleaded to have reserved to the Fairbridge Society (UK) the right to appoint and dismiss the Principal of the Fairbridge Farm School, and by reason of agreement with that Principal, to delegate to the

Principal the full charge of the children at the Fairbridge Farm, the right to employ, direct and control the staff employed at the farm and the school, and the operational conditions under which the farm and the school were carried out.

Based upon these agreements, and its role solely as Trustee of the real estate concerned, the Fairbridge Foundation denies that any duty of the kind pleaded arose, or that it was in breach of any such duty.

The Defence makes plain that the Fairbridge Foundation argues, in effect, that it is not the correctly named defendant and that it was in truth the Fairbridge Society (UK) that is the appropriate body which was responsible for the Fairbridge Farm.<sup>1430</sup>

We note media reports that the Fairbridge Farm litigation settled in late June 2015.<sup>1431</sup> The proper defendant issue had not been decided in this case when it settled, and the hearing was not due to commence in the Supreme Court of New South Wales until August 2015.<sup>1432</sup>

During the public hearing, an exchange took place between the Chair of the Royal Commission and Mr McConnel, representing the Law Council of Australia, as follows:

THE CHAIR: In your submission, you also identify the problem with an unincorporated association. I think you recognise that, if I might call it, major institutions should have or should accept an obligation that there be some entity that can be

sued. What do we do about the cricket club and the swimming club and all those thousands of organisations that provide for children but don't have the asset backing or financial structure of the larger institutions?

MR McCONNEL: I think that's where this alternative redress scheme becomes all important and that's why we've said it should supplement the common law and not replace it. The common law will provide an effective remedy for some cases, but in other cases where a defendant no longer exists or they are impecunious, then the alternative scheme might be all that is available.<sup>1433</sup>

A number of submissions to the Consultation Paper expressed some support for the Victorian Family and Community Development Committee's recommendation that the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions or other entitlements.<sup>1434</sup>

There was also some support for the option that state and territory governments could require that certain children's services that are authorised or funded by the government be provided only by incorporated entities and that those entities be required to insure.<sup>1435</sup> However, no submissions discussed how the incorporation of children's services would alleviate the difficulties that survivors face if those incorporated bodies have no assets or connection to the claim.

## 16.5 Discussion and conclusions

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We have heard extensively about attempts by survivors to bring civil claims against religious bodies. A number of these attempts have run into difficulties with identifying a proper defendant to sue because of the structure of the religious body. The same difficulty will arise whenever the assets of any institution are held in a manner that makes them unavailable in a civil action brought by a survivor. This may be because, like various religious bodies, the assets of an institution are held in a trust.

We are satisfied that survivors should be able to sue a readily identifiable church or other entity that has the financial capacity to meet claims of institutional child sexual abuse. We are satisfied that the difficulties for survivors in identifying a correct defendant when they are commencing litigation against unincorporated religious bodies, or other bodies where the assets are held in a trust, should be addressed.

We have heard that a number of religious bodies now assist claimants or their lawyers by nominating an appropriate defendant when those bodies are presented with a claim for institutional child sexual abuse.

In Chapter 17, we recommend that both government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse adopt their own set of guidelines for responding to claims for compensation for allegations of child sexual abuse. As we discuss in Chapter 17, Victoria's *Common guiding principles for responding to civil claims involving allegations of child*

*sexual abuse* and the New South Wales *Guiding principles for government agencies responding to civil claims for child sexual abuse* provide useful models to consider.

We recommend that both government and non-government institutions include in those guidelines that, where possible, if known, the institution will identify the correct defendant when presented with a claim for child sexual abuse, and provide the claimant with information in its possession, custody or power that may assist the claimant to identify the correct defendant to sue.

However, in addition to recommending the guidelines, we consider that survivors should have more certainty when seeking to commence litigation against religious or other institutions associated with statutory property trusts or other property trusts.

We consider that state and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution in question is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- the property trust is a proper defendant to the litigation
- any liability of the institution with which the property trust is associated arising from the proceedings can be met from the assets of the trust.

We note the concerns of some faith-based institutions that property trusts have been established for specific religious

charitable purposes and the assets are not, or should not be, available to meet claims. We consider that the approach we favour leaves faith-based institutions with sufficient options to avoid any difficulties. In particular, faith-based institutions affected by our approach could choose to:

- accept the defendant named by the plaintiff and not argue that it is not the proper defendant
- nominate an alternative legal entity as the defendant, which either is the proper defendant or is a defendant that the faith-based institution is willing to accept is a proper defendant for the proceedings

rather than allowing the litigation to proceed against the statutory property trust.

We consider that this approach achieves the right balance between:

- on the one hand, recognising that institutions should retain the ability to conduct their affairs in a variety of ways
- on the other hand, ensuring that plaintiffs have a reasonable ‘fall-back’ option that is not dependent upon the cooperation of the institution.

It is not clear to us that recommending legislation to require faith-based institutions to establish and fund nominal defendants would be an appropriate solution to the problems experienced by some survivors. We note the particular difficulties an approach relying on nominal defendants might create for insurance coverage for claims.

A further issue is the absence of a connection between the legislated nominal defendant and the conduct the plaintiff complains of, particularly when dealing with historical claims. Nominal defendants are usually established to respond to claims where the nominal defendant is reasonably likely to be able to assess and defend claims if required. For example, states and territories have compulsory third party insurance schemes to fund a nominal defendant that can compensate people who are injured as a result of the negligent driving of unidentified and/or uninsured drivers. Motor vehicle claims are generally brought within a three-year limitation period and it is less likely that there will be difficulties with an absence of relevant evidence.

If particular institutions wish to establish an entity that effectively acts as a nominal defendant, we do not see any reason why they could not do so. If they nominate this entity as a proper defendant and ensure that it has sufficient assets to meet any liability arising from the proceedings then a plaintiff would not need to rely on the ‘fall-back’ provisions we recommend to allow the property trust to be sued.

We accept that there may be some merit in the Victorian Parliament Family and Community Development Committee’s recommendation that, where the Victorian Government funds non-government organisations or provides them with tax exemptions and/or other entitlements, the government consider requiring them to be incorporated and adequately insured.

Incorporation will not necessarily overcome the difficulties that might arise from the passage of time or the absence of assets.

However, insurance – if the insurance policy and the insurer can be found and the insurer is solvent – may help to overcome an absence of assets.

We are not satisfied that it is appropriate to recommend that any particular institutions should be incorporated and insured. In particular, if incorporation and insurance for small, temporary, informal unincorporated associations is required, people may be deterred from forming those associations and the various sporting, cultural and other activities they provide in the community would potentially be lost. We are satisfied that governments should consider whether there are any unincorporated bodies that they fund – whether directly or indirectly, including through funding local government – to provide children’s services and, if there are, they should consider requiring them to maintain insurance that covers their liability for institutional child sexual abuse claims.

### **Recommendations**

94. State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:
  - a. the property trust is a proper defendant to the litigation
  - b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.
95. The Australian Government and state and territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children’s services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.

# 17 Model litigant approaches

## 17.1 Introduction

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Australian courts have long recognised that governments are expected to act as model litigants.<sup>1436</sup>

The Australian Government and some state and territory governments have adopted written model litigant policies. Other state and territory governments have not adopted written policies but are subject to the common law obligation.

Some states and territories have gone further in adopting principles for how they will handle civil litigation for child sexual abuse claims.

Particularly through some of our case studies, we have heard evidence of approaches and actions that governments and non-government institutions have taken to defend civil litigation involving child sexual abuse allegations. We have heard evidence from a number of witnesses that they now, at the time of giving evidence, consider that the litigation should have been handled differently. We have received evidence from lawyers who acted for defendants in the litigation and from representatives of the defendants.

Governments and non-government institutions should learn from these experiences and adopt different approaches to responding to civil litigation involving allegations of child sexual abuse.

## 17.2 Existing policies

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The Australian Government and some state and territory governments have adopted written model litigant policies.

The *Legal Services Directions 2005* are a set of legally binding rules that relate to the performance and conduct of Australian Government legal work.<sup>1437</sup> They include at Appendix B a ‘model litigant policy’, which applies to all Australian Government agencies. They are made under section 55ZF of the *Judiciary Act 1903* (Cth) and they are enforceable by the Attorney-General.

In New South Wales, the model litigant policy is set out in government policy guidelines that apply to civil claims and civil litigation involving the state or its agencies.<sup>1438</sup> The policy states that it ‘has been endorsed by Cabinet to assist in maintaining proper standards in litigation and the provision of legal services in NSW’.<sup>1439</sup> The responsibility for ensuring compliance with the policy is primarily the responsibility of the chief executive of each agency.

In Victoria, the model litigant policy is set out in government policy guidelines that apply to the provision of legal services in matters involving government agencies.<sup>1440</sup> The policy is based on the Australian Government’s *Legal Services Directions 2005*.

In Queensland, the model litigant policy is set out in government principles that apply to the provision of legal services in matters involving government agencies.<sup>1441</sup> The principles were issued at the direction of Cabinet. They set out principles of fairness, principles of firmness, and principles on alternative dispute resolution.



In the Australian Capital Territory, the Attorney-General must issue model litigant guidelines under the the *Law Officers Act 2011* (ACT). The model litigant guidelines are set out in the *Law Officer (Model Litigant) Guidelines 2010* (No 1) (ACT). The guidelines apply to the ACT and its agencies in civil claims and litigation.

In South Australia, the duties of the Crown as a model litigant are set out in Legal Bulletin No 2. Legal Bulletins are issued by the Crown Solicitor from time to time for the information and benefit of public sector agencies. The current Legal Bulletin concerning model litigant obligations in the State was issued on 10 June 2011. It applies to the State of South Australia, Ministers, any separately incorporated agency or instrumentality of the Crown, any administrative unit of the public service and private solicitors acting for the Crown.<sup>1442</sup>

Each of the model litigant policies requires the relevant government and its agencies to act as a model litigant. The obligations are expressed in slightly different terms. The New South Wales policy is summarised on the relevant New South Wales Government website in the following terms:

The Model Litigant Policy is designed to provide guidelines for best practice for government agencies in civil litigation matters. It is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation. Under the policy, government agencies are required to:

- Deal with claims promptly
- Not take advantage of a claimant who lacks the

resources to litigate a legitimate claim

- Pay legitimate claims
- Avoid litigation
- Keep costs to a minimum, and
- Apologise where the State has acted inappropriately.<sup>1443</sup>

The policies generally do not explicitly require governments or government agencies to make any particular concessions in litigation or not to raise available defences such as limitation periods.

Some state governments have gone further than their model litigant policies and have adopted principles or approaches specifically to do with responding to claims involving child sexual abuse.

In Victoria, the Department of Human Services and the Department of Education and Early Childhood Development have adopted the *Common guiding principles for responding to civil claims involving allegations of child sexual abuse* (the Victorian Guiding Principles).<sup>1444</sup> The principles are ‘to inform their responses to civil claims involving allegations of child sexual abuse in connection with State institutions’. They are stated to be ‘intended to complement the Model Litigant Guidelines as they apply in the specific context of responding to civil child sexual abuse claims’.

The principles are as follows:

- a. Departments should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.

- b. Departments should ordinarily not rely on a defence that the limitation period has expired, either formally (for example in pleadings) or informally (for example in the course of settlement negotiations). If a limitation defence is relied on, careful consideration should be given as to whether it is appropriate to oppose an application for extension of the relevant period.
- c. Departments should ordinarily not require confidentiality clauses in the terms of settlement.
- d. Departments should ordinarily pursue a contribution to any settlement amount from alleged abusers.
- e. Departments should consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.
- f. Departments should develop pastoral letters that acknowledge claims and provide information about services and supports available to claimants.
- g. Departments should offer a written apology in all cases where they consider it is appropriate. Ordinarily it will be appropriate for the apology to be signed by a senior executive officer, however this will depend on the circumstances.<sup>1445</sup>
- The principles are said to be:
- designed to ensure that [the departments] respond appropriately to civil child sexual abuse claims in a manner that:
- a. minimises potential further trauma to victims/survivors;
  - b. is not unnecessarily adversarial;
  - c. is consistent between claimants in similar circumstances; and
  - d. responds to the different circumstances of different claims brought against the State.<sup>1446</sup>
- On 3 November 2014, the New South Wales Government announced that it would introduce 18 Guiding Principles to guide how its agencies respond to civil claims for child sexual abuse.<sup>1447</sup> The principles are said to ‘promote cultural change across NSW Government agencies’.<sup>1448</sup> They are also said to complement the model litigant policy.
- The principles are detailed but include the following guidance for agencies:
- Be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.

- Make available training for lawyers who deal with child sexual assault matters.
- Consider resolving matters without a formal statement of claim.
- Consider survivors' requests for alternative forms of acknowledgment or redress in addition to monetary claims.
- Provide early information about available services and supports.
- Facilitate access to free counselling and access to records.
- Consider paying legitimate claims without litigation and facilitating early settlement and entering into negotiations.
- Generally do not rely on a statutory limitation period as a defence.
- Seek quick resolution of claims.<sup>1449</sup>

Following the report of the taskforce to examine redress established under recommendation 40 of the report of the Commission of Inquiry into Children in State Care, the South Australian Government announced that common law claims that arise from sexual abuse in state care would be litigated compassionately or that survivors could apply for ex gratia payments pursuant to the *Victims of Crime Act 2001* (SA) as an alternative to litigation.<sup>1450</sup> The then Attorney-General said that the South Australian Government would look sympathetically at an application for an extension of time where there was no insurmountable prejudice to the state.<sup>1451</sup>

In its submission in response to *Issues paper 5 – Civil litigation*, the South Australian Government provided information on how it had responded to the claims it had received, including following the Commission of Inquiry's report. It stated:

The majority of these legal proceedings have resolved, principally through the payment of damages under a settlement reached between the plaintiff and the State ... The State has taken an approach which has encouraged the settlement of claims, and this is an important reason why no matter so far has proceeded to trial.<sup>1452</sup>

The South Australian Government also stated it had received a number of claims where proceedings had not been issued. It said that most of these had been resolved by way of settlement by the payment of damages, by the payment of ex gratia compensation under the *Victims of Crime Act 2001* (SA) or by the claim not proceeding.<sup>1453</sup> This was reiterated in the government's submission in response to the Consultation Paper.<sup>1454</sup>

## 17.3 Evidence from case studies

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In the Consultation Paper, we stated that it was not surprising that we had heard from many survivors, survivor advocacy and support groups and lawyers about the difficulties survivors have faced in pursuing civil litigation.<sup>1455</sup> These have included difficulties arising from defendants raising limitation issues and the time and costs of dealing with preliminary issues without a hearing on the merits of the claim, as discussed above, and other issues such as defendants declining to mediate or enter into settlement discussions.

We stated that what was perhaps more surprising was the evidence we had heard from defendants and their lawyers in a

number of our case studies that reflected on the approaches they have taken to defending civil litigation involving child sexual abuse allegations.<sup>1456</sup> We heard evidence from a number of defendants and defendants' lawyers to the effect that they now, at the time of giving evidence, consider that the litigation should have been handled differently.

For example, in Case Study 8 on Mr John Ellis's civil litigation, Cardinal George Pell gave the following evidence:

The legal battle was hard fought, perhaps too well fought by our legal representatives who won a significant legal victory. I would now say, looking back, that these legal measures, although effective, were disproportionate to the objective and to the psychological state of Mr Ellis as I now better understand it.<sup>1457</sup>

Cardinal Pell also gave the following evidence:

With any litigation, my approach overall is always to retain competent lawyers and to expect that they will conduct the litigation in an appropriate, professional manner, relying on their expertise in that field. I do not consider myself to have the experience or the knowledge to make decisions about the day-to-day running of legal claims.

I have reflected on the course of the litigation and there were several steps taken in the course of the litigation which, as a priest, now cause me some concern.<sup>1458</sup>

Cardinal Pell gave the following evidence on legal advice and mediation:

Q. Lawyers act on instructions, don't they?

A. Yes, they do, but generally they advise what the instructions should be.

Q. Did you feel unable to take any action that was not consistent with what you were advised you should do?

A. Not really. I'm not suggesting for a minute that our lawyers did anything contrary to instructions. In retrospect, our surveillance and our instructions would be much more extensive.

THE CHAIR: Q. Cardinal, you may not have this experience, but is it within your knowledge that many executives of major corporations who became involved in litigation – that is, their companies do – see a need to ensure that the litigation doesn't have the effect of disproportionately breaking the relationship between that company and the company they're litigating with? Do you understand that?

A. I do understand what you're saying. We now have our in-house lawyer who, if we're involved in any court cases, sits in on all the court cases precisely to avoid the sort of mess we got into.

Q. What the executives of those companies do, of course, is agree to mediate and try to sort out

their problems in a mediation rather than let it become a complete contest in the court?

A. And we usually did that, and I very much regret we didn't try to do it more than we did in this case.

Q. You rejected the prospect of mediation here, didn't you?

A. I did.

Q. Why?

A. Because we were so advised.

Q. But, you see, what I'm saying to you is that executives of major companies, notwithstanding the advice they may get that they're going to win, nevertheless see a need to ensure that there's an ongoing relationship and so will mediate and settle. Do you understand that?

A. I certainly do. I'm not the executive of a major company. I'm not – I haven't regularly been involved in this. You might say that there was more of an onus on me to seek mediation than perhaps in a company, and I would have to accept that.<sup>1459</sup>

Mr Daniel Casey gave the following evidence as to why he joined in saying that there should be no counteroffer to Mr Ellis's offer to settle:

A. We were advised that we had very strong prospects, and we accepted that advice.

Q. So you thought the proper course was to say nothing, offer him nothing?

A. Your Honour, looking back on this, I think that was a mistake. The extent to which I could have influenced things back then – I wish I had done more. Certainly today things would proceed on a very different path.<sup>1460</sup>

In Case Study 11 concerning the Christian Brothers institutions in Western Australia:

- Brother Shanahan gave evidence that, if the litigation were to occur now, the Christian Brothers' response would be different – there would be more vigorous early efforts to try to find a non-litigious outcome and they would try to reach a settlement earlier<sup>1461</sup>
- Brother Shanahan gave evidence that he now thought the Christian Brothers had got the settlement wrong in terms of the amount and that it should have been a more liberal settlement<sup>1462</sup>
- Brother McDonald gave evidence that he now considers that the \$5 million settlement was inadequate<sup>1463</sup>
- Brother Shanahan gave evidence of the Christian Brothers' fear of the future waves of litigation, concern about the cost of litigation to the Christian Brothers and concern to maintain resources to fund the ongoing work of the Christian Brothers<sup>1464</sup>
- Brother McDonald gave evidence of his concern for the viability and future of Christian Brothers schools<sup>1465</sup>
- Brother Shanahan gave evidence that there were moneys available within the Christian Brothers

Order to contribute to a fund and expressed regret that, when they did settle, they were looking at their own interests more than the gravity of the offences against the claimants.<sup>1466</sup>

In Case Study 19 concerning Bethcar Children’s Home, the Secretary of the Department of Family and Community Services, Mr Michael Coutts-Trotter, gave evidence that he had conducted a review of the way the department conducted the litigation commenced by former residents of the children’s home.<sup>1467</sup> Mr Coutts-Trotter gave evidence that, in his view, the department had breached a number of clauses of the model litigant policy in its conduct of the litigation. The breaches involved:

- issuing requests for particulars about matters which were in the State’s knowledge<sup>1468</sup>
- attempting to require the claimants to separately file a statement of claim and to have each claimant separately run their case<sup>1469</sup>
- requiring the plaintiffs who had made complaints which led to the convictions and guilty plea of the offender to prove that the sexual abuse alleged in the statements of claim occurred<sup>1470</sup>
- not agreeing to attend a mediation by mid-2010<sup>1471</sup>
- attempting to run an application for a permanent stay application on evidence the department knew omitted matters relevant to the issues in dispute<sup>1472</sup>
- not offering an apology by mid-2010.<sup>1473</sup>

The Crown Solicitor, Mr Ian Knight, also gave evidence in Case Study 19 concerning Bethcar Children’s and the model litigant policy.<sup>1474</sup> We will publish our report on Case Study 19 shortly.

## 17.4 Options for reform

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In the Consultation Paper, we discussed the Productivity Commission’s consideration of model litigant rules in its recent inquiry into access to justice arrangements.<sup>1475</sup> The Productivity Commission found that evidence on the effectiveness of model litigant rules is mixed. It said:

While good in theory, in practice it appears that they are not always enforced.<sup>1476</sup>

The Productivity Commission recommended that governments, their agencies and legal representatives should be subject to model litigant obligations and that compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met.<sup>1477</sup>

The Productivity Commission also considered whether model litigant rules should apply to non-government litigants where there are power imbalances between the parties. It concluded as follows:

The Commission’s view is that the practical difficulty in establishing whether there is a situation of ‘resource disparity’, coupled with the special role of government, mean that model litigant rules should not

be extended to private parties. While there are compelling grounds for ensuring that resource disparities do not determine case outcomes, other duties on parties, such as overarching obligations, are better suited to tackling this issue.<sup>1478</sup>

In the Consultation Paper, we stated that, while there might be no harm in non-government institutions choosing to comply with model litigant principles in responding to civil claims for institutional child sexual abuse, these principles may not be sufficiently specific to help institutions, and their lawyers, to respond more appropriately to these claims.<sup>1479</sup>

As discussed in the Consultation Paper, we considered that both governments and non-government institutions that receive civil claims for institutional child sexual abuse would benefit from adopting more specific guidelines for responding to claims for compensation concerning allegations of child sexual abuse.<sup>1480</sup> We suggested that the Victorian Guiding Principles and the New South Wales *Guiding principles for government agencies responding to civil claims for child sexual abuse* (the New South Wales Guiding Principles) provide useful models to consider.

We suggested that such guidelines would be of assistance to institutions in instructing their external lawyers on the approach they wish to take to these claims and the principles that they wish their external legal advice to be based on. They could assist both institutions and their lawyers in avoiding unnecessarily adversarial approaches in favour of more cooperative and effective approaches. They might also assist those lawyers who do not understand

the nature and impact of child sexual abuse to understand the more unusual features of such claims, such as delay.

We suggested that such guidelines might also usefully include a requirement that institutions and their lawyers assist claimants in identifying a proper defendant to the claim, as discussed in Chapter 16.

In the Consultation Paper, we particularly invited submissions on whether governments and non-government institutions should adopt principles for how they will handle civil litigation concerning child sexual abuse claims.<sup>1481</sup>

## 17.5 What we have been told

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Many submissions in response to the Consultation Paper were supportive of both government and non-government institutions adopting principles for how they will handle civil litigation concerning child sexual abuse claims.<sup>1482</sup>

For example, Survivors Network of those Abused by Priests (SNAP) Australia submitted:

SNAP supports measures to ensure less exploitative and adversarial approaches by institutions to claims by survivors. However SNAP notes that there is little evidence, other than highly qualified admissions of inadequacy reluctantly dragged from entitled institutional witnesses, that institutions understand the depth of the problems with their past behavior, or honestly intend to act any differently in the future.<sup>1483</sup>



Care Leavers Australia Network submitted:

model litigant approaches especially concerning child abuse should be required from both government and non-government agencies where power disparities arise. These should also be written and be enforceable. If the policies are not written they are not transparent and many Care Leavers and other victims would be unaware of their use and application. Similarly, if these policies were not enforceable then they would be pointless.<sup>1484</sup>

Kelso Lawyers submitted:

Recently we have seen Victoria and NSW propose changes to the model litigant policy. The Victorian Principles outlined in the Consultation Paper would be positive developments that could usefully be adopted by all Australian jurisdictions. Some elements of these Principles are replicated in the Guiding Principles announced by the NSW Government in November 2014, also outlined in the Consultation Paper. These NSW Guiding Principles incorporate broader structural reforms that would make the claims process easier for survivors, including making 'training available to lawyers who deal with child sexual assault matters', considering 'resolving matters without a formal Statement of Claim' and 'seeking to resolve all claims as quickly as possible'. Again, to ensure consistency across Australia, such reforms should be

replicated Australia-wide.<sup>1485</sup>

[References omitted.]

Some institutions submitted that they have either committed to or are considering how they could adopt specific guidelines for responding to civil claims that concern allegations of child sexual abuse.

For example, in its submission in response to the Consultation Paper, the Anglican Church of Australia stated:

All institutions should handle both mediation and civil litigation in relation to child sexual abuse claims sensitively and compassionately. The ACA is committed to handling mediation and litigation in relation to child sexual abuse claims in a timely and responsible way. The ACA is open to exploring how adoption of model guidelines for litigation could significantly reduce the stress associated with civil litigation for survivors.<sup>1486</sup>

In its submission in response to the Consultation Paper, the Truth Justice and Healing Council stated:

The Council agrees with the Royal Commission that both government and non-government institutions against which civil claims in relation to child abuse are brought would benefit from adopting more specific guidelines for responding to civil claims in relation to allegations of child sexual abuse. The Council is considering whether it is feasible for all Catholic Church authorities to adopt a consistent set of model litigant guidelines in this area.<sup>1487</sup>



In its submission in response to the Consultation Paper, the Uniting Church in Australia stated:

The Uniting Church believes that non-government organisations should adopt a set of values based principles.

The principles that the Uniting Church commits to adopt in relation to the resolution of claims of child sexual abuse which are brought to their attention include a commitment to:

1. Act at all times to minimise potential further trauma to survivors;
2. Support the survivor in undertaking a redress process;
3. Attempt to resolve matters without the need for litigation;
4. Respect that survivors are individuals and will require different responses to their different circumstances and needs;
5. Ensure that all survivors are treated in a manner which is consistent with claimants in similar circumstances;
6. Ensure that those dealing with child sexual abuse matters have appropriate skills;
7. Provide survivors with early information about available services and supports;
8. Facilitate survivors receiving access to records; and

9. Not act or instruct representatives to act in a manner which is unnecessarily adversarial.<sup>1488</sup>

In its submission in response to the Consultation Paper, Northcott Disability Services submitted:

Northcott's position is that we will voluntarily adopt model litigant approaches in any case that is brought before us where a person claims that we were negligent within what was considered reasonable at the time.<sup>1489</sup>

Some submissions supported the Productivity Commission's recommendation that governments, their agencies and legal representatives' compliance with model litigant principles should be monitored and enforced and made suggestions as to how they may be enforced.<sup>1490</sup>

For example, Kelso Lawyers submitted:

Model litigant principles are a positive approach to ensuring that survivors of abuse in government institutions are treated respectfully throughout the litigation process, so that the process reduces the risk of re-traumatisation. Unfortunately, as has been demonstrated in Royal Commission hearings, these principles have not been followed in many claims for child sexual abuse to date. These breaches were acknowledged by the NSW government officers in the Royal Commission Case Study 19 into Bethcar Children's Home. It is of utmost importance that these

principles are followed by governments for claims made in the future. The Productivity Commission has accordingly recommended that there be a formal avenue for complaint when these policies are not followed, as a minimum development. Claimants should in fact have a formal avenue for redress in cases where model litigant policies have not been followed, giving rise to costs orders in favour of survivors for the costs incurred responding to demands that would not be permitted by these policies.<sup>1491</sup>

The Women's Legal Services NSW submitted:

It is our further submission that those employed by government agencies tasked with defending civil claims of child sexual abuse should be required to document their consideration of the requirements of the model litigant obligations when advising on strategy or significant steps in the litigation. This requirement should also extend to counsel briefed by defendants. Consideration should be given to requiring a declaration similar to that required by an expert witness pursuant to r 31.23(3) of the *Uniform Civil Procedure Rules 2005*; suitable for the provision of advice.

Model litigant obligations should also explicitly require that comments by judicial officers on whether the model litigant obligations are being considered in an approach taken before the Court

be reported to the Crown Solicitor and client agency.

For a litigant with significant resources such as the State, it is not sufficient for cost orders to be the consequence of breaching the model litigant obligations. Mechanisms that put greater weight on preventing breaches rather than remedying non-compliance after the event will have a much stronger protective factor for vulnerable and disadvantage plaintiffs.<sup>1492</sup>

## 17.6 Discussion and conclusions

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We are satisfied that there are advantages for both survivors who proceed with civil litigation and governments and non-government institutions that receive civil claims for institutional child sexual abuse in adopting specific guidelines for responding to claims for compensation that concern allegations of child sexual abuse.

We have heard evidence of litigation being handled by lawyers of institutions in an overly adversarial manner with little sensitivity to the potential re-traumatising effect of litigation on a survivor of child sexual abuse. We have also heard that institutions have not been sufficiently well informed or sufficiently confident to instruct their lawyers to take into account the sensitivities of handling claims by child sexual abuse victims or to question the advice that they are given on approaches to litigation.

If institutions adopt guidelines such as the

Victorian Guiding Principles and the New South Wales Guiding Principles, survivors should benefit from:

- a more sensitive handling of claims by defendants and their lawyers
- more focus on the merits of the claim
- an increased chance of an early settlement or quicker resolution of the claim
- access to information about services and supports, counselling, records and apologies
- less reliance on limitation periods and other procedural requirements (such as a formal statement of claim or confidentiality clauses in terms of settlement).

Such guidelines should benefit institutions by assisting them in instructing their external lawyers on the approach they wish to take to these claims and the principles that they wish their external legal advice to be based on. They could assist both institutions and their lawyers in avoiding unnecessarily adversarial approaches in favour of more cooperative and effective approaches. They might also assist those lawyers who do not understand the nature and impact of child sexual abuse to understand the more unusual features of such claims, such as delay. Such guidelines do not prevent institutions from defending claims on their

merits where they are satisfied that this is the appropriate course.

Specific guidelines for responding to child sexual abuse claims do not duplicate model litigant rules. Model litigant rules apply to governments and govern the full range of civil litigation claims. We remain satisfied that they are unlikely to give sufficient recognition to the particular features of institutional child sexual abuse claims, which require particularly sensitive responses to avoid unnecessarily re-traumatising claimants.

We consider that both government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse adopt guidelines for responding to claims for compensation that concern allegations of child sexual abuse. We remain satisfied that the Victorian Guiding Principles and the New South Wales Guiding Principles provide useful models to consider.

We also consider that institutions that adopt such guidelines should publish the guidelines or otherwise make them available to claimants. This fosters transparency and accountability. Depending upon the guidelines adopted, it might also encourage claimants and their solicitors to seek to bring and resolve claims in a less adversarial and more cost-effective manner.

## **Recommendations**

96. Government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.
97. The guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessarily adversarial responses to claims.
98. The guidelines should include an obligation on the institution to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.
99. Government and non-government institutions should publish the guidelines they adopt or otherwise make them available to claimants and their legal representatives.





# APPENDICES





# Appendix A: Letters Patent

## Letters Patent

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable Justice Peter David McClellan AM,  
Mr Robert Atkinson,  
The Honourable Justice Jennifer Ann Coate,  
Mr Robert William Fitzgerald AM,  
Dr Helen Mary Milroy, and  
Mr Andrew James Marshall Murray

GREETING

WHEREAS all children deserve a safe and happy childhood.

AND Australia has undertaken international obligations to take all appropriate legislative, administrative, social and educational measures to protect children from sexual abuse and other forms of abuse, including measures for the prevention, identification, reporting, referral, investigation, treatment and follow up of incidents of child abuse.

AND all forms of child sexual abuse are a gross violation of a child's right to this protection and a crime under Australian law and may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect.

AND child sexual abuse and other related unlawful or improper treatment of children have a long-term cost to individuals, the economy and society.

AND public and private institutions, including child-care, cultural, educational, religious, sporting and other institutions, provide important services and support for children and their families that are beneficial to children's development.

AND it is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse and any related unlawful or improper treatment of children be fully explored, and that best practice is identified so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims.

AND it is important that those sexually abused as a child in an Australian institution can share their experiences to assist with healing and to inform the development of strategies and reforms that your inquiry will seek to identify.

AND noting that, without diminishing its criminality or seriousness, your inquiry will not specifically examine the issue of child sexual abuse and related matters outside institutional contexts, but that any recommendations you make are likely to improve the response to all forms of child sexual abuse in all contexts.

AND all Australian Governments have expressed their support for, and undertaken to cooperate with, your inquiry.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters, and in particular, without limiting the scope of your inquiry, the following matters:

- a. what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;
- b. what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
- c. what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;
- d. what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to have regard to the following matters:

- e. the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts, and the provision of opportunities for them to share their experiences in appropriate ways while recognising that many of them will be severely traumatised or will have special support needs;
- f. the need to focus your inquiry and recommendations on systemic issues, recognising nevertheless that you will be informed by individual cases and may need to make referrals to appropriate authorities in individual cases;
- g. the adequacy and appropriateness of the responses by institutions, and their officials, to reports and information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
- h. changes to laws, policies, practices and systems that have improved over time the ability of institutions and governments to better protect against and respond to child sexual abuse and related matters in institutional contexts.

AND We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to consider the following matters, and We authorise you to take (or refrain from taking) any action that you consider appropriate arising out of your consideration:

- i. the need to establish mechanisms to facilitate the timely communication of information, or the furnishing of evidence, documents or things, in accordance with section 6P of the *Royal Commissions Act 1902* or any other relevant law, including, for example, for the purpose of enabling the timely investigation and prosecution of offences;
- j. the need to establish investigation units to support your inquiry;
- k. the need to ensure that evidence that may be received by you that identifies particular individuals as having been involved in child sexual abuse or related matters is dealt with in a way that does not prejudice current or future criminal or civil proceedings or other contemporaneous inquiries;
- l. the need to establish appropriate arrangements in relation to current and previous inquiries, in Australia and elsewhere, for evidence and information to be shared with

you in ways consistent with relevant obligations so that the work of those inquiries, including, with any necessary consents, the testimony of witnesses, can be taken into account by you in a way that avoids unnecessary duplication, improves efficiency and avoids unnecessary trauma to witnesses;

- m. the need to ensure that institutions and other parties are given a sufficient opportunity to respond to requests and requirements for information, documents and things, including, for example, having regard to any need to obtain archived material.

AND We appoint you, the Honourable Justice Peter David McClellan AM, to be the Chair of the Commission.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by any of Our Governors of the States or by the Government of any of Our Territories.

AND We declare that in these Our Letters Patent:

**child** means a child within the meaning of the Convention on the Rights of the Child of 20 November 1989.

**government** means the Government of the Commonwealth or of a State or Territory, and includes any non-government institution that undertakes, or has undertaken, activities on behalf of a government.

**institution** means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:

- i. includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and
- ii. does not include the family.

**institutional context:** child sexual abuse happens in an **institutional context** if, for example:

- i. it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or
- ii. it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or
- iii. it happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.

**law** means a law of the Commonwealth or of a State or Territory.

**official**, of an institution, includes:

- i. any representative (however described) of the institution or a related entity; and
- ii. any member, officer, employee, associate, contractor or volunteer (however described) of the institution or a related entity; and
- iii. any person, or any member, officer, employee, associate, contractor or volunteer (however described) of a body or other entity, who provides services to, or for, the institution or a related entity; and
- iv. any other person who you consider is, or should be treated as if the person were, an official of the institution.

**related matters** means any unlawful or improper treatment of children that is, either generally or in any particular instance, connected or associated with child sexual abuse.

AND We:

- n. require you to begin your inquiry as soon as practicable, and
- o. require you to make your inquiry as expeditiously as possible; and
- p. require you to submit to Our Governor-General:
  - i. first and as soon as possible, and in any event not later than 30 June 2014 (or such later date as Our Prime Minister may, by notice in the *Gazette*, fix on your recommendation), an initial report of the results of your inquiry, the recommendations for early consideration you may consider appropriate to make in this initial report, and your recommendation for the date, not later than 31

December 2015, to be fixed for the submission of your final report; and

- ii. then and as soon as possible, and in any event not later than the date Our Prime Minister may, by notice in the *Gazette*, fix on your recommendation, your final report of the results of your inquiry and your recommendations; and
- q. authorise you to submit to Our Governor-General any additional interim reports that you consider appropriate.

IN WITNESS, We have caused these Our Letters to be made Patent.

WITNESS Quentin Bryce, Governor-General of the Commonwealth of Australia.

Dated 11th January 2013

Governor-General

By Her Excellency's Command

Prime Minister

Appendix A – Letters Patent

## Appendix B: Glossary

Term	Definition
<b>child*</b>	<p>human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier</p> <p>(Convention on the Rights of the Child of 20 November 1989)</p>
<b>child sexual abuse</b>	<p>any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards</p> <p>sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child's inhibitions in preparation for sexual activity with the child</p>
<b>child sexual abuse in an institutional context*</b>	<p>abuse that, for example:</p> <ul style="list-style-type: none"> <li>• happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution</li> <li>• is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased or in any way contributed to (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk</li> <li>• happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.</li> </ul> <p>Note that we recommend a different definition of 'child sexual abuse' in an institutional context for eligibility for redress in Chapter 11.</p>
<b>civil litigation</b>	involves a formal legal claim for damages in the civil courts and includes the process of resolving the claim
<b>common law</b>	law developed by judges through decisions in individual cases
<b>exhibits</b>	evidence tendered during a public hearing
<b>government*</b>	<p>government of the Commonwealth or of a state or territory, including any non-government institution that undertakes, or has undertaken, activities on behalf of a government</p> <p>Note that we use 'government' to refer to the Australian Government and state and territory governments in this report.</p>

<b>institution*</b>	<p>public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:</p> <ul style="list-style-type: none"> <li>• includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families</li> <li>• does not include the family.</li> </ul>
<b>Letters Patent</b>	official instructions for the Royal Commission
<b>official (of an institution)*</b>	<p>includes:</p> <ul style="list-style-type: none"> <li>• any representative of the institution or a related entity</li> <li>• any member, officer, employee, associate, contractor or volunteer of the institution or a related entity</li> <li>• any person, or any member, officer, employee, associate, contractor or volunteer of a body or other entity who provides services to, or for, the institution or a related entity</li> <li>• any other person who you consider is, or should be treated as if the person were, an official of the institution.</li> </ul> <p>Note that we recommend a particular definition of ‘person associated with an institution’ in Chapter 15.</p>
<b>redress</b>	<p>to provide redress is to remedy or rectify a wrong</p> <p>In this report, we use ‘redress’ to refer to redress (whether involving monetary payments, provision of services, recognition, apologies or other forms of redress) obtained outside of civil litigation.</p>
<b>related matters*</b>	unlawful or improper treatment of children that is, either generally or in any particular instance, connected or associated with child sexual abuse
<b>survivor</b>	<p>someone who has suffered child sexual abuse in an institutional context</p> <p>In this report, we generally use ‘survivor’ rather than ‘victim’ to refer to those who suffer child sexual abuse in an institutional context. However, we acknowledge that ‘victim’ may be appropriate in addition to, or instead of, ‘survivor’ in some places.</p>
<b>victim</b>	<p>someone who has suffered child sexual abuse in an institutional context</p> <p>In this report, we generally use ‘survivor’ rather than ‘victim’ to refer to those who suffer child sexual abuse in an institutional context. However, we acknowledge that ‘victim’ may be appropriate in addition to, or instead of, ‘survivor’ in some places.</p>

\* indicates the definition is taken from the Letters Patent.



## Appendix C: Claims data notices

This is summary information about the notices or summonses the Royal Commission issued to obtain data for the claims data analysis.

Notice / Summons ID	Recipient	Date of Issue
S-VIC-8	Victoria	13 September 2013
S-QLD-8	Queensland	13 September 2013
S-NSW-61	Salvation Army – Eastern Territory	13 September 2013
S-VIC-9	Catholic Church Insurance Ltd	13 September 2013
S-VIC-10	Salvation Army – Southern Territory	13 September 2013
C-NP-68	Australian Capital Territory	13 September 2013
C-NP-69	Northern Territory	13 September 2013
C-NP-70	South Australia	13 September 2013
C-NP-71	Tasmania	13 September 2013
C-NP-67	Commonwealth of Australia	24 September 2013
C-NP-72	State of Western Australia	24 September 2013
S-NSW-60	New South Wales	24 September 2013
C-NP-74	Western Australia	24 September 2013
S-VIC-11	Victoria	24 September 2013
S-NSW-86	New South Wales	17 October 2013
S-TAS-3	Tasmania	29 November 2013
S-QLD-61	Queensland	19 August 2014
C-NP-444	Northern Territory	19 August 2014
S-TAS-12	Tasmania	20 August 2014
C-NP-442	Australian Capital Territory	22 August 2014
C-NP-446	Western Australia	26 August 2014
S-VIC-107	Salvation Army Southern Territory	26 August 2014
C-NP-443	Commonwealth of Australia	28 August 2014
S-VIC-106	Catholic Church Insurance Ltd	1 September 2014
S-NSW-279	Salvation Army Eastern Territory	5 September 2014
S-VIC-109	Victoria	8 September 2014
C-NP-445	South Australia	22 September 2014
S-NSW-278	New South Wales	29 September 2014
S-VIC-150	Catholic Church Insurance Ltd	4 February 2015
S-NSW-393	Salvation Army Eastern Territory	4 February 2015
S-VIC-151	Salvation Army Southern Territory	10 February 2015
S-NSW-401	New South Wales	4 March 2015
S-VIC-157	Victoria	11 February 2015
S-QLD-77	Queensland	13 February 2015

C-NP-650	South Australia	13 February 2015
C-NP-665	Western Australia	13 February 2015
C-NP-652	Australian Capital Territory	10 February 2015
C-NP-651	Northern Territory	10 February 2015
S-TAS-18	Tasmania	26 February 2015
C-NP-638	Commonwealth of Australia	13 February 2015
S-NSW-434	Suncorp	24 April 2015
S-VIC-160	EIG-Ansvar	1 April 2015
S-NSW-436	Allianz	2 May 2015
S-VIC-163	Victorian Managed Insurance Authority	1 May 2015
S-NSW-438	IAG	2 May 2015

## Victims of Crime Compensation Notices

Notice / Summons ID	Recipient	Date of Issue
C-NP-358	South Australia	17 June 2014
C-NP-343	Australian Capital Territory	4 June 2014
S-NSW-239	New South Wales	4 June 2014
C-NP-338	Northern Territory	4 June 2014
S-QLD-47	Queensland	4 June 2014
S-TAS-9	Tasmania	4 June 2014
S-VIC-69	Victoria	5 June 2014
C-NP-340	Western Australia	4 June 2014
S-NSW-369	New South Wales	3 December 2014
C-NP-777	South Australia	17 April 2014

## Other Catholic Notices

Notice / Summons ID	Recipient	Date of Issue
S-NSW-32	Provincial of Christian Brothers	26 June 2013
S-NSW-33	National Committee of Professional Standards	26 June 2013
S-NSW-46	Provincial of Marist Brothers	2 August 2013
S-VIC-66	Archdiocese of Melbourne	11 June 2014
S-VIC-67	Catholic Church Insurance Ltd	11 June 2014
S-VIC-73	Archdiocese of Melbourne	11 June 2014
S-VIC-82	Mr Peter O'Callaghan QC, Independent Commissioner for the Melbourne Response	2 July 2014
S-VIC-95	Carelink	10 July 2014

# Appendix D: Claims data notices general wording

This is summary information about the wording of the notices or summonses the Royal Commission issued to obtain data for the claims data analysis.

The recipients of the claims data notices were required to complete a spreadsheet with the following data for each claim resolved in the period from 1 January 1995 to 30 June 2014:

1. The name of the claimant;
2. The name of the perpetrator(s) or alleged perpetrator(s) of the child sexual abuse contained in the claim;
3. The specific institution(s) at which the acts of child sexual abuse or alleged acts of child sexual abuse the subject of the claim ('the acts') occurred or the specific institution with which the perpetrator was associated;
4. The date(s) on which the acts occurred;
5. The age of the claimant at the time of the acts;
6. The date on which the claim was received whether or not it was in the period between 1 January 1995 and 31 December 2014;
7. The date on which the claim was resolved;
8. The name of the insurer, if any, involved in resolving the claim;
9. The manner in which each claim was resolved specifying whether by apology, compensation, settlement, mediation, court order, withdrawal, discontinuance, abandonment or rejection or other methods;
10. Where the claim was resolved in such a way as to include a payment of money, the amount of the payment;
11. Where the claim was resolved by agreement or settlement whether there was a term of any such agreement which required confidentiality of any sort;
12. Whether the institution had legal representation during some or all of the receipt, consideration, determination and/or resolution of the claim;
13. Whether the claimant had legal representation during some or all of the receipt, consideration, determination and/or resolution of the claim;
14. Whether there was a psychologist, a psychiatrist or other allied health professional involved in the resolution of the claim and if so the nature of the profession;
15. Whether the claimant was counselled by any person with respect to the claim at the behest of the entity the subject of the notice or its predecessor;
16. Whether the claim was investigated or assessed and if so, by whom;
17. Whether any specific procedural principle, guideline or policy was used to respond to the complaint and, if so, the name of the principle, guideline or policy;
18. Whether the claim was referred to any law enforcement agency or state welfare departments at any stage of the claim and, if so, which organisation and when.

# Appendix E: Claims data methodology and assumptions

This is information about the methodology used and the assumptions made in the claims data analysis.

In order to analyse the claims data, the data from all states and territories, together with data from insurers and Salvation Army Eastern Territory and Southern Territory, were incorporated into a single data set. The data were then cleaned with certain assumptions applying and duplicate claims identified. The analysis consisted of unweighted descriptive statistics. The data were unweighted because it was assumed that the Royal Commission has collected all claims resolved between 1 January 1995 and 31 December 2014 that were made against the included jurisdictions rather than a sample of these claims.

The following assumptions were made when the claims data were cleaned:

- Cases from Northern Territory Department of Children and Families were not included, as they appeared to be investigations into whether notifications of sexual abuse were substantiated or not.
- Cases were dropped from the data set if the claimant was 18 or older at the time of abuse. Note that this may include cases where the claimant was listed as the parent of the child abused.
- If a range of age at time of abuse was given (rather than one age), the youngest of these ages was taken as the age at time of abuse and the case was included if the youngest age was below 18.
- Where indicated, the total amount paid to the claimant was included rather than the amount paid to the claimant by the particular institution.
- If a claim appeared twice (or even three times) in the dataset from the same operator, with an identical victim and abuser name, institution name, years of abuse, claim received and claim resolved and amount of compensation received, only one of the claims was retained and a marker included in the dataset to identify this retained claim. Additionally, claims from different operators also have duplicated claims. If, across operators, two claims have the same victim name, abuser name, institution of abuse, and years of abuse, claim received and claim resolved, the two claims are tagged as duplicates, but both are included in this analysis. The 'original' is tagged as that with the highest compensation paid, if there is a difference.
- When the later notices were issued in August and September 2014, requesting information on claims resolved from 2011 to mid-2014, some recipients included claims that had been resolved before 2011 and were included in the earlier data. These claims were removed from the later data so that they were not counted twice.
- Claims from Tasmania were not included in the analysis, as these claims were paid through a state redress program.

# Appendix F: Government redress scheme notices

## Government redress scheme notices

This is summary information about the notices or summonses the Royal Commission issued to obtain data in relation to government redress schemes.

Notice / Summons ID	Recipient	Date of Issue
S-TAS-8	Tasmania	4 June 2014
S-QLD-49	Queensland	4 June 2014
C-NP-275	Western Australia	11 April 2014
C-NP-339	Western Australia	4 June 2014
C-NP-358	South Australia	17 June 2014
C-NP-590	Western Australia	5 December 2014
C-NP-591	Western Australia	10 December 2014
C-NP-597	Barton Consultancy <sup>1493</sup>	5 January 2014
S-QLD-80	Queensland	20 March 2015
S-TAS-22	Tasmania	1 May 2015

# Appendix G: Government redress scheme notices wording

This is summary information about the wording of the notices or summonses the Royal Commission issued to obtain data in relation to government redress schemes.

## Queensland

The following data were requested on the Queensland scheme:

- a. number of applications for Level 1 payments
- b. number of Level 1 payments offered
- c. number and total value of Level 1 payments made
- d. number of applications for Level 2 payments
- e. number of Level 2 payments offered
- f. number, total value and average of Level 2 payments made
- g. details of any other benefits or services paid or provided, including type of benefit or service, total cost or value, number paid or provided and average cost or value
- h. number of complaints made about the Scheme
- i. total administration costs for the Scheme.

The following data were requested on applications to the Queensland scheme:

- a. the date of birth of the applicant
- b. the gender of the applicant
- c. the address of the applicant
- d. whether the applicant identifies as:
  - i. Aboriginal
  - ii. Torres Strait Islander
  - iii. South Sea Islander
  - iv. Aboriginal and Torres Strait Islander
- e. The names of the specific institutions where the applicant was a child resident;
- f. Status of applicant when as a child was resident at the institutions:
  - i. under the guardianship of the state
  - ii. British child migrant
  - iii. placed in a non-government institution

- g. Level 1 payment amount received
- h. Level 2 payment amount received
- i. Panel assessment decision categories e.g. Categories A–D
  - i. Very extreme
  - ii. Extreme
  - iii. Severe
  - iv. Very serious.

## Western Australia

The following data were requested on the Western Australia Country Hostels scheme:

- a. the total and average payments made to eligible applicants
- b. the number of maximum payments of \$45,000 made to eligible applicants
- c. details of any payment amounts other than \$45,000 offered to eligible applicants and the number of payments made of each such amount.

The following data were requested on the Redress WA scheme:

- a. all documents comprising the samples provided to Barton Consultancy and referred to in paragraphs 16 to 18 of the 'Report to Redress WA concerning Payment Distribution Regimes' dated 10 December 2009
- b. all relevant records contained in any database of claims made under the Redress WA Guidelines held by the Department of Local Government and Communities
- c. all electronic files pertaining to Redress WA, including but not limited to all files with prefix 09058 which are understood to be those related to the analysis and investigations undertaken by Barton Consulting Pty Ltd for the redress scheme.

## South Australia

The following data were requested on the South Australian scheme:

- a. the number of applications made
- b. the number of compensation offers made
- c. the number of compensation offers accepted
- d. the total and average amount of compensation paid
- e. in each case where the compensation offered was not accepted, the amount of compensation offered.

## Tasmania

The following data were requested on the Tasmanian Abuse in care review:

- a. number of applications for payments in the round
- b. number of payments made in the round
- c. total and average value of payments made in the round
- d. details of any other benefits or services paid or provided in connection with the scheme, including type of benefit or service, total cost or value, number paid or provided and average cost or value
- e. number of complaints made about the scheme
- f. total administration costs for the scheme.

The following data on ex gratia payments made under the *Stolen Generations of Aboriginal Children Act 2006 (Tas)* were requested:

- a. the total and average amounts paid to Category 3 applicants
- b. the total and average amounts paid to Category 1 and 2 applicants.

The following data were requested on applications to the Tasmanian redress scheme:

- a. the date of birth of the applicant
- b. the gender of the applicant
- c. the names of the specific institutions where the applicant was a child resident
- d. type of abuse or neglect experience:
  - i. physical
  - ii. sexual
  - iii. neglect
- e. amount of ex gratia payment offered to applicant.



# Appendix H: Previous government redress schemes

This is summary information about examples of current and former government redress schemes in Australia.

## Redress WA (and WA Country High School Hostels ex gratia scheme)

<b>Eligibility</b>	Redress WA was open to adults who, as children, were abused (including physical, sexual, emotional or psychological abuse or neglect) in state care before 1 March 2006. State care included facilities that were subsidised, monitored, registered or approved by the Western Australian Government, including foster homes and other residential settings and institutions such as group homes, hostels or orphanages. Persons who had been resident in Country High School Hostels were eligible for Redress WA but some did not realise this, so an additional scheme was later run for them.
<b>Point of access</b>	Redress WA in the Department of Communities, by registering interest and, in due course, making an application.
<b>Process to verify</b>	Application form considered, with certified proof of the applicant's identity. Redress WA sought departmental records to verify state care, but applicants were not to be disadvantaged if records could not be found to verify that they were in care and staff were instructed, within reason, to believe the applicant's claim if there was a valid reason why no record existed. Informal telephone conferences were conducted to ensure applicants had provided all the information they wished to provide. There was no 'right of reply' for any individual or organisation against whom abuse was alleged.
<b>Standard of proof</b>	Described as balance of probabilities but appears to have been closer to plausibility. The scheme guidelines state that the scheme 'is based on the principle that the applicant's statements will be acknowledged as their personal experience in State care unless there is evidence to the contrary'.
<b>Process to quantify</b>	An assessor with Redress WA considered the application, relevant records and any medical reports and assessed the claim and payment level. Telephone conferences could be conducted with applicants but were not required. Assessments were subject to approval by a Team Leader for level 1 and 2 abuse and the Independent Review Panel for level 3 and 4 abuse. The Independent Review Panel could include legal, social work, health and community knowledge and expertise. Any prior payment of compensation, including criminal injuries compensation, was deducted.

<b>Appeal rights</b>	The quantum of the ex gratia payment could not be the subject of a complaint. Complaints could be made about errors of process or fact and were subject to escalating reviews conducted by the Independent Review Panel, the Department of Communities and the Ombudsman.
<b>Previous accounts</b>	N/A
<b>Counselling</b>	A number of services were funded to provide assistance, including counselling, to applicants through the application and assessment process. Information was also provided to applicants about Medicare rebates for counselling.
<b>Legal advice</b>	Independent legal advice to a value of \$1,000 was to have been funded when a deed of release was to have been required, but the requirement for a deed was removed when the maximum payment was reduced.
<b>Releases</b>	Requirement for deed of release was removed when the maximum payment was reduced.
<b>Access to records</b>	The scheme guidelines excluded any right to records from Redress WA (as opposed to applying under Freedom of Information laws to the agency that held the records). Apparently, however, over one-third of applicants were given their care records.
<b>Monetary payments – rationale</b>	In announcing Redress WA, the then Minister said: ‘Money cannot make up for the abuse some people suffered in State care. However, the experience of abuse may have resulted in missed opportunities in life, together with emotional pain and suffering. It is appropriate therefore, that some payment is made available.’
<b>Monetary payments – amounts and categories</b>	<p>Initially, ex gratia payments were set at up to \$10,000 if an applicant showed they experienced abuse while in state care and up to \$80,000 where there was medical or psychological evidence of loss or injury as a result of the abuse. Fewer applications were received than expected, but the severity and impact of the abuse was higher than expected.</p> <p>Payment levels were then changed, with four levels of payment set to enable claims to be quantified and paid within the budget (which was increased by some \$27 million for additional ex gratia payments) as follows:</p> <p>\$45,000 – Level 4 – <i>Very Severe</i> abuse or neglect with ongoing symptoms and disabilities</p> <p>\$28,000 – Level 3 – <i>Severe</i> abuse or neglect with ongoing symptoms and disabilities</p> <p>\$13,000 – Level 2 – <i>Serious</i> abuse or neglect with some ongoing symptoms and disabilities</p> <p>\$5,000 – Level 1 – <i>Moderate</i> abuse or neglect.</p>

<b>Monetary payments – amounts and categories cont.</b>	<p>An Assessment Matrix required the assessment of:</p> <ul style="list-style-type: none"> <li>• the severity of abuse and/or neglect</li> <li>• compounding or ameliorating factors, including period of time in abusive care, age of child at first entry to the first abusive care placement, amount of contact with parents or extended family and position or role of abuser in the placement or organisation</li> <li>• consequential harm, being the extent of injury, loss or harm resulting from the abuse or neglect, measured across physical harm, psychological/psychiatric harm, social harm and sexual impact</li> <li>• aggravating factors, including verbal abuse, racist acts, direct and indirect intimidation, humiliation etc.</li> </ul> <p>Interim payments of up to \$10,000 could be made and were deducted from any final payment.</p>
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## Queensland ex gratia scheme

<b>Eligibility</b>	<p>Persons who experienced institutional abuse or neglect in detention or in a licensed government or non-government children’s institution covered by the Forde Inquiry. That is, residential care only, not foster care and not adult institutions, and institutions providing care for children with disabilities or those suffering from acute or chronic health problems were also excluded. The applicant was required to have been released from care and to have turned 18 years of age on or before 31 December 1999.</p>
<b>Point of access</b>	<p>Application to Redress Services in the Department of Communities, assistance in completing applications available at Lotus Place.</p>
<b>Process to verify</b>	<p>All applicants were assessed for eligibility (in an institution covered by the Forde Inquiry, 18 years of age on or by 31 December 1999, and had experienced institutional abuse or neglect). Eligibility could be confirmed through a review of available records and documentary evidence of proof of identity. The application required a declaration that the information was true and correct. The assessment was an administrative assessment by Redress Services and Redress Services obtained available records.</p>

<b>Standard of proof</b>	<p>To be eligible at Level 1, the claimant must have indicated abuse or neglect at an eligible institution in the application form. There was no assessment of the plausibility of abuse or neglect for Level 1 payments (although verification procedures were carried out for proof of residency in an eligible institution and age requirements).</p> <p>For Level 2 payments, the assessment relied on summaries of descriptions of abuse and harm in the application form and in support documents. Stronger weighting was placed on the description of the abuse and immediate harm rather than on harm suffered in later life, in recognition of the inability to test evidence and the difficulties in distinguishing between the credible and non-credible.</p>
<b>Process to quantify</b>	<p>Applications for Level 2 (i.e. higher) payments (having been determined as eligible for a Level 1 payment) were assessed on a case-by-case basis by a panel of experts, appointed by the Minister for Communities, against a set of guidelines. The panel of experts included personal injuries lawyers; psychologists, social workers and counsellors; an administrator with skills in project and financial management; and an Indigenous representative with cultural and historical expertise. Applicants for Level 2 payments were required to provide more details about the abuse itself and/or the harm suffered and supporting information to assist the panel to determine their eligibility for the higher payments and the amount of the payment. A two-member panel considered each application, with a four-member panel to be convened if the two-member panel was unable to reach agreement.</p>
<b>Appeal rights</b>	<p>Internal review of determination of ineligibility for Level 1, with administrative review available in the Supreme Court. No review of or appeal against determination of eligibility for or level of Level 2 payment.</p>
<b>Previous accounts</b>	<p>No. Application form had to be completed.</p>
<b>Counselling</b>	<p>Reference was made to counselling being available through Aftercare Resource Centre, through Lotus Place.</p>
<b>Legal advice</b>	<p>Independent legal advice to a set fee was funded for advice before signing the deed of release.</p>
<b>Releases</b>	<p>Deed of release required before payment made.</p>
<b>Access to records</b>	<p>Claimants were advised that records could be sought under FOI.</p>

<p><b>Monetary payments – rationale</b></p>	<p>The scheme completed the Queensland Government’s response to recommendation 39 of the Forde Inquiry, which recommended: ‘The Queensland Government and responsible religious authorities establish principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services.’ Services were offered, and continue to be offered, through the Forde Foundation.</p> <p>The statement by the then Deputy Premier and relevant Minister referred to money never really being able to compensate for the harm suffered by some residents and the hope that the scheme would offer some support and assistance and help bring some closure to individuals and families. It also referred to the Government’s decision to proceed with monetary payments instead of an alternative proposal based on a services access card because payments provide direct material assistance.</p> <p>The <i>Redress Scheme Internal Guidelines for the Assessment of Level 2 Applications</i> referred to the scheme not including economic loss or other losses of the kind compensated through personal injury proceedings. A Level 2 payment was not intended to represent full compensation or an award of damages.</p>
<p><b>Monetary payments – amounts and categories</b></p>	<p>Applicants for Level 1 payments (\$7,000) were assessed for eligibility (in an institution covered by the Forde Inquiry, 18 years of age on or by 31 December 1999, and had experienced institutional abuse or neglect) and, if eligible, offered the Level 1 payment.</p> <p>Applicants for Level 2 payments (up to \$33,000, paid in addition to the Level 1 payment of \$7,000) were for the more serious cases of harm, including harm suffered at the time of the abuse or neglect and harm that existed later in life as a result of the abuse or neglect. Categories of harm were listed as physical injury, physical illness, psychiatric illness, psychological injury and loss of opportunity, with applicants able to include other types of harm.</p> <p>Level 2 payments assessed by the panel of experts considering, among other matters, the nature and severity of abuse or neglect suffered while in institutional care; the nature and extent of harm suffered as a consequence of the abuse or neglect; length of time spent in institutional care; number of institutional placements and the period of time in which these placements occurred; age at entry into and exit from institutional care; and type and history of the institution in which the applicant was placed, including any information known about the treatment of residents in that institution.</p>

**Monetary payments – amounts and categories cont.**

The *Redress Scheme Internal Guidelines for the Assessment of Level 2 Applications* required greater weight to be placed on the abuse, neglect and harm suffered during the period of placement and less weight on the harm suffered in later life because applicants were considered better able to describe what happened and what they did or felt at the time than ‘to divine the thread that such events have woven into the fabric of their often complex lives’.

The *Redress Scheme Internal Guidelines for the Assessment of Level 2 Applications* provided an Assessment Table for use in assessing Level 2 applications, with provision for seven types of harm, each with a weighting and a range (low, medium high) for the panel’s assessment. Depending upon a final rating out of 100 across all types of harm, the claimant was allocated to a payment level. In summary, the assessment was as follows:

Type of harm	Weighting	% Range
Physical injury (including harm from Sexual Abuse and/or Neglect) – <i>During Placement</i>	0–20	Low 0–6% Medium 7–15% High 16–20%
Physical injury (including harm from Sexual Abuse and/or Neglect) – <i>Post Placement</i>	0–5	Low 0–1% Medium 2–3% High 4–5%
Physical illness – <i>During Placement</i>	0–5	Low 0–1% Medium 2–3% High 4–5%
Physical illness – <i>Post Placement</i>	0–5	Low 0–1% Medium 2–3% High 4–5%
Psychological injury/ Psychiatric illness (including harm from Sexual Abuse, Systems Abuse and/or Neglect) – <i>During Placement</i>	0–34	Low 0–10% Medium 11–28% High 29–34%

Type of harm	Weighting	% Range
Psychological injury/ Psychiatric illness (including harm from Sexual Abuse, Systems Abuse and/or Neglect) – <i>Post Placement</i>	0–16	Low 0–4% Medium 5–12% High 13–16%
Loss of opportunity	0–15	Low 0–4% Medium 5–12% High 13–15%
<b>Total</b>	<b>0–100%</b>	

Once all Level 1 payments were finalised and all Level 2 applications were assessed, final apportionment of Level 2 payments was set as follows:

0–14%	No further payment	Level 1 payment only
15–24%	Very serious	\$6,000 (in addition to Level 1 payment)
25–39%	Severe	\$14,000 (in addition to Level 1 payment)
40–59%	Extreme	\$22,000 (in addition to Level 1 payment)
60–100%	Very extreme	\$33,000 (in addition to Level 1 payment)

## Tasmanian Abuse in care ex gratia scheme

<b>Eligibility</b>	Persons over 18 years of age who, as children, suffered abuse in state care. Abuse included sexual abuse, physical abuse and mental or emotional abuse.
<b>Point of access</b>	Ombudsman, through a telephone hotline or by lodging a claim.
<b>Process to verify</b>	<p>Preliminary details of claims were recorded when initial contact with the Ombudsman's office was made. Claimants who appeared to meet the review criteria were interviewed by two investigators from the Ombudsman's Child Abuse Review Team, who prepared a written summary of the interview. Claimants were asked what outcomes they were seeking from their claim. Departmental files were analysed to verify that the claimant was in state care and to record any reported incidents of abuse. If departmental files could not be located, the claimant was invited to provide additional information to support their claim. There was no 'rigorous investigation' of individual claims (e.g. identifying and questioning witnesses) and the Ombudsman recognised that many claims were so old that there was little likelihood of obtaining sufficient corroborative evidence to prove allegations.</p> <p>The Ombudsman provided to the Department of Health and Human Services in respect of each claimant: details of their history while in state care; a summary of their interview; the Ombudsman's assessment of the strength of their claim; and recommendations to the department for further action relating to individual reparation (but not ex gratia payments). The Ombudsman could also recommend that the department make enquiries to corroborate a particular claim.</p> <p>When the scheme was extended to Phase 2, claimants were required to provide a statutory declaration about the information they had given, consent to a police check and explain why they had delayed in claiming.</p>
<b>Standard of proof</b>	Later descriptions of the scheme referred to balance of probabilities, but it appears to have been credibility or plausibility.
<b>Process to quantify</b>	An independent assessor was appointed to assess claims and determine ex gratia payments. The first independent assessor was a QC and retired Crown prosecutor. The independent assessor offered claimants an opportunity for an interview with him before he determined their ex gratia payment.
<b>Appeal rights</b>	Claimants were able to request a review of their assessment for an ex gratia payment, which was undertaken by the independent assessor.
<b>Previous accounts</b>	N/A – the review and claims processes ran together.



<b>Counselling</b>	Claimants were advised when they contacted the Ombudsman’s office that they could seek counselling through the Department of Health and Human Services. For Rounds 3 and 4, three counselling sessions were funded for each claimant, with advice also given on obtaining counselling through the Medicare rebate scheme.
<b>Legal advice</b>	For Rounds 3 and 4, \$300 per claimant was available for legal advice once claimants were informed of the outcome of their claim.
<b>Releases</b>	Claimants were required to indemnify the state against claims arising from the claimant’s abuse in care.
<b>Access to records</b>	Guided access to the claimant’s personal departmental file and assistance with locating ‘lost’ family members were included as outcomes that claimants might indicate they were seeking during their interview. These elements of individual reparation could be recommended to the Department by the Ombudsman, outside of the ex gratia payment process.
<b>Monetary payments – rationale</b>	<p>The ex gratia payment was not compensation. Rather, it was a payment in recognition of the alienation claimants have felt, the feeling of being inferior and unworthy and their separation from society and community, support, schools and employers. The payment was seen as the final part of an attempt at a healing experience. It was a badge of re-acceptance as part of the community, a re-affirmation of belonging and an attempt to undo a wrong.</p> <p>The then Premier said that the money was given ‘in the spirit of a helping hand to enable these people to get on with their lives ... We cannot change the events of the past but we can demonstrate that we are genuinely sorry and that we are willing to help these people move forwards’.</p>

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**Monetary payments  
– amounts and  
categories**

Ex gratia payments of up to \$60,000, with the possibility for the independent assessor to recommend the payment of more than \$60,000 in exceptional circumstances for the consideration of the Premier and Cabinet. It was originally thought that many claims would be resolved by the Department of Health and Human Services through counselling, reimbursement of expenses and the giving of any apology, but it turned out that a payment was considered appropriate in all cases that were accepted as eligible.

The independent assessor considered schemes in Ireland and Canada as possible guides to a monetary assessment and looked at broad categories such as the severity and length of abuse; the medical consequences; the psycho-social consequences; the loss of life's opportunities; the possible need for future counselling and assistance; and future needs and problems. There were no formal categories or scales of payment. Later, guidelines were adopted, with \$5,000 increments in payment from \$5,000 to \$60,000 depending on type, severity and duration of abuse etc, although it appears that they were to be applied flexibly.

Round 4 of the scheme (2011 to 2013) applied a cap of \$35,000, instead of \$60,000.

For those who missed out on the ex gratia scheme, the Abuse in State Care Support Service makes available up to \$2,500 per person to pay for goods and services related to education, employment, counselling, personal development, family connection, medical and dental services.

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# Appendix I: Case studies data extracts

This is information about evidence given in certain case studies relevant to data about claims and redress.

In a number of the public hearings, the Royal Commission heard evidence in relation to data on numbers of claims for redress and amounts paid to victims.

- Case Study 5 (Salvation Army Eastern Territory)
- Case Study 8 (Towards Healing)
- Case Study 11 (Christian Brothers)
- Case Study 16 (Melbourne Response)
- Case Study 19 (Bethcar)
- Case Study 26 (St Joseph's Orphanage, Neerkol).

In Case Study 5, Commissioner Condon gave evidence that the Salvation Army Eastern Territory had, as at March 2014 received 157 claims that reference sexual abuse. He gave the following evidence:

The vast majority of those had been made in the previous 12 years. Only eight claims had been rejected after investigations. A total of 133 people have received ex gratia payments, some with counselling costs as well.

Apology, counselling offered and restitution, 133 persons; apology and counselling costs, 6 persons; lost contact/persons who did not pursue claim, 3; 8 rejected; 1 apology; and 3 active cases or unresolved cases.

It has been interesting, too, if I may say so, during the course of the Royal Commission, that there have been a

number of people, survivors from our children's homes, who have appeared here and given testimony that had never come forward and were not known to us.<sup>1494</sup>

In Case Study 8, evidence was heard in relation to data produced by the Archdiocese of Sydney, which indicate that 204 claims that concern child sexual abuse had been received by the Sydney Archdiocese since Cardinal Pell's appointment as Archbishop on 26 March 2001. Evidence was given that these claims were brought through Towards Healing, civil process or by other means. Just under \$8 million was paid in relation to claims by the archdiocese of its insurer for child sexual assault since Cardinal Pell's appointment in March 2001. The highest amount of reparation paid by the Sydney Archdiocese in a Towards Healing process was \$795,000.<sup>1495</sup>

In Case Study 11, evidence was heard from Brother Julian McDonald, a former Provincial of the Christian Brothers, about compensation paid by the Christian Brothers to victims of abuse. Between 1 January 1980 and 1 June 2013, the Christian Brothers paid over \$20 million to complainants who alleged sexual abuse or a combination of sexual abuse, physical or psychological abuse. Of that, \$3.34 million was paid to complainants who had been at the four institutions the subject of Case Study 11 (Bindoon, Castledare, Clontarf and Tardun). Complainants who had been at the four institutions and who received a monetary settlement were paid an average of \$36,700 each.<sup>1496</sup>

In Case Study 15, data relating to the Melbourne Response was described as follows:

351 complaints have been made to the Melbourne Response in that time. Of these complaints, 326 were upheld by an Independent Commissioner, nine were not upheld and 16 were defined as being undetermined. The undetermined claims are either dormant, ongoing, the complainant is deceased or the complainant is described as considering civil proceedings. Of the 326 complaints which have been upheld six were subsequently settled outside of the Melbourne Response.

80 per cent of the 326 complaints related to alleged incidents of child sexual abuse that occurred from 1950 to 1980 inclusive. Fourteen per cent related to alleged incidents that occurred from 1981 to 1990 inclusive, and two per cent relate to alleged incidents that occurred from 1991 to 2006 inclusive.

The remaining four per cent of those upheld related to incidents that occurred from 1937 to 1949. No upheld complaints relate to incidents of child sexual abuse that is reported to have occurred after 2006. The totals of complaints settled in and out of the Melbourne Response up to March 2014 the amount is \$2.934 million, which is about \$2.5 million in compensation and just over 375 in counselling.

The data provided to the Royal Commission reveals that from October 1996 to 31 March 2014 the average compensation payment amount paid is \$36,100, \$33,187 for

those claims settled within the response, \$168,000 for those that began within the Melbourne Response but settled outside, and just short of \$300,000 for those outside the Melbourne Response.

Since the cap increased to \$75,000 the total amount of compensation paid to 65 victims of child sexual abuse has been \$3.3 million, the average compensation payment being just over \$50,000. 201 of the 301 claims paid within the Melbourne Response were completely or partially indemnified by the Catholic Church insurance company. The data provided indicated that a third of the claims reported to be paid within the Melbourne Response were paid in full by the Archdiocese and were not indemnified by CCI.

The total amount paid until the end of March 2014 in the Melbourne Response is \$9.723 million by way of ex gratia compensation. \$1.63 million has been paid by way of compensation outside the Melbourne Response, with a total of \$11.354 million. Carelink medical consultation, counselling and treatment costs amounted to \$7.385 million, and medical consultation, counselling and treatment costs paid by the Archdiocese and not costed to Carelink amounted to an additional \$150,000-odd.

The calculation as a result of all of those figures is that the total of ex gratia payments made under the

Melbourne Response for child sexual abuse claims and amounts paid for medical counselling and treatment amounted to \$17.259 million. The cost of administering the Melbourne Response was \$17.011 million. This includes Independent Commissioner costs of \$7.794 million, Compensation Panel costs of just under half a million and Carelink costs of \$3.766 million.<sup>1497</sup>

Exhibit 19-0023, which was tendered in Case Study 19, sets out data received from the New South Wales Department of Family and Community Services (FACS) regarding civil litigation involving the department and its predecessor departments concerning child sexual abuse. The data revealed that, during the period 1995 to 31 October 2014, 81 individual plaintiffs commenced claims against FACS regarding allegations of child sexual abuse.

Of the above 81 individual claims, 34 were settled (including 15 of the individual plaintiffs in the Bethcar proceedings).

FACS reported that all civil litigation claims brought against FACS which involve child sexual abuse are conducted by the Crown Solicitor's Office.<sup>1498</sup>

In Case Study 26, evidence was heard about compensation paid to victims of child sexual abuse at St Joseph's Orphanage, Neerkol an orphanage operated by the Sisters of Mercy in the Catholic Diocese of Rockhampton. Data relating to claims was described as follows:

The total cost of operating the Professional Standards Office [of the Diocese of Rockhampton] from

1997 until 2011 was at least \$1.2 million, not including lump sum payments of compensation, which amounted to over a further \$640,000.<sup>1499</sup>

Data relating to claims was further described as follows:

By June 1999, the sisters and the diocese had settled with 72 claimants regarding the abuse that they suffered at the orphanage. The total amount paid to the former residents at the time was \$790,910. All amounts were paid equally between the sisters and the diocese. The State Government made it plain it would rely on the statute of limitations and declined to be involved in any settlement of the civil litigation at that time.

The Sisters of Mercy eventually sold the whole of Neerkol in order to fund the response to former residents of the orphanage, including the payment of compensation to settle the civil claims, and to provide ongoing support through the Professional Standards Committee.<sup>1500</sup>

Evidence was heard about a contribution made by the Sisters of Mercy to the Victims of Crime Association Queensland:

During the meeting we were informed that the sisters had provided \$5,000 to the Victims of Crime Association Queensland to assist in the provision of counselling

support for those involved in the committal proceedings in Rockhampton.<sup>1501</sup>

During questioning by Counsel Assisting, Sister Di-Anne Rowan gave evidence about the amount of compensation paid to victims:

COUNSEL ASSISTING: So is it the case that, I think, \$555,000 was ultimately paid in compensation? Is that correct, or is that not taking into account legal costs?

D ROWAN: Legal costs were on top of that.

COUNSEL ASSISTING. On top of that?

D ROWAN: Yes.<sup>1502</sup>

# Appendix J: Redress WA administrative costs

This is information about the administrative costs of Redress WA, obtained from Annual Reports of the Western Australian Department for Communities.

## Redress WA administrative costs

Measure	2009–10	2010–11	2011–12
Total cost ('000)	\$6,963	\$8,986	\$1,936
Number of claims actively worked on	4,038	5,846	4,625
Number of claims paid	613	3,303	1,409
<b>Average administrative cost per claim</b>	<b>\$1,724</b>	<b>\$1,536</b>	<b>\$419</b>

According to the Department for Communities Annual Report 2011–12, the 2011–12 average administrative cost per claim actual was 158 per cent more than the target due to more payments falling within 2011–12 than was anticipated, requiring more administrative support. Additionally, funding for counselling to claimants continued as long as the redress applications process was ongoing to ensure an appropriate level of assistance was available.<sup>1503</sup>

The average cost was calculated by dividing the total cost by the number of claims actively worked on. This was to include the extensive work conducted by the Redress WA team on those claims that progressed to payment and to provide an accurate picture of administrative efficiency.<sup>1504</sup>

In addition to annual administrative and support cost per active claim, the cumulative average per confirmed claim is reported as a supplement. This is to show how Redress WA progressed towards the overall average administrative cost per claim over the life of the project. The cumulative average was calculated by adding the 2009–10, 2010–11 and 2011–12 administrative and support costs and dividing by the total number of confirmed claims.

## Cumulative average administration and support cost per claim

2009–10	2010–11	2011–12
\$1,177	\$2,695	<b>\$3,024</b>

The final figure for 2011–12 represents the actual administrative and support cost per claim for the life of the project.<sup>1505</sup>

According to the Department for Communities Annual Report 2012–13, Redress WA administrative costs included:

- operation of an information line for claimants
- funding to community organisations to provide advice, counselling and support with applications
- assessment of claims
- police referrals when requested by claimants
- promotion of scheme.<sup>1506</sup>



# Appendix K: Non-government mainstream service providers

These are some examples of the types of non-government organisations that provide initial points of contact for mental health services to the general population.

Type	Description	Service provider examples
24-hour crisis support and suicide prevention services	<ul style="list-style-type: none"> <li>• Immediate counselling and support services for anyone in Australia experiencing a crisis and contemplating suicide.</li> <li>• Provide referral information and assistance to other specialised services in the person's local area.</li> </ul>	<ul style="list-style-type: none"> <li>• Lifeline</li> <li>• Kids Helpline</li> <li>• Mensline</li> <li>• Suicide Call Back Service</li> <li>• National Hope Line</li> </ul>
National mental health services	<ul style="list-style-type: none"> <li>• These organisations raise public awareness and educate the general population about mental health issues through campaigns and information delivery. They also provide targeted programs to address specific groups of people.</li> <li>• Their telephone helpline and online services provide information and advice about mental health and can help direct survivors to specialist service providers in their local area.</li> </ul>	<ul style="list-style-type: none"> <li>• beyondblue</li> <li>• headspace</li> <li>• Mental Health Australia</li> <li>• SANE</li> </ul>
Community service organisations	<ul style="list-style-type: none"> <li>• Generally, non-profit organisations with the purpose to promote or deliver welfare services in the community.</li> <li>• These organisations are diverse, some providing general services similar to national mental health services but at the local level; others are specialised and will overlap with specialist services and/or the broader support services network for survivors.</li> </ul>	<ul style="list-style-type: none"> <li>• Benevolent Society – Post Adoption Resource Centre (NSW and the ACT); Post Adoption Support Queensland (Qld)</li> <li>• Life Without Barriers – Mental health and housing support</li> <li>• Community Mental Health Australia – a coalition of eight peak community mental health organisations from each state and territory in Australia, representing over 800 community-based, non-government organisations that work with mental health consumers and carers across Australia.</li> </ul>

## Appendix L: Sexual assault services

These are some examples of sexual assault services.

Sexual assault services provide specialised therapeutic and support services for victims and survivors of sexual abuse and assault. In many cases, this includes adult survivors of child sexual abuse. This table provides examples of sexual assault services in each Australian jurisdiction. It is not intended to be comprehensive.

Jurisdiction	Overview
National	<ul style="list-style-type: none"><li>• <b>1800RESPECT National Sexual Assault, Domestic Violence Counselling Service:</b> Free 24-hour telephone and online, crisis and trauma counselling service for sexual assault and domestic violence victims.</li><li>• <b>Rape and Domestic Violence Services Australia:</b> Provides crisis counselling 24/7 for anyone in Australia who has experienced or is at risk of sexual assault, family or domestic violence and their non-offending supporters. It is also responsible for servicing the 1800RESPECT line, Sexual Assault Counselling Australia for people affected by the Royal Commission and the NSW rape crisis line. It receives funding from the Commonwealth Department of Social Services and NSW Health.</li><li>• <b>Adults Surviving Child Abuse:</b> Professional phone support providing short-term counselling. Telephone counsellors can also assist survivors with options for additional help and support from its national database of practitioners and agencies with expertise. Majority of revenue provided by government grants.</li><li>• <b>Bravehearts:</b> Provides an information and support line for people affected by child sexual assault. See also Queensland.</li><li>• <b>Mensline Australia:</b> Professional telephone and online counselling available 24/7. Funded by the Australian Government to assist men affected by child abuse. Also receives support from charitable donations.</li></ul>

NSW	<ul style="list-style-type: none"> <li>• <b>NSW Rape Crisis Centre:</b> 24/7 telephone and online counselling service for anyone in NSW who is at risk of or has experienced sexual assault.</li> <li>• <b>Women’s Health Centres:</b> NSW Rape Crisis specialist trauma counsellors are available in a number of Women’s Health Centres throughout the state. They provide medium- to long-term trauma counselling for women who experienced childhood sexual assault.</li> <li>• <b>Victims Services’ Approved Counselling Scheme’s Victims Access Line:</b> Victims of sexual assault or any other violent crime in NSW can receive free face-to-face counselling from experienced counsellors. Victims Services also runs a confidential enquiry line for Aboriginal and Torres Strait Islander victims of violent crime.</li> <li>• <b>Sexual Assault Services:</b> NSW Health Sexual Assault Services are based in hospitals or community health centres across NSW. They are staffed by specially trained counsellors and can provide 24-hour crisis counselling, medical care and forensic tests as well as counselling in the months after the assault.</li> <li>• <b>Child and Adolescent Sexual Assault Counsellors:</b> NSW peak body for community-based services providing child sexual assault counselling and support services to children, young people and adults, and their non-offending family members. Adult survivors may receive counselling from some services.</li> </ul>
Vic	<ul style="list-style-type: none"> <li>• <b>Victorian Centres Against Sexual Assault:</b> Comprises 15 centres and the Victorian Sexual Assault Crisis Line (after hours). Services including short- to medium-term counselling and support to child and adult survivors of sexual assault and their non-offending family members and significant others. The centres also provide services to the Sexual Assault Response – The Royal Women’s Hospital.</li> <li>• <b>Elizabeth Hoffman House Aboriginal Women’s Services:</b> Women’s refuge for Aboriginal women and children experiencing family violence. Provides family violence counselling for women and a children’s counselling program. Outreach services also available to non-Aboriginal women who are mothers of Aboriginal women and/or have Aboriginal partners.</li> <li>• <b>The Aboriginal Family Violence Prevention and Legal Service Victoria:</b> Provides assistance including counselling to Aboriginal and Torres Strait Islander survivors of family violence and sexual assault.</li> </ul>

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Qld

- **Sexual Assault Services:** Queensland Health runs 10 metropolitan and regional sexual assault services that provides support to people who have been raped or sexually assaulted or are survivors of child sexual abuse. Services include crisis counselling and referral services. There is also a state-wide sexual assault helpline providing telephone counselling.
  - **Centre Against Sexual Violence:** Provides counselling and support for females aged 12 years and above in the Logan, Beenleigh and Beaudesert region who have experienced both recent and past sexual assault. Does not provide services to male survivors but can offer them information and referral options.
  - **Gold Coast Centre Against Sexual Violence:** Free and confidential counselling for women who have experienced sexual violence at any time in their lives.
  - **Murrungunyah Aboriginal and Torres Strait Islander Corporation for Women:** Counselling for Aboriginal and Torres Strait Islander women and their families who are survivors of sexual violence. Funded by Qld Department of Communities, Child Safety and Disabilities.
  - **Working alongside people with Intellectual and Learning Disabilities:** Works with people with disability who have been victims or are at risk of sexual violence, assault or exploitation. Has a Sexual Violence Prevention counselling program for people aged 13 years and over. Receives funding from Qld Department of Communities, Child Safety and Disability Services and Department of Justice and Attorney-General for victims of crime advisory service.
  - **Living Well:** Face-to-face counselling to any Qld man affected by sexual assault/abuse. Offers a national telephone counselling service to any man affected in Australia. Receives funding from the Qld Department of Justice and Attorney-General and private donations.
  - **Men Affected by Rape and Sexual Assault:** Self-help group for male survivors aged 16 years and over. Funded by the Qld Department of Communities.
  - **ZIG ZAG – Young Women’s Resource Centre:** Counselling and support to women aged between 12 and 25 years who have experienced sexual assault/abuse at some stage in their lives. Also offers medium-term housing. Receives funding from the Qld Department of Communities, Child Safety and Disability Services and Department of Communities Housing and Homelessness.
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- **Immigrant Women’s Support Service:** Community-based crisis and support service for immigrant women and children who have experienced rape and sexual assault.
  - **Brisbane Rape & Incest Survivors Support Centre:** Non-government organisation available for any woman 15 years and over who is a survivor of sexual violence.
  - **Bravehearts:** Provides face-to-face counselling services for children and young people who have experienced sexual assault or who are at risk. Adult survivors can also access services.
  - **Laurel House and Laurel Place:** Specialised counselling support for people who have experienced recent and past sexual assault in the Maroochydore, Gympie and Murgon regions.
  - **Gladstone Women’s Health Centre:** Sexual assault services for men and women including counselling and other practical support services such as personal growth and community education. Counselling services are provided free of charge while some programs and community education may involve a cost.
  - **Phoenix House:** Bundaberg-based charitable community service organisation aiming to eliminate sexual violence within society. Services include counselling, 24-hour crisis response and other practical support services for people who have experienced sexual assault. Receives funding from the Qld Department of Communities, Commonwealth Government through the Department of Social Services, and other donations.
  - **The Women’s Centre:** Women’s services hub in the Townsville area incorporating sexual assault support services, specialist homelessness services and women’s health. Provides crisis and ongoing counselling services to women. Group programs are also available include therapeutic support groups and yoga and craft classes. Also has an outreach counselling service. Receives funding from several Qld Government departments, the Lady Bowen Trust and The Mercy Foundation.
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WA

- **Western Australia Sexual Assault Resource Centre:** Emergency sexual assault service to anyone aged 13 years or over in metropolitan Perth who has been sexually assaulted in the past 14 days. Counselling is also provided to survivors of past abuse.
- **Incest Survivors Association:** Therapeutic services to survivors of child sexual abuse including extra-familial experiences (e.g. baby sitter, priest, teacher, etc). Services also available to survivors who are at risk of committing child sexual abuse. Funded by the WA Department of Child Protection and grants from Lotterywest. Fees are charged on a sliding fee scale.
- **Allambee Counselling:** Counselling service for survivors and families of sexual abuse, sexual assault and family violence.
- **Yorgum Aboriginal Corporation:** Indigenous specific community service providing a wide range of services including specialised cultural therapeutic practises for counselling. Funded by the Australian Government.
- **Goldfields Rehabilitation Services:** Sexual assault support services including counselling to anyone 13 years and over who has been sexually assaulted/abused. Also provides 24-hour crisis intervention for anyone assaulted within the last 10 days.
- **Chrysalis Support Services:** Sexual assault services to people in the Geraldton region. Counselling services also include long-term counselling where needed, a child sexual assault therapist, 24/7 crisis response and group programs. Also acts as a women's refuge.
- **Waratah Sexual Assault Service:** Services to people aged 13 years and over from Bunbury and the South West Region. Types of counselling include trauma informed therapeutic intervention, 24/7 crisis intervention and specialised child sexual assault and child domestic violence services.
- **Anglicare WA Incorporated:** Its sexual abuse therapy services comprise of the Kimberley Sexual Assault / Abuse Counselling Service, Child Sexual Abuse Therapy Service, Marooloo Child Sexual Response Service and Royal Commission Support Service. Counselling is available to survivors of sexual abuse and assault and includes services that are culturally appropriate to Indigenous clients. Also provides support services including financial support and housing services. Royal Commission services available state-wide to anyone impacted by sexual abuse of children while in institutional care.

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SA

- **Yarrow Place:** The lead public health agency in SA responding to rape and sexual assault. Services are limited to people who were aged 16 years and over at the time of assault. However, it also offers youth counselling services for people aged 12 to 18 years who are under the Guardianship of the Minister for Aboriginal and Torres Strait Islander people. Receives funding from the SA Department of Health and Department of Community Services.
  - **Junction Australia Sexual Abuse Counselling Service:** Counselling and support services in the City of Onkaparinga region available to survivors of child sexual abuse aged 12 years and over and family members affected. Receives funding from the Commonwealth and SA Governments. Most services are free, but some attract a small fee.
  - **SHine SA:** Sexual health agency in SA for women and men under the age of 35 years. Counselling provided for concerns related to sexual health including effects of sexual assault and sexual abuse. Funding received from SA Department of Health and Aging. Counselling services are free for people under the age of 25 years. For clients aged 25 years and over, fees are charged according to the appointment length and any client concessions.
  - **The Women’s Health Services:** Works with women to increase their health and wellbeing with specific services tailored to women who have experienced childhood sexual abuse and complex trauma. Therapeutic counselling services include face-to-face or telephone. There are also Aboriginal specific services and a medical clinic for newly arrived women refugees. Funded by the SA Department of Health. Services are free or bulk-billed by Medicare.
  - **Victims Support Service (VSS):** General services available to adult victims of crime but also offers Royal Commission support services to adult survivors. Offers face-to-face and telephone counselling and referrals to longer-term therapeutic support. Funded by the SA Attorney-General’s Department from the Victims of Crime Fund.
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Tas	<ul style="list-style-type: none"> <li>• <b>Laurel House:</b> Provides therapeutic services to survivors of sexual violence as well as families, friends and support people in North and North-West Tasmania. Examples of counselling include medium- to long-term face-to-face counselling, telephone counselling, 24-hour crisis support and group programs. Funded by the Australian Government to assist people affected by child abuse.</li> <li>• <b>Sexual Assault Support Service:</b> Services to survivors of sexual violence as well as families, friends and support people in Southern Tasmania. Also provides Royal Commission support services for people who experienced child sexual abuse within an institution. Funded by the Australian Government and the Tasmanian Department of Health and Human Services.</li> </ul>
ACT	<ul style="list-style-type: none"> <li>• <b>Canberra Rape Crisis Centre:</b> Non-government organisation, partly funded by the ACT Government. Provides free counselling, crisis appointments, phone support, crisis call-out service, advocacy and legal and medical support to survivors of sexual assault and their support people.</li> </ul>
NT	<ul style="list-style-type: none"> <li>• <b>Sexual Assault Referral Centres:</b> Five centres located in the NT providing free counselling and support to male and female victims of sexual assault, including adult survivors and children who have been recently sexually abused. Partners, family members and significant others of people who have been assaulted/abused are also covered. Darwin and Alice Springs centres also provides 24-hour access to information regarding medical, legal and counselling/support options. Funding provided by NT Department of Health.</li> <li>• <b>Ruby Gaea Darwin Centre Against Rape:</b> Women and children’s counselling and information service for survivors of sexual assault and their supporters. Also provides emergency relief services. Receives funding from the NT Government.</li> <li>• <b>Victims of Crimes NT Inc:</b> Community-based organisation for any victim of crime who resides in the NT. Provides 24-hour phone helpline. Funded by the NT Department of Justice.</li> </ul>



# Appendix M: Support services for adults who were in institutional care as children

These are some examples of support services for adults who were in institutional care as children.

Adult survivors who as children were in institutional and other out-of-home care through the last century are today recognised by the Australian Government and state and territory governments as a vulnerable group. There are support service organisations in each state and territory that act as a 'one-stop shop' to assist this group. This table provides examples of these support services in each Australian jurisdiction. It is not intended to be comprehensive.

Jurisdiction	Name	Services
NSW	Wattle Place	<p>Services available for people who grew up in orphanages, children's homes, institutions and foster homes in NSW from the 1920s to the 1990s. Support services include Find &amp; Connect and Royal Commission Support Service. For no charge, survivors can access:</p> <ul style="list-style-type: none"> <li>• counselling</li> <li>• access to care records</li> <li>• assistance with health and education</li> <li>• support for family reunions and tracing</li> <li>• a drop-in centre</li> <li>• social activities and events</li> <li>• life skills workshops.</li> </ul> <p>Operated by Relationships Australia NSW.</p>
Vic	Open Place	<p>Coordinates and provides direct assistance to address the needs and issues of people who grew up in Victorian orphanages and homes during the last century, irrespective of where they reside currently. Services are provided free of charge and include:</p> <ul style="list-style-type: none"> <li>• counselling</li> <li>• assisting in accessing records, finding family and reuniting families</li> <li>• social support groups</li> <li>• support in accessing specialist services</li> <li>• financial assistance</li> <li>• individual advocacy</li> <li>• support for people engaging with the Royal Commission.</li> </ul> <p>Operated by Berry Street in partnership with Relationships Australia Victoria. Relationships Australia Victoria also provides free support services for people affected by their engagement with the Royal Commission and our processes.</p>

Qld	Lotus Place	<p>Provides counselling for Forgotten Australians and Former Child Migrants in Queensland. Services include:</p> <ul style="list-style-type: none"> <li>• access to professional support and counselling services</li> <li>• information resource centre and gateway</li> <li>• personal and skills development opportunities and peer support activities</li> <li>• individual advocacy and support to seek access to government and community services</li> <li>• help to seek redress of past abuse through the criminal justice system, civil processes, or internal church or religious institutional processes</li> <li>• help to obtain personal records, reconnect with family and trace history</li> <li>• support for regional peer networks and activities</li> <li>• information and referral to other services such as the Child Migrant Trust and Link-Up</li> <li>• support for Forgotten Australian and Former Child Migrants that are affected by the Royal Commission.</li> </ul> <p>Operated by Micah Projects Inc.</p>
	Relationships Australia Queensland	<p>Support services for people who have been affected through their engagement with the Royal Commission and our processes.</p>
WA	Tuart Place	<p>Services for people who experienced any form of out-of-home care in Western Australia. Free of charge services include:</p> <ul style="list-style-type: none"> <li>• counselling</li> <li>• support groups</li> <li>• life skills</li> <li>• computer skills</li> <li>• family tracing</li> <li>• support with complaints</li> <li>• obtaining records</li> <li>• social activities.</li> </ul> <p>Operated by Forgotten Australians Coming Together Inc, an organisation representing people who were in out-of-home care during childhood, including Former Child Migrants from the UK and Malta and Indigenous and non-Indigenous Australian-born care leavers.</p>

	Relationships Australia WA	<p>Operates the WA branch of Find &amp; Connect. Services include obtaining records and family tracing; and access to individual counselling and group support.</p> <p>Relationships Australia WA also provides support services for people affected through their engagement with the Royal Commission and our processes.</p>
SA	Elm Place	<p>Offers services for individuals over 18 years whose lives have been affected by being in out-of-home care when they were children. Services are free of charge and include:</p> <ul style="list-style-type: none"> <li>• counselling and therapeutic services</li> <li>• access to records</li> <li>• Find &amp; Connect support services</li> <li>• housing and financial management</li> <li>• life skills</li> <li>• drop-in support.</li> </ul> <p>Operated by Relationships Australia SA, which also provides counselling, assistance and support for people engaging with the Royal Commission and our processes.</p>
Tas	Relationships Australia Tasmania	<p>Runs the Find &amp; Connect Support Services for Tasmania, to assist Forgotten Australians and Former Child Migrants:</p> <ul style="list-style-type: none"> <li>• access personalised support and counselling</li> <li>• where possible, obtaining personal records and tracing history</li> <li>• connecting survivors to other services and other support networks</li> <li>• family reunions where possible</li> <li>• drop-in centre to connect with other Forgotten Australians and Former Child Migrants.</li> </ul> <p>Relationships Australia Tasmania also provides family and relationship counselling and specialist support services for individuals engaged with or affected by the Royal Commission and our processes.</p>

ACT	Relationships Australia Canberra & Region	<p>Operates the Find and Connect Support Services in the ACT to help Forgotten Australian and Former Child Migrants:</p> <ul style="list-style-type: none"> <li>• access personalised support and counselling</li> <li>• obtaining personal records, tracing history</li> <li>• connect with other services and support networks</li> <li>• family reunions where possible.</li> </ul> <p>Also provides support services for people affected by the Royal Commission and our processes.</p>
NT	Relationships Australia NT	<p>Relationships Australia NT Find and Connect Support Service provides help with records searches, specialist counselling, referral to other services and follow-up support including peer and social support. Also provides free support services for people who have made contact with the Royal Commission.</p>

# Appendix N: Monetary payments under other schemes

## State government schemes

The three former state government redress schemes in Tasmania, Queensland and Western Australia offered support services as well as monetary payments. However, the focus was on monetary payments. The South Australian Government currently provides a redress scheme through its statutory victims of crime compensation scheme.

Table 13 in Chapter 7 provides an overview of the former and, in the case of South Australia, current state government redress schemes. The South Australian data are current as at 31 December 2014.

Further details on the method for calculating monetary payments and the range of payments made in each of these redress schemes are set out below.

### Tasmania

In 2003, the Tasmanian Government established a review of claims of abuse from adults who had been in state care as children and a redress scheme offering ex gratia payments of up to \$60,000. Four rounds of payments were undertaken between 2003 and 2013. The maximum payment was reduced to \$35,000 for the fourth and final round.<sup>1507</sup>

Originally, an independent assessor determined the amount of the monetary payment. The assessor considered broad categories such as:

- the severity and length of abuse
- the medical consequences
- the psychosocial consequences
- the loss of life's opportunities
- the possible need for future counselling and assistance
- future needs and problems.

There were no formal categories or scales of payment.

Later, guidelines were developed to assist in determining payment levels of between \$5,000 and \$60,000, in \$5,000 increments. Claims were graded on a scale of 1 to 10 according to the nature, severity and effect of the abuse. A verified short period of sexual and non-sexual abuse would result in payments of between \$5,000 and \$10,000. Sexual related abuse would generally result in payments in excess of \$30,000. The maximum payment of \$60,000 was reached if there was evidence of harsh, sustained abuse for a period of more than 10 years.<sup>1508</sup>

The program operated for 10 years. Over 1,800 people received ex-gratia payments worth over \$54 million.<sup>1509</sup> The average payment was around \$30,000.

**Table 30: Overview of the four rounds of the Tasmanian redress schemes<sup>1510</sup>**

Round	Years	Claims made	Ex gratia payments	Maximum payment	Average payment	Total amount paid to applicants
1	2003–2004	364	247	\$60,000	\$38,000	\$9.4 million
2	2005–2006	514	423	\$60,000	\$35,000	\$14.6 million
3	2007–2010	995	784	\$60,000	\$32,000	\$25.3 million
4	2011–2013	541	394	\$35,000	\$14,000	\$5.5 million
<b>TOTAL (all rounds)</b>		<b>2,414</b>	<b>1,848</b>	<b>\$60,000</b>	<b>\$30,000</b>	<b>\$54.8 million</b>

## Queensland

In 2007, the Queensland Government established a redress scheme for those who experienced abuse and neglect as children in the Queensland institutions that were the subject of Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde inquiry).

The scheme had two payment tiers: a Level 1 payment of \$7,000 and an additional Level 2 payment of up to \$33,000.

Level 1 payments of \$7,000 were made on the basis of a written application. Provided the applicant had been in an institution covered by the scheme and said in their application that they had experienced institutional abuse or neglect, they were offered the Level 1 payment.

Level 2 payments were for the more serious cases of harm, including harm suffered at the time of the abuse or neglect and harm that existed later in life as a result of the abuse or neglect. Categories of harm were listed as physical injury, physical illness, psychiatric illness, psychological injury and loss or opportunity. Applicants were able to include other types of harm.

Level 2 payments were assessed by a panel of experts who considered, among other matters:

- the nature and severity of abuse or neglect suffered while in institutional care
- the nature and extent of harm suffered as a consequence of the abuse or neglect
- length of time spent in institutional care
- number of institutional placements and the period of time in which these placements occurred
- age at entry into and exit from institutional care
- type and history of the institution in which the applicant was placed, including any information known about the treatment of residents in that institution.

The categories for Level 2 payments are shown in Table 31.

**Table 31: Queensland redress scheme categories for Level 2 payments**

Very serious	\$6,000
Severe	\$14,000
Extreme	\$22,000
Very extreme	\$33,000

Table 32 gives an overview of redress payments made under the scheme. Just over 7,000 claimants received Level 1 payments. Some 5,416 were assessed for a Level 2 payment. Of those who received a Level 1 payment, around 3,500 received an additional amount of between \$6,000 and \$33,000. The average total payment per claimant among all claimants to the scheme was around \$14,000. The average total payment for those deemed eligible for a Level 2 payment was \$20,000 (which was the Level 1 payment of \$7,000 plus an average payment of \$13,000 for Level 2).

**Table 32: Overview of redress payment in Queensland<sup>1511</sup>**

Payment category	Amount	Number deemed eligible	Number paid	Total amount paid
Level 1	\$7,000	7,453	7,168	\$50.2 million
<b>Level 2 (total)</b>	<b>various</b>	<b>3,492</b>	<b>3,481</b>	<b>\$46.8 million</b>
Very serious	\$6,000	1,455	1,447	\$8.2 million
Severe	\$14,000	1,254	1,252	\$18.1 million
Extreme	\$22,000	616	616	\$13.9 million
Very extreme	\$33,000	167	166	\$5.6 million

## Western Australia

In 2007, the Western Australian Government established Redress WA for adults who were abused or neglected in state care in Western Australia when they were children. 'State care' was defined broadly.

Initially, ex gratia payments were set at up to \$10,000 if an applicant showed they experienced abuse while in state care and up to \$80,000 where there was medical or psychological evidence of loss or injury as a result of the abuse.

Fewer applications were received than expected, but the severity and impact of the abuse were higher than expected. The allocated budget for the scheme was increased, but payment levels were changed and the maximum monetary payment was reduced to \$45,000 to enable payments to be made within the increased budget.

Four payment levels were set, as shown in Table 33.

**Table 33: Redress WA payment levels**

Level 1: Moderate abuse and/or neglect	\$5,000
Level 2: Serious abuse and/or neglect with some ongoing symptoms and disability	\$13,000
Level 3: Severe abuse and/or neglect suffered with ongoing symptoms and disability	\$28,000
Level 4: Very severe abuse and/or neglect suffered with ongoing symptoms and disability	\$45,000

Redress WA used an assessment matrix, shown in Table 34, to assess applications and to determine the level of payment to be offered.

**Table 34: Redress WA assessment matrix**

Category	Description
Severity of abuse and/or neglect	The intensity and frequency of the physical/sexual abuse; psychological abuse; and neglect
Compounding or ameliorating factors	Time spent in abusive care; age when first entering care; isolation; the amount of family contact; the position or role of the abuser
Consequential harm	Impact of the mistreatment in regard to physical, social, psychological and sexual harm
Aggravating factors	Verbal abuse, racist abuse, failure to provide care following abuse, witnessing abuse of another child et cetera

Table 35 shows payments made under Redress WA.

**Table 35: Payments made under Redress WA**

Payment level	Payments made	Amount paid
1 – \$5,000	859	4,295,000
2 – \$13,000	1,813	23,569,000
3 – \$28,000	1,477	41,356,000
4 – \$45,000	1,063	47,835,000
<b>TOTAL</b>	<b>5,212</b>	<b>117,055,000</b>

In 2012, the Western Australia Government established the Country High School Hostels ex gratia payment scheme for those who had been abused in country high school hostels and who had not applied to Redress WA. It had three payment levels. Table 36 shows payments that were made under the scheme.



**Table 36: Payments made under Country High School Hostels scheme**

Payment level	Payments made	Amount paid
1 – \$5,000	2	10,000
2 – \$20,000	28	560,000
3 – \$45,000	60	2,700,000
<b>TOTAL</b>	<b>90</b>	<b>3,270,000</b>

## South Australia

Following the report of the Commission of Inquiry into Children in State Care (the Mullighan inquiry) in 2008, the South Australian Government announced that victims of sexual abuse in state care could apply for ex gratia payments under the *Victims of Crime Act 2001 (SA)* as an alternative to litigation.

The *Victims of Crime Act 2001* gives the Attorney-General various discretions to make ex gratia payments, despite applications not complying with requirements of the scheme – for example, time limits for applying and the requirement that ex gratia payments be capped at the amount that was available at the time of the offence.

The South Australian Government provided the following data on applications and payments as at 31 December 2014:

- 167 applications have been received
- 96 offers have been made
- 85 offers have been accepted
- total payments of \$1,198,500 million have been made
- the average payment is approximately \$14,100.<sup>1512</sup>

## Non-government institution schemes

A number of non-government institutions have established redress schemes or processes. Three well-known schemes that have been considered in case studies to date are the Catholic Church's Towards Healing and Melbourne Response and The Salvation Army Eastern Territory's protocol.

Table 14 in Chapter 7 provides an overview of these non-government institution schemes. The data for Towards Healing and Melbourne Response are current to 30 June 2014. The data for The Salvation Army redress procedures are current to 31 December 2014.

The method for calculating monetary payments and the range of payments made in each of these redress schemes are discussed below.

## Towards Healing

Towards Healing was established at the end of 1996. It is available to anyone who has suffered physical, sexual or emotional abuse by a priest, religious or other Catholic Church personnel. Claims in relation to the Archdiocese of Melbourne are dealt with under the Melbourne Response and not under Towards Healing.

Monetary payments are negotiated on a case-by-case basis through facilitation. There is no table or chart specifying the financial outcomes or range of outcomes that might be expected or offered having regard to needs of the victim or the type or degree of abuse suffered.<sup>1513</sup>

According to data summonsed by the Royal Commission, between 1 January 1995 and 30 June 2014:

- 881 known payments were made to claimants
- a total of \$42.5 million was paid out under Towards Healing
- the average payment was \$48,300
- over 96 per cent of payments were for \$150,000 or less.

## Melbourne Response

In 1996, the Archdiocese of Melbourne established the Melbourne Response, which covered abuse by priests, lay people and religious under the control of the Catholic Archbishop of Melbourne.<sup>1514</sup>

Under the Melbourne Response, a compensation panel determines the amount of any monetary payment. The panel is

chaired by a Queen's Counsel and includes a psychiatrist, a solicitor and a community representative. There is a contested hearing if the alleged perpetrator denies the abuse.

There is a cap on monetary payments. Initially, the cap was set at \$50,000. It was increased to \$55,000 in 2000 and to \$75,000 in 2008.<sup>1515</sup>

The Chair of the Compensation Panel, Mr David Curtain QC, gave evidence in Case Study 16 that the 'original maximum was related to the payments that could be awarded by the courts through the Victorian Victims of Crime Compensation Scheme'.<sup>1516</sup> Mr Curtain also gave evidence that 'if there has been penetrative abuse our default position is to award the maximum'.<sup>1517</sup>

According to data summonsed by the Royal Commission, under the Melbourne Response between 1 January 1995 and 30 June 2014:

- 310 known payments were made to claimants
- a total of \$12 million was paid out
- the average payment was \$38,800.

## The Salvation Army

The Salvation Army Australia's Eastern Territory redress process was governed by the *Procedures for complaints of sexual and other abuse against Salvationists and workers 1996*.

Under the procedures, a matrix is used to calculate monetary payments. This matrix is entitled *Guidelines for assessment of personal injury claims* and the current version was developed in 2010.<sup>1518</sup>

The matrix requires an assessment of whether the applicant suffered:

- deprivation of liberty
- psychological/emotional abuse
- physical assault
- cultural separation/discrimination.

The applicant qualifies for \$10,000 if one or two of these were suffered and for \$15,000 if three or more were suffered.

To this amount is added an amount based on age at time of entry into the home and length of stay, with the following options:

- aged 12 or above and stayed for less than one year – add \$5,000
- aged 12 or above and stayed for one to three years – add \$10,000
- aged 12 or above and stayed for over three years – add \$15,000
- aged under 12 and stayed for less than one year – add \$7,000
- aged under 12 and stayed for one to three years – add \$14,000
- aged under 12 and stayed for over three years – add \$20,000.

To the new total amount further amounts for any aggravated factors are added as follows:

- \$500 per day of isolation
- \$15,000 for indecent assault
- \$30,000 for sexual assault
- \$10,000 for profound impact
- \$20,000 for personnel secretary's discretionary offer.

A further \$5,000 is then added for counselling.

However, amounts may be determined outside the matrix and a substantial degree

of discretion is allowed in determining ex gratia payments.

According to data summonsed by the Royal Commission, for both The Salvation Army Eastern Territory and Southern Territory between 1 January 1995 and 31 December 2014:

- 506 known payments were paid to claimants
- a total of around \$25,800,000 was paid out
- the average payment was \$51,000.

The Salvation Army Australia Eastern Territory provided information to the Royal Commission confirming that, as at 25 September 2014, it had made payments to 196 survivors. The average payment was \$39,959.<sup>1519</sup>

In its submission in response to the Consultation Paper, The Salvation Army Australia stated that 'a number of positive modifications have been made to the redress process followed by The Salvation Army Australia Eastern Territory' and that the procedures no longer govern the redress process.<sup>1520</sup>

## Irish Residential Institutions Redress Scheme

In 2002, the Government of Ireland established a national redress scheme under the *Residential Institutions Redress Act 2002*.

Under the *Residential Institutions Redress Act 2002*, the Minister appointed a committee with medical and legal expertise to report on what amounts should be available as monetary payments and how they should be assessed.

Payments were determined under a weighting scale for evaluating the severity of abuse and consequential injury. Points were awarded on the variables set out in Table 37.

**Table 37: Irish Residential Institutions Redress Scheme weighting scale for payments**

1–25	Severity of abuse
1–30	Medical verified physical/psychiatric
1–30	Psychosocial sequelae
1–15	Loss of opportunity

The aggregate level of points determined the redress band within which the amount of the payment was determined as set out in Table 38.

**Table 38: Irish Residential Institutions Redress Scheme redress bands**

Aggregate points	Redress band level	Payment
Less than 25	I	Up to €50,000
25–39	II	€50,000–€100,000
40–54	III	€100,000–€150,000
55–69	IV	€150,000–€200,000
70 or more	V	€200,000–€300,000

If the weighting was 100 and the case was considered an exceptional case, an award in excess of €300,000 could be made. ‘Aggravated damages’ of up to 20 per cent of the award could be ordered. An award could also include an additional amount for reasonable future medical expenses, capped at 10 per cent of the award determined by the weightings.

Details of payments made and the spread of payments are set out in Chapter 7, including in Table 16. Under the Irish scheme, lawyers had extensive involvement in preparing and presenting applicants’ cases. It gathered extensive evidence, including applicants’ medical records, to allow a rigorous assessment of causation and injury or loss.

A number of participants in our consultations supported many features of the Irish scheme but opposed the legalism of the Irish scheme process. While some survivor advocacy and support groups indicated support for a scheme with monetary payments as substantial as those available in the Irish schemes, these groups also recognised that the processes involved were considerably more onerous than they would support in an Australian redress scheme.

# Appendix O: Current limitation periods in Australia

This is summary information about current relevant limitation periods in Australia.

Child sexual abuse claims are generally personal injury claims. Personal injury limitation periods are summarised below.

## New South Wales: Limitation Act 1969 (NSW)

### Limitation periods

The basic limitation periods that apply in a child sexual abuse claim are:

- for an action that accrued before 1 September 1990, six years from when the action accrued
- for an action that accrued between 1 September 1990 and 5 December 2002, three years from when the action accrued
- for an action that accrued on or after 6 December 2002, the earlier of three years from when the cause of action was discoverable and 12 years from the time of the act or omission that resulted in the injury.

For actions that accrued on or after 6 December 2002, if the injury to the child was caused by a parent, guardian or a parent or guardian's 'close associate', the action is discoverable only when the claimant turns 25 and the 12-year long-stop limitation period only begins running from when the claimant turns 25.

### Suspension of time

A limitation period is suspended for as long as a person remains a child, except that, for actions that accrue on or after 6 December 2002, the suspension does not apply if the child had a capable parent or guardian.

The limitation period is suspended where a person is 'incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action ... by reason of ... any disease or impairment of his or her physical or mental condition'.

### Extension of time

The court may extend time if:

- the action accrued before 1 September 1990, there is evidence to establish the action and the prospective plaintiff did not have the means of knowledge of a 'material fact of a decisive character relating to the right of action' (here the court may extend the limitation period to one year after the plaintiff came to have the means of knowing that material fact)
- the action accrued on or after 1 September 1990 but before 6 December 2002 and the court considers it 'just and reasonable to do so', considering:
  - the length of and reasons for the delay
  - prejudice to the defendant
  - when the plaintiff came to know of the injury, its nature and extent and the connection between the

- injury and the defendant's act or omission
- any of the defendant's conduct inducing the delay
- the steps the plaintiff took to receive advice
- the extent of the loss (here the court may extend the limitation period by up to five years)
- it is 'just and reasonable to do so', being satisfied that the plaintiff did not know that personal injury had been suffered, was unaware of the injury's nature or extent or was unaware of the connection between the injury and the defendant's act or omission; and being satisfied that the plaintiff made the application within three years of becoming aware of all these things.

The limitation period must not be extended beyond 30 years running from the date that the original limitation period runs.

## Victoria: Limitation of Actions Act 1958

The *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) will come into operation on 1 September 2015, if not proclaimed to commence before that date.

The following provisions in the Victorian *Limitation of Actions Act 1958* (Vic) are in effect, or will be in effect, on the dates indicated:

- as at 30 June 2015 (Current Law June 2015); or

- once the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) comes into operation on 1 September 2015, or upon proclamation (Amended Law).

## Limitation period(s)

### Current Law June 2015

The basic limitation period applying in a child sexual abuse claim is the *shorter* of:

- 12 years from the act or omission from which the injury resulted; or
- six years from the date on which the cause of action is discoverable by the plaintiff.

If the injury to the child was caused by a parent, guardian or a parent or guardian's 'close associate', the action is discoverable only when the claimant turns 25. The 12-year long-stop limitation period only begins running from when the claimant turns 25.

### Amended Law

No limitation period will apply to a cause of action if the action is founded on the death or personal injury of a person resulting from:

- an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse
- psychological abuse (if any) that arises out of that act or omission.

This removal of the limitation period for a survivor of physical or sexual abuse applies

regardless of whether or not the action was subject to a limitation period at any time in the past.

For claims by dependents of a deceased survivor of physical or sexual abuse, the limitation period is three years from the date the claim is discoverable, with no long-stop period. This applies to actions regardless of the date of death of the deceased and regardless of whether or not the action was subject to a long-stop limitation period at any time in the past.

## Suspension of time

### Current Law June 2015

The limitation period is suspended where a person is a minor not in the custody of a capable parent or guardian or is 'incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action ... by reason of ... any disease or impairment of his or her physical or mental condition'.

### Amended Law

Suspension of time is not applicable because the relevant limitation period is abolished for survivors of physical or sexual abuse.

## Extension of time

### Current Law June 2015

The court may extend time 'if it decides that it is just and reasonable to do so'. It must consider all the circumstances of the case, including:

- the length and reasons for the delay
- possible prejudice to the defendant
- whether the defendant had taken steps to make available to the plaintiff means of ascertaining facts relevant to the cause of action
- the duration of any disability or legal capacity of the plaintiff
- the time within which the cause of action was discoverable
- whether the plaintiff acted promptly and reasonably once he or she knew that there might be an action for damages
- the steps the plaintiff took to obtain medical, legal and other expert advice
- whether the passage of time has prejudiced a fair trial of the claim
- the nature and extent of the plaintiff's loss
- the nature of the defendant's conduct.

### Amended Law

Extension of time is not applicable because the relevant limitation period is abolished for survivors of physical or sexual abuse.

## Queensland: Limitation of Actions Act 1974

### Limitation periods

The basic limitation period applying in a child sexual abuse claim is three years from when the action accrued.

If the person was under 18 when the action accrued, the limitation period is extended so

that it ends six years from when the person turns 18 years of age.

### Suspension of time

If the person was 'of unsound mind' when the action is accrued, the limitation period is extended so that it ends six years from when the person ceases to be under that disability.

### Extension of time

The court may extend time if there is evidence to establish the action and the prospective plaintiff did not have the means of knowledge of a 'material fact of a decisive character relating to the right of action' (here the court may extend the limitation period to one year after the plaintiff came to have the means of knowing that material fact).

## Western Australia: Limitation Act 2005

### Limitation periods

The cause of action accrues only when the plaintiff becomes aware that he or she has sustained a 'not insignificant personal injury' or there is a symptom, clinical sign or other manifestation of that injury.

If the person is less than 15 years old when the cause of action accrues, the limitation period is six years, although this period is suspended while the person is under 18 years of age and lacks a guardian, though it cannot be suspended past 21 years of age.

If the person is 15, 16 or 17 years old, the limitation period ends when the person reaches 21 years of age.

If the plaintiff was a minor and was in a 'close relationship' with the defendant, the limitation period ends when the plaintiff turns 25 years of age, unless a longer limitation period applies.

### Suspension of time

The limitation period is suspended while the plaintiff is suffering a 'mental disability' and is without a guardian but not for more than 12 years since the cause of action accrued. A mental disability is 'a disability suffered by the person (including an intellectual disability, a psychiatric condition, an acquired brain injury or dementia) an effect of which is that the person is unable to make reasonable judgments in respect of matters relating to the person or the person's property'.

### Extension of time

The court may extend time if it is satisfied that, when the limitation period expired, the plaintiff was not aware of the physical cause of the injury, that the injury could be attributed to someone's conduct or of the identity of the person to whose conduct the injury could be attributed. The court must consider whether the delay would 'unacceptably diminish the prospects of a fair trial of the action' and whether extending the time would 'significantly prejudice the defendant' (here the court may extend the period by up to three years from when the plaintiff became aware or ought reasonably to have become aware of the relevant fact).



## South Australia: Limitation of Actions Act 1936

### Limitation periods

The basic limitation period is three years from when the cause of action accrued, but if the personal injury 'remains latent for some time after its cause', the limitation period commences when the injury comes to the person's knowledge.

The limitation period is extended for the period in which the plaintiff remains under 18 years of age.

### Suspension of time

The limitation period is suspended by reason of disability where a person 'is subject to a mental deficiency, disease or disorder by reason of which he is incapable of reasoning or acting rationally in relation to the action or proceeding that he is entitled to bring'.

It may not be suspended for more than 30 years after the cause of action accrued.

### Extension of time

The court may extend time if it is 'just' in 'all the circumstances of the case' to do so and either the plaintiff instituted the claim within a year of ascertaining the case's material facts or the failure to institute the claim within time resulted from the defendant's representations or conduct.

## Tasmania: Limitation Act 1974

### Limitation periods

For an action that accrued before 1 January 2005:

- the basic limitation period that applies in a child sexual abuse claim is three years from when the action accrued
- if the action accrued when the plaintiff was under 18 years of age and not in the custody of a parent, the limitation period is suspended until the person turns 18.

For an action that accrued on or after 1 January 2005:

- the basic limitation period that applies in a child sexual abuse claim is the earlier of three years from when the cause of action was discoverable and 12 years from the time of the act or omission that resulted in the injury
- if the action accrued when the plaintiff was under 18 years of age and not in the custody of a parent, the limitation period is suspended until the person turns 18
- if the plaintiff was a minor and the defendant was a parent or in a 'relationship' with the plaintiff, the limitation period is three years commencing from when the claimant turns 25 years of age.

## Suspension of time

The limitation period is suspended for a person who has a disability at the time of the action's accrual in the sense of being 'incapable, by reason of mental disorder, of managing his property or affairs'.

## Extension of time

For actions that accrued before 1 January 2005, the court can extend time for up to six years from when the action accrued if 'in all the circumstances of the case it is just and reasonable to do so'.

For actions that accrued on or after 1 January 2005, if 12 years have elapsed from the date of the relevant act or omission, the court may extend the limitation period to three years from the date of discoverability 'having regard to the justice of the case', including whether the passage of time has prejudiced a fair trial, the nature and extent of the loss and the nature of the defendant's conduct.

## Australian Capital Territory: Limitation Act 1985

### Limitation periods

The basic limitation period that applies in a child sexual abuse claim is three years from when the action accrues.

If the action accrued when the plaintiff was under 18 years of age, the limitation

period is suspended until the plaintiff turns 18 years of age. However, if notice has not been given to the defendant within six years of the relevant act or omission, the plaintiff cannot recover damages for medical, legal or gratuitous services that were provided before the proceedings commenced.

## Suspension of time

The limitation period is suspended where a person is 'incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action ... by reason of ... any disease or impairment of his or her physical or mental condition'. The limitation period cannot expire less than three years after when the disability ends. It is extended if necessary to ensure this.

## Extension of time

The court may extend time 'if it decides that it is just and reasonable to do so'. It must consider:

- the length of and reasons for the delay
- prejudice to the defendant
- when the plaintiff came to know of the injury, its nature and extent
- the connection between the injury and the defendant's act or omission
- any of the defendant's conduct inducing the delay
- the steps the plaintiff took to receive advice
- the extent of the loss.

## Northern Territory: Limitation Act

### Limitation periods

The basic limitation period that applies in a child sexual abuse claim is three years from when the action accrues.

If the plaintiff was under 18 when the action accrued, the limitation period is suspended so that it ends three years after the person turns 18 years of age.

### Suspension of time

The limitation period is suspended while a person remains 'disabled', in that 'by reason of age, disease, illness or mental or physical infirmity' he or she is 'incapable of managing his affairs in respect of legal proceedings'.

The limitation period cannot expire less than three years after when the disability ends. It is extended if necessary to ensure this.

### Extension of time

The court may extend time if it is 'just' in 'all the circumstances of the case' to do so *and* either the plaintiff instituted the claim within a year of ascertaining the case's material facts or the failure to institute the claim within time must be the result from the defendant's representations or conduct.



# Endnotes

1. *Royal Commissions Act 1902* (Cth) ss 2(1)(b), 2(3A); *Royal Commissions Act 1923* (NSW) s 8; *Commissions of Inquiry Act 1950* (Qld) s 5(1)(b); *Royal Commissions Act 1917* (SA) s 10(c); *Commissions of Inquiry Act 1995* (Tas) s 22(1)(b); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 17(1); *Royal Commissions Act 1968* (WA) ss 8B(1)(b), 9. Note s 17(1) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) has been repealed but a transitional provision (s 164) provides for a grandfathering clause so that s 17(1) continues to apply to the Royal Commission.
2. *Letters Patent*, p(ii)-(iii).
3. Care Leavers Australia Network (CLAN), Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 6: Redress Schemes*, released 23 April 2014, pp 2-3.
4. Senate Standing Committee on Legal and Constitutional Affairs, 'Review of Government Compensation Payments', Parliament House, Canberra, 6 December 2010, p 29.
5. Alliance for Forgotten Australians, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 6: Redress Schemes*, released 23 April 2014, p 3.
6. Coalition of Aboriginal Services, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 9.
7. See, for example: Transcript of T Allen, T13613:46-T13614:5 (Day 130); Transcript of J Whitwell, T13683:1-7 (Day 131); Transcript of F Sullivan, T13688:9-12 (Day 131); Transcript of W Strange, T13868:40-43 (Day 132); Transcript of L Sheedy, T13783:37-39 (Day 132); Transcript of C Bates, T13818:26-29 (Day 132).
8. Transcript of M Humphreys, T13744: 6-9 (Day 131).
9. For example, see J Cashmore & R Shackel, 'The long-term effects of child sexual abuse', *CFCA Paper No. 11*, 2013, <https://www3.aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf> (viewed 30 June 2015).
10. For example, see J Cashmore & R Shackel, 'The long-term effects of child sexual abuse', *CFCA Paper No. 11*, 2013, <https://www3.aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf> (viewed 30 June 2015) and the Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Volume 1*, 2014, p 117.
11. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 45.
12. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 45-46.
13. Transcript of EG, T3944:8-17 (Day 37).
14. Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014 p 64.
15. Transcript of J Hennessey, TWA1543:13-18 (Day WA13).
16. Ballarat Centre Against Sexual Assault and Ballarat Survivors Group, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 2.
17. The Salvation Army Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 2.
18. Child Migrants Trust, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 32.
19. Broken Rites, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 1.

20. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 50.
21. Transcript of K Walsh, T13579:9-18 (Day 130).
22. Transcript of M Singh, T13595: 12-28 (Day 130).
23. Transcript of C Carroll, T13756:22-38 (Day 131).
24. Transcript of L Sheedy, T13782:37-43 (Day 132).
25. Transcript of J Pocock, T13825:17-23 (Day 132).
26. Transcript of S Razi, T13843:9-22 (Day 132).
27. For example, see the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: Alliance for Forgotten Australians, p 2, p 15; Care Leavers Australia Network (CLAN), p 2; Centre for Excellence in Child and Family Welfare, p 2; Public Interest Advocacy Centre (PIAC), p 5; International Association of Former Child Migrants and their Families, p 8; Australian Lawyers Alliance, p 10; Kelso Lawyers, p 32.
28. New South Wales Bar Association, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 3.
29. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 61.
30. For example, see the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: CREATE Foundation, p 8; Anglicare WA, p 2; Centre for Excellence in Child and Family Welfare, p 2; Berry Street, pp 7-8; Victim Support Service, p 7 and p 11; the Anglican Church of Australia, pp 2-3; Micah Projects, pp 1-2; Scouts Australia, p 4; knowmore, p 2, p 4; Survivors Network for those Abused by Priests (SNAP) Australia, p 10; Angela Sdrinis Legal, p 11; Actuaries Institute, p 2.
31. Transcript of P McIntyre, T13632: 44-T13633:8 (Day 130).
32. For example, see the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: Australian Lawyers Alliance, p 5; Lutheran Church of Australia, p 2; Aboriginal Legal Service of Western Australia, p 4; YMCA Australia p 5; Broken Rites, p 2; Care Leavers Australia Network (CLAN), p 4; Uniting Church in Australia, p 4; Northern Territory Government, p 11; Goodstart Early Learning, p 3.
33. J Breckinridge, J Cunningham & K Jennings, *Cry for help: Client and worker experiences of disclosure and help seeking regarding child sexual abuse*, Relationships Australia (SA), South Australian Government Department for Families and Communities, [http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report\\_2008.pdf](http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report_2008.pdf) (viewed 30 June 2015).
34. Royal Commission into Institutional Responses to Child Sexual Abuse *Interim Report: Volume 1*, 2014, p 6.
35. Royal Commission into Institutional Responses to Child Sexual Abuse *Interim Report: Volume 1*, 2014, pp 1516.
36. Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 6: The response of a primary school and the Toowoomba Catholic Education Office to the conduct of Gerard Byrnes*, 2015, p 4, p 6.
37. Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 12: The response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009*, 2015, p 5.
38. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 61.
39. Transcript of KR, TQ41:3-8 (Day Q1).

40. The evidence in relation to financial settlements of the civil claims by the school in respect of all five complainants is subject to a suppression order restricting publication. The nature of the evidence in relation to the financial settlements was referred to in the Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 12: The response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009*, 2015, p 52.
41. CREATE Foundation, Submission to the Royal Commission into Institutional Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 8; Centre for Excellence in Child and Family Welfare, Submission to the Royal Commission into Institutional Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 3.
42. Senate Legal and Constitutional Affairs References Committee 2010, *Review of Government Compensation Payments*, Canberra, Recommendations 1-5, paras [2.90]-[2.98]; Senate Community Affairs References Committee 2009, *Lost Innocents and Forgotten Australians Revisited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports*, Canberra, Recommendation 4-5, paras [6.38]-[6.39]; Senate Community Affairs References Committee 2004, *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*, Canberra, , Recommendation 6, para [8.125]; Senate Legal and Constitutional Affairs References Committee 2000, *Healing: A Legacy of Generations: The Report of the Inquiry into the Federal Government's implementation of recommendations made by the Human Rights and Equal Opportunity Commission in Bringing Them Home*, Canberra, Recommendation 7, p 261; Human Rights and Equal Opportunity Commission 1997, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney, Recommendation 15.. See also: Family and Community Development Committee 2013, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, vol 1, East Melbourne, Recommendation 28.1, Part H, p xlvi.
43. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 63-79.
44. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 63.
45. The claims data produced by the Tasmanian Government relate only to claims under its government redress scheme, and so this data were not included in the claims data analysis.
46. See Appendix B for list of summonses and notices to produce.
47. South Australia was not issued with an additional notice because its government redress scheme operates through its statutory victims of crime compensation scheme.
48. Western Australia, *Parliamentary Debates*, Legislative Council, Tuesday 14 August 2012, 4837-4839 (Hon Alison Xamon, Hon Michael Mischin); Western Australia, *Parliamentary Debates*, Legislative Council, Tuesday 14 August 2012, 4837-4839 (Hon Alison Xamon, Hon Robyn McSweeney).
49. Material obtained by Royal Commission from Western Australian Government in response to notice to produce C-NP-339.
50. Smart Service Queensland, Redress Scheme Project Closure Report, 28 June 2010, material obtained by Royal Commission from Queensland Government in response to summons to produce S-QLD-49.
51. Smart Service Queensland, Redress Scheme Project Closure Report, 28 June 2010, material obtained by Royal Commission from Queensland Government in response to summons to produce S-QLD-49.
52. Tasmanian Government Department of Health and Human Services, *Review of Claims of Abuse of Children in State Care, Final Report – Round 4*, November 2014, material obtained by Royal Commission from Tasmanian Government in response to summons to produce S-TAS-8.
53. Material obtained by Royal Commission from South Australian Government in response to notice to produce C-NP-358 and C-NP-777.

54. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 153.
55. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 50-51.
56. Bravehearts, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 6: Redress Schemes*, released 23 April 2014, p 8.
57. See the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: Open Place, p 5; Relationships Australia p 9; Kelso Lawyers pp 12-13.
58. Relationships Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 9.
59. See the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on *Issues Paper No: 6 Redress Schemes*, released 23 April 2014: Victim Support Australia, p 2; Aboriginal Legal Rights Movement, p 1; Centre for Excellence in Child and Family Welfare, pp 6-7.
60. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly, 21 March 2006, A/RES/60/147.
61. See for example the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: Law Council of Australia, p 4; Women's Legal Services NSW p 2; Kelso Lawyers, p 13; Berry Street, p 6; Kimberley Community Legal Services, p 3.
62. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly, 21 March 2006, A/RES/60/147, VII, 11(a)-(c).
63. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly, 21 March 2006, A/RES/60/147, Principles 19-23.
64. Alliance for Forgotten Australians, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper on Redress and Civil Litigation*, 2015, p 6.
65. See for example the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: Relationships Australia, pp 9-10; Restorative Justice International, p 1; Eithne Donlon; Law Council of Australia, p 6; Tasmanian Government, p 4; The Salvation Army Australia, pp 21-22; knowmore, p 4; Robert Mackays; Professor Dr Ivo Aertsen; Angela Sdrinis Legal, pp 3-4.
66. M S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice', *Melbourne University Law Review*, vol 32, no 3, 2008, pp 1096-1126, p 1102.
67. T F Marshall, 'The Evolution of Restorative Justice in Britain', *European Journal on Criminal Policy and Research*, vol 4, no 4, 1996, pp 21-43, p 37.
68. J Braithwaite, 'Restorative justice and therapeutic jurisprudence', *Criminal Law Bulletin*, vol 38, no 2, 2002, pp 244-62, p 246.
69. J Braithwaite, 'Restorative justice and therapeutic jurisprudence', *Criminal Law Bulletin*, vol 38, no 2, 2002, pp 244-62, p 247.
70. M S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice', *Melbourne University Law Review*, vol 32, no 3, 2008, pp 1096-1126.
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73. J Ellis & N Ellis, 'A new model for meaningful redress for victims', *Current Issues in Criminal Justice*, vol 26, no 1, 2014, pp 31-41, p 36.
74. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 53-54.
75. Australian Psychological Society, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 11.
76. Kimberley Community Legal Services, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 4.
77. Law Council of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 4.
78. Ballarat Centre Against Sexual Assault and Ballarat Survivors Group, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 3.
79. The Salvation Army Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 3.
80. Transcript of E J Fretton, T9477:7-8 (Day 89).
81. Transcript of JC Ingham, T2831:17-T2832:2 (Day 27).
82. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 81-103.
83. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 81-82.
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87. Transcript of A Hywood, T13733:8-15 (Day 131).
88. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 82.
89. Transcript of JE, T6723:2-3 (Day 64).
90. Alliance for Forgotten Australians, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 8.
91. Care Leavers Australian Network (CLAN), Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 5.
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  107. NSW Ombudsman, *Apologies: A practical guide (2<sup>nd</sup> edition)*, Sydney, March 2009, p 17-18.
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  111. Transcript of JE, T6730:36-44 (Day 64).
  112. Transcript of DG, T3098:18-31 (Day 29).
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1079. *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [105], citing *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25 (2 October 1996); (1996) 186 CLR 541, 550 (Toohey and Gummow JJ).
1080. *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [111].
1081. *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [64]-[68], [113].
1082. *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [115].
1083. *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [124].
1084. *The Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347 (11 December 2008) [95]-[107] (McColl JA), [134]-[143] (Basten JA), [155]-[156] (Bell JA). While there was disagreement in the Court of Appeal for how the claim of breach of fiduciary duty interacted with s 36 of the *Limitation of Actions Act 1936* (SA), that disagreement is not presently relevant.
1085. [2015] SASC 12 (4 February 2015).
1086. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [1]-[4].
1087. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [8].
1088. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [9].
1089. *Limitation of Actions Act 1936* (SA) s 45.
1090. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [10].
1091. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [103]-[106].
1092. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [11].
1093. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [64].



1094. *A, DC v Prince Alfred College Incorporated [2015] SASC 12* (4 February 2015) [196].
1095. *A, DC v Prince Alfred College Incorporated [2015] SASC 12* (4 February 2015) [204].
1096. *A, DC v Prince Alfred College Incorporated [2015] SASC 12* (4 February 2015) [205]-[209].
1097. *A, DC v Prince Alfred College Incorporated [2015] SASC 12* (4 February 2015) [198].
1098. *Limitation of Actions Act 1936 (SA)* s 48.
1099. *A, DC v Prince Alfred College Incorporated [2015] SASC 12* (4 February 2015) [216]-[221].
1100. *A, DC v Prince Alfred College Incorporated [2015] SASC 12* (4 February 2015) [223]-[225].
1101. See for example *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25 (1996); 186 CLR 541, 552–53 (McHugh J); New South Wales Law Reform Commission, *First Report on the Limitation of Actions*, New South Wales, 1967, p 133; D Jackson, ‘The legal effects of the passing of time’, *Melbourne University Law Review*, vol 7, no 3, 1970, p 407, p 409.
1102. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 61, p 111 and p 204.
1103. J Breckinridge, J Cunningham & K Jennings, *Cry for help: Client and worker experiences of disclosure and help seeking regarding child sexual abuse*, Relationships Australia (SA), South Australian Government Department for Families and Communities, [http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report\\_2008.pdf](http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report_2008.pdf) (viewed 30 June 2015).
1104. Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Volume 1*, Sydney, 2014, p 6.
1105. *Jago v District Court of NSW* [1989] HCA 46 (12 October 1989); (1989) 168 CLR 23; *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27 (14 June 2006); (2006) 226 CLR 256.
1106. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 205–206.
1107. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 35 and 232.
1108. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 205–206.
1109. Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, pp 542–43 [26.3.2] and recommendation 26.3.
1110. Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, pp 542–43 [26.3.2].
1111. *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014* (Vic) Exposure Draft cl 1.
1112. *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014* (Vic) Exposure Draft cl 5 inserting s 27P(2).
1113. *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014* (Vic) Exposure Draft cl 5 inserting s 27Q(2).
1114. Parliament of Victoria, *58<sup>th</sup> Parliament 1<sup>st</sup> Session Bill Status List as at 12 May 2015*, [http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs.nsf/5c1631817579e7d3ca256dd5000be881/7340C880F5C15734CA257E43000086E6/\\$FILE/Bill%20Status%20List%202015.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/5c1631817579e7d3ca256dd5000be881/7340C880F5C15734CA257E43000086E6/$FILE/Bill%20Status%20List%202015.pdf) (viewed 30 June 2015).
1115. *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) s 2.
1116. *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) s 4 inserting s 27P.
1117. *Limitation of Actions Amendment (Child Abuse) Bill 2015* (Vic) s 3.
1118. Victoria, *Parliamentary Debates*, Legislative Assembly 2015, Tuesday 24 February 2015, p 343 (Mr Pakula, Attorney-General).

1119. *Limitation of Actions Amendment (Child Abuse) Act 2015* s 4 inserting s 27O.
1120. Explanatory Memorandum, *Limitation of Actions Amendment (Child Abuse) Bill 2015* (Vic) p 2.
1121. *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) s 4 inserting s 27Q.
1122. *Limitation of Actions Amendment (Child Abuse) Bill 2015* (Vic) s 3 inserting 27N(6) and s 4 inserting 27Q..
1123. *Limitation of Actions Amendment (Child Abuse) Act 2015* s 4 inserting s 27R.
1124. NSW Government Department of Justice, *Limitation periods in civil claims for child sexual abuse*, Discussion Paper January 2015, p 10.
1125. NSW Government Department of Justice, *Discussion Papers*, [http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd\\_consultation/lpclrd\\_discussion.aspx](http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/lpclrd_discussion.aspx) (viewed 30 June 2015).
1126. NSW Government Department of Justice, *Limitation periods in civil claims for child sexual abuse*, Discussion Paper January 2015, p 10.
1127. NSW Government Department of Justice, *Limitation periods in civil claims for child sexual abuse*, Discussion Paper January 2015, p 10.
1128. NSW Government Department of Justice, *Limitation periods in civil claims for child sexual abuse*, Discussion Paper January 2015, p 11.
1129. NSW Government Department of Justice, *Limitation periods in civil claims for child sexual abuse*, Discussion Paper January 2015, pp 19-21.
1130. See for example Aboriginal Legal Service of Western Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 15; and National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 10.
1131. See for example the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: Kelso Lawyers, p 46; Professor Patrick Parkinson, p 11; Angela Sdrinis Legal, p 9; Ballarat Centre Against Sexual Assault and Ballarat Survivors Group, p 2; Centre Against Sexual Violence, p 6; CREATE Foundation, p 17; Centre for Excellence in Child and Family Welfare, pp 1-2; Alliance for Forgotten Australians, p 5; Berry Street, p 8; Victim Support Service, p 8; Australian Baptist Ministries, p 4; Care Leavers Australia Network (CLAN), p 14; Micah Projects, p 18; Slater and Gordon Lawyers, p 17; Women's Legal Service NSW, p 8; Kingsford Legal Centre, p 4; knowmore, p 2; Associate Professor Ben Matthews, p 1; Public Interest Advocacy Centre (PIAC), p 11; Commission of Inquiry Now (COIN), p 19; Bravehearts, p 18; Kimberley Community Legal Services, p 16; Goodstart Early Learning, p 4; Survivors Network of those Abused by Priests (SNAP) Australia, p 6.
1132. Care Leavers Australia Network (CLAN), Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 14-15.
1133. Bravehearts, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 18-20.
1134. Australian Lawyers Alliance, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 17.
1135. Australian Lawyers Alliance, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 19.
1136. Australian Lawyers Alliance, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 19-20.
1137. Associate Professor Ben Mathews, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 1.



1138. Associate Professor Ben Mathews, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 3.
1139. Associate Professor Ben Mathews, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 4-5.
1140. See for example the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse on the *Consultation Paper into Redress and Civil Litigation*, 2015: The Salvation Army Australia, pp 22-23; Anglican Church of Australia, p 9; Scouts Australia, p 7; Uniting Church in Australia, p 20; Truth Justice and Healing Council, p 13.
1141. Tasmanian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 5.
1142. Transcript of C Vickers, T13672:23-T13673:14 (Day 131).
1143. Law Council of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 12.
1144. The Salvation Army Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 22-23.
1145. Truth Justice and Healing Council, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 13.
1146. Transcript of F Sullivan, T13693:5-15 (Day 131).
1147. Anglican Church of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 9.
1148. Uniting Church in Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 20.
1149. South Australian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 10-13; and Insurance Council of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, pp 3-4.
1150. Insurance Council of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 4.
1151. Transcript of R Whelan, T13751:41-T13752:20 (Day 131).
1152. Transcript of R Whelan, T13752:28-T13753:11 (Day 131).
1153. Transcript of R Whelan, T13753:18-28 (Day 131).
1154. Transcript of R Whelan, T13753:30-39 (Day 131).
1155. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 206.
1156. Associate Professor Ben Mathews, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, p 5.
1157. *Cole v Turner* (1704) 6 Mod 149 [87 ER 907]; *R v Cotesworth* (1704) 6 Mod 172 [87 ER 928].
1158. *Stanley v Powell* [1891] 1 QB 86.
1159. See generally P Vines, 'Negligence: Introduction' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts*, LawBook Co, 10<sup>th</sup> ed, 2011, p 119.
1160. *Williams v Eady* (1893) 10 TLR 41, 42 (Lord Esher); *Victoria v Bryar* (1970) 44 ALJR 174; *Geyers v Downs* [1977] HCA 64 (9 December 1977) [6], [18]; (1977) 138 CLR 91, 94 (Stephen J), 102 (Murphy and Aickin JJ); *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [141] (McHugh J); 212 CLR 511, 564.

1161. *Perre v Apand Pty Ltd* [1999] HCA 36 (12 August 1999) [198] (Gummow J); (1999) 198 CLR 180, 253; *Sullivan v Moody* [2001] HCA 59 (11 October 2001) [50]–[52] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); (2001) 207 CLR 562, 579–80; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (5 December 2002) [149] (Gummow and Hayne JJ); (2002) 211 CLR 540, 597–98.
1162. *Perre v Apand Pty Ltd* [1999] HCA 36 (12 August 1999) [198]–[199] (Gummow J); (1999) 198 CLR 180, 253–254.
1163. *Pyrenees Shire Council v Day* [1998] HCA 3 (23 January 1998); (1998) 192 CLR 330; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (10 November 1999); (1999) 200 CLR 1; *Brodie v Singleton Shire Council* [2001] HCA 29 (31 May 2001); (2001) 206 CLR 512; *Sullivan v Moody* [2001] HCA 59 (11 October 2001); (2001) 207 CLR 562; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (5 December 2002); (2002) 211 CLR 540; *Stuart v Kirkland-Veenstra* [2009] HCA15 (22 April 2009); (2009) 237 CLR 215.
1164. *TC v State of New South Wales* [1999] NSWSC 31 (11 February 1999); *SB v State of New South Wales* [2004] VSC 514 (14 December 2004); (2004) 13 VR 527.
1165. *Williams v Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843 (26 August 1999); (1999) 25 Fam LR 86; *Williams v The Minister Aboriginal Land Rights Act 1983* [2000] NSWCA 255 (12 September 2000).
1166. However, in at least two decisions, courts have held that such a case was at least arguable for the purpose of deciding whether the limitation period for making a claim should be extended: *SDW v Church of Jesus Christ of Latter-Day Saints* [2008] NSWSC 1249 (27 November 2008); (2008) 222 FLR 84; *The Salvation Army v Rundle* [2008] NSWCA 347 (11 December 2008).
1167. *Wyong Shire Council v Shirt* [1980] HCA 12 (1 May 1980) [14] (Mason J); (1980) 146 CLR 40, 47.
1168. *Wyong Shire Council v Shirt* [1980] HCA 12 (1 May 1980) [14] (Mason J); 146 CLR 40, 47.
1169. *Wyong Shire Council v Shirt* [1980] HCA 12 (1 May 1980) [14] (Mason J); 146 CLR 40, 47–48. These requirements have been codified, and to a small extent modified, by state and territory civil liability legislation: *Civil Law (Wrongs) Act 2002* (ACT) s 43; *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 1936* (SA) s 32; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B.
1170. *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5 (2 February 1998) [158] (Hayne J); (1998) 192 CLR 431, 489.
1171. *Wallace v Kam* [2013] HCA 19 (8 May 2013) [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); (2013) 250 CLR 375, 381.
1172. *Civil Liability Act 2002* (NSW) s 5D; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 2002* (WA) s 5C; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Civil Law (Wrongs) Act 2002* (ACT) s 45; *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12 (24 April 1991) [17]–[22] (Mason CJ); (1991) 171 CLR 506, 515–17; *Strong v Woolworths Ltd* [2012] (7 March 2012) [18]–[20] (French CJ, Gummow, Heydon, Crennan and Bell JJ); (2012) 246 CLR 182, 190–91; *Wallace v Kam* [2013] HCA 19 (8 May 2013) [16]–[40] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) 250 CLR 375, 383–391.
1173. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, 426.
1174. P Case, *Compensating child abuse in England and Wales*, Cambridge University Press, 2007, p 210.
1175. See *TC v New South Wales* [2000] NSWSC 292 (12 April 2000) [66]–[81] (Studdert J).
1176. *TC v New South Wales* [2000] NSWSC 292 (12 April 2000) [53]–[81] (Studdert J). Affirmed on appeal in *TC v New South Wales* [2001] NSWCA 380 (31 October 2001).
1177. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004); (2004) 13 VR 527.
1178. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [94]; (2004) 13 VR 527, 543.
1179. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [94]; (2004) 13 VR 527, 543.
1180. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [96]–[308]; (2004) 13 VR 527, 543–91.

1181. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [291]–[307]; (2004) 13 VR 527, 588–91.
1182. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [395]–[525]; (2004) 13 VR 527, 594–606.
1183. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [494]; (2004) 13 VR 527, 599.
1184. *SB v State of New South Wales* [2004] VSC 514 (14 December 2004) [382]–[389]; (2004) 13 VR 527, 592–93.
1185. *S v The Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473 (7 December 2001).
1186. *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19 (16 May 2006); (2006) 226 CLR 161.
1187. *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19 (16 May 2006); (2006) 226 CLR 161.
1188. Although legislation in some states and territories provides that community organisations may be liable for torts committed by volunteers carrying out community work in good faith: *Wrongs Act 1958* (Vic) s 37(2); *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA) s 7(1); *Volunteers Protection Act 2001* (SA) s 5(1); *Civil Liability Act 2002* (Tas) s 48(1); *Civil Law (Wrongs) Act 2002* (ACT) s 9(1); *Personal Injuries (Liabilities and Damages) Act* (NT) s 7(3). See also *Commonwealth Volunteers Protection Act 2002* (Cth) s 7(1), which applies to volunteers working for the Australian Government or an Australian Government authority.
1189. *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117 (24 May 2007) [32] (Mason P); 70 NSWLR 565, 573.
1190. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [40]; 212 CLR 511, 535.
1191. *Lloyd v Grace, Smith & Co* [1912] AC 716.
1192. *Deatons Pty Ltd v Flew* [1949] HCA 60 (12 December 1949); (1949) 79 CLR 370.
1193. *London CC v Cattermoles (Garages) Ltd* [1953] 1 WLR 997.
1194. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003); (2003) 212 CLR 511.
1195. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [74]; (2003) 212 CLR 511, 546.
1196. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [130]; (2003) 212 CLR 511, 561.
1197. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [232]; (2003) 212 CLR 511, 592.
1198. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [318]; (2003) 212 CLR 511, 618. (References omitted).
1199. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [67]; (2003) 212 CLR 511, 544.
1200. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [132]; (2003) 212 CLR 511, 561.
1201. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [239]; (2003) 212 CLR 511, 594.
1202. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [241]–[142]; (2003) 212 CLR 511, 594.
1203. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [327]; (2003) 212 CLR 511, 621.
1204. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [345]; (2003) 212 CLR 511, 626.
1205. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013).
1206. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015).
1207. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [1], [4].
1208. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [1], [4], [5].
1209. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [5].
1210. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [134].
1211. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [140].

1212. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [134]-[139].
1213. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [142].
1214. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013) [143].
1215. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [1].
1216. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [168], [171] citing *Withyman v State of New South Wales* [2013] NSWCA 10 (11 February 2013).
1217. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [172].
1218. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [173].
1219. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [173]-[174].
1220. *Withyman v State of New South Wales and Blackburn* [2013] NSWCA 10 (11 February 2013).
1221. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [175].
1222. *A, DC v Prince Alfred College Incorporated* [2015] SASC 12 (4 February 2015) [178].
1223. New South Wales and Victorian legislation requires a claim for a breach of a non-delegable duty to be determined as if it were a claim for vicarious liability: *Civil Liability Act 2002* (NSW) s 5Q; *Wrongs Act 1958* (Vic) s 61.
1224. *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35 (2 September 2009); (2009) 240 CLR 1.
1225. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [158]; (2003) 212 CLR 511, 570.
1226. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [159]; (2003) 212 CLR 511, 571.
1227. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [257]; (2003) 212 CLR 511, 599.
1228. *Scott v Davis* [2000] HCA 52 (5 October 2000) [248]; (2000) 204 CLR 333, 417..
1229. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [265]-[270]; (2003) 212 CLR 511, 601-3.
1230. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [161]; (2003) 212 CLR 511, 571-72.
1231. *New South Wales v Lepore* [2003] HCA 4 (6 February 2003) [36]; (2003) 212 CLR 511, 534.
1232. *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] SCC 59 [25] (28 September 2001) (Major J, writing for the court); (2001) 2 SCR 983, 995.
1233. *KLB v British Columbia* [2003] SCC 51 (2 October 2003) [19] (McLachlin CJ, writing for herself, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ); 2 SCR 403, 417.
1234. *John Doe v Bennett* [2004] SCC 17 [27] (McLachlin CJ, writing for the Court); (2004) 1 SCR 436, 449.
1235. *KLB v British Columbia* [2003] SCC 51 (2 October 2003) [25] (McLachlin CJ); 2 SCR 403, 421.
1236. [1999] 2 SCR 534.
1237. *Bazley v Curry* [1999] 2 SCR 534, 554 [31].
1238. *Bazley v Curry* [1999] 2 SCR 534, 59 [41].
1239. *Bazley v Curry* [1999] 2 SCR 534, 558-59 [40].
1240. [1999] 2 SCR 534, 560 [41].
1241. [1999] 2 SCR 570.
1242. *Jacobi v Griffiths* [1999] 2 SCR 570, 618-19 [80] (Binnie J).
1243. *Jacobi v Griffiths* [1999] 2 SCR 570, 621 [84] (Binnie J).
1244. *Jacobi v Griffiths* [1999] 2 SCR 570, 582-87 [13]-[22] (McLachlin CJ, writing for herself, L'Heureux-Dubé and Bastarache JJ).

1245. See the discussion of the vicarious liability of an ‘agent’ in PS Atiyah, *Vicarious liability in the law of torts*, Butterworths, 1967, pp 99–144.
1246. *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013) [3].
1247. *E v English Province of Our Lady of Charity* [2013] QB 722, 745 [18], 765 [62] (Ward LJ), 786 [131] (Davis LJ).
1248. [2013] 2 AC 1.
1249. *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 20 [60].
1250. *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 20 [56]–[58].
1251. [2013] QB 722.
1252. *E v English Province of Our Lady of Charity* [2013] QB 722, 769 [73].
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ISBN 978-1-925289-28-2  
Published August 2015