

Consultation Paper: Redress and Civil Litigation – Commonwealth submission

1. In its consultation paper the Royal Commission into institutional responses to child sexual abuse (Royal Commission) put particular questions to the Commonwealth. This submission responds to those questions. It does not seek to address each point comprehensively, but to indicate the Commonwealth's position on each issue and to outline the reasons for it.

Whether the Australian Government favours a single, national redress scheme led by the Australian Government or an alternative approach

2. The Commonwealth 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.
3. The Commonwealth is concerned that 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.
4. As the Royal Commission itself recognises,¹ a national scheme would require protracted and complex negotiations with the State and Territory governments (as well as other stakeholders). Victims of crime redress schemes have traditionally been introduced and operated at the state and territory level. In addition, where health services form part of the redress model, these are likely to be delivered by state and territory service delivery agencies. Determining 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.
5. An additional complication for a national scheme is identifying the source of legislative power for the Commonwealth government to operate such a scheme. Enabling legislation would be necessary to authorise payments of monetary compensation.² The constitutional basis on which such laws might be made by the Commonwealth is uncertain. There is no obvious constitutional head of power for enacting a single national redress scheme. While it would be possible for the States and Territories to refer power to the Commonwealth, this could again be expected to require complex and protracted negotiations before national uniformity was achieved.
6. Assuming legislation could be enacted by the Commonwealth, its implementation would need to be supported by systems, structures and processes which do not currently exist. A bureaucracy would need to be created to administer the scheme, including frontline staff, decision-makers (both primary and reviewing decision-makers) and enforcement officers. The establishment of these arrangements would be time-consuming, further frustrating survivors and the broader community. The body is likely to overlap with, or at least duplicate, state or territory based victims of crime and similar administrative units.

¹ See pages 10 and 57 of Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (January 2015).

² See *Williams v Commonwealth* [2012] HCA 23 and *Williams v Commonwealth* (No 2) [2014] HCA 23.

Whether the Australian Government favours options for expanding the public provision of counselling and psychological care for survivors

7. The Commonwealth recognises the importance of sufficient and appropriate counselling and psychological care for survivors of child sexual abuse, regardless of the context or environment in which they were abused. A number of services already exist for survivors. Counselling and other mental health services are presently available, both under the Medicare Benefits Schedule and under other programmes supported by the Australian Government, States and Territories. These services cover a range of clinical responses, from allied mental health services to psychiatric treatment for those more severely affected survivors of child sexual abuse. For example, psychiatric treatment at a community health centre or a public hospital is generally free, while private consultations with psychiatrists are subsidised through Medicare. Services provided by clinical and registered psychologists, social workers and occupational therapists are similarly subsidised through Medicare.
8. The Commonwealth also funds - on a national basis - a range of programs delivered through non-government organisations to provide a range of community-based support services, such as counselling and mental health support. These non-government organisations offer one-on-one support through counselling or emotional support, information on recovery planning and help with accessing other mental health services. Such organisations also run group rehabilitation programs.³
9. 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).
10. 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.

The Australian Government's views on appropriate funding arrangements, funder of last resort arrangements, and the level of flexibility allowed in implementing redress schemes and funding

11. Responsibility for providing redress should lie with the institution that failed to protect the individual survivors.⁴ 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.

³ Department of Health, *Non-government services and case management* (November 2011) Department of Health, <http://www.health.gov.au/internet/publications/publishing.nsf/Content/mental-pubs-p-psych10-toc~mental-pubs-p-psych10-exe~mental-pubs-p-psych10-exe-non>.

⁴ This is not to take away from the responsibility of the individual perpetrators of the abuse, but focuses on the institutional dimension of the Royal Commission's mandate, and recognises the reality that, in most instances, the institution will be better placed than the perpetrator/s to meet the redress needs of survivors.

12. 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.
13. Having regard to that principle, the Commonwealth does not see itself as having a role as 'funder of last resort'. Depending upon the design of the redress scheme, such a role would not be necessary. 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.

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