A response to Royal Commission *Consultation Paper: Redress and Civil Litigation*

Frank Golding, 28 February 2015

Preamble

This personal submission does not claim to represent the views of any organisation with which I am associated. However, as an active member of a number of Care Leaver[1] organisations over many years, I am confident that my personal views are widely shared among Care Leavers around Australia and elsewhere.

In December 2014 I attended an international conference and workshop in Sweden where I had opportunity to speak with people closely associated with redress schemes in Ireland, Sweden, Norway and Canada, and other countries where other measures are in place or proposed.

In the Consultation Paper (the Paper) the Royal Commission (the Commission) has astutely analysed the complexity of the task it confronts in acknowledging that it is not possible to start with a blank page (the Paper, pp. 8-9). The analysis provides a basis on which principles can be established – even if only by way of negating failed past practices.

In general, the Paper deserves to be widely supported and it is also heartening to note the position now taken by the Catholic Church's Truth, Healing and Justice Council which proposes that "a generous national redress scheme, funded by institutions responsible for the abuse, but led by the Australian government is now broadly supported as the best way forward to adequately redress survivors of institutional child sex abuse". It is to be hoped that other major institutions and all governments will adopt a similar position without further delay.

A. Introduction – some important points of principle

1. It is not possible to ignore a range of redress schemes and support services - past and current. The evidence shows these schemes to be flawed, inadequate and limited in their scope and reach. If the touchstone is fairness, consideration must be given both to those who have been able to avail themselves of these schemes but with full regard to their defects and to those who were eligible on the face of it but, for whatever reason, have not - or could not have - participated in these schemes.

[1] Care Leavers are defined as: people who grew up in what was called 'care', outside of their families in institutions or in foster 'care', but who have left that 'care'. (It is common to use the word 'care' in ironical quotation marks.)

2. The Commission's broad definition of 'institution' stretches far beyond what Care Leavers normally associate with redress. Moreover, people who spent their childhood in orphanages and other abusive out-of-home 'care' do not normally see themselves as survivors in the same light as survivors of abuse in the world outside of children's residential institutions. This is not to say that a child abused by a priest in the vestry or by a swimming coach in the change rooms or by a scout leader on camp did not experience insufferable harm. They obviously did, and were severely damaged by their experience; and their needs must be met. But child residents were vulnerable in a qualitatively different manner. Placed in 'care' precisely for their own protection and nurturing, they were totally at the mercy of the very people who were entrusted to protect them. When that trust was betrayed, they had no parents or local community to turn to. Those who fled through absconding (and there were thousands who did so) were systematically rounded up by the police and routinely returned to their abusers – with no questions asked.

3. The scope of the Commission's inquiry limited as it is to sexual abuse, if narrowly applied to recommendations for redress, is almost certainly destined to create a profound sense of injustice for those who suffer from other forms of life-defining abuse in their childhood. Sexual abuse of children is not a stand-alone crime against children in 'care' institutions. It is part of a cluster of abuse that vulnerable children endured. The Hon Peter McClelland was right to remark recently: "When an institution provided residential care it is common to find sexual abuse accompanied by high levels of physical abuse and exploitation of the children's labour" (Address, October 26, 2014). He could have gone further to say that high levels of physical and psychological abuse engendered a constant fear of sexual abuse which many children witnessed as part of their institutional experience.

4. There is ample documented evidence of ferocious criminal violence, humiliation, deprivation of food and schooling, forced labour and medical neglect in residential institutions. We must not lose sight of the need for redress for the immense suffering from those crimes against children simply because the public fury about sexual crimes against children pushes them off the public agenda. Some – but by no means all - who survived these other forms of abuse and neglect have already had their claims acknowledged and restitution paid through earlier redress schemes. It would be a grave injustice if a redress scheme were set up that did not extend to these other forms of abuse and neglect.

5. It may well be the case that the Commission cannot satisfy all interest groups and stakeholders. I make the proposition that the Commission's first duty – in a moral sense if not in a technical sense – is to survivors of abuse in children's residential institutions for they were the state's children, and of all the children the most at risk and the least likely to find support at their time of need, and since.

B. Single national scheme and future abuse?

6. The piecemeal approach has clearly failed almost everywhere it has been tried in Australia and elsewhere. In Norway, for example, the existence of a host of different local arrangements for the payment of reparations has exacerbated the problem for many applicants.[2] And without some overarching monitoring and accountability it seems that there are more risks than advantages with perpetuating this scrappy approach. Child abuse is a challenge for Australian society as a whole, needing strong and committed national leadership. Moreover the scope of the task is of such a scale that only a national scheme fully funded by contributions from all levels of government, all relevant churches and all relevant charities can be expected to manage it.

7. Notwithstanding the complexities and the time that would be required for a single national scheme, this is by far the preferred model for the reasons stated in the Paper. Given the scale of the undertaking, it may be possible to manage its development and implementation in stages, having proper regard for the pressing needs of the sick and elderly as a first stage priority. (See also paragraphs 38-39)

8. It seems impossible to envisage a scenario where institutional child abuse is forever eradicated. Wherever vulnerable children are exposed, evil people will exploit them. Therefore, the Commission should recommend redress processes and outcomes that would also cover future institutional child sexual abuse. It is also possible that the very existence of a multi-agency funded national redress scheme providing regular public reports could have the additional beneficial effect of reducing the quantum of abuse cases because of the fear of adverse publicity and financial penalties.

C. The principles for an effective direct personal response and the interaction between a redress scheme and direct personal response.

9. With the caveat about other forms of child abuse and neglect discussed above, I strongly support the dot points listed as general principles that should guide the provision of all elements of redress□(at page 9).

10. An institution's direct response could include (a) an apology; (b) an opportunity to meet with a senior representative of the institution; and (c) an assurance as to steps taken to protect against further abuse. However, these can sometimes be the least effective forms of a redress package. For example, there have been apologies already which are tokenistic, dutiful, often delivered in the absence of the survivors – and

[2] Kjersti Ericsson, 'Victim Capital and the Language of Money: The Norwegian Process of Inquiries and Apologies', *Journal of the History of Childhood and Youth*, Vol. 8, no. 1, 2015, pp. 123-137.

ultimately perceived by survivors as insincere and meaningless. As well, meetings with senior representatives of institutions have proven to be, in some cases, condescending and self-serving. The third of the elements - steps taken to protect against further abuse - is more likely to be reassuring to survivors if institutions show that their measures in that regard are well resourced and subject to quality control and objective monitoring and reporting.

11. Survivors are likely to be more positively responsive to institutions which offer tangible support of the kind listed on page 13 of the Paper, especially assistance with gaining access to personal and family records; family tracing and family reunion; memory projects; and collective forms of response such as memorials, reunions and commemorative events.

12. The Paper is right to point out that such responses should be delivered by people who have received training about the nature and impact of child abuse and the needs of survivors. Representatives of survivors and their advocacy groups should play a prominent role in any training programs of this nature. The adage, 'Nothing about us without us', should apply.

13. While institutions may well continue to interact with survivors on a range of matters, one thing is clear: we must never again accept the unethical situation where an institution plays investigator and sole judge of allegations against itself.

D. Support services, counseling, psychological care and other forms of redress

14. Monetary redress cannot be seen as the total answer to the needs of survivors of institutional abuse. The various forms of direct personal response discussed above, together with ongoing counselling for as long as it is needed, form part of the mix alongside financial payments – as do other forms of redress such as scholarships and educational opportunities to compensate for lost or diminished educational opportunities.

15. I strongly support the remarks in the Paper, at page 16, about the importance of strengthening the provision of services and counseling. The option of a trust fund is worth further development – and possible extention to other areas such as scholarships and educational opportunities for survivors, and even their children who have been caught up in the consequences of their parents' trauma.

16. Some support services provided by past providers, however, are regarded with disdain and a lack of trust by some survivors who feel so strongly about the history of the service provider that they are prepared to waive their rights and opportunities for access. It would be better all round if services were provided at arms length by agencies with no record of service to survivors when they were children in 'care'. Better still, organisations for Care Leavers run by Care Leavers, properly funded, would be optimal.

17. One of the most pressing problems with current service providers is the lack of clarity and transparency about survivors' entitlements. This may have to do with uncertainties about available budgets, but it leads sometimes to allegations and perceptions (a) that some 'clients' get better treatment than others; (b) that going cap-in-hand to ask for service is a reminder of the bad old days of charitable handouts; and (c) that passivity and a continuing sense of victimhood are encouraged. The ultimate effect of this approach is that survivors struggling to gain control over their lives are not encouraged to be proactive, and indeed in some cases, suffer further disempowerment through increased dependency.

18. In Ireland, an independent state body, called Caranua (formerly known as the Residential Institutions Statutory Fund**)**, has been set up to help people who have received awards through settlements, courts or the Redress Board. Caranua provides support, information, advice and advocacy to help survivors to get the services they are entitled to as citizens – in health, personal well-being, housing, and education. Caranua can pay for some services and/or can give additional grants to individuals to source services themselves. The agency will also work closely with public services "to improve their capacity to understand, recognise and address the particular needs of survivors arising from their adverse childhood experiences".[3]

19. Providers of services for Care Leavers, including survivors of child abuse, have not given sufficient consideration to educational opportunities as a potentially valuable part of redress for survivors and their families. Of all the services at state level offering support to Care Leavers, only one mentions education and even there that is not a major component of their work with survivors. Many survivors were not in a position to benefit from whatever educational opportunities were offered during their childhood and youth. Some feel that loss very keenly because their lack of education was not related to their intelligence or general capacity to benefit. In some cases, they feel it is now too late for them to benefit from attending further

[3] http://www.caranua.ie

education classes or undertaking courses in higher education; but they a very keen that their children should have access to these benefits as a form of compensation for the trauma that has blighted their lives. In any event, apart from the instrumental value of educational and training qualifications that enhance employment prospects, there is a great deal to be gained from education that will help with personal and social development and the improvement of general well being. **I strongly recommend** that the Commission pay close attention to the merits of setting up a trust fund for scholarships and related support for education opportunities as an element of redress and healing.

20. While there have been a number of opportunities for survivors to tell their stories to support groups like CLAN, to redress bodies, to various inquiries, and now to the Commission, it is clear that not everyone has yet done so and not everyone will have done so by the time the Commission's work is done. This is not only because many survivors are alienated from formal social structures and communication networks, but also because they are not yet ready to tell their story – but might be ready at some critical point in the future. Consideration should be given to the formation and resourcing of an ongoing truth commission that will provide a forum for those delayed stories and perhaps, too, provide a way into ongoing support.

E. Monetary payments

21. It is reasonable that claimants should understand what any payment they are offered is meant to represent, and to assess whether or not they should accept any payment. Although the primary focus of any payment should be squarely on the needs of the claimant, it could be argued that it might also serve the purpose of restoring to some degree the moral credibility and authority of the institutions – and of society at large. Indeed, on both sides of the transaction, to a greater or lesser extent, monetary payments - including their quantum - can be either or both symbolic and restorative.

22. In Sweden, compensation is conceptualised not as redress for the damage or injuries a survivor may have encountered. Instead, compensation is conceptualised as serving as society's acknowledgement and recognition of the suffering a survivor has had to endure. This conceptualisation, together with the practical problems of objectively assessing the severity of impact of widely divergent forms of abuse has led the Swedish government to adopt a flat, egalitarian scheme.

23. The matrix model is beguilingly simple and 'fair' on the surface. It seems reasonable to see monetary compensation as going some way to repair the damage, and so the more severe the damage to an individual, the more money should be paid to compensate. I have supported this concept in the past.

24. However, over time I have changed my mind about the merits of the matrix model. All sorts of complexities arise given the problems of objective assessment especially of the impact of widely divergent abuse. That impact varies from case to case even when the circumstances look similar. Practical and philosophical problems soon emerge when one person's damage – physical and/or emotional - is compared with another's in terms of its severity and impact, especially when so much time has elapsed and the evidentiary basis is difficult to assess.

25. A flat-rate scheme would have other, positive advantages. It would be simpler and would minimise stress for applicants especially for those who continue to find the seemingly constant requirement to re-tell the story of their childhood abuse and neglect reiterates their trauma. A flat-rate scheme would also better accommodate those whose records have been lost or destroyed.

26. The Swedish model is based on a flat payment in which all eligible applicants will receive the same amount (which seems to be to be too low at 250,000 SEK which is about $50,000). Given the payments in civil litigation and other settlements – e.g. Bruce Trevorrow, $750,000; Cornelia Rau, $2.6m; Vivien Solon, $4.5m; six figure payments for schoolboy thrashings[4] - nothing less than $150,000 would seem appropriate.

27. I do not know that there is any way of knowing what proportion of survivors would be willing to agree to a payment by instalments arrangement. However, if that were proposed and agreed, I should think there must be an ironclad guarantee that if the survivor were to die before the final instalment was paid, all outstanding payments would be paid into the deceased estate for disbursement according to their valid will.

28. Any monetary payment should take account of what was or was not paid under other schemes as listed on page 17 of the Paper. Given the many flaws of schemes examined by the Commission, blanket ruling-out would be unconscionable.

F. Redress scheme processes

29. As already argued, limiting redress to survivors of sexual abuse would create immense problems of justice denied. Redress schemes that have already operated in Queensland, Tasmania and Western Australia have set a broader precedent. You have the Senate reports - *Forgotten Australians* (2004), *Lost innocents and Forgotten Australians Revisited* (2009) and *Review of Government Compensation Payments* (2010) - as strong indications of the broader need and practice. All former residents of orphanages or foster care whether under the aegis of state government or churches

[4] Other examples can be found in the CLAN submission to the Royal Commission on Issues Paper #6 at http://www.childabuseroyalcommission.gov.au/getattachment/7076b2c3-db49-4788-a2ef-ebdb13fcdbbd/66-Care-Leavers-Australia-Network-(CLAN)

or other non-government agencies should be eligible. ☐

30. The Commission will have clear evidence of the great difficulty of obtaining documentation of abuse (overwhelmingly it was never kept by the abuser or employer) and of proving that damages were the direct result of incidents while in 'care'. Any redress scheme should operate on a standard of proof based on "a plausibility test or a test of reasonable likelihood" as the Paper puts it (page 23).

31. Cross-examination of applicants should be limited to those cases where some reasonable doubt exists as to the bona fides of the applicant.

32. Given the low levels of education and high levels of alienation from forms of public information that many former residents experience, the scheme should not have an arbitrary end point that would unfairly disadvantage those who are least likely to be aware of their entitlements.

33. I fully concur with the proposition put in the Paper (page 23): "Decisions about redress should be made by a body 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." No person or institution with a pecuniary or related interest in the decision should be involved in making that decision.

34. No deeds of release should be required by an institution. The acceptance of a redress settlement should not deprive the applicant of the right to initiate other lawful action, including civil litigation or assisting police in enquiries that might lead to prosecution of offenders. Extracting vows of silence in exchange for money is unethical.

G. Funding redress

35. The position of the Catholic Truth Healing and Justice Council is strongly endorsed: "The scheme would be independently managed but funded by the institutions responsible for the abuse. All survivors of institutional child sex abuse, regardless of where or when the abuse occurred, would be treated in the same way" – although I stand by my earlier remarks about extending redress to other forms of abuse.

36. There seems no good reason why all authorities and agencies that had responsibility for the care of applicants when they were children should not carry equitable responsibility for the cost of redress. The concept of government being 'funder of last resort' is well considered in the Paper at pages 28-29. There are institutions

where abuse took place that have long since closed their doors and it is not always easy to identify an agency that can properly be said to have inherited responsibility.

37. It is very important to note that many applicants have, in the past, found that large proportions of compensation payments have been extracted from them in legal costs and in demands for repayments of counseling costs leading up to the payment. Any redress amount should be calculated to cover counseling and associated costs and legal and associated costs, if any. In general, legal costs should be governed and regulated by the rules of the scheme.

H. Interim arrangements

38. Knowing that any scheme, especially a single national scheme, will require considerable time for development and implementation, the Paper is right to consider interim arrangements.☐ Many Care Leavers are frail and elderly. They have been waiting decades for justice, and we know from experience that a significant number do pass away before their case has been settled. As well, the families of Care Leavers who die before their application is determined are entitled to some measure of compensation. Every encouragement and incentive must be given to responsible agencies to implement interim arrangements where urgent cases, at least, can be dealt with.

39. It may be feasible for the Royal Commission to make some specific recommendations to guide and to encourage the major stakeholders, especially governments and major churches, to implement 'without prejudice' interim arrangements covering a core of urgent cases on compassionate grounds.

I. Civil litigation

40. Options for seeking redress and related outcomes should not be closed off to Care Leavers simply because a national independent redress scheme is mooted or installed.

41. I am heartened to learn that the Victorian Government has determined to make significant reforms to limitation periods for criminal child abuse. It appears that any changes might apply retrospectively.[5] Hopefully, governments in other jurisdictions will now soon take similar compassionate action.

---

[5] 'Child abuse legal time limits to be lifted in Victoria', *The Age*, 23 February, 2015, *http://www.theage.com.au/victoria/child-abuse-legal-time-limits-to-be-lifted-in-victoria-20150223-13mk6t.html* - accessed 23 February 2015.

42. Another major impediment confronting survivors is how to identify a proper defendant in faith-based institutions with statutory property trusts. Cardinal Pell and the Catholic Truth, Healing and Justice Council are both on record as declaring that any such impediments should now be removed. There appear to be two straightforward ways this goal might be expedited. The first is through changes to laws governing taxation concession for churches and charities to require them to be structured so that alleged wrongs may be pursued in the courts. The second would be a strongly enforced policy that no government funds should be granted to such bodies before they are properly constituted as legal entities capable of defending civil actions brought to the courts by aggrieved parties.☐

43. Another mechanism is through an agreed protocol requiring governments and non-government institutions to conform to model litigant principles for the handling of civil litigation in child abuse cases. There are precedents for this approach, although it is clear that they have not been honoured in particular cases. It would be prudent for the Commission to examine ways in which institutions and governments may be more accountable for breaches of protocols.

44. The Commission should examine more closely the role of insurance agencies in these matters. The Victorian Parliamentary Inquiry into Child Sexual Abuse (*Betrayal of Trust,* 2013) found evidence of insurance company interference in the handling of claims. For example, in settlement negotiations under the Catholic Church's Towards Healing policy – in the so-called facilitation process – many claimants were shocked to find that the Catholic Church was represented not only by its lawyers but also by its insurers. The Inquiry found that: "Victims were not necessarily aware of an insurer's involvement until they attended facilitation. Consequently, the exact nature of an insurer's involvement was unknown to the victim until this point, or if the insurer organised a psychiatric assessment of the victim".[6] The Inquiry also found large discrepancies in the amounts paid to claimants depending on whether insurers were present in the process.

45. In the UK, Tim Hulbert, a retired head of social services in Bedfordshire, recently alleged that insurance companies tried to suppress information about child sex abuse in council 'care' Homes.[7] Hulbert said he was instructed by the county council's insurers not to admit liability or apologise to victims involved in a sex abuse investigation. Mr Hulbert said: "Some insurers sought to suppress facts and justice for vulnerable young people in order to protect their own commercial interests." Hulbert declined to name the insurance company but said it operated internationally. It would be a matter of very great concern if that insurance company operates in this domain in Australia or if other insurance companies are operating in the same unethical and possibly unlawful manner.[8]

---

[6] *Betrayal of Trust*, Vol. 2: 256.
[7] *The Telegraph*, London, 14 January 2015.
[8] A BBC report as recently as 24 February 2015 cited other instances across Britain of insurance companies influencing investigations of child abuse: http://www.bbc.com/news/uk-31594120

46. The Victorian Parliamentary Committee commented that organisations that implement risk management processes only with the motivation of reducing their insurance premiums "ultimately prioritise their financial and legal concerns over their moral responsibility to protect children from criminal child abuse".[9] In its response to the Commission's Issues Paper 5 on Civil Litigation, Barnardos Australia argued that "Insurance companies should not be involved with the process of determining guilt or levels of compensation." I think that is obviously axiomatic. However, on another view of it, insurance companies have a reasonable interest in contributing to the way organisations they insure effectively minimise and manage risk. They could, therefore, properly advise on prevention strategies: child safe practices, staff selection and training, accountability and reporting measures, and the like – without becoming involved in specific cases.

J. Conclusion: What will bring about the changes that are so necessary?

47. The residing questions for me include: what is needed to compel those who carry the responsibility to discharge that responsibility with honesty and respect for those who require and deserve compensation? Have we learned anything about why past recommendations for reform have not been carried out? Will the good intentions articulated by leaders be acted upon or will institutional inertia return once the tumult of the Royal Commission has died down.

48. In 2004, the Senate's *Forgotten Australians* Report, found major problems in the redress schemes run by the Catholic, Anglican, and Uniting churches and the Salvation Army and made strong recommendations for reform to the churches and charities in this regard. But in 2009 when the Senate Committee reviewed progress, despite invitations to the major churches, not one single church was willing to offer a submission and none gave evidence at the hearings of that Senate Committee in 2009. Relying on evidence of survivors and other commentators, the Committee found that the problems identified in the church-based redress schemes in 2004 remained unchanged.[10]

49. I am profoundly disappointed to find, at page 9 of the Paper, the Commission conceding "the need to make recommendations that can be implemented and that are likely to be implemented, including taking account of the affordability of what we recommend." That statement is likely to send a message to the vested interest groups that the name of the game is making a case that they can only afford something less than the best scheme. The scheme should meet what is needed, not what the vested interest groups say they can afford or what the Commission thinks they can afford. We are at an historical tipping point where moral leadership and

[9] *Betrayal of Trust*, Vol. 2: 257.
[10] Community Affiars References Committee, *Lost Innocents and Forgotten Australians Revisited,* paragraphs 2.190-2.208.

political will must be brought together to produce significant, tangible action for change.

50. I do not want to end on a negative note. There is much to applaud in the work of the Commission to date and there are some promising signs that cultural change is already occurring in some institutions. But perhaps the Commission's greatest success will be seen to be its contribution to the restoration of Care Leavers' faith in society and trust in its institutions through the implementation of a national independent redress scheme.