Royal Commission Into Institutional Responses to Child Sexual Abuse

SCOUTS AUSTRALIA

The Scout Association of Australia

Incorporated by Royal Charter

Scouts Australia: Submission in Response to the Consultation Paper - Redress and Civil Litigation
6 March 2015

Consultation feedback: Redress and civil litigation

SCOUTS AUSTRALIA DRAFT RESPONSE

Scouts Australia (Scouts) and each of the State and Territory branches of Scouts Australia, welcomed the Federal Government's decision to establish a Royal Commission into institutional responses to instances and allegations of child sexual abuse in Australia.

Scouts will assist the Commission in carrying out this important task and make the following submission outlining some key issues we believe need to be taken into consideration in developing any national redress scheme and civil litigation process which is equitable, simple, clear and sustainable for all Australians – especially our young people.

Scouts Australia

Scouts Australia is a not-for profit organisation which heavily involves families in all activities to provide its 66,000 youth members (aged 6-25 years) with educational, fun and challenging opportunities to grow and develop.

Scouts is a part of nearly every Australian community. Our members come from a wide variety of cultural and religious backgrounds, across the socio-economic spectrum and include individuals with intellectual or physical disabilities.

The aim of Scouting is to encourage the physical, intellectual, emotional, social, and spiritual development of young people, so they may play a constructive role in society as responsible citizens and as members of their local and international communities. This is achieved through a series of strong and active non-formal education programs that inspire young people to do their best and to always be prepared.

Before responding to some of the specific matters in respect of which the Commission has invited a response, we note and affirm that the safety and welfare of the youth in our care are of paramount concern. All forms of child abuse are inexcusable.

As a thriving, modern organisation, we strive to be vigilant in identifying and eradicating child abuse.

We have a zero tolerance policy on child abuse and for decades have had a practice of reporting any allegations of child abuse to police. If any such allegations are made, we deal with them by reporting such allegations to the police and immediately standing down any leaders in respect of whom such allegations are made.

Background of Scouting with this issue

It is a tragic historical fact that children in the care of many institutions and also in a private environment have been sexually abused, This has sometimes occurred in circumstances where, if institutions like ours had better practices, or been more alert, that abuse may have been avoided or at least detected earlier than was the case.

Community institutions such as Scouts are not wealthy. We are a volunteer organisation with relatively few salaried staff members. We operate on the basis that annual fees, miscellaneous income and donations cover annual expenses with relatively little capital.

In the past we have sought to ensure that if youth members were abused by criminal activity by any of our leaders there was adequate insurance cover to provide compensation to the youth members within the then legal framework in which Scout groups operated.

Through paying increased premiums, we have sought to provide for youth who might be injured/abused in circumstance where unfortunately we may not have lived up to the required standard the community rightly expected of us. It is tough for many families whose children take part in Scout programs to pay even minimal fees or activity costs. If insurance or redress scheme costs escalate, then this will adversley affect communities least able to pay – and who benefit from our programs the most.

Our efforts over the past decades have been focussed on reducing the potential for abuse in Scouting through much tighter checking, immediate suspension, police involvement and developing a culture of reporting. If formal community based institutions such as Scouts are required to pay continually increasing insurance premiums and a significant contribution to a redress scheme the programs offered by these community based organisations will become unaffordable to those who may need them most. In some cases the organisations may cease to exist. c

Not only will this deprive very many young Australians of a well established and proven learning and development program each year, it will also encourage informal, unregulated activities to fill the void of youth programming.

Government is constantly seeking to shift activity and the provision of services to the community or private sector. It cannot restrict the liablity of the public sector (or the community as a whole) and pass on retrospective liability to community groups for what is essentially a whole of community issue. To do so is neither equitable nor sustainable as an Australian system.

A national redress scheme

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 bureacratic process and stress.

We support the view that all victims of child sexual abuse, and not only those in respect of which institutions owed a duty of care, should receive some monetary compensation which is provided in the context of a non-adversarial scheme.

Money should not be the sum total, and other compensation measures such as counselling, support and proper apologies can assist greatly in a healing process.

There are three crucial issues to discuss regarding a sustainable and fair redress scheme:

> 1/ Source of funds: who will pay for the bulk of such a monetary redress scheme? If the level of payments is above that which can be afforded, and if they are not covered by insurance, will those organisations continue to exist? Organisations which don't exist

cannot make payments at all and cannot continue to provide service for the benefit of the community.

2/ Retrospectivity: in circumstances where an institution which relies almost entirely on volunteer help is sought be made retrospectively liable for financial compensation above the levels required by the legal framework in which they operated and covered by contemporanious insurance, what limits will be applied that are fair and reasonable?

3/ Equity: any scheme must be equitable for all victims. Those who experienced abuse in a government institution are no less deserving than those who were abused in a community institition or family setting. Redress should be equitable, based on the human suffering. And this should be transparent for all victims.

Sourcing funds to cover a scheme

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.

In the case of our organisation we have over the years developed very clear child protection policies and required all leaders not only to abide by a strict code of conduct but also to undertake specific child protection training. Scouting and other similar organisations are vital in educating our youth to become resilient and self-reliant members of our community. We with other similar organisations provide vital non classroom education the benefit of which is clearly recognized by leading child psychologists such as Dr Michael Carr-Gregg and others.

If significant funding for a national sedress 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.

Retrospective liability

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.

We now turn to some of the specific issues raised in the discussion paper (repeated in bold).**The issues raised in Chapter 2.**

In particular:

• we welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse. (Page 11)

We are of the view that child abuse is likely to be equally horrendous whether it occurs in the context of an institution or in another context such as a family. “Compensation” / “redress” whether for past abuse or future abuse should be available regardless of the context and be available on a no fault basis.

Submissions that discuss the issues raised in Chapter 4, including the principles for an effective direct personal response and the interaction between a redress scheme and direct personal response. (Page 14)

We support the view that survivors of child sexual abuse in an institutional context should have the opportunity to meet with a senior representative of the institution, in our case the Chief Commissioner of a State or Territory branch and/or the State/Territory Chairman. Survivors should be given a genuine oral and written apology and be given an opportunity to engage with those representatives, to tell their story, and hear what steps the organisation has and is taking to protect children from child sexual abuse.

We also understand that at times the victim/survivor prefers to remain anonymous or refrain from direct contact. In cases such as these, organisations can reach out to the victim/survivor through a third party such as the police. This is a process which could be formalised in cases where victims do not wish direct contact but would benefit from receiving an acknowledgement and apology in written form.

Submissions that discuss the issues raised in Chapter 5, including the principles for counselling and psychological care, existing services and service gaps and the principles for supporting counselling and psychological care through redress.

In particular:

• we seek 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 welcome submissions on the relative effectiveness and efficiency of the options in meeting survivors’ needs. (Page 17)

We support the provision of ongoing counselling and feel that this should be coordinated as part of a holistic program to address the needs of the survivor. Medicare should be utilised and if need be an increased levy to provide support for the mental health of all Australians.

It is our practice to source recognised, independent counselling and psychological support services that are outside any Scout organisation. We believe it is crucial to have a clear, external support service rather than attempt to employ staff within the organisation for the situation of sexual abuse. It must be independent and accredited with recognised government authorities.

Submissions that discuss the issues raised in Chapter 6, including the purpose of monetary payments. In particular, we welcome submissions on: (Page 22)

• 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.

In chapter 6 the discussion paper highlights the difference between a monetary payment that is fully compensatory and an ex gratia payment. It is suggested that a redress scheme "is more suited to providing ex gratia monetary payments". An ex gratia payment is by definition voluntary and not payable as a result of legal liability. In our view any recommendation about a proposed redress scheme will need to come to grips with whether it is voluntary and truly results in ex gratia payments, or whether it will impose retrospective legal liability on organisations.

While we would support a voluntary scheme in which recommendations are made by an administrative body this may lead to uncertainty.

A preferable scheme should the Commission favour retrospective liability on a no fault or limited fault basis is for the Commonwealth/State to pay survivors out of the public purse so that all survivors will be treated equally regardless of the circumstance in which they were abused.

As to the maximum monetary payment this will depend on a number of factors. If retrospective liability is imposed on institutions then the higher the maximum sum the more unfair it will be on the institution. On the other hand nominal payments will not provide adequate redress.

We are not in a position to express a view about the appropriate level of payment under a redress scheme as the hurt suffered is simply not capable of being converted into a monetary amount. Any amount 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. We are of the view that previous payments either through litigation, settlement, or redress should be deducted from payments under a redress scheme.

Submissions that discuss the issues raised in Chapter 7, including any aspects of redress scheme processes.

In particular, we welcome 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. (Page 24-25)

In our view all victims of child abuse should be eligible for a payment assuming there is a Government funded scheme. This will treat all victims equally regardless of blame.

It seems to us to be difficult to have a scheme which is a no fault or limited fault scheme and which compels all institutions to contribute. Once one moves to a degree of liability which is different from that provided for in the historical legal framework one has the difficulty of retrospective legislation which, if legal, should be reserved for very exceptional cases of culpability.

In regard to the standard of proof required that will depend on the type of redress scheme. We support a non-confrontational scheme based on not establishing any fault. But it would be unfair to make institutions liable in such cases unless they had been culpable or breached their duty of care.

Submissions that discuss the issues raised in Chapter 8, including the modelling of required funding and the possible approaches to funding redress.

In particular, we seek the views of the Australian Government, state and territory governments and institutions on:

• appropriate funding arrangements

• appropriate funder of last resort arrangements

• the level of flexibility that should be allowed in implementing redress schemes and funding arrangements. (Page 30)

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.

Submissions that discuss the issues raised in Chapter 9, including the additional principles for interim arrangements and possible structures.

In particular, we seek the views of survivors, survivor advocacy and support groups and institutions on whether there are other issues on which direction or guidance might be required for interim arrangements. (Page 32)

It is important that a regime for interim arrangements be made. By definition such arrangements will be voluntary but they should encourage at least the immediate provision of counselling, and a formal apology together with the opportunity to meet with representatives of the institution as discussed above.

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.

Submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions on:

• 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. (Page 35)

We do not oppose the reasonable extension of limitation periods for common law claims assuming there is no compensation/redress which institutions such as ours are required to pay on a no fault basis. Where institutions were insured for such claims the extension of the limitation periods should not prejudice the institution's right to be indemnified under its insurance policies.

Submissions that discuss the issues raised in Chapter 7, including any aspects of redress scheme processes.

In particular, we welcome 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. (Page 177)

A redress scheme to which an institution is required to contribute should be limited to cases where the institution has clearly failed in its responsibility to take reasonable care of the survivor.

The mere fact that a child was abused by a person who was a member of the institution is not in our view a sufficient basis to be entitled to monetary redress from the institution unless the amount will, as we recommend, be payable to all survivors on a no fault basis and funded by the community as a whole.

Submissions that discuss the issues raised in Chapter 8, including the modelling of required funding and the possible approaches to funding redress.

In particular, we seek the views of the Australian Government, state and territory governments and institutions on:

• appropriate funding arrangements

• appropriate funder of last resort arrangements

• the level of flexibility that should be allowed in implementing redress schemes and funding arrangements. (Page 189)

We do not believe that institutions should be made retrospectively liable except in extreme cases of culpability. As such the scheme, if compulsory, should be funded by the community as a whole. Alternatively redress schemes should be voluntary and truly represent ex gratia payments.

Contact for further information or discussion

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