SUBMISSION TO THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

This submission responds to the 'Consultation Paper: Redress and Civil Litigation'

Slater and Gordon Lawyers

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Introduction

1. Slater and Gordon is Australia's largest consumer law firm, with over 70 offices across Australia, offering a wide range of legal services to individuals and families. We welcome the opportunity to provide this submission to the Royal Commission's ("Commission") *Redress and Civil Litigation Consultation Paper* ("Consultation Paper").

2. Slater and Gordon has a long history of acting for survivors of child sexual abuse. Over the past 20 years we have acted for hundreds of survivors of child sexual abuse, in claims involving the Catholic Church, Anglican Church, and various other religious and secular institutions such as the Fairbridge Foundation.

    2.1. These claims have been made in Victoria, Western Australia and New South Wales, where we have obtained compensation for many survivors by way of negotiated settlements during difficult, costly and hard-fought litigation.

    2.2. We have also acted for individuals who have obtained compensation through out-of-court schemes, including the *Towards Healing* and *Melbourne Response* protocols of the Catholic Church.

    2.3. Slater and Gordon Lawyers UK also represent survivors of child abuse in the UK including over 170 people who were sexually or physically abused by Jimmy Savile at various institutions.

3. Our experience entails both individual cases and group actions on behalf of people who have been injured and suffered loss as a consequence of the negligent actions or failures of major corporations, institutions and organisations.

    3.1. We have run group litigation involving allegations of child abuse. In the 1990s, Slater and Gordon conducted the first major sexual abuse 'group' litigation in Australia in relation to four institutions run by the Christian Brothers Order in Western Australia.[1] Slater and Gordon currently acts for a group of people who were abused in a home located in Molong, NSW run by the Fairbridge Foundation.[2] The proceedings are listed for trial commencing in August 2015.

4. Our work has provided us with insight into the range of legal problems that continue to confront survivors when considering and conducting legal action against the perpetrators of child abuse, or against any relevant controlling or authorising institution.

5. This Royal Commission represents an important step towards providing access to justice to the many survivors who have to date been denied fairness.

    5.1. Survivors of child sexual abuses have been wronged both by the abuse that occurred, and also when those responsible obstructed and frustrated their access to justice. In many cases, fair compensation to survivors has been denied or limited by legal manoeuvring by institutional defendants.

    5.2. We consider that there is an important opportunity to secure alternative compensation arrangements, through a transparent and uniform redress scheme. We also believe that survivors should retain the choice to access the civil courts, and that there are a number of changes which should be implemented to remove existing barriers to bringing civil proceedings.

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[1] That litigation was the subject of the Royal Commission's *Case Study 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.*

[2] *Giles & Anor v Commonwealth of Australia & Ors*, Supreme Court of NSW proceedings 2009/329777.

Summary of Recommendations

Redress Scheme

6. A workable and just redress scheme which offers an appropriate alternative to civil litigation for survivors should be developed and implemented as soon as possible. This scheme should be funded by all institutions and government organisations responsible for the care of children on a liability-basis, such that institutions with greater culpability bear greater financial responsibility for the provision of compensation. Any shortfall in compensation should be addressed by contributions from the Australian and state and territory governments.

7. A redress scheme should not displace a survivor's capacity to pursue civil access to justice and their rights at common law.

8. A redress scheme should be led by the Australian Government, with the participation of state and territory governments and other institutions.

Elements of Redress

9. Survivor-focused redress should form the overarching guiding principle for all elements of redress, and all institutions involved in the delivery of those elements must be survivor-focused.

Direct Personal Response

10. As a first step, all institutions should offer and provide an apology. Survivors should be afforded an opportunity to meet with a senior representative of the institution to receive that recognition and apology. Assurances given by leaders of institutions of future preventative measures must be purposeful and meaningful. Any re-engagement with the relevant institution should only occur if requested by a survivor.

11. As part of a redress process, transparency must be key; institutions should be required to provide all materials, documents and information to which they have retained access.

Therapeutic counselling and psychological care

12. A stand-alone Australian Government counselling scheme should be developed and designed around the needs and experiences of survivors. The scheme should be voluntary and accessible geographically. Survivors should retain the option to access alternative services with financial support.

Monetary payment/compensation

13. Compensation should be assessed in accordance with common law principles; heads of damage available at common law should be incorporated in the matrix approach identified by the commission.

14. The level of compensation should be reasonable, having regard to common law damages and the viability of the scheme over time. Economic loss should be included in compensation payments for severe cases in particular.

15. Any monetary payment should be specifically excluded from the compensation recovery schemes run by Medicare and Centrelink.

16. Compensation from a new redress scheme should be available to those who have already received some earlier form of redress payment, if that payment is deemed

inadequate. 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.

Standard of Proof

17. The 'plausibility' standard is appropriate for a redress scheme of this nature.

Survivor Advocates

18. Advisors on compensation entitlements should have legal experience and expertise with the nature and impact of child sexual abuse and the needs of survivors. An accreditation process should be established, which would provide for the registration and credentialing of appropriately qualified lawyers.

19. An event costing or fixed-fee model should be adopted for the payment of legal fees. In that model, fixed payment for the necessary advice and support is provided by reference to key stages of the redress process. The fee should be funded in part or in whole by the redress scheme. The legal work and consequent fixed costs incurred on any category of claim should be proportionate to the outcome of the claim.

Civil litigation

20. The creation of a redress scheme should not eliminate civil liability for wrongdoers. It is of critical importance that survivors retain the right to pursue common law claims against institutions, with access to civil justice to be improved by removing obstacles and discouraging the use of technical defences by defendants.

21. Despite the important exposure that this Royal Commission has given to the suffering of adult survivors of child sex abuse, institutions and governments continue to engage in legal tactics and force sexual abuse claimants into lengthy, costly and complex civil proceedings. We recommend that governments and relevant institutions conduct an audit of their existing civil compensation claims and ensure that their executive or leaders are providing instructions to their legal representatives to conduct themselves as 'model litigants'; that is, to desist from use of technical arguments and strategy of legal maneuvering that delays outcome and increases legal costs.

Limitation Periods

22. We support abolishing the limitation period for survivors of child sexual abuse. We support the approach proposed by Victoria in its exposure draft of the *Limitations of Actions Amendment (Criminal Child Abuse) Bill* 2014.

Vicarious Liability

23. Legislative change should be implemented to provide that persons in religious orders be deemed employees of the relevant religious institution.

24. A scheme of vicarious liability be established in which liability would be imposed on institutions, unless the institution could prove that reasonable steps were taken to prevent abuse.

Proper Defendants

25. Unincorporated bodies with the benefit of perpetual succession for property ownership should also bear the burden of succession to meet claims of child sexual abuse.

Churches should be treated in the same way as any other entity that enjoys the benefit of perpetual succession

26. Institutions which have responsibility for the care of children should be incorporated, and should be required to have appropriate mandatory insurance.

Adequacy of compensation

27. A consistent approach which removes caps on compensation in all jurisdictions should be adopted.

28. It is preferable that discount rates not apply. If discount rates persist, an approach which maintains discount rates at a level no higher than 3% would be preferable. We support a single national rate to ensure equality and consistency.

29. Civil liability legislation should be amended so as to render the treatment of survivors' damages awards the same (that is, not subject to a compensation cap or a higher discount rate), regardless of the nature of the defendant involved.

Submissions

30. Our submissions focus on those areas of the Consultation Paper where we are able to draw on our experience to offer insight and suggestions for reform.

Chapter 2: Structural Issues

31. The Commission has previously received submissions about the inadequacies of redress schemes, which expressed a view that they have proved an inappropriate mechanism to provide genuine access to justice for survivors. We agree that compensation schemes of this nature have historically failed to provide adequate redress to recipients, whether because of under-funding or evasive tactics by institutions which render their assets unavailable to meet claims for compensation.

    31.1. We note however that for some survivors, an improved common law system may still fail to offer an appropriate pathway to justice. This may be the case where the institution no longer exists; or where documents have been destroyed which render it impossible to meet the civil standard of proof. We also acknowledge that the prospect of litigating a claim through the court system is sometimes fraught and painful for many survivors.

    31.2. We therefore believe that despite the failings of redress schemes of the past, there is an opportunity to develop a workable and just scheme that, in conjunction with civil litigation, offers another path for survivors.

    31.3. To this end, we strongly recommend that the redress scheme be funded by all institutions and government organisations responsible for the care of children. Funding contributions should be made on a liability-basis, such that institutions with greater culpability bear greater financial responsibility for the provision of compensation.

    31.4. Any shortfall in compensation should be made up by contributions from the Australian and state and territory governments.

32. We strongly submit that a redress scheme should not displace a survivor's capacity to pursue their rights at common law.

Possible structures for providing redress

33. We refer to the Commission's three possible options for structures for providing redress,[3] and support the Commission's statement that the "ideal position" is the creation of a single national redress scheme led by the Australian Government, with the participation of state and territory governments and other institutions.[4]

34. We agree with the advantages of this approach identified in the Consultation Paper:

    34.1. The Consultation Paper describes a number of advantages of a single national scheme, including consistency for survivors across jurisdictions, and the minimisation of compliance costs for institutions that cross these jurisdictions. We believe that access to justice should not be arbitrarily determined by geographic location, and a national redress scheme would provide consistency where abuse occurred in more than one state or territory.

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[3] Consultation Paper, Ch 2.6.

[4] Consultation Paper, p. 58.

34.2. It is disappointing that the Australian Government, and the governments of the two largest states in Australia – NSW and Victoria – have failed to establish redress schemes, despite previous recommendations.[5]

34.3. Although we appreciate the practical difficulties it would involve, we consider that the involvement and leadership of the Australian Government in the scheme is a goal worth pursuing.

35. There are two key reasons underlying this position.

35.1. Firstly, the Commonwealth is a respondent or defendant in many instances of child sexual abuse. As a directly responsible institution, it is essential that the Australian Government is involved in this capacity, regardless of the structure a redress scheme ultimately takes.

- By way of example, the allegations involving abuse of junior recruits at HMAS Leeuwin would be one case in which the Commonwealth has institutional responsibility. The Defence Abuse Response Taskforce heard complaints of sexual abuse from 102 such junior recruits who were 15 to 17 years of age when the abuse occurred.[6]

- The Australian Government also likely has liability for certain acts of child abuse suffered by child migrants, by reason of the *Immigration (Guardianship of Children) Act 1946* (Cth). Under that Act, it is arguable that unaccompanied child migrants were under the guardianship of the Minister of Immigration. The Commonwealth Minister had the same "duties, obligations and liabilities as a natural guardian of the child would have"[7] at a time when some of those children suffered horrific abuse. That the Australian Government shared responsibility for abuses suffered by child migrants was a view shared by the Senate Standing Committee on Community Affairs' report, which concluded:[8]

> *The Committee concludes that these failures of duty of care and the unfortunate circumstances in which many former child migrants now find themselves is a shared responsibility between the British, Australian and Australian State governments, and the sending and receiving agencies.*

35.2. Secondly, Commonwealth involvement is necessary to respond to the concerns a number of previous submissions have expressed about the under-resourcing and inadequacy of existing and historical redress schemes.

- The depth of resources and leadership of the Commonwealth will go some way to ensuing that the relevant levels of government, and institutions, appropriately resource the redress scheme. The epidemic of sexual abuse is a cross-border challenge, such that it makes perfect sense that the Australian Government take responsibility for the governance of the redress scheme.

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[5] See e.g. recommendation 6 of the Senate Standing Committee on Community Affairs report into institutional care, *Forgotten Australians*, August 2004, at p. 227.

[6] Defence Abuse Response Taskforce, *Report on Abuse at HMAS Leeuwin*, June 2014, at p. 12.

[7] Section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth).

[8] Senate Standing Committee on Community Affairs, *Lost Innocents: Righting the Record - Report on child migration*, August 2001, at p. 121.

36. Given the difficulties experienced by those participating in non-government schemes such as *Towards Healing* and *Melbourne Response*, we consider that there is no realistic alternative to having a scheme in which government takes a leadership role. Government oversight and involvement would enhance transparency, and bring a stronger arm to making participants accountable in the scheme, which was lacking in these non-government schemes.

    36.1. This position is supported by the indications to the Commission from institutions that cooperative approaches to redress are unlikely in the absence of government leadership and participation.[9]

    36.2. We consider that the Australian Government should take this leadership role.

Chapter 4: Direct personal response

Possible structures for providing redress

37. We support the elements of redress identified by the Commission. We note that survivor-focused redress is listed as a general principle, but respectfully submit that it should form the overarching guiding principle for redress.

    37.1. All elements of redress, and all institutions involved in the delivery of those elements must be survivor-focused. The key consideration driving every decision and action should be what best supports survivors going forward to have the best chance of a happy and productive life.

    37.2. In recognition of the enormous suffering and torment endured by survivors, the various levels of government, the courts, institutions and all bodies involved in delivering redress must have the best interests of survivors as their overarching guiding principle.

38. As a first step, all institutions should offer and provide 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. We strongly believe that re-engagement should only occur if requested by a survivor.[10]

    38.1. It is our experience that non-consensual contact between an institution and survivor can have severe and devastating effects for survivors. Therefore all contact should be at the request of the survivor and facilitated through a third party where appropriate.

39. The redress process offers a unique opportunity for institutions to disclose information and admit wrongdoing. We submit that as part of this process, institutions should be required to provide all materials, documents and information to which they have retained access.

    39.1. This approach will likely make the experience significantly more meaningful for survivors, who, if they so choose, will have access to information regarding institutional failure and steps taken to prevent future abuse.

    39.2. The disclosure of this information would also assist in determining the level of compensation to be provided. Internal documents and materials will likely

[9] Consultation Paper, p. 32.

[10] Consultation Paper, p. 81 to 83.

reveal the extent of an institution's culpability, which should constitute a relevant consideration in determining the level of compensation to be paid.

Chapter 5: Counselling & Psychological Care

40. In our work with survivors of child sexual abuse, we are humbled by their courage and determination. That courage has often arisen despite little or no contact with mainstream counselling services or indeed any services. Survivors, particularly those with limited resources and poor educational attainment, sometimes lack the ability to access services that are available.

41. Moreover, our experience is that survivors can be easily discouraged by gaps and limitations of the kind identified in the Consultation Paper,[11] especially difficulties around long waiting lists, difficulties accessing services in regional areas, and an inability or unwillingness to articulate the criteria of a DSM-V recognised psychiatric condition to a GP. It can take many years to build up the courage to seek out counselling services. This may be destroyed when a survivor is told that there will be a six month wait or longer before those services are available.

42. Access to appropriate counselling services should work in tandem with a redress scheme.

    42.1. At the front end of redress, our experience has been that some survivors only begin to consider themselves able to take steps to seek access to justice and redress, after having a positive (and usually prolonged) experience with counselling.

    42.2. Further, the participation of a survivor in any redress scheme has the potential to be traumatic for that survivor, as it will necessarily involve reliving the abuse. The redress scheme will need to be sensitive to ensuring that survivors interacting with it are able to access counselling services which are seen to be independent.

43. Given the unique difficulties faced by survivors of child sexual abuse, we support the creation of a stand-alone Australian Government counselling scheme.

    43.1. As with many aspects of responding to child sexual abuse, we consider that this is an area where there are real practical benefits of a stand-alone system that is designed around the needs and experiences of survivors.

    43.2. Counsellors assisting survivors need training and experience with the nature and impact of child sexual abuse and how to provide appropriate support.

    43.3. We note that the Consultation Paper has identified the need to avoid funds being diverted from existing services into a standalone counselling scheme.[12] We recommend that in addition to the creation of a stand-alone counselling scheme, survivors should receive financial support to access counselling and psychological services of their choice.

    43.4. The purpose of a stand-alone service would be to create a specialist scheme and a default point of access to professional services where sought by survivors. The scheme should be voluntary, and survivors should retain the option to access alternative services with financial support.

[11] Consultation Paper, p. 119 to 122.

[12] Consultation Paper, p. 123.

Chapter 6: Monetary Payments

44. We believe that compensation should form part of a redress scheme. Compensation should bear a relationship to pain and suffering and take account of how the abuse has affected the survivor. It should also have regard to issues including the severity of abuse and its impact on the survivor's life.

Assessment of damages

45. An assessment of damages according to common law principles would offer a well-established way of ensuring that the monetary payment bears a relationship to the harm suffered. We consider that the heads of damage available at common law are relevant in developing the matrix, including damages for pain and suffering; past and future out of pocket expenses; and damages for economic loss.

    45.1. Although we appreciate the particular difficulty in compensating economic loss in a redress scheme, we respectfully disagree with the Commission's view that redress is not intended to provide compensation for economic loss.[13] We submit that economic loss should be included in compensation payments for severe cases in particular.

    45.2. We consider that there are models available which may obviate or at least reduce resource limitations of incorporating economic loss into a redress scheme. State workers' compensation schemes, for example, have a variety of caps and thresholds which could inform the provision of some economic loss payment. We would encourage the Commission to have regard to the Victorian workers' compensation scheme and its mechanism for compensating an injured person's loss of wages only in circumstances where a person's earning capacity has been significantly impaired.

    45.3. Alternatively, where the impact of abuse is severe enough to have substantially limited a survivor's earning capacity, this could be specifically included as an aggravating factor in any matrix.

Level of compensation

46. As to the level of payments, we recognise the relationship between maximum and average payments in ensuring the overall monetary viability of any scheme. We consider that there should be a wide range of payments, and the maximum payment should be as high as possible, even at the expense of a lower average payment.

    46.1. The availability of a high maximum payment ensures that seriously impacted survivors are not needlessly put in the position of bringing civil litigation due solely to a perception that only limited recompense is available in a redress scheme.

    46.2. Payments in a redress scheme should bear some relationship to the sorts of payments available at common law, if a redress scheme is to provide access to justice. However, we recognise that resource constraints will make the exact replication of common law damages awards unlikely in a redress scheme.

[13] Consultation Paper, p. 151.

46.3. We submit that the level of compensation should be as great as possible, having regard to the need for equality; common law damages; and the viability of the scheme over time.

47. We consider that the matrix approach identified by the Commission[14] represents a reasonable and fair way of ensuring a transparent monetary payment, which takes account of a survivors' experience. We agree with the factors identified by the Commission as to severity of abuse and severity of impact.[15]

47.1. 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[16] – to assessing severity of abuse or impact.

47.2. 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.

47.3. 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.

48. It would be desirable that any monetary payment is specifically excluded from the compensation recovery schemes run by Medicare[17] and Centrelink,[18] as is suggested.[19]

48.1. Survivors should not be discouraged from seeking redress by the potential loss of an important means of providing for their needs. This is especially the case where survivors of child sexual abuse suffer from poverty, poor educational attainment, or other forms of social exclusion.

48.2. This is the kind of issue that underlines the importance of a scheme which involves the Australian Government. Although bulk payment arrangements might be negotiated with state schemes, only the Australian Government is in a position to guarantee this outcome without risk or uncertainty for participants in a scheme, and without costs to those administering a scheme who would otherwise have to negotiate exemptions or bulk payment arrangements.

49. Finally, we support the proposal for compensation from a new redress scheme for those who have already received some form of redress payment.

49.1. Having regard, for example, to the outcome of the Christian Brothers' litigation, all involved now accept that that process provided inadequate monetary recompense. In light of this, we are strongly of the view that survivors who have previously compromised their claims in the face of aggressive legal

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[14] Consultation Paper, p. 147 to 148.

[15] Consultation Paper, p. 148 to 149.

[16] Generally "whole person impairment" assessments have replaced a "table of maims" approach in workers' compensation systems: Worksafe Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, February 2010, p. 33.

[17] Pursuant to the *Health and Other Services (Compensation) Act 1995* (Cth).

[18] Pursuant to Part 3.14 of the *Social Security Act 1991* (Cth). It may be that a redress payment is not captured by this legislation in any event by virtue of the narrow definition of compensation in Section 17(2), where payments which are not "wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury" are excluded.

[19] Consultation Paper, p. 151.

tactics by defendants, should not be excluded from seeking further compensation.

49.2. We respectfully disagree that "gross" payments, inclusive of legal costs, should be used to calculate a top up payment.[20] It is an unfortunate matter that, due to the tactics taken by some defendants, settlements of civil litigation relating to child sexual abuse can involve substantial legal costs. Some of these substantial costs may have been incurred fighting technical defences like limitations, or in trying to sheet home responsibility to a legally unorthodox religious entity. Survivors should not be penalised for having incurred these legal costs, particularly where those defendants now accept their tactics should not have been pursued**.**

Chapter 7: Redress Scheme Processes

50. We consider that in assessing redress scheme processes, it is important to bear in mind that the central purpose of a redress scheme should be to ameliorate difficulties experienced in seeking redress through other forums, especially civil litigation.

51. We would encourage the Commission to explore options for a 'fast-track' scheme for claims where appropriate. Given the volume of claims likely to be lodged through a redress scheme, we suggest that the Commission consider international best practice examples which incorporate digital mechanisms for lodging claims for minor injuries.

Standard of Proof

52. The difficulty with the civil standard of proof is obvious, in that the abuse concerned occurred a long time ago. In the time since, records have often been lost or destroyed, and the memories of witnesses are not what they once were. It is therefore an unrealistic and onerous demand to ask that survivors meet the balance of probabilities standard.

53. We consider that a standard of proof well short of that applicable in civil litigation should be used in any redress scheme. The challenge of meeting the survivor's onus of proof to the requisite standard has been a key impediment of civil litigation, which a redress scheme should not perpetuate. We strongly believe that a higher standard of the kind in *Briginshaw v Briginshaw* (1938) 60 CLR 336 has no place in this sort of scheme.

54. 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.[21]

54.1. The Defence Abuse Response Taskforce adopted this standard, and found as follows regarding its efficacy:[22]

> *In short, for very many people who have experienced abuse in Defence there was (and is) absolutely no prospect that they could obtain recourse through existing formal legal or administrative processes. Their cases were unresolvable.*

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[20] Consultation Paper, p. 159.

[21] Defence Abuse Response Taskforce, 'The differences between Standards of Proof used by the Defence Abuse Response Taskforce and Defence', p. 1.

[22] Defence Abuse Response Taskforce, Report on Abuse in Defence, November 2014, p. 20.

The then Government's decision to put in place the test of 'plausibility' as a gateway for a complainant to have their account of abuse heard, accepted as true, acknowledged as wrong and to be provided specific practical outcomes, was a ground-breaking means of resolving the unresolvable.

54.2. A plausibility standard would ensure that survivors are not prevented from making claims because the standard of proof demands the availability of non-existent materials or documents destroyed by institutions.

Survivor Advocates

55. We respectfully agree that a redress scheme should be as simple as possible.

56. As identified in the Consultation Paper, a redress scheme will likely incorporate a process of offer (in the form of a written determination) and acceptance.

56.1. The survivor will need advice about whether to accept the offer. This advice should come from an appropriately qualified and legally experienced advisor.

56.2. The scheme might also offer a right of review or appeal. The survivor will need advice about whether to take this step, and likely also legal assistance in doing so.

56.3. To ensure its actuarial viability, the scheme might require participants to enter into deeds of release as a condition of payment; again the survivor will need assistance to understand the effect of entering into such a deed.

56.4. If a redress scheme is to complement a retained but enhanced scheme of civil litigation, where survivors will have to choose one or other scheme to pursue, a survivor will require advice as to which scheme is best for their circumstances.

56.5. The need for legal assistance for survivors is inevitable. The involvement of experienced legal representatives will ensure that the redress scheme is accessible to all survivors, and will enhance the efficiency and speed of the application process and outcome.

57. One theme of the Consultation Paper is that the delivery of various aspects of redress should be limited to people who have training and experience as to the nature and impact of child sexual abuse, and the needs of survivors.

57.1. This is suggested for those involved in providing a direct personal response to survivors,[23] those involved in counselling survivors,[24] lawyers who act for government in dealing with claims of survivors,[25] and those who interact with survivors generally.[26]

57.2. The same considerations of expertise apply for providers of legal services. They too should have experience with the nature and impact of child sexual abuse. Although the Consultation Paper favours the provision of advocacy services through community legal centres,[27] another approach would be to rely on firms with expertise in litigation arising from child sexual abuse. Specialist

[23] Consultation Paper, p. 101.

[24] Consultation Paper, p. 115.

[25] Consultation Paper, p. 228 and 232.

[26] Consultation Paper, p. 54.

[27] See e.g. Consultation Paper, p. 172 and 174.

lawyers have particular experience with the challenges survivors face in navigating and interacting with the legal system and with administrative processes.

57.3. As set out in the introduction above, we have this experience, as do a number of other firms who conduct these claims. Whilst we hold the work that community legal centres do with very limited resources in the highest regard, we are concerned that they do not have the depth of experience in civil litigation regarding child sexual abuse claims, and they are not adequately resourced to provide these legal services. This is particularly the case given the volume of people likely to be making claims.

57.4. We recommend that the Commission consider implementing an accreditation process. This would provide a means through which skilled and appropriately qualified lawyers could be further trained, and then registered and credentialed. The redress scheme would then be able to refer survivors to these accredited specialists.

57.5. For many claims, the compensation payable may be minor to moderate – in those instances, we could encourage the Commission to explore an event-based or fixed cost model for payment of legal fees. An event costing model would ensure actuarial viability. In that model, the necessary advice and support is provided by reference to stages of the redress process, by an expert firm, in return for a fixed fee per stage, which fee is funded by the redress scheme.

57.6. In setting these fees, it is essential that the Commission have regard to the type of work and advocacy required in this area. Once the levels of compensation available have been set, the Commission should have regard to the evidentiary and advocacy skills required for those outcomes. Fees should be set based on the principle that for any claim, the legal work and costs attributed should be proportionate to the outcome.

Chapter 10: Civil Litigation

58. The creation of a redress scheme should not eliminate civil liability for wrongdoers. It is of critical importance that survivors retain a right to pursue common law claims against institutions.

58.1. The common law is more likely to provide adequate compensation for survivors, in circumstances where a redress scheme places a cap on the maximum payment available. The amount awarded at common law is more likely to adequately reflect the survivor's loss and the harm suffered. Whilst no amount of money can place a survivor in a position as if the harm had not occurred, the common law offers a pathway to a more appropriate sum which takes full account of the harm caused and loss incurred.

58.2. Moreover, the common law is a fundamental institution of society through which ordinary people are entitled to pursue claims against wrongdoers – it is of utmost importance that survivors are not precluded from exercising their rights to bring a claim in the ordinary court system, whether through express exclusion or pressure to settle claims through a redress scheme.

58.3. The choice as to which pathway is best should be made by the individual with regard to their circumstances, with full awareness that in some cases the level of compensation available at common law is likely to exceed that available through a redress scheme.

58.4. Whilst a redress scheme may offer advantages over civil litigation in some areas, it will not offer the independent judiciary and the protections and transparency of formal legal proceedings. These are important considerations which must be borne in mind in the development of a redress scheme – it should not detract from or deter survivors from pursuing common law claims where they are willing and able to do so.

59. We recognise the limitations of civil litigation as an appropriate pathway to justice for some survivors. The barriers facing survivors include the lengthy process involved in pursuing a civil claim; the trauma of giving evidence in a public forum; the costs of litigating a claim; restrictive limitation periods; and the difficulty of identifying a proper defendant in circumstances where institutions have time and again proven their ability to evade responsibility.

59.1. Even if legislative obstacles such as limitation periods were removed, we acknowledge that civil litigation is not an appropriate or preferred pathway for all survivors.

59.2. In many cases there remain other barriers which mean survivors are unable to recover compensation. Whist some barriers can be addressed, others are essentially impossible to overcome. The perpetrators of abuse may have died; institutions no longer exist, or if they do, have destroyed the necessary documents required by the survivor to prove their claim; or the institution may have no assets from which compensation can be paid out.

59.3. Focusing on the needs of survivors requires recognition that, even in circumstances where legal barriers are removed, civil litigation is not an appropriate pathway to justice for all survivors. We therefore support the creation of a redress scheme, to offer an alternative, survivor-focused means to access justice.

60. We submit that there exist a number of options for improving access to justice through civil litigation, and make a number of recommendations which would remove some of the barriers to justice below.

Limitation Periods

61. We are very familiar with the difficulties that limitation periods pose for survivors of child sexual abuse. In the Christian Brothers litigation, the limitation periods and procedural rulings around them ensured that the claims were never heard on their merit. This obstacle was a substantial factor in the compromise that ensued.

62. We consider that the experience of asbestos litigation should inform the approach taken to reform. There are of course differences between asbestos litigation and claims arising from child sexual abuse. In asbestos litigation, the latency period between exposure to asbestos and illness is at least 10 years and more usually 20 to 30 years. In that period, the victim of an asbestos illness cannot know of their entitlement to make a claim.

62.1. The difficulty faced by a survivor of child sexual abuse is more subtle, in that the survivor's barrier is not so much lack of knowledge as the substantial psychological hurdles which prevent them from disclosing the elements of their claim to someone who might assist them, such as a counsellor or lawyer.

62.2. And yet there are similarities. As it is put in the Consultation Paper, "it makes little sense to talk of [survivors] 'sleeping' on their rights,"[28] – the same is true of asbestos litigants. It is also telling that the Commission's review found that it took survivors of child sexual abuse some 22 years, on average, to disclose their abuse.[29] One recent study of asbestos illness found that same median latency period after initial exposure to asbestos.[30]

62.3. Some states have tried to deal with the difficulty around asbestos litigation by reliance on the latent injury provisions or more general questions of discoverability. However, NSW, Victoria, Queensland, and the Northern Territory have recognised the weaknesses of this approach and have abolished the limitation periods altogether for asbestos claims.[31]

62.4. We consider that the argument in favour of a discoverability-based limitation period (as an alternative to abolishing the limitation period) is stronger in an asbestos claim than in child sexual abuse cases. Although asbestos victims face very serious challenges and understandably suffer from conditions like depression, their ability to act, once they have knowledge of a serious illness, is not always an issue. As compared to a survivor of child sexual abuse, there is generally no inherent psychological impediment that impairs a victim of asbestos from approaching the Court.

62.5. Moreover, it is generally easy to identify the point in time that an asbestos illness, and the civil liability which arises from it, becomes discoverable. Mesothelioma is capable of definitive pathological diagnosis, and it is only caused by exposure to asbestos. A psychiatric illness, on the other hand, is much more complex, often becoming known to the survivor gradually over many years. It can have a multiplicity of causes, such that even once it is diagnosed, the survivor may still not be in a position to ascribe it to child sexual abuse, and so be in possession of the minimum information necessary to consider bringing a civil claim.

62.6. It is inevitable that a test of limitations which involves an obligation on claimants to not "delay" bringing claims will be a source of protracted disputation in civil litigation, given the ambiguities that are inherent in psychiatric illness.

63. We also note that limitation periods can wrongly prevent survivors from bringing claims in circumstances where they have reported the abuse to an authority figure within the institution, only to have the issue ignored, or to find themselves rather than the perpetrator blamed. This often discourages taking the matter any further, and contributes significantly to delay in bringing a claim.

64. The cause of any delay in bringing a claim in child sexual abuse cases is directly attributable to the nature of a defendant's wrongdoing. Justice demands that survivors not be denied an opportunity to bring civil claims against institutions where the cause of the delay is the difficulty of disclosing the abuse to which they have been subjected.

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[28] Consultation Paper, p. 204.

[29] Consultation Paper, p. 61.

[30] Specifically, a median latency period of 22.8 years was identified in a British cohort with occupational exposure to asbestos: Frost, "The latency period of mesothelioma among a cohort of British asbestos workers (1978–2005)", *British Journal of Cancer*, October 2013, Volume 109, p. 1965-73, at p. 1967.

[31] In NSW see *Dust Diseases Tribunal Act* 1989, s12A and *Limitation Act* 1969, s 8(2); in Queensland see *Limitation Act* 1974, s 11(2); in Victoria see *Limitation of Actions Act* 1958, s 27B(2)(d); in NT see *Limitation Act* 1981, s 12(2)(a). See also as to occupational claims in Tasmania, *Asbestos-Related Diseases (Occupational Exposure) Compensation Act* 2011, s 175.

65. Accordingly, we support abolishing the limitation period for survivors of child sexual abuse.[32] We support the approach proposed by Victoria in its exposure draft of the *Limitations of Actions Amendment (Criminal Child Abuse) Bill* 2014.[33]

Vicarious Liability

66. We also note the difficulties involved in establishing that religious institutions are responsible for the intentional acts of clergy. The complex legal history regarding this issue has resulted in great uncertainty.

    66.1. We therefore submit that legislative change should be implemented to provide that persons in religious orders be deemed employees of the relevant religious institution.

67. We would also support a scheme of vicarious liability in which liability would be imposed on institutions, unless the institution could prove that reasonable steps were taken to prevent abuse.

68. It is true that requiring an institution to prove that reasonable steps were taken to prevent abuse means that with the passing of time, an institution may face difficulties discharging this onus. We note however that institutions are significantly better placed to bear this burden of proof.

    68.1. Institutions have peculiar knowledge of their own procedures, and have the capacity to access names (and likely contact details) of relevant former officials. Institutions also have ready access to their own records, and documents and materials to support their position.

    68.2. The claimant may have a lawyer, but access to records and information depends upon their provision by the institution.

69. Although the reversal of the onus will require a defendant to establish a matter in litigation (which is not the customary approach), the matter does not require proof of a negative, but rather evidence of positive steps taken to prevent abuse.[34]

70. We consider that the reversal of the onus is a modest reform that would significantly advance the position of survivors in civil litigation.

Proper Defendants

71. We respectfully agree that unincorporated bodies with the benefit of perpetual succession for property ownership should also bear the burden of succession to meet claims of child sexual abuse.

    71.1. The unique structure of churches is an anachronism which derives from a time where the modern corporate entity and unincorporated associations were not

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[32] To the extent a protection for defendants is necessary, it is provided by the Court's inherent jurisdiction to prevent an abuse of its process: *Batistatos v Roads and Traffic Authority of NSW* [2006] HCA 27.

[33] We note this is "Option A" for reform identified by the NSW Government: NSW Justice, *Discussion Paper: Limitation periods in civil claims for child sexual abuse*, January 2015, p. 10.

[34] As has been said of the reversal of the onus in the general protections provisions of the *Fair Work Act* 2009 and their predecessors, "the plain purpose of the provision [is to throw] on to the defendant the onus of proving that which lies peculiarly within his own knowledge": *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J, cited in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at [50] per French CJ and Crennan J, at [86] per Gummow and Hayne JJ, and at [149] per Heydon J.

features of the law. Churches should be treated in the same way as any other entity that enjoys the benefit of perpetual succession.

72. We note the Commission particularly seeks submissions as to whether claimants have experienced difficulties in locating a "proper defendant" in non-faith based institutions. We wish to draw the Commission's attention to the Fairbridge litigation.[35]

    72.1. 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[36] 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."[37]

    72.2. Regrettably, identifying a proper defendant is a problem that extends beyond religious contexts.

73. We believe that institutions which have responsibility for the care of children should be incorporated, and should be required to have appropriate insurance. This will ensure that impecunious or non-incorporated bodies are able to be sued at common law, and that survivors are not denied access to justice on the basis of the financial status or nature of the institution.

Adequacy of compensation

74. In consideration of the importance of equal access to redress for survivors, we submit that the existence of caps on compensation in some jurisdictions is inequitable. In the same way that access to compensation through a redress scheme should not differ based on geographic location, differential compensation for common law claims based on jurisdiction should be avoided.

    74.1. We submit that a consistent approach which removes caps on compensation in all jurisdictions is therefore appropriate.

    74.2. We also note that the application of discount rates to compensation awards can have a punitive effect on claimants. We submit that an approach which maintains discount rates at a level no higher than 3% is appropriate, and support a single national rate to ensure equality and consistency.

75. We note particularly our concerns about the differing treatment of intentional torts in civil liability legislation, depending on the identity of the defendant.

    75.1. For example, section 3B(1)(a) of the *Civil Liability Act 2002* (NSW) provides that that Act (with some exceptions) does not apply in circumstances where a person has committed an intentional act including sexual assault. The provisions which do not apply include the higher 5% discount rate, the cap on non-economic loss damages, the damages threshold, and certain limitations on economic loss claims. We support this position, but note our concern that the wording of the legislation is designed to include only those cases where the claimant is suing the person who assaulted them, and not suing the institution said to be vicariously liable for those assaults.

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[35] See 3.1, above.

[36] Available at http://www.supremecourt.justice.nsw.gov.au/supremecourt/sco2_class_action/sco2_class_action_fairbridge. html.

[37] See e.g. transcript of proceedings on 11 April 2014 at T17.41 and T18.31.

75.2. That is, where a defendant is liable for another's intentional act, the survivor does not get the benefit of s3B(1)(a).[38]

75.3. In circumstances where the perpetrator is impecunious or deceased, the survivor's only pathway to justice is to bring a claim against the institution – where any award of damages will be subject to a higher discount rate and other restrictions. We submit that this results in inequitable treatment of survivors' common law claims, and renders their access to fair compensation dependent upon the capacity to sue the perpetrator.

75.4. We therefore submit that civil liability legislation should be amended so as to render the treatment of survivors' damages awards the same, regardless of the nature of the defendant involved.

Conclusion

76. The inquiries of this Royal Commission to date have revealed the extent and severity of the horrendous harm and torment caused to children in the care of institutions. It is widely acknowledged that providing some form of redress which addresses the needs and wishes of survivors is of critical and urgent importance.

77. This submission, along with others made by individuals and groups from a range of backgrounds and experiences, contain recommendations for real steps that can be taken to start the process of redress. We recognise that a history of broken promises weighs heavily on survivors, and that the responsibility for ensuring that this Royal Commission results in real and lasting change lies with all of us.

78. We wish to thank the Commission for this opportunity to make a submission. We would again welcome the opportunity to expand on any matter in this submission or any other issue that the Commission may deem appropriate.

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[38] *New South Wales v Bujdoso* [2007] NSWCA 44.