WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

9 March 2015

Royal Commission into Institutional Responses
to Child Sexual Abuse
GPO Box 5283
Sydney 2001

By email: redress@childabuseroyalcommission.gov.au

Dear Commissioners,

Royal Commission Consultation Paper: Redress and Civil Litigation

1. Women's Legal Services NSW (WLS NSW) thanks the Royal Commission into Institutional Responses to Child Sexual Abuse for the opportunity to comment on the Royal Commission's Consultation Paper: Redress and Civil Litigation.

2. We have organised our submission by answering some of the key questions identified by the Royal Commission.

3. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

Chapter 2 Structural Issues

Justice for victims and elements of redress

4. We support the analysis and conclusions drawn by the Royal Commission in relation to justice for victims and in describing the elements and general principles of redress. In our experience these resonate strongly with the experiences of our clients.

A National Scheme

5. We agree that the establishment of a single national redress scheme led by the Australian Government and with the participation of the state and territory

governments and non-government institutions is ideal and should be the preferred approach.

6. WLS NSW anticipates that there are more benefits than not for victims in establishing a national redress scheme. A consistent approach nationally is most likely to provide fairness and consistency. It should not matter whether the abuse occurred in one state or another (where compensation laws may differ); nor should it matter whether an institution responsible for abuse has resources with which to pay compensation; nor should it matter that the structure of an institution is technically difficult to sue, as has been the experience with claims against the Catholic Church.

7. WLS NSW submits that it should be mandatory for institutions to be subject to a national redress scheme. All decision-making should be independent of the institution. An oversight function to monitor systemic issues should also be part of a national scheme.

Past and future abuse

8. We support a redress scheme that does not have a closing date for claims relating to past abuse claims. An example that may be useful to reflect upon is the Aboriginal Trust Fund Repayment Scheme (AFTRS) in NSW which closed with reasonably short notice and with little effort to effectively communicate with communities. In our experience this led to a denial of access to the scheme for many potential claimants and caused undue distress.

9. Although the occurrence of future abuse is likely to be minimised as a consequence of the Royal Commission it would be naïve to think that it will never occur again and accordingly, we are not confident that a redress scheme for future abuse will be unnecessary.

10. We strongly submit that access to a redress scheme should always be an option available to victims of institutional abuse, including those who may experience abuse in the future. While we remain hopeful that improvements in the civil litigation system will make it more likely that victims will be able to bring civil claim should they choose to do so, it should not be the only option available to victims of abuse.

11. We submit that providing redress in an on-going way is an obligation of all States under United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,*[1] the primary international legal instrument governing redress and reparation schemes.

12. We acknowledge that it is difficult to identify with confidence now what might be sought by victims of abuse long into the future, and therefore an option for consideration could be to review the nature and extent of need for an on-going redress scheme for future abuse, and how this might operate at the end of the first 10 years activities of the redress scheme that emerges out of the Royal Commission's

[1] *UN Doc. A 60/509/Add.1, adopted by the General Assembly 1 December 2005.* Although the Basic Principles primarily apply to State actors, principle 15 provides that where another entity is responsible for the violation 'such party should provide reparation to the victim' while principle 3(c) specifically provides that a component of reparations is equal and effective access to justice 'irrespective of who may ultimately be the bearer of responsibility for the violation'.

findings.

Chapter 4 Direct personal response

13. We support the principles enunciated in the Consultation Paper for an effective direct personal response. The 3 elements of any direct personal response put forward as those that should be offered by institutions as a minimum, are supported by the experiences of clients of WLS NSW.

14. We also support the findings that collective redress in the form of traditional healing is needed as an additional form of direct personal response for Aboriginal and Torres Strait Islander victims.

15. The issues identified in the Consultation Paper lead us to conclude that:

    - an appropriate personal response can only be provided by the institution;
    - a redress scheme should offer to facilitate the provision of the direct personal response but also not preclude the option of direct approach to the institution; and
    - the redress scheme should interact with the institution sufficiently to ensure that the principles for an effective direct personal response are adhered to. Asking victims for feedback about the direct personal response could be part of monitoring this aspect of redress.

Chapter 5 Counselling and psychological care

16. We support the principles for counselling and psychological care and the principles for supporting counselling and psychological care through redress outlined in the Consultation Paper. We welcome the acknowledgement that there are key gaps in services and expertise and particularly for Aboriginal and Torres Strait Islander victims and victims in regional and remote areas.

17. Submissions on the relative effectiveness and efficiency of the options in meeting victims' need are sought. We acknowledge the complexity, including the problems outlined with Medicare funded services. Whatever solution emerges, we submit it must be consistent with the principles for supporting counselling and psychological care through redress to ensure it:

    - supplements existing services rather than displace or compete with them;
    - provides funding not services. This supports flexibility and choice, ensures a client focussed approach and also avoids silo-ing of services;
    - provides funding on an 'as needed basis' for victims given needs can be lifelong and episodic.

18. Institutions should contribute to the funding of services to supplement services and fill service gaps generally, rather than provide ad-hoc additional services themselves.

Chapter 6 Monetary Payments

Assessment of Monetary Payments

19. We have had difficulty fully understanding the actuarial charts contained in the Consultation Paper. However, in general terms we support the approach suggested in taking a nuanced approach to the assessment of monetary payments taking into account severity of abuse, severity of impact and any distinctive institutional factors.

20. In previous submissions to the Royal Commission we suggested that a two-tiered system of assessment may be appropriate. We argued that to be eligible for a 'base' compensatory payment of sexual assault, all that a victim should need to establish is that a sexual assault(s) occurred. If a victim is able and willing to engage in further evidence gathering to establish that the assault(s) was of a particularly aggravated nature, or that it caused particularly aggravated forms of harm, victims should be able to elect to engage in a 'supplementary' process in which the gravity of harm could be quantified to make a victim eligible for further compensatory payments. This approach is broadly consistent with the matrix proposed in the Consultation Paper.

Amounts of monetary payments

21. WLS NSW recognises that to some extent, reparations payments may be conceptualised as symbolic recognition of damage done, rather than a payment of restitution to the victim. Inherent in this concept of the purpose of reparations is the notion that no amount of money may adequately compensate for the harms perpetrated by crimes such as child sexual abuse.

22. WLS NSW believes that it is not appropriate that the quantum of damages available through a redress scheme be significantly less than the compensation available to victims through civil litigation. As outlined in the Consultation Paper, a token amount would not provide a sense of justice for many survivors.

23. For these reasons, we have previously suggested that where child sexual abuse is made out, the minimum 'base' level of compensation in all statutory victims of crime schemes should be no less than $100,000.

24. We submit that $100,000 be the minimum 'base' level for a redress scheme.

25. We support the principle of choice regarding a lump sum payment or payment by instalment. In our experience payment by instalment is likely to be taken up by some survivors but certainly not all.

26. We support the suggested approach to treatment of past monetary payments outlined at p160 of the Consultation Paper.

27. We note the preference of the Royal Commission to establish a 'one-stop shop' redress scheme which envisages that each person, including those who have been abused in more than one institution, will have their claim assessed once and that the assessment will take into account those claims involving abuse over multiple institutions. We are concerned this approach will mean that victims of child sexual abuse that took place in multiple institutions will be forced to disclose instances of abuse which took place in institutions about which they do not feel ready and able to

face so they can have their claim assessed or face being denied redress for abuse which otherwise would have been recognised under the redress scheme. We submit that in order to retain a victim focussed approach which takes account of the time it may take for some victims to disclose all of their experiences of abuse, the redress scheme should not operate as a 'one-stop' shop. This would not mean that any previous payments made under the redress scheme could not be taken into account when assessing a subsequent claim.

28. We suggest that consideration also needs to be given to the inadequacy of state based statutory victims of crime compensation schemes for child sexual assault. WLS NSW has previously made submissions to the Royal Commission about its deep concern for the diminishing level of support offered to victims of violence, particularly in NSW. For example, the reduction in the quantum of damages to victims of domestic violence and sexual assault in NSW by changes to the victims compensation scheme under the *Victims Rights and Support Act* in 2013 sends a troubling message about the relative importance to the State regarding the healing and recovery for victims of crime. The maximum amount of compensation / recognition payment for harm was reduced from $50,000 to $15,000. While financial assistance is available for immediate needs and economic loss there are significant barriers to victims of child sexual assault accessing these, including the time limits for filing an application for financial assistance. Where time limits have passed limited financial assistance is available, for example, up to $5,000 for out-of-pocket expenses where loss of actual earnings cannot be shown and up to $5,000 for expenses associated with criminal or coronial proceedings.

29. It can be argued that failure to protect children from sexual abuse is a community responsibility no matter where or how it occurs and that States have a responsibility established through international human rights instruments to provide reparations.[2] We urge the Royal Commission to recommend improvements to the maximum amounts of money available to survivors of child sexual abuse, no matter where the formal responsibility lies, through state victims of crime compensation schemes.

Chapter 7 Redress scheme processes

Eligibility

30. We support a broad definition of institution for a redress scheme.

31. We support all forms of abuse being included in the redress scheme.

Duration

32. We agree a scheme should not be subject to a fixed closing date.

[2] The *Universal Declaration of Human Rights* (art. 8), the *International Covenant on Civil and Political Rights* (art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 14), the *Convention on the Rights of the Child* (art. 39), *CEDAW General Recommendation 19: Violence against Women, as contained in UN Doc A/47/38 (1992)* [9, 24(i), 24(t)(i)].

Application Process

33. We acknowledge and support the role identified for support services and community legal centres to assist and advise applicants to a redress scheme and for services to be funded for this work. We appreciate the acknowledgement that funding should be made available to a range of community legal centres taking account of regional and remote communities and those applicants who may have specific needs such as Aboriginal and Torres Strait Islander victims and women.

34. We support a paper-based application and evidence gathering process. For many victims of abuse, the prospect of giving oral evidence is too overwhelming and shameful and leads to a greater likelihood that a victim will not pursue an application.

35. We support the availability of an oral hearing for those instances where a written application is not possible or where an applicant's case is not able to be fully made without the benefit of oral evidence, particularly in relation to levels of severity of abuse and / or injury.

36. We note the support expressed at page 169 for the use of statutory declarations to verify accounts of abuse. While this may be necessary in circumstances where there is a dearth of evidence to support an application, we submit that where there is sufficient other forms evidence of the abuse and its effects, in order to minimise the risk of re-traumatisation, an applicant should not be forced to provide an account by way of statutory declaration.

37. Where an applicant is not able to obtain sufficient evidence to support a claim and is not in a position to prepare a statutory declaration at that time and the absence of such evidence means that the application is not otherwise going to be successful, an applicant should be able to withdraw their application without consequence and be allowed to file a fresh application at a later date.

The appropriate standard of proof

38. We support a 'plausibility test' or a test of reasonable likelihood as the appropriate standard of proof in a redress scheme.

Offer and acceptance of offer

39. We support the proposal that an offer be made and open for 3 months for acceptance and that free legal advice be made available to applicants prior to acceptance.

40. In our experience, difficulties arise if applicants become unwell, or cannot be found between making a claim and the offer being made to them. In these circumstances, provision should be made to hold the offer made to them in trust, so that it can be claimed at a later date.

Review and appeals

41. We support the availability of internal review and accept the suggestion that external appeal rights should be determined at the time of establishing the scheme.

Deeds of release

42. Our view is that deeds of release should not be required. If deeds of release are required, we agree with the proposal that free legal advice be available prior to accepting an offer and signing a deed of release.

43. We support there being no confidentiality obligation imposed on survivors, but that privacy obligations would apply to the scheme.

Funding redress

44. We support the proposition outlined in the Consultation Paper at page 27 'that although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusions that the problems faced by many people who have been abused are the responsibility of our entire society. The broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse.'

45. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.[3]

46. Significantly, as noted in General Recommendation 19 made by the Committee on the Elimination of Discrimination against Women, States may 'be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.[4]

47. In her 2013 annual thematic report to the United Nations Human Rights Committee Special Rapporteur on Violence Against Women, its causes and consequences, Ms Rashida Manjoo, advocates that the due diligence standard be divided into two categories: individual due diligence and systemic due diligence.[5]

48. Individual due diligence should be flexible and respond to the specific needs of the individual – housing, health and counselling, legal needs, assistance in finding employment as well as compensation. It requires that perpetrators of violence against women and those who failed in their duty be held accountable and be punished.[6]

49. Systemic due diligence refers to States obligations to ensure 'a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence

[3] The *Universal Declaration of Human Rights* (art. 8), the *International Covenant on Civil and Political Rights* (art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 14), the *Convention on the Rights of the Child* (art. 39), *CEDAW General Recommendation 19: Violence against Women,* as contained in UN Doc A/47/38 (1992) [9, 24(i), 24(t)(i)], Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6 [8]; Committee on the Rights of the Child, *General Comment No. 5,* CRC/GC/2003/5, 27 November 2003 [1]; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), [33].

[4] *CEDAW General Comment 19: Violence against Women, as contained in UN Doc A/47/38 (1992)* [9, 24(i), 24(t)(i)].

[5] *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo,* Human Rights Council, 14 May 2013 A/HRC/23/49, [70]

[6] Ibid.

against women'.[7] Significantly, it requires States 'to be involved more concretely in overall societal transformation to address structural and systemic gender inequality and discrimination'.[8]

50. The United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* supports the 'strengthening and expansion' of compensation funds.[9]

51. It is therefore incumbent upon government to fund redress and to also determine whether or not to require non-government institutions to fund a redress scheme.

Chapter 10 Civil Litigation

Limitation periods

52. We submit that the case for the removal of limitation periods has been clearly and well made by reference to the problems brought forward to the Royal Commission, public discussions and by research over recent years.

53. Removal of limitation periods in child sexual abuse matters would improve access to justice by focusing on the child sexual abuse itself rather than allowing alleged perpetrators to benefit from delays in reporting. Having to face the barrier of proving disability under a *Limitation Act* if a matter is out of time may mean that a victim chooses not to pursue a civil claim and thus is denied justice. We submit it is in the public interest that perpetrators of child sexual abuse and any organisations that owe a duty of care to children and allowed such abuse to occur are held accountable for their actions and are not able to escape such liability due to limitation periods.

54. A study of reported child sexual abuse in the Anglican Church found that on average there was a 23 year delay in reporting child sexual abuse.[10] In recognition of the significant delays in reporting child sexual abuse, the NSW Parliament did not include time limits for recognition payments for victims of child sexual abuse in the *Victims Rights and Support Act* 2013.

55. Disappointingly though, in NSW victims of child sexual abuse only have until they turn 20 years old to apply for financial support for medical and dental expenses and economic loss incurred as a direct result of the abuse.[11] In our experience, and well documented in the literature, there are many reasons why victims of child sexual abuse would not report or disclose abuse before they were 20 years old, for example, shame, an inability to recognise the abuse was a crime and a lack of access to therapeutic services to help them emotionally prepare themselves to seek redress. The Royal Commission *Interim Report* concluded that disclosure often takes more

[7] Note 4 at [71]
[8] Ibid. See also *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo,* Human Rights Council, 23 April 2010 A/HRC/14/22, [24].
[9] U.N General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, U.N Doc. A/RES/40/34 [13].
[10] P. Parkinson, K. Oates A. Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, May 2009 at 5.
[11] *Victims Rights and Support Act 2013* s 40(1).

than 20 years.[12]

56. We support the removal of limitation periods for actions relating to child sexual abuse.

Duty of institutions

57. We support imposing an absolute liability on institutions so that they are liable for the abuse regardless of the steps they had taken to prevent it. This reflects the great difficulty that an institution may have in preventing child sexual abuse in all circumstances and focuses attention on supporting a victim. The culpability of the institution, or its efforts to provide a safe environment, may however be relevant to the assessment of compensation.

Model litigant approaches

58. We submit that model litigant obligations should be applied nationally or at the least, be consistent across the various states and territories.

59. We further submit that model litigant obligations must be enforceable and as such would best be expressed as rules rather than as a policy.

60. The obligations must be clearly expressed. Where concepts such as fairness have the potential to be ambiguous, we argue that it is all the more incumbent on government agency leaders to facilitate open and frank discussion of what is fair. There needs to be clear principles and understanding within and amongst government agencies as to the everyday application of the model litigant obligations in order to achieve its aim of maintaining proper standards in litigation and the provision of legal services.

61. It is our further submission that those employed by government agencies tasked with defending civil claims of child sexual abuse should be required to document their consideration of the requirements of the model litigant obligations when advising on strategy or significant steps in the litigation. This requirement should also extend to counsel briefed by defendants. Consideration should be given to requiring a declaration similar to that required by an expert witness pursuant to r 31.23(3) of the *Uniform Civil Procedure Rules 2005,* suitable for the provision of advice.

62. Model litigant obligations should also explicitly require that comments by judicial officers on whether the model litigant obligations are being considered in an approach taken before the Court be reported to the Crown Solicitor and client agency.

63. For a litigant with significant resources such as the State, it is not sufficient for cost orders to be the consequence of breaching the model litigant obligations. Mechanisms that put greater weight on preventing breaches rather than remedying non-compliance after the event will have a much stronger protective factor for vulnerable and disadvantage plaintiffs.

64. We support guiding principles for responding to civil claims involving allegations of

[12] p158 Commonwealth of Australia. Royal Commission into Institutional Responses to Child Sexual Assault. *Interim Report Volume 1* 30 June 2014.

child sexual abuse such as those introduced in NSW and Victoria but submit that like the model litigant obligations, they should be nationally consistent and enforceable.

65. If you would like to discuss any aspect of this submission, please contact Janet Loughman, Principal Solicitor on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor