

Submission to the
Royal Commission into Institutional
Responses to Child Sexual Abuse

Consultation Paper:
Redress and Civil Litigation



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About the Authors

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Table of Contents

ABOUT BRAVEHEARTS INC.	1
INTRODUCTION	2
SUBMISSION	3
COMMENTS IN RELATION TO CHAPTER 2	3
<i>A National Redress Scheme</i>	3
<i>Process and Outcomes</i>	4
COMMENTS IN RELATION TO CHAPTER 4	5
<i>Effective Personal Response</i>	5
COMMENTS IN RELATION TO CHAPTER 5	6
<i>Support During the Redress Process</i>	7
<i>Ensuring Effectiveness and Efficiency in Meeting Survivors' Needs</i>	7
<i>Principles of Effective Therapeutic Intervention</i>	8
<i>Options for Service Provision and Funding</i>	8
COMMENTS IN RELATION TO CHAPTER 6	9
<i>Assessment of Payments</i>	9
<i>Average and Maximum Monetary Payments</i>	11
<i>Option for Instalments</i>	11
<i>Recognition of Past Payments</i>	11
COMMENTS IN RELATION TO CHAPTER 7	12
<i>Eligibility Criteria and Standard of Proof</i>	12
<i>Deeds of Release</i>	13
COMMENTS IN RELATION TO CHAPTER 8	13
<i>Funding Redress</i>	14
COMMENTS IN RELATION TO CHAPTER 9	14
<i>Interim Arrangements</i>	15
COMMENTS IN RELATION TO CHAPTER 10	15
<i>Abolition of Statutes of Limitations</i>	15
<i>Civil Litigation: Duty of Care</i>	17
<i>Civil Litigation: Proper Defendant</i>	17
<i>Civil Litigation: Model Litigant</i>	18
REFERENCES	19



About Bravehearts Inc.

Our **Mission** is to stop child sexual assault in our society.

Our **Vision** is to make Australia the safest place in the world to raise a child.

Our **Guiding Principles** are to at all times, do all things to serve our Mission without fear or favour and without compromise and to continually ensure that the best interests and protection of the child are placed before all other considerations.

Bravehearts has been actively contributing to the provision of child sexual assault services throughout the nation since 1997. As the first and largest registered charity specifically and holistically dedicated to addressing this issue in Australia, Bravehearts exists to protect Australian children against sexual harm. All activities fall under 'The 3 Piers' to Prevention; Educate, Empower, Protect – Solid Foundations to Make Australia the safest place in the world to raise a child. Our activities include but are not limited to:

EDUCATE

- ◆ Early childhood (aged 3-8) 'Ditto's Keep Safe Adventure' primary and pre-school based personal safety programs including cyber-safety.
- ◆ Personal Safety Programs for older children & young people and specific programs aimed at Indigenous children.

EMPOWER

- ◆ Community awareness raising campaigns (Online and Offline) including general media comment and specific campaigns such as our annual national White Balloon Day.
- ◆ Tiered Child sexual assault awareness, support and response training and risk management policy and procedure training and services for all sectors in the community.

PROTECT

- ◆ Specialist advocacy support services for survivors and victims of child sexual assault and their families including a specialist supported child sexual assault 1800 crisis line.
- ◆ Specialist child sexual assault counselling is available to all children, adults and their non-offending family support.
- ◆ Policy and Legislative Reform (Online and Offline) - collaboration with State Government departments and agencies.

Bravehearts Inc. is a National organisation, it is a registered Public Benevolent Institution, registered as a Deductible Gift Recipient, operates under a Board of Management and is assisted by State based Community Regional Committees, Executive Advisory Committees and a Professional Finance Committee.

Introduction

As an agency that works with, and advocates for, survivors of child sexual assault we regularly and continue to provide support and referral for clients who have sought financial compensation through a range of avenues.

Bravehearts believes that redress and compensation processes are important mechanisms to assist survivors of child sexual assault achieve appropriate levels of financial redress as well as access to crucial services, including mental health and medical. It is particularly important for these individuals to receive appropriate compensation, given the lifelong, wide-ranging effects of child sexual assault often on their adult lives.

At the outset, we would like to commend the Royal Commission on the work completed to date in identifying the current failings that exist and seeking to establish a framework for appropriate redress in the future. Appropriate redress for victims of this crime, founded on principles of equality and fair treatment between all survivors is one very important goal to achieve.

We appreciate the task is complex given the vast array of competing interests, previous schemes and processes that exist and the lack of existing support services currently available to serve needs for victims of child sexual assault. As an organisation at the coalface working with limited resources to address such a large societal problem we appreciate the work being done to highlight the gaps and find a resolution moving forward to address them.

In particular, we would like to support and echo the Commission's work to date defining the key elements of Redress and General Principles as outlined in the Consultation Paper at p.9.

It is these elements and guidelines as stated that have underpinned the Bravehearts contributions to Round tables and previous Issue papers submissions from our organisation.

Please note: for the most part, responses in this submission reiterate our previous submissions to Issues Papers 5, 6 and 7.

Comments in Relation to Chapter 2

We welcome submissions that discuss the issues raised in Chapter 2. In particular:

- we seek the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternative approach
- we welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse.

A National Redress Scheme

As outlined in our submission to Issues Paper 6, Bravehearts supports a nationally run redress scheme for survivors of sexual assault in institutional care. It is our position that such an approach could provide greater transparency and consistency in the process of providing compensation for survivors.

Removing the process of redress away from individual institutions or governments would provide for greater faith and trust in the system through ensuring independence in decision-making. However, an important understanding to take from international approaches, is the need to ensure that the responsibility of the institution where the sexual assaults and abuse occurred is preserved. Reports of low levels of contribution by religious institutions to the Irish redress scheme, was seen by many victims as further evidence of the responsible institution not acknowledging responsibility.

There have been a number of issues with the operations of the statutory redress schemes that have been implemented in various states of Australia. Two of the major issues have been:

- Inequitable access to redress schemes: for example in Queensland the redress scheme established after the Forde Inquiry, survivors of sexual assault and abuse while in State-care were denied access to the redress scheme.
- Inconsistent features: without a national-run scheme, redress in Australia to date has included varying eligibility requirements and methods for assessing compensation, and wide variation in levels of compensation.

Although a national Scheme would be the preferred outcome for survivors we do recognise as outlined in the Consultation Paper, that there are some practical difficulties in delivering such a scheme in a timely manner to many survivors who need assistance now and may not have the luxury of time to pass before this was established. We are also cognisant of the fact that a national scheme requires agreement of all States, Territories, Federal governments and Institutions involved and this will also further protract the timeframe for survivors to access fair and just compensation. Therefore, we would support the Commission establishing interim arrangements or “core guidelines” that Institutions government and non-government are required to implement

immediately in order to provide some greater level of transparency and consistency around the redress issue.

We would also suggest that there would need to be some element of independence to the administration of these schemes, whether it be in the form of a National Advisory Panel or other to guide and report back on outcomes of “interim arrangements” to the Royal Commission during their tenure.

Process and Outcomes

To recap our previous submission in relation to a redress scheme, the design of a scheme to compensate victims of institutional sexual assault should be guided by a number of fundamental principles.

It should provide a quick, cost-effective and efficient means of fairly compensating people for their loss, whenever the sexual assault or abuse occurred.

The Law Commission of Canada (2000) outlined five fundamental principles to ensure an effective redress process for survivors:

1. Provision of all information needed for survivors to make informed choices on what course of redress to undertake.
2. Access to counselling and support for survivors undertaking the process of redress.
3. Training for all of those managing the redress process (including judges and lawyers) to ensure that those responsible for the conduct of the scheme have an understanding of the dynamics and impacts of sexual assault on survivors.
4. Persistent review and modification needed to improve redress schemes
5. Every effort needs to be made to ensure that the process of redress does not cause further harm to survivors.

In addition, Bravehearts would submit that other key features that that would underpin an effective redress scheme would include:

- A national approach, independent of specific institutions, would provide transparency of process.
- Consideration of funding for essential services such as counselling, advocacy, medical assistance, and other support services (such as housing, educational and employment).
- Coordination with police units to facilitate investigation of historical child sexual assault matters.
- Removal of requirement of signing a confidentiality agreement as part of a deed of settlement. Understanding that silence, secrecy and shame are such intrinsic elements of child sexual assault, survivors should have a right to speak of their experience if they wish to.
- As discussed in our previous submission to Issue Paper 5, an idea raised at a recent Public Hearing that would work well under a redress scheme, would be a “Gold Card” program similar to the Department of Veterans Affairs process,

whereby once over the threshold, a survivor would be given a life-long entitlement to services which could be accessed by using the card.

Comments in Relation to Chapter 4

We welcome 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.

Effective Personal Response

There is a great cynicism about the internal processes and policies used to deal with allegations of child sexual assault that has occurred in institutional settings, religious or otherwise. There is certainly a reluctance to trust these internal procedures when organisations, on the most part, have in the past shown to only act when they are made accountable in a legal sense. This distrust is evident every time there is further disclosure of covered up sexual assault in an institutional setting. There is a perception amongst sectors of the community that organisations' interests are more focussed on the public relations and legal liability aspects of allegations rather than in seeking to achieve healing, restoration and just settlements for survivors.

Seeking redress or compensation through a redress scheme absolutely must be optional for survivors. Survivors should be provided with a choice of avenues available to them. One of the fundamental current issues is that most victims are not aware or made aware of the avenues for redress or compensation and are therefore more often than not, not empowered to make informed decisions.

Choices for survivor should include:

- National Redress Scheme and/ or
- Civil litigation

Whichever option a survivor chooses, there must be adequate legal and emotional support provided.

We note the Consultation paper considers, **apologies and assurances** of future steps taken as important elements of an effective direct personal response.

From a Bravehearts perspective we consider these elements critical. As an organisation that has advocated for victims rights for over 18 years, a continual theme we are told by survivors is the importance of ensuring that these organisations don't harm future children under their care.

It is critical that any assurance made moving forward to a victim is more than just a commitment to adopt more stringent policies and procedures. Policies and procedures alone are just words on a page.

There must be a commitment from the Institution from the top down that they will address the cultural issues, and training and education gaps which have been demonstrated time and again in the Royal Commission Public Hearings to have failed victims.

Without this genuine commitment assurances to protect future generations of children in their care are ineffective.

Bravehearts along with many of the other organisations working in this space have been delivering training packages and products for children and adults alike to assist with this critical prevention message.

From our Three Piers to Protect literature (<http://bravehearts.org.au/pages/3piers.php>) and our recently launched ChildPlace initiative (<http://www.royalcommission.org.au/training---risk-management.html>) there are tailorable solutions available for Institutions to address these issues, we therefore feel its of critical importance that any assurances moving forward from an Institution consider an independent view of what is required to prevent child sexual assault within their organisation.

On the issues of apologies to victims we would also echo the literature as provided in the Public Consultation Paper. In particular the NSW ombudsman's guidelines provides a good start by considering that an apology should provide recognition to the victim by describing the wrong inflicted, a clear and unequivocal recognition that it was wrong and acknowledgement of the harm caused to that victim.

Bravehearts additionally recognises that for many victims a fundamental requirement of an apology is an acknowledgement of the responsibility to keep children safe within the organisation.

It is also recommended it should take place in a manner or format that suits the victim. Not all will want to meet face to face, some may require a letter or other form. An important part of delivering an effective apology to a victim could be easily ascertained by asking the victim themselves and/or establishing a feedback process to refine and improve this over time.

Furthermore, to be effective and meaningful to victims they should always be delivered by the most senior person relevant in that organisation, and if delivered face to face by that person only after they have had appropriate training and support in how to deal with victims of child sexual assault.

Comments in Relation to Chapter 5

<p>We welcome 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:</p>

- 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.

Support During the Redress Process

Survivors need to have access to independent legal advice and emotional/therapeutic support throughout the process.

One of the advantages of an independent national redress scheme would be a reduction in the level of legal support needed. However, Bravehearts believes that under such a scheme, capped legal fees should be provided for.

In addition, survivors should have no limitation to access of counselling support throughout the process.

Ensuring Effectiveness and Efficiency in Meeting Survivors' Needs

As outlined in the Consultation Paper, the impacts of child sexual assault are wide and varied. Survivors experience short and long-term psychological and emotional impacts. Childhood trauma can impact on children's development across a range of domains including physical, emotional, social and cognitive (Lamont, 2010). Child sexual assault has also been linked with long term poor mental health outcomes, with those who experienced child sexual assault at greater risk of mental health issues (Tarczon, 2012).

There are a number of well researched and documented long term impacts of child sexual assault affecting adult survivors. Individuals with a history of child sexual assault are at an increased risk for:

- mental illness
- substance abuse
- homelessness
- suicidality
- revictimisation, including domestic violence and sexual assault
- parenting difficulties, and
- health issues.

Diagnoses of anxiety, depression and personality disorders are common in adults with a history of child sexual assault (Hillberg, Hamilton-Giachritsis & Dixon, 2011; Manglio, 2010; Spila, Makara, Kozak & Urbanka, 2008). Long term psychopathology of 2,759 Australian children who were sexually assaulted between the years of 1964 and 1995, were evaluated 12 to 43 years after the assault occurred (Cutajar et al. 2010). Findings revealed that 22% of individuals who had experienced child sexual assault later accessed public mental health services, in comparison to only 7% of those in the control group.

The authors identified that child sexual assault increased the likelihood of experiencing psychosis, mood and anxiety disorders, substance abuse and personality disorders.

Principles of Effective Therapeutic Intervention

We note the principles for effective therapeutic intervention outlined in the Consultation Paper include:

- Counselling should be available throughout a survivors life
- Counselling should be available on an episodic basis
- Survivors should be allowed flexibility and choice
- No fixed limits on services provided to a survivor
- Psychological care should be provided by practitioners with the right capabilities to work with complex trauma clients
- Suitable ongoing assessment and review
- Services for family members if necessary for survivors treatment

In addition Bravehearts would advocate that effective service provision should also be based on the following principles:

- Timely provision of services
- Psychological care should be provided by practitioners with the specialised training in the dynamics and impacts of child sexual assault

Options for Service Provision and Funding

Consideration of funding for essential services such as counselling, advocacy, medical assistance, and other support services (such as housing, educational and employment) is critical.

We note the issues raised in the Consultation Paper in relation to the utilisation and expansion of the Medicare funded system. While we support the proposed avenues to reform the system to ease the process for survivors to access therapeutic services and ensure adequacy of service provision, we are concerned that the potential level of increased funding burden on the Government would be an insurmountable barrier. This is particularly of concern given the need for unlimited sessions funded under the Scheme and the issues this may cause given the principle of universality underpinning the Medicare system.

As put forward in our submission to Issue Paper 6, the concept of a “Gold Card” program similar to the Department of Veterans Affairs process is one favoured by Bravehearts. This system, whereby once over an established threshold, a survivor would be given a life-long entitlement to services which could be accessed by using the card, would ensure that survivors are efficiently able to access services as needed throughout their lifetime.

Bravehearts would advocate that while such a program should be administered independently to individual institutions, either through a specific National Panel or through the Federal Government, it should include contributions from institutions. A

large part of the healing process for survivors is seeing that organisations are taking responsibility for harm caused.

Comments in Relation to Chapter 6

We welcome submissions that discuss the issues raised in Chapter 6, including the purpose of monetary payments. In particular, we welcome submissions on:

- 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.

Assessment of Payments

As outlined in earlier submission to Issue Paper 6 and as proposed by the Consultation Paper we support the use of a matrix to guide the assessment of payments. It is our position that whichever assessment approach is adopted, it is essential that there be flexibility for consideration of exceptional or individual needs or circumstances.

The model Bravehearts put forward to the Royal Commission in our submission to Issues paper 6, is based on the Residential Institutions Redress Board established in Ireland, with recognition of the challenges the Irish approach faced.

In response to revelations of sexual assault and abuse in orphanages, industrial schools and other institutions in Ireland, the Compensation Advisory Committee made recommendations to the Irish Government on the structure of a redress scheme. As a result in 2002 the Residential Institutions Redress Board was established with its functions and powers provided for under the *Residential Institutions Redress Act 2002* (Mathews, 2004).

As a result of an agreement between the Irish Ministers for Education and Finance and the Conference of Religious in Ireland (representing 18 Religious Orders) a fund was established on the basis that the Orders would donate cash, property, and counselling services to the fund. In exchange, the State agreed to indemnify the Orders against civil actions brought against them by survivors during the life of the proposed redress scheme. It has been criticised as a major mistake as insurers should have been relied on instead of the State in line with other jurisdictions (UK).¹

The Board administered the redress scheme to provide an alternate method of providing redress to those children who were sexually assaulted or abused while resident in one or more (scheduled) Irish Institutions.

¹ Abuse Redress, Property and Catholic Church in Ireland, Human rights in Ireland, 2014: <http://humanrights.ie/law-culture-and-religion/abuse-redress-property-and-the-catholic-church-in-ireland/>

A review process was available for applicants. An applicant had to establish four matters to the satisfaction of the Board in order to qualify for an award:

- His or her identity;
- His or her residence during childhood in a scheduled institution;
- That he or she was sexually assaulted or abused while resident and suffered injury, and
- The injury is consistent with any sexual assault or abuse that is alleged to have occurred while a resident.²

Under this Scheme redress was awarded through a staged process. First, the Board assessed the weight to be attached to the different elements that go to make up the experiences of victims according to the following table (from 1-25). The Board then, by reference to the medical evidence, assessed on a scale of 1 - 30 the severity of the physical and/or psychiatric illness. It then performed the same task with regard to the psycho-social sequelae of the sexual assault or abuse. Finally, on a scale of 1-15 it assessed the loss of opportunity suffered by the applicant. No redress was payable for loss of earnings. It is noted that for many victims of child sexual assault loss of income may be a significant factor and therefore in some examples there may be need to factor an additional payment to compensate for this.

<i>Constitutive elements of redress</i>	<i>Severity of abuse</i>	<i>Severity of injury resulting from abuse</i>		
		<i>Medically verified physical/psychiatric illness</i>	<i>Psycho-social sequelae</i>	<i>Loss of opportunity</i>
<i>Weighting</i>	<i>1-25</i>	<i>1-30</i>	<i>1-30</i>	<i>1-15</i>

The Board then came up with an overall rating and used the following table to determine the band it fell into:

Redress band	Total weighting for severity of abuse and injury/effects of abuse	Award payable by way of redress
V	70 OR MORE	€200,000 - €300,000
IV	55-69	€150,000 - €200,000
III	40 – 54	€100,000 - €150,000
II	25-39	€50,000-€100,000
I	LESS THAN 25	Up to €50,000

² A Guide to the Redress Scheme under the Residential Institutions Redress Act 2002 (Ireland), 3rd Ed, 2005, The Residential Institutions Redress Board, Dublin.

Under the Irish Scheme, additional redress could be provided in exceptional circumstances on the principle of aggravated damages to the maximum of an additional 20% in circumstances where the sexual assault or abuse was “so oppressive or outrageous that an award based solely on the constitutive elements of redress does not represent an award which is fair and reasonable having regard to the unique circumstances of the applicant”. This additional award may serve to compensate some of the more significant cases for the inevitable impact the sexual assault and associated trauma has had on their ability to maintain stable employment in the workforce.

The Board could also include an additional award in respect of the reasonable costs of medical treatment which the applicant will receive in the future, but such award could not exceed 10 % of the redress award.

Average and Maximum Monetary Payments

We recognise that any National Redress scheme is not an award of common law damages and therefore limits need to be imposed to reflect the lower burden of proof required to access the scheme. It is our position that the maximum amount payable needs to be considered and appropriate to harm done and the long-term impacts of child sexual assault

Option for Instalments

As outlined in the Consultation Paper, large lump-sum payments may cause some difficulties for some survivors. However, Bravehearts does recognise that payment by instalment brings with it additional issues, including increased administration costs.

We would advocate that for large lump-sum payments consideration be given to a trustee or other arrangements to support survivors who may benefit from assistance to manage the money.

Recognition of Past Payments

Need to recognise that any prior payments received should be taken into account when applying for redress. It has been clear in a number of the public hearings conducted to date, that compensation paid out under many of these internal processes has been paltry and inadequate in terms of the loss and damage suffered by survivors of child sexual assault.

Acknowledging this, Bravehearts’ position is that any financial compensation already received should be taken into consideration but should not be a barrier to making a further claim under any new redress scheme

Comments in Relation to Chapter 7

We welcome 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.

Eligibility Criteria and Standard of Proof

Bravehearts has previously noted that in the Irish scheme, an applicant had to establish four matters to the satisfaction of the Board in order to qualify for an award:

- His or her identity;
- His or her residence during childhood in a scheduled institution;
- That he or she was sexually assaulted or abused while a resident and suffered injury, and
- The injury is consistent with any sexual assault or abuse that is alleged to have occurred while a resident.³

Bravehearts would additionally recommend that the determination of claims under a national redress scheme could establish a lower burden of proof than required in civil proceedings. For example, as recommended in the *Forgotten Australians* report (2004), determination of claims should be based in the 'reasonable likelihood' that the harm occurred. Similar to the financial assistance scheme established under the *Victims of Crime Assistance Act 2009* in Queensland, assessment could be based on a psychological, counselling or medical report.

While there may be some concerns that lowering the standard of proof will open up claims based on untrue allegations of child sexual assault, research has shown that false allegations are infrequent. Clinicians and researchers in the field of sexual assault are in agreement that false allegations by children are extremely rare (Oates, Jones, Denson, Sirotnak, and Krugman, 2000). Wall and Tarczon (2013) report that there is broad consensus in the research that only around 2% of sexual assault reports are false.

With a low risk of false claims coming forward research certainly suggests the usefulness of multiple assessment points, particularly the use of specialist mental health reports, in reviewing claims.

Examples of documents that may be used to assess claims could be:

- Medical records
- Mental health records, including psychology or counselling reports
- Records of time in care, including formal and informal records
- Copies of any police statements or child protection reports.

³ A Guide to the Redress Scheme under the Residential Institutions Redress Act 2002 (Ireland), 3rd Ed, 2005, The Residential Institutions Redress Board, Dublin.

Deeds of Release

In relation to deeds of release, we note that many of our clients have signed these as a condition of redress set by the institutions. The biggest issue that clients have with these is the condition of silence and being prohibited from speaking out.

One of the greatest challenges for organisations seeking to address concerns of child sexual assault is the need to understand and overcome the silence, secrecy and shame (the 3 S's) that surrounds this crime. Child sexual assault strongly relies on silence; in order to keep offending perpetrators need secrecy. Within organisations this can operate at two levels, (1) silencing of victims and (2) silence within the organisation.

Offenders usually put a great deal of effort into ensuring that a child remains silent. Apart from promises, threats and bribes, offenders also take advantage of the child's powerlessness by presenting a distorted or false view of what is happening. Victims of sexual assault are silenced their whole lives and then again typically through the Deed of Release process. This must stop.

It is Bravehearts' position that if a victim wishes to speak out about harms they experienced they must be entitled to do so. The silencing of victims must stop at all costs.

Historically, and often in more recent times, Church responses to disclosures or concerns of child sexual assault have come under much scrutiny. If we are to successfully confront the issue of child sexual assault, challenging the culturally and historically entrenched response of secrecy and silence to child sexual assault is imperative.

Additionally, if a scheme was to be established that reflects the ranges of compensation as discussed in the Public Consultation paper we feel it is inappropriate for a client to be asked to relinquish their rights to pursue civil litigation or common law damages should they choose. At a very minimum in the event a deed of release was required to participate in a redress scheme victims must be afforded the opportunity for legal representation / advice to consider alternate avenues and the affect of signing such a release on future rights.

Comments in Relation to Chapter 8

We welcome 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.

Funding Redress

As discussed in our submission to Issues Paper 6, Bravehearts supports Recommendation 6 in the Community Affairs Reference Committee *Forgotten Australians* report (2004).

This report concluded that the Commonwealth Government establish and manage a national reparations fund for victims of institutional abuse in institutions and out-of-home care setting and that:

- The scheme be funded by contributions from the Commonwealth and State Governments and the Churches and agencies proportionately;
- The Commonwealth have regard to the schemes already in operation in Canada, Ireland and Tasmania in the design and implementation of the above scheme;
- A board be established to administer the scheme, consider claims and award monetary compensation;
- The board, in determining claims, be satisfied that there was a 'reasonable likelihood; that the abuse occurred;
- The board should have regard to whether legal redress has been pursued;
- The process established in assessing claims be non-adversarial and informal; and
- Compensation be provided for individuals who have suffered physical, sexual or emotional abuse while residing in these institutions or out-of-home care settings.

A national redress scheme should be proportionally funded though Commonwealth and State Governments, as well as Churches and institutions. In creating such a scheme, contributions should be assessed with respect to liability and responsibility and ability to pay and funds available.

An advantage of such an approach is the ability to compensate victims where institutions have ceased to exist if larger financially viable institutions contributed an additional 10% or otherwise suitably determined figure of their claims to cover gaps.

Comments in Relation to Chapter 9

We welcome 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.

Interim Arrangements

As outlined above in our response to the issues raised in Chapter 2, we recognise the issues in delivering such a national scheme in a timely manner. Many survivors require timely, fair and just compensation. As such, we would support the establishment of interim processes or “core guidelines” that can be immediately implemented by Institutions, both government and non-government to provide both immediacy and some level of transparency and consistency around redress for survivors.

It is important that in terms of Interim arrangements that some consideration is made to establishing appropriate mechanisms to monitor adherence to these guidelines and ensuring that Institutions are following appropriate recommendations to afford some level of consistency and equality for victims who require and receive redress prior to any formal scheme being established. Be it via the Royal Commission or an external independent agency or body it will be important to report and ensure a level of transparency exists in relation to Interim arrangements that various Institutions may seek to establish.

Comments in Relation to Chapter 10

We welcome 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.

Abolition of Statutes of Limitations

Bravehearts supports recommendations in the *Betrayal of Trust* Inquiry in Victoria that civil limitation periods be abolished in relation to criminal child abuse matters, and specifically child sexual assault.

Adult survivors of child sexual assault that are potential plaintiffs are frequently statute-barred as they are bringing the claim “out of time”. The general position is that an individual has three years from the date the cause of action accrued by which to

commence an action in relation to personal injuries.⁴ Where the individual was a child on the date of accrual, time commences to run once they reach majority.⁵

The legal position must be altered to recognise the nature of sexual offending against children and its ongoing effect on adult survivors. We note that the Victorian Government has introduced a Bill abolishing statute of limitations in relation to child sexual offences in response to recommendations in the *Betrayal of Trust* report.

Mathews (2003) notes survey results that found 12% of survivors took 5-9 years to disclose, 16% took 10-19 years, and just under a quarter (24%) took 20 years or more to disclose childhood sexual assault.

Such a significant delay in disclosing the childhood sexual assault, as an adult, is not an anomaly but is a reflection of key characteristics of the offending itself, namely: silence; secrecy; and, shame.

Survivors of child sexual assault face enormous barriers in disclosing. The impacts of child sexual assault typically mean that the victim does not disclose until they feel safe to do so, and this frequently does not occur until some time has passed.

Having been, in many cases, completely disempowered by an offender, the psychological consequences of child sexual assault have far reaching consequences: shame and guilt can often mean that survivors are unable to disclose until parents have passed away; many survivors are simply not ready to disclose as they may still be processing the psychological trauma and impacts of the sexual assault; and victims may experience post-traumatic stress disorder (essentially this means that a victim is aware of the harm they experienced but disassociate themselves from any reminders of the traumatic event, including litigation). Even if a survivor is aware of the possibility of legal action they may decide that to take such action would revive traumatic memories and may even be destructive and therefore delay proceeding with the matter.

Bravehearts recognises that limitation periods serve a valid purpose in relation to other civil matters. The general primary justification for imposing statutory time limits is twofold: (1) to avoid injustice by allowing potential respondents to be able to arrange their affairs with certainty after a set time period; and, (2) to recognise that it is preferable for proceedings to be instituted early, due to the risk of evidence going stale. However, these purposes should not be granted such prominence that the system so heavily favours the respondent that potential-plaintiffs are – in the majority of cases where an adult has disclosed in the average period of 20 years following the cause of action – unable to pursue a civil claim.

Given the key characteristics of childhood sexual assault (silence, secrecy, shame and delayed disclosure) it is not appropriate for limitation periods to apply to proceedings related to criminal child abuse matters, such as child sexual assault and associated

⁴ For example, in Queensland see *Limitation of Actions Act 1974* (Qld) s 11

⁵ For example, in Queensland see *Limitation of Actions Act 1974* (Qld) ss 29, 5(2), 29(2)(c)

damages. It is equally inappropriate for limitation periods to apply where the respondent(s) is an institution, an employee of the institution, or Government and the claim is one of negligence in relation to child sexual assault, as where the respondent is themselves the alleged perpetrator.

Presently, applications for extensions of time are complex and rarely successful.

Civil Litigation: Duty of Care

The consultation paper proposes 3 Options for reform considering the law as it relates to the Duty of Care to be imposed on an institution at p.219.

It is Bravehearts position that it is critical that reform occurs in this area, the law as it currently stands makes bringing a civil claim on behalf of a survivor very difficult and in a vast majority of cases impossible.

Although Bravehearts acknowledges that Option three which imposes an absolute liability for survivors as being a more straight forward option, we can appreciate the difficulties that this will create and potentially the consequence that Institutions do not focus on appropriate preventative measures being established as they will be found to be liable for conduct regardless of what measures were in place.

Bravehearts advocates that the better position is Option 2, which requires that the Institution is liable for child sexual abuse unless the institution can prove it took reasonable precautions to prevent this. This reverses the onus of proof, making the institution liable for the abuse unless it can prove they took reasonable steps to prevent it.

In terms of the requirement for introducing such a duty prospectively or retrospectively, Bravehearts shares the views as expressed in the Consultation paper that a retrospective application may hinder the progress of establishing a National Redress scheme and getting commitment from governments and Institutions to participate. Additionally, a retrospective application does not of itself open the gates for survivors of historical abuse to pursue civil litigation as the “reasonable precautions” standard of the day would not be the same as what might be expected in 2015. Additionally, lack of available records and documented procedures and processes in historical matters would create a practical difficulty for victims and institutions alike in establishing the required level of proof.

Civil Litigation: Proper Defendant

Bravehearts supports the requirement for state and territory legislation to be amended to ensure that survivors can identify a correct defendant when dealing with unincorporated religious bodies.

The current situation that sees Religious institutions receive the benefits of succession in relation to property ownership and tax exemptions for their DGR status yet have no burden in terms of meeting claims for child sexual abuse is manifestly unjust.

Bravehearts supports the recommendation of the Victorian Parliament in its Betrayal of Trust report where it was recommended that they consider requiring non-government organisations to be incorporated and adequately insured.

Civil Litigation: Model Litigant

Bravehearts recognises that there would be some challenges in imposing “Model Litigant” principles on all non-government institutions when responding to civil claims for child sexual abuse.

Notwithstanding this though, we would advocate that more should be done to establish a set of guidelines for responding to claims of this nature so that Institutions can be better equipped and informed in terms of instructing their lawyers on the approach they wish to take with managing these claims.

Given the case studies we have heard to date and the stories we hear from survivors directly it is clear that much cost and angst could be saved by adopting Model litigant principles such as ;

- Prompt management and payment of claims
- Considering relevant disadvantage of the claimant to the institution
- Reducing litigation costs / avoiding litigation
- Apologies

References

- Cutajar, M., Mullen, P., Ogloff, J., Thomas, S., Wells, D., & Spataro, J. (2010). Schizophrenia and other psychotic disorders in a cohort of sexually abused children. *Archives of General Psychiatry*, 67(11): 1114-1119.
- Hillberg, T., Hamilton-Giachritsis, C., & Dixon, L. (2011). Review of Meta-Analyses on the Association Between Child Sexual Abuse and Adult Mental Health Difficulties: A Systematic Approach Trauma Violence Abuse, 12: 38-49.
- Lamont, A. (2010). National Child Protection Clearinghouse resource sheet: *Effects of child abuse and neglect for children and adolescents*. Melbourne: Australian Institute of Family Studies.
- Law Commission of Canada (2000). *Restoring Dignity: Responding to child abuse in Canadian institutions*.
- Lisak, D., Gardinier, L., Nicksa, S., & Cote, A. (2010). False allegations of sexual assault: An analysis of ten years of reported cases. *Violence Against Women*, 16(12): 1318–1334
- Maniglio, R. (2010). The impact of child sexual abuse on health: A systematic review of reviews. *Clinical Psychology Review*, 29: 647-657.
- Mathews, B. (2003). Limitation periods and child sexual abuse cases: Law, psychology, time and justice. *Torts Law Journal*, 11(3): 218-243.
- Mathews, B. (2004). Queensland Government Actions to Compensate Survivors of Institutional Abuse: a critical and comparative evaluation. *QUT Law and Justice Journal*, 4(1): 23-4.
- Morrison, A. (2013). Compensation for child sexual abuse in religious institutions. *Precedent Journal*, (Issue 116): 35-39.
- Oates, R. K., Jones, D., Denson, D., Sirotnak, A., Gary, N., and Krugman, R. (2000): Erroneous Concerns about Child Sexual Abuse. *Child Abuse & Neglect* 24:149-57
- Senate Standing Committee on Legal and Constitutional Affairs (2010). *Review of Government Compensation Payments*. Canberra [ACT]: Commonwealth of Australia.
- Community Affairs Reference Committee (2004). *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*. Canberra [ACT]: Commonwealth of Australia.

Spila, B., Makara, M., Kozak, G. & Urbanka, A. (2008). Abuse in childhood and mental disorder in adult life. *Child Abuse Review*, 17(2): 133-138.

Tarczon, C. (2012). *Mothers with a history of childhood sexual abuse: Key issues for child protection practice and policy*. Melbourne: Australian Centre for the Study of Sexual Assault.

Wall, L. & Tarczon C. (2013). *True or false? The contested terrain of false allegations*. Melbourne: Australian Centre for the Study of Sexual Assault.