

## **Micah Projects Submission**

### **Consultation paper – Redress and civil litigation (‘the Consultation Paper’)**

This submission is part of a series of papers being presented to the Royal Commission from consultations including

- a) responses from 162 adults who were in out of home care in the child protection system such as institutions, foster care and detention centres to the questions in the consultation paper “*Redress and civil litigation*”
- b) the framework for Redress developed by the Historical Abuse Network (HAN) which is an ongoing discussion paper with adults who experienced abuse in institutions, foster care and detention centres.
- c) This paper which is an overall summary of an understanding of the issues arising from the work being undertaken through Lotus Place (formerly the Esther Centre) since 1997 in relation to the Consultation Paper *Redress and Litigation*.

## **Chapter Two: Overall structure of Redress Scheme**

Micah Projects supports the introduction of an independent national redress scheme for survivors of institutional child sexual abuse that is a good alternative to the civil justice system of both past, present and future responses to childhood sexual abuse within institutions operating services to children in Australia.

The civil justice system will continue to be the preference for some survivors when seeking redress and accordingly, we support changes to the civil litigation system that remove barriers that prevent survivors from bringing their claims in court.

We continue to hold the views expressed in the submissions that we made in response to your discussion papers that dealt with redress schemes and civil litigation.

As previously submitted, we believe that any redress scheme should:

- be a national scheme underpinned by legislation
- be developed using human rights standards for victims of crime and victims of abuse of power as a framework
- respond to the needs of survivors and be flexible enough to deliver justice as negotiated by individual claimants
- overcome the failings of previous and internal redress schemes that have been established to provide redress to survivors
- be administered by an independent body that is constituted of both legal and non-legal members (including from medical and social work backgrounds) who have particular expertise related to abuse experienced by adults who were in out of home care as children

- be funded by the institutions that are connected to the abuse (including churches, government and non-government organisations) and administered independently of these institutions
- accept claims in relation to past, current and future abuse to be made at any time
- recognise that sexual abuse of children in an institutional setting involves a breach of a fiduciary duty and ensure that institutions are accountable for the criminal actions of their employees and agents
- provide monetary payments that are calculated in consideration of the wrong that has occurred , including a component in recognition of children being in statutory care at the time of the abuse.

In addition we support the Framework as outlined by the Historical Abuse Network, which sees a Redress Framework having five key components as being:

- Truth, Reconciliation and Healing processes;
- Access to mainstream Services through improved policy settings and investment;
- Financial payments with contributions from Australian Government, States and Territories, religious, non-government and secular organisations,
- Enhanced investment by Australian, State and Territory governments into specialist services for adult survivors of abuse in institutional context;
- and policy and law reform across a number of areas.

Undeniably, the suggestions made in the Consultation Paper will improve the position of survivors when attempting to access justice if implemented. However, it is critical that an Independent Redress Scheme has a clear focus on accountability and reform as well as providing financial payments, and services to address psychological harm. For many people services need to be much broader than psychological harm as adult survivors are over represented in disadvantaged populations such as homelessness, justice, current child protection systems, as well as having specific needs in health systems including mental health, disability and aged care. Additionally, sufficient consideration needs to be given to access justice for future survivors of child sexual abuse by the Royal Commission so as to design a scheme that realises the potential of what can be achieved through a contemporary redress scheme.

Micah Projects believes that the purpose of redress needs to be focused on addressing the breach of the duty of care that institutions had in relation to children who were abused in connection with them, hold institutions accountable and provide survivors with justice that includes access to the resources and support that they and are entitled to and advocate for.

As well as being a component of justice for survivors, holding institutions accountable through a redress scheme has the potential to reduce the risk of future abuse, provide a deterrent and cause institutions to reflect upon, and make improvements to risk

management systems that respond to the inherent risk of child abuse that is present where the activities of an institution involve interacting with children.

Central to this is the call from many survivor groups for the Royal Commission to recognise the specific context in which sexual abuse of children occurred within the child protection system. This requires incorporating into the design of the Redress scheme all forms of abuse and neglect experienced by children and the lifelong impact this has had on the identity as adults. To isolate sexual abuse as one form of abuse will in fact do more harm than good, and creates the basis of further trauma and injustice for a significant number of people for whom the Royal Commission into Institutional Responses to Child Sex Abuse has been a source of hope and their aspirations for justice.

Micah Projects has noted that the Terms of Reference of the Royal Commission are the perimeters around the recommendations outlined in the Redress and Civil Litigation Paper. However, on reviewing the Terms of Reference it is also noted that the following statement is made

*We direct you to make any recommendations arising out of your inquiry that you consider appropriate including recommendations about any policy, legislative, administrative and structural reforms and without limiting your scope of your inquiry or any recommendations arising out of the Inquiry that you may consider appropriate. We direct you for the purposes of the Inquiry to have regard for the following matters:*

- a) the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts, and the provision of opportunities for them to share their experiences in appropriate ways while recognising that many of them will be severely traumatised or will have special support needs .*

Micah Projects would request that the Royal Commission consider the specific needs of adults survivors from out of home care arrangements such as institutions, foster care and detention centres as a specific population in which the context of neglect, abuse of power, physical and emotional abuse, enhanced vulnerability of children due to statutory removal from their families, (other related matters) and the significant widespread accounts of sexual abuse and the impacts on all children (directly or indirectly) as well on the specific nature of individual experiences of sexual abuse be considered as being within the scope of the inquiry .

The directive as stated in the terms of reference do enable the Commissioners to go beyond the scope of separating out childhood sexual abuse from other forms of abuse as an eligibility criteria for Redress. Micah Projects recognises that the specific incidents and impact of childhood sexual abuse should be considered as part of a matrix which as a starting point recognizing the breach of fiduciary care of State Governments in the placement of children, the poor administration and accountability required from institutions accepting children into environments which enabled significant abuse including sexual abuse

to occur. This includes the isolation of children from protective parents and the increased vulnerability for being removed through the court and child protection system. Government and churches removed children to protect them from harm when in fact more harm occurred through multiple forms of abuse and neglect, and exposure to and or victims of childhood sexual abuse.

### **Accountability of institutions**

We believe that a redress scheme should provide survivors with access to justice as defined by them including through monetary payments, access to counselling, therapy, mainstream and specialist services, and holding institutions accountable and by protecting the public from future instances of child sexual abuse.

We have previously given examples of goals that survivors may have when seeking redress, including ensuring that the perpetrator is aware of the damage that they have caused, to have the perpetrator removed from their position, to protect and warn others, to ensure that the perpetrator is punished and to change the system.<sup>1</sup>

The van Boven principles, referred to in the Consultation Paper, states that the five forms of reparation that should be offered to victims are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>2</sup> Satisfaction includes measures aimed at stopping the continuation of abuse, verification of the facts and full and public disclose of the truth, public apology and sanctions against people liable for the abuse.<sup>3</sup>

Widespread community sentiment suggests that the public expects that institutions that have been or are complicit in child sexual abuse should be accountable for the harm that has been caused and the abhorrent crimes and human rights abuses that they have been involved in.

### **An alternative to the civil justice system**

While the Royal Commission does not intend that any redress scheme replace the civil justice system or render it redundant in cases of institutional child sexual abuse, we believe that because reasons for establishing a redress scheme include offering justice to those who have been prevented from seeking it through civil litigation and offering others a good alternative to the lengthy and costly process of civil litigation, the scheme should replicate the benefits of civil litigation while avoiding the negative characteristics.

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<sup>1</sup> See the annexure to Submission 25, Micah Projects submission for Issues Paper Number 5, Civil Litigation.

<sup>2</sup> UN General Assembly, *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*, adopted by the General Assembly, 21 March 2006, A/RES/60/147, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>, accessed on 21 February 2015.

<sup>3</sup> *Ibid*, article 22.

The following table summarises some of the positive and negative elements of independent redress schemes and civil litigation based on our observations:

	<b>Positives</b>	<b>Negatives</b>
<b>Redress schemes</b>	<ul style="list-style-type: none"> <li>• Easy to access</li> <li>• Low cost for survivors</li> <li>• Less complicated application and assessment process</li> <li>• Claimants do not usually have to prove any element of the claim to the standard required in civil litigation.</li> <li>• There is no requirement that the survivor engage with the institution that was complicit in their abuse.</li> <li>• Can offer flexibility so that 'justice' is provided to survivors as defined by them.</li> </ul>	<ul style="list-style-type: none"> <li>• Monetary payments are often inadequate</li> <li>• Monetary payments are often set amounts that have been pre-determined by the government rather than properly assessed in consideration of the individual circumstances of the survivor</li> <li>• There may be no acknowledgement of the truth of the claim</li> <li>• No public record of the abuse may be created</li> <li>• Often no finding of liability or fault</li> <li>• The institution and perpetrator are not usually held to be accountable for the harm that they have caused</li> </ul>
<b>Civil litigation</b>	<ul style="list-style-type: none"> <li>• Awards of damages are calculated according to the harm suffered and are often substantial.</li> <li>• A finding of liability is on the public record – as are the facts of the case.</li> <li>• Civil litigation has been described as having therapeutic potential because of findings of liability and because compensation is paid.</li> <li>• There is potential to benefit both the survivor and the public as the perpetrator and institution may be publically held to be liable and required to pay significant compensation to the survivor - this serves as both a deterrent and punishment.</li> </ul>	<ul style="list-style-type: none"> <li>• Limitation periods currently lock many survivors out of the justice system.</li> <li>• There may be no defendant to sue.</li> <li>• The aggressive nature of litigation and interaction with the perpetrator and institution has the potential to cause further harm.</li> <li>• The power imbalance between the institution and the survivor can be re-enforced as institutions typically have more resources to allocate to responding to a claim.</li> <li>• Often results in out-of-court settlements- meaning that there may be no direct consequences for perpetrators. In some instances they may continue to work with and abuse children.</li> <li>• Costly</li> </ul>

		• Lengthy process
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*Based on our observations summarised in the table above, a redress scheme will be a good alternative to civil litigation if, in addition to providing significant monetary payments and access to a range of services, it:*

- provides survivors with monetary payments that reflect the breach of duty that caused the harm; and
- creates a public record of the breach of duty and harm as well as the institution’s response.

The issue on whether the Royal Commission should recommend redress processes and outcomes for future institutional child sexual abuse. Micah Projects supports the need for a redress scheme which provides for victim/survivors of future childhood sexual abuse to access redress provided

- it does not provide an option which reduces the ability for the perpetrator of abuse to not be held accountable
- it provides a public record which is sensitive to the privacy of the victim/ survivor
- it is open and transparent with reporting to Parliament annually

The Consultation Paper states that designing a redress scheme that is open to survivors of future sexual abuse that occurs within an institutional setting (abuse that occurs after the Royal Commission’s work is concluded) would be too expensive. Accordingly, it is likely that any redress scheme that is recommended by the Royal Commission will not be accessible to survivors of future child sexual abuse.

Optimistically, the Consultation Paper says that the implementation of the Royal Commission’s recommendations and changes in societal attitudes to children and authority figures should result in a reduction in child sexual abuse so that a redress scheme is not required for survivors of future child sexual abuse. Where child sexual abuse does occur in an institutional setting in the future, it is suggested that the changes to the civil litigation system will mean that survivors of child sexual abuse are not locked out of the justice system. We are not convinced by these propositions.

We believe that there will always be a risk of child sexual abuse occurring when institutions work with children because of the power dynamics that are present in adult/child relationships, the fact that these settings provide access to children and because there will always be people who look for opportunities to abuse children.

In addition to this, although there may be no future cohort of survivors similar to the Stolen Generation, Forgotten Australians and Former Child Migrants, new risks have emerged including for example those associated with technology and there will be other cohorts of children at risk of child sexual abuse (including for example unaccompanied minors seeking asylum in Australia).

The Consultation Paper has suggested that the inadequate responses to child sexual abuse are unlikely to be repeated. This is an unconvincing argument given that certain institutions that have been found to be complicit in child sexual abuse have continued to aggressively defend claims made by survivors, continued to protect perpetrators and have provided inadequate redress to survivors where their claims have been established. In addition to this, it is clear that child sexual abuse is continuing to occur in connection with institutions.

Despite the significant and important reforms that the Royal Commission is likely to recommend in relation to the civil litigation system (discussed below) issues that many litigants engaged in civil litigation experience will remain. The civil justice system will continue to be expensive, claims will potentially take years to resolve, survivors may feel pressured to enter into out-of-court settlements and litigation will continue to have the potential to re-traumatise victims.

According to the Letters Patent the Royal Commission has been asked to look at what institutions and governments should do to better protect children against child sexual abuse in the future and what governments and institutions should do to address or alleviate the impact of future child sexual abuse – including ensuring justice for victims through the provision of redress. In light of this, in consideration of the fact that some child sexual abuse is likely to continue to occur in institutional settings and because civil litigation will continue to be a difficult way to pursue justice, a redress scheme should be available to future as well as past survivors of child sexual abuse.

### **A redress scheme that reduces future occurrences of child sexual abuse**

Information sharing between the redress scheme, the police and other regulatory bodies should be a significant element of any redress scheme that is established for survivors of institutional child sexual abuse. The Royal Commission has been asked to look at what institutions and governments should do to better protect children against child sexual abuse in the future and what should be done to improve the reporting and investigation of child sexual abuse. Clearly improved reporting and investigation of child sexual abuse will help to improve the protection of children in the future.

Often when survivors make claims through institutional redress schemes or civil litigation these claims are resolved through confidential, out-of-court settlements. As commented in the table above, an out-of-court settlement can mean that there are no direct consequences for perpetrators and limited consequences for the institutions complicit in the abuse. It also means that reporting of abuse to the police and other relevant authorities may not occur. If a redress scheme that provides an attractive and comparable alternative to the civil litigation system is implemented, the risk of non-reporting due to claims being resolved through confidential out-of-court settlements is reduced.

The redress scheme recommended by the Royal Commission should ensure that where an application is made the crime is also reported to the police. Where a claim is accepted and a payment is made, measures should be in place to make sure that the perpetrator of the abuse no longer has access to children and any working with children check reveals the allegations/findings. The Consultation Paper has acknowledged that information sharing could be a characteristic of the scheme. We believe that this is an important aspect of the scheme that should be emphasised and publicised.

### **Other support services**

Redress should also provide survivors with access to mainstream support and health services. Our observation is that not all survivors wish to engage in counseling. It is important to provide survivors with access to other types of therapy and to mainstream health services. This access should be through a system, much as Medicare, which is available to the general public.

### **Legal assistance**

We note the suggestion that funding be given to community legal centres to provide survivors with legal advice in relation to any payment offered through a redress scheme. We support this suggestion on the basis that the community legal centres provides the advice with no cost to the survivor and that the community legal centres does not refer the matter to a private law firm.

As an interim measure, we also support funding community legal centres to represent and advise survivors who are interacting with internal redress schemes and also to assist survivors to participate in mediation.

We do not support community legal centres referring survivors to private law firms for this assistance because this may mean that significant legal fees are deducted from any payment that is made to the survivor.

## **Chapter Four: Direct Personal Response**

To achieve any sense of justice is it clear that there needs to be processes, which enables truth, reconciliation and healing to occur between leadership of institutions and the victim/survivors. These processes need to be directed by the needs of any individual person, and require well-trained personnel to implement an agreed upon process.

Such a process needs to be separate to a Redress Scheme and the decision making process for determining payments to individuals so as not to confuse, or be seen to influence the outcome.



Many people have experienced significant distress by entering into what was considered a pastoral process only to find that lawyers were directing it with an influence on the amounts of money that may be offered.

Micah Projects considers that this is an area of work, which requires more attention, and the direct involvement of people who have experienced abuse as children in institutions, foster care and detention centers with church representatives could provide direction for how processes could be offered in the future

Collective responses also can play a significant role in the reconciliation and healing process. Whilst the consequence of sexual and other forms of abuse is a very personal experience often resulting in post-traumatic stress on a psychological level, a significant moral and ethical injury has occurred within communities, where institutions entrusted to care and protect vulnerable children have failed, covered up and betrayed not only the individual but the community as a whole. Collective processes can begin a journey of moral repair for victim/survivors and the community together, which creates opportunity for healing and reconciliation.

For example; every year in Queensland during Child Protection Week, a day of Remembrance is a formal acknowledgment of the past experiences of Adult Survivors, the failure of the child protection system and a commitment to ensure that it does not occur again by current politicians responsible for child protection. It would be a beneficial addition to events such as this if church leaders would also participate in acknowledging their failure to protect children, and respond to survivors over the years, as well as a commitment to ongoing truth and reconciliation with adult survivors. The erection of memorials which acknowledge the past experiences and failure of the institutions to protect children have been significant for many adult survivors.

Many times individual survivors also want to be assured that the perpetrators of sexual abuse are not still in positions of trust. Institutions should find ways to inform victims of the status of perpetrators within the institution. For example, often requested of the Catholic Church are all priests who have been found guilty of sexual abuse of children liaised from the priesthood? Of have all priests who in the past have been dealt with through internal process been referred to the police for investigation and contact with the victims to proceed with criminal convictions.

For many apologies have been received and what is important is that apologies are for the wrong doing of the institution rather than an acknowledgement of the pain and suffering of a victim/survivor. Whilst the latter requires recognition it is not the purpose of the apology. Most apologies have been crafted by lawyers which creates a sense of protecting the institution rather than a real acknowledgment of failure and responsibility for the legacy of criminal behavior, neglect and abuse of children whilst in care of governments, religious authorities/ or secular organisations.

To date many adults who were in the care of the State Governments are concerned that not enough attention has been given to the breach of fiduciary care of State Governments and the relationship with faith based institutions, foster care and detention centers. Of the 15 years since the Forde Inquiry in Queensland many Ministers responsible for child protection have continued to dialogue and acknowledge the past with adult victims/survivors.

After the National Apology to Forgotten Australians and Former Child Migrants the National Museum and National Library were provided with funding for a National Exhibition and Oral History. It is important that processes like this are not simply one off, and that more localized and regional responses across Australia to have historical accounts of this part of Australia's history as a public acknowledgment of the lives of Forgotten Australians and former Child Migrants as the child protection system. Many people would like to see public exhibitions of institutions, their history and the legacy on the lives of many Australian families be funded and maintained in local communities.

### **Chapter Five: Counseling and Psychological Care**

Micah Projects supports the needs for ongoing psychological care as one component of services to people who as children were in institutional, foster care, or any other out of home care arrangements for themselves, and their families.

This includes:

- Improving the public provision and availability of counselling and psychological care through Medicare.
- Creating a separate Medical Benefits schedule item number for adults who have experienced childhood sexual abuse. In order to mitigate the concerns of the Australian Government response in relation to Medicare providing equal and universal access based on clinical need the impact of childhood sexual abuse on any child and the lifelong consequences have been clearly demonstrated through the evidence to the Royal Commission. There would be significant benefit to Australians if all adults who experienced childhood sexual abuse could access Medicare based on clinical need as one option for healing and recovery. Whilst this would require investment there is also a great cost benefit if well-trained practitioners were more accessible and available.
- The creation of a Trust for Adults who were in out of home care as children in line with Caranua an independent state body for survivors of institutional abuse. [www.caranua.ie](http://www.caranua.ie) Micah Projects recommends that the Royal Commission facilitate discussions with Australian, State and Territory governments to look at adaptability of the model to Australia, whether it would be best as a National or State based fund for the purposes of providing the wide range of services which Adults Survivors,

( Forgotten Australians, Child Migrants, and Stolen Generations) have identified as being critical to their quality of life and reduction in the over representation of people in homelessness, child protection, justice systems and their particular needs in other service systems such as health, mental health, housing, family support, aged care, peer support, reunions etc.

- The Australian Government provide create legislation to support the funding of services such as Find and Connect independently of as part of the Trust Fund to ensure that Australians who were in care can access records, be supported to understand their childhood, reconnect with family and culture, peer support and access to mainstream services. That an increased investment into services to match the current demand for services be addressed by doubling the current investment into Find and Connect.
- That the Royal Commission facilitate further discussions on the models of service delivery to meet the expressed needs for services by adult survivors

## **Chapter 6: Monetary Payments**

Some of the issues that have been characteristic of redress schemes in various states of Australia and in other jurisdictions have been responded to in the Consultation Paper. In particular, we note the acknowledgment that previous monetary payments have been inadequate.

The way that monetary payments are calculated has also been addressed. The Consultation Paper says that a monetary payment is a means of recognising a wrong suffered by a person. We note that the suggested approach to assessing monetary payments is very much associated with the abuse and impact of the abuse. This approach apparently ignores the elements of ‘the wrong’ that are attributable to the breach of duty that the institution should be accountable for.

Survivors of child sexual abuse have told us that they believe that monetary payments should take into consideration factors such as the:

- failure of the institution to fulfil their role as guardian
- nature of the relationship between the perpetrator and the survivor and the survivor and the institution,
- impoverished and inappropriate environments that many survivors were accommodated in
- failure to report crimes
- failure to listen to or believe allegations of abuse and the betrayal of trust.
- statutory fiduciary care, which placed children in the institutions, foster care or detention, centres after removal of children from families and culture, which in many cases, included a protective parent, family or community.

Although we understand that the quantity of the payment made through a redress scheme is not intended to be comparable to that achieved through civil litigation, it is useful to consider how courts have considered the actions of perpetrators and used monetary payments (in the form of damages) to compensate survivors for this behaviour and also to punish the perpetrator and provide retribution.

Courts make awards of aggravated damages to compensate survivors when the perpetrator's behavior after the injury made injuries worse. Awards of exemplary damages are made to punish the perpetrator and provide retribution and a deterrent.

Following is an example of how the Queensland Supreme Court has assessed aggravated and exemplary damages in a matter involving child sexual abuse:

**P v R 6 May 2010 [2010] QSC 139**

In this case the judge noted that the perpetrator had denied that he committed the assaults, that he had convinced the survivor's father that the assaults did not occur (leading to damage to her relationship with her father) and that his behavior during the litigation had further exacerbated the survivor's injuries. Because of this, \$50,000 was allowed for aggravated damages.

The judge also noted that the perpetrator had not been charged with a criminal offence. The perpetrator had not been punished and the judge said that "sexual abuse...of a vulnerable child is conduct which calls for an award of punitive damages...It is necessary, in fixing the amount to be awarded under this head, to convey the court's disapproval of this conduct." \$50,000 was also allowed for exemplary damages.

The survivor was awarded a total of \$439,937.00.

Our view is that any matrix or table that is developed by the Royal Commission to be used to calculate monetary payments should have a component that takes into consideration the behaviour of the institution prior to and after the abuse and that also acts as a deterrent and/or punitive measure. This should increase any maximum payment that is available in the schemes suggested in the Consultation Paper and should, where possible, be paid directly by the institution.

**The assessment of monetary payments, including possible tables or matrices, factors and values**

In the assessment of monetary payments Micah Projects recommends that the specific needs of adults survivors from out of home care arrangements such as institutions, foster care and detention centers as a specific population in which the context of neglect, abuse of power, physical and emotional abuse, enhanced vulnerability of children due to statutory removal from their families, (other related matters) and the significant widespread accounts

of sexual abuse and the impacts on all children ( directly or indirectly ) as well on the specific nature of individual experiences of sexual abuse be considered as being within the scope of the inquiry.

That a matrix acknowledging statutory care and other related matters be developed as a matrix for adults survivors from institutions and out of home arrangements be considered

The related factors need to be acknowledged if the outcome for justice is to be achieved. The extent of the failure of institutions operated by government and churches has been well documented over the past 15 years, clearly demonstrating that these related matters enabled and compounded sexual abuse occurring and impacted on all children.

Furthermore any redress process needs to consider the different and diverse context of the institutional arrangements for children which sexual abuse has occurred in. Of specific importance is the nature of the guardianship and statutory responsibility of the government in relation to placement of children and failure in monitoring systems of care.

**The average and maximum payments monetary payments that should be available through redress**

Micah Projects recommends that further investigation is undertaken into the average of current payments being made by churches since the commencement of the Royal Commission to determine the scale of payments.

In looking at the current information and data which provided some insight into the variation of payments adult survivors of institutions and out of home care settings would be interested in an analysis of payments of students to boarding schools, and payments to adults who were in out of home care systems.

<b>Factor</b>	<b>Value</b>
Statutory responsibility	20%
Impact of child sex abuse	30%
Severity of child sexual abuse	30%
Institution	10%
Aggravation	10%

Whether many survivors and whether it should be offered by a redress scheme would take up an option for payments by installments.

Micah Projects supports that options for payments be considered alongside providing financial advise for options of self-management of funding as part of the Redress process.

### **The treatment of past monetary payments under a new redress scheme**

Micah Projects would recommend further work in relation to monetary payments that investigates current average payments and address eligibility in regard to related matters.

If the Commission does not consider related matters and provide a category in a matrix recognizing the breach of statutory fiduciary care as a primary category alongside related matters of physical, emotional and spiritual abuse then current redress payments should not be considered as it would be very difficult to proportion what amount of the payment was identified for sexual abuse as an isolated experience. The overall relationship and breach of fiduciary care fostered and enabled sexual abuse to occur on the scale that has been reported and more, thus impacting on all children. Our view is that current redress payments should not be considered in dealing with a new redress scheme, because they were paid for a different purpose. However given that the recognition that payments have been significantly small in relation to the abuse experienced, an average of \$65,000 seems too low, as many people may already have received more than that currently. What is unclear is if the current scale is related to multiple institutions or to each institution.

### **Chapter 7: Redress Scheme process**

- 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.

Previous comments have been made about eligibility for redress by covering all forms of abuse and failure to provide safe and nurturing environments, which enabled sexual abuse to occur at such a scale, had an impact on all children. Therefore a specific matrix for people who as children were in out of home care institutional arrangements should be developed with the minimum payment being in recognition of failure of the State to place children in safe and nurturing environments resulting in wide scale sexual abuse occurring having an impact on all children, with more severe impact on children who were victims of criminal sexual acts who would be eligible for different category of payment.

Micah Projects endorses an approach, which requires;

- verification of being in care of the State and institutions but recognizes some of the difficulties with this process by allowing for some exceptions if plausible
- does not require perpetrators of abuse to be living or name situational circumstances are plausible in the light of other allegations and circumstances within an institution
- applies plausibility framework which requires that the decision maker be satisfied that the allegations are plausible and may be true Reviews and Appeals

### **Reviews and Appeals**

Micah Projects supports the incorporation of a review and appeals process in the establishment of a scheme.

### **Deeds of Release**

Micah Projects supports no deeds of release as accessing the Redress Scheme should not prevent a person if they change their mind and enter into a civil litigation process. If the case was successful and a sum of money was awarded, then the matter of funds from the Redress Scheme would be factored into the settlement.

### **Support for Survivors**

Micah Projects supports the inclusion of short term counseling services during redress as a mechanism for assisting a survivor to understand the process, provide emotional support during the process and to refer to mainstream or specialist services.

## **Transparency and Accountability: Building on learning from the past.**

### **Creating a public record**

The only measures raised in the Consultation Paper that could contribute to holding institutions accountable are:<sup>4</sup>

- information from the redress scheme could be shared with the police and other regulatory authorities (such as those monitoring working with children checks); and
- each year the agency administering the scheme will release information that includes the names of the institutions that claims relate to.

These measures alone will not hold institutions accountable – particularly given that the scheme does not make findings of liability.

The Consultation Paper suggests that a standard of proof be applied to claims for redress made by survivors to any newly created scheme. It also says that the higher amount of monetary payment that is available, the more reasonable it would be to adopt a higher standard of proof. However, the Consultation Paper does not propose a scheme that would attempt or purport to make any finding of liability in relation to the abuse.

It is difficult to understand why a survivor should be required to prove their claim for the purpose of receiving a significant monetary payment while their evidence will not be accepted for the purpose of determining who is responsible for the harm.

If a survivor is required to prove that the sexual abuse occurred, the redress scheme should make a finding that the abuse occurred and, with the permission of the survivor, it should

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<sup>4</sup> These measures are not described in the Consultation Paper as having the purpose of holding institutions accountable.

publish its findings so that there is a public record of the fault and/or involvement of the relevant institution.

In our submission that related to your Redress Schemes Issues Paper we recommended that any meaningful redress scheme should create a public record. We pointed to the South African Truth and Justice Commission as an example of the development of a public record for human rights abuses. The Register of Reconciliation is a website that records people's experiences of Apartheid as well as their regret in failing to prevent human rights abuses and their commitment to reconciliation. We also pointed out that the Law Commission of Canada recommended that a similar register be established in Canada for survivors of institutional child sexual abuse.

It is difficult to see why a redress scheme implemented in Australia to provide justice to survivors of child sexual abuse could not include a public record of the abuse where the survivor consents.

Similarly, it is difficult to understand why no real attempt to make institutions accountable is likely to be incorporated in the design of the scheme. A fundamental purpose of a Redress Scheme needs to be the accountability of institutions.

It has been established that justice for many survivors includes seeking an assurance that the abuse will not continue. It seems reasonable to request that any institution that is found to be involved in child sexual abuse should, regardless of what standard of proof is applied, provide a public response that details the institution's response to the allegations – including what they did to protect other children from the perpetrator of the abuse and the risk management measures that they have implemented to lessen the likelihood of any further child sexual abuse occurring.

Not only would this accountability measure contribute to providing meaningful redress for survivors, it would help to provide an impetus for improved institutional responses to child sexual abuse and, consequently, improve public safety.

Any redress scheme also needs to have processes for quality assurance and continuous improvement in seeking feedback from people accessing the scheme on a regular basis.

#### **Interaction with Alleged abuser, disciplinary process and police**

Micah Projects supports a process, which does make findings about what institutions have done about the abuse, what actions have been taken with the perpetrator and the circumstances or events that enabled the abuse to occur.



## **Chapter 8: Funding Redress**

Micah Projects supports an approach in which the Australian Government, the State and Territory Governments, Religious, Secular and Non-government organisations contribute to the Redress Scheme based on the claims against them.

- That the structure of the scheme be national and independent with access in all states and territories with a legislative, not policy base. That any victim/survivor can claim against multiple institutions in the one application.
- That the Australian Government begin to work on the policy settings and legislation required to work with the States and Territories
- That the Australian Government fund the administration of the scheme recognising that the Australian Government should provide leadership in facilitating a Redress Scheme for past practices and inadequate policies including Immigration, payment of child endowment to institutions rather than families, inadequate response to poverty and income support for vulnerable families.
- The states and territories are a funder of last resort where institutions no longer exist.
- That support and advocacy groups with adult survivors of sexual abuse and related matters have a formal role in the development of the Redress Scheme.
- There be minimal flexibility in implementing a redress scheme in relation to contributions, and that legal process are investigated to ensure that churches and State Governments do not meet their requirements under the Scheme.

## **Chapter 9: Interim Arrangements**

Micah Projects recommends that the Royal Commission undertake and audit on current practice, process and payments to victim/survivors since the Royal Commission has been in progress, taking into account:

- how people know about the current process
- what changes have been made to existing process
- how many out of court settlements led by lawyers are being undertaken
- how many cases are proceeding to court hearings
- how are review of previous payments being undertaken in a fair and transparent manner
- what is the scale of payments in private schools compared to out of home care settings and how does this impact on the suggested framework for monetary payments
- that the results of the audit further inform the development of a Redress Scheme.

Generally we are concerned about the way in which interim responses are being implemented within the same framework, which has been presented to the Commission and found to be inadequate and established to protect the institutions rather than what is in the best interest of the whole population of adult victim/survivors rather than a proportion of

individuals who are currently accessing internal and not independent arrangements. While institutions are advocating that they support an Independent national scheme the process of working towards this has not begun. Micah Projects suggests that the role of the Royal Commission could be to facilitate a process for all churches and institutions, with other stakeholders come together to develop an implementation plan that could be presented to government. Current process be focused on people who are ageing or have a life threatening illness.

Micah projects do not support non-government organisations undertaking a cooperative approach in isolation to government. A redress scheme needs to be a comprehensive person centered scheme with the two central components of sensitivity and justice to victim/survivors and accountability of institutions.

As identified in the consultation paper Government is as responsible and needs to be accountable for the breach of Fiduciary care of children in their care, for the poor and inadequate administration and accountability of out of home care and detention centers alongside non-government organisations who failed in the same way.

## **Options for Reform**

### **Civil litigation**

We strongly support reform to the civil litigation system, as stated in our earlier submission.

In particular we support:

- the removal of limitation periods where a survivor of child sexual abuse makes a claim in relation to that abuse in any civil court
- imposing absolute liability on institutions in relation to child sexual abuse; or at least institutions are made liable for child sexual abuse committed by their employees unless the institution proves that it took reasonable precaution to prevent this abuse , therefore reversing the onus of proof so that the institution is liable for the abuse unless it can prove that the steps it took were reasonable.
- clarifying that child sexual abuse is a breach of a fiduciary duty that is owed by institutions to children in their care
- implementing changes that ensure that survivors are able to identify a proper defendant to sue
- ensuring that institutions adopt 'model litigant' guidelines for responding to claims for compensation in relation to allegations of child sexual abuse
- the adoption of national or uniform legislation in all states of Australia that reflects the changes supported above so that survivors of child sexual abuse have the same improved ability to sue any institution complicit in the abuse that they suffered – regardless of which state they live in.
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### **Implementing changes to ensure that survivors are able to identify a proper defendant to sue**

Consistent with our comment above, we believe that a national approach is required to ensuring that survivors are able to identify the correct defendant to sue. We understand that they approach that we are recommending will require the states referring power to the Commonwealth. Alternatively, a similar outcome could be achieved through all states and territories agreeing to adopt a uniform approach.

We understand that survivors can experience difficulties identifying a proper defendant to sue because there may be no incorporated body, the institutions assets are protected through trust arrangements or the institution may no longer exist. In order to overcome these difficulties we support:

1. Enacting legislation that ensures that trusts that hold the assets of any institution are liable for and able to be sued in relation to claims involving child sexual abuse;
2. The establishment of a national 'nominal defendant' who could act as a defendant whenever a survivor has difficulties identifying a defendant. The nominal defendant would then have the power to recover any money that they paid to the survivor and costs incurred in defending the claim from the institution
3. Requiring non-government organisations that interact with children to be incorporated and adequately insured so that they are able to respond to any claims of child sexual abuse that may be made against them.