

The Terms of Reference require the Royal Commission to inquire into what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse in institutional contexts, including in ensuring justice for victims through the provision of redress by institutions. To provide 'redress' is to remedy or rectify a wrong. The 'redress' provided will be a remedy or compensation, and it can include financial compensation, provision of services, recognition and apologies and the like.

Assumed care about duty of care.

It is argued that the “man in the street” assumes that a School Principal, a Regional Director,

a Dormitory Master, a Bishop or Presbytery or Synod

actually care about the nurturing of Children in their care

because they are in care to be protected, to be educated, to learn and to grow.

This is particularly the case in a Church where there should be zero tolerance of sexual abuse

When sexual sin between two informed consenting adults is prohibited

one would assume that any form of sexual abuse would be intolerable.

To most parishioners the thought of a person in a position of trust in a church sexually abusing a member of the congregation is reprehensible but the thought of a member of the Clergy or an Elder or Deacon sexually abusing a child in a church is unthinkable.

Therein lies the first dynamic – the denial of the great majority in which the silence of the abusers has festered in the darkness. No one was shining the light.

When allegations of sexual surfaced the leaders either went into cover up mode falsely thinking they were protecting “the good name” of the institution , when in fact, as time has shown, they were

destroying it's reputation and betraying the trust placed in them as administrators and leaders. It has been shown in Criminal Cases and Civil Cases and Royal Commissions around the world that sexual abuse HAS occurred and that

sometimes even by those in positions of authority – the Supervisors, the Managers, Bishops,.

It appears to me that one of the triggers to Civil Litigation is that when an institutions response to sexual abuse is denial, and / or discreditation and / or an avoidance of taking reesponsabilitiy for the failutes in duty of care. An alternative may be a Tribunal that determines weather on probability and according to the victim's testomony that the sexual abuse probably occurred.

One form of redress would be for the persons in positions of authority and the Child Protection Officer or Director met with the victim/s and hear where they feel the systems failed and how to rectify the gaps that led to alleged breaches of duty of care.

When there are failures of duty of care

the Issues Paper introduction continues...

One of the ways in which a person who suffered child sexual abuse in an institutional context may seek redress is by bringing a claim for damages against the institution (and potentially against the perpetrator(s) of the abuse) in the civil courts..."

My personal analysis is that:

- the resistance to admitting that sexual abuse was occurring
- the barriers to victims reporting sexual abuse
- the difficulty for investigators to gather sufficient evidence to secure a conviction
- the denials by the institutions

forced survivors to take Civil Action to force an admission that the sexual abuse occurred.

However this view does not fully explain the need for Civil litigation in all cases.

the Issues Paper introduction continues.....

"All states and territories, and the Commonwealth where relevant, have civil litigation systems that allow a person who claims to have been wrongfully harmed to seek damages from the individual or institution that they allege caused the harm. While there are some differences in systems, they are broadly similar throughout Australia.

The Royal Commission is concerned to know how effective the civil litigation systems are, as they currently operate, in resolving claims for damages for child sexual abuse in institutional contexts. The Royal Commission seeks submissions on possible reforms to improve the effectiveness of the civil litigation systems.

In discussing how effective the civil litigation systems are, it is noted that survivors have suffered multiple and complex losses, some of which can not be remedied with the payment of money alone, hence alternatives will be explored in this paper.

an admission alone, or remorse alone gives affirmation but in themselves do not facilitate healing of the damage of sexual abuse.

However, whereas a child disclosing at the time who is rescued and nurtured and provided with

relevant counselling and support after the child is believed can find a measure of recovery and functionality in adult years, this is not so with adult survivors with untreated sexual trauma compounded by marginalisation in response to the untreated symptoms of sexual abuse and all too often decreased functionality. The neurological impact of sexual trauma alone may inhibit memory functions, make matters like spelling and syntax difficult which is all too often attributed to laziness rather than a recognition and accommodation of the impacts of sexual trauma.

the majority of victims have lived in an abuser induced shame

silence because no one wanted to know - abandonment.

it was almost normalised – one survivor did not know that it was a Crime for a teacher to indecently assault him until the Wood Royal Commission.

The impacts of sexual assault are enormous and I personally suspect, not fully understood and certainly under researched (based on my own enquiries) with the Post Graduate research being researcher driven and lacking funding to research areas of concern for survivors.

There is anecdotal evidence that there is discrimination against survivors both in educational institutions where staff are not trained to educate students suffering from post sexual abuse symptoms.. For example, a student survivor of sexual abuse may struggle with learning times tables or spelling or learning a language because of the neurological impact of PTSD but rather than

adapting the educational process to accommodate the educational needs of a students struggle to learn because of PTSD, historically the student is accused of being lazy. The student may be marginalised when the student needs assistance. The pressure to “work harder” and the fear of further marginalisation retraumatizes the student who by then may be the subject of teasing or social isolation compounding any post sexual abuse disconnectedness. The under funding of support, simultaneously compounds the situation. School Counsellors in some public schools report that their hours are so limited that they barely have time for testing with little time to provide Counselling or teach more effective coping mechanisms.

A fundamental question is - Can the Civil Litigation System address these issues or should governments and institutions provide more more supportive and more restorative responses to survivors of sexual abuse? It is suggested that Research and reforms of the educational methodology and process to be accommodating of survivors of sexual abuse and any form of PTSD could significantly reduce the impact of PTSD on students so that rather than a downward spiral there could be an educational engagement , an increase in self esteem and a reclaiming of the survivors life. Similarly sexual abuse (in fact any form of abuse and/ or neglect) by a person in authority produces a level of mistrust in authority and the student s then labeled a rebel in need of discipline which can be accompanied by a marginalisation process with a compounding effect that should never have occurred. It is argued that a supportive teacher or Pastor or Sunday School teacher or relative or neighbor can reduce the impact of PTSD and through affirmation of the child's worth turn the situation around.

It is argued therefore that the Civil Litigation system is not the best process to seek redress for sexual abuse. In fact during a recent Public Hearing of the Royal Commission, it was suggested that the institutions defence against a survivor's claim amounted to legal rape, in other words re-traumatisation. It may well be that a Royal Commission itself, with its wide investigative powers is a more appropriate mechanism to address the impacts of sexual abuse. As a Royal Commission is a part of the reserve powers of the Governor General and my reading of the Constitution suggests that this power is there as a mechanism to address matters which the normal functioning of government and the Criminal and Legal Systems have not been able to address, there needs to be the establishment of an entity or systems which can be established to achieve what a Royal Commission can achieve. It is argued that the Civil Litigation Process may not be the appropriate mechanism. Victims of crime regularly complain that the Criminal Justice system is not supportive and the adversarial nature of the Civil Courts can also be counter-productive.

What then is the nature or ingredient of a Royal Commission, that could be identified as essential ingredients of a survivor friendly system upon which new institutions could be based?

- Royal Commissions are primarily investigative. Because they do not prosecute but make recommendations to governments they are not adversarial. There is a need for the establishment of institutions which listen to survivors of sexual abuse in particular and victims of crime in general and activate. Maybe there needs to be a Victims of Crime support agency with innovative responses to be supportive of victims of crime...not just access to counselling, but understanding, remedial educational programmes and assistance to adult survivors to assist with employment opportunities.
- It may be that institutions themselves should be budgeting to fund research into the development of survivor supportive processes and policies and procedures. In other words, just as an earlier issue paper discussed "Child Safe Institutions" it is suggested that there is a need to develop policies and procedures to make institutions **survivor supportive**.
- It is suggested that Universities, Colleges and in particular Theological Colleges should be a pillar of reform in changing the culture of institutions to be more survivor supportive. For some unknown reason Theological Colleges and the prevailing message in modern Christendom is what I have called "the theology of

forgiveness for sinners". It is argued that this has inadvertently degenerated into an abusive sensitive culture where all too often there is pressure on survivors to forgive abusers whilst survivors are re victimised through processes of marginalisation and abandonment. Civil Litigation may provide financial redress to console a victim but it can't reverse these processes. It is suggested that fear of litigation triggers a process of marginalisation and discreditation and a denial of resources which could facilitate support, to survivors. One Pastor of a congregation, where there was institutionalised entrenched indecent assaults by a protected alleged abuser, found that when he fulfilled his Mandatory Reporting obligations and activated internal discipline of the alleged offender to protect the congregation, that because the Criminal Justice system did not activate immediate affirmation of the need for his responses to disclosures, that the slowness of the investigation actually empowered those who activated a victimisation process. He then found that constant harassment and taunts along the lines of "has he been charged?" and "what proof do you have" caused him to make a Civil Claim which in turn activated more marginalisation and ultimately compounded what became his financial loss. In this case it may have been that external mediation would have been more effective, However in a corrupt institution the only remedy may be the Criminalisation of the victimisation and marginalisation and discreditation of victims and mandatory Reporters may be the only effective deterrent. On the other hand it may produce an outcry from abusers and their supporters and in the end come down to whether society is going to support survivors, and those who protect children and support adult survivors or whether society is going to continue to facilitate abuses through neglect.

- There is a need for Theological Colleges and pro active survivor sensitive clergy to develop a "Theology for survivors" akin to the Parable of the Good Samaritan. Where the focus is on the traveller stopping and assisting the robbed man. The absence of survivor sensitive ministry, it is suggested, creates a vacuum of neglect facilitating abandonment which has its own spiraling effect. In Genesis Chapter 2 verse 18 God said "it is not good that man should be alone" (NIV). Aloneness is not helpful and it is suggested that it is destructive unless one has incredible coping mechanisms. In most cases it produced severe consequences. It is suggested that survivors are not only looking for affirmation, for an apology from the leaders of the institution but acceptance and inclusiveness.

Victims are not the abusers. Victims need first aid not abandonment.

It is further argued that Civil Action can be counter productive because institutions and their supporters guard their Trust Funds. They fear any claim on their trust funds more than any propensity to call to account those who have spent Trust Fund money on the employment of employees or functionaries who have breached their duty of care and by their neglect facilitated abuse or those who actually abused children in their care. Here too there is a need for a culture change.

By the time an adult survivor reports that he or she has been sexually abused in his childhood he has already suffered setbacks educationally and in lost employment opportunities and all too often relationship breakdowns or difficulties. By the time he reaches his fifties or sixties there are all too often massive financial losses compounded by having resolved to now deal with post abuse issues, he faces the cost of counselling and time off work to attend counselling. Many have fallen into part time work or the casualised workplace with no sick leave and no annual holidays. He needs space but getting space tightens the financial tightness. His financial losses spiral. His long term losses increase and become measurable. It is argued that the cumulative systematic failures outlined above, the almost out of control marginalisation and discrimination of survivors which forces the hand of some survivors of sexual abuse in one's childhood within an institution to seek financial redress from that institution. Whilst it is encouraging to hear testimony of some institutions appearing before the Royal Commission Public Hearings that there is remorse and that some institutions have set up processes to provide financial redress through internal processes it is of concern that other institutions known to this writer are unresponsive to the cumulative financial losses of survivors and victimised (sacked) Mandatory Reporters and Protectors of Children from sexual abuse.

"The Royal Commission is concerned to know how effective the civil litigation systems are...."

The capacity of the Civil Litigation systems to be effective in resolving claims for damages

is frustrated by the massive differential between the capacity of institutions to employ the best legal teams and to hire their highly qualified expert witnesses and the inability of the often already financially impoverished victim with little or no understanding of the functioning and requirements of the legal system to prosecute a case against a cashed up institution.

Some survivors walk away fearing the cost if they lose the case.

Some are awarded damages only to find the legal costs consume part or all of the compensation.

Whilst there is Legal Aid it is under funded. The Barristers of professional excellence don't normally work for legal aid. Pro bona appears to be a rarity. How can a recent graduate working for Legal Aid match a highly paid Barrister? Whilst most survivors struggle to find a Counsellor with a Diploma or a Graduate Degree, one institution hires a triple PH D psychologist. Furthermore many professionals are reluctant to record or write symptoms of sexual abuse in a referral letter for fear of being subpoenaed to court and challenged by the institution's expert witnesses.

The result is inadequate medical referrals, inadequate briefing of colleges resulting in a decreased level of care. One Colonopist undertook three Colonoscopies before recording the observed 3 cm scar, and only then because of the patient's request for a detailed report. The report contained the nearest of information. Not even how well the scar had healed. In these instances the Civil Litigation system has, in the long term become counter productive.

Whilst some institutions have indicated to the Royal Commission that they will compensate survivors and the Commissioner of the Salvation stated survivors would be given an apology

certain other institutions remain intractable. They have perfected the art of defending civil litigation,

and the more reprehensible institutions appear to be almost set up to destroy litigants with burdensome financial costs and expert witnesses.

Variances in institutional structure.

When discussing institutions, particularly churches,

it is necessary to explain variances in structure and power.

The Roman Catholic Church is heirachial from the Pope,Cardinals, Bishops to Priests the congregations and chuldren in particular and altar boys even more so are vulneable to abuses in power.

The other extreme is the Congregational Church and to a lesser degree a Baptist Church (with Deacoms) where power lies with the congregation where an abuser is more likely to be a trusted member or Deacon who wields policial power.

In the middle is the Presbyterian Church where Ministers and Elders Share power and there is no heirachy of persons but a heirachy of church courts – Sessions (Parish Minister and Elders), the Presbytery functioning like a corporate Bishop (where the Moderator has no power) and State and Federral Assemblies wo function parallel to the Parliamentary System.

In this sence there are differentials between institutions.

There are also independent churches and ethnic congregations.

Our legal system needs to accomodate these diversities of structure.

Perversities of doctrine:

Civil litigation is not going to remedy what some have called "twised scriptures"

It is a fundamental tennant of the Judo Christian Islamic traditions as found in the old testament,

that God requires not only righteousness but justice.

kindness and compassion.

Unfortunately religous institutions are prone to being infultrated by those who gravitate towards positions of power and then abuse that power / authority. The

Royal Commission has heard testimony in public hearings of instances where that power has been abused. There is a need for barriers to prevent abusive persons from gaining such power.

Psalm 23 talks of sheep being comforted by the shepherd's rod and staff. The rod is not to discipline sheep as some suggest, but the shepherd's instrument to protect the sheep. Sadly there are some who ignore the wolves and attack the sheep. As Jesus said, some wolves put on sheep's clothing.

Christianity appears to be particularly prone to a perverting of scripture which demands victims forgive the abuser whilst blaming the victim. It would seem to me that there is a need for internal self-correction as I can't see how Civil Litigation can correct perverted doctrine. However being a Pastor I am capable of advocating such doctrinal correction and writing survivor sensitive hermeneutics.

Blaming the victim is a serious issue. Some survivors may see Civil Litigation as a means of recovering the cost of false blame and marginalisation or of seeking punitive damages as a means of provoking change. It may be that both responses are valid.

My thesis is that seeking redress is complex and I would personally prefer an interdisciplinary approach with a focus on institutional reforms with legislative frameworks to be activated when institutional responses are recalcitrant.

SUBMISSION

As an interested individual, (a male survivor and a victimised Mandatory Reporter , I hereby seek to make my submission on the areas of particular interest to the Royal Commission.

1. Are there elements of the civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? For example:

One observed deficiency of the Public Liability / Civil Action systems is that some institutions do not even have mediation processes. One representative said " If you want to talk with us you have to write a letter of demand". The institution then hands over the matter to their Barrister, one institution even directing the victim to send all emails and enquiries to their Barrister, thus running up legal expenses when there could have been mediation or settlement by internal trained officials . Funds that could be used to pay for

Counselling or to assist the survivor with living expenses are diverted to legal expenses this depriving the victim of support.

One provocation of the activation of legal action in the Civil Courts is the observance of hostility toward the victim. By the office bearers of the institution. Legal action seeking redress may fuel the hostility “how dare you sue the church” being a common retort. Whilst Civil Action seeking financial redress may not end the hostility it may assist the survivor to financially survive by relieving some financial stress.

It may be that some particular facilities of an institution have such an abusive culture, such hostility to victims, such resistance to change that the only redress may be a Court order on the institution to close the facility (school, seminary, orphanage) order it's demolish , declare that the implimentation of the trust has been corrupted beyondrepair and order it's sale and the proceeds held in trust for the benefit of those who suffered from breaches of duty of care and sexual (and / or ophysical) abuse. Institutions capable of reform would demonstrate this. However as part of the cycle of abuse was he dis-empowerment of the victims, part of the restitution should be the empowerment of non offending survivors through their inclusion into boards and committees and positions such as Child Protection Officers (with scholarships for training).

a. some institutions cannot be sued because they are not incorporated bodies or they no longer exist or because decisions were made personally by an individual officeholder;

It is assumed this refers particularly to the Ellis Case, where Cardinal Pell has publicly indicated to the Royal Commission that victims will be paid financial compensation. The dynamics are changing over time.

For an institution to be a legal entity it must exist under some legislation. In the Colonial Days in NSW the NSW Parliament passed laws to set up denominational trust acts. University Colleges at the University of Sydney were also set up under individual legislation which gave them autonomy.

Currently Churches are set up as institutions either as Incorporated Bodies or as not for profit companies under the ACCC . In either case Parliaments have the Legislative power to impose conditions for an institution to be registered or to modify a Property Trust Act to ensure that all, institutions with legal existence in Australia can be sued.

There can also be requirements for institutions existing under various forms of State or Commonwealth Legislation to be insured. Issues of providing avenues of redress to survivors of institutions which no longer exist need to be explored.

b. some institutions do not hold assets from which damages could be paid, or they are not insured or their insurance status is unknown;

It is intriguing that some Trustees claim they can't use their Trust funds to compensate victims but then use trust funds to fund expensive legal defence against the very victims alleging the institution has betrayed. Some see this as legal abuse. Once again, it would be a case of Legislative Clarification and a Legislative requirement to make financial restitution to survivors of sexual abuse where the institution has betrayed trust and breached their duty of care and where sexual abuse has occurred.

The Commission may see fit to recommend that Governments Legislate to require institutions to be insured to provide compensation to survivors. However Public Liability Insurance is not there to provide compensation but to defend the institution against litigation. It is a defensive policy rather than a victims support policy. There is a need for a claims based policy to be restorative towards victims of sexual abuse, which the Public Liability Policies are not designed to do. Being activated by litigation it is a very expensive policy to operate and except where there are out of court settlements the victim now faces incredible legal and financial obstacles.

c. the circumstances in which institutions are liable for the criminal conduct of their employees or other people;

Where there is Supervision or Layers of Management such as a denomination with Trustees, Department Heads, Bishops or Presbyteries and rules with expectations the institution ought to be liable for failure of Supervision.

Eg That a teacher left his school every lunchtime or lunch and free period for a week and sexually abused a colleges son constitutes a clear case of dereliction of duty by the layers of School authorities.

Eg Elders failed to warn a new Minister that there was a man who attended church who posed a risk and there had been a complaint. The Presbytery and Two Church Department Heads failed to support the Minister and failed to provide legal advice or a sexual assault counsellor. ..

the Salvation Army Homes Public Hearing

the YMCA hearing where the HR failed to conduct adequate checks

d. the circumstances in which regulators are liable for failures of oversight or regulation;

where a report or request for assistance or advice not acted on.

Where there have been a failure to inspect or do spot checks.

Eg the Salvation Army Homes were not inspected by DOCs or Police

e. limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended;

needs to be removed – no limitation the Royal Commission's Report clearly demonstrates that survivors disclose at any age

and 18 – 20 is the lowest rate of disclosure. In NSW Its two years after turning 18. The Royal Commission's end of first year report stated that% of survivors coming forward are males over the age of ...

the current limitation periods deprive most adult male survivors of the opportunity to undertake Civil Action against the institution.

f. the requirements for bringing a class action, if victims from the same institution wish to sue as a group;

the need for legal aid to assist survivors taking class action

survivors are often not up to litigation against rich and powerful institutions.

g. the existence of relevant records, locating them and retrieval costs;

Institutions ought to be required to archive historical records and maintain them with accessible retrieval processes. When institutions set up special projects or divisions or Special religious Orders there should be requirements for the main body or a Trust or Institution designated as the main body to be required to archive records. Eg a Church school with it's own board trading with the churches "brand name" should have obligations back to that denomination. There are expectations of institutions and institutions "trading" with their "brand name."

It is imperative that whilst the state should and can require conditions on institutions, that the separation of church and state be maintained. For example, the right of a small group of people to form an independent place of worship. In such settings members join knowing there are few assets however the group has more control and the members usually exert more control. It's easier to leave an independent place of worship because there is only one centre, or a few centres. The group may be marginalised from "mainline denominations" so it's easier to leave and join another institution. Historical institutions with hierarchial structures often wield enormous power and records are needed indefinitely

to assist members who may have suffered abuse at the hands of a particular office bearer.

And failures of Supervisors, Bishops, Elders, Principals, School Inspectors or Directors etc.

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h. the process of giving evidence and being subject to examination and cross-examination;

who pays the most gets the best barrister and wins.

Needs to be regulations limiting the questions a barrister can ask a survivor
the trashing the character of the survivor days need to end it's no defence
not permitted to call the survivor a liar

defendant lawyers should be limited to ensuring the fair process of law
and the accuracy of evidence

Court procedures need to be changed to recognise and accommodate that
the survivor has been traumatised and in most cases is still traumatised.

Some survivors will recall different aspects with varying degrees of clarity.

Judges should be able to ask questions

witnesses should be able to make statements beyond the limitations of
questions asked by the barristers.

Institutions who invite survivors to sue should agree to pay their costs
regardless of the outcome so they can't bate the survivor into taking legal
action and if they loose to be financially crippled beyond their existing
financial losses, the costs of counselling, inability to work or restricted ability
to work.

I. proving that the victim's injuries and losses were caused by the abuse;

there needs to be a statutory body that sets the perimeters

there needs to be court appointed impartial experts - not institutions out bidding for the most qualified expert.

A Psychologist with a Ph D said the institution would employ a psychologist with two or three PhD's this is untenable. Most survivors would have a psychologist with a Bachelor's Degree or a Counsellor with a Diploma.

Professionals are afraid of writing reports or referrals to other professionals for fear of being called before a court and cross examined, It has created a new code of silence which limits the care available to survivors.

Remuneration for a Court appearance is less than the income lost. Cross examination in a Public Courtroom can humiliate a professional, and ruin his or her reputation. The current system has created many injustices , denial of interdisciplinary support. There is a need for reports between professionals to be legally protected and Professionals protected from being subpoenaed so that survivors have access to professional support a survivor should have the option of signing a release to a professional. From are referral or notes being subpoenaed

j. the way in which damages are assessed; and

costs of counselling and medical treatment and costs incurred in travel abs time off work

lost employment opportunities from symptoms such as repression or loss of concentration, flash backs etc.

provision of housing and an income equal to the minimum wage

k. the cost of litigation and access to funding and legal services.

Limitations to prevent institutions from overkill

a tax in institutions who are declared as neglectful in procedures and/ or supervision to fund legal aid

regulation of legal costs

legal accounts should be submitted to the judge for approval or rejection

awards for damages should be legal costs plus damages / compensation

at present legal costs sometimes wipe out any financial compensation to the survivor rendering the legal process of little or no benefit to the survivor.