



# The **Salvation** Army

## Australia

### **The Salvation Army Australia**

*Submissions made on behalf of The Salvation Army Australia Eastern Territory and  
The Salvation Army Australia Southern Territory*

*Response to the*

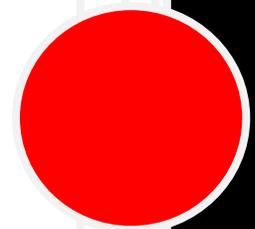
**Royal Commission into Institutional Responses to Child Sexual Abuse**

**Issues Paper 5 – Civil Litigation**

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## About The Salvation Army

The Salvation Army is an international movement, recognised as part of the Christian church, and one of the world's largest Christian social welfare organisations. It has more than 1,680,000 members at work in 126 countries and is supported by the efforts of many thousands of employees and volunteers.

Operating in Australia since 1880, The Salvation Army is one of the largest national providers of welfare services, and is the largest provider of homelessness services in Australia. The Salvation Army has a significant history of working with and advocating for the rights and needs of disadvantaged people in our community. Consistent with our values of human dignity, justice, hope, compassion and community, The Salvation Army is committed to the promotion of social justice and the protection of the rights of disadvantaged and marginalised people.

The Salvation Army, with an annual operating budget of approximately \$700 million, provides over 1,000 social programs and activities through a network of social support services, community centres and churches across the country.

Key services provided by The Salvation Army Australia network include:

- Accommodation and homelessness services
- Aged care services
- Children and youth at risk programs
- Drug and alcohol support and treatment services
- Education, training and employment support services
- Family and domestic violence support and accommodation services
- Financial counselling and assistance
- Material aid and emergency relief
- Migrant and refugee services
- Out of home care services, and
- Personal counselling and support.

The Salvation Army Australia has an established reputation for providing these services across the spectrum of disadvantage - working with individuals and families impacted by poverty, deprived of opportunities and activities considered part of everyday Australian life. The Salvation Army works with individuals who, due to life experiences and events, have inadequate education and training, poor health, and a sense of powerlessness that compromises their capabilities and opportunities to participate in the community.

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# **The Salvation Army Australia**

**Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse made on behalf of The Salvation Army Australia Eastern Territory and The Salvation Army Australia Southern Territory.**

## **Submissions in response to Issues Paper 5 – Civil Litigation**

The Salvation Army welcomes the opportunity to respond to the fifth issues paper released by the Royal Commission into Institutional Responses to Child Sexual Abuse.

These submissions are made on behalf of both Salvation Army Territories (Australia Eastern Territory and Australia Southern Territory) in Australia.

### **1. Introduction**

- 1.1. These submissions address the questions raised in Issues Paper 5 released by the Royal Commission on 6 December 2013. The issue identified by the Royal Commission is the question of redress and the means by which survivors of child sexual abuse are able to access appropriate remedies to secure an appropriate form of redress, as identified in the Issues Paper.
- 1.2. The Salvation Army recognises the importance of survivors having a range of appropriate avenues in which to seek redress.
- 1.3. The Salvation Army strongly feels that the appropriate remedies are not simply those that might be available in a traditional court system. Resort to the civil courts is simply one way in which a survivor might explore appropriate remedies but should not be the only way in which a survivor may seek a remedy. Ideally, resort to the civil courts should be a last resort. The Salvation Army considers that restorative justice and healing should be the primary means for survivors seeking redress.

### **2. Civil Litigation Systems—General Observations**

- 2.1. The civil litigation process, by its nature, can be intimidating and daunting to survivors, and costly to access. The Salvation Army believes that, wherever possible, the claims of survivors of child sexual abuse should be resolved without recourse to civil litigation. The

Salvation Army recognises, however, that it will not always be possible to resolve survivors' claims without recourse to the courts. It is vital, in such cases, that the civil litigation system operates as effectively and fairly as possible.

- 2.2. In the event that civil litigation is elected as the course a particular survivor wishes to take, then the litigation should facilitate claims being resolved in a just, efficient, timely and cost effective manner. Most Australian jurisdictions have enacted civil procedure legislation with these aims, in varying forms, as the stated overarching purpose of their respective civil litigation systems.
- 2.3. The Salvation Army supports initiatives directed at improving the civil litigation system so as:
  - to eliminate imbalances between litigants with a view to improving accessibility to and the affordability of justice;
  - to enforce high standards of conduct by all participants in litigation;
  - to encourage the resolution of disputes without the necessity of commencing proceedings or holding a contested trial; and
  - where proceedings are commenced, to encourage the cooperation of the parties in order to identify issues to be determined by the court and avoid unnecessary delay and expense.
- 2.4. The Salvation Army, as a litigant, strives to have regard not just to its legal obligations, but also to the moral standards that it sets for itself and that it believes are demanded by the community. The Salvation Army acknowledges that, in the past, it has not always met those standards.
- 2.5. The Salvation Army considers that those standards require it to endeavour at all times:
  - (a) to act with complete propriety and fairness towards survivors of child sexual abuse and their representatives;
  - (b) to seek to resolve any claim through negotiation, without requiring the survivor to issue proceedings in court;
  - (c) to make an early assessment of The Salvation Army's liability and, where appropriate, to concede liability;

- (d) not to require a survivor to prove any matter which The Salvation Army knows, or reasonably suspects, to be true;
- (e) not to take advantage of a survivor who lacks resources;
- (f) where liability is conceded, to offer redress that is fair and reasonable; and
- (g) to apologise where The Salvation Army is aware that it has, or its past or present officers, employees or volunteers have, acted wrongfully or improperly.

**3. Question 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?**

**(a) The capacity to sue unincorporated bodies**

- 3.1. In *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*,<sup>1</sup> the NSW Court of Appeal held that an unincorporated body cannot be sued because it has no legal personality. Both Australian Territories of The Salvation Army have made a policy decision that they will not seek to defend any claim by a survivor on the basis of the principle in *Ellis*.
- 3.2. The Salvation Army would welcome the introduction of appropriately worded legislation that provides a solution to the predicament faced by child sexual abuse survivors wishing to sue an unincorporated organisation. Legislation would need to be drafted carefully so as to protect the legitimate interests of individuals who were not involved with the wrongdoing and who would not otherwise be liable. One solution may be to require non-government organisations that engage with children to adopt incorporated legal structures.

**(b) Some institutions do not hold assets from which damages could be paid, or they are not insured or their insurance status is unknown**

- 3.3. The Salvation Army is comprised of a number of incorporated and unincorporated bodies. Where any particular entity does not itself own assets that could be used to satisfy any financial liability, The Salvation Army stands in the shoes of the relevant entity to meet

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<sup>1</sup> (2007) 70 NSWLR 565.

any liability. Again, this reflects The Salvation Army's view that, as a wider organisation, it is morally responsible for each of its component integers, including unincorporated entities that do not otherwise own any assets.

- 3.4. As a broader issue, The Salvation Army recognises that there will be instances where an organisation that is at least morally responsible for the criminal conduct of its employees, officers or volunteers, will not hold any assets from which damages could be paid, or are otherwise not insured. In such a case, this can operate to prevent survivors from obtaining redress for the harm that they have suffered.
- 3.5. The Salvation Army accepts that financial compensation is an integral part of providing redress to a survivor of child sexual abuse, and represents a tangible acknowledgement of the wrongs suffered by a survivor. The inability of an organisation to meet its financial liability to which a survivor of child sexual abuse is entitled is likely to compound a survivor's suffering.
- 3.6. To ensure survivors of child sexual abuse receive redress, The Salvation Army would be open to considering the creation of a federal statutory compensation scheme which had as its objectives enabling:
  - (a) survivors of child sexual abuse to apply for compensation;
  - (b) an independent assessor to determine a survivor's eligibility for compensation and, if compensation is to be paid, the quantum;
  - (c) survivors to be provided with other support services, such as counselling.
- 3.7. The Salvation Army understands that the issue of statutory compensation schemes will be the subject of a subsequent Issues Paper. Accordingly, will provide further submissions on this issue at that time. However, The Salvation Army wishes to place on the record its desire that any such statutory compensation scheme would not prevent any survivor from having interaction with The Salvation Army where an ongoing meaningful engagement is appropriate in the individual's circumstances.

**(c) The circumstances in which institutions are liable for the criminal conduct of their employees or other people**

- 3.8. As a result of the decision in *NSW v Lepore*,<sup>2</sup> Australian courts are generally reluctant to conclude that an employer can be vicariously liable for the deliberate, illegal acts of an employee. This is predicated on the view that, ordinarily, criminal conduct cannot be regarded as being undertaken in the course of employment. Conceptually, however, where there is a 'sufficient connection' between a person's specific duties as an employee, and his or her wrongdoing, a court may hold the employer to be vicariously liable.
- 3.9. In its report tabled on 13 November 2013, 'Betrayal of Trust', a Victorian Parliamentary Committee identified two options for legislative change that would impose legal obligations on organisations to take reasonable care to protect children from abuse. They were:
- (a) legislating a non-delegable duty of care requiring organisations to take reasonable care to prevent intentional injury to children in their care; or
  - (b) enacting legislative provisions, similar to those contained in the *Equal Opportunity Act 2010* (Vic), which would hold employers vicariously liable for criminal acts by employees in the course of their employment, unless the organisation took reasonable precautions to prevent the behaviour.
- 3.10. The Salvation Army notes with great interest those recommendations, and would carefully consider any proposed legislation which made provision for either of these options.

**(d) The circumstances in which regulators are liable for failures of oversight or regulation**

- 3.11. The Salvation Army does not make any submissions in response to this particular issue.

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<sup>2</sup> (2003) 212 CLR 511.

**(e) Limitation periods which restrict the time within which a survivor may sue and the circumstances in which limitation periods may be extended**

3.12. As a general starting point, The Salvation Army's policy is not to seek to rely on limitation periods in circumstances where allegations of child sexual abuse are made against an entity within its structure. This reflects The Salvation Army's view that moral responsibility can extend beyond legal responsibility. That being said, however, any significant prejudice occasioned by the late commencement of proceedings needs to be carefully considered in any particular case before a decision can be made.

3.13. Nevertheless, where proceedings are issued in a court, legislative limitation periods can have an important role to play in ensuring that a fair trial is held. The Salvation Army considers that courts should have wide discretions to allow or disallow reliance on limitation periods having regard to all relevant circumstances. The Salvation Army agrees with the thrust of the recommendations of the Law Council of Australia (LCA) in its position paper dated June 2011, regarding the proposed development of a federal model limitation regime. Of the LCA's various recommendations, The Salvation Army supports the following particular recommendations in respect of survivors of child sexual abuse:

- that there should be a special limitation period for child sexual abuse survivors;
- that there should be a general discretion to extend the limitation period;
- that time should not commence running against a minor or those under a disability until they reach 18 years of age or cease to be under a disability; and
- that the test for discoverability should incorporate a subjective element that takes into account the personal antecedents of the survivor.

3.14. Other than the need to make express provision for the above matters, The Salvation Army considers that the following considerations, which are provided for in varying forms in the State and Territory statutes of limitations, remain important:

- the likely prejudice to the defendant;
- whether a fair trial is still possible given the passage and extent of time;
- the nature and extent of the plaintiff's loss;
- the explanation for the delay in commencement of proceedings; and
- the nature of the defendant's conduct.

**(f) The requirements for bringing a class action, if survivors from the same institution wish to sue as a group**

3.15. If a group of survivors chose to bring a representative action against The Salvation Army, then The Salvation Army would not oppose the mere election of such an approach. If an election is made, then the survivors would need to follow the proper processes of the relevant forum, which is ultimately a matter for the relevant governing legislation for the forum. Presently, Part IVA of the *Federal Court of Australia Act 1976* (Cth), Part 4A of the *Supreme Court Act 1986* (Vic) and Part 10 of the *Civil Procedure Act 2005* (NSW) set out the requirements for representative or group proceedings and procedures for the conduct of such proceedings.

**(g) The existence of relevant records, locating them and retrieval costs**

3.16. In The Salvation Army's own experience, the absence of relevant records, or the cost of locating and retrieving relevant records, has not prevented it from engaging with survivors of child sexual abuse and, where possible, resolving claims.

3.17. While of course every claim is unique, the investigation of claims of child sexual abuse does not, generally speaking, involve significant documentary material. The resolution of claims of child sexual abuse typically turns more on a survivor's testimony and the outcome of other investigations than on the existence or absence of documentary evidence. The Salvation Army recognises the importance of a survivor's records which may be held by it and actively assists survivors to obtain a comprehensive copy of all documents relevantly held.

3.18. The Salvation Army is supportive of any recommendations which would better equip a survivor to obtain copies of relevant documents, at no cost to the survivor.

3.19. The Salvation Army otherwise repeats the submissions given in response to question 11 of Issues Paper 4 - Preventing Sexual Abuse of Children in Out of Home Care.

**(h) The process of giving evidence and being subject to examination and cross-examination**

- 3.20. Giving evidence under examination and cross-examination in an adversarial system is invariably daunting. This is particularly so for persons who are attesting to matters that are the cause of significant mental distress, such as survivors of child sexual abuse. The Salvation Army is acutely conscious of the need to be extremely sensitive when dealing with survivors of child sex abuse and their families in the litigation process.
- 3.21. The mental health of a person directly impacts on their ability to give evidence. Where a survivor of child sexual abuse is required to give evidence, The Salvation Army considers that the survivor, and the court, would be assisted by the ready availability of counselling services.
- 3.22. Ultimately, the vulnerability of witnesses in cases of child sexual abuse is able to be managed by the trial judge taking into account the relevant specific needs of the individual witness on advice, as necessary, from any treating medical or psychological practitioners.

**(i) Proving that the survivor's injuries and losses were caused by the abuse**

- 3.23. The Salvation Army, in resolving claims outside of court, strives not to put survivors to proof beyond obtaining the minimum objective data necessary to establish a claim. Its policy recognises the need to try to minimise any further distress of a survivor of child sexual abuse, and not in any way to aggravate that distress by reason of the survivor having come forward.
- 3.24. It is an unavoidable consequence of court proceedings, however, that in the absence of admissions by the defendant, plaintiffs are required to prove their allegations. The Salvation Army seeks, where it can, to minimise the distress that this entails in child sexual abuse cases by making appropriate admissions and treating survivors with the utmost sensitivity. It is unrealistic, however, to think that all distress can be avoided for survivors who prosecute claims of child sexual abuse in the courts. In any event, The Salvation Army's view is that the incidence of the burden of proof, and the need for

survivors in all but the most unusual of cases to give evidence to establish their claims, are not matters that can be said to prevent the effective operation of the civil litigation systems called upon to hear and determine claims of child sexual abuse.

**(j) The way in which damages are assessed**

3.25. The assessment of damages must, necessarily, reflect the individual circumstances of the particular survivor. The assessment of damages is a necessary part of the determination of claims of child sexual abuse.

3.26. There is no reason to depart from the ordinary principles for the assessment of damages in personal injuries cases. Generally, the task of determining the quantum of financial compensation to be offered to a survivor involves a consideration of the following factors, among others:

- the nature and extent of the abuse;
- the period of time during which the survivor was abused;
- whether the abuse has adversely affected the survivor's subsequent earning capacity later in life; and
- whether there are past and ongoing medical expenses.

3.27. Because every case is unique, The Salvation Army does not consider that the way in which damages are assessed by courts presents an impediment to the effective operation of the various civil litigation systems.

**(k) The cost of litigation and access to funding and legal services**

3.28. Survivors of child sexual abuse are often under-resourced and suffer from long term effects as a consequence of their injuries. The costs of going to court can be prohibitive and thus operate as a material impediment to the ability of survivors to achieve justice. In The Salvation Army's experience, legal aid is often not available to survivors of child sex abuse. In some instances, survivors may be disadvantaged by the terms on which lawyers are prepared to act for them in respect of claims of child sexual abuse.

- 3.29. The Salvation Army seeks wherever possible to avoid the costly process of litigation, by endeavouring to resolve disputes with survivors outside of court. However, where a survivor elects to run their case in a court, The Salvation Army acknowledges the existence of certain court rules in various jurisdictions which may protect a plaintiff from the potential of a significant adverse costs order. An example is rule 40.51 of the *Federal Court Rules 2011* (Cth).

**Question 2 - Are there other elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? If so, what are they and what issues do they raise?**

The Salvation Army makes no further submissions in response to this particular issue.

**4. Question 3 - How well do early dispute resolution or mediation processes work as part of the civil litigation systems for people who suffer child sexual abuse in institutional contexts?**

- 4.1. The Salvation Army embraces alternative dispute resolution outside of a court environment as a best practice model. Such processes are vital to the effective operation of civil litigation systems.
- 4.2. The Salvation Army endeavours to resolve all claims of child sexual abuse without necessary recourse to the courts. Indeed, of the various claims of child sexual abuse made to The Salvation Army, many have reached a resolution without the institution of court proceedings. The Salvation Army's experience therefore is that alternative dispute resolution processes have been effective in providing survivors with redress.
- 4.3. The Salvation Army supports the various means in each civil litigation system by which parties attempt to resolve a dispute regarding a claim of child sexual abuse without the need for a contested trial. In particular, The Salvation Army prefers the least intrusive form of dispute resolution in seeking to resolve a claim by a survivor. However, The Salvation Army recognises that some survivors do not wish to explore alternative dispute resolution and that they want their case determined by a judicial officer.

**5. Question 4 - What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?**

5.1. The Salvation Army has addressed these matters above. By way of summary, The Salvation Army would be open to considering the following changes:

- (a) the introduction of appropriately worded legislation that provides a solution to the predicament faced by child sexual abuse survivors wishing to sue an unincorporated organisation. This imperative would need to be carefully balanced however against the legitimate interests of individuals who are otherwise not liable for or who were not involved with criminal wrongdoing. One such solution may be to require non-government organisations that engage with children to adopt incorporated legal structures;
- (b) the creation of a Federal statutory compensation scheme;
- (c) the introduction of legislation that clarifies when an employer is vicariously liable. In particular, legislation that either:
  - (i) creates a non-delegable duty of care. For example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care; or
  - (ii) hold employers vicariously liable for criminal acts by employees in the course of their employment, unless the organisation took reasonable precautions to prevent the behaviour;
- (d) the introduction of a Federal model limitation regime that expressly provides for the following:
  - (i) a special limitation period for child sexual abuse survivors;
  - (ii) a general discretion to extend the limitation period;
  - (iii) the non-commencement of the limitation period against a minor or persons under a disability until they reach 18 years of age or cease to be under a disability; and
  - (iv) that the test for discoverability should incorporate a subjective element that takes into account the personal antecedents of the survivor.
- (e) the provision of court provided support persons in circumstances where a survivor is required to give evidence in court.

**6. Question 5 - Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages or financial compensation? Can these other forms of redress be obtained through civil litigation?**

6.1. The following comments are not exhaustive.

6.2. While financial compensation provides survivors with a tangible acknowledgement of the wrongdoing they have suffered, acknowledgement in the form of an apology is often a powerful means of providing survivors with meaningful redress and a significant part of the healing process.

6.3. Some survivors seek compensation in the form of funded counselling. The Salvation Army considers such requests, where they are received, and has in the past funded counselling in appropriate cases. The Salvation Army is prepared in such cases to fund counselling for a survivor where it is appropriate and necessary to do so. In The Salvation Army's experience, survivors who require counselling usually seek financial compensation to cover this expense. Where courts order the payment of compensation, the quantum will usually take into account the present-day value of future counselling.

6.4. The Salvation Army's comments in this paper are not intended to be exhaustive on any of the issues raised and it welcomes ongoing discussion on these important issues in a consultative manner.

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**Dated: 24 March 2014**