

30 May 2014

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Dear Sir/Madam,

Response to Royal Commission Issues Paper 6 “Redress Schemes”

Tzedek welcomes the opportunity to provide a submission to the Royal Commission in relation to redress schemes.

Tzedek (‘Justice’ in Hebrew) is an Australian-based support and advocacy group for Jewish victims/survivors of child sexual abuse—promoting their needs and interests and offering them and other relevant stakeholders a range of services. Tzedek’s vision is to achieve a Jewish community free of child sexual abuse, and its mission is to:

- support and advocate for Jewish victims/survivors of child sexual abuse and their families
- raise awareness and create a cultural change in relation to child sexual abuse
- educate the community including children, parents and organisations
- empower members of the Jewish community to be able to prevent, recognise and address child sexual abuse for themselves and others

1. Background

- 1.1. Manny Waks, founder and CEO of Tzedek, in his personal capacity prior to the establishment of Tzedek, made submissions on behalf of many Jewish victims/survivors of child sexual abuse to the Victorian Parliament’s Family and Community Development Committee “Inquiry into the Handling of Child Abuse by Religious and Other Organisations” (“**Victorian Inquiry**”) in respect of some of the matters raised here.¹
- 1.2. Tzedek appreciates that the issue of redress schemes presents both an opportunity and a challenge for institutions, victims/survivors, and government and regulators.
- 1.3. Tzedek views redress schemes as but one approach for responding to abuses occurring within an institutional context, with a number of drawbacks. Although no one form of response is perfect, Tzedek sees redress schemes as ultimately offering limited benefit to victims/survivors generally, and certainly to the victims/survivors Tzedek specifically represents.
- 1.4. Tzedek submits that redress schemes should not be established to the exclusion of any other forms of redress, but that redress schemes could have a role to play as part of a multi-faceted approach.

¹ [Submission of Manny Waks](#)

- 1.5. To the extent that Tzedek supports the establishment of a redress scheme, Tzedek would support a scheme with the following features:
- (a) Institutions must fund schemes, with government compensation as a “scheme of last resort”
 - (b) Institutional leaders must be personally liable for the actions or omissions of the institution, especially in the event that an institution is unable to meet a redress obligation
 - (c) All schemes must provide ancillary support to victims
 - (d) All schemes must operate according to standards and processes applying nationally
 - (e) An independent statutory authority must be established to monitor and enforce compliance
 - (f) Complainants must not be precluded from simultaneously or alternatively seeking remedies from a court

2. **Institutional funding with a government “scheme of last resort”**

- 2.1. As a basic proposition, Tzedek firmly believes that institutions and offenders must be responsible for and liable to their victims for the harms they perpetuate.
- 2.2. Tzedek does not believe that governments should be required to “bail out” or act as a “safety net” for institutions and offenders. Governments acting in this way create a moral hazard which effectively absolves culpable institutions and offenders from bearing the consequences of their actions. Tzedek believes that this moral hazard adds to and perpetuates institutional harm because it disincentivises institutions from establishing processes which protect children from harm. In addition, when governments rescue institutions from the consequences of their poor decisions, they effectively make the whole community absorb the cost by diverting taxpayer resources from much-needed programs to pay compensation on behalf of institutions.
- 2.3. However, Tzedek also believes that governments have an obligation to protect society’s most vulnerable, and children in an institutional context represent a very large part of that constituency. Tzedek believes governmental obligation here rests on the implied social contract between the government and the community, on explicit obligations found in treaties and other instruments,² or on rights express or implied in the *Constitution* and supporting legal doctrine.
- 2.4. Accordingly, Tzedek believes it is incumbent upon institutions who perform functions with, for, or in respect of children to fund redress for institutional child abuse victims, while also preserving a role for the government.
- 2.5. Tzedek has no present position on whether institutions’ contributions should vary in accordance with their capacity to pay, number of children in care, historical record of abuse, or any other factor. To the extent that a contribution formula or initial contribution amount can be settled upon, Tzedek believes this should be subject to adjustment should circumstances require an institution to contribute further funding.

² Such as the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Universal Declaration of Human Rights, and the Convention on the Rights of the Child.

2.6. For reference, Mr Waks' submission to the Victorian Inquiry stated (relevantly):

Compulsory fund contributions. In order to ensure that there is compensation available to meet any future claims, certain institutions should contribute a statutory amount to a government-controlled fund to provide for payouts in the event that any of the responsible institutions are no longer in operation or have altered their business structure in some way to avoid liability. Whilst this may appear to be burdensome and intrusive, it should be borne in mind that some congregations (for example, the Catholic Church in Ireland and the United Church in Canada) have already self-imposed the creation of a compensatory fund, so this is a logical extension of the same principle. Indeed, given the quantum of compensation in many cases, the state burden in the event of insolvent institutions would represent a far greater community cost than would the creation and administration of a contribution scheme. Leaving the operation of such schemes to the institutions themselves exposes these schemes to accusations of witness intimidation, evidence tampering, loss of independence and improper conduct of investigations.

The contribution scheme could be applied flexibly, such that it takes account of the differences among institutions, such as by size, number of institutional leaders, funding, assets or some other measure(s) to be determined. The value of the contribution could be calculated similarly, alternatively trigger points could apply such that some institutions could avoid contribution if they met certain disclosure, training or insurance requirements, or were not, for example, implicated in any reports to police or involved in any eventual convictions.

Finally, it should be noted that insurance policies are available which specifically indemnify institutions in respect of molestation and sexual abuse claims (subject to certain limitations). The establishment of contribution schemes is merely a minor advancement upon the concept of insurance, and would remove the uncertainty and additional stress of an insurance claims process.

2.7. Tzedek believes the government's role here is to contribute funding in the event that institutions are insolvent or refuse to contribute to the scheme. Naturally, the government will need to establish processes to ensure compliance and audit any funding shortfalls. The government's operational costs can be (at least in part) offset by any interest earned on contributed funds.

3. **Personal liability for institutional leaders**

3.1. Tzedek is aware that institutions may arrange their affairs in ways which minimise legal exposure or consequences for certain activities. It is not appropriate to describe the range of possible arrangements which institutions can establish, nor speculate as to the possible arrangements actually established by any particular institution. Suffice it to say that institutions can (and very likely do) take advantage of organisational structures and transactions which may allow them to avoid liability for child abuse which is perpetrated on institutional property or in breach of a legal obligation (such as a duty of care or a contractual requirement) to prevent children from abuse.

3.2. By contrast, victims cannot make their own arrangements to ensure that any liability to them is discharged. Obviously, as children, this cannot be expected of them, but as is the case for any victim of a crime or a tort, child sexual abuse victims/survivors have had the abuse imposed on them without notice. Child abuse victims/survivors are not at all like transactional parties who are able to conduct prior due diligence, obtain advice and negotiate transactional terms. As a consequence, institutions have all of the benefits of organisational structures and none of the burdens, while victims are in the exactly opposite position with none of the benefits and all of the burdens. Institutions effectively hide behind the veil of separate corporate entities or trust relationships. This is grossly unfair to victims/survivors.

3.3. In certain special circumstances, the law can and does lift the corporate veil, such as for public policy reasons in relation to unsecured creditors of companies in administration or liquidation, or for victims of major torts. Lifting the veil imposes liability personally on those who are charged with the management and direction of the institution. Frequently, it is the courts which lift the veil in the context of specific litigation, however there are also examples from statute (such as the personal liability of a company director for not remitting superannuation contributions or PAYG withholding deductions).



- 3.4. Tzedek submits that the position of victims/survivors of institutions is a special circumstance, which does warrant the lifting of the veil, for the reasons outlined above in relation to their position of particular disadvantage relative to the institutions. Tzedek further submits that legislation be enacted (or existing legislation amended) to statutorily lift the veil in this context to ensure that victims/survivors are not further victimised by institutions relying on corporate or accounting structures to claim they have no assets or income in order to avoid actually discharging their liability. The law must support victims/survivors being able to recover, if not directly from the institution, then from those who were involved in the management, direction or operation of the institution. If necessary, the law should permit victims/survivors the right to trace as far as possible to ensure that institutions and any individuals behind the veil cannot hide assets in order to avoid meeting a recovery obligation.
- 3.5. The lifting of the veil and attaching of personal liability will support the government in its role of being a “scheme of last resort”.
- 3.6. For reference, Mr Waks’ submission to the Victorian Inquiry stated (relevantly):

Personal liability. Where fault is found on the part of the institution, there should also be strict personal liability for all those involved in the management/governance of the institution. Those responsible for setting the culture, practices and procedures of the institution should be and remain accountable for any actions carried out by those employed or engaged by the institution. This is no different to the way in which persons involved in the contravention of serious Occupational Health and Safety, corporate law or trade practices issues are treated, and is proportionate with the harm involved and the level of community outrage that is being generated.

The personal liability should apply even to those who were not present at the time of the alleged activity, as this would ensure that those seeking to assume a position in an organisation would make the necessary enquiries and conduct their own due diligence before assuming any position of responsibility. Any areas of concern noted during these enquiries should also be made a mandatorily reportable issue.

- 3.7. Tzedek submits that this position is ultimately no more burdensome than the position faced by directors of corporations which trade whilst insolvent.³ If Parliament was concerned to address the needs of unprotected creditors, then Tzedek submits Parliament ought to be similarly concerned to protect the needs of unprotected victims/survivors. Tzedek submits that the community should be outraged that the law potentially enables perpetrators and their enablers to use the institution’s separate legal existence to avoid their own personal responsibility, and accordingly Tzedek agitates for legislative change.

4. Provision of ancillary support

- 4.1. Tzedek believes that counselling and legal advice should be provided as part of any redress scheme. While Tzedek prefers no limits on attendances, Tzedek appreciates that this can represent a significant cost. Accordingly, Tzedek would propose that any counselling or legal advice be supplied by independent professionals with reimbursement by the scheme. Attending professionals would supply services within the ethical frameworks of their own professions – if a victim/survivor needs more or less service, then that is no concern of the redress scheme. If the redress scheme believes the professional has over-serviced, they can address that with the professional, but the victims’/survivors’ needs must be paramount.

³ Corporations Act (Cth) 2001, s 588G

5. Application of national standards

- 5.1. Tzedek believes that institutional redress schemes should operate in accordance with a national standard. There is no reason why institutions should be separately able to create their own methodology for addressing claims, assessing liability and quantifying redress. From an institutional perspective, the only difference between victims/survivors of different institutions is simply the fact that their abuse occurred at different institutions, a difference which we submit is immaterial. The most important factor here is that victims were abused and, although each victim/survivor bears their harm uniquely and individually, their harm is a matter of national shame.
- 5.2. A uniform approach to managing redress schemes will also ease administration and remove uncertainty and cost within the redress system.
- 5.3. Tzedek submits that national standards must have the force of law and be supported by a criminal penalty regime.
- 5.4. Tzedek has no present position on what should be the form of these national standards.

6. Establishment of an independent statutory authority

- 6.1. As part of the establishment of national standards for the operation of redress schemes, Tzedek advocates for the creation of an independent statutory authority to administer these standards, monitor scheme performance and enforce compliance.
- 6.2. Tzedek submits that this authority must be equipped with investigative and coercive powers (including the ability to prosecute for criminal penalties established under the national standards legislation).
- 6.3. Tzedek submits that this authority should be funded by institutional contributions and interest earned on retained funds.
- 6.4. Tzedek submits that the creation of an independent statutory authority would not increase bureaucracy, add complexity, increase the costs of institutional compliance or reduce the recovery to victims. To the contrary, the establishment of an independent authority would streamline the redress strategy, adding certainty and removing variability between and among institutions. Indeed, institutions have for far too long been left to their own devices in addressing victims, a situation which has allowed institutions to avoid dealing with victims/survivors in the hope they may die or exhaust their own resources before any recovery or compensation becomes due.
- 6.5. The establishment of an independent statutory authority would introduce a degree of accountability and compliance that has been unendurably denied to victims/survivors. In addition, an independent statutory authority would avoid the possibility of conflict of interest, which could arise where institutions (either by themselves directly or through related organisations or by proxy) permitted to operate their own redress schemes. It hardly needs be said that the risk of a conflict of interest is just too great, especially within closed communities, and would unquestionably lead to detrimental outcomes for victims/survivors. It is enough that victims/survivors have been let down in the first place by their institutions allowing them to come to harm – the community compounds this if victims/survivors are allowed to be let down once again by institutions acting in their own best interests rather than the victims'/survivors'.

7. **Reservation of right to sue**

- 7.1. Tzedek submits that, notwithstanding the operation of a redress scheme, no victim/survivor should be prohibited ever from commencing litigation against an institution and/or those individuals who hide behind the veil of the institution. Victims/survivors must be permitted to pursue litigation both simultaneously and alternatively to the operation of any redress scheme (including, if necessary, litigation in respect of the particular application and operation to that victim/survivor of the redress scheme).
- 7.2. While the aim of a redress scheme might, quite laudably, be the avoidance of costly and protracted litigation, the fact remains that the court system (whilst imperfect) does provide the best and most comprehensive review of the circumstances of each victim, something unlikely to be achieved even in the most accommodating of redress schemes.

Tzedek thanks the Royal Commission for considering our submission. In addition to the submission, we welcome the opportunity to provide additional information in person if required by the Committee in its deliberations.

Sincerely,

Manny Waks
Chief Executive Officer

