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REVISION NOTE

This document is a revised version of our submission to the Royal Commission. It preserves the original document format. Substantive emendments are identified in the text by an asterix (*) with explanations in End Notes to avoid disturbing existing footnotes. Minor emendments not affecting the original sense of the text are not identified.

SUBMISSION

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

Issues Paper 6

REDRESS SCHEMES

We are grateful for the opportunity to submit material to the Royal Commission on the topic of Redress Schemes.

The aim of this submission is primarily to make the case for the inclusion of a Restorative Justice element in any proposal for a Redress Scheme, and also to offer some general remarks on setting up a Redress Scheme in this field.

Our submission also has a bearing upon Issues Paper 7 on Compensation Schemes.

The Appendix gives answers to the Royal Commission's specific questions.

1. RESTORATIVE JUSTICE – BACKGROUND

Restorative Justice is an approach to doing justice that focuses on dealing directly with the harm done and its consequences for all those involved, particularly the survivor[1] and the offender, but also including the wider community. It is a peacemaking model of justice. Its aims are to repair the harm insofar as this is possible, and to put in place measures that will reduce the likelihood of reoffending and assist the survivor to recover as much as possible from the experience. The approach typically depends on the offender taking responsibility for the offence and for the harm that they have done. This entails a statement by the offender to the survivor. Restorative Justice may involve the offender making some form of amends to the survivor, which may be material or social (e.g. in the form of apology). In this way, the restorative process allows some of the civil law aspects of a case to be settled within the criminal justice system. Restorative practice includes all those involved in the harmful event. This entails that supporters of the survivor and offender and community representatives participate in restorative conferences, peacemaking circles and other restorative processes. It provides an opportunity to further the healing process for the survivor, and for the relationship between the survivor and the offender and the institution.

In conventional restorative justice programs, harm is defined primarily as material and psychological (including psycho-social and psycho-sexual issues). The spiritual dimension of harm may be explored in certain contexts, particularly in indigenous restorative processes.

Restorative Justice takes on one aspect of the traditional criminal justice principle of retribution, in holding the offender to account. It also takes on some aspects of rehabilitation, through the reform of the offender and the healing for the survivor. It thus embraces two important principles of our criminal justice system, but transcends them by focusing on the people, including both the survivor and offender, and their reintegration into the community.

Restorative approaches have been adopted at all levels of seriousness in the criminal justice – penal systems worldwide, from pre-prosecution victim-offender mediation through to reconciliation work between relatives of murder victims and offenders awaiting execution. Restorative approaches have also been adopted in the school setting and workplaces in non-criminal matters where harm has occurred between individuals. The potential application in the field of the abuse phenomenon is in relation to the harm done to survivors by the actions of institutions. This is relevant where institutions have acknowledged that they have harmed survivors and their families.

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[1] Generally the term 'survivor' is used in preference to 'victim' in this submission. However, where an original source refers to victims, that term is used in discussion of that text. Similarly, 'victim-offender mediation' will be used as it describes a specific method in Restorative Justice.

Generally, restorative processes involving the criminal justice system and other bodies which have disciplinary functions may be categorised as akin to 'Mediation-Arbitration (Other)'. The restorative process deals with some aspects of the case through mediators or facilitators, but the body with power to impose a sanction takes that decision in a way which may or may not take into account the outcomes of the mediation or conference.

The application of Restorative Justice in this field is possible, but there are some issues in attempting it which need to be addressed.

The situation is complex because:

1. We are dealing with three legal jurisdictions: secular criminal law, civil law, and church laws;
2. There are at least three legal parties (offender, survivor and the institution);
3. There are a larger number of people affected by the problem (families of survivors, priests and religious who are wrongly accused, priests and religious who feel hurt, members of the laity who have been distressed by events).
4. Many perpetrators cannot or will not participate.
5. Many of the cases are old.

All these issues can be addressed within well-designed restorative processes.

1.1 General forms of restorative practice

Restorative processes have a number of forms. These include *facilitated meetings* between survivors and perpetrators, with the opportunity for a survivor to be accompanied by a supporter and family members.

Other approaches include *peacemaking circles* and *restorative conferences*. These could involve anyone who might attend a facilitated meeting as well as members of relevant community groups. An example might be the case of a survivor who wished to have a meeting not only with representatives of the institution but also, for instance, with other members of a parish.

1.2 Some remarks on misconceptions about Restorative Justice

It is important to clear up some misconceptions about Restorative Justice, especially in relation to the implications for its application in this context.

1.2.1 General misconceptions

1.2.1.1 Restorative Justice as leniency

It has been suggested that Restorative Justice is a form of leniency, and that it does not attribute blame. This view is not supported by mainstream proponents of Restorative Justice.

Restorative processes are designed to hold people to account for what they have done and to give those who have caused harm the opportunity to hear those whom they have hurt, and the chance to make amends. Insincere apologies are not acceptable in these processes. It is often reported that offenders who participate in restorative programs find the experience very challenging and more difficult than going through the normal process of court.

Restorative processes occur at all levels of the criminal justice and penal process, but it is the prerogative of the prosecutor, judge or parole body to decide whether a referral to a restorative process is consistent with the nature and seriousness of the case. A prosecutor may refer a case, which, on other grounds, does not require prosecution. A judge may dispose of a case to a restorative program as part of a community sentence, which does not otherwise require the public protection that only a custodial sentence can provide. Restorative Justice can also be invoked after sentence, for instance when a survivor seeks a restorative process with an offender who is incarcerated.

1.2.1.2 In-house Restorative Practice

A second misconception is that a restorative outcome can be achieved simply by bilateral procedures, or by officers of an institution acting 'restoratively' in self-ascribed neutral roles. Although restorative outcomes may be achieved by these approaches, in matters of the level of seriousness that the abuse phenomenon represents, acting without a trained independent facilitator or mediator fails to ensure that power imbalances are addressed and that the vulnerability of the survivor is not reactivated. Cases at a much lower threshold of seriousness would require independent intervention. In-house restorative practice does not promote external accountability for the mediator / facilitator.

1.2.1.3 Forgiveness[*i]*

The general view of the restorative justice community is that forgiveness is not an expectation to be laid upon the survivor. Some survivors of the abuse phenomenon may believe that restorative processes require them to forgive. This belief may have arisen from having encountered programs which use restorative rhetoric within a religious framework for their practice. However, this impression does not accord with mainstream restorative philosophy.

That being said, if a restorative process facilitates forgiveness, this may be beneficial to the victim. Nevertheless there is no test of applicability for entry to a restorative program, or implicit moral or spiritual coercion that should be laid upon survivors in this matter.

1.2.2 Misconceptions on the part of the Roman Catholic Church in Australia

It is important to note the differences in understandings of Restorative Justice, its principles and practice, between the *Truth Justice and Healing Council's*

presentation to the Royal Commission, and the position that is broadly held within the Restorative Justice community worldwide.

There are a number of points that ought to be made:

1. The Church states in its submission that *Towards Healing* 'draws upon the principles of restorative justice'. However, no documents relating to the process currently available on the Catholic Bishops' website make any reference to Restorative Justice. It is noticeable that the text states, 'Some features of restorative justice programs include ...', thereby indicating that the list is incomplete. There are three critical principles missing from the account from a restorative perspective.

2. The *first omission* is that *Towards Healing* process does not engage with the community in any way, either the internal community of the Church itself or the wider community. The Church's submission suggests that the main focus of attention should be on the victim and the offender. It does not address the community context in which the offending took place: the parishioners, the family, other clergy, and the institution's own response. Engagement in the restorative process of all who have a stake in the harm done, including the community, has been mainstream to restorative theory and practice from before 1996-7 when *Towards Healing* was set up[2].

3. The *second omission* is that the Church does not see itself as engaging in dialogue as an involved institution. *Towards Healing* is concerned with amends, pastoral help and reconciliation of the victim with the Church. Although the Church has made public apology for shortcomings, it does not see dialogue with the victim as part of the restorative process. The Church does not appear to recognise that it itself is a party in this issue. Restorative Justice can be practiced where there is no criminal liability involving the partners, as stated above.

4. The *third omission* is that the process does not have an independent facilitator. This is critical to the conduct of restorative processes, and especially where there is an imbalance of power between the parties.

5. The Church has suggested that it is willing to consider changes, but has not mentioned the introduction of fully restorative principles and practices.

2. THE CASE FOR A *REDRESS AND RESTORATIVE MEDIATION PROGRAM*[3]

[2] See, for instance, Howard Zehr. 1990. *Changing Lenses: A New Focus for Crime and Justice*. Scottsdale, PA: Herald Press; Martin Wright. 1991. *Justice for Victims and Offenders*. Milton Keynes (UK) and Philadelphia (USA): Open University Press.

[3] Cross-reference Appendix Questions 1 and 4.)

A Redress Scheme for survivors of historic institutional abuse is a pragmatic response to the volume of claims that are likely to be made.

A Redress Scheme should be able to achieve high degrees of distributive and proportional justice whilst avoiding the drawn-out and harrowing process of extended judicial proceedings.

However, it is argued here that a Redress Scheme alone will not address a major concern that many survivors are likely to have, that is, the opportunity to address and be heard by senior representatives of the institutions who have been responsible for exacerbating their injuries: physical, psychological, social and spiritual.

It is true to say that the Royal Commission and other State inquiries have achieved important aims of justice by giving audience and validation to many survivors. Nevertheless, there is an important sense in which, despite the questioning of institutional leaders in the most public of forums, survivors were not able to address or confront the institutions directly; nor did the leaders of institutions directly address survivors.

Some may argue that restorative justice in this area is a matter for civil society and not a responsibility of government. However, governments have also been party to the failed community responses to the abuse phenomenon. Many survivors were children in the legal care of State and Territory governments. Governments failed to provide adequate oversight of placements or effective protection to many children in the care of religious institutions. Nor did they always effectively pursue criminal investigations when these were warranted. Similarly, children who were abused as ordinary pupils in religious schools should have a claim against governments. Governments were and are responsible for ensuring that all educational institutions are safe environments for children who are undergoing the statutory requirement to attend schooling. Furthermore, the NSW Parliament passed the *Roman Catholic Property Trust Act 1937* which provided effective legal immunity for the Roman Catholic Church, and thus made it impossible for survivors to sue for redress. State and Territory governments are therefore responsible for assisting survivors in the remediation of their moral and spiritual injuries, which only the comprehensive combination of restorative practices, redress, and psychological and social support can effectively provide.

A number of submissions to the *Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and other Non-government Organisations* supported the use of restorative justice approaches. These came from a variety of sources: Lawyers, survivors' organisations and a church:
On P. 565 the report states:

> 'The Law Institute of Victoria recommended the establishment of an independent body to deal with complaints:
>
> 'We would support an oversight body to oversee the internal complaints

processes of religious organisations and possibly to receive direct complaints and mediate those complaints in accordance with restorative justice principles.132

'Similarly, Berry Street [Lawyers] recommended that the Government develop a model complaints process and reparations agreement for care leavers and establish an independent reparations board to manage the investigation of allegations.133

'There was also strong support for the process to have the authority to discover the relevant facts and the circumstances that allowed the abuse to occur. The Committee's research pointed also to the need for the process to be fair to all parties involved.134

'The Inquiry's evidence and research makes it clear that the process through which outcomes are achieved is critical for survivors.135 This has also been recognised internationally. For example, in its report on the Canadian responses to criminal child abuse in institutions, the Law Commission of Canada concluded that two fundamental values should guide any attempt to understand and respond to the needs of survivors of child abuse:

'First, one must respect survivors and engage them to the fullest extent possible in any redress process. Second, survivors must be given access to information and support so that they can make informed choices about how to deal with their experience of abuse.136' [4]

The report also cited Ms Angela Sdrinis of Ryan Carlisle Lawyers:

"'More than the money, there also has to be a real acknowledgement of the wrongdoing and apology—restorative justice, if you like—where the organisation is able to say, 'We recognise what happened to you, we apologise for it. Here is an offer of compensation which is a gesture which

[4] Op cit. P 565. Textual notes (TNs). **TN 132** Transcript of evidence, Law Institute of Victoria, p. 2. See also Submission S226A, Law Institute of Victoria; and Law Institute of Victoria – written submission http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Law_Institute_of_Victoria.pdf. P 10. (Accessed 23.05.2014.) **TN 133** Submission S262, Berry Street, p. 14. **TN 134** Fred Kaufman (2002) Searching for justice: An independent review of Nova Scotia's response to reports of institutional abuse Province of Nova Scotia, p. 455. **TN 135** Reg Graycar & Jane Wangmann (2007) 'Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution'. University of Sydney, Legal studies research paper 07/50. **TN 136** Law Commission of Canada (2000) Restoring dignity: Responding to child abuse in Canadian institutions. Ottawa, Law Commission of Canada, p. 3.

> expresses a belief that you suffered at our hands.' That all has to be part of the process."'[5]

Berry Street lawyers wrote:

> 'Recommendation One: Royal Commission into the Impact of Child Abuse Involving Religious Personnel
>
> That the State government establish a Royal Commission to inquire into the abuse and maltreatment of children by personnel of religious organisations; and that the Royal Commission report on
>
> - the prevalence of this form of child abuse and maltreatment,
>
> - the impacts, (including social, psychological, health and economic) on individuals, their families and the Victorian community; and the
>
> - the optimal arrangements for a systematic approach to restorative justice and reparations for victims of such abuse and maltreatment' [6]

In Good Faith & Associates and the Melbourne Victims Collective also supported the application of restorative approaches[7].

Archbishop Freier of the Anglican Archdiocese of Melbourne told the Committee:

> "'We remain very conscious that there are real people behind each of these numbers, and I hope our engagement with them has been of some assistance in their recovery of hope and confidence. We have wanted most of all to have restorative outcomes for people who have reported abuse"'[8]

The case for establishing a restorative process alongside a redress scheme is very strong. One of the major institutions involved has stated that it acted wrongfully towards those who had been in its care. There is clear evidence of injury. The Christian ethos requires atonement, contrition and reparation to

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[5] Op cit. 7. P 510 Textual note **TN** 7. Transcript of evidence, Ryan Carlisle Thomas Lawyers, Melbourne, 17 December 2012, p. 8.

[6] http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Berry_Street.pdf. P3. (Accessed 23.05.2014.)

[7] *United in Truth* In Good Faith and Associates (1997 - ongoing) Consultants Responding to Clergy and Religious Sexual Assault and Systemic Church Abuses
with The Melbourne Victims' Collective (2006 - ongoing) Combined Submission.
http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/IGF_Melbourne_Victims_Collective.pdf

[8] Op cit. P 515. Textual note **18**. Transcript of evidence, Anglican Diocese of Melbourne, p. 26.

those who have been harmed. This ethos is entirely compatible with Restorative Justice. This phenomenon will not be dealt with by monetary payments alone. It is clear that any attempt by institutions to undertake restorative meetings without external independent facilitation is procedurally flawed and fails to address power imbalances in the process. It invites the possibility of re-victimisation. There is no accountability of either process or outcome. An independent restorative program will provide the opportunity for both the survivor and the institution to benefit from Restorative Justice and avoid the pitfalls of alignment with one of the parties.

3. DESIGNING A *REDRESS AND RESTORATIVE JUSTICE PROGRAM*

In this section two European approaches will be presented, within the limits of the material available, followed by a possible model for Australia.

3.1 Two European Approaches[9]

It would be useful to consider the approaches adopted by other countries, particularly Belgium and The Netherlands in relation to redress and restorative justice. Belgium has developed an arbitration process, which combines the arbitration of redress and restorative practice. In The Netherlands a particular restorative mediation model has been developed.

There is a need for further information about how these approaches work, but their principles are evident. They are worth exploring and their operations deserve to be fully understood as possible models for Australia.

3.1.1 The Belgian Arbitration Commission

This account is based on a presentation by Dr. Ivo Aertsen, Professor of Criminology at the Catholic University of Leuven, Belgium, and a member of the Belgian Commission of Arbitration, dealing with victims and the Roman Catholic Church[10].

The Belgian Parliament and the Roman Catholic Church negotiated the establishment of an Arbitration process. There are two distinct phases: reconciliation and arbitration. Arbitration commissioners are present at each phase. The victim may be assisted by a supporter and a lawyer; the Church, by a lawyer.

[9] Cross reference Appendix Question 10.

[10] Ivo Aertsen. 'Sexual Abuse in the Roman Catholic Church in Belgium: phenomenon and response mechanism'. Workshop on 'Sexual abuse in the church and other institutional settings', 10 and 11 April 2014, at the International Institute for the Sociology of Law, Oñati, Spain.

The percentages of meetings that have ended with conciliations are as follows:

	Men		Women	
	2012	2013	2012	2013
Conciliation	90.32%	84.47%	100%	87.5%

(Translated from the French.)

The Centre for Arbitration dealt with 621 cases in 2012.

There are four levels of compensation. The maximum level is €25,000.

A 'central need' that has been identified is that of recognition of victims.

3.1.2 The Netherlands Triptych Restorative Mediation Approach

This material is based on a presentation by Dr. Anke Bisschops of the School of Catholic Theology at Tilburg University, The Netherlands[11], but has been revised in the light of subsequent information provided by the Triptych (*Triptiek*) Program*[ii]

This approach was developed at the request of a religious congregation and victims thereof following a report to the Dutch bishops by a former minister of state, Willem Deetman.
The *Triptych Restorative Mediation Approach* is based on

- Centring on the needs of the victim;
- Voluntary participation in the process, including mediation-arbitration
- An agreement about participation in the mediation-arbitration process
- Forensic mediation and collaborative law;
- A collaborative mediator and arbitrator team (one with experience in therapeutic work; the other in law) and a secretary/lawyer;

The model has three parts, with an appeal process:

1. Separate 'inventory talks' with both the victim and the representative of the institution

'[The c]onversation with the victim takes around 3 hours'. '*This phase is … necessary to build trust and realize one is believed.'* [Italics in original.]

[11] Anke Bisschops. 'The Triptych Mediation Approach versus the official procedures in Ireland and The Netherlands'. Workshop on 'Sexual abuse in the church and other institutional settings', 10 and 11 April 2014, at the International Institute for the Sociology of Law, Oñati, Spain. https://pure.uvt.nl/portal/en/activities/restorative-justice-healing-and-the-handling-of-child-sexual-abuse-cases-in-the-roman-catholic-church-in-the-netherlands(1329b816-3887-4f6e-896a-3ada65ecc984).html (Accessed 22.05.2014.)

2. ‘Mediation between the parties’

This involves both parties, ‘the mediator’ and ‘a secretary/lawyer’. The mediation is preceded by signing an agreement to mediate and is concluded with the signing of an agreement that includes a brief description of what parties have talked about and/or agreed on as well as whether or not the congregation takes responsibility for the acts as described by the victim and whether an apology was offered and accepted. The agreement is a settlement agreement according to Dutch law. It does not, however, deal with the financial aspect. That happens in the third part of the program.

3. Compensation proposal

This part begins with a signed agreement that commits the parties to participation in a process of assessing and awarding financial compensation. There are five categories of abuse with compensation ranging from a maximum of €5,000 for the first category and a maximum of €100,000 for the fifth category. The award may be appealed. The proposal also deals with physical abuse and emotional abuse as well as sexual abuse, which is a major difference with the official complaint procedure in the Netherlands (that deals only with sexual abuse). The proposal also takes into account the implications of the abuse on the rest of a victim’s life.

4. Appeal

There is a process of appeal. First, victims can raise objections to the proposal and the arbitrator will decide whether or not those objections warrant review of the proposal. If the victim does not agree with the outcome of this process, an appeals board will hand down a binding decision.

In her remarks about the approach, Dr. Bisschop writes, amongst other things, that ‘contact between victims and the church is crucial’ and that ’[s]uch contacts need to be facilitated’. ‘Support groups for victims are ‘helpful’.

3.2 An Australian *Redress and Restorative Mediation Program*

In the case of a redress scheme, to which a restorative process may be attached, there are two separate agendas, one relating to material amends, the other to psychological, social and spiritual remedy. One is a social process governed by ethical principles and informed by social scientific findings. The other is conducted as (technically) an informal legal process following legally prescribed principles. Their concerns overlap, but the logics of these processes are different.

3.2.1 Principles to be drawn from the European Redress Programs

There are some important principles to be drawn from the European models.

1. *The key parties in the process are the survivor and the institution.*

This statement emphasises that the institution is being held accountable vicariously for the perpetrator’s actions and also for its own actions in either failing to prevent the abuse’ or having acted wrongly in response to the abuse.

(But see also point 12 in the section 3.2.2 *The Components of a* Redress and Restorative Mediation Program: *Convictions for perversion of the course of justice.)*

2. *The mediation or conciliation phase occurs before the arbitration.*

This ensures that the survivor has the opportunity to be heard occurs before the arbitration. Their story can be taken into account at the point of arbitration.

3. *The schemes follow the model of Mediation-Arbitration.*

With one variation, mediators are involved in the arbitration. There is no need to involve a separate set of personnel.

3.2.2 Components of a Redress and Restorative Mediation Program

It is therefore recommended that a *Redress and Restorative Mediation Program* should have the following components:

1. *A Restorative Mediation - Arbitration format involving the survivor and a representative of the institution.*

   The survivor is allowed to be accompanied by a supporter and a lawyer. (The latter should be remunerated from public funds, as in the Coordinated Family Dispute Resolution model[12].)

   There are a number of variants in the design of mediation arbitration processes. In some instances the mediator/s act as the arbitrator/s. In other models, the mediators and arbitrators are separate professionals. One concern in designing a mediation-arbitration model for this program should be that survivors should not have to explain their situation twice to separate people. Therefore, should it be deemed that mediation-arbitration (other) is the preferred approach, the model should provide that the arbitrators should have full access to the mediation process, either through report, direct observation of the mediation, or some other appropriate mechanism.

2. *The principle of voluntary participation for the survivor should be honoured.*

   If a survivor does not wish to participate in mediation, they should be permitted to provide a personal impact statement to the arbitrators. The institution should also be able to make a representation to the arbitrators.

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[12] R. Kaspiew, J. De Maio, J. Deblaquiere and B. Horsfall. 2012. *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases - Final report.* Australian Institute of Family Studies. Australian Government. http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF (Accessed 22.05.2014.)

3. *Voluntary participation is not applicable to institutions, which are part of the* Redress and Restorative Mediation Program*.*

   It is proposed that, as part of the consideration towards institutions in limiting their liability through a redress scheme, they will have a duty to participate in a restorative process if the survivor seeks to have one. Some will argue that the obligation to participate in a restorative process is contrary to the principle of voluntariness in restorative justice and alternative dispute resolution. However, it is suggested that the enormity and profundity of the phenomenon as a public concern require a different approach. The survivor's right to a restorative meeting should have more weight than the reluctance of any institution to meet those whom it has harmed, or to whose harm it has contributed. At the same time, care must be taken to ensure genuine participation of the institution to create a safe space for the survivor and to avoid the risk of further re-traumatisation.

4. *The process should be supported by therapeutic assistance to the survivor and access to conflict coaching and support for the representative of the institution[13].*

   It is necessary to ensure that support to the survivor is integrated into the Program. An example of how this can be achieved may be found in an Australian approach to family dispute resolution known as 'Coordinated Family Dispute Resolution' (CFDR) in which both survivor and perpetrator of domestic violence*[iii] are given support and counselling prior to engagement in mediation. The professional workers supporting each party attend the mediation[14].

5. *Mediators should work in pairs (conjointly) with expertise in trauma and relational skills.*

6. *The Restorative Mediation phase of the process should follow the norms for a restorative conversation*

   Restorative conversations address the following questions:

   - What happened?
   - What went wrong?
   - How were the participants affected or involved?
   - What needs to be done to put things right?

7. *The arbitration criteria should focus on the level of injury both in relation to the impact on the survivor and to the culpability of the perpetrator and the institution.*

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[13] Cross reference Appendix Question 11.

[14] R. Kaspiew, J. De Maio, J. Deblaquiere and B. Horsfall. 2012. Op. cit.

Reference to a framework of moral and spiritual injury may be useful[15].

8. *The design of the arbitration scheme will have to address the question of the level of evidence that is needed to establish a claim.*

9. *Cases that have previously reached settlement may be reviewed by the Program[16].*

   Previous settlements would be taken into account in the Arbitration phase. Arbitration in these cases may provide for additional awards to take them up to the level operating within the Program. However, the arbitrators will have no power to determine a reduction or repayment of any previous award.

10. *Those entering arbitration should commit to persevere with the process until a finding is reached by arbitration*[iv].*

11. *Any appeal process should be to binding and final arbitration rather than to a court.*

12. *Convictions for perversion of the course of justice*.

    If an officer of an institution is convicted of perversion of the course of justice related to institutional child sex abuse, the court or correctional service may have provisions for referral to restorative justice programs. It may be appropriate to consider whether such an offender should be permitted to participate in a Restorative Mediation. If so, statutory provisions would need to be made to enable the criminal/penal restorative process to be aligned with the Redress and Restorative Mediation Program. This is subject to the willingness of the survivor and the perpetrator to participate.

13. *If the original perpetrator is still alive, it may be possible, subject to the agreement of the survivor and the perpetrator, for the perpetrator to participate in the Restorative Mediation process.*

    Participation by the perpetrator will require careful screening and assessment of the perpetrator's attitude and capacity, and of the needs of survivors and the risks attendant on a restorative mediation meeting in terms of re-traumatisation. If the perpetrator is subject to any form of correctional order, the relevant State agency will require to be involved in the screening and assessment process.

14. *Elective communal restorative processes*.

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[15] R E Mackay. 2013. 'The nexus between restorative justice and rights', in T Gavrielides and V Artinopoulou (eds.) *Reconstructing Restorative Justice Philosophy – Greek philosophers and human rights*. Aldershot UK: Ashgate.

[16] Cross reference Appendix Question 12.

It is possible that after a *Redress and Restorative Mediation* process, the survivor and members of their family and members of the institutional community (e.g. church) may wish to engage in further restorative processes such as healing and peacemaking circles and conferences. It is suggested that these are private civil society arrangements between the parties to be facilitated by competent restorative practitioners/ mediators[17].

15. *Mediators should be trained and accredited under national guidelines for mediators.*

    Additional training and induction will be needed for mediators to work in this setting.

16. *National Guidelines and Protocols*. It would be necessary to set out national guidelines and protocols for the conduct of the *Redress and Restorative Mediation Program*.

    These should include:
    - the requirement for clinical supervision for mediators; and,.
    - the independence of mediators and arbitrators in the program[18].

17. *Involvement of stakeholders*

    There will need to be continuous consultation with representatives of survivors' and with the participating institutions in the planning and delivery of the Program.

4. STRUCTURING A *REDRESS AND RESTORATIVE JUSTICE PROGRAM*

4.1 The need for a statutory framework[19]

The level of redress to be granted may need to be tailored pragmatically to the resources available to the institutions involved. These resources are not easy to ascertain if an institution's legal status is unclear and public accounts are not rendered. Therefore the credibility of a Redress Scheme, which in any way limits the level of damages that could be achieved in the courts' will depend principally on transparency on the part of institutions. Any participating institution must be a clearly identifiable legal person whose assets are publicly disclosed, and which is capable of being sued in the courts.

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[17] For an account of how restorative practices can be used in this field, see Robert Mackay's submission to the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non- government Organisations, 2013. http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Mackay_Robert.pdf

[18] Cross reference Appendix Question 2.

[19] Cross reference Appendix Question 2.

There will need to be mechanisms to provide that a realistic level of assets is earmarked and committed to ensure that the scheme is viable.

From this it follows that the *Redress and Restorative Mediation Program* will only work if there is clear and enforceable agreement between governments and between governments and institutions, and a statutory framework.

4.2 Status, structure and scope of a *Redress and Restorative Mediation Program*[20]

The Program should be established by legislation. It should comprise an overarching national body which manages and delivers the redress component of the program, and a restorative component which is overseen and funded by the national body, but which is delivered within States and Territories by independent mediators and arbitrators, commissioned by the national body. The national body would be a main source of referrals to restorative practice, facilitating self-referrals of survivors.

The Program should be independently monitored and evaluated by academic researchers with expertise in restorative justice and victimology and in legal schemes of compensation.

A Redress Scheme provides some limitation of liability for those who are responsible for making payments to survivors. The provision of this benefit to institutions is in consideration of their willingness to accept a degree of responsibility. The Scheme also limits the costs to all of expensive and painful court processes.

Institutions which are subject to claims of child sexual abuse will be legally required to participate in the Program.

Institutions should be required to become a single legal entity in the case where different elements or bodies within a community are bound by a common internal chain of accountability. For instance, although the Roman Catholic church has no apparent legal status for the purposes of being pursued at law, and has a variety of different congregations, orders and communities as well as separate local structures, they are all tied to a common obedience to the Papacy, and are all bound by a common legal framework, that is Canon Law. Other churches have local and regional structures but are accountable to national bodies. They, too, therefore have a common internal disciplinary structure.

The *Redress and Restorative Mediation Program* should be available to historic and new cases. If child protection procedures are effective, the number of new claims should be few, but provision for meeting them ought to be made within the Program.

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[20] Cross reference Appendix Questions 2, 4, 6 and 8.

4.3 Funding a *Redress and Restorative Program*[21]

Questions will arise about how *Redress and Restorative Mediation* should be funded. From the comment above about the responsibility of State governments for earlier failings, it is proposed that funding should come both from State governments and the institutions involved.

There needs to be a realistic and substantial level of funding, with a limit to the exposure of governments, and clear expectations of participating institutions.

The Royal Commission will be aware that the experience of Ireland with the Residential Institutions Redress Board led to a heavy exposure of the Irish State to the meeting of claims. Measures will need to be taken to ensure that imbalance in effective liability is not repeated in Australia.

On the other hand, payments from the Belgian redress scheme appear to be very modest. It not clear whether the relatively low level of payments there would meet the expectations of the Australian public.

It is necessary to determine a costing for a *Redress and Restorative Mediation Program*. The two main areas of cost are the total value of all potential awards and the costs of providing and delivering the program,

It is necessary to have a mechanism to determine a reasonable estimate of the number of potential claims. For instance it may be necessary to set a deadline for historic claims. However, new claims should also be eligible.

Once a global figure for historic claims has been established, it will be necessary to determine an upper limit of the value of claims. That would provide an upper figure for liability for redress awards. It may be possible, on the basis of sampling, to develop a model of distribution of cases by level of claim. This could inform the level of funding required, but there is a danger of under-capitalising the fund.

In all events, a global figure for a redress fund should be established.

The redress fund should be set up by contributions to be determined from institutions and governments of funds which equal the established global figure. This fund would be instituted before the Program comes into operation. The fund should be held in effect 'in escrow', by a body or bodies currently acting as public trustees, or by some similar independent publicly accountable body.

Funding for the Program will need to provide not only for the costs of awards, but also for the costs of providing the Program itself: including; the remuneration of mediator-arbitrators, support lawyers; support counsellors and coaches; administrative staff; induction and training of all staff and contractors; and, costs of monitoring and evaluation.

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[21] Cross reference Appendix Questions 2 and 4.

4.4. Levels of award[22]

The question of how the levels of award will need to be set.

Whilst no detailed structure is offered here, three considerations are relevant to the establishment of a framework. These are:

1. What level of evidence the Program requires to establish eligibility;

2. The level of harm inflicted and experienced; and,

3. The level of culpability on the part of institutions and state agencies in their handling of the case.

5. CONCLUSION

There is a need to establish how restorative principles and practice can be incorporated into any future scheme for redress. There is considerable interest in the Restorative Justice community in developing services in this area.

It is recommended that any future Redress Scheme integrates Restorative Justice principles and practices into its arrangements and operations.

Please refer any questions to Rob Mackay who will be happy to answer them. (See below for contact details.)

6. APPENDIX – ANSWERS TO THE ROYAL COMMISSIONS SPECIFIC QUESTIONS

1. What are the advantages and disadvantages of redress schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts, particularly in comparison to claims for damages made in civil litigation systems?

The main advantage is that the survivor is able to obtain a material outcome without the problems attendant on litigation.

The disadvantage may be that the levels of award may be capped at a lower rate than might be achieved in court.

Neither a redress scheme nor a court will provide the benefit of the survivor being able to address the institution and obtain a helpful response without an independently provided restorative mediation process.

[22] Cross reference Appendix Questions 3 and 9.

(See section 2 of our submission.)

2. *What features are important for making redress schemes effective for claimants and institutions? What features make redress schemes less effective or more difficult for claimants and institutions?*

The three key elements are:

1. A statutory framework for the Redress Scheme (section 4.1 of submission);
2. Government involvement in the framing, management and funding of the Scheme (sections 4.2 and 4.3 of submission); and
3. Independent mediation and arbitration (sections 3.2.2 # 16 and 4.2 of submission).

3. *What forms of redress should be offered through redress schemes? Should there be group benefits available to, say, all former residents of a residential institution where abuse was widespread? What should be the balance between individual and group redress?*

Q1
Redress should be financial. The Program should also provide for the opportunity for independent mediation to address the moral and spiritual harm done to the survivor.

(See also our answer to 9 below.)

Qs2 and 3
Group redress is feasible. Individual redress should have priority in a redress / compensation scheme.

4. *What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims? If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?*

Qs 1 and 2
There can only be advantage in the involvement of government in redress and compensation schemes. First, as argued in Section 2 of our submission, governments bear some responsibility for the abuse phenomenon. Second, government can provide an independent structure for such a scheme. It is proposed that a national *Redress and Restorative Mediation Program* is set up as a separate statutory agency, with authority to commission independent mediators and arbitrators. (See section 4.2 of our submission).

Q3
The program should be funded by a combination of commonwealth, state and territory government funding and institutional funding. The requirement for the fund should be calculated using the following factors:

- the ascertained number of claims
- the range of awards
- distribution of accountability by government and institution.

(See section 4.3 of our submission.)

5. *If institutions have established internal redress schemes, should all or any part of the decision-making of the scheme be independent of the institution? Should the schemes be subject to any external oversight? If so, what?*

All internal redress schemes should be replaced by a national *Redress and Restorative Mediation Program*.

6. *Should establishing or participating in redress schemes be optional or mandatory for institutions?*

Participation in a national *Redress and Restorative Mediation Program* should be mandatory for institutions.

(See section 4.2 of our submission.)

7. *Should seeking redress or compensation through a redress scheme be optional for claimants? Should claimants retain the ability to pursue civil litigation if they wish?*

Q1
It should be the survivor's right.

Q2
Survivors should have the right to claim through the courts if they so wish.

8. *How should fairness be determined in redress schemes when some institutions have more assets than others? How should fairness and consistency between survivors be achieved in these circumstances? What should be the position if the institution has ceased to operate and has no clear successor institution?*

All institutions against which claims have been made must make full disclosure of all their assets. All assets of the institution must be eligible for contribution to a national redress fund.

An institution should be deemed to be comprised of all bodies (regional entities, schools, communities, trusts, etc.) sharing a common obedience, allegiance or internal legal discipline.

Should the claims on the fund exceed the eligible assets of an institution, the government in whose jurisdiction the abuse took place should make up the shortfall.

(See section 4.2 of our submission.)

9. *What are the advantages and disadvantages of offering compensation through a redress scheme which is calculated on the same basis that damages are awarded by courts in civil litigation systems? Should affordability for institutions be taken into account? If so, how?*

Whilst we have no direct answer to the question, three considerations are relevant in our view to the establishment of a framework. These are:

4. What level of evidence the Program requires to establish eligibility;

5. The level of harm inflicted and experienced; and,

6. The level of culpability on the part of institutions and state agencies in their handling of the case.

(See section 4.4 of our submission.)

10. *Given that the sexual abuse of children mostly occurs where there are no witnesses, what level of verification or proof should be required under a redress scheme to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation?*

It would be advisable to obtain information from redress schemes in other countries such as Belgium and The Netherlands. (See section 3.1 of our submission.)

11. *What sort of support should be available for claimants when participating in a redress scheme? Should counselling and legal advice be provided by any redress scheme? If so, should there be any limits on such services?*

The level of support should be comparable to that provided in Coordinated Family Dispute Resolution programs in Australia. (See section 3.2.2 # 4 of our submission.)

12. *If a claimant has already received some financial compensation for the abuse through one or more existing schemes or other processes, should*

the financial compensation already received be taken into account in any new scheme?

Yes. (See section 3.2.2 # 9 of our submission.)

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[i] Forgiveness: This addition has been made because concern has been expressed that restorative justice processes presuppose that the survivor will forgive the person causing the harm.
[ii] This section has been emended in the light of subsequent clarifications and corrections provided by the Program Coordinator, Drieluik Herstelbemiddeling at Tritych.
[iii] Domestic violence: clarification of the context of CFDR.
[iv] Emended in the light of clarifications by Triptych.

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