Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 6: Redress Schemes

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About Bravehearts Inc.

Our **Mission** is to stop child sexual assault in our society.

Our **Vision** is to make Australia the safest place in the world to raise a child.

Our **Guiding Principles** are to at all times, do all things to serve our Mission without fear or favour and without compromise and to continually ensure that the best interests and protection of the child are placed before all other considerations.

Bravehearts has been actively contributing to the provision of child sexual assault services throughout the nation since 1997. As the first and largest registered charity specifically and holistically dedicated to addressing this issue in Australia, Bravehearts exists to protect Australian children against sexual harm. All activities fall under ‘The 3 Piers’ to Prevention; Educate, Empower, Protect – Solid Foundations to Make Australia the safest place in the world to raise a child. Our activities include but are not limited to:

**EDUCATE**
- Early childhood (aged 3-8) ‘Ditto’s Keep Safe Adventure’ primary and pre-school based personal safety programs including cyber-safety.
- Personal Safety Programs for older children & young people and specific programs aimed at Indigenous children.

**EMPOWER**
- Community awareness raising campaigns (Online and Offline) including general media comment and specific campaigns such as our annual national White Balloon Day.
- Tiered Child sexual assault awareness, support and response training and risk management policy and procedure training and services for all sectors in the community.

**PROTECT**
- Specialist advocacy support services for survivors and victims of child sexual assault and their families including a specialist supported child sexual assault 1800 crisis line.
- Specialist child sexual assault counselling is available to all children, adults and their non-offending family support.
- Policy and Legislative Reform (Online and Offline) - collaboration with State Government departments and agencies.

Bravehearts Inc. is a National organisation, it is a registered Public Benevolent Institution, registered as a Deductible Gift Recipient, operates under a Board of Management and is assisted by State based Community Regional Committees, Executive Advisory Committees and a Professional Finance Committee.
Introduction

Impact of Child Sexual Assault on Survivors
Any discussion on redress for survivors of child sexual assault must include an understanding of the complex effects of the sexual exploitation of children.

Childhood trauma can impact on children’s development across a range of domains including physical, emotional, social and cognitive (Lamont, 2010). Child sexual assault has also been linked with long term poor mental health outcomes, with those who experienced child sexual assault at greater risk of mental health issues (Tarczon, 2012). Diagnoses of anxiety, depression and personality disorders are common in adults with a history of child sexual assault.

There are a number of well researched and documented long term impacts of child sexual assault affecting adult survivors. Individuals with a history of child sexual assault are at an increased risk for:

- mental illness
- substance abuse
- homelessness
- suicidality
- revictimisation, including domestic violence and sexual assault
- parenting difficulties, and
- health issues.

Child sexual assault has been found to be a risk factor for the development of psychopathology later in life (Hillberg, Hamilton-Giachritsis & Dixon, 2011; Manglio, 2010; Spila, Makara, Kozak & Urbanka, 2008). Long term psychopathology of 2,759 Australian children who were sexually assaulted between the years of 1964 and 1995, were evaluated 12 to 43 years after the assault occurred (Cutajar et al. 2010). Findings revealed that 22% of individuals who had experienced child sexual assault later accessed public mental health services, in comparison to only 7% of those in the control group. The authors identified that child sexual assault increased the likelihood of experiencing psychosis, mood and anxiety disorders, substance abuse and personality disorders.

Limitation Periods
As discussed in Bravehearts’ previous submission on civil litigation, when the statute of limitations is considered in the context of child sexual assault, it is argued that the traditional balance between the rights of the alleged offender and the survivor, and those of society, should be altered in favour of the survivor and more particularly that no limitation period should apply. If there is any consideration of placing limits on time for redress, Bravehearts believes that this also must be the case.
It is Bravehearts’ stance that in cases involving the sexual assault of children, the application of any limitation provisions to deny adult survivors of sexual assault or abuse access to redress is theoretically, practically and morally unjustifiable. Bravehearts supports recommendations in the *Betrayal of Trust* Inquiry in Victoria that civil limitation periods be abolished in relation to criminal child abuse matters, and specifically child sexual assault. However, if this is not adopted, at the very least the limitation periods should be extended to reflect the average time at which adults disclose their childhood sexual assault. For example, the relevant statutes could be modified to legislate for a limitation period of 25 years from date the cause of action accrued.

**Financial Redress Schemes in Australia**

Few States in Australia have introduced specific redress schemes for survivors of institutional sexual assault and abuse:

- In response to recommendations in the Forde Inquiry (1999), the Queensland Government established a redress scheme that provided eligible applicants with an ex gratia payment (ranging from $7,000-$40,000) (Senate Standing Committee on Legal and Constitutional Affairs, 2010). However, the scheme has been highly criticised, with survivors being directed to take legal action in court (Mathews, 2004).

- In 2005, the Tasmanian Government established a redress scheme (with ex gratia payments of up to $60,000, later revised to $35,000) in response to a review of the claims system that had been established after the disclosures of sexual assaults by former State wards (Senate Standing Committee on Legal and Constitutional Affairs, 2010).

- In 2007 the Western Australian Government established the *Redress WA Scheme* for survivors of sexual assault, abuse or neglect in State care (ex gratia payments were initially capped at $80,000, later revised to $45,000) (Senate Standing Committee on Legal and Constitutional Affairs, 2010).

- In response to the 2008 Mullighan Report in South Australia, the South Australian Government established a redress scheme for former State care residents who had experienced sexual assault (with ex gratia payments ranging from $30,000-$50,000) under the *Victims of Crime Act 2001* (Senate Standing Committee on Legal and Constitutional Affairs, 2010).

- Both the New South Wales and Victorian Governments advised the Senate Standing Committee on Legal and Constitutional Affairs (2010) that they would not establish redress schemes. The Committee reported evidence received in 2008 that the Victorian Government had paid out over $4million in case-by-case matters settled out of court.

- Neither the Northern Territory nor Australian Capital Territory Governments have established redress schemes.

- In the 2013 *Betrayal of Trust* report prepared for the Victorian Government, the Committee made the following findings and recommendations:
Key finding
The elements of a successful alternative justice approach include:
• independence and authority
• respect, engagement and support for victims
• contribution by non-government organisations
• opportunity for appeal and review.

Recommendation
That the Victorian Government review the functions of the Victims of Crime Assistance Tribunal (VOCAT) to consider its capacity to administer a specific scheme for victims of criminal child abuse that:
• enables victims and families to obtain resolution of claims arising from criminal child abuse in non-government organisations
• is established through consultation with relevant stakeholders, in particular victims
• encourages non-government organisations to voluntarily contribute a fee to administer the scheme
• ensures non-government organisations are responsible for the funding of compensation, needs and other supports at amounts agreed through the process.

International Redress Schemes
Canada
A number of provincial governments have set up redress schemes in Canada since the 1990s. These schemes vary in function and include both provincially-based and federally-based schemes. The schemes have been established in response to specific institutions. For example, the Ontario Grandview Agreement was set up to respond to claims from former residents of the Grandview School for Girls (detention centre) and Helpline Reconciliation Agreement was established in response to physical and sexual assault disclosures from former students of the St Joseph’s Training School for Boys and the St John’s Training School for Boys.

Ireland
In response to revelations of sexual assault and abuse in orphanages, industrial schools and other institutions in Ireland, the Compensation Advisory Committee made recommendations to the Irish Government on the structure of a redress scheme. As a result in 2002 the Residential Institutions Redress Board was established with its functions and powers provided for under the Residential Institutions Redress Act 2002 (Mathews, 2004). This response will be discussed further under the response to Questions 4.
Redress Schemes: Response to Issues
Paper 6

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?

There are a number of identified advantages and disadvantages of a national redress scheme, these include:

**Advantages:**
- Avoidance of an adversarial court process
- Evading cost of civil litigation proceedings
- Transparent and consistent compensation process
- Immediacy / access to funds
- Lower burden of proof on victims as opposed to requirements in civil proceeding to establish compensation.

**Disadvantages:**
- Potential for damages to be capped / limited
- Limitations of one size fits all – each victim will have unique set of circumstances and personal impact doesn’t necessarily equate to level of sexual assault or abuse endured

Certainly experiences of Bravehearts’ clients has been that the civil system is more often than not inaccessible, excessively expensive, re-traumatising, non-therapeutic, inadequate and lengthy.

For survivors of sexual assault in institutional contexts the civil litigation system can be particularly adversarial. Often required to recount and face cross-examination around traumatic childhood experiences, the civil litigation process can result in re-traumatisation for survivors. In addition, civil processes are a less conducive forum for apology and acknowledgement of harm as the process itself encourages a challenging of evidence provided by the survivor.

Civil litigation often involves high costs for survivors and against institutions willing to incur large legal costs to defend against action, the cost of pursuing civil claims can be a significant impediment for survivors.

A nationally run redress scheme for survivors of sexual assault in institutional care could provide greater transparency and consistency in the process of providing compensation for survivors. Removing the process of redress away from individual institutions or governments would provide for greater faith and trust in the system through ensuring
independence in decision-making. However, an important understanding to take from international approaches, is the need to ensure that the responsibility of the institution where the sexual assaults and abuse occurred is preserved. Reports of low levels of contribution by religious institutions to the Irish redress scheme, was seen by many victims as further evidence of the responsible institution not acknowledging responsibility.

Bravehearts would additionally recommend that the determination of claims under a national redress scheme could establish a lower burden of proof than required in civil proceedings. For example, as recommended in the Forgotten Australians report (2004), determination of claims should be based in the ‘reasonable likelihood’ that the harm occurred. Similar to the financial assistance scheme established under the Victims of Crime Assistance Act 2009 in Queensland, assessment of eligibility could be based on a psychological, counselling or medical report.

Examples of documents that may be used to assess claims could be:

- Medical records
- Mental health records, including psychology or counselling reports
- Records of time in care, including formal and informal records
- Copies of any police statements or child protection reports

While there may be some concerns that lowering the burden of proof will open up claims based on untrue allegations of child sexual assault, research has shown that false allegations are infrequent. Clinicians and researchers in the field of sexual assault are in agreement that false allegations by children are extremely rare (Oates, Jones, Denson, Sirotnak, and Krugman, 2000). Wall and Tarczon (2013) report that there is broad consensus in the research that only around 2% of sexual assault reports are false.

With a low risk of false claims coming forward research certainly suggests the usefulness of multiple assessment points, particularly the use of specialist mental health reports, in reviewing claims.

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 design of a scheme to compensate victims of institutional sexual assault should be guided by a number of fundamental principles.

It should provide a quick, cost-effective and efficient means of fairly compensating people for their loss, whenever the sexual assault or abuse occurred.

Fortunately, examples from other jurisdictions exist and could be adopted and modified for Australian circumstances. In particular, the scheme established in Ireland, as part of the Ryan Inquiry had the following features Bravehearts recommends should be adopted as a set of guiding principals in establishment of any National Redress scheme:
GUIDING PRINCIPALS FOR REDRESS SCHEME

- **Centralised:** rather than generating a multiplicity of lawsuits, which would drag on for years, the scheme was a centrally administered method of appropriating just and accessible compensation to victims.

- **Early commencement:** the Irish scheme was established following a recommendation in the Ryan Inquiry’s interim report, meaning that the compensation process for victims could begin quickly, without waiting for the end of a lengthy inquiry.

- **No limitation period:** claimants were able to seek compensation, regardless of when the sexual assault or abuse occurred. This overcame the traditional limitation period barrier, when pursuing compensation through litigation.

- **No-fault scheme:** rather than claimants having to exhaustively prove they suffered sexual assault or abuse, claimants were only required to submit expert medical / psychiatric reports and have attended the relevant institution during the stated period. This avoided the risk of victims being re-traumatised by seeking justice through an adversarial process, and overcame evidential issues associated with sexual assault or abuse having occurred many years in the past.

- **Common law style damages:** to ensure adequate compensation, redress payments were based on the likely damages that would be obtained at common law and included reasonable medical costs. This avoided the arbitrary statutory caps, seen in other models, which often compensate a victim for well below what would be obtained for an assault of a non-sexual nature. Further discussion on Common Law damages is considered on p.18 of this Issues papers response.

- **Legal representation:** victims were entitled to legal representation, in recognition of their often disempowered situation, and legal costs were covered on an indemnity basis. This ensured that legal costs were well below those that would have been incurred in a common law claim.

- **One claim:** victims who obtained compensation through the Irish scheme were required to forego any civil claim against an institution regarding the same sexual assault or abuse.

The Law Commission of Canada (2000) also reviewed responses to institutional sexual assault or abuse and outlined five fundamental principles to ensure an effective redress process for survivors:

1. Provision of all information needed for survivors to make informed choices on what course of redress to undertake.
2. Access to counselling and support for survivors undertaking the process of redress.
3. Training for all of those managing the redress process (including judges and lawyers) to ensure that those responsible for the conduct of the scheme have an understanding of the dynamics and impacts of sexual assault on survivors.
4. Persistent review and modification needed to improve redress schemes
5. Every effort needs to be made to ensure that the process of redress does not cause further harm to survivors.

In addition, Bravehearts would submit that other key features that that would underpin an effective redress scheme would include:
• A national approach, independent of specific institutions, would provide transparency of process.
• Consideration of funding for essential services such as counselling, advocacy, medical assistance, and other support services (such as housing, educational and employment).
• Coordination with police units to facilitate investigation of historical child sexual assault matters.
• Removal of requirement of signing a confidentiality agreement as part of a deed of settlement. Understanding that silence, secrecy and shame are such intrinsic elements of child sexual assault, survivors should have a right to speak of their experience if they wish to.
• As discussed in our previous submission to Issue Paper 5, an idea raised at a recent Public Hearing that would work well under a redress scheme, would be a “Gold Card” program similar to the Department of Veterans Affairs process, whereby once over the threshold, a survivor would be given a life-long entitlement to services which could be accessed by using the card.

There have been a number of concerns with the operations of the statutory redress schemes that have been implemented in various states of Australia. These include:
• Inequitable access to redress schemes: for example in Queensland the redress scheme established after the Forde Inquiry, survivors of sexual assault and abuse while in State-care were denied access to the redress scheme.
• Inconsistent features: without a national-run scheme, redress in Australia to date has included varying eligibility requirements and methods for assessing compensation, and wide variation in levels of compensation.

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?
In recognition of the varied and different degrees of impacts of child sexual assault on survivors, it is necessary that redress schemes be flexible. Schemes typically include a number of avenues of redress. These include not just financial compensation but also written apology and acknowledgement of the harm done, access to records held, provision of assistance for reunification with family members, and access to counselling or support programs.

Bravehearts would question the viability of an assessment of ‘group’ redress, and suggest that assessments would need to be made on individual merit.
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?

As outlined under Question 1, there are a number of identified advantages and disadvantages of a national redress scheme, these include:

**Advantages:**
- Avoidance of an adversarial court process
- Evading cost of civil litigation proceedings (noting need to ensure that legal costs of administering scheme and providing advice to victims needs to be capped to ensure these expenses doesn’t overrun costs of payments to victims)
- Transparent and consistent compensation process
- Immediacy / access to funds
- Lower burden of proof on victims as opposed to requirements in civil proceeding to establish compensation.
- Ability to compensate victims where institutions have ceased to exist if larger financially viable institutions contributed an additional 10% or otherwise suitably determined figure of their claims to cover gaps.

**Disadvantages:**
- Potential for damages to be capped / limited
- Limitations of one size fits all – each victim will have unique set of circumstances and personal impact doesn’t necessarily equate to level of sexual assault or abuse endured
- Potential unintended consequence of creating inequity for victims who need compensation however were not sexually assaulted or abused in an institutional context and have no other redress option available

In 2013, the Betrayal of Trust report considered proposals from Inquiry participants that a government-operated redress scheme be considered. The Committee looked at a similar approach set up in Canada and Ireland and suggested that key to an effective model would be the processes of co-contribution by non-government institutions; the experience in Ireland has, for example, seen particularly low levels of contribution by religious institutions. In addition the Committee identified a number of limitations experienced in previous government-run redress schemes, including:

- Time limits and eligibility criteria imposed by redress schemes have meant that some claimants missed out.
- Because most schemes impose a limit on the quantum of compensation, for some victims the assistance was inadequate.
- Some victims found the application process traumatic.
Bravehearts also considers and supports Recommendation 6 in the Community Affairs Reference Committee *Forgotten Australians* report (2004):

This report concluded that the Commonwealth Government establish and manage a national reparations fund for victims of institutional abuse in institutions and out-of-home care setting and that:

- The scheme be funded by contributions from the Commonwealth and State Governments and the Churches and agencies proportionately;
- The Commonwealth have regard to the schemes already in operation in Canada, Ireland and Tasmania in the design and implementation of the above scheme;
- A board be established to administer the scheme, consider claims and award monetary compensation;
- The board, in determining claims, be satisfied that there was a ‘reasonable likelihood’ that the abuse occurred;
- The board should have regard to whether legal redress has been pursued;
- The process established in assessing claims be non-adversarial and informal; and
- Compensation be provided for individuals who have suffered physical, sexual or emotional abuse while residing in these institutions or out-of-home care settings.

To achieve these desired outcomes, one model Bravehearts recommends to the Royal Commission is the Residential Institutions Redress Board established in Ireland, with recognition of the challenges the Irish approach faced.

In response to revelations of sexual assault and abuse in orphanages, industrial schools and other institutions in Ireland, the Compensation Advisory Committee made recommendations to the Irish Government on the structure of a redress scheme. As a result in 2002 the Residential Institutions Redress Board was established with its functions and powers provided for under the *Residential Institutions Redress Act 2002* (Mathews, 2004).

As a result of an agreement between the Irish Ministers for Education and Finance and the Conference of Religious in Ireland (representing 18 Religious Orders) a fund was established on the basis that the Orders would donate cash, property, and counselling services to the fund. In exchange, the State agreed to indemnify the Orders against civil actions brought against them by survivors during the life of the proposed redress scheme. It has been criticised as a major mistake as insurers should have been relied on instead of the State in line with other jurisdictions (UK).\(^1\)

The Board administered the redress scheme to provide an alternate method of providing redress to those children who were sexually assaulted or abused while resident in one or more (scheduled) Irish Institutions.

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A review process was available for applicants. An applicant had to establish four matters to the satisfaction of the Board in order to qualify for an award:

- His or her identity;
- His or her residence during childhood in a scheduled institution;
- That he or she was sexually assaulted or abused while resident and suffered injury, and
- The injury is consistent with any sexual assault or abuse that is alleged to have occurred while a resident.²

Under this Scheme redress was awarded through a staged process. First, the Board assessed the weight to be attached to the different elements that go to make up the experiences of victims according to the following table (from 1-25). The Board then, by reference to the medical evidence, assessed on a scale of 1 - 30 the severity of the physical and/or psychiatric illness. It then performed the same task with regard to the psycho-social sequelae of the sexual assault or abuse. Finally, on a scale of 1-15 it assessed the loss of opportunity suffered by the applicant. No redress was payable for loss of earnings. It is noted that for many victims of child sexual assault loss of income may be a significant factor and therefore in some examples there may be need to factor an additional payment to compensate for this.

<table>
<thead>
<tr>
<th>Constitutive elements of redress</th>
<th>Severity of abuse</th>
<th>Severity of injury resulting from abuse</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Weighting</td>
<td>1-25</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1-30</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1-30</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1-15</td>
</tr>
</tbody>
</table>

The Board then came up with an overall rating and used the following table to determine the band it fell into:

<table>
<thead>
<tr>
<th>Redress band</th>
<th>Total weighting for severity of abuse and injury/effects of abuse</th>
<th>Award payable by way of redress</th>
</tr>
</thead>
<tbody>
<tr>
<td>V</td>
<td>70 OR MORE</td>
<td>€200,000 - €300,000</td>
</tr>
<tr>
<td>IV</td>
<td>55-69</td>
<td>€150,000 - €200,000</td>
</tr>
<tr>
<td>III</td>
<td>40 – 54</td>
<td>€100,000 - €150,000</td>
</tr>
<tr>
<td>II</td>
<td>25-39</td>
<td>€50,000-€100,000</td>
</tr>
<tr>
<td>I</td>
<td>LESS THAN 25</td>
<td>Up to €50,000</td>
</tr>
</tbody>
</table>

Under the Irish Scheme, additional redress could be provided in exceptional circumstances on the principle of aggravated damages to the maximum of an additional 20% in circumstances where the sexual assault or abuse was “so oppressive or outrageous that an award based solely on the constitutive elements of redress does not represent an award which is fair and reasonable having regard to the unique circumstances of the applicant”. This additional award may serve to compensate some of the more significant cases for the inevitable impact the sexual assault and associated trauma has had on their ability to maintain stable employment in the workforce.

The Board could also include an additional award in respect of the reasonable costs of medical treatment which the applicant will receive in the future, but such award could not exceed 10% of the redress award.

The Board ceased its operations in 2012 and in its place a ‘Statutory Fund’ was introduced in 2013 made up from the contributions from religious congregations for those who were offered awards from the Board or who received awards through court actions and who would otherwise have received awards from the Board.³

The Residential Institutions Statutory Fund Board was officially established on 27th March 2013 under the service name of Caranua. Caranua began accepting applications on the January 6th 2014.⁴

The support provided includes a range of approved services, including health and personal development and social services, education and housing services, but not monetary compensation.⁵

The application process consists of filling out an online form and then being allocated a case worker who then further assists the applicant to fill out the next stage of forms. The forms are submitted by post or online and a decision is made. Caranua will either pay a service provider or the applicant directly. The applicant is responsible for submitting the receipts if they are paid directly.⁶

There is no limit to the number of services one person can apply for; however, funding is limited in line with recommendations by public bodies.

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?
As outlined above under Question 4 Bravehearts position is that there should be a national redress scheme in line with Recommendation 6 made in the Forgotten Australians report (2004).

³ Irish Survivors in Britain: [http://www.irishsurvivorsinbritain.org/government-information-sites/](http://www.irishsurvivorsinbritain.org/government-information-sites/)
⁴ Caranua: [http://www.caranua.ie/make-an-application/](http://www.caranua.ie/make-an-application/)
⁵ Irish Survivors in Britain: [http://www.irishsurvivorsinbritain.org/government-information-sites/](http://www.irishsurvivorsinbritain.org/government-information-sites/)
However, if this recommendation is not taken up, and redress schemes are run through individual institutions, it is absolutely a minimum requirement that the decision-making in relation to claims is independent of the institution.

6. Should establishing or participating in redress schemes be optional or mandatory for institutions?
Bravehearts position is that it should be mandatory for institutions to participate in redress. Participation should be proportional and we note that there may be some limitations if an institution is no longer in existence.

As outlined under Question 8 below, a national redress scheme should be proportionally funded though Commonwealth and State Governments, as well as Churches and institutions. In creating such a scheme, contributions should be assessed with respect to liability and responsibility and ability to pay and funds available.

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?
Seeking redress or compensation through a redress scheme absolutely must be optional for survivors. Survivors should be provided with a choice of avenues available to them. One of the fundamental current issues is that most victims are not aware or made aware of the avenues for redress or compensation and are therefore more often than not, not empowered to make informed decisions.

Choices for survivor should include:
- National Redress Scheme or
- Civil litigation

Whichever option a survivor chooses, there must be adequate legal and emotional support provided.

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?
As previously discussed, a national redress scheme should be proportionally funded though Commonwealth and State Governments, as well as Churches and institutions. In creating such a scheme, contributions should be assessed with respect to liability and responsibility and ability to pay and funds available.

Consideration should also be given to a 10% additional contribution or other such suitable determined figure to fund redress for survivors where an institution and its governing body is no longer in existence.
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?

It is critical that any redress scheme established must be calculated with reference to common law damages awards that could be obtained via civil litigation. History of statutory schemes or internally run compensatory schemes such as Towards Healing that serve to cap or limit damages for victims, have proved inadequate for many victims.

The advantage of running compensation via a Redress scheme would be the hope that the level of trauma is reduced for the victim, there is greater transparency and independence in decision making, the timeframes are confined and there is greater access to justice for all victims who have previously been dissuaded by legal costs involved in pursuing a civil case.

Many of the case studies examined by the Royal Commission to date have shown that often the legal costs involved in defending civil claims has far often exceeded the common law damages payable in the multiples, so there can also be seen to be advantages to the Institutions themselves to fund a Redress Scheme that could circumvent these costs however still ensure appropriate and fair payments are received by victims.

Many of Bravehearts’ clients have expressed that the most important aspects of redress for them is the recognition of the harm done to them, sufficient financial compensation and access to therapeutic services, of the survivor’s choice.

Financial compensation is more often than not the best form of redress. It empowers the survivor and provides them with a means to improve their life and wellbeing at a pace and through avenues that are relevant to their needs.

Calculating compensation levels is a difficult process though and there are a number of issues that must be considered in determining individual redress for survivors. Key is the understanding that no one act of sexual assault is the same and the impact of any act of sexual assault on any given survivor varies greatly.

A number of approaches, and the advantages and disadvantages of each considered:

- **Weighted Assessment**: Bravehearts recommendation is a weighted assessment approach to assessing compensation. Outlined under our response to Question 4, the Irish Scheme is an example of weighted assessment for claims. On the basis of the medical and other evidence available to it, the Board assesses claims with reference to the severity of (1) the sexual assault or abuse suffered, (2) physical and mental injuries, (3) the emotional and social effects of the injuries, and (4) loss of employment and other opportunities. The overall rating scale is then used to determine which rating band the claim falls into and provides a minimum and maximum award. This approach would also serve to provide some guidance as to the relevant contributions required.
from each Institution in order to establish a proportional contribution to a National Redress fund.

- **Scale Systems**: the Queensland *Civil Liability Act 2003*, provides a scale used to calculate what level of compensation should to be awarded to a claimant. The *Civil Liability Act 2003* Regulations includes a table which sets out a range of injuries. Each injury has an Injury Scale Value (ISV) range. Each injury type also has a set of criteria which indicates at what level the injury should be assessed at within the allocated range, so the appropriate ISV rating for the injury can be determined. Once the ISV is ascertained, then that ISV number accords to a monetary amount on the ISV Scale. The idea of the scale is to rate the seriousness of the injury between 0 and 100. Issues with the compensation scale approach is the lack of flexibility and allowance for objective assessment on individual claims.

- **Set Maximum Amounts**: An example of set maximum amounts is the financial assistance provided under Queensland’s *Victims of Crime Assistance Act 2009*, which sets maximum amounts by victim category:
  - Primary victims (s39) can be granted assistance up to the value of $75,000, as well as $500 for legal costs incurred by the victim in applying for assistance if the application is successful.
  - Secondary parent victims (s42), may be granted assistance up to the value of $50,000 (a combined total of $100,000 may be granted to the parents), in addition to $500 for legal costs incurred by each parent in applying for assistance is available if the application is successful.
  - Witness secondary victims (s45 and s46) to a more serious act of violence may be granted up to the value of $50,000, as well as $500 for legal costs incurred by each witness in applying for assistance is available if the application is successful. In addition, a witness secondary victim to a less serious act of violence may be granted up to the value of $10,000 for counselling and medical expenses; and
  - Related victims (s49) may be granted assistance of up to the value of $50,000. Where there are two or more related victims a pool of assistance up to the value of $100,000 is available. In addition $500 for legal costs incurred by each witness in applying for assistance is available if the application is successful.

This Scheme also includes capacity for interim payments (of up to $6,000) for immediate expenses such as counselling, crime scene clean up and security. Special assistance is also available to primary victims in a lump sum payment (between $130 and $10,000 and taken from within the total value of assistance available to a primary victim)

In addition, whichever assessment approach is adopted, it is essential that there be flexibility for consideration of exceptional or individual needs or circumstances. The Irish Redress Scheme does this by allowing for: (1) additional redress, where the Board may make an additional payment not exceeding 20% of the normal redress award where is is deemed appropriate to do so; (2) medical expenses, incurred in relation to past, current
or potential medical or psychiatric treatment for the injuries resulting from the sexual assault or abuse experienced; and (3) the Board may also provide recompense for reasonable costs or expenses, including legal fees, incurred in making an application for redress.

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? Bravehearts notes that in the Irish scheme, an applicant had to establish four matters to the satisfaction of the Board in order to qualify for an award:

- His or her identity;
- His or her residence during childhood in a scheduled institution;
- That he or she was sexually assaulted or abused while a resident and suffered injury, and
- The injury is consistent with any sexual assault or abuse that is alleged to have occurred while a resident.⁷

Bravehearts would additionally recommend that the determination of claims under a national redress scheme could establish a lower burden of proof than required in civil proceedings. For example, as recommended in the Forgotten Australians report (2004), determination of claims should be based in the ‘reasonable likelihood’ that the harm occurred. Similar to the financial assistance scheme established under the Victims of Crime Assistance Act 2009 in Queensland, assessment could be based on a psychological, counselling or medical report.

Examples of documents that may be used to assess claims could be:

- Medical records
- Mental health records, including psychology or counselling reports
- Records of time in care, including formal and informal records
- Copies of any police statements or child protection reports.

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?

Survivors need to have access to independent legal advice and emotional/therapeutic support throughout the process.

One of the advantages of an independent national redress scheme would be a reduction in the level of legal support needed. However, Bravehearts believes that under such a scheme, capped legal fees should be provided for.

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In addition, survivors should have no limitation to access of counselling support throughout the process.

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?
   It has been clear in a number of the public hearings conducted to date, that compensation paid out under many of these internal processes has been paltry and inadequate in terms of the loss and damage suffered by survivors of child sexual assault.

   Acknowledging this, Bravehearts’ position is that any financial compensation already received should be taken into consideration but should not be a barrier to making a further claim under any new redress scheme.
Common Law Damages

In response to question 2 Bravehearts considered that any National Redress Scheme must be founded upon the principal of ensuring common law damages apply to the establishment of any weighted scale or means of calculating and assessing appropriate payments of damages. A National Redress scheme should not be established in anyway to limit or cap damages otherwise available to victims of child sexual assault as some other statutory schemes have served to do in the past.

This section provides a summary of case law in Australian jurisdictions concerning the award of common law general damages for injuries resulting from sexual assault. It will also briefly consider the legislation which seeks to limit such awards in each jurisdiction. It is worth noting at the outset that there are surprisingly few Australian cases relating to the assessment of damages for civil assault. There also appears to be some divergence between jurisdictions in terms of the causes of action brought in relation to such conduct, as well as the amount of damages awarded.

Furthermore, the existence of different criminal compensation schemes appears to serve to reduce the number of common law cases brought in some jurisdictions in relation to sexual assault.

In terms of redress schemes, Bravehearts argues that given the limitations imposed by the various State legislation in force, it is important that any redress scheme or scale of payment devised makes reference to the common law damages claimants have received not the minimum statutory requirements.

Comparison of Australian Jurisdictions

Queensland

Statutory limitations

The Civil Liability Act 2003 (Qld) limits the award of general damages for injuries arising after 1 December 2002.

Pursuant to section 62 of the Act the court must calculate general damages by reference to the general damages calculation provisions set out in Schedule 6A of the Civil Liability Regulation 2003 (Qld).

The calculations in Schedule 6A are based on the injury scale value (ISV), determined by the court with reference to:

- the ISV rules set out in Section 6 and Schedules 3 to 6 of the Regulation; and
- the award of damages in previous proceedings.

The court may assesses an injury scale value to be more or less than any injury scale value prescribed for or attributed to similar particular injuries under

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8 As noted by Harrison AJ in “AM” v “KW” [2005] NSWSC 876, [50].
subsection (1)(c), however the court must justify the assessment and state the factors on which it is based.

Schedule 5 and 6 of the Regulations set out the ISVs for psychiatric impairments.

**Case examples of awards of damages**

**P v R (2010) QSC 139**
The plaintiff claimed damages for personal injuries resulting from sexual assaults committed on her by the defendant when she was a child.

This did not fall under the Civil Liability Act 2003 (because the injury had not been incurred after 1 December 2002).

Plaintiff was awarded $80,000 in general damages and $10,000 in interest. The plaintiff was awarded damages of $439,937.04 in total.

**K v G (2010) QSC 13**
The plaintiff claimed damages for personal injuries she has suffered as a consequence of being sexually assaulted by the defendant. The plaintiff developed post traumatic stress disorder and a borderline personality disorder as a result.

Daubney J assessed the plaintiff’s ISV as being 45 and accordingly awarded general damages of $80,900.

Total damages of $629,855 were awarded.

**Bird v Bool & Anor (Queensland Supreme Court, 16 October 1997, Derrington J)**
The plaintiff sought damages for personal injury sustained through the prolonged sexual assault she was subjected to by her stepfather over a period of five years from when she was 11 years of age. The actions of the defendant had a severe psychological impact on the plaintiff who suffered post traumatic stress disorder as a result.

Derrington J considered that, in light of the circumstances, the award of general damages should be substantial. He awarded $40,000 in general damages, with total damages in the sum of $69,750.

**New South Wales**

**Statutory limitations**
The *Civil Liability Act 2002 (NSW)* will not apply to civil liability of a person and awards of damages in relation to an intentional act ‘that is sexual assault or other sexual misconduct committed by the person’. This may apply, however, to actions for negligence against organisations in relation to the occurrence of such assaults.

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9 *Civil Liability Act 2002 (NSW), s 3B(1).*
Section 16(2) of the Civil Liability Act 2002 (NSW) provides that the maximum that can be awarded for non-economic loss is $350,000, but that this is to be awarded only in the most extreme case.

Under s 16(1) damages will be awarded for non-economic loss only where the severity of the non-economic loss is considered to be ‘at least 15% of a most extreme case’. The method for calculating damages for non-economic loss and the table to be referred to is set out in the section.

Case examples of awards of damages

*XY v Featherstone* [2010] NSWSC 1366
The plaintiff was a victim of child sexual assault over a five year period whilst he was a ward of the state. The plaintiff suffered post-traumatic stress disorder as a result and was severely inhibited in his capacity to find employment. This also impacted on his relationships later in life.

McCallum J determined that an award of general damages at the high end of the range was warranted. His honour awarded $350,000 in general and aggravated damages, with the total award being $2,963,412.

*Mccrae v Boy Scout Association (NSW Branch)* [2007] NSWDC 196
The plaintiff was sexually assaulted over a period of several years by his scoutmaster. The plaintiff suffered a severe psychological condition which interfered with his education and adversely impacted upon his entry into the workforce and earning capacity.

Proceedings were brought against the Boy Scout Association (first defendant) for negligence and the scoutmaster (second defendant) for assault.

Damages against the first defendant: Johnstone DCJ determined that the plaintiff’s non-economic loss as 40% of the most extreme case, being $171,000. A total of $501,941 was awarded.

Damages against the second defendant: Johnstone DCJ calculated general damages against the second defendant without regard to the limitations under the CLA. His Honour, considering common law principles, awarded $300,000 in general damages. A total of $766,941 was awarded.

*“AM” v “KW”* [2005] NSWSC 876
The plaintiff was subjected to numerous sexual assaults perpetrated on him by the defendant, his then babysitter.
These assaults occurred over a four year period when the plaintiff was between six and ten years of age.
The plaintiff developed psychological and psychiatric problems as a result, the most serious being major depression.
Harrison AJ assessed general damages as $246,000 including interest, making a total award of $444,745.09.

Victoria

Statutory limitations
The personal injury provisions under the *Wrongs Act 1958* (Vic) will not apply to an award of damages where the fault concerned is an intentional act ‘that is sexual assault or other sexual misconduct’.¹⁰ These provisions may, arguably, still apply to actions in negligence against organisations in relation to the occurrence of such acts.

Section 28G of the *Wrongs Act 1958* (Vic) provides that the maximum amount of damages that may be awarded to a claimant for non-economic loss is $371,380. Section 28H makes provision for the indexation of this amount.

Section 28LE provides that damages for non-economic loss will not be recoverable unless the person has suffered a ‘significant injury’. The meaning of ‘significant injury’ is defined under section 28LF with reference to whether the injury is physical or psychological.

Case examples of awards of damages

*AM v KB* [2007] VSC 429
The plaintiff was sexually assaulted on three occasions between 1984 and 199 by the defendant, who was a neighbour and family friend. The plaintiff suffered psychological and emotional disturbance as a result.

The plaintiff brought proceedings against the defendant for sexual assault claiming general damages for past and future pain, suffering and loss of enjoyment of life.

In determining the amount of general damages to be awarded, Kaye J noted that the amount must adequately cater for the substantial diminution of the plaintiff’s quality of life. On this basis $65,000 in general damages was awarded, with total damages amounting to $79,500.

*SB v State of New South Wales* [2004] VSC 514
The plaintiff was a ward of the State who was placed in the care of her natural father. Following this decision, she was subjected to non-consensual sexual relations by her father over a period of 10 years.

The plaintiff brought proceedings against the State for damages for negligence and breach of fiduciary duty on the basis of the psychiatric injuries she suffered.

Redlich J, whilst finding that the claim for equitable compensation for breach of fiduciary duty failed, awarded the plaintiff general damages of $195,000 for the negligence of the State. Total damages of $281,461 were awarded.

¹⁰ *Wrongs Act 1958* (Vic), 28C.
**Hook v Hook [2002] VSC 584**

The plaintiff was subjected to repeated sexual assaults and exposed to explicit sexual acts by the defendant, her father, between 1976 and 1989. The plaintiff experienced emotional and psychological pain and suffering as a result.

The plaintiff brought proceedings seeking damages and compensation for assault and negligence.

The court awarded general damages of $150,000, with total damages of $620,000 being awarded.

**South Australia**

**Statutory limitations**

The *Civil Liability Act 1936* (SA) section 51 provides that the provisions relating to damages for personal injury will apply in the following circumstances, amongst others:

(a) where damages are claimed for personal injury arising from—...

(ii) an accident caused wholly or in part by—

(A) negligence; or

(B) some other unintentional tort on the part of a person other than the injured person; or

(C) a breach of a contractual duty of care...

On this basis, personal injury claims against the perpetrators of sexual assault are unlikely to fall within the ambit of these provisions and these provisions will only really apply to allegations of negligence.

In circumstances where the Act does apply, it seeks to limit the amount of general damages which may be awarded, by proving that damages for non-economic loss may only be awarded where:

- the injured person’s ability to lead a normal life has been significantly impaired for a period of at least 7 days as a result of the injury; or

- medical expenses have been reasonably incurred in connection with the injury to at least the minimum prescribed amount (as defined in s 3).\(^{11}\)

Section 52(2) provides that non-economic loss for a personal injury which does not arise from a motor vehicle accident is to be assessed according to a scale running from 0–60.

**Case example/s of awards of damages**

**CGS v CS [2012] SADC 128**

The plaintiff brought an action against the defendant for trespass to the person following his indecent assault on her 14 years prior, when she was 8 years of age. As a result the plaintiff suffered psychological and psychiatric injury which

\(^{11}\) *Civil Liability Act 1936* (SA), s 52(1).
impacted upon her education, employment prospects and her ability to interact with others.

Past non-economic loss: Stretton J provided an allowance for the assault itself, together with the subsequent trauma, upset and consequent loss of the amenities and enjoyment of life it also caused. His honour assessed her past non-economic loss at $50,000 (plus interest of $12,500).

Future non-economic loss: His honour assessed the plaintiff’s entitlement to damages for future non-economic loss as $75,000.

The plaintiff was awarded total damages in the sum of $317,500.

X v the State of South Australia (No 2) [2005] SASC 150

The plaintiff brought an action against the parole board for negligence in allowing a notorious paedophile to remain in the community, during which time the paedophile assaulted the plaintiff.

Whilst a duty of care could not be established in the circumstances, Anderson J considered that he would have assessed damages for non-economic loss in the sum of $120,000.

Western Australia

Statutory limitations

The provisions in the Civil Liability Act 2002 (WA) relating to the assessment of damages for personal injury do not apply in relation to personal injury caused by an intentional act which is a sexual offence or unlawful sexual conduct.\(^{12}\) As above, it is unclear whether this would apply to actions in negligence in relation to such conduct.

When the Act does apply, it restricts the damages which may be awarded for non-pecuniary loss by providing that no award will be made if a threshold amount of $19,000 is not reached. The amount to be awarded is assessed on a scale.

The method for calculating any award for non-pecuniary loss is set out in the Part 2, Division 2 of the Act. In determining the appropriate damages to be awarded for non-pecuniary loss, the court may have regard to earlier decisions of that court or other courts.\(^{13}\)

Case example/s of awards of damages

There appears to be very little Western Australian case law concerning common law claims for general damages. Research in this area has not revealed any cases

\(^{12}\) Civil Liability Act 2002 (WA), 3A(1).

\(^{13}\) Civil Liability Act 2002 (WA), s 10A
relating to common law claims for general damages arising from sexual assault or similar acts.

Instead, it appears that the majority of claims are for compensation under the *Criminal Injuries (Compensation) Act*. This legislation provides for limits as to the amount of compensation awardable for each isolated offence. In considering the award of damages under this legislation the Court will apply the ordinary principles of assessment of damages, subject to the maximum amount provided by the legislation. ¹⁴

**Tasmania**

**Statutory limitations**

The personal injury provisions under the *Civil Liability Act 2002* (Tas) will not apply to civil liability in respect of an intentional act award of damages ‘where the fault concerned is an intentional act ‘that is sexual assault or other sexual misconduct’. ¹⁵ It is again unclear whether this will apply to claims for negligence against organisations in relation to such acts.

Section 27 of the *Civil Liability Act 2002* (Tas) provides for the restriction on awards of damages for non-economic loss in accordance with a prescribed formula. In determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts, including courts of other Australian jurisdictions, for the purpose of establishing the appropriate award in the proceedings. ¹⁶

**Case example/s of awards of damages**

*Horne v Wilson (No 2)* (Unreported Judgment, Supreme Court of Tasmania, 30 April 1998, Underwood J)

The plaintiff brought a claim in negligence against the defendant for the systemic and regular sexual assault he subjected her to over a seven year period. The case concerned the allegation that the defendant had breached the duty of care he owed her on the basis of their familial relationship and proximity. The plaintiff suffered loss, psychological injury and damage as a result.

Underwood J awarded $15,000 in general damages. In assessing this consideration was given to the hopeful prognosis of the plaintiff, the extent of her injury and the fact that she had only suffered injury since approximately 1995. This figure was also reached by reference to the Queensland decision of *Bird v Bool & Anor* (discussed above).

The plaintiff was awarded a total of $55,000 in general and exemplary damages.

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¹⁴ *JARD v DGS* [2001] WADC 238, [7].
¹⁵ *Civil Liability Act 2002* (Tas), s 38(1)(a).
¹⁶ *Civil Liability Act 2002* (Tas), s 28.
Northern Territory

Statutory limitations
Section 27 of the Personal Injuries (Liabilities and Damages) Act (NT) provides that the maximum amount of damages awardable for non-economic loss is to be declared by the Minister. The latest declaration provides that, from 1 October 2013, this maximum amount is $571,000. This applies in relation to all civil claims for damages for personal injuries, other than those excluded by the Act.\(^{17}\)

Case example of awards of damages
Research conducted has only revealed two cases which relate to the award of general common law damages for sexual assault or sexual conduct, however these did not relate to child sexual assault offences and therefore the relevant awards have not been considered. There are, however, a number of cases concerning the award of compensation for sexual assault under criminal compensation schemes.

Australian Capital Territory

Statutory limitations
The Civil Law (Wrongs) Act 2002 (ACT) does not place a limit on the amount of damages recoverable for non-economic loss and simply provides that the court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceeding.\(^{18}\) This applies to all claims for damages for personal injury.\(^{19}\)

Case example/s of awards of damages
The ACT does not appear to have much case law in this area for relevant consideration of child sexual assault common law damages.

Summary
On the basis of the above summaries of the different Australian jurisdictions, it appears that New South Wales courts have generally made the greatest awards of common law general damages in cases concerning sexual assault. It is also clear that the relevant common law awards vary significantly from state to state and again support our proposition that there needs to be a National approach to this issue of compensation for victims of child sexual assault. It is also clear that when reviewing the common law awards paid out to victims, the various statutory schemes that have in the past limited compensation to $20,000 to $75,000 or less has served to compensate victims well below what they may have been otherwise entitled to at common law.

It is important to note, this summary is based on the cases researched and reviewed. The severity of the conduct in each case can obviously vary substantially and this has an impact on the amount of damages awarded.

\(^{17}\) Personal Injuries (Liabilities and Damages) Act (NT), s 4.
\(^{18}\) Civil Law (Wrongs) Act 2002 (ACT), s 99.
\(^{19}\) Civil Law (Wrongs) Act 2002 (ACT), s 93.
References


