

Issues Paper 6 - Redress Schemes

(To be read in conjunction with RCT's submission in response to Issues Paper 5-Civil Litigation)

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?*

Redress schemes are generally established where there is recognition that a group of claimants deserve compensation in circumstances where other available legal processes are unlikely to deliver just compensation and/or where the alternative legal processes are likely to be too slow, cumbersome and/or expensive.

In cases of historical sexual abuse, there are good reasons for having the option of a redress scheme available to victims, in addition to their potential rights to seek compensation via civil litigation.

As discussed in our previous submission, there are a number of barriers which face victims of historical sexual abuse should they wish to litigate. These barriers have meant that victims have either chosen not to pursue claims for compensation or where they have chosen to litigate, the trauma that they have suffered often outweighs the "value" of the financial outcome. The Royal Commission's case study in the matter of John Ellis highlights the trauma involved in this type of litigation.

An independent redress scheme would offer victims choice as to whether to confront the difficulties involved in issuing proceedings versus the option of pursuing a claim via an alternative therapeutic justice model which would be specifically designed to minimize the trauma faced by victims of abuse.

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?*

Features of redress schemes that are important for claimants include:

- Not having to give evidence as would be required by a court of law. (see previous submission)
- A redress scheme is likely to deliver compensation more quickly than could be achieved in a legal process.
- Costs involved in making and pursuing a redress claim are likely to be significantly less than costs incurred in pursuing litigation (see previous submission). It is certainly our experience that costs involved in pursuing redress claims in WA, Queensland, Tasmania and under the Defence Abuse Response Taskforce (DART) scheme were significantly lower than the costs involved in claims where proceedings are issued. It follows that costs would also be minimised for institutions.
- A redress scheme can incorporate therapeutic justice principles so that the claimant receives more than just a cheque at the end of the process. For example, the DART process provides that in addition to the availability of a reparations payment, claimants have the option of counselling, restorative engagement and/or referral to police.

- Establishing the truth is also important to victims who need to understand how their abuse was allowed to occur. Currently under our adversarial arrangements, institutions are scared to provide information, acknowledge wrongdoing and/or to cooperate with a Plaintiff to establish the truth. A redress scheme which was non adversarial would allow an institution to engage in a more open and positive way which would also minimise distress to claimants. As part of a therapeutic justice model, guidelines should be established which require an institution to provide all relevant information regarding systemic abuse in the institution generally and with respect to a named perpetrator ie what the institution knew about the alleged perpetrator and when. This information is important not just to assist in a victim's healing but may also be relevant to the assessment of compensation.
- Guidelines for the awarding of compensation should be established which would provide some degree of certainty for both claimants and institutions. For example the Irish Residential Redress Board established "bands" of compensation as did the WA redress scheme. Further the DART allowed for an additional band of compensation where a claimant could show that their complaint had been mishandled by the Defence force. We say that additional compensation should be available where it can be shown that an institution failed to act when it became aware of allegations of abuse or where it can be shown that there was serious systemic abuse.
- Compensation of a level that is adequate to compensate victims for the severity of the abuse suffered and to acknowledge the effect of the abuse on them.
- Payments should be exempted under the Health and Other Services Compensation Act 1995 ie claimants should not be required to refund to Medicare out of their settlement sum, the cost of services claimed for treatment of their compensable condition. (see previous 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?*

Group benefits should not be available solely with respect to a particular class of claimant. It is important that victims are all treated equally by the scheme. However, in addition to financial forms of redress, there is scope to make available a range of benefits which all claimants can access such as counseling, access to life skills programs, assistance in locating records, family etc. "Open Place" which has been established by the Victorian Government to assist former wards abused in care offers these types of services. Similarly organizations such as CLAN or In Good Faith and Associates offer a range of support services to their members and could be used as a model for the type of services that can be provided through a redress scheme.

Financial compensation should be characterized as pain and suffering rather than economic loss so as to best avoid affecting any Centrelink benefits where claimants are in receipt of these benefits (other than those subject to assets testing). In addition, in cases of child abuse it is very hard to predict what income earning capacity a claimant might have had if not for the abuse.

As stated above, claimants should have the option of counselling, restorative engagement and/or referral to police in addition to a reparation payment.

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?

It is important that a national scheme is established. Many of the institutions who would be involved in a redress scheme are national organizations such as the YMCA, Catholic Church and others. We know that perpetrators were moved not just within a state but nationally and internationally. We also know that some organizations handle abuse claims differently depending on where the claim is made. For example, the Salvation Army has handled claims differently depending on whether the claims were being handled by the Eastern Headquarters as opposed to the Southern Headquarters. Claimants should be able to expect equal treatment regardless of where their abuse occurred. Further, in the case of state wards, a fair proportion of claimants with whom we have dealt have suffered abuse in more than one state. Pursuing separate claims under different jurisdictions can be problematic.

Again, because it is important that all victims are treated equally, a national scheme should include all institutions involved in the care of children including state governments and the commonwealth government which was involved in the child migrant scheme. All institutions/government organizations should contribute to the scheme proportionally with respect to their liability.

We recommend that a national reparations tribunal be established which would administer the scheme and have power to order an institution to pay an amount of compensation pursuant to an order of the tribunal. The tribunal should be involved in determining contribution if more than one institution is responsible for the abuse.

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?*

The independence of any redress scheme is vital. Schemes which have been administered by institutions such as the Melbourne Response and Towards Healing have been the subject of significant complaint largely because the institution which is allegedly at fault determines what compensation it should pay. By way of analogy, a scheme which was run by institutions would be like asking James Hardie to determine what level of compensation it should pay in asbestos matters. The only way to restore trust in victims is to establish a completely independent redress board .

Appeal rights are important in any compensation scheme. One option for a redress scheme is that it could be overseen by the Administrative Appeals Tribunal (AAT) which currently has oversight of compensation claims under the Safety Rehabilitation and Compensation Act 1988, the Seafarer's Rehabilitation and Compensation Act 1992, National Disability Insurance Scheme Act 2012 and the Social Security Act 1991. Whilst it would obviously be necessary to expand the jurisdiction of the AAT and increase its resources, the infrastructure and relevant legislation is already in place to allow the establishment and oversight of a national scheme by a body which already has the expertise to undertake such a task.

If this proposal is not considered feasible, international models should be looked at for guidance such as the Irish Residential Redress Scheme. For example, an independent redress board was established by legislation in Ireland. The Board had power to administer the scheme and make awards of compensation. The initial claim was assessed administratively. Claimants had the right to appeal a decision and have a full hearing.

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

Participation in a redress scheme should be mandatory for all institutions. We repeat our comments in response to question 5 above, regarding the difficulties experienced by claimants dealing with processes which are controlled by institutions and the importance of victims being treated equally. Participation in the scheme could commence once the first claim involving a particular institution was lodged.

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?*

Claimants should always have the option of choosing civil litigation if they wish. Whilst we have referred to some of the difficulties faced by claimants who have been forced to pursue civil litigation, it is important that civil courts remain available as a vehicle for justice where claimants believe that they have legal claims with good prospects of success and wish to litigate their matter in a public forum. In this connection, more claimants are likely to opt for civil proceedings if the legal barriers discussed in our previous submission are removed. Further, litigation can still be a powerful weapon for individual justice and systemic change. In addition, successful damages claims will provide important precedents as to how damages are assessed in abuse cases and will help inform the decision making processes of those determining claims under a redress scheme.

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?*

A levy should be raised on participating institutions to provide for the administrative costs of the scheme and to establish a pool of funds which would be available to cover awards to claimants where an institution no longer exists or which could demonstrate that it had no capacity to pay. In addition, even where organizations no longer exist, there may be insurers who were on risk at the relevant time and these insurers should be called upon to contribute to a fund. Any shortfall regarding administration costs and/or the pool of funds to compensate claimants where organizations no longer exist or have no capacity to pay, should be made up by federal and state governments who would in any event be contributing to the levy as participating institutions. Legislation should be passed to require all organizations who care for children to ensure that there is appropriate insurance cover with respect to current claims.

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?*

Bands of compensation referred to above in response to question 2 could be developed which are in part based on an assessment of common law type damages. "Culpability" of

the institution could also be taken into account as in the DART scheme referred to above. Affordability for institutions should not be the sole criteria for determining rates of compensation but may be a practical consideration with respect to the long term viability of a redress scheme.

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?*

When a claim is made, institutions should be called upon to provide any documentation/information which is available to them with respect to allegations against particular perpetrators and guidelines should be established which require institutions to cooperate in full with the investigation and determination of a claim.

Further the Royal Commission itself has received a plethora of material relating to allegations of specific and/or systemic abuse. In addition, information has been provided to other inquiries such as the Victorian Parliamentary Inquiry into Organizational Responses to Child Abuse, the three Senate Reports into the Stolen Generation, Child Migrants and Forgotten Australians and to other inquiries referred to in our previous submission. In addition, state police services should be called upon to provide summaries of allegations regarding perpetrators who have been investigated for child abuse in institutional settings.

This information should be collated and digitized and placed on a data base which should be made available to the reparations tribunal. This body of information would form a significant resource which could provide “corroboration” which would otherwise not be available to victims. In this connection, it is important to victims to understand that they may not have been the only victims of a particular perpetrator. Having access to this body of information would also mean that a reparations tribunal would not be solely reliant on institutions “doing the right thing” and willingly providing potentially damaging information.

On this point, serious penalties should apply if institutions are found to have failed to provide relevant information that was available to them. Further this body of evidence would most likely ensure that institutions would be loathe to fail to disclose relevant material and claimants would be wary of putting forward bogus claims.

Where there is no corroborative evidence, allegations can only be “verified” in the usual way ie a sworn statement, medical reports and if necessary vive voce evidence by a claimant which would allow experienced tribunal members to form a view as to the truth of the allegations.

One of the advantages of a redress scheme would be to allow a different standard of proof. DART employed a test of ‘plausibility’ which was stated to mean ‘having the appearance of reasonable’ on the basis of all material and/or information available. It was distinguished from the higher test of ‘having the appearance of truth’ and also distinguished from the lower tests of being ‘seemingly worthy of approval or acceptance’ and ‘not fanciful’. A test of this nature would recognize that in some circumstances institutions have not retained the necessary materials which would allow a claimant to ‘prove’ his or her allegations.

In other words, many institutions such as those involved in out of home care of children, have destroyed or failed to maintain records which if available may have been used to prove a claimant’s allegations. These institutions should not be “rewarded” for their failures by being able to avoid paying compensation because no documentary evidence exists.

A non-compulsory option should be given to claimants to include their story in the above mentioned database upon making a claim to assist future claimants.

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?*

We refer to our comments in para 3 re counseling. It is important that claimants have the option of being legally represented. Even though institutions may choose not to pay lawyers to represent them in redress claims, as institutional respondents they will have access to expertise and appropriate representation/advice which they will be able to pay for. It is important that victims have the right to equal representation.

Further claims prepared and presented by lawyers will mean that resources required for the claims process will be minimized and claimants are less likely to be distressed by the claims process if they are legally represented.

Legal costs on successful claims were payable as part of the Irish scheme and it is important that some contribution towards costs is made available to successful claimants who choose to be legally represented.

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 is absolutely vital that any redress scheme that is established allows claimants who have already settled their claims to apply for a "top up". Many victims of abuse have come forward to tell their stories at some personal cost because they believe that change is vital in terms of how institutions deal with allegations of abuse.

Locking these victims out of any compensation scheme would not only be unjust but it would be rewarding institutions who in the past have used every technical legal defence and tactic to minimise their liabilities at the expense of their victims.

Locking past victims out would also create two classes of victim ie those who have had the benefit of being able to access redress through an independent scheme and those who had no choice but to go to an institution cap in hand begging for recognition from the very institution which had caused them grievous harm.

Conclusion:

Institutions are already paying very large amounts of money to victims of abuse in ad hoc or self managed processes or through litigated claims. These claims are resulting in significant cost to institutions, including state governments and potentially the federal government which is a defendant in a class action being brought by child migrants in New South Wales.

The costs of these claims are likely to rise, particularly if the legal barriers confronting victims of historical abuse are broken down or removed as a result of recommendations such as those found in the Victorian Parliamentary "Betrayal of Trust" report and hopefully recommendations handed down by the Royal Commission.

Further, institutions are being forced to review their compensation arrangements simply because of public pressure being brought to bear on them through the Royal Commission processes and generally as a result of adverse publicity. For example, the Christian Brothers have announced that they will be reviewing compensation payments that have been made in the past. Re-opening claims will come at a significant cost.

In addition, we are seeing an increase in the level of payments that are being achieved for victims, even in out of court settlements ie the “tariff” in these claims is rising and is likely to continue to do so because of the extent of the corroborative evidence which is now available to claimants and because of the public’s demand that institutions involved in the care of children deal fairly with victims of abuse.

For reasons previously outlined, whilst litigation must always remain an option for victims of abuse, there are very significant drawbacks for many claimants in historical abuse cases. Further, even if laws are changed which make it easier for victims of abuse to win their cases, thousand of victims who have already settled their cases on unfavourable terms will be locked out of any litigation process because they will have signed binding releases which bar them from taking further action.

Accordingly, a redress scheme should be established as an alternative to litigation for those claimants who either cannot or do not wish to issue legal proceedings and for those claimants who have had previous and arguably inadequate settlements.

Recommendation:

That a national reparations tribunal be established to manage a redress scheme which will provide compensation for victims of institutional abuse. The scheme should be funded by all relevant institutions including governments and any institution against whom a claim for compensation is lodged.

Relevant institutions should be levied to contribute to the costs of the administration of the scheme and to provide for a pool of funds to cover claims where an institution no longer exists or has no capacity to pay. State and federal governments should make up any shortfall.

Alternative 1.

An administrative body similar to Comcare (the federal agency which currently administers compensation claims for national employers and the commonwealth government) should be established to administer a redress scheme.

The claims process should commence with the filing of a claim form and accompanying material. Accompanying material should include:

- **Statement of the claimant**

- **Proof of identity**
- **Medical or psychological report**
- **Witness statements, where available**
- **Police statements, where available**
- **Other relevant records eg ward records, school reports, clinical notes etc**

A copy of the claim form and accompanying material should be provided to the relevant institution(s) who should be called upon to respond and in particular to provide any documentation/information relevant to the allegations including what the institution knew or knows about the alleged perpetrator and any action taken in response to this knowledge.

The claim should then be assessed by a claims officer taking into account the material provided by the claimant, the institutional response, material obtained from a search of the data base and having regard to “bands of compensation” as referred to above.

A determination should then issue advising of the amount of any reparation payment and appropriate ancillary services should be offered including counseling, restorative engagement (including pastoral meetings and letters of apology) possible referral to the police and a contribution towards the claimants legal costs, if a claimant has been legally represented through the claims process.

The relevant institution(s) should be required to pay to the claimant the amount of compensation determined by the claims officer. If more than one institution is involved, the claims officer should also determine contribution. If there has been a previous settlement or payment to the claimant, this will be offset against the further award of compensation.

If a claimant and/or institution is dissatisfied with the determination, an internal review can be requested and a reviewable decision will be made. The reconsideration process should be undertaken by designated review officers being someone other than the delegate who made the determination.

Claimants/institutions should have the right to lodge an application for review in the AAT and the usual AAT processes should apply (see Administrative Appeals Tribunal Act 1975).

Alternative 2

A redress scheme should be established modeled on the Irish Residential Institutions Redress Board. The Irish Redress Board was established under the Residential Institutions Redress Act 2002.

Claims Process:

- **Application form**
- **Proof of identity**
- **Written statements**
- **Medical reports**
- **Any other relevant documentation**

The Board has power to call upon institutions to provide relevant material.

An award of compensation will be assessed under the four following headings:

- **The severity of the abuse**
On the basis of medical and other evidence available to it the Board will assess the redress award with reference to the severity of 1. the abuse suffered, 2. physical and mental injuries, 3. the emotional and social effects of the injuries, and 4. loss of employment and other opportunities. (NB no redress is payable for loss of earnings but the loss of employment opportunities may be a factor in assessing the redress payment).
- **Additional Redress**
In exceptional cases the Board may make an additional award not exceeding 20% of the normal redress award where it is satisfied that it is appropriate to do so.
- **Medical Expenses**
The Board may make an award for reasonable medical and like expenses incurred in respect of past, present and future medical expenses for treatment of the injuries (physical and psychiatric) suffered by the claimant.
- **Other costs and expenses**
The Board may also make an award for any other costs and expenses reasonably incurred by the claimant in making the application for redress. This includes reasonable costs of legal representation for the making of the application and includes reasonable disbursements.

Once an application is reviewed by the Board's legal team, a completion letter is forwarded either confirming that no further evidence is required or containing notification that a hearing is required.

If a hearing is not required an offer of settlement may be made. If the offer is accepted no further proceedings are necessary. If an offer is rejected or if the

Board deems that a hearing is necessary the matter will be listed for a hearing before the Board. All hearings are private and legal expenses are covered by the Board on a successful outcome.

A hearing may also be held if:

- **The applicant indicates that he or she wishes to give oral evidence or wishes to call witnesses to give oral evidence on his or her behalf**
- **The Board requests that the applicant or a person who has given written evidence on behalf of the applicant is required to give oral evidence with respect to one or more matters arising from the application**
- **The Board considers it appropriate to hear oral evidence by any person**

A claimant not satisfied with an award following a hearing may apply to the Residential Institutions Redress Review Committee for a review of the Board's award. The Review Committee may uphold, increase or decrease the amount of the Board's award.

The relevant institution(s) should be required to pay to the claimant the amount of compensation which is awarded. If more than one institution is involved, the Board should also determine contribution. If there has been a previous settlement or payment to the claimant, this will be offset against the further award of compensation.

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