



# Anglican Church of Australia

## Royal Commission Working Group

### REDRESS SCHEMES SUBMISSION

This paper is submitted by the Royal Commission Working Group appointed by the Standing Committee of the General Synod of the Anglican Church of Australia to coordinate the Church's response to the Royal Commission. The submission responds to questions in **Issues Paper 6** entitled Redress Schemes issued by the Royal Commission into Institutional Responses to Child Sexual Abuse on 23 April 2014.

#### SUBMISSIONS

- 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?**

A number of dioceses comprising the Anglican Church of Australia have in place pastoral care and assistance schemes to respond to those who suffer child sexual abuse. In this submission we distinguish between 'redress schemes' and 'pastoral care and assistance schemes'. As we understand it, the concept of a redress scheme in the issues paper focuses on financial compensation. While the terms of pastoral care and assistance schemes vary, the common feature is that they are established on a relational basis to address the on-going needs of survivors of child sexual abuse to promote their healing, including social, emotional and spiritual dimensions, rather than merely providing them with monetary compensation.

In our experience, the advantages of such pastoral care and assistance schemes, particularly in comparison to the civil litigation process, include:

- (a) Survivors are responded to holistically in a wider pastoral context to meet physical, emotional, social, spiritual and financial needs necessary to bring about healing.
- (b) Care and assistance can be provided immediately, without having to wait for determination of a dispute.
- (c) Survivors are given the opportunity to tell their story to a senior officer of the institution.

- (d) The institution has the opportunity to declare that it accepts responsibility for the harm. Such responsibility could be legal and moral or moral such as where no legal responsibility attaches to the institution for the abuse.
- (e) The institution has the opportunity to offer a genuine apology by a senior officer of the institution.
- (f) While a settlement agreement concludes the legal aspects of the process between a survivor and the institution, it does not necessarily conclude the pastoral relationship. For example, ongoing counselling may be continued in appropriate cases.
- (g) The survivor has more control over the pace of the process to suit their own needs.
- (h) Survivors can participate with or without legal representation. If they are legally represented, the legal costs are usually borne by the institution.
- (i) The process is not adversarial.
- (j) There is often no limitation period to making a claim.
- (k) A lower threshold of proof is generally required. It is not necessary to prove all the elements of relevant legal causes of action.
- (l) The financial cost to survivors of engaging in a pastoral care and assistance scheme's process is lower than would be expended in court proceedings.
- (m) The process is generally more timely than pursuing civil litigation.

One disadvantage of a redress scheme may be the receipt of a lower quantum of monetary compensation than may be awarded in a successful claim for damages in civil litigation. We do not believe that there are any other disadvantages to a properly administered redress scheme such as the pastoral care and assistance schemes operated by the various dioceses of the Anglican Church of Australia.

**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?**

Speaking from the Church's experience of pastoral care and assistance schemes, we believe that redress schemes are likely to be effective if:

- (a) they take a holistic approach to meeting the survivor's needs;
- (b) they seek to operate on the basis of a personal, pastoral relationship between the survivor and the institution;
- (c) a senior officer of the institution (for example a diocesan bishop) hears the survivor's story at first hand, acknowledges the wrongdoing and harm suffered by the survivor, makes an apology and, where appropriate, provides reassurance that the causes of the survivor's hurt have been redressed so as to prevent harm occurring to others;
- (d) they operate pastorally rather than adversarially;

- (e) they offer financial assistance to meet demonstrated needs;
- (f) they take account of the needs and circumstances of the survivor at all stages and allow flexibility in the operation of the process to suit the needs of the survivor;
- (g) there is regular contact with and support for the survivor throughout the process;
- (h) the officers of the institution administering the scheme understand the outcomes of abuse and have experience in handling pastoral care and assistance schemes;
- (i) the process is administrative rather than litigious.

To the extent that a redress scheme is not holistic and pastoral and is more adversarial, then the redress scheme is less effective and more difficult for both survivors and institutions. For survivors, any difference between the quantum of financial compensation received under a redress scheme compared with damages which would be received in successful civil litigation in relation to the same events may make the redress scheme less effective. Effectiveness in this context depends on the survivor's needs and goals.

**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?**

Redress schemes should offer the forms of pastoral care and assistance described in sections 1 and 2 above.

The benefits of redress schemes should be available to anyone who has suffered harm in the relevant institution irrespective of circumstances which would exclude legal liability, for example, the expiry of a limitation period or the inability to prove on a legal standard of proof abuse for which the institution is legally liable.

Group benefits should not be available irrespective of whether each group member suffered harm, directly or indirectly, such as to all former residents of a residential institution where abuse was widespread. Subject to that qualification, there may be advantages in group claims, provided that each claimant is able to receive individualised care, support and assistance for their particular needs. Dealing with claimants as a group should not take away this individual focus.

**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 difficult to respond to the first question without knowing the features of a national redress scheme covering all institutions.

Advantages of a national scheme are that it is more likely there will be consistency in quantification of monetary compensation across the country and the same rules would apply to every survivor.

The goal of consistency is desirable, but achieving it is problematic. Consistency could be better achieved by adopting national minimum standards for all redress schemes.

A disadvantage with a national redress scheme is that it is unlikely to replicate all the features of pastoral care and assistance schemes that we have described above, particularly spiritual support and assistance. As outlined in our response to Question 1. above, pastoral care and assistance schemes have a relational basis and are directed to the needs of individuals for healing. They are not mere compensation schemes.

Another disadvantage of a centrally administered national redress scheme is that the redress claimants and the institutions may be at a distance from each other. The outcomes would be diminished if institutions are not able to engage pastorally with survivors. There is a possibility that survivors may feel dehumanised, treated as a number in an administrative process rather than a hurting individual. They would be no more than claimants.

A further disadvantage of a national scheme is that it may remove an important moral element from the process. It is right that institutions take direct responsibility for the abuse that has occurred and express that to the survivor. A purely compensatory scheme would provide no opportunity for the institution to do two things that are important for survivors, namely, to apologise and to provide reassurance (when it is proper to do so) that, so far as possible, steps have been taken to prevent further abuse in the institution..

However, if there is a national scheme, there is no reason why government institutions should be excluded.

If there is a national scheme it should not exclude institutional involvement. We envisage that financial compensation would be determined by the national scheme but the institution should still be able to look after the pastoral needs of the survivor. It would be a disadvantage of such an arrangement if the survivor has to engage with two separate processes and so could not receive a holistic response from either.

The issue of funding is very complex.

It is likely that the administration costs of a national scheme will be greater than the individual institution's administration costs. The financial capacity of institutions to contribute to the additional cost of a national scheme will vary greatly.

Institutions should pay for claims from their own resources. If, however, it is contemplated that institutions should all contribute to a central fund to pay for a national redress scheme, it would be difficult to devise a system of contributions which will be equitable amongst the contributing institutions.

Imposing a levy connected to insurance policies or the issue of licences to operate could be an option to fund future claims but it will be necessary to adjust contributions according to institutions' claims history. Funding historical claims under a national scheme by contributions from institutions is particularly difficult where an institution has ceased to exist or where the institution has insufficient assets or insurance to meet its liabilities, or no capacity to borrow or is unable to realise assets because they are held upon charitable trusts.

Even if an equitable funding solution is found, participating institutions which do not or cannot pay their share present another issue. It would be unfair to require other institutions which participate in a national redress scheme to contribute to redress for survivors of abuse occurring in defaulting institutions.

Having regard to the submissions about funding above, a coherent national redress scheme which is equitable for both survivors and institutions will require governments to provide funding where there are shortfalls of the kinds described.

An alternative to a national redress scheme would be a set of national minimum criteria to which all redress or pastoral care and assistance schemes must adhere.

**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?**

It is not necessary for all or any part of the process to be conducted independently of the institution if there are national minimum criteria and survivors have access to independent legal advice before making any final agreement.

To interpose an independent body in the decision making process is likely to add complexity, delay and cost and deprive the parties of the opportunity to address the matter relationally and holistically.

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

Those who suffer sexual abuse as a child in an institutional context should be entitled to seek redress from the institutions where the abuse occurred. All institutions working with children should have some form of redress scheme which meets national minimum criteria. Smaller institutions could participate in a scheme operated by a peak body.

**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?**

It should not be mandatory for survivors to seek redress only through a redress scheme. We believe that it is the best process to facilitate the healing of survivors but it should be voluntary.

Survivors should be free to pursue civil litigation independently of a redress scheme.

Where survivors seek redress through a redress scheme, institutions should be able to stipulate that, if a resolution is reached under the redress scheme, then the survivor should forego the right to pursue civil litigation in relation to the same set of facts. Without that stipulation, insurers are unlikely to contribute to redress scheme payments and institutions without insurance will have to bear the cost of two processes which will diminish the funds available to provide their existing services, which are often directed to the disadvantaged, poor and marginalised, and to provide redress to survivors.

All benefits received from a redress scheme that are quantifiable should be set off against any damages recovered in civil litigation.

**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 we have submitted above, consistency in entitlements can be achieved by having a set of national minimum criteria for redress schemes.

When some institutions have more assets than others, the question of fairness and consistency between survivors and the question of fairness as between institutions only arises if institutions have insufficient assets to make redress payments to survivors. An institution cannot provide financial assistance to survivors beyond its capacity to pay. A claimant under a redress scheme is subject to limitations similar to those a civil litigant faces in relation to a defendant's ability to pay compensation.

The making up for shortfalls has been addressed in our submission on funding in section 4 above.

**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?**

The obvious advantage to a survivor of offering compensation through a redress scheme which is calculated on the same basis that damages are awarded by courts in civil litigation systems is that there is no difference

between the outcomes of the financial component of the scheme and civil litigation.

An obvious disadvantage for institutions is that they would be required to pay full common law damages without the survivor having to satisfy the common law burden of proof and the institution would not have the benefit of defences such as those relating to limitation periods and vicarious liability.

Pastoral care and assistance schemes are designed as an alternative system to provide care and assistance which the civil litigation system cannot provide. Participating in a pastoral care and assistance scheme provides the opportunity for a holistic healing of the relationship between the institution and the survivor. The purposes of pastoral care and assistance schemes differ from those of courts. Therefore, such schemes ought not to be required to offer compensation calculated on the same basis that courts award damages in the civil litigation system.

Requiring redress schemes generally to offer compensation calculated in the same way as civil damages puts them in the same position as a court, for which they have neither the resources nor the skills. Calculation of damages will require presentation of relevant evidence which must be evaluated by the determiner. Presumably, that evaluation will include some form of testing which inevitably introduces an adversarial element into the process. This is inimical to the relational, pastoral basis on which pastoral care and assistance schemes are founded.

By far the greatest proportion of all civil litigation is settled before it comes to trial. Rather than impose on redress schemes the burden of administering a common law damages system, with its technicality, delay and adversarial culture, it would be more beneficial for the function of awarding common law damages to remain with the courts and for the courts to adopt procedures to take account of the needs of sexual abuse survivors who seek damages.

Affordability of common law damages ought to be taken into account for institutions offering redress schemes. Institutions with insufficient assets or insurance cover to satisfy financial redress calculated on the same basis that damages are awarded by the courts in civil litigation systems would be put in a position where their viability is threatened and the services which they provide to the underprivileged and disempowered in our society would be lost. Institutions are unlikely to put themselves in that position voluntarily. To compel them to do so would clearly be counterproductive to social good.

- 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?**

We address the questions of verification proof under a redress scheme and the involvement of institutions in verifying or contesting claims for compensation from the standpoint of our experience of pastoral care and

assistance schemes' practice. We distinguish between historical claims and contemporary claims.

In relation to historical claims, the practice is that the institution needs to be satisfied that, at the relevant time:

- (a) the alleged survivor had a relevant connection with the institution; and
- (b) the alleged perpetrator had a relevant connection with the institution.

Where there are other credible witnesses, their evidence is taken into account.

Where the records of the institution do not disclose information concerning (a) or (b) above, the uncorroborated and uncontested evidence of the survivor is accepted.

Where the perpetrator has died or cannot be identified, the survivor's evidence is accepted.

Where the alleged perpetrator has a known history of abuse but there is doubt whether the survivor was in fact abused, the survivor's evidence is accepted.

In cases of contemporary abuse, where the perpetrator is identified and is alive, pastoral and counselling aspects of a pastoral care and assistance scheme can be initiated when the matter comes to the institution's notice but the finalisation of an agreement under the scheme would be deferred until the outcome of criminal or disciplinary proceedings is known. If there is a positive finding that the abuse did not occur, then the survivor is unlikely to receive financial assistance. If there is a finding that the allegation of abuse is not substantiated, that does not preclude financial assistance being provided to the survivor, depending on the circumstances.

It is unclear to us to what kinds of redress schemes the second question refers. If it relates to pastoral care and assistance schemes, it proceeds on a false assumption as to how those schemes operate because it ignores the low threshold of proof usually applied in addressing historical claims and the relational, pastoral method of approach. If the question assumes that an external decision maker determines the monetary component of the redress, institutions will have to be involved in verifying or contesting claims by producing all relevant records and witnesses.

If institutions on reasonable grounds do not believe that the abuse occurred, then they should be entitled to test the evidence put in favour of the survivor.

If institutions wish to contest matters going to the quantification of a payment to be made under redress scheme, then they ought to be entitled to undertake appropriate investigations, adduce relevant evidence and test the survivor's claims.

**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?**

Once again, we relate the general practice of pastoral care and assistance schemes as we know it.

We believe that support in the form of counselling should be offered to survivors participating in pastoral care and assistance schemes. Ordinarily, counselling is provided in relation to both the harm suffered and the redress process. Survivors ought to be entitled to legal advice before making a final agreement under a pastoral care and assistance scheme.

In our experience, counselling is generally offered to survivors from the commencement of the process of a pastoral care and assistance scheme. That counselling is not restricted to treating the survivor's trauma but may also include assistance to engage in the processes of the scheme. Indeed, depending on the case, it has been known for counselling to continue beyond the time when a final agreement is made under a scheme. Reimbursement of reasonable legal costs ought to be part of the final determination of the benefits to be received under the scheme.

**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?**

We believe that benefits capable of monetary quantification already received under an existing scheme should be taken into account in any scheme in order to prevent duplicating a redress or double compensation.

Dated: 3 June 2014