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Anglicare WA Response to Issue Paper No 6

www.anglicarewa.org.au

This response comments on the matter of redress programs from background knowledge of the literature on child sexual abuse, trauma and therapeutic approaches, and the collective experience of staff at AnglicareWA.

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?

Advantages:

- A state based scheme such as RedressWA and those conducted in Queensland and Tasmania allowed a broad brush community-wide approach so that people who might not have otherwise have come forward individually were 'given permission' to do so in a more anonymous, collective way. Applicants may not have come forward if they had to approach a specific institution's redress program or engage in civil litigation.
- Applicants did not have to sit across the table with organisational representatives and argue or negotiate for their financial recompense.
- More generally, redress programs allow for a lower standard of evidence being accepted than in civil litigation and the process avoids the requirement to conduct the argument in a court environment. The lower standard of evidence may be especially important for cases where abuse occurred decades beforehand or when documentation has been lost or destroyed.
- Non court-based redress programs saved applicants from having to use the services of and pay the costs for lawyers. In WA most people did not go through lawyers to complete their RedressWA applications but some did and in some cases, where lawyers did not undertake the process pro bono, paid a percentage of their payment to those lawyers.

- Redress schemes put the onus of investigation of eligibility on the institution or the State, rather than on the applicant. This included both bureaucratic and financial aspects of investigation.
- In the case of RedressWA the process was a public acknowledgement by the State that it did not meet adequate standards of supervision of institutions and therefore also carried some of the burden of responsibility for the abuse.
- Redress schemes allow institutions or governments to offer compensation without uncapped financial exposure. Decision making around the development of redress schemes is often hampered by fears about how much they will cost. The actuarial model mitigates the risks raised by “open cheque book” schemes.

Disadvantages:

- The very nature of the State based RedressWA scheme and its expenditure of state funds meant that assessments and therefore *ex gratia* payments, were made in large, impersonal, actuarial categories which did not take fully into account the specific details of each individual. The categories were identified as:
 - Level 1 up to \$5000 - moderate abuse or neglect
 - Level 2 \$13,000 - serious abuse or neglect with some ongoing symptoms and disabilities
 - Level 3 \$21,000 - severe abuse or neglect with ongoing symptoms and disabilities
 - Level 4 \$45,000 - very severe abuse or neglect with ongoing symptoms and disabilities.
- A consequence of this actuarial approach was that in some circumstances the RedressWA payment was partially determined by the skill and knowledge of the application writer. For example, helping professionals who were able to document an applicant’s experiences, the consequences of these, including trauma responses and the impacts in terms of education, work and family history may have achieved a better monetary outcome than did applicants who wrote their own information down or had inexperienced assistance. In some cases lawyers provided correct ‘evidence’ but were not in a position to provide direct and comprehensive psycho-social information on the impact of the abuse.
- The following quote from Stephen Winter’s article *Ex Gratia Redress in The Australian Indigenous Law Review* (2009) 13(1) raises another concern, specifically that when such schemes make *ex gratia* payments, they do not take responsibility nor recognise the right of the applicant to demand payment.

Black's Law Dictionary (2004) characterises the *ex gratia* instrument as follows: 'as a favour; not legally necessary'. 'As a favour', state *ex gratia* disbursement criteria include that payment be benevolent, made in response to a loss or other burden, and that there be no clear legal liability for, nor prior right in the victim to, payment from the state.

<http://www.austlii.edu.au/au/journals/AUIndigLawRw/2009/3.pdf>

- In the case of institutional redress programs many applicants to the State based program reported that they did not feel empowered by the process, quite the opposite. Such applicants, even with support often felt more alone, less sure of their position and further shamed by having to appeal for money. Some applicants and recipients have specifically stated, including at public hearings of the current Royal Commission, that no apology from the institution which allowed their abuse would be believed or accepted.
- On the other hand, in other cases known to AnglicareWA staff, where applicants went to church based redress schemes such as Towards Healing, one advantage for stronger applicants was that they were able to face the representatives of the organisation that abused them and were able to hear a direct acknowledgement of sorrow and responsibility. Some applicants were able to walk away from this process empowered and were able to put the abuse into context in the narrative of their lives.
- Finally, a major matter of concern has been that some players (victims, families, organisations and government) in redress processes have tended to make an assumption that by victims telling their story and by institutions (the State or other) responding to it, a therapeutic process has taken place and that *ipso facto*, applicants will therefore feel much better. This is not necessarily true and not necessarily for all time. It has been observed for instance that many people may have felt elated when they first felt listened to or received a payment but this did not mean that they continued to feel better over the longer term. Nor did it mean they could then manage relationships, life processes and engagement in employment, social networks and community in any better way. Once it dawned on some applicants that talking about their abuse and receiving payments did not change their lives, their disappointment and despair was often even deeper than it was prior to the process. A recent article on treatment of PTSD in the New York Times, confirms such concerns. (See **A Revolutionary Approach to Treating PTSD** by Jeneen Interlandi on May 22, 2014.)

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?

Effective

- Long lead times from announcement of a program until closing. Lead times are regularly misjudged, services forgetting the slowness of information of this nature seeping into a community.
- Widespread advertising, especially including the use of radio and television rather than printed or even web based means has seemed to better target marginalised, older and rural applicants.
- Clear and transparent information about criteria for applications, how and by whom assessments are made and expected lead times from application to finalisation. Whilst some of this would be difficult to achieve, the underlying principle should be that all available or possible information is provided to possible applicants at the beginning, and perhaps repeatedly so that there is no mistaking the bases for the process.
- Applicants having as much access as possible, in a timely manner, to the documentation that assessors may have in making a determination. Such access to documentation, for example, child welfare service case files, has many positives and several potential dangers:
 - Applicants can see the narrative of their lives. This may be happening more now in foster care for example than it did in the past in the form of Life Story documents. Having this information can be critical for an applicant to understand how things happened over time, what factors carers were taking into account (or ignoring) and exactly what authorities knew and when.
 - Applicants have the opportunity to dispute recorded information. Under the Privacy Act it would appear that it is a right of adults to review information, including opinions held about them. Applicants to redress schemes should also be given this opportunity.
 - Processes should be established to ensure that applicants are provided with support when viewing their files. The processes of copying and redacting of files and making counselling support available to applicants may be an expensive process but it is a moral and ethical one and likely to be cost effective in the longer term.

- Clear statements of responsibility by offending organisations should be provided. These statements do not necessarily have to accept individual blame or guilt but they do need to do more than careful, elliptical statements of sorrow or regret. Of course the difficulty with this is that as the legal and insurance landscape currently stands, such apologies can underestimate the strategic risk to organisations.
- Clear statements that children were not responsible for what occurred to them. This has to be said repeatedly and in as many ways as possible, acknowledging that one of the clearest things we know about how child victims think is that they believe they are to blame for what occurred to them. For an example of both an apology and statement that children were not responsible, see Parliament of South Australia website, *House of Assembly Hansard*, 17 June 2008, <http://www.parliament.sa.gov.au/Hansard/DailyHansard.htm> accessed 1 June 2009.
- Clear statements about what the institution has since done to prevent future abuses. Many victim applicants report that they are coming forward to ensure that no other children have to experience the abuse that happened to the applicant. They need to see that institutions are making active efforts to stop abuse.
- Open discussion, more akin to mediation than to litigation which enabled victims to discuss their feelings and the consequences of their abuse with representatives of the institution. This would not only assist people with poor writing skills to construct a coherent narrative of their time in care but would also ensure that the institution's representatives really heard the impact of the abuse on the applicant. Such meetings may need to be recorded and transcribed so what occurred could be referred to again in the future.
- Principles of trauma informed care would be met more effectively by applicants having supported, face to face meetings with representatives of institutions. See below for a definition of trauma informed care and in particular the importance for survivors of obtaining some empowerment.

Trauma Informed Care and Practice is a strengths-based framework grounded in an understanding of and responsiveness to the impact of trauma, that emphasizes physical, psychological, and emotional safety for both providers and survivors, and that creates opportunities for survivors to rebuild a sense of control and empowerment. (our emphasis)
<http://www.asca.org.au/about/what-we-do/trauma-informed-care-and-practice.aspx>

Less Effective

- Apologies are important whether or not tied to payments. Many applicants see the payment as an estimation by those in positions of power and authority of the damage done to them. This would often be incorrect as issues such as budgets or funding available, the questions asked on application forms, victims having the skills to obtain or provide suitable information, access to documentation and institutional records, the skills of the assessors or hearers all play their part in how much recompense a victim may receive.
- Short lead times for applications. The initial RedressWA application period of application was one year - 2008-2009. This time period did not, in hindsight, take into account the amount of time it took for people, for example in remote Aboriginal communities to even begin to hear about and understand the application process, the criteria for application and the ex gratia payment processes. It was not only Aboriginal communities; it is a particular characteristic of traumatised clients (in fact, a diagnostic criterion for PTSD) that many actively avoid any situations, thoughts or feelings associated with their trauma. Knowledge of such responses by traumatised clients might have been better taken into account in considering advertising modalities.
- Delays in processing applications. It has been noted in several articles and commentaries about RedressWA that there was a delay for many people between making their application and the outcome being known to them. Whilst AnglicareWA is aware that priority had to be given to many applicants who were dying or in other ways needed rapid processing, it is also aware that some of the earliest applicants were not provided with an outcome until the very end of the program in 2012. Staff members were advised at the time that non-emergency applications would be managed by the Department for Communities randomly selecting 100 at a time to process. This was also confirmed by the Minister, Robyn McSweeney in a Liberal Party statement made on 16 February 2010. <http://www.wa.liberal.org.au/article/start-redress-wa-ex-gratia-payment-offers> Unfortunately this was deeply distressing to those who had to wait a very long time for an outcome.
- Not having access to institutional files within a reasonable time period. See earlier comments and some following, about access to files.

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?

Forms of Redress

AnglicareWA staff are aware that redress programs such as Towards Healing have used a range of payments to assist applicants in WA. For example, Towards Healing purchased cars, cleared debt, paid for overseas holidays and the like for successful applicants.

Anglicare WA would advocate for people to use the money as they wish, and to put in place support and advice to ensure they made the most of it.

Group Benefits

While it may be possible for future claims to be addressed by group benefits, AnglicareWA does not see that this is something that can be applied retrospectively to issues already known to have existed. Too many disparate payments have already been made to individuals from say, Christian Brothers' homes and schools for new applicants not to be recompensed in the same individual way.

Should a new case come to light in which a number of children were similarly abused, it is conceivable that they should all receive similar amounts but it is well known in the trauma literature that different people have different levels of susceptibility to traumatic stresses. Some of this may be a matter of personality but each child for instance would have different levels of support from their family or community, may receive better or less good counselling or therapy support, may have other health or psychological difficulties in the future which could be influenced by accumulation of stresses.

Potentially each victim could receive a base level of support but this may simply reinvent the application process at a different payment level.

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?

Advantages

- Something that could be either a disadvantage or an advantage is that an ongoing national redress process, while costly to establish, it may be cheaper to keep in place over time.

- The existence of a permanent redress scheme would become a constant incentive to keep child sexual abuse at a bare minimum into the future.

Disadvantages

- The major disadvantage of a national redress scheme will be that whatever categories are listed as eligible to apply, many people will not meet the criteria – abuse that is not sexual or that occurred in the family or occurred between or after care but can be connected to time in care etc. As with all the current programs, including the Royal Commission, some people will feel left out by eligibility constraints and may then view this emotionally as abandonment, disrespect or lack of concern.
- Another disadvantage of course would be the huge expense this process will entail for the administrative bureaucracy, the support networks to assist people and for the actual payouts.
- In the face of such huge costs, it can be seen that payments would inevitably be pared back to a bare minimum, time limits would be implemented for provision of support and other cost saving measures would be sought. Undoubtedly some victims would see much of this as a reduction of their rights.

Government institutions

- Assuming that Governments will continue into the foreseeable future to be the funders of out of home care, either directly or indirectly and therefore liable for abuse which happens in those services, AnglicareWA cannot see how it would be possible not to include government.

Funding

- One possible idea is to have all institutions deposit some percentage of their normal insurance fees into a specific fund annually. One benefit of such a plan would be to remove the issue of insurance liability from institutional thinking; thereby hopefully reducing the initial legal arguments about accepting liability and therefore about making apologies and about protecting the name of the institution instead of protecting the child.
- Other benefits of such a scheme would be to set up a means of centralising reporting of allegations of abuse in institutions and therefore redress claims. Repeated offenders, offending institutions and a standard of rates of payout would all become apparent over time.

- One other possibility for funding a national redress scheme would be to set up a futures fund which might be invested in order to grow funds.
- An additional benefit would be to ensure that funding remains available for redress when, as is now acknowledged, there is a considerable gap between the abuse and its reporting.
- As is true of many professional liability insurance schemes, organisations which are closing down would have to make financial allowance to remain insured for up to twenty years or more into the future.

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 can be seen from at least two or three of the Public Hearings (**Case Study 8, March 2014, Sydney**, The response of the Catholic Church to the complaint made by John Ellis under Towards Healing, **Case Study 11, April 2014, Perth**, The experiences of men who were resident at Christian Brothers' residences in Western Australia and **Case Study 12, April 2014, Perth**, The response of an independent school in Perth to concerns raised between 1999 and 2009 by teachers and others about another teacher, for example) internal redress schemes are fraught with dangers.

- They can suffer from the same problems all internal investigations experience – there are conflicts of interest for investigators between loyalty to the organisation and to the victim, their own experiences of the organisation and the institution's beliefs about children, child sexual abuse and external monitoring of their activities.
- The perception by victims and their families that no matter how well redress schemes are conducted, the process will be an unequal and unfair one. This perception may be difficult to avoid through the prism of their own hurt and loss of trust.
- An additional perception by victims is that the process can remain secret and therefore could be potentially abusive and may also risk remaining unexamined against community standards.
- The possibility that administrators of such schemes, lacking public scrutiny, do not have to be aware of community standards and may not be exposed to current best practice.

Overall it is the view of AnglicareWA that such systems should not remain internal to the organisation however, if a decision is made to continue to

allow such schemes, at the very least the following conditions should be taken into account with any redress scheme:

- At least one member of the scheme panel should be completely independent of the institution. Preferably this member should turn over every three or so years, to minimise the possibility of enculturation.
- At least one member, preferably a separate person from the person above, should be a qualified professional Social Worker, Psychologist or other professional with up to date knowledge of best practice in the child protection field.
- Annual reports on the progress of the scheme should be made to a governing body and where possible to the lay membership of the organisation. Such reports should identify ongoing systemic concerns, methods of calculating payouts, complaints and appeals.
- Members of Boards of Management should be in no doubt as to their legal obligations in regard to abuse which occurs while they are on the Board.

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

- It would be simpler and less costly for both organisations (and claimants) if all organisations working in services to children paid into the same compulsory scheme.
- A collective approach would limit the potential for institutions to establish or maintain 'secret' protocols or procedures or to unintentionally or through ignorance, mismanage such a scheme as has been done too often in the past.
- If all organisations had to contribute a set percentage of their funding/insurance costs or some other expenses, they could incorporate such costs into the budgets, fee structures and so on.

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?

- From a non-legal point of view AnglicareWA would always like to simplify procedures for claimants, protect them from opportunist lawyers and interested parties and minimise time delays and resultant distress.

- A non-legal approach would increase the potential for restorative justice and mediation approaches to the issues. Such approaches would be conducted by specialised, experienced practitioners.
- Unfortunately the determinant for the question regarding civil litigation is more likely to revolve around potential payouts being believed to be greater 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?

- Fairness could be met by a contributory mechanism, as discussed in Point 6 above, which would be based on organisational income, insurance rates or something similar. See also the discussion about actuarial tables in Question 9.
- Fairness and consistency for victims would be met by the proposals mentioned in Point 7 above. If non legal processes were adopted, it would be the responsibility of the scheme to fully explain to applicants the process by which determinations would be made.
- As mentioned in Point 4 above, many organisations and individuals are required to continue some form of insurance for some years after they cease to operate. Many professionals must keep insurance up when they retire. It should be possible in the winding-up process to cost-in contributions to a redress scheme for some time after closure.

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 would seem inconceivable that any institution, including those proposed above such as an insurance-funded scheme or an NDIS-like funding process or even a futures fund could possibly afford to pay the huge numbers of potential applicants nationally (from the past) at anywhere near rates which might be obtained in civil litigation. Two cases discussed at the Royal Commission might illustrate this point: after many years of struggle and civil litigation, John Ellis received approximately \$800,000 from the Catholic Church as recompense for his abuse and the effect of this on his life and

earning capacity; a young male victim of abuse in the recently discussed private school in WA received approximately \$375,000 through negotiation with the school. The maximum amount available for Western Australian applicants through RedressWA was \$45,000.

It is possible that in the future a set rate for various abuses could be established and publicised in the same way actuarial tables are established for compensating physical damage.

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?

- In any future scheme, it would be a mandatory requirement that participant organisations should freely provide to the scheme, and possibly to the victim and their family, access to files – both as a means of remembering timelines and of looking for gaps in documentation etc.
- See also other comments in this paper.

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?

Many Towards Healing applicants in Western Australia have had available to them ongoing subsidised community support and individual counselling support. RedressWA clients received time-limited access to counselling before receiving their financial compensation and a smaller amount post receiving the payment.

In the case of the RedressWA process there were differing interpretations of the purpose of counselling. Some contracted counsellors took this to mean 'counselling to assist in the application processes, some took it to mean 'counselling or therapy for their trauma history' and some attempted to combine the two whilst being open about the time limited nature of the process. That is to say, AnglicareWA staff who worked on RedressWA contracts made clear to clients what the limits of the service were (generally 12 hours all together) but were also able in some cases to expand that to 18 hours and to manage the therapeutic aspects of the process in ethical ways.

Whilst sophisticated therapy models such as Exposure Therapy are allegedly able to be conducted in twelve sessions (see Foa et al *Prolonged Exposure Therapy for PTSD* Oxford University Press 2007 for example) with good outcomes, research on this treatment is very specifically designed to exclude many comorbidities and such treatment is generally beyond the training and skill of most counsellors. On the other hand it was possible for some RedressWA applicants to then self-fund private counselling.

Better Access to Mental Health (BAMH) and Access to Psychological Services (ATAPS) are funded through Medicare for between 10 and 12 sessions. Generally speaking most professional and experienced counsellors would not commence in-depth trauma counselling in this time frame but would provide supportive and skills based interventions to assist clients and refer them to private counsellors if this was affordable.

Overall then, the trauma literature would argue that twelve sessions is too brief a time to really assist applicants with complex trauma, whilst unlimited support currently shows little evidence of efficacy. Provided a counsellor could demonstrate adequate training and skills and could demonstrate improvement by the use of assessment tools, AnglicareWA would argue for at least a year of therapy – somewhere between 26 and 30 sessions to ensure improvements were made and retained.

As mentioned previously however, there is no guarantee that all clients would benefit from extended counselling nor that such counselling would provide a cure for all time.

12. If a claimant has already received some financial compensation for the abuse through one or more existing schemes or other processes, should the financial compensation already received be taken into account in any new scheme?

Yes. This would not be a popular decision but AnglicareWA cannot see any alternative for the future. AnglicareWA is aware that some applicants in the past have received multiple payments and, as has been discussed throughout this paper, receiving financial compensation is in itself, no guarantee of any therapeutic effect.

Other comments

1. This submission has referred on a number of occasions to client access to file notes and other records. These are particularly important when

considering how effective record keeping may make a difference to disclosure of child sexual abuse, patterns of offending behaviour and the potential to make all workers and auditors of files aware of systemic failures of care.

How professionals write and keep file notes therefore becomes a central concern. Huge changes have taken place in how records have been kept over time. In the past many non-professionals working in service industries were not well instructed in keeping records which noted subjective and objective information (clearly separated), an assessment and a plan which could be measured and evaluated. Good client file notes enable a reviewer to glean far more information if file notes meet these criteria. File notes in child service agencies should meet this base standard and should also be regularly audited.

2. Differences in recording information occur between professions and workplaces. Possibly as a result of concerns about litigation, some professions and some workplaces advocate neutral and non-specific file note keeping whereas for example, the 2010 Ethics for the AASW note the following:

- 3.

Social workers will record information impartially and accurately, taking care to:

- o report only essential and relevant details
- o refrain from using emotive or derogatory language
- o acknowledge the basis of subjective opinions
- o protect clients' privacy and that of others involved in the situation.

Where records are shared across professions or agencies, information will be recorded only to the degree that it addresses clients' needs and meets the essential requirements of those to be notified. When conveying confidential information, verbally, through the post and electronically, particular attention will be given to protection of privacy. (p 29)

But also:

Social workers will ensure all prepared reports, whether for legal purposes or any other purpose, include separation of fact and opinion, that no relevant facts are deliberately omitted and that the conclusions reached are based on fact and research evidence. Reports will provide a professional opinion and are not to be a submission to

emphasise one particular interest over another. (P30) (Our emphasis).

4. A good outcome of the current Royal Commission would be a recommendation that makes very clear the standard of record keeping that is required in child safe organisations. This recommendation would need to balance onerousness and issues of accuracy and safety. Furthermore it could be argued that writers of such file notes should be protected by whistle blower legislation if their document meets the criteria of accuracy and objectivity.
5. Applicant access to their client file. It has been mentioned above that during the RedressWA Scheme, applicants could apply for their Department for Child Protection file and even though this often took a very long time, many did in fact receive the bulk of their file unreacted. However since the end of the Redress scheme, it has been noted that the Department has reverted to Freedom of Information requests and specifies that the applicant must:

Describe clearly the documents you are requesting access to (include subject matter, time period or date range, or any other information that would help identify the requested documents). Please specify type of documents rather than entire files. Including your reason for access (although not a requirement) may assist in the accurate capture of documents.
<http://www.dcp.wa.gov.au/Search/Pages/results.aspx?k=access%20to%20files>

Furthermore a small fee (\$30) is required for information referring to third parties which may also be in the file. Whilst it is not a large sum generally speaking, it may be enough to prevent many clients from proceeding with an application.

This process is required even for applicants wishing to access their file in order to respond to the Royal Commission itself. Whilst it may be argued that the Royal Commission can access the files it requires for its purposes, that does not assist the applicant to review information regarding her or his own history prior to approaching the Royal Commission or when simply wanting to know what is written about them.