A REPARATIONS TRIBUNAL FOR VICTIMS OF CHILD SEXUAL ABUSE: “VOCSART”

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Introduction: This submission is COIN’s response to the Commission’s Issues Paper No 6, “Redress Schemes”, dated 26/4/2014. It proposes, and outlines the broad features of, a new national Victims of Child Sexual Abuse Reparations Tribunal (“VOCSART”). COIN recommends that civil actions for damages for personal injuries continue to be available for victims of child sexual abuse, as an alternative to the proposed VOCSART. As to this “legal proceedings” option, and necessary reforms to current laws and procedures if justice for victims is to be achieved, see COIN’s prior submission No 1.¹

A summary only of selected Tribunals, considered to be useful precedents now operating in Australia, is provided with emphasis on features appropriate for the peculiar problems related to victims of child sexual abuse. For further responses to Issues Paper No 6, see private submissions of Dr. B.A Keon-Cohen QC and Dr. Joseph Poznanski. Particular reference is also made to the recent *Betrayal of Trust* Report of the Victorian Parliamentary Committee into child sexual abuse (“BoT Report”), tabled on 13 November 2013.

**Part I: AUSTRALIAN PRECEDENTS**

**I. VICTORIA**

**(A) Transport Accident Commission**

**Jurisdiction** The Transport Accident Commission (“TAC”) pays compensation to a person, or to the dependants of a person who is injured, or who dies as a result of a transport accident that occurs on or after 1 January 1987. The TAC was established by the *Transport Accident Act 1986* (Vic) (“TA Act 1986”).

**Eligibility** The TAC administers a common law scheme where an applicant must establish negligence (not considered here) and a “no-fault” scheme. Questions of “fault” or “negligence” by the victim, his/her abuser, or an institution responsible for that abuser, are, in COIN’s view, irrelevant in relation to seeking, and assessing, compensation for child sexual abuse. That is to say, the proposed VOCSART would administer a “no fault” scheme.

A “transport accident” is defined to mean an incident directly caused by the driving of a motor car, motor vehicle, railway train, or a tram. A “transport accident” also includes an accident between a motor vehicle (stationary or moving) and a cyclist while the cyclist is travelling to or from their place of employment. Furthermore, an “injury” is referred to as a physical or mental injury suffered by a person as a direct consequence of a transport accident. In the “no fault” scheme, irrespective of who caused the accident, persons are eligible to make a claim to TAC’s Compensation Tribunal, provided that the transport accident falls within one of the following conditions:

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4 *BoT Report*, Chs 27, 28.
5 Yasmin Geneva (TAC), Selina Cheung (Tasmanian Magistrates’ Court); Helen Cankaya (VOCAT and VOCC), all COIN volunteers, law students, La Trobe University, Bundoora, Victoria.
7 Questions of negligent or inadequate responses to a victim’s plight by a responsible institution may, however, be relevant to that institution’s contribution to both establishment costs of the proposed scheme and compensation awards to a particular victim: see further below.
8 *Transport Accident Act 1986* (Vic) s 3(1) (“TA Act 1986”).
9 TA Act 1986, s 3(1).
10 TA Act 1986, s 35.
- The injury resulted from a transport accident within Victoria (regardless of whether the vehicle involved was registered in Victoria or interstate); or
- A transport accident occurred interstate involving a Victorian registered vehicle where the person injured is either a Victorian resident, or an occupant of a Victorian registered vehicle; or
- A transport accident occurs in another State or Territory and the injured person is a non-Victorian resident who is an occupant of a Victorian registered vehicle.

All of the above circumstances establish grounds for injured persons to receive support services due to satisfying TAC’s compensation eligibility. If Australian jurisdictions establish new Tribunals in respect of child sexual abuse, each serving a single jurisdiction, out-of-jurisdiction eligibility factors, such as the above, will need to be addressed.

**Procedures** A driver of a motor car involved in a transport accident must fill out a form and make a report to the TAC within 28 days after the accident if requested to do so by the TAC. A claim by an injured person must generally be lodged within one year of the accident or death or when the injury first becomes obvious. The one year deadline can be extended to three years if reasonable grounds for making a claim are shown.

The claimant, after lodging a claim, is sent a Claim for Compensation Summary. This summarises the claim information and claimant’s details. The claimant then signs and returns a General Authority to Release Information Form which enables the TAC to contact the claimant’s health professionals. Medical certificates detailing injuries and likely period of incapacity, and a Certificate of Earnings form must usually be supplied as well. The TAC must generally make a decision on a claim within 21 days of receiving the claim, unless it requests further information when it must make a decision within 14 days of receipt of the further information.¹¹

The TAC requests information using authority outlined in the *TA Act 1986*. Such information is seen as necessary in order to clarify:
- the extent of injuries sustained in a transport accident;
- any aggravation of an already existing injury or condition caused by the transport accident;
- the extent of financial loss suffered as result of the transport accident injuries.

If a claim is successful (ie, accepted by the TAC) a claimant receives a claim number and will then be able to arrange payment for medical costs etc. In most cases, a medical practitioner treating the injured person can bill the TAC directly.

The relatively informal evidence-gathering and complaint processing procedures outlined, especially the power to request such information, may be particularly relevant to the operations of a national child sexual abuse compensation or reparation scheme (see part 3 below).

**Appeals** Any person dissatisfied with a TAC decision (or failure to make a decision) may appeal. The injured person must initiate an appeal within 12 months\(^{12}\) of becoming aware of TAC’s decision by applying to the Victorian Civil and Administrative Tribunal (VCAT) for review of the decision. Three appeal processes are available, ie:\(^{13}\)

- to the TAC, which conducts an informal review;
- utilising dispute resolution processes based on an agreement reached between the TAC, the Law Institute of Victoria, and the Australian Lawyers Alliance;
- by filing an application to review the decision to the Victoria Civil and Administration Tribunal (VCAT).

The Victorian Ombudsman can also investigate any administrative action of the TAC.\(^{14}\)

**Compensation/Reparation** Once a claim is accepted by the TAC the injured person can claim the following “no-fault” benefits:

- compensation and benefits relating to medical and related expenses;
- weekly payments from the TAC for being unable to work;
- an impairment benefit and compensation for a family member who died in an accident.

**Medical expenses** This is a central feature of the scheme, and provides important guidance for any national VOCSAT. The TAC is empowered to pay for the cost of medical and related expenses a person requires as a result of the transport accident. These expenses include:\(^{15}\)

- hospital bills;
- doctor, specialist health care providers;
- pharmaceutical expenses;
- rehabilitation costs;
- ambulance bills;
- Counselling services;
- Disability services;
- Reasonable travel expenses to/from medical appointments;
- Domestic or home assistance;
- Modifications of the home or car;

\(^{12}\) _TA Act 1986_, s 3(B).


\(^{15}\) _TA Act 1986_ (Vic) s 60.
• child care;
• help returning to work or re-training;
• accommodation and or travel expenses for a spouse or dependent child;
• In certain circumstances, travelling and accommodation expenses for a spouse / dependent children.

Lost-Employment Benefits If a person is unable to work or can only work part-time due to the relevant motor accident injuries, he/she may claim benefits from the TAC. These benefits are payable for up to three years or if a person’s impairment is assessed at 50% or more, up to age 65. COIN considers such restrictions inappropriate for the proposed national VOCSART.

Impairment benefit A person who is determined to have suffered a “permanent impairment” caused by a transport accident is entitled to a lump sum compensation payment for an accident occurring on or after 16 December 2004. The maximum amount available for a lump sum impairment benefit is $295,100.00. COIN does not support such a “cap” for awards made by the proposed Tribunal.

Funding Funding for TAC operations and compensation payments is provided by compulsory levies imposed upon Victorian motorists. These levies are part of the cost of registering a vehicle in Victoria. This charge currently appears on a driver’s VicRoads renewal notice as ‘TAC Premium’, or as ‘TAC Charge’.

Some statistics In 2012/13 the TAC funded a total of $1.086 billion in support services and benefits (compared with $1.01 billion in 2011/12). The number of new claims received was 19,354 (compared to 19,002 in 2011/12). The TAC provided funded support to 45,038 people compared with 44,410 the previous year.

(B) Victims of Crime Assistance Tribunal (“VOCAT”)

VOCAT was established by legislation to provide financial assistance to victims of violent crime committed in Victoria.

Qualifying for Assistance A person may apply for financial assistance if they have suffered injury as a result of a violent crime being committed against them; the crime occurred in Victoria; and the person is either a primary, secondary, or related victim of that violent crime.

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21 VOCA Act 1996 s 3.
As pursuant to Division 1,22 a “primary victim” is classified as someone who is injured or dies as a direct result of:

- A violent crime being committed against the individual;
- Trying to assist or rescue someone who is believed to be a victim of violent crime;
- Attempting to prevent the commission of a violent crime; or
- Trying to arrest someone believed to have, on reasonable grounds, committed a violent crime.

A “secondary victim”, in accordance to Division 2,23 is defined as a person being injured as a direct result of being present at the scene of a violent crime and witnessing that crime; or subsequently becoming aware of a violent crime where he/she is the a parent/guardian of the primary victim who was under the age of 18 at the time the criminal act was committed. In the child sexual abuse context, “secondary victims” – eg, parents, siblings, friends, colleagues of an abused child – are a significant category of victims currently poorly catered for by both legal and private mediation processes in Australia. These “secondary victims” should be entitled, independently of whether the relevant child claims, to approach the proposed VOCSART and seek reparation orders. COIN notes that the catholic church, in Australia, has generally refused to compensate such secondary victims through its internal processes.24

Division 325 defines a “related victim” to be a person who, at the time of the violent crime:

- Was a close family member to the deceased primary victim
- Was a dependant of a deceased primary victim
- Had an intimate personal relationship with the deceased primary victim

Moreover, a person who has incurred funeral expenses as a direct result of the death of a primary victim is also eligible to gain financial assistance.26 It is also possible, in certain circumstances, for an application to be made on behalf of another person (such as a child).27

Procedures An application for financial assistance from the Tribunal is made in writing by completing and lodging the Application for Assistance form.28 There is no fee for filing an application for assistance with the Tribunal. The following information is required:

22 VOCA Act 1996 s 7(1).
23 VOCA Act 1996 s 19(1).
24 See eg, evidence of Chris and Anthony Foster, Melbourne. Personal communication. And see C Foster, Hell on the Way to Heaven (Bantum, 2010) for an account of the Melbourne archdiocese’s treatment of parents of an abused child in recent decades.
25 VOCA Act 1996
26 VOCA Act 1996 , Division 4.
27 VOCA Act 1996 , s 25(3).
Whether the applicant is claiming as a primary, secondary or related victim or for funeral expenses only;
- The date and location of the crime (referred to as “the act of violence”);
- Whether the act of violence was reported to the police and who and where it was reported;
- Details of injury (or death) arising from that act of violence;
- Whether the applicant wants to attend a hearing;
- Whether the applicant has applied for damages, compensation, assistance or payments of any kind under any other scheme (such as schemes administered by the TAC or Workcover) and details of any relevant insurance cover; and
- The type of assistance sought by the applicant.\textsuperscript{29}

The standard of proof required is the civil standard, ie, on “the balance of probabilities.”\textsuperscript{30}

**Awards** Awards of assistance may be made to a maximum of $60,000.\textsuperscript{31} Assistance may include:
- reasonable counselling, medical, safety-related and funeral expenses;
- lost earnings; and
- other reasonable expenses;

to assist a victim of crime in their recovery, when assistance for those expenses is not available from another source. If exceptional circumstances are shown, further awards (within the $60,000 cap) may be made to assist the victim’s recovery from an act of violence: see s 8(3). Such awards may relate to needs specific to a victim, eg, family holidays, removal expenses, security equipment, bonds on premises, or a deposit on a motor vehicle.\textsuperscript{32}

- Special Financial Assistance (“SFA”) is available, up to $10,000 in certain circumstances, eg, sexual abuse.\textsuperscript{33} SFA is provided as a lump-sum payment, generally within six weeks of an appearance in VOCAT. For the purposes of SFA awards, and pursuant to the Act (s 8A) the relevant Regulations designate four categories of “acts of violence” of a sexual nature, with a declining scale of mandatory monetary awards for each category. These range from $10,000 to $100 and are, clearly, grossly inadequate.\textsuperscript{34} This criticism applies despite a “ramping up” provision (Reg 7) where minor sexual acts falling within a low

\textsuperscript{29} *Vidia Act* 1996 s 27(a) – (f).
\textsuperscript{30} *Vidia Act* 1996, s 31.
\textsuperscript{31} *Vidia Act* 1996 s 8.
\textsuperscript{32} Advice, Mr Rod Willcox, barrister, of the Victorian Bar. Mr Willcox practices in this jurisdiction.
\textsuperscript{33} See *Vidia Act* 1996, s 8A; See *Bot Report*, Ch 27, p.553.
\textsuperscript{34} See *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011*, Reg 6, Schedule 1, setting out categories of crimes, including sexual offences, ie: Category A (any offence involving sexual penetration, attempted murder, $10,000 - $3,250); Category B (any offence involving eg, attempted sexual penetration, indecent act etc, $3,250 - $1,300); Category C (any offence involving attempt to commit category B act, $1,300 - $650); Category D (any offence involving attempt to commit a category C act etc, $650 - $100).
category may, in appropriate circumstances, be elevated to a higher category, thus enabling the victim to be awarded a higher sum, i.e., up to $10,000.

**Lump-sum payments** Such payments (for Special Financial Assistance and distress) may also be made to certain victims of crime to assist victims in their recovery and in recognition of injury, distress and trauma experienced or suffered by them as victims of crime. This lump-sum option is an important precedent when considering a national VOCSART.

The average amount of financial assistance awarded during 2011-2012 was $8,169 - clearly an inadequate scheme that risks grave injustice. COIN does not support such “capping” in the proposed VOCSART. In support of this approach, COIN refers to the inadequate sums awarded to victims, and inequities arising between victims, in the Catholic Church’s Melbourne Response Scheme. In this scheme, commenced in 1996, lump-sum awards were initially “capped” at $50,000, currently at $75,000.

**Funding** VOCAT is funded by the Consolidated Fund of the State of Victoria.

**Conclusion** COIN submits that for victims of child sexual abuse, VOCAT demonstrates both desirable features that may be built in when considering a national VOCSART, as well as limitations that should be avoided. VOCAT’s desirable features include:

- a viable alternative to civil litigation for victims;
- VOAT’s ability to provide an independent acknowledgement of harm coupled with its non-adversarial approach;
- support provided for victims, tailored to their individual needs, including lump-sum payments for pain and suffering.

Limitations of VOAT include:

- A two year time limit on filing claims for financial assistance. This runs from the date of the crime. Extensions of time may be granted in certain circumstances, including in criminal child abuse cases. Considerations for granting an extension of time include:
  - The age of the applicant at the time of the alleged act of violence;
  - Whether the applicant is intellectually disabled or mentally ill;
  - Whether the alleged perpetrator was in a position of power, influence of trust in relation to the applicant.

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36 See *BoT Report*, p.420.
37 Victim of crime compensation schemes in some jurisdictions impose a levy on offenders to raise funds to compensate a victim. See SA and Queensland legislation, mentioned below.
38 *VOCA Act 1996*, s 69(1).
39 *VOCA Act 1996*, s 29(1).
• Limited compensation available. This is substantially less than the amount of damages that might be obtained in a successful civil claim in the courts. Furthermore, claimants are obliged to refund the amount of assistance provided by VOCAT if they subsequently receive damages through successful civil actions.\textsuperscript{41} COIN notes that one justification asserted for VOCAT's limited and capped compensation amounts is its essentially “ex-gratia” nature: the state is not the offender, does not seek reimbursement from the offender of awards made; yet the state provides compensation. In child sexual abuse cases, however, COIN rejects the capping of sums that may be awarded, and suggests further that the state (obviously) and the proposed VOCSART should be vested with all powers necessary to recoup awards of compensation from a responsible perpetrator and/or the relevant responsible institution, when deemed appropriate.

• Lack of ongoing financial support for victims. VOCAT's inability to assist victims who suffer ongoing or permanent injury is a significant limitation for child sex-abuse victims who typically suffer lifelong psychological harm.

The BoT Report records the following strengths of Victoria's approach to victims of crime compensation:

• Cases are determined by a Magistrate- giving authority and legitimacy to victims claims;

• VOCAT provides an avenue for victims to tell their story to a Tribunal Member without having to attend a hearing;

• An applicant is rarely required to give evidence or be cross examined (even though VOCAT's determination is based on a civil standard of proof- the balance of probabilities);

• A power to recoup compensation from offenders, although this power has rarely (if ever) been exercised in practice;

• Victims can receive financial assistance through VOCAT even if the offender has not been identified or charged;

• VOCAT is not required to consider the financial circumstances of the offender in awarding compensation.

• In most situations, financial assistance is available to a victim provided the Tribunal is satisfied that the relevant crime has been perpetrated against the victim and that crime has been reported to the police.\textsuperscript{42}

COIN submits that, in any VOCSART scheme, reporting the alleged sexual abuse to police should not be a pre-condition to a victim's claim being accepted and assessed.

\textsuperscript{41} VOCA Act 1996, s 29(3).

\textsuperscript{42} BoT Report, Ch 27.
II. SOUTH AUSTRALIA

A. VICTIMS OF CRIME COMPENSATION ("VOCC")

In 1969, South Australia established a state-paid compensation fund to provide immediate victims of a criminal offence some recompense for injury sustained as a result of that crime ("VOCC").

Eligibility A person is eligible to claim VOCC if he/she is the immediate victim of a crime which took place in South Australia, and at least one of the following elements applies:\(^\text{43}\)

- The crime involved either violence or a threat of violence to the victim or an immediate family member;
- The crime created an imminent risk of harm to the victim or an immediate family member;
- The crime was a sexual crime;
- The crime resulted in death or physical injury.

Immediate family members include: a spouse/domestic partner, parent, grandparent, child/grandchild (including an adult child/grandchild) and brother or sister. A parent or guardian can apply for VOCC on a child’s behalf.

Costs associated with VOCC Lawyers provide an initial assessment relating to a possible VOCC claim. The lawyer may not seek fees for services above a figure fixed by the law. If the applicant is awarded compensation, legal fees are paid in full and out of the VOCC fund, in addition to any compensation that is awarded to a victim.\(^\text{44}\)

Compensation Monetary compensation can be awarded for:\(^\text{45}\)

- Pain and suffering- including physical injury, emotional and psychological illness, shock and pregnancy;
- Financial losses- including loss of earnings or reduced ability to earn that flows from the injury;
- Past and/or future treatment costs.

Limits on claims Where an injury is deemed to be very minor, the applicant may not be entitled to compensation for pain and suffering- the payment being limited to the applicants’ financial losses.\(^\text{46}\) For compensable crimes,\(^\text{47}\) the amount claimable from the VOCC Fund depends on the date of the crime, as follows:\(^\text{48}\)

\(^{43}\) Victims of Crime Act 2001(SA), s 17(1).
\(^{44}\) Ibid, s 25(1).
\(^{45}\) Ibid, s 20(1).
\(^{46}\) Ibid, s 20.
<table>
<thead>
<tr>
<th>From date</th>
<th>To date</th>
<th>Amount that is able to be claimed</th>
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<tbody>
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<td>22/1/1970</td>
<td>10/4/1974</td>
<td>$1,000</td>
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<td>11/4/1974</td>
<td>30/6/1978</td>
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</tr>
<tr>
<td>1/8/1987</td>
<td>31/8/1990</td>
<td>$20,000</td>
</tr>
<tr>
<td>1/9/1990</td>
<td>onwards</td>
<td>$50,000</td>
</tr>
</tbody>
</table>

In a case of homicide, a claimant may claim $10,000 for grief, but this payment only applies when:

- the deceased victim is the spouse/domestic partner of the claimant;
- the deceased is a child (under 18 years) of the claimant.

**Time limits** Time limits apply to filing of claims for VOCC. Adults are permitted three years from the date of the crime to file a VOCC claim. Victims who were children at the time of the offence, have 3 years from the time they turn 18 to make a claim. In claims arising from a homicide, the claimant is allowed 12 months from the death of the victim to make a VOCC claim.49

**Offender information** The offender need not be known to the claimant for the claim to proceed.50 If the offender has not been identified, the claimant must present evidence to VOCC in relation to the occurrence of the crime, and the injuries or losses sustained as a result. If an offender is convicted of the relevant crime, the victim and VOCC will be notified, enabling the VOCC Fund to attempt to recover any compensation sums awarded from the offender.51

**Delays** If the offender is known and is being prosecuted, the claimant must wait the result of any relevant prosecution before the VOCC claim can be resolved. In urgent situations, the Fund may approve an Interim Payment until a VOCC claim is finalised.52 Such factors should be irrelevant, in COIN’s view, to the proposed VOCSART scheme.

As a guide, simple claims can be resolved in around 3 to 6 months from the time the claimant’s lawyer notifies the VOCC Fund of a claim. More complex cases can take one to

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47 Ibid, s 17.
48 Ibid, s 20.
50 Ibid, s 18(4).
51 Ibid, s 19.
52 Ibid, s 27(4).
two years to resolve, while claims associated with a criminal prosecution of the offender will take longer.

Limitations of VOCC Coin notes that:

- Applicants cannot claim compensation for property loss or damage;
- An application for VOCC may be refused if, without good reason, the applicant failed to cooperate with the police;
- Evidential requirements pose difficulties for claimants.

Each claim is necessarily, individually assessed and is based on medical reports and other available evidence. Thus, if the applicant consults with a doctor at an early stage, this may assist his/her claim. Similarly, it is important for an applicant to keep all police reports and receipts (medical or otherwise) concerning expenses arising from the crime. These requirements are likely to pose obvious, and often insurmountable, difficulties for victims of child sexual abuse, especially given (as is the norm) many years before a victim fully comprehends the impact of his/her childhood trauma, and develops sufficient understanding and confidence to seek help or take remedial action. Thus victims, the Commission reports, first voice complaints, on average, “more than 20 years” after the abuse occurred, and often after a victim has suffered considerable damage and expense.

Compensation in any form is not available from the VOCC if compensation is available from another source.54

III. OTHER AUSTRALIAN SCHEMES

The Commission is referred to the following additional victim of crime compensation schemes operating in various Australian States and Territories:

- NSW: Victims Recognition/Restitution Payment Scheme administered by the NSW Civil and Administration Tribunal established by the Victims Rights and Support Act 2013 (NSW). This abolished and replaced NSW’s previous Victims Compensation Tribunal (VCT).

- WA: Victims of Crime Reference Group and the Sexual Assault Resource Centre administered by the Victims of Crime Western Australia established by the Criminal Injuries Compensation Act 2003 (WA).

- SA: See Victims of Crime Act 2001 providing for Victims of Crime Compensation (VOCC) administered by the SA District Court. Compensation sums are drawn from a Victims of Crime Fund administered by the Attorney General’s Department.

54 Ibid, s 17(5).
- **Queensland:** See *Victims of Crime Assistance Act 2009:* Applications are made to a scheme manager.

- **Tasmania:** See *Victims of Crimes Assistance Act 1976:* This scheme is administered by a Master of the Tasmanian Supreme Court.

- **ACT:** See *Victims of Crime (Financial Assistance) Act 1983:* Applications for financial assistance are made to the ACT Magistrates Court.

- **NT:** See *Victims of Crime Assistance Act 2007.* This establishes not a tribunal, but a Crime Victims Services Unit, within the bureaucracy.

### IV. CONCLUSIONS

These various schemes and tribunals, utilizing various procedures and delivering various “capped” outcomes, are, it is submitted, inadequate and inherently flawed when it comes to devising a fair and responsive reparations scheme for victims of child sexual abuse. These schemes are founded on a philosophy that gives little, or inadequate consideration to the special needs and vulnerabilities of this class of victim—perhaps because those psychological and social impacts have not hitherto been widely, or fully, appreciated. Thus, for example, these schemes provide a limited range of non-monetary outcomes to a limited range of “victims”: important powers and procedures are often missing: eg, to provide, or force, opportunities for face-to-face meetings and apology, on-going rehabilitation, or a wide range of social, medical, psychological and like assistance. Further, the responsibility of institutions employing or otherwise responsible for the conduct of offenders, is entirely ignored.

Thus COIN recommends against extending the powers and jurisdiction of these already existing victims of crime schemes: a new approach and a new start.

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**Part II: OVERSEAS PRECEDENTS**

### I. THE REPUBLIC OF IRELAND

**(A) Residential Institutions Redress Board**

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55 See, for example, the Truth and Reconciliation Commission, South Africa, introduced following the collapse of apartheid in the 1990s. An important aspect of that scheme was to allow such face-to-face meetings between victims and officers of the former regime.

56 Lauren Taylor, Claire Hughes, 19 May 2014, COIN volunteers, law students, La Trobe University, Bundoora, Victoria.
This Board, established by legislation in 2002, seeks to compensate children who are abused in industrial schools, orphanages and children’s homes. The majority of these places were run by catholic religious institutions.

**Procedures**  Applicants attend before an informal independent Board and submit applications for compensation. A non-adversarial process is pursued. The Board does not make findings of fact. If the victim is incapable, his/her application may be submitted by a properly authorised person. Post 1999, family members may make applications on the behalf of a deceased relative, or act on their behalf in future proceedings. The Board had received a total of 16,081 applications as of December 2012.

The mission statement of the Board is “to make financial awards to assist in the recovery of certain persons who as children were abused while resident in certain institutions in the State and who have or have had injuries that are consistent with that abuse.”

**Compensation/ Reparation:** The calculation of compensation is based on the below tables. The average value of awards is currently €62,860. These awards can be paid in instalments.

**Table of the Weighing scale for evaluation of severity of abuse and consequential injury**

<table>
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<th>Constitutive elements of redress</th>
<th>Severity of abuse</th>
<th>Severity of injury resulting from abuse</th>
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<tr>
<td></td>
<td></td>
<td>Medically verified physical/psychiatric illness</td>
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<td>Weighting</td>
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<td>1 - 30</td>
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</table>

**Five Bands**

<table>
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<tr>
<th>Redress Bands</th>
<th>Total Weightings for Severity of Abuse and Inquiry/Effects of Abuse</th>
<th>Award Payable by way of Redress</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
</table>

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57 *Residential Institutions Redress Act 2002* ("RID Act 2002").
60 *RID Ann Rep 2012*, p 22.
61 Ibid, 5.
<table>
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<tr>
<th>V</th>
<th>70 or more</th>
<th>£200,000-£300,000</th>
<th>43</th>
<th>0.30%</th>
</tr>
</thead>
<tbody>
<tr>
<td>IV</td>
<td>55 to 69</td>
<td>£150,000-£200,000</td>
<td>261</td>
<td>1.82%</td>
</tr>
<tr>
<td>III</td>
<td>40 to 54</td>
<td>£100,000-£150,000</td>
<td>1954</td>
<td>13.59%</td>
</tr>
<tr>
<td>II</td>
<td>25 to 39</td>
<td>£50,000-£100,000</td>
<td>7019</td>
<td>48.81%</td>
</tr>
<tr>
<td>!</td>
<td>Less than 25</td>
<td>Up to £50,000</td>
<td>5102</td>
<td>35.48%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>14379</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

**Summary cost of Redress Scheme**

<table>
<thead>
<tr>
<th>Awards Made</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal costs paid in respect of applications</td>
<td>€7,391,474.74</td>
<td>€6,382,756.55</td>
</tr>
<tr>
<td>Related High Court costs</td>
<td>€308,680.74</td>
<td>€189,531.26</td>
</tr>
<tr>
<td>Board expenditure</td>
<td>€4,099,255.18</td>
<td>€3,722,054.91</td>
</tr>
<tr>
<td>Total</td>
<td>€39,336,781.83</td>
<td>€38,639,765.98</td>
</tr>
</tbody>
</table>

One strength of this system is that compensation may be tailored according to the unique circumstances of each victim.

The *RID Act 2002*, s. 27(1) also provides that the Board will pay a reasonable amount for expenses incurred by the applicant in presentation and preparation of the application to the Board.

**(B) Caranua**

Caranua is the service name of the Irish Residential Institutions Statutory Fund established in March 2013. Caranua is not a redress board and does not provide compensation payments. It provides education, health care, housing assistance and ongoing support for survivors of institutional abuse.

**Procedures**  Applicants must provide their identity, the residence at which the claimed abuse occurred, the nature of the abuse and the injury caused as a result. Thus, the Board has regard to any evidence, any expenses incurred in making the application, medical expenses, and any regulations the Minister has made specifying compensation amounts.

Only those who have received awards through the Redress Board are eligible. Certain applicants have been prioritised, ie, those born before 1 January 1943 and those who at the time of making their application were suffering from a medical illness or psychiatric condition that is life-threatening.

Applications had to be lodged by 15 December 2005. However, pursuant to *RID Act 2002* s8(2) and s8(3), the Board has a discretion enabling it to extend to receive applications

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64 Ibid, 44.
65 *RID Act 2002*, s 17.
66 Ibid, s 27(1).
if exceptional circumstances exist.\textsuperscript{70} This discretion does not apply to any applications submitted after 17 September 2011.

Therefore, whilst the Board is not entirely bound by the Irish Statutes of Limitation,\textsuperscript{71} applicants unaware of their right to compensation until after 2011 were disappointed by this limited timeframe.\textsuperscript{72}

The Board has all powers necessary to perform its functions.\textsuperscript{73} If any issues arise from the legislation the responsible Minister has power to take action to remove that difficulty so as to make the provision effective.\textsuperscript{74}

If the Board refuses to award compensation an applicant may appeal to a Review Committee.\textsuperscript{75} This must be done within one month of the Board’s decision.\textsuperscript{76}

**Funding** Under a 2002 Indemnity Agreement, catholic Religious organisations in Ireland pledged to contribute funding. Further funding was provided for by the ‘Oireachtas’ (Parliament).\textsuperscript{77} Any other person with permission from the responsible Minister and Minister of Finance may also contribute to the fund.\textsuperscript{78}

Despite this pledge by the Catholic Church to provide funds, the Church has refused to pay. A “constitutional” protection of the right to property in Ireland, and further special protection concerning the Church’s right to property, prevents the Government from confiscating Church assets to fund the redress scheme. Through negotiation, the Church has slowly reduced its agreed compensation contribution leaving the Irish government primarily responsible for funding the redress scheme. As of 2011, the Irish Government had received only €126 million of the anticipated €1.47 billion that the implicated Catholic congregations promised under a 2002 Indemnity Agreement.\textsuperscript{79} As a result, efforts to enter into a legally binding agreement with the Church to secure funding have been abandoned.\textsuperscript{80} Given this history, COIN recommends that any arrangements entered into between governments and the catholic church hierarchy in Australia concerning the proposed VOCSART, or any other reparations scheme, be the subject of legislation, with clear penalties and powers to deal with breach or default.

\textsuperscript{70} *RID Act 2002, s 8(2) and s 8(3).*  
\textsuperscript{71} *‘Victims to miss out on redress as board closes’, Irish Independent, 15 July 2011; Residential Institutions Redress Act (Amendment Act) 2011 s.1.*  
\textsuperscript{72} *‘Sisters to challenge refusal to allow Redress Board application’, The Irish Examiner, 6 February 2012.*  
\textsuperscript{73} *RID Act 2002, s 5(2).*  
\textsuperscript{74} *Ibid, s 36(1).*  
\textsuperscript{75} *Ibid, s 9 and s 13(4).*  
\textsuperscript{76} *Ibid, s 13(4)(b).*  
\textsuperscript{77} *The Congregational Indemnity Agreement (2002).*  
\textsuperscript{78} *RID Act 2002, s 23(5).*  
\textsuperscript{79} *Carl O’Brien, ‘Cost of State redress for abused up to nearly €1.5bn’, The Irish Times, 4 May 2012.*  
II. UK (Northern Ireland)

(A) The Historical Institutional Abuse (HIA) Inquiry

Jurisdiction The Historical Institutional Abuse ("HIA") Inquiry operates within Northern Ireland. It was established in 2012 following the publishing of the Ryan Report, (May 2009),\(^1\) to investigate claims of institutional abuse dating back to 1922. The Inquiry is limited to investigating claims of abuse by children who attended institutions in Northern Ireland, regardless of whether they were funded by state, religious organisations or voluntary organisations.\(^2\)

Currently the Inquiry has no power to make civil or criminal findings. However it may pass information on to police to assist in criminal investigations.\(^3\)

Structure The Inquiry is operating in a similar manner to a Royal Commission. It is collecting testamentary evidence and undertaking research to determine appropriate initiatives of apology, compensation and funding. Currently, the Inquiry is identifying and contacting various institutions to be investigated.\(^4\)

III. CANADA

(A) The Grandview Agreement

The Grandview Agreement provided for a mediation style out-of-court settlement for victims of institutional abuse that occurred at the Grandview Training School for Girls through the 1960-1970s. In 1994, a Draft Agreement for compensation was formulated by the Ontario Government and Grandview Survivors’ Support Group (GSSG).\(^5\) In June 1994, following Government approval, the Agreement came into effect.\(^6\) The scheme operated for two and a half years, during which time, the majority of the 329 claims that were lodged were validated.\(^7\)

Procedures The compensation Agreement enabled all victims of abuse that occurred at the Grandview institution to apply for compensation through a non-adversarial, alternative dispute resolution process. Participation in this process did not limit an individual’s right to also pursue criminal charges or alternate civil claims against his/her perpetrators.

The adjudication process involved assessment of evidence, the impact of abuse on a victim and assessment of damages. Hearings were conducted in a largely traditional manner

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\(^3\) Ibid.
\(^6\) Ibid
\(^7\) Ibid
in which evidence was presented and the adjudicators made findings of fact on the basis of legal principles.\textsuperscript{88} Hearings were also designed to provide a means to empower victims and allow them to outline the wrongs they experienced and the ongoing consequences of such abuse on their adult lives.

Only residents of the Grandview Training School and its predecessor, the Ontario School for Girls, were eligible to lodge an application. Before lodging an application, a victim (always a female) was required to seek independent legal advice. Applicants were required to outline the abuse suffered and the ongoing consequences of such abuse on their lives; swear an affidavit; and sign a statement releasing the Ontario Government from further legal liability.

**Decision-Making** An initial investigation process was conducted to ensure that the claimant had attended Grandview and to resolve any inconsistencies in evidence provided. Final paperwork was then sent to an independent adjudicator for review. Negotiations in 1994 between the Ontario Government and the GSSG led to the appointment of six female legal Adjudicators.\textsuperscript{89}

The Adjudicators were required to consider the following when assessing a claim:\textsuperscript{90}

(a) How long was the claimant in residence?
(b) What was the age of the applicant?
(c) Were complaints made and if so when?
(d) By whom were the acts committed? What was the relationship of the claimant to the person?
(e) What was the frequency of the abuse and mistreatment? Was it an isolated act or a series of acts?
(f) What was the nature and severity of the abuse and mistreatment?
(g) What was the impact on the claimant? What was/is the consequence of the abuse? What treatment has been received for the injuries identified?
(h) Were criminal charges laid; was there a conviction; was conduct criminal in nature? (It is understood that many of the hearings may be concluded before the on-going criminal investigations are concluded, and accordingly, no adverse inference should be made with respect to beneficiaries whose alleged perpetrators have not yet been charged or convicted. Furthermore, neither the laying of criminal charges nor a conviction are preconditions for certification and relief under this agreement.)

\textsuperscript{89} *Kaufman Report*, 2002, 342.
\textsuperscript{90} *Grandview Agreement 1994*, s 4.2.5.
(i) Was the claimant a resident of Churchill House?

The applicant was entitled to an initial oral hearing before an Adjudicator. No transcript was kept to ensure confidentiality. As parties to the hearing, the Government, the applicant and the GSSG were all entitled to submit information the Adjudicator. The applicant was entitled to legal representation and in most cases lawyers were present at the hearings.

The applicant bore the onus of proving that the abuse had occurred; that abuse was major; and that substantial long term consequences had occurred as a result.\(^91\) The decision of the Adjudicator was final and the applicant was not entitled to an appeal.\(^92\)

**Compensation/Reparation: 3 Categories** The Agreement provided for three categories of compensation: General Benefits, Group Benefits and Individual Benefits.

**General Benefits** were designed for Canadian society as a whole. The Agreement defined these benefits as "programs, actions or commitments that the Government may undertake or foster and which may provide benefits to survivors of sexual, physical and institutionalized abuse generally."\(^93\) These Benefits included the amendment of various provincial laws and the elimination or extension of limitation periods.\(^94\)

**Group Benefits** were intended for former residents of the institution. These included a dedicated crisis line and funds for the removal of self-inflicted tattoos and scars ($120,000 for tattoo removal and $50,000 for scar reduction). Those applying for the removal of self-inflicted tattoos and scars had to swear a statement declaring they attended the institution and that they received the tattoos or scars during this period. See table below.\(^95\)

**Grandview - Usage of Benefits**

<table>
<thead>
<tr>
<th>BENEFIT</th>
<th>NUMBER OF WOMEN WHO HAVE USED BENEFITS</th>
<th>PERCENTAGE OF WOMEN WHO HAVE USED BENEFITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Therapy/counselling</td>
<td>123</td>
<td>91.8</td>
</tr>
<tr>
<td>Tattoo/Scar Removal</td>
<td>52</td>
<td>38.8</td>
</tr>
<tr>
<td>Contingency Fund</td>
<td>132</td>
<td>98.5</td>
</tr>
<tr>
<td>Educational/Vocational Assistance</td>
<td>46</td>
<td>34.3</td>
</tr>
<tr>
<td>Financial/Budget counselling</td>
<td>6</td>
<td>4.5</td>
</tr>
<tr>
<td>Total number of women who used at least one of the Agreement benefits</td>
<td>134</td>
<td>100</td>
</tr>
</tbody>
</table>

**Individual Benefits** were for individuals claiming specific incidents of abuse.

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\(^91\) *Kaufman Report, 2002.*
\(^92\) Ibid, 343.
\(^93\) Ibid, 335.
\(^94\) Ibid, 335.
\(^95\) Ibid, 341.
Quantum  Compensation provided depended on whether abuse or mistreatment and compensation was demonstrated. Compensation was awarded accordingly as per the table below.  

<table>
<thead>
<tr>
<th>ACTS ALLEGED</th>
<th>HARM/INJURY</th>
<th>EVIDENCE/PROOF</th>
<th>AWARD RANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repeated serious sexual abuse (sexual intercourse anal/oral) &amp; physical</td>
<td>Continued harm resulting in serious</td>
<td>Possible: Medical/psychological/therapist/police reports/direct evidence of</td>
<td>$40,000.00 - $60,000.00</td>
</tr>
<tr>
<td>beating and threats.</td>
<td>dysfunction. Adjudicator applies</td>
<td>victim if credible witnesses/documentary-proof conviction of perpetrator.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>standards set out in Agreement.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Physical abuse involving hospitalization with broken bones or serious</td>
<td>Harm sufficient to justify award must</td>
<td>Same as above</td>
<td>$20,000.00 - 40,000.00</td>
</tr>
<tr>
<td>internal injuries.</td>
<td>be demonstrated. Adjudicator applies</td>
<td></td>
<td>&quot;mid range&quot;</td>
</tr>
<tr>
<td></td>
<td>standards set out in the Agreement.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Isolated act of sexual intercourse/oral or anal sex or masturbation with</td>
<td>Harm sufficient to justify award must</td>
<td>Same as above</td>
<td>$20,000.00 - $40,000.00</td>
</tr>
<tr>
<td>threats or abuse of position of trust.</td>
<td>be demonstrated. Adjudicator applies</td>
<td></td>
<td>&quot;mid range&quot;</td>
</tr>
<tr>
<td></td>
<td>standards set out in the Agreement.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| No physical interference-forms of "mistreatment" i.e. cruel conduct that    | Long term detrimental impact - conduct   | Same as above                                                                  | $3000.00 on proof of acts | Ż
| was prolonged and persistent. Confinement in segregation alone will not      | must not have been lawful or            |                                                                               | of acts of abuse or       |
| attract an award. Segregation may be justified in accordance with           | condensed. The nature of the harm will  |                                                                               | mistreatment. $10,000.00  |
| administrative authority. Abusive segregation cannot be.                    | determine once proof of the acts are    |                                                                               | - $20,000.00 where serious | Ż
|                                                                              | accepted whether a minimal recovery or a |                                                                               | harm found by the         |
|                                                                              | higher award.                            |                                                                               | adjudicator               |

Funding  As Grandview was a Government institution, the relevant government was solely responsible for funding the Tribunal, compensation costs and any other measures the Adjudicator deemed appropriate.

(B) Aboriginal Residential Schools

In 1998, as a part of the Canadian Government’s Response to the Royal Commission’s Gathering Strength Report, a Statement of Reconciliation was issued. The Statement expressed regret and apologised to those who suffered from sexual abuse in the Aboriginal Residential School system. Furthermore, accompanying the Statement, the Government established a Community Healing Fund of $350 million, to be administered by the Aboriginal Healing Foundation. This Fund supports healing initiatives, but is not used to

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96 Ibid, 338.
98 Ibid, 2.
pay compensation to individual victims\textsuperscript{99} or support civil legal claims a victim may wish to pursue\textsuperscript{100}.

These are just two examples of the many mechanisms that have been put in place within Canada. Further mechanisms have instituted across Canada including in British Columbia, Ontario and Newfoundland.\textsuperscript{101}

IV. USA

While specific states have taken steps to investigate institutional child abuse, no federal inquiry has occurred and no specific redress mechanisms have been instituted. Reasons for this situation might include greater success achieved by victims in civil actions for damages through the courts, where million-dollar awards have been achieved.

(A) Pennsylvania Example

Grand Jury In Pennsylvania, the District Attorney, the Hon. Lynne Abraham, empanelled a Grand Jury to investigate the sexual abuse of minors by Catholic clergy. The Grand Jury found evidence that at least 63 priests had committed sexual assaults against hundreds of minors over a period of many decades.

In conducting its inquiry, the Grand Jury encountered issues familiar to Australian victims, i.e., surrounding criminal prosecution of and civil action against Catholic priests; the unincorporated nature of relevant dioceses; and relevant statute of limitations. Thus many complaints could not be considered due to their historical nature.

Recommendations The Grand Jury handed down a number of recommendations:\textsuperscript{102}

1) The abolition of the local statute of limitations for sexual offences against children, in line with initiatives by other states;

2) The offense of endangering welfare of children should be expanded to include reckless or negligent conduct in the supervision of those working with children;

3) Increase the penalty for indecent assault where there is a pattern of abuse against a child;

4) Tighten the Pennsylvania Child Protective Services Law to enforce an obligation to report child abuse to authorities where evidence of such abuse is clear;

5) Amend the Child Protective Services Law to require background checks on all individuals likely to encounter or supervise children in a professional capacity;

6) Hold unincorporated associations to the same standards as corporations regarding crimes of sexual assaults against minors;

\textsuperscript{99} Ibid, 3.
\textsuperscript{100} Ibid, 382.
\textsuperscript{101} Ibid, 380-381.
\textsuperscript{102} Re County Investigating Grand Jury (Pennsylvania) 2003 (Vic), 7-9.
7) Enlarge or eliminate statutes of limitation on civil suits involving child sexual assault, in order to ensure not just a criminal penalty but a continuing financial disincentive to engage in abuse.

V. CONCLUSIONS

In Victoria, reforms similar to points 2 and 3 above have been legislated to ensure that criminal penalties now exist for those who fail to prevent or report sexual abuse of children. Grand Jury procedures are not available in Australia. However, the inclusion of significant community (including “former” victims) with appropriate qualifications (eg, being sexually abused as a child; social work, psychology, paediatrics, law, rape counselling, etc) in both the devising and administration of the proposed VOCSART is strongly recommended.

In examining the overseas precedents, it is clear that schemes that are wholly government-funded and that do not rely on third party (eg, institutional) contributions, while they may reduce costs to the state when considering victims of crime, they are completely inadequate in terms of adequately compensating victims and providing a sound basis for future assistance and support. Ex-gratia schemes funded solely by government (ie, the taxpayer) with artificial “caps” imposed, must be avoided.

Part III: A REPARATIONS TRIBUNAL: PRINCIPLES, PROCEDURES AND PERSONELLE

Based on the above Australian and overseas experience, COIN considers that Australia should now establish a specialised, informal, properly empowered and funded Tribunal to provide a measure of justice and assistance to victims of child sexual abuse. The proposed new Tribunal – Victims of Child Sexual Abuse Reparations Tribunal or “VOCSART” – should embrace all victims, perpetrators and institutions (public or private, religious-based or otherwise) responsible for or employing such perpetrators.

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103 Crimes Amendment (Protection of Children) Act 2014 (Vic), (No 36 of 2014) s 49C; and see Crimes Act 1958 (Vic) s 327.

104 Annie Kent, Eve Jardine, COIN volunteers, law students, La Trobe University, Bundoora, Victoria.
VOCSART should be implemented and organised by legislation, either nationally or, if the federal parliament lacks constitutional power, on a state-by-state (or territory), basis, perhaps supported by s 92 “tied grants”. COIN recommends, however, that it is critical that each state scheme, if it is to be independent, should be founded on, and apply, common principles, procedures, powers and compensation entitlements.

Some details of these proposed Tribunals are set out below. Discussion, herein, is limited to Victoria.

I. JURISDICTION OF THE TRIBUNAL

(A) Eligibility to Claim

(i) Victims directly affected by child sexual abuse  Victims directly affected should be eligible to apply to a new independent Tribunal - “VOCSART” - for redress. As discussed above, overseas Tribunals seek to compensate children abused in schools, orphanages and children’s homes. Similarly, within Victoria, a specialised redress scheme to compensate victims of violent crime who experience injury, distress and trauma, ie, VOCAT, already exists. COIN does not recommend adding this class of “victims of crime” to VOCAT. It prefers a new, dedicated Tribunal especially adapted to meet the peculiar needs of child sex abuse victims.

(ii) People indirectly affected by child sexual abuse  Additionally, those who are indirectly affected should be entitled to access redress in certain circumstances. As is the case with the Victims of Crime Compensation Fund in South Australia (see above), immediate family members such as a spouse or domestic partner, parent, grandparent, child/grandchild (including an adult child/grandchild) and brother or sister are entitled to approach the Fund. A parent or guardian should be able to apply on a child’s behalf; just as a guardian can be court-appointed as a litigation guardian or self-appointed, to bring an action on that child’s behalf.

The extent to which family members, ie, secondary or “indirect victims”, are eligible to claim redress, should be carefully considered and declared. Eligibility for such “indirect victims” should include instances where:

- a primary victim has committed suicide; or
- a primary victim suffers employment, medical, social, psychological or like condition that significantly impedes his/her quality of life and/or that of other family members;

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105 See Constitution, s 92. See also s 122 (the territories power) whereby the Commonwealth enjoys ample power to establish a VOCSART in the ACT and NT.
106 For similar entitlements in VOCAT (Vic), see above.
107 Supreme Court (General Civil Procedure) 2005 (Vic), rule 15.02(1).
a secondary or indirect victim, eg a parent, is shown to have suffered similar conditions, and/or detriment, to his/her quality of life, irrespective of the impact upon, or redress provided to, the primary victim, eg, from the simple knowledge that his/her child had been raped.

The Victorian Parliamentary Committee concluded that claiming compensation for guilt suffered by a family member or victim should not ground a claim.\textsuperscript{108} This was because guilt, the Committee asserts, although serious in some cases, may result in too many claims being lodged. COIN disagrees. Feelings of “guilt” experienced by a victim is often an integral part of psychological damage caused to, and suffered by, a victim by reason of child sexual assault. That psychological damage will be an important factor in a Tribunal assessing compensation.\textsuperscript{109}

\textbf{(B) Categories of Institutional Respondents}

Institutions subject to the Tribunal’s jurisdiction should comprise, essentially, all those that interact with children. Such institutions include, obviously, large religious organisations, in particular, the Catholic Church, Salvation Army and Anglican Church. But additional, perhaps less-prominent or smaller institutions, should also be covered, eg, out-of-home care organisation, early education and private schools, childcare, youth groups, recreational and sporting organisations.

The Parliamentary Committee noted that it might be appropriate that nominal defendants should include non-government organisations that claim to act in the public interest and receive charitable or tax exemptions.\textsuperscript{110} This stratagem would catch the majority of the abovementioned organisations.

COIN submits that any institution which deals with children should be subject to the Tribunal’s jurisdiction, regardless of whether it is an incorporated body or not, or whether it receives charitable or tax-exemptions, or not. However, a problem arises where a “defendant” cannot be identified, or no longer exists.\textsuperscript{111} For example, when an organisation is not incorporated it is difficult (perhaps impossible) to sue the entity in its own name.\textsuperscript{112} However, most not-for-profit organisations are incorporated. This provides members with protection from personal liability and gives the organisation a legal identity.\textsuperscript{113}

\textsuperscript{108} BoT Report, p 79.
\textsuperscript{109} See J. Poznansky, Submission to Royal Commission, 26/5/2014.
\textsuperscript{110} BoT Report, 528.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid, p 530.
\textsuperscript{113} Ibid.
Incorporated associations are common in Victoria: they are regulated by the Associations Incorporation Reform Act 2012 (Vic) and Report to Consumer Affairs Victoria.\(^\text{114}\)

Not-for-profit organisations are currently not required to incorporate,\(^\text{115}\) raising the issue whether such institutions can be subject to the proposed Tribunal’s jurisdiction. COIN recommends that to ensure the proposed VOCSART is effective, all organisations dealing with children should be required to incorporate and be insured.

Government departments with responsibilities and duties for care and community services should also be subject to the Tribunal’s Jurisdiction where they are actively dealing with children, or oversee public or private bodies that engage in community services that involve children. Such departments should be viewed as responsible and accountable: they administer policies, statutory or regulatory schemes that, inter alia, may guide or control organisations where perpetrators are employed or have close associations with.

The Australian Charities and Not-for-Profits Commission (ACNC) regulates charities and aims to ensure that such bodies meet a certain level of governance in relation to their activities.\(^\text{116}\) However, the ACNC faces a dilemma; its governing legislation, the Australian Charities and Not-for-profits Commission Act 2012 (Cth), ultimately results in the situation where the ACNC cannot solely rely on a breach of governance standards to justify an investigation into or suspension of an alleged perpetrator.\(^\text{117}\)

Further, organisations involving a “high risk environment” should also fall within the Tribunal’s Jurisdiction. Many organisations’ activities involve situations where children are left alone under the care of an adult. These one-on-one situations provide opportunities to offend, such that children may be at risk. Some of these activities occur in what the National Child Protection Clearing House refers to as ‘high-risk environments.’\(^\text{118}\) These are ‘home-like’ contexts where an adult has access to children outside of the ‘organised’ activity, eg, car rides. Organisations and activities raising such ‘high risk’ environments include:

**Religious organisations:**
- Home visits;
- Choir/assistance roles in parishes;
- Sunday School (eg, preparation for Confirmation and Communion).

**Recreational, sporting, youth groups:**
- Scouts and Girl Guides camping trips;

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\(^{114}\) Ibid.

\(^{115}\) Ibid, p 531.

\(^{116}\) Ibid, p 535. The ACNC was terminated as part of the Federal Government’s 2014 Budget announcements.

\(^{117}\) Ibid, p 536.

\(^{118}\) Ibid, p 130.
• Access in physically exposed situations - locker rooms, change rooms, etc.

**Educational institutions:**

• Detention meetings with teachers in an office;
• School camping trips.

**Child Care institutions:**

• ‘Home-like’ environment
• a loving/nurturing environment may be encouraged, such that physical contact (hugging) is not considered inappropriate

**(C) Limitation Periods**

In regard to adults abused as children, no limitation period should apply on bringing a claim against a perpetrator or his/her employer. Commonly, victims fail to link their medical and other problems to the trauma they experienced as a child. In addition, many victims don’t reveal their experiences until years after, usually well into adulthood.

The *Limitation of Actions Act 1958* (Vic), s 27I(1), posits a maximum limitation period of 12 years once a victim has turned 25 years old (and who at the time of the alleged commission of the act or omission was a minor) to initiate proceedings from when the abuse occurred where such abuse is caused by a close associate. A ‘close associate’ is a person who, by virtue of their relationship with a victim’s parent or guardian, may influence them not to bring action against the associate on behalf of the victim; or, who may render the victim unwilling to disclose to the parent or guardian any harmful act or omission engaged in by the close associate. Judges have a discretion to extend a limitation period. According to police evidence presented to the Victorian Parliamentary Committee, it takes at least 23 years, on average, for victims who have suffered child sexual abuse to report the matter to the police.

People suffering an intellectual disability or who are otherwise unable to communicate or understand an act of child sexual abuse should also not be prevented from seeking access to redress due to technical limitation restrictions. Such a victim might be unaware of their abuse when a limitation period is inappropriate and unjust. Victims might take decades to act due to failing to understand that their problems arise from their abuse of decades earlier. Further, in a study conducted in the United States on Child Protective Service

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120 Ibid. See further below, Part III (II) (A), p 29.
121 *Limitations of Actions Act 1958* (Vic), s 27I(2).
122 *Bot Report*, p 537.
123 Ibid, 10.
agencies, it was found that children with a disability were maltreated 1.7 times more than children without disabilities.\textsuperscript{124}

(D) Ancillary Jurisdiction: Protecting Child Complainants

In the event that a child, (ie, under 18 years), by him/herself, or next-of-kin, or appointed guardian, applies to the proposed Tribunal for redress, the Tribunal should be a “one-stop-shop”, ie, it should possess powers to enable it to make not only reparation orders for past abuse but also, in appropriate circumstances, “care and protection” orders for the future. In this regard, the powers and procedures of the Tasmanian Magistrates Court are set out at Appendix 1.

II. TRIBUNAL PRACTICE AND PROCEDURE

(A) Requirements of Proof

Given that sexual abuse of children mostly occurs with no witnesses, what level of verification or proof should be required under the proposed redress scheme to establish sexual abuse?

COIN submits that for this class of claimants, formal requirements of proof should be avoided. Memories fade and typically, an average 20 years will have passed since an incident.\textsuperscript{125} Additionally, the more “formal” the evidence requirements, the more likely it is that the victim/witness will suffer significant trauma due to recalling these childhood experiences. As occurs with VOCAT (discussed above), an applicant should be required to give evidence or be cross-examined, only in exceptional circumstances, and then only by leave of the Tribunal, eg, where serious dispute as to facts arises following failure to resolve that dispute at mediation. The Commissioner’s “private” information gathering procedures, used extensively around Australia, provide a useful precedent to evidence-gathering procedures by the proposed Tribunal.

\textit{Information to be provided by a victim} At a minimum, victims should be required to provide the following details upon application to the Tribunal for redress:

- Whether the applicant is claiming as a “primary”, “secondary” or “related” victim or for specific (eg, funeral) expenses only. The closeness of the relationship between the claimant, the victim, and the incident will most likely be relevant to the nature and quantum of redress awarded;

- The date and location of the abuse: identifying specific dates may be difficult for a claimant due to effluxion of time, and/or the incident being repressed. However,


provision of background circumstances should facilitate proving the act of child sexual abuse;

- Whether the abuse was reported to police; if so, to whom and where. This should not be a determining factor. Child victims typically would not have had access to police or might not know of the significance of their abuse until years later;
- The extent of injury or death arising from the alleged act of violence;
- Whether the applicant has applied for damages, compensation, assistance or payments of any kind under any other scheme (such as the Victorian TAC or VOCAT scheme discussed above) or other government-funded medical, psychological or like services;
- Details of any relevant insurance cover;
- The offender’s personal details, if known. Interestingly, victims can receive financial assistance through VOCAT regardless of whether the offender has been identified, charged or convicted.126

- Time elapsed since sexual abuse. The BoT Report127 recommended that the Limitations of Actions Act 1958 (Vic) should be amended and limitation periods relaxed, or removed entirely: see discussion above. COIN recommends that no time limits should be imposed upon claimant’s making applications to the proposed Tribunal. Precluding victims from seeking redress for child abuse crimes on such technical grounds is not within the public interest. However, dangers associated with removing such time limits entirely should be noted: evidence may be lost; delayed claims may be oppressive to the respondent (eg, an individual), eg, people should be entitled to arrange their affairs without threat of legal action arising from activity occurring perhaps decades previously; and the timely resolution of disputes is itself in the public interest.128 COIN welcomes (but still awaits) the Victorian Government’s indication that it will “overhaul the Limitation of Actions Act” and “remove inappropriate limitations … that restrict (victims’) access to the civil judicial system.”129

Fact-finding procedures The level of verification required to prove the occurrence of child sexual abuse should be dependent on individual circumstances arising in each case. At a

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126 BoT Report, p 556.
127 Ibid, 537.
minimum, the Tribunal must be adequately satisfied in all cases. Evidence gathering and decision-making as to factual matters should proceed, as follows;

(a) Informal, private, non-adversarial gathering of material, in written or oral form, not subject to normal rules of evidence (eg, hearsay);

(b) Compilation, by Tribunal staff, of a “Case Statement and Preliminary Facts”;

(c) Provision of Preliminary Facts to offender/relevant institution’s representatives for response;

(d) If any factual dispute arises, that dispute proceeds to a Tribunal-controlled Mediation;

(e) If resolution is not achieved at Mediation, the Tribunal be empowered to decide any disputed fact: the Panel will apply the civil burden-of-proof;

(f) An offender/relevant institution be entitled to appeal that finding to a Panel of three Tribunal members, including a legally qualified Chairman;

(g) The Panel may decide the matter solely on the papers or may proceed by way of hearing. Legal representation will be allowed only by leave of the Panel, and will normally be refused. The Panel will apply the civil burden-of-proof;

(h) The Panel’s decision as to matters of fact will be final;

(i) Any party may appeal the Panel’s findings to a Supreme Court Judge, but only on questions of law. The Judge’s decision will be final and not subject to further appeal.

Provision (apart from relying upon costs orders) should be made, especially where facts establishing abuse are not questioned and an appeal concerns questions of law only, to indemnify victim-claimants against costs arising from such appeals.

(B) Evidence Gathering

This amounts to an informal screening process. It could include meetings involving a Tribunal staff, or third party. Questioning if the parties involved would seek to establish facts and issues. The scheme would seek to resolve all factual matters at this informal stage. This, obviously, avoids the need for a Tribunal hearing, saving costs and avoiding the added stress of “legal action”.

COIN notes that in Victoria, VCAT established a short mediation and hearing (SMAH) listings after a pilot program in 2010 in the civil claims list. These are a shortened form of mediation where parties explore options and resolve their dispute. If a dispute cannot be resolved through this process, the matter then proceeds to a hearing on the same day.

(C) Support for Claimants

Support, including counselling, should be provided by the Tribunal as necessary, to enable the victim to accurately and adequately present his/her claim. This might include

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legal, medical, psychiatric, mental or financial planning advice. Procedures utilised by the Royal Commission provide a useful precedent. Here, financial assistance is currently offered by the Royal Commission, funded by the Commonwealth Attorney-General’s Department. This grant provides for the cost of legal representation (if required) and expenses relating to the provision of evidence.

Medical, psychiatric and mental support, should similarly be accessible to all victims whilst participating in a redress scheme to acknowledge, encourage and comfort victims through the process. Reliving horrendous experiences and repeatedly going through fine details (in a potentially daunting environment), emphasises the need for this type of support. Twenty-eight community-based support services and organisations within the Department of Social Services, located around Australia, designed to assist those who participate in the Royal Commission currently exist. These services might be recruited as affiliated services for the Tribunal scheme. Organisations such as Bravehearts Pty Ltd (national), Healing Foundation (national) and Open Place (Vic) should be approached.131

Financial assistance or indemnification should be offered for victims' and witness expenses (e.g., a daily appearance fee), costs to attend hearings including travel and accommodation expenses, or loss of income. Such financial aid for victims should reduce any monetary strain and consequential stresses incurred by them.

Preliminary support. From the outset of the application process, the Tribunal should have the ability to refer victims if necessary to support services, e.g., in Victoria, Victims of Crime Helpline, Victims Support Agency, the Victims Assistance and Counselling Program. Such agencies can provide general counselling and legal advice.

The Victims Support Agency (VSA) is the official Victorian Government Agency that aids and supports those affected by violent crimes in Victoria. The agency operates the Victims of Crime Helpline, and funds statewide services such as counselling and practical assistance to victims within the justice system. VSA aims to links victims to support systems, and ensure that they receive individual, efficient and effective assistance to enable victims to better manage the impact of violent crime.132

The Victims Assistance and Counselling Program (VACP) helps victims deal with, and recover from, the effects of a crime by offering services such as: emotional and physical support; practical assistance and counselling; advocacy; providing information and referrals to other services; help with preparing Victim Impact Statements; offering support to access

the criminal justice system and to lodge Victims of Crime Assistance Tribunal (VOCAT) applications where eligible.\textsuperscript{133}

**D) Factors when considering Support Services and Compensation Orders**

Research shows that child sexual abuse impacts upon many facets of a victim's life and the lives of victims' families\textsuperscript{134} - physical, psychological, cognitive, behavioural and social.\textsuperscript{135} Support services associated with the proposed Tribunal should specifically address the following: mental health issues; relationship problems; addiction; anger management; sexual intimacy and development; issues with authority; and life skills, education and employment.

* (a) *Mental Health*  
Post-traumatic stress disorder has been isolated as the leading mental health issue suffered by victims of child sexual abuse.\textsuperscript{136} Suicidal ideation was also experienced by a substantial number of victims.\textsuperscript{137} The effects of abuse often become part of the victim’s persona, such that it may prove difficult to provide services that fully assist him/her.

* (b) *Relationship counselling*  
Child sexual abuse can lead to trust issues and an inability to be intimate.\textsuperscript{138} Victims experience difficulty in forming or maintaining relationships with family, friends and colleagues. Social isolation and depression is often experienced, perpetuating other psychological issues.\textsuperscript{139} Victims record a fear of abusing their own children and inability in sharing affection.\textsuperscript{140}

* (c) *Addiction*  
Support should be provided when victims suffer personal or social problems such as alcoholism, gambling, illicit drug dependencies and other addictions. Addictive behaviours are described by victims as a way to numb oneself from the pain of child sexual abuse.\textsuperscript{141} Addictive behaviour, such as alcoholism, can lead to further detrimental health issues if pursued for a prolonged period of time. Such problems may affect the extent to which a victim can present a claim to any court or Tribunal.

Victims reported to the Victorian Parliamentary Committee that they were introduced to alcohol, tobacco and other addictive substances through the grooming process inflicted

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\textsuperscript{134} See, recently, M Cunneen SC, *Report of Special Commission of Inquiry* (re Maitland-Newcastle Diocese, NSW), 4 Vols, 30/5/2014, Vol 1, Ch 7 pp 76-77; 82-84.

\textsuperscript{135} *Bot Report*, p 66.

\textsuperscript{136} Ibid, 70.

\textsuperscript{137} Ibid.

\textsuperscript{138} Ibid, 72.

\textsuperscript{139} Ibid, 73.

\textsuperscript{140} Ibid.

\textsuperscript{141} Ibid, 74.
upon them by the perpetrator.\textsuperscript{142} Thus “damages” arising from these addictions may be properly included in any award/compensation order determined by the Tribunal.

(d) Anger management assistance Victims often struggle to cope with their emotions and may experience intense anger or violent outbursts associated with such.\textsuperscript{143} Anger management issues can arise from an internal process whereby victims seek to resist any form of over powering or abuse.

(e) Sexual intimacy and development Problems with sexual intimacy and identity may arise from experiencing child sexual abuse. These conditions may cause, in turn, increased stress and relationship complications such as divorce.\textsuperscript{144}

Abuse in early adolescence is most problematic since, at this time, a sense of self, sexual consideration, and the ability to establish trusting relationships are still being established.\textsuperscript{145}

(f) Assistance to deal with persons in authority Victims often feel suspicious of, even paranoid about, men in a position of authority and/or nervous in their presence.\textsuperscript{146} The Tribunal’s processes, and damages awards, if any, should take account of such factors, if shown on the evidence.

(g) Life skills, education and employment Inability to act in social situations due to low self-esteem and confidence often arise.\textsuperscript{147} The BoT Report records that many victims had not achieved their aspirations in life, eg, regarding employment and education.\textsuperscript{148} The Tribunal processes should support victims with these factors in mind to better enable them to articulate such emotions and difficulties. The tailoring of Tribunal compensation orders or awards may, in relevant cases depending upon the evidence, take into account such factors.

(h) Limit on the provision of services A question arises whether limits should be imposed upon support provided to a victim by the Tribunal. Such support should be proportionate to the victim’s overall state, considering past and current experiences. Consideration of decline in psychological or mental state may be pertinent to this issue. Powers to limit support provided may be useful in order, eg, to prevent vexatious or extravagant claims, in contrast to genuine claims. COIN recommends against the imposition of any, or any arbitrary, “cap” on compensation amounts.

\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid, 75.
\textsuperscript{144} Ibid, 76.
\textsuperscript{145} Ibid.
\textsuperscript{146} Ibid, 77.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid.
(E) **Forms of Redress Available**

*Monetary assistance and compensation* Monetary compensation should be available, and may prove to be the most prominent form of redress. Typically, many years will have passed since an incident of sexual abuse. In this situation, for the adult claimant, in relation to those past years (as distinct to the future), other support is irrelevant. As to the future, financial assistance may be provided for reasonable counselling, medical, safety-related and funeral expenses. In addition, damages for loss of earnings directly related to child sexual abuse should be available, plus financial assistance for reasonable expenses to assist a victim on his/her path to recovery. A host of services may be involved, eg, victim support group sessions, programs such as yoga to deal with anxiety, etc.

*Medical* Ongoing medical needs should be addressed appropriately and adequately. Needs may include medication, rehabilitation such as physiotherapy, and regular visits to a general practitioner or specialist to monitor physiological issues. The *BoT Report* records beatings and canings as frequent forms of abuse along, with anal penetration and digital rape.\(^{149}\) Clearly, resulting physical and psychological injuries should be the subject of monetary compensation (eg, a lump-sum) and/or financial assistance for future medical and associated expenses. Importantly, the Tribunal should be empowered to consider, amongst other guidance, quantum figures awarded in analogous claims for damages for personal injuries in the civil courts in Australia, and elsewhere.

*Psychiatric or psychological services* The Tribunal should be empowered to order that the Respondent individual, or institution, or failing these, an insurance scheme (see below) indemnify a claimant against the cost of future medical and associated expenses. Such expenses might relate to the Tribunal determining that a claimant requires, or would benefit from, a range of services to meet problems caused by the child sexual abuse. Such services might, in a given case, include ongoing counselling, therapy or social support where monetary compensation does not address a client’s situation. Money alone may not best satisfy a claimant’s needs: psychological support might more appropriately address their situation. Counselling and psychological support should be offered as an ongoing basis with regard to the circumstances of the case. The Victorian VOCAT scheme is criticised in the *BoT Report*\(^{150}\) due to lack of such outcomes. Programs that provide life skills, education and employment support on an ongoing basis are essential. Services may include support in relation to mental health issues; relationship problems; addiction; anger management; sexual intimacy and development; and issues with authority.

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\(^{149}\) *BoT Report*, pp 55, 59.

\(^{150}\) Ibid, 559.
Dispute resolution alternatives and restorative justice  The Tribunal’s powers and processes should acknowledge that victims, when fully informed of all compensation options available, including monetary awards, may nevertheless seek non-monetary outcomes, either alone or coupled with monetary damages. Victims may seek a simple, yet sincere apology and recognition, perhaps face-to-face, by senior and responsible powers in the offending institution’s hierarchy, e.g., a Catholic Bishop from the relevant diocese. The inclusion of an opportunity to pursue alternative dispute resolution or mediation to facilitate face-to-face meetings between victims and organisations (be they public or private) is important. These processes may facilitate understanding of the offender’s actions and convey remorse to the victim. The ability of a victim to express feelings and concerns in an informal environment to an offender may be of real therapeutic value.

Additionally, the process must allow for the perpetrator or his/her employing/managing institution to be held accountable for the relevant behaviour. A perpetrator might be asked to explain or attempt to justify past conduct. In this way, perpetrators are not permitted to be merely passive actors; all parties are engaged, providing, hopefully to a victim, the opportunity to better understand the harm caused and to the perpetrator, a better understanding of the consequences of his/her actions, including the “secondary trauma” often occasioned to a victim by an institution’s rejection of complaints. This might assist the victim to heal in a way that monetary compensation may not enable.

Apology and acknowledgment  Pastoral support, a formal apology and acknowledgement of instances of child sexual abuse should always be an option in any redress package. These forms of redress potentially offer healing for the victim that is complementary to counselling. Allowing a victim to openly engage in dialogue with the perpetrator offers a restorative justice approach, as mentioned above.

Limits on awarded redress?  An issue arises whether the Tribunal’s powers should be “capped” in relation to monetary redress. In Victoria, VOCAT is capped at $60,000 when providing financial support; although, in special cases, $70,000 may be awarded in non-sexual matters. In sexual crimes, a cap of $10,000 is imposed. COIN considers this cap to be grossly inadequate, on any view: see discussion above. COIN submits that, as with the civil courts, no “caps” should be applied. Rather, the processes pursued, quality of personelle appointed, guidance provided by civil awards at common law, and the ability of an aggrieved individual or institutional respondent to appeal on questions of law, or, perhaps on the basis of “manifestly excessive” monetary orders, should ensure reasonable and just outcomes. If caps were applied, the questions will inevitably arise whether, in a particular case, justice for a victim is denied, i.e., the maximum “capped” sum may not adequately address the needs of a
victim who may require ongoing support for life, plus monetary compensation for prior suffering, damage, and medical expenses. Basically, redress provided should be proportionate to a victim's harm or injuries suffered. Assessment of damages and awards generally should be commensurate with likely outcomes should the matter have proceeded as a civil action for damages at common law in Australian courts. One important additional, and distinguishing factor included in determining VOCSART awards, is that these should be directed also at rectifying cultural (eg, “clericalism” in the catholic church) or systemic faults (eg, deliberate failure to report abuse by the cultural hierarchy) revealed in the responsible institution, thus seeking to prevent future abuse. Clearly, both victims and respondents also benefit from avoiding the delays, costs, uncertainty, trauma, narrow or inadequate outcomes, and unwanted publicity associated with litigation.

Options of ongoing evaluation and support would also be required, with an individual's symptoms regularly monitored and support orders adjusted accordingly.

(F) Group Redress?

A question arises: should group benefits be available to, say, all former residents of an institution where abuse was widespread (i.e. group redress)?

Although the significance of individual healing processes for survivors of child sexual abuse should not be undermined, group benefits also provide multiple therapeutic advantages. Group activity and collective benefits assist in decreasing some of the adverse long-term impacts suffered by victims of child sexual abuse such as depression, low self-esteem, social isolation, and poor interpersonal relationships (including trust issues). The opportunity to share similar experiences in a safe environment with others who have suffered similar types of trauma decreases feelings of isolation within victims. In addition, the group itself has the potential to become a vital network of social support for fellow victims.

Empirical research has examined the degree of effectiveness group recovery has on victims of child sexual abuse in comparison to individual redress approaches. The results indicate that group work achieved significantly higher improvements than those undertaking individual healing processes. Impacts of the approaches were measured against an index assessing levels of anxiety, interpersonal sensitivity and hostility. However, levels of depression did not show significant improvement in this case study. Nonetheless, both participants and therapists involved in group work reported child sexual abuse issues were

152 Ibid, 54.
153 Ibid, 55.
155 Ibid.
more thoroughly addressed in a group context compared to participants undertaking an individual approach.\textsuperscript{156}

Consequently, in appropriate circumstances, group benefits should be available, as one redress option, in the proposed Tribunal, provided that group members can demonstrate similar experiences. Additionally, individuals should still provide adequate proof or verification of abuse complained of. These group benefits may be offered as an alternative where an "individual" claim fails or if pursuit of group action is more appropriate. Moreover, group redress benefits may provide an added incentive for victims of child sexual abuse to come forward and gain justice, if daunted by the idea of facing a Tribunal by themselves; or where a complainant has friends or family also subject to child abuse by the same individual or institution.

(G)\textbf{Tribunal Personnel}

The proposed Tribunal's staff might usefully be based on Victoria's VCAT. There, a range of administrative, research and professional staff perform various roles including counselling and support functions. Similar staff, all with appropriate qualifications and experience, would be required in the proposed Tribunal.

In addition, Tribunal "Members", as with VCAT, should be of sufficient seniority and expertise to command confidence and respect from the whole community. The Tribunal should be headed-up by a Supreme Court Judge, and employ adjudicating "Members" from various disciplines, especially legal, medical, psychological, and social work.

In Victoria, VCAT, in its Guardianship and Administration jurisdiction, utilises a three-Member Panel to conduct hearings and reach decisions, ie, a lawyer, psychiatrist and community health worker. Among other functions, they decide whether a person remains as a psychiatric inpatient or is released into the community.

The competencies that Tribunal members should possess, to ensure Members have the relevant expertise and authority to decide matters, should include:

- knowledge and technical skills;
- a concern to achieve just outcomes and fair treatment;
- ability to communicate with all parties with courtesy, patience, tolerance, fairness, sensitivity, compassion and self-discipline;
- awareness of a need to conduct hearings in an independent manner;
- awareness of the need, in relevant circumstances, to:
  - encourage participation (eg, by concerned families, friends, support groups);

\textsuperscript{156} Ibid.
encourage Alternative Dispute Resolution (Mediation), as an option for people daunted by the VOCSAT process;

- efficiency - manage hearings to facilitate the fair and timely resolution of disputes;
- professionalism and integrity;
- leadership and management skills.

(H) Funding a Compensation Tribunal

In Victoria, VOCAT notes that its payments to victims are offered as, in part, symbolic expressions to emphasise the community’s recognition of, and the needs of, victims of crime. Nonetheless, VOCAT is currently funded by the State’s Consolidated Fund. If the proposed Tribunal is established, at Commonwealth or State/Territory levels, various possible streams of funding can be considered. COIN considers that the proposed Tribunal’s funding, by force of law, should comprise:

1. Institutional funding, especially major perpetrators or “high risk” institutions – be they public, private, faith-based or otherwise, large or small – plus
2. An insurance scheme funded by a mix of major perpetrators according to a “Risk Rating” scheme, and others dealing with children; and
3. A jurisdiction’s consolidated fund arising from general revenue.

Such funding should support:

1. The establishment and operations of the Tribunal; and
2. Cost arising from compensation, in cash or by way of services, ordered to victims.

Institutional funding It is a fundamental right of victims to be compensated by the perpetrator and, if appropriate, his/her Institution. COIN believes that major offenders, eg, the Catholic and Anglican churches, and the Salvation Army in the private sphere, state-run orphanages and places caring for wards-of-state in the public sphere, and other culpable Institutions, should be forced by law, to:

(i) contribute to a national dedicated fund to support the establishment and ongoing administrative costs of the proposed Tribunal; and
(ii) pay such monetary awards made in favour of victims shown to have been abused by that institution and/or its employees, servants or agents, on a case-by-case basis.

As with the scheme established in Ireland (see above), the main institutional perpetrators should be required to contribute funding to the dedicated fund in quantum pursuant to a “Risk Rating” formula, to be devised. That formula should reflect:

- The culpability of the Institution in terms of, eg, number of victims, damage caused, ability to prevent abuse, history of denial and cover-up, moral factors, etc;
- Its wealth;
• Its size;
• Its public support through, eg, charitable or tax-exemptions;
• Its social contribution, if any, eg, social welfare or educational activities in the community;
• Other factors, as relevant.

Based on experience in Ireland any funding required from the Catholic Church should be mandated by law. In Ireland, the Church repeatedly breached an agreement to pay: see discussion above.

Insurance Scheme If, by application of the above suggested funding formula, an impoverished, now non-existent or small “institution” (eg, a sporting club) is unable to satisfy, in whole or in part, its establishment and running costs requirements, then a National/State/Territory insurance scheme, to be established, may be accessed by order of the Tribunal. This may be similar in its operations to, eg, various insurance schemes operating in various sectors of the community, funded by a levy on those active in or participating in that sector, eg, building insurance, various professional indemnity insurance funds, etc.\(^\text{157}\) All organisations associated with the care and control of children should be required to contribute to such a fund. Steps should be taken to control the ability of such organisations to “pass-on” these levy costs to their clientele, eg, parents or school-children by way of raising school fees. Ultimately, it might be that the tax-payer, one way or another, will end up bearing some additional burden.

Proceeds of Crime A further possible source of funding in Victoria (and doubtless in other jurisdictions) is the Confiscated Assets Account resulting from the Commonwealth’s Proceeds of Crimes Act 2002: see s 286. Payments may be made from the Account to the states or territories (s 297). But currently, the Act makes no provision for confiscation of crime proceeds to support victims of a particular, or any, crime. This approach may be justified on the basis, in a particular case, where the perpetrator is convicted of a sexual assault or similar crime: his/her controlling institution is wealthy (eg the Catholic Church); and that institution is required to contribute to the Confiscated Assets Account by reference to a formula, to be devised.

General Revenue Here, the proposed VOCSART, with Victoria’s VOCAT, would be funded, in whole or in part, our of general revenue. If a national scheme were sought to be

\(^{157}\) See eg, the professional indemnity insurance requirements for all legal practitioners in Victoria, under the Legal Profession Practice Act 2004 (Vic), Part 3.5.2(1). Insurance premiums paid annually by practitioners are assessed by reference to, inter alia, several risk factors, eg, the type of legal practice; and past claims and rulings (if any) made against the insured. See Ibid, part 3.5.6(2).
imposed by the Commonwealth, no doubt state-federal financial arrangements would need to be negotiated.

III Conclusions and Recommendations

The BoT Report states that a successful alternative justice scheme for child sex-abuse victims should include the following elements: 158

- independence with sufficient authority to ensure that the appropriate parties “come to the table” to resolve claims;
- respect for, proper engagement with, and support for victims throughout the process by ensuring access to counselling services and legal assistance;
- a strong focus on the needs of victims, families and communities;
- not be bound by legal parameters applying to civil actions when determining outcomes that respond to the multiple needs of victims;
- be empowered to require relevant organisations (eg, faith-based or secular, public or private) to take responsibility for delivering outcomes ordered by the scheme, including the funding of compensation and services for a victim;
- be empowered to continue regardless of a parallel police investigation;
- include a clear avenue to appeal decisions.

COIN agrees with these principles, refers to the various recommendation concerning the proposed VOCSART stated above, and adds the following:

- informal decision-making processes should be utilized wherever possible;
- no time-limitations on making applications should apply, including in relation to historical claims. Thus, any amendment or repeal of limitation-of-action laws should have force and effect retrospectively;
- access to the civil courts should be available as an alternative source of redress, should victims so chose;
- victims who have already pursued civil action in the courts, or who have pursued claims against institutions utilizing in-house private mediation schemes (eg, the catholic church’s Towards Healing and Melbourne Response processes) should not be precluded from claiming again to the proposed Tribunal (eg, to “top-up” financially, or add medical support elements, to a settlement if considered inadequate), but may not “double-dip”.

Signed

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158 See BoT Report, Ch 2, p 41.
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30 June 2014
Dated
APPENDIX 1
Ancillary Jurisdiction: Care and Protection Orders

TASMANIA MAGISTRATES COURT (CHILDREN)

Tasmania has established (like Victoria and other jurisdictions) a separate court for children. See the Children, Young Persons and Their Families Act 1997 (Tas) ("YPFA Act 1997"). Multiple orders, under their legislation, may be made by the Magistrates Court (Children’s Division): eg, assessment orders (s 22), care and protection orders (s 42), extension of care and protection orders (s 44) and variation of care and protection orders (s 48).

Assessment Orders In Tasmania, assessment orders under the YPFA Act 1997 are more efficient (and less strict) than those made under equivalent powers in Victoria. On application to the Secretary, the Court may make an assessment order in respect of a child if the Court is satisfied that there is a reasonable likelihood that the child is at risk, that further assessment is warranted and that it would be in the best interests of the child to make the order. These requirements can be seen as more subjective and lenient than those applying in other courts in Australia.

Protection Orders Protection orders may be obtained from the Tasmanian Magistrates’ Court if the Court is satisfied that the child is “at risk” and that a care and protection order should be made to secure the care and protection of the child. The Court must also be satisfied (on other criteria).
- That proper arrangements exist for the care and protection of the child, without which the child will be likely to suffer psychological harm; and
- that it would be in the best interests of the child for the arrangements to be initiated.

Extension of Care and Protection Orders If an application is made to the Departmental Secretary before a Care and Protection Order ceases to have effect, the Court may decide to extend that order if:
- a family group conference has been held to review the arrangements; and
- they are satisfied that the child would be at risk if the order were to cease effect; or
- that it is in the best interests of the child for those arrangements to continue.

These procedures reflect the Magistrates Court (Children)’s focus on the best interests of the child.

The YPFA Act 1997 is mainly concerned to protect children considered to be ‘at risk’, eg, if the child is being abused or neglected or likely to be abused or neglected. These concepts are defined broadly. For example, s 4 states numerous scenarios where a child may not be immediately at risk but if a child is in the care of guardians that have previously abused or murdered, that fact alone may raise a reasonable likelihood of the child in question being in danger.

One significant difference between the Tasmanian and Victorian Children’s Court schemes is that the Tasmanian Act provides that the primary responsibility for a child lies with the child’s family (s 8(1)). This approach ensures that the highest priority is given to supporting the family. If a family is unable to provide for a child’s care and protection, the Departmental Secretary may take on the task.

Serious consideration is given to the child’s future, such as ensuring that the child is kept with their family and that family ties are not broken. It is also provided that the child

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159 YPFA Act 1997, s 22.
160 Ibid, s 42.
161 Ibid, s 42.
162 Ibid, s 44.
163 Ibid, s 4.
164 Ibid, s 4.
165 Ibid, s 8(1).
will not be withdrawn from their familiar environment if possible.\textsuperscript{166} COIN considers these family-responsibility aspects to be an important consideration in devising the proposed VOCSART in appropriate circumstances, ie, when the victim complains and he/she, and/or his/her family, approach a VOCSART scheme when the victim is still a minor, eg, under 18 years.

\textsuperscript{166} Ibid, s 8(1).