



**Submission from the  
Truth Justice and Healing Council**

**Royal Commission into Institutional Responses to Child Sexual Abuse  
Issues Paper No. 6 | Redress schemes**

**11 August 2014**



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Justice Peter McClellan AM  
Chair  
Royal Commission into  
Institutional Responses to Child Sexual Abuse

Via email: [solicitor@childabuseroyalcommission.gov.au](mailto:solicitor@childabuseroyalcommission.gov.au)

Dear Justice McClellan

As you know, the Truth Justice and Healing Council (the Council) has been appointed by the Catholic Church in Australia to oversee the Church's response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

We now submit the Council's submission in response to the Royal Commission's Issues Paper 6 – Redress Schemes.

Yours sincerely

**Neville Owen**  
**Chair**  
**Truth Justice and Healing Council**  
**11 August 2014**

## Our Commitment

The leaders of the Catholic Church in Australia recognise and acknowledge the devastating harm caused to people by the crime of child sexual abuse. We take this opportunity to state:

- Sexual abuse of a child by a priest or religious is a crime under Australian law and under canon law.
- Sexual abuse of a child by any Church personnel, whenever it occurred, was then and is now indefensible.
- That such abuse has occurred at all, and the extent to which it has occurred, are facts of which the whole Church in Australia is deeply ashamed.
- The Church fully and unreservedly acknowledges the devastating, deep and ongoing impact of sexual abuse on the lives of the victims and their families.
- The Church acknowledges that many victims were not believed when they should have been.
- The Church is also ashamed to acknowledge that, in some cases, those in positions of authority concealed or covered up what they knew of the facts, moved perpetrators to another place, thereby enabling them to offend again, or failed to report matters to the police when they should have. That behaviour too is indefensible.
- Too often in the past it is clear some Church leaders gave too high a priority to protecting the reputation of the Church, its priests, religious and other personnel, over the protection of children and their families, and over compassion and concern for those who suffered at the hands of Church personnel. That too was and is inexcusable.
- In such ways, Church leaders betrayed the trust of their own people and the expectations of the wider community.
- For all these things the Church is deeply sorry. It apologises to all those who have been harmed and betrayed. It humbly asks for forgiveness.

The leaders of the Catholic Church in Australia commit ourselves to endeavour to repair the wrongs of the past, to listen to and hear victims, to put their needs first, and to do everything we can to ensure a safer future for children.

## Authorising Church Bodies

The following Catholic Church bodies have authorised the Truth Justice and Healing Council to represent them at the Royal Commission:

### Dioceses

Archdiocese of Adelaide	Diocese of Broome	Diocese of Sandhurst
Archdiocese of Brisbane	Diocese of Bunbury	Diocese of Toowoomba
Archdiocese of Canberra-Goulburn	Diocese of Cairns	Diocese of Townsville
Archdiocese of Hobart	Diocese of Darwin	Diocese of Wagga Wagga
Archdiocese of Melbourne	Diocese of Geraldton	Diocese of Wilcannia-Forbes
Archdiocese of Perth	Diocese of Lismore	Diocese of Wollongong
Archdiocese of Sydney	Diocese of Maitland-Newcastle	Eparchy of Saints Peter & Paul of Melbourne
Diocese of Armidale	Diocese of Parramatta	Military Ordinariate of Australia
Diocese of Ballarat	Diocese of Port Pirie	Personal Ordinariate of Our Lady of the Southern Cross
Diocese of Bathurst	Diocese of Rockhampton	
Diocese of Broken Bay	Diocese of Sale	

### Religious Institutes

Adorers of the Blood of Christ	Loreto Sisters	Sisters of Mercy Brisbane
Augustinian Recollect Sisters	Marist Brothers	Sisters of Mercy North Sydney
Augustinian Sisters, Servants of Jesus and Mary	Marist Fathers Australian Province	Sisters of Mercy Parramatta
Australian Ursulines	Marist Sisters – Congregation of Mary	Sisters of Nazareth
Benedictine Community of New Norcia	Ministers of the Infirm (Camillians)	Sisters of Our Lady of Sion
Blessed Sacrament Fathers	Missionaries of God's Love	Sisters of St Joseph
Brigidine Sisters	Missionaries of the Sacred Heart	Sisters of St Joseph of the Apparition
Canons Regular of Premontre (Norbertines)	Missionary Franciscan Sisters of the Immaculate Conception	Sisters of St Joseph of the Sacred Heart
Canossian Daughters of Charity	Missionary Sisters of Mary, Queen of the World	Sisters of St Joseph, Perthville
Capuchin Friars	Missionary Sisters of St Peter Claver	Sisters of St Paul de Chartres
Christian Brothers	Missionary Sisters of Service	Sisters of the Good Samaritan
Cistercian Monks	Missionary Sisters of the Sacred Heart	Sisters of the Good Shepherd
Columban Fathers	Missionary Sisters of the Society of Mary	Sisters of the Holy Family of Nazareth
Congregation of the Mission – Vincentians	Missionary Society of St Paul	Sisters of the Little Company of Mary
Congregation of the Most Holy Redeemer – Redemptorists	Oblates of Mary Immaculate	Sisters of the Resurrection
Congregation of the Passion – Passionists	Order of Brothers of the Most Blessed Virgin Mary of Mount Carmel (Carmelites)	Society of African Missions
Congregation of the Sisters of Our Lady Help of Christians	Order of Friars Minor Conventual	Society of Catholic Apostolate
Daughters of Charity	Order of Saint Augustine	Society of Jesus
Daughters of Mary Help of Christians	Order of the Friar Servants of Mary (Servite Friars)	Society of St Paul
Daughters of Our Lady of the Sacred Heart	Our Lady of the Missions	Society of the Divine Word Australian Province
De La Salle Brothers	Patrician Brothers	Society of the Sacred Heart
Discalced Carmelite Friars	Pious Society of St Charles – Scalabrinians	Sylvestrine-Benedictine Monks
Dominican Friars	Poor Clare Colettines	Ursuline Missionaries of the Sacred Heart
Dominican Sisters of Eastern Australia & The Solomons	Presentation Sisters – Lismore	
Dominican Sisters of North Adelaide	Presentation Sisters – Queensland Congregation	<b>Other Entities</b>
Dominican Sisters of Western Australia	Presentation Sisters – Tasmania	Australian Catholic Bishops Conference
Faithful Companions of Jesus	Presentation Sisters – Victoria	Catholic Religious Australia
Family Care Sisters	Presentation Sisters – Wagga Wagga Congregation	Catholic Church Insurance Limited
Franciscan Friars	Presentation Sisters – Western Australia	Professional Standards Office Tasmania
Franciscan Missionaries of Mary	Religious of the Cenacle	Professional Standards Office NSW/ACT
Franciscan Missionaries of the Divine Motherhood	Salesians of Don Bosco	Professional Standards Office NT
Franciscans of the Immaculate	Salvatorian Fathers	Professional Standards Office Qld
Holy Cross – Congregation of Dominican Sisters	Secular Institute of the Schoenstatt Sisters of Mary	Good Samaritan Education and Lourdes Hill College
Holy Spirit Missionary Sisters	Servants of the Blessed Sacrament	Good Samaritan Education and Mater Dei
Hospitaller Order of St John of God	Sisters of Charity of Australia	Good Samaritan Education and St Mary Star of the Sea College
Institute of Sisters of Mercy Australia & Papua New Guinea	Sisters of Jesus Good Shepherd "Pastorelle"	Good Samaritan Education and St Patrick's College
		Loreto Mandeville Hall Toorak
		Trustees of Mary Aikenhead Ministries



## The Truth Justice and Healing Council

The Catholic Church in Australia (the Church) welcomes the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse as an opportunity to acknowledge the truth about child sexual abuse within the Church, and to have these issues investigated and considered, objectively and publicly. It is an opportunity to bear witness to the suffering of the many victims of this abuse.

The Church is committed to cooperating fully with the Royal Commission, without reservation or qualification.

In February 2013 the Australian Catholic Bishops Conference (ACBC) and Catholic Religious Australia (CRA)<sup>1</sup> jointly established the Truth Justice and Healing Council (the Council) to coordinate and oversee the Church's overall response to and appearance at hearings of the Royal Commission.

The Council is a body of 12 people, with expertise spanning such fields as child sexual abuse, trauma, mental illness, suicide, psycho-sexual disorders, education, public administration, law and governance. The majority of Council members are lay, two of its members are bishops, and one of its members is a Brigidine sister. Three of the Council members are either themselves victims of abuse or have immediate family members who are victims. The Council provides independent advice to the ACBC and CRA, through a Supervisory Group, which is comprised of the Permanent Committee of the ACBC, and representatives of CRA. The Supervisory Group may accept or reject such advice. The Supervisory Group fully endorses this Submission. The members of the Supervisory Group are listed on the TJHC website [here](#).<sup>2</sup>

The Council is chaired by the Hon Neville Owen, former judge of the Supreme Court of Western Australia and former HIH Royal Commissioner. Mr Owen's appointment follows the death of the Council's inaugural Chair, the Hon Barry O'Keefe in April 2014.

The other members of the Council are:

- Archbishop Mark Coleridge, Archbishop of Brisbane
- Professor Maria Harries, Adjunct Professor at Curtin University and Research Fellow in Social Work and Social Policy at the University of Western Australia
- Mr Jack Heath, CEO of SANE Australia
- Associate Professor Rosemary Sheehan AM, Department of Social Work, Faculty of Medicine, Nursing and Health Sciences, Monash University
- Hon Greg Crafter AO, former South Australian Minister of Education
- Sr Maree Marsh, former Congregational Leader of the Brigidine Sisters and psychologist with Anti-Slavery Australia at the University of Technology Sydney, Faculty of Law
- Bishop Bill Wright, Bishop of the Diocese of Maitland-Newcastle

<sup>1</sup> CRA is the peak body, previously known as the Australian Conference of Leaders of Religious Institutes, for leaders of religious institutes and societies of apostolic life resident in Australia.

<sup>2</sup> <http://www.tjhcouncil.org.au/about-us/members-of-supervisory-group.aspx>

- Professor Greg Craven, Vice-Chancellor of the Australian Catholic University
- Ms Elizabeth Proust AO, former Secretary to the Victorian Department of Premier and Cabinet, and Chairman of the Bank of Melbourne and Nestlé Australia and member of other boards
- Mr Stephen Elder, former Member of the Victorian Legislative Assembly and Parliamentary Secretary for Education and currently Executive Director of Catholic Education for the Archdiocese of Melbourne, and
- Dr Marian Sullivan, child and adolescent psychiatrist.

The CEO of the Council, Mr Francis Sullivan, has worked in government and private practice and has held positions as secretary-general of the Australian Medical Association, chief executive of Catholic Health Australia and consultant to the Pontifical Council for the Pastoral Care of Health Care Workers at the Vatican. He is also an Adjunct Professor at the Australian Catholic University.

The Council oversees the Church's engagement with the Royal Commission, including by:

- speaking for the Church in matters related to the Royal Commission and child sexual abuse
- coordinating the Church's legal representation at, and the Church's participation in, the Royal Commission.

The Council's role extends to:

- initiating research into best practice procedures, policies and structures to protect children
- assisting in identifying any systemic institutional failures that have impeded the protection of children
- providing information to the Royal Commission concerning the various procedures, policies and structures that have been successively put in place by Church organisations over the past 25 years to deal with complaints and instances of child sexual abuse and any improvements which might be made to them to provide greater protection for children
- seeking to promote lasting healing for the victims and survivors of abuse.

To date, 31 dioceses and 97 religious institutes (commonly referred to as congregations and orders) have given an authorisation to the ACBC or CRA, authorising those bodies to represent and act for them in the engagement of the Church with the Royal Commission.

The ACBC and CRA have in turn delegated that authority to the Council. The Council therefore seeks to appear at the Royal Commission for all the authorising bodies, and will speak with one voice for all of them.

Pursuant to these arrangements, the Council acts for all archdioceses and dioceses in Australia, with the exception of three of the Eastern Rite Eparchies, and for all the major religious institutes. The Council also acts for a number of other Catholic organisations including Catholic Church Insurance Limited (CCI).

For practical purposes, the Council will ordinarily speak for the whole Church: its dioceses, its religious institutes, its priests and religious, in the Royal Commission.

The Catholic Church in Australia today is an extensive and diverse religious organisation committed to worship, prayer and pastoral care. It is involved in providing pastoral, educational, health, human and social services across Australia.<sup>3</sup>

Notwithstanding that all the dioceses and religious institutes are autonomous and independent, each from the other, with no one central or controlling authority, and with each free to govern its affairs separately and independently, all are united in their support for the principles stated in the Commitment at the head of this Submission.

Those principles are also fully shared by all the innocent and high-minded priests and religious whose long years of devoted and selfless service have been admirable and who are heartbroken by the revelations of sexual abuse which have emerged in recent decades.

The Council's aim is to do everything in its power to ensure that the Royal Commission has available to it from the Church all the material that it needs for the work it seeks to do, so as to ensure that a light is shone on dark places and times and events, and to ensure that nothing is concealed or covered up in respect of what Church personnel did or failed to do.

The Council seeks to fulfil that role, on behalf of the Church, in a spirit of honesty, openness and genuine humility.

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<sup>3</sup> See Annexure B, TJHC Submission to Royal Commission Issues Paper No 2: Towards Healing, 30 September 2013 <[http://tjhcouncil.org.au/media/39435/30549468\\_2\\_TJHC-Towards-Healing-submission-30-Sep-2013.pdf](http://tjhcouncil.org.au/media/39435/30549468_2_TJHC-Towards-Healing-submission-30-Sep-2013.pdf)>

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## Introduction

- 1 The Truth Justice and Healing Council has publicly expressed a desire to support the establishment by governments of an independent national redress or compensation scheme to provide financial reparation to victims of child sexual abuse within institutions in Australia. The Council considers that any scheme for victims should be independent, generous, and designed and developed in consultation with victims, and should represent best practice in terms of process and outcomes for victims of child sexual abuse.
- 2 A particular advantage of redress schemes, as articulated by the Law Commission of Canada, is that they are “more comprehensive and flexible, as well as less formal and costly than judicial options.”<sup>4</sup>
- 3 In proposing and supporting a national redress scheme, the Council does not suggest that any such scheme would replace the duty of relevant institutions to assist those persons affected by child sexual abuse perpetuated through them. The Council acknowledges that a national, independently administered and efficient redress scheme reflecting community standards and covering all institutions is desirable in circumstances where the Church’s existing pastoral schemes (*Towards Healing* and the *Melbourne Response*) have been criticised as lacking sufficient independence from the Church. However, if a national scheme is established, the Church will continue to offer pastoral and spiritual assistance to victims. The Church will look to set up a parallel process to provide pastoral assistance alongside the scheme.
- 4 The Council has prepared this submission on the assumption that no changes would be made to the civil litigation system other than those mentioned in the Council’s submission on Civil Litigation.<sup>5</sup>
- 5 This submission addresses each of the issues set out in the Royal Commission’s issues paper and concludes by setting out the Council’s proposal for a redress scheme to address the needs of victims who have suffered child sexual abuse in institutions. The Annexure to this submission describes the features of some similar redress schemes that have operated, or are operating, in Australia, Canada and Ireland.

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<sup>4</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, March 2000, Executive Summary, p.8.

<sup>5</sup> Submission from the Truth Justice and Healing Council, Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No.5, *Civil Litigation*, 15 April 2014.

# 1 What are the advantages and disadvantages of redress schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts, particularly in comparison to claims for damages made in civil litigation systems?

## 1.1 Advantages of redress schemes

### Opportunity for governments and institutions to acknowledge abuse and take responsibility

- 1 The Council submits that the most significant advantage of a redress scheme is the opportunity that it provides for a government or an institution to take responsibility for the harm caused to victims of institutional child sexual abuse, to apologise publicly on behalf of the government or the institution, and to provide redress for individuals as a “form of solace designed to provide some degree of comfort to the victim for his or her injury and to make some attempt to put right the wrong which he or she has suffered”.<sup>6</sup> It is an opportunity for governments and institutions to take moral, political and legal responsibility<sup>7</sup> for the harms suffered by victims of child sexual abuse.

### Access for victims/survivors to redress where other options not available

- 2 In many cases, a redress scheme provides to a claimant an opportunity to receive redress in relation to abuse that occurred historically in situations where the claimant would have very few other options available. As was stated by the Council in its submission to the Royal Commission dated 30 September 2013 in relation to *Towards Healing*:

*Most victims face serious obstacles in relation to bringing civil proceedings. Litigation is a public, adversarial and often traumatic process for victims. There are evidentiary difficulties arising from the fact that claims are normally made many years after the abuse, and there are difficulties with respect to the assessment of damages (especially in connection with causation). Litigation is, for most victims, particularly ill-suited to the resolution of claims of sexual abuse”.*<sup>8</sup>

- 3 As the Council further said in that submission<sup>9</sup>, there are well known difficulties in the path of any victim who may be giving consideration to bringing legal proceedings. They include:
  - (a) A civil action for damages is conducted and dealt with in public. Many victims do not want painful and sensitive matters associated with sexual abuse to be dealt with in this way
  - (b) Proving the facts relevant to the abuse itself when the events may have occurred a long time ago may be very difficult
  - (c) Proving that the plaintiff’s present condition was caused by the abuse may present complex problems, especially if there is a range of factors in the plaintiff’s life that may have contributed to that condition, and
  - (d) The uncertainty and stress associated with the bringing of any legal proceedings in the courts and the length of time involved in bringing matters before the courts.

<sup>6</sup> *Towards Redress and Recovery*, Report to the (Irish) Minister for Education and Science by The Compensation Advisory Committee, (Ryan Report) January 2002, p.38.

<sup>7</sup> Forde Inquiry Report – Commission of Inquiry into Abuse of Children in Queensland Institutions (August 1999), p.288.

<sup>8</sup> Submission from the Truth Justice and Healing Council to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No.2, *Towards Healing*, 6 September 2013, pp.144-145.

<sup>9</sup> *Ibid*, section 7.

- 4 Further difficulties can relate to the operation of statutes of limitation or identification of the appropriate party against which to bring proceedings.
- 5 While issues of proof and causation may also arise under a redress scheme, generally speaking the obtaining of redress under such a scheme is not beset with the range of evidentiary and other difficulties that arise in the making of a civil claim. In any redress scheme, however, the absence of requirements to adhere to strict evidentiary standards must be balanced with the need for accused persons to be afforded procedural fairness.

### Redress schemes quicker, more flexible and less formal

- 6 Redress schemes in general offer a much quicker, more efficient and less onerous mechanism of providing redress to victims of child sexual abuse. The process is much simpler than the process applying under a civil claim. The process is initiated by the claimant completing and submitting an application form. Application forms are short<sup>10</sup>, and designed in such a way so as to minimise further trauma to claimants.<sup>11</sup> An independent expert panel or qualified assessors assess the application and make a decision about the applicant's eligibility for payments under the scheme and the appropriate redress amount. In addition, claimants should receive acknowledgment of the abuse and payments in a relatively short time frame. Most redress schemes are designed in such a way as to require applications to be assessed and payments made within a specified period. For example, the Irish Residential Redress Board's legislation required applications to be processed within 14 weeks.<sup>12</sup> Redress WA provided for a registration period for claimants<sup>13</sup>, and required "assessors to determine applications expeditiously and without formality having regard to the requirements of natural justice as far as this is practicable".<sup>14</sup> In the twelve months following the establishment of the Defence Abuse Response Taskforce, in 161 of the 181 final decisions made by the Reparations Payments Assessor redress awards had been paid to claimants.<sup>15</sup> The average time between a person providing their electronic banking details and payment being made was eight days.<sup>16</sup>
- 7 Whilst in practice under some schemes, payments have not always conformed to the timeframe mandated by legislation or in supporting documentation,<sup>17</sup> they have in general been made in a more timely fashion than could normally be expected through litigation.

### Low cost and ease of access

- 8 In contrast to civil litigation which can involve the expenditure of considerable legal fees and costs, redress schemes are generally low cost to claimants, and are designed to be administered without the need for claimants to obtain legal representation. They are thus easier to access than the courts. In some redress schemes (such as was the case in the Irish Residential Redress

<sup>10</sup> Graycar R and Wangmann J, "Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution", University of Sydney, Sydney Law School, Legal Studies Research Paper No. 07/50, July 2007, p.20.

<sup>11</sup> Witness statement of Narelle Lethorn, Royal Commission into Institutional Responses to Child Sexual Abuse, 24 April 2014, paragraph 138.

<sup>12</sup> See further Community Affairs References Committee, *Forgotten Australians*, a Report on Australians who experienced institutional or out of home care as children, August 2004, para 8.93.

<sup>13</sup> Redress WA Guidelines (as amended 18 May 2011), guideline 7(1)(d)(i).

<sup>14</sup> Redress WA Guidelines (as amended 18 May 2011), guideline 16(1).

<sup>15</sup> Defence Abuse Response Taskforce, Fourth Interim Report to the Attorney-General and Minister for Defence, December 2013, p.10.

<sup>16</sup> Defence Abuse Response Taskforce, Fourth Interim Report to the Attorney-General and Minister for Defence, December 2013, p.10.

<sup>17</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 11, Evidence of Narelle Lethorn, 2 May 2014: Transcript WA1773:13-28.

Scheme), claimants are reimbursed for any reasonable costs and expenses incurred in seeking assistance from lawyers in the process.<sup>18</sup>

### Restorative justice and therapeutic outcomes

- 9 The Law Commission of Canada noted in its report, *Restoring Dignity, Responding to Child Abuse in Canadian Institutions* that “redress programs negotiated with survivors and their communities are the best official response for addressing the full range of their needs while being responsive to concerns of fairness and accountability”<sup>19</sup> and that “redress programs should offer a wider range of benefits than those available through the courts or administrative tribunals”.<sup>20</sup>
- 10 A redress scheme tailored to providing redress for child sexual abuse can be set up so that it seeks to meet restorative justice and therapeutic outcomes for victims in a way that a court determining a claim for damages could rarely achieve.
- 11 As was stated by the Council in its submission on *Civil Litigation* dated 15 April 2014:
- “Court judgments in civil litigation matters focus on ‘damages’ or financial redress as the legal remedy for harm. That focus deflects attention from what may be required to deal positively with the consequences of the injury, including ongoing counselling and, in cases where the injury occurred in the Church context, an opportunity for healing through re-establishment of a pastoral relationship”.*<sup>21</sup>
- 12 A wider range of benefits is generally offered to claimants, including, but not limited to, ongoing counselling and support, education and training assistance, individual apologies and financial advice services.<sup>22</sup> Other possible therapeutic benefits may include rehabilitation measures and commitments by governments and institutions to measures that demonstrate learning from the past to prevent repetition.<sup>23</sup> Assistance has been provided in the *Towards Healing* process for such needs as “self-education or school or university fees; finding employment; rent; purchase of equipment such as computers; a vehicle; family funeral expenses; or medical and dental costs”.<sup>24</sup>
- 13 An apology letter<sup>25</sup> or a meeting with a person in authority to apologise for the harm caused by the abuse on behalf of the institution<sup>26</sup> is a benefit that is not normally provided in the course of civil litigation. Restorative conferences with senior representatives of the institution (such as occur in the Defence Abuse Response Taskforce or the *Towards Healing* process) provide an opportunity for a claimant to articulate their needs and concerns, to tell their story and to be heard by and receive an apology from senior members of the institution.<sup>27</sup> It is important that if the

<sup>18</sup> Residential Institutions Redress Act 2002, s.13(2)(a). See also “A Short Guide to the Redress Scheme under the Residential Institutions Redress Act 2001”, Issued by the Residential Institutions Redress Board, December 2002.

<sup>19</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, March 2000, Executive Summary, p.13

<sup>20</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, March 2000, Executive Summary, p.29.

<sup>21</sup> Submission from the Truth Justice and Healing Council to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No. 5, *Civil Litigation*, 15 April 2014, p.11.

<sup>22</sup> Graycar R and Wangmann J, “Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in ‘alternative’ dispute resolution”, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 07/50, July 2007, p.19.

<sup>23</sup> *Bringing them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Human Rights and Equal Opportunity Commission, 1997, Recommendation 3.

<sup>24</sup> Submission from the Truth Justice and Healing Council to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No.2, *Towards Healing*, 6 September 2013, p.60.

<sup>25</sup> Hon Robyn McSweeney (South West – Minister for Community Services) Hansard, Western Australian Legislative Council, p.7954a, Thursday 29 September 2011.

<sup>26</sup> *Towards Healing*, Principles and Procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia, January 2010, paragraphs 41.3-41.4; Defence Abuse Response Taskforce, Second Interim Report to the Attorney-General and Minister for Defence, June 2013, p.34 – see reference to Defence Abuse Restorative Engagement Program.

<sup>27</sup> *Ibid.*

provision of an apology by letter were to become part of any redress scheme for victims of institutional abuse, it not be perfunctory or a token gesture, but be available if the claimant requests it and believes it will assist them.

- 14 Redress schemes that have been designed by claimants, such as the Grandview Agreement in Canada, can include measures that meet what they want. The Grandview Agreement, for example, included such measures as paying for “laser removal of tattoos and scar reduction<sup>28</sup>” and the creation of an historical record about the ex-residents of the school, providing “a means of recording and commemorating the experience of survivors.”<sup>29</sup>
- 15 The provision of ongoing counselling, such as is offered in *Towards Healing* and the *Melbourne Response*<sup>30</sup>, is a benefit that provides support to a claimant long after the redress payment is made, and acknowledges the unique needs for support of those who have suffered institutional child sexual abuse.
- 16 Effective redress can be a validating process for victims of child sexual abuse; their experience of abuse is acknowledged and is validated. In addition, the measure of any payment made further validates their claim.

## 1.2 Disadvantages of redress schemes

- 17 Some claimants who have sought to participate in redress schemes have had negative experiences. Most redress schemes operate within a specified time frame, where applications need to be submitted by a certain date in order for the application to be processed. Rigid time limits can disentitle genuine claimants who have not received notice about the redress scheme in time to make an application.<sup>31</sup>
- 18 In addition, the expectations surrounding what redress schemes can deliver can be higher than what may actually be provided to claimants. As was seen in the WA Redress scheme, the initial proposal of a cap of \$80,000 to claimants was reduced to \$45,000 when the WA Government became aware that the allocated budget would not be sufficient to cater for the number of claimants who subsequently emerged. The reduction in the cap amount was traumatic for some claimants, who felt that government had betrayed them in making the change.<sup>32</sup>
- 19 For some claimants, the application process itself can be traumatic.<sup>33</sup>
- 20 From the Council’s point of view, redress schemes must not be a way for institutions to effectively ‘wash their hands’ of those seeking redress by channelling them into a scheme administered by another entity and simply writing a cheque at the end of it. As explained above, the Council

<sup>28</sup> Graycar R and Wangmann J, “Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in ‘alternative’ dispute resolution”, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 07/50, July 2007, pp 16-17.

<sup>29</sup> *Ibid*, p.18.

<sup>30</sup> See further the Melbourne response website at [www.cam.org.au](http://www.cam.org.au).

<sup>31</sup> see Commonwealth Senate Legal and Constitutional Affairs Reference Committee, Review of Government Compensation Payments, December 2010, paragraph 2.27; Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust – Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, November 2013, pp.567-568, paragraph 28.2.1.

<sup>32</sup> For example, see Commonwealth Senate Legal and Constitutional Affairs Reference Committee, Review of Government Compensation Payments, December 2010, paragraph 2.34.

<sup>33</sup> see Commonwealth Senate Legal and Constitutional Affairs Reference Committee, Review of Government Compensation Payments, December 2010, paragraph 2.27; Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust – Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, November 2013, pp.567-568, paragraph 28.2.1.

submits that a national redress scheme for victims of child sexual abuse should not be seen as a substitute for the relevant institution's duty to provide them any additional pastoral or other assistance, where appropriate. The design of any statutory redress scheme must encompass the prospect that many organisations (and particularly religious organisations) will want to provide a path for claimants to continue engaging with them. For religious organisations this means providing a path for claimants to practice their faith in an environment where they feel that they are a valued part of their Church community. It is recognised that this must be with the consent and trust of the claimant, and that the claimant must also be able to engage with the scheme in a way that is entirely independent of any organisation if that is their wish.

- 21 A further aspect, sometimes seen as a disadvantage, of redress schemes is that in many schemes (although not all) in making a claim under the scheme the claimant is required to forgo their future ability to take civil legal action against the institution. This may be seen by claimants as unfair and unreasonable, particularly where common law damages may significantly exceed the value of redress available under the relevant scheme.

## 2 What features are important for making redress schemes effective for claimants and institutions? What features make redress schemes less effective or more difficult for claimants and institutions?

### 2.1 Important features of redress schemes that make them effective

- 1 The Council submits that the following features are important for ensuring that redress schemes are effective for claimants and institutions:
  - A redress scheme should be designed with claimants uppermost in mind, and with their input, so that from the outset their actual and articulated needs are met. This will ensure the scheme is designed with proper consideration of what will bring claimants some measure of healing or restoration, acknowledging that many have suffered great harm, and with institutions prepared and willing to acknowledge and accept responsibility for any harm done in the institution.
  - The scheme should provide a genuine alternative to the commencement of civil proceedings.
  - The scheme should be designed so that it is readily accessible by claimants and is not administratively burdensome. Participation should be easy and straightforward.
  - The scheme should be as non-adversarial as is possible.
  - There should be strict timeframes in place for responding to complaints, to ensure there is minimal delay in the processing of claims.
  - The scheme should be characterised by “well developed processes and procedures ... [to ensure it deals] fairly and appropriately with all complaints ... received.”<sup>34</sup>
  - The scheme should be publicised widely to ensure that everyone who is possibly eligible has the opportunity to apply.
  - The process itself should not cause harm to claimants,<sup>35</sup> and claimants should be required to relate their experience as few times as possible (preferably only once).
  - The scheme should ensure that claimants are provided with support and counselling during the process of seeking redress and after determination of the claim.
  - Application forms should be simple and straightforward to complete, with the option to apply orally (including through an advocate) where the claimant prefers.
  - The scheme should not require the participation of lawyers and should be low cost to applicants.
  - Assessors should be independent and suitably qualified to ensure claimants have confidence in the outcomes of their claims.
  - There should be measures in place to keep applicants updated on the progress of their claims, as well as staff employed to respond to their queries.

<sup>34</sup> Defence Abuse Response Taskforce, Fourth Interim Report to the Attorney-General and Minister for Defence, December 2013, p.4.

<sup>35</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, March 2000, Executive Summary, pp. 9-10.

- The process should be transparent with adequate review mechanisms.
- Adequate financial and non-financial options should be offered, with the flexibility for applicants to choose what would be of most assistance and benefit to them.
- The provision of redress should adequately reflect the trauma suffered.
- The process should be such as to ensure that false and opportunistic claims are minimised, ensuring that resources are not diverted away from genuine claims.

## **2.2 Features that make redress schemes less effective or more difficult for claimants and institutions**

2 The following are some aspects of redress schemes that make them more difficult for claimants:

- Redress schemes that create unrealistic expectations or that change expectations during the course of the scheme.
- Lack of independence.
- Delays in the processing of claims.
- Administratively burdensome and legalistic processes.
- Lack of transparency about processes.
- Power imbalance between the institution and the claimant.
- Overly legalistic evidentiary and other requirements.
- Legalistic, defensive strategies and language employed by governments or institutions that avoid acknowledging their responsibility.
- Lack of suitable assessors.
- Processes that cause further trauma to claimants.
- Redress is inadequate.

### **3 What forms of redress should be offered through redress schemes? Should there be group benefits available to, say, all former residents of a residential institution where abuse was widespread? What should be the balance between individual and group redress?**

#### **3.1 Forms of redress**

- 1 The Council submits that the most preferable form of redress to be offered to claimants through a national redress scheme should be a combination of an upfront financial payment and the ongoing provision of counselling and other support, as identified by individual claimants.
- 2 In particular, redress should contain the following elements:
  - (a) an apology from the institution, and if available, from the abuser, which acknowledges and accepts responsibility for the harm done to the claimant
  - (b) the payment of appropriate financial redress, that makes provision for the following elements:
    - (i) interim payments to meet immediate needs while the claim is being assessed (subject to some initial acceptance criteria)
    - (ii) past out-of-pocket medical expenses
    - (iii) past and future loss of earnings, and
    - (iv) expenses incurred in making a successful application
  - (c) provision of, and payment for, counselling and other health-related support on an ongoing and as-needed basis, including while the claim is being assessed
  - (d) other more ad-hoc forms of financial and in-kind assistance required by claimants from time to time
  - (e) indexation, and
  - (f) the flexibility to evolve over time as the needs of claimants change.
- 3 The Council notes that the Church has a responsibility to offer claimants ongoing therapeutic and pastoral support, in recognition of the spiritual and emotional suffering experienced by them at the hands of the Church. Final lump sum payments can be insufficient to address such ongoing needs. The goal of any redress scheme must always be the healing of the victim of the abuse.
- 4 In its proposed model, the Council also submits that redress should be made available to family members of victims of abuse. The purpose of this is to acknowledge the impact of child sexual abuse not only on primary victims, but also on parents, partners and dependants of those victims. This is also reflected in victims' compensation schemes in all states and territories.
- 5 However, making redress available for the primary victims of child sexual abuse should be the principal purpose of any redress scheme. Allowing the scheme to be open to family members of victims may compromise the objectives of a scheme that aspires to ensure meaningful redress,

quick turnaround times and is sustainable for participating institutions (both in administration levies and compensatory payments). Accordingly, the Council submits that the redress available for family members of victims be capped or otherwise limited.

### 3.2 The balance between individual and group redress

- 6 A system that is entirely group-based, without any, or any adequate, consideration of individual circumstances, is unlikely to achieve the desired outcome of compensating and placing claimants on the road to healing, helping them to reach a place of peace. This is particularly so in light of current evidence, which tells us that suffering sexual abuse as a child has vastly different impacts on different individuals. As Associate Professor Harries stated in evidence to the Royal Commission in Case Study 11 in relation to the Christian Brothers, for victims of child sexual abuse:

*There is no one situation that is identical to another. ... there was no 'one size fits all'. Every single person had a different story, and, yes, some of those stories overlapped. ... we needed to provide for their individual needs, we needed to provide for their collective needs...<sup>36</sup>*

- 7 For this reason, as far as possible, redress schemes should be flexible enough to accommodate the individual needs of claimants, to adapt to changes in those needs over time, and to respond to the 'disruptions' that claimants might experience from time to time on an ongoing, and as-needed basis.<sup>37</sup>
- 8 To be balanced against this however are considerations of whether a group approach to redress may provide a more objectively equitable outcome, in terms of service availability and amounts of financial redress paid. Group redress would ensure that all members of a cohort of victims of abuse in a particular institution are included, treated consistently and, in theory, that no-one is permitted to 'fall through the cracks'. Administratively, a group approach would necessarily be much simpler, and less costly to operate.
- 9 However, such an approach is unlikely to effectively meet the needs of claimants. For this reason, the Council considers that redress should be provided on an individual, rather than a group basis. The Council submits that where a claimant makes a successful claim in respect of abuse suffered in a particular school, home or other situation where there may be a group of similar victims, that result should be publicised so that other potential claimants may consider coming forward.

<sup>36</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 11, Evidence of Associate Professor Maria Harries, 30 April 2014: Transcript WA1753:24-25, 38-40.

<sup>37</sup> Associate Professor Harries characterised these disruptions as: '*... men and women come to a place of peace. There is never any closure. You cannot ever get back the life you lost but you come to a place of peace and when people come to a place of peace they feel okay. I knew that that place of peace - and we would say - "Things will disrupt you again, and we're here." What I don't think we were prepared for enough then was how dramatically regular were the disruptions. Some of those disruptions were actually things like senate inquiries, this Royal Commission - very important things but they are times of huge disruption. So the time of peace is short-lived.*' Transcript WA1760:6-20.

## **4 What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims? If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?**

### **4.1 Advantages of a scheme that covers all institutions**

- 1 The Council submits that all government institutions, including state and territory institutions, should be part of a national redress scheme. Claimants should have access to redress regardless of whether their abuse occurred in a government or other institution. A national redress scheme could be modelled on the Irish residential redress scheme, which covered all government and non-government institutional abuse, and was funded by government and non-government institutions.
- 2 The Council has been advocating for the establishment of a national redress scheme for victims of institutional child sexual abuse for some time.<sup>38</sup> In the Council's submission, a national redress scheme is necessary in order to remove the lack of transparency associated with Church entities or persons perceived to be associated with the Church investigating claims of child sexual abuse and then determining the level of redress to be provided to claimants.
- 3 A national redress scheme would overcome this lack of transparency. It would also increase fairness by addressing issues associated with inconsistency in levels of redress provided to claimants in different states or geographic regions, inconsistency between institutions and inconsistency as between different entities within the church. Under a national scheme, all claimants would be subject to the same entitlements and governed by the same rules and considerations.
- 4 A national scheme would reduce the chance of any claimant receiving a different outcome based on their state or territory of residence or the location at which they suffered abuse, and would allow for the claimant to access redress under the scheme based solely on an individual assessment of the abuse they suffered.
- 5 All Australian institutions, including all government and religious organisations, should be required to participate in and to fund (to the extent of their liability) the national redress scheme.

### **4.2 Disadvantages of a scheme that covers all institutions**

- 6 The disadvantages of a scheme that covers all institutions are:
  - (a) the scheme would become much larger in scope, increasing the number of claims and the resources required to respond to them, and

<sup>38</sup> <http://tjhcouncil.org.au/media/42515/131114-Media-Release-National-compensation-scheme-for-victims.pdf>;  
<http://tjhcouncil.org.au/media/62464/140212-TJHC-MR-TJHC-supports-CLAN-call-for-National-Compensation-Scheme.pdf>

- (a) this could result in delay and backlog, such as has occurred with the NSW victims of crime compensation scheme.<sup>39</sup>
- 7 The Council recognises that institutions will differ markedly in size, resources, nature of operations and degree of contact with children. For this reason, care would need to be taken to ensure that the principles are not drafted on a 'one-size-fits-all' basis.

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<sup>39</sup> See for example New South Wales Auditor-General's Report: Financial Audit, Volume 6 2013, Focusing on Law, Order and Emergency Services, [http://www.audit.nsw.gov.au/ArticleDocuments/288/01\\_Volume\\_Six\\_2013\\_Full\\_Report.pdf.aspx?Embed=Y](http://www.audit.nsw.gov.au/ArticleDocuments/288/01_Volume_Six_2013_Full_Report.pdf.aspx?Embed=Y)

## **5 If institutions have established internal redress schemes, should all or any part of the decision making of the scheme be independent of the institutions? Should the schemes be subject to any external oversight? If so, what?**

- 1 The Council agrees that if institutions have established internal redress schemes, there are benefits to all or part of the decision making of those schemes being independent of the institutions, subject to any requirements of Church authorities to adhere to canon law.<sup>40</sup> Transparent and independent decision making creates confidence in the processes and outcomes. Assessors should be independent, legally (or otherwise appropriately) qualified and paid through the scheme.
- 2 However, the Council believes that institutions should be able to reach out to claimants and provide pastoral, spiritual or other assistance, if appropriate, both during the claimant's participation in the scheme and afterwards. This would only occur when the claimant expressed a willingness or desire for the institution to make contact and provide support.
- 3 In the interests of best practice governance, all schemes should be subject to independent audits and accreditation on agreed standards.
- 4 Additionally, claimants should have a right to an internal review of any determination of their claim, both in relation to acceptance of the claim and quantum or type of redress provided.

<sup>40</sup> For example, the bishop of a diocese is required to ensure that the goods of the diocese for which he is responsible are administered for "proper purposes", as outlined in canon law. In particular, these are "to order divine worship, to care for the decent support of the clergy and other ministers, and to exercise works of the sacred apostolate and of charity, especially toward the needy" (Canon 1254 § 2). See also Canon 1274 § 3 "Insofar as necessary, each diocese is to establish a common fund through which bishops are able to satisfy obligations towards other persons who serve the Church and meet the various needs of the dioceses and through which the richer dioceses can also assist the poorer ones".

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

- 1 The Council does not consider that it should be mandatory for institutions to establish their own redress schemes. This needs to be a matter for individual institutions, taking into account their own circumstances. Indeed, in some cases, it may be more prudent for entities other than those responsible for the abuse to operate any relevant redress scheme. The Catholic Church in Australia is committed to providing ongoing pastoral assistance to claimants through a process that runs parallel with any national redress scheme.
- 2 The Council is of the view that if governments in Australia establish a national redress scheme, all governments (Commonwealth, state and territory) and relevant institutions should contribute to and participate in the scheme. The Council considers that equity for all claimants can only be achieved if participation in a national redress scheme is mandatory for all governments and relevant institutions.
- 3 Participation in a national redress scheme would involve contributing financially to the scheme,<sup>41</sup> as well as cooperating with the scheme in other non-financial ways, such as assisting with verifying claims, as required.<sup>42</sup>
- 4 The Council supports the development of national legislation to facilitate such participation. This could be achieved by development of model legislation, with each state and territory enacting legislation in similar terms to give effect to the scheme.

<sup>41</sup> See further discussion about co-payments made in the Irish scheme in the Annexure to this paper.

<sup>42</sup> See further the Irish Residential Institutions Redress Act 2002, ss.10(6) and (7).

## **7 Should seeking redress or compensation through a redress scheme be optional for claimants? Should claimants retain the ability to pursue civil litigation if they wish?**

- 1 Whilst the Council considers that participation in a national redress scheme should be mandatory for governments and institutions, participation by claimants should be optional.
- 2 As stated above, an important principle of effective redress schemes is that they do not cause further harm to a claimant. A claimant should be afforded the opportunity to make an independent decision, based upon their own circumstances, about whether or not to participate in any national redress scheme. Mandating participation in a redress scheme may have the effect of re-traumatising the claimant, especially if they have strong reservations about participating. Each claimant has their own unique story, and may or may not wish to revisit past events in their lives. Some may have participated in historical redress schemes (either government or institutional) and may not wish to revisit such issues again. There are others however who are dissatisfied with their experience, or with outcomes they received, who may wish to bring a claim for redress in relation to any national redress scheme that is established. A national redress scheme may provide an opportunity for those who are dissatisfied with previous processes to have their claims re-assessed and reviewed.
- 3 The Council submits that an effort should be made to ensure that any national redress scheme offers substantial redress that takes into account the particular effects the abuse has had on the claimant, so as to encourage potential claimants to use the scheme rather than civil litigation.
- 4 It is a feature of many redress schemes that claimants who decide to participate in a redress scheme forgo their ability to pursue civil litigation in relation to the claim. The Council submits that a national redress scheme should include a feature that is similar to the Irish redress scheme, which provided that participants would only need to forgo their right to future civil litigation if they accepted an offer made by the Redress Board. In this way, the claimant has full knowledge of the amount they are eligible to receive under the redress scheme, and is therefore in a position to make an informed decision at that point about whether to accept the redress payment or take civil action.
- 5 Upon receiving an offer in writing outlining the amount of redress offered to the claimant, the claimant would be given a month to decide whether to accept the award. As in the Irish redress scheme, the claimant would forgo their ability to pursue civil litigation only once they had accepted (in writing) the offer of redress from the scheme.
- 6 However, where a claimant had been offered an amount under a redress scheme, but did not accept that offer, the claimant would then retain their right to pursue civil litigation if they so desired.

## **8 How should fairness be determined in redress schemes when some institutions have more assets than others? How should fairness and consistency between survivors be achieved in these circumstances? What should be the position if the institution has ceased to operate and has no clear successor institution?**

- 1 A redress scheme will only deliver equity to all victims of child sexual abuse in institutions if all of them are eligible to participate in such a scheme. The Council submits that victims should have access to a national redress scheme regardless of which entity was responsible for their abuse. Victims who experienced abuse in an institution that is less resourced than others should not be precluded from participating in a national scheme simply because the institution in question cannot afford to contribute to such a scheme.
- 2 To support the involvement of all institutions however, and as stated in its Civil Litigation submission to the Royal Commission dated 15 April 2014, the Council considers that:  
  
*...there should be legislative change at the national level in Australia which imposes a requirement on all unincorporated associations that appoint or supervise people working with children to establish an incorporated entity as a person against whom any victim of alleged abuse who wishes to take civil proceedings against the association may proceed.*  
  
*This legislation would require the institution to:*
  - (a) *take reasonable steps to ensure that the entity is sufficiently insured and/or indemnified from the assets of the institution to meet any civil claims which may be made against it relating to the abuse of a child, and*
  - (b) *take steps to make the entity and its purpose known to the community.*<sup>43</sup>
- 3 Implementation of this proposal with its associated insurance requirement would go some way to providing the security needed to ensure that all institutions were in a position to contribute to a redress scheme if it were to be established.
- 4 The scheme should be empowered to recover payments from the institution (or its successor). The legislation establishing the scheme would need to address how best to make the payments recoverable.
- 5 In the event that an institution has ceased to operate and has no clear successor institution, the Council submits that victims of child sexual abuse within that institution should nevertheless be entitled to make a claim for redress under a national scheme, the funding of which by governments is sufficient to meet such a contingency.
- 6 Alternatively, funding of payments for those institutions (along with the costs of the operation of the scheme) could be met by a levy on public liability insurance for institutions that have contact with children (with a commensurate levy being payable by government institutions, if they self-insure). The levy could be applied on a 'per locality' basis for institutions that operate in multiple localities, with each school, church, club-house, orphanage etc constituting a locality. The vast number of localities would ensure that the amount of the levy, on a per locality basis, is low. To

<sup>43</sup> Submission from the Truth Justice and Healing Council, Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No.5, *Civil Litigation*, 15 April 2014, page 16.

ensure fairness, the amount of that levy could be calculated in accordance with the length of time that the institution has existed:

- (a) Institution (or a predecessor institution of the institution) has existed for 30 years or more as at the date of the introduction of the scheme: highest rate;
- (b) Institution (or a predecessor institution) has existed for 15 to 30 years as at the date of the introduction of the scheme: medium rate;
- (c) Institution (or predecessor institution) has existed for 5 to 15 years as at the date of the introduction of the scheme: lower rate;
- (d) Institution (or predecessor institution) has existed for 0 to 5 years as at the date of the introduction of the scheme, or comes into existence after the introduction of the scheme: lowest rate.

## 9 What are the advantages and disadvantages of offering compensation through a redress scheme which is calculated on the same basis that damages are awarded by courts in civil litigation systems? Should affordability for institutions be taken into account? If so, how?

- 1 Through submissions made in response to Issues Paper No 5: Civil Litigation and evidence taken during the hearing of recent case studies, the Royal Commission has received a lot of information indicating that the civil litigation process as it currently operates is not an ideal process for pursuit of redress for victims of child sexual abuse in an institutional context.
- 2 The advantage of offering compensation through a redress scheme where redress is calculated on the basis of components similar to the components applying to damages awarded by the courts in civil litigation is that claimants would not need to take civil action in order to receive financial redress broadly equivalent to common law damages for the abuse they suffered.
- 3 However, a number of questions arise.
- 4 *If redress were to be calculated on a similar basis to that applying to civil suits, to which civil law jurisdiction should the calculation of redress scheme compensation have reference?* It is clear that if the same set of facts were put before a court in each of the eight Australian civil jurisdictions, the state and territory courts would reach different outcomes as to the extent of damage and in calculating the amount of financial redress that should be awarded.
- 5 *Would the redress scheme be affordable for governments and institutions if redress compensation were assessed at similar rates to common law damages?* Any national redress scheme needs to be, and to remain, affordable for the governments and institutions involved with it. Some of the more recent examples of redress schemes in Australia, namely those which operated in Western Australia and Queensland, both experienced great pressure when the number of applicants was greater than anticipated, putting strain on allocated resources. This meant that the schemes had to reduce amounts paid to claimants, an unsatisfactory outcome.
- 6 *Should the benefits to claimants of a non-adversarial, cheap, accessible and efficient redress scheme be taken into account?* In engaging in a scheme such as the one the Council has proposed in this submission, claimants are provided with a substantially cheaper, quicker and less onerous option than pursuing civil proceedings, and an option which is also likely to be significantly less traumatic and more certain, in that the claimant need not prove the institution was at fault, but simply that the abuse was committed by one of its members. Also, claimants would not be put to proof of their case under the strict rules of evidence that apply in civil litigation. Having regard to these benefits, the Council considers that, while claimants should certainly be provided with damages that properly compensate them for the injuries they have suffered as a result of the abuse, some contemplation of the benefits should factor into the setting of the quantum of redress available under a redress scheme.
- 7 The Council also takes the realistic view that, while a redress scheme might offer financial redress assessed under similar heads of damage as would apply in civil proceedings, issues of affordability for governments and institutions are likely to operate to place limitations on the overall amount of financial redress that can be paid in lump sum form under a redress scheme. Accordingly, the Council submits that financial redress under a national redress scheme should not be calculated on the same basis as damages are awarded by courts in civil litigation, but rather on the basis of accepted community standards as to the appropriate amount of financial

redress. These community standards should be developed independently of governments and institutions which will be responsible for payment of financial redress, after consultation with claimants and with governments and institutions which will be responsible for funding the scheme.

- 8 Reparations determined under the redress scheme should meet community standards but should be less than the amounts awarded in civil proceedings.

## 10 Given that the sexual abuse of children mostly occurs where there are no witnesses, what level of verification or proof should be required under a redress scheme to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation?

- 1 In most redress schemes, the standard of proof required to access financial payments and support is much lower than what is required through a civil litigation process.
- 2 The Catholic Church's *Towards Healing* process employs a 'balance of probabilities' test,<sup>44</sup> as does the Independent Commissioner in conducting investigations under the *Melbourne Response*.
- 3 Other redress schemes require standards such as a 'reasonable likelihood'<sup>45</sup> or 'plausible allegation'.<sup>46</sup>
- 4 The first question is what the claimant is required to prove. The Council proposes that claimants be required to prove that:
  - (a) the abuse occurred; and
  - (b) the abuser was acting in a role at the institution or came into contact with the claimant because of a role at the institution.
- 5 The Council submits that the relevant standard of proof should be that of the balance of probabilities (without application of the *Briginshaw* principle<sup>47</sup>). The reason for this is that the intended award of financial redress offered by the redress scheme would be significantly higher than is available under most other victims' compensation schemes. For example, the relevant standard under the Defence Abuse Reparation Scheme is a 'plausible allegation'. However the maximum amount available under this scheme is \$55,000. In circumstances where the national redress scheme would be able to offer claimants financial redress in amounts higher than this, a higher standard of proof is reasonable.
- 6 The Council proposes that institutions should be involved in verifying claims for financial redress by cooperating with any national redress scheme through such measures as providing assistance as required with relevant documentation or records, or as requested by those administering the scheme.

<sup>44</sup> *Towards Healing*, Section 40, paragraph 40.9. This was also the test employed in the Canadian Grandview Agreement (clause 8.5).

<sup>45</sup> Redress WA Guidelines (as amended 18 May 2011), guideline 16(2).

<sup>46</sup> Defence Abuse Reparation Scheme Guidelines, guideline 1.5.1.

<sup>47</sup> The principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 provides that the more serious the allegation, the higher the degree of persuasion that is required before the finder of fact can be reasonably satisfied as to the truth of that allegation.

## 11 What sort of support should be available for claimants when participating in a redress scheme? Should counselling and legal advice be provided by any redress scheme? If so, should there be any limits on such services?

- 1 As outlined in response to the questions above, any national redress scheme needs to be flexible in order to meet the individual needs of claimants as far as possible. There will need to be detailed consultation with claimants in order to determine their need for, and forms of required support during their participation in the redress scheme.
- 2 At a minimum, these needs are likely to include a need for counselling as required and legal advice, particularly during the application and lump sum compensation processes associated with the redress scheme.
- 3 In its proposed model scheme, the Council submits the following provisions should be made for counselling:
  - (a) counselling should be available as a type of redress, and on an ongoing basis, similar to the way counselling is available through Carelink under the *Melbourne Response*.
  - (b) interim counselling should be available:
    - (i) while claims are being assessed; and
    - (ii) between the period where the claim is accepted and the quantum of redress is yet to be determined.
- 4 The Council also submits that provision should be made for claimants to return for further counselling support for as long as a treating practitioner considers that such support is required.<sup>48</sup>
- 5 The Catholic Church is committed to providing pastoral assistance to claimants through a process that runs parallel with any national redress scheme and is committed to re-evaluating *Towards Healing* and the *Melbourne Response* to ensure they remain available as alternatives to claimants who are seeking pastoral outcomes. The proposed scheme should provide that, where the claimant wants it to occur, the organisation should be able to provide support both through the scheme process and on an ongoing basis after the scheme process is complete.
- 6 In its proposed model scheme, the Council submits the following provisions should be made for legal advice/representation:
  - (a) limited free legal advice should be available through the scheme or through another government agency, such as LawAccess in NSW
  - (b) the scheme should be designed so that legal representation is not needed, but allows claimants to be legally represented if they choose. The scheme should prescribe a fixed fee scale to ensure that lawyers do not charge excessive amounts. However, if an assessor forms the view that a claim is particularly complex and requires additional legal

<sup>48</sup> Such ongoing entitlements might be established along the lines of existing schemes including workers compensation entitlements under the Commonwealth *Safety Rehabilitation and Compensation Act 1988* under which, once liability is established, workers are entitled to ongoing compensation for incapacity and medical expenses for the entire period that they continue to suffer the effects of their accepted condition. While claimants need to establish that their condition continues to relate to the original condition, cessation of liability and redemption of those entitlements is available only in very limited circumstances.

work, the assessor should have the discretion to allow additional legal fees to be incurred, upon application by the claimant or institution.

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

- 1 The Council considers that any financial compensation that a person has received through an existing redress scheme or process should be taken into account in any new scheme.
- 2 There are strong policy arguments against allowing a person to reopen a claim once they have pursued their rights against a wrongdoer to finality (whether by judgment or agreement) at common law.
- 3 However, where an individual can show that there was something manifestly inadequate about the process in which they reached their settlement, they ought to be entitled to reopen the matter. *Towards Healing* contains review provisions directed to this very issue.
- 4 The fact that a deed of release has been signed should not affect a claimant's right to re-open their claim under the national redress scheme. However, it would continue to operate to prevent the claimant from commencing civil proceedings in respect of the same injuries.

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## 13 The Council's proposal

- 1 The Council supports the establishment of an independent national redress scheme for victims of institutional child sexual abuse in Australia.
- 2 The Council submits that a national redress scheme should be one in which claimants have a prime input, to ensure that the process by which claimants can apply for redress, and the outcomes available under the scheme, are ones that appropriately meet the needs of claimants in relation to the harm they have suffered.
- 3 The national redress scheme should be non-adversarial, low cost to claimants and one that does not require claimants to obtain legal representation. The scheme should incorporate an established set of criteria based around common law heads of damages, and which employs a 'balance of probabilities' test for verifying a person's claim of abuse. The scheme should be open to any victim of child sexual abuse within an institution in Australia.
- 4 Claimants who have received payments under a government or institutional redress scheme in the past should be able to make a claim for redress under the new scheme. This would provide those claimants with an opportunity to have payments made under historical schemes reviewed by an independent entity.
- 5 In order to assist the Commission, in the following pages the Council proposes a redress scheme with the following elements:

No.	Element	Description
<b>Eligibility</b>		
1.	Primary victims	<p>The redress scheme should be available to the victims of sexual abuse committed by members of a government or non-government institution when the victims were aged 17 or under.</p> <p>The scheme would not apply to victims of sexual abuse committed when the victims were aged 18 or older and would not apply where the sexual abuse occurred between minors at an institution and there was no direct involvement by an adult member of the institution.</p>
2.	Family victims	<p>The scheme should be extended to:</p> <ul style="list-style-type: none"> <li>■ parents, step-parents and guardians of child claimants</li> <li>■ partners, and</li> <li>■ dependants of claimants.</li> </ul> <p>The primary purpose of the scheme would be to provide redress to the primary victims of child sexual abuse. However, in acknowledgement of the vast and serious effects of child sexual abuse, the scheme should be open to immediate family victims.</p> <p>The provision of redress to these family victims should be based on the nature of the child sexual abuse suffered by the primary victim and the circumstances and extent of the injury suffered by the family victim.</p>
3.	Child sexual abuse	<p>Child sexual abuse should be given a broad definition, formed around definitions in existing child welfare legislation.</p> <p>For example: <i>Child sexual abuse occurs when a person uses their authority to get a child to participate in activities that are for the adult or older person's sexual gratification</i></p>
<b>Timeframes</b>		
4.	Time limit for bringing a claim	There should be no time limit for bringing a claim.
5.	Timeframe for assessing applications	The outcome of an application should be communicated to the claimant no more than six months following the date the application was made.

<b>Types of redress available</b>		
6.	Financial redress	<p>Financial redress should be calculated taking into account:</p> <ul style="list-style-type: none"> <li>■ past out-of-pocket medical expenses</li> <li>■ past and future loss of earnings</li> <li>■ cost of counselling services</li> <li>■ recognition or acknowledgement of the effects of child sexual abuse</li> <li>■ non-economic loss (eg pain and suffering), and</li> <li>■ expenses incurred in making the application, where the application is successful.</li> </ul>
7.	Non-financial redress	<p>Counselling should be provided through the scheme on an ongoing basis as needed by the victim. The cost of this counselling would be separate to any lump sum redress payment and not subject to the cap (see below).</p>
8.	Interim redress	<p>Financial and non-financial redress should be made available:</p> <ul style="list-style-type: none"> <li>■ while claims are being assessed</li> <li>■ between the period where the claim is approved and the quantum of compensation is still to be determined</li> </ul> <p>and deducted from the amount of the final award.</p>
9.	Free counselling outside claims	<p>Claimants should be able to apply for 10 hours of free counselling outside the redress scheme, which could be extended depending on the counsellor's recommendation.</p>
10.	Maximum amount of financial redress (cap)	<p>The financial redress to be capped and determined by reference to community standards.</p> <p>Financial redress to be indexed annually to CPI</p>

<b>Procedure for bringing a claim</b>		
11.	Application	<p>Claimants should be able to make an application either by filling out an application form, or if they would prefer, telling their story to a person employed by the scheme. If the latter option were chosen, the claimant should be able to bring a support person with them, who could act as an advocate or assist the claimant to tell their story.</p> <p>The application form should be brief and easy to follow. It should be able to be completed without assistance from a lawyer.</p>
12.	Supporting documentation	<p>Supporting documentation such as medical reports and material supporting a claim for loss of earnings or earning capacity should be provided if appropriate.</p>
13.	Contact with the claimant	<p>Once an application is received, a contact person should immediately contact the claimant. That contact person should continue to update the claimant on the progress of their claim, and should be available to respond to any of the claimant's queries. The contact person should inquire whether the claimant wishes to receive support from the institution, through the scheme process, if that is available.</p>
14.	Contact with institution	<p>Once an application is received, the relevant institution should be immediately contacted.</p> <p>The institution should be allowed a four week period in which to respond to the claim, and to advise if the claim is disputed in any way.</p> <p>Once an institution is contacted, if the claimant has indicated a willingness to receive support from the institution, then the institution should make contact with the claimant to provide additional assistance outside the scheme if that is appropriate. This could involve pastoral assistance or the facilitation of additional counselling etc.</p>

<b>Status of alleged offender</b>		
15.	Relationship between alleged abuser and the relevant institution	<p>The introduction of a mandatory national scheme would be a matter of law reform. The scheme should respond to any claims of a claimant when an assessor determines a particular institution has responsibility under the law reform proposal set out in section 8 of this submission.</p> <p>The purpose of this would be to ensure that the relationship between the abuser and the institution is sufficient for the institution to compensate the claimant in respect of the abuse.</p> <p>Some further consultation may be necessary following consideration by the Royal Commission of the civil litigation and redress scheme submissions it receives.</p>
16.	Where the offender is alive and the assault has not yet been reported to the police	<p>Where the offender is still alive, the matter should be immediately referred to the police.</p> <p>The claimant should be given the option to:</p> <ul style="list-style-type: none"> <li>■ await the outcome of any police investigation; or</li> <li>■ pursue the claim.</li> </ul> <p>Either way, the claimant would be entitled to seek interim redress.</p>
17.	Where the offender is dead but the assault was never reported to the police	<p>It would still be open to the claimant to make a claim and the assessor would determine whether the abuse occurred on the balance of probabilities.</p>
18.	Where the assault was reported to the police but a charge was not laid	<p>It would still be open to the claimant to make a claim and the assessor would determine whether the abuse occurred on the balance of probabilities.</p>
19.	Where the offender has been convicted	<p>The presumption would be that the abuse occurred. In instances where the offender has been charged but the matter has not been finally determined, the redress outcome would be expressed on the basis that it does not affect the outcome of the criminal proceedings.</p>

<b>Assessment</b>		
20.	Assessors	<p>Claims would be assessed by independent assessors with legal or other appropriate qualifications who are paid by the scheme. Ensuring assessors are independent and qualified would provide claimants with confidence their claims are being treated seriously.</p> <p>Assessors should be provided with training to ensure they understand the impact of child sexual abuse.</p>
21.	Requests for further information	<p>Assessors should have the power to request the production of additional documents from claimants and institutions to enable them to properly assess claims.</p> <p>In cases where a significant amount of financial redress is sought or is being considered, assessors should be able to request claimants undergo medical examinations.</p>
22.	Submissions	<p>If the relevant institution were to dispute the claim in some way, the claimant should be given the opportunity to make a submission in response. This could be made in writing, or orally to the appointed assessor (including by an advocate on the claimant's behalf), if the claimant prefers.</p>
23.	Acceptance of claim	<p>The assessor should determine on the balance of probabilities, based on the material that is presented, whether the incidents occurred and whether the institution identified is responsible for the abuse.</p> <p>Once a decision is made by an assessor to accept a claim, then that decision would need to be communicated to the claimant as soon as possible.</p>
24.	Determination of quantum	<p>An assessor may require further time in which to determine the quantum of the redress and other assistance to be awarded to the claimant. However, this decision should be made within six months of the application being received.</p>
25.	Offer of redress payment	<p>Once an assessor has made a decision, the offer is made to the claimant in writing. The claimant would then be given four weeks in which to make a decision about whether to accept the offer.</p>
26.	Acceptance of offer	<p>Acceptance of the offer would need to be provided in writing and signed by the claimant.</p> <p>Acceptance of the offer will have the effect of extinguishing any rights the claimant might have had to take civil action in respect of the abuse.</p>

27.	Apportionment	Where there are overlapping relationships and multiple institutions involved, the provision of redress should be apportioned between them.
<b>Review</b>		
28.	Internal review	If a claimant or institution was not satisfied with the assessor's findings, an internal review mechanism should be available.
<b>Legal advice and representation</b>		
29.	Legal advice	Limited free legal advice should be available through the scheme or through another government agency, such as LawAccess in NSW. Alternatively, claimants should be able to retain lawyers, with costs calculated on a prescribed fee scale.
30.	Restrictions on legal representation	The scheme should be designed so that legal representation would not be necessary, but should allow claimants to be legally represented if they choose. The scheme should prescribe a fixed fee scale to ensure that lawyers do not charge excessive amounts or a percentage of the financial redress awarded.
31.	Discretion to extend time, allow higher fees	<p>If an assessor was to form the view that a claim is particularly complex and requires additional work, the assessor should have the discretion to extend the time for consideration of the claim and allow additional legal fees to be incurred, upon application by the claimant or institution.</p> <p>An example of this may be where there are overlapping relationships or multiple institutions involved which has increased the amount of work required.</p>
<b>Effect on right to commence litigation</b>		
32.	Effect on right to commence civil litigation	Upon electing to accept the offer of redress, claimants would waive their right to commence civil proceedings in respect of the abuse, subject to what is said in section 7 of this submission.
33.	Right to re-open claims	<p>As discussed in section 12 of this submission, claimants should be permitted to re-open previous claims against institutions that have been settled through other redress schemes, although the amount of any redress already received should be taken into account.</p> <p>This should not extend to the ability to re-open claims at civil law.</p>

<b>Source and tax treatment of funds</b>		
34.	Payment of financial redress	<p>Payments would be made by the redress body and would be recoverable from the relevant government or non-government institution. The legislation establishing the redress scheme would need to address how best to establish and enforce the liability of the institutions for meeting recoveries.</p> <p>Where there is no institution in existence to pay the redress, the Council has proposed in section 8 of this submission a funding model based on a levy on public liability insurance for institutions that have contact with children.</p>
35.	Tax treatment of redress payments	Redress payments should be subject to the same taxation treatment as structured settlements and court-awarded damages for personal injury, such that these amounts are not taxable
36.	Funding of scheme	<p>Institutions should be responsible for the costs (redress and administration costs) associated with claims they are responsible for.</p> <p>A fund would need to be established to provide for matters where no institution remains in existence. The Council has proposed in section 8 of this submission a funding model based on a levy on public liability insurance for institutions that have contact with children.</p>
<b>Publicity</b>		
37.	Publicity	The scheme should be publicised widely so potential claimants are aware of their right to bring a claim.

## Annexure

### Redress schemes in Australia

#### Commonwealth

##### Defence Abuse Reparation Scheme

The Commonwealth Government has recently established the Defence Abuse Reparation Scheme, following the DLA Piper Review into Defence handling of sexual abuse claims.

*'The Australian Government recognises that individuals who suffered sexual or other forms of abuse in Defence should be afforded some form of financial reparation, as part of a broader acknowledgment that such abuse should never have occurred. The purpose of the Defence Abuse Reparation Payment Scheme is to recognise that abuse in Defence is unacceptable and wrong, and is not condoned.'*<sup>49</sup>

The scheme allows reparation payments to be made in relation to sexual abuse that occurred before 11 April 2011, and in relation to applications that are made before 31 May 2013.

The Department of Defence has prepared guidelines<sup>50</sup> regarding the way the reparation scheme is to operate (*Defence Guidelines*).

There are five categories of reparation payment<sup>51</sup>:

- Category 1 (Abuse): \$5,000
- Category 2 (Abuse): \$15,000
- Category 3 (Abuse): \$30,000
- Category 4 (Abuse): \$45,000
- Category 5 (Mismanagement by Defence): \$5000.

Category 5 is a payment that can be made in the situation where Defence failed to properly manage or respond to a verbal or written report or complaint about alleged sexual abuse. The payment can be made if, in the opinion of the Reparation Payments Assessor, the allegation is plausible. It can however, only be made once in relation to a person, even if there is more than one instance of a complaint being allegedly mishandled by Defence.

The Defence Guidelines provide the following broad parameters:

- A payment can be made without meeting the legal burden of proof.

<sup>49</sup> Defence Abuse Response Taskforce, First Interim Report to the Attorney-General and Minister for Defence, p. 15.

<sup>50</sup> Defence Abuse Reparation Scheme Guidelines.

<sup>51</sup> The amounts do not represent a sliding scale. They are intended to allow for 'recognition of increasingly serious abuse', with a single incident that did not result in serious injury for example possibly falling within categories 1 and 2, and serious sexual assault, such as rape, falling into category 4. See further 'Frequently Asked Questions'.

- A payment will be made in the situation where a person has made a **plausible allegation** of being subjected to sexual or other forms of abuse in Defence.
- A reparation payment is not a compensation payment for injury or loss or damage suffered by the person as a result of the abuse.
- A payment made by Defence does not constitute an admission of liability on the part of Defence.<sup>52</sup>
- A payment also does not affect the statutory, common law or legal rights of a person, except that a court or tribunal may take that into account when assessing quantum of damages payable at a later date under the common law or statute.<sup>53</sup>
- The amount of any Reparation Payment is at the discretion of the Reparation Payments Assessor, in accordance with the Guidelines.<sup>54</sup> In making a reparation payment assessment, the reparation payments assessor is not bound by rules or practice as to evidence or procedure.<sup>55</sup>
- The Reparation Payments Assessor is able to take whatever steps he or she considers are necessary or appropriate in determining whether a claim of abuse or mismanagement is plausible.<sup>56</sup>
- A person may only receive one Reparation Payment under the Guidelines,<sup>57</sup> and an Assessment by an Assessor under the Guidelines is final.<sup>58</sup>
- No provision is made in the Guidelines for a hearing, negotiation or appeal in relation to the making of a reparation payment.<sup>59</sup>

An application must be made in the approved form, and needs to include a personal account by way of Statutory Declaration<sup>60</sup>. This Statutory Declaration must include the person's history of employment in Defence, details of the abuse or mismanagement, information about whether any written/verbal reports or complaints were made and any resultant actions taken in regard to those reports.

As at 28 May 2014, 724 decisions to make a payment had been made by the Independent Assessor. \$29 million in payments have been made to complainants. There have been 2,400 complaints in total, and 1,900 of these have been assessed. In addition, 63 matters have been referred to State and Territory police.<sup>61</sup>

## State redress schemes

### Queensland

Following the report of the Forde inquiry,<sup>62</sup> a state redress scheme operated from May 2007 to provide compensation to people who had been abused or neglected whilst a child in institutional care in

<sup>52</sup> Defence Abuse Reparation Scheme Guidelines, para 1.6.1.

<sup>53</sup> Defence Abuse Reparation Scheme Guidelines, para 1.6.2.

<sup>54</sup> Defence Abuse Reparation Scheme Guidelines, para 2.1.4.

<sup>55</sup> Defence Abuse Reparation Scheme Guidelines, para 4.1.3.

<sup>56</sup> Defence Abuse Reparation Scheme Guidelines, para 4.5.2.

<sup>57</sup> Defence Abuse Reparation Scheme Guidelines, para 2.1.3.

<sup>58</sup> Defence Abuse Reparation Scheme Guidelines, para 4.2.1.

<sup>59</sup> Defence Abuse Reparation Scheme Guidelines, para 2.1.6.

<sup>60</sup> Defence Abuse Reparation Scheme Guidelines, para 3.3.3.

<sup>61</sup> Hansard, Legal and Constitutional Affairs Legislation Committee, Estimates, Wednesday 28 May 2014, pp.53-54.

<sup>62</sup> *The Commission of Inquiry into Abuse of Children in Queensland Institutions*, chaired by Ms Leneen Forde, which released its final report on 31 May 1999.

Queensland. Applications were accepted until 30 September 2008 (Level 1 payments) and 27 February 2009 (Level 2 payments).<sup>63</sup>

To qualify for a Level 1 payment of \$7,000, applicants needed to establish they had been placed in a detention or licensed government or non-government children's institution, had been released from care and turned 18 years of age on or before 31 December 1999, and had experienced institutional abuse or neglect. If that abuse or neglect was more serious, applicants qualified for an additional Level 2 payment of up to \$33,000.

Abuse and neglect suffered by individuals while in foster care or while in an adult institution (such as a mental institution) were excluded from the scheme.

The scheme received over 10,200 applications during the period it operated. 7,385 applicants received a Level 1 payment and 3,525 were offered a Level 2 payment (varying between \$6,000 and \$33,000).<sup>64</sup>

Under the scheme, applicants were required to sign a deed of release preventing them from further claiming against the Queensland government in relation to their treatment in State care.

When the scheme was finalised on 30 June 2010, the Queensland Government had made payments totalling over \$100.7 million to over 7,300 applicants.<sup>65</sup>

#### *Western Australia*

The Redress WA scheme commenced in December 2007 and accepted applications until 30 April 2009. It operated to provide assistance and compensation to people who had been abused or neglected whilst a child in state care, whether foster care or in an institution.<sup>66</sup>

The scheme was administered in accordance with the Redress WA Administration Guidelines. The Western Australian Government allocated \$114 million to the scheme. The scheme was open to individuals who had been harmed by sexual, physical or emotional abuse or neglect. Under the scheme applicants received an apology, support and counselling, and an *ex gratia* payment of between \$5,000 and \$45,000 depending on their circumstances.<sup>67</sup> The maximum payment was initially set at \$80,000 but was reduced when the scheme received many more applications than first anticipated.<sup>68</sup>

Recipients were not required to waive their legal rights to further legal redress.

The scheme was based on the principle that an applicant's statement was "acknowledged as their personal experience in State care unless there was evidence to the contrary".<sup>69</sup>

The scheme provided for four possible levels of payments:<sup>70</sup>

- Level 1 (moderate) (abuse or neglect)
- Level 2 (serious)(abuse or neglect with some ongoing symptoms)

<sup>63</sup> Department of Communities Queensland 2009-10 Annual Report p.207  
<http://www.communities.qld.gov.au/resources/corporate/annual-reports/2009-10/annual-report-pdf>

<sup>64</sup> Department of Communities Queensland 2009-10 Annual Report p.207  
<http://www.communities.qld.gov.au/resources/corporate/annual-reports/2009-10/annual-report-pdf>

<sup>65</sup> Inclusive of compensation, legal fees, application fees and funeral assistance. Department of Communities Queensland 2009-10 Annual Report p.58 <http://www.communities.qld.gov.au/resources/corporate/annual-reports/2009-10/annual-report-pdf>

<sup>66</sup> Department of Local Government – Communities Western Australia 2007-2008 Annual Report p.7  
<http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities%20Annual%20Report%202007-2008.pdf>

<sup>67</sup> Department of Local Government – Communities Western Australia 2010–2011 Annual Report p 45 (viewed 6 September 2013)  
<<http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities%20Annual%20Report%202010-2011.pdf>>

<sup>68</sup> Department of Local Government – Communities Western Australia 2007–2008 Annual Report p 41-42 (viewed 6 September 2013) <<http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities%20Annual%20Report%202007-2008.pdf>>

<sup>69</sup> Redress WA Guidelines (as amended 18 May 2011), guideline 8 (2).

<sup>70</sup> Redress WA Guidelines (as amended 18 May 2011), Schedule 3 – Assessment Table.

- Level 3 (severe)(severe abuse or neglect with ongoing symptoms and disabilities)
- Level 4 (very severe)(Very severe abuse or neglect with ongoing symptoms and disabilities)

Assessors were required to determine applications expeditiously and without formality having regard to the requirements of natural justice as far as this was practicable under the scheme, and as required by the Guidelines.

In assessing an application assessors were not bound by rules or practice as to evidence or procedure but were able to inform themselves in any manner they thought fit and determine a matter on the basis that they were **reasonably satisfied that it would be likely that the abuse and/or neglect occurred.**<sup>71</sup>

Guideline 21 (4) specifically provides that the Redress WA Guidelines did not require or make provision for hearings or negotiating an *ex gratia* payment because the intention of the Western Australian Government was to avoid the expense, delay and stress that any such processes necessarily involved.

The offer of an *ex gratia* payment was **an expression of regret** and was **not intended to represent full reparation.**<sup>72</sup>

The scheme was finalised in November 2011, having made compensation payments totalling \$117.7 million to over 5,900 claimants.<sup>73</sup>

- Level 1: 859 payments were made (from 866 offers)
- Level 2: 1813 payments were made (from 1818 offers)
- Level 3: 1477 payments were made (from 1478 offers), and
- Level 4: 1063 payments made (from 1063 offers).<sup>74</sup>

In 2012, following a Special Inquiry into sexual abuse at the St Andrews Hostel in Katanning,<sup>75</sup> the Western Australian Government announced a further limited Redress Scheme for people abused as children boarding as secondary school students in WA hostels.<sup>76</sup> Claims of up to \$45,000 could be made.

Anyone who was subjected to abuse while boarding at one of the 28 facilities run by the Country High School Hostels Authority between 1960 and 2006 could apply for an *ex gratia* payment of up to \$45,000, with applications closing in May 2013.

### South Australia

South Australia has operated a redress scheme limited to compensating people who were sexually abused while in state care. Any other forms of abuse are not covered. Applicants are compensated via the *Victims of Crime Act 2001* (SA). The maximum payment made under this scheme is usually \$30,000, but in exceptional circumstances amounts of up to \$50,000 have been awarded.

Under the scheme, applicants sign a deed of release indemnifying the State Government against claims arising from “abuse of any kind” while in State care.

<sup>71</sup> Redress WA Guidelines (as amended 18 May 2011), guidelines 16(1) and (2).

<sup>72</sup> Redress WA Guidelines (as amended 18 May 2011), guideline 21 (4).

<sup>73</sup> Department of Local Government – Communities Western Australia *2011–2012 Annual Report* p 57 (viewed 6 September 2013) <<http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities,%20Annual%20Report%202011-2012.pdf>>

<sup>74</sup> Hansard, WA Parliament, Tuesday 14 August 2012, p.4837b-4839a.

<sup>75</sup> St Andrew's Hostel Katanning: How the system and society failed our children A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse, 2012

<sup>76</sup> Country High Schools Hostels Ex Gratia Scheme.

The decision making process is entirely within the discretion of the Attorney-General and is not subject to any review mechanism.<sup>77</sup> The Attorney-General does not provide reasons for the decision as to whether to make an award.

### *Tasmania*

Tasmania has operated two relevant redress schemes. The first operated between 15 January and 15 June 2007, to provide redress to members of the Stolen Generation and children of deceased Stolen Generation members. The scheme operated under the *Stolen Generations of Aboriginal Children Act 2006* (Tas), which established a \$5 million stolen generations fund to be divided among eligible claimants.

Under the scheme, 106 members of the Stolen Generation were assessed to be entitled to receive \$58,333 each in compensation, while 22 children of deceased members of the Stolen Generation received \$4,000 or \$5,000 each.<sup>78</sup>

The second scheme provided redress for people abused as children in State care in Tasmania. It closed on 15 February 2013 after operating for nine years. People who established an entitlement received up to \$35,000 in compensation. The maximum payment was initially set at \$60,000 under this scheme, but was subsequently reduced. Applicants were also entitled to an apology, official acknowledgment that the abuse most likely occurred, assurance that such abuse was not continuing today, guided access to personal department files and professional counselling.

People placed into State care voluntarily by parents or relatives were excluded from the scheme.<sup>79</sup>

Over the nine years that it operated, the Tasmanian Government received over 2,300 claims and paid more than \$52 million in compensation.<sup>80</sup>

<sup>77</sup> South Australian Attorney-General's Department (2010) Application Guidelines for ex gratia payments for former residents in state care who experienced sexual abuse as children <<http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Policies%20Procedures%20Codes/Ex%20gratia%20payments/2014%20Application%20Guidelines%20for%20Ex%20Gratia%20%28Former%20residents%20in%20State%20Care%20Sexually%20Abused%29.pdf>>

<sup>78</sup> Department of Premier and Cabinet Tasmania (2008) *Report of the Stolen Generations Assessor* pp 2, 7 and 8 (viewed 6 September 2013) <[http://www.dpac.tas.gov.au/data/assets/pdf\\_file/0004/53770/Stolen\\_Generations\\_Assessor\\_final\\_report.pdf](http://www.dpac.tas.gov.au/data/assets/pdf_file/0004/53770/Stolen_Generations_Assessor_final_report.pdf)>

<sup>79</sup> Department of Health and Human Services Tasmania *Abuse in State Care Information Sheet* (viewed 6 September 2013) <[http://www.dhhs.tas.gov.au/data/assets/pdf\\_file/0003/75081/ABUSE\\_IN\\_CARE\\_-\\_INFORMATION\\_SHEET.pdf](http://www.dhhs.tas.gov.au/data/assets/pdf_file/0003/75081/ABUSE_IN_CARE_-_INFORMATION_SHEET.pdf)>

<sup>80</sup> Media Release, Michelle O'Byrne, Minister for Children, Tasmania (5 January 2013) Abuse in care program (viewed 19 August 2013) <[http://www.premier.tas.gov.au/media\\_room/media\\_releases/abuse\\_in\\_care\\_program](http://www.premier.tas.gov.au/media_room/media_releases/abuse_in_care_program)>

## International redress schemes

### Irish Residential Institutions Redress Board

The Residential Institutions Redress Act 2002 established the Irish Redress Board. The object of the Act was to:

*‘provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the state and who have or have had injuries that are consistent with abuse received while so resident and for that purpose to establish the residential institutions redress board to make such awards and to provide for the review of such awards by the Residential institutions review committee and to provide for related matters’.<sup>81</sup>*

The Board was wound down in 2011. An amendment was made to the Act preventing the Board from considering any applications made to it on or after 17 September 2011. According to the 2012 Annual Report of the Board, by the closing date for applications, the Board had received 16,081 applications. As at 31 December 2013, the Board had completed the process in 16,151 cases as follows:

- 11,709 offers or awards had been made following settlement;
- 2,907 awards had been made following hearings;
- 16 applicants rejected their awards;
- 487 awards had been made following review;
- 1,048 applications were withdrawn or refused or resulted in no award.

The 2012 annual report states that total awards made to 31 December 2012 amounted to €903.8 million. The average value of awards was €62,860, with the largest being €300,500.

An agreement was reached between the Irish government and 18 religious congregations (“2002 Indemnity Agreement”) whereby the religious congregations agreed to contribute €128 million to the special account in exchange for indemnity for future claims about past child abuse claims.<sup>82</sup>

Following publication of the Ryan Report (which outlined the findings of the Commission to Inquire into Child Abuse), it emerged that the cost of compensating some 13,000 former residents had risen to €1.36 billion. The congregations were asked to make further substantial contributions.<sup>83</sup> The Residential Institutions Statutory Fund Board was established in 2013 to oversee the use of €110 million in funds pledged by religious congregations to support survivors of institutional child abuse.<sup>84</sup>

Under the Act, awards were not capped. The final award made by the Board was required to be ‘a fair and reasonable sum, having regard to a person’s unique circumstances’,<sup>85</sup> and was assessed according to the severity of the abuse and injury, and additional redress, medical expenses and other costs and expenses.<sup>86</sup>

A person was not eligible to apply for an award under the Act if they had previously been granted an award from a court or settlement in respect of the abuse.<sup>87</sup>

<sup>81</sup> Residential Institutions Redress Act 2002, Long title.

<sup>82</sup> This included 41.1 million in case, 10 million for counselling services and 76.8 million from the transfer of real estate to the government.

<sup>83</sup> The Congregations offered a further €110 million in case, but as at 26 December 2012, only €39 million had been received by the State. Negotiations considered the transfer of deeds of school and other property assets owned by the congregations as a way of redressing the cash shortfall. However, this has been complicated by the fact that many of the properties are owned by trust and not directly by the orders.

<sup>84</sup> Residential Institutions Statutory Fund Act 2012.

<sup>85</sup> Residential Institutions Redress Act 2002, s. 5(1)(a).

<sup>86</sup> See Residential Institutions Redress Act 2002, s. 17 (requiring the Minister to make regulations specifying the amounts to be paid for abuse, injuries and medical expenses, including categories of severity of abuse).

<sup>87</sup> Residential Institutions Redress Act 2002, s.7(2).

The *making* of an application to the Board did not require the applicant to waive any other right of action by the applicant.<sup>88</sup> An applicant was free to accept or reject an offer made by the Board. An *acceptance* of an award however precluded the applicant from bringing any future claims for damages in the courts in respect of the abuse and injuries covered by the award. An applicant was required to confirm this in writing. Applicants were given one month from the date of the offer within which to decide whether to accept the award.

An applicant was required to provide the Board with evidence either orally or in writing of his or her identity, residence at the institution concerned, the abuse received while so resident and the injury received as a consequence of the abuse.<sup>89</sup>

### Canadian redress schemes

Canada has implemented a number of redress schemes. These include the Canadian Government's national settlement agreement with former students of the Indian Residential School (IRS) system, as well as redress schemes in relation to specific provincial institutions, including the Helpline Reconciliation Model Agreement (1993, Ontario), the Grandview Agreement (1994, Ontario), the Reconciliation Agreement between the Primary Victims of George Epoch and the Jesuit Fathers of Upper Canada (1994, Ontario), the New Brunswick compensation agreement (1995, New Brunswick), the Jericho Hill Compensation Program (1996, Nova Scotia) and the Alternative Dispute Resolution project for Sir James Whitney School for the Deaf (1998, Ontario).<sup>90</sup>

### Grandview Agreement (1994, Ontario)

The Grandview Agreement was an agreement negotiated between the Government of Ontario and the "GSSG," (Grandview Survivor's Support Group), a group of ex-residents of the Ontario Training School for Girls. The school was operated by the Government of Ontario from 1932 to 1976.<sup>91</sup>

The Agreement was designed in consultation with the GSSG and included the following elements:

- Claimants were required to obtain independent legal advice before claiming compensation under the scheme.<sup>92</sup>
- Claimants were prevented from pursuing future civil claims against the government but could still pursue criminal charges against the perpetrators, or civil claims against the perpetrators.
- The agreement provided that each claimant was entitled to \$1,000 to pay for the legal advice.
- A committee was established to oversee the implementation of the scheme. The committee was comprised of a chair who was jointly appointed by the GSSG and the government, two members of the GSSG and one government representative.
- The GSSG negotiated general, group and individual benefits as part of the Agreement.
- General benefits were defined in the agreement to be "those 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".<sup>93</sup>

<sup>88</sup> Residential Institutions Redress Act 2002, s.7(4).

<sup>89</sup> Residential Institutions Redress Act 2002, s.10(4).

<sup>90</sup> See further Shea G, 'Redress Programs Relating to Institutional Child Abuse in Canada', Prepared for the Law Commission of Canada, October 1999.

<sup>91</sup> Kaufman F, *Searching for Justice, An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse*, (Kaufman Report), January 2002, Chapter XVI, p.2.

<sup>92</sup> Ibid, p.3.

- Group benefits were defined in the agreement as being “access to the crisis line, tattoo removal/scar reduction; General acknowledgment.”<sup>94</sup>
- Individual benefits were defined as “vocational or educational training or upgrading, direct financial support in the form of an award made in accordance with the provisions of this agreement and an additional payment for major and exceptional medical/dental expenses as directed by the adjudicator where the benefit from the fund established under section 12 is insufficient; financial services; counselling/therapy; and Individual Acknowledgment.”<sup>95</sup>

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<sup>93</sup> Agreement between the Grandview Survivors Support Group and the Government of Ontario (“Grandview Agreement”), 30 June 1994, clause 1.10.

<sup>94</sup> Grandview Agreement, clause 1.8.

<sup>95</sup> Grandview Agreement, clause 1.9.