

# Submission to the Government of Victoria on the Creation of a Redress Scheme for Institutional Child Abuse

## 1. INTRODUCTION

**knowmore** is a free legal service established to assist people engaging with or considering engaging with the Royal Commission into Institutional Responses to Childhood Sexual Abuse (“the Royal Commission”). Advice is provided through a national telephone service and at face to face meetings, including at outreach locations. **knowmore** has been established by the National Association of Community Legal Centres, with funding from the Australian Government, represented by the Attorney-General’s Department. **knowmore** has offices in Sydney, Brisbane, Melbourne and Perth.

Our service was launched in July 2013 and since that time we have provided over 11,000 client advices. Our latest ‘Service Snapshot’, providing some information and statistics about our service delivery to 30 June 2015, is attached as **APPENDIX A**. Although the focus of our service has been the provision of assistance to survivors of child sexual abuse within institutional settings, many of our clients have disclosed that they also experienced other forms of abuse including physical, emotional and cultural abuse and neglect.

Many of the clients that we have assisted have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to childhood sexual and other abuse they suffered in institutional contexts. Many of these clients have had direct experiences with a redress process, whether it be state or institution based.

**knowmore** commends recent law reform initiatives of the Victorian Government made to date in response to the recommendations in the *Betrayal of Trust* report, including the removal of limitation periods for civil actions founded upon child abuse; the introduction of three new criminal offences to prohibit certain behaviours including ‘grooming’ and the failure to disclose childhood sexual abuse to police; and the strengthening of the Working with Children Check scheme.

**knowmore** also commends the commitment of the Victorian government to the implementation of Recommendation 28.1 of *Betrayal of Trust*, proposing the establishment of a redress scheme for survivors of institutional child abuse. We note that since the publication of the Public Consultation paper, the Royal Commission has now released its final report on redress and civil litigation reforms<sup>1</sup> which confirms the position indicated previously by the Royal Commission that “[I]n order to provide redress under the most

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<sup>1</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse**, Redress and Civil Litigation Report (2015).

*effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.”<sup>2</sup>*

As outlined in previous submissions **knowmore** has made to the Royal Commission,<sup>3</sup> our preferred option is for the establishment of a national redress scheme supported by each of the States and Territories. We welcome the advice noted in the Public Consultation Paper that the Victorian Government continues to be open to participating in a national redress scheme or cooperating with other Australian governments. We would urge the Victorian Government to work towards the national model recommended by the Royal Commission. Indeed, the Victorian Government is in a position, following its Parliamentary Inquiry and the insights arising from that work, to play a leading role in driving efforts to implement the Royal Commission’s recommendations. We appreciate, as the Consultation Paper also notes, that there are some current obstacles to the enactment of a redress scheme. However, we would suggest that the importance of finally delivering some meaningful and fairer outcomes for survivors warrants the investment of the time and resources, by all Governments, as will be necessary to find workable solutions leading to the implementation of a national redress scheme. In giving evidence at the Royal Commission’s public hearings into redress, our Executive Officer said:

*It has been noted that to establish a national redress scheme would be complex and time consuming and certainly that’s correct, but that’s not an unusual position that governments and policy makers must face and we urge that work continues towards finding the solution that best delivers the outcome that survivors need<sup>4</sup>*

**knowmore** further supports the Royal Commission’s recent recommendations that failing a commitment from the Australian Government by the end of 2015 to establish a single national redress scheme, as the next best option for ensuring justice for survivors each State and Territory government should establish a redress scheme covering government and non-government institutions in the relevant State or Territory.<sup>5</sup>

**knowmore’s** submission will respond directly to the questions posed by the Victorian Government in its Public Consultation Paper dated 4 August 2015. We recommend that a Victorian redress scheme be established for survivors of institutional child abuse in the event there is no commitment from the Australian Government to establishment of a national redress scheme by 31 December 2015. In the event a Victorian Scheme is to be

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<sup>2</sup> Ibid., Recommendation 26.

<sup>3</sup> See **knowmore**, Submission No 17 (Issues Paper 5 – Civil Litigation); **knowmore**, Submission No 74 (Issues Paper 6 - Redress Schemes); **knowmore** Submission No 42 (Issues Paper 7 - Statutory victims of crime compensation schemes) and **knowmore** Submission (Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse. These submissions can be viewed at <http://www.childabuseroyalcommission.gov.au/research/issues-papers-submissions>

<sup>4</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse** Public Hearing - Case Study 25 (Day 132), Transcript, p. 13868.

<sup>5</sup> See **Royal Commission into Institutional Responses to Child Sexual Abuse**, Redress and Civil Litigation Report (2015), Recommendations 28 to 33.

implemented, we propose this occur no later than 1 July 2017 as recommended by the Royal Commission.<sup>6</sup>

**knowmore** further recommends that the redress scheme be accompanied by the creation of an independent statutory agency/tribunal to make decisions relating to awards of redress, including the payment of financial compensation. Funding for the scheme should come from the State government as well as institutions, including non-government organisations involved in relevant service delivery. Consideration could also be given to locating the redress scheme within the framework of the Victorian Commission for Children and Young People.

We also note that since the form of redress scheme we are recommending would comprise a ‘public authority,’ within the meaning of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), it will be critical to ensure that the enacting legislation is consistent with Victoria’s human rights obligations under the Charter.

In making this submission, we rely primarily on what we have learned, through our work, about the collective experience of our clients and their needs. We also note our previous submissions on relevant topics to the Royal Commission.<sup>7</sup> Some specific content of those previous submissions will be cited where relevant in this response, although for brevity we will not routinely cite all relevant passages from those submissions. We do however refer the Government to the entirety of those submissions, to assist understanding of the context surrounding the recommendations and observations we have made to the Royal Commission, and herein.

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<sup>6</sup> Ibid., Recommendation 31.

<sup>7</sup> See **knowmore**, Submission No 7 (Issues Paper 2 – *Towards Healing*) to the Royal Commission into Institutional Responses to Child Sexual Abuse; **knowmore**, Submission No 17 (Issues Paper 5 – Civil Litigation); **knowmore**, Submission No 74 (Issues Paper 6 - Redress Schemes); **knowmore** Submission No 42 (Issues Paper 7 - Statutory victims of crime compensation schemes) and **knowmore** Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

## 2. LIST OF RECOMMENDATIONS

1. That the statement of purpose for a Victorian Redress Scheme proposed in the “Response to Victorian Redress Scheme for Institutional Child Abuse Public Consultation Paper” be adopted, with the addition of wording to reflect that the scheme itself, its processes, and the decisions made pursuant to it, are independent of the institution(s) liable for the abuse founding the claim for redress.
2. (i) That participation in a State redress scheme be mandatory for any Victorian government or non-government organisation with responsibility for children.  
  
(ii) Similarly, the redress fund be funded by all Victorian government and non-government institutions with responsibility for children, but payments for each claim should be paid by the State, with orders for repayment of some or all of that award to be made by particular institutions.  
  
(iii) Any institution that has responsibility for children should be required to pay annual contributions under the Scheme, based upon risk factors. These contributions would be determined by a number of factors, including:
  - the size of the institution;
  - the assets of the institution; and
  - the number of claims the institution has had maintained against it.  
(iv) All institutions with responsibility for delivering services to children must be required to hold appropriate insurance to cover any claims that may be made.
3. That the definition of ‘institution’, as provided for in the Royal Commission’s Letters Patent, be adopted for the purposes of the Victorian redress scheme.
4. That the forms of institutional child abuse covered by the redress scheme should include sexual, physical, cultural and emotional abuse and neglect in institutions.
5. That ‘abuse’ be left undefined under a Victorian redress scheme.
6. That the Royal Commission’s approach to the connection required between the institution and abuse (as recommended in its report on Redress and Civil Litigation) be adopted for the purpose of the redress scheme.
7. (i) That the recommended Victorian redress scheme not be implemented with a ‘closing’ date for the lodging of claims.  
  
(ii) That the scope of the redress scheme include ‘future institutional child abuse’.

8. That any Victorian redress scheme be established with specific provision for a review of its operations after a set period of time, and that such review addresses, among other things, the needs of future victims of institutional abuse.
9. The Victorian redress scheme should include the capacity for claims by secondary victims.
10. That the decision-making body under a national redress scheme proceeds and makes its decisions informally and expeditiously.
11. That there be a clear right to legal representation for claimants with respect to all steps of preparing a claim, lodging a claim, determining that claim and any appeal process.
12. That the decision-maker for redress claims has the legislative power to pass information on to relevant law enforcement bodies, with the claimant's consent.
13. (i) That counselling support be provided to survivors making an application through the redress scheme.  
  
(ii) Ongoing counselling should be provided to survivors who wish to access it through a service provider of their choice and that this counselling should be funded through the redress scheme.
14. That under the procedures relating to redress claims, institutions be required to disclose all documents within the institution's possession or control, in whatever form, relating to the claimant.
15. That the procedures relating to redress claims provide the means for claimants to readily access records concerning them that are now held by third party agencies, such as government departments.
16. That the redress scheme should rely primarily on completion of a written application form.
17. That processes relating to the 'testing' of claims under the redress scheme should recognise the inherent evidentiary difficulties that exist for claims based on historical child sexual abuse and minimise the potential for re-traumatisation of claimants.
18. That the 'testing' of claims under the redress scheme explicitly take into consideration the possible destruction of records and the record-keeping practices of the time or as applied to certain groups of people, such as the Stolen Generations.

19. Claimants be required to show that it was 'reasonably likely' that the abuse occurred, to be able to access the benefits of a redress scheme.
20. The redress scheme should not require any further rule of liability, beyond proof of abuse itself.
21. That an independent decision-making body be established as an independent statutory agency to assess and determine, under a Victorian redress scheme, claims for redress, including financial compensation, made by survivors of childhood abuse in institutional contexts. This body should:
  - be able to determine awards of redress against guidelines;
  - have a role or jurisdiction to review past decisions made under other institution based redress schemes, with, as is necessary to now do justice, a capacity to enforce the waiver of the rights and obligations of the parties arising from the resolution of such past matters;
  - incorporate an appeal or review mechanism for parties dissatisfied with initial decisions of the new decision-making body; and
  - while having due regard to the confidentiality of individuals, operate in such a way that promotes the broader goals of transparency, accountability of institutions and the general and specific deterrence of future child sexual abuse and inappropriate institutional responses.
22. That the establishing legislation provides for the relevant decision-makers under this new redress scheme to have an additional power to comment, in delivering decisions in appropriate cases, upon anything connected with a redress claim that relates to:
  - ways to prevent child sexual abuse from happening in similar circumstances in the future;
  - ways to provide for improved institutional responses to future allegations of child sexual abuse;
  - the general welfare and safety of children in institutional contexts; and
  - the administration of justice.
23. That the Victorian Government produce an annual report regarding preventative recommendations arising from redress claims and the progress of relevant institutions, whether government or non-government, in implementing such recommendations.
24. There should be a mix of skills, backgrounds and experience among the decision-making group leading the redress scheme, all of whom should have expertise in relation to institutional child abuse.

25. (i) Under a Victorian redress scheme there should be separation between those officials responsible for ultimate decision-making, from those people that receive, collate and assess evidence.

(ii) Scheme officials involved in the receipt, collation and assessment of evidence should have specialist experience in relation to institutional childhood abuse; be trained in trauma-informed practices and should include a number of Aboriginal assessors to provide cultural knowledge relating to claims by Aboriginal survivors.

26. In so far as is possible, and with appropriate exceptions to protect identifying information concerning third parties (where there is a compelling reason to do so) a survivor's ability to use records and information arising from the redress process should not be subject to confidentiality obligations.

27. That an independent, multidisciplinary and trauma informed legal service be established to assist survivors in making decisions around engaging in the redress process, and in pursuing claims under that scheme. The service should also provide assistance about related legal issues.

Alternatively, capacity within the Victorian Community Legal centre sector be built to deliver this support.

28. That the capacity of institutions to contest a claim be limited to the issue of responsibility (rather than including the impact of the abuse) and occur through the making of submissions and comments in the redress process.

29. That concise written reasons be provided with any award of redress and for any refusal to make an award under the redress scheme.

30. That any decision awarding redress under the redress scheme should be reviewable through an internal process and, particularly, claimants should have the right to seek a review of any award of compensation to them.

31. That a matrix based approach to the calculation of financial payments should be adopted.

32. (i) It is essential that the principle of choice be maintained at the centre of any Victorian redress scheme, including in terms of the manner in which monetary payments are made under the scheme.

(ii) Financial counselling should be an option that claimants can choose to access, under the scheme.

33. It is essential that the principle of choice be maintained at the centre of any Victorian redress scheme, in terms of the types of outcomes available to claimants. Survivors should be given the option of choosing the types of redress they are wishing to access and be given the opportunity to access appropriate forms of redress at relevant times.
34. That non-monetary and therapeutic benefits be able to be claimed by survivors to cover a range of present and future needs, including, but not limited to: medical costs; educational support; assistance in finding families.
35. That the redress scheme should offer a range of treatment options that:
- (i) Are not limited by a set schedule of sessions but rather reflect the needs of individual clients;
  - (ii) Should be monitored and regularly reviews to ensure efficacy and client satisfaction;
  - (iii) Should be available to survivors' loved ones; and
  - (iv) Ensure culturally safe and community managed healing is available to Aboriginal and Torres Strait Islander people.
36. That a Victorian redress scheme permits for direct personal responses to be provided, subject to the claimant's choice as to the affording and manner of that response. Officials administering the scheme should not be directly involved in the provision of such responses, but the scheme should set appropriate standards for such responses and monitor institutional compliance.
37. (i) Financial amounts previously received by claimants, relating to injuries and abuse claimed for under any new redress scheme, should be taken into account in calculating redress awards made in response to applications under a Victorian scheme.
- (ii) The receipt of any previous 'compensation' for that abuse and injuries, should not be a bar to applying for any additional redress.
38. That claimants not be required to enter Deeds of Release under the redress scheme.
39. An independent statutory authority should be established to operate any Victorian redress scheme.
40. That consideration be given to whether the Victorian Commission for Children and Young People should include within its functions the recommended Victorian redress scheme.



### 3. SPECIFIC QUESTIONS

#### **3. The Purpose of a Victorian redress scheme**

The Government proposes the following statement of purpose for a Victorian redress scheme:

*“The purpose of the redress scheme is to recognise the harm caused by institutional child abuse. The scheme should support survivors to address the impacts of the abuse on their lives and obtain justice in a non-adversarial forum. It should provide a means for the institution to acknowledge the harm suffered by the survivor, and accept responsibility for its role in contributing to the abuse.”*

**Question 1. The Government seeks views on whether the above statement of purpose for a Victorian Redress Scheme is appropriate.**

**knowmore** has set out in its previous submissions, in response to Issues Papers released by the Royal Commission, the major barriers that exist under existing avenues of redress for survivors. These include barriers under the current the civil litigation system<sup>8</sup> and State and Territory based statutory victims of crime compensation schemes,<sup>9</sup> as well as institutional and government redress schemes.<sup>10</sup>

In our response to Issues Paper 6: Redress, we said:

*Given the barriers that exist in accessing compensation through existing legal processes, it is vital that survivors of childhood institutional sexual abuse have an alternate way to access compensation and support in recognition of that individual’s experience.*

*In our experience, survivors wish to access an alternative redress process for many reasons. Many clients wish to utilise a process to obtain financial compensation for the abuse that occurred as well as various non-financial and/or therapeutic outcomes. An appropriately designed redress scheme will ensure survivors will be able to have the abuse that has been perpetrated against them acknowledged in a therapeutic and supportive way, while providing the support that the individual needs. Importantly, an effective redress scheme will also ensure institutional accountability for that abuse and its impacts upon the survivor. <sup>11</sup>*

The statement of purpose suggested in the Public Consultation paper picks up the important elements, identified above, that the redress scheme will be an alternative to existing and

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<sup>8</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>9</sup> **knowmore**, Submission No 42 (Issues Paper 7) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>10</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse; and **knowmore**, Submission No 7 (Issues Paper 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>11</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.2

adversarial forums, accessible, and will provide a means through which the responsible institution will acknowledge accountability.

However, we raise for the Government's consideration whether the proposed statement of purpose might be improved by making specific reference to the important element of 'independence'; in the sense that the scheme is structurally independent, and that the scheme's processes, and particularly decisions made under the scheme, are independent of the institutions associated with the abuse suffered by survivor claimants.

Our submission to the Royal Commission's Issues Paper 6<sup>12</sup> set out at some length the importance of having a redress scheme that is established with, and observes in its practices and decisions, independence from the institutions liable for providing redress to claimants. It is clear from our work with our clients that these elements of structural and demonstrated independence in practice are essential to engender confidence among survivors in any redress scheme, and in its processes and decisions. The Royal Commission, in its report on redress, also noted:

*A single national redress scheme or state and territory redress schemes would ensure that decision making on redress is independent of the institutions that the abuse occurred in.*<sup>13</sup>

We do not have a preferred option for amending the wording of the proposed statement of purpose. One option might be to insert, before the existing last sentence, words to the effect of "[W]hile the redress scheme itself, its processes and the decisions made are independent of the institution .... [I]t should provide a means for ... "

**Recommendation 1:** That the statement of purpose for a Victorian Redress Scheme proposed in the "Response to Victorian Redress Scheme for Institutional Child Abuse Public Consultation Paper" be adopted, with the addition of wording to reflect that the scheme itself, its processes, and the decisions made pursuant to it, are independent of the institution(s) liable for the abuse founding the claim for redress.

## **4. The scope of a Victorian redress scheme**

### **4.1 & 2 Participation of non-government organisations**

***Question 2. The Government seeks views on how NGO participation in the scheme should be determined.***

We do not support the option of participation in the redress scheme to be voluntary for any organisation subject to a claim of child abuse. Our clients' experience, and some of the evidence arising from public hearings held to date by the Royal Commission,<sup>14</sup> strongly suggests that some institutions, which should properly be subject to claims, will be unlikely

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<sup>12</sup> Ibid., see pp.11-15

<sup>13</sup> See **Royal Commission into Institutional Responses to Child Sexual Abuse**, Redress and Civil Litigation Report (2015), p.48

<sup>14</sup> See footnote 21 below.

to voluntarily participate in a redress scheme. Alternatively, their participation may come at a 'price'; in the sense of being conditional upon an institution having influence over the scheme's processes, or perhaps the membership of decision-makers, which will compromise the scheme's actual and perceived independence. We note the Salvation Army of Australia<sup>15</sup> said the following in its submission responding to the Royal Commission's Consultation Paper on redress and civil litigation:

*The Salvation Army, in its response to the Royal Commission's Issues Paper 6 – Redress Schemes, noted the advantages of a national redress scheme would be consistency, transparency, accountability and funding of costs. On the matter of funding, **The Salvation Army stated it would resist having to fund the operation of a Commonwealth agency if it had no authority or capacity to engage the personnel, determine structures or question the costs.***<sup>16</sup>

Voluntary participation also would mean that an institution, having initially determined to participate, might later unilaterally decide to withdraw from the scheme, such as in circumstances where a number of claimants come forward with redress claims likely to result in significant monetary payments having to be made.

The structure of some key institutions, particularly the churches, also presents a challenge in this context. While church leaders may espouse a particular aspirational position upon redress, decisions about voluntary participation in any scheme may devolve to the level of individual orders and dioceses, whose financial positions (and consequently their approach to providing any form of redress), will be widely divergent.

The Public Consultation Paper notes that voluntary participation might, among other reasons, be encouraged by internal pressures to resolve claims of abuse in an efficient and compassionate manner (as compared to civil litigation). While the Victorian Government has acted to remove limitation periods for civil claims arising from child abuse, for the majority of survivors, many barriers still remain to the successful prosecution of a civil claim. We have addressed these difficulties at length in our response to the Royal Commission's Issues Paper 5.<sup>17</sup> In reality, the prospect of civil litigation is unlikely, in itself, to persuade many institutions to participate in a redress scheme, particularly where the majority of claims arising against that institution are historical in nature.

One further difficulty surrounding the model of voluntary participation will be how redress is apportioned in circumstances where a survivor has experienced child sexual abuse in multiple institutions. Regrettably, for many of our clients, their childhood involved repeated placements in a range of institutional settings; including residential homes, schools, hospitals, 'training' or detention centres, and foster care. Voluntary participation may mean that only some aspects of such a survivor's history of abuse might lead to redress, which will be re-traumatising and unsatisfactory.

As to determining what institutions should be included, for the redress scheme to have legitimacy, it must include all government and non-government institutions that currently have responsibility for delivering services to children. Any existing institution that was

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<sup>15</sup> An important institution in the context of likely claims under a Victorian State redress scheme.

<sup>16</sup> **Salvation Army**, Submission (Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.4 (**emphasis added**).

<sup>17</sup> See particularly pp. 2-4 and pp. 17-27 of the **knowmore** submission.

previously responsible for delivering services to children, where there is an accepted claim against the institution and officials, should also be required to participate in a State redress scheme.

The State redress schemes that have been previously established have been narrow in their scope, excluding many survivors on what they perceived to be a relatively arbitrary basis. For example, the Tasmanian scheme only applied to those who were abused while in the care of the Department of Health and Human Services and did not cover abuse occurring in private placements or those children placed into care voluntarily.<sup>18</sup> The scheme established in Queensland following the recommendations made in the Forde Inquiry into the Abuse of Children in Queensland Institutions did not extend to cover abuse suffered by children in many institutional contexts, such as out of home care, therefore excluding foster care and other institutions such as hospitals.<sup>19</sup>

What is clear from our clients' experiences is that there has been a two tiered system, where some survivors have been compensated and others not, with no reasonable or fair rationale underpinning the distinction. For many clients who were abused in New South Wales or Victorian government institutions there has been no accessible compensation process, as there have been no State redress schemes established. One client aptly described their placement and the consequences as "pot luck," in that they were placed and abused in a State government institution and therefore unable to access any form of redress scheme such as was available to children who experienced similar circumstances but in State government homes in other States, or in institutions maintained by organisations with existing internal redress schemes.

The existing and past inequalities of access to redress must not be replicated in any new Victorian state redress scheme. As the Public Consultation Paper notes, the goal of the scheme is to provide "*equitable and transparent redress to all survivors of institutional child abuse.*"

We note that the Letters Patent pertaining to the Royal Commission define 'institution' as follows:

*Institution means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:*

- i. includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and*
- ii. does not include the family.*

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<sup>18</sup> **Ombudsman Tasmania**, *Listen to the children: Review of claims of abuse from adults in state care as children*, (2004).

<sup>19</sup> **Commission of Inquiry into Abuse of Children in Queensland Institutions**, *Final Report* (2000).

We recommend that similar eligibility/inclusion criteria should be adopted for a Victorian redress scheme. We have otherwise addressed our views in relation to the connection that should be required between the institution and the abuse suffered in our response to question 5 below.

### **Funding**

In our submission responding to Issues Paper 6 we set out our views on how a redress scheme should be funded by both the State and relevant institutions.<sup>20</sup> Therein we noted:

*The affordability of institutions should not be a barrier to survivors accessing redress payments. All relevant institutions, inclusive of government, must fund the scheme. If the institution is unwilling to arrange its financial priorities to meet its redress responsibilities,<sup>21</sup> it should be compelled to do so and also be prevented from delivering any services to children until it does.*

#### **Recommendation 2:**

(i) That participation in a State redress scheme be mandatory for any Victorian government or non-government organisation with responsibility for children

(ii) Similarly, the redress fund be funded by all Victorian government and non-government institutions with responsibility for children, but payments for each claim should be paid by the State, with orders for repayment of some or all of that award to be made by particular institutions.

(iii) Any institution that has responsibility for children should be required to pay annual contributions under the Scheme, based upon risk factors. These contributions would be determined by a number of factors, including:

- the size of the institution;
- the assets of the institution; and
- the number of claims the institution has had maintained against it.

(iv) All institutions with responsibility for delivering services to children must be required to hold appropriate insurance to cover any claims that may be made.

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<sup>20</sup> See **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp. 31-33 and p.40.

<sup>21</sup> In this context we note the evidence arising from the Royal Commission's Case Study 3, and the evidence given of the Anglican Church's claimed inability to fund reasonable compensation payments to survivors because of its other financial commitments, despite the real property assets it then held. Also, note the evidence given, surrounding the willingness and capacity of the Australian Indigenous Ministries to fund adequate redress, during Case Study 17 concerning the Retta Dixon home in Darwin.

**Recommendation 3:** That the definition of ‘institution’, as provided for in the Royal Commission’s Letters Patent, be adopted for the purposes of the Victorian redress scheme.

### 4.3 Forms of abuse covered by the scheme

**Question 3. The Government seeks views on the forms of institutional abuse that a Victorian redress scheme should cover.**

The work of **knowmore** has necessarily, by nature of our specific role, been focused on assisting survivors disclosing child sexual abuse within institutional settings. However, as we noted in our response to Issues Paper 6 it is clear from the experiences of clients presenting to **knowmore**:

*“ ... that the sexual abuse of children in many institutions, especially residential homes, rarely occurred in isolation of physical and emotional abuse, and that at times, the boundaries between different forms of abuse often overlapped. Some of our clients have spoken of institutional cultures where extreme physical abuse and degradation of children created a culture which in turn facilitated the occurrence of sexual abuse*

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*We have also spoken to clients who suffered extreme physical and emotional abuse in residential homes and other institutional settings, but who did not experience sexual abuse within the Royal Commission’s Terms of Reference. The overwhelming majority of clients who have reported surviving sexual abuse also report enduring physical and emotional abuse; in many institutions, particularly residential home settings, it seems rare for sexual abuse to have occurred in isolation of other mistreatment.”<sup>22</sup>*

To date, over 18% of our clients have identified as being Aboriginal or Torres Strait Islanders. In our response to Issues Paper 7, we said the following about their reported experience of cultural abuse:

*Many of **knowmore**’s clients talk about the sadness of losing contact with their family and their cultural heritage. This is especially an issue for many Indigenous clients who were removed from their families and placed with white families or in institutions run by non-Indigenous people.*

*For many survivors removal from their parents was accompanied by ongoing separation from their siblings, with family contact often discouraged. Many survivors do not know who their family is, have incorrectly believed their parents to be dead, or*

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<sup>22</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.19-20

*cannot find their relatives. It is critical that survivors be given assistance to locate and reconcile with family members.*

*This is particularly significant for Indigenous survivors, many of whom were taken from their families under government policy at that time, and are members of the Stolen Generations. knowmore's Indigenous clients regularly talk about loss of family, language and culture. knowmore has assisted an Aboriginal man who was removed from his mother's care at a young age, by the relevant State department, and later sexually, physically and emotionally abused while 'in care'. He ultimately established a life outside Australia, returning decades later 'in search of his Aboriginality':*

*"I came home to claim my Aboriginality. I was deprived of my Aboriginality. I was culturally dislocated. People don't understand the cultural complexity of Aboriginal life".<sup>23</sup>*

Some of **knowmore's** Aboriginal clients have told us that they had no knowledge they were Aboriginal until they received their institutional records, which revealed their cultural heritage.

We note that it is also clear from the *Betrayal of Trust* Report and the work of the Royal Commission to date that survivors of institutional abuse have frequently experienced forms of harm other than or in addition to sexual abuse.

It is difficult in those circumstances to maintain why a redress scheme should be restricted and exclude those who suffered abuse in institutional contexts as children, which did not involve sexual or some other specific form of abuse which is used to trigger redress eligibility. Further, the limitation of a redress scheme simply to some forms of abuse, for example sexual and/or physical abuse, would mean that many claimants would be forced to undertake more than one process to seek redress (which in itself will be re-traumatising), or may have no recourse to redress for some aspects of their institutional abuse.

**Recommendation 4:** That the forms of institutional child abuse covered by the redress scheme should include sexual, physical, cultural, emotional abuse and neglect in institutions.

#### **4.4 Defining "abuse"**

**Question 4. The Government seeks views on whether "abuse" or similar terms should be defined, and if so, the form of any definition.**

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<sup>23</sup> **knowmore** Submission No 42 (Issues Paper 7 - Statutory victims of crime compensation schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.16

The Public Consultation Paper notes that the options for addressing this question could include:

- conduct that is criminal in nature
- creating a definition for the purposes of the scheme; or
- leaving the terms undefined, and open for interpretation on a case-by-case basis

**knowmore** is of the view that the preferable position would be that ‘abuse’ should be left undefined under a Victorian redress scheme, beyond noting that it includes physical, sexual, emotional and cultural abuse and neglect.

In previous submissions, necessarily relating only to the issue of whether the term ‘sexual abuse’ should be defined for redress purposes, we have noted the importance of adopting a wide definition, if one is to be adopted at all.<sup>24</sup>

In any case, we strongly recommend that a definition using reference to the criminal law from the period in which the abuse occurs should *not* be used. We hold this view firmly, for several reasons which we outlined in more detail in our response to the Royal Commission’s Issues Paper 5: Civil Litigation.<sup>25</sup> We note in particular that child sexual abuse, was not seen as a widespread social problem by parliaments until the 1970’s and 1980’s.<sup>26</sup> Many forms of behaviour, especially with respect to non-penetrative forms of abuse and male victimhood, while sexually abusive by any standard, might not have been identified and criminalised at the relevant time. We note there are also factors other than criminality relevant to determining what sexually abusive behaviour is and who should be able to claim redress. Other relevant factors include the relationship between the perpetrator and the victim; the respective ages of the perpetrator and victim; the mental capacity and social circumstances of the victim; and the presence of coercion and violence.

**Recommendation 5:** That ‘abuse’ be left undefined under a Victorian redress scheme.

#### 4.5 A connection between the abuse and an institution

***Question 5. The Government seeks views on whether the Royal Commission’s criteria for a “connection” between the abuse and the institution is sufficient for the purpose of a Victorian redress scheme.***

As the Public Consultation Paper notes, any Victorian redress scheme will likely address a variety of harms and organisations, so eligibility criteria may need to be similarly broad. The

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<sup>24</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.19-20; and **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.14.

<sup>25</sup> **knowmore**, Submission No 17 (Issues Paper 5 – Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.14-15.

<sup>26</sup> **Kathleen Daly**, ‘Conceptualising Responses to Institutional Abuse of Children’ (2014) 26:1 *Current Issues in Criminal Justice* 5, 8.



Paper also makes reference to the approach adopted in the Letters Patent for the Royal Commission, to defining child sexual abuse as occurring within an institutional context.

**knowmore** has previously recommended that a similar approach be taken for the purpose of a redress scheme for institutional child sexual abuse,<sup>27</sup> and we recommend that similar and consistent eligibility criteria should be adopted for any Victorian State redress scheme, save that it extend to other forms of child abuse.

In particular, the Parliamentary Inquiry and the Royal Commission will have been informed of many examples, as **knowmore** has, of children being abused in circumstances falling within sub-paragraph (iv) of the definition of ‘institutional context’ in the Royal Commission’s Letters Patent; that is, where perpetrators have misused their position and association with an institution, and the consequent relationship of trust with the child victim, to commit sexual offences. It is important that this reality be recognised in the eligibility criteria and that a narrow approach not be adopted, that limits eligibility to only abuse that occurred within institutions themselves. Such an approach would unfairly exclude thousands of survivors of what is quite properly and currently recognised under the Royal Commission’s Letters Patent as “institutional child sexual abuse”.

We do not anticipate major difficulties, in the practical application of a redress scheme, arising from the inclusion of a ‘catch-all’ style provision such as paragraph (v) of the definition of ‘institutional context’ in the Royal Commission’s Letters Patent; that is, abuse is taken to have occurred in an ‘institutional context’ if it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.

Given the purpose of a redress scheme, and the wide scope of cases it should deal with (ranging over a lengthy period of time and across many diverse institutions) it is not inappropriate to apply a broad and non-exhaustive approach to the drafting of definitional terms. Scope still exists, in the context of such an approach, for an institution to dispute responsibility in any specific case where it is considered that the facts of the institution’s relationship with the alleged abuser should not found institutional responsibility. These types of cases are likely to turn on their own facts, and do not therefore in any event lend themselves to ready definitional resolution.

In time, it is suggested that the tribunal determining claims under a Victorian redress scheme could formulate and issue some ‘guideline’ decisions around eligibility and jurisdictional issues, such as where it is considered that an institution or its activities have created or facilitated a risk of child sexual abuse.

Where terms within the definition utilised by the Royal Commission are further defined in its Letters Patent, such as ‘official’, we recommend those definitions be also adopted for the

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<sup>27</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.18-19; and **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.7.

purposes of a Victorian scheme. Obviously some expansion would be needed to adjust the definitions to extend beyond solely ‘child sexual abuse’.

**Recommendation 6:** That the Royal Commission’s approach to the connection required between the institution and abuse (as recommended in its report on Redress and Civil Litigation) be adopted for the purpose of the redress scheme.

#### 4.6 Time period of abuse addressed by the scheme

**Question 6. The Government seeks views on an appropriate eligibility date for a redress scheme, including whether such a date should be set by reference to:**

- a) **The date of establishment of the Redress Scheme;**
- b) **The date of related civil law reforms (for example, recent Victorian reforms to limitation periods)**
- c) **Other**

We note the position stated in the Public Consultation Paper that the Victorian Government considers that a redress scheme should address past, rather than future harms, and will therefore need to operate by reference to an eligibility date. We make four observations on that position, consistent with the views we have expressed previously in submissions to the Royal Commission.<sup>28</sup>

First, and consistent with what we have said above, it is important that any Victorian redress scheme does not place overly restrictive eligibility criteria on individuals wishing to access the scheme. Many **knowmore** clients have expressed concerns about the overly restrictive eligibility criteria placed on many of the past redress schemes and how they have operated to their detriment.

Secondly, the scheme should not limit access to a defined period of opportunity, as the past State based schemes<sup>29</sup> have done with ‘closing dates’. To so limit eligibility in this way is completely inconsistent with the recognised effects of the complex trauma that results from childhood sexual abuse, and the weight of authoritative research, as to the average length of time that elapses before survivors are able to make and support a disclosure about their experiences. One client commented on their inability to apply under a now closed scheme, *“I just wasn’t ready when redress came out. Now I am ready to tell my story but there is nobody to listen!”*

Additionally, many clients have reported to **knowmore** that they were simply unaware of the existence of past redress schemes, and therefore missed lodgement closing dates. In

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<sup>28</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.17-18; and **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.4.

<sup>29</sup> Such as the scheme in Queensland established after the Forde Inquiry.

this regard, many clients have moved to live in States (or even overseas), away from the jurisdiction where they were institutionalised and abused as children.

The 'closing date' approach of past schemes has in practice meant that many survivors missed out on putting in an application, despite being eligible for payments. The position is analogous in many respects to the problems arising in the civil litigation context, as a result of the application of limitation periods (although closed redress schemes permit no option of seeking to extend the 'cut-off' date).

It is essential that any scheme is open ended and on-going, allowing survivors to access what services they wish, when they are ready.

Thirdly, while we appreciate the point made in the Public Consultation Paper about the difficulty in accurately predicting the circumstances or needs of future abuse victims, we do not share the confidence that reforms to civil litigation, and other factors such as the work of the Royal Commission (or that of the Parliamentary Inquiry in Victoria), may remove the need for a redress scheme to continue to operate prospectively into the future. Reforming the civil litigation system is likely to remove many legal difficulties specific to claims arising from institutional child sexual abuse; however, these reforms will not necessarily render that system more accessible to many survivors, from an access to justice perspective. As noted throughout this response, numerous individual and systemic barriers to accessing legal assistance and engaging in the civil litigation system remain.<sup>30</sup>

In **knowmore's** experience, these barriers disproportionately affect survivors of child sexual abuse, and it is likely that people experiencing institutional child sexual abuse in future will face similar barriers. A redress scheme is likely to be more accessible to past and future survivors than the civil litigation system. Moreover, a redress scheme can adopt and deliver restorative justice and therapeutic jurisprudence approaches that the civil litigation system cannot.

Finally, based on our clients' reported experiences of institutional responses to date, even since the commencement of the Royal Commission and the undertaking of the Victorian Parliamentary Inquiry, a concern arises, in terms of encouraging all relevant institutions to adopt and implement appropriate child safety practices into the future, if those institutions know that from a set, future point in time they will not face the prospect of liability under any State redress scheme.

We would suggest that the uncertainty surrounding the future needs of victims could be best addressed by ensuring that any Victorian scheme is established with provisions which specifically allow for its review after a certain period of operation (sufficient to allow some

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<sup>30</sup> See also: **M Karras, E McCarron, A Gray and S Ardasinski**, 'On the edge of justice: the legal needs of people with mental illness in NSW' (May 2006), Law and Justice Foundation of NSW, 93-149; **L Schetzer and J Henderson**, 'Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW' (August 2003) (Consultation paper), Law and Justice Foundation of NSW, 29-87, 135-173.

gauging of the impact of civil litigation and other reforms), and that such a review addresses the issue of what future victims may need, in the context of redress.

As a final comment relating to all definitional and eligibility issues, we would urge the Victorian Government to adopt a wide and inclusive approach to eligibility to claim redress. Many of our clients have endured a life time of exclusion, and deep consequential trauma. Their childhood experiences of institutionalisation and sexual and other abuse have deeply impacted upon their physical and mental health; their capacity to develop and maintain positive relationships; their opportunity and ability to obtain an education and, in turn, rewarding and stable employment. Until now, many have been excluded from obtaining any form of redress or compensation for the clear wrongs done to them. Many of those who have obtained some redress have had to participate in disempowering and traumatising processes to obtain outcomes that, generally, have been highly inadequate.

The balance in settling any eligibility issue under a Victorian scheme must fall in favour of potential claimants over institutions.

**Recommendation 7:** (i) That the recommended Victorian redress scheme not be implemented with a 'closing' date for the lodging of claims.

(ii) That the scope of the redress scheme include 'future institutional child abuse'.

**Recommendation 8:** That any Victorian redress scheme be established with specific provision for a review of its operations after a set period of time, and that such review addresses, among other things, the needs of future victims of institutional abuse.

#### **4.7 Additional beneficiaries**

***Question 7. The Government seeks views on whether a scheme should provide redress to any individuals or groups beyond the primary victims of abuse.***

A redress scheme should properly recognise the impact of childhood institutional abuse on entire families, and across generations. Our clients consistently tell us of the 'ripple effect' of what happened to them. They speak of the fracturing of relationships with their own parents, with partners, children, grandchildren and great grandchildren. Family environments featuring intergenerational trauma are common amongst our client group. Many clients have expressed to us a need for support and particularly counselling services to be extended to members of their immediate family, often proposed in the hope that this will help family members to better understand the trauma that their survivor relative is trying to manage.

Similarly, when some of our clients have contemplated whether redress for them might include a direct personal response from representatives of an institution, it is common for us to hear that our clients wish for this apology to either be given directly to, or to involve and include, their family members. This is often expressed in terms of "*they are the ones who have had to live with my problems.*"

**knowmore** has also assisted a number of clients who are family members of victims of institutional child sexual abuse, in circumstances where the primary victim is no longer alive. Tragically, in many of these cases the primary victim took their own life, as a result of their experiences of abuse and the consequent trauma. Several elderly survivors, who have no assets and no income beyond social benefits such as the aged or disability pension, have told us that they worry extensively about how their family will meet the funeral costs upon their death, and have explained that this element is to them a very important aspect of any redress settlement that the responsible institution is to make. This was recognised in the Western Australian redress scheme, as noted in the Public Consultation Paper.

These are particularly important issues in the context of the potential redress claimants' population being an aging one. As Appendix A reflects, to 30 June 2015 77% of the clients we have assisted have been aged 45 years or older. Over 15% of our clients are aged 66 years or older.

At present, the practices of institutions vary in relation to 'surviving' rights when a redress claimant dies before resolution of their claim. Some institutions allow a monetary aspect to 'survive' for the victim's estate/next of kin; others do not.

Many Indigenous survivors also speak of the impact of loss of culture on not only their children and grandchildren but future generations and their wider communities. The proposed redress scheme needs to be broad enough to encompass these important aspects of a survivor's recovery.

At the least, a redress scheme should allow for counselling for family members of survivors where that is necessary, as the Royal Commission has recommended.<sup>31</sup> Another element of redress which could be provided to family or secondary members is that of a direct personal response from the institution, such as an apology. Claims which are pending but unresolved at the time of a survivor's death should be able to be pursued by a representative of their estate.

**Recommendation 9:** The Victorian redress scheme should include the capacity for claims by secondary victims.

## **5. Redress scheme processes and validation of claims**

### **5.1 The application process**

***Question 8. The Government seeks views on the:***

- a) proposed application process; and***
- b) support services that should be available during the application process.***

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<sup>31</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation Report** (2015), Recommendation 68.

In our response to the Royal Commission's Issues Paper 6, we made the following observations:<sup>32</sup>

*An appropriately designed, national and independent redress scheme, as recommended herein, could provide the following advantages to survivors in providing redress and compensation:*

- *Non-legalistic: the scheme should not be constrained by the general rules of civil procedure, including the rules of evidence, and should operate as a true non-litigation based, administrative alternative to those who, for one reason or another, do not wish to or cannot pursue a civil claim for damages.*
  
- *A range of outcomes: the scheme should allow for an informal and timely process for survivors to obtain redress in a variety of ways appropriate to that individual survivor. In particular, financial outcomes, both in quantum and liability (in the sense of who ultimately bears the burden of payment), should reflect the abuse endured and the damage sustained by the claimant and, very importantly, the level of institutional culpability.*
  
- *Independence: in the model proposed, the redress process would be overseen by an independent body, taking away the current model of institutional based schemes and adding much needed transparency to the redress process and decisions.*
  
- *Fairness: the scheme should ensure that all survivors of institutional abuse will be adequately compensated, including in circumstances where institutions may no longer exist or institutions do not have the funds to pay amounts determined. It is vital that the current problems of inconsistent access and outcomes are overcome.*
  
- *Less traumatising: A redress scheme would generally be a faster and more efficient method of dealing with claims, and operate in a way that minimized trauma for claimants through effective and trauma informed practices and the incorporation of access to necessary support mechanisms during and after the claims process. One of those essential support mechanisms is legal assistance.*
  
- *Free legal assistance: In light of the trauma experienced by survivors of institutional child sexual abuse and the difficulty many of them have experienced in presenting any claim for redress or compensation, it is important that claimants to any redress scheme have legal assistance in preparing and presenting their claims for redress.*

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<sup>32</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.11 & pp.20-22.

- *Certainty and transparency of process: Clear processes, guidelines and operation of the scheme will mean that institutions, claimants and their advisers are aware of the processes for dealing with claims and understand the likely outcomes, which should encourage timely resolution of claims. Additionally, transparency of process and outcomes, with due regard for individuals' confidentiality in appropriate circumstances, will operate to promote institutional learning and risk management responses in relation to the handling of allegations of institutional abuse, such as procedural reform and better management practices, both at the level of the institution involved in a case, and more widely, by way of general deterrence. Procedural fairness for all parties is also essential in the processes of the scheme, and in any review mechanism.*

...

*It is essential that the redress scheme provide for clear application and decision making processes so that survivors and institutions are aware of procedural requirements and how decisions about redress claims are determined. Processes should be as informal as possible and need to recognise the circumstances of vulnerability and disadvantage of many survivors.*

*Many **knowmore** clients who have had unsatisfactory experiences with redress schemes have complained about the lack of consistency and transparency of processes and decisions. Many of the existing institutional redress schemes really provide very little practical guidance as to what information should be collected and submitted by claimants in support of claims, leading often to 'piecemeal' processes and delay and, inevitably, claimants omitting to provide relevant information within their possession that would have assisted their claim.*

...

*Expeditious and informal processes should be central to the redress scheme, with such requirements contained in the legislative provisions. There should be an obligation that the independent body making decisions do so in an informal way and that decisions should be made as quickly as possible. Processes must be respectful of survivors and their experiences, and must be accompanied by a commitment to the application of trauma-informed practice.*

*There should also be a clear right to legal representation for claimants with respect to all steps of preparing a claim, lodging a claim, determining that claim and any appeal process.<sup>33</sup>*

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<sup>33</sup> This issue is addressed in more detail in our response to question 17 herein.

**Recommendation 10:** That the decision-making body under a national redress scheme proceeds and makes its decisions informally and expeditiously.

**Recommendation 11:** That there be a clear right to legal representation for claimants with respect to all steps of preparing a claim, lodging a claim, determining that claim and any appeal process

We note that the Government does not believe that it is necessary for alleged abusers to be named on an application, nor is it necessary that the alleged abuse be reported to police.

We agree with the latter suggestion, although we would note that it is important that the processes attaching to any redress scheme ensure that there are powers for matters involving allegations of historical offences to be reported to police, with the claimant's consent, and also provide for all relevant material to be passed to the relevant police agency. We have previously noted:<sup>34</sup>

*Many of the survivors we have assisted have not made a report about their abuse to the police, for many reasons. Giving the survivor an opportunity to have the relevant information to be passed to the police will ensure that they will not need to unnecessarily recount their experience, and facilitate the reporting of crimes to the relevant authorities and the detection, investigation and prosecution of offenders.*

*Many redress schemes that have operated in both Australia and overseas have had either formal or informal information sharing processes with relevant law enforcement agencies. Given the breadth of information that would be received in these applications, it would be important to ensure that there are formal information sharing procedures established across relevant agencies.*

*Significant amounts of reports and criminal 'intelligence' about offenders will arise from claims dealt with under a redress scheme. It is important that there is the opportunity for this material to be passed to law enforcement agencies to enhance the capacity to identify, group and target perpetrators and maximise prospects of prosecution, through improved capacities to corroborate information.*

*Similarly, there should be provision for the dissemination of information to any other relevant agency, such as State departments with responsibilities for child safety issues.*

**Recommendation 12:** That the decision-maker for redress claims has the legislative power to pass information on to relevant law enforcement bodies, with the claimant's consent.

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<sup>34</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.22-23



We consider that the scheme's processes should allow for the claimant to name their abuser, if they wish. This is an important aspect for some of our clients. Identification of alleged abusers may also assist in the early resolution of claims where, for example, the nominated abuser is a known offender and the relevant institution has accepted this fact on previous occasions and in previous claims. It is necessary that the scheme is flexible in this regard; we have assisted many clients who cannot name their abuser, due to their age and the circumstances of the offending (for example, when children were abused by a visitor, or a contractor, attending a residential home).

### **8 b). The government seeks views on the support services that should be available during the application process**

In our submission to Issues Paper 6, we said:<sup>35</sup>

*Counselling support for survivors can make a significant difference in dealing with the trauma that inevitably results from revisiting their experiences for the purpose of pursuing claims. Any redress scheme should ensure that counselling support both during the redress process and beyond is funded. However, again this is an area where individual choice is important.*

*Our service places high importance on delivering trauma-informed services through a multi-disciplinary model. In the short time that **knowmore** has been in operation, our social work/counsellor team has assisted many clients who are navigating complex psychosocial issues as a result of institutional child sexual abuse. This includes assisting both primary and secondary victims of abuse. The issues include homelessness, ongoing difficulties with emotional regulation, complex grief and loss relating to separation from family, suicides of primary victims, loss of faith, loss of role, social isolation, limited education, attachment issues, problematic sexual behaviour and family violence. Clients have also presented with complex needs related to physical and mental health.*

*The complexity of psychosocial issues experienced by **knowmore's** clients reflects professional literature relating to complex trauma in the aftermath of child sexual assault.<sup>36</sup>*

*Accordingly, reflecting the multidimensional needs of survivors of institutional child sexual assault, redress schemes should ensure survivors are provided with adequate counselling and social support to maximise their ability to participate in redress*

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<sup>35</sup> Ibid., at pp.42-45

<sup>36</sup> **Van der Kolk, B.A.** 1994 *The Body Keeps the Score: Memory and the Evolving Psychobiology of Post-Traumatic Stress*, Harvard Review of Psychiatry, 1(5), 253-265; **Hodges, M., Godbout, N., Briere, J., Lanktree, C., Gilbert, A., Taylor Kletzka, N.**, 2013 *Neglect Cumulative trauma and symptom complexity in children: A path analysis*, Child Abuse & Neglect, 37, USA, pp. 891–898; **Courtois, C.A and Ford, J.D.**, 2012 *Treatment of Complex Trauma, A Sequenced, Relationship-Based Approach*, Guilford Press, NY.

*schemes and to minimise the risk of traumatisation from experiencing processes where they feel disempowered/ voiceless. For more vulnerable clients, this support might be best provided through a case management model to ensure that multiple needs can be addressed through linking in with psychological and social support agencies. As noted above, ongoing casework support may in itself be an appropriate redress outcome.*

*In providing survivors with support through the redress process, survivors should be able to choose the mental health care professional or advocate with whom they would like to work. Evidence drawn from survivors' experiences points to the importance of choice in accessing flexible and complex-trauma informed psychological and social support, which can be fundamental in recovery from complex trauma.<sup>37</sup> Psychological interventions with survivors need to be flexible and to address issues that clients would like to negotiate. For many of the survivors with whom we have had contact, redress is identified as a significant component of their recovery and sense of justice; however they have experienced confusion in relation to how to negotiate redress schemes.*

*Survivors of complex trauma may present with a multiplicity of symptoms and social issues, and individuals vary in relation to which issues would they would like to address and when. For many survivors we have worked with, redress is seen as a cornerstone for healing and recovery in providing a sense of formal recognition of their experiences and a sense of justice. For many survivors, the impact of a traumatic childhood, where fundamental social and emotional skills were not developed, necessitates that psychological interventions should assist survivors to develop capacities for effective functioning. A one-stop shop approach to complex trauma does not work, and accordingly any redress scheme must maximise client ability to navigate redress processes, through education, support and referral to follow- up care and support.*

*In recognising the potential complexity of issues faced by survivors of child sexual assault, redress schemes should ensure that clients are able to access independent psychological assessment to identify needs. Comprehensive assessment is seen as the first phase for treatment of complex trauma and should involve not only assessment of post traumatic symptoms, but comorbidities such as medical illness and an assessment of needs and resources such as access to housing and specialised treatment.<sup>38</sup> Assessment of psychosocial need should be voluntary to maximise control over recovery processes.*

*The literature reveals that best practice in the psychological treatment of complex trauma requires skilled and appropriately trained professionals, a phased based model of treatment, and treatment duration varying, with around two years on*

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<sup>37</sup> **Mental Health Professionals Network**, April 2013, A Collaborative Approach to Supporting Adult Survivors of Childhood Abuse Webinar. <http://www.mhpn.org.au/webinars?pa=webinars>.

<sup>38</sup> **Courtois, C.A and Ford, J.D.**, 2012 *Treatment of Complex Trauma, A Sequenced, Relationship-Based Approach*, Guilford Press, NY.

*average recommended. Research has also supported that use of art therapy and other more novel 'mind-body' modalities in the treatment of complex trauma.*

*Hence, redress schemes must acknowledge that current arrangements under Medicare do not allow for psychologists and other mental health professionals to be flexible in what modalities they deliver under the Better Access scheme.<sup>39</sup> Under Better Access, psychology sessions are capped at 10 per year and favour a Cognitive Behavioural approach to treatment, which likely would not meet the needs of many individuals negotiating the effects of child sexual abuse. Accordingly, redress schemes must recognise that treatment of complex trauma cannot currently be solely addressed in the public health system. Redress schemes need to be flexible in recognising that the length of time in treatment may vary for individuals, and indeed change over time.*

*As noted, criticism has been made of arrangements of church based redress schemes where clients have been sent to counsellors selected by the church. Criticism has included that clients are unable to choose their own counsellors, that this treatment is not evaluated or regularly reviewed and that the effectiveness of this treatment is limited.<sup>40</sup>*

*In understanding the impact of complex trauma on the interpersonal relationships of survivors, redress schemes should recognise the needs of family members and other loved ones in the provision of counselling support.<sup>41</sup> Access to family therapy and counselling for survivors' loved ones should be provided for in redress.*

*Understanding that victims of child sexual abuse suffer higher incidence of further trauma throughout their lifespan, and thus may experience complex issues related to poverty and economic instability, redress schemes should assess clients' current social functioning, and assist where necessary to ensure that clients' basic needs are being met. This would ensure that clients are not exploited due to their social circumstance, and not coerced into accepting less compensation due to immediate needs.*

*In providing psychosocial assistance to victims navigating redress schemes, psychological interventions should be limited to assisting clients to regulate their emotions, providing general supportive counselling and psycho-education around managing the retriggering of trauma. This would be in keeping with best practice principles referenced above which dictate that deeper psychological work addressing childhood trauma only be commenced once a client is in a safe and stable state to do*

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<sup>39</sup> See: <http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-ba>.

<sup>40</sup> **Inquiry into the Handling of Child Abuse by Religious and Other Organisations** [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child Abuse Inquiry/Transcripts/In Good Faith Associates 12-Nov-12.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child%20Abuse%20Inquiry/Transcripts/In%20Good%20Faith%20Associates%2012-Nov-12.pdf).

<sup>41</sup> **Cashmore, J., and Shackel, R.** 2013, *The Long Term Effects of Child Sexual Abuse*, Australian Institute of Family Studies, Child Family Community Australia issues paper no. 11.

*so. Psychological support to assist a client during a redress process, might also involve psycho-education around decision making and problem solving.*

*The provision of psychological assistance to survivors during a redress process should be managed by an independent body rather than an 'in house' counselling service. This would minimise risk of re-traumatisation and would benefit monitoring and reporting of support services.*

*In recognising the wider impact of childhood trauma on the families and loved ones of survivors of childhood sexual abuse, particular cultural needs must be recognised in psychological interventions. Indeed where whole communities have been affected by institutional childhood sexual abuse, redress should address multidimensional needs of communities. For example, it has been recognised that Aboriginal and Torres Strait Islanders impacted by intergenerational trauma might benefit from the creation of healing centres to strengthen and rebuild social relationships in culturally safe places.<sup>42</sup> The need for redress schemes to recognise the importance of community controlled and culturally safe practice is fundamental to outcomes for Aboriginal and Torres Strait Islander people affected by institutional child sexual abuse.*

*In summary, in addressing the psychological needs of survivors of childhood sexual abuse, redress schemes should offer a range of treatment options:*

- *that are not limited by a set schedule of sessions but rather reflect the needs of individual clients;*
- *that should be monitored and regular reviewed to ensure efficacy and client satisfaction;*
- *that should be available to survivors' loved ones; and*
- *ensure that culturally safe and community managed healing is available to Aboriginal and Torres Strait Islander people.*

Further observations about the availability of counselling and support services are provided below, in answer to Question 24.

**Recommendation 13:** (i) That counselling support be provided to survivors making an application through the redress scheme.

(ii) Ongoing counselling should be provided to survivors who wish to access it through a service provider of their choice and that this counselling should be funded through the redress scheme.

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<sup>42</sup> **Atkinson, J.** 2012 *An Educaring Approach to Healing Generational Trauma in Aboriginal Australia* PPT. Retrieved from: <http://www.aifs.gov.au/institute/seminars/2012/atkinson/index.php>.

## 5.2. Gathering of evidence

### 5.2.1 Responsibility for evidence gathering

**Question 9. The Government seeks views on who should be responsible for gathering evidence:**

- a) **Mainly the claimant and/or the relevant organisation**
- b) **Mainly the redress scheme.**

As the Public Consultation Paper notes, most past State and Territory schemes have required claimants to assume responsibility for the gathering of evidence in support of an application. Noting the additional administrative costs that would be involved in the scheme undertaking an active role in the gathering of evidence, **knowmore** broadly supports a process requiring claimants to initially undertake that task, subject to several contingencies discussed below, with the redress scheme to also have its own evidence-gathering role.

First, any attribution of responsibility to the claimant to initially source and gather evidence and information to support their claim must only occur alongside the provision of legal and other assistance necessary to enable claimants, and their representatives, to undertake this task effectively.

Secondly, as we noted in our submission to Issues Paper 6,<sup>43</sup> the inherent difficulties that many claimants will face in gathering supporting information must be recognised. We note in relation to the issue of proof on the point that a claimant was in a specific institution at a specific time, that it is not uncommon for clients to have been unable, through their own endeavours and even where assisted by other services,<sup>44</sup> to locate any institutional records relating to their childhood. Reasons given for this include the passage of time and loss or destruction of documents; the transfer of administrative responsibility for an institution; and intervening natural events (floods and fires have been cited). Additionally, we understand there may be instances where survivors have been told by institutions that no records exist, although such records have later been discovered in the possession of the institution or another agency.

Accordingly, any redress scheme must require disclosure by the institution of all documents within the institution's possession or control, in whatever form, relating to the claimant. There must also be processes, beyond accessing existing Freedom of Information schemes, whereby claimants and institutions can 'discover' documents held by third party agencies, such as Government departments.

The redress scheme should also be empowered to gather any additional evidence not already supplied by the claimant that it considers necessary to make a determination in accordance with the schemes procedures and guidelines for determination of an award. As noted below, the scheme, in applying the appropriate standard of proof to determine claims, should take into consideration the possible destruction or non-availability of records

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<sup>43</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.21. See also our comments in **knowmore**, Submission No 17 (Issues Paper 5 – Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.17-19, concerning the importance of records to our clients, and their experience in seeking to retrieve them

<sup>44</sup> Such as Find and Connect

and, for historical cases, the record-keeping practices of the time. This aspect is the subject of a further specific recommendation in part 5.3.1 of this submission, below.

**Recommendation 14:** That under the procedures relating to redress claims, institutions be required to disclose all documents within the institution's possession or control, in whatever form, relating to the claimant.

**Recommendation 15:** That the procedures relating to redress claims provide the means for claimants to readily access records concerning them that are now held by third party agencies, such as government departments.

## 5.2.2 Written or oral evidence

**Question 10. The Government seeks views on the way evidence should be gathered:**

- a) In writing
- b) Orally
- c) A combination of both

We submit that the redress process should be as accessible and informal as possible for survivors, with a view to minimising the possibility of re-traumatisation. We broadly support a process requiring the submission of a written application with supporting records such as medical and/or psychological reports. The existence of support and legal services to assist survivors with their applications should obviate the need for oral evidence in most cases. The option for the redress scheme to require additional evidence to be given orally for particularly complex matters could co-exist, provided the situations in which this can occur are clearly outlined in the scheme's guidelines for the assessment of claims and do not involve participation by institutions (in the sense of challenging a claimant's oral material). We note that the Royal Commission has recommended that a redress scheme should rely primarily on completion of a written application form.<sup>45</sup>

**Recommendation 16:** That the redress scheme should rely primarily on completion of a written application form.

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<sup>45</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation Report** (2015), Recommendation 51

## 5.3 Testing of evidence and verification of claim

### 5.3.1 What evidence will be “tested”, and how

**Question 11. The Government seeks views on what aspects of a claim should be ‘tested’, and the way in which this should occur.**

**knowmore** broadly supports an application process requiring evidence of connection between the claimant and the institution; that abuse occurred within that context; and that the claimant suffered harm related to that abuse.

#### **Proving connection between the claimant and the institution**

We affirm our recommendation numbered 14 above, that the redress scheme require disclosure by the relevant institution of all documents within the institution’s possession or control relating to the claimant.

We also refer to the difficulties (outlined in our response to Question 9) that many survivors confront when attempting to obtain records in support of proof of their connection with the institution, and the need for the redress scheme to take these factors into account in making determinations.

#### **Proving that abuse occurred**

**knowmore** is of the view that once an applicant has established connection with the institution, it is reasonable for the redress scheme to require a claimant to demonstrate that abuse occurred. In situations where there have been findings made by a judicial or administrative process, such as where there has been a successful criminal prosecution or there has been a victims’ compensation award, or acceptance of a claim under a past redress scheme, this should generally (in the absence of any cogent new fresh evidence not available to the institution at the time of the earlier matter), avoid the need for the claimant to provide any further evidence to substantiate that the abuse did in fact occur.

However, as noted in our previous submissions in response to Royal Commission Issues Papers,<sup>46</sup> in the context of child sexual abuse, proof of the offending can be problematic, especially in historical cases. Even if a person did report the offence to the police, there are often difficulties in locating any historical police, medical or other records that may assist claims. Even records to establish the fact that a child lived at a certain institution at the relevant time often cannot be found. Where an institution’s records are in existence, they are unlikely to document the sexual abuse. These realities can affect the prospects of successfully claiming an award under existing legal processes.

It is therefore critical that the proposed redress scheme recognise those realities and not replicate the disadvantage that survivors currently experience by imposing evidentiary

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<sup>46</sup> See **knowmore** Submission No 42 (Issues Paper 7 - Statutory victims of crime compensation schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse. at p.8

requirements that will, in many cases, not be capable of being met. In circumstances where records cannot be located or are incomplete, a statutory declaration from the claimant outlining the abuse suffered should suffice in support of demonstrating that abuse occurred.

### **Proving the impact of abuse**

Once a claimant has met the threshold of establishing that abuse occurred, then the issue becomes one of the impact of that abuse.

It is essential that a range of evidence be accepted for this purpose, including:

- relevant psychologist and counselling reports;
- statements of the individual survivor and possibly other survivor witnesses; and
- additional corroborative records, such as schooling records, hospital records and other documentation, from which appropriate inferences can be drawn.

Given the nature of child sexual abuse, a statement from the individual along with a corroborative psychologist or counselling report should ordinarily be enough to establish the impact of abuse. A range of impacts should be considered, which is discussed in response to question 21 below.

The redress scheme processes for testing or verifying a claim should ensure that, as far as possible, the potential for re-traumatising the claimant is reduced.

**Recommendation 17:** That processes relating to the ‘testing’ of claims under the redress scheme should recognise the inherent evidentiary difficulties that exist for claims based on historical child sexual abuse and minimise the potential for re-traumatisation of claimants.

**Recommendation 18:** That the ‘testing’ of claims under the redress scheme explicitly take into consideration the possible destruction of records and the record-keeping practices of the time or as applied to certain groups of people, such as the Stolen Generations.

## **5.3.2 Standard of proof**

***Question 12. The Government seeks views on the standard of proof a scheme should use.***

**knowmore** recommends that the ‘reasonably likely’ standard of proof be applied to all claims under a Victorian redress scheme. This is consistent with what the Royal Commission has recently recommended.<sup>47</sup>

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<sup>47</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation Report** (2015), Recommendation 57



A redress scheme is not designed to necessarily balance the interests of all parties in the same way that the civil or criminal process does, due to the different purposes of the various forms of proceedings.

In acknowledging the aims of a redress scheme, it is necessary that the standard of proof is less onerous than any court process. The ordinary civil law standard of the balance of probabilities test is a difficult one for claimants to meet and its application in a redress scheme would mean that many meritorious claims would not succeed. In addition to the evidentiary and other barriers outlined herein, and in **knowmore**'s submission in response to the Royal Commission's Issues Paper 5,<sup>48</sup> there is also the application of the *Briginshaw* standard<sup>49</sup> (as noted in the Public Consultation Paper) that mandates a higher degree of proof given the nature of the allegations in contest.

It is noted the Commonwealth Senate Inquiry, *Lost Innocents and Forgotten Australians Revisited* considered the test of 'reasonable likelihood that the claimant was abused' to be the most appropriate standard of proof.<sup>50</sup>

Under the JICP programme in Canada, the determining panel had to be satisfied that there was a reasonable likelihood that the claimant was sexually abused at the school.<sup>51</sup> Redress WA worked on the same standard.<sup>52</sup>

In our submission, situations where findings have already been made by a judicial or administrative process would meet the "reasonable likelihood" threshold without a requirement for additional substantiating evidence.

As noted, the redress scheme's processes should compel institutions to produce all relevant material in response to claims. This should include all material relating to the 'claims history' of alleged perpetrators. One of the underlying problems with current schemes is that due to their confidential and non-public nature information about other claims against a nominated perpetrator is simply not accessible by the claimant, and can be withheld by an institution, unfairly and to its own clear advantage.

**Recommendation 19:** Claimants be required to show that it was 'reasonably likely' that the abuse occurred, to be able to access the benefits of a redress scheme.

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<sup>48</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>49</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>50</sup> **Senate Community Affairs Reference Committee**, Parliament of Australia, *Lost Innocents and Forgotten Australians Revisited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports* (2009), see Recommendation 8.124.

<sup>51</sup> **Goldie Shea**, *Redress programs relating to Institutional Child Abuse in Canada*, Law Reform Commission of Canada (1999)

<https://dalspace.library.dal.ca/bitstream/handle/10222/10443/Shea%20Research%20Redress%20Programs%20EN.pdf?sequence=1>

<sup>52</sup> Redress WA required applicants to show "there was a reasonable likelihood that they experienced abuse and/or neglect"

### 5.3.3 Further rules of liability

**Question 13. The Government seeks views on whether the scheme should require any further rule of liability, beyond proof of abuse itself.**

As detailed by **knowmore** in its submission responding to the Royal Commission's Issues Paper 5 on civil litigation systems,<sup>53</sup> there are distinct barriers that exist within those systems that operate to deny many survivors access to that form of redress. Some of those barriers relate specifically to difficulties survivors face under existing laws in demonstrating that the institution should be held liable for the abuse that occurred. One such example is the current state of the law limiting the vicarious liability of institutions for the criminal acts of their employees or for others in positions similar to employees, such as clergy and volunteers.

We do not intend to again outline our position in relation to those difficulties or our proposed civil litigation reforms here. However, in our view it is critical that the standards for establishing liability under the proposed Victorian redress scheme are not equally onerous, thereby operating as a continued bar to redress for many survivors.

We note that the Royal Commission in its Redress and Civil Litigation Report<sup>54</sup> does not recommend there be a requirement for any further rule of liability under its proposed redress scheme (whether national or State and Territory based). We respectfully agree with that approach. The importing of any further standards of liability, such as that mentioned in the Public Consultation Paper of an institution not being required to provide redress unless it is shown that the institution knew or should have known of the abuse but failed to act, will unnecessarily delay and complicate redress claims and inappropriately diminish institutional responsibility for the abuse suffered by children placed in institutional settings. The evidence from the Victorian Parliamentary Inquiry and the Royal Commission to date provides a clear picture of widespread and systemic institutional failure to provide safe environments for children, and in that context the introduction of any additional rule of liability is inappropriate.

**Recommendation 20:** The redress scheme should not require any further rule of liability, beyond proof of abuse itself.

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<sup>53</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>54</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse**, *Redress and Civil Litigation Report* (2015).

## 5.4 The decision-maker

**Question 14. The Government seeks views on:**

- **Who should be the scheme’s ultimate decision-maker(s); and**
- **Whether one decision maker should adjudicate claims, or a panel.**

We have in our response to the first question above, noted the fundamental importance of independence in the decision-making process under a redress scheme. It is pleasing to see the commentary contained in the Public Consultation Paper that the Government supports an independent decision-maker. In our submission responding to Issues Paper 5 we said the following:<sup>55</sup>

### ***An Independent Decision Maker***

*Having an independent statutory authority to make all decisions about redress helps to ensure the efficacy and legitimacy of the process is maintained and that outcomes are fair to all parties and consistent across institutions and claims.*

*The lack of an independent decision maker has been a key criticism of survivors in redress schemes established thus far in Australia. Many of our clients have engaged with schemes where there has been no element of independence, with representatives of the institution assessing and making all decisions about claims. The power imbalance between the claimant and the institution, together with the context of the claims arising from circumstances of childhood sexual abuse, inevitably means that engagement for most clients, particularly without effective legal and other support, is difficult and traumatising and accompanied by an understandable lack of trust in the institution’s processes and the likely outcome. From its work to date the Royal Commission will be well aware of the sad reality that many survivors made contemporaneous complaints about their abuse as children to either officials of the relevant institution or to others (such as parents, teachers or police) and were disbelieved, or not uncommonly, even further victimised by the very adults they reported to. In that context, a lack of trust in believing the same institution will now approach a redress process in a compassionate and fair way is inevitable as a consequence of the trauma resulting from claimants’ childhood sexual abuse.*

*This context demands that independence must be strictly observed in practice, and not just noted in policies and procedures. As **knowmore** submitted in its response to Issues Paper 2 on the Catholic Church’s Toward Healing process,<sup>56</sup> there have been consistent complaints from our clients of the perceived lack of independence of the personnel engaged in that process. Some clients have instructed that the personnel in the Towards Healing process have been involved with the Catholic Church and are*

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<sup>55</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse. at pp.12-14

<sup>56</sup> **knowmore**, Submission No 7 (Issues Paper 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse.

*therefore part of the organisation which abused them, concluding that by implication these people, and the process itself, cannot be trusted.*

*Similarly, many clients have expressed the view that a partisan approach was adopted by the facilitator/mediator in the process, which has left them feeling that they were seen as the 'guilty' party and not to be believed. Concerns have also been raised by clients about counsellors being nominated by the Catholic Church in the Towards Healing process. Understandably, some clients have explained that they were not comfortable seeing a counsellor nominated by the Church or one who is in any way affiliated with the Church (or for some clients, any other religious institution). Irrespective of the personal qualities and approach of the counsellor involved, the context of childhood sexual abuse and the resultant complex trauma experienced by survivors leads to some to understandably suspect that any counsellor so affiliated will be on the side of the Catholic Church and that the counsellor will not be supportive of the claimant, or may not respect the confidentiality of their disclosures.*

*As noted above, and as reflected in some of the case studies examined to date by the Royal Commission,<sup>57</sup> many clients have experienced institutions adopting a very 'hard line' and adversarial approach during redress negotiations. Clients have spoken of being harassed and bullied by decision makers aligned with institutions to take the manifestly inadequate settlement on offer and have been told that they should accept it because they would not get any better offer, and it would otherwise be withdrawn. For vulnerable claimants, particularly those lacking competent legal and other support during the redress process, the adoption of such an approach, in the context of the ongoing effects of their trauma, is simply overwhelming and leads to a preparedness to compromise so as to try and effect some immediate reduction of their trauma levels.*

*Given the importance of independence to the effective functioning of a redress scheme, it is recommended that a new independent agency be established by statute. We note that an independent agency was established in the Republic of Ireland following its Commission of Inquiry, where after extensive consultation it was decided that an independent scheme should be established to make decisions about redress to compensate survivors of abuse in residential institutions.*

*The Irish scheme was established by way of legislation, with the Parliament enacting the Residential Institutions Redress Act 2002. This Act established both the Residential Institutions Redress Scheme and the Residential Institutions Redress Board to receive and assess claims. The government will no doubt be familiar with the relevant aspects of the Irish scheme, which enables survivors to make a claim*

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<sup>57</sup> Such as Case studies 3, 8 and 11.

*through the Board, which is then assessed per the guidelines under the Act in relation to the severity of the abuse and the injury/effect of that abuse.*

A similar decision making function within a Victorian redress scheme would ensure a similar level of independence. It would be envisaged that the scheme would:

- determine awards of redress against guidelines;
- have a role or jurisdiction to review past decisions made under institution based redress schemes with, as is necessary to do justice, enforced waiver of the rights and obligations of the parties in relation to the resolution of such matters;
- incorporate an appeal or review mechanism for parties dissatisfied with initial decisions of the new decision-making body; and
- while having due regard to the confidentiality of individuals, operate in such a way that promotes the broader goals of transparency, accountability of institutions and the general and specific deterrence of future child sexual abuse and inappropriate institutional responses.

On the last mentioned issue, such a scheme and Board would, in assessing and determining cases, be in an advantageous position to identify both institutional factors that may have contributed to the occurrence of child sexual abuse, and improvements or ‘best practice’ initiatives or models for child based institutions to follow in the future to reduce the risk of harm. For that reason, we would recommend that legislation provides for the relevant decision-maker under the scheme to have a power to comment, in delivering decisions in appropriate cases, upon anything connected with a redress claim that relates to:

- ways to prevent child sexual abuse from happening in similar circumstances in the future;
- ways to provide for improved institutional responses to future allegations of child sexual abuse;
- the general welfare and safety of children in institutional contexts; and
- the administration of justice.

Such a statutory power would, in some respects, be similar to the powers that Coroners have in relation to inquest findings, and the important preventative function served in making those coronial comments or recommendations. See, for example, sections 67(3) and 72(2) respectively, of the *Coroner’s Act 2008 (Vic)*.

### **Relevant expertise**

In order to ensure informed and just outcomes from the redress process, as well as credibility with survivors, it is critical that decision makers are both trauma-informed and have sufficient, relevant expertise. As noted elsewhere in this paper, there are many complexities confronting survivors in the making of claims for redress, both from an evidentiary perspective and in terms of the impacts of the abuse itself. It is for those

reasons that **knowmore** supports the establishment of a multidisciplinary panel of decision-makers, comprised of lawyers and medical and mental health or other professionals with expertise in issues relating to institutional child abuse as well as cultural engagement advisors.

**Recommendation 21:** That an independent decision-making body be established as an independent statutory agency to assess and determine, under a Victorian redress scheme, claims for redress, including financial compensation, made by survivors of childhood abuse in institutional contexts. This body should:

- be able to determine awards of redress against guidelines;
- have a role or jurisdiction to review past decisions made under other institution based redress schemes, with, as is necessary to now do justice, a capacity to enforce the waiver of the rights and obligations of the parties arising from the resolution of such past matters;
- incorporate an appeal or review mechanism for parties dissatisfied with initial decisions of the new decision-making body; and
- while having due regard to the confidentiality of individuals, operate in such a way that promotes the broader goals of transparency, accountability of institutions and the general and specific deterrence of future child sexual abuse and inappropriate institutional responses.

**Recommendation 22:** That the establishing legislation provides for the relevant decision-makers under this new redress scheme to have an additional power to comment, in delivering decisions in appropriate cases, upon anything connected with a redress claim that relates to:

- ways to prevent child sexual abuse from happening in similar circumstances in the future;
- ways to provide for improved institutional responses to future allegations of child sexual abuse;
- the general welfare and safety of children in institutional contexts; and
- the administration of justice.

**Recommendation 23:** That the Victorian Government produce an annual report regarding preventative recommendations arising from redress claims and the progress of relevant institutions, whether government or non-government, in implementing such recommendations.

**Recommendation 24:** There should be a mix of skills, backgrounds and experience among the decision-making group leading the redress scheme, all of whom should have expertise in relation to institutional child abuse.

## 5.5 Evidence assessors

**Question 15. The Government seeks views on whether a scheme should separate its ultimate decision-makers from the people that receive, collate and assess evidence. If so, what particular training or expertise should these people have?**

We generally support the redress scheme separating ultimate decision-makers from the people that receive, collate and (where appropriate) gather evidence. The Public Consultation Paper sets out a number of reasons favouring this position.

**knowmore** is of the view that it is vital any officers responsible for the collating and gathering of evidence (and indeed any officers involved in the scheme who will have any form of contact with claimants) be appropriately trained in the application of trauma informed practices, and have specialist experience in issues relating to institutional child abuse. We also recommend that Aboriginal assessors with specialist cultural knowledge be included in the pool of assessing officers. There should also be scope for claimants to stipulate if they wish for contact to be made with them only by officials of a nominated gender. We note from our client work that some survivors find it extremely difficult to speak about their experiences; often through embarrassment in disclosing details of sexual abuse to a person of another gender, but sometimes also because they do not wish to engage with someone of the same gender as their abuser(s).

**Recommendation 25:** (i) Under a Victorian redress scheme there should be separation between those officials responsible for ultimate decision-making, from those people that receive, collate and assess evidence.

(ii) Scheme officials involved in the receipt, collation and assessment of evidence should have specialist experience in relation to institutional childhood abuse; be trained in trauma-informed practices and should include a number of Aboriginal assessors to provide cultural knowledge relating to claims by Aboriginal survivors.

## 5.6 Other uses of evidence

**Question 16. The Government seeks views on whether limits should be placed upon the evidence gathered and produced by a redress scheme**

We have already noted above the importance of allowing for the dissemination of appropriate information to law enforcement agencies.

As recognised by the Victorian Parliamentary Inquiry,<sup>58</sup> records might bring therapeutic benefits to clients. These include establishing their identity; making sense of their

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<sup>58</sup> *Betrayal of Trust*, pp.68-70.

experiences; discovering why they were in the care of an institution; locating family members; or discovering what the institution did to assist them.<sup>59</sup>

As the Public Consultation Paper notes, survivors may also wish to pursue a civil claim in relation to the institutional abuse they experienced, a process which is vitally dependent on access to relevant institutional records. In our view, survivors should be able to use evidence gathered and produced by a redress scheme – relating to that survivor - in support of any future civil application. Other statutory provisions will continue to operate to prohibit or limit the use of material arising from a redress claim that in turn may lead to the identification of certain parties in criminal proceedings relating to child sex offences.

In this context, it is important to acknowledge the overwhelming dissatisfaction that so many survivors, who have previously pursued and resolved civil or redress claims, have experienced in relation to the obligations of confidentiality imposed upon them in deeds of settlement. Many of our clients have explained that they have deeply regretted signing such settlements, referring to the payment of “hush money,” and their concern that maintaining confidentiality assists institutions to “cover up” offending or even may contribute to exposing other children to the risk of abuse.

There may in individual cases be a need to protect the identifying information of third parties from further publication, but we suggest that the general approach should not be to seek to restrict how a survivor may use records obtained in the redress process which relate to them.

**Recommendation 26:** In so far as is possible, and with appropriate exceptions to protect identifying information concerning third parties (where there is a compelling reason to do so) a survivor’s ability to use records and information arising from the redress process should not be subject to confidentiality obligations.

## 5.7 Legal representation and support

***Question 17. While redress claimants should always have the option of legal representation, the Government seeks views on whether legal representation should be funded by the scheme for all claimants. If yes, how should this be delivered?***

We have addressed previous submissions to this issue, and adopt those submissions in relation to a Victorian scheme.<sup>60</sup>

In our submission responding to Issues Paper 6, we said the following about the need for independent legal assistance for claimants:<sup>61</sup>

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<sup>59</sup> **knowmore** has previously made submissions about these issues and the importance of appropriate record-keeping in our submission to the Royal Commission’s Issues Paper 4 (Preventing the sexual abuse of children in out-of-home care), at p.9

<sup>60</sup> See also our comments about legal assistance in **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.22-27

<sup>61</sup> **knowmore**, Submission No 74 (Issues Paper 6 - Redress) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.45-46



*It is fundamental that clients have access to independent legal assistance as part of any redress process. Many redress schemes that have been established overseas and domestically have acknowledged this, and have made provisions for survivors to access some form of independent legal assistance.<sup>62</sup>*

*One of the key issues raised by clients has been the lack of independent legal advice when going through the current redress schemes. Clients have reported:*

- *they were not given adequate time to consider the proposal put to them;*
- *the advice they received was arranged by the institution and at the very least, there was a perception that the legal representative was affiliated with the institution; and*
- *legal representation that was obtained was not adequate, and practitioners were unskilled in the particular area of law or lacked awareness of the trauma resulting from the client's experiences.*

*Generally, clients have noted further difficulties of engaging with redress processes, despite the intention of the schemes being non-adversarial and easily accessible.*

*Concerns raised include:*

- *being unclear of the process involved and what documentation and information was required;*
- *not being able to understand or interpret written correspondence given by the particular regulatory agency;*
- *mistrust of the agency providing the redress process; and*
- *lack of any capacity to influence timelines or obtain timely responses from the institution and others in the process.*

*Given that any national and independent redress scheme will by its nature require a certain evidentiary burden to be met, and processes to be navigated, it is recommended an independent legal service be established to assist survivors in navigating redress processes as well as with a range of other related legal issues. An independent legal service would assist in the smooth running of the redress process, enabling survivors to rely on the professional services of a government funded independent legal service to negotiate the process for them, and provide the relevant supporting material to enable them to make informed decisions. Such a service could also undertake, in a nationally co-ordinated way, important community legal education work to support access to the scheme by relevant survivors.*

*Such a legal service would need to be multidisciplinary, employing counsellors and Aboriginal and Torres Strait Islander staff to deliver trauma-informed and culturally safe services. The service would operate without regard to restrictive commercial interests and should also be funded to provide representation to clients in seeking redress through a national redress scheme, and in any related review proceedings.*

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<sup>62</sup> For example, as part of the Grandview Agreement in Canada, clients were to obtain independent legal advice before agreeing to participate in the program.

In our response to the Royal Commission's Consultation Paper, we said:<sup>63</sup>

*As previously submitted,<sup>64</sup> knowmore is of the firm view, following the work we have undertaken with many hundreds of survivors, that it is fundamental that applicants have access to competent and independent legal assistance as part of, throughout and upon conclusion of any redress process. Competent and independent legal assistance is fundamental because:*

- *the redress scheme will be the only viable option for many survivors to access any form of redress; their opportunity should therefore be maximised*
- *legal assistance is likely to significantly assist decision-makers and survivors satisfactorily engaging in the redress scheme process*
- *legal assistance is likely to add another layer of consistency, transparency and accountability to the redress process (which is by nature a process conducted by another 'institution'), including the exercise of review and appeal rights*
- *a centralised legal service has the added benefits of improving consistency in the redress scheme process and addressing systemic issues arising in its processes*
- *survivors may have multiple legal issues that require addressing*
- *support services assisting survivors may need to collaborate or consult with a legal service*
- *in knowmore's experience, even relatively 'simple' legal processes, such as engaging with the Royal Commission, or making a claim under statutory victims of crime compensation schemes can:*
  - *overwhelm and confuse survivors*
  - *present significant barriers to survivors effectively engaging in these processes*
  - *make wrong decisions*
- *of the need to respond to emerging and unforeseen legal issues that the process itself creates*
- *of the need for a co-ordinated and consistent approach to ensuring survivors who are entitled to bring redress claims can in reality access the redress process. In this regard, we note that many survivors live in regional and remote communities, or otherwise in circumstances where they are not connected with support services. Our experience in assisting considerable numbers of clients who missed the opportunity to engage with now finalised State redress schemes<sup>65</sup> underlines the need for there to be concerted efforts made through both general and targeted*

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<sup>63</sup> knowmore, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.12-14

<sup>64</sup> knowmore, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.24-25; knowmore, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.45-46.

<sup>65</sup> Such as those in Queensland and Western Australia.

*community legal education programs to enable eligible survivors to access the redress scheme.*

*It is important that survivors have access to competent legal representation at all stages of any redress process. Indeed, at the outset, clients need to receive correct advice to enable them to choose between the options available, which would include possibly instigating a civil claim. It is completely inadequate for most survivors to only receive legal assistance at the point of determining a tabled offer. In our response to the Royal Commission's Issues Paper 5 we addressed at length the barriers that survivors face in accessing civil litigation remedies. Many of those observations are apposite to the context of survivors being able to effectively access any redress scheme.*

*Given that any national and independent redress scheme will by its nature require a certain evidentiary burden to be met, and processes to be navigated, it is recommended an independent legal service be established to assist survivors in navigating redress processes as well as with a range of other related legal issues. An independent legal service would assist in the smooth running of the redress process, enabling survivors to rely on the professional services of a government funded independent legal service to negotiate the process for them, and provide the relevant supporting material to enable them to make informed decisions. Such a service could also undertake, in a co-ordinated way, important community legal education work to support access to the scheme by relevant survivors.*

***knowmore's** work with survivors to date demonstrates the need that survivors accessing the redress scheme will have for an independent and trauma-informed legal assistance. While our services are free, it is clear that the overwhelming majority of our clients lack the financial means to privately fund any legal action.*

*For the reasons set out above, we remain of the view that the provision of government funding for the establishment of an independent, multidisciplinary and trauma informed legal service, delivering free legal services to survivors, is the most efficient means to assist survivors in making decisions around engaging in a redress process, and in pursuing claims under that scheme. That service would operate without regard to restrictive commercial interests, would be able to address systemic and cross-jurisdictional issues through a truly national approach and could significantly contribute to the inevitable need to continuously improve processes and arrangements under the redress scheme once it commences operation, through the submission of feedback and recommended reforms. A co-ordinated multi-disciplinary approach would also assist in building relationships (or developing existing relationships), that would serve to connect clients with other necessary support services, such as ongoing counselling and support needs. It would also best serve the needs of clients with claims arising across multiple jurisdictions and multiple institutions (a common circumstance).*

*A purpose specific service would also facilitate the appropriate handling of cases that may otherwise present a conflict of interest for another publicly funded legal service (e.g. it is likely that many perpetrators of sexual offences who have faced prosecution*

*will have received funding or defence services through State and Territory Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services.*

*Alternatively, funding could be injected into the ... Community Legal Centre (CLC) sector to build the resource capacity that would be required for these services to undertake the work. CLCs are experienced in working with disadvantaged clients and, for many centres, in providing legal assistance with claims under statutory victims of crime compensation schemes. These services are also well networked and coordinated at national and state levels, are embedded in their local communities, are linked to local support services and provide significant community legal education across communities. As noted above, once a redress scheme is established it will be very important that the scheme's availability is promoted to potential claimants.*

*Given the figures contained in the Commission's consultation paper indicating that the total number of eligible survivors who will make a claim for payment under a redress scheme is estimated to be 65,000, there would obviously be a huge impact on the existing CLC sector if this body of work became its responsibility.*

*One difficulty that will arise in the context of this work falling to a number of CLCs rather than a single purpose-specific service, will be in managing the workload and particularly the inevitable impacts on staff of undertaking a significant caseload of survivors' redress claims.<sup>66</sup> The establishment of a single service provides, in our view, the better framework and structure for addressing the inevitable impacts of vicarious trauma on lawyers and other staff acting for survivors, and in supporting those staff to undertake this challenging work on a sustained basis. Such a service can ensure flexibility, learning and a consistency of approaches to work that may not be able to be replicated within individual CLCs or across the broader CLC sector, given other service delivery priorities.*

*Finally, we also recommend that disbursements necessarily incurred by claimants or their legal representatives during the making of a redress claim be reimbursed under the final offer/award, such as those expenses incurred in obtaining supporting documentation.*

**Recommendation 27:** That an independent, multidisciplinary and trauma informed legal service be established to assist survivors in making decisions around engaging in the redress process, and in pursuing claims under that scheme. The service should also provide assistance about related legal issues.

Alternatively, capacity within the Victorian Community Legal Centre sector be built to deliver this support.

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<sup>66</sup> For an explanation of the risks of vicarious trauma for workers in this context, see, for example, **Morrison Z**, 'Feeling Heavy': Vicarious trauma and the other issues facing those who work in the sexual assault field, ACSSA Wrap No. 4 September 2007. Viewed at <http://www.aifs.gov.au/acssa/pubs/wrap/w4.html>

## 5.8 Participation of alleged perpetrator or institution

### 5.8.2 Institutions

*Question 18. The Government seeks views on:*

- *The extent that organisation should be involved in the scheme; and*
- *Whether organisations should have a role in the investigation, testing, and adjudication of claims.*

#### **The extent that organisations should be involved in the scheme**

Although **knowmore** supports the establishment of an independent statutory body to administer the redress scheme, institutions nevertheless have a vital role to play in the successful operation of the scheme. As discussed in our response to question 2 herein, institutions have a critical role to play in the funding of the redress scheme and being accountable to claimants.

In order to ensure claimants are able to effectively gather necessary evidence in support of an application, the scheme should require any institution in respect of whom a claim has been made to produce records within its possession or control relating to the claimant. We otherwise refer to our response to question 9 regarding the difficulties many survivors confront when attempting to access institutional records and the necessity of compelling institutions to provide them.

Many survivors also seek some form of direct personal response from the institution by way of redress, either in addition to or in place of monetary compensation. It is critical that the scheme make provision for such a response to be provided by institutions for those survivors seeking that avenue of redress. We have set out in response to question 25 below, our recommendations in relation to the role of institutions in providing apologies and other forms of non-financial redress that survivors might seek.

#### **Whether organisations should have a role in the investigation, testing, and adjudication of claims.**

**knowmore** does not support institutions having a role in the redress scheme beyond those matters referred to above, and a capacity to make comment (submissions) about whether the particular claim is accepted or not. The capacity of an institution to 'contest' claims should be limited, as is necessary to provide fairness, but should not extend to the element of the impact of the abuse suffered by a survivor. In situations where the institution asserts that it has no responsibility for the claim (e.g. that it did not administer the institution at the time, or that abuse did not occur), the capacity to so contest the claim should be limited to the making of comment and submissions.

In our submission to Issues Paper 5, we made the following comments about the context of civil litigation and the position of many survivors:<sup>67</sup>

*The Royal Commission will by now have accumulated great insight into how most survivors of child sexual abuse experience severe anxiety in speaking out about the abuse they experienced. The reasons for this are varied and complex, but for many stem from threats made to them by perpetrators at the time of enduring the abuse, for example, threats that awful things would happen to them, or to people they care about, if they ever disclosed the abuse; and that no-one would ever believe their account over that of the alleged perpetrator and other institutional figures.*

*In addition to the impact of this secrecy and fear in the lives of survivors, many institutional child sexual abuse survivors' trauma has frequently also been compounded by experiences of being blamed, disbelieved, punished or shamed when they have previously sought help by disclosing the sexual abuse to others.*

*The minimising, trivialising and denying of abuse survivors' experiences not only invalidates the profound violation already experienced by survivors, but creates a dissonance between survivors' lived and embodied experiences of abuse and the human need for survival and belonging within socio-cultural contexts. Many survivors develop coping strategies, including substance abuse, to bridge this disconnect between the abuse that was experienced and invalidating contexts that have surrounded them. Most survivors will choose not to speak of their abuse until contextual safety is assured.*

*The process of giving evidence and being subject to cross examination aimed at invalidating a person's abuse experience and, in fact, their personal credibility, conflicts profoundly with survivors' hard-fought instinctive survival mechanisms, and in most cases replicates the trauma of being discredited, attacked and blamed for speaking out about the abuse originally. Given this systemic traumatisation inherent within the civil litigation process, coupled with other substantial psycho-social barriers often confronting survivors, it is unsurprising to us that civil litigation is not an option that many survivors of institutional child sexual abuse have chosen to subject themselves to.*

Many of our clients have been re-traumatised during existing redress processes; for example, when informed by institutions or their legal representatives that they will be required to submit to an 'independent' psychiatric or psychological examination with a practitioner of the institution's choice, in order to 'verify' their injuries. For survivors, the making of such a request can be seen as invalidating of their experiences and in itself potentially highly traumatic, in that disclosing such experiences to an unfamiliar and possibly 'critical' person is extremely challenging.

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<sup>67</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.19-20.

A requirement that claimants undergo a further process that involves the institution having any formal role in ‘testing’ or adjudicating and potentially invalidating a person’s abuse experience (and their personal credibility), will in most cases replicate the trauma of being discredited, attacked and blamed for speaking out about the abuse originally. Such direct involvement of the institution will be re-traumatising for many claimants and may serve to jeopardise their participation in a redress scheme, if not prohibit it altogether. Such involvement of institutions may also bring into question the perceived independence and impartiality of the scheme for many claimants, particularly those who have had negative experiences with institutional redress schemes in the past. We outlined some of those difficulties in our response to question 14 above.

We generally support the recommendation made by the Royal Commission that:

*A redress scheme should inform any institution named in an application for redress of the application and the allegations made in it and request the institution to provide any relevant information, documents or comments.*<sup>68</sup>

We further recommend:

**Recommendation 28:** That the capacity of institutions to contest a claim be limited to the issue of responsibility (rather than including the impact of the abuse) and occur through the making of submissions and comments in the redress process.

## 5.9 Provision of reasons

*Question 19. The Government seeks views on whether written reasons should be provided.*

*If yes, in what manner should reasons be provided?*

In the interests of transparency and accountability of decision making processes, **knowmore** supports claimants being provided with concise written reasons for the decision to make or refuse an award of redress under the scheme. Written reasons should not be legalistic or complex, in order to minimise the risk or re-traumatisation to claimants, and need not extend to specific findings against an individual perpetrator. However, they should still include enough information to enable the claimant to understand the grounds on which the decision to either refuse the application or to grant a particular award was made, including the basis on which any monetary payment was calculated. Written reasons should also outline the claimant’s next options, including any rights of review.

A written reason for decision also provides the claimant with tangible evidence that their claim has been read and considered in accordance with the scheme’s guidelines, rather than arbitrarily determined. Perceived arbitrariness and lack of transparency in decision-making

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<sup>68</sup> **Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation Report** (2015), Recommendation 56

has been a frequent criticism communicated to **knowmore** by many survivors engaged in past and existing institutional redress schemes.<sup>69</sup>

In our submission to the Royal Commission's Issues Paper 2 (about *Towards Healing*), we said:<sup>70</sup>

*We note that the effectiveness of any review rights, from the perspective of the complainant, depend in large part on the complainant receiving detailed advice about the nature of the decision made, the reasons for that decision, what are their options for review and what those options may involve.*

**Recommendation 29:** That concise written reasons be provided with any award of redress and for any refusal to make an award under the redress scheme.

## 5.10 Appeals

**Question 20.** *The Government believes claimants should have appeal rights and seeks views on:*

- *how appeals should be conducted and by whom;*
- *what aspects of a claim should be eligible for an appeal; and*
- *whether institutions should have a right of appeal.*

As noted above in Recommendation 21, we are in favour of the redress scheme incorporating an appeal or review mechanism. In our submission responding to Issues Paper 6, we noted:<sup>71</sup>

*It is essential that the redress scheme has a formal appeal process. One of the key complaints from our clients has been the lack of any appeals process or the lack of independent review mechanism available for the review of decisions made under existing schemes. Very few internal redress schemes in Australia have allowed for an appeals process.*

*... the Irish scheme allows for a survivor to submit their decision (as to the compensation award), to a Review Committee.<sup>72</sup>*

*It is recommended that any decision ... awarding redress .... should be susceptible to review and, particularly, claimants should have the right to seek a review of an*

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<sup>69</sup> See **knowmore**, Submission No 7 (Issues Paper 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse

<sup>70</sup> *Ibid.*, p.8

<sup>71</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.23

<sup>72</sup> *Residential Institutions Redress Act 2002* s.13(4)(b)



award of compensation made to them. Such decisions could be reviewed in a number of ways, including:

- a merits review process through an authorised review officer within the redress body; or
- allowing the decision to be one that could be reviewed by the Victorian Civil and Administrative Tribunal on the merits; and
- allowing any such VCAT matter to be appealed on a matter of law to the Supreme Court of Victoria.

*Given the need to make any redress process as informal, efficient and accessible as possible, it is recommended that any review process be timely and as informal as possible in its processes. It is essential that applicants be given the opportunity for a review to take place, and a process of allowing a full internal review on the merits, would allow for this.*

For the reasons set out above, we would favour an internal review process that is open to claimants and, for reasons of fairness, also to institutions. As to any element of external review beyond that, care must be taken not to allow decisions to become the subject of protracted and expensive dispute. We therefore do not support a right to external review “as of right” in relation to the merits of a case, following the outcome of an internal merits review. The right to any external review should be limited in nature.

**Recommendation 30:** That any decision awarding redress under the redress scheme should be reviewable through an internal process and, particularly, claimants should have the right to seek a review of any award of compensation to them.

## **6. Benefits available under a redress scheme**

### **6.1.2 Calculation of financial payments**

**Question 21. The Government seeks views on:**

- ***whether a matrix-based approach to payment calculation is appropriate; and***
- ***the key factors that should determine payment amounts within a matrix.***

We said the following about financial payments in our submission responding to Issues Paper 6:<sup>73</sup>

*In knowmore’s experience, clients who have been through redress schemes more often than not are extremely disappointed with the amount of monetary compensation they have received. Clients routinely describe it as “hush money” that has only been given to them to “go away”. Clients report that there is no true understanding from the institution about the impact abuse has had on them and the*

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<sup>73</sup> knowmore, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.36-

*amount was not in any way a realistic or significant recognition of the pain, impact and suffering caused by the institution.*

*Many clients speak with disappointment about the Redress WA approach where the amount was initially announced as offering \$80,000, but was then reduced to the maximum to \$45,000.<sup>74</sup> As explored in **knowmore's** submission on Towards Healing, many clients have expressed dissatisfaction with the monetary compensation offered through that process. This disappointment has not been isolated to those two schemes, and has been the consistent feedback from our clients who have collectively experienced what we expect is the entire spectrum of redress processes available in Australia.*

*Many clients have spoken of the disparity of the awards given under such schemes. One client explained of their experience: "my brother and I went through the same hell, the same homes. We were abused by the same man. I got \$5,000, he got \$25,000. There is no justice in this".*

*Damages awarded by the courts in civil litigation processes are awarded on a number of bases, and can include:*

- *general damages for pain and suffering*
- *aggravated damages<sup>75</sup>*
- *exemplary or punitive damages<sup>76</sup>*
- *past expenses that have been incurred*
- *past and future losses of earning capacity*

*It is recommended that any approach to the award of monetary compensation under a redress scheme be awarded on a similar basis to damages awarded in the civil litigation process, and for a wide range of the above factors to be taken into account in a systematic way. This ensures that there is transparency and consistency when it comes to the calculation of compensation amounts.*

*It is possible for there to be a range of financial compensatory options that combine the notions of individual and group redress approaches. As the Senate Inquiry noted:*

*"A number of different approaches may be taken in awarding monetary compensation. Awards can either be based on an individual, needs-based approach - this may be done on a case-*

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<sup>74</sup> **Courtney Trenwith** 'State abuse victims reject Premier's apology', *WA Today* (online) 8 September 2011 <<http://www.watoday.com.au/wa-news/state-abuse-victim-rejects-premiers-apology-20110908-1jz5d.html>>

<sup>75</sup> See: *GGG v YYY* [2011] VSC 429 – matter of historic sexual abuse within an intrafamilial context where the court assessed aggravated damages at \$20,000, noting that this further amount was justified in light of the plaintiff's mental anguish and humiliation flowing from the manner in which he was abused.

<sup>76</sup> See: *GGG v YYY* [2011] VSC 429 – fixed exemplary damages at \$30,000; the Court regarded it as appropriate to award exemplary damages in light of the 'gross breach of trust involved in the deliberate continuing sexual abuse of a child' and the 'legitimate element of deterrence in such an award'.

*by-case basis, or based on various scales and categories of harms experienced - or on a predetermined award per person that offers general compensation to all members of an aggrieved group. Individually-based awards may exclude certain categories of individuals who are unable to prove or explain their situation and forces victims to endure further pain through the requirement to prove the severity of their past experiences.”<sup>77</sup>*

### **Irish Redress Scheme Approach**

*The Irish Scheme utilised a similar process to how courts calculate damages at common law, and had four heads of damages, including:*

- *severity of abuse and injury;*
- *additional redress (such as aggravated damages);*
- *medical expenses; and*
- *other costs and expenses.<sup>78</sup>*

*As depicted below, to determine the severity of the abuse and injury, a scale is used to determine a number of factors, including:*

- *medically verified physical/psychiatric illness;*
- *psycho-social sequelae; and*
- *loss of opportunity.*

*Once it is determined where on the scale the survivor’s injuries fall, then an amount of compensation is awarded based on the second scale used. The maximum amount is €300,000. While perhaps not the equivalent that some claimants may receive were they to litigate through the civil justice system and be successful, this is a significant upper limit and one that far exceeds anything set as a ‘cap’ in any of the Australian schemes.*

*Aggravated damages can also be claimed under the Irish scheme, where:*

*“the Board or the Review Committee is satisfied that it is appropriate to do so having regard to the circumstances of abuse ... where the injury suffered by an applicant was not restricted to specific acts of abuse, but was exacerbated by the general climate of fear and oppression which pervaded the institution in which he or she was resident, additional redress may be awarded by the Board.”<sup>79</sup>*

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<sup>77</sup> **Senate Community Affairs Reference Committee**, Parliament of Australia, *Forgotten Australians, A report on Australians who experienced institutional or out-of-home care as children* (2002)

<sup>78</sup> *Residential Institutions Redress Act 2002 (Section 17) Regulations 2002*

<sup>79</sup> *Residential Institutions Redress Act 2002 (Section 17) Regulations 2002 ss.4.*

Constitutive elements of redress	Severity of abuse	Severity of injury resulting from abuse		
		Medical	Psycho-social sequelae	Loss of opportunity
		Physical		
		Psychiatric illness/impact		
Weighting	1-25	1-30	1-30	1-15
	<p><b>Factors:</b></p>	<p>Factors:</p> <p>Considering: <b>Physical, injury, physical illness, psychiatric illness</b></p> <p>Loss of sight or hearing. Loss of or damage to teeth. Permanent scar/s &amp; disfigurement.</p> <p>Sexually transmitted diseases. Respiratory diseases. Skin diseases.</p> <p>Severe depression with suicide attempts. Personality disorder. Post-traumatic stress disorder.</p>	<p>Factors:</p> <p>Considering: <b>Emotional disorder</b> Inability to show affection or trust Low self-esteem; persistent feelings of shame or guilt. Recurrent nightmares or flashbacks.</p> <p><b>Cognitive impairment / educational impact</b> Literacy level well below capability. Impoverished thought processes. Limited vocabulary leading to communication difficulties.</p> <p><b>Psychological maladjustment</b> Marital difficulties involving sexual dysfunction. Low frustration tolerance. Shyness and withdrawal from mixing with people.</p> <p><b>Anti-social behaviour</b> Substance abuse. Compulsive stealing. Physical aggressiveness.</p>	<p>Factors:</p> <p>Considering: Having to refuse employment opportunity/promotion because of illiteracy.</p> <p>Need to concoct a false identity and to live a lie with workmates.</p> <p>Unable to pursue certain occupations, e.g. police, because of "record".</p>

Redress Band	Total weighting	Award (€)
V	70 or more	200,000 – 300,000 + potential aggravated damages + reasonable medical treatment
IV	55-69	150,000 – 200,000
III	40-54	100,000-150,000
II	25-39	50,000-100,000
I	Less than 25	Up to 50,000

*As noted by the Irish Commission, the above scale provides a “fair and reasonable [amount] having regard to the unique circumstances of each applicant”, it is also essential that there be “a suitable degree of predictability, sensitivity and flexibility, and that it ultimately provides payments which are, and are seen to be, comparable with amounts awarded in respect of other types of serious personal injury”.<sup>80</sup>*

*The Irish model presents a useful template in a way that is able to clearly provide for consideration of both the abuse itself as well as the impact that it has had on the individual. Additional factors for the specific Australian context can include loss of culture, identity and language, especially for Aboriginal survivors.*

In responding to the Royal Commission’s Consultation Paper and proposed model of redress, we noted that:<sup>81</sup>

- *Consideration should be given to whether loss of culture, identity and language, especially for Aboriginal and Torres Strait Islander survivors, could be explicitly included under the ‘severity of impact’ or ‘distinctive institutional factors’ heads of loss or as an entirely separate head of loss.*
- *Assessing and quantifying the ‘severity of impact’ is more complex in historic claims of child sexual abuse, as causation is often unclear, intergenerational trauma exists and many survivors may have experienced subsequent re-victimisation.<sup>82</sup>*

<sup>80</sup> **Compensation Advisory Committee**, *Towards Redress and Recovery: Report to the Minister for Education and Science*, (2002) vi.

<sup>81</sup> **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.10

<sup>82</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, pp. 20-21.

- *Consideration be given to whether the institution’s responses could be considered when assessing the ‘severity of impact’.*
- *Consideration be given to adopting the impacts of sexual offences used by section 27(1)(f) of the Victims of Crime Assistance Act 2009 (Qld).<sup>83</sup>*
- *Competent legal assistance is likely to greatly assist the applicant in voicing the impact of the abuse and to assist the decision-maker in forming an accurate assessment.*

In relation to issues of the average and maximum monetary payments that should be available through redress, we noted that:<sup>84</sup>

- *There are compelling public policy reasons to ensure that survivors receive adequate redress payments. The most compelling argument is that in the absence of significant monetary redress payments, the community significantly bears the costs associated with addressing unresolved childhood trauma; rather than the culpable individuals and institutions. Addressing unresolved childhood trauma, for example, has recently been calculated to cost the Australian community an average annual budget cost of \$6.8 billion.<sup>85</sup> The redress scheme should operate as much as possible to shift this financial cost back onto the institutions that are responsible.*
- *We agree with the Royal Commission’s view that amounts paid under the redress scheme should be higher than those currently available under statutory victims of crime compensation schemes due to the responsibility or culpability of institutions, including Governments, in this context.*
- *As previously submitted, **knowmore** reinforces that the affordability of institutions should not be a barrier to survivors accessing meaningful redress payments.<sup>86</sup> Otherwise, ultimately the Australian community will be required to bear the costs of any shortfall.*

In conclusion, we support the adoption of a matrix based approach to the calculation of financial payments under a Victorian redress scheme, taking into account the factors addressed in our previous submissions.

**Recommendation 31:** That a matrix based approach to the calculation of financial payments should be adopted.

<sup>83</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, p. 21.

<sup>84</sup> *Ibid.*, at pp.10-11

<sup>85</sup> Includes child sexual, emotional and physical abuse: **Dr C Kezelman, N Hossack, Dr P Stavropoulos and P Burley**, *The cost of unresolved childhood trauma and abuse in adults in Australia* (January 2015), Report for Adults Surviving Child Abuse, 41.

<sup>86</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.26 & p.40.

### 6.1.3 Lump-sum or managed payments

**Question 22. The Government seeks views on:**

- ***how financial payments should be paid; and***
- ***whether the scheme should offer financial counselling.***

In responding to the Royal Commission’s Consultation Paper, we made no specific submission in relation to whether payments by instalments should be offered under a redress scheme, other than that the principle of survivor choice should underlie the redress scheme.

Based on our client work, we do support the availability of financial counselling as part of the range of options a survivor may choose to access under the scheme. This should not be a mandatory requirement attaching to the receipt of monetary payments. Such a service could be co-located with any specific multi-disciplinary service established to assist claimants, as noted above.

We also note that for some clients, real and complex issues around legal capacity will arise from time to time, which may impact upon how any financial award is managed. This is another circumstance reflecting the benefits of claimants having access to competent legal assistance during the claims process.

**Recommendation 32:** (i) It is essential that the principle of choice be maintained at the centre of any Victorian redress scheme, including in terms of the manner in which monetary payments are made under the scheme.

(ii) Financial counselling should be an option that claimants can choose to access, under the scheme.

## 6.2 Non-Financial benefits

### 6.2.1 Types of non-financial benefits available

**Question 23. The Government seeks views on what non-financial benefits should be offered universally by the scheme, rather than being provided directly by relevant institutions as part of a “direct personal response”.**

We adopt our previous submissions on this issue. In our response to Issues Paper 6 we said:<sup>87</sup>

*Consistent with preservation of the rights of survivors to litigate their claims in the court of their wish, it is essential that the principle of choice be maintained at the centre of the national redress scheme, in terms of the types of outcomes available*

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<sup>87</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.24 & pp.26-27

*should survivors proceed under that alternative. Survivors should be given the option of choosing the types of redress they are wishing to access and be given the opportunity to access appropriate forms of redress at relevant times.*

*Clients have frequently reported to **knowmore** that the types of compensation or support offered under existing institutional redress schemes have been forced on them and they have not been given the opportunity to enter into any discussion about the support that they need and might be able to access. Examples include:*

- *A homeless client seeking assistance under a redress scheme was offered a refrigerator as interim assistance, despite him seeking assistance with ongoing housing; and*
- *Counselling being offered to survivors of abuse perpetrated in residential homes administered by religious bodies, with such counselling to be provided by institutionally and religiously affiliated counsellors.*

*Internationally, other redress schemes have been tailored to assist the specific needs of a particular client group. It is essential that a range of outcomes be available to claimants, including counselling, ‘casework’ assistance,<sup>88</sup> formal apologies, family support, financial counselling and also pastoral responses. On the latter point, we have dealt with many clients who despite suffering sexual abuse within a religious institutional context, continue to strongly observe their faith and see a faith-based pastoral response from their Church as a key component of any redress response and their own personal healing.*

...

*As noted above, wide range of redress outcomes should be available through the national redress scheme, which must have at its core the flexibility to best assist the survivor and provide a ‘tailored package’ to address individual needs. Overseas schemes have seen a range of innovative and appropriate non-monetary redress options offered, including*

1. *Monetary compensation; and*
2. *Non-monetary forms of redress:*
  - *medical costs*
  - *educational supports*
  - *assistance in family reunion services*
  - *apologies*
  - *gold card eligibility<sup>89</sup>*
  - *funeral costs*
  - *an opportunity to have a survivor’s story placed on the public record, and*

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<sup>88</sup> Such as help in locating appropriate housing, medical, employment and other support services.

<sup>89</sup> Such as is available to defence force veterans in Australia, and provides for eligibility for some health care services – see [http://www.dva.gov.au/benefitsAndServices/health\\_cards/Pages/gold.aspx](http://www.dva.gov.au/benefitsAndServices/health_cards/Pages/gold.aspx)



- *commitments and undertakings that the institutions will in the future prevent child abuse.*

...

*Ireland has established a Board to provide 'eligible survivors with information, advice and advocacy, enhancing their access to entitlements as citizens of providing grants to them to avail of services approved by [the Board]'*<sup>90</sup> *This fund has been established by legislation and the independent Board's role is to administer the funds provided to it by the relevant Minister.*<sup>91</sup>

*The Board can assist survivors with education, health and housing assistance and can contract with organisations to deliver specific services to survivors or pay amounts to survivors directly, so they can pay for services themselves. This individually centred approach allows for choice to remain at the centre of what survivors need. Once an individual has had a payment made by the Board, then they are automatically entitled to access this fund.*

*Other models of administering such benefits exist. The Canadian experience was that each application was approved by an Eligibility and Implementation Committee and need had to be established.*<sup>92</sup> *The Forde Foundation was established in Queensland following the redress process arising from the Forde Inquiry in that State. This fund provides certain benefits to claimants who received a redress amount through the redress process and offers grants for certain types of assistance.*

### **Medical Costs**

*In one Canadian redress scheme, the adjudicator was able to direct an amount of \$10,000 to cover exceptional medical or dental costs related to the consequences of abuse.*

*Many of our clients have reported that they have suffered a range of chronic health conditions as a result of their ill-treatment in institutions. Many of these clients report that they have been unable to successfully seek treatment through the public health system. One client explained: "all I want to do is get my teeth fixed. They knocked all of my teeth out when I was a child, one by one, and all I want to do is be able to enjoy a steak".*

### **Educational Supports**

*Many overseas redress models have provided for access to educational or vocational training or upgrading of skills and qualifications, as part of the support offered to claimants.*

*It is clear from the reported experiences of our clients and the Royal Commission's public hearings to date that many of the institutions in which*

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<sup>90</sup> Caranua website – FAQ. See <http://www.caranua.ie/faq/>

<sup>91</sup> Residential Institutions Statutory Fund Act 2012

<sup>92</sup> The Hon. Fred Kaufman, *Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse*, Province of Nova Scotia 2002, <http://novascotia.ca/just/kaufmanreport/fullreport.pdf>, p.341.

*children were placed put little, if any, importance upon those children being educated. Many were simply denied the opportunities of proper schooling, through being forced into manual labouring roles at a young age; through being stigmatised and discriminated against at schools because they were 'home kids', or were simply unable to benefit from any access to schooling or education due to the trauma arising from their experiences of severe sexual, physical and emotional abuse. We have seen instances where welfare officers and other officials have recommended care-leavers be given early exemptions from compulsory schooling until the required age because the impact of their institutionalisation was such that there was perceived to be no further 'purpose' in continuing with schooling.*

*Many survivors who were not provided with access to schooling or education have reported an ongoing and very heavy sense of loss of opportunity and a perceived failure, because of their experiences of abuse and its consequences, to ever reach their potential.*

*Other inquiries have corroborated that many survivors have lost educational opportunities because of their abuse and institutionalisation.<sup>93</sup>*

*In one Canadian redress scheme 'basic costs' including tuition, books, course materials and other support costs as needed, such as computer and child care costs, were available.<sup>94</sup> In Tasmania, the Ombudsman recommended that a private educational trust fund be established to assist individuals in continuing their educational studies.<sup>95</sup>*

*It is recommended that these types of outcomes be considered in any Australian scheme.*

### ***Assistance in finding family members***

*The Royal Commission will have heard of many instances where children were removed from their families, and where siblings were separated across institutions, and family contact discouraged. Consequently, many survivors who have been in institutional care have lost contact with family members, or do not know even who their family members are. It is vitally important that survivors be given the ongoing assistance necessary to access relevant records and to find these family members.*

*This is a particularly important issue for Aboriginal survivors, many of whom were removed from their families under official government policy of the time, and are members of the Stolen Generations.*

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<sup>93</sup> See: **Ombudsman Tasmania**, *Listen to the children: Review of claims of abuse from adults in state care as children*, November 2004.

<sup>94</sup> **The Hon. Fred Kaufman**, *Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse*, Province of Nova Scotia 2002, <http://novascotia.ca/just/kaufmanreport/fullreport.pdf>, p.340.

<sup>95</sup> **Ombudsman Tasmania**, *Listen to the children: Review of claims of abuse from adults in state care as children*, November 2004.

**Recommendation 33:** It is essential that the principle of choice be maintained at the centre of any Victorian redress scheme, in terms of the types of outcomes available to claimants. Survivors should be given the option of choosing the types of redress they are wishing to access and be given the opportunity to access appropriate forms of redress at relevant times.

**Recommendation 34:** That non-monetary and therapeutic benefits be able to be claimed by survivors to cover a range of present and future needs, including, but not limited to: medical costs; educational support; assistance in finding families.

## 6.2.2 Counselling and psychological care

The Public Consultation paper notes:

*In regard to counselling and psychological care, the Royal Commission has suggested that:*

- *counselling should be available on a life-long basis;*
- *counselling should be available on an episodic basis if required;*
- *survivors should be able to choose between counselling options provided by appropriately capable professionals (who have the right capabilities to work with complex trauma clients);*
- *subject to regular review there should be no fixed limit on the number of counselling sessions available to the survivor; and*
- *family members should receive counselling through existing Medicare services, and not redress.*

**Question 24. The Government seeks views on whether the above principles governing the provision of counselling are appropriate. If not, in what manner should counselling be offered? Should there be any limits on the provision of counselling?**

Again, this is an issue we have addressed at length in previous submissions responding to the Royal Commission's Issues Paper 6 and its Consultation Paper. We have set out some relevant excerpts from our submission responding to Issues Paper 6 above, in our response to Question 8(b).

In responding to the Royal Commission's Consultation Paper, we noted:<sup>96</sup>

*The needs of survivors of institutional child sexual abuse are diverse in relation to the access of appropriate counselling and psychological care. All providers of psycho-social care should develop capabilities in relation to being trauma-informed and aware of the potential needs of adult survivors of child sexual abuse.*

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<sup>96</sup> **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.7-9

*In our experience, there are specific possible issues in service delivery that need to be addressed. These are discussed below.*

### **Gender**

*The predominance of male survivors means that traditional counselling models may need to be reviewed to address gender issues. The context which counselling occurs (i.e. what organisation and type of counselling is available for men), is an important issue. There is a particular need for specialist services for men to address trauma-informed principles of both safety and choice.*

### **Modality**

*The constantly developing knowledge-base, in terms of trauma and recovery, is greatly informed by work in the area of neuroplasticity.*

### **Ageing population**

*The nature of our ageing population and the impact of institutional child sexual abuse needs further consideration. This client group, who are needing to engage more and more with health and aged care services, often have significant fear about 'returning to institutional care'. The prospect of being re-institutionalised is a horrifying one for many of our client, with little understanding among mainstream aged-care providers of the significance of this fear. It is recommended that care options are developed that respect the clients' specific circumstances and acknowledge the risk of re-traumatisation. Health and aged services could make counselling options available for this client group outside institutional settings. There is a need for organisational and staff training to underpin service provision in order to fully address the needs of this client group. Older survivors have reported an increase in grief and loss issues related to their childhood experience. Their specific needs may not fit within the medical model of service provision offered by Medicare, or specialised sexual assault counselling. Some older clients of **knowmore** have reported benefiting from psychological support by counsellors who have a good understanding of the social dimensions of surviving child sexual abuse and who can attend to issues related to social isolation and grief and loss.*

### **Getting to counselling as opposed to getting counselling**

*We note that a significant issue for our clients is, having accessed appropriate counselling, the heavy burden of the costs of getting to and from a counselling service. This is particularly true for those clients who live in rural and remote areas and who cannot access public transport. Most of our clients are on a limited and fixed income and cannot stretch resources any further to accommodate extra financial burden. The proposed schemes should address this by paying for clients' transport costs, or by paying support services for the delivery of services in more marginalised areas.*

### **Intergenerational impact of abuse**

*Our clients consistently tell us of the ripple effect of what has happened to them. They speak of the fracturing of relationships with partners, children, grandchildren*

and great grandchildren. The proposed counselling scheme needs to be broad enough to encompass these important aspects of a survivor's recovery.

### **Source of funding**

The source of funding for counselling and psychological care is important to our clients. For some clients, they want nothing to do with the institution responsible for the abuse they experienced, so many survivors may reject counselling offered via funding from these institutions. However, for others, it is important that the institutions themselves are seen to contribute as a form of acknowledgement of responsibility.

### **Aboriginal and Torres Strait Islander needs**

The Royal Commission acknowledges that the Western model of care does not address or may not be appropriate to meet the psychological, counselling and cultural needs of Aboriginal and Torres Strait Islander people. It is recommended that further attention be given to cultural models of healing; such as healing circles, family work, community focused healing and connection to culture, that might currently not receive attention due to limits in the current evidence base and funding

It would also be beneficial if mainstream services employed Aboriginal and Torres Strait Islander staff and that all staff are culturally aware and culturally sensitive in their service provision. Attention also needs to be directed toward developing the capacity of Aboriginal and Torres Strait Islander workers and organisations and ensuring that their particular support needs are addressed, when responding to community members who are survivors of institutional child sexual abuse.

### **Disabled clients**

We have noted a lack of appropriate counselling services for this large and diverse client group. On the whole, mainstream services are providing case management for these clients in lieu of the counselling our clients are seeking. Often, the only referral pathway is to existing organisations, such as Partners in Recovery or People with Disabilities. While this is a good first step in partnering people, it may not result in the provision of the counselling or psychological care that is needed by a survivor. Expanding access to therapeutic counselling for survivors with disabilities is an essential factor of any model adopted, particularly given the over-representation of people with disability as victims of sexual abuse as children.

### **Clients in prisons**

The current focus of psychological interventions in correctional settings is on offending behaviour. However, our experience with this client group, and clients in the community with criminal histories, has indicated that their experience of institutional child sexual abuse has often been indirectly related to their offending behaviour. Factors such as poor emotional regulation, interpersonal difficulties, poor education, mental health difficulties, anti-social attitudes and substance abuse, which have been reported by our clients as related to their experience of institutional child sexual abuse, are also risk factors in offending behaviour.

*Male clients in prison state that they have difficulties in accessing counselling and psychological support in relation to their childhood sexual abuse. Our clients have told us that they would have benefited from psychological support and believe that addressing ongoing trauma, interpersonal difficulties and anger related to what happened to them, would have reduced or would in turn reduce the likelihood of their offending.*

*It is recommended that in addressing the counselling and psychological care needs of survivors that consideration is given to ensuring that staff in correctional settings receive training in trauma-informed care. The expansion of offence-related interventions, focused on attending the psychological and well-being needs of adult survivors of child sexual abuse who are incarcerated, should be recommended.*

### **Trust fund**

*A trust fund, to fill existing service gaps, may be of benefit in relation to survivors who already have counselling support in place but face constraints in relation to current funding arrangements. As noted by the Royal Commission, the administration of a trust fund could provide a case-management function for those clients who require care coordination in relation to their counselling and psychological needs; with additional functions of overseeing a referral database and monitoring of treatment efficacy. A trust model would provide a degree of survivor choice in relation to where they receive support and by whom.*

**Recommendation 35:** That the redress scheme should offer a range of treatment options that:

- (i) are not limited by a set schedule of sessions but rather reflect the needs of individual clients;
- (ii) should be monitored and regularly reviewed to ensure efficacy and client satisfaction;
- (iii) should be available to survivors' loved ones; and
- (iv) ensure culturally safe and community managed healing is available to Aboriginal and Torres Strait Islander people.

## **6.3 “Direct personal response”: acknowledgement, apology, and other services**

### **6.3.2 Acknowledgement and apology**

**Question 25.** *The Government seeks views on whether, as a minimum an institution should provide (where requested):*

- *an apology;*
- *an opportunity to meet with the senior member of the institution; and*

- *an assurance of the steps the institution has taken (or is taking), to prevent similar harms occurring in future.*

**The Government also seeks views on whether a redress scheme should set any further standards or requirements in this area.**

**knowmore** acknowledges the need for the opportunity for a direct personal response to be provided to those survivors seeking that form of redress. The Parliamentary Inquiry, the Royal Commission and **knowmore** have heard from many survivors about the importance to them of receiving a genuine apology and an acknowledgement of the impact of the abuse upon them from the institution. Some survivors do not seek an apology but may want assurances from the institution that steps have or will be taken to better protect children in the future. Yet other survivors (a significant number) report not wanting any form of engagement with the institution responsible for their abuse.

In responding to the Royal Commission’s Consultation Paper, we noted:<sup>97</sup>

***Re-engagement between a survivor and institution***

*We support the principle that re-engagement, including the opportunity to provide a direct personal response, should be survivor oriented and should only be survivor-led.*

*We have previously submitted that any national or state-based redress schemes should co-exist with existing, and in some circumstances, expanded capacity to pursue civil claims against institutions.<sup>98</sup> Best practice principles for direct personal responses should contemplate and accommodate the choice of survivors to pursue alternate pathways to redress. Importantly, the provision of an apology or other direct personal response should not be contingent on a survivor's choice to approach an organisation in person, or by means of a proposed redress scheme, rather than by bringing a civil claim against the responding institution.*

***Apologies***

*We support the principle that an apology is a key component of a minimum standard of direct personal response.*

*The existing legislative framework for the effect of apologies on civil liability in each state and territory<sup>99</sup> does not generally present any immediate barrier to the provision of apologies,<sup>100</sup> although there may be some exemptions arising in respect of civil liability of a person for an unlawful sexual assault or other unlawful sexual misconduct committed by the person. There is a lack of consistency regarding the*

<sup>97</sup> **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at pp.5-6

<sup>98</sup> **knowmore** Submission No 74 (Redress Schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 2014, pp.34-35.

<sup>99</sup> *Civil Liability Act 2002* (NSW), s.69; *Civil Liability Act 2002* (WA), s.54H; *Civil Liability Act 2003* (Qld), s.72D; *Civil Liability Act 2002* (Tas) s.7; *Personal Injury (Liabilities and Damages) Act 2011* (NT) s.13; *Wrongs Act 1958* (Vic), s.14J; *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s.75

<sup>100</sup> For further discussion, see **NSW Ombudsman**, *Apologies: A Practical Guide* (2<sup>nd</sup> Edition, 2009) 25-26.

*definition of an apology or expression of regret in the respective state and territory provisions, which may affect the quality of the direct personal response offered by institutions that take a conservative approach to their possible liability for a survivor's injury. We submit that this concern might be addressed by a recommendation for states and territories to adopt a uniform definition of 'apology', in line with the current definition in the New South Wales Civil Liabilities Act 2002, which enables an institution to admit or imply an admission of fault.*

### ***Other forms of direct personal response***

*We support the continued provision of needs-based financial assistance, access to records, memorials, family-tracing services, reunions and support groups and pastoral care by institutions.*

*As previously submitted, many of these responses are key components of justice for survivors. Survivors' choices should be honoured and facilitated by making such forms of personal response equally accessible, by means of a redress scheme, for those survivors who do not choose to re-engage with an institution.*

### ***Training for people delivering a direct personal response***

*We support the principle that a direct personal response to survivors should be delivered by people who have received training about the nature and impact of child sexual abuse and the needs of survivors, including the need for cultural safety in delivering responses and services.*

*We further submit that it may be beneficial to provide training or forums for discussing and developing a range of best practice personal responses for board members, trustees, executive level staff and other parties with responsibility for the governance of smaller institutions, in particular clubs, associations and non-government organisations, which continue to provide services for children. Such training might address the effect of apologies on civil liability discussed above and other issues which may adversely affect the quality of direct personal responses afforded to survivors, such as formulating a complaints process for survivors raising concerns about the personal response of the institution.*

### ***Interaction between a redress scheme and direct personal response***

*We support the principle that an independent redress scheme should not be involved in the direct provision of appropriate personal responses to survivors by institutions.*

*It is our view that the issues raised in the consultation paper about re-traumatisation and the consistency and reliability of institutional responses underscore the need for survivors to have access to independent support and advocacy, as well as the importance of trauma-informed approaches by institutions.*



In responding to Issues Paper 6 we said:<sup>101</sup>

### **Apology**

*The impact of an apology from the responsible parties is central to many survivors' redress experience, and is something that should be offered by the relevant institution.*

*The form of the apology, and the appropriate institutional representative to deliver it, should be the subject of respectful consultation with the individual survivor, as to their wishes. Many survivors have advised us that they have taken some comfort from receiving a personal apology from a high-ranking official of the relevant institution (such as an Archbishop); others have appreciated being able to receive an apology in the presence of their family members, and some have placed great weight on obtaining a written apology.*

*Some of our clients wish to see 'symbolic' responses implemented, such as the removal of an offender's name from a street or place-name; construction of a memorial relating to an institution etc. There should be scope for such requests to be considered in the redress process.*

**Recommendation 36:** That a Victorian redress scheme permits for direct personal responses to be provided, subject to the claimant's choice as to the affording and manner of that response. Officials administering the scheme should not be directly involved in the provision of such responses, but the scheme should set appropriate standards for such responses and monitor institutional compliance.

## **7. Deeds of Release**

### **7.1 Existing deeds of release**

***Question 26. The Government seeks views on how the scheme should deal with claimants subject to an existing Deed of Release.***

We recommend that a redress scheme be able to reconsider claims resolved under past and currently existing redress schemes, taking into account past redress awards and supplementing those as appropriate. The proceedings of the Royal Commission have emphatically established that past redress awards have often been inadequate.

If a claimant has received an amount of financial compensation for the abuse and injuries claimed for under any new scheme, that amount(s) should be taken into account in calculating any redress amount in respect of the same acts of abuse.

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<sup>101</sup> **knowmore** Submission No 74 (Redress Schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 2014, pp.28-29

The fact that a survivor has received a compensation amount should not be a bar in applying to the redress scheme for additional financial compensation or other forms of redress.

**Recommendation 37:** (i) Financial amounts previously received by claimants, relating to injuries and abuse claimed for under any new redress scheme, should be taken into account in calculating redress awards made in response to applications under a Victorian scheme

(ii) The receipt of any previous ‘compensation’ for that abuse and injuries, should not be a bar to applying for any additional redress.

## 7.2 Future deeds of release

**Question 27. The Government seeks views on whether a Deed of Release will be required when a claimant obtains redress. If yes, should any conditions be attached to the Deed?**

**The Government is also interested to hear whether NGOs within the potential scope of the scheme would be willing to participate if a Deed of Release was not required.**

We have addressed the issues of deeds of release, and the context of possible redress and civil claims being open to a survivor, in previous submissions.<sup>102</sup>

Survivors should retain their rights to commence civil action against the perpetrator, the institution or other relevant bodies. Providing a redress scheme on a ‘take it or leave it’ basis does not promote the concept of choice for survivors, and “does not promote the principle of respect, engagement, choice and fairness”.<sup>103</sup>

Given the difficulties of our civil litigation systems, as discussed in **knowmore’s** submission in response to the Royal Commission’s Issues Paper 5, for many survivors a redress scheme which allows for the payment of an adequate amount of compensation will be the preferable alternative.

General principles of damages at common law mean that any amount that would be awarded as part of a redress scheme should be deducted from any amount awarded through any civil litigation proceedings. Further, in situations where new evidence may emerge that may make an application at law more fruitful, a survivor should not be unable to rely on such evidence where a civil claim may be possible.

Further, for survivors who may at a later date find new evidence that would mean a civil claim is a viable option, they should not be barred from making such a claim, where there is now a viable cause of action available to that individual.

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<sup>102</sup> **knowmore**, Submission ( Consultation Paper: Redress and Civil Litigation) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.15; and also **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse,

<sup>103</sup> **The Hon. Fred Kaufman**, *Searching for Justice: An Independent Review of Nova Scotia’s Response to Reports of Institutional Abuse*, Province of Nova Scotia 2002, <http://novascotia.ca/just/kaufmanreport.pdf>, p. 2

It is noted that the Western Australian government adopted this approach when establishing the Redress WA scheme and survivors were not required to sign a deed of release, with the responsible Minister noting “*I felt that it was immoral to make people waive their legal entitlements*”.<sup>104</sup>

In short, a redress scheme should co-exist with civil litigation as an alternative for survivors seeking justice, and an award of outcomes under such a scheme, including financial awards, should not operate as a bar to a civil action. However, amounts of compensation received from any source should be regarded in determining awards of damages or financial awards under the scheme. It is to be noted that the Australian Government’s Defence Abuse Reparations Fund adopted the following position:

*Nothing in the Guidelines, nor the making of a Reparation Payment to a person, or their authorised representative, in accordance with the Guidelines, is intended to affect the statutory, common law or other legal rights of the person, save and except that a court or tribunal may, if it thinks fit, take the making of a Reparation Payment into account in assessing the quantum of any damages or compensation otherwise payable to a person under common law or statute.*<sup>105</sup>

We recommend a similar approach for any Victorian State redress scheme.

However, in the alternative, if the Government decides that claimants enter deeds of release under the scheme, we submit that the deed of release should clearly provide that:

- a) the deed is to be set aside in certain circumstances, such as where new evidence emerges about abuse or liability (the circumstances that should be included will vary depending on what is taken into account during the assessment stages);
- b) the deed does not preclude the survivor from claiming future counselling expenses; and
- c) the deed releases the relevant parties only in relation to the abuse specifically claimed for under the scheme -

and claimants should be required to obtain competent legal advice, prior to entering the deed of release.

Any deed of release should not seek to bind the claimant to confidentiality.

**Recommendation 38:** That claimants not be required to enter Deeds of Release under the redress scheme.

<sup>104</sup>Western Australia, *Parliamentary Debates*, Legislative Council, 3 March 2010 (The Hon. Robyn McSweeney).

<sup>105</sup> Commonwealth of Australia, *Defence Force Reparation Fund Application Form*, Defence Force Abuse Tribunal (2012) <http://www.defenceabusetaskforce.gov.au/Forms/Documents/application-for-reparation-form.pdf>

## **8. Administrative arrangements for a redress scheme**

### **8.3 A statutory or administrative scheme**

**28. The Government seeks views on potential administrative arrangements for redress:**

- a) an expansion of VOCAT;**
- b) a co-operative “industry” model;**
- c) a statutory or administrative scheme established by Government and administered by Government or an independent authority.**

Our preferred position, as noted in the introduction to this submission, is that an independent statutory body be established to administer any Victorian redress scheme. We suggest that the unique purpose of such a redress scheme, and the arrangements for its operation (as recommended above), best fit within the framework of an independent statutory body, rather than within an expanded Victims of Crime Assistance Tribunal, Victoria (VOCAT).

**knowmore** made a detailed submission in response to the Royal Commission’s Issues Paper 7: Statutory Victims of Crime Compensation Schemes. That submission proposed a number of reforms to statutory victims of crime compensation schemes, including VOCAT.

**Recommendation 39:** An independent statutory authority should be established to operate any Victorian redress scheme.

Another option for consideration, in the event a Victorian rather than a national scheme is to be established and if the Government’s preference is to include any redress scheme within an existing framework, could be whether the scheme should be incorporated within the framework of the Victorian Commission for Children and Young People, given the Commission’s legislated oversight and research functions concerning the protection of vulnerable children.

In our submission to Issues Paper 6, we noted:<sup>106</sup>

*... the importance of seeking to continuously improve the quality of services delivered to children in institutional contexts, and to reduce the incidence of sexual abuse in institutions and also more generally, raises the issue of whether a redress scheme and decision-maker should be placed within a broader organisation, as foreshadowed in the introductory section of this submission. We note that various States, including the Victorian government, have created statutory agencies and roles that have broader responsibilities, including some oversight and regulatory functions and responsibilities to protect and promote the interests of children, in*

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<sup>106</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, p.16

*particular, those in circumstances of disadvantage. Examples include the Commissions for Children and Young People in Victoria, New South Wales and Queensland.*

**Recommendation 40:** That consideration be given to whether the Victorian Commission for Children and Young People should include within its functions the recommended Victorian redress scheme.