

Our Ref: WGS

20 June 2014

The Hon. Peter McClellan AM  
Chair  
Royal Commission into Institutional Responses to Child Sexual Abuse  
GPO Box 5283  
SYDNEY NSW 2001

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

Dear Judge,

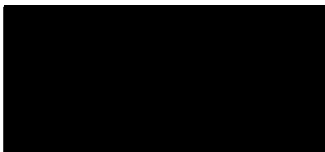
**RE: KNOWMORE'S SUBMISSION IN RESPONSE TO ISSUES PAPER 6: REDRESS SCHEMES**

We enclose **knowmore's** submission in response to Issues Paper 6 relating to redress schemes.

Thank you for considering our submission and its accompanying recommendations. We have no concerns about this submission being published.

Should you wish to discuss our submission further, please contact me on (02) 8267 7400.

Yours sincerely,



**WARREN STRANGE**  
Principal Lawyer

**ENCL.**



# Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

## Issues Paper 6: Redress Schemes

### 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. 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 Inc, with funding from the Australian Government, represented by the Attorney-General's Department. **knowmore** has offices in Sydney, Brisbane and Melbourne and an office in Perth will open in July 2014.

Our service was launched in July 2013 and since that time we have provided over 3,500 client advices. 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 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's** submission will respond directly to the questions proposed by the Royal Commission in Issues Paper 6, and recommend that a national, independent redress scheme be established for survivors of institutional abuse. We recommend that this scheme be accompanied by the creation of an independent Commonwealth 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 Commonwealth, State and Territory governments as well as institutions, including non-government organisations involved in relevant service delivery.

We also recommend that consideration be given to establishing a statutory Commonwealth agency, as a permanent Commission for Children or Child Safety, equipped with other functions including regulatory oversight at a national level of organisations and institutions who have current responsibility for delivering services to children; as well as a best practice research arm to inform policy change and improvement for institutions. Consideration could also be given to locating the redress scheme within this agency.



Given the barriers that exist in accessing compensation through the civil litigation system (as detailed in **knowmore**'s response to Issues Paper 5<sup>1</sup>), 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.

Recommendations to establish some form of redress scheme or to provide reparation or compensation payments to survivors of childhood abuse have been made in a number of past inquiries within Australia.<sup>2</sup> Many of these inquiries have recommended that an independent board or authority be established to make decisions about compensation.<sup>3</sup>

Some of these recommendations have been adopted by the relevant governments and we have seen payments made to some categories of survivors of institutional child abuse in Tasmania, Queensland and Western Australia following the establishment of specific redress schemes in those States. Further, institutions themselves have also established redress schemes, such as the Catholic Church's *Towards Healing* protocol, the Salvation Army's internal compensation process and the internal schemes that exist in most Anglican dioceses.

While redress schemes have not been established in all State and Territory jurisdictions, nor by all institutions, both prior to and since the commencement of the Royal Commission there has been some support expressed for the establishment of a national redress scheme.<sup>4</sup> The Commonwealth Senate

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<sup>1</sup> See <http://www.childabuseroyalcommission.gov.au/getattachment/13de076f-98a9-4564-bc94-88d2c8005dc0/18-Knowmore>

<sup>2</sup> The Human Rights and Equal Opportunity Commission's *Bringing them Home: The Stolen Children report* in 1997, which examined the impact of removal policies on Stolen Generations, recommended a compensation mechanism to provide redress to those children removed. Following the Forde Inquiry into the Abuse of Children in Australian Institutions in 1999 recommending that a compensation fund be established, the Queensland Government introduced a redress scheme limited in eligibility to those who had been placed in children's institutions in that State. The Tasmanian Ombudsman in 2004 recommended that a fund be set up to provide some form of compensation for children in care in Tasmania (Tasmania subsequently established a Government scheme, which has now ended, to compensate those who suffered abuse while in the care of the Tasmanian Department of Health and Human Services). 2004-2005 saw the Commonwealth Senate Community Affairs Reference Committee recommend that an independent national redress scheme be established, and the Mullighan inquiry in South Australia recommended that the State Government there examine the issue of redress and "investigate the possibilities of a national approach to the provision of services". The recent Victorian Parliamentary Inquiry into the Handling of Abuse by Religious and Other Organisations made recommendations that the government look at an appropriate way to compensate survivors of childhood abuse.

<sup>3</sup> It is noted that the Royal Commission is currently examining, as part of its broader research program, the challenges to the implementation of the recommendations arising from such inquiries.

<sup>4</sup> It was noted in the 2009 report of the 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*, that the New South Wales Department of Community Services was supportive of compensation "being considered at the national level" and willing to assess the viability of a proposal. Further, recently the Truth Justice and Healing Council, the organisation coordinating the Catholic Church's response to the Royal Commission, noted that it was supportive of a national redress scheme.

Committee looking at Australians who experienced out of home care<sup>5</sup> and the Human Rights and Equal Opportunity Commission<sup>6</sup> both made recommendations that an independent board be established to provide for compensation payments to be made to survivors who had experienced abuse. The Senate Community Affairs Reference Committee<sup>7</sup> in 2009 heard from many criticising the lack of government movement on a national redress scheme for survivors and urged government and institutional providers to look at the issue of compensation.

## 2. LIST OF RECOMMENDATIONS

**Recommendation 1:** That a national and independent decision-making body be established as an independent Commonwealth statutory agency to assess and determine, under a national redress scheme, claims for redress, including financial compensation, made by survivors of childhood sexual abuse in institutional contexts. This national 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 or State 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 2:** That the establishing legislation provides for the relevant decision-maker 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 3:** That the Commonwealth 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 4:** That given the circumstances of many survivors of childhood sexual abuse in institutional contexts who are now aged and/or in ill-health, actions be taken to establish a national redress scheme as soon as practicably possible.

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<sup>5</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>6</sup> Human Rights and Equal Opportunity Commission, *Bringing them Home: The Stolen Children Report*, Report (1997).

<sup>7</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).

**Recommendation 5:** That further consideration be given to establishing a national body, in the form of a Children's or Child Safety Commission, to better protect the interests of children and to improve the quality of services delivered to children nationally. Such an agency should have a broad range of functions, including regulatory oversight of relevant institutions at a national level, and all of the current functions of the existing role of National Children's Commissioner.

**Recommendation 6:** That if it is considered such a Commission should be established, further consideration be given to whether that agency should include within its functions the recommended national redress scheme.

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

**Recommendation 8:** That any survivor who has experienced childhood sexual abuse within an institutional context as contemplated by the Royal Commission's Letters Patent be eligible to make an application under a national redress scheme.

**Recommendation 9:** If a national redress scheme is to be established, consideration be given to widening its application to include claims of physical and emotional childhood abuse in institutions.

**Recommendation 10:** That a national redress scheme provides for clear application and decision-making processes.

**Recommendation 11:** 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 12:** That the procedures relating to redress schemes provide the means for claimants to readily access records concerning them that are now held by third party agencies, such as government departments.

**Recommendation 13:** That the decision-making body under a national redress scheme proceeds and makes its decisions informally and expeditiously.

**Recommendation 14:** 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.

**Recommendation 15:** That the independent Board (i.e. the decision-maker for redress claims) has the legislative power to pass information on to relevant law enforcement bodies, with the claimant's consent.

**Recommendation 16:** That a nationally co-ordinated and Taskforce approach be adopted by Australian policing agencies to ensure a co-ordinated and effective response to such material.

**Recommendation 17:** That any decision of the board awarding redress under a national Australian scheme should be reviewable and, particularly, claimants should have the right to seek a review of the Board's award of compensation to them.

**Recommendation 18:** It is essential that the principle of choice be maintained at the centre of any national 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 19:** That the *Health and Other Services (Compensation) Act 1995* (Cth) and the *Social Security Act 1991* (Cth), be amended to exempt payments made under a national redress scheme to survivors of historic child sexual abuse for their abuse from the operation of refund and deeming provisions, to ensure an amount is not required to be paid back to Medicare and Centrelink benefits can continue to be received. Consideration should also be given to the possibility of seeking a determination under s 8(11) (d) of the *Social Security Act 1991*, in regards to Centrelink payments.

**Recommendation 20:** 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 supports
- assistance in finding families
- formal apologies through the institution

**Recommendation 21:** That consideration be given to enabling survivor groups to make collective applications for compensation through a national redress board.

**Recommendation 22:** That a redress fund be funded by all relevant institutions, including all Australian governments and institutions, but that payments for each claim should be paid by the Commonwealth, with orders for repayment of some or all of that award to be made by particular institutions and State/Territory governments.

Any institution that has responsibility for children should be required to pay annual contributions based upon risk factors either to the National Child Safety Commission, part of which will be provided to an ongoing redress fund, or directly to the redress scheme. These fees would be determined by a number of factors, including:

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

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

**Recommendation 23:** 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.

**Recommendation 24:** That counselling support be provided to survivors making an application through a national redress scheme.

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



**Recommendation 25:** That an independent, multidisciplinary and trauma informed legal service be established to assist survivors in making decisions around engaging in the national redress process, and in pursuing claims under that scheme. The service should also provide assistance in relation to related legal issues.

**Recommendation 26:** 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.

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

### 3. SPECIFIC QUESTIONS

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

As detailed by **knowmore** in its submission responding to Issues Paper 5 on civil litigation systems, there are distinct barriers that exist within those systems that operate to deny many survivors both access to that form of redress and to the support that they need while pursuing it. As such, it is the position of **knowmore** that while civil litigations systems should be reformed and remain as an alternative for survivors seeking justice, an independent, national redress scheme should also be established as an alternative method to pursue redress. For many survivors this will be the more appropriate mechanism to deal with these types of claims.

The major barriers that exist in the present civil litigation system and which operate to defeat potential civil suits seeking redress include:<sup>8</sup>

- the lack of a legal entity to sue: for example, the structuring of institutions in a way such that the ‘Ellis defence’ operates;<sup>9</sup>
- statutes of limitation that apply to personal injury claims of this type;
- 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;
- the length of time these claims take to resolve; and

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<sup>8</sup> See **knowmore**’s submission to Issues Paper 5 for a further in-depth discussion on the barriers in our civil litigation systems and possible reforms proposed.

<sup>9</sup> In the case of *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, the New South Wales Court of Appeal held that an unincorporated association, such as the Roman Catholic Church in the Archdiocese of Sydney, cannot, at common law, sue or be sued in its own name because it does not exist as a juridical entity (the so-called “Ellis defence”). Applied in *PAO & Ors v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216.



- the cost and other demands involved in engaging solicitors and in prosecuting a contested action through a highly adversarial legal system.

While **knowmore** made a number of recommendations about potential reforms that should be made to civil litigation systems, such as the removal of limitation periods for childhood sexual abuse claims and a move to an “enterprise risk” approach to vicarious liability, the civil litigation process will still often not be an appropriate mechanism for survivors seeking redress and support. The reasons for this include:

- the historical nature of the acts of abuse, and the circumstances in which they occurred, will often result in there now being a lack of evidence in these types of matters. Consequently, the application of the ordinary civil standard of proof (on the balance of probabilities), is too high a threshold for many meritorious claims to succeed at civil law;
- there may now simply be no entity or individual against whom a civil action can be brought, with any real prospect of recovery of damages;
- the civil litigation process is adversarial, time consuming and costly, meaning that it may be years before claims are resolved;<sup>10</sup>
- the need to engage in a process which is inherently and extremely traumatising for survivors, to the point where the validity of their experiences of abuse may be the subject of prolonged cross-examination by lawyers representing perpetrators and the institution;<sup>11</sup> and
- the outcomes arising from civil action may not be satisfactory or appropriate for individual survivors, as they may not be looking solely for financial assistance but also other, therapeutic outcomes, such as an apology or access to counselling or medical services, and procedural reforms that will reduce the risk of further incidents of child sexual abuse.

The other current main legal mechanisms for pursuing redress are the State and Territory based statutory victims of crimes compensation schemes. These too often involve a number of barriers, including:

- time limits requiring claims to be brought within a specific time period represent a possible bar to claims, although out of time applications may be able to be made;<sup>12</sup>

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<sup>10</sup> We note as an example the current matter before the NSW Supreme Court that has been commenced by a group of survivors in relation to allegations of historic child sexual abuse of child migrants at Fairbridge Farm. The initial statement of claims was lodged over five years ago, with leave only just been granted to have the matter heard by the Court. See: *Giles v Commonwealth of Australia* [2014] NSWSC 83 (21 February 2014). See also *Rundle v Salvation Army (South Australian Property Trust) & Anor* [2007] NSWSC 443, where in May 2007 the NSW Supreme Court decided an application for an extension of time to commence proceedings, in respect of a statement of claim filed more than four years earlier. While these examples involved complex interlocutory proceedings that might not entail so much delay should reforms be enacted to civil litigation procedures for claims for childhood sexual abuse, it remains that civil cases ordinarily take considerable time to prepare and to proceed to final decision.

<sup>11</sup> The Royal Commission’s Case Study 8, regarding the response of the Catholic Church to the complaint made by John Ellis, stands as a prime example.

<sup>12</sup> For example, applications made in all State and Territory jurisdictions bar New South Wales must be made within a certain period, usually two or three years from the date of the act of violence or injury. Most jurisdictions allow for an extension of time application to be made.

- commencement dates of certain schemes operate as a complete bar, making some historical claims impossible;<sup>13</sup>
- the quantum of compensation is low and often does not take into account the range of factors of relevance, especially for historic child sexual abuse cases, including the impact that the abuse has had on the survivor;
- often schemes require individuals reporting to the police or a government agency;<sup>14</sup>
- the requirement of many schemes that the sexual act be a criminal offence as contemplated by the law of that State or Territory; and
- the linking of the redress provided to a criminal act attributes responsibility to the offender (more often borne, in terms of the provision of financial redress, by the Government), rather than to the institution, leading to perceptions by survivors of a lack of accountability on the part of the institution and a lack of any incentive to enact reform. Indeed, some clients of **knowmore** have instructed they are unwilling to pursue claims under such schemes in relation to acts of institutional child sexual abuse as they do not regard the relevant state government as the body responsible for their abuse.

We note the recent release of Issues Paper 7, concerning statutory victims of crime compensation schemes. **knowmore** will provide a more detailed response on this topic in responding to that Issues Paper.

Given the above barriers to the two main alternatives to a redress scheme, it is clear that an alternative approach is required to provide justice to survivors. Accordingly, while the concept of an effective redress scheme has considerable merit, it must be acknowledged that the problems with the existing civil litigation and criminal injuries systems are not resolved by the existing and/or recent government or institutional redress schemes. Wide-ranging reform of past models and existing redress schemes must occur to deliver such an effective and fair redress scheme for the future. In short, a new approach is required, being an independent and national scheme.

As noted, many of **knowmore's** clients have engaged with the redress processes that are currently in existence or, in the case of State based schemes, have been in place in recent years and are no longer available. Comparatively few clients have reported achieving satisfactory outcomes. Other clients have simply had no possible redress scheme available to them. The problems with the past and current redress mechanisms are numerous. Many fall into a general category of inconsistency, of both access and outcomes. Some of the major problems or disadvantages of the current redress schemes include:

- fundamentally, the inability of many survivors to access a government or institutional scheme at all. As noted above, not all Australian States and Territories have enacted

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<sup>13</sup> For example, the Australian Capital Territory scheme does not allow claims to be made for injuries occurring before June 1983; see: *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 4: the Victorian scheme does not allow victims of crime to make claims for certain payments where the act of violence occurred before 1997, see: *Victims of Crime Assistance Act 1996* (Vic).

<sup>14</sup> Most State and Territory schemes require the individual to make a report to the police and/or a government agency for the claim to be successful; for example in New South Wales, the victim is required to make a report to a government agency to be able to make a claim for certain awards of financial assistance, see: *Victim Rights and Support Act 2013* (NSW) s 39. In Victoria, the Tribunal must refuse to make an award of assistance if satisfied that the act of violence was not reported to police within a reasonable time, see: *Victims of Crime (Financial Assistance) Act 1983* s 52.

redress schemes.<sup>15</sup> **knowmore** has advised many clients who spent their childhood in multiple institutions across different States, particularly across eastern Australia. These clients are painfully aware of the inequities in the redress scheme options that have been open to them, particularly in relation to government administered institutions; *"I was abused in homes in both Queensland and New South Wales. I received some compensation from the Queensland scheme following the Forde Inquiry but nothing from New South Wales ... "*;

- of the States which did enact schemes, each scheme restricted eligibility in a way that excluded thousands of people who had suffered childhood institutional abuse but in contexts outside the limited scope of such schemes. Other potential claimants missed submission deadlines and closing dates, either because they were unaware of possible entitlements and procedures, or were emotionally unable at the relevant time, as survivors of childhood sexual abuse, to report that abuse and provide the level of information required by these schemes to substantiate a claim; and
- of the non-government schemes, as the Commission will be aware, inconsistent and inadequate outcomes for survivors are commonly reported. Even in some of the more established schemes, such as *Towards Healing* in the Catholic Church, the varying responses enacted at a diocese or Order level, together with a culture of confidentiality and non-disclosure obligations, have resulted in hugely inconsistent outcomes for claimants which bear little proportionality to the abuse suffered, when compared to an assessment of likely damages if a civil claim on the same facts had been maintained.<sup>16</sup>

In some instances, institutions have clearly made a genuine effort to establish what outcomes a survivor is seeking and to provide reasonable financial redress. But in many other cases, claimants have received completely inadequate redress, when measured against the abuse endured and the institution's responsibility (for example, circumstances where the institution has failed to act appropriately upon reported allegations of child sexual abuse, thus arguably contributing to further offending occurring). In some instances, commercially 'hard-line' approaches have undoubtedly been pursued by institutions, in a context of well knowing that any other option open to the survivor for seeking redress, such as through a civil claim, would face major impediments. Unequal bargaining positions have often, in our clients' experiences, led to completely inadequate amounts of financial redress being offered, on a *"take it or leave it"* basis, and begrudgingly accepted for want of any alternative.

Beyond these general disadvantages of gross inconsistencies of outcomes and consequent unfairness, many clients have reported that their experience of institutional redress schemes was characterised by:

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<sup>15</sup> In this context, we note with interest media reports published during the Royal Commission's Case Study concerning the experience of women who were sexually abused as children, between 1950-1974 while committed in The Parramatta Girls' Training School and The Institution for Girls in Hay, to the effect that the NSW Government was now considering options for a redress scheme for those survivors.

<sup>16</sup> For further information on the specific issue of our client's experiences with the Catholic Church's *Towards Healing* scheme, see **knowmore's** submission to Issues Paper 2, at <http://www.childabuseroyalcommission.gov.au/getattachment/e7ce30e8-11f6-4453-8d11-c865af92d573/7-Knowmore1>

- a lack of any independence on the part of the institution or the process;
- little or no understanding of the survivor's position and the ongoing impacts of their childhood abuse, in the context of an existing and highly significant power imbalance between the parties;
- unacceptable delay, with many clients reporting they had to drive the process and the institution was purely reactive;
- a reluctance on the part of the institution to entertain any legal representation for claimants,<sup>17</sup> and a corresponding inability on the part of the claimant to properly prepare, present and negotiate their claim without competent assistance;
- a lack of willingness or knowledge on the part of legal representatives to pursue claims vigorously in the redress scheme context (or to properly explain processes and limitations to clients), leading to compromise and inadequate settlements, at times accompanied by legal costs eroding significantly the amount of financial redress claimants actually received;
- a reluctance by institutions to accept any legal or 'moral' responsibility for the conduct complained of, through delivering heavily qualified outcomes, such as financial settlements with no admission of liability or even acceptance that the acts complained of occurred;
- no effective appeal or review mechanism in relation to an adverse decision, with the institution receiving, assessing and adjudicating on the claim and any further representations; and
- a failure to deliver any meaningful non-financial outcomes, such as a sincere personal apology, ongoing support and institutional and procedural reform.

As noted above, many institutional processes are conducted entirely in a confidential way. One consequence of this is that there is no opportunity for broader lessons to be learned across institutions in general, and little opportunity across larger institutions, particularly those like the churches that are administered, in a day to day sense, by multiple entities, such as individual dioceses and/or Orders. Allied to these outcomes is a lack of any deterrent impact arising from decided cases, both across institutions generally, or within a larger institution operating as distinct and separate entities.

In the next section of this submission we detail a number of features that **knowmore**, based on our work with clients, considers to be important for making a redress scheme effective. It follows that the absence or limited application of many of these features in current redress schemes contributes to their collective inability to operate effectively as a means of providing justice and appropriate outcomes for survivors.

As noted, in theory the operation of an effective redress scheme presents as a way to overcome the barriers that currently exist in the other primary compensation mechanisms, being claims for damages made through civil litigation systems and claims under statutory schemes for victims or criminal injuries compensation. However, to be effective in providing a comprehensive mechanism for survivors to access the supports and outcomes required by them, an alternative to the current redress schemes must be established to overcome the issues and problems listed above.

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<sup>17</sup> This remains an issue, despite the current proceedings of the Royal Commission.

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.
- *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.



## **2a. What features are important for making redress schemes effective for claimants and institutions?**

We have set out above the key components any redress scheme must have to ensure it operates effectively for all parties involved: non-legalistic in nature; providing a range of outcomes; independent of institutions involved in claims; fair and consistent in eligibility to access and in outcomes; trauma-informed and supportive; providing claimants with access to free legal representation; and certain and transparent in process.

At the heart of any scheme should be the needs of survivors and consideration of how the scheme should operate to deliver appropriate and adequate forms of redress and assistance for them. Based on the experiences of **knowmore**'s clients, we think it important that a redress scheme addresses the following principles:

- take into account the needs of survivors, their families and their communities;
- address the unique needs of every survivor with respect, engagement, appropriate support mechanisms and informed choice (including the delivery of culturally safe and appropriate services and processes);
- avoid as far as possible causing further harm to survivors, their families and their communities;
- promote community initiatives as a significant means of redressing institutional child abuse; and
- establish programs of public education, protocols and other strategies for prevention of further institutional child abuse.<sup>18</sup>

A number of redress schemes have been established both domestically and internationally, which can be drawn on to give an indication of both the beneficial features that could be included in a national Australian scheme and those features that may detract from the efficiency and efficacy of any such scheme.

### **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

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<sup>18</sup> Law Reform Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian Institutions*, Report, (2000) Canadian Department of Justice < <http://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/dig/intro.html>>

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, 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 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>19</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 Royal Commission will no doubt be familiar with the relevant aspects of the Irish scheme, which enables survivors to make a claim 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.

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<sup>19</sup> Such as case studies 3, 8 and 11.

A similar decision making function within a national Australian 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, section 46 of the *Coroner's Act 2003 (Qld)*.

We also note that it is the practice in Queensland and in New South Wales, in relation to coronial recommendations, for the Government to publish annually a Government Response to Coronial Recommendations Report that contains responses to coronial recommendations directed to Government in the preceding calendar year.<sup>20</sup> If the above recommendation is adopted, it is further suggested that there would be merit in the Commonwealth Government producing a similar report regarding preventative recommendations arising from redress claims, and the progress of relevant institutions, whether Government or non-Government, in implementing such recommendations.

It is envisaged that a national redress scheme would be funded by all appropriate parties and that all institutions should be required to make contributory payments where those institutions are presently engaged in activities that have responsibility for children. We will discuss the funding of such arrangements in more detail in our response to Question 4.

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<sup>20</sup> For a recent example of this report see <https://publications.qld.gov.au/dataset/the-queensland-government-s-response-to-coronial-recommendations/resource/e02723df-ce09-4313-bacc-9b82bfe7b1c6>

A properly constructed and truly independent national redress scheme will enable survivors of institutional childhood sexual abuse to access a range of compensatory outcomes and will overcome the barriers that exist in terms of survivors effectively accessing other, current legal remedies.

Given that discussion about redress schemes has occurred within governments and institutions at various levels over a number of years since the Senate *Forgotten Australians* Inquiry, it is essential that this issue be progressed as soon as possible. While we appreciate the Royal Commission has some time yet to complete its work and report, it is an inescapable reality that for many survivors, who are now elderly and suffering from a range of health problems, the time available to them to obtain some form of justice is diminishing.

**Recommendation 1:** That a national and independent decision-making body be established as an independent Commonwealth statutory agency to assess and determine, under a national redress scheme, claims for redress, including financial compensation, made by survivors of childhood sexual abuse in institutional contexts. This national 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 or State 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 2:** That the establishing legislation provides for the relevant decision-maker 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 3:** That the Commonwealth 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 4:** That given the circumstances of many survivors of childhood sexual abuse in institutional contexts who are now aged and/or in ill-health, actions be taken to establish a national redress scheme as soon as practicably possible.

The importance of seeking to continuously improve the quality of services delivered to children in institutional contexts, and to reduce the incidence of child sexual abuse in institutions and also more generally, raises the issue of whether such a national 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 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 particular, those in circumstances of disadvantage. Examples include the Commissions for Children and Young People in Victoria, New South Wales and Queensland.

We also note the establishment and appointment in 2013 of the National Children's Commissioner, whose role is to promote public discussion and awareness of issues affecting children, conduct research and education programs and consult directly with children and representative organizations. The role also examines relevant existing and proposed Commonwealth legislation to determine if it recognises and protects children's human rights in Australia. The work of the National Children's Commissioner is intended to complement the work conducted by State and Territory Children's Commissioners and guardians, as noted above. The position sits within the Australian Human Rights Commission, Australia's national independent statutory body dealing with human rights.<sup>21</sup>

The work to date of the Royal Commission demonstrates that there are many issues relating to the protection of children receiving services from institutions that might be better addressed through a more co-ordinated and national response, rather than simply on a State by State basis. Accordingly we recommend that consideration be given to the issue of whether children's interests would be better protected, and the quality of services delivered to children improved, if a national Commonwealth Commission was established with a broader range of functions, including regulatory oversight of relevant institutions at a national level and, as exists at present in relation to the role of National Children's Commissioner, a research function to drive continuous improvements in practice, and roles of scrutinising legislation and consulting with stakeholders.

If it was considered that such a Commission should be established, further consideration should be given to whether it should include the recommended national redress scheme.

A model for such a Commission is **attached as Annexure A**.

**Recommendation 5:** That further consideration be given to establishing a national body, in the form of a Children's or Child Safety Commission, to better protect the interests of children and to improve the quality of services delivered to children nationally.

Such an agency should have a broad range of functions, including regulatory oversight of relevant institutions at a national level, and all of the current functions of the existing role of National Children's Commissioner.

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<sup>21</sup> Taken from <http://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/national-children-s-commissioner>



**Recommendation 6:** That if it is considered such a Commission should be established, further consideration be given to whether that agency should include within its functions the recommended national redress scheme.

### Eligibility criteria

It is important that any national 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.

First, the scheme should not limit access to a defined period of opportunity, as the past State based schemes 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, with which the Royal Commission will be familiar, 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 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.

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

The State redress schemes that have been previously established have also 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>22</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

<sup>22</sup> Ombudsman Tasmania, *Listen to the children: Review of claims of abuse from adults in state care as children*, (2004).

suffered by children in many institutional contexts, such as out of home care, therefore excluding foster care and other institutions such as hospitals.<sup>23</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 national scheme. In regard to what should be the eligibility criteria for that scheme, we note the Letters Patent for your Royal Commission, and the definitions set out therein of 'institution' and 'institutional context':

***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.*

***institutional context:** child sexual abuse happens in an **institutional context** if, for example:*

- iii. it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or*
- iv. it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or*
- v. it happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.<sup>24</sup>*

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<sup>23</sup> Commission of Inquiry into Abuse of Children in Queensland Institutions, *Final Report* (2000).

<sup>24</sup> Letters Patent for the Royal Commission into Institutional Responses to Child Sexual Abuse.

We recommend that similar and consistent eligibility criteria should be adopted for any national redress scheme. In particular, by now the Royal Commission will have been informed of many examples, as **knowmore** has, of children being sexually abused in circumstances falling within sub-paragraph (iv) of the terms of reference, 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 recognised under the Royal Commission's Letters Patent as "institutional child sexual abuse".

Where terms within the above definition are further defined in the Letters Patent, such as 'official', we recommend those definitions be also adopted.

Sub-paragraph (v) of the Letters Patent as above is a 'catch-all' provision that may not necessarily be required to define the jurisdiction of any future redress scheme; it is difficult to anticipate circumstances where institutional child sexual abuse could not be brought within the other aspects of the definition. However, this is a definitional issue where **knowmore** recognises the Royal Commission may have dealt with cases where it was necessary to use this head of jurisdiction, and can therefore better assess its utility in any future context.

In time, it is suggested that the tribunal determining claims under a national 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.

Similarly, we suggest that the definition of 'child sexual abuse' adopted by the Royal Commission should be maintained, being the working definition of 'child sexual abuse' outlined by Senior Counsel Assisting during her opening remarks at the Commission's first sittings.<sup>25</sup> Importantly, the non-exhaustive list of 'sexually abusive behaviours' noted by Ms Furness SC included 'voyeurism' and 'grooming' behaviours.

Again, it is important that a wide definition be employed for the purposes of determining eligibility and jurisdiction. As is noted in the research resources appearing on the Commission's website concerning childhood sexual abuse,<sup>26</sup> defining 'sexual abuse' is a complicated task and one that depends on the relationship between the victim and the perpetrator. In the current context of institutional child sexual abuse, any redress scheme will be dealing with cases which will exhibit the consistent feature of huge power imbalances between the child victim and the perpetrators, who often wielded absolute authority over institutionalised children. In those circumstances, consistent with the approach to defining child sexual abuse noted in these resources, any behaviour with a sexual element, between a child and a person with such power and authority over them, should be regarded as constituting child sexual abuse for eligibility purposes.

Finally, from its work to date the Royal Commission would well understand that the sexual abuse of children in many institutions, especially residential homes, rarely occurred in isolation of physical and

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<sup>25</sup> Transcript 3 April 2013, at p.13

<sup>26</sup> Viewed at: <http://www.aifs.gov.au/cfca/pubs/factsheets/a142091/index.html>

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. Indeed, the Royal Commission's Letters Patent specifically provide for this reality in authorising the Commission to inquire into "related matters". 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.

While the reasons for the limitations of the current Royal Commission's scope are understood, in terms of the magnitude of the Commission's existing task and the need to make timely reports and recommendations, it is perhaps difficult to maintain why any national redress scheme, if one is established, should be so restricted and exclude those who suffered abuse in institutional contexts as children, which did not involve sexual abuse. Further, the limitation of any such scheme simply to childhood sexual 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) and may, for the reasons set out herein, have no recourse to redress for the non-sexual aspects of their institutional abuse.

**Recommendation 8:** That any survivor who has experienced childhood sexual abuse within an institutional context as contemplated by the Royal Commission's Letters Patent be eligible to make an application under a national redress scheme.

**Recommendation 9:** If a national redress scheme is to be established, consideration be given to widening its application to include claims of physical and emotional childhood abuse in institutions.

### **Clear decision making processes – consistency, transparency and accountability**

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.

As noted herein, 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. Some of our clients have been traumatised during redress processes when informed by institutions or their legal representatives that they may 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.

Further, clients routinely speak of the lack of any accountability when it comes to reviewing decisions made under redress schemes.

The Irish Scheme had a formal decision making process, which included:

- an application is lodged with a written claim, which provides evidence of identity;
- proof that they were in a particular institution(s); and
- evidence that the injury that was suffered in the institution is consistent with the alleged abuse.

The Irish scheme also provided for an appeal mechanism (this is discussed further at page 24).

The evidence that might be required for such an application is discussed in response to question 10. At this point however, we would 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>27</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 procedure 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 Right to Information schemes, whereby claimants and institutions can 'discover' documents held by third party agencies, such as Government departments.

**Recommendation 10:** That a national redress scheme provides for clear application and decision-making processes.

**Recommendation 11:** 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 12:** That the procedures relating to redress schemes provide the means for claimants to readily access records concerning them that are now held by third party agencies, such as Government departments.

### Principles of informality

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.

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<sup>27</sup> Such as Find and Connect



There are a number of precedents in existence for such provisions, relating to existing administrative tribunals.

However, there should 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.

**Recommendation 13:** That the decision-making body under a national redress scheme proceeds and makes its decisions informally and expeditiously.

**Recommendation 14:** 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.

### Police Reporting

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 the relevant State, Territory or Commonwealth policing agency, with the claimant's consent, and also provide for all relevant material to be passed to the relevant police agency.

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. As current policing structures around Australia are established along State and Territory lines, a nationally co-ordinated approach to pursuing historical sexual abuse claims is required. In this regard, we would note the Taskforce model established to date in some jurisdictions,<sup>28</sup> to co-ordinate responses to information transmitted by the Royal Commission and other relevant inquiries.

Significant amounts of reports and criminal 'intelligence' about offenders will arise from claims dealt with under a national 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.

A national approach to gathering of this intelligence about offenders is important to ensure that where offences were committed by the same offender in multiple jurisdictions, relevant jurisdictions are aware of those offences committed in other jurisdictions to maximise prospects of prosecution in each jurisdiction.

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<sup>28</sup> For example, the Victorian Taskforce SANO

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

**Recommendation 15:** That the independent Board (i.e. the decision-maker for redress claims) has the legislative power to pass information on to relevant law enforcement bodies, with the claimant's consent.

**Recommendation 16:** That a nationally co-ordinated and Taskforce approach be adopted by Australian policing agencies to ensure a co-ordinated and effective response to such material.

## Appeal Process

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 appeal process.<sup>29</sup>

As mentioned above, the Irish scheme allows for a survivor to submit their decision (as to the compensation award), to a Review Committee.<sup>30</sup>

It is recommended that any decision of the board awarding redress under a national Australian scheme should be susceptible to review and, particularly, claimants should have the right to review the Board's award of compensation 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 Tribunal, or within any national Child Safety Commission; or
- allowing the decision to be one that could be reviewed by the Administrative Appeals Tribunal on the merits; and
- allowing any such AAT matter to be appealed on a matter of law to the Federal Court; or
- allowing the decision of the authority to be one that can be reviewed by the courts per the *Administrative Decisions (Judicial Review) Act 1974* (Cth).

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.

**Recommendation 17:** That any decision of the Board awarding redress under a national Australian scheme should be reviewable and, particularly, claimants should have the right to seek a review of the Board's award of compensation to them.

<sup>29</sup> Noting the Tasmanian, Queensland, South Australian schemes have not allowed for a review process.

<sup>30</sup> *Residential Institutions Redress Act 2002* s.13(4)(b)

## Principle of Choice and Flexibility

Consistent with preservation of the rights of survivors to litigate their claims in the court of they 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 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>31</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.

**Recommendation 18:** It is essential that the principle of choice be maintained at the centre of any national 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.

### **2b. What features make redress schemes less effective or more difficult for claimants and institutions?**

It follows from the above discussion that the absence of the features noted, or the presence in the scheme of other features that are antithetical in nature, will adversely impact on the effectiveness of the scheme for survivors and would generally hinder the effective operation of the scheme, ultimately impacting on institutions as well. Such features would include:

- overly legalistic and inflexible processes, that are not supported by trauma-informed practice and application;

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<sup>31</sup> Such as help in locating appropriate housing, medical, employment and other support services.

- a standard of proof that is too high to be met given the recognised difficulties survivors face in pursuing historical claims of childhood abuse;
- a decision making process that would be traumatising for survivors, such as one which permitted unrestricted cross-examination of witnesses and survivors; and
- restrictive eligibility criteria that operate to unfairly and unreasonably exclude categories of survivors and potential claimants.

Additionally, there is one other feature which should be addressed in the scheme to ensure that it operates effectively and that survivors are not disadvantaged.

### **Payments to Medicare and Centrelink**

At present, the *Health and Other Services (Compensation) Act 1995* (Cth) allows the Commonwealth to claim a certain proportion of any compensation amount if that individual has claimed benefits through Medicare for the injury to which that compensation payment relates, where the payment is more than \$5,000.<sup>32</sup>

Given that many individuals who have experienced historic child sexual abuse have been required to utilise a range of health services over their lives, it can be difficult to determine definitively the causal link between the health service use and the impact of the abuse. Further, survivors are disproportionately more likely to have chronic health issues than others in the community.

In addition, provisions within the *Social Security Act 1991* (Cth) mean survivors who receive certain compensation amounts for economic loss will be required to provide half of that amount to Centrelink, which can result in an individual having to repay Centrelink, or can result in the individual being precluded from accessing their benefits.<sup>33</sup>

Of note, the *Social Security Act 1991* (Cth) specifically excludes payments made under statutory victims of crime laws in each State and Territory. Given survivors would be in a similar position, insofar as they are receiving an amount in relation to an act of violence that they have experienced, similar provisions should arguably apply to exempt payment amounts in relation to historic child sexual abuse from a redress scheme, or from any other source.

Under the *Social Security Act 1991* (Cth) s 8(11)(d), the Secretary of the Department of Social Security (DSS) and the Department of Employment may determine that an amount is an exempt lump sum for the purpose of the *Social Security Act*. A determination relating to payments made under the Western Australian redress scheme was made by the relevant Secretary, exempting those payments from the income test relating to benefit payments.<sup>34</sup>

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<sup>32</sup> *Health and Other Services Compensation Act 1995* (Cth) s 8.

<sup>33</sup> See Part 3.14 *Compensation Recovery of the Social Security Act 1991*.

<sup>34</sup> Social Security Exempt Lump Sum (Redress WA) (FaHCSIA) Determination 2008.

**Recommendation 19:** That the *Health and Other Services (Compensation) Act 1995* (Cth) and the *Social Security Act 1991* (Cth), be amended to exempt payments made under a national redress scheme to survivors of historic child sexual abuse for their abuse from the operation of refund and deeming provisions, to ensure an amount is not required to be paid back to Medicare and Centrelink benefits can continue to be received. Consideration should also be given to the possibility of seeking a determination under s 8(11)(d) of the *Social Security Act 1991*, in regards to Centrelink payments.

### **3a. What forms of redress should be offered through redress schemes?**

As noted above, a 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 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>35</sup>
  - funeral costs
  - an opportunity to have a survivor's story placed on the public record, and
  - commitments and undertakings that the institutions will in the future prevent child abuse.

#### **Monetary Compensation**

Monetary compensation is important and provides a range of benefits to a claimant, including giving validity and recognition to that person's experience. Additionally, the awarding of adequate amounts of monetary compensation is important in holding institutions to account in a way that is meaningful and encourages improvements in service delivery to reduce the incidence of child sexual abuse.

We stress that monetary compensation must be adequate. We have seen too many instances of institutions being willing to offer vulnerable survivors quite paltry sums of financial assistance, accompanied by a signing away of all future legal rights. Payments must be sufficient to properly recognise not just future expenses faced by the survivor, but also the survivor's pain and suffering and other forms of loss, including economic loss and, where relevant, loss of cultural identity and language.

This issue is further discussed in our response to Question 9.

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<sup>35</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)



## Non-monetary Benefits

For many clients, while a monetary compensation amount is beneficial, it is not the only form of redress that they are seeking. Many clients are wishing to seek assistance through a range of other supports and outcomes, as detailed above.

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>36</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>37</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>38</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 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

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<sup>36</sup> Caranua website – FAQ. See <http://www.caranua.ie/faq/>

<sup>37</sup> *Residential Institutions Statutory Fund Act 2012*

<sup>38</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.

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>39</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>40</sup> In Tasmania, the Ombudsman recommended that a private educational trust fund be established to assist individuals in continuing their educational studies.<sup>41</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.

### **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.

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<sup>39</sup> See: Ombudsman Tasmania, *Listen to the children: Review of claims of abuse from adults in state care as children*, November 2004.

<sup>40</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>41</sup> Ombudsman Tasmania, *Listen to the children: Review of claims of abuse from adults in state care as children*, November 2004.

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 20:** 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 and formal apologies.

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

Consideration could be given to a concept of collective redress, as was the case in certain Canadian compensation schemes established for survivors. Under those arrangements a survivors’ group was established to represent a group of survivors at a particular institution, and that group was provided with an opportunity to collectively vote on an agreement.<sup>42</sup>

This may be appropriate for a group of survivors who have particular claims, which could include:

- survivors making a joint claim through the redress process; or
- survivors proposing an agreement.

There may be some benefit with this type of approach, and such group processes. A Canadian agreement negotiated between a group of survivors of a particular institution allowed for particular concerns and issues to be raised and dealt with within an agreement.<sup>43</sup>

Where there are clusters of survivors where individuals have been through the same institution, consideration should be given to groups of survivors being able to have an application for ‘collective redress’ considered by the Board. This approach might also allow opportunities to provide other appropriate forms of redress, such as:

- assistance with organising reunions; and
- specific services or assistance that would assist that particular group – such as memorials or other commemorative processes.

However, any such group or collective approach must be a choice for survivors, who need autonomy to choose their particular process, inclusive of being able to individually approach the redress board for their own individual application to be dealt with. Group and individual redress should be able to be obtained separately, and allow the opportunity for awards to be made relating to group and individual experiences. For example, in one Canadian scheme many applicants opted out of the group agreement and chose to pursue their own individual claims.

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<sup>42</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>, p334.

<sup>43</sup> The Grandview Healing Package was entered into between survivors and the Province of Ontario relating to the former Training School for Girls.

We have heard from clients who participated in group negotiations and settlements under existing Australian redress schemes, or under some class actions. Some have reported ongoing dissatisfaction with outcomes, in that they felt compelled to accept inadequate compensation amounts “for the greater good of the group”; or held a lingering sense of injustice in that all group members received equivalent settlements yet had vastly different experiences of abuse, with correspondingly different impacts. Others are simply uncomfortable in disclosing anything of their own experiences in the company of others who, despite sharing those experiences as children, have not been in contact for decades and with whom no ongoing relationship has existed.

Additionally, evidence before the Royal Commission and certainly the reported experiences of many **knowmore** clients reflect a significant number of instances where the sexual abuse of children in institutions involved sexual assault at the hands of older children, in addition to staff and other adults. The abusive context of many institutions involved older children assaulting younger children, for their own sexual gratification or for the gratification of officials and others. In many such instances children ‘progressed’, during their institutionalisation, from victim to perpetrator.

Clearly, this factor will complicate some potential group approaches and is one that due to its apparent prevalence must be borne in mind. It underlines the importance of individual choice around options to proceed with any group arrangement or collective approach.

**Recommendation 21:** That consideration be given to enabling survivor groups to make collective applications for compensation through a national redress board.

#### **4a. What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims?**

The range of benefits that can be delivered through a national redress scheme are discussed throughout this submission and include:

- consistency and transparency of process around redress decisions;
- a nationally consistent and equitable approach to eligibility;
- independence, ensuring survivors are not forced to return to their abusers for justice; and
- broader recognition of wrongs and provision of an appropriate range of redress outcomes available to claimants.

The steadfast refusal of some institutions and State and Territory governments to establish a redress scheme, such as the New South Wales government, underlines the importance of a truly co-ordinated and national approach to the issue of redressing the wrongs done to so many children, and particularly for the thousands of survivors who have not been able to effectively access any form of compensation.

As outlined in this submission, we recommend that a national redress scheme have the ability to review previous amounts paid under State based redress schemes and institutional based redress schemes to ensure national consistency in the processing of redress claims and in the amounts paid for redress for survivors of child sexual abuse. It may be difficult for States to undertake a review of their own processes and decisions and such decisions would be better made by a national scheme, taking into account a nationally consistent approach to such decisions.

States and Territories may also face difficulties where current State and Territory statutory victim compensation schemes for victims of child sexual abuse which did not occur in an institution are severely limited in the amounts of compensation available and the processes to make a successful claim are very restrictive. It is likely that those States and Territories will feel the need to limit amounts of redress and adopt consistent approaches to those existing schemes in any redress scheme implemented on a State/Territory basis. Such an approach would severely limit the ability of claimants who were sexually abused in an institutional context to obtain redress, as will be outlined in our response to Issues Paper 7 on Crimes Compensation Schemes.

**4b. If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?**

**Government Institutions**

For the scheme to have legitimacy, the scheme must include all government institutions, including State and Territory institutions as well as Commonwealth institutions. We have set out above our views regarding claimant eligibility and the adoption of appropriately broad definitions for the purposes of determining jurisdiction.

While the Commonwealth has had, compared to the States and Territories, limited direct responsibility for the welfare of children in care,<sup>44</sup> there are significant policy grounds on which the Commonwealth should be committed to a scheme. It has been noted by the Senate Committee on Community Affairs that the Commonwealth:

- provided federal endowment money to institutions that supported their operation;
- had direct responsibility for the broader political and social environment that saw many children placed into institutional care;<sup>45</sup>
- provided funds directly to the States and Territories for funding child welfare services; and
- works routinely with States and Territories to lead on matters that are not strictly within enumerated heads of power.

**Funding**

Previous inquiries and reports have recommended that the responsible institutions be jointly responsible for the funding of a redress scheme.<sup>46</sup> It is essential that contributions come from all parties, given the dissatisfaction internationally where funding came either not at all or unwillingly from non-government institutions. A number of parties, including religious institutions, have already

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<sup>44</sup> Although here the plight of the thousands of children brought to Australia under the Commonwealth's Child Migration Scheme must be recognised.

<sup>45</sup> Such as many of the policies and statutes resulting in the forced removal of Aboriginal children.

<sup>46</sup> The Bringing Them Home report recommended that major church based institutions be encouraged to contribute to the compensation fund recommended for Stolen Generation survivors.

acknowledged the need for joint funding of a redress scheme, and many have argued that all responsible parties should fund any such redress scheme.<sup>48</sup>

When we look at international arrangements, most have dealt with situations where the State and often religious institutions were responsible for the safety of children. For example in Canada, the Helpline Reconciliation Agreement provided for a joint co-payment where the Government of Ontario paid the survivor an amount and the Christian Brothers of Ontario would match the government's commitment.<sup>49</sup>

The Irish Scheme was mostly funded by the State, however a group of religious entities agreed to provide €128 million; in return the State agreed to an indemnification of the entities. The amount contributed fell far short of what was required, and left a large gap that the State was eventually required to fund, with an estimated €1 billion being the cost of the fund.<sup>50</sup>

The Irish experience underlines the need to ensure adequate ongoing funding for any redress scheme, and that these contributions come and continue to come, from both the State and the relevant institutions.

### **Membership Funding Model**

One possible model of funding is for each institution to pay amounts into the fund based on a range of factors, backed by a legislative requirement that institutions be adequately insured to pay for any claim that is made through the scheme. These factors, reflecting really the level of risk that the institution is exposed to (and correspondingly brings to the redress scheme) could include:

- the size of the institution (employee numbers and locations);
- the types of services delivered to children;
- the number of claims that have been established in relation to that institution;
- collective evidence combined from findings of the Royal Commission and past claims and prosecutions; and
- a requirement that any service which has responsibility for children be adequately ensured to cover claims made under the scheme (akin to a professional indemnity insurance scheme).

### **Restitution Model**

However, while a membership funding model could be used to contribute to the costs of a national redress scheme, we recommend that a better approach would be for redress payments to be made by the Commonwealth for each claim with orders for a contribution to be provided to the Commonwealth by the State/Territory government and/or an institution to any redress amount offered. This would be a matter for the independent decision-maker to consider when a redress amount is awarded. This could include examining a range of factors:

- principles of proportionate liability between possible institutions;

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<sup>48</sup> Buti A, *Bridge Over Troubled Australian Waters: Reparations for Aboriginal Child Removals and British Child Migrants*, Murdoch University Electronic Journal of Law (2003) v 10, issue 4.

<sup>49</sup> <http://www.mcass.gov.on.ca/documents/en/mcass/social/directives/ow/0406.pdf>

<sup>50</sup> See, for example, the settlement data in the Annual Reports of the Board at <http://www.rirb.ie/annualReport.asp>

- the assets of the liable institutions; and
- whether the institution has an insurer or incorporated body from which funds can be sought.

In our view, claimants should not need to wait for a particular institution or State/Territory to contribute their share of any redress amount awarded, or be subject to receiving an amount of redress depending on whether a particular institution is solvent or still in existence nor for any potential appeals to be resolved between institutions and States about whether, for example, the proportionate contribution from each is fair. This is generally the approach taken by most State/Territory crimes compensation schemes where the State/Territory acknowledges that the victim needs to be compensated at the time of the award being made and that it is then a matter for the State/Territory government to seek to recoup some or all of that award from the offender.

**Recommendation 22:** That a redress fund be funded by all relevant institutions, including all Australian governments and institutions, but that payments for each claim should be paid by the Commonwealth, with orders for repayment of some or all of that award to be made by particular institutions and State/Territory governments.

Any institution that has responsibility for children should be required to pay annual contributions based upon risk factors either to a National Child Safety Commission, part of which will be provided to an ongoing redress fund, or directly to the redress scheme. These fees 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.

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

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

It is recommended that the implementation of a national redress scheme as proposed would eliminate the need for institutions to have their own individual separate schemes. The exception to this would be in relation to internal schemes catering solely for the provision of pastoral responses, such as faith-based processes for survivors wishing to access those responses.

The reality is that from our clients' collective experiences, we know of no internal institutional redress scheme, even among the more established schemes, that operates in a way that meets the objects set out herein, or delivers, consistently, fair and appropriate outcomes.

However, if the new scheme resulted in institutions being able to continue with an internal scheme, then it is important that such schemes have an independent external oversight body.

The proposed Commission could provide this function, with all institutions offering internal schemes be required to have such decisions subject to external review by the Commission.



The Senate Inquiry recommended that there be a move for internal processes to have:

- where possible, independent input;
- internal and external review of decisions; and
- an independent complaints mechanism established by the Commonwealth to review decisions, review processes and operations and report to Parliament.<sup>51</sup> accessing and navigating current schemes, and in obtaining meaningful and fair outcomes, will simply be replicated if institutions retain the capacity to administer internal redress schemes. The power imbalance inherent in the relationship between survivors and the institution will always be present and is in itself a significant impediment to ensuring that claimants make informed choices about what compensation avenues are available and which option they should pursue.

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

Consistent with what we have said above, any institution that has responsibility for children should be required to contribute to an annual fund and to contribute to redress awards.

Any existing institution that was previously responsible for delivering services to children, where there is an accepted claim against the institution and officials, should be required also to co-operate with the processes of the scheme and make a financial contribution to any award, although payment of the award should be made by the Commonwealth, with orders made for repayment of some or all of the award by the particular institution(s) or State and Territory government(s).

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

Survivors should be given the option to pursue other legal claims if they wish to. Providing a redress scheme on a 'take it or leave it' basis does not promote the concept of choice for survivors, and as noted "does not promote the principle of respect, engagement, choice and fairness".<sup>52</sup>

#### **Civil action**

Survivors should retain their rights to commence civil action against the perpetrator, the institution or other relevant bodies.

Given the difficulties of our civil litigation systems, as discussed in **knowmore's** submission to 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.

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<sup>51</sup> Above, footnote 5, see: Recommendation 7.8.

<sup>52</sup> Kauffman Report, p.2.

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.

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>53</sup>

In short, a national 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>54</sup>

We recommend a similar approach for any national redress scheme.

As explained above, we recommend that a national 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.

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

We have set out above some of the factors that should determine contribution levels to a national scheme. The concept of ‘proportional liability’ is a useful concept and one the Senate Committee examined in the context of a redress scheme. The Committee stated:

*The relative contribution of the various parties to the scheme should be based on their proportionate liability which, as discussed previously in this chapter, should take into account such factors as the relative roles of the respective groups in the*

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<sup>53</sup>Western Australia, *Parliamentary Debates*, Legislative Council, 3 March 2010 (The Hon. Robyn McSweeney).

<sup>54</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>

*provision of institutional care; their ability to pay; and the degree to which they are already providing compensation or funding services for care leavers.<sup>55</sup>*

In situations where there is no clear successor institution, survivors who have attended those institutions should not be disadvantaged and should be able to make a claim in the same way others can, with the Commonwealth Government making payments of redress awards, with an order for State/Territory governments and institutions to repay the Commonwealth for some or all of that award.

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

In **knowmore's** experience, as noted already in this submission, 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 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>56</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>57</sup>

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<sup>55</sup> Above, footnote 5, see recommendation 8.123.

<sup>56</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>57</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.

- exemplary or punitive damages<sup>58</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-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>59</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>60</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:

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<sup>58</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’.

<sup>59</sup> Above, footnote 5.

<sup>60</sup> *Residential Institutions Redress Act 2002 (Section 17) Regulations 2002*

*“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>61</sup>*

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<sup>61</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
	<b>Factors:</b>  	<b>Factors:</b>  Considering: <b>Physical, injury, physical illness, psychiatric illness</b>  Loss of sight or hearing. Loss of or damage to teeth. Permanent scar/s & disfigurement.  Sexually transmitted diseases. Respiratory diseases. Skin diseases.  Severe depression with suicide attempts. Personality disorder. Post-traumatic stress disorder.	<b>Factors:</b>  Considering: <b>Emotional disorder</b> Inability to show affection or trust Low self-esteem; persistent feelings of shame or guilt. Recurrent nightmares or flashbacks.  <b>Cognitive impairment / educational impact</b> Literacy level well below capability. Impoverished thought processes. Limited vocabulary leading to communication difficulties.  <b>Psychological maladjustment</b> Marital difficulties involving sexual dysfunction. Low frustration tolerance. Shyness and withdrawal from mixing with people.  <b>Anti-social behaviour</b> Substance abuse. Compulsive stealing. Physical aggressiveness.	<b>Factors:</b>  Considering: Having to refuse employment opportunity/promotion because of illiteracy.  Need to concoct a false identity and to live a lie with workmates.  Unable to pursue certain occupations, e.g. police, because of "record".

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>62</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.

### Affordability

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>63</sup> it should be compelled to do so and also be prevented from delivering any services to children until it does.

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

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.

<sup>62</sup> Compensation Advisory Committee, *Towards Redress and Recovery: Report to the Minister for Education and Science*, (2002) vi.

<sup>63</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.



## Appropriate Standard of Proof

In acknowledging the aims of a redress scheme, it is necessary that the standard of proof is less onerous than any court process. The issue with the balance of probabilities is that given the nature of the claims, this standard of proof is a difficult one for claimants to meet. In addition to the evidentiary and other barriers outlined in **knowmore's** submission to Issues Paper 5, there is the application of the *Briginshaw* standard<sup>64</sup> that mandates a higher degree of proof given the nature of the allegations in contest.

It is noted the Senate Inquiry considered the test of 'reasonable likelihood that the claimant was abused' to be the most appropriate standard of proof.<sup>65</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>66</sup> Redress WA worked on the same standard.<sup>67</sup>

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, and would meet the "reasonable likelihood" threshold.

As noted, the redress scheme's processes should compel institutions to produce all relevant material in response to claims. This would 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 23:** 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.

## Proving the impact of abuse

Once a claimant has met the threshold of proving that it is reasonably likely that the 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;

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<sup>64</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>65</sup> Above footnote 5, see Recommendation 8.124.

<sup>66</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>67</sup> Redress WA required applicants to show "there was a reasonable likelihood that they experienced abuse and/or neglect"

- 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 be enough to establish the impact of abuse. A range of impacts should be considered, which has been discussed in response to question 9.

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

**Counselling Services**

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 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>68</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 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

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<sup>68</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.

trauma.<sup>69</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>70</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 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>71</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

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<sup>69</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>70</sup> Courtois, C.A and Ford, J.D., 2012 *Treatment of Complex Trauma, A Sequenced, Relationship-Based Approach*, Guilford Press, NY.

<sup>71</sup> See: <http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-ba>.

their own counsellors, that this treatment is not evaluated or regularly reviewed and that the effectiveness of this treatment is limited.<sup>72</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>73</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 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>75</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 regularly reviewed to ensure efficacy and client satisfaction;

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<sup>72</sup> Inquiry into the Handling of Child Abuse by Religious and Other Organisation  
[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_Abuse_Inquiry/Transcripts/In_Good_Faith_Associates_12-Nov-12.pdf).

<sup>73</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.

<sup>75</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>.

- 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.

**Recommendation 24:** That counselling support be provided to survivors making an application through a national redress scheme.

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

## Independent Legal Assistance

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>76</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.

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 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.

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<sup>76</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.

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.

**Recommendation 25:** That an independent, multidisciplinary and trauma informed legal service be established to assist survivors in making decisions around engaging in the national redress process, and in pursuing claims under that scheme. The service should also provide assistance in relation to related legal issues.

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

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.

As noted, 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.

**Recommendation 26:** 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.

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

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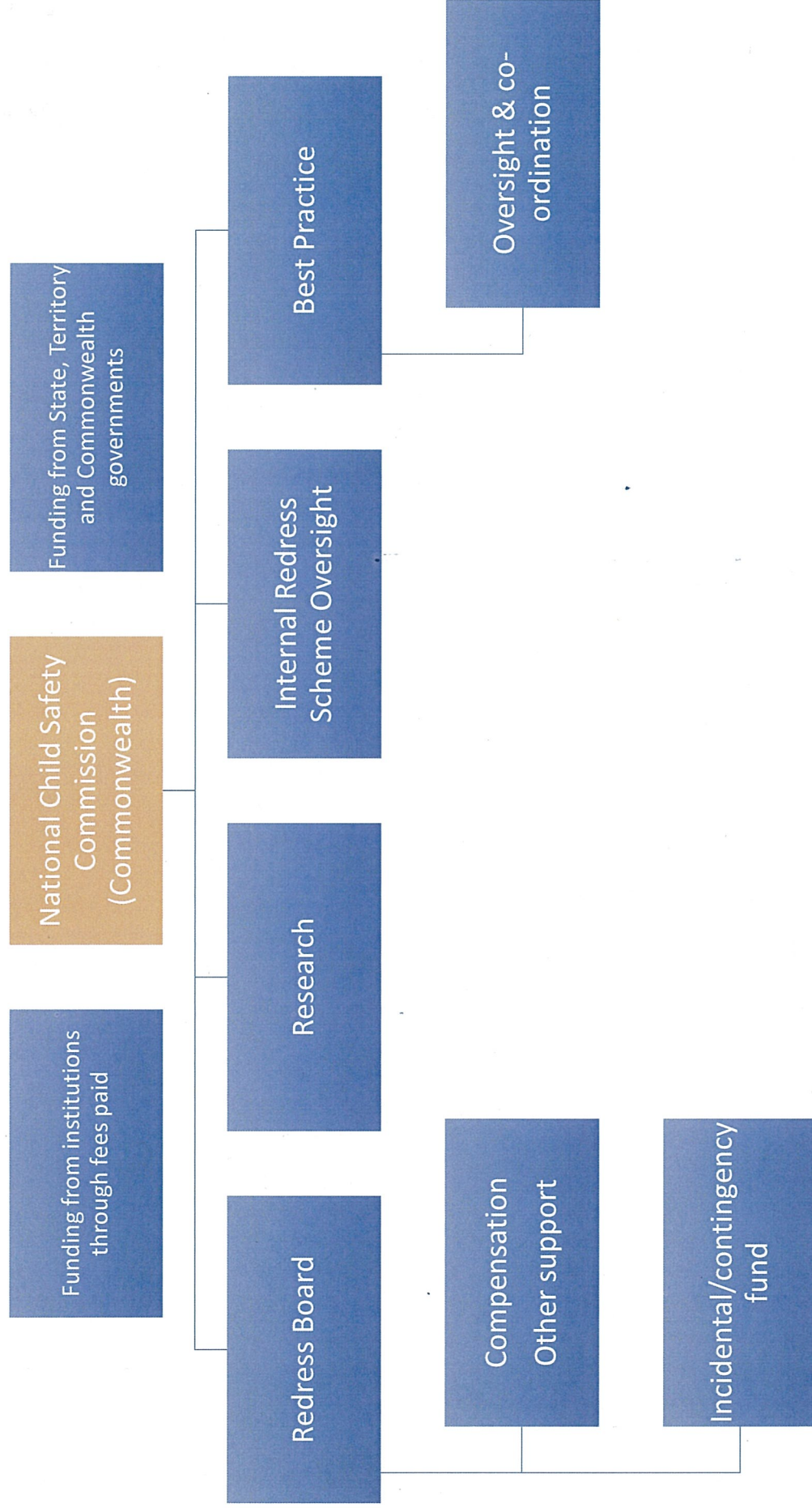
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#### Annexure A: Possible Model for a National Child Safety Commission



knowmore is a program of the National Association of Community Legal Centres Inc ABN 67 757 001 303 AREN 163 101 737  
(incorporated in the ACT with limited liability of its members).

NACLC acknowledges the traditional owners of the lands across Australia upon which we live and work. We pay deep respect to Elders past and present.



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