



Royal Commission
into Institutional Responses
to Child Sexual Abuse

CONSULTATION PAPER

Redress and civil litigation

JANUARY 2015



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Consultation Paper

Redress and civil litigation

January 2015

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Executive summary

Introduction

The Letters Patent provided to the Royal Commission into Institutional Responses to Child Sexual Abuse require that it ‘inquire into institutional responses to allegations and incidents of child sexual abuse and related matters’.

Under paragraph (d) of the Terms of Reference we are given in the Letters Patent, we are required to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

Commissioners have agreed to endeavour to make findings and recommendations in relation to redress and civil litigation by the middle of 2015.

We have already obtained significant input on redress and civil litigation from a broad range of sources, including private sessions, public hearings, issues papers, private roundtables, expert consultations, research projects, and information obtained under summons.

Through this consultation paper, we seek submissions from all interested parties on the issues raised. We have no settled views at this stage. We have drawn attention to some particular issues, but we welcome submissions on any or all of the issues raised in this consultation paper.

We invite all interested parties to make written submissions responding to this consultation paper by midday on Monday 2 March 2015, preferably electronically to redress@childabuseroyalcommission.gov.au.

We have also provided a facility on our website to allow people to provide short comments on specific issues by completing a short online form.

Structural issues

In Chapter 2, we discuss a number of structural issues that are significant for our approach to redress and civil litigation.

Justice for victims

A number of survivors, and many survivor advocacy and support groups, have highlighted the importance to survivors of ‘fairness’ in the sense of equal access to redress for survivors and of equal treatment of survivors in redress processes. They regard equal access and equal treatment as essential elements if a redress scheme is to deliver justice.

Equality in this sense does not prevent recognition of different levels of severity of abuse or different levels of severity of impact of abuse. However, it does mean that the availability and type or amount of redress available should not depend on factors such as:

- the state or territory in which the abuse occurred
- whether the institution was a government or non-government institution
- whether the abuse occurred in more than one institution
- the nature or type of institution
- whether the institution still exists
- the assets available to the institution.

We accept the importance to survivors of equality in this sense. We accept that many survivors and survivor advocacy and support groups will not consider that any approach to redress that we recommend is capable of delivering ‘justice’ unless it seeks to achieve equality or fair treatment between survivors.

Current failings

Institutional child sexual abuse can have a severe and sometimes lifelong impact on survivors. Survivors experience many difficulties in seeking redress or damages through civil litigation.

We have heard from survivors, survivor advocacy and support groups and others about the many difficulties that survivors experience in seeking redress or damages through civil litigation.

Individual experiences of inadequate or unobtainable redress should be placed in the broader context of a social failure to protect children. There was a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused. Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution they were part of, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society.

This broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse.

The complexity of the task

Making findings and recommendations about redress is complex because of:

- what has already been done through past and current redress schemes, statutory victims of crime compensation schemes and civil litigation, with all the inconsistencies that have arisen
- the range of existing support services available to survivors that may overlap with or supplement redress and the need for us to avoid making recommendations that might reduce resources for, or divert efforts from, existing support services
- the breadth of our Terms of Reference through the definition of ‘institution’, which includes a far greater range of institutions than have been covered by past or current redress

schemes; and the narrowness of our Terms of Reference in focusing on sexual abuse in an institutional context, in contrast to redress schemes that have typically also included physical abuse and neglect

- the need to make recommendations that can be implemented and that are likely to be implemented, including taking account of the affordability of what we recommend.

Elements of redress

The elements of appropriate redress for survivors appear to be:

- a direct personal response by the institution if the survivor wishes to engage with the institution, including an apology, an opportunity for the survivor to meet with a senior representative of the institution and an assurance as to the steps the institution has taken, or will take, to protect against further abuse
- access to therapeutic counselling and psychological care as needed throughout a survivor's life, with redress to supplement existing services and fill service gaps so that all survivors can have access to the counselling and psychological care that they need
- monetary payments as a tangible means of recognising the wrong survivors have suffered.

General principles for providing redress

The following general principles should guide the provision of all elements of redress:

- redress should be survivor-focused – redress is about providing justice to the survivor, not about protecting the institution's interests
- there should be a 'no wrong door' approach for survivors in terms of gaining access to redress – whether survivors approach a scheme or an institution, they should be helped to understand all the elements of redress available and to apply for those they wish to seek
- all redress should be offered, assessed and provided having appropriate regard to what is known about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular, and to the cultural needs of survivors – all of those involved in redress, and particularly those who might interact with survivors or make decisions affecting survivors, should have a proper understanding of these issues and any necessary training
- all redress should be offered, assessed and provided having appropriate regard to the needs of particularly vulnerable survivors and ensuring access to redress can be obtained with minimal difficulty and cost and with appropriate support or facilitation if required.

Possible structures for providing redress

We have identified three possible options for structures for providing redress.

Institutional schemes

One approach to redress would be for institutions to adopt a common approach to what should be available under each element of redress, how allegations of abuse should be determined and how any variable elements of redress should be calculated. This approach would be the quickest

and easiest to implement. However, many survivors do not want to have to go to the institution in which they were abused to seek redress, some institutions no longer exist and many survivors were abused at more than one institution.

To achieve equal or fair treatment between survivors and to avoid survivors having to apply to the institution in which they were abused or make more than one application for redress, it is necessary to devise a structure for redress that provides an independent 'one-stop shop' for survivors – that is, it requires all institutions to participate in one redress process.

National or state and territory schemes

It is apparent that governments must participate in the redress process to meet claims of survivors abused in government institutions. Beyond this, however, it is likely that substantial government leadership will be required to establish a redress process in which governments and non-government institutions will participate.

Options are a national redress scheme or separate state and territory schemes. There are arguments in favour of a national scheme, but there are also complications that arise from the different starting points of the different states and territories in coming to a single national redress scheme. These differences probably could be reconciled, but it is unlikely to be a quick or easy process to negotiate.

There are also benefits and risks in recommending separate state and territory redress schemes.

The ideal position for survivors would be a single national redress scheme led by the Australian Government and with the participation of state and territory governments and non-government institutions. However, the ideal position will be difficult to reach if the Australian Government does not favour it or if the state and territory governments do not favour it.

If the ideal position is not favoured or reasonably achievable, each state or territory could establish a single redress scheme for the state or territory, with the participation of relevant governments (the Australian Government will need to participate in some schemes) and non-government institutions. The state and territory schemes could be established in accordance with the principles recommended by the Royal Commission, which would operate as a national framework or principles to achieve reasonable national consistency across the elements of redress (that is, direct personal response, counselling and psychological care and monetary payments) and redress scheme processes.

If there are to be state and territory schemes, there may be benefit in establishing a national advisory body to share information, encourage consistency, advise on implementation and discuss any concerns raised about particular schemes.

Past and future abuse

Our Terms of Reference require us to consider both past and future institutional child sexual abuse. We use 'past child sexual abuse' to refer to child sexual abuse that has already occurred or that occurs between now and the date that any reforms we recommend to civil litigation

commence. We use ‘future child sexual abuse’ to refer to child sexual abuse that occurs on or after the date that any reforms we recommend to civil litigation commence.

Many of the difficulties that survivors have encountered in trying to obtain adequate redress to date, whether through redress schemes or civil litigation, have arisen from the power imbalance between institutions and survivors. If any reforms we recommend to civil litigation are adopted, they may contribute to a substantial change in this power balance.

A redress scheme for future abuse may be unnecessary if recommendations are made and adopted that make it more likely that survivors can recover damages at common law and if we make recommendations under other parts of our Terms of Reference that aim to minimise the occurrence of future abuse. It might also be difficult to identify with confidence now what might be sought by survivors long into the future.

Children

Some children, or parents or guardians on their behalf, will wish to seek redress or compensation for institutional child sexual abuse while the victim is still a child. It is unlikely that there will be many applications to a redress scheme made by or on behalf of those who are still children, as children are more likely to be able to obtain compensation through civil litigation. However, there is no reason why children could not be accommodated within the sort of structures and approaches raised in this consultation paper.

We welcome submissions that discuss the issues raised in Chapter 2.

In particular:

- we seek the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternative approach
- we welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse.

Data

To date, very little data on redress and compensation paid to victims of child sexual abuse in institutions in Australia have been publicly available. To address this gap and to improve our understanding of redress outcomes to date, we have collected data from a number of sources, often under summonses or notices to produce.

We set out the sources of the data we have obtained and then present our analysis of different datasets.

We obtained claims data under notice from governments, Catholic Church Insurance Ltd (CCI), and the Eastern and Southern Territories of The Salvation Army. The data cover claims of child sexual abuse resolved in the period from 1 January 1995 to 30 June 2014. The data cover claims resolved through litigation, out-of-court settlement and otherwise.

The claims data are analysed as follows:

- number of claims by year of resolution (Table 3 and Figure 1)
- compensation in real dollars (2013) by years of claim resolution, including the mean (or average), median, minimum and maximum payments, and in 20 per cent payment bands (Table 4 and Figures 2 and 3).

We obtained data on key elements of the following government redress schemes:

- Redress WA and WA Country High School Hostels ex gratia scheme
- Queensland ex gratia scheme
- Tasmanian Abuse in Care ex gratia scheme
- South Australian payments under *Victims of Crime Act 2001* (SA).

We obtained data of particular relevance to redress and civil litigation from our private sessions held between 7 May 2014 and 31 August 2014. The private sessions data are analysed as follows:

- abuse by number of institutions (Table 10), which shows how many private session attendees reported abuse in one institution, two institutions and three or more institutions
- abuse by institution type (Table 11) which shows the types of institutions in which private session attendees reported they were abused.

Direct personal response

Many survivors of child sexual abuse in an institutional context have told us how important it is to them, and their sense of achieving justice, that the institution makes a genuine apology to them, acknowledges the abuse and its impacts on them and gives a clear account of steps the institution has taken to prevent such abuse occurring again. Many survivors also want an opportunity to meet with a senior representative of the institution to tell their story. They want a senior representative of the institution to understand the impacts of the abuse on them.

Some survivors have had positive experiences when engaging with the institution in which they were abused; others have not. It is clear from many of our private sessions that this direct personal response from the institution can be a very important step in providing redress for a survivor.

A personal response can only come from the institution. An apology and acknowledgment from the institution, or a meeting with senior representatives of the institution, must involve the institution itself.

Principles for an effective direct personal response

The following principles may be appropriate for an effective direct personal response:

- Re-engagement between a survivor and institution should only occur if, and to the extent that, a survivor desires it. Some survivors will want to re-engage with the institution in which they were abused. Other survivors may not want to engage or interact with the institution at all.

- Institutions should make clear what they are willing to offer and provide by way of direct personal response. They should ensure that they are able to provide what they offer. Further harm may be caused to survivors when institutions are unclear about what they are willing to provide or fail to provide what they offer.
- At a minimum, all institutions should offer and provide on request by a survivor:
 - an apology
 - an opportunity to meet with a senior representative of the institution
 - an assurance as to steps taken to protect against further abuse.

These are three elements of any direct personal response that our work to date indicates are essential. Every institution should be able to provide at least this level of response.
- In offering direct personal response, institutions should try to be responsive to survivors' needs. There is no 'one size fits all' approach to an appropriate personal response. Institutions should recognise the diversity of survivors and their needs in terms of a direct personal response. They should be responsive to those needs where possible.
- Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response. Some institutions currently offer a broad range of services to survivors, including:
 - assistance with gaining access to records
 - family tracing and family reunion
 - memory projects
 - collective forms of direct personal response such as memorials, reunions and commemorative events
 - culturally appropriate collective redress for Aboriginal and Torres Strait Islander survivors.
- Direct personal response should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors. Institutional staff may also require cultural awareness or sensitivity training to support particular survivor groups.
- Institutions should welcome feedback from survivors about the direct personal response they offer and provide. This will help to ensure that the direct personal response is as effective as possible in meeting survivors' needs and expectations.

Interaction between a redress scheme and direct personal response

An appropriate personal response can only be provided by the institution and cannot be provided through a redress scheme independent of the institution. An independent redress scheme could facilitate the provision of the direct personal response. For survivors who seek a written apology but wish to have no further contact with the institution, an independent redress scheme may be able to convey their request to the institution so that they do not need to have any further contact with it themselves.

Any other forms of direct personal response would require direct contact between the survivor and the institution. A redress scheme could facilitate the pursuit of a direct personal response by offering survivors the choice between having their details passed on to the institution with a request that the institution contact them directly or being given the contact details of the relevant person in the institution so that the survivor can initiate contact with the institution.

We welcome submissions that discuss the issues raised in Chapter 4, including the principles for an effective direct personal response and the interaction between a redress scheme and direct personal response.

Counselling and psychological care

The effects of child sexual abuse on mental health functioning have been well documented. These effects are many and varied and affect survivors in many ways including:

- at the individual level: mental health and physical health
- at the interpersonal level: emotional, behavioural and interpersonal capacities
- at the societal level: quality of life, opportunity.

Many survivors will need counselling and psychological care from time to time, throughout their lives. Survivors' needs for counselling and psychological care should be singled out from the broader range of needs and addressed through redress as a necessary part of ensuring justice for victims.

Principles for counselling and psychological care

The following principles may be appropriate for the provision of counselling and psychological care:

- Counselling should be available throughout a survivor's life. The trauma associated with sexual abuse is not a specified medical condition that can be cured at a specific point in time so that it will not reoccur.
- Counselling should be available on an episodic basis. Counselling is not necessarily needed continuously throughout a survivor's life.
- Survivors should be allowed flexibility and choice. Different groups of survivors have differing needs in terms of counselling and psychological care. Survivors also have differing needs at an individual level.
- There should be no fixed limits on services provided to a survivor. The needs of survivors are complex and varied and there should be no fixed limit on the number of counselling sessions available to a survivor per episode of care.
- Psychological care should be provided by practitioners with the right capabilities to work with complex trauma clients.
- There should be suitable ongoing assessment and review. For good clinical outcomes, and to appropriately target limited resources, a suitable process of initial assessment and ongoing review is required for each episode of counselling or psychological care.
- Counselling and psychological care should be available through redress for family members if it is necessary for the survivor's own treatment and there are no other sources of funding available.

Current services and service gaps

There are many services that currently provide counselling and psychological care to survivors.

Most members of the general population will access mainstream services as an initial point of contact for assistance to address their psychosocial needs, whether or not these issues are associated with childhood sexual abuse. These services include in-patient, out-patient and community-based mental health services, alcohol and drug rehabilitation services, and primary health services.

The Australian Government supports two primary health care initiatives that may be of particular use to survivors, principally through funding under Medicare. The Australian Government also supports specialist psychiatric services by providing unlimited funding through Medicare for these services.

There are many specialist services, most of which receive extensive government funding. Specialist services include sexual assault services, which provide specialised and targeted therapeutic care for victims of sexual assault; support services for adults who, as children, were in out-of-home care, including Former Child Migrants; and Aboriginal and Torres Strait Islander organisations, which provide support targeted at Indigenous people, particularly members of the Stolen Generations.

Some institutions provide counselling and psychological care as part of the redress they provide to survivors.

Despite the many services currently assisting survivors with counselling and psychological care, key gaps are as follows:

- resource limitations of specialist services, particularly specialist sexual assault services
- restrictions on access to Medicare, including the need for ‘an assessed mental disorder’, a GP referral and Mental Health Treatment Plan, the focus on shorter-term interventions and the charging of gap fees
- gaps in expertise, including where practitioners do not have the right capabilities to work with complex trauma clients
- gaps in services for specific groups, including for survivors in regional and remote areas and Indigenous survivors.

Principles for supporting counselling and psychological care through redress

The following principles may be appropriate for supporting the provision of counselling and psychological care through redress:

- Redress should supplement existing services rather than displace or compete with them. It may be counterproductive to the quality and choice of counselling and psychological care available to survivors to put pressure on governments to redirect funding from existing services into a stand-alone counselling scheme provided through redress.

- Redress should provide funding, not services. A redress scheme would not establish its own counselling and psychological care service for survivors. By providing funding, flexibility and choice for survivors is supported.
- Redress should fund counselling and psychological care as needed by survivors. Funding should be provided to service providers as survivors need care rather than as a lump-sum component of a monetary payment to individual survivors.
- Institutions should fund the counselling and psychological care where possible. Our Terms of Reference refer to the 'provision of redress by institutions'. A case can be made for full public provision of counselling and psychological care, but it may be necessary to recognise government funding of existing services and look primarily to non-government institutions to provide the funding for supplementing services through redress.

Options for service provision and funding

There are a number of options for ensuring that survivors' needs for appropriate counselling and psychological care are met.

Public provision of counselling and psychological care could be expanded by substantially expanding Medicare-funded services. To address the difficulties that survivors may experience with Medicare, a number of changes could be made to Medicare – for example, removing the need for 'an assessed mental disorder', a GP referral and Mental Health Treatment Plan, and the cap on services. There are precedents for these changes to Medicare. However, this would require services to be made available through Medicare based on a person's status as an eligible survivor, not based only on need. We acknowledge the Australian Government's position that equal and universal access to medical services based on clinical need is a fundamental principle of Medicare.

The public provision of counselling and psychological care could be expanded by establishing a dedicated stand-alone Australian Government scheme. While this approach would also single out survivors based on where the abuse occurred, it would not interfere with the principle of universality under Medicare. There are examples of existing stand-alone Australian Government schemes.

Another option is to create a trust fund as part of the redress scheme to hold funds to be used to supplement existing services and fill service gaps to ensure that survivors' needs for counselling and psychological care are met. A trust fund could take actions to supplement existing services and fill service gaps, including by improving survivors' access to Medicare; exploring with state-funded specialist services whether the trust could provide funding to increase the availability of services and reduce waiting times for survivors; and addressing gaps in expertise and geographical and cultural gaps. As an essential last resort, the trust fund could also fund counselling and psychological care, particularly for survivors whose entitlements under Medicare have been exhausted or whose needs for counselling and psychological care cannot otherwise be met.

We welcome submissions that discuss the issues raised in Chapter 5, including the principles for counselling and psychological care, existing services and service gaps and the principles for supporting counselling and psychological care through redress.

In particular:

- we seek the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors
- we welcome submissions on the relative effectiveness and efficiency of the options in meeting survivors' needs.

Monetary payments

A monetary payment is a tangible means of recognising a wrong that a person has suffered. A redress scheme for survivors should include a monetary payment.

Purpose of monetary payments

The purpose or meaning of ex gratia payments is not always easy to identify.

Identifying and clearly stating the purpose of ex gratia payments in a redress scheme is important in:

- helping claimants, institutions and other participants understand the purpose of the scheme
- informing choices about the processes that should be adopted for the scheme
- helping claimants to understand what any payment they are offered is meant to represent and to assess whether or not they should accept any payment.

The purpose of a monetary payment should have some connection with the amount of the monetary payment.

Monetary payments under other schemes

Any monetary payments offered under a new scheme will be assessed in the context of what has gone before, including under former and current state government schemes in Tasmania, Queensland, Western Australia and South Australia; non-government institution schemes such as Towards Healing, Melbourne Response and the Salvation Army Eastern Territory scheme; statutory victims of crime compensation schemes; and overseas schemes such as the Irish Residential Institutions Redress Scheme. The claims data also provide information about monetary payments to date.

These schemes have assessed monetary payments on a range of bases and provided a range of minimum, maximum and average payments. Almost all of these schemes cover types of abuse other than sexual abuse, including physical abuse and neglect.

For example:

- the Tasmanian Government scheme made 1,848 payments, with a minimum payment of \$5,000, a maximum payment of \$60,000 and an average payment of \$30,000
- the Queensland Government scheme made 7,168 payments, with a minimum payment of \$7,000, a maximum payment of \$40,000 and an average payment of \$13,000
- the larger Western Australian Government scheme, Redress WA, made 5,302 payments, with a minimum payment of \$5,000, a maximum payment of \$45,000 and an average payment of \$23,000
- as at 16 June 2014, the South Australian Government scheme had made 82 payments, with an average payment of \$14,400
- according to the data summonsed by the Royal Commission, under Towards Healing 881 known payments were made between 1 January 1995 and 30 June 2014, with an average payment of \$48,300
- according to the data summonsed by the Royal Commission, under the Melbourne Response 310 known payments were made between 1 January 1995 and 30 June 2014, with an average payment of \$38,800
- according to data summonsed by the Royal Commission, The Salvation Army Eastern and Southern Territories made 478 known payments between 1 January 1995 and 30 June 2014, with an average payment of \$49,100
- maximum payments available under statutory victims of crime compensation schemes range from \$15,000 to \$75,000
- as at 17 December 2014, the Irish Residential Institutions Redress Scheme had made some 15,547 payments, with the largest payment being €300,500 (around \$423,000 in Australian dollars based on January 2015 exchange rates) and an average payment of €62,237 (around \$88,000 in Australian dollars based on January 2015 exchange rates).

A possible approach

Assessment of monetary payments

In our consultations to date, there has been strong support for adopting a table or matrix that would take account of the severity of the abuse and the impact of abuse. There was also recognition that there may be other aggravating factors that should be considered.

We have no fixed view on what form a table or matrix should take at this stage. A possible table or matrix could provide for the assessment of severity of abuse, severity of impact and distinctive institutional factors as follows:

Table ES1: Possible table/matrix for assessing severity of abuse, severity of impact and distinctive institutional factors

Factor	Value
Severity of abuse	1-40

Impact of abuse	1-40
Distinctive institutional factors	1-20

There is research literature on circumstances that may affect each of factors and how they can be evaluated.

Amounts of monetary payments

In our consultations to date, participants have found it difficult to nominate a maximum amount for monetary payments. Many participants also grappled with the issue of affordability.

We have no fixed view on what the payments should be at this stage. For the purposes of this consultation paper, we commissioned actuarial modelling of the following possibilities, each with a minimum payment of \$10,000 and:

- a maximum payment of \$100,000
- a maximum payment of \$150,000
- a maximum payment of \$200,000.

For each of these maximum payment levels, our actuarial advisers have modelled how payments could be distributed to achieve average payments of \$50,000, \$65,000 or \$80,000.

Monetary payments at these levels would be higher than the amounts available under previous state government redress schemes, both at the minimum, maximum and average amounts.

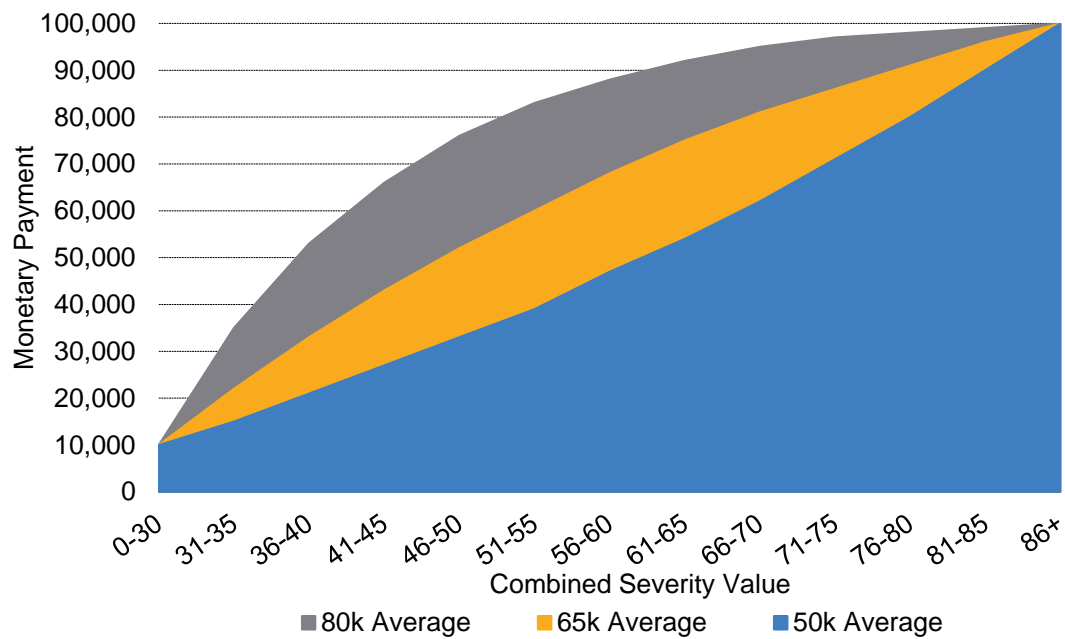
Actuarial modelling

We are publishing Finity Consulting Pty Limited's actuarial report to us in conjunction with releasing this consultation paper so that all interested parties can understand the detail of the actuarial advice that has informed our work on monetary payments and funding. It is published on the Royal Commission's website. Finity Consulting have used a variety of data for their modelling, particularly detailed data from Redress WA.

For the purpose of looking at a possible distribution of payments, the total number of eligible survivors who will make a claim for payment under a redress scheme has been estimated to be 65,000.

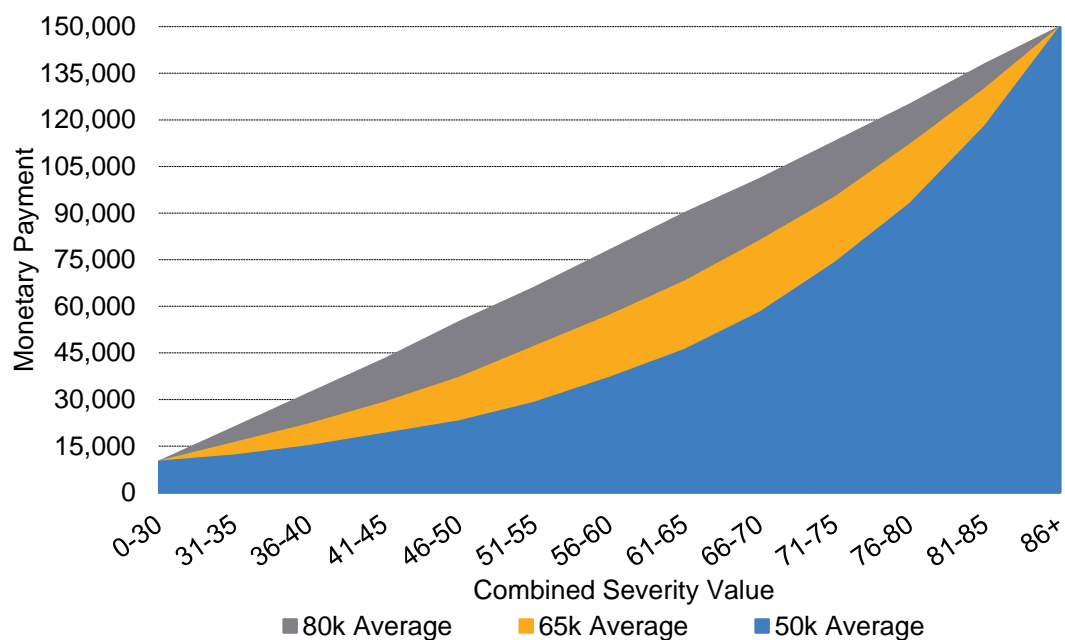
The chart below shows the possible spread of payments when the maximum payment is set at \$100,000 and the average payment is \$50,000 (blue), \$65,000 (yellow) or \$80,000 (grey).

Figure ES1: Possible payment spread assuming a maximum payment of \$100,000



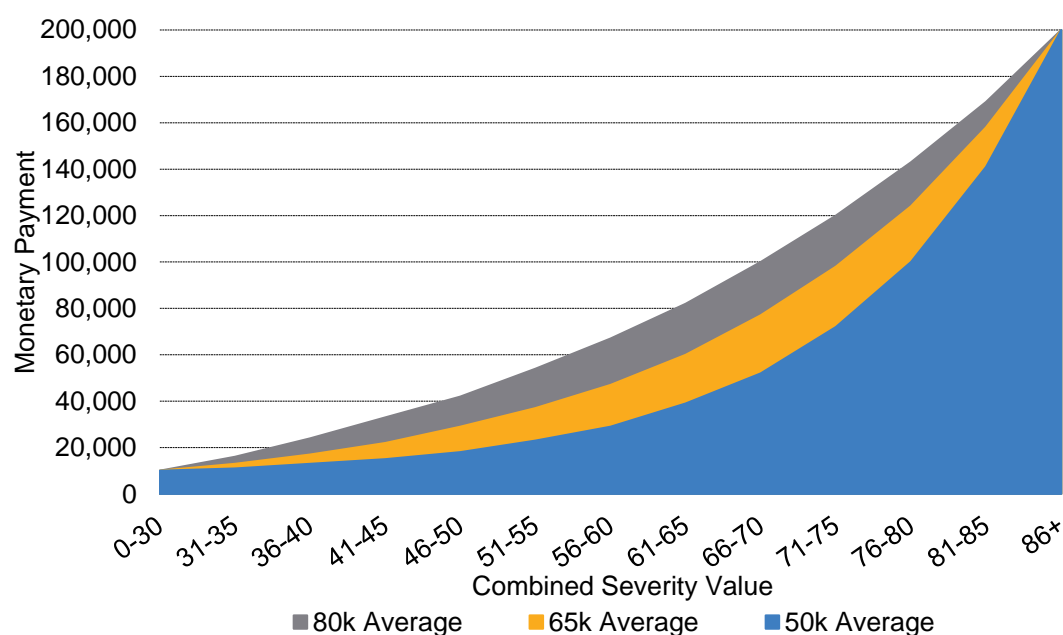
The chart below shows the possible spread of payments when the maximum payment is set at \$150,000 and the average payment is \$50,000 (blue), \$65,000 (yellow) or \$80,000 (grey).

Figure ES2: Possible payment spread assuming a maximum payment of \$150,000



The chart below shows the possible spread of payments when the maximum payment is set at \$200,000 and the average payment is \$50,000 (blue), \$65,000 (yellow) or \$80,000 (grey).

Figure ES3: Possible payment spread assuming a maximum payment of \$200,000



Different maximum payments can be set without affecting the total cost of payments – that is, the cost of payments is affected by the average cost rather than the maximum cost. A scheme with an average payment of \$65,000 will have the same total cost of payments, regardless of whether the maximum payment is set at \$100,000, \$150,000 or \$200,000.

Within any given range of minimum and maximum payments, the higher the average payment, the greater the relevant proportion of total payments will be directed to those *less seriously* affected by abuse – that is, those with a lower total assessment determined under the table or matrix. In contrast, the lower the average payment the greater the relative proportion of total payments will be directed to those *most seriously* affected by abuse – that is, those with a higher total assessment determined under the table or matrix.

Other payment issues

Survivors may experience difficulties in receiving lump-sum payments that are much larger than the amounts of money they are used to handling. However, many survivors want to receive a lump-sum payment. A redress scheme could provide an option for monetary payments to be paid to survivors in instalments rather than as a lump sum if this option would be taken up by many survivors. It would involve additional administrative costs for the scheme.

Many survivors have already received redress through previous and current government and non-government redress schemes, including statutory victims of crime compensation schemes. Some survivors have received monetary payments through civil litigation. In our consultations to date, there has been support for the principle that those who have already received monetary payments should remain eligible to apply under a new scheme, provided that any previous payments are taken into account.

We welcome submissions that discuss the issues raised in Chapter 6, including the purpose of monetary payments.

In particular, we welcome submissions on:

- the assessment of monetary payments, including possible tables or matrices, factors and values
- the average and maximum monetary payments that should be available through redress
- whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme
- the treatment of past monetary payments under a new redress scheme.

Redress scheme processes

For a redress scheme to work effectively for all parties, its processes must be efficient. They must be focused on obtaining the information required to determine eligibility and calculate monetary payments, and then making that determination and calculation fairly and in a timely manner. Previous and current redress schemes provide many examples of effective and less effective processes.

Eligibility for redress

An effective redress scheme must clearly define eligibility for the purposes of the scheme. Eligibility refers to the criteria that determine whether a person is able to obtain redress through the scheme. This requires consideration of:

- the types of institutions included
- the connection required between the institution and the abuse
- the type of abuse included
- any cut-off date by which the abuse must have occurred
- whether those who have already received redress may apply.

Duration of a redress scheme

Whether a redress scheme is open-ended or has a fixed closing date has significant implications for survivors who may be eligible for the scheme and for those responsible for funding and administering the scheme. Given that fixed closing dates create significant difficulties for survivors and particularly risk excluding eligible survivors, a scheme should not be subject to a fixed closing date.

Publicising and promoting the availability of the scheme

A key feature of an effective redress scheme is a comprehensive communication strategy. This strategy should ensure that the availability of the scheme is widely publicised and promoted. Particular communication strategies are needed for people who might be more difficult to reach.

Application process

The application process for redress should be as simple as possible while obtaining the information necessary to assess eligibility and determine the amount of any monetary payment. A scheme may require additional material or ‘evidence’ and additional procedures to determine the validity of claims if it has higher maximum or average payments available. A scheme should fund a number of support services and community legal centres to assist applicants to apply for redress.

Institutional involvement

Decisions about redress should be made by a body independent of the institutions. The scheme should provide any institution that is the subject of an allegation with details of the allegation. It should seek from the institution any relevant records, information or comment. If an allegation is made against a person who is still involved with the institution, the institution may have to act on the allegation independently of any issues of redress.

Standard of proof

The standard of proof used in a scheme determines the degree to which a decision maker must be satisfied of an allegation in order to accept it as true. Current and previous redress schemes have adopted different standards of proof. There are arguments against adopting a standard of proof used in civil litigation. A plausibility test or a test of reasonable likelihood may be more appropriate.

Decision making on a claim

A national or separate state and territory redress schemes should provide sufficient independence of decision making from the institutions in which abuse occurred. Administrative decision making, with levels of delegation, seems appropriate. A mix of legal, medical, psychosocial and similar skills, including experience in issues relating to institutional child sexual abuse, is likely to ensure that properly informed decisions are made.

Offer and acceptance of offer

Once a decision has been made on an application, the applicant should be provided with a statement of decision. The scheme could encourage (and pay for) applicants to have an additional consultation with their support service or community legal centre before deciding whether or not to accept the offer. If a deed of release is to be required on acceptance of an offer, the scheme should require (and pay for) applicants to receive legal advice before they accept the offer. Offers should remain open for acceptance for at least three months.

Review and appeals

Review and appeals processes for redress schemes appear to depend in large part on how they are established. A redress scheme could offer internal review to the applicant. It may be

appropriate to leave external review or appeal rights for the decision of those establishing the scheme.

Deeds of release

We have heard very different views on whether or not a deed of release should be required. At the very least, an applicant should be required to agree that the value of any redress should be offset against any common law damages and that, if common law damages are obtained, the applicant will cease to be eligible for any counselling and psychological care through redress. This approach may not go far enough. If a deed of release is required, the scheme should fund a legal consultation for the applicant before the applicant decides whether or not to accept the offer of redress and sign the deed of release. There should be no confidentiality obligation imposed on survivors. The scheme would be subject to any relevant privacy obligations.

Support for survivors

A redress scheme should offer counselling during the scheme from assistance with the application through the period when the application is being considered to the making of the offer and the applicant's consideration of whether or not to accept the offer. A redress scheme should also consider offering a limited number of counselling sessions for family members, particularly in cases where survivors are disclosing their abuse to their family for the first time in the context of the redress scheme.

Transparency and accountability

A redress scheme should be transparent and accountable, including by:

- making its processes and timeframes as transparent as possible
- allocating each applicant to a particular contact officer who they can speak to with any queries
- operating a complaints mechanism and welcoming any complaints or feedback
- publishing data, at least annually, about applications and their outcomes.

Interaction with alleged abuser, disciplinary process and police

Past and current redress schemes have adopted different approaches to whether and how they interact with the alleged abuser, institutional disciplinary processes and the police. If any alleged abusers are, or may be, still working or otherwise involved with the institution, the institution should pursue its usual investigation and disciplinary processes when it receives advice from the scheme about the allegations. The scheme must comply with any legal requirements to report or disclose the abuse. A scheme should also seek to cooperate with any reasonable requirements of the police.

We welcome submissions that discuss the issues raised in Chapter 7, including any aspects of redress scheme processes.

In particular, we welcome submissions on:

- eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included
- the appropriate standard of proof
- whether or not deeds of release should be required.

Funding redress

Funding required for redress

Funding for redress would require funding sufficient for the counselling and psychological care and monetary payments elements of redress, as well as the administration costs of the redress scheme. Funding also needs to take account of amounts already spent on providing redress to the extent that these would reduce funding requirements under a new scheme.

Our actuarial advisers have conducted modelling of the funding needs across states and territories. They have estimated the breakdown between government-run institutions and non-government-run institutions.

Our actuarial advisers have not been able to estimate the cost of counselling and psychological care already provided to survivors through existing support services. If this amount can be estimated, it should be deducted from the counselling and psychological care amounts below.

For the purpose of this consultation paper, we have included the modelling based on an average monetary payment of \$65,000. The modelling of costs based on average monetary payments of \$50,000 and \$80,000 is set out in the actuarial report, which is published on the Royal Commission's website. The monetary payment amounts below have been adjusted to take account of amounts already spent on providing redress under past and current redress schemes.

The following table shows the total estimated cost by jurisdiction and by government and non-government institutions.

Table ES2: Breakdown of estimated total costs for redress by jurisdiction and government- and non-government-run institutions

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of estimated eligible claimants (total 65,000)									
Gov	7,070	6,130	3,020	2,090	1,310	430	230	180	20,460
Non-gov	15,920	12,850	6,000	4,270	3,180	1,110	880	330	44,540
Counselling and psychological care (\$ million)									
Gov	39	34	17	11	7	2	1	1	113

Non-gov	88	71	33	23	17	6	5	2	245
Monetary payments adjusted for past payments (average \$65,000) (\$ million)									
Gov	452	384	132	52	79	-8	14	11	1,115
Non-gov	969	779	369	266	193	69	43	21	2,710
Administration (\$ million)									
Gov	21	18	9	6	4	1	1	1	61
Non-gov	48	39	18	13	10	3	3	1	134
TOTALS (\$ million)									
Total gov	512	436	158	69	90	-4	16	13	1,289
Total non-gov	1,104	888	420	303	220	79	51	24	3,088
GRAND TOTAL	1,616	1,324	578	372	309	74	67	37	4,378

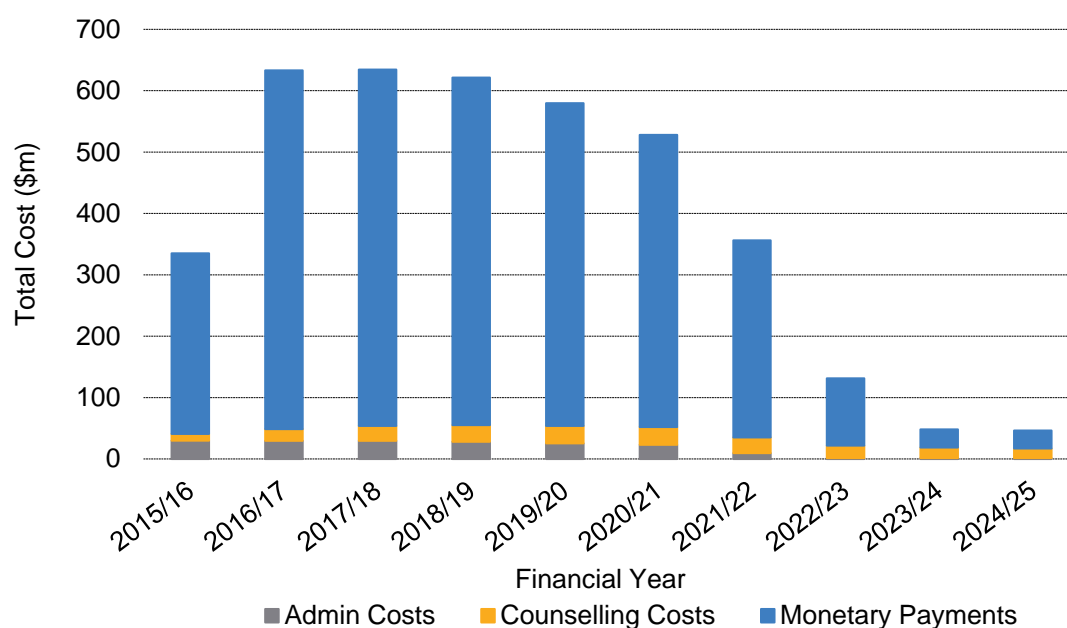
Due to rounding, numbers presented in this table may not add up precisely to the totals provided.

Australian Government funding contributions may be relevant to:

- government-run institutions, if the Australian Government ran an institution or under its broader social or regulatory responsibilities
- non-government run institutions, under its broader social or regulatory responsibilities.

Clearly the total funding would not be required immediately upon establishment of a scheme. Our actuarial advisers have modelled a possible pattern of claims and funding requirements as follows.

Figure ES4: Estimated annual cost of the scheme over the first 10 years



This modelling of the funding needs is based on the estimate of 65,000 eligible claimants. Our actuarial advisers have also shown the impact on costs if there are 45,000 or 85,000 eligible claimants. This is set out in their actuarial report, which is published on the Royal Commission's website.

Possible approaches to funding redress

Our Terms of Reference refer to the 'provision of redress by institutions'. A reasonable starting point for funding redress may be that the institution in which the abuse occurred should fund the cost of:

- counselling and psychological care, to the extent it is provided through redress
- any monetary payment
- administration in relation to determining the claim.

We know that some institutions in which abuse is alleged to have occurred no longer exist. Where those institutions were part of a larger group of institutions, or where there is a successor to those institutions, it might be reasonable to expect the larger group of institutions or the successor institution to fund the costs described above.

The breakdown in funding requirements between government and non-government institutions in the actuarial modelling takes account only of whether or not an institution was run by a government. However, there are other bases on which governments could be considered responsible for institutions and conduct within them.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. The broad social failure to protect children across a number of generations makes clear the pressing need

to provide avenues through which survivors can obtain appropriate redress for past abuse. In addition to this broader social responsibility, governments may also have responsibilities as regulators and as guardians of children.

There will be cases where institutions in which abuse occurred no longer exist and they were not part of a larger group of institutions or there is no successor institution. There will also be cases where institutions that still exist have no assets from which to fund redress.

Possible options for who might fulfil the 'funder of last resort' role are the institutions that fund redress (both government and non-government), or governments, or some combination of the two.

Arguments can be made in support of governments being funders of last resort on the basis of governments' social, regulatory and guardianship responsibilities. The extent to which governments might take on some or all of the responsibility for funding of last resort might depend in part upon actions they have already taken on redress.

Our actuarial advisers have estimated the adjustments to the government and non-government shares of the estimated total costs for redress if governments were to act as funders of last resort.

Table ES3: Breakdown of estimated total costs for redress by jurisdiction and government- and non-government-run institutions adjusted for governments as funders of last resort

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of estimated eligible claimants (total 65,000)									
Gov	10,530	8,590	4,280	2,940	2,040	690	420	240	29,730
Non-gov	12,460	10,390	4,740	3,420	2,450	850	690	270	35,270
Counselling and psychological care (\$ million)									
Gov	58	47	24	16	11	4	2	1	164
Non-gov	69	57	26	19	13	5	4	1	194
Monetary payments adjusted for past payments (average \$65,000) (\$ million)									
Gov	677	544	214	107	126	9	27	15	1,718
Non-gov	744	619	287	211	145	52	31	17	2,107
Administration (\$ million)									
Gov	32	26	13	9	6	2	1	1	89
Non-gov	37	31	14	10	7	3	2	1	106
TOTALS (\$ million)									
Total gov	766	617	251	132	143	15	30	17	1,971

Total non-gov	850	707	328	240	166	60	37	20	2,407
GRAND TOTAL	1,616	1,324	578	372	309	74	67	37	4,378

Due to rounding, numbers presented in this table may not add up precisely to the totals provided.

Different starting points between the states and territories might influence contributions to funding for redress. It seems that some flexibility is likely to be needed in order to allow adequate funding for redress to be secured efficiently and with appropriate recognition for what has already been done.

The following principles may provide some guidance for implementation:

- Whether a single national redress scheme or a system of separate state and territory redress schemes is favoured, the relevant government or governments could propose a scheme structure that would enable the scheme to make decisions or recommendations about eligibility for the scheme and any amount of monetary payment to be offered.
- Non-government institutions that are expected to be subject to a number of claims for redress could be invited to participate with the relevant government or governments in developing the scheme. These non-government institutions could be participants in the scheme from the start.
- Other non-government institutions could participate in the scheme if and when either they or the scheme receive an application for redress for abuse in the relevant institution.
- The relevant government and non-government institutions that are initial participants in the scheme from the start could fund the administrative costs of the scheme. Other non-government institutions that participate in the scheme, if and when an application for redress in respect of abuse in relevant institution is received, could pay a reasonable fee for use of the redress scheme.
- If a system of separate state and territory redress schemes is favoured, in states and territories where the Australian Government has or had particular regulatory responsibility for some children the Australian Government and the relevant state or territory government could negotiate a reasonable contribution by the Australian Government to offset the funding responsibilities of the state or territory government.
- If a system of separate state and territory redress schemes is favoured, where the Australian Government itself operated an institution it could participate in the relevant state or territory scheme just as any non-government operator of an institution would participate.
- Each government could be a funder of last resort for its scheme or it could negotiate with or require non-government institutions to contribute funding of last resort.
- Governments could also determine whether or not to require non-government institutions, or particular types of non-government institutions, to fund a redress scheme.
- Governments would also have to determine how to fund their contributions to redress.

We welcome submissions that discuss the issues raised in Chapter 8, including the modelling of required funding and the possible approaches to funding redress.

In particular, we seek the views of the Australian Government, state and territory governments and institutions on:

- appropriate funding arrangements
- appropriate funder of last resort arrangements
- the level of flexibility that should be allowed in implementing redress schemes and funding arrangements.

Interim arrangements

Commissioners have agreed to make findings and recommendations on redress and civil litigation by the middle of 2015. However, no matter how quickly we report, it will inevitably take some time to implement our recommendations. The amount of time may be greater if larger or more complex structures are favoured. There is also the possibility that our recommendations may not be implemented, either nationally or in some states or territories.

It seems likely that additional recommendations might be required to guide institutions as to how they should provide redress either while any national or state and territory arrangements are being implemented or if such arrangements are not implemented.

We would expect that individual institutions should be able to adopt the principles and approaches we recommend generally. It may also be that some or many institutions could combine together to provide an interim scheme for redress.

Institutions may need additional guidance on some issues either until the structures we recommend for redress are implemented, or if they are not implemented.

Additional principles

Independence from the institution

A single national redress scheme or state and territory redress schemes would ensure that decision making on redress is independent of the institutions that the abuse occurred in. Until these structures are implemented, institutions will need to seek to achieve independence in decision making on any redress claims that they receive.

It seems likely that institutions would need to consider the following in seeking to achieve independence in an institutional redress process:

- they should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim

- if feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions
- they should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues
- they should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 4 in relation to meetings and meeting environments
- processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.

Cooperation on claims involving more than one institution

A single national redress scheme or state and territory schemes would ensure that a survivor's experiences of institutional abuse could be assessed in one redress process, even where the survivor had experienced abuse in more than one institution. Until these structures are implemented, institutions will need to seek to achieve a similar outcome in decision making on any redress claims that they receive.

This issue will clearly arise where a survivor alleges abuse in more than one institution. In these circumstances, with the survivor's consent, the institution's redress process should approach the other institutions named to seek cooperation on the claim. If the survivor consents and the relevant institutions agree, one process should assess the survivor's claim in accordance with the redress processes and under the table or matrix and amounts of monetary payments we finally recommend and allocate contributions between the institutions. If any institution no longer exists and has no successor, their share should be met by the other institution or institutions.

Counselling and psychological care

The option for supporting the provision of counselling and psychological care through redress by creating a trust fund to supplement existing services and fill service gaps would not be available in the absence of a 'one-stop shop' redress scheme. Institutions may not have the number of claims necessary to allow efficient pooling of contributions and individual institutional trust funds may have little capacity to supplement existing services or fill service gaps.

Through their redress processes, institutions could undertake to meet survivors' needs for counselling and psychological care. Institutions would also need to ensure that a survivor's need for counselling and psychological care is assessed independently of the institution.

Possible structures

In the absence of a national redress scheme or state and territory redress schemes, there may be structures that institutions could adopt in order to offer redress more effectively than through individual institutional redress schemes.

There is no legal impediment to institutions establishing cooperative arrangements on an on-going basis, rather than on an ad hoc basis as particular claims require cooperation. However, some institutions have told us that cooperation is unlikely in the absence of government leadership or direction. Unless governments join any cooperative effort, at least in relation to claims of abuse in government-run institutions, then a cooperative structure may have limited application.

Some level of coordination might be achieved through an independent entity offering a redress process on a fee-for-service basis. In order to offer an effective redress process, the entity would need to adopt the principles and approaches we recommend generally, as well as any relevant additional principles for institutions. Again, such an approach may have limited application if governments do not participate, at least for claims of abuse in government-run institutions.

Options for non-government institutions to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.

We welcome submissions that discuss the issues raised in Chapter 9, including the additional principles for interim arrangements and possible structures.

In particular, we seek the views of survivors, survivor advocacy and support groups and institutions on whether there are other issues on which direction or guidance might be required for interim arrangements.

Civil litigation

In Australia, the process for obtaining civil justice for personal injury is by an award of damages through successful civil litigation. Redress schemes may provide a suitable alternative to civil litigation for some or even many claimants, but they do not offer monetary payments in the form of compensatory damages obtained through civil litigation.

In considering possible reforms to civil litigation systems, we have focused on the issues that appear to be particularly difficult for survivors. In focusing on issues of particular significance for survivors, it may be possible to improve the capacity of the civil litigation systems to provide justice to survivors and in a manner at least comparable to that of other injured persons.

Limitation periods

Limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation. Given what we know about the average length of time that victims of child sexual abuse take to disclose their abuse, standard limitation periods are fairly clearly inadequate for survivors.

Options for reform are to remove limitation periods for actions relating to child sexual abuse altogether or to substantially extend them. There is also an issue as to whether any changes should apply prospectively only or retrospectively.

The Exposure Draft for the Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 (Vic), released on 24 October 2014 by the Victorian Department of Justice, would remove limitation periods altogether, including retrospectively.

If limitation periods are removed altogether, defendants may be required to defend proceedings without evidence that would have been available to them previously and in circumstances where the trial could not be fair. If limitation periods are removed altogether, an option is to include provision for the courts to stay proceedings for reasons of unfairness to the defendant.

Duty of institutions

A survivor will have a clear cause of action against the individual perpetrator or perpetrators of the abuse in the intentional tort of battery. Causes of action against an institution are considerably more difficult. Difficulties arise because civil litigation against the institution seeks to have the institution found liable for the deliberate criminal conduct of another person.

The legal bases for institutional liability for abuse currently available in Australia are:

- an action in negligence involving breach by the institution of a duty of care owed to the child. It will require proof of the existence of the duty and its breach; and that the breach caused the damage. The duty is a duty to take reasonable care. What is 'reasonable' is determined by reference to the standards applying at the time the duty is alleged to have been breached
- vicarious liability of the institution for torts committed by its employees while acting in the course of their employment. In Australia, this liability has been limited to apply only to the acts of 'employees' and it is unclear in Australian law when child sexual abuse might be found to have occurred 'in the course of employment'
- an action for breach of the institution's non-delegable duty to ensure that a third party takes reasonable care to prevent harm. This is a duty to ensure that reasonable care is taken by others. It is somewhat similar to vicarious liability, but it applies to the acts of independent contractors rather than employees. It is not clear that a non-delegable duty will extend to liability for the criminal acts of the third party.

The leading Australian case, *New South Wales v Lepore*, decided by the High Court in 2003, has left the law on vicarious liability and non-delegable duties in a somewhat uncertain state. Courts in Canada and the United Kingdom have adopted considerably broader approaches to finding institutions liable for institutional child sexual abuse.

Options for reform include:

- imposing an absolute liability on institutions so that institutions would be liable for the abuse regardless of any steps they had taken to prevent it
- imposing liability on institutions, unless the institution proves that it took reasonable precautions to prevent the abuse.

There is also an issue as to whether any changes should apply prospectively only or retrospectively.

Identifying a proper defendant

Survivors and their legal advisers have had difficulties in finding a proper defendant to sue. A survivor will always have a cause of action against the perpetrator of the abuse, but survivors may wish to sue the institution in which they were abused.

Much of the discussion of difficulties in finding the proper defendant to sue has focused on the absence of an incorporated body, particularly for some faith-based institutions. However, in some cases the difficulties for survivors may arise not so much from the absence of an incorporated body at the time the abuse occurred as from the passage of time between the occurrence of the abuse and the survivor wishing to commence civil litigation. Incorporation does not guarantee that an entity will survive for any particular period of time. Also, incorporation does not guarantee that an entity will have any assets to meet the claim.

In considering options for reform, it seems reasonably clear that the difficulties for survivors in identifying a correct defendant when they are dealing with unincorporated religious bodies should be addressed. It may be appropriate for state and territory legislation to be amended to provide that any liability of the religion or religious body that a statutory property trust is associated with for institutional child sexual abuse can be met from the assets of the trust and that the trust is a proper defendant to any litigation involving claims of child sexual abuse for which the religion or religious body is alleged to be liable. Alternatively, some religions or denominations might prefer to solve the problem in different ways, such as by providing a 'nominal defendant' that is to be a proper defendant to any claims of child sexual abuse.

A requirement for incorporation and insurance, particularly for small, temporary, informal unincorporated associations, may deter people from forming such associations, potentially losing the various sporting, cultural and other activities they provide in the community. However, it might be reasonable for state and territory governments to require that certain children's services that are authorised or funded by the government be provided only by incorporated entities and that those entities be insured.

Model litigant approaches

There is a general common law obligation on governments to act as 'model litigants'. The Australian Government and some state and territory governments have adopted written model litigant policies. Some states and territories have gone further in adopting principles for how they will handle civil litigation in relation to child sexual abuse claims.

The Productivity Commission has recently concluded that model litigant rules should not be extended to non-government litigants where there are power imbalances between the parties. While there might be no harm in non-government institutions choosing to comply with model litigant principles in responding to civil claims for institutional child sexual abuse, these principles may not be sufficiently specific to help institutions, and their lawyers, to respond more appropriately to such claims.

Both governments and non-government institutions that receive civil claims for institutional child sexual abuse would benefit from adopting more specific guidelines for responding to claims

for compensation in relation to allegations of child sexual abuse. Victoria's *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse* and New South Wales's Guiding Principles provide useful models to consider.

We welcome submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions on:

- the options for reforming limitation periods and whether any changes should apply retrospectively
- the options for reforming the duty of institutions and whether any changes should apply retrospectively
- how to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts
- whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed
- whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims
- whether any changes may have adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them.

1 Introduction

1.1 Terms of Reference

The Letters Patent provided to the Royal Commission into Institutional Responses to Child Sexual Abuse require that it ‘inquire into institutional responses to allegations and incidents of child sexual abuse and related matters’.

In carrying out this task, the Royal Commission is directed to focus its inquiries and recommendations on systemic issues but also recognise that its work will be informed by an understanding of individual cases. The Royal Commission must make findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse on children when it occurs.

Under paragraph (d) of the Terms of Reference we are given in the Letters Patent, we are required to inquire into:

what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

This requires consideration of the extent to which justice is, or has been, achieved in terms of both criminal justice and civil justice for those who suffer institutional child sexual abuse.

We are examining a range of criminal justice issues through our Criminal Justice Project.

In terms of civil justice, redress and civil litigation have emerged as issues of great importance both to those who have suffered institutional child sexual abuse and to institutions. Many survivors have raised these issues in private sessions, and we have examined them in a number of case studies.

In this consultation paper, we generally use ‘survivor’ rather than ‘victim’ to refer to those who suffer child sexual abuse in an institutional context. However, we acknowledge that ‘victim’ may be appropriate in addition to, or instead of, ‘survivor’ in some places.

1.2 Findings and recommendations

Commissioners have agreed to endeavour to make findings and recommendations on redress and civil litigation by the middle of 2015.

By reporting as early as possible on these issues, we are seeking to give survivors and institutions more certainty on these issues and enable governments and institutions to implement our recommendations to improve civil justice for survivors as soon as possible.

We have already obtained significant input on redress and civil litigation from a broad range of sources, as discussed in section 1.4 below.

In this consultation paper we set out the issues we have considered to date to do with how redress should be provided and civil litigation reformed to provide justice for victims. On some issues we think the way forward is fairly clear, while on other issues there are a range of options. We have not formed concluded views on any issues at this stage.

After we have received submissions responding to this consultation paper, we will hold a public hearing to allow invited interested parties to speak to their submissions and address questions from Commissioners. The public hearing will provide an opportunity for key topics and areas of disagreement to be examined publicly so that all interested parties can follow the debate.

Submissions to this consultation paper and the public hearing will help us to finalise our findings and recommendations so that we can submit our report on redress and civil litigation by the middle of 2015.

1.3 Redress and civil litigation

Throughout our consultations to date, we have used ‘redress’ to mean remedy or compensation. We recognise that redress can include monetary payments, provision of services, recognition, apologies and the like. However, we need to distinguish between monetary payments in the form of compensatory damages obtained through civil litigation, and monetary payments made under redress schemes. We use ‘redress’ in this paper to mean redress obtained outside of civil litigation.

During 2014 we published separate issues papers on each of civil litigation, redress schemes and statutory victims of crime compensation schemes. We wished to obtain detailed input on each of these topics. We also recognised that some stakeholders would have particular interest in only one or two of these topics.

However, we are satisfied that these issues need to be considered together. Our consideration of what is required for adequate redress is informed by our assessment of the effectiveness of civil litigation as a mechanism for providing justice for victims, and vice versa. Redress and civil litigation need to be considered together because they offer alternative avenues through which survivors may seek justice.

Both survivors and institutions need to be able to assess options for redress and civil litigation together. Potential claimants need to know their options in order to make an informed choice about whether to pursue litigation or to participate in an available redress scheme. Institutions need to understand likely civil litigation outcomes and costs in order to assess the value of alternative approaches through redress and their likely success.

This consultation paper addresses both redress and civil litigation. Our report in the middle of 2015 will also address both topics.

1.4 What we have done to date

Private sessions

When the Royal Commission was appointed, it was apparent to the Australian Government that many people (possibly thousands of people) would wish to tell the Royal Commission about their personal history of sexual abuse in an institutional setting when they were a child. As a consequence, the Commonwealth Parliament amended the *Royal Commissions Act 1902* to create a process called a 'private session'.

A private session is conducted by one or two Commissioners and is an opportunity for a person to tell their story of abuse in a protected and supportive environment. At 16 January 2015, the Royal Commission had held 2,847 private sessions and 1,478 people were waiting for one.

Written accounts are an alternative method for people affected by child sexual abuse to tell us of their experiences. At 16 January 2015, the Royal Commission had received 3,183 written accounts.

Many survivors have told the Royal Commission in private sessions or written accounts about their experiences in seeking redress through civil litigation, redress schemes or other avenues. These are an important source of information for us in understanding survivors' experiences of redress and what survivors consider is necessary to give them justice.

Public hearings

At 16 January 2015, the Royal Commission had held 21 public hearings or 'case studies'.

The decision to conduct a case study is informed by whether or not the hearing will advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes so that any findings and recommendations for future change that the Royal Commission makes will have a secure foundation.

In many of the 21 case studies to date, we have heard evidence relevant to redress and civil litigation. We refer to these case studies throughout this consultation paper. Our findings on individual case studies are published in separate reports. These are available on the Royal Commission's website.

Consultations

We have already conducted a wide range of public and private consultations on redress and civil litigation. This consultation paper is another important element in our continuing consultations.

Issues papers

At 16 January 2015, the Royal Commission had published seven issues papers on topics relevant to its Terms of Reference.

The issues papers most relevant to our work on redress and civil litigation are:

- *Issues paper 2 – Towards Healing*
- *Issues paper 5 – Civil litigation*
- *Issues paper 6 – Redress schemes*
- *Issues paper 7 – Statutory victims of crime compensation schemes.*

Interested parties are able to give us their views on issues raised by making submissions to issues papers. We have received a wide range of submissions to each issues paper. Some survivors have used submissions to tell us of their relevant experiences. We have also heard from a broad range of governments, regulators, institutions, survivor advocacy and support groups, academics and other interested parties. These submissions are an important source of information that has helped us to understand the many different perspectives on the issues raised.

Most of the submissions we receive responding to issues papers are published on the Royal Commission's website, unless:

- the author has expressly requested that their submission not be published
- the Royal Commission has made the decision not to publish a submission. The Royal Commission generally makes the decision not to publish a submission for procedural fairness reasons – for example, the submission may refer to an institution or make allegations about a person that are of such a nature that it would not be fair to publish the submission without giving that institution or person an opportunity to respond.

Table 1 lists the submissions we have received for each of the issues papers relevant to our work on redress and civil litigation, and the number of these submissions that are published on our website.

Table 1: Submissions on relevant Royal Commission issues papers

Issues paper	Date closed	No of submissions received	No of submissions published
2. Towards Healing	4 September 2013	57	23
5. Civil litigation	17 March 2014	47	41
6. Redress schemes	2 June 2014	108	86
7. Statutory victims of crime compensation schemes	30 June 2014	49	44
TOTAL		462	389

Private roundtables

Between September and November 2014, after our issues papers process on redress and civil litigation had concluded, we convened nine days of private roundtables. The private roundtables were conducted by the Chair, The Hon Justice Peter McClellan AM, and Commissioner Robert Fitzgerald AM.

These private roundtables allowed for more focused consultations with invited participants on key issues in relation to redress and civil litigation. They also provided a forum for participants to directly exchange views with each other.

In the private roundtables we heard from a wide range of participants, including survivor advocacy and support groups, governments, faith-based organisations, community service organisations, lawyers, insurers, actuaries and academics.

The private roundtables were not public events. We made clear to participants that the roundtables were not open to the public and that we would not publish any recordings or transcripts of them. We do not reference any individual contributions made at the private roundtables in this consultation paper.

We consider that the private roundtables were of great value to us in testing and refining our views. We particularly appreciate the time that participants gave in preparing for and attending the roundtables and the generosity and goodwill of their contributions to the discussions. We also encourage all of those who participated in the private roundtables to continue to give us the benefit of their experience and opinions by responding to this consultation paper.

Expert consultations

In addition to the private roundtables, we conducted some more targeted consultations with experts on particularly technical topics. These included consultations with the Insurance Council of Australia and some of their members, and with experts on counselling and psychological care.

Again, we consider that the expert consultations were of great value to us. We appreciate the time that participants gave to them and the generosity and goodwill of their contributions. We also encourage all those who participated in our expert consultations to continue to give us the benefit of their expertise and opinions by responding to this consultation paper.

Research projects

The Royal Commission has an extensive external research program. However, most of our research on redress and civil litigation has been conducted in-house and through consultations.

We commissioned one external research project that was particularly relevant to our work for redress on counselling and psychological care. We engaged the University of New South Wales to carry out a rapid evidence review, incorporating systematic review principles, to identify what existing research and other evidence tells us about the availability, modality and effectiveness of existing support services available to child and adult survivors of child sexual abuse. The research also looked at these issues in institutional contexts. It focused primarily on services providing therapeutic psychosocial support to survivors.

We have used the draft report provided in this research project in our work to date. Subject to this project satisfying our research governance and peer review requirements, the final report will be published on our website.

We also commissioned the University of New South Wales to undertake a scoping study of the existing broader support services network. This scoping study was designed to help us understand the broader (including non-therapeutic) support services that are currently available for survivors across Australia. Information was sought on the type of services offered, the eligibility criteria and any associated fees. The scoping study was undertaken in a relatively short period of time and relied upon public information available on the internet. It was not designed to identify every single service or the level and quality of services provided. We are publishing the scoping study on our website in conjunction with this consultation paper.

Obtaining information under summons

The Royal Commission has powers to issue summonses and Notices to Produce specified documents or data.¹

For our work on redress and civil litigation, we used these powers to obtain data and documents on:

- child sexual abuse claims resolved between 1 January 1995 and 30 June 2014 by the governments and institutions to which summonses or notices were issued
- government redress schemes
- statutory victims of crime compensation schemes.

The data included de-identified records of the assessment of each application to the Western Australian Government's redress scheme, Redress WA. These data were particularly useful for the actuarial advice we obtained.

Some data obtained under other notices have also been of use to us in relation to redress and civil litigation.

Our analysis of the data we obtained is set out in Chapter 3.

Actuarial advice

We have engaged Finity Consulting Pty Limited (Finity) to give us actuarial advice on designing and funding redress. Ms Estelle Pearson, a Principal and Managing Director of Finity, is leading this work.

We are publishing the Finity actuarial report to us in conjunction with releasing this consultation paper so that all interested parties can understand the detail of the actuarial advice that has informed the relevant parts of this consultation paper.

1.5 Next steps

We seek input from all interested parties on the issues we raise in this consultation paper. This is an important step for us in testing relevant views and raising options for further input.

We have no settled views at this stage. We have drawn attention to some particular issues, but we welcome submissions on any or all of the issues raised in this consultation paper.

We invite all interested parties to make written submissions responding to this consultation paper by midday on Monday 2 March 2015, preferably electronically to redress@childabuseroyalcommission.gov.au.

People who wish to make short comments on specific issues can complete a short online form on the Royal Commission's website. This form is intended for those who do not wish to provide formal submissions. It is not intended to be a substitute for formal submissions.

Formal submissions to this consultation paper will be made public unless the person making the submission requests that it not be made public or the Royal Commission considers it should not be made public. The Royal Commission generally makes the decision not to publish a submission for procedural fairness reasons – for example, the submission may refer to an institution or make allegations about a person that are of such a nature that it would not be fair to publish the submission without giving that institution or person an opportunity to respond.

2 Structural issues

2.1 Justice for victims

Under our Terms of Reference, the recommendations we make on redress and civil litigation must be focused on:

- what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts
- ensuring justice for victims through the provision of redress by institutions.

‘Justice’ is a broad term. However, in the context of our Terms of Reference, and in relation to civil rather than criminal justice, the term ‘justice’ focuses on the provision of redress to address or alleviate the impact on survivors of institutional child sexual abuse.

In Australia the process for obtaining civil justice for personal injury is by an award of damages through successful civil litigation. One issue is whether civil litigation is an effective way for survivors to obtain compensation and to address or alleviate the impact on them of institutional child sexual abuse, and what reforms might be needed to make it more effective. We consider civil litigation in Chapter 10.

What we have learned to date suggests that civil litigation is unlikely to be an effective way for all survivors to obtain redress that is adequate to address or alleviate the impact on them of institutional child sexual abuse. This is perhaps most clearly the case in past institutional child sexual abuse, where there are large groups of survivors, including many Forgotten Australians, Former Child Migrants and members of the Stolen Generations, who suffered child sexual abuse in residential institutions and who have not obtained redress or have not been satisfied with the redress they have obtained.

It is clear to us from the very many accounts we have heard from survivors in private sessions, and through submissions to issues papers, that many survivors do not consider that justice has been, or can be, achieved for them through existing civil litigation systems or through previous or existing redress schemes that some governments and non-government institutions offer.

We acknowledge that justice is an inherently individual and subjective experience. Some survivors have told us that nothing could repair the impact of institutional child sexual abuse on their lives, that no amount of money could compensate them adequately for the abuse they suffered, and that no apology or support could give them back their lost childhoods or make up for the damage in their adult lives.

Many survivors have told us about measures that they have found beneficial and that in some cases have provided them with a sense of justice, acknowledgment and recognition. These measures included:

- personal apologies for the abuse
- recognition and acknowledgment that the abuse occurred through public apologies and memorials

- monetary payments
- counselling
- practical assistance with matters such as employment, housing, literacy, and drug and alcohol addictions
- support for survivor networks and reunions
- culturally sensitive forms of collective or community supports that lessen the impact of abuse on survivors' families and broader communities.

Another element stands out from what we have heard from many survivors and survivor advocacy and support groups.

A number of survivors, and many survivor advocacy and support groups, have highlighted the importance to survivors of 'fairness', in the sense of equal access to redress for survivors and of equal treatment of survivors in redress processes.

For example, the Care Leavers Australia Network (CLAN), in supporting a national redress scheme, stated:

It is and always has been CLAN's position that the only way to ensure justice and equity for all Australian Care Leavers is to provide a National Independent Redress Scheme (NIRS) for ALL Australian Care Leavers...

...if a National Redress Scheme was introduced it would mean uniformity across the country eliminating the inequality between states and past providers. The redress schemes that have operated in the past all had their flaws and allowed for inequality between Care Leavers... If a national redress scheme was introduced it would eliminate the injustice that occurred and all[ow] for all Care Leavers to be treated equally.²

Similarly, CLAN's submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry conducted in 2010 sought a redress scheme that would achieve '...universality, consistency, fairness, accessibility and equality'.³

The Alliance for Forgotten Australians also emphasised the importance of consistency and fairness, stating:

The inconsistencies and disparities between different redress schemes are unfair and has created confusion in the minds of many Forgotten Australians and their families...

To address these deficiencies, and to ensure a consistent and fair framework for redress, a national scheme is needed...⁴

Survivors and survivor advocacy and support groups have repeatedly told us that they regard equal access and equal treatment as essential elements if a redress scheme is to deliver justice.

Equality in this sense does not mean that different levels of severity of abuse, or different levels of severity of impact of abuse would not be recognised. However, it does mean that the availability and type or amount of redress available should not depend on factors such as:

- the state or territory in which the abuse occurred
- whether the institution was a government or non-government institution

- whether the abuse occurred in more than one institution
- the nature or type of institution
- whether the institution still exists
- the assets available to the institution.

We accept the importance to survivors of equality in this sense. We accept that many survivors and survivor advocacy and support groups will not consider that any approach to redress that we recommend is capable of delivering ‘justice’ unless it seeks to achieve equality or fair treatment between survivors.

2.2 Current failings

The effects of child sexual abuse on mental health functioning have been well documented.⁵ These effects are many and varied and affect survivors in many ways:

- at the individual level: mental health and physical health
- at the interpersonal level: emotional, behavioural and interpersonal capacities
- at the societal level: quality of life, opportunity.⁶

What survivors have told us confirms the severe, and sometimes lifelong impact, that institutional child sexual abuse can have across all of these areas of life.

All Commissioners have been affected by the accounts they have heard from individual survivors in our private sessions that bear witness to the devastating impacts of abuse.

We have heard from survivors, survivor advocacy and support groups and others about the many difficulties survivors experience in seeking redress or damages through civil litigation.

The difficulties are many and varied and in some cases insurmountable. Understandably, many survivors cannot or do not wish to engage with the institution in which they were abused, yet there is no independent mechanism through which they can seek redress. For some survivors, the institution in which they were abused no longer exists and there is no successor institution they can approach for redress. Some institutions have not offered any redress to those who suffered abuse in the institution. Some have also strongly defended any attempted civil litigation. Some survivors have sought to commence civil litigation but have been advised that it was too late for them to sue.

Even where survivors have obtained redress or damages, in many cases it is not of a kind or in an amount that they consider ‘just’. While some government redress schemes have offered redress to broad groups of survivors, many survivors have told us that they consider the redress provided was completely inadequate. Where civil litigation has settled, many survivors have told us that the settlement payments were inadequate and that legal technicalities forced them to accept these settlements without ever having their claims determined on the merits.

In some cases, survivors have been poorly treated as they have sought redress or pursued civil litigation. This interaction with the institution in which they were abused has been the source of further trauma and distress to them.

Individual experiences of inadequate or unobtainable redress make a powerful argument for addressing current failings. However, it is also clear to us that the scale of the problem, particularly for past abuse, makes these arguments compelling.

A picture is emerging for us that, although sexual abuse of children is not confined in time – it is happening today – there has been a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high risk environment in which thousands of children were abused.

The societal norm that ‘children should be seen but not heard’, which prevailed for unknown decades, provided the opportunity for some adults to abuse the power that their relationship with the child gave them. When the required silence of the child was accompanied by an unquestioning belief by adults in the integrity of the carer for the child – whether they were a youth worker, teacher, residential supervisor or cleric – the power imbalance was entrenched to the inevitable detriment of many children. When, amongst adults who are given the power, there are people with an impaired psychosexual development, a volatile mix is created.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society’s values and mechanisms that were available to regulate and control aberrant behaviour failed. This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions. It is confirmed by the development, in recent years, of significantly increased regulatory control by government over many institutions that provide for children, and the development of education programs and mechanisms by which problems can more readily be brought to attention.

This broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse. It also highlights the importance of improving the capacity of the civil litigation systems to provide justice to survivors in a manner at least comparable to that of other injured persons, so that those who suffer abuse in the future are not forced to repeat the experiences of those who have sought redress to date.

2.3 The complexity of the task

There are a number of significant and complex issues in determining an approach to redress that will achieve ‘justice’, including fairness and equality, for survivors. They must be understood and accommodated in any proposal.

What has already been done

Redress and compensation for survivors is not a new issue. We are not starting from a position where nothing has been done in the past, and where we can design a new approach without regard for actions taken to date.

We must take account of:

- government redress schemes, which have covered a variety of types of abuse and a variety of types of institutions, and have offered varying forms of redress
- non-government institution redress schemes, which have covered a variety of types of abuse, and have offered varying forms of redress
- statutory victims of crime compensation schemes, through which some survivors have obtained some forms of redress
- redress obtained by some survivors through civil litigation (usually through settlement rather than a contested hearing on liability and damages).

The government schemes have differed from each other. The non-government institution schemes have differed from each other and from the government schemes. The statutory victims of crime compensation schemes are all different, some of them have changed over time and they have differed from the government schemes and non-government institution schemes. Outcomes obtained through civil litigation have varied widely. Some monetary payments have been in the order of fully compensatory common law damages and others have been closer to nominal amounts to bring litigation to an end.

While there is little consistency in the actions taken to date, we do not seek to criticise any government or institution for seeking to take action on these issues. We recognise that many survivors and survivor advocacy and support groups criticise the particular actions that have been taken. Some criticisms are well founded. However, it is also the case that some governments and many non-government institutions have not established any specific redress schemes, and some survivors have not been offered any avenues through which to seek redress for the abuse they suffered.

In these circumstances, the actions taken to date by some governments and some non-government institutions to provide redress need to be recognised for the contribution they have made to individual lives. They are a useful source of information for interested parties and for us in considering how to design an effective approach to redress. It is also necessary to consider how any redress that has already been provided should be taken into account in a new redress scheme. This affects survivors who may wish to seek further redress, funders who may wish to seek credit for amounts already spent, and those who administer any redress scheme or schemes.

A summary of the key features of the various government redress schemes and some particularly well-known non-government institution schemes is in Appendix A. By way of contrast, a summary of the key features of two commonly cited overseas redress schemes – the Irish Residential Institutions Redress Scheme and the Grandview Agreement from Ontario Canada – is in Appendix B.

Recognising existing support services

Survivors and survivor advocacy and support groups have told us that survivors have many different needs. Survivors may need assistance with housing, education and employment, drug and alcohol issues, dental issues and a range of other medical needs. What is needed varies considerably between individual survivors.

However, in most cases it is difficult to identify a clear connection between a survivor's experience of institutional child sexual abuse and these broader needs. The needs may arise more from the experience of being in a residential institution than from suffering sexual abuse. People who were in residential institutions as children but who did not experience sexual abuse may also need assistance with housing, education and employment, drug and alcohol issues, dental and other medical needs. Indeed, other members of the community who have not experienced institutional child sexual abuse and have not been in any form of state care may also need assistance with these matters.

Broader public programs, such as Medicare, and more specialist support services help to meet these needs. Some are available across the community, while others are targeted at care leavers or particular groups of care leavers, such as Forgotten Australians, Former Child Migrants or members of the Stolen Generations. Other services target victims of sexual assault, including child sexual assault in an institutional context.

Many survivors and survivor advocacy and support groups have told us of the considerable support survivors receive from existing support services. Many survivors value these services very highly. The Commissioners have been impressed by the dedicated work that many organisations working with limited resources do for people who for various reasons are disadvantaged.

The Royal Commission is conducting a separate project to investigate how adequate support services are in meeting survivors' needs. We are not seeking to make any recommendations about support services in this work on redress and civil litigation. Our separate project on support services will examine the adequacy of existing support services in meeting the needs of survivors and others affected by institutional child sexual abuse, including survivors' family members and broader communities. It will consider whether any recommendations should be made for increasing or otherwise changing existing support services.

However, it is important to recognise the range of existing support services because:

- it should be acknowledged that a redress scheme is not necessarily the best, or even an appropriate, mechanism for meeting all the various needs that survivors may have
- existing support services are highly valued by many survivors
- some elements of redress (particularly counselling and psychological care) overlap with the services provided by some existing support services
- nothing that we raise or discuss in this consultation paper is intended to reduce resources for, or divert effort from, existing support services.

Focusing on our Terms of Reference

Our Terms of Reference are both broader and narrower than the coverage of most current and previous redress schemes.

We are required to examine what institutions and government should do to address, or alleviate the impact of, child sexual abuse in institutional contexts. Our Terms of Reference define 'institution' and 'institutional context' as follows:

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

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

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.

The range of institutions and institutional contexts is generally far broader than the range of institutions covered by government redress schemes (although we recognise that statutory victims of crime compensation schemes cover all relevant crimes regardless of the circumstances or context in which they occur).

Government redress schemes in Australia and overseas have generally covered residential institutions, and sometimes foster care. Our Terms of Reference include non-residential schools; child care services; all the activities of large and small faith-based organisations; small associations, clubs, and voluntary associations; and all of the residential and other out-of-home care services.

The institutions included in our Terms of Reference vary enormously in size, assets, locations, type of operations and services, levels of regulation and oversight, sophistication of the management and governance practices and the like. Their histories, including their histories of child sexual abuse and their experience in receiving and responding to allegations of child sexual abuse, will also vary enormously.

In contrast, the requirement that we examine child sexual abuse in an institutional context gives us a narrower focus than most government and non-government institution redress schemes have had. Our Terms of Reference acknowledge that child sexual abuse ‘may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect’. They also allow us to consider what should be done to address, or

alleviate the impact of, ‘child sexual abuse *and related matters* in institutional contexts’ (emphasis added). However, we are primarily focused on institutional child sexual abuse.

Some current redress schemes focus on sexual abuse. The South Australian Government redress scheme carried out through its statutory victims of crime compensation scheme applies only to sexual abuse. The Salvation Army Eastern Territory scheme applies only to ‘sexual misconduct’, although it then allows for assessment of other matters, including physical assault and emotional abuse, in assessing monetary payments.

However, most previous and current redress schemes cover at least sexual and physical abuse. Some also cover emotional abuse or neglect.

These broad and narrow aspects of our Terms of Reference make it more complex to accommodate actions taken to date under current or former redress schemes because almost all of these schemes have had coverage both broader and narrower than our Terms of Reference.

Ensuring that what we recommend can be implemented

We are acutely aware of the need to make recommendations that can be implemented and that, we hope, are likely to be implemented.

We have to balance a number of factors, including:

- the requirement of survivors that the redress scheme be ‘fair’, in the sense of affording equal access and equal treatment for survivors
- a recognition that survivors have many different needs, only some of which can or should be met through redress
- the need to accommodate actions taken to date in relation to redress
- the need to avoid the risk that existing support services could be adversely affected
- the need to develop an approach that can be effective for a broad variety of institutions that now, or may in the future, face allegations of institutional child sexual abuse
- whether and how to take account of abuse other than sexual abuse.

We also recognise that a number of previous inquiries have recommended that redress schemes be introduced and some of these recommendations have not been implemented.⁷ We consider that our recommendations are more likely to be acted upon if we strike the right balance between detail and flexibility, where flexibility is consistent with achieving justice for victims. We also consider that account has to be taken of the affordability of what we recommend. Funding is fundamental to any effective redress arrangement.

2.4 Elements of redress

Our discussions to date suggest that the elements of appropriate redress for survivors are as follows:

- Direct personal response: a response that an institution provides directly to a survivor if the survivor wishes to engage with the institution. When a survivor requests it, all institutions would be required to offer and provide survivor an apology, an opportunity for the survivor

to meet with a senior representative of the institution and an assurance about the steps that the institution has taken, or will take, to protect against further abuse. An institution may offer any other forms of direct personal response they are able to offer that might be of assistance to survivors of abuse at the institution. Responses might include spiritual support, or forms of direct assistance outside of the redress scheme.

- **Counselling and psychological care:** therapeutic counselling and psychological care should be available to survivors when they need it throughout their lives. Redress should supplement existing services and fill service gaps so that all survivors can have access to the counselling and psychological care that they need.
- **Monetary payments:** monetary payments should be available to survivors as a tangible means of recognising the wrong they suffered. The amount of monetary payments should be determined by assessing factors such as the relative severity of the abuse and the relative severity of the impact of the abuse. However, it must be recognised that the monetary payments under redress are not intended to be fully compensatory and they will not equate to common law damages.

These elements of redress are discussed in detail in chapters 4 (Direct personal response), 5 (Counselling and psychological care) and 6 (Monetary payments) below.

We have focused primarily on providing redress for survivors themselves, rather than for their families or broader communities who might also be affected by the abuse. We acknowledge the needs of ‘secondary victims’ of institutional child sexual abuse. These include family members of victims who are now deceased, in some cases as a result of suicide. These needs will be considered further through our separate work on support services.

A number of submissions to the relevant issues papers have recommended to us the value of international human rights law in identifying appropriate redress.⁸ In particular, submissions discussed the potential relevance of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the van Boven principles) adopted by the General Assembly of the United Nations in 2005.⁹

The van Boven principles outline victims’ rights to:¹⁰

- equal and effective access to justice
- adequate, effective and prompt reparation for harm suffered
- access to relevant information concerning violations and reparation mechanisms.

The van Boven principles highlight that remedies are not limited to monetary payments and can include the five forms of reparation set out in Table 2 below.¹¹

Table 2: Five forms of reparation outlined in the United Nations van Boven principles

Restitution	Should, whenever possible, restore the survivor to the original situation they were in before the abuse occurred.
Compensation	Should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.

Rehabilitation	Should include medical and psychological care as well as legal and social services.
Satisfaction	<p>Should include, where applicable, any or all of a number of measures, relevantly including the following:</p> <ul style="list-style-type: none"> • effective measures aimed at the cessation of continuing abuse • verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations • public apology, including acknowledgement of the facts and acceptance of responsibility • judicial and administrative sanctions against persons liable for the abuse • commemorations and tributes to the victims.
Guarantees of non-repetition	<p>Should include, where applicable, any or all of a number of measures, relevantly including the following:</p> <ul style="list-style-type: none"> • ensuring that all proceedings abide by standards of due process, fairness and impartiality • providing continuing education and training • promoting codes of conduct and ethical norms • reviewing and reforming laws contributing to or allowing violations.

Apart from restitution, these elements would be achieved through the elements of redress we have identified. 'Compensation', as used in the van Boven principles, is not a reference to common law damages.

'Restitution', as used in the van Boven principles, refers to the restoration of a survivor to the original situation they were in before the violation occurred. If the violation involved taking someone's land, restitution would require the return of the land. However, for survivors such restoration is not possible because no form of redress can undo a survivor's experience of institutional child sexual abuse and its impact. Survivors seeking to be restored to their original situation, in so far as money can do this, would need to seek common law damages through civil litigation.

2.5 General principles for providing redress

From what we have learned to date, it is clear to us that the process for providing redress is fundamental for survivors. How survivors feel they were treated, and whether they were listened to, understood and respected, are likely to have a significant impact on whether they consider that they have received 'justice'.

Some interested parties have submitted that we should adopt 'restorative justice' or 'therapeutic jurisprudence' as our approach to redress.

There is no single restorative justice theory, or agreed definition of restorative justice.¹² One commonly cited definition describes restorative justice as 'a process whereby all the parties with

a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.’¹³

Restorative justice processes are often seen as allowing the stakeholders involved in an injustice to ‘have an opportunity to discuss its effects on people and to decide what is to be done to attempt to heal those hurts’.¹⁴ The intention of restorative justice practices is to promote victim wellbeing and offender rehabilitation. The values of restorative justice have been identified as including:

- empowerment
- respectful listening
- equal concern for all stakeholders
- accountability
- respect for fundamental human rights.¹⁵

Therapeutic jurisprudence considers the impact that the law and the legal system can have on an individual’s psychological and physical wellbeing. It has been characterised as ‘emotionally intelligent justice’.¹⁶ Therapeutic jurisprudence explores the impact not only of law and legal processes, but also of ‘legal institutions and legal actors upon the wellbeing of those affected by them.’¹⁷

There is no agreed definition of therapeutic jurisprudence.¹⁸ However, its potential relevance to redress for survivors is indicated by its advocacy of ‘consideration of the impact of legal processes on psychological wellbeing, rather than simply the adjustment of legal rights’.¹⁹

We have not adopted the terminology of ‘restorative justice’ or ‘therapeutic jurisprudence’. The terms have different meanings and no agreed definition, so they may confuse the issues and suggest different things to different interested parties.

However, their focus on the importance of processes for empowerment, respect and psychological wellbeing means that they may be of value in this area. We refer to the importance of processes where they are particularly relevant below. Those involved in designing or administering redress processes may benefit from study or training in these fields.

We also consider that certain principles should apply generally across all elements of redress. Although these principles may seem obvious, it seems to us to be worth stating them, particularly given that we have heard enough to know that they have not always been applied in the past.

We propose the following general principles to guide the provision of all elements of redress:

- redress should be survivor-focused – redress is about providing justice to the survivor, and not about protecting the institution’s interests
- there should be a ‘no wrong door’ approach for survivors in gaining access to redress – whether survivors approach a scheme or an institution, they should be helped to understand all the elements of redress available and to apply for the types of redress they wish to seek
- all redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors. All of those involved in redress,

and particularly those who might interact with survivors or make decisions affecting survivors, should have a proper understanding of these issues and any necessary training

- all redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors. It should be ensured that survivors can get access to redress with minimal difficulty and cost and with appropriate support or facilitation if required.

2.6 Possible structures for redress

Institutional schemes

As discussed above, we accept that it is important to survivors that any redress scheme seeks to achieve equal or fair treatment between survivors. We also accept that many survivors and survivor advocacy and support groups will not consider that any approach to redress that we recommend is capable of delivering 'justice' unless it seeks to achieve equality or fair treatment between survivors.

One way of seeking to achieve such equality or fair treatment might be to recommend that each institution adopt a common approach to:

- what should be available under each element of redress (direct personal response, counselling and psychological care, and monetary payments)
- how allegations of abuse should be determined
- how any variable elements of redress (particularly monetary payments) should be calculated.

Under this approach, institutions with existing schemes could modify those schemes to adopt the common approach and institutions without existing schemes could adopt schemes consistent with the common approach.

In some respects, this approach would be the quickest and easiest to implement. There would be no need for detailed negotiations or agreement between institutions, and each institution would be responsible for implementing the common approach.

However, there are three significant shortcomings in this approach.

First, many survivors have told us that they do not want to have to go to the institution in which they were abused to seek redress. Many survivors have told us that they do not accept that the institutions in which they were abused should be able to decide whether or not their claims are valid and what monetary payments and other support they should be offered. Many survivors do not trust the institutions, both because of the abuse they suffered as children and because of how the institutions have responded to their claims.

Second, some institutions no longer exist and there is no clear successor institution that would be required to take responsibility for claims against the former institution. Further, some institutions may not have sufficient assets to meet redress claims.

Third, many survivors were abused at more than one institution. Under this approach they would be required to apply to each institution for redress. This would mean that survivors would have to complete multiple applications and assessment processes. It would also not achieve

equal or fair treatment because some survivors would be entitled to redress from a number of institutions and others would only be entitled to redress from one institution. This would create particular inequities if some survivors could obtain multiple monetary payments, while other survivors were eligible only for one payment. Also, the total amounts would not necessarily reflect the overall severity of the abuse and its impact on the survivor.

It has been suggested that the second shortcoming could perhaps be addressed by governments accepting a role. If there was no institution to meet a redress claim, perhaps these claims could be met by the relevant state or territory government.

The first and third shortcomings are more difficult to address other than by establishing an independent 'one-stop shop' for redress. The private sessions data in Chapter 3, Table 10 suggest that the number of survivors who were abused at more than one institution is not insignificant. Of the 1,810 private sessions analysed, 308 survivors (17 per cent of the total) gave accounts of abuse at a second institution and a further 98 survivors (over 5 per cent of the total) gave accounts of abuse at three or more institutions.

To achieve equal or fair treatment between survivors and to ensure that survivors do not have to apply to the institution in which they were abused or make more than one application for redress, it is necessary to devise a structure for redress that provides an independent 'one-stop shop' for survivors – that is, it requires all institutions to participate in one redress process.

It is apparent that governments must participate in the redress process to meet claims of survivors abused in government institutions. Beyond this, however, it is likely that substantial government leadership will be required to establish a redress process in which governments and non-government institutions will participate. This is apart from government accepting a role as funder of last resort.

National scheme or state and territory schemes

Many survivors and survivor advocacy and support groups have advocated for the Australian Government to lead and coordinate a national redress scheme for those abused in residential institutions or in out-of-home care.

In 2004, the Senate Community Affairs References Committee recommended that the Australian Government establish and manage a national reparations fund for victims of abuse in institutions and out-of-home care settings. The committee recommended that:²⁰

- the scheme be funded by contributions from the Australian and state governments and the churches and agencies proportionately
- the Australian Government have regard to the schemes already in operation in Canada, Ireland and Tasmania in the design and implementation of the scheme
- a board be established to administer the scheme, consider claims and award monetary compensation
- the board, in determining claims, be satisfied that there was a 'reasonable likelihood' that the abuse occurred
- the board have regard to whether legal redress has been pursued
- the processes established in assessing claims be non-adversarial and informal

- compensation be provided for individuals who have suffered physical, sexual or emotional abuse while residing in these institutions or out-of-home care settings.

The Australian Government responded to the recommendations by stating that institutional care was primarily a state government responsibility, and that its role was one of influence and discussion.²¹

Regardless of the fact that the Australian Government did not take up the committee's recommendation, an overwhelming majority of submissions to *Issues paper 6: Redress schemes* supported the establishment of a single, national redress scheme established by the Australian Government. This approach was favoured not only by survivors and survivor advocacy and support groups but also by many institutions.

In addition to the issue of fairness or equality for survivors discussed above, submissions favoured a single national redress scheme for a number of reasons, including less complexity for survivors and consistency in procedures and support services. Some submissions suggested that a single national scheme would be easier for those survivors who no longer reside in the state or territory in which they were abused.

Through the course of our consultation processes to date, we have been told that some parties favour a single national scheme because of the Australian Government's greater financial resources. Others have expressed some distrust of state governments. Some survivors have told us that they do not want a state running the scheme because they were abused in a state-run institution or while in state care.

There is no doubt that state governments will be significant participants in, and contributors to, a redress scheme, if only because of their roles in running many residential institutions and, in most cases, their primary responsibility for foster care. The Australian Government has had legal responsibility for some children in the past, particularly in the territories and in Indigenous communities, and continues to have some legal responsibility for some children – for example, in the Australian Defence Force and in immigration detention. However, its potential need to respond to allegations of institutional child sexual abuse is not of the same magnitude as that of the states.

There are many examples of cooperative schemes led by the Australian Government and with the participation of the Australian Government and the state and territory governments. One recent example is the National Disability Insurance Scheme, which is currently being implemented. Indeed, in the course of our consultation processes, some parties recommended the National Disability Insurance Scheme to us as a possible model for a national redress scheme.

However, it is fair to say that there are few, if any, examples of Australian Government/state and territory government cooperative schemes that have been established quickly. Here, of course, there is the added complication of the number and range of non-government institutions that would also need to be involved in the scheme.

Another significant complicating factor in a national scheme would be the very different starting points of the different states and territories. Queensland, Western Australia and Tasmania have conducted redress processes. They have made monetary payments of approximately \$96 million,

\$120 million and \$55 million respectively. South Australia is conducting a redress process through its statutory victims of crime compensation scheme. It has made monetary payments of less than \$2 million. New South Wales, Victoria, the Australian Capital Territory and the Northern Territory have not operated any specific redress processes for institutional abuse.

The complications arise not just from the difference between jurisdictions that have and have not conducted redress processes to date. They also arise because of the structure of those processes: redress has been offered for abuse in any of the institutions covered by the processes, not just in institutions run by the relevant state. That is, the relevant state has provided redress from public funds to survivors of abuse that occurred in non-government institutions. This approach has enabled redress to be provided to more survivors than might otherwise have received redress, given that no redress would otherwise have been available for survivors of abuse in some non-government institutions.

Survivors were treated equally within the individual schemes as they were eligible to apply for the same forms and amounts of redress and their applications for redress were assessed against the same criteria. However, unequal treatment was created because some survivors could also obtain redress from non-government institutions that offered redress. Those who were abused in government institutions were limited to the government redress scheme only, as were those who were abused in non-government institutions that did not offer redress.

Finally, each state redress scheme has had different eligibility rules and coverage and has offered different amounts of redress.

The different starting points of the different states and territories in coming to a single national redress scheme probably could be reconciled, but it is unlikely to be a quick or easy process to negotiate.

It is also not clear whether the Australian Government, on the one hand, or the state and territory governments, on the other hand, favour or see any benefit in the Australian Government establishing a scheme. While government attitudes should not determine the approach that should be recommended, a lack of leadership and enthusiasm amongst government participants might see already difficult negotiations stall and, ultimately, fail.

There may also be legal limitations on the Australian Government's ability to establish a single national redress scheme. These issues may need to be overcome by referrals of power from the states and legislation enacted by the Australian Parliament. We refer to this again below in discussing how a scheme should be established.

If state and territory redress schemes, instead of a single national scheme, were recommended, the need for national cooperation and national negotiations, including with all governments and many non-government institutions, would be reduced. It would therefore overcome some of the difficulties and risks identified above.

However, there are other risks with recommending state and territory redress schemes.

Clearly, there is a risk that some states or territories might be slower to act on any recommendations than other states or territories, and some might not act at all. Some might implement a redress scheme, but in different terms from those recommended. These risks, if

realised, would leave survivors with unequal access to redress, because the redress available to them would depend on the jurisdiction in which they were abused.

Balanced against this risk is the possibility that some states and territories might act quite quickly to implement any recommendations, providing leadership to the other states and territories and improving the availability of redress for survivors in those states and territories. This might substantially improve existing inequities if the states that moved quickly were the states that have not offered redress schemes in the past.

If state and territory redress schemes were recommended, some difficulties for institutions that operate beyond one state or territory might be created. These institutions might have to participate in multiple state and territory schemes rather than a single national redress scheme. The administrative burden this may create for them should be acknowledged.

It is not clear to us that a recommendation for state and territory redress schemes is likely to create difficulties for survivors. We have been told that some survivors have been abused in institutions in different states or territories. However, it is not clear to us that this is the case in a material number of cases. We understand that this is not a common experience and it may be able to be addressed sufficiently by cooperative arrangements between the relevant state and territory schemes. These arrangements should endeavour to ensure that the outcome for the applicant is not affected by the involvement of more than one scheme.

For survivors who no longer live in the state or territory in which they were abused, whether separate state and territory redress schemes are likely to create difficulties will depend largely on the scheme processes. Provided that the scheme has written applications, does not require oral hearings in person, and provides the necessary support to applicants from outside the state or territory to participate in the scheme, no difficulties should arise for a survivor living outside of the jurisdiction. Each state or territory scheme should assist applicants to make contact with the correct scheme, if it is a different state or territory scheme.

Finally, there is also a risk that some states and territories may not consider that they can afford to offer redress in accordance with any recommendations. Without the financial support of the Australian Government, some state or territory redress schemes might not be adequately funded.

In conclusion, when comparing a single national redress scheme with separate state and territory redress schemes, at present the following has become apparent:

- The ideal position for survivors would be a single national redress scheme led by the Australian Government and with the participation of state and territory governments and non-government institutions.
- The ideal position will be difficult to reach if the Australian Government does not favour it.
- The ideal position will also be difficult to reach if the state and territory governments do not favour it.
- If the ideal position is not favoured or reasonably achievable, each state or territory could establish a single redress scheme for the state or territory, with the participation of relevant governments (the Australian Government will need to participate in some schemes) and non-government institutions.

- The state and territory schemes could be established in accordance with the principles that the Royal Commission recommends. These principles would operate as a national framework or principles to achieve reasonable national consistency across the elements of redress (that is, direct personal response, counselling and psychological care and monetary payments) and redress scheme processes.
- If there are to be state and territory schemes, there may be benefit in establishing a national advisory body to share information, encourage consistency, advise on implementation and discuss any concerns raised about particular schemes. This body could include government, non-government institution and survivor representatives.

How a scheme should be established

A redress scheme could be established by legislation, administratively, by contract or through some combination of these measures.

Australian government redress schemes, including the Australian Government's Defence Abuse Reparation Scheme and the various state government schemes, have been established administratively and not by legislation.

The Irish Residential Institutions Redress Scheme is an example of a redress scheme established by legislation.

During our consultations, some interested parties suggested that the Financial Ombudsman Service (FOS) is an example of a largely contractual scheme established to work across multiple non-government entities.

The subject matter that FOS works with consists of disputes between consumers and financial service providers. This is, of course, quite different to the subject matter of a redress scheme. However, FOS is a useful model to consider. The scheme is to some extent underpinned by legislation: financial service providers must be licensed and their licences require them to participate in a dispute resolution service approved by the Australian Securities and Investment Commission (ASIC). ASIC has approved FOS. Financial service providers can apply for membership of FOS, and FOS conducts its dispute resolution process under detailed terms of reference that ASIC has approved. FOS is funded by its members, who pay a mix of base levies and fees based on usage.

As noted above, there may be legal limitations on the Australian Government's ability to establish a single national redress scheme. These issues may need to be overcome by referrals of power from the states and legislation enacted by the Australian Parliament. In any event, the likely complexity of any arrangements involving the Australian Government, all states and territories and many non-government institutions might suggest that legislation would be required to support a single national redress scheme, even if referrals of power from the states are not required.

One issue of significance is whether there is any need for us to recommend any particular means of establishing a redress scheme, whether it is a national scheme or state and territory schemes. Provided that the outcome from any scheme meets our recommendations, there may be no benefit in prescribing how the scheme must be implemented. This is particularly relevant if

redress is to be provided through state and territory redress schemes, because the different states and territories may have different existing administrative arrangements or processes that they might wish to use to provide redress. Again, provided that the scheme meets our recommendations, there would seem to be little benefit in suggestions that deliberately or inadvertently prevent a state or territory from making use of existing mechanisms and the most efficient arrangements available to it to provide redress.

The need for fairness and equal treatment may not result in a requirement for complete uniformity in every aspect of the implementation of a redress scheme. Where it does not adversely affect our recommendations, a flexible approach seems likely to encourage the acceptance and timely implementation of the recommendations.

Governments may also require some flexibility in implementing redress in consultation with non-government institutions, particularly if a variety of potential funding arrangements exist. This is discussed further in relation to funding in Chapter 8.

2.7 Past and future abuse

Our Terms of Reference require us to consider both past and future institutional child sexual abuse in considering what institutions and governments should do to address, or alleviate the impact of, institutional child sexual abuse.

We use ‘past child sexual abuse’ to refer to child sexual abuse that has already occurred or that occurs between now and the date that any reforms we recommend to civil litigation commence. We use ‘future child sexual abuse’ to refer to child sexual abuse that occurs on or after the date that any reforms we recommend to civil litigation commence. However, the precise date is less important than the concept.

As noted above, what we have learned to date suggests that civil litigation is unlikely to provide an effective avenue for many survivors to obtain redress that is adequate to address or alleviate the impact on them of sexual abuse. We discuss civil litigation in Chapter 10.

Many survivors and survivor advocacy and support groups have told us that many of the difficulties that survivors have encountered in trying to obtain adequate redress to date through redress schemes or civil litigation have arisen from the power imbalance between institutions and survivors. The elements of that imbalance are obvious. The nature of the trauma survivors suffer because of the abuse creates a significant power imbalance. Many survivors have also told us that, without a strong legal position, they have had to go ‘cap in hand’ to institutions and accept whatever an institution was willing to offer, no matter how inadequate the survivor considered it to be.

If any reforms to civil litigation that we recommend are adopted, they may contribute to a substantial change in this power balance. The broader work of the Royal Commission and its contribution to a better public understanding of the occurrence and impact of child sexual abuse is also likely to contribute to this change.

We appreciate that, no matter what reforms might be made to civil litigation, some survivors of future child sexual abuse will not wish to undertake civil litigation. Redress processes may

remain the preferred option for some survivors of future child sexual abuse. Institutions are also likely to prefer to offer specific redress processes as an alternative to settling individual civil proceedings.

We also appreciate that it may be too difficult for some survivors to seek redress or pursue civil litigation, both for past abuse and for future abuse.

A redress scheme for future abuse may be unnecessary if we make recommendations that are adopted that make it more likely that survivors can recover damages at common law, and if we make recommendations under other parts of our Terms of Reference that aim to minimise the occurrence of future abuse. It might also be difficult to identify with confidence now what survivors may seek far into the future.

2.8 Children

The delay in reporting of child sexual abuse is now well known. Many survivors will not disclose their abuse until adulthood.²² Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse. Men took longer than women to disclose abuse.²³

However, we also know that some children disclose abuse and their disclosures are acted upon.

In case study 2, we examined YMCA NSW's response to Jonathan Lord's sexual abuse of 12 children. We heard evidence that some of Lord's victims disclosed the abuse at the time it was occurring and the disclosures were reported to police.²⁴ In case study 6, we are examining the responses of the Catholic Education Office, Diocese of Toowoomba, and a Catholic primary school in Toowoomba to disclosures about the conduct of Gerard Byrnes, a teacher at the school. We heard evidence that some of Byrnes's victims disclosed the abuse at the time it was occurring and the disclosures were reported to the school.²⁵ In case study 12, we are examining the response of an independent school in Perth to concerns raised about the conduct of a teacher. We heard evidence that one of the teacher's victims disclosed the abuse as a young adult of 18 or 19 years of age and reported it to the police. Other victims were still children attending the school.²⁶

It is possible, therefore, that some children, or parents or guardians on their behalf, will wish to seek redress or compensation for institutional child sexual abuse while the victim is still a child.

We do not think it likely that there will be many applications to a redress scheme made by or on behalf of those who are still children. In particular, children are more likely to be able to obtain compensation through civil litigation. They will almost always be within time limitations to commence proceedings, even under the limitation periods currently applying in civil litigation. In some cases, the occurrence and circumstances of the abuse may already have been proved through a criminal conviction. Children are more likely to receive larger payments, even by way of settlement, through civil litigation than might be available through a redress scheme.

In case study 6, we heard evidence that parents of some of the victims engaged solicitors and sought compensation for their children. Some commenced civil litigation. The Diocese of Toowoomba invited families of the victims to participate in a mediation process, regardless of whether they had commenced any proceedings. Many, but not all, of the families elected to

participate. At the date of the hearing, more than \$2.25 million had been paid in damages, costs and administration fees to nine victims and some family members in relation to Byrnes' offences. We heard evidence of one settlement in the amount of \$350,000 plus costs.²⁷

In case study 12, we heard evidence that the independent school reached settlements with the five victims and negotiated ex gratia payments to their parents after the offending teacher was convicted for the abuse.²⁸

While we do not think it likely that many applications to a redress scheme would be made by or on behalf of children, there is no reason why children could not be accommodated within the sort of structures and approaches raised in this consultation paper.

Children, or parents or guardians on their behalf, could apply for redress, including referral for any direct personal response from the institution, and assessment for eligibility for counselling and psychological care and a monetary payment. A child's counselling and psychological care needs are likely to be different from those of an adult survivor, but there is no reason why they could not be supported through a redress scheme. If a child or young adult is assessed for a monetary payment, an assessment of the impact of the abuse might have to be predictive of the likely impact rather than assessing actual impact from a position of hindsight. This is comparable to elements of damages assessments routinely undertaken in civil litigation and could be accommodated within a redress scheme.

We welcome submissions that discuss the issues raised in Chapter 2.

In particular:

- we seek the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternative approach
- we welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse.

3 Data

3.1 Reasons for collecting data

In this chapter we analyse some of the data we have obtained on existing redress schemes and civil litigation.

Many survivors and survivor advocacy and support groups have told us how difficult it has been for survivors to assess whether the redress they have been offered is fair or consistent compared with what the institution has offered other survivors, or what survivors more generally have received. Some survivors have told us they had no information about the fairness or comparability of the redress they were offered other than what a representative of the institution might have told them.

To date, there has been very little publicly available data on redress and compensation paid to victims of child sexual abuse in institutions in Australia. Some information about payments made under previous government redress schemes has been published, although it is not always easy to find. With the possible exception of the government redress schemes, it is not clear that governments or institutions have had much information about payments, other than under their own schemes or processes.

To address this gap, and to improve our understanding of redress outcomes to date, we have collected data from a number of sources, often under summonses or Notices to Produce.

The data we have collected do not attempt to cover every claim made. We sought data only from those institutions that we anticipated had received a relatively large number of claims and that would have data on an aggregated basis reasonably readily available. There are obvious omissions – for example, the data do not include data from any faith-based organisations other than Catholic organisations and The Salvation Army or from non-government recreation or sports institutions. There may also be some gaps in the data provided by the parties to whom notices were issued.

We have also analysed data from as many of the private sessions as we are able to analyse at this stage. This data gives us information about the institutional spread of claims, and the number of institutions in which individual survivors have reported suffering child sexual abuse.

Due to rounding, numbers presented in this chapter may not add up precisely to the totals provided.

3.2 Sources of data

Claims data

In September and October 2013, the Royal Commission sought under notice from each state and territory government, the Australian Government, Catholic Church Insurance Ltd (CCI) and the Eastern and Southern Territories of The Salvation Army data about claims of child sexual abuse resolved in the period from 1 January 1995 to 31 December 2010. Further notices were issued in August and September 2014 to the same parties seeking the same data on claims resolved in the period from 1 January 2011 to 30 June 2014. A schedule of the notices issued is at Appendix C.

All parties to whom notices were issued provided claims data for the period 1 January 1995 to 30 June 2014.²⁹

The data that were sought cover all claims resolved, including claims resolved through litigation, out-of-court settlement or otherwise. The exact wording of the notices is set out at Appendix D.

The methodology used and assumptions made in analysing the claims data are in Appendix E.

The Royal Commission intends to seek additional claims data from the same parties for the period 1 July 2014 to 31 December 2014 in order to complete the claims data for the year 2014.

Other Catholic Church data

A number of datasets are available on claims made against the Catholic Church. The claims data include all of CCI's data.

However, redress was also provided by other parts of the Catholic Church. Those parts were not included in the claims data obtained from CCI. Therefore, they have not been included in the claims data analysis.

The Royal Commission obtained under summonses or notices the Catholic Church data on redress and civil litigation discussed below.

Towards Healing data

Data on Towards Healing were obtained under notice from the Catholic Church.

The summons for Towards Healing data sought details on the redress outcome for each complaint between 1997 and 2013. Redress was defined broadly to include:

- monetary compensation by way of lump sum or periodic payment
- financial support for therapeutic or medical consultations or treatment
- apology or acknowledgement
- assurance regarding cessation of an accused's position or role within an institution.

The Towards Healing data include more than 800 claims with known compensation amounts.

Melbourne Response data

The Royal Commission obtained under notice data from the Archdiocese of Melbourne, the Independent Commissioner for the Melbourne Response, counselling data from Carelink and all claims from CCI relating to the Melbourne Response since it began in October 1996 up to 31 March 2014. These datasets are collectively referred to as ‘the Melbourne Response data’.

The Melbourne Response data includes more than 300 claims with known compensation amounts.

Christian Brothers data

The Provincial of the Congregation of Christian Brothers produced data in response to a summons dated 25 June 2013.

The summons requested details of each individual claim for compensation or redress made against any past or present province of the Congregation of Christian Brothers within Australia since 1 January 1980 in respect of an allegation of child sexual abuse by any consecrated Christian Brother or other member of the Congregation of Christian Brothers within Australia.

The Christian Brothers data include more than 450 claims with known compensation amounts.

Marist Brothers data

The Provincial of the Marist Brothers produced data in response to a summons dated 2 August 2013.

The summons requested details of each individual claim for compensation or redress made against any past or present province of the Marist Brothers within the Australia since 1 January 1980, in respect of an allegation of child sexual abuse by any consecrated Marist Brother or other member of the Marist Brothers within Australia.

The Marist Brothers data include more than 50 claims with known compensation amounts.

Government redress schemes data

The states of Western Australia, Queensland, Tasmania and South Australia operated state-run redress schemes. The Royal Commission obtained data on government redress schemes under separate notices to Western Australia, Queensland, Tasmania and South Australia. A schedule of the notices issued is at Appendix F.

Data were required on the numbers of applications made, the number of compensation offers made, the number of compensation offers accepted and the total and average amount of compensation made. The exact wording of the notices to each jurisdiction is set out at Appendix G.

A brief description of the government redress schemes is in Appendix A.

Statutory victims of crime compensation schemes data

Notices were issued to each state and territory seeking data on the numbers of claims and payments made in respect of child sexual abuse through their statutory victims of crime compensation schemes.³⁰

Private sessions data

The Royal Commission has analysed information collected from private sessions held between 7 May 2013 and 31 August 2014. The information was voluntarily reported; it is not necessarily representative of all those affected by child sexual abuse in an institutional context because it relates to those people who have chosen to come forward to the Royal Commission. Given the long delay associated with abuse occurring and being disclosed, the private sessions data is likely to under represent more recent abuse.

Case studies data

In a number of the case studies held to date, the Royal Commission has received evidence about data on redress claims and payments.

The relevant evidence is set out in Appendix H.

3.3 Analysis of claims data

The methodology used and assumptions made in analysing the claims data are in Appendix E. These claims data do not include any claims resolved through government redress scheme.

This analysis is for all data received as at 22 December 2014. The total number of claims resolved between 1 January 1995 and 30 June 2014 was 2,755.

Table 3 and Figure 1 appear on the next two pages. They show the distribution of claims by the year the claim was resolved. Seventy-nine claims (3 per cent) did not have reported year of resolution, so they are not included in Table 3. Note that 2014 data are for the first six months of the year only.

Table 3: Number of claims by year of resolution

Year claim resolved	Frequency	Percent
1995	21	0.8
1996	27	1.0
1997	109	4.1
1998	71	2.7
1999	80	3.0
2000	49	1.8
2001	65	2.4
2002	90	3.4
2003	112	4.2
2004	118	4.4
2005	153	5.7
2006	119	4.5
2007	151	5.6
2008	172	6.4
2009	237	8.9
2010	261	9.8
2011	240	9.0
2012	320	12.0
2013	205	7.7
2014	76	2.8
TOTAL	2,676	100.0

Figure 1: Number of claims by year claim resolved

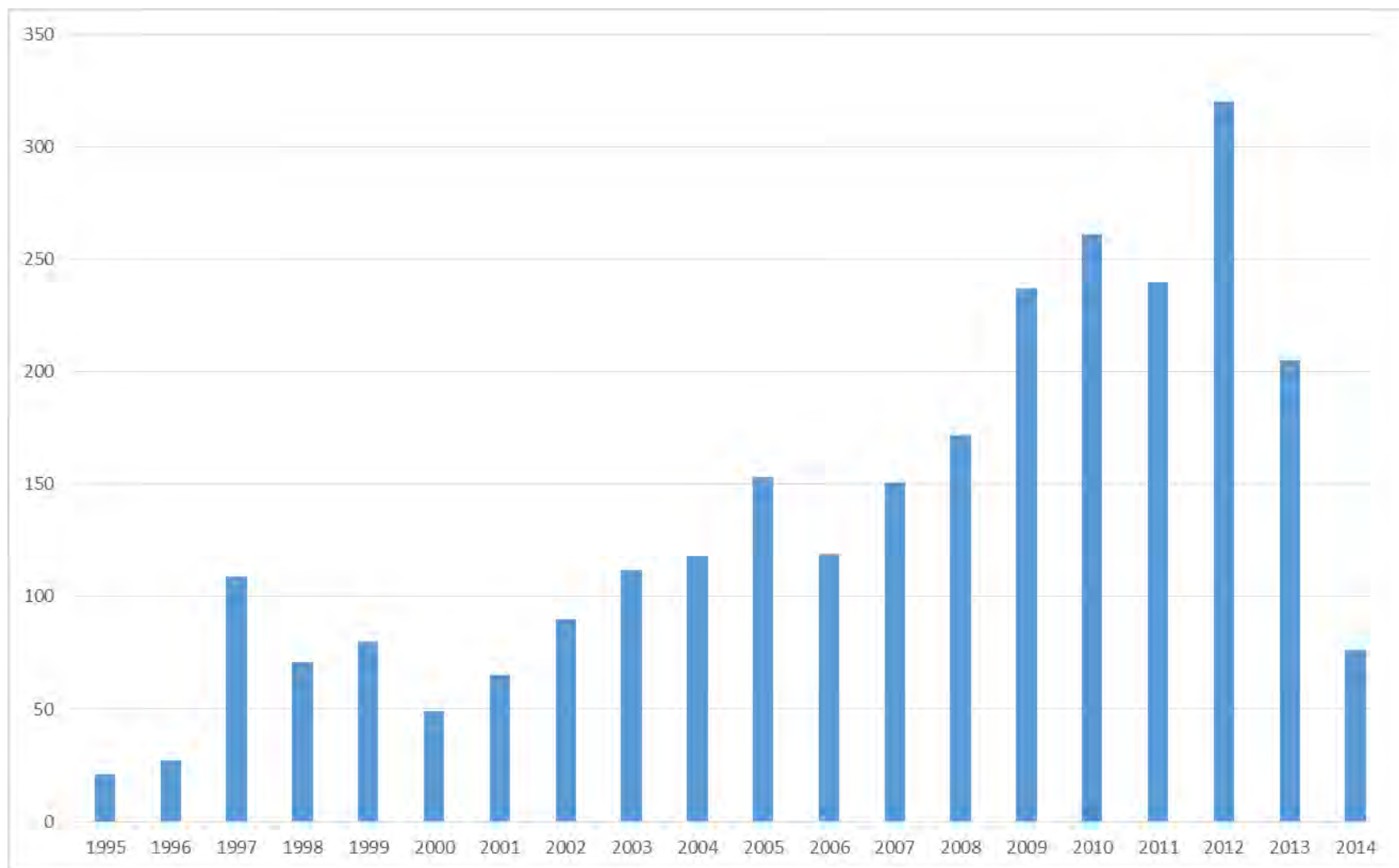


Table 4 ‘Compensation in real dollars (2013) by year of claim resolution’, appears on the next page.

The dollar values contained in the data produced to the Royal Commission have been adjusted for inflation to the 2013 value (real 2013 dollars). The Reserve Bank inflation calculator of the value of a basket of goods in 2013 has been used for this adjustment.

The payments across all claims resolved are illustrated in Table 4 and Figure 2 below. The columns in Table 4 show the mean and median amounts; ‘quintile’ bands of 20 per cent, 40 per cent, 60 per cent, and 80 per cent; and an additional band at 90 per cent.

The mean (or average) compensation paid is the sum of all claim amounts divided by the number of claims. If in a given year there are any significantly large amounts paid on particular claims, this will cause the mean to be higher than in other years.

The median is the middle value in the list of payment amounts. This means that 50 per cent of claims are below this amount and 50 per cent of claims are above this amount. Across all claims for all years, the mean compensation paid was \$78,206 and the median was \$43,200.

The bands of 20 per cent, 40 per cent, 60 per cent, 80 per cent and 90 per cent are a way of understanding the range of payments made – that is, for the 20 per cent band, 20 per cent of the payments lie below this compensation amount (in real 2013 dollars) and 80 per cent lie above it. Ninety per cent of all compensation payments were at or under \$168,750 (in real 2013 dollars), but the top 10 per cent of payments ranged from \$168,750 to \$3,926,000 (in real 2013 dollars).

Where no information was provided on the compensation paid for a claim, this claim has not been included in the data. For example in 1998 there were 71 claims, but the compensation paid is only known for 69 of those claims.

Figure 2 illustrates the quintile bands of payment, in bands of 0-20, 20-40, 40-60, 60-80 and 80-100 per cent. Figure 3 illustrates the mean and median payment lines, which generally diverge most significantly when there are any significantly large payments in the year. In general, the median is between \$40,000 and \$60,000 across these years of data.

Some trends can be seen in the data:

- more claims were resolved from 2009 onwards
- jurisdictions were more likely to resolve claims at the end of the 2000s and early 2010s than earlier years (however, this may be driven by the fact that more claims were submitted).

Table 4: Compensation in real dollars (2013) by year of claim resolution

Year	Number of claims with known compensation	Mean	Median	Minimum	Maximum	20%	40%	60%	80%	90%
1995	20	54,958	50,880	0	159,000	25,440	43,725	55,650	79,500	95,877
1996	26	76,710	52,313	0	387,500	23,250	42,625	77,500	120,900	170,500
1997	102	84,693	60,063	0	852,500	31,000	54,067	69,750	119,820	170,500
1998	69	119,402	61,600	0	693,000	38,500	53,130	84,700	130,900	308,000
1999	77	129,635	56,625	0	3,926,000	34,730	45,300	67,950	120,800	166,100
2000	49	76,524	52,200	0	362,500	36,250	50,750	79,750	130,500	145,000
2001	62	91,892	69,500	0	766,684	34,750	62,550	76,450	104,250	180,700
2002	87	70,317	49,275	0	364,500	27,000	44,550	60,750	87,750	162,000
2003	108	69,649	41,593	0	982,500	24,497	38,907	45,850	75,325	144,100
2004	117	61,772	38,400	0	569,600	21,760	32,000	51,200	83,200	140,800
2005	148	57,490	41,250	0	596,176	25,000	37,500	50,000	68,750	125,000
2006	115	72,502	39,600	0	780,000	18,000	36,000	44,850	63,000	102,000
2007	148	63,847	41,300	0	342,790	25,960	35,400	47,200	64,900	177,000
2008	168	53,923	35,001	0	875,750	19,775	28,250	43,505	64,410	90,400
2009	235	87,178	44,400	0	882,450	19,425	33,300	55,500	111,000	260,850
2010	261	105,205	54,000	0	1,760,400	27,000	43,200	64,800	135,000	216,000
2011	240	73,821	41,600	0	748,800	18,200	31,200	52,000	109,200	187,200
2012	318	60,758	30,600	0	765,000	14,280	22,950	40,800	76,500	153,000

Year	Number of claims with known compensation	Mean	Median	Minimum	Maximum	20%	40%	60%	80%	90%
2013	205	88,833	40,000	0	2,600,000	5,000	25,500	59,000	120,000	210,000
2014	76	123,720	50,000	0	775,000	22,500	42,500	72,750	195,000	330,000

Figure 2: Quintiles of real compensation (2013 dollars) by year of claim resolution

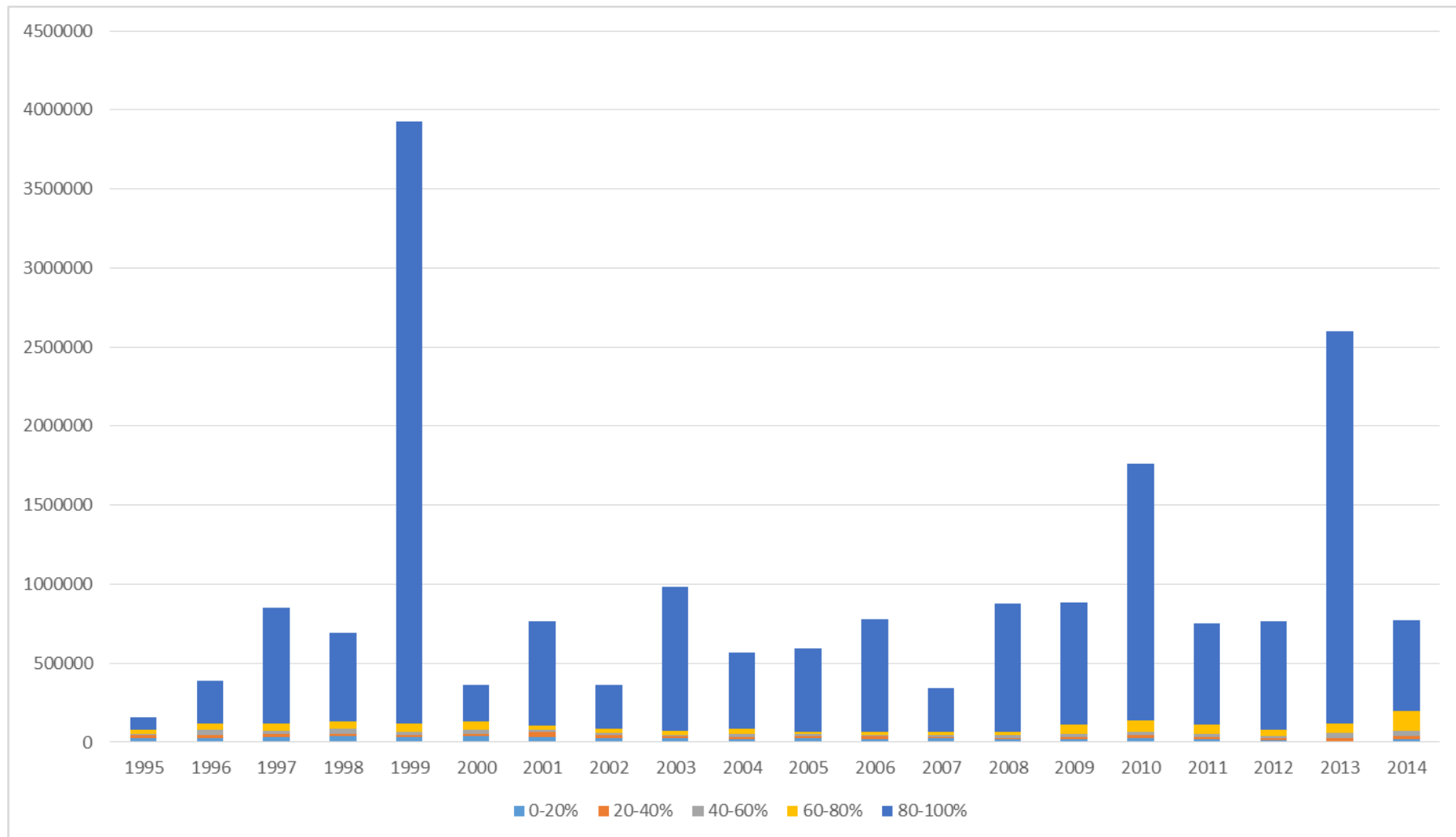
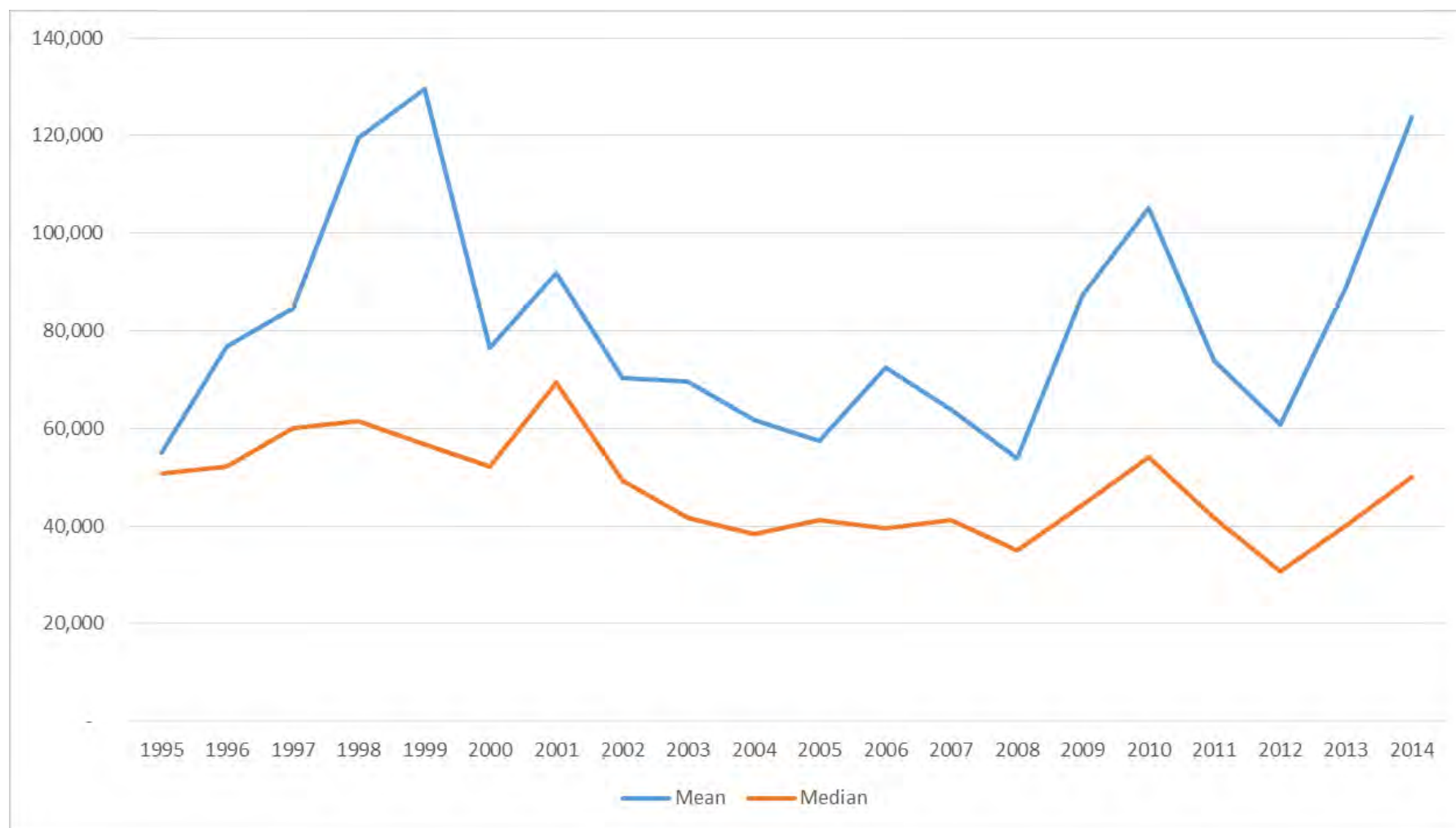


Figure 3: Mean and median of real compensation (2013 dollars) by year of resolution



3.4 Government redress schemes data

Data on key elements of the government redress schemes, particularly number of payments and amounts and spread of payments, are set out below. A brief description of the government redress schemes is in Appendix A.

Redress WA and WA Country High School Hostels ex gratia scheme

Table 5 shows payments made under Redress WA.³¹

Table 5: Payments under Redress WA

Payment level	Number of payments made	Total amount paid (\$)
1 – \$5,000	859	4,295,000
2 – \$13,000	1,813	23,569,000
3 – \$28,000	1,477	41,356,000
4 – \$45,000	1,063	47,835,000
TOTAL	5,212	117,055,000

Assuming that payments under Redress WA were paid in 2010 the total amount paid is equivalent to \$126,419,400 in 2013 dollars. The average payment is equivalent to \$24,255 in 2013 dollars (rounded to the nearest dollar). Some 82 payments were made to deceased estates. Some \$23 million was spent on administering the scheme, including for counselling costs, advice and assistance with applications. More detailed information on the administrative costs of Redress WA is in Appendix I.

Table 6 shows payments made under the Country High School Hostels ex gratia payment scheme.³²

Table 6: Payments under Country High School Hostels ex gratia scheme

Payment level	Number of payments made	Total amount paid (\$)
1 – \$5,000	2	10,000
2 – \$20,000	28	560,000
3 – \$45,000	60	2,700,000

TOTAL	90	3,270,000
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Queensland ex gratia scheme

Table 7 shows data provided on the Queensland ex gratia scheme.³³

Table 7: Payments under Queensland ex gratia scheme

Level 1 (payment amount set at \$7,000)	Applications made: 10,218 Payments offered: 7,453 Number of payments made: 7,168 Value of payments made: \$50,186,205
Level 2 payments (up to an additional \$33,000)	Applications made: 5,416 Payments offered: 3,492 Number of payments made: 3,531 (included deferred Level 1 payments to applicants who were unsuccessful for Level 2 payments): 1,455 – additional \$6,000 1,254 – additional \$14,000 616 – additional \$22,000 167 – additional \$33,000 Value of payments made: \$47,174,097

Total expenditure of the Queensland ex gratia scheme is shown in Table 8.³⁴

Table 8: Total expenditure of the Queensland ex gratia scheme

Item	Amount (\$)
Level 1 payments	50,186,205
Level 2 payments	47,174,097
Legal fees	3,468,750
Funeral assistance	179,025
Application assistance	43,802
Medicare Australia bulk payment	510,000
Administration	8,600,000
TOTAL	110,161,880

Tasmanian Abuse in Care ex gratia scheme

Table 9 shows payments made under the Tasmanian Abuse in Care ex gratia scheme.³⁵

Table 9: Payments under Tasmanian Abuse in Care ex gratia scheme

Round	Claims	Payments made	Amount paid	Average payment
1 (2003–2004)	364	247	\$9,400,000	\$38,056
2 (2005–2006)	514	423	\$14,600,000	\$34,515
3 (2007–2010)	995	784	\$25,300,000	\$32,270
4 (2011–2013)	541	394	\$5,500,000	\$13,959
TOTAL	2,414	1848	\$54,800,000	\$29,653

South Australian payments under Victims of Crime Act

South Australia provided the following data as at 16 June 2014 on ex gratia payment applications made by persons who were sexually abused while in state care under the *Victims of Crime Act 2001* (SA):

- 163 applications have been received
- 91 offers have been made
- 82 offers have been accepted
- total payments of \$1.167 million have been made
- the average payment is approximately \$14,400.³⁶

3.5 Private sessions data

The following analysis is based on data from private sessions held between 7 May 2013 and 31 August 2014.

Table 10 sets out data on the number of institutions reported by private session attendees. Table 10 shows how many private session attendees reported abuse in one institution, how many private session attendees reported abuse in two institutions, and how many private session attendees reported abuse in three or more institutions. Table 11 sets out data on the types of institutions in which private session attendees reported they were abused.

Table 10 – Abuse by number of institutions

Total	Abuse in one institution		Abuse in two institutions		Abuse in three or more institutions	
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
1810	1404	77.6	308	17	98	5.4

Table 11 – Abuse by institution type

Institution type or activity	Number	Per cent	Categorical percentage
Out-of-home care: residential home: government	239	9.9	34.6
Out-of-home care: residential home: non-government, secular	62	2.6	
Out-of-home care: residential home: non-government, faith-based	534	22.1	
Out-of-home care: foster care / kinship care: government	45	1.9	
Out-of-home care: foster care / kinship care: non-government, secular	5	0.2	

Institution type or activity	Number	Per cent	Categorical percentage
Out-of-home care: foster care / kinship care: non-government, faith-based	0	0.0	7.6
Out-of-home care: foster care / kinship care: type unknown	134	5.5	
Education day and boarding school: government	140	5.8	28.1
Education day and boarding school: non-government secular	11	0.5	
Education day and boarding school: non-government, faith-based	527	21.8	
Religious activities: places of worship	389	16.1	16.6
Religious activities: clergy training facility	7	0.3	
Religious activities: other	6	0.2	
Recreation, sports and hobbies: government	6	0.2	4.2
Recreation, sports and hobbies: secular (includes scouts and guides)	70	2.9	
Recreation, sports and hobbies: faith-based	5	0.2	
Recreation, sports and hobbies: sporting and other	20	0.8	
Health and allied: hospital and rehabilitation: government	33	1.4	2.1
Health and allied: hospital and rehabilitation: non-government, secular	4	0.2	
Medical practitioners	9	0.4	
Health and allied: other	5	0.2	
Juvenile justice / detention: police	5	0.2	

Institution type or activity	Number	Per cent	Categorical percentage
Juvenile justice / detention / corrective institutions	18	0.7	1.1
Juvenile justice / detention / immigration detention	4	0.2	
Child care centre based care: government	6	0.2	0.9
Child care centre based care: non-government, secular	15	0.6	
Child care: non-government, faith-based	1	0.0	
Supported accommodation: government	7	0.3	0.6
Supported accommodation: faith-based	7	0.3	
Supported accommodation: other	1	0.0	
Arts and cultural	1	0.0	0
Social support services: government	2	0.1	0.8
Social support services: non-government, secular	2	0.1	
Social support services: non-government, faith-based	15	0.6	
Other	73	3.0	3.4
Unknown	8	0.3	
TOTAL	2,416	100.0	100.0

4 Direct personal response

4.1 Introduction

Many survivors of child sexual abuse in an institutional context have told us of how important it is to them, and their sense of achieving justice, that the institution makes a genuine apology to them, acknowledges the abuse and its impacts on them, and gives a clear account of steps it has taken to prevent such abuse occurring again. Many survivors also want an opportunity to meet with a senior representative of the institution to tell their story. They want a senior representative of the institution to understand the impacts of the abuse on them.

Some survivors have had positive experiences when engaging with the institution in which they were abused; others have not. It is clear from many of our private sessions that this direct personal response from the institution can be a very important step in providing redress for a survivor.

The importance of this process was also reflected in evidence given in public hearings. Ms Emma Fretton, a survivor of abuse at Northside Christian College, gave evidence in case study 18:

I didn't actually want the money. I wanted an apology, but I never got one.³⁷

Ms Jennifer Ingham, a survivor of abuse by a priest in the Diocese of Lismore, gave evidence in case study 4:

... when I received [the personalised letter of apology from the Bishop] it was very – it was very empowering ... to the point where it had made such a difference to me that I actually wanted to ring and tell him personally, 'Thank you for that letter.'³⁸

It will be obvious that a personal response can only come from the institution. A scheme that provides monetary payments and support for counselling and psychological care can operate independently of the institutions involved, but an apology and acknowledgment from the institution, or a meeting with senior representatives of the institution, must involve the institution itself.

We recognise that it is not possible to require, or regulate for, a 'genuine' apology from an institution. The quality of any direct personal response for survivors will depend upon whether the institution is genuine in its desire to assist the survivor. This may in turn depend upon the adequacy of the institution's understanding of child sexual abuse and its impacts on survivors.

There will be survivors who will not want any form of direct contact or engagement with the institution. We propose below some possible mechanisms through which survivors could

obtain a response – for example, a written apology and acknowledgment from the institution – without being required to have any direct contact with the institution. We also discuss the principles that may be appropriate in formulating an institution’s personal response to a survivor.

Some survivors have other needs beyond counselling and lump-sum monetary payments. Some institutions have already taken steps to meet those needs. They should be understood as part of the personal response from the institution outside of any more structured ‘redress scheme’. They include:

- financial assistance to pay for drug and alcohol, employment or education programs
- assistance to obtain institutional records
- assistance to find lost family and facilitate reunions
- providing a copy of any relevant publications (such as yearbooks) and reproductions of photographs
- providing ‘pastoral care’, in the sense of spiritual guidance, support or re-engagement with a faith-based institution
- providing opportunities for collective redress, such as memorials and commemorative events, newsletters and reunions
- case management to assist survivors to gain access to available support services.

All of these issues are explored in this chapter.

4.2 Principles for an effective direct personal response

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on appropriate principles for direct personal response. On the whole, the attendees supported the principles we suggested. We have refined some of them in response to the consultations.

Re-engagement between a survivor and institution should only occur if, and to the extent that, a survivor desires it

Some survivors will want to re-engage with the institution in which they were abused.

Other survivors may not want to engage or interact with the institution at all. For example, as one survivor said in a private session:

I’m happy to take their money but I will never talk to them about what they have done to me.

In private sessions, public hearings and submissions survivors have consistently reported that it is important that any interaction they have with the institution after they disclose their abuse should occur only if they wish for it to occur and in the way they wish it to occur.

A number of survivor advocacy and support groups have told us how important it is that these choices remain with the survivor. It addresses the power imbalance that was inherent in the relationship between the survivor and the institution when the abuse occurred.

Institutions should make clear what they are willing to offer and provide by way of direct personal response and they should ensure that they are able to provide what they offer

A key aspect of any direct personal response that is provided to survivors is that institutions ensure they are clear about what they can, and in some cases cannot, provide.

Many survivors have told us how disappointed they were after their attempts to re-engage with the institution. The reasons for their disappointment vary, but in a number of instances the disappointment arose from a lack of clarity about what the institution was offering, or from the institution failing to provide what it had promised.

For example, in case study 10 on The Salvation Army Eastern Territory, JE, a survivor gave evidence that, after he disclosed his abuse, the institution refused him a meeting with representatives of the institution, even though its website indicated that such a meeting would be offered. In his evidence, JE linked the institution's failure to provide what was offered on its website with its failure to provide him with adequate care in the past. JE gave evidence that he was subsequently offered a meeting, but he felt that 'the meeting was only offered after I blasted them for not following their policies.'³⁹

This example and the many other accounts we have heard illustrate the harm that may be caused when institutions are unclear about what they are willing to provide or fail to provide what they offer to survivors.

At a minimum, all institutions should offer and provide on request by a survivor an apology; an opportunity to meet with a senior representative of the institution; and an assurance as to steps taken to protect against further abuse

Our work to date indicates that the following three elements of any direct personal response are essential:

- receiving an apology from the institution
- the opportunity to meet with a senior institutional representative and receive an acknowledgement of the abuse and its impact on them
- receiving an assurance or undertaking from the institution that it has taken, or will take, steps to protect against further abuse of children in that institution.

Our inquiries indicate that, if the personal response includes these elements, when delivered appropriately it can be of significant value to survivors.

Many survivors will wish to seek other responses from the institution. However, it would seem that every institution should be able to provide at least this level of response. None of these elements should be beyond the resources or capacity of any institution to provide, at least so long as the institution or an identifiable successor to the institution exists.

Apologies

Survivors have told us, particularly in private sessions, about the importance of receiving a genuine apology from the institution and in some cases the perpetrator. These accounts are consistent with the research into the importance and impact of apologies for survivors and their importance in the healing process. According to Eldridge and Still:

The hopes of adult survivors of child sexual abuse are often very similar and reflect a desire for the offender to accept responsibility in a way that facilitates a letting-go process for the survivor.⁴⁰

Canadian research on the therapeutic needs of victims of institutional child abuse supports this, noting that:

[S]urvivors need to receive apologies from those responsible for wrongdoing. A separate study into the therapeutic effects of court and non-court based processes used to resolve claims of sexual abuse made very similar findings ... Specifically, 'respondents consistently highlighted the desire to be heard, to have their abuse acknowledged and their experience validated, and to receive an apology.'⁴¹

Much of the institutional child sexual abuse revealed to the Royal Commission has, at its heart, a power imbalance between the perpetrator and the victim. When the survivor seeks redress, there is often the same power imbalance between the institution and the survivor. Apologies should be carefully made to ensure that they do not reinforce any power imbalance. Eldridge and Still write:

The apology should be for the survivor's well-being, not just a device to make the offender feel better. If it is truly for the survivor, then care needs to be taken that there are no hidden messages within it that enable the offender to maintain power and control.⁴²

Apologies can go some way toward redressing this power imbalance by empowering the survivor. Lazare writes:

[W]hat makes an apology work is the exchange of shame and power between the offender and the offended. By apologizing, you take the shame of your offense and redirect it to yourself. You admit to hurting or diminishing someone and, in effect, say that you are really the one who is diminished – I'm the one who was wrong, mistaken, insensitive, or stupid. In acknowledging your shame you give the offended the power to forgive. The exchange is at the heart of the healing process.⁴³

It is important for institutions, as the 'wrongdoer', not to dictate the agenda for making apologies, as this will simply reinforce any power imbalance.

Alter writes that there are two types of apologies that survivors usually want:

- a personal, private apology where the perpetrator directly apologises to the survivor on an interpersonal, one-on-one level. This is usually given face to face or by personal letters
- an official, public apology addressed to the individual or the group harmed. The apology's delivery is more formal and calculated, held at a public forum and always set down in some permanent form or official and public record.⁴⁴

Apologies by institutions, whether they are government or non-government, are an important and necessary form of redress for many survivors of institutional child sexual abuse. For example, when explaining its recommendation that the Queensland Government and responsible religious authorities issue a formal apology to children in Queensland institutions who experienced significant harm, the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Inquiry) reported:

Accountability for the harm done cannot be characterised as a legal issue only; the government and religious organisations must also accept moral and political accountability. The approach to reparation must include the engagement of survivors in the design of the redress process, provision of independent advice to victims regarding the redress options available to them, respect for and sensitivity towards them when conducting these processes, and a recognition of the power imbalance between victims and institutions.⁴⁵

The Royal Commission is aware of a number of examples of public apologies issued by non-government institutions for abuse of children in their care. These include apologies by the Christian Brothers;⁴⁶ Bishop Wright of the Catholic Diocese of Maitland Newcastle;⁴⁷ Bishop Morris of the Catholic Diocese of Toowoomba;⁴⁸ The Salvation Army;⁴⁹ and the Anglican Church of Australia.⁵⁰ Some survivors told us they sought, and welcomed, these public apologies, while other survivors have expressed dissatisfaction with public apologies.

Government apologies may relate not just to government-run institutions, but also to government regulation or oversight of non-government institutions, and to issues of broader public policy. We have heard a variety of views from survivors about the value and effectiveness of these apologies. We have heard from survivors who, having received the same form of private apology or having heard the same public apology, have reacted very differently.

Ms Robin Kitson, an Aboriginal survivor of abuse at Parramatta Training School for Girls, gave evidence in case study 7 that the various apologies she had heard or received did not mean anything to her because she did not think they demonstrated any real understanding of her experience:

I went to Sorry Day. I went to Forgotten Australians apology in Canberra. I have received letters from a number of support networks but I look at them and think, 'What does it all mean?' Well, it means nothing to me. It's not worth the paper it's written on. What are people sorry for? They were not even around. They do not know what the stories are. If they provided more explanations and did something to

let people know why they were saying sorry, then okay. But they did not tell the true story of why they were saying sorry.⁵¹

In contrast, Ms Jennifer Ingham gave evidence in case study 4 about the letter of apology she received:

I received a formal letter of apology from Bishop Jarratt. I have realised now how important it is to myself and my siblings. Bishop Jarratt apologised unreservedly for the ‘unconscionable and disgraceful conduct of a priest who betrayed every standard of decency and of the spiritual and moral trust expected of him’ and ‘of the singular failure of concern and pastoral care when you most needed to be believed and helped’. He said ‘we can’t undo the past but the church must make drastic change. Those responsible must be accountable.’ And they must.⁵²

While it is clear that individual survivors will respond differently to apologies, whether public or private, there is guidance available to assist institutions in making their apologies as effective as possible.

The New South Wales Ombudsman has published *Apologies: A practical guide* (2nd ed), which identifies the ‘six R’s’ as fundamental elements of the content of an apology:

- recognition
- responsibility
- reasons
- regret
- redress
- release.⁵³

While the Ombudsman’s guide is directed to all sorts of apologies, and not particularly to apologies for institutional child sexual abuse as a form of direct personal response, a number of these elements may assist institutions to make more effective apologies.

The Ombudsman suggests that the recognition element of apologies ought to comprise three components:

- a description of the wrong the subject of the apology
- a clear and unequivocal recognition that the action or inaction was wrong
- an acknowledgment of the harm upon the affected person.⁵⁴

Survivors have raised these elements of an apology during private sessions and case studies. Many survivors have said that, although they received an apology from the institution, they considered it meaningless because it failed to acknowledge or recognise the abuse or the harm done to them.

For example, JF, who gave evidence in case study 10 about abuse at The Salvation Army’s Indooroopilly Boys’ Home, said that he considered the written apologies he was offered ‘totally inadequate’:

I didn’t feel like either Major Cox or the Committee genuinely acknowledged what had happened to me while I was in the care of The Salvation Army. I didn’t feel that

the 'sorry' meant anything. You can say 'sorry' for anything. I would have appreciated it if they'd tried to really engage with me, and made an effort to understand what I'd gone through. That would have meant more to me than the word 'sorry' in a letter.⁵⁵

JE, who also gave evidence in case study 10 about abuse while in a Salvation Army institution, said of his letter of apology:

The letter advised me that the Committee had considered my statement, and said they were 'very sorry that your experiences at Riverview were so unpleasant.' To me, it sounded like a letter that you get from a hotel when you complain about the room. I did not consider it an adequate apology, not by a long shot.⁵⁶

JE gave evidence that he felt an adequate apology needed to indicate that the institution understood what the survivor had experienced and that they acknowledge the subsequent harm it had caused:

'We're sorry.' It doesn't mean anything. Let them address each individual case like they actually read it and like they know about it and they put themselves in your shoes for five minutes and can apologise for various parts of the process of what happened to me when I stayed there, when I escaped from there, and through the suffering that I went through in the application process, because that's reliving the whole abuse all over again, let me tell you.⁵⁷

For an apology to be of value to some survivors, it must adequately describe the wrong for which the apology is being given. However, we acknowledge that there is a balance to be struck in this process. Particularly in a written apology, some survivors do not want a detailed account to be given of particular incidents of their abuse or its impacts. Providing too much detail may cause further harm.

For some survivors, it may be important that the person giving the apology is well informed about the survivor's experience, and is not someone who is simply signing a letter without having any personal knowledge of the survivor.

DG, a survivor of abuse by a Marist Brother, gave evidence in case study 4 that he was not satisfied with the letter of apology offered to him, in part because he did not feel that the person giving the apology – the new Provincial of the Marist Brothers, Brother Thompson – had a genuine understanding of his experience:

The letter acknowledged that the Brothers accepted the substantial truth of my allegations of abuse and apologised to my family and me for the pain and suffering caused by Brother Foster and the handling of my allegations. It noted that a more sensitive and pastorally caring approach could have been taken. Overall, though, I thought the apology was pretty hollow and I was over it all by that stage. Basically, the letter made an apology for this and that, and I thought, 'I don't even know who you are, and it doesn't really mean that much to me.' To me, Brother Thompson was apologising for something he probably knew very little about. I thought it was rather worthless.⁵⁸

One of the strongest themes emerging from survivors' experiences of apologies is the importance they place on the institution taking responsibility for the wrong and for the harm caused. The New South Wales Ombudsman describes the taking of responsibility as good practice but also notes that it is what people affected expect from an apology.⁵⁹

The failure of institutions to take full responsibility for the wrong and/or for the harm caused by making a partial apology can significantly limit the effectiveness of the apology. The New South Wales Ombudsman describes partial apologies as those which are mere expressions of regret, sympathy, sorrow or benevolence but which do not admit responsibility.⁶⁰

The Royal Commission has heard from a number of survivors during public hearings who spoke of their disappointment with apologies that failed to take responsibility. Mr Tommy Campion, a survivor of abuse in the North Coast Children's Home, gave evidence in case study 3 about his views of an apology offered by Bishop Slater of the Anglican Diocese of Grafton:

Well, you know, there was no apology there. He didn't – nothing was admitted. He's just saying he was saddened, his heart goes out, and just 'Please accept my apology', but it doesn't say anything about the church, that the church was to blame for the abuse of the children or that they had run the home. So it's not any sort of apology to me.⁶¹

Ms Emma Fretton, a survivor of abuse at Northside Christian College, gave evidence in case study 18:

[I want not] just an apology; acknowledgment, not only for me but for all those other girls and boys. An acknowledgment, what they know. A sorry – anyone can say sorry, but I actually want acknowledgment that the school admits to their wrongdoing, that the church admits to their wrongdoing.⁶²

In some circumstances, an effective apology will include an explanation of the reasons for or cause of the problem.⁶³ The New South Wales Ombudsman notes that apologies should not excuse or justify the problem and that care should be taken when delivering this component of apologies:

It is totally inappropriate to say 'I am sorry but...' followed by an explanation as to why what was done was correct or justified. What is more appropriate is to say 'I am sorry because...' .⁶⁴

Ms Helen Gitsham, the mother of one of the children abused while in the care of St Ann's Special School, gave evidence in case study 9 about an apology that the Archbishop of Adelaide offered to affected families. She gave evidence that the families were concerned that the Archbishop did not provide any detail about how the children had been left so vulnerable to abuse in the institution:

I am aware that Archbishop Wilson apologised to families at this meeting ... I am also aware that many families raised questions about the church's failure to deal with the

situation ... but no information was given by the archbishop which went beyond what I already knew.⁶⁵

Providing reasons in an apology is a matter that needs to be considered very carefully in each individual case. Reasons may be more accurate and appropriate where the apology relates to more recent events, including, for example, an apology for initial failures in the institution's response to allegations of abuse.

The New South Wales Ombudsman refers to regret as a key component of an effective apology. The Ombudsman describes regret as 'an expression of sincere sympathy, sorrow, remorse and/or contrition', noting that the 'content, form and means of communication of an apology is very important as it can indicate the level of sincerity of the apologiser'.⁶⁶

Many survivors have told us that they consider the apologies they received from institutions to be insincere. Some survivors have told us that they would not consider any apology they were offered by the institution to be sincere.

Some survivors are willing to accept that an institutional apology is sincere. For these survivors, an apology that expresses regret after giving appropriate 'recognition' and taking appropriate 'responsibility' may be most likely to be regarded as sincere.

The New South Wales Ombudsman suggests that the 'redress' component of an apology should include a statement of the action that the institution has taken, or intends to take, to address the issue. It may include an assurance or undertaking that it will not happen again.⁶⁷

Obviously, the Royal Commission is using the term 'redress' in a much broader sense than this. Here, however, this component of an apology picks up on another one of the forms of redress we are proposing as the essential minimum forms of direct personal response that institutions should offer – that is, giving an assurance as to the steps the institution has taken, or will take, to protect against further abuse.

Some survivors have told us they have valued the assurances given in written apologies they received from the institution. Other survivors have told us there was not enough detail given in the assurances. It is fairly clear that assurances that will be regarded as valuable by some survivors will be regarded as inadequate or unhelpful by other survivors.

For survivors who seek both a written apology and an assurance of steps taken, or to be taken, it seems sensible to include both in the one letter of apology.

The New South Wales Ombudsman describes a request for forgiveness, or release from blame or the reconciliation of a relationship as being an optional, but important, component of a full apology.⁶⁸

During public hearings the Royal Commission has learnt of many apologies offered to survivors by the relevant institution. In offering apologies, some institutions, particularly faith-based institutions, have also sought the forgiveness of the victim.

For example, the national written apology issued by the Congregation of Christian Brothers in 1993 stated:

We cannot change the past. We cannot take away the hurt. We can express our heartfelt regret for the failings of the past and we can, on behalf of our predecessors, beg the forgiveness of those who suffered.⁶⁹

As with other aspects of apologies, not all survivors will respond positively to requests for forgiveness. It may be that not all of the New South Wales Ombudsman's 'six Rs' need to be present for an apology to be effective. What an apology ought to contain in order to be effective will vary from person to person. It is most likely to be effective if it is responsive to the survivor's needs.

According to Carroll:

Research has shown that what is considered to be a 'good enough' apology depends on which of these components needs to be present to meet the psychological needs of the recipient. In turn, this is influenced by the recipient's perception of the seriousness of the harm, the level of responsibility they attribute to the wrongdoer and the perceived wrongfulness of the behaviour with reference to the principle that was violated.⁷⁰

The Royal Commission has heard that, for many survivors, the apology that the institutions have offered to them can have a significant impact. Depending on the content, framing and delivery of the apology, the impact can be either positive, resulting in beneficial healing outcomes for the survivor, or negative, potentially resulting in further harm.

Meetings with senior institutional representatives

Many survivors have told us that they wanted to meet in person with a senior representative of the organisation. Many survivors felt that a meeting afforded them an opportunity to 'tell their story' to a person in authority, and also to receive a personal apology from a representative of the institution. In particular, the desire to meet with *senior* representatives of the institution was a strong theme emerging from public hearings, submissions and private sessions.

Of course, such meetings can be the best opportunity for offering a personal, face-to-face apology to a survivor. Survivors have given us many examples of apologies offered by institutional representatives during meetings, some of which were accepted and some of which were not.

Generally speaking, survivors have told us they wanted the person they were meeting with to be senior within the institution; they wanted them to be sincere and genuine; and they wanted to feel respected in their interaction with them.

Survivors have told us they want a senior representative to attend the meeting because they believed it was important for someone with authority or status to hear what they had to say about how the institution had failed them; and that they felt it was a sign of respect that the institution send a senior figure to meet with them.

For example, Ms Ingham a survivor of abuse by a Catholic priest, gave evidence in case study 4 that:

the bishop is, in my perception ... the head of that diocese. I can't go any higher, and I wanted the person who was responsible – he's not responsible for what happened to me ... But he is the leader of that church and I wanted respect, to tell the person who was the very leader, so that I felt that I was valued and respected and heard.⁷¹

Some survivors reported feeling angry or upset when they were offered meetings with institutional representatives who were not 'senior' within the organisation. For example, Ms Ingham gave the following evidence:

[I was told] that his calendar prevented availability until the end of June 2013 [and that] 'he is past the age of retirement and bishops retire much later than others, and he needs assistance in challenging tasks, hence the responsibility put to Chris for the facilitation.' This angered and confused me. I felt I deserved the respect to have Bishop Jarrett present and I needed answers from him. Instead the Chancellor Christopher Wallace would be present. With no disrespect to Chris Wallace's position within the church, he was only a deacon and a layperson. I thought that my case was important enough to bring in the most senior person of the diocese to the facilitation but clearly was not.⁷²

Survivors reported feeling positive about meetings that they felt were with a senior institutional representative and where the representative made them feel respected and supported.

A number of institutions already have, as part of their internal processes or procedures for responding to complaints of child sexual abuse, a component involving a meeting between the survivor and representatives of the organisation.

For example, the Catholic Church's Towards Healing process includes provision for a facilitated meeting between the complainant and the Church Authority.⁷³ The purpose of the meeting with the survivor is described as follows:

The primary purpose of a facilitated meeting ought to be pastoral. Many victims have said that one of the most important aspects of the process is that they have been listened to by the Church. Meeting with the victim demonstrates that they are important and their complaint is important. It shows respect for them, when their experience of abuse has been one of disrespect and violation. The meeting with the Church Authority therefore often plays an important part in promoting healing. Apologies can be offered, and the Church Authority is in a position to express empathy with the pain of the victim.⁷⁴

In a submission to the Royal Commission, the Anglican Church of Australia indicated that a number of its dioceses have pastoral care and assistance schemes in place which, among other things, provide survivors with an 'opportunity to tell their story to a senior officer of the institution'⁷⁵ and give the institution the 'opportunity to offer a genuine apology by a senior officer of the institution'.⁷⁶ It submitted that this feature is one of a number of elements that make the schemes effective in responding to both survivor and institutional needs.⁷⁷ The Anglican Church cites a diocesan bishop as an example of a 'senior officer'.⁷⁸

Feeling ‘respected’ during a meeting with institutional representatives was important to many survivors. Meeting with a senior representative from the institution was one key factor in survivors feeling that they were being shown respect by the institution.

For some survivors, other factors were also relevant. For example, the wearing of uniforms by institutional representatives when attending meetings with survivors was raised by a number of survivors, although some survivors thought wearing uniforms was respectful whereas others considered wearing uniforms to be inappropriate. Other factors, including the location of the meeting, and ensuring that the survivor has the opportunity to bring a support person, can also affect the success of the meeting.

It is important that, in offering, arranging, and holding meetings with survivors, institutional representatives are aware of these factors, and actively consider and manage them in a way that gives both parties the best possible opportunity to ensure the meeting is constructive and positive. It may be that at least some of these factors should be discussed with the survivor or the survivor’s support person before the meeting so that any concerns can be addressed before the meeting takes place.

Assurances and undertakings

The evidence before the Royal Commission indicates that for many survivors, their families and the wider community, receiving reassurances or undertakings from institutions is an important part of any redress process.

As discussed above, the New South Wales Ombudsman suggests that a fundamental element of the content of an apology is a statement of the action that the institution has taken, or intends to take, to address the issue, and possibly an assurance or undertaking that it will not happen again.⁷⁹

Some survivors have told us they have valued the assurances given in written apologies they received from the institution. Other survivors have told us there was not enough detail given in the assurances. It is apparent that assurances that will be regarded as valuable by some survivors will be regarded as inadequate or unhelpful by other survivors.

For survivors who seek both a written apology and an assurance of steps taken, or to be taken, it seems sensible to include both in the one letter of apology. Survivors who seek a meeting with a senior institutional representative might wish to discuss the steps the institution has taken or intends to take during the meeting, either instead of or in addition to any assurances and undertakings given in the written apology.

In some cases, survivors might be seeking particular assurances or undertakings about their abuser, and whether he or she continues to have any access to children. Institutions will have to consider whether and to what extent those assurances or undertakings can be given, particularly if an investigation or disciplinary process is underway.

In offering direct personal response, institutions should try to be responsive to survivors' needs

It must be emphasised that our inquiries indicate that there is no 'one size fits all' approach to an appropriate personal response. The information that survivors provided in public hearings, submissions and private sessions strongly suggests that to properly respond to survivor needs, institutions need to engage sensitively with survivors and be prepared to listen to what they say about what they need to assist them to heal.

As part of this process, institutions must recognise the diversity of survivors and what direct personal response they might need. They must remain open to receiving information from survivors about what they want. Institutions should actively seek to identify the needs of survivors of abuse in the relevant institution, and should be responsive to those needs where possible.

It is likely that, in some cases, institutions will not be able to meet the expectations or desires of some survivors. This may be because they do not have the required resources available to deliver the requested redress. Resource limitations may be financial in some instances, while in other cases institutions may lack the appropriate skill set or expertise to be able to deliver what is being sought. In these cases, institutions should communicate clearly and respectfully with survivors. They should be open to exploring alternatives with survivors and, where relevant, with third-party support services.

An example of where institutions may be able to meet the needs of some survivors is by responding to requests to rename buildings or other facilities that have been named in honour of former staff or patrons who are later named as abusers. Similarly, institutions could consider requests to remove statues or other memorials honouring those later named as abusers. Survivors have told us in private sessions of the continuing distress such honours can cause them.

Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal response

Some institutions currently offer a broad range of services to survivors, beyond the three elements of direct personal response we have identified as a proposed minimum requirement for all institutions – that is, an apology, a meeting with a senior institutional representative and an assurance or undertaking about steps taken to protect against future abuse – and that are separate from counselling and monetary payments that are considered in chapters 5 and 6.

These services include needs-based financial assistance, memorials, reunions and support groups, family tracing services and family reunions, and pastoral care.

Many survivors have told us that these forms of direct personal response have assisted them.

We consider that institutions that currently offer a broader range of direct personal response should continue to do so where possible.

To some extent, other elements of redress may replace some forms of direct personal response that some individual institutions currently offer. For example, some institutions currently provide counselling and psychological care for survivors. These may no longer be required if counselling and psychological care are provided through a redress scheme.

Similarly, monetary payments provided through a redress scheme should generally replace monetary payments provided directly by the institution.

However, it is important to emphasise that a number of survivors have told us about the value of receiving financial assistance, often paid directly to a third party, to address urgent or particular needs. In many cases, they related these needs to their experience of being in residential institutions, although not necessarily to any experience of institutional child sexual abuse. Any redress scheme should not discourage this direct engagement where it is within the capacity of the institution.

Examples of more formal schemes or arrangements that have provided needs-based payments include the following:

- The Forde Foundation in Queensland provides financial support to persons who were in institutional care in Queensland when they were children. It provides funding for medical and dental services, education and personal development among other things.
- In case study 11, evidence was given about the Western Australian Institutions Reconciliation Trust, which was established as part of a settlement of a class action against the Christian Brothers. The trust made lump-sum monetary payments to ex-residents of the relevant institutions for serious sexual abuse. It also provided ex-residents with needs-based financial assistance under a range of categories, including therapy, re-training, literacy classes, family reunification, housing and accommodation and emergency relief.
- In case study 11, evidence was also given about the Christian Brothers Ex-Residents & Students Services. The organisation provided ex-residents of the relevant institutions with a broad range of services and funding, including counselling, family tracing services, funding for family reunification expenses, adult education, advocacy and referrals and small no-interest loans.

In each of these examples, financial assistance is or was available to former residents of residential institutions, regardless of whether the person had experienced any institutional abuse.

Many survivors have also told us of less formal arrangements under which they have received emergency or needs-based financial assistance from institutions as part of, or in connection with, the institution's response to their allegations of institutional child sexual abuse.

Survivors' needs for other forms of direct personal response are unlikely to be affected by a redress scheme that offers monetary payments and counselling. Some examples of particular needs that institutions could meet through a direct personal response are discussed below.

Gaining access to records

Gaining access to personal records may help many survivors to understand and reclaim their identities and histories. Generally, the need for assistance in obtaining records is most pressing for those who were in residential institutions, particularly Forgotten Australians, Former Child Migrants and members of the Stolen Generations.

In some cases, people seek records because of their experience of institutional child sexual abuse. For example, they may need records to support a claim for redress or for litigation for institutional child sexual abuse. In other cases, they seek records not because they experienced institutional child sexual abuse but because they are seeking records of their childhood in residential institutions or, less often, in foster care.

The following are examples of more formal arrangements to help people to obtain records:

- Anglicare Australia recently launched a project to assist people who were in Anglican institutions to identify which Anglican agency or diocese has taken over the functions of an Anglican institution that has ceased to exist.⁸⁰
- The Christian Brothers, the Sisters of Mercy and the Poor Sisters of Nazareth have developed a Personal History Index to assist Former Child Migrants who were placed in Catholic residential institutions to find their personal details, trace their families, and locate any records held about them.⁸¹
- The New South Wales Government recently announced that the Department of Family and Community Services will aim to make care records available as soon as possible by doubling its resources to clear the backlog of applications from survivors.⁸² This announcement was made in connection with case study 19 on Bethcar Children's Home and also in response to case study 7 on the Parramatta Training School for Girls and the Institution for Girls in Hay.

Family tracing and family reunion

Some survivors, particularly Former Child Migrants and members of the Stolen Generations, have told us that they have received assistance to trace family members as well as further support and financial assistance to facilitate family reunions.

A number of support services assist people to trace and reunite with family. They include the Child Migrants Trust, the Forde Foundation in Queensland and services operating Link-Up programs.

Some institutions have also provided this assistance. For example, evidence was given in case study 11 about the Christian Brothers Ex-Residents and Students Services.⁸³ Another example is the Personal History Index that the Christian Brothers, the Sisters of Mercy and the Poor Sisters of Nazareth developed to assist with family tracing and records location.⁸⁴

Survivors may particularly benefit from financial support for facilitating family reunions if the support they seek is not available to them through support services such as the Child Migrants Trust, the Forde Foundation, and Find and Connect.

Memory projects

The Royal Commission has been told that ‘memory projects’ may be important to some survivors. The term ‘memory projects’ refers to activities that record and publicly communicate survivors’ experiences – for example, through yearbooks, photo albums and collections of survivors’ accounts of their experiences. For some survivors, this type of redress can help to give them a voice, while also placing their personal account of their experiences on the public record.

According to Daly, survivors may see memory projects as a form of redress because they not only inform members of the general public but also remember, validate and vindicate victims.⁸⁵

Memory projects may be conducted outside of individual institutions, but some institutions may find that survivors seek support and assistance in conducting such projects for former residents of a particular institution or group of institutions.

Collective forms of direct personal response

With the exception of public apologies and some memory projects, the various forms of direct personal response discussed above focus on individual survivors’ needs and wishes. However, some survivors and a number of survivor advocacy and support groups have told us that some identifiable groups of survivors have collective needs or desires and seek collective forms of direct personal response for their group.

Some survivors have told us that they identify with specific groups of other survivors, and some survivors identify as part of multiple groups. Some of these groups are well known and include Forgotten Australians, Former Child Migrants, and the Stolen Generations. Other groups may form around shared experiences of being former residents of a particular residential institution. Some of these groups seek forms of collective redress, including memorials or plaques to mark important sites, commemorative events, group reunions and collective or group healing therapies.

Memorials

As discussed above, a key part of direct personal response for many survivors is feeling that their experiences have been recognised and acknowledged. Some survivors wish to have a symbolic acknowledgement of their experiences in the form of a permanent memorial or plaque, usually at a significant or important site and most commonly at the site of the relevant institution.

Daly reports that memorials (and other forms of collective redress, including commemorative activities, media and memory projects) have a range of objectives and functions:

They seek to remember, validate and vindicate victims. They encourage new formats for victim ‘voice’ and new ways to communicate experiences of institutional abuse. They promote new relational histories of institutional abuse and policy wrongs that include survivors, officials and carers, and societal ‘on-lookers’. They bring an

understanding of institutional abuse to a wider audience of new participants (family members of survivors and other society members), and they celebrate the potential for individual, communal, and societal change.⁸⁶

In 2001, the Senate's Community Affairs References Committee recognised the importance of memorialisation and recommended, among other things, that:

the Commonwealth and State Governments, in conjunction with the receiving agencies, provide funding for the erection of a suitable memorial or memorials commemorating former child migrants, and that the appropriate form and location(s) of such a memorial or memorials be determined by consulting widely with former child migrants and their representative organisations.⁸⁷

The Australian Government responded by endorsing the 'concept of a memorial to former child migrants in commemorating the contribution child migrants have made to Australia'⁸⁸ supported by a \$100,000 contribution toward implementing the memorials. A number of memorials recognising child migrants were established.⁸⁹

The Royal Commission has heard from a number of survivors and groups of survivors who have advocated for permanent memorials to be erected as part of collective redress outcomes for people who identify as being a part of that group.

In case study 7, the Royal Commission heard evidence of abuse at the Parramatta Training School for Girls and the Hay Institution for Girls. A memorial plaque was erected at the site of the Hay Institution for Girls in 2007.⁹⁰ Following the hearing in case study 7, the New South Wales Government announced that it would establish 'an active place of recognition at the Parramatta Girls Home to pay tribute to the children who experienced sexual and physical abuse at this site'.⁹¹

In private sessions, a number of survivors also said that memorials or plaques were potentially something they would like the Royal Commission to recommend. Some survivors suggested that there should be a memorial dedicated to children who died in care as a result of abuse or neglect. At least one survivor suggested that a memorial also commemorate adults who died (including as a result of suicide) due to abuse or neglect they suffered as children in care. Some suggested that a memorial be established specifically to remember children who experienced institutional child sexual abuse.

Reunions and commemorative events

Reunions and commemorative events can have an important function in recognising the experience of a group of survivors. The Senate Community Affairs References Committee Inquiry into Children in Institutional Care (the Forgotten Australians inquiry) recognised the importance of reunions for ex-residents of institutions.⁹² Many survivors who have spoken to us confirmed this.

We have heard from survivors that reunions are often initiated by a survivor or group of survivors, but are sometimes supported by the relevant institution, either financially or in some other way – for example, by sending representatives along to speak to survivors and

hear their stories. It is this financial and other support that could be provided as a form of direct personal response.

For example, in case study 5, FP gave evidence about the support for reunions that he received from The Salvation Army:

I'd just really like to thank The Salvation Army for what they have been doing for us for this reunion. It's been a big thing ... If I want something, I ring Sydney and speak to the head officers ... and I say, 'Okay, I have a function on such and such a day. I need a certain amount of cash' – sometimes around \$250, or whatever. There's no hesitation, whatsoever. They're only too happy to help us. So we go forth. And the reunion's going quite strongly.⁹³

Collective redress for Aboriginal and Torres Strait Islander survivors

The Royal Commission has heard from many Indigenous survivors through public hearings, private sessions, community meetings, and submissions in response to issues papers.

The Royal Commission acknowledges that many Indigenous survivors were also subjected to policies of forced removal from their families and resultant dislocation from their kin, country and culture. The impact of institutional child sexual abuse is often compounded by these factors and can be devastating not only to the individual survivor but also to broader family groups and communities. The impact of intergenerational trauma is best understood when considered in the context of Aboriginal society and culture:

Aboriginal people are a collective society, aunties have the role of mothers, uncles of fathers and children are raised knowing the relationship they have to each and every member of their family and 'mob' or tribal clan. In schools even today, many Aboriginal kids have their cousins and relations as their best friends and grow up with an understanding of this unspoken connection they have to their extended family and community. When Aboriginal people were removed from their families and placed in out of home care, not only their connection to their family was disrupted, but their connection to their community was and they grew up with a sense of disconnection from family, community, land, culture, language etc. This is cultural abuse and all those disconnected in this way suffer from trauma, now entrenched through generations of removals – intergenerational trauma. Those that suffered sexual abuse in addition to this cultural abuse have yet another layer of trauma to work through.⁹⁴

It is because of this context that additional forms of direct personal response need to be considered for Indigenous survivors. The Victorian Aboriginal Child Care Agency (VACCA) informed the Royal Commission that:

Collective redress and traditional healing is crucial to Aboriginal people's healing as it provides for reconnection to that which was taken when they were removed. Cultural and other abuses have damaged the spirit of an Aboriginal person ... no amount of mainstream counselling will heal the spirit, only reconnection and collective healing opportunities on country will achieve this.⁹⁵

The importance of Aboriginal spirituality and collective belonging has long been recognised in the literature as being a critical component to identity and, consequently, to healing after trauma.⁹⁶

A number of advocacy groups, recognising this context and its impact on Indigenous survivors, have called for collective redress in the form of traditional healing for their client group. The Royal Commission has been told that collective redress and traditional healing for Aboriginal and Torres Strait Islander people would provide a range of benefits, including:

- reducing isolation experienced by individuals within the group
- providing an opportunity to learn about colonisation and disconnection, resulting in better understandings of their own identity and reassuring them that ‘they are not going mad’⁹⁷
- providing opportunities to reconnect with their spirit
- reconnecting with all that they have lost.⁹⁸

A desire for some form of collective redress has been a key theme emerging from Indigenous survivors’ accounts. The Royal Commission has heard that, for many Indigenous survivors, collective redress delivered through traditional healing models is a beneficial and welcome alternative or addition to some of the general redress outcomes.

A number of Indigenous survivors and Indigenous advocacy and support groups have told us that some Indigenous survivors wish to access group-based, or collective, healing models.⁹⁹ For this group, the need to reconnect with culture, family and community is deeply associated with the impacts of historical disenfranchisement, isolation and abuse, and is a critical aspect of redress.

In its 2009 report regarding Aboriginal and Torres Strait Islander healing and the establishment of the Aboriginal and Torres Strait Islander Healing Foundation, the Aboriginal and Torres Strait Islander Healing Foundation Development Team identified that many of the problems prevalent in Indigenous communities today have their roots in the failure of Australian governments and society to acknowledge and address the legacy of unresolved trauma.¹⁰⁰ It found that the research demonstrates:

an overwhelming need among Aboriginal and Torres Strait Islander people for services that are designed and run by communities to address the underlying causes of dysfunction in a manner that is holistic, safe and culturally appropriate.¹⁰¹

This includes addressing the broader family and community context that is relevant for many Indigenous people:

Participants in the consultation process agreed that healing is a spiritual journey that requires initiatives to assist in the recovery from trauma and addiction and reconnection with family, community and culture.¹⁰²

Following the release of the 2009 report, the Australian Government helped to fund the establishment of the Healing Foundation, an independent national organisation to support the emotional wellbeing of Indigenous people, with a particular focus on members of the Stolen Generations. The Healing Foundation runs Indigenous healing programs across Australia. From its recent experience and research, it has stated that:

cultural and traditional practices act as a pathway to healing for Aboriginal and Torres Strait Islander peoples and communities. Improved social and emotional wellbeing appears to be an outcome of the renewal of cultural practices that builds cultural and community strength and personal identity with pride and dignity.¹⁰³

The need to consider a more flexible, responsive approach to the needs of Indigenous people has been recognised particularly in the context of members of the Stolen Generations. For example, in 2007 a report prepared for the Office for Aboriginal and Torres Strait Islander Health in the Australian Government Department of Health and Ageing recommended that services:

adopt a flexible approach to service delivery that extends beyond the mainstream clinical counselling model. This includes conducting group activities in community settings ... Services should [also] liaise closely with Stolen Generations organisations to ensure that services meet the needs of these groups.¹⁰⁴

In 2012, the Australian Government Department of Health and Ageing recognised in *Social and emotional wellbeing program: Handbook for counsellors* that 'counselling is just one type of healing activity that may be provided to clients, with alternative supports including yarning circles, healing camps, outreach services and case management'.¹⁰⁵

A 'holistic' approach to healing, which considers health in a much broader context than that adopted in Western health models, is prominent in literature around Aboriginal healing, both in Australia and internationally. 'Blended healing', which combines traditional therapeutic services such as counselling with traditional healing and other cultural practices, is recognised by the Healing Foundation to be an element of a good quality healing program. Following a recent review it commissioned of international literature on Indigenous cultures and healing, the Healing Foundation stated that there were recurring themes in international Indigenous healing settings that suggested:

healing takes time, cultural approaches are blended with other healing traditions, there is a central component to healing, programs are better delivered by people of the same cultural group, program staff need support of the emotional strain in healing, there is substantial diversity among people needing healing, and healing program must first do no harm.¹⁰⁶

Similar findings have been made in the rapid evidence review undertaken for the Royal Commission by Breckenridge and Flax. The review states:

there is broad consensus in the literature that services and supports for Indigenous people who have experienced [child sexual abuse] should be based on a recognition of the central importance of extended family and community relationships, the ongoing impact of inter-generational trauma and historical injustices, and the effects of socio-economic disadvantage. Research points to a range of factors that may lead to more effective support services for Indigenous people who have experienced [child sexual abuse], such as:

- Cultural competence and understanding of Indigenous worldviews

- The option to see an Indigenous worker if preferred
- Recognition of the interconnectedness of individuals
- Extended family and community in the lives of Indigenous people
- Partnership and involvement with Indigenous communities in developing and delivering [child sexual abuse] support services.

There is also an increasing focus in the literature on healing programs for Indigenous [child sexual abuse] victims and their families and communities. Evaluation of healing programs is still at a formative stage, and it is unclear how effective these programs are for victims of [child sexual abuse], as many [child sexual abuse]-related healing programs have a restorative justice focus and do not appear to provide therapeutic support for [child sexual abuse] victims or survivors.¹⁰⁷

In a Canadian context, Castellano writes:

Holistic approaches to maintaining and restoring health have been advocated by Aboriginal people for many years. This means attending to physical, mental, emotional and spiritual dimensions of persons, across the life cycle for children, youth, adults and elders. It means addressing social and environmental conditions including education, housing, and a compromised natural environment. Holistic thinking is now being embraced in approaches to population health and recognition that determinants of health lie outside of the conventional medical domain, but practice is still firmly rooted in the medical model of treatment. The spiritual dimensions of healing remain mysterious and neglected.¹⁰⁸

For Indigenous people:

[Traditional healing involves] creating opportunities for Aboriginal people to come together, where possible on country and reconnect. It involves spending time together, often with elders (healers) and connecting with their spirit.¹⁰⁹

In addition to cultural healing programs, the Royal Commission is aware that there have been suggestions for other forms of collective redress to respond to the needs of Indigenous survivors. Suggestions have included calls for Indigenous language revival programs, day trips to or on country and the transfer of institutional land back to Indigenous people.¹¹⁰

The Royal Commission has been told that the way to best deliver traditional healing to Indigenous communities is to work with organisations servicing those communities and with members of the community themselves. VACCA has advocated for better resources and funding support for community-controlled health centres, which 'have a major role to play in incorporating spirituality, bush medicine and traditional healers in their healing practices'.¹¹¹

For institutions to support Indigenous survivors who want to access traditional healing and collective redress options, one option could be to work to develop relationships with support organisations and to consider funding assistance to deliver the appropriate services to this group as a form of direct personal response.

Direct personal response should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors

If the direct personal response that is provided by an institution is to be meaningful and effective for survivors, it is important that survivors feel that the care or support is genuine, empathic and sincere.

The Royal Commission has heard from survivors in public hearings, submissions and private sessions that, in some instances, re-engaging with the institution has been a difficult, even traumatic, experience because of the lack of understanding demonstrated by institutional personnel.

Some survivors described situations where they felt that the institution's representatives said things that were inappropriate. For example, in case study 10, JD gave evidence that an institutional representative referred to her own granddaughter during a meeting and in a subsequent letter. JD gave evidence that:

I didn't like how [the institutional representative] referred to her own granddaughter. I thought that was inappropriate and she was personalising it or making it about her.¹¹²

Other survivors reported that during meetings, institutional representatives made them feel 'rushed' or as though there was a process they were being pushed through. For example, in case study 4, Ms Joan Isaacs gave evidence that:

As soon as I finished [telling my story, the institutional representative] said, 'Now we'll move on to the agenda of apology' and I said, 'No, I don't want to move on to the apology. I have told you all what happened to me and I want you ... to tell me how you felt listening to me' ...¹¹³

Other survivors reported concerns ranging from the set-up and seating arrangement of rooms for meetings to whether the representatives wore institutional uniforms or attire.

Some institutional representatives have also acknowledged that they did not appreciate the impact of child sexual abuse at the time they met with survivors.¹¹⁴

A number of survivor advocacy and support group representatives have told us that they believe that anyone who is providing support to survivors should receive trauma-informed care training.

The Mental Health Coordinating Council, the peak body for community mental health organisations in New South Wales, cites Bloom in describing 'trauma-informed care and practice':

[Trauma-informed care and practice is] grounded in and directed by a thorough understanding of the neurological, biological, psychological and social effects of trauma and interpersonal violence and the prevalence of these experiences in persons who receive mental health services. It involves not only changing

assumptions about how we organise and provide services, but creates organisational cultures that are personal, holistic, creative, open and therapeutic. A trauma-based approach primarily views the individual as having been harmed by something or someone: thus connecting the personal and the socio-political environments.¹¹⁵

In describing the positive impact that trauma informed training can have on the culture of an organisation, the Council argues that the improved outcomes flow through to people who have experienced interpersonal trauma and are receiving services or support from the organisation:

Transformational outcomes can happen when organisations, programs, and services are based on an understanding of the particular vulnerabilities and/or triggers that trauma survivors experience (that traditional service delivery approaches may exacerbate) so that these services and programs can be more supportive, effective and avoid re-traumatisation.¹¹⁶

At this stage, we consider that trauma-informed care training for institutional representatives who interact with survivors may well be of considerable assistance in ensuring that they have a good understanding of child sexual abuse and its impacts. It can also ensure that they do not do any further harm. However, it is not clear to us that this is the only form of suitable training or that it is sufficiently widely available and affordable for it to be recommended as a minimum requirement.

It has also been suggested to the Royal Commission that institutional staff dealing with survivors, in addition to being given education about the nature and impacts of child sexual abuse and training on how to appropriately respond to survivors, may require training to support particular survivor groups. For example, it has been suggested that institutional staff who are providing direct personal response to Indigenous survivors, particularly in circumstances where the institution was responsible for significant numbers of Indigenous children, should receive cultural awareness or sensitivity training to ensure that they are able to engage appropriately with these survivors, their families and broader communities. This training would appear to be appropriate, particularly for institutions with a number of Indigenous survivors.

The Royal Commission considers that it is important, particularly for survivors but also for institutions, that institutional representatives who are involved in delivering a direct personal response have the skills necessary to interact with survivors in a way that ensures that the direct personal response does no further harm. Direct personal response, when sought by a survivor, should provide a positive contribution to healing for the survivor.

Institutions should welcome feedback from survivors about the direct personal response they offer and provide

Institutions that provide direct personal response should continuously work to ensure that the direct personal response is as effective as possible in meeting survivors' needs and expectations.

One way of doing this is to encourage and welcome feedback from survivors who have sought or obtained direct personal response from the institution. Feedback may enable an institution to improve its processes and services to better meet survivors' needs, by identifying particular areas that could be improved through staff training or the allocation of other resources.

In addition to improving existing services, seeking and receiving feedback could assist an institution to identify any additional survivor needs that it might be able to meet. In these instances, where institutions have the resources to do so, they should consider whether there are other specific services they are able to offer that survivors might find of use, such as services for survivors' family members or the broader community. Providing services for the broader community might be particularly important in some Indigenous communities where the impact of institutional sexual abuse has been community-wide.

Institutions should also consider seeking the advice of survivor advocacy and support groups from time to time or on an on-going basis to help ensure that the direct personal response they offer and provide is as effective as possible.

4.3 Interaction between a redress scheme and direct personal response

An appropriate personal response can only be provided by the institution and cannot be provided through a redress scheme independent of the institution.

It has been suggested that, if an independent redress scheme is established to determine appropriate counselling and psychological care and monetary payments, the scheme might also facilitate the provision of the direct personal response.

Some survivors may seek a written apology, but may wish to have no further contact with the institution. In these circumstances, an independent redress scheme may be able to convey their request to the institution so that they do not need to have any further contact with it.

This process would only work if a survivor seeks a written apology, a written acknowledgment and/or a written assurance of steps taken to protect against further abuse. Any other forms of direct personal response would require direct contact between the survivor and the institution, or between an intermediary who is supporting or acting for the survivor and the institution. In these cases, a redress scheme could facilitate the pursuit of a direct personal response by offering survivors the choice between having their details, or the details of their intermediary, passed on to the institution with a request that the institution contact them directly or being given the contact details of the relevant person in the institution so that the survivor or their intermediary can initiate contact with the institution.

Apart from this, redress schemes would not have any further role in the offer or provision of a direct personal response or the range or quality of direct personal response offered or provided.

Any option for seeking direct personal response through the redress scheme should not preclude a survivor from choosing to approach an institution directly, either themselves or through an intermediary.

This limited interaction between an independent redress scheme and the provision of direct personal response was discussed during our private roundtables and was generally supported by participants. Some participants expressed concern that simply providing survivors with institutional contact details for them to initiate contact should they wish to re-engage with the institution has the potential to result in further trauma if institutional staff were not appropriately trained to respond to survivors. It was also indicated that it would be important that the redress scheme, in referring a survivor to the institution, could rely on information that the institution provides about what direct personal response it was able to offer.¹¹⁷

We welcome submissions that discuss the issues raised in Chapter 4, including the principles for an effective direct personal response and the interaction between a redress scheme and direct personal response.

5 Counselling and psychological care

5.1 Introduction

Through private sessions, public hearings, and submissions, many survivors of child sexual abuse in an institutional context have told us of their need for counselling and psychological care, and of their experiences in seeking this care. Many survivors coming to private sessions have also made use of the counselling services available through the Royal Commission.

The effects of child sexual abuse on mental health functioning have been well documented.¹¹⁸ These effects are many and varied and affect survivors in multiple life domains. They include:

- at the individual level, mental health and physical health
- at the interpersonal level, emotional, behavioural and interpersonal capacities
- at the societal level, quality of life and opportunity.¹¹⁹

What survivors have told us confirms the severe and sometimes lifelong impact that institutional child sexual abuse can have across all of these areas of life.

Based on what we have learned to date, it is clear that many survivors will need counselling and psychological care from time to time throughout their lives. At times, very intensive therapy and support may be needed, while at other times, a survivor may go for years without needing counselling or psychological care. Some survivors will need more counselling and psychological care than others, including psychiatric care. Some may not seek any care, regardless of need.

Survivors have told us that they have a range of needs and counselling and psychological care will only be one. For example, survivors may require assistance with housing, education and employment, drug and alcohol issues, dental issues as well as a range of other medical needs. What is needed varies considerably between individual survivors.

However, in most cases it is difficult to identify a clear connection between a survivor's experience of institutional child sexual abuse and these broader needs. Rather, the needs may arise more from the experience of being in residential institutions than from the experience of institutional child sexual abuse. For example, people who were in residential institutions as children but who did not experience institutional child sexual abuse may also require assistance with housing, education and employment, drug and alcohol issues and dental and other medical needs. Indeed, other members of the community who have not experienced institutional child sexual abuse and have not been in any form of residential or state care may also require assistance with these matters.

Broader public programs such as Medicare and more specialist support services assist in meeting these needs. Some of these services are available across the community; some are targeted at care leavers or particular groups of care leavers; and some are targeted at survivors. As discussed in Chapter 4, some of these needs could also be met through direct personal response. The Royal Commission is conducting a separate project to investigate the adequacy of support services in meeting survivors' needs.

Based on all the information that we have obtained to date, we are satisfied that survivors' needs for counselling and psychological care should be singled out from the broader range of needs and addressed through redress as a necessary part of ensuring justice for victims. We are satisfied of this because:

- the need for counselling and psychological care arises, in whole or in part, from survivors' experiences of institutional child sexual abuse
- while it is perhaps not universal, it is a need that is so widespread amongst survivors that it should be addressed separately through redress.

In civil litigation, a plaintiff who needs counselling and psychological care as a result of a personal injury caused (intentionally or negligently) by the defendant is entitled to recover damages for the cost of the plaintiff's past and future counselling and psychological care.

An allowance could be made for counselling and psychological care by providing an addition to the monetary payments that are available through redress. However, we consider that a different approach is more likely to meet survivors' needs.

Survivors will not have the same level of need for counselling and psychological care. Also, the needs of many survivors will be episodic and unpredictable. Survivors may not be aware of the extent of support they may require throughout their lives and they may not have the means to set aside funds for this purpose.

Further, existing public programs and support services already provide a range of counselling and psychological care services, many of which are valued by survivors. It is important that counselling and psychological care that is provided through redress not displace or impair these existing programs and services. Rather, funding for counselling and psychological care through redress should supplement existing programs and services.

One significant suggestion is that a funding source should be created through redress to ensure that survivors can obtain appropriate counselling and psychological care that can be used periodically whenever they need it. Survivors would be assisted to find appropriate practitioners who have the right capabilities to work with complex trauma clients. Survivors would also be assisted to make use of existing public programs and support services where these can provide appropriate counselling and psychological care.

The Royal Commission is concerned to recommend an approach that will operate as effectively and efficiently as possible and that will supplement rather than compete with existing programs and services.

The counselling and psychological care discussed in this chapter is long-term therapeutic counselling and psychological care. It is not intended to cover any counselling and support

services to help survivors to apply for redress through a redress scheme. These services are discussed in Chapter 7.

5.2 The need for counselling and psychological care

The impact of child sexual abuse

It is now clearly established that there is a link between experiences of child sexual abuse and a range of psychological problems and mental health issues later in life. This link can be demonstrated not only for people who have been diagnosed with a clinical mental health disorder; it also exists for people who do not meet clinical diagnostic criteria for a mental illness but who nonetheless experience symptoms associated with trauma – for example, anxiety and depression.¹²⁰

Child sexual abuse victimisation is strongly associated with a range of issues around health and wellbeing well into adulthood. Adults with child sexual abuse histories have been found to have a higher risk of mental health problems such as depression, anxiety, substance abuse and self-harm when compared with the community as a whole.¹²¹ Some survivors require intensive psychiatric care, sometimes throughout their lives, including in residential psychiatric facilities.

Although these impacts vary widely amongst individuals in both degree and composition, disruptions generally fall into three main areas:

- intrapersonal problems such as compromised sense of self-worth, deep feelings of guilt and responsibility for the abuse
- relational impairments including trust and intimacy difficulties
- disturbances in affect, such as depression, anxiety, anger and post-traumatic stress.

The impacts of child sexual abuse can sometimes be fatal:

A number of studies indicate that sexual victimisation, both in childhood and beyond, is a significant risk factor for suicide attempts and for (accidental) fatal overdoses among both men and women.¹²²

What survivors have told us in private sessions, public hearings and submissions confirms the findings in the academic literature.

We have heard about many examples of the severe impacts that untreated trauma of institutional child sexual abuse has had on survivors. We have had a number of private sessions with relatives of victims of institutional child sexual abuse who have committed suicide. Their relatives have told us of the terrible impact of the abuse on the victims and the ongoing impact of the abuse and suicides on their families.

Survivors' accounts in private sessions also show that, when compared with the general population, survivors may have a higher risk of experiencing during their life:

- lower levels of community participation

- social isolation and homelessness
- lower earnings and socio-economic status, and difficulty maintaining employment
- imprisonment.¹²³

Survivors have also given evidence in a number of case studies about the serious and life-long impact of abuse.

Survivors from the Parramatta Training School for Girls and the Institution for Girls in Hay gave evidence in case study 7 about the effect that institutional abuse has had on their lives. They gave evidence:¹²⁴

- of the ongoing psychological trauma that former residents still experience, with almost all saying they had considered or attempted suicide at least once¹²⁵
- that some became homeless as soon as they left the institution¹²⁶
- that employment prospects were few and many now receive a disability or other pension¹²⁷
- that their relationships with family have also suffered and a number of them feel they have been poor role models for their children.¹²⁸

One survivor also gave evidence of how institutional abuse adversely affected her connection with her community. Ms Mary Farrell-Hooker, who identified as Aboriginal, said that institutional care had isolated her from her culture.¹²⁹

Psychological and neurobiological explanations

Medical researchers continue to explore connections between childhood abuse and atypical brain development, which can result in an increased risk of psychopathology.¹³⁰

The trauma literature also identifies early onset trauma as having a particular impact on the developing brain, especially when the trauma is prolonged, repetitive and unrepaired.¹³¹ According to Wall and Quadara:

Where early care-giving relationships are dysfunctional, either because they are a source of trauma or there is an inability to nurture and protect a child, the child's developmental competencies in the areas of sense of self, agency, communication, and interpersonal relationships can be negatively affected, thereby setting the scene for many of the problems associated with complex trauma.¹³² [References omitted.]

There can also be dramatic impacts across development, including in a child's capacity to learn as a result of impairments in working memory.¹³³

Other research demonstrates that complex trauma influences attachment, working memory and other areas of functioning and psychological life. As Tarczon notes, a brain conditioned to be easily triggered into a stress response is likely to become highly responsive to substances and behaviours that provide short-term relief. This helps to explain a neurological and psychological basis for many traumatised people's dependence on alcohol. The complex problems that can manifest for child sexual abuse survivors can be understood as a person's best efforts to cope with the effects of these harmful external events.¹³⁴

Resilience and protective factors

There is much literature on the negative long-term effects for people who were sexually abused as children.¹³⁵ However, the Royal Commission also recognises that not all survivors will face difficult adjustments in their future as a consequence. When discussing traumatic events, every individual reacts differently. It is also important to recognise the role of resilience.¹³⁶

In addition to individual resilience, the way that abuse impacts on a child will also be affected by many other aspects of their life and the circumstances at the time it occurred, including:

- the child's individual characteristics and make-up
- their care-giving experiences
- family and social support
- the various aspects of their school, community and society that protect or put them at risk.¹³⁷

Accordingly, the impact of abuse and the way it impacts upon a survivor both immediately and in the long term varies according to the individual and their circumstances. There are numerous factors at play on the individual, interpersonal and societal level that will affect the severity of each survivor's trauma and their psychosocial needs.

How counselling and psychological care can help

Recent evidence suggests that not only can child sexual abuse cause substantial long-term damage but also the effects can be cumulative and increase in severity over time if left unaddressed.¹³⁸

Research shows that the mental health impacts of child abuse require specialist and long-term care.¹³⁹

Counselling is reliant on brain plasticity for effectiveness. Through counselling, practitioners try to facilitate cognitive, behavioural, emotional and psychological change. Evidence in the field of neurobiology demonstrates that counselling can positively stimulate neurotransmitters and therefore provide some repair to the damage that trauma has caused. The process causes new neurons and neuronal networks to develop. These neurons and neuronal networks impact on different brain systems and contribute to positive outcomes.¹⁴⁰

Studies have shown that counselling can help survivors to:

- understand their abuse history
- understand the dynamics of child sexual abuse in new ways
- authenticate their experiences
- challenge and change long standing guilt-based beliefs of responsibility and culpability when practitioners assist participants to view the vulnerabilities and limitations of the

child they were within the abusive context created by an older, more physically powerful and psychologically dominant offender

- understand themselves, including their emotions, reactions, behaviours and beliefs, in deeper ways and learn to connect to the self and to the body in new and positive ways.¹⁴¹

A recent study about what aspects of counselling facilitate healing from child sexual abuse found that counselling contributed to healing of participants in three important ways:

- by helping them to understand the assaults and their impacts in new ways
- by facilitating a change in their intrapersonal relationships
- through the relationship with their practitioner.¹⁴²

We have heard from some survivors that they have had bad experiences of counselling and psychological care, where they did not feel that the practitioner understood them or their needs. For some survivors, this has discouraged them from seeking any further counselling. Some survivors report being further traumatised by the counselling they received.

Survivor advocacy and support groups and practitioners have also told us of survivors who have attended counselling that has been more damaging and re-traumatising than positive. Instances of negative counselling have also been studied empirically. Particular difficulties arise where practitioners have not let the client lead and where they have, for example, asked for details of abuse when the client was not comfortable discussing these or stopped the client from giving details that the client wanted to give.¹⁴³

We have heard through private sessions of survivors' disappointment in a health care system which seeks to reduce their suffering to a set of symptoms to be 'cured' through short term interventions without the practitioner taking an interest in the cause of their trauma. We have heard from survivors, survivor advocacy and support groups and professionals in psychology and social work that this symptoms-based approach to diagnosis and care is not appropriate to respond to the complex trauma related needs of survivors.

Survivor advocacy and support groups and practitioners have told us that it is very important that practitioners who work with survivors have the appropriate capabilities, including trauma specific training and relevant experience, to work with survivors. We discuss this further below as a principle for providing counselling and psychological care for survivors.

Other forms of healing

Some survivors and survivor advocacy and support groups have expressed support for healing services that are outside of Western medical models of counselling and psychological care. These services can range from drop-in centres and support groups to Indigenous traditional healing practices.

While there is not yet a strong empirical evidence base for many of these therapies, we note that the research on treatment effectiveness for adult survivors demonstrates regardless of

the model used, more effective outcomes result from providing any evidence-based psychotherapeutic treatment than from providing no treatment.¹⁴⁴

At this stage, there is no reason to oppose therapies or services that survivors find useful. Further, we support the continued provision of any existing support services (including any provided through direct personal response). Additional therapies or services could also be supported by institutions through direct personal response where these are sought by survivors, as discussed in Chapter 4. Of course, survivors who receive monetary payments could also choose to spend some of the payment on any alternative therapies or services they find useful.

However, counselling and psychological care supported through redress would support conventional counselling and psychological care.

5.3 Principles for counselling and psychological care

From our work so far, it would seem that, to best meet survivors' needs, the principles discussed in this section should inform the provision of counselling and psychological care to survivors.

Through our roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics about some of these proposed principles. We also consulted a number of experts and practitioners on the principles. We have refined and expanded the proposed principles in response to these consultations.

Counselling should be available throughout a survivor's life

The trauma associated with sexual abuse is not a specified medical condition that can be cured at a specific point in time so that it will not reoccur. Therefore, counselling and psychological care should be available to survivors when they need it throughout their lives.

The delay in reporting of child sexual abuse is now well known. Many survivors will not disclose their abuse until adulthood.¹⁴⁵ Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse. Men took longer to disclose abuse than women.¹⁴⁶ For example, in the Royal Commission's Interim Report, we reported on Arthur's experience as follows:

Arthur went on to build a career and a family, but never told anyone about his abuse until 2011 when he was 65 years old and stumbled across the CLAN (Care Leavers Australia Network) website by accident.¹⁴⁷

Research also indicates that not all survivors will develop symptoms immediately; it is important to be alert to 'sleeping effects' – problems can possibly emerge at later stages in life or be triggered by significant life events.¹⁴⁸ What we have heard in private sessions confirms this.

Consistently with post-traumatic stress disorder (PTSD) and complex PTSD more generally, survivors often have symptoms emerge for the first time later in life. For example, survivors may experience anxiety and flashbacks when their own children reach the age when they were abused. Similarly, many survivors who have come to private sessions and who are in the older age group have told us they are experiencing symptoms of depression, nightmares and sleep disturbance as they confront impending institutionalisation associated with ageing, increased health needs, and possible hospitalisation or residential aged care.

Further, 'treatment readiness' is considered a key factor for success in most counselling and psychological care. That is, in order for treatment to be successful, the survivor must be ready and willing to engage in the difficult process of facing what happened to them as a child, and the impact it had on their life. They must also commit to the sometimes difficult task of changing often entrenched ways of thinking and responding to life events and interactions with others. They also need to be ready to attempt to build a trusting and therapeutic relationship with their therapist. Some survivors will not reach this level of readiness until later in life. In case study 11, VI, a survivor, gave the following evidence:

I think I was ready to have counselling by this time. I guess you really have to be ready to do it. You just can't force counselling on anyone.

When I went through Redress, I was in my 50s. I was much more settled and I was able to focus on myself more and dealing with these things.

These sessions with [the counsellor] really helped me. They brought back all the memories, and lots of things started triggering the memories of what had happened to me. The process was very, very confronting because of this.¹⁴⁹

Counselling should be available on an episodic basis

While there is a need for counselling to be accessible throughout a survivor's life, it is not necessarily needed continuously. A survivor may not need any counselling for decades and then require intensive therapy and support for many months, perhaps following a decision to disclose the abuse or where they experience a significant life event, as discussed above in relation to the need for lifelong access to counselling and psychological care.

The episodic nature of counselling needs means that these needs cannot be predicted accurately for individual survivors, including by the survivors themselves.

Survivors should be allowed flexibility and choice

Different groups of survivors, such as children, care leavers, and Indigenous people, have different needs for counselling and psychological care. Survivors also have different needs at an individual level. Survivors and survivor advocacy and support groups have told us of the importance of finding the right practitioner and type of service to provide a survivor's counselling and psychological care.

We have been given examples of situations where services and individual practitioners have met the needs of some survivors, while others have not valued those services and practitioners. Some survivors have told us they valued counselling services provided by the institution in which they were abused, while others have not wanted to use services with any connection to the institution.

Some survivors have preferred to gain access to counselling and psychological care through specialist sexual assault services. Others have preferred to go through broader support services for groups such as Forgotten Australians, Former Child Migrants, or members of the Stolen Generations. In other cases, survivors have preferred to consult their own private practitioner and rely on funding available through Medicare to help pay for these services. Some survivors value group therapies, while others prefer individual counselling.

Research also supports the view that flexible and individually focused care is a very important factor in the care of people with complex trauma. According to Wall and Quadara, the nature of victimisation is such that there is variation in the type and intensity of abuse, and its impact is affected by factors such as the victim's relationship to the abuser and the age and developmental stage of the victim.¹⁵⁰ They continue:

Because each victimisation experience can be so vastly different and result in different symptoms or degrees of need, it is important that care can be attuned to the level and type of need of that person.¹⁵¹

The importance of client choice was also a strong theme in the literature on treatment efficacy for adult survivors of child sexual abuse – it suggests that it is important to allow survivors to choose the method of service delivery and evidence-based treatment model they feel most comfortable with.¹⁵²

Accordingly, survivors should be able to choose between counselling options provided by properly capable professionals, including options available through existing support services.

In particular, children and young people are likely to have different treatment needs from adult survivors, and their parents will often be making decisions on their behalf. Cognitive techniques and processes used in traditional cognitive behavioural approaches to counselling may be easier for an older child or young person to understand and incorporate into daily routines and behaviours than for a younger child.¹⁵³ Some adjunct treatments may also positively affect primary treatment outcomes. For example, different therapies to reduce intrusive memories and assist emotional regulation are increasingly used to complement psychotherapeutic approaches.¹⁵⁴

Counselling and psychological care supported through redress should be flexible enough to meet the needs of child survivors and young adults. It should also assist parents or guardians to make choices that best meet their children's therapeutic needs.

No fixed limits on services provided to a survivor

We have heard mixed views on what constitutes an appropriate number of counselling sessions to be offered to a survivor, at least initially. Some participants in our private roundtables and expert consultations believed that the current practice of 10 hours or 10 sessions was sufficient, whereas others were of the view that many more sessions should be allowed because of the time it takes to build trust and rapport with survivors who have experienced complex trauma.

The research literature suggests that effective intervention with survivors requires services to offer skilled, longer-term work that can respond to survivors' complex needs in a multi-faceted and flexible way.¹⁵⁵

In their review of the literature, Breckenridge and Flax found that:

Research on the duration, intensity and number of sessions offered for optimal outcomes does not yield consistent results.¹⁵⁶

The needs of survivors are complex and varied. Some survivors may need very few sessions per episode of care, while others may need many. This difference can be related to the complexity of the psychological issues being treated, and also the time it takes for each individual to build rapport with a therapist.

Research shows that building a trusting relationship between the therapist and client, even if that takes months or years, is a prerequisite to addressing traumatic memories or applying any technique.¹⁵⁷ According to Breckenridge, Salter and Shaw:

People who have been abused may have many defences in place that work well for their survival but may work against their ability to undertake (therapeutic) work quickly.¹⁵⁸

We consider that, while there should be regular assessment and review to ensure that services are provided based on need as discussed below, there should be no fixed limit on the number of counselling sessions available to a survivor per episode of care.

Psychological care should be provided by practitioners with the right capabilities to work with complex trauma clients

As discussed above, we have heard accounts of survivors receiving counselling that was damaging and re-traumatising.

The literature suggests that general training in child sexual abuse is inadequate.¹⁵⁹ Also, a number of survivor advocacy and support groups, practitioners and experts told us that they consider general qualifications in counselling and psychology to be inadequate for treating survivors.

A number of representatives at our private roundtables and expert consultation emphasised the need for improving the capabilities and skills of professionals working with survivors. A

number of survivor advocacy and support groups, practitioners and experts also told us that counselling and psychological care for survivors should be provided by trauma-informed services.

People experiencing complex trauma have a very strong need to feel safe. Healing and recovery is stage based and emphasises establishing safety first. The trauma literature recognises core stages for treatment and recovery. These are:

- stabilisation or establishing safety
- processing trauma – exploring traumatic memories and reintegrating them into a personal narrative
- the positive reconnection with others.¹⁶⁰

In *'The Last Frontier' Practice guidelines for treatment of complex trauma and trauma informed care and service delivery*, Dr Cathy Kezelman and Dr Pam Stavropoulos define trauma-informed services as follows:

Trauma-informed services are 'informed about, and sensitive to, trauma-related issues'. They do not directly treat trauma or the range of symptoms with which its different manifestations are associated. The *possibility* of trauma in the lives of all clients/patients/consumers is a central organizing principle of trauma-informed care, practice and service-provision. This is irrespective of the service provided, and of whether experience of trauma is known to exist in individual instances.¹⁶¹ [Emphasis original; references omitted.]

They go on to describe a trauma-informed service as one that:

- Commits to and acts upon the core organising principles of *safety, trustworthiness, choice, collaboration* and *empowerment*
- Has reconsidered and evaluated *all components of the system* 'in the light of a basic understanding of the role that violence plays in the lives of people seeking mental health and addictions services'
- Applies this understanding 'to design service systems that accommodate the vulnerabilities of trauma survivors and allows services to be delivered in a way that will avoid inadvertent retraumatization and ... facilitate consumer participation in treatment'
- Requires ('to the extent possible') close 'collaborative relationships with other public sector service systems serving these clients and the local network of private practitioners with particular clinical experience in 'traumatology'.¹⁶² [Emphasis original; references omitted.]

Consistently with the principle of supporting flexibility and choice, it is likely that no particular model of care should be prescribed. However, professionals should be encouraged to obtain the right capabilities to best treat survivors with complex trauma through appropriate training, including in trauma-specific approaches.

Further, consideration should be given to helping survivors and their referring general practitioners or support services to find practitioners who have the right capabilities.

Professionals could be accredited as having the right capabilities and then be listed on a database so that they could be easily identified. It was suggested this database could be held by a redress scheme, or with a consortium of accreditors – for example, the Australian Psychological Society, the Australian Association for Social Workers, Adults Surviving Child Abuse and a specialist sexual assault service.

The intention here would not be to limit the range of professionals who could provide care. Professionals who have or obtain the right capabilities, whether they are psychologists, social workers, occupational therapists, psychiatrists, or other mental health providers, should be eligible for accreditation.

Suitable ongoing assessment and review

For good clinical outcomes, and to appropriately target limited resources, a suitable process of initial assessment and ongoing review is required for each episode for which a survivor receives counselling or psychological care.

The process of assessment and review should take into account the complex needs of survivors. For example, we have heard from survivor advocacy and support groups, practitioners and experts that survivors:

- may have difficulty building rapport with people in authority, including medical practitioners
- may have difficulty articulating the impact of the abuse on their lives
- should be assessed by professionals with the right capabilities to work with trauma victims in order to minimise the risk of re-traumatisation and further harm.

We consulted with survivor advocacy and support groups, practitioners and experts on what might be a suitable assessment process to determine the counselling and psychological care needs of survivors. There was general support for the process where a treating therapist develops a treatment plan appropriate to the needs of the survivor, identifies goals for treatment and incorporates reviews to assess progress.

There was no clear view on whether reviews conducted by the survivor's treating therapist should be sufficient or whether the redress scheme should engage an independent therapist to review progress and the need for further treatment.

Services for family members if necessary for survivor's treatment

We have heard from a number of survivors in private sessions that they have benefited from their partners and other family members receiving counselling, often in connection with the survivor disclosing the abuse to family members.

Where counselling is required for family members, existing services, including Medicare funding, may be sufficient to meet their needs.

It is also important to target limited resources to the needs of survivors. It may be that some counselling and psychological care for family members could be funded through redress if it is necessary for the survivor's own treatment, and there are no other sources of funding available (for example, through Medicare or other support services).

Research has shown that for many children and young people the inclusion of non-offending caregivers also contributed positively to treatment outcomes.¹⁶³ Counselling and psychological care through redress could extend to family members in the context of treating children and young people where this is beneficial to the child or young person.

5.4 Current services and service gaps

There are many government and non-government generalist and specialist services and practitioners that provide counselling and psychological care to survivors. We consider that it is important to recognise the range of existing services, both to help identify where there are gaps that might need to be filled through redress and to be clear that any expansion in services should build on existing services, rather than displacing or competing with them.

Current services

Mainstream services

Most members of the general population will access mainstream services as an initial point of contact for assistance to address their psychosocial needs, such as mental health or substance abuse issues, whether or not these issues are associated with childhood sexual abuse.¹⁶⁴ Examples of mainstream services include:

- in-patient hospital-based mental health services
- out-patient and community-based services
- non-crisis mental health services
- alcohol and drug rehabilitation and treatment services
- primary health services.

Research reveals that survivors of child sexual abuse make up a higher proportion of clients of mental health services when compared with the general population.¹⁶⁵

A number of non-government organisations also operate mainstream services that provide initial points of contact for mental health services. Most of these services receive significant government funding and endorsement. Well known examples of these services are Lifeline and beyondblue. A list and description of these services is at Appendix J.

The Australian Government supports two primary health care initiatives that may be of particular use to survivors, principally through funding under Medicare.

- The Better Access initiative is for people with an assessed mental disorder.¹⁶⁶ To be eligible, patients must be referred by their general practitioner (GP) or in certain circumstances by a psychiatrist or paediatrician. The GP must complete a detailed

mental health assessment and prepare a Mental Health Treatment Plan before referring the person to a Medicare approved provider, such as a Medicare registered psychologist. Up to 10 individual and 10 group sessions are available per calendar year. A review by the GP is required after six sessions. The sessions are free if the Medicare-approved provider bulk bills, otherwise the patient must pay the difference between the scheduled Medicare fee and the fee charged by the provider.

- The Access to Allied Psychological Services (ATAPS) program is similar to the Better Access initiative in that access to a psychologist requires a GP referral and there must be a review after six sessions.¹⁶⁷ However, ATAPS is designed to offer psychological intervention to certain categories of people who are more vulnerable than the general population to experiencing mental health disorders and who cannot afford care. For example, target groups of particular relevance to survivors include Aboriginal and Torres Strait Islander people, care leavers and former child migrants, and people at risk of homelessness. ATAPS offers up to 12 individual sessions (with periodic reviews) and up to 12 group sessions per calendar year at no cost.

The Australian Government also supports specialist psychiatric services by providing unlimited funding through Medicare for these services. While some survivors with serious mental disorders will require care by a psychiatrist, psychiatrists will not always meet survivors' needs and most survivors do not need the specialist services of a psychiatrist. Although psychiatrists have psychological training and can provide counselling and other psychological care, they are specialist medical practitioners who deal mostly with patients with a clinical mental health disorder requiring medical, including pharmaceutical, treatment. Patients are likely to have to pay a gap fee that covers the difference between the Medicare rebate and the fees charged by the psychiatrist. In most cases, this gap is larger than for other practitioners who provide psychological care.

Specialist services

Specialist services are designed to support particular groups of people with specific needs. These types of services have overlaps and interactions with mainstream services and the broader support services network for survivors.

Specialist services may also provide social support, information and resources outside of the therapeutic context to help facilitate recovery of survivors and raise public awareness of the specific health and/or welfare issues they aim to address.

There are many specialist services, most of which receive extensive government funding.

The main categories of specialist services are:

- **Sexual assault services:** These services provide specialised and targeted therapeutic care for victims of sexual assault. They are generally recognised for their extensive skills and expertise in working with survivors. Although priority may be given to people who have most recently been sexually assaulted due to limited funding and resources, adult survivors of child sexual abuse represent approximately one quarter of their clients.¹⁶⁸ In most cases, services are provided free of charge. Service providers receive funding from government departments, usually from the state or territory department that is

responsible for health and community services. Medium- to long-term face-to-face counselling is normally available along with immediate crisis support. Some sexual assault services may also offer practical support services to assist survivors with certain aspects of their lives (for example, emergency housing relief, court preparation and advocacy). A list and description of these services by state or territory is at Appendix K.

- **Support services for adults who, as children, were in out-of-home care:** These services provide a range of support services, including counselling and psychological care. They are targeted at adults who were in institutional or other out-of-home care when they were children, including Former Child Migrants. Generally, these services receive government funding. A list and description of these services by state or territory is at Appendix L.
- **Aboriginal and Torres Strait Islander organisations:** These services provide support targeted at Aboriginal and Torres Strait Islander people, particularly members of the Stolen Generations. These services generally receive funding from the Australian Government and the relevant state or territory government. They operate with specialised capabilities and particular expertise in providing services in a culturally sensitive manner. As discussed in Chapter 4, the Healing Foundation runs Indigenous healing programs across Australia.¹⁶⁹ Link-Up organisations in most states and territories provide a range of services to members of the Stolen Generations and their families. Link-Up organisations provide counselling and support for people who are in the process of obtaining family and personal records and seeking family reunions. There are also some sexual assault services that operate exclusively for Aboriginal and Torres Strait Islander women and children.

Counselling is also a feature of state and territory statutory victims of crime compensation schemes. In general, eligible victims are entitled to face-to-face counselling for a specified number of sessions. In some cases, additional sessions may also be provided. These services are provided without charge to the victim.

Services associated with existing redress schemes

Some institutions provide counselling and psychological care as part of the redress they provide to survivors. These services are discussed as part of direct personal response in Chapter 4.

Service gaps

It is clear from the description of current services above that there are many government and non-government services that currently assist survivors with counselling and psychological care.

However, we have heard from survivors, survivor advocacy and support groups, practitioners and experts that survivors' needs are not being fully met by existing services.

Our consultations through private roundtables and our expert consultations suggested that access to and delivery of counselling and psychological care for survivors should be improved.

Based on what we have learned to date, it seems that the key gaps in existing services that prevent them from adequately meeting survivors' needs for counselling and psychological care are as follows.

Resource limitations of specialist services

We have been told that the specialist sexual assault services that provide counselling and psychological care to survivors of sexual assault are some of the best-regarded services available. They provide quality, long-term care that is sensitive to the complex trauma suffered by survivors.

However, we have also been told that adult survivors wishing to use these services may be faced with long waiting periods before a counsellor is able to see them. In some cases, some services may not be able to support victims of past assaults if their funding agreements require them to focus on addressing the needs of recent victims of sexual assault. In those situations crisis-care (including forensic care) and short-term counselling models are prioritised.¹⁷⁰

For example, in New South Wales, sexual assault services may not have sufficient staff to meet demand. New South Wales Health policy states that, when sexual assault services are required to prioritise service provision (due to demand, understaffing, or both), historical childhood sexual abuse is to be given the lowest priority, and recent sexual assault of children and adults the highest priority. This results in a situation where sexual assault services, at current staffing levels, may be able to provide only limited one-to-one counselling and therapy to adult survivors.¹⁷¹

Restrictions on access to Medicare

The funding provided through Medicare for counselling and psychological care under the Better Access initiative and the ATAPS program could operate as an effective minimum level of service provision for survivors. For some survivors, the number of sessions available through these programs may be sufficient or at least a good start in meeting their needs for counselling and psychological care.

However, we have been told that the requirements of these programs create difficulties for some survivors for the following reasons.

- The Medicare programs are available only to persons who have 'an assessed mental disorder'. Child sexual abuse is not a recognised mental disorder.¹⁷² We have been told that the symptom-based approach to diagnosing a mental disorder creates barriers for some survivors. Many survivors will present with a range of symptoms that meet some of the diagnostic criteria for a mental disorder – for example, anxiety, depression or post-traumatic stress disorder. However, some survivors may not be able to articulate the impact of the trauma from their abuse or the extent of their symptoms sufficiently

enough to demonstrate that they meet enough criteria in order to be diagnosed with a mental disorder.

- The Medicare programs are available only on referral by a GP and require a Mental Health Treatment Plan to be prepared by the GP. We have been told that some survivors are not comfortable disclosing their abuse history to a GP in order to get a diagnosis or a referral. We have been told that some survivors do not want to disclose their abuse history to their GP because they do not want to be ‘pathologised’ in this way, and risk having every aspect of their health viewed through the lens of their experience of abuse. Where survivors do not disclose their history of abuse to their GP, the GP may be less likely to diagnose a mental disorder.
- The Medicare programs tend to focus on symptoms to be treated through shorter-term interventions. While these types of interventions are well-supported by the evidence as being effective for some counselling and psychological care needs, they may not be adequate for the complex trauma experienced by many survivors. The orientation manual for practitioners using the Better Access initiative acknowledges that the Better Access initiative may not meet the needs of clients with chronic and particularly complex mental health conditions.¹⁷³
- The Medicare programs cover the cost of the scheduled fee for the service provided. If practitioners do not bulk bill, survivors may have difficulty in paying gap fees and may therefore not be able to consult those practitioners.

Gaps in expertise

There appear to be at least three gaps in ‘expertise’ in this area.

- **Capabilities of practitioners:** As discussed above, not all practitioners have the right capabilities to work with complex trauma clients. We have not been told that there is a shortage of capable practitioners (other than in some regional and remote areas); rather, we have heard that it can be difficult for general practitioners or survivors to recognise the need to find a capable practitioner, and then to find a practitioner who has the right capabilities.
- **Capabilities of mainstream services:** As discussed above, many survivors will first seek help through a mainstream service such as mental health or drug and alcohol services. A number of survivor advocacy and support groups, practitioners and experts told us of the importance of a ‘no wrong door’ approach. Under this approach, mainstream services need to be better at recognising survivors and their needs. They need to be able to ensure that those needs are addressed in the mainstream service if appropriate, or that the survivor is referred to another more appropriate service.
- **Capabilities of survivors:** Gaining access to appropriate counselling and psychological care can be a complex business. A number of survivor advocacy and support groups have told us that many survivors need assistance in identifying what is available, assessing what might be most useful for them (including, perhaps, support services provided outside of the counselling and psychological care) and gaining access to the most useful services.

Gaps in services for specific groups

A number of survivor advocacy and support groups, practitioners and experts have told us that there are gaps in the availability of appropriate services, particularly for survivors living in regional and remote areas. They have also told us that there are gaps in the availability of practitioners with adequate cultural awareness to enable them to provide appropriate services for Indigenous survivors, culturally and linguistically diverse survivors and survivors with disabilities. These gaps may be compounded in regional and remote areas.

We have also heard of a shortage of appropriate services for women experiencing mental health problems during the perinatal period as a result of their experiences of child sexual abuse. The Australian Child and Adolescent Trauma and Grief Network notes there is strong evidence that mothers who have experienced potentially traumatic events (including child sexual abuse) are at greater risk of a range of mental health problems during the perinatal period, including depression, anxiety and substance abuse disorders.¹⁷⁴

Similarly, we have heard of a shortage of appropriate services for men, in particular to assist men manage anxieties associated with becoming a father, such as fear of becoming an abuser themselves, or not being able to develop healthy attachments with their children due to their experience of abuse.

5.5 Principles for supporting counselling and psychological care through redress

It would seem that the principles set out in this section should inform how the provision of counselling and psychological care to survivors can best be supported through redress.

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on some of these proposed principles. We also consulted a number of experts and practitioners on the principles. We have refined and expanded the proposed principles in response to these consultations.

Supplement existing services

It is clear that there are many existing services and means of obtaining counselling and psychological care. It is also clear that many survivors gain great assistance from these services.

Any expansion of counselling and psychological care, or funding or support for counselling and psychological care, through redress should build on these existing services, rather than displace or compete with them.

While it might be possible to establish a stand-alone scheme to provide or fund counselling and psychological care for survivors of institutional child sexual abuse, this may cause survivors to miss out on the considerable expertise, as well as the diversity, flexibility and

choice that is available through the existing services and means of obtaining counselling and psychological care.

It also needs to be recognised that the Australian Government, and the state and territory governments provide much of the funding for existing services (including Medicare). These governments are also likely to be significant funders of any redress scheme, as discussed in Chapter 8. It may be counterproductive to the quality and choice of counselling and psychological care available to survivors to put pressure on governments to redirect funding from existing services into a stand-alone scheme.

Counselling and psychological care through redress should be designed to supplement existing services, primarily by filling service gaps.

Provide funding not services

Consistent with this principle of supplementing existing services and filling service gaps, counselling and psychological care through redress should be supported by providing funding, not services. That is, a redress scheme would not establish its own counselling and psychological care service for survivors.

Providing funding rather than services also supports flexibility and choice for survivors, rather than requiring them to attend a particular service.

Given the gaps in expertise and the geographical and cultural gaps that have been identified, support for counselling and psychological care might also involve providing financial support for appropriate training programs or programs to facilitate the provision of counselling and psychological care in regional and remote areas. That is, while some gaps might best be filled by funding the counselling and psychological care provided to survivors, other gaps might best be filled by improving the availability of appropriate counselling and psychological care.

Fund as needed by survivors

Funding for counselling and psychological care should be provided to service providers as the survivors need that care, rather than being provided as a lump sum component of a monetary payment to individual survivors.

Given what we have heard about the counselling needs of survivors being lifelong and episodic, this will ensure that funding is available when counselling and psychological care is needed, even if it is needed in circumstances that the survivor did not anticipate.

Institutions to fund where possible

Our Terms of Reference refer to the ‘provision of redress by institutions’. As we have identified counselling and psychological care as an element of redress, as a starting point, institutions should provide it. Also, survivors and survivor advocacy and support groups have

told us that it is particularly important to some survivors that redress be funded by the institutions that were responsible for the abuse.

As noted above, the Australian Government, and the state and territory governments, provide much of the funding for existing services. These governments are also likely to be significant funders of any redress scheme, both because they operated many institutions and through their broader social and regulatory roles.

A case can be made for full public provision of counselling and psychological care, as discussed below. Alternatively, in the absence of full public provision, it may be necessary to recognise government funding of existing services outside of redress, so as to be consistent with the principle of supplementing existing services, and not displacing or competing with them. This approach would require a redress scheme to look primarily to non-government institutions to provide the funding to supplement services and fill service gaps through redress.

A redress scheme is likely to operate most efficiently if the funding institutions are required to contribute an amount per survivor for counselling and psychological care once the survivor is assessed as eligible under a redress scheme and when any monetary payment is made. The amounts that these institutions pay would be pooled and used as required to supplement existing services and to fill service gaps to meet survivors' needs for counselling and psychological care.

5.6 Options for service provision and funding

There appear to be a number of options for ensuring that survivors' needs for appropriate counselling and psychological care are met.

Through our private roundtables we consulted a number of survivor advocacy and support groups, institutions, governments and academics on some of these options. However, our consultations made clear that the options required substantial re-thinking in light of the range of existing services, and their significant value to many survivors.

As discussed above, the best approach appears to be that redress should supplement existing services and fill service gaps rather than seek to displace or compete with them. This means that redress itself will not seek to meet all survivors' needs for counselling and psychological care.

Further, as noted above, the Australian Government and the state and territory governments provide much of the funding for existing services. These governments are also likely to be significant funders of any redress scheme, as discussed in Chapter 8. These different roles could be balanced in different ways.

Substantially expanding Medicare funded services

One way in which to improve the availability of counselling and psychological care for survivors is to expand the public provision of counselling and psychological care. This could be done through substantially expanding Medicare-funded services.

As discussed above, the Better Access initiative and ATAPS programs, while of considerable value to some survivors, have requirements that create difficulties for other survivors. In particular, some survivors may not be able to get the counselling and psychological care they need through Medicare funding because:

- they may not present in a way that enables their GP to diagnose them as having ‘an assessed mental disorder’
- they may not be comfortable disclosing their history of abuse to their GP, and this may also make diagnosis of a mental disorder less likely
- the Medicare programs focus more on shorter-term interventions and they may not provide sufficient sessions for some survivors
- they may not be able to afford to pay gap fees that some practitioners charge
- they may wish to be treated by a practitioner who works for a state or territory specialist sexual assault service and this treatment is not funded by Medicare. Although survivors would not be charged for using these specialist sexual assault services, they may face lengthy waiting periods and limited availability because of the resource constraints on the services. If Medicare funding was available to the services, they should be able to expand the services they can provide and reduce waiting periods.

It might be possible to reform the existing Medicare programs to address these difficulties for survivors as follows:

- the need for a diagnosis of ‘an assessed mental disorder’ by a GP, or for any GP referral, could be removed and replaced by a requirement that the survivor has been assessed as eligible for redress under a redress scheme – that is, eligibility or need would be assumed on the basis that the person had experienced institutional child sexual abuse
- eligible survivors could then be eligible for funding of an uncapped number of sessions of counselling or psychological care
- a separate Medical Benefits Schedule item number could be allocated for counselling and psychological care provided to eligible survivors. The item number would allow a higher scheduled fee to be paid to practitioners for sessions with eligible survivors, and it would be available to practitioners only if they do not charge the survivor any gap fee
- to help eligible survivors to use state or territory specialist sexual assault services if that is their preference, exemptions could be made under section 19(2) of the *Health Insurance Act 1973* (Cth) to enable the government-funded sexual assault services to claim Medicare rebates for providing counselling and psychological care to this group
- if there was concern to ensure that enhanced Medicare benefits were available only if the practitioner was assessed as having the right capabilities to work with survivors, they could be made available only to practitioners who had undergone a capability assessment (for example, conducted by the Australian Psychological Society).

There are precedents for these various possible reforms:

- some groups, such as children with autism, people with chronic health conditions, and women requiring pregnancy counselling support, have been given special access to counselling and psychological care through Medicare
- the exemptions that would be needed to make Medicare funding available for counselling and psychological care by specialist sexual assault services could be similar to arrangements that are in place for Aboriginal Community Controlled Health Services and some remote state and territory government health clinics. Those arrangements enable those services to claim Medicare funding under the Better Access initiative for services provided by practitioners employed by or contracted to the service
- the Australian Psychological Society provides capability assessments for psychologists under the child ATAPS scheme, and the Children with Autism and other Pervasive Developmental Disorder (PDD) initiative, as well as for eligibility to provide pregnancy support counselling. The Australian Psychological Society also assessed eligibility for delivery of the psychological therapy items under Medicare from 2006 to 2010, when national registration of practitioners commenced.

However, we acknowledge that this approach would require these services to be made available through Medicare based on a person's status as an eligible survivor and not only on need. A person would be an eligible survivor if they applied to a redress scheme and the redress scheme accepted that they had suffered child sexual abuse in an institutional context. Persons who had suffered child sexual abuse in other contexts would not be eligible.

We have engaged in detailed consultation with the Australian Government on possible reforms to Medicare. We acknowledge the Australian Government's response on this point. It stated:

A fundamental principle of Medicare is equal and universal access to medical services based on clinical need. While it is certainly not the case that all Medicare items are available to all Australians, limitations on access to items are based on clinical considerations and, relevantly, not by consideration of the cause of the condition.

However, the Scheme [put forward by the Royal Commission for discussion] proposes creating a set of 'no-cost to patient' Medicare items for counselling or psychological treatment for survivors of child sexual abuse, eligibility for which is restricted based on where that abuse occurred. It is the Department's view that this may be seen by the public as undermining the principle of universality of access under the Medicare system and using Medicare to give more favourable treatment to those accepted through the redress scheme.¹⁷⁵

We doubt that anyone would object to counselling and psychological care being made more readily available to all survivors of child sexual abuse, and not just to survivors of child sexual abuse in an institutional context. However, we appreciate that this would involve a much larger group of eligible people and probably a significantly greater demand for services.

The Australian Government also raised concerns about other aspects of the possible reforms to Medicare that have been put forward for discussion. The Australian Government's response is available in full on our website.¹⁷⁶

A possible objection to substantially enhanced public provision of counselling and psychological care for survivors through Medicare is that it may place the increased funding burden on the Australian Government (and therefore taxpayers) rather than on institutions.

The *Health and Other Services (Compensation) Act 1995* (Cth) arrangements currently requires compensation payers to pay to Medicare, not a claimant, an amount that Medicare has funded in the *past* where the compensation payer is liable to compensate the claimant for this amount. We have raised the possibility of legislating to introduce a requirement for institutions to pay an actuarially-determined estimate of the cost of *future* counselling and psychological care services to Medicare. Currently, Medicare can accept 'bulk payment' arrangements for past costs. Under this approach, rather than determining actual costs in each individual claim, an estimate is paid per claim settled. Legislation could be amended to allow something similar for future costs. Rather than having to assess the likely needs of each individual, the actuarial assessment would determine a 'per head' estimate of future costs. We appreciate that this arrangement would leave the risk of under-funding with Medicare. Any risk of over-funding would lie with the institutions.

If funding arrangements could be resolved, the particular advantages of expanding the public provision of counselling and psychological care in this way appear to be that:

- it would avoid creating a stand-alone administration for counselling and psychological care for survivors
- it would make use of Medicare's extensive existing infrastructure
- Medicare should be familiar to most, if not all, survivors and should be reasonably easy for them to use.

Stand-alone Australian Government scheme

Another way to improve the availability of counselling and psychological care for survivors by expanding the public provision of counselling and psychological care is to establish a dedicated stand-alone Australian Government scheme.

Rather than reforming Medicare, a case could be made to publicly fund the provision of counselling and psychological care by setting up a stand-alone Australian Government scheme for survivors of child sexual abuse in an institutional context.

While this approach would also single out this group based on where the abuse occurred, it would not interfere with the principle of universality under Medicare.

Further, the Australian Government and all state and territory governments have already recognised that this group deserves particular consideration by establishing this Royal Commission. While this does not in itself indicate that any government accepts that survivors of institutional abuse should receive special access to counselling and

psychological care, it does indicate a readiness by governments to consider the particular experiences and needs of this group.

As discussed above, we are satisfied from what we have heard that survivors of institutional abuse need better access to counselling and psychological care. Again, of course, we would not object to counselling and psychological care being made more readily available for all survivors of child sexual abuse, or for sexual abuse victims more generally.

There are some stand-alone Australian Government schemes that provide special access to counselling and psychological services.

The 'Balimed' scheme was established by the Australian Government to support Australian residents who were injured in the 2002 bombings in Bali, Indonesia. Eligible claimants include the Australian victims who survived, immediate family members of Australian victims who survived and Australian victims who died, and eligible foreign nationals. Once an eligible claimant registers for the Balimed scheme, the Australian Government reimburses them for any out-of-pocket expenses – for example, gap payments – that are not covered by Medicare, other government programs or insurance. Assistance with the costs of counselling, psychological services and psychiatric services is also available.¹⁷⁷

To register for the scheme, eligible claimants must apply to the Australian Government. They complete a registration form and submit supporting documents to prove their eligibility. Once their application is accepted, claimants can be reimbursed through a 'special assistance payment' after lodging a claim and any supporting documents with Medicare.¹⁷⁸

From our discussions with the Australian Government, we understand that Balimed is a small scheme. There are a small number of clients currently receiving counselling and psychological care treatment, and the cost of the scheme is low.

Another example of a stand-alone Australian Government program is the Department of Veterans' Affairs (DVA) scheme. The Department of Veterans' Affairs issues a number of repatriation health cards to eligible veterans and former members of the Australian Defence Force, their widows/widowers and dependants. The Repatriation Health Card – For All Conditions (Gold Card) and the Repatriation Health Card – For Specific Conditions (White Card) give eligible cardholders access to a wide range of public and private health care services, including counselling and psychological care, that the Australian Government pays for, regardless of whether the injury was caused during service.¹⁷⁹

At 30 June 2014, DVA supported more than 300,000 clients, some through treatment cards (Gold Cards and White Cards) and some through other benefits and services.¹⁸⁰

The Australian Government has also established the Veterans and Veterans' Families Counselling Services (VVCS) to provide free and confidential, nation-wide counselling and support for war and service-related mental health conditions. It also provides relationship and family counselling to address issues that arise as a result of the unique nature of military lifestyle.¹⁸¹

According to the DVA's latest annual report, 14,136 clients received an episode of counselling from VVCS in 2013-14. Some clients received multiple care episodes during the year.

There is also an example of a state government supported stand-alone program. The Bushfire Psychological Counselling Voucher Program was established to assist people who were directly affected by the 2009 Victorian bushfires to obtain psychological counselling. It provides up to 12 vouchers for psychological counselling to those who were directly affected by the bushfires. Each voucher pays for one hour of psychological counselling from a practitioner who is an approved provider under Medicare.¹⁸²

While the program is a joint initiative of the Victorian Bushfire Reconstruction and Recovery Authority and the Victorian Government Department of Human Services, it was developed through a \$3.5 million gift from the Victorian Bushfire Appeal Fund, which received donations from members of the public in response to the devastating bushfires.¹⁸³

A stand-alone Australian Government program could be developed for survivors. Particularly if the Australian Government led the implementation of a redress scheme by establishing a single, national redress scheme, that scheme could determine eligibility for the stand-alone program.

A stand-alone Australian Government program might attract the possible objection that it may place the increased funding burden on the Australian Government (and therefore taxpayers) rather than on institutions. There does not seem to be any reason why institutions could not contribute to the cost of a stand-alone Australian Government program. As discussed in relation to Medicare above, an actuarial assessment could estimate the amount required per survivor to be paid by institutions to the Australian Government. Again, the risk of under-funding would lie with the Australian Government and any risk of over-funding would lie with the institutions.

If funding arrangements could be resolved, the particular advantages of expanding the public provision of counselling and psychological care in this way appear to be:

- although it would require a stand-alone administration, the Australian Government already has extensive experience in establishing and running these programs
- it would make use of the Australian Government's existing infrastructure and expertise
- many survivors and survivor advocacy and support groups have indicated their support for the Australian Government establishing a single, national redress scheme, so an Australian Government scheme for counselling and psychological care should be welcomed by survivors.

A redress scheme fund to fill gaps

Another option is to create a trust fund as part of the redress scheme to hold funds to be used to supplement existing services and fill service gaps to ensure that survivors' needs for counselling and psychological care are met.

The Forde Foundation provides an example of a charitable trust fund. It was established by the Queensland Government some years in advance of the Queensland redress scheme. The Forde Foundation provides financial support to persons who were, as children, in institutional care in Queensland. It gives financial support for services including medical and dental services, education and personal development. It also provides funding to Lotus Place and other non-government organisations that deliver community-based support services for survivors, including counselling. Of course, a trust fund established for counselling and psychological care in redress would have much narrower purposes than the Forde Foundation.

As discussed above, it may be that a redress scheme should not seek to operate its own counselling service, as this would not facilitate survivor choice.

Rather, a trust fund could take the following actions to supplement existing services and fill service gaps.

The trust fund could seek to improve survivors' access to Medicare. This might involve the following actions:

- funding case management style support to help survivors to understand what is available through the Better Access initiative and ATAPS, and why a GP diagnosis and referral is needed
- maintaining a list of GPs who have mental health training, are familiar with the existence of the redress scheme, and are willing to be recommended to survivors as providers of GP services in relation to counselling and psychological care
- supporting the establishment and use of a database that provides details of practitioners who have been assessed as having the right capabilities to treat survivors and who are registered practitioners for Medicare purposes.

The trust fund also could seek to supplement existing services by exploring with state-funded specialist services whether it could provide funding to increase the availability of services and reduce waiting times for survivors. This might be most effective where there are particularly well-regarded specialist services that are well located for a number of survivors who require counselling and psychological care.

The trust fund could seek to address gaps in expertise and geographical and cultural gaps by:

- supporting the establishment and use of a database that provides details of practitioners who have been assessed as having the right capabilities to treat survivors
- funding training in cultural awareness for practitioners who have the capabilities to work with survivors but have not had the necessary training or experience in working with Indigenous survivors
- funding rural and remote practitioners, or Indigenous practitioners, to obtain the right capabilities to work with survivors
- providing funding to facilitate regional and remote visits to assist in establishing therapeutic relationships; these could then be maintained largely by online or telephone counselling. There could be the potential to fund additional visits if required from time to time.

As an essential last resort, the trust fund could also fund counselling and psychological care, particularly for survivors whose entitlements under Medicare have been exhausted or whose needs for counselling and psychological care cannot otherwise be met.

This approach would involve the administrative burden and additional costs of establishing a trust fund alongside a redress scheme. It would not have the advantage of existing expertise that would be available to Medicare or in a stand-alone Australian Government scheme.

However, it would have the advantage of potentially allowing a greater variety of funding arrangements to be undertaken, which would allow existing services to be supplemented and service gaps to be filled more flexibly.

A trust fund would need to be funded by institutions. The risk of under-funding would lie initially with the fund, then with contributing institutions and ultimately with survivors if there were insufficient funds to meet survivors' needs for counselling and psychological care.

This option most clearly raises the difficulty of how to establish an adequately funded scheme to ensure that survivors' needs for counselling and psychological care are met without undermining existing services.

In particular, as noted above, the Australian Government, and the state and territory governments, provide much of the funding for existing services and they may also be significant funders of any redress scheme. It may be counterproductive to the quality and choice of counselling and psychological care available to survivors to put pressure on governments to redirect funding from existing services into a stand-alone scheme. However, a scheme for counselling and psychological care might not be adequately funded if it has to rely mainly or exclusively on the contributions of non-government institutions.

A trust fund alongside redress might be needed even if the public provision of counselling and psychological care is expanded, whether through Medicare or a stand-alone Australian Government scheme. For example, there might still be a need to assist in filling gaps in capabilities and expertise or geographical and cultural gaps. However, it is likely that the funding needs of a trust fund would be substantially lower if there was a significant expansion in the public provision of counselling and psychological care for survivors.

We welcome submissions that discuss the issues raised in Chapter 5, including the principles for counselling and psychological care, existing services and service gaps and the principles for supporting counselling and psychological care through redress.

In particular:

- we seek the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors
- we welcome submissions on the relative effectiveness and efficiency of the options in meeting survivors' needs.

6 Monetary payments

6.1 Introduction

A monetary payment is a tangible means of recognising a wrong suffered by a person.

Civil justice for personal injury caused by another person's negligent act is usually achieved in Australia by an award of an amount of money by way of damages obtained through successful civil litigation. Damages are intended to compensate the successful claimant for loss or injury by placing the claimant, as nearly as possible, in the position that he or she would have been in had the breach of duty not occurred. However, common law damages require the claimant to prove the existence of a duty of care, breach of the duty, causation of the injury or loss and the extent of injury or loss.

Redress payments are typically characterised as 'ex gratia' payments – that is, payments made irrespective of whether there is a legal liability to make a payment. Ex gratia payments can be offered under particular criteria or schemes, such as existing or previous redress schemes. They are typically not intended to be fully compensatory and they are often not based on any detailed assessment of a claimant's individual injury, loss or needs.

Many survivors have told us that they do not consider the amount of monetary payments made under past or current redress schemes is adequate. However, a number of survivors have told us how they benefited from receiving payments, not just for the money itself but also for its meaning to them. For example, in the Royal Commission's Interim Report, we reported on Sharon's experience as follows:

In 2010, Sharon received \$55,000 from the Tasmanian State Government Redress Scheme. She said the payment meant a great deal to her. 'They believed me, and I'd never been believed before. That was the first time.'¹⁸⁴

It seems clear from our work to date that a redress scheme for survivors should include a monetary payment. The issues to be determined are its purpose, how it should be calculated and the amounts of monetary payments available.

Due to rounding, numbers presented in this chapter may not add up precisely to the totals provided.

6.2 Purpose of monetary payments

If a survivor wishes to obtain a monetary payment that is as fully compensatory for their loss as possible, then civil litigation is the appropriate avenue for them to consider pursuing. As a society, we do not compel a defendant to compensate a claimant unless the defendant's legal liability for the claimant's injury or loss has been proved to the standard required in civil litigation.

A redress scheme is more suited to providing ex gratia monetary payments. These do not require proof of legal liability, and they do not require that all interested parties participate in legal proceedings. Also, claimants do not have to prove any element of a claim to the standard required in civil litigation, including causation or the extent of a claimant's injury or loss. The trade-off is usually that only a much lower, often capped, amount of money is available as an ex gratia payment.

However, the purpose or meaning of ex gratia payments is not always easy to identify. They may involve a sense of moral responsibility or an element of being in some way indirectly responsible (but not legally liable) for a detriment that has been suffered. In circumstances where a serious allegation is made against a third party (for example, where an allegation of child sexual abuse is made to the institution against the alleged perpetrator), the person making the payment (the institution) may not be able or willing to acknowledge the truth of the allegation or any responsibility.

Identifying and clearly stating the purpose of ex gratia payments in a redress scheme is important in:

- helping claimants, institutions and other participants to understand the purpose of the scheme
- informing choices about the processes that should be adopted for the scheme, including the level of verification required for claims and whether alleged perpetrators or institutions should be given any opportunity to participate
- adopting guidelines or scales for quantifying monetary payments under the scheme
- helping claimants to understand what any payment they are offered is meant to represent
- helping claimants to assess whether or not they should accept any payment they are offered, including assessing any conditions imposed on accepting the offer (for example, any requirement to give a deed of release).

The purpose or meaning of ex gratia payments, and their quantification, may also have implications for claimants who receive social security or veterans' pensions or other payments. Generally, payments for past or future economic loss will affect social security and veterans' payments, while payments more in the nature of recognition of pain and suffering may not. Rulings can be sought from the Commonwealth in advance to determine how payments under a scheme will be treated, but the purpose and quantification of the payments to be offered may be important in seeking these rulings.

Existing and former redress schemes have been established with a variety of stated purposes. Some examples are as follows.

- **Defence Abuse Response Taskforce:** A Reparation Payment is 'made in acknowledgement by the Australian Government including the Department of Defence (Defence) and the Australian Defence Force (ADF), that sexual or other abuse within Defence is wrong and should not have occurred. A Reparation Payment is an acknowledgement by Defence that:
 - the abuse was wrong
 - the abuse can have a lasting and serious impact, and

- mismanagement by Defence of verbal/written reports or complaints about abuse is unacceptable.

A Reparation Payment is not paid as compensation for any physical, psychological, emotional or financial injury, or loss or damage suffered by a person as a result of abuse.'

- **Queensland ex gratia scheme:** It was hoped that the scheme would offer some support and assistance and would help bring some closure to individuals and families. It offered monetary payments instead of an alternative proposal based on a services access card because payments provide direct material assistance. A payment was not intended to represent full compensation or an award of damages.
- **Irish Residential Institutions Redress Scheme:** The payments were to provide some tangible recognition of the seriousness of the hurt and injury that has been caused to the victims of institutional child abuse and it may allow many victims to pass the remainder of their years with a degree of physical and mental comfort that would otherwise not be readily attainable.

Other examples can be seen in the summary of redress schemes in Appendix A.

The purpose of a monetary payment should have some connection with the amount of the monetary payment. For example, a smaller payment might more readily be accepted as an 'acknowledgement', while a larger amount might be expected as a 'tangible recognition of the seriousness of the hurt and injury' suffered.

6.3 Monetary payments under other schemes

Adequacy of current payments

Many survivors and survivor advocacy and support groups have told us of their experiences in seeking monetary payments under current and previous government and non-government institution redress schemes. Survivors have given evidence in a number of our case studies about the monetary payments they were offered and their opinions of them.

It is clear to us from the many accounts we have heard from survivors in private sessions, and through submissions to issues papers, that many survivors do not consider that justice has been, or can be, achieved through current or previous redress schemes.

Many survivors have told us that they considered the amounts available as monetary payments were far too low and the process for calculating them was unfair or difficult to understand.

For example, in case study 5, EG gave evidence about the payment he received under the Queensland redress scheme. He said:

The Government chucked us away in this hell hole, and made me miss out on a childhood, all for \$14,000.¹⁸⁵

Many survivors told us they were very unhappy when the Western Australian Government reduced the maximum payment under Redress WA from \$80,000 to \$45,000. The Western Australian Government increased the initial budget for Redress WA but reduced the maximum payment when it became evident during the assessment process that a higher than expected proportion of applicants would be assessed as having suffered very severe abuse.¹⁸⁶ Most of the survivors who gave evidence in case study 11 were very critical of the reduction in the maximum payment from \$80,000 to \$45,000. For example, Mr John Hennessey gave the following evidence:

I was disappointed when the new government came in and halved the money available to be paid. The previous government had committed to it. This was yet another betrayal.

The money I got was not adequate.¹⁸⁷

In one private session, a survivor told us in relation to Towards Healing:

You're really wrecked and your life's only worth \$33,000.

Of course, any monetary payments offered under a new scheme will be assessed in the context of what has gone before. We set out below information about the calculation and amount of monetary payments provided under some current and previous redress schemes and under statutory victims of crime compensation schemes.

State government schemes

The three former state government redress schemes in Tasmania, Queensland and Western Australia offered support services as well as monetary payments. However, the focus was on monetary payments. The South Australian Government currently provides a redress scheme through its statutory victims of crime compensation scheme.

Table 12 provides an overview of the former state government redress schemes.

Table 12: Overview of Australian state government redress schemes

State	Minimum payment	Maximum payment	Average payment	Total number of payments	Amount spent on redress payments
Tasmania	\$5,000	\$60,000	\$30,000	1,848	\$55 million
Queensland	\$7,000	\$40,000	\$13,000	7,168	\$96 million
Western Australia	\$5,000	\$45,000	\$23,000	5,302	\$120 million

Further details on the method for calculating monetary payments and the range of payments made in each of these redress schemes, and in the current South Australian scheme, are set out below.

Tasmania

In 2003, the Tasmanian Government established a review of claims of abuse from adults who had been in state care as children and a redress scheme offering ex gratia payments of up to \$60,000. Four rounds of payments were undertaken between 2003 and 2013. The maximum payment was reduced to \$35,000 for the fourth and final round.¹⁸⁸

Originally, an independent assessor determined the amount of the monetary payment. The assessor considered broad categories such as:

- the severity and length of abuse
- the medical consequences
- the psychosocial consequences
- the loss of life's opportunities
- the possible need for future counselling and assistance
- future needs and problems.

There were no formal categories or scales of payment.

Later, guidelines were developed to assist in determining payment levels of between \$5,000 and \$60,000, in \$5,000 increments. Claims were graded on a scale of 1 to 10 according to the nature, severity and effect of the abuse. A verified short period of sexual and non-sexual abuse would result in payments of between \$5,000 and \$10,000. Sexual related abuse would generally result in payments in excess of \$30,000. The maximum payment of \$60,000 was reached if there was evidence of harsh, sustained abuse for a period of more than 10 years.¹⁸⁹

The program operated for 10 years. Over 1,800 people have received ex-gratia payments worth over \$54 million.¹⁹⁰ The average payment was around \$30,000.

Table 13: Overview of the four rounds of the Tasmanian redress schemes¹⁹¹

Round	Years	Claims made	Ex gratia payments	Maximum payment	Average payment	Total amount paid to applicants
1	2003–2004	364	247	\$60,000	\$38,000	\$9.4 million
2	2005–2006	514	423	\$60,000	\$35,000	\$14.6 million
3	2007–2010	995	784	\$60,000	\$32,000	\$25.3 million

4	2011–2013	541	394	\$35,000	\$14,000	\$5.5 million
TOTAL (all rounds)		2414	1848	\$60,000	\$30,000	\$54.8 million

Queensland

In 2007, the Queensland Government established a redress scheme for those who experienced abuse and neglect as children in the Queensland institutions that were the subject of Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde inquiry).

The scheme had two payment tiers: a Level 1 payment of \$7,000 and an additional Level 2 payment of up to \$33,000.

Level 1 payments of \$7,000 were made on the basis of a written application. Provided the applicant had been in an institution covered by the scheme and said in their application that they had experienced institutional abuse or neglect, they were offered the Level 1 payment.

Level 2 payments were for the more serious cases of harm, including harm suffered at the time of the abuse or neglect and harm that existed later in life as a result of the abuse or neglect. Categories of harm were listed as physical injury, physical illness, psychiatric illness, psychological injury and loss or opportunity. Applicants were able to include other types of harm.

Level 2 payments were assessed by a panel of experts who considered, among other matters:

- the nature and severity of abuse or neglect suffered while in institutional care
- the nature and extent of harm suffered as a consequence of the abuse or neglect
- length of time spent in institutional care
- number of institutional placements and the period of time in which these placements occurred
- age at entry into and exit from institutional care
- type and history of the institution in which the applicant was placed, including any information known about the treatment of residents in that institution.

The categories for Level 2 payments are shown in Table 14.

Table 14: Queensland redress scheme categories for Level 2 payments

Very serious	\$6,000
Severe	\$14,000
Extreme	\$22,000

Very extreme | \$33,000

Just over 7,000 claimants received Level 1 payments. Some 5,416 were assessed for a Level 2 payment. Of those who received a Level 1 payment, around 3,500 received an additional amount of between \$6,000 and \$33,000. The average total payment per claimant among all claimants to the scheme was around \$14,000. The average total payment for those deemed eligible for a Level 2 payment was \$20,000 (which was the Level 1 payment of \$7,000 plus an average payment of \$13,000 for Level 2).

Table 15: Overview of redress payment in Queensland¹⁹²

Payment category	Amount	Number deemed eligible	Number paid	Total amount paid
Level 1	\$7,000	7,453	7,168	\$50.2 million
Level 2				
Very serious	\$6,000	1,455	1,447	\$8.2 million
Severe	\$14,000	1,254	1,252	\$18.1 million
Extreme	\$22,000	616	616	\$13.9 million
Very extreme	\$33,000	167	166	\$5.6 million

Western Australia

In 2007, the Western Australian Government established Redress WA for adults who were abused or neglected in state care in Western Australia when they were children. 'State care' was defined broadly.

Initially, ex gratia payments were set at up to \$10,000 if an applicant showed they experienced abuse while in state care and up to \$80,000 where there was medical or psychological evidence of loss or injury as a result of the abuse.

Fewer applications were received than expected, but the severity and impact of the abuse was higher than expected. The allocated budget for the scheme was increased but payment levels were changed and the maximum monetary payment was reduced to \$45,000 to enable payments to be made within the increased budget.

Four payment levels were set, as shown in Table 16.

Table 16: Redress WA payment levels

Level 1: Moderate abuse and/or neglect | \$5,000

Level 2: Serious abuse and/or neglect with some ongoing symptoms and disability	\$13,000
Level 3: Severe abuse and/or neglect suffered with ongoing symptoms and disability	\$28,000
Level 4: Very severe abuse and/or neglect suffered with ongoing symptoms and disability	\$45,000

Redress WA used an assessment matrix to assess applications and to determine the level of payment to be offered.

Table 17: Redress WA assessment matrix

Category	Description
Severity of abuse and/or neglect	The intensity and frequency of the physical/sexual abuse; psychological abuse; and neglect
Compounding or ameliorating factors	Time spent in abusive care; age when first entering care; isolation; the amount of family contact; the position or role of the abuser
Consequential harm	Impact of the mistreatment in regard to physical, social, psychological and sexual harm
Aggravating factors	Verbal abuse, racist abuse, failure to provide care following abuse, witnessing abuse of another child et cetera

Table 18 shows payments made under Redress WA.

Table 18: Payments made under Redress WA

Payment level	Payments made	Amount paid
1 – \$5,000	859	4,295,000
2 – \$13,000	1,813	23,569,000
3 – \$28,000	1,477	41,356,000
4 – \$45,000	1,063	47,835,000

TOTAL	5,212	117,055,000
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In 2012, the Western Australia Government established the Country High School Hostels ex gratia payment scheme for those who had been abused in Country High School Hostels and who had not applied to Redress WA. It had three payment levels. Table 19 shows payments that were made under the scheme.

Table 19: Payments made under Country High School Hostels scheme

Payment level	Payments made	Amount paid
1 – \$5,000	2	10,000
2 – \$20,000	28	560,000
3 – \$45,000	60	2,700,000
TOTAL	90	3,270,000

South Australia

Following the report of the Commission of Inquiry into Children in State Care (the Mullighan inquiry) in 2008, the South Australian Government announced that victims of sexual abuse in state care could apply for ex gratia payments under the *Victims of Crime Act 2001* (SA) as an alternative to litigation.

The *Victims of Crime Act 2001* gives the Attorney-General various discretions to make ex gratia payments, despite applications not complying with requirements of the scheme – for example, time limits for applying and the requirement that ex gratia payments be capped at the amount that was available at the time of the offence.

The South Australian Government provided the following data on applications and payments as at 16 June 2014:

- 163 applications have been received
- 91 offers have been made
- 82 offers have been accepted
- total payments of \$1,167,000 million have been made
- the average payment is approximately \$14,400.

Non-government institution schemes

A number of non-government institutions have established redress schemes or processes. Three well-known schemes that have been considered in case studies to date are the Catholic Church's Towards Healing and Melbourne Response, and The Salvation Army Eastern Territory's protocol.

Table 20 provides an overview of these non-government institution schemes.

Table 20: Overview of claims and payments made under Towards Healing, Melbourne Response and The Salvation Army redress procedures

Resolution period	Towards Healing	Melbourne Response	Salvation Army protocol
1995–1999	14	59	13
2000–2004	205	65	23
2005–2009	338	49	287
2010–2014	314	24	154
Unknown	10	113	1
Total number of claims	881	310	478
Total payment	\$42.5 million	\$12.0 million	\$23.5 million
Average payment	\$48,300	\$38,800	\$49,100

The method for calculating monetary payments and the range of payments made in each of these redress schemes are discussed below.

Towards Healing

Towards Healing was established at the end of 1996. It is available to anyone who has suffered physical, sexual or emotional abuse by a priest, religious or other Catholic Church personnel. Claims in relation to the Archdiocese of Melbourne are dealt with under the Melbourne Response, and not under Towards Healing.

Monetary payments are negotiated on a case-by-case basis through facilitation. There is no table or chart specifying the financial outcomes or range of outcomes that might be expected or offered having regards to needs of the victim or the type or degree of abuse suffered.¹⁹³

According to data summonsed by the Royal Commission, 881 known payments were made to claimants between 1 January 1995 and 30 June 2014. A total of \$42.5 million was paid out under Towards Healing during that period. The average payment was \$48,300. Over 96 per cent of payments were for \$150,000 or less.

Melbourne Response

In 1996, the Archdiocese of Melbourne established the Melbourne Response, which covered abuse by priests, lay people and religious under the control of the Catholic Archbishop of Melbourne.¹⁹⁴

Under the Melbourne Response, a compensation panel determines the amount of any monetary payment. The panel is chaired by a Queen's Counsel and includes a psychiatrist, a solicitor and a community representative. There is a contested hearing if the alleged perpetrator denies the abuse.

There is a cap on monetary payments. Initially, the cap was set at \$50,000. It was increased to \$55,000 in 2000 and to \$75,000 in 2008.¹⁹⁵

The Chair of the Compensation Panel, Mr David Curtain QC, gave evidence in case study 16 that the 'original maximum was related to the payments that could be awarded by the courts through the Victorian Victims of Crime Compensation Scheme'.¹⁹⁶ Mr Curtain also gave evidence that 'if there has been penetrative abuse our default position is to award the maximum'.¹⁹⁷

According to data summonsed by the Royal Commission, 310 known payments were made to claimants under the Melbourne Response between 1 January 1995 and 30 June 2014. A total of \$12 million was paid out during this period. The average payment was \$38,800.

The Salvation Army Eastern Territory

The Salvation Army Eastern Territory's *Procedures for complaints of sexual and other abuse against Salvationists and workers 1996* applies to sexual misconduct by an officer or worker against any person.

A matrix is used to calculate monetary payments. This matrix is entitled *Guidelines for assessment of personal injury claims* and the current version was developed in 2010.¹⁹⁸

The matrix requires an assessment of whether the applicant suffered:

- deprivation of liberty
- psychological/emotional abuse
- physical assault
- cultural separation/discrimination.

The applicant qualifies for \$10,000 if one or two of these were suffered, and for \$15,000 if three or more were suffered.

To this amount is added an amount based on age at time of entry into the home and length of stay, with the following options:

- aged 12 or above and stayed for less than one year – add \$5,000
- aged 12 or above and stayed for one to three years – add \$10,000
- aged 12 or above and stayed for over three years – add \$15,000
- aged under 12 and stayed for less than one year – add \$7,000

- aged under 12 and stayed for one to three years – add \$14,000
- aged under 12 and stayed for over three years – add \$20,000.

To the new total amount further amounts for any aggravated factors are added as follows:

- \$500 per day of isolation
- \$15,000 for indecent assault
- \$30,000 for sexual assault
- \$10,000 for profound impact
- \$20,000 for personnel secretary's discretionary offer.

A further \$5,000 is then added for counselling.

However, amounts may be determined outside the matrix and a substantial degree of discretion is allowed in determining ex gratia payments.

According to data summonsed by the Royal Commission, 478 known payments were made to claimants by The Salvation Army Eastern and Southern Territories between 1 January 1995 and 30 June 2014. A total of \$23.5 million was paid out during that period. The average payment was \$49,100.

Statutory victims of crime compensation schemes

All states and territories have established statutory schemes that allow victims of crime to apply for and receive a monetary payment, as well as counselling and other services, from a dedicated pool of funds. A victim of institutionalised child sexual abuse may apply for redress under these schemes if they meet the eligibility requirements.

Some schemes, such as those in New South Wales, Victoria, Queensland and the Australian Capital Territory, focus on providing services and financial reimbursement to assist in covering expenses. The lump-sum monetary payment available is lower and could be thought of as a symbolic gesture, acknowledging that the claimant has been the victim of a violent crime.¹⁹⁹

Other schemes, such as those in Western Australia, South Australia, Tasmania and the Northern Territory, focus primarily on lump-sum monetary payments. The lump sum amount is intended to compensate for pain and suffering, loss of enjoyment of life, loss of income and treatment expenses. In the Northern Territory, a schedule of compensable injuries is used to determine the amount of compensation.²⁰⁰

The current state and territory maximum lump-sum payments are shown in Table 21.

Table 21: Maximum lump-sum payments under state and territory victims of crime compensation schemes

State / territory	Maximum lump sum payment to primary victim
New South Wales ²⁰¹	\$15,000

Victoria	\$60,000
Queensland	\$75,000
South Australia	\$50,000
Western Australia	\$75,000
Tasmania	\$50,000
Australian Capital Territory	\$50,000
Northern Territory	\$40,000

Irish Residential Institutions Redress Scheme

A number of submissions to issues papers suggested that the Irish Residential Institutions Redress Scheme might be a good redress model to consider.

In 2002, the Government of Ireland established a national redress scheme under the *Residential Institutions Redress Act 2002*.

Under the *Residential Institutions Redress Act 2002*, the Minister appointed a committee with medical and legal expertise to report on what amounts should be available as monetary payments and how they should be assessed.

Payments were determined under a weighting scale for evaluating the severity of abuse and consequential injury. Points were awarded on the variables set out in Table 22.

Table 22: Irish Residential Institutions Redress Scheme weighting scale for payments

1–25	Severity of abuse
1–30	Medical verified physical/psychiatric
1–30	Psychosocial sequelae
1–15	Loss of opportunity

The aggregate level of points determined the redress band within which the amount of the payment was determined as set out in Table 23.

Table 23: Irish Residential Institutions Redress Scheme redress bands

Aggregate points	Redress band level	Payment
Less than 25	I	Up to €50,000
25-39	II	€50,000-€100,000

40-54	III	€100,000-€150,000
55-69	IV	€150,000-€200,000
70 or more	V	€200,000-€300,000

If the weighting was 100 and the case was considered an exceptional case, an award in excess of €300,000 could be made. 'Aggravated damages' of up to 20 per cent of the award could be ordered. An award could also include an additional amount for reasonable future medical expenses, capped at 10 per cent of the award determined by the weightings.

As at 17 December 2014, some 15,547 payments had been made.²⁰² Around 85 per cent of claimants were awarded amounts below €100,000 (around \$140,000 in Australian dollars based on January 2015 exchange rates). Almost half of claims (48.3 per cent) were assessed as being redress band II, meaning their weighting was scored at between 25 to 39 out of a possible 100 and they were awarded between €50,000 and €100,000 (between \$70,000 and \$140,000 in Australian dollars based on January 2015 exchange rates).

The average value of awards up until 17 December 2014 was €62,237 (\$88,000) and the largest award was €300,500 (\$423,000).

Table 24: Spread of payments in Irish Residential Institutions Redress Scheme, 2003 to 2013²⁰³

Redress band level	Range of payment	Number receiving payments in this range	Proportion of all recipients (%)
I	Up to €50,000	5,643	36.3
II	€50,000-€100,000	7,507	48.3
III	€100,000-€150,000	2,069	13.3
IV	€150,000-€200,000	280	1.8
V	€200,000-€300,000	48	0.3
TOTAL		15,547	100.0%

The Irish scheme had extensive involvement from lawyers in preparing and presenting applicants' cases. It gathered extensive evidence, including applicants' medical records, to allow a rigorous assessment of causation and injury or loss.

A number of participants in our consultations, while expressing support for many features of the Irish scheme, have opposed the legalism of the Irish scheme process. While some survivor advocacy and support groups indicated support for a scheme with monetary payments as substantial as those available in the Irish schemes, these groups also recognised that the processes involved were considerably more onerous than they would support in an Australian redress scheme.

Monetary payments in the claims data

As discussed in Chapter 3, the Royal Commission obtained data from all states and territories, the Australian Government, CCI and the Eastern and South Territories of the Salvation Army about claims of institutionalised child sexual abuse resolved in the period from 1 January 1995 to 30 June 2014.

These data include a mix of payments made in claims that were pursued through civil litigation, made under non-government institution redress schemes or otherwise directly made to the relevant government or institution.

The data include 2,658 claims for the period from 1 January 1995 to 30 June 2014. They provide a useful picture of monetary payments made in response to claims from all sources by governments and institutions that could reasonably be expected to have received the most claims.

These data revealed that the average payment over that period was \$78,542 in 2013 dollars. That figure is derived by dividing the total number of payments by the total amount paid. However, this average is skewed by a small number of very large payments. The median payment – that is, the middle point for which 50 per cent of payments were higher and 50 per cent were lower – was \$43,230.

Table 25: Range of all payments made 1995 and 2014 (adjusted to 2013 dollars)

Percentage of claims	Average payment
20% of payments were below	\$19,440
40% of payments were below	\$36,000
50% of payments were below	\$43,200 (median)
60% of payments were below	\$52,000
80% of payments were below	\$102,000
90% of payments were below	\$168,750

In Table 25, the bands of 20, 40, 50, 60, 80 and 90 per cent are a way of understanding the range of payments made. For the 20 per cent band, 20 per cent of the payments lie below this compensation amount (in real 2013 dollars) and 80 per cent lie above it. Ninety per cent of all compensation payments were at or under \$168,750 (in real 2013 dollars), but the top 10 per cent of payments ranged from \$168,750 to over \$3,926,000 (in real 2013 dollars).

We have reviewed the details of some of the claims that received payments in the top 10 per cent of claims – that is, amounts over \$168,750 (in real 2013 dollars). Generally, these claims involved catastrophic injuries arising in close connection to incidents of abuse, and in

circumstances where there appear to have been reasonable bases to argue that the institution owed a duty of care and had breached it.

These large amounts, even if reached by agreement, are more likely to represent what a court might award as common law damages.

More detail on the claims data is set out in Chapter 3.

6.4 A possible approach

Assessment of monetary payments

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics, on approaches to assessment of monetary payments. There was strong support for a table or matrix that took account of the severity of the abuse and the impact of abuse. There was also recognition that there may be other aggravating factors that should be considered.

A number of survivor advocacy and support groups recognised that many survivors have competing concerns: on the one hand, they do not want to feel like they are being judged against each other in a ‘meat market’ of injuries; on the other hand, they want the range and severity of experiences of abuse to be recognised. Some survivor advocacy and support groups acknowledged that these competing concerns cannot be resolved. They favoured a table or matrix that would provide a transparent assessment process that survivors could understand.

We have no fixed view on what form a table or matrix should take at this stage. For the purposes of this consultation paper, we put forward the table or matrix shown in Table 26 for comment.

A possible table or matrix could provide for the assessment of severity of abuse, severity of impact and distinctive institutional factors, as shown in Table 26.

Table 26: Possible table/matrix for assessing severity of abuse, severity of impact and distinctive institutional factors

Factor	Value
Severity of abuse	1-40
Impact of abuse	1-40
Distinctive institutional factors	1-20

A number would be determined for each of the above factors (that is, the greater the severity of abuse, the higher the number in the range of 1 to 40). A total number for the three factors would be added to determine the payment level.

As discussed below, the consequences for people who are abused may not be proportionate to the severity of their abuse. For some survivors, what may be considered to be a relatively modest level of abuse may have severe or even catastrophic consequences. The appropriate response through a monetary payment under redress must be determined having regard to both the severity and the consequences of abuse for the individual.

It is important to understand that an effective redress scheme will not follow the decision-making process that a court will follow. It will not make a judicial decision. Rather, as discussed in Chapter 7, it is likely to make an assessment by applying a standard of proof lower than the standard applied in civil litigation to assess both severity of abuse and severity of impact.

Severity of abuse

While the seriousness of every kind of child sexual abuse must be acknowledged, it has long been recognised that certain abuse acts can be more severe to the child and can increase the likelihood of adverse outcomes in life.

A review of empirical studies published in 1993 found that the following characteristics of the abuse experience are likely to lead to a greater number of adverse psychosocial symptoms for survivors:

- penetrative abuse (oral, anal or vaginal penetration)
- use of force
- high frequency of sexual contact
- long duration
- having a close relationship with the perpetrator(s).²⁰⁴

Other intervening variables, such as the number of perpetrators, time elapsed between the end of the abuse and assessment of the abuse and the survivor's age during the time of abuse and assessment, may also lead to a higher number of adverse symptoms in adulthood. However, the review indicated that there are still too few studies to make a clear finding.²⁰⁵

A study published in 2009 suggests that the following factors should be considered in measuring the severity of the abuse:

- age of victim at the time of first sexual assault
- intensity of the abuse (for example, penetrative or non-penetrative)
- duration of the abuse (for example, were there multiple occurrences over a long period of time)
- the existence of multiple perpetrators
- use of physical force or coercion.²⁰⁶

Most redress schemes that have used tables or matrices have provided for an assessment of the relative severity of the abuse.

Severity of impact

Research also has found a connection between child sexual abuse and a wide variety of impacts in adulthood that may affect the survivor's psychological and social functioning, physical health and interpersonal relationships.²⁰⁷ However, the impact of abuse on survivors varies greatly between survivors. For example, aside from the severity of the abuse experience, the lack of support at the time of disclosure and the survivor's personal outlook in life and coping style may also increase the survivor's psychosocial symptoms.²⁰⁸

Research has found that although the impact of abuse varies widely in both degree and composition, disruptions generally fall into three main areas:

- intrapersonal problems such as compromised sense of self-worth, deep feelings of guilt and responsibility for the assault
- relational impairments including impaired relationships, trust and intimacy difficulties
- disturbances in affect, such as depression, anxiety, anger and post-traumatic stress.²⁰⁹

This element of assessment would be intended to measure the relative severity of the disruptions that child sexual abuse has caused to the survivor's life.

We recognise that for any children or young adults who are being assessed through a redress scheme, this assessment of the impact of the abuse might have to be predictive of the likely impact rather than assessing actual impact from a position of hindsight. This is comparable to elements of damages assessments routinely undertaken in civil litigation and could be accommodated within a redress scheme.

Some survivors have told us that focusing on severity of impact punishes those who have done well in their lives, in spite of their abuse. However, this element of the assessment is intended to reflect a survivor's greater need for assistance because of how disruptive the abuse has been on the remainder of their life up to the time of assessment.

Distinctive institutional factors

There may be some distinctive institutional factors that exacerbate the impact of institutional child sexual abuse.

For example, many children placed in long-term institutional care were already severely disadvantaged before being placed into care, having suffered either abuse in a familial context or the deprivation that accompanies being in a dysfunctional family. This may mean that they were particularly vulnerable to abuse, and susceptible to greater damage as a result of further abuse in an institution.

The Western Australian Government considered such variables in developing the ratings system on which they based payments for Redress WA. A 'compounding factors' rating was included as a domain of abuse and neglect. It was intended to show the extent to which

children entered care already fragile/damaged (it was assumed that an institutional maltreatment was exacerbated by the child's poor circumstances).

Redress WA's assessment matrix also included 'ameliorating factors', which took into account the extent to which the victim had the social support of family and/or friends at the time of the harm.²¹⁰

The differences in types of institutions may influence how institutional abuse affects a child. A distinction might be drawn between 'closed' and 'open' institutions. In a 'closed' institution, such as a 24 hour-a-day residential care facility, the three spheres of life – sleeping, playing and work – are conducted in the same place and the child may be subject to a single authority and more or less isolated from contact with anyone from the outside world.²¹¹ Children abused in such contexts may effectively be trapped and unable to seek any help, thus exacerbating the trauma. Abuse perpetrated by an owner or sole authority figure in an institution or in foster care may also potentially have a more damaging impact on the victim.

Developing a table or matrix

Any table or matrix would need to be accompanied by detailed assessment procedures and manuals to enable staff to apply the factors consistently across claims, and consistently with any actuarial modelling on which the level of monetary payments is based. A failure to ensure that the assessment is consistent with funding expectations may result in an under-funded scheme or significant pressure to reduce payment levels.

Amounts of monetary payments

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on what amounts of monetary payments should be offered. Again, there was strong support for a scheme where payments are offered at different levels or tiers to reflect the severity of the abuse and the impact of abuse and other aggravating factors as discussed above.

It was clearly very difficult for many participants in our private roundtables to nominate a maximum amount for monetary payments. We were told that, for some survivors, even a very modest amount could be life-changing, while for others, the €300,000 offered under the Irish Residential Institutions Redress Scheme would be too low and there should be no cap on monetary payments.

Many participants grappled with the issue of affordability, recognising that a scheme is unlikely to be implemented if the estimated total amount of funding required for monetary payments appears to be unaffordable. On the other hand, justice will not be achieved unless survivors are satisfied that the monetary payment amounts are reasonably fair.

We have no fixed view on what the payments should be at this stage.

For the purposes of this consultation paper, we have commissioned actuarial modelling of the following possibilities, each with a minimum payment of \$10,000 and:

- a maximum payment of \$100,000
- a maximum payment of \$150,000
- a maximum payment of \$200,000.

For each of these maximum payment levels, our actuarial advisers have modelled how payments could be distributed to achieve average payments of either \$50,000, \$65,000 or \$80,000.

The modelling of these possible payment ranges is set out below. Our actuarial advice also models total payments at these levels in order to estimate total funding costs. This is discussed further in Chapter 8 below.

Monetary payments at these levels would be higher than the amounts available under previous state government redress schemes, at each of the minimum amount of \$10,000, the maximum amounts of \$100,000, \$150,000 or \$200,000 and the average amounts of \$50,000, \$65,000 or \$80,000.

Many survivors have told us that any monetary payment should be meaningful, in the sense that it would provide a means to make a tangible difference in their lives. We have been told that survivors are seeking a payment in an amount that will positively impact on the quality of life of survivors, many of whom have struggled to cope with adverse physical and mental health conditions as a consequence of their abuse.²¹² A ‘token’ amount would not provide any sense of justice to many survivors.

At our private roundtables, a number of survivor advocacy and support groups told us of the sorts of things that survivors might wish to use their redress payments for. Some need to pay off debts or pay medical expenses; some need to secure more stable housing; and some would like to provide assistance to their families, who they feel have also been substantially affected by their abuse. Monetary payments at the levels we have had modelled should assist survivors with these sorts of things.

We note that it is not intended that the levels of monetary payments we have had modelled will be affected by any deduction that is necessary to repay past Medicare expenses. That is, these amounts would be the amounts that survivors actually receive. If the scheme is required to make a payment to the Health Insurance Commission for past Medicare expenses, we would anticipate that the scheme would negotiate a ‘bulk payment’ arrangement whereby it could pay an amount per claim to the Health Insurance Commission without affecting the amount of the monetary payment paid to a survivor. These arrangements were put in place for both the Queensland and Western Australian government redress schemes.

Further, the above maximum payment levels are not so high that they should have implications for claimants who receive social security or veterans’ pensions or other payments, as discussed above. They do not exceed common law damages awards for non-economic loss, and so they would not provide, or be intended to provide, ‘compensation’ for past or future economic loss.

Some survivor advocacy and support groups have argued that redress payments should be calculated in the same way as common law damages.

We are satisfied that this approach would not be possible or appropriate. Calculating damages at common law requires detailed evidence of causation and extent of loss or damage. Such a process would not be achievable in a redress scheme designed to assess many claims. Further, calculating monetary payments in the same way as common law damages would be likely to make the redress scheme unaffordable.

Civil litigation remains available for those who wish to seek damages under common law. We discuss this further in Chapter 10 below. A redress scheme is intended to make redress available to many survivors who would not be able to bring common law claims. If those survivors were to receive payments as if they had brought successful common law claims, the cost of funding the scheme would be likely to be unaffordable for governments and non-government institutions or at least unaffordable without significantly affecting other services and programs.

Some interested parties have asked why those who have suffered institutional child sexual abuse should be eligible for monetary payments higher than those payments available to, say, victims of crime under statutory victims of crime compensation schemes.

We are satisfied that higher payments under a redress scheme for survivors are appropriate.

This is not an argument about who has suffered the worst impacts as a result of criminal behaviour. Some crimes covered by the statutory victims of crime compensation schemes may have terribly severe impacts on the victims. In some cases, those impacts may be greater than those experienced by some survivors of institutional child sexual abuse. For example, some cases of intra-familial child sexual abuse may have more severe impacts than some cases of institutional child sexual abuse.

However, a redress scheme for survivors recognises that institutions have a degree of responsibility for the harm done to survivors. The responsibility may not be a legal liability (although in some cases it may be), but there is a moral or social responsibility to address the harm done. This is the case for government and non-government institutions. Governments may also have an additional level of responsibility through their roles as regulators of institutions and for government policies that encouraged or required the placement of children in institutions. Again, this may not be a legal liability, but the moral or social responsibility to address the harm done remains.

The Law Council of Australia, in its submission to *Issues paper 7: Statutory victims of crime compensation schemes*, stated:

The case for a separate category of redress schemes in the case of abuse which occurs in an institutional context is the arguable culpability of the organisation or institution in failing to protect the victims of abuse, the degree of vulnerability of the victims and the community's expectation that organisations charged with the fiduciary, moral and ethical obligation to care and provide a safe environment for children uphold those duties to the highest extent possible.²¹³

These considerations of responsibility or culpability do not arise in the context of statutory victims of crime compensation schemes. These schemes seek to recognise that someone has been a victim of a crime and to provide them with publicly funded support and a monetary payment to help them to recover from the crime. They do not seek to acknowledge that the relevant government or state has any responsibility for the commission of the crime or the harm suffered.

We are satisfied that a redress scheme for survivors that merely matched the payments available under statutory victims of crime compensation schemes would fail to recognise the role and responsibility of governments and institutions in providing redress for survivors of institutional child sexual abuse.

Actuarial modelling

We have obtained actuarial advice from Finité Consulting Pty Limited (Finité) on:

- the number of eligible survivors who may make a claim for a payment under a redress scheme
- possible distributions of payments across the possible maximum payment levels set out above.

It is extremely difficult to make these estimates and to model possible distributions. This is because:

- there is no precedent for a redress scheme that covers such a broad range of institutions
- there is a lack of data on the number of people exposed to abuse in an institutional context.

We are publishing the Finité actuarial report to us in conjunction with this consultation paper so that all interested parties can understand the detail of the actuarial advice that has informed our work on monetary payments and funding. The report is published on the Royal Commission's website.

In order to estimate the number of likely claimants, Finité has analysed data on the number of claimants to previous state redress schemes, as well as estimates on the number children who have suffered sexual abuse in institutions. While based on a number of uncertain assumptions, Finité has estimated an indicative number of claimants in the vicinity of 65,000, Australia wide. This figure has been used for the purpose of looking at a possible distribution of payments. (For the purpose of modelling funding of redress, the impact on costs if claimant numbers are 45,000 or 85,000 has also been considered, as discussed in Chapter 8.)

How claimants are distributed along the payment scale will depend upon the severity, impact and distinctive institutional factors of the abuse assessed in applications, and the adequacy and rigour of the assessment process. Again, this is very difficult to estimate. However, Finité has been able to model a hypothetical spread of abuse severity based on the severity scores for those applications to Redress WA that involved allegations of sexual abuse, and in this way determine a hypothetical spread of severity.

Payment curve options for maximum payments of \$100,000

Figure 4 and Table 27 show the possible spread of payments when the maximum payment is set at \$100,000 and the average payment is either \$50,000 (blue), \$65,000 (yellow) or \$80,000 (grey).

Figure 4: Possible payment spread assuming a maximum payment of \$100,000

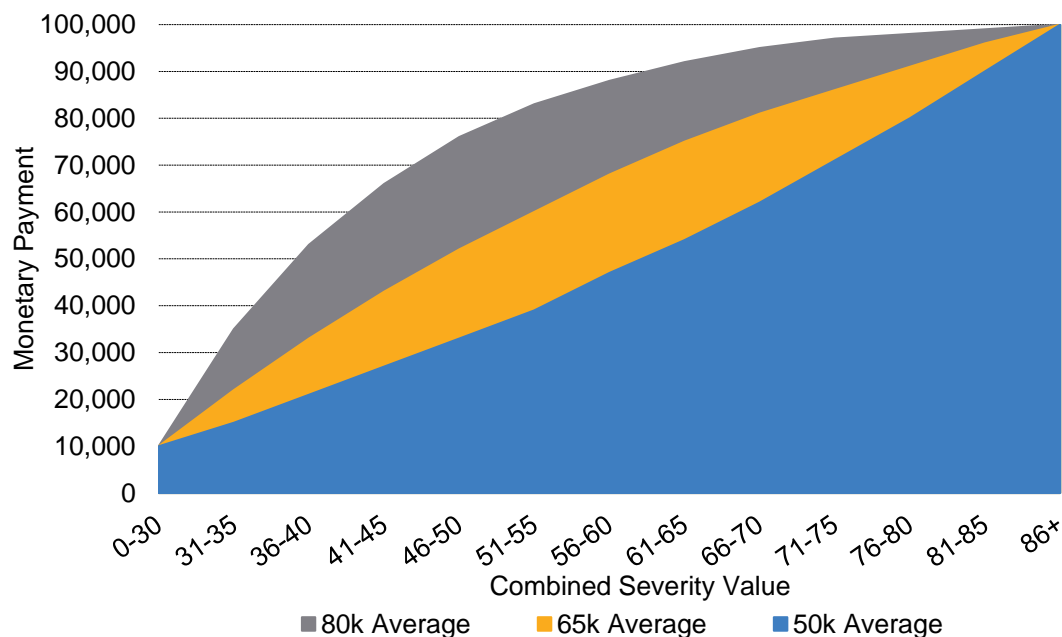


Table 27: Possible payment spread assuming a maximum payment of \$100,000

Scheme participant information			Hypothetical payment levels		
Assessment Score	Proportion Participants	Cumulative Proportion	80k Average	65k Average	50k Average
0-30	5%	5%	10,000	10,000	10,000
31-35	5%	10%	35,000	22,000	15,000
36-40	6%	16%	53,000	33,000	21,000
41-45	8%	24%	66,000	43,000	27,000
46-50	10%	34%	76,000	52,000	33,000
51-55	9%	43%	83,000	60,000	39,000
56-60	9%	53%	88,000	68,000	47,000

61-65	10%	62%	92,000	75,000	54,000
66-70	10%	72%	95,000	81,000	62,000
71-75	9%	82%	97,000	86,000	71,000
76-80	9%	91%	98,000	91,000	80,000
81-85	5%	96%	99,000	96,000	90,000
85+	4%	100%	100,000	100,000	100,000
Total / Average	100%		80,000	65,000	50,000

Payment curve options for maximum payments of \$150,000

Figure 5 and Table 28 show the possible spread of payments when the maximum payment is set at \$150,000 and the average payment is either \$50,000 (blue), \$65,000 (yellow) or \$80,000 (grey).

Figure 5: Possible payment spread assuming a maximum payment of \$150,000

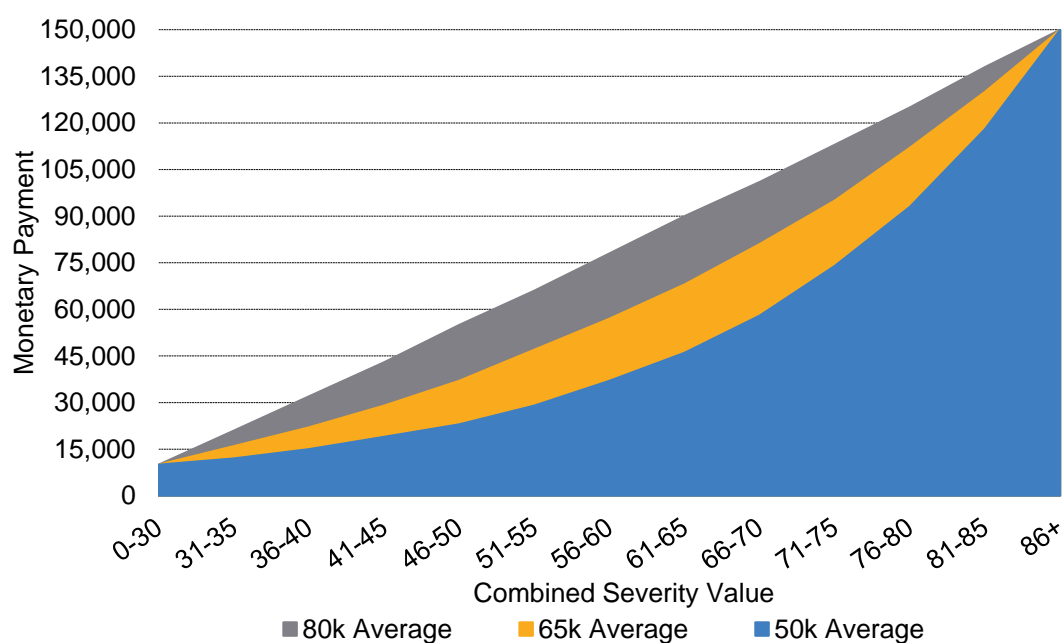


Table 28: Possible payment spread assuming a maximum payment of \$150,000

Scheme participant information			Hypothetical payment levels		
Assessment Score	Proportion Participants	Cumulative Proportion	80k Average	65k Average	50k Average
0-30	5%	5%	10,000	10,000	10,000
31-35	5%	10%	21,000	16,000	12,000
36-40	6%	16%	32,000	22,000	15,000
41-45	8%	24%	43,000	29,000	19,000
46-50	10%	34%	55,000	37,000	23,000
51-55	9%	43%	66,000	47,000	29,000
56-60	9%	53%	78,000	57,000	37,000
61-65	10%	62%	90,000	68,000	46,000
66-70	10%	72%	101,000	81,000	58,000
71-75	9%	82%	113,000	95,000	74,000
76-80	9%	91%	125,000	112,000	93,000
81-85	5%	96%	138,000	130,000	118,000
86+	4%	100%	150,000	150,000	150,000
Total / Average	100%		80,000	65,000	50,000

Payment curve options for maximum payments of \$200,000

Figure 6 and Table 29 show the possible spread of payments when the maximum payment is set at \$200,000 and the average payment is either \$50,000 (blue), \$65,000 (yellow) or \$80,000 (grey).

Figure 6: Possible payment spread assuming a maximum payment of \$200,000

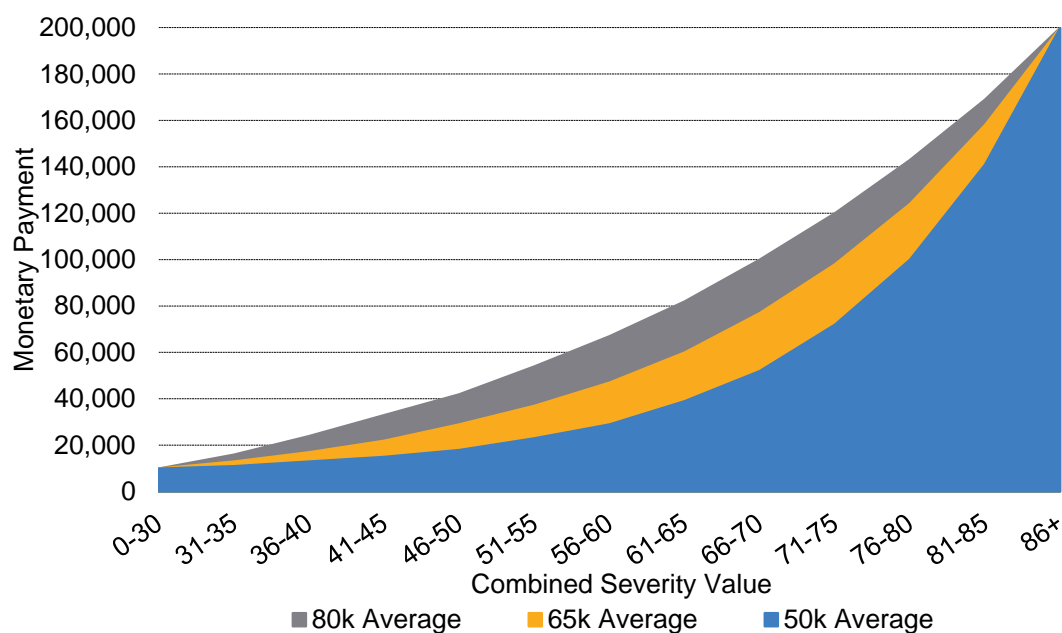


Table 29: Possible payment spread assuming a maximum payment of \$200,000

Scheme participant information			Hypothetical payment levels		
Assessment Score	Proportion Participants	Cumulative Proportion	80k Average	65k Average	50k Average
0-30	5%	5%	10,000	10,000	10,000
31-35	5%	10%	16,000	13,000	11,000
36-40	6%	16%	24,000	17,000	13,000
41-45	8%	24%	33,000	22,000	15,000
46-50	10%	34%	42,000	29,000	18,000
51-55	9%	43%	54,000	37,000	23,000
56-60	9%	53%	67,000	47,000	29,000
61-65	10%	62%	82,000	60,000	39,000
66-70	10%	72%	100,000	77,000	52,000
71-75	9%	82%	120,000	98,000	72,000
76-80	9%	91%	143,000	124,000	100,000

81-85	5%	96%	169,000	158,000	141,000
86+	4%	100%	200,000	200,000	200,000
Total / Average	100%		80,000	65,000	50,000

Comparing the payment curve options

Some comments should be noted about the payment curve options set out above.

Different maximum payments can be set without affecting the total cost of payments. That is, the cost of payments is affected by the average cost rather than the maximum cost. A scheme with an average payment of \$65,000 will have the same total cost of payments, regardless of whether the maximum payment is set at \$100,000, \$150,000 or \$200,000.

Within any given range of minimum and maximum payments, the higher the average payment the greater the relative proportion of total payments will be directed to those *less seriously* affected by abuse, being those with a lower total assessment determined under the table or matrix. In contrast, the lower the average payment the greater the relative proportion of total payments will be directed to those *most seriously* affected by abuse, being those with a higher total assessment determined under the table or matrix. Where there is a fixed or finite pool of money available for payments, most 'compensation' schemes tend to direct payments to those most seriously affected because they are generally considered to be the most seriously in need of assistance.

Of the options modelled, the options that will direct payments to those most seriously affected by abuse are:

- a maximum payment of \$200,000 and an average payment of \$50,000
- a maximum payment of \$150,000 and an average payment of \$50,000
- a maximum payment of \$200,000 and an average payment \$65,000.

The higher the maximum payment, or the higher the average payment, the more likely that a scheme should require additional material or 'evidence' and additional procedures to determine the validity of claims, at least at the medium to higher levels of severity under the table or matrix. For example, a scheme might require medical evidence, psychological or psychiatric reports, and an oral 'hearing' before deciding to offer larger monetary payments.

It should also be noted these options model figures that are estimates based on incomplete and imperfect data. Great caution should be taken in interpreting the numbers. As with previous schemes, there is always the risk that the number of claimants or the spread of payments (or both), as modelled, will bear little resemblance to what may actually occur. Nevertheless, it is important that monetary payments are discussed, and levels of monetary payments are set, with the best possible understanding of the likely total size and cost of the scheme.

How the scheme could be funded is discussed in Chapter 8.

6.5 Other payment issues

Availability of payments by instalments

Some survivor advocacy and support groups have told us about the difficulties some survivors may experience in receiving lump-sum payments that are much larger than the amounts of money they are used to handling. Comparatively large lump-sum payments may create particular difficulties in communities, including Indigenous communities, where survivors may come under pressure from other community members to share the payment or to spend it in particular ways that may not be how the survivor wishes to spend it.

However, we have also been told that many survivors want to receive a lump-sum payment, that they wish to determine how to manage and spend it themselves, and that they may require the full amount for a major purchase or expense.

A redress scheme could provide an option for monetary payments to be paid to survivors in instalments rather than as a lump sum. However, this would involve additional administrative costs for the scheme.

Treatment of past monetary payments

Many survivors have already received redress through previous and current government and non-government redress schemes, including statutory victims of crime compensation schemes. Some survivors have received monetary payments through civil litigation, generally through settlements rather than following a contested hearing on liability and damages. Some survivors have received monetary payments through both of these mechanisms, or through more than one redress scheme.

Through our consultations, there has been general support for the principle that those who have already received monetary payments should remain eligible to apply under a new redress scheme, provided that any previous monetary payments are taken into account. This appears to be the approach most likely to achieve ‘fairness’ between survivors in the sense overwhelmingly advocated by survivors and survivor advocacy and support groups.

We are satisfied that monetary payments already received for the relevant institutional abuse should be taken into account.

It should be reasonably straightforward to compare previous monetary payments against monetary payments available under a new scheme to determine whether any ‘top-up’ is appropriate. If the scope of a previous payment is unclear, and it cannot be determined that it relates to the same abuse for which a survivor is applying to the scheme then the survivor should receive the benefit of the doubt and there should be no deduction for the previous payment. Previous payments that relate to the abuse would need to be treated on a ‘gross’ basis, and not net of any deductions such as legal fees or Medicare reimbursements.

Determining eligibility for counselling and psychological care may be more difficult, particularly if a substantial settlement has been paid in civil litigation. This is because such a settlement would be expected to cover all future medical expenses. It may be appropriate for the scheme to provide guidance to potential claimants on whether any previous monetary payment would exclude them from eligibility for counselling and psychological care under the scheme (in addition to any monetary payment).

Applicants will need to be asked for, and will need to provide, information about any previous redress or compensation they have received. However, we have seen situations where survivors have difficulty accurately recalling previous redress or compensation they have received. Subject to addressing any privacy concerns through obtaining applicants' consent, the redress scheme may be able to negotiate arrangements with prior government redress schemes to confirm any redress the applicant has already received. Information about any redress or compensation already paid could also be sought from the relevant institution.

It would seem likely that the following approach is appropriate:

- past payments received under redress schemes should be adjusted for inflation and then deducted from any proposed monetary payment
- past payments under civil litigation, including through settlements, should be adjusted for inflation and then deducted from any proposed monetary payment
- past payments under statutory victims of crime compensation schemes should be adjusted for inflation and then deducted from any proposed monetary payment.

We welcome submissions that discuss the issues raised in Chapter 6, including the purpose of monetary payments.

In particular, we welcome submissions on:

- the assessment of monetary payments, including possible tables or matrices, factors and values
- the average and maximum monetary payments that should be available through redress
- whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme
- the treatment of past monetary payments under a new redress scheme.

7 Redress scheme processes

7.1 Introduction

For a redress scheme to work effectively for all parties, its processes must be efficient and focused on:

- obtaining the information required to determine eligibility and calculate monetary payments
- making that determination and calculation fairly and in a timely manner.

Redress schemes processes, and the way in which the scheme is administered, must be sensitive, transparent and survivor-centred, so that they minimise any risk of re-traumatisation and maximise the benefit of redress.

As discussed in relation to monetary payments in Chapter 6, redress scheme processes will have a significant impact on the application of a scale of payments and the overall cost of monetary payments under redress. Accordingly, redress scheme processes must be settled in close alignment with actuarial assessments of scheme costs and the sustainability of scheme funding.

Previous and current redress schemes provide many examples of effective and less effective processes.

7.2 Key redress scheme processes

Through our private roundtables, we consulted a number of survivor advocacy and support groups, institutions, governments and academics on these elements of redress scheme processes. The approaches we proposed on these elements were, on the whole, supported through the private roundtables, although there are clearly different views that can be taken on a number of them. We have refined or explained some of them further in response to the consultations.

Eligibility for redress

An effective redress scheme must clearly define eligibility for the purposes of the scheme. Eligibility refers to the criteria that determine whether a person is able to obtain redress through the scheme.

The key elements to consider for eligibility are:

- the types of institutions included
- the connection required between the institution and the abuse
- the type of abuse included

- any cut-off date by which the abuse must have occurred
- whether those who have already received redress may apply.

Types of institutions included

The definition of ‘institution’ in our Terms of Reference is very broad. We appreciate that no previous or current scheme has such broad coverage (other than statutory victims of crime schemes, which apply to all criminal abuse regardless of whether it has any connection with an institution). Even the broad government schemes have been limited by, for example, excluding foster care (Queensland), only covering residential institutions (although Western Australia included foster care), or only covering those who were in formal state care (Tasmania). However, we have not heard anything that suggests to us that any particular entities or types of entity that are included in the definition of ‘institution’ in our Terms of Reference should be excluded from the coverage of a redress scheme.

It is apparent that there must in fact be an institution involved in the arrangement in which abuse is said to have occurred. In particular, abuse in foster care and kinship care should be covered by a redress scheme, as these out-of-home care arrangements are organised and overseen by institutions. However, abuse in voluntary foster care or kinship care arrangements that are not organised or overseen by an institution should not be covered by a redress scheme.

Connection required between the institution and the abuse

It is also necessary to consider what degree of connection is required between the institution and the abuse in order to be eligible for a redress scheme. Our Terms of Reference define child sexual abuse as occurring within an institutional context if:

- it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or
- it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where [we] 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
- it happens in any other circumstances where [we] consider that an institution is, or should be treated as being, responsible for adults having contact with children.

It seems likely that the abuse covered by a redress scheme should be that for which the institution can reasonably be said to be responsible. This might include all abuse committed in a closed, residential institution, including peer-on-peer abuse. However, it may not include all peer-on-peer abuse on day school premises, for example if the abuse occurred on school premises out of school hours or during school holidays. Similarly, instances of family or stranger abuse committed on institutional premises, or abuse committed by a stranger

while a child is in foster care may be instances where an institution cannot reasonably be said to be in any way responsible for the abuse.

A satisfactory approach may be that abuse should be included for redress if:

- it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution, in circumstances where the institution is, or should be treated as being, responsible for the contact in which the abuse was committed between the abuser and the applicant
- it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the of risk abuse or the circumstances or conditions giving rise to that risk
- it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.

Type of abuse included

Our Terms of Reference require us to examine child sexual abuse within an institutional context. Our Terms of Reference also acknowledge that child sexual abuse ‘may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect’.

The issue here is whether a redress scheme should be limited to child sexual abuse or whether it should also extend to physical abuse of children or other forms of abuse or neglect.

Some current redress schemes are focused on sexual abuse. The South Australian Government scheme carried out through its statutory victims of crime compensation scheme applies only to sexual abuse. The Salvation Army Eastern Territory scheme applies only to ‘sexual misconduct’, although it then allows for assessment of other matters, including physical assault and emotional abuse, in assessing monetary payments.

However, most previous and current redress schemes cover at least sexual and physical abuse. Some also extend to emotional abuse or neglect. A number of submissions from survivors and survivor advocacy and support groups advocated including all forms of abuse, not just sexual abuse.

We are satisfied from what we have heard in private sessions and case studies that physical abuse and neglect may accompany, and make worse, sexual abuse, particularly in residential institutions. As discussed in Chapter 6, we consider that physical abuse accompanying sexual abuse may affect the severity of the abuse, and that this should be taken into account in assessments under a redress scheme.

Having regard to our Terms of Reference, it would not be appropriate for us to consider making recommendations about redress for physical abuse or neglect that is unrelated to sexual abuse.

Cut-off date by which the abuse must have occurred

We have heard a range of views regarding whether a redress scheme should apply to past and future occurrences of abuse. On balance, most of those who expressed views in our consultation processes to date have advocated redress being available for future occurrences of abuse, and not just for past occurrences of abuse.

The Actuaries Institute submitted that an option that is ‘more likely to be sustainable’ would be to limit the period of abuse that a redress scheme covers to:

any past abuse of living persons, where the first episode of abuse occurred prior to the trigger date [that is, the cut-off date]. If abuse occurred both before and after the trigger date, then it will be covered. Any case where the first episode of abuse occurs after the trigger date would not be part of the scheme.²¹⁴

On balance, we are inclined to think that this is the best approach. We are not suggesting that the only avenue for seeking redress for any future occurrences of abuse should be civil litigation. Rather, it is not clear that the particular form of redress or redress scheme we recommend for past abuse will be necessary or adequate for future occurrences of abuse.

We consider that the work of the Royal Commission as a whole is likely to change the dynamics between survivors and institutions, including in relation to redress. In particular, any reforms to civil litigation may well alter views about what ‘justice’ is in relation to redress. It is also unlikely that as large a cohort of survivors as currently exists (particularly Forgotten Australians, Former Child Migrants and members of the Stolen Generations) could be created through failures of policy and inaction in the future.

We consider that a redress scheme should cover ‘past’ abuse – that is, abuse that has already occurred or that occurs between now and the date on which civil litigation reforms commence. This would not prevent institutions or governments deciding in future to extend a redress scheme or run additional redress schemes. As discussed in Chapter 2, we welcome submissions on this issue.

Whether those who have already received redress may apply

We have discussed our proposed approach to this issue when discussing monetary payments in Chapter 6.

In short, we propose those who have already received redress through previous and current government and non-government redress schemes, including statutory victims of crime compensation schemes, or through civil litigation, should remain eligible to apply to the scheme. However, these previous payments should be adjusted for inflation and then deducted from any proposed monetary payment.

Clearly, survivors who have already received monetary payments greater than the maximum monetary payment under the scheme would effectively be ineligible for any further monetary payment. Determining eligibility for counselling and psychological care may be more difficult, particularly if a substantial settlement has been paid in civil litigation given that the settlement would be expected to cover all future medical expenses. It may be

appropriate for the scheme to provide guidance to potential applicants on whether any previous monetary payment would exclude them from eligibility for counselling and psychological care under the scheme (in addition to any monetary payment).

It would also be important for survivors who have already received redress through previous or current redress schemes to understand that the assessment processes and levels of payments may be different. In particular, a survivor who received the maximum payment under Redress WA or the Queensland Government scheme, for example, should not assume that they would receive the maximum payment under the new redress scheme. The scheme should provide appropriate guidance and support to survivors through the application process to assist them to maintain realistic expectations.

Applicants will need to be asked for, and will need to provide, information about any previous redress or compensation they have received. However, we have seen examples of situations where survivors have difficulty accurately recalling previous redress or compensation they have received and who do not have accurate records. Subject to addressing any privacy concerns through obtaining applicants' consent, the redress scheme may be able to negotiate arrangements with prior government redress schemes to confirm any redress the applicant has already received. Information about any redress or compensation already paid could also be sought from the relevant institution.

Duration of a redress scheme

Whether a redress scheme is open-ended or has a fixed closing date has significant implications for survivors who may be eligible for the scheme, and for those responsible for funding and administering the scheme.

A redress scheme may be finite or ongoing. Previous and current redress schemes provide examples of both. The Queensland and Western Australian government schemes were each finite, as was the Tasmanian Government scheme, except that it was extended several times to allow additional rounds of applications. Statutory victims of crime compensation schemes are ongoing, although some impose time limits on applications from the date of the crime. Non-government institution redress schemes, such as Towards Healing, tend to be ongoing, although some smaller non-government institution redress schemes have operated for fixed times only.

The main argument against having a fixed closing date is that eligible survivors may miss out on redress because they do not find out about the scheme until after the closing date, when it is too late for them to apply. We have heard from a number of survivors and survivor advocacy and support groups that this was a problem with Redress WA. The Western Australian Government recognised this issue to some extent when it established a further scheme for those abused while resident in country high school hostels who had not realised that they were eligible to apply under Redress WA.²¹⁵

Although there was an extensive communication strategy to promote the availability of Redress WA, we have been told by a number of survivors and survivor advocacy and support groups that survivors may be particularly difficult to reach, and some survivors may not

appreciate that a scheme is available to them. In particular, although Redress WA targeted remote Indigenous communities through its communication strategy, we have been told that a number of survivors in these communities did not realise that they might be eligible for Redress WA until other community members received payments, by which time applications had closed and it was too late for them to apply.²¹⁶

There are other difficulties with having a fixed closing date. Many survivors may find it difficult to describe their abuse sufficiently for the application process in the time allowed. Some survivors may not be ready to discuss their abuse for the purposes of a redress scheme at that time. Further, because of these difficulties, there may be many applications still to be completed in the lead-up to the fixed closing date. This can place considerable pressure on survivors and support services given that they are trying to complete applications to ensure that survivors' claims are put before the redress scheme in adequate detail for them to be fairly and properly assessed.

We acknowledge that open-ended schemes may be considerably more difficult for those who fund and administer them. Having finite government schemes in Western Australia and Queensland enabled claims to be assessed and monetary payments to be determined in accordance with scheme budgets (including the increased budget for Redress WA). It also enabled all claims to be determined over a reasonably short period of time. This is likely to have improved consistency and fairness between survivors. Finite schemes may also encourage more efficient administration and reduced administrative costs.

However, given what we know about how long it may take survivors to disclose their abuse, it could be expected that a redress scheme would need to be available for some 20 or more years after the last occasion of abuse it is intended to cover.²¹⁷ Of course, when a redress scheme opens, it could also be expected that many survivors will be ready and waiting to apply. This is particularly the case with groups such as the Forgotten Australians, Former Child Migrants and the Stolen Generations, which have participated in inquiries, have prominent advocacy and support groups, and in many cases have been pursuing redress for abuse from well over 20 years ago. Other survivors may need some years before they are ready to apply.

Given that fixed closing dates create significant difficulties for survivors and they particularly risk excluding eligible survivors, we consider that a scheme should not have a fixed closing date.

If applications dwindle to the point where the need for the continued operation of the scheme is questioned, it may be that the scheme can be closed. However, this should only occur after the closing date has been given widespread publicity and at least a further 12 months for applications to be made has been allowed.

Publicising and promoting the availability of the scheme

A key feature of an effective redress scheme is a comprehensive communication strategy. This strategy should ensure that the availability of the scheme is widely publicised and promoted.

Much can be learned from the communication strategies used by previous government schemes, although it may be necessary to update strategies to include wider use of social media. A mix of mass, niche and direct marketing might be considered.

Some survivors are likely to be difficult to reach. An effective communications strategy should target hard-to-reach groups. Some groups may be reached best through promoting the scheme to survivor advocacy and support groups, other support services and community legal centres.

Some survivors may not be reached through these strategies. However, having no fixed closing date for a redress scheme will remove some of the urgency in reaching all survivors quickly to promote the availability of the scheme and allow them sufficient time to apply. This will allow more survivors, including survivors who might not be in contact with support groups or services, to be reached through word of mouth.

The Royal Commission acknowledges that communication strategies need to be tailored to overcome any barriers that particular groups within the community may face.

Particular communication strategies could be considered for people who might be more difficult to reach. For example, specific materials and content could be created to engage with:

- Aboriginal and Torres Strait Islander communities
- people with disability
- culturally and linguistically diverse communities
- regional and remote communities
- people with mental health difficulties
- people who are experiencing homelessness
- people in correctional or detention centres
- children and young people.

Careful consideration should be given to how best to reach these groups. Redress WA and the Queensland redress scheme may provide useful examples to consider.

Application process

Survivors and survivor advocacy and support groups have overwhelmingly called for the application process for redress to be as simple as possible to minimise the risk of re-traumatisation.

An application process must obtain the information necessary to assess eligibility and determine the amount of any monetary payment. It should do this as efficiently as possible and in a manner that ensures that applicants have a good opportunity to put forward the best application they can.

However, as noted above in Chapter 6, a scheme may require additional material or 'evidence' and additional procedures to determine the validity of claims if it has higher maximum or average payments available.

Based on all that we have heard to date, it appears that the basic application process should rely primarily on completion of a written application form. The form should be designed and tested before it is used to ensure that it is as simple as possible, while seeking all of the necessary information.

It is apparent that the scheme should fund a number of support services and community legal centres to assist applicants to apply for redress. This was done in both the Western Australian and Queensland government schemes. The support services and community legal centres that are chosen should cover a broad range of likely applicants, taking into account the need to cover regional and remote areas, and to take account of particular needs of different groups of survivors, including Indigenous survivors.

Despite the use of service providers to assist applicants, Redress WA reported considerable variability in the quality of written applications.²¹⁸ It seems likely that some applications were not adequately completed because of time pressures. Having no fixed closing date for a redress scheme should reduce these difficulties. Further, the scheme should ensure that it communicates clearly and regularly with the service providers, so that there is no doubt as to what is required.

There is an issue as to whether, if survivors retain their own lawyers to assist them in applying for redress, the fees lawyers can charge survivors should be capped.

Redress WA adopted an approach of contacting each applicant by telephone to give them an opportunity to add to the account they had given in their application and to answer any queries that Redress WA had about their application. Redress WA reported that the telephone conversations were critical in balancing out the varying quality of the initial applications, although some applicants found the telephone calls distressing and traumatising.²¹⁹

This difficulty might be best addressed by working with service providers to ensure that they understand what is required in application forms. Given that applications will be determined on the basis of information provided in the application form, it is in applicants' interests to submit forms only when they are as complete as reasonably possible. Again, not having a fixed closing date for the scheme should assist.

Some survivor advocacy and support groups have suggested that every applicant should be given an oral hearing so that they have an opportunity to tell their story. Conducting a hearing for each application may substantially slow down the determination of applications and increase administrative costs. Some survivors and survivor advocacy and support groups have also reported bad experiences of hearings that were part of redress schemes. There may need to be some provision for oral hearings where the written application process is unable to ensure that the applicant's case has been fairly and adequately made. However, unless an applicant has insurmountable difficulties in completing a written application even with the assistance of available support services, an oral hearing should not be needed for applications to be fairly and properly assessed and determined.

As noted above, there may also be a need for oral hearings, additional material or 'evidence' and additional procedures to determine the validity of claims if the scheme has higher

maximum or average payments available. Additional requirements could apply only for those applications that might be assessed at the medium to higher levels of severity under the table or matrix, rather than for all applications. For example, a scheme might require medical evidence, psychological or psychiatric reports, and an oral hearing before deciding to offer larger monetary payments. The scheme might also wish to consider the outcome of any disciplinary investigations before determining an application if the abuse is recent or fairly contemporary and the alleged perpetrator is still involved with the institution.

The Western Australian and Queensland government schemes required applicants to verify their accounts of abuse by statutory declaration. We see no harm in requiring applicants to verify their accounts of abuse, including the impact of the abuse, by statutory declaration, particularly as service organisations can help applicants to understand the nature and effect of a statutory declaration. Further, if an applicant has a copy of a previous application they have made for redress, or another document in which they have recorded an account of the abuse and its impact, we see no difficulty in the application process allowing them to attach the previous account, along with any supplementary information the applicant wishes to provide, and verifying that account by statutory declaration.

Institutional involvement

Many survivors and survivor advocacy and support groups have told us that they consider that decisions about redress, particularly the determination of any monetary payment, must be made by a body independent of the institutions in which the abuse occurred. A number of institutions have also called for independent decision-making processes to be established, although some have expressed reservations about the need for independence and the timeliness of decision making in an independent scheme.

The structure of an independent, ‘one-stop shop’ redress scheme envisages independent decision making by either a national or separate state and territory schemes. Of course, these schemes would not be independent of the government or governments that are involved in establishing and administering them. We have not heard any complaints about a lack of independence in the previous government redress schemes run in Tasmania, Western Australia and Queensland comparable with the complaints made about some non-government institutions’ schemes. (There have been complaints about other aspects of the previous government redress schemes, but not their independence.) It seems likely that this approach would provide sufficient independence to address the concerns that survivors and survivor advocacy and support groups raise.

However, independent decision making does not mean that there should be no role for the institution. It is apparent that the scheme should provide any institution that is the subject of an allegation with details of the allegation, and should seek from the institution any relevant records, information or comment. The institution may also indicate that it accepts the allegations, although it would still be necessary for the redress scheme administrators to determine the abuse and impact in accordance with the scheme’s decision-making processes.

It seems to us to be particularly important that institutions should be provided with details of the allegations to ensure that institutions are aware of abuse that is alleged to have occurred in connection with their operations. Many institutions have already dealt with many allegations. However, some institutions have told us that they had no allegations of abuse made against them in circumstances where we have heard allegations made against them in private sessions. It does not seem to us to be desirable that institutions not know as early as possible about any allegations involving them that are made through a redress scheme. In particular, if an allegation is made against a person who is still involved with the institution, the institution may have to act on the allegation independently of any issues of redress.

The relevant institution may be well placed to confirm or challenge the presence of the applicant and alleged abuser at the institution at the relevant time. The institution might also have relevant information about other allegations against the alleged abuser, and information about any previous redress or compensation provided to the applicant for the alleged abuse.

Standard of proof

The standard of proof determines the degree to which a decision maker must be satisfied of an allegation in order to accept it as true. Current and previous redress schemes have adopted different standards of proof, although how different they are in practice seems to us to be questionable.

Through our private roundtables, we considered the following possible standards of proof:

- the balance of probabilities, which is the standard of proof that generally applies in civil litigation. It requires that the matters alleged must be more probable than not, in order to be accepted as true
- the higher civil standard of proof discussed by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336, which requires that, the more serious an allegation, the more ‘reasonably satisfied’ of its truth the decision maker must be before it can be accepted as true
- plausibility, which requires that the decision maker be satisfied that the allegations are plausible and may be true.

There are other possible standards. For example, the Senate Community Affairs References Committee recommended a ‘reasonable likelihood’ standard of proof when it recommended that the Australian Government establish a national reparations fund for victims of abuse in institutions and out-of-home care settings.²²⁰ A standard of reasonable likelihood would be higher than plausibility but lower than the balance of probabilities.

We have heard a variety of views from our consultation processes as to which of these standards of proof should be adopted.

We acknowledge that, the higher the amount of monetary payments available, the more reasonable it might be for a scheme to adopt a higher standard of proof. However, we also recognise that the monetary payments we are considering do not, and are not intended to, provide compensation equivalent to common law damages. Further, as noted above, a

scheme could require additional material or ‘evidence’ and additional procedures to determine the validity of claims if it has higher maximum or average payments available, without adopting a higher standard of proof as such.

Another argument against adopting a standard of proof used in civil litigation is that past experience suggests that, even if a scheme purports to apply the civil standard of proof, it seems that a lower standard is actually applied, at least in determining whether or not the abuse occurred. Often, there is no ‘witness’ other than the applicant, and there is no other ‘evidence’ against which an applicant’s allegation of abuse can be balanced. The decision for the decision maker is, essentially, simply whether or not, or to what extent, they believe the applicant’s allegations. It may be that this is best reflected in a plausibility test or a test of reasonable likelihood. Of course, more ‘evidence’ may be needed to determine the severity of the impact of the abuse, including material such as medical evidence and psychological or psychiatric reports.

If a civil standard of proof is adopted, the scheme would need to adopt a process that allowed the rebutting or testing of the applicant’s allegations. This may require contested hearings.

Because we do not propose that a scheme should attempt or purport to make any finding that any named person was involved in any abuse, there is no need to adopt the standards of proof applied in civil litigation for this reason.

Decision making on a claim

A redress scheme structure that provides for independent decision making by either a national scheme or separate state and territory schemes should provide sufficient independence of decision making from the institution in which the abuse occurred.

The previous government redress schemes in Western Australia and Queensland provide examples of administrative decision-making processes within large-scale schemes. An approach that provides for levels of delegation, with assessments of more serious abuse or impact to be determined by more senior staff, seems appropriate.

Through our consultations, there was strong support for a mix of expertise in decision making. A mix of legal, medical, psychosocial and similar skills, including experience in issues relating to institutional child sexual abuse, is likely to ensure that properly informed decisions are made. The mix of skills should be designed to ensure that matters requiring assessment under the matrix for determining monetary payments can be properly understood by drawing on appropriate expertise. It is unlikely that every decision will need to be made using the full mix of skills. Rather, by ensuring a mix of skills to provide guidance to decision makers and oversee the consistency of decision making across claims, fair and consistent decisions on applications should be encouraged.

Offer and acceptance of offer

Most current and previous redress schemes that we have considered appear to have adopted reasonably straightforward processes for informing applicants of decisions and allowing them to accept or reject offers.

For example, in the Redress WA scheme, once decisions were made the scheme sent to the applicant a Notice of Decision, Statement of Decision, letter of apology from the Western Australian Government, and offer of payment. Applicants were asked to formally accept or reject the offer. If they accepted the offer, they were asked to provide bank account details for the deposit of the payment. If an applicant refused the offer or could not be found, the amount offered was set aside as 'unclaimed money' so that it remained available if the applicant accepted the offer at a later date or could be found.²²¹

It would seem appropriate that, once a decision has been made that an applicant is eligible for redress and the size of any monetary payment to be offered has been determined, the applicant should be provided with a statement of decision, with sufficient information for the applicant to understand the determination of eligibility and the amount of any monetary payment while minimising the risk of re-traumatisation. The applicant should also receive:

- written notice of the amount of any monetary payment
- advice about other forms of redress (for example, direct personal response and counselling and psychological care) and how they can be obtained
- the next steps that are available to the applicant.

We see potential benefit in the scheme encouraging (and paying for) applicants to have an additional consultation with their support service or community legal centre before deciding whether or not to accept the offer. This session could support the applicant not only in deciding whether or not to accept the offer but also in considering what use they wish to make of any monetary payment, whether and how they wish to seek any direct personal response, and whether they have a current need for assistance with counselling and psychological care.

If a deed of release is to be required on acceptance of an offer (discussed below), the scheme should require (and pay for) applicants to receive legal advice before they accept the offer.

Offers should remain open for acceptance for at least three months. If applicants seek a review of their offer (discussed below), the period for acceptance of the amended or confirmed offer should commence again once the review is completed. If an applicant has not accepted or sought a review of their offer within the three months (or any longer period allowed), the offer could be treated as rejected, subject to any reasonable explanation from an applicant as to why more time should be allowed.

Review and appeals

Whether or not redress schemes offer review and appeals processes appears to depend in large part on how they are established. If a scheme is established by legislation, it will typically allow external review on administrative law grounds and it may well provide for further reviews and appeals. If a scheme is established administratively, it is more likely to allow for internal reviews of decisions, and otherwise may be subject to general review and oversight mechanisms such as through state ombudsmen.

One approach may be that a redress scheme should offer internal review to the applicant only, and not to the institution or any alleged perpetrator. An applicant would be able to request a review of any decision that they are not eligible for the scheme or the determination of the amount of any monetary payment (including the determination of any deductions for past payments).

Any internal review would be decided by the most senior decision makers, as a panel, and with legal and medical advice or expertise available. It may be appropriate that applicants be offered the opportunity for an oral hearing, particularly if they have been determined to be ineligible for the scheme.

It may be appropriate to leave external review or appeal rights for the decision of those establishing the scheme. As discussed in Chapter 2, it may not be necessary to prescribe how a redress scheme should be implemented. Any external review or appeal rights should be reasonably appropriate to the scheme, depending on whether it is established under legislation, administratively, by contract or through some combination of these measures.

Deeds of release

Through submissions to our issues papers and through our consultations, we have heard many views from survivors, survivor advocacy and support groups, institutions, governments and academics about whether and when deeds of release might be appropriate. We have also heard evidence in a number of case studies about the use of deeds of release in the past.

Some interested parties argue that survivors should never be asked to give up their common law rights to sue unless they have attained an outcome on the merits of their claim through civil litigation.

Other interested parties argue that a deed of release gives finality and certainty to the matter for both the survivor and the institution. Some interested parties have argued that, provided a survivor has the option to accept or reject any offer under a redress scheme, it is not unreasonable for them to provide a deed of release if they choose to accept the offer.

In our private consultations, some survivor advocacy and support groups suggested that whether or not it would be reasonable to require survivors to give a deed of release before accepting a monetary payment might depend upon the size of the monetary payments. Some participants suggested that the size of payments available under government redress

schemes were too small to justify a deed of release, whereas it might be fair to require a deed if monetary payments were to be significantly higher.

The Actuaries Institute submitted that if the ‘redress scheme is to be most efficient, affordable and sustainable, then there should be no option to pursue civil litigation’.²²² They submitted that, when a no-fault scheme (which they said is similar in principle to a redress scheme) and a common law entitlement co-exist, history suggests that costs tend to increase beyond expectations.²²³

Our present view is that, at the very least, if no deed of release is required, an applicant should be required to agree that the value of any redress should be offset against any common law damages and that, if common law damages are obtained (either through a settlement or a judgment), the applicant will cease to be eligible for any counselling and psychological care through redress.

However, it is not clear to us that this approach would go far enough.

Another option, short of simply requiring a deed of release, might be to require a deed of release but include in its terms a power to apply to set it aside in certain cases – for example, if significant new evidence came to light as to the institution’s liability for the abuse that is alleged.

If a deed of release is required, we consider that the scheme should fund, at a fixed price, a legal consultation for the applicant before the applicant decides whether or not to accept the offer of redress and sign the deed of release.

As to confidentiality, we anticipate that there should be no confidentiality obligation imposed on survivors, whether through a deed of release or otherwise. The scheme would be subject to any relevant privacy obligations.

Support for survivors

Previous government and non-government institutional redress schemes have generally provided support and assistance for applicants seeking redress. Although some survivors have told us they were unhappy with the particular support that was provided, it is clear to us that support is necessary and should be provided.

We are satisfied that a redress scheme should fund a number of counselling and support services and community legal centres to assist applicants to apply for redress. These services should be chosen based on their ability to cover a broad range of likely applicants and their needs, including regional and remote applicants, Indigenous applicants, applicants with disabilities and so on.

We are also satisfied that a redress scheme should offer counselling during the scheme, from assistance with the application, through the period when the application is being considered, to the making of the offer and the applicant’s consideration of whether or not to accept the offer. A reasonable number of counselling sessions should be allowed per

applicant, with capacity to allow further counselling if required and with provision for telephone counselling support and the like.

We are also satisfied that a redress scheme should consider offering a limited number of counselling sessions for family members, particularly in cases where survivors are disclosing their abuse to their family for the first time in the context of the redress scheme, or where the application process causes particular distress to the applicant which in turn creates a need for counselling for their family members.

Transparency and accountability

Many survivors and survivor advocacy and support groups have told us they are concerned about what they see as a lack of transparency and accountability in redress schemes to date. We have heard accounts of survivors not being provided with information about how schemes operate; and some survivors' applications not being handled in accordance with the scheme's published processes and guidelines.

We have also heard concerns about the lack of information available to survivors on amounts of redress payments. We have been told of the difficulties that survivors face in determining whether or not to accept what they are offered when they may have no information about monetary payments generally other than what an institutional representative tells them. We have sought to address the lack of data by obtaining and analysing the data discussed in Chapter 3. These data have helped us to get a better understanding of past monetary payments, but they are not comprehensive in their coverage.

We are satisfied that a redress scheme should take the following steps to improve transparency and accountability:

- In addition to publicising and promoting the availability of the scheme, the scheme's processes and time frames should be as transparent as possible. The scheme should provide up-to-date information on its website and through any funded counselling and support services and community legal centres, other relevant support services, and relevant institutions.
- If possible, the scheme should ensure that each applicant is allocated to a particular contact officer who they can speak to if they have any queries about the status of their application or the timing of its determination and so on.
- The scheme should operate a complaints mechanism and should welcome any complaints or feedback from applicants and others involved in the scheme (for example, support services and community legal centres).
- The scheme should provide any feedback it receives about common problems that have been experienced with applications or institutional response to funded counselling and support services and community legal centres, other relevant support services and relevant institutions and include any suggestions on how to improve applications or responses or ensure more timely determinations.
- The scheme should publish data, at least annually, about:
 - the number of applications received

- the institutions to which the applications relate
- the periods of alleged abuse
- the number of applications determined
- the outcome of applications
- the mean, median and spread of payments offered
- the mean, median and spread of time taken to determine the application
- the number and outcome of applications for review.

Interaction with alleged abuser, disciplinary process and police

Past and current redress schemes have adopted different approaches to whether and how they interact with the alleged abuser, institutional disciplinary processes and the police. Some schemes have referred allegations to the relevant police force, in some cases at the request of the survivor.

Our present view is that a scheme should not attempt or purport to make any ‘findings’ that any alleged abuser was involved in any abuse. The scheme would simply assess the validity of a survivor’s application by applying a standard of proof that is likely to be lower than the standard applied in civil litigation. Therefore, there may be no need to involve anyone named as an alleged abuser in the scheme assessment and decision-making processes.

If any alleged abusers are, or may be, still working or otherwise involved with the institution, the institution should pursue its usual investigation and disciplinary processes on receipt of advice from the scheme about the allegations. This should not require any involvement of the scheme other than by providing the allegations to the institution. However, as noted above, the scheme might wish to consider the outcome of any disciplinary investigations before determining an application if the abuse is recent or fairly contemporary and the alleged perpetrator is still involved with the institution.

Clearly, the scheme must comply with any legal requirements to report or disclose the abuse. These requirements may vary from state to state and schemes will need to obtain advice on what is required of them.

We consider that the scheme should comply with any requirements, and make use of any permissions, to report to other oversight agencies – including for the purposes of Working with Children Checks – if any alleged abuser is, or may be, still working in children’s services but not with the relevant institution.

Aside from complying with any legal requirements to report or disclose the abuse, how a scheme should interact with police may depend on the preferences of police in the relevant state or territory, and on any relevant recommendations we make through our work on criminal justice.

At this stage, we consider that a scheme should seek to cooperate with any reasonable requirements of the police in terms of information sharing, subject to satisfying any privacy and consent requirements with applicants. A scheme should comply with police

requirements by delaying any scheme processes if they would otherwise interfere with an active police investigation.

We welcome submissions that discuss the issues raised in Chapter 7, including any aspects of redress scheme processes.

In particular, we welcome submissions on:

- eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included
- the appropriate standard of proof
- whether or not deeds of release should be required.

8 Funding redress

8.1 Introduction

This chapter examines the possible funding needs for redress. Our actuarial advisers have conducted modelling of the funding needs across states and territories, and divided between government and non-government institutions. This chapter discusses options for how these funding needs could be met.

Funding for redress under the possible approaches considered above would require funding sufficient for the counselling and psychological care and monetary payments elements of redress, and the administration costs of the redress scheme (whether a national scheme or state and territory schemes). The direct personal response element of redress is not included in this assessment of funding. As discussed in Chapter 4, individual institutions would meet the cost of direct personal response.

Funding for redress also needs to take account of amounts already spent on providing redress, to the extent that these would reduce funding requirements under a new scheme. As discussed in chapters 6 and 7, if past monetary payments are taken into account under a new scheme, then some adjustment should be made for them to reflect lower future funding needs.

The funding estimates in this chapter are taken from the modelling done by our actuarial advisers, Finity Consulting Pty Limited (Finity). The detail underpinning the estimates here is set out in the Finity actuarial report, which we are publishing in conjunction with this consultation paper. The report is published on the Royal Commission's website.

For the purpose of this consultation paper, we have included the modelling based on an average monetary payment of \$65,000. The modelling of costs based on average monetary payments of \$50,000 and \$80,000 is set out in the actuarial report.

This modelling is also based on an estimate of 65,000 eligible claimants. The impact on costs if there are 45,000 or 85,000 eligible claimants is set out in the actuarial report.

The modelling in this chapter distinguishes between government-run and non-government-run institutions. Australian Government funding contributions may be relevant to:

- government-run institutions, if the Australian Government ran an institution or under its broader social or regulatory responsibilities discussed in this chapter
- non-government-run institutions, under its broader social or regulatory responsibilities discussed in this chapter.

Due to rounding, numbers presented in this chapter may not add up precisely to the totals provided.

8.2 Funding required for redress

Funding for counselling and psychological care

Finity have estimated the total cost of providing counselling and psychological care to survivors and the total cost per jurisdiction. Finity has also estimated the breakdown in counselling and psychological care costs between those relating to abuse in government-run institutions and those relating to abuse in non-government-run institutions.

Table 30: Breakdown of estimated costs of counselling by jurisdiction and government- and non-government-run institutions (\$ million)

	Government institutions	Non-government institutions
NSW	39	88
Victoria	34	71
Queensland	17	33
South Australia	7	17
Western Australia	11	23
Tasmania	2	6
ACT	1	5
Northern Territory	1	2
TOTAL	113	245

We have used the above estimates to represent the funding required for counselling and psychological care under redress. This is the total cost of counselling and psychological care and it does not take into account the existing public provision of counselling and psychological care used by survivors, as discussed in Chapter 5. Therefore, the additional cost of counselling and psychological care under redress should be less than this. Also, as discussed in Chapter 5, it may be that some of the need to which this funding relates could be met by expanding public provision of counselling and psychological care, not through a redress scheme.

Funding for monetary payments

Finity has estimated the total cost of providing monetary payments to survivors and the total cost per jurisdiction. Finity has also estimated the breakdown in monetary payments between those relating to abuse in government-run institutions and those relating to abuse in non-government-run institutions.

For the purpose of this consultation paper, we have included the modelling based on an average monetary payment of \$65,000. The modelling of costs based on average monetary payments of \$50,000 and \$80,000 is set out in the actuarial report, which is published on the Royal Commission's website.

Table 31: Breakdown of estimated costs of monetary payments by jurisdiction and government- and non-government-run institutions (\$ million)

	Government institutions	Non-government institutions
NSW	460	1,035
Victoria	398	835
Queensland	196	390
South Australia	85	207
Western Australia	136	278
Tasmania	28	72
ACT	15	57
Northern Territory	12	21
TOTAL	1,330	2,895

The amounts in Table 31 are estimates of the total costs without taking into account amounts already spent on providing redress, which could be taken into account in determining monetary payments under a redress scheme. Table 32 sets out estimates with an estimated adjustment for past monetary payments.

Table 32: Breakdown of estimated costs of monetary payments by jurisdiction and government- and non-government-run institutions, adjusted for past monetary payments (\$ million)

	Government institutions	Non-government institutions
NSW	452	969
Victoria	384	779
Queensland	132	369
South Australia	79	193
Western Australia	52	266
Tasmania	-8	69

ACT	14	43
Northern Territory	11	21
TOTAL	1,115	2,710

Funding for administration

Finity has estimated the cost per application of administering a redress scheme. Finity has also estimated the breakdown in administration costs between those relating to abuse in government-run institutions and those relating to abuse in non-government-run institutions. Based on the estimated number of claims per jurisdiction, the total cost of administration per jurisdiction is shown in Table 33.

Table 33: Breakdown of estimated administrative costs by jurisdiction and government- and non-government-run institutions (\$ million)

	Government institutions	Non-government institutions
NSW	21	48
Victoria	18	39
Queensland	9	18
South Australia	4	10
Western Australia	6	13
Tasmania	1	3
ACT	1	3
Northern Territory	1	1
TOTAL	61	134

Total costs for redress

Table 34 shows the total estimated cost by jurisdiction and by government- and non-government-run institutions for:

- counselling and psychological care
- monetary payments, adjusted for past monetary payments
- administration costs.

As noted above, the total costs below include the modelling based on an average monetary payment of \$65,000. The modelling of costs based on average monetary payments of \$50,000 and \$80,000 is set out in the actuarial report, which is published on the Royal

Commission's website. This modelling is also based on an estimate of 65,000 eligible claimants. The impact on costs if there are 45,000 or 85,000 eligible claimants is set out in the actuarial report.

Table 34: Breakdown of estimated total costs for redress by jurisdiction and government- and non-government-run institutions

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of estimated eligible claimants (total 65,000)									
Gov	7,070	6,130	3,020	2,090	1,310	430	230	180	20,460
Non-gov	15,920	12,850	6,000	4,270	3,180	1,110	880	330	44,540
Counselling and psychological care (\$ million)									
Gov	39	34	17	11	7	2	1	1	113
Non-gov	88	71	33	23	17	6	5	2	245
Monetary payments adjusted for past payments (average \$65,000) (\$ million)									
Gov	452	384	132	52	79	-8	14	11	1,115
Non-gov	969	779	369	266	193	69	43	21	2,710
Administration (\$ million)									
Gov	21	18	9	6	4	1	1	1	61
Non-gov	48	39	18	13	10	3	3	1	134
TOTALS (\$ million)									
Total gov	512	436	158	69	90	-4	16	13	1,289
Total non-gov	1,104	888	420	303	220	79	51	24	3,088
GRAND TOTAL	1,616	1,324	578	372	309	74	67	37	4,378

As noted above, Australian Government funding contributions may be relevant to:

- government-run institutions, if the Australian Government ran an institution or under its broader social or regulatory responsibilities discussed in this chapter
- non-government-run institutions, under its broader social or regulatory responsibilities discussed in this chapter.

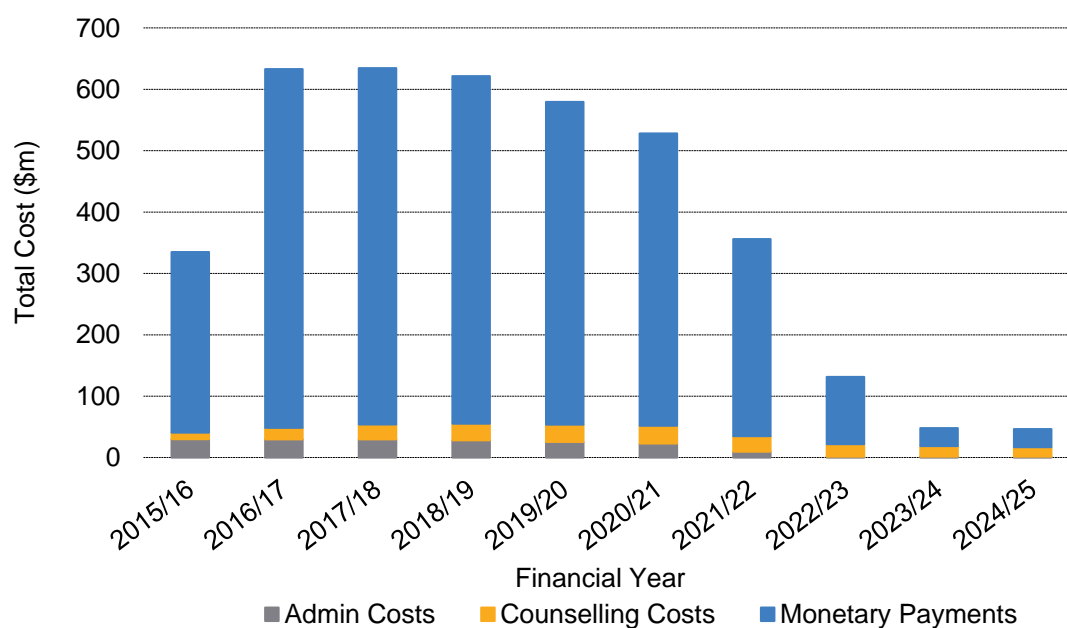
Annual costs

Clearly the total funding would not be required immediately upon establishment of a scheme. While funding needs might be highest in the earlier years of a scheme, total costs and therefore funding needs would be spread over a number of years.

It is difficult to estimate the likely timing of applications for redress and the flow of funds required to meet them in a scheme with no fixed closing date. Previous government schemes have had closing dates, so they do not provide useful precedents for predicting the rate of claims. It might be expected that there would be larger number of claims in the first two years of the scheme, as those who have previously sought redress and those who have been waiting for a scheme make their applications. Claim numbers may then taper off gradually over the next following years.

Our actuarial advisers have modelled a possible pattern of claims and funding requirements as follows.

Figure 7: Estimated annual cost of the scheme over the first 10 years



As noted above, this modelling of the funding needs is based on the estimate of 65,000 eligible claimants. Finitary has also shown the impact on costs if there are 45,000 or 85,000 eligible claimants. This is set out in the actuarial report, which is published on the Royal Commission's website.

8.3 Possible approaches to funding redress

Initial principles

Our terms of reference refer to the ‘provision of redress by institutions’. A reasonable starting point for funding redress may be that the institution in which the abuse occurred should fund the cost of:

- counselling and psychological care, to the extent it is provided through redress
- any monetary payment
- administration in relation to determining the claim.

We know that some survivors experienced abuse in more than one institution. Where a redress scheme determines to the required standard of proof that abuse alleged in more than one institution occurred, it might also be reasonable to expect that the costs described above should be apportioned between the relevant institutions, taking account of the relative severity of the abuse in each institution and any features of the relevant institutions relevant to calculating a monetary payment, as discussed in Chapter 6.

We know that some institutions in which abuse is alleged to have occurred no longer exist. Where those institutions were part of a larger group of institutions or where there is a successor to those institutions, it might be reasonable to expect the larger group of institutions or the successor institution to fund the costs described above.

Responsibilities of governments

The breakdown in funding requirements between government and non-government institutions earlier in this chapter takes account only of whether or not an institution was run by a government.

However, there are other bases on which governments could be considered responsible for institutions and conduct within them.

As we discussed above in Chapter 2, a picture is emerging for us that there has been a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused.

The societal norm that ‘children should be seen but not heard’, which prevailed for unknown decades, provided the opportunity for some adults to abuse the power that their relationship with the child gave them. When the required silence of the child was accompanied by an unquestioning belief by adults in the integrity of the carer for the child the power imbalance was entrenched to the inevitable detriment of many children.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the

problems faced by many people who have been abused are the responsibility of our entire society. Society's values and mechanisms that were available to regulate and control aberrant behaviour failed. This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions. It is confirmed by the development in recent years of significantly increased regulatory control by government over many institutions that provide for children and the development of education programs and mechanisms by which problems can more readily be brought to attention.

In addition to this broader social responsibility, governments may also have responsibilities as regulators and as guardians of children. In some cases these responsibilities may be legal responsibilities, potentially leading to legal liability.

Governments in Australia have for many decades regulated a number of institutions, including residential institutions, other forms of out-of-home care and schools. More recently, governments have also regulated child care and other forms of out-of-school-hours care as well as other providers of children's services.

The nature and extent of government regulation has varied over time. Determining the precise legal duties of governments arising from their regulatory roles would require a detailed case-by-case examination of the regulations that applied at the particular time in question and a consideration of the sometimes changing legal principles and legislation as to the potential liability of regulators. It would also depend upon the particular facts of the case. However, it is clear that, for many decades, governments have had a substantial role in regulating and overseeing institutions providing children's services in Australia, including institutions that are not government run.

Further, governments have for many decades had legal guardianship of state wards or children in state care. Many of these children were placed in residential institutions or in other forms of out-of-home care. We have heard in private sessions and in case studies accounts of abuse from many former state wards. Again, the precise legal duties of governments arising from their guardianship roles would require detailed case-by-case examination of the relevant legislation and the particular facts of the case. However, it is again clear that governments have had substantial responsibilities for children in institutions, including institutions that are not government run.

Many of the responsibilities for regulating institutions and for guardianship of children lay with state governments. However, the Australian Government also has relevant responsibilities of this nature. For decades the Australian Government had particular responsibility for the territories. For decades the Australian Government has also had particular responsibilities for Indigenous people, including Indigenous children, and particularly in the territories. The Australian Government had some involvement in the child migrant program. We have heard accounts of abuse from a number of former child migrants, including in case study 11 on four Christian Brothers former institutions in Western Australia. The Australian Government continues to have some responsibility for its own operations that involve children, such as the Australian Defence Force academies and immigration detention facilities.

Government redress schemes in Australia to date have been funded solely by the relevant state governments, even though these schemes covered non-government-run institutions. This may in part recognise governments' broader responsibilities beyond government-run institutions, including responsibilities arising from regulatory and guardianship roles. By contrast, the Irish Residential Institutions Redress Scheme was funded in part by a contribution from the Catholic Church, although this amounted to less than 10 per cent of the total cost of the scheme. The government funded the remainder of the cost.

This suggests that governments may have a greater responsibility for providing redress than that which relates to abuse in government-run institutions alone. It does not allow a precise calculation of degrees or percentages of relative responsibility for abuse in non-government institutions between the non-government institution and the government, but it is consistent with governments taking a broader role in ensuring that adequate redress is provided for those abused in any institution, whether it is government or non-government.

Funder of last resort

There will be cases where institutions in which abuse occurred no longer exist and they were not part of a larger group of institutions or there is no successor institution. There will also be cases where institutions that still exist have no assets from which to fund redress.

Funding for redress for survivors of abuse in these institutions will need to come from elsewhere. Leaving these survivors without access to the redress that is available to others would fall short of the requirement in our Terms of Reference of 'ensuring justice for victims'.

Possible options for who might fulfil the 'funder of last resort' role are the institutions that fund redress (both government and non-government) or governments or some combination of the two.

Arguments can be made in support of governments acting as funders of last resort on the basis of governments' social, regulatory and guardianship responsibilities discussed above.

The extent to which governments might take on some or all of the responsibility for funding of last resort might depend in part upon actions they have already taken on redress.

Governments that operated redress schemes that covered government and non-government institutions might wish to look to non-government institutions to provide all or a greater share of funding of last resort given that those governments may argue that they have already met some redress obligations that would otherwise fall to the non-government institutions. Governments that have not operated redress schemes in the past might expect to make a greater contribution to funding of last resort.

Finity has estimated the adjustments to the government and non-government shares of the estimated total costs for redress if governments were to act as funders of last resort.

Table 35 shows the total estimated costs for redress by jurisdiction and by government- and non-government-run institutions adjusted for governments acting as funders of last resort.

It can be compared with Table 34, which shows the total estimated costs without the adjustment for governments acting as funders of last resort.

Table 35: Breakdown of estimated total costs for redress by jurisdiction and government- and non-government-run institutions adjusted for governments as funders of last resort

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of estimated eligible claimants (total 65,000)									
Gov	10,530	8,590	4,280	2,940	2,040	690	420	240	29,730
Non-gov	12,460	10,390	4,740	3,420	2,450	850	690	270	35,270
Counselling and psychological care (\$ million)									
Gov	58	47	24	16	11	4	2	1	164
Non-gov	69	57	26	19	13	5	4	1	194
Monetary payments adjusted for past payments (average \$65,000) (\$ million)									
Gov	677	544	214	107	126	9	27	15	1,718
Non-gov	744	619	287	211	145	52	31	17	2,107
Administration (\$ million)									
Gov	32	26	13	9	6	2	1	1	89
Non-gov	37	31	14	10	7	3	2	1	106
TOTALS (\$ million)									
Total gov	766	617	251	132	143	15	30	17	1,971
Total non-gov	850	707	328	240	166	60	37	20	2,407
GRAND TOTAL	1,616	1,324	578	372	309	74	67	37	4,378

Again, the total costs above include the modelling based on an average monetary payment of \$65,000. The modelling of costs based on average monetary payments of \$50,000 and \$80,000 is set out in the actuarial report, which is published on the Royal Commission's website. This modelling is also based on an estimate of 65,000 eligible claimants. The impact on costs if there are 45,000 or 85,000 eligible claimants is set out in the actuarial report.

Implementation

The funder of last resort discussion suggests that different starting points between the states and territories might influence contributions to funding for redress. It seems that some flexibility is likely to be needed to allow adequate funding for redress to be secured efficiently and with appropriate recognition for what has already been done.

The following principles may provide some guidance for implementation.

- Whether a single national redress scheme or a system of separate state and territory redress schemes is favoured, the relevant government or governments could propose a scheme structure that would enable the scheme to make decisions or recommendations about eligibility for the scheme and any amount of monetary payment to be offered.
- Non-government institutions that are expected to be subject to a number of claims for redress could be invited to participate with the relevant government or governments in developing the scheme. These non-government institutions could be participants in the scheme from the start.
- Other non-government institutions could participate in the scheme if and when either they or the scheme receive an application for redress in respect of abuse in the relevant institution.
- The relevant government and non-government institutions that are initial participants in the scheme from the start could fund the administrative costs of the scheme. Other non-government institutions that participate in the scheme could pay a reasonable fee for use of the redress scheme if and when an application for redress for abuse in the relevant institution is received.
- If a system of separate state and territory redress schemes is favoured, in states and territories where the Australian Government has or had particular regulatory responsibility for some children, the Australian Government and the relevant state or territory government could negotiate a reasonable contribution by the Australian Government to offset the funding responsibilities of the state or territory government (which would effectively reduce the amount the state or territory government might need to contribute as funder of last resort, rather than reducing the state or territory government's responsibility for funding redress for abuse in its own institutions). Such a contribution could be on a per relevant claim basis or on a lump sum basis.
- If a system of separate state and territory redress schemes is favoured, where the Australian Government itself operated an institution it could participate in the relevant state or territory scheme just as any non-government operator of an institution would participate.
- Each government could be a funder of last resort for its scheme or it could negotiate with or require non-government institutions to contribute funding of last resort. If the way in which a scheme should be established is left for the relevant government to decide then the government can take into account considerations of funding and funding contributions in adopting the most suitable method to establish the scheme.
- Governments could also determine whether or not to require non-government institutions or particular types of non-government institutions to fund a redress scheme. Governments may have a range of legal mechanisms, including legislation and funding

agreements, through which they could impose obligations on institutions. Some governments may prefer to involve all non-government institutions in a redress scheme, while others might prefer to focus on the institutions with the most claims, accepting that this would probably increase the funding required from the funder of last resort. Governments could also take into account the extent to which particular non-government institutions rely on government funding for their operations and any implications this might have for their participation in a redress scheme.

- Governments would also have to determine how to fund their contributions to redress. Some government programs are funded wholly or partly by specific levies such as the Medicare levy, which has also been increased to raise funds for the National Disability Insurance Scheme. It has also been suggested to us that the New South Wales Workers' Compensation Dust Diseases Board established under the *Workers' Compensation (Dust Diseases) Act 1942* (NSW) might be a useful model. The board is funded primarily by levies on New South Wales employers' aggregate wages, with levies collected through the workers' compensation administration. However, it is not clear how those who might pay a levy to fund a redress scheme should be identified, particularly if institutions providing children's services are already contributing to the scheme.

We welcome submissions that discuss the issues raised in Chapter 8, including the modelling of required funding and the possible approaches to funding redress.

In particular, we seek the views of the Australian Government, state and territory governments and institutions on:

- appropriate funding arrangements
- appropriate funder of last resort arrangements
- the level of flexibility that should be allowed in implementing redress schemes and funding arrangements.

9 Interim arrangements

9.1 Introduction

Many survivors and institutions have urged us to make recommendations about redress and civil litigation as quickly as possible. Many survivors are anxious to obtain justice, and the practical benefits it should bring. Some institutions have acknowledged that their current approaches are not adequate and they have indicated a willingness to receive guidance from us as to how they should change them. It is primarily for these reasons that Commissioners have agreed to make findings and recommendations on redress and civil litigation by the middle of 2015.

No matter how quickly we report, implementing our recommendations will inevitably take some time. This time may be longer if larger or more complex structures are favoured. There is also the possibility that our recommendations may not be implemented, either nationally or in some states or territories.

It seems likely that additional recommendations might be required to guide institutions as to how they should provide redress while any national or state and territory arrangements are being implemented, or if such arrangements are not implemented.

We would expect that individual institutions should be able to adopt the principles and approaches we recommend generally. It may also be that some or many institutions could combine together to provide an interim scheme for redress. In particular, institutions should be able to apply the following:

- the elements of redress
- the general principles for providing redress
- the minimum forms of a direct personal response and the other principles for a direct personal response
- the principles for counselling and psychological care and the principles for supporting counselling and psychological care through redress
- the table or matrix and amounts for determining monetary payments and the treatment of past payments
- many of the key redress scheme processes.

However, institutions may need additional guidance on some issues until the structures we recommend for redress are implemented or if they are not implemented. The following discussion is intended to assist in the identification of appropriate principles.

9.2 Additional principles

Independence from the institution

As discussed in chapters 2 and 7, a single national redress scheme or state and territory redress schemes would ensure that decision making on redress is independent of the institutions in which the abuse occurred. Many survivors have told us how important this is to them.

It seems clear that any structures we recommend for redress should be designed to ensure that decision making is sufficiently independent of institutions. Until these structures are implemented, institutions will need to seek to achieve independence in decision making on any redress claims that they receive.

Independence should be considered at the stages of:

- the survivor making a claim
- determining to the required standard of proof whether or not the survivor was abused
- determining the amount of any monetary payment to be offered
- determining what counselling or psychological care should be offered or supported.

As discussed in Chapter 4, some survivors do not want to have any contact with the institution in which they were abused. Ideally, a survivor should be able to make a claim for redress and receive any support needed to pursue their claim without having to engage with the institution or have any dealings with its representatives.

Decision making on the allegations of abuse and redress to be offered should also be independent of the institution to reduce the risk of bias or the appearance of bias.

Providing for independence in these processes might be easier for institutions that receive a number of claims. Such institutions could create an ongoing process and engage third parties with appropriate expertise and training to administer and make decisions on redress claims. It might be unrealistic to expect institutions that receive very few claims to establish an independent process on an ongoing basis. Those institutions are perhaps more likely to join with larger institutions and make use of their administrative and decision-making processes or engage independent advisors as decision makers on an ad hoc basis.

The Melbourne Response provides an example of an ongoing institutional redress process that adopted some independent decision-making elements. We examined the Melbourne Response in case study 16 and will report on it in the coming months.

It seems likely that institutions would need to consider the following in seeking to achieve independence in an institutional redress process:

- they should provide information on the application process, including online, so that survivors do not need to approach the institution if there is an independent person with whom they can make their claim

- if feasible, the process of receiving and determining claims should be administered independently of the institution to minimise the risk of any appearance that the institution can influence the process or decisions
- institutions should ensure that anyone they engage to handle or determine redress claims is appropriately trained in understanding child sexual abuse and its impacts and in any relevant cultural awareness issues
- institutions should ensure that any processes or interactions with survivors are respectful and empathetic, including by taking into account the factors discussed in Chapter 4 in relation to meetings and meeting environments
- processes and interactions should not be legalistic. Any legal, medical and other relevant input should be obtained for the purposes of decision making.

Institutions would need to fund their redress processes while ensuring that the administration of the processes remained independent of the institutions. It may be important for institutions to ensure that the required independence of the process is set out clearly in writing between the institution and any person or body they engage to administer their redress process, whether on an ongoing or ad hoc basis, and that they and the persons they engage scrupulously observe that independence.

We discuss some possible structures for interim arrangements below. These approaches might be of some assistance to institutions in ensuring appropriate independence in institutional redress schemes.

Cooperation on claims involving more than one institution

As discussed in Chapter 2, a single national redress scheme or state and territory schemes would ensure that a survivor's experiences of institutional abuse could be assessed in one redress process, even where the survivor had experienced abuse in more than one institution. This is an important feature of a 'one-stop shop' for redress, because it ensures fairness and equal treatment for survivors and minimises the occasions on which they have to tell their stories.

It seems clear that any structures we recommend for redress should be designed to achieve a 'one-stop shop'. Until such structures are implemented, institutions will need to seek to achieve a similar outcome in decision making on any redress claims that they receive.

This issue will clearly arise where a survivor alleges abuse in more than one institution. In these circumstances, with the survivor's consent, the institution's redress process should approach the other named institutions to seek cooperation on the claim. If the survivor consents and the relevant institutions agree, one process should assess the survivor's claim in accordance with the redress processes and under the table or matrix and amounts of monetary payments we finally recommend and allocate contributions between the institutions. If any institution no longer exists and has no successor, their share should be met by the other institution or institutions.

Institutions could agree either that one of their redress processes will assess and determine the claim and allocate contributions or that their redress processes will conduct these steps

jointly. Any process that is followed should seek to minimise the risk of re-traumatising the survivor.

If a survivor does not allege abuse in more than one institution, the institution's redress process may need to ask the survivor to confirm whether or not they have experienced abuse in another institution. This is important, because a table or matrix and levels of monetary payment that are designed for a 'one-stop shop' approach work on the basis that all of the survivor's experiences of institutional abuse are assessed at the one time. If a survivor is assessed more than once, even for different experiences of institutional abuse, this may result in over-payment and in survivors being treated unequally.

If a survivor confirms that they have experienced abuse in another institution then the cooperative approaches discussed above should be pursued. Alternatively, if the survivor has already received redress for the abuse experienced in another institution, that redress should be taken into account, as discussed in Chapter 6. Otherwise, the institution's redress process can be followed on the basis that the survivor experienced institutional abuse only in that institution.

Again, we discuss some possible structures for interim arrangements below. These approaches might be of some assistance to institutions in facilitating cooperation in determining claims where required.

Counselling and psychological care

In Chapter 5 we discuss an option for supporting the provision of counselling and psychological care through redress by creating a trust fund to supplement existing services and fill service gaps to ensure that survivors' needs for counselling and psychological care are met. The trust fund would operate as part of a 'one-stop shop' in a national redress scheme or state and territory redress schemes. Institutions would contribute an amount per eligible survivor, which would be pooled and used to supplement existing services and fill service gaps.

This approach would not be available in the absence of a 'one-stop shop' redress scheme. Institutions may not have the number of claims necessary to allow efficient pooling of contributions. Individual institutional trust funds may have little capacity to supplement existing services or fill service gaps.

Given the concerns that some survivors express about counselling services operated by institutions, it may be unlikely that many survivors would wish to use these services to meet their counselling and psychological care needs.

As an interim arrangement, perhaps the best that institutions could do is to undertake, through their redress processes, to meet survivors' needs for counselling and psychological care. This could be done by assisting survivors to gain access to suitable public services or by funding counselling and psychological care where public services are inadequate or not available.

Institutions would also need to ensure that a survivor's need for counselling and psychological care is assessed independently of the institution. It may be that institutions should simply accept the advice of a survivor's treating practitioner as to what the survivor needs.

If a 'one-stop shop' redress scheme is later established, with a survivor's consent the institution may be able to negotiate to then make a payment into the trust fund so that the survivor's ongoing counselling and psychological care needs are supported through the redress scheme instead of by the institution.

9.3 Possible structures

In the absence of a national redress scheme or state and territory redress schemes, there may be structures that institutions could adopt to offer redress more effectively than through individual institutional redress schemes.

We discussed above the need for relevant institutions to seek to cooperate with each other where a survivor claims to have experienced abuse in more than one institution. There is no legal impediment to institutions establishing cooperative arrangements on an ongoing basis rather than on an ad hoc basis as particular claims require cooperation.

However, we acknowledge that some institutions have told us that cooperation is unlikely in the absence of government leadership or direction. Institutions may have quite different histories and philosophies and they may have different attitudes towards responding to institutional child sexual abuse. They may also have very different claims histories. In some cases, some institutions may effectively be competitors and ongoing cooperation may be unlikely.

Importantly, unless governments join any cooperative effort, at least for claims of abuse in government-run institutions, then a cooperative structure may have limited application.

Some level of coordination might be achieved through an independent entity offering a redress process on a fee-for-service basis. The entity could receive and assess claims for member institutions and could be authorised to apportion claims across members where a claim involves more than one member institution. In order to offer an effective redress process, the entity would need to adopt the principles and approaches we recommend generally, as well as any relevant additional principles for institutions.

We discussed the Financial Services Ombudsman in Chapter 2. It provides an example of this sort of approach. Some governments might consider requiring non-government institutions that provide particular types of children's services or receive particular government funding to participate in such an approach. This would be comparable to the requirement that financial service providers participate in an approved dispute resolution service, which underpins the Financial Services Ombudsman.

Again, however, such an approach may have limited application if governments do not participate at least for claims of abuse in government-run institutions.

Based on what we have heard to date, options for non-government institutions to adopt effective cooperative approaches to redress in the absence of government leadership and participation appear limited.

We welcome submissions that discuss the issues raised in Chapter 9, including the additional principles for interim arrangements and possible structures.

In particular, we seek the views of survivors, survivor advocacy and support groups and institutions as to whether there are other issues on which direction or guidance might be required for interim arrangements.

10 Civil litigation

10.1 Introduction

In Australia the process for obtaining civil justice for personal injury is by an award of damages through successful civil litigation. Redress schemes may provide a suitable alternative to civil litigation for some or even many claimants, but they do not offer monetary payments in the form of compensatory damages obtained through civil litigation.

One issue for us to consider is whether civil litigation provides an effective avenue for survivors to obtain compensation and to address or alleviate the impact on them of institutional child sexual abuse. We must then consider whether to recommend any reforms to make it more effective.

What we have learned to date suggests that civil litigation is unlikely to provide an effective avenue for all survivors to obtain redress adequate to address or alleviate the impact on them of institutional child sexual abuse. This is perhaps most clearly the case for past institutional child sexual abuse, where there are large groups of survivors, including many Forgotten Australians, Former Child Migrants and members of the Stolen Generations, who suffered child sexual abuse in residential institutions and who have not obtained redress or have not been satisfied with the redress they have obtained.

It is clear to us from the very many accounts we have heard from survivors in private sessions and through submissions to issues papers that many survivors do not consider that justice has been or can be achieved for them through existing civil litigation systems or through previous or existing redress schemes that some governments and non-government institutions offer.

However, we also recognise that some survivors have obtained substantial payments by pursuing civil litigation. Generally, the payments have come from settlements. As discussed in Chapter 6 we reviewed the details of some of the larger claims in the claims project data. These claimants received payments in the top 10 per cent of claims – that is, amounts over \$168,750 (in real 2013 dollars). Generally, these claims involved catastrophic injuries arising in close connection to incidents of abuse, and in circumstances where there appear to have been reasonable bases to argue that the institution owed a duty of care and had breached it. These large amounts, even if reached by agreement, are more likely to represent what a court might award as common law damages.

As discussed in Chapter 2, if any reforms we recommend to civil litigation are adopted, they may contribute to a substantial change in the power balance between institutions and survivors. While detailed recommendations for a redress scheme or schemes may be needed for survivors of past child sexual abuse, it is not clear that such recommendations are needed for future abuse. However, any recommendations for reforms to civil litigation may focus particularly on future abuse.

In *Issues paper 5: Civil litigation*, we sought submissions on a range of elements of civil litigation systems. The submissions we received gave many examples of the difficulties that survivors experience in seeking to commence or pursue civil litigation under the existing civil litigation systems.

In the topics we discuss below, we have focused on the issues that appear to have a particularly adverse effect on survivors given what we know about the nature of their injuries and the impact they have on them and also taking account of issues that arise from the institutional context of the abuse.

We acknowledge that there are other difficulties survivors may face, including legal costs, difficulties in bringing class or group actions, and the burden of giving evidence and being subject to cross-examination. However, these difficulties may be shared by many people who suffer personal injuries and consider commencing civil litigation.

In focusing on topics that have a particularly adverse effect on survivors, it may be possible to improve the capacity of the civil litigation systems to provide justice to survivors. In this way it may be possible to ensure that survivors have reasonable access to civil litigation as an avenue for justice comparable to that of other injured persons.

10.2 Limitation periods

Introduction

Limitation periods are the time limits within which legal proceedings must be commenced. They are set out in legislation in each state or territory in Australia. The legislation is sometimes referred to as the ‘statute of limitations’.

Many survivors, survivor advocacy and support groups and academics have told us that limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation.

Most limitation periods for personal injury actions are three years. For a child who is injured, these periods usually do not commence until the child turns 18 years of age. Commencement may be further delayed by other factors, including if the claimant does not have knowledge of essential elements of the claim.

However, given what we know about the average length of time that victims of child sexual abuse take to disclose their abuse, standard limitation periods are fairly clearly inadequate for survivors. A survivor said to us in a private session, commenting on the limitation period:

The statute is designed for someone who has tripped over in K-Mart, it is not designed for victims of child sexual abuse.

Although state and territory legislation often allows limitation periods to run from a time later than when the injury itself occurred or to be extended by a court’s exercise of

discretion, the existence of limitation periods may still create significant barriers for survivors.

They create the risk of lengthy litigation – sometimes years of litigation – about whether or not the claim can be brought. This involves substantial legal costs without any consideration of the merits of the case. Many survivors and survivor advocacy and support groups have told us that this risk is enough to prevent many survivors from commencing civil litigation.

Existing limitation periods

Limitation periods are prescribed by state and territory legislation. That legislation typically determines what the limitation period is for a particular action depending on the nature of that action – for example, if it is in tort or relates to personal injury. Survivors who seek to commence civil litigation against institutions are likely to be subject to the limitation periods applying to personal injury actions in negligence.

While all states and territories make some provision for extending their basic limitation periods in some circumstances, there is great variety in the particular provisions across Australia. In his submission to *Issues paper 5: Civil litigation*, Dr Ben Mathews submitted:

[t]here is no uniform approach across Australia and the laws differ substantially. ... This complexity complicates matters for plaintiffs generally, and even more so for those in child sexual abuse claims. It also makes it difficult to synthesise even basic propositions.²²⁴

Key elements in the various limitation periods can be summarised as follows:

- **Length of limitation period:** Most jurisdictions have set the relevant limitation period at three years.
- **When the limitation period commences:** In some jurisdictions, the limitation period begins from the time of the tortious conduct (for example, the sexual abuse), while in others it begins from when the claimant first knows of the injury or from when the claimant could have known of the injury.
- **Application to children:** In most jurisdictions, the limitation period does not begin until the child turns 18. In some states, this applies only if the child did not have a parent or guardian, although there is a further extension if the child had a ‘close relationship’ with the defendant or the defendant was a ‘close associate’ of the child’s parent or guardian.
- **Suspension for a disability:** All jurisdictions provide for suspending, or lengthening, the limitation period to account for periods when the claimant was under a disability, although they differ in what they recognise as a relevant disability.
- **Circumstances of extension:** All jurisdictions provide for the limitation period to be extended, but the circumstances in which this may be done vary significantly between jurisdictions.
- **Whether there is a ‘long stop’:** Some jurisdictions include a ‘long stop’ provision that applies an absolute time bar. For example, the limitation period might be three years from when the claimant first knows of the injury but subject to a ‘long stop’ of 12 years from the date of the abuse.

A description of relevant current limitation periods is in Appendix M.

Limitation periods and institutional child sexual abuse

Barrier to commencing proceedings

Many survivors, survivor advocacy and support groups and academics have told us that the existence of limitation periods acts as a significant barrier to survivors being able to commence civil litigation. They have told us that, although state and territory legislation often allows limitation periods to run from a time later than when the sexual assault itself occurred or to be extended by a court's exercise of discretion, the existence of limitation periods may still create significant barriers for survivors.

Many survivors who consider pursuing civil litigation would already be well outside the basic limitation period for personal injury claims. Some might have good grounds to support an application for an extension of time; however, many may be advised that their claims are too late.

A number of survivors have told us in private sessions that they have been given legal advice that they cannot commence civil litigation because of the relevant limitation period.

In case study 7 on the Parramatta Training School for Girls and the Institution for Girls in Hay, we heard evidence that some survivors had tried to start civil claims for compensation against the State of New South Wales but that these claims did not go ahead, mainly because of limitation period issues and the cost of litigation. The report of case study 7 summarised the relevant evidence as follows:

Ms Kitchener said she approached solicitors about making a claim in 1999. They reportedly told her they would not take on a historical case because it was too long and would go on for two years. They said the funding had run out and they would need a million dollars to keep it going.

Ms Patton said she contacted Gerard Malouf & Partners in 2005 and started a claim. Until then, she felt she could not face talking publicly about her experiences as she was disempowered and ashamed. She said that her claim eventually failed because it was outside the statute of limitations on child sexual abuse and she could not afford the court costs to continue to trial.

Ms Kitson gave evidence that she met with LHD Lawyers in 2009 to discuss a claim. However, the lawyers never returned her calls and told her they had lost her files, before then returning them to her.²²⁵ [References omitted.]

The report of case study 7 also summarised relevant evidence about a possible group claim as follows:

In 2007, Gerard Malouf & Partners represented a group of around 40 plaintiffs in a claim against the State. The group sought compensation for abuse sustained in the State's care. Ms Chard and Ms Robb were both involved in this claim.

However, it never went ahead because the lawyers advised that it would be unsuccessful under the statute of limitations ...

Ms Stone said she was contacted by Gerard Malouf & Partners to join a 2007 class action against the State relating to the Hay Institution. However, her file was transferred in 2008 and she could not get in contact with her new lawyer.

Ms Stone then contacted Shine Lawyers in 2012, but they told her that she could not file a claim as her limitation period had closed.²²⁶ [References omitted.]

Impact of limitation periods on proceedings

Survivors who commence proceedings against institutions face the risk that the institutions will raise the limitation period issue and resist the claim on these grounds.

Institutions may raise a number of preliminary issues in defending any civil litigation without having a hearing on the merits of the claim. For example, they may raise the expiry of the limitation period and object to any extension of time. These preliminary issues may take considerable time – even years – and may involve substantial legal costs.

In case study 11, we heard evidence of the various proceedings commenced by Slater & Gordon on behalf of a number of claimants who were former residents in the Congregation of Christian Brothers Western Australian institutions.

In August 1993, law firm Slater & Gordon commenced proceedings in New South Wales for some 240 claimants seeking damages from the Christian Brothers and other defendants for physical, sexual or psychological abuse at the institutions in the 1950s, 1960s and early 1970s. In November 1993, Slater & Gordon commenced similar proceedings in Victoria for 23 of those claimants who lived in Victoria.²²⁷

The limitation period was one of the issues Slater & Gordon faced in bringing the claims. The limitation period in Western Australia at the time was six years from the date of the tort, which meant six years from the date of the abuse. At the time Slater & Gordon received instructions, the men were already decades outside the limitation period for bringing a claim. At the time, the six-year limitation period could not be extended in Western Australia.²²⁸

Slater & Gordon commenced the proceedings in New South Wales and Victoria so that it could avoid the Western Australian limitation laws.²²⁹

In January 1994, the defendants applied to the Supreme Court of Victoria for orders that the Victorian proceedings be stayed or ‘cross-vested’ – meaning transferred – to the Supreme Court of Western Australia. In June 1994, the Supreme Court of Victoria ordered that the proceedings be transferred to Western Australia.²³⁰

In August 1994, after the transfer of the Victorian proceedings to Western Australia, Slater & Gordon applied to the Supreme Court of Western Australia for orders that that court would apply the procedural laws of Victoria, including the Victorian limitation period. In November 1994, the judge in Western Australia dismissed the applications and ordered that

Western Australian procedural laws should apply to the proceedings. This effectively meant that the Western Australian proceedings could not continue.²³¹

The New South Wales proceedings were still on foot. Further preliminary matters concerning the appropriate defendant were dealt with during 1995.²³²

In mid-1996, the New South Wales proceedings were settled by the establishment of a trust fund of \$3.5 million for payments to claimants. There was provision for limited lump-sum payments and other needs-based payments. In addition, \$1.5 million was paid towards Slater & Gordon's legal costs and disbursements. The Christian Brothers' legal costs and disbursements totalled about another \$1.1 million.²³³

From 1994 to 1996, these various proceedings involved interlocutory, or preliminary, hearings in New South Wales, Victoria and Western Australia; one appeal to the New South Wales Court of Appeal; and three applications for special leave to appeal to the High Court of Australia. The underlying claims of abuse were not heard or determined on their merits on any of these occasions.²³⁴

We heard evidence from a number of survivors, some of whom had participated in the Slater & Gordon proceedings. Mr Clifford Walsh gave the following evidence:

What I couldn't understand is how the Christian Brothers could raise a limitation defence. We were kids. It seemed to me that we couldn't do anything about the abuse when it was happening, and by the time we were able as a group to do something about it, in particular being in the right mental state to do so, we were told it was too late. We were just being abused all over again.²³⁵

We also heard evidence about limitation periods in case study 19 on the Bethcar Children's Home, including about issues that the New South Wales Government raised in defending civil litigation commenced by former residents of Bethcar Children's Home. We will publish our report on case study 19 shortly.

The following two cases provide further examples of how limitation periods may be dealt with in institutional child sexual abuse matters and the competing considerations that may arise in determining whether or not to grant an extension of time.

[Hopkins v Queensland](#)

An extension of time was refused in *Hopkins v Queensland*²³⁶ in the District Court of Queensland in 2004.

The claimant, who was born in 1974, alleged that, between 1984 and 1987, she was sexually abused by the foster father who the Queensland Department of Families had placed her with. She argued that the department was negligent and in breach of statutory duty for not removing her from the foster family in 1986, following a complaint she made to a child care officer about 'emotional abuse'. The claimant suffered the abuse as a child, so the limitation period expired in 1998 – six years after she turned 18 years of age.²³⁷ However, she commenced her claim in 2003.

The court refused to grant the claimant an extension of the limitation period. Under the relevant Queensland legislation, a court ‘may’ extend time if ‘a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant’ and there is evidence to establish the right of action. Time can only be extended to one year after the material fact comes within the applicant’s means of knowledge.

The claimant argued that it was only in 2003 that she became aware, from a psychiatric report, of the psychiatric injury she had suffered, and it was only in 2002 that she had obtained her departmental file from the Department of Families and so became aware that department employees possessed information that ought to have caused them to remove her from her foster placement.

The court held that neither of these were ‘material facts’. In relation to the psychiatric report, the court said that the claimant had suffered, and was aware of, symptoms, including depression and flashbacks to the abuse, from the time of the abuse,²³⁸ and that the claimant was aware, or should have been aware, that these symptoms were persisting and sufficiently serious to justify a claim for damages.²³⁹ The report indicated the particular psychiatric condition these symptoms represented, but the judge said that, of itself, this was not material.²⁴⁰

In relation to the departmental file, the court said that the claimant was already aware of much of the information in the file.²⁴¹ Regarding the information that the claimant had not been previously aware of, the court said that the fact that the department had this information was ‘material’ but not ‘decisive’, because, on the standards of 1986, it would have been unlikely to be reasonable for the department to remove the claimant from her foster father on the basis of such information.²⁴²

The court also said that, even if the requirement relating to ‘a material fact of a decisive character’ had been satisfied, it would not have exercised its discretion to extend the limitation period because of ‘real prejudice to the defendant in being required now to defend this action’.²⁴³ The court referred to the difficulty the department had experienced in locating the child care officers who had dealt with the claimant’s case and how the officers who could be located recollected few details of the claimant.²⁴⁴

The court also said that, if an extension was granted, the focus of the case would likely be on ‘what was the appropriate standard of care, and what responses were dictated by that standard at the relevant time’.²⁴⁵ The fact that ‘the passage of time can make it more difficult properly to apply the standards of the time when assessing questions of negligence’ pointed against granting an extension.²⁴⁶

Finally, the passage of time would also make it very difficult to assess whether any failure of the department caused the applicant’s psychiatric condition or if this condition would have appeared anyway.²⁴⁷

In this case, the claimant gave evidence that the reason that she had not made earlier complaints to police or begun her claim in court earlier was that, as a coping mechanism, she had been trying to avoid thinking about the abuse. The court said that ‘any

understandable reluctance of the plaintiff to pursue this matter earlier'²⁴⁸ was not a factor that the extension of time provisions were intended to overcome.

Rundle v Salvation Army (South Australia Property Trust)

An extension of time was granted in *Rundle v Salvation Army (South Australia Property Trust)*²⁴⁹ by the Supreme Court of New South Wales in 2007.

The claimant, who was born in 1952, had been put into the care of The Salvation Army (South Australian Property Trust) and placed at a boys' home. He alleged that he was sexually assaulted there between 300 and 400 times in the period 1960 to 1965 by an officer of the Property Trust and other boys.

Although the claim was commenced in the Supreme Court of New South Wales, South Australian tort and limitations law applied. Since the alleged assaults occurred when he was a child, the limitation period expired three years after he turned 21 years of age.²⁵⁰ This meant that the limitation period expired in 1976.²⁵¹ The claimant commenced his claim in 2003. He argued that The Salvation Army was negligent in its supervision of the boys' home, vicariously liable for the sexual assaults and in breach of a fiduciary duty to him.

The court granted an extension of the limitation period. Under the relevant South Australian legislation, a court could extend time to one year after the time when the claimant became aware of 'facts material to [his or her] case' so long as 'in all the circumstances of the case it is just' to grant the extension. The legislation directed attention to what the claimant *did* know and not what he or she *should have* known.

The court accepted as 'material facts' how the claimant's capacity for work had been reduced by 60 to 70 per cent because of his psychiatric disability, that the correct entity to sue was The Salvation Army (South Australian Property Trust) and that certain personality features of the applicant amounted to a disability caused by his experiences at the boys' home.²⁵² The applicant only became aware of these facts within the year before he commenced his claim.²⁵³ The court said it did not matter that from an earlier stage he may have 'had a sense of grievance which he thought should be resolved by a monetary compensation' since any such sense was different from actual awareness of material facts.²⁵⁴

As for whether it was just to grant an extension of time, the court held that the test to apply was whether the delay made the chances of a fair trial unlikely.²⁵⁵ The court said that it was 'not insignificant' that The Salvation Army had undertaken extensive investigations but was unsuccessful in seeking the claimant's high school records or information about his employment history and had had only limited success in investigating individuals that the claimant had named.²⁵⁶

However, the court was concerned that two solicitors for The Salvation Army had given misleading impressions in failing to refer to significant information they had in fact been able to obtain.²⁵⁷ The court also said that, in a future trial, The Salvation Army's inability to obtain material would be relevant to the assessment of credibility and evidence.²⁵⁸ The

court concluded that The Salvation Army was not ‘precluded from mounting an adequate defence’ and therefore it extended time.²⁵⁹

The New South Wales Court of Appeal dismissed The Salvation Army’s appeal, holding that the first instance judge did not make any error in assessing whether granting an extension was just.²⁶⁰ The case later settled.

Competing considerations

Limitation periods may be justified on a number of grounds. Limitation periods can be considered necessary to:

- prevent and discourage people with claims from ‘sleeping on their rights’ and encourage them to institute proceedings as soon as it is reasonably possible to do so
- prevent the difficult questions of proof that arise when a long period of time elapses between the injury and determination of the claim – for example, in relation to missing documentary trails or the weak recollections of witnesses
- prevent oppression to a defendant by allowing an action to be brought long after the circumstances giving rise to it have passed
- create certainty by recognising the status quo that presently exists between parties and give certainty to a potential defendant that a possible case against it is closed.²⁶¹

Limitation periods may also provide some certainty to insurers in indicating a period during which litigation can be commenced. In some cases, these justifications may be good ones. In many personal injury cases, it will be desirable to resolve claims quickly – not just to give the defendant certainty and to ensure evidence is not lost but also to ensure that the claimant receives any damages as soon as possible so that the claimant can take steps to make good their injury or loss.

However, in some circumstances, limitation periods operate unreasonably to deny claimants access to justice through civil litigation.

As discussed in Chapter 5, the delay in reporting of child sexual abuse is now well known. Many survivors are unable to disclose their abuse until adulthood.²⁶² Analysis of our early private sessions revealed that, on average, it took survivors 22 years to disclose the abuse. Men took longer than women to disclose abuse.²⁶³

When survivors are able to disclose their abuse, their first needs may be counselling and psychological care and the assistance provided through various support services. They might also wish to report to police and consider options for seeking justice through the criminal law. It cannot be assumed, or expected, that considering civil litigation will be their first priority.

If a claimant does not know that they may have a claim or they face substantial psychological barriers in disclosing the essential elements of their claims, it makes little sense to talk of them ‘sleeping’ on their rights.

Further, the interests of the defendant are protected by the court's jurisdiction to stay proceedings if any delay has made the chances of a fair trial unlikely.

The court's jurisdiction to stay proceedings was the subject of evidence in case study 19 on the Bethcar Children's Home. We will publish our report on case study 19 shortly.

The factors relevant to the exercise of the court's jurisdiction are also illustrated in the two cases of *Hopkins v Queensland*²⁶⁴ and *Rundle v Salvation Army (South Australia Property Trust)*,²⁶⁵ discussed above.

Options for reform

Through our private roundtables and other consultations, we consulted a number of survivor advocacy and support groups, institutions, governments, academics and insurers on possible reforms to civil litigation. On the whole, attendees supported reform of limitation periods.

A range of views were expressed in the submissions to *Issues paper 5: Civil litigation* and through our private roundtables and consultations. While some submissions supported retaining limitation periods and opposed increased discretion for courts to extend them, many submissions and attendees at our consultations supported removing limitation periods altogether, including retrospectively. Others supported retaining limitation periods but making them much longer than they are currently.

The key issues that arise are:

- Should the limitation period for claims for damages for personal injury involving allegations of criminal child sexual abuse be removed altogether or retained but extended to better reflect the time survivors take to disclose their abuse?
- Should any changes apply prospectively only or retrospectively?

In 2014, the Parliament of Victoria's Family and Community Development Committee considered limitation periods in its report, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (the Betrayal of Trust report).

The committee recommended that limitation periods for criminal child abuse should be abolished.²⁶⁶ It also considered that the removal of limitation periods should apply retrospectively.²⁶⁷

On 24 October 2014, the Department of Justice of Victoria released an Exposure Draft for the Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 (Vic). The purpose of the Bill would be 'to amend the *Limitation of Actions Act 1958* to remove limitation periods that apply to actions in respect of causes of action that relate to death or personal injury resulting from criminal child abuse'.²⁶⁸

The Bill would apply to physical and sexual abuse. It defines criminal child abuse as follows:

criminal child abuse means an act or omission in relation to a person when the person is a minor –

- (a) that is physical or sexual abuse; and
- (b) that could, at the time the act or omission is alleged to have occurred, constitute a criminal offence under the law of Victoria or the Commonwealth.

The Bill would insert a new section 27P into the *Limitation of Actions Act 1958* (Vic) titled 'No limitation period for certain actions'. The section would allow an action for personal injury founded on criminal child abuse to be brought at any time. The section makes clear that this removal of the limitation period would apply both prospectively and retrospectively, since the provision 'applies whether the act or omission alleged to have resulted in the death or personal injury occurs before, on or after the commencement of section 5 of the *Limitation of Actions Amendment (Criminal Child Abuse) Act 2014*'.²⁶⁹

For claims by dependants of a deceased survivor, the Bill would provide a limitation period of three years from the date the claim was discoverable, with no long-stop period.²⁷⁰

When we consulted a number of survivor advocacy and support groups, institutions, governments, academics and insurers through our private roundtables and other consultations, we queried whether the limitation period should be removed altogether or whether there should be some balance struck between the interests of both the survivor and institution in having any proceedings brought as soon as possible and the known delays in reporting or disclosing.

We gave the following as a possible example of how an extension to the limitation period could be framed:

- set a basic limitation period of 12 years from the time the survivor turns 18 years of age
- after 12 years (that is, after the survivor turns 30 years of age), the claim could proceed unless the institution defendant establishes actual prejudice in defending the proceedings
- with an absolute bar or 'long stop' of 30 years from the time the survivor turns 18 years of age so that no civil action could be brought by a survivor against an institution after the survivor turns 48 years of age.

If limitation periods are removed altogether, there would be a risk that defendants may be required to defend proceedings without having evidence that would have been available to them previously and in circumstances where the trial could not be fair.

An option would be to include provision for the courts to stay proceedings for reasons of unfairness to the defendant. To ensure that that provision would not undermine the removal of the limitation periods, it could be framed so that a stay could be granted only if the court was satisfied that a fair trial was not possible.

If limitation periods are removed but a capacity to stay proceedings is retained, it will be important for survivors to be advised not to delay. This is because the risk of proceedings being stayed is likely to increase, at least in some matters, the longer the time between the abuse and a claim. It is also very much in a survivor's interests to seek any damages as soon as possible so that, if they are successful, they can use the damages they receive to take steps to make good their injury or loss.

10.3 Duty of institutions

Introduction

A survivor will have a clear cause of action against the individual perpetrator or perpetrators of the abuse in the intentional tort of battery. Battery, which includes sexual assault, involves harmful or offensive contact with another's body.²⁷¹ The contact must be intentional.²⁷²

Causes of action against an institution are considerably more difficult. Survivors need to establish that the institution owed them a duty, the breach of which caused their damage, or that the institution is vicariously liable for the perpetrator's acts.

Difficulties arise because civil litigation against the institution seeks to have the institution found liable for another person's deliberate criminal conduct. That criminal conduct (sexual offences against children) is completely contrary to the purpose and undertaking of any institution providing children's services.

Existing duty of institutions

The legal bases for institutional liability for abuse currently available in Australia are:

- an action in negligence involving an institution's breach of a duty of care owed to the child. It will require proof of the existence of the duty and its breach and that the breach caused the damage. The duty is a duty to take reasonable care. What is 'reasonable' is determined by reference to the standards that applied at the time the duty is alleged to have been breached
- vicarious liability of the institution for torts committed by its employees while acting in the course of their employment. In Australia, this liability has been limited to apply only to the acts of 'employees' and it is unclear in Australian law when child sexual abuse might be found to have occurred 'in the course of employment'
- an action for breach of the institution's non-delegable duty to ensure that a third party takes reasonable care to prevent harm. This is a duty to ensure that reasonable care is taken by others. It is somewhat similar to vicarious liability, but it applies to the acts of independent contractors rather than employees. It is not clear that a non-delegable duty will extend to liability for the criminal acts of the third party.

These legal bases are discussed in more detail below.

A number of submissions to issues paper 5 referred to the lack of clarity in some of these principles and the uncertainty of their application.

Negligence

The tort of negligence involves the failure of a person to exercise reasonable care in a way that causes harm to another. Establishing negligence requires showing three things:

- the defendant must have owed the injured person a ‘duty of care’
- the defendant must have breached that duty by failing to exercise the care that a reasonable person in the same circumstances would have exercised
- the harm the injured person suffered must have been caused by that failure to exercise reasonable care.²⁷³

A person who suffered sexual abuse as a child might make a claim in negligence against an institution that arguably could have taken steps to prevent the abuse but did not. However, in Australia, there are very few examples of litigation in which a claim of negligence in relation to child sexual abuse proceeded to trial and judgment in court. The majority of cases either settle or fail – for example, because of limitation period issues. This means that the effectiveness of the tort of negligence for institutional child sexual abuse claims is somewhat unclear.

This can be illustrated by considering how each element of a negligence action might be treated in relation to institutional child sexual abuse.

The first element is that the defendant owed a duty of care to the claimant. There are many relationships between a defendant and a claimant where it will be certain that a duty of care is owed because the relationship fits into a well-established category of relationships recognised by the law as giving rise to a duty of care. For example, it is beyond doubt that a school student is owed a duty of care by his or her school and teachers.²⁷⁴

However, uncertainty can arise outside of the well-established categories. The test for the existence of a duty of care is whether, first, it was reasonably foreseeable to the defendant that there was a risk of harm to the class of persons which included the claimant; and, secondly, whether the relationship between the claimant and defendant involved ‘salient features’ that warrant the imposition of a duty of care.²⁷⁵ What these salient features are depends on the facts of an individual case.²⁷⁶

If a claim of negligence is made against a government agency with responsibility for child protection and child placements, for example, the court must consider factors such as:

- the legislation governing the agency and its powers
- the degree of control the agency exercised over the risk of the harm that occurred
- the degree of vulnerability of those who depend on the exercise of the agency’s powers
- the consistency of the alleged duty of care with the terms, scope and purpose of the statutory scheme.²⁷⁷

Agencies have been found to owe a duty of care to state wards and other vulnerable children in some cases²⁷⁸ but not in others.²⁷⁹

Outside of the school–pupil and agency–ward contexts, it is unclear in what situations a duty of care will be owed in relation to a child sexual abuse claim. For example, there do not appear to have been any cases in Australia where it was decided that a religious organisation that was not a religious school owed a duty of care to a child who was abused.²⁸⁰

Even where a duty of care is held to be owed, a claimant must go on to establish that the defendant has breached that duty to him or her. For a duty of care to have been breached, resulting in damage, the risk of injury to the claimant must have been reasonably foreseeable.²⁸¹ It must also be proven that a reasonable person in the position of the defendant would have taken precautions in response to the risk that the defendant failed to take.²⁸²

To determine what a reasonable person would have done, all the relevant circumstances must be considered, including:

- the magnitude of the harm that could occur
- the probability of the risk materialising
- how practicable or onerous measures to combat the risk would have been
- any responsibilities the defendant might have which could conflict with taking precautions.²⁸³

Importantly, what precautions a reasonable person would have taken depend on the standards to which reasonable people would have been held *at the time* of the alleged negligence: ‘The reasonableness of measures of protection must be judged according to the prevailing standards of the day.’²⁸⁴ It may be harder for a claimant to prove breach of a duty of care in relation to institutional child sexual abuse if the breach occurred at a time when the risk and prevalence of institutional abuse, and the seriousness of the harm caused by abuse, were not as well understood or recognised as they are now. Standards of the past to do with how information and suspicions of abuse should be dealt with may have been considerably lower than standards that would apply today.

The third element of the tort of negligence is causation of damage. This requires both that the injury must have been *factually* caused by the breach of duty and that, as a *normative* question, legal responsibility for the injury should be attributed to the tortfeasor – that is, the person who committed the act that causes the injury.²⁸⁵

Stating what the applicable tests are is relatively straightforward. A breach of a duty of care factually caused an injury if, ‘but for’ the breach, the injury would not have occurred, although the common law and legislation each recognise that there may be situations where this test is not appropriate and a more complicated one is necessary.²⁸⁶ Legal responsibility will be attributed to the defendant if the general type of harm that occurred was reasonably foreseeable by the defendant.²⁸⁷

In claims made for child sexual abuse, the injury usually suffered is ‘psychiatric harm’, as understood in legal terms.²⁸⁸ In the context of a claim for negligence, a plaintiff typically would have to prove both that the defendant’s breach of duty led to the abuse, or allowed the abuse to continue, and that the abuse caused that psychiatric harm.²⁸⁹

Thus, in *TC v New South Wales*,²⁹⁰ where the Department of Community Services failed to undertake all reasonable investigations of abuse allegations and delayed in obtaining a psychiatric assessment, the Supreme Court of New South Wales nonetheless held that causation was not established. This was because, if those breaches had not occurred, the

department still would not have taken action to remove the child in question and so stop the abuse.

The decision in *SB v New South Wales*²⁹¹ provides an example of how the elements of duty and breach were dealt with in one case. A former state ward, SB, sued the State of New South Wales in the Supreme Court of Victoria. She had been sexually abused by her natural father when she was left with him by the then Department of Youth and Community Services after being removed from her foster father, who had abused her. She argued that the department breached its duty of care to her when deciding to restore her to her father by failing to take into account her vulnerable status or to assess her father's capacity or will to meet her needs.²⁹² She also argued the department did not adequately monitor her situation and did not take the necessary action to protect her and advance her welfare.²⁹³

The court gave detailed reasons about why the department owed SB a duty of care.²⁹⁴ It concluded that such a duty was owed because of:

- the claimant's status under court order as a ward of the state
- her known vulnerability following the disclosure of her foster father's abuse
- the department's substantial degree of control over the risk to the plaintiff
- the compatibility of such a duty with the statutory scheme governing the department since the duty would serve to promote the department's standards and the legislative objects.²⁹⁵

As to breach of duty, the court held that the department breached its duty to the claimant when, having restored her to her father, it failed to remove her or insist on access to her despite being aware of her vulnerability and despite suspecting that her father was abusing her.²⁹⁶ The department considered that there was nothing to be done because the claimant would soon turn 18 and no longer be a ward, but the court found this view to be unjustified.²⁹⁷

However, the court held that the department did not breach its duty when it restored the claimant to her father in the first instance. This had occurred in urgent circumstances where her foster family had insisted she leave immediately and the department had few options for placing her. Further, the departmental policy at the time was that a ward should be restored to his or her natural parent unless minimum, not optimal, standards of care could not be met.²⁹⁸

Another example of a claim in negligence in relation to institutional abuse is *S v Corporation of the Synod of the Diocese of Brisbane*.²⁹⁹ In this case, the claimant, S, had been a boarder in a school run by the Corporation of the Synod of the Anglican Diocese of Brisbane. It was accepted that a boarding master had sexually abused the claimant in 1990. The claimant argued that the corporation failed to create and maintain proper systems in place to take care of the boarders. Particularly, she argued that the headmaster failed to recognise and act on complaints and that other employees of the corporation failed to sufficiently voice their concerns. The case was decided by a civil jury and so no written reasons were given, but the jury accepted that the corporation failed to take reasonable care in at least one of these ways.

Vicarious liability

According to the doctrine of vicarious liability, an employer will be liable for torts committed by employees acting ‘in the course of employment’. Importantly, vicarious liability does not require showing that the employer has committed any wrong; rather, the employer is required to pay damages compensating a victim for an employee’s wrong if certain requirements are met.

Under Australian law, a person (the employer) will be vicariously liable for another’s tort if two requirements are met:

- the person who committed the tort was an ‘employee’ of the employer (and not, for example, an independent contractor)
- the tort was committed in the ‘course of employment’.³⁰⁰

Both requirements can create difficulties for survivors of child sexual abuse.

Employees do not include ‘independent contractors’³⁰¹ and are unlikely to include volunteers.³⁰² The Court of Appeal of the Supreme Court of New South Wales left open ‘whether a priest in the Roman Catholic Church who is appointed to a parish is an employee in the eyes of the law or otherwise in a relationship apt to generate vicarious liability in his superior’.³⁰³

Identifying what is, and what is not, within the course of employment creates particular difficulties. Chief Justice Gleeson has explained ‘in the course of employment’ in the following way:

The limiting or controlling concept, course of employment, is sometimes referred to as scope of employment. Its aspects are functional, as well as geographical and temporal. Not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment. And the fact that wrongdoing occurs away from the workplace, or outside normal working hours, is not conclusive against liability.³⁰⁴

The line between what is within and what is outside of the course of employment can be difficult to draw. Some examples determined by the court but which do not relate to child sexual abuse are as follows:

- A law firm’s managing clerk who fraudulently conveyed a client’s property to himself was acting in the course of employment because he was authorised by his firm to act in a class of matter including that sort of conveyancing transaction.³⁰⁵
- A barmaid who threw beer and a glass into a patron’s face, arguing that he provoked her, was not acting in the course of employment.³⁰⁶
- A garage hand whose job was to shunt cars but who was expressly prohibited from driving them was acting in the course of employment when he drove one vehicle and collided with another vehicle.³⁰⁷

In claims relating to child sexual abuse, an employer may be liable for an employee’s negligence in failing to investigate and guard against a perpetrator’s abuse (this issue was

left to the civil jury in *S v Corporation of the Synod of the Diocese of Brisbane* discussed above). However, more commonly in institutional abuse cases it may be argued that an employer is vicariously liable for sexual abuse committed by the perpetrator, who happens to be an employee.

However, following the High Court's decision in *New South Wales v Lepore*³⁰⁸ (*Lepore*), the law is unclear as to whether the sexual abuse of a child can be conduct in the course of employment.

In *Lepore*, the three plaintiffs sued either the State of New South Wales or the State of Queensland, arguing that those states were vicariously liable for sexual abuse perpetrated by teachers in state primary schools. The teachers were clearly employees of the relevant state, so the dispute was as to whether the sexual abuse could be said to have occurred in the course of employment. Six judges considered whether the states could be vicariously liable in this way. The seventh judge, McHugh J, did not consider the issue because he held that the schools owed non-delegable duties to the students that could be breached if the students were sexually abused by their teachers.

The six judges who considered vicarious liability stated a number of different tests for deciding whether a tort is in the course of employment:

- Gleeson CJ asked whether there was 'sufficient connection' between what the employee was employed to do and the tortious conduct.³⁰⁹
- Gaudron J suggested that the relevant question was whether 'the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred'.³¹⁰
- Gummow and Hayne JJ emphasised that '[i]t is the identification of what the employee was actually employed to do and held out as being employed to do that is central to any inquiry about course of employment'.³¹¹
- Kirby J, approving developments in the law in Canada and the United Kingdom, stated the applicable tests as whether the employment 'materially and significantly enhanced or exacerbated the risk of [the tort]'; whether there is a significant connection between the creation or enhancement of the risk and the wrong that it occasions within the employer's enterprise; and whether the conduct may 'fairly and properly be regarded as done [within the scope of employment]'.³¹²
- Callinan J did not state a clear test.

The six judges who considered vicarious liability also examined the more specific question as to whether sexual abuse can be 'conduct in the course of employment':

- Gleeson CJ said that it could: 'there are some circumstances in which ... persons associated with school children ... have responsibilities of a kind that involve an undertaking of personal protection, and a relationship of such power and intimacy, that sexual abuse may properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers'.³¹³
- Gaudron J said that it could: it was possible 'that by acquiescing in the teacher's use of the storeroom for the purposes of chastisement or, even, in having a secluded room which might be so used the State of New South Wales is estopped from contending that

the teacher was not acting as its servant, agent or representative in doing what he did in that room'.³¹⁴

- Gummow and Hayne JJ effectively said that it could not. They said that an employer can be vicariously liable for an intentional tort, but only in two narrow circumstances: when the tort was committed in the intended pursuit of the employer's interests or in the intended performance of the employee's contract of employment; or where the tort was committed in the apparent pursuit of the employer's business or apparent execution of the employee's authority.³¹⁵ They said that '[w]hen a teacher sexually assaults a pupil, the teacher has not the slightest semblance of proper authority to touch the pupil in that way. ... [To hold the State responsible] would strip any content from the course of employment and replace it with a simple requirement that the wrongful act be committed by an employee'.³¹⁶
- Kirby J said that it could: sexual assault was 'arguably inherent in close intimacy between adults and vulnerable children that may arise in the specific circumstances of a school setting'.³¹⁷
- Callinan J said that under no circumstances could sexual abuse fall within the course of employment: 'deliberate criminal conduct is not properly to be regarded as connected with an employee's employment: it is the antithesis of a proper performance of the duties of an employee'.³¹⁸

Non-delegable duty

A 'non-delegable duty' in tort law is a duty not merely to exercise reasonable care but also, if a third party is engaged, to ensure that reasonable care is taken.³¹⁹ It imposes obligations beyond the duty to exercise reasonable care oneself, but it does not impose an absolute duty to prevent all harm to a person.

However, it is unclear whether a non-delegable duty can make a person liable for another's *intentional* tort:

Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care.³²⁰

Various views about this were expressed in *Lepore*, again the leading case. However, because some of the judges adopted a meaning of a non-delegable duty in tort law that has since been rejected implicitly by the High Court in *Leighton Contractors Pty Ltd v Fox*³²¹ (*Leighton*), it may be that some of the reasoning in *Lepore* cannot stand.

Before *Leighton*, there were competing positions about whether a 'non-delegable duty' in tort law simply referred to how some duties to take reasonable care in the law of negligence had to be exercised personally and could not be delegated or whether it instead referred to duties the content of which went *beyond* taking reasonable care to 'ensuring that reasonable care is taken'. However, in *Leighton*, the High Court unanimously used the second meaning.

In *Lepore*, Gleeson CJ, Gaudron and Callinan JJ treated non-delegable duties as having the first meaning. Gleeson CJ's reasoning was based on an understanding that a person may

breach a non-delegable duty by another's intentional tort or intentional criminal conduct, but this would be where there is a 'failure to exercise reasonable care to prevent foreseeable criminal behaviour.'³²² While Gaudron, Kirby and Callinan JJ did not consider the specific issue in detail, their analyses are compatible with the reasoning of Gleeson CJ.

In contrast, McHugh, Gummow and Hayne JJ adopted the meaning of a non-delegable duty in tort law that has since been adopted unanimously by the High Court in *Leighton*. McHugh J said that it makes no difference whether another's failure to take reasonable care occurs via negligence or via a criminal assault.³²³ However, Gummow and Hayne JJ said that allowing breach of a non-delegable duty through another's intentional tort or intentional criminal conduct would involve an extension of the law of non-delegable duties that should be rejected.³²⁴

Given that Gleeson CJ, Gaudron, Kirby and Callinan JJ took an understanding of non-delegable duties in tort law that has since been overtaken, it is hard to know what weight should be given to Gleeson CJ's view that a non-delegable duty can be breached by another's intentional tort. Lower courts generally have read *Lepore* as holding that a non-delegable duty does not extend to others' intentional torts or criminal conduct.

Therefore, while it is clear that a non-delegable duty will be owed to a child by a person in respect of whom the child is vulnerable, and while it is also clear that this duty requires the person not only to take reasonable care but to 'ensure that reasonable care is taken', it is not clear whether the duty may be breached by another's intentional tort or criminal conduct.

Overseas approaches to vicarious liability

Canadian approach

Vicarious liability is imposed more broadly in Canada than it is in Australia.

First, Canada does not restrict vicarious liability to the employer/employee relationship.³²⁵ The test is whether the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate.³²⁶ The courts have held that a bishop can be vicariously liable for a priest's sexual abuse of a child,³²⁷ while foster parents who sexually abused a child in their care were found to be too far removed from the government to justify holding the government vicariously liable for the abuse.³²⁸

Second, Canada has moved away from a requirement that the tort be in the 'course of employment' towards a broader 'enterprise risk' theory of liability.

In *Bazley v Curry*,³²⁹ a non-profit organisation operated residential care homes for treating emotionally troubled children. An employee of the organisation sexually abused children at one of the homes. One of the children later sued the organisation for the employee's sexual assaults. The Supreme Court held that the organisation was vicariously liable for the sexual abuse. It said:

The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.³³⁰

The test is whether there is a 'significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires'.³³¹ In order for the employer to be vicariously liable, the enterprise and employment must *materially* enhance the risk in the sense of significantly contributing to it.³³²

In *Bazley v Curry*, the court identified five factors relevant to determining this:

- the opportunity that the enterprise afforded the employee to abuse his or her power
- the extent to which the wrongful act may have furthered the employer's aims
- the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise
- the extent of power conferred on the employee in relation to the victim
- the vulnerability of potential victims to wrongful exercise of the employee's power.³³³

The test of material enhancement of risk by the employment enterprise is much broader than the 'course of employment' test applied in Australia, but it can be difficult to apply.

In *Jacobi v Griffiths*,³³⁴ which was handed down on the same day as *Bazley v Curry*, the Supreme Court was divided (4:3) on how to apply the test in relation to a non-profit club that had the objective of promoting the health, social, educational, vocational and character development of children such as through after school and Saturday recreational activities on club premises and occasional outings. The program director of the club sexually abused the claimants and other children.

The majority held that vicarious liability was not established. Although the director's job was to develop a positive rapport with children, no relationship of intimacy was actually encouraged by the club. In fact, the abuse occurred off club premises outside club hours – a practice that the club had prohibited.³³⁵ The majority said that the director:

took advantage of the opportunity the Club afforded him to make friends with the children. His manipulation of those friendships is both despicable and criminal, but whatever power [the director] used to accomplish his criminal purpose for personal gratification was neither conferred by the Club nor was it characteristic of the type of enterprise which the [club] put into the community.³³⁶

However, the minority found that:

- the club encouraged mentoring of children by adults in circumstances where no other adults were present
- the club's goal of providing 'behaviour guidance' authorised the development of trusting and intimate relationships and therefore increased the risk of abuse

- the club positively encourage such intimate relationships developing
- there was significant power conferred on the employee in relation to victims
- the potential victims were vulnerable particularly since they were ‘troubled adolescents’
- while the abuse occurred away from club premises, it did occur following the employee’s ‘careful plan of entrapment’, which he carried out while working in his job.³³⁷

United Kingdom approach

The law in the United Kingdom has long recognised that vicarious liability may be owed outside the employer/employee relationship.³³⁸ More recently, courts have asked whether the defendant and the tortfeasor ‘stand in a relationship which is sufficiently analogous to employment’³³⁹ or are in a relationship ‘akin to employment’.³⁴⁰

In *Various Claimants v Catholic Child Welfare Society*,³⁴¹ the claimants had been sexually abused as children in a Roman Catholic residential school. They sought to sue a lay Roman Catholic Order – the Brothers of the Christian Schools, members of which had been perpetrators. The Supreme Court held that it was enough ‘that the relationship between the teaching brothers and the institute was sufficiently akin to that of employer and employees to satisfy’ the requirement that there be a relationship between tortfeasor and defendant apt to possibly generate vicarious liability.³⁴²

The court said:

In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with [local Roman Catholic organisations], but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute’s rules.

The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.

Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of the employer and its employees.³⁴³

In *E v English Province of Our Lady of Charity*,³⁴⁴ the Court of Appeal considered whether a Roman Catholic bishop could be vicariously liable for sexual abuse committed by a priest

and occurring in a children's home operated by a Roman Catholic order of nuns. A majority of the court held that the bishop–priest relationship was akin to an employer–employee relationship and therefore capable of giving rise to vicarious liability.

Lord Justice Ward asked 'whether the relationship of the bishop and [the priest] is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable'.³⁴⁵ His Lordship said that the relationship was sufficiently close because of:

- the residual control the bishop retained to supervise the priest
- the highly organised character of the Roman Catholic Church
- how the priest's role was wholly integrated into the organisational structure of the Church's enterprise
- the priest not being like an entrepreneur but being required by canon law to reside in the parochial house close to his church like an employee making use of the employer's tools of trade.³⁴⁶

Lord Justice Davis referred to the bishop's capacity of control over the priest such as through his power to remove and transfer the priest; and to how the priest was appointed and entrusted to further the bishop's religious aims and purposes.³⁴⁷

Lord Justice Tomlinson dissented, much on the basis that his Honour did not think that it was appropriate to transpose concepts such as enterprise or benefit into the question of what relationships could generate vicarious liability.³⁴⁸ As Davis LJ described:

[t]he divergence of viewpoints [between Ward and Tomlinson LJ] seems to be fashioned by competing attitudes as to the extent to which, as a matter of policy, an innocent defendant should (without fault) be made to bear responsibility for the wrongful acts of another.³⁴⁹

The United Kingdom courts have also taken a much broader view than the Australian courts on what conduct will be in 'the course of employment'.

In *Lister v Hesley Hall Ltd*,³⁵⁰ former boarding house residents sued the employer of the warden who had sexually abuse them. The decision makes clear that, in the United Kingdom, the 'course of employment' is capable of including sexual abuse.

Four of five of the Lords approved a 'close connection' test for determining what will be in the course of employment, but gave 'four different versions' of this test.³⁵¹ The Supreme Court of the United Kingdom has said that:

[i]t is not easy to deduce from the *Lister case* ... the precise criteria that will give rise to vicarious liability for sexual abuse. ... The test of 'close connection' approved ... tells one nothing about the nature of the connection.³⁵²

The Supreme Court has recently clarified what the close connection test requires. In *Various Claimants v Catholic Child Welfare Society*,³⁵³ drawing on the Canadian approach discussed above, the court said:

Starting with the Canadian authorities a common theme can be traced through most of the cases ... Vicarious liability is imposed where a defendant, whose relationship

with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

These are the criteria that establish the necessary ‘close connection’ between relationship and abuse. ... Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.³⁵⁴

Options for reform

Many of the submissions to *Issues paper 5: Civil litigation* that we received expressed support for clarifying and expanding the circumstances in which an institution could be liable for institutional child sexual abuse.

In addition to support for the Canadian and United Kingdom approaches to vicarious liability discussed above, a number of the submissions expressed support for the recommendations made by the Parliament of Victoria Family and Community Development Committee in its Betrayal of Trust report.

The committee recommended:

That the Victorian Government undertake a review of the *Wrongs Act 1958* (Vic) and identify whether legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse.³⁵⁵

The committee put forward two possible options for reform:

- legislating a non-delegable duty of care in the *Wrongs Act* – for example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care
- including in the *Wrongs Act* a provision regarding vicarious liability based on the examples in the Victorian and Commonwealth discrimination legislation.³⁵⁶

The reference to ‘Victorian and Commonwealth discrimination legislation’ is a reference to the *Equal Opportunity Act 2010* (Vic) and to the *Sex Discrimination Act 1984* (Cth). This legislation essentially creates a reverse onus of proof. If an employee or agent commits a relevant breach, the employer or principal is taken to have also committed the breach unless the employer or principal proves that it took reasonable precautions to prevent the employee or agent from committing the breach.

Through our private roundtables and other consultations, we consulted a number of survivor advocacy and support groups, institutions, governments, academics and insurers about possible reforms to the liability of institutions.

We put forward the following three options for reform:

- Institutions could have an express duty to take reasonable care to prevent child sexual abuse of children in their care. This reflects the Parliament of Victoria Family and Community Development Committee's first possible option. It is not a significant advance on the duty of care that currently applies to institutions through the law of negligence.
- Institutions could be made liable for child sexual abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent this abuse. This approach reverses the onus of proof, so that the institution is liable for the abuse unless it can prove that the steps it took to prevent abuse were reasonable.
- Institutions could be made liable for child sexual abuse committed by their employees or agents. This would establish absolute liability, so that institutions would be liable for the abuse regardless of any steps they had taken to prevent it.

In our private roundtables, there was some support for the third option of absolute liability, but participants generally favoured the second option of the reverse onus of proof.

The third option of absolute liability would be more straightforward for survivors. A survivor would need to prove that they were abused by an employee or agent of the institution, but they would not need to prove that the institution's conduct caused or allowed the abuse to occur or that the institution could or should have taken steps to prevent the abuse.

However, it is considerably more onerous on institutions in that it does not require any fault or failing on the part of the institution. If abuse occurred then, even if an institution had taken every action possible to prevent abuse, the institution would be liable. This might suggest that, if an absolute duty were to be favoured, it may be appropriate to apply it only to a fairly narrow range of institutions. For example, an absolute duty might be reasonable in relation to residential institutions, but it might not be reasonable in relation to foster care agencies. It might be reasonable to hold foster care agencies liable if they fail to adopt and apply adequate policies and procedures, but it might not be reasonable to hold them liable in the absence of any fault or failing on their part, given that they do not control the foster home environment.

There is also the issue of whether any change in the duty of institutions should apply prospectively only or retrospectively as well.

Applying a new duty to institutions in respect of past conduct may not be appropriate, regardless of which option is preferred. It is likely to expand significantly institutions' potential liability. It is also not clear why, if this approach were adopted, it would be necessary or efficient to invest in establishing a redress scheme or schemes, because any redress schemes might be undermined by the much more ready availability of compensation through civil litigation. Institutions might face significant difficulties in trying to produce documents and witnesses to give evidence about their past practices, which potentially relate to periods a number of decades ago, in order to attempt to discharge the reverse onus of proof.

There is also a risk that survivors might have their expectations raised unrealistically, particularly as the 'reasonable precautions' required of an institution would reflect what

was reasonable at the time the abuse occurred, not what would be accepted as reasonable today.

If a broader duty were to be favoured in combination with the removal or substantial extension of the limitation period and if these changes were to be made retrospective, it may be necessary to consider whether the damages available to a claimant should be limited. For example, damages could be limited to the categories of non-economic loss and the cost of any future counselling and psychological or psychiatric care. This might avoid some of the difficulties inherent in assessing causation of loss or damage many years after the abuse.

10.4 Identifying a proper defendant

Introduction

A number of survivors and survivor advocacy and support groups have told us of the difficulties survivors and their legal advisers have had in finding a proper defendant to sue. Many submissions to *Issues paper 5: Civil litigation* raised difficulties that survivors may face in trying to identify a defendant against whom to commence civil litigation.

A survivor will always have a cause of action against the perpetrator of the abuse. However, in some cases the perpetrator may have no assets. If they are deceased, their estate may have been distributed. In some cases, a survivor might not be able to identify the perpetrator with any certainty. At least in these circumstances, survivors may wish to sue the institution in which they were abused.

Much of the discussion of difficulties in finding the proper defendant to sue has focused on the absence of an incorporated body, particularly for some faith-based institutions.

However, in some cases the difficulties for survivors may arise not so much from the absence of an incorporated body at the time the abuse occurred but from the passage of time between the occurrence of the abuse and the survivor wishing to commence civil litigation. Incorporation does not guarantee that an entity will survive for any particular period of time. Incorporated entities can be deregistered and wound up. There is no guarantee that they will survive as long as the natural persons associated with them.

Also, incorporation does not guarantee that an entity will have any assets to meet the claim. Indeed, incorporation has historically been a means of *limiting* liability through protecting assets outside of the corporation. Similarly, assets held on trust may be protected by the terms of a trust, regardless of whether they are held by an incorporated entity or by a natural person as trustee.

Scope of the problem

An entity can be sued only if it has a distinct ‘legal personality’, meaning that it has legal rights, liabilities and duties, including the ability to sue and be sued. It is well established

that natural persons, corporations and some other bodies such as governments and statutory bodies have legal personality.

In contrast, however, the law does not treat unincorporated associations as legal persons. Unincorporated associations are voluntary combinations of persons with a common object or purpose.³⁵⁷ They differ widely in size, nature and other characteristics; a former Chief Justice of Australia described their variety as ‘infinite’.³⁵⁸ Common examples of unincorporated associations include many religious groups and sporting or other special interest clubs.

It is well established in Australia that an unincorporated association lacks distinct legal personality and therefore cannot sue or be sued.³⁵⁹ For example, if a claimant was abused in an unincorporated sports club or a church congregation, the claimant could not name the club or congregation as a defendant to civil litigation.

There are a number of ways in which entities may incorporate. Many commercial entities are likely to adopt a corporate structure by incorporating under Part 2A of the *Corporations Act 2001* (Cth). Once they do so, the corporation exists as a legal entity distinct from its shareholders or directors.³⁶⁰

Associations that are small in scale and engage in non-profit or non-commercial activities may incorporate under the various state Association Incorporation Acts.³⁶¹ They may then sue and be sued, although, of course, they may have few if any assets.

Some associations are specifically given corporate identity by statute. For example, it is common for state legislation to incorporate the trustees of major Christian denominations to assist those denominations in holding property despite changes in church membership.³⁶²

Absent any one of these forms of incorporation, under Australian law an association of persons, regardless of its size or assets, will not have legal personality that renders it capable of being sued.

We have heard evidence of the difficulties of identifying the correct defendant in a number of our case studies.

In case study 8, we heard evidence about the civil litigation concerning Mr John Ellis’s allegations of abuse he suffered at the hands of Father Aidan Duggan, an Assistant Priest at the Christ the King Catholic Church at Bass Hill in the Archdiocese of Sydney at the time of the abuse.

Mr Ellis could not sue the Catholic Archdiocese of Sydney because it was an unincorporated association.³⁶³ In 2004, Mr Ellis began legal proceedings against three defendants:

- the Archbishop of Sydney at the time of the proceedings – Cardinal George Pell
- the Trustees of the Roman Catholic Church for the Archdiocese of Sydney
- Father Duggan.³⁶⁴

Father Duggan died soon after the proceedings were commenced. Mr Ellis did not continue the proceedings against his estate.³⁶⁵

The trustees were incorporated under New South Wales legislation: the *Roman Catholic Church Trust Property Act 1936* (NSW).

In *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*,³⁶⁶ the Court of Appeal of the Supreme Court of New South Wales held that the trustees could not be vicariously liable for the abuse of Mr Ellis because:

- the legislation establishing the trustees as a corporate entity only gave the trustees a limited role in holding property, with no responsibility for ecclesiastical, liturgical and pastoral activities³⁶⁷
- as a matter of fact the trustees played no role in the appointment or oversight of priests at the relevant times.³⁶⁸

The court held that the cardinal could not be legally liable for the abuse of Mr Ellis because he was not Archbishop of Sydney at the time the abuse occurred and he could not inherit any possible legal liability of his predecessor.³⁶⁹

In case study 8, we heard evidence from representatives of the Catholic Church that the estate of Archbishop James Freeman, who was Archbishop of Sydney at the time of the abuse, was a possible appropriate defendant that Mr Ellis could have sued.³⁷⁰ However, evidence was given that the Archdiocese of Sydney followed its legal advice and did not provide information to Mr Ellis's lawyers as to who the proper defendant in the proceedings should have been.³⁷¹

In case study 11, we heard evidence of the difficulties that the solicitors for the claimants faced in identifying the proper defendants to claims for abuse in the Christian Brothers institutions in Western Australia. The abuse was alleged to have occurred in the 1950s, 1960s and 1970s. The legal proceedings were commenced in 1993.³⁷²

The Court of Appeal of the Supreme Court of New South Wales held that the Archbishop of Perth could not be liable for the abuse, either as a natural person or as the incorporated corporation sole.³⁷³ The court held that there could not be any successor liability between the previous archbishop at the time the abuse occurred and the current archbishop at the time of the litigation; and that the corporation sole was responsible only for holding land and not for operating the institutions.³⁷⁴ The possible liability of the Trustees of the Christian Brothers, which was incorporated under New South Wales legislation, was not determined by a court and the proceedings settled in 1996.³⁷⁵

In case study 13, we heard evidence that the Marist Brothers would use the 'Ellis judgment' to defend any litigation brought against the Trustees of the Marist Brothers, which was incorporated under New South Wales legislation.³⁷⁶

In case study 3, a number of claimants made claims against the Anglican Diocese of Grafton for abuse at the North Coast Children's Home. We heard evidence that the diocese's lawyers informed the claimants' lawyers that the Anglican Diocese of Grafton was not a separate legal entity and they sought the claimants' lawyers' advice as to 'which individuals or office bearers you would seek to hold liable for any alleged misconduct'.³⁷⁷ We also heard evidence that the management committee that ran the North Coast Children's Home at the time of the alleged abuse was not incorporated.³⁷⁸

The Corporate Trustees of the Diocese of Grafton was incorporated under New South Wales legislation – the *Anglican Church of Australia Trust Property Act 1917 (NSW)* – for the purposes of holding property for the Anglican Church in the Diocese of Grafton.³⁷⁹ Litigation against them could be expected to have raised the same difficulties as Mr Ellis experienced in trying to sue the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, discussed above. Most of the claims were settled in 2007. The issue of a proper defendant was not considered by any court.³⁸⁰

Many of the submissions we received responding to *Issues paper 5: Civil litigation* expressed concern that the absence of legal personality of unincorporated associations, particularly faith-based institutions, made it impossible to sue those associations.

We have not been given examples of difficulties in suing because of a lack of an appropriate corporate defendant in situations involving unincorporated associations other than faith-based institutions.

It may be that the issue has arisen in relation to faith-based institutions for reasons such as the following:

- Faith-based institutions may appear to be, and may conduct themselves as if they are, legal entities – for example, by speaking in the name of ‘the church’.
- The institutions still exist decades after the alleged abuse, when a survivor may wish to sue.
- The institutions may have, or appear to have, significant assets.
- The perpetrator may well have taken a vow of poverty and given their assets to ‘the church’, making them unsuitable as a defendant if there will be no assets from which they could meet any judgment against them.

In these circumstances, it may not be surprising that survivors do not understand why they cannot sue ‘the church’ or any other incorporated entity associated with it.

There is no doubt that the same problem could arise in relation to *any* unincorporated body, but a lack of incorporation may not be the most significant problem facing a potential claimant. In particular, a lack of assets may be a far greater hurdle for any claimant than identifying who to name as a defendant.

If abuse occurs in the context of small, temporary, informal unincorporated associations of natural persons who come together around a shared interest in perhaps a sporting or cultural activity, a survivor’s best, and sometimes only, prospects for civil litigation may well be the perpetrator.

Options for reform

It seems reasonably clear that the difficulties for survivors in identifying a correct defendant when they are dealing with unincorporated religious bodies should be addressed. To the extent that religious bodies receive the benefit of succession in relation to property ownership under state and territory legislation, it is not unreasonable to expect that they

should also bear the burden of succession in terms of meeting claims for child sexual abuse against the relevant religious groups or personnel.

Given that the benefit of succession in relation to property ownership is conferred on a number of religions and religious bodies by state and territory legislation, it may be appropriate for that state and territory legislation to be amended to provide that any liability of the religion or religious body that the property trust is associated with for institutional child sexual abuse can be met from the assets of the trust and that the trust is a proper defendant to any litigation involving claims of child sexual abuse for which the religion or religious body is alleged to be liable.

It may be that some religions or denominations might prefer to solve the problem in different ways. For example, the state or territory legislation could:

- provide for an entity to be established in the nature of a ‘nominal defendant’ that is to be a proper defendant to any claims of child sexual abuse that the religion or any of its religious bodies is alleged to be liable for
- require that that entity meet any claims, including from the assets of the relevant property trusts if required.

The necessary outcome of any approach would seem to be that survivors should be able to sue a readily identifiable church entity that has the financial capacity to meet claims of institutional child sexual abuse.

It may also be appropriate that states and territories should ensure that their policies require them not to enact similar legislation to give otherwise unincorporated bodies the benefit of succession unless they are satisfied that adequate provision is made to ensure that the assets associated with the unincorporated bodies will remain available for meeting any damages awards, at least for child sexual abuse.

There is a further question as to whether it is necessary to go further than religious bodies that have the benefit of state or territory legislation.

Many of the submissions we received to *Issues paper 5: Civil litigation* supported the relevant recommendation of the Parliament of Victoria Family and Community Development Committee in its Betrayal of Trust report. The committee relevantly recommended:

That the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements.³⁸¹

Incorporation does not overcome the difficulties that might arise for a survivor in seeking to commence civil litigation from the passage of time or the absence of assets. As noted above, incorporation does not guarantee that an entity will survive for any particular period of time or that an entity will have any assets, including relevant insurance, to meet the claim. A requirement for incorporation and insurance, particularly for small, temporary, informal unincorporated associations, may deter people from forming such associations, potentially losing the various sporting, cultural and other activities they provide in the community.

It might be reasonable for state and territory governments to require that certain children's services that are authorised or funded by the government be provided only by incorporated entities and that those entities be insured. For example, non-government schools, out-of-home care services and out-of-school-hours care services are generally authorised or funded by state and territory governments.

10.5 Model litigant approaches

Introduction

There is a general common law obligation on governments to act as 'model litigants'. Australian courts have long recognised that governments are expected to act as model litigants.³⁸²

The Australian Government and some state and territory governments have adopted written model litigant policies. Other state and territory governments have not adopted written policies but are subject to the common law obligation.

Some states and territories have gone further in adopting principles for how they will handle civil litigation for child sexual abuse claims.

Particularly through some of our case studies, we have heard evidence of approaches and actions taken by governments and non-government institutions to defend civil litigation involving child sexual abuse allegations. We have heard evidence from a number of witnesses that they now, at the time of giving evidence, consider that the litigation should have been handled differently. We have heard such evidence from lawyers who acted for defendants in the litigation and from representatives of the defendants.

Governments and non-government institutions might learn from these experiences and adopt different approaches to responding to civil litigation involving allegations of child sexual abuse.

Existing policies

The Australian Government and some state and territory governments have adopted written model litigant policies.

The *Legal Services Directions 2005* are a set of legally binding rules that relate to the performance and conduct of Australian Government legal work.³⁸³ They include at Appendix B a 'model litigant policy', which applies to all Australian Government agencies. They are made under section 55ZF of the *Judiciary Act 1903* (Cth) and they are enforceable by the Attorney-General.

In New South Wales, the model litigant policy is set out in government policy guidelines that apply to civil claims and civil litigation involving the state or its agencies.³⁸⁴ The policy states that it 'has been endorsed by Cabinet to assist in maintaining proper standards in litigation

and the provision of legal services in NSW'. The responsibility for ensuring compliance with the policy is primarily the responsibility of the chief executive of each agency.

In Victoria, the model litigant policy is set out in government policy guidelines that apply to the provision of legal services in matters involving government agencies.³⁸⁵ The policy is based on the Australian Government's *Legal Services Directions 2005*.

In Queensland, the model litigant policy is set out in government principles that apply to the provision of legal services in matters involving government agencies.³⁸⁶ The principles were issued at the direction of Cabinet. They set out principles of fairness, principles of firmness, and principles on alternative dispute resolution.

In the Australian Capital Territory, the Attorney-General must issue model litigant guidelines under the *Law Officers Act 2011 (ACT)*.³⁸⁷ The model litigant guidelines are set out in the *Law Officer (Model Litigant) Guidelines 2010 (ACT)*. The guidelines apply to the ACT and its agencies in civil claims and litigation.

Each of the model litigant policies requires the relevant government and its agencies to act as a model litigant. The obligations are expressed in slightly different terms. The New South Wales policy is summarised on the relevant New South Wales Government website in the following terms:

The Model Litigant Policy is designed to provide guidelines for best practice for government agencies in civil litigation matters. It is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation. Under the policy, government agencies are required to:

- Deal with claims promptly
- Not take advantage of a claimant who lacks the resources to litigate a legitimate claim
- Pay legitimate claims
- Avoid litigation
- Keep costs to a minimum, and
- Apologise where the State has acted inappropriately.³⁸⁸

The policies generally do not explicitly require governments or government agencies to make any particular concessions in litigation or not to raise available defences such as limitation periods.

Some state governments have gone further than their model litigant policies and have adopted principles or approaches specifically to do with responding to claims involving child sexual abuse.

In Victoria, the Department of Human Services and the Department of Education and Early Childhood Development have adopted the *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse*.³⁸⁹ The principles are 'to inform their

responses to civil claims involving allegations of child sexual abuse in connection with State institutions'. They are stated to be 'intended to complement the Model Litigant Guidelines as they apply in the specific context of responding to civil child sexual abuse claims'.

The principles are as follows:

- a. Departments should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.
- b. Departments should ordinarily not rely on a defence that the limitation period has expired, either formally (for example in pleadings) or informally (for example in the course of settlement negotiations). If a limitation defence is relied on, careful consideration should be given as to whether it is appropriate to oppose an application for extension of the relevant period.
- c. Departments should ordinarily not require confidentiality clauses in the terms of settlement.
- d. Departments should ordinarily pursue a contribution to any settlement amount from alleged abusers.
- e. Departments should consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.
- f. Departments should develop pastoral letters that acknowledge claims and provide information about services and supports available to claimants.
- g. Departments should offer a written apology in all cases where they consider it is appropriate. Ordinarily it will be appropriate for the apology to be signed by a senior executive officer, however this will depend on the circumstances.³⁹⁰

The principles are said to be:

designed to ensure that [the departments] respond appropriately to civil child sexual abuse claims in a manner that:

- a. minimises potential further trauma to victims/survivors;
- b. is not unnecessarily adversarial;
- c. is consistent between claimants in similar circumstances; and
- d. responds to the different circumstances of different claims brought against the State.³⁹¹

On 3 November 2014, the New South Wales Government announced that it would introduce 18 Guiding Principles to guide how its agencies respond to civil claims for child sexual abuse.³⁹² The principles are said to 'promote cultural change across NSW Government agencies'.³⁹³ They are also said to complement the model litigant policy.

The principles are detailed but include the following guidance for agencies:

- Be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.
- Make available training for lawyers who deal with child sexual assault matters.
- Consider resolving matters without a formal statement of claim.
- Consider survivors' requests for alternative forms of acknowledgment or redress in addition to monetary claims.
- Provide early information about available services and supports.
- Facilitate access to free counselling and access to records.
- Consider paying legitimate claims without litigation and facilitating early settlement and entering into negotiations.
- Generally do not rely on a statutory limitation period as a defence.
- Seek quick resolution of claims.³⁹⁴

Following the report of the taskforce to examine redress established under recommendation 40 of the report of the Commission of Inquiry into Children in State Care, the South Australian Government announced that common law claims arising from sexual abuse in state care would be litigated compassionately or that survivors could apply for ex gratia payments pursuant to the *Victims of Crime Act 2001* (SA) as an alternative to litigation.³⁹⁵ The then Attorney-General said that the South Australian Government would look sympathetically at an application for an extension of time where there was no insurmountable prejudice to the state.³⁹⁶

In its submission to *Issues paper 5: Civil litigation*, the South Australian Government provided information on how it had responded to the claims it had received, including following the Commission of Inquiry's report. It stated:

The majority of these legal proceedings have resolved, principally through the payment of damages under a settlement reached between the plaintiff and the State ... The State has taken an approach which has encouraged the settlement of claims, and this is an important reason why no matter so far has proceeded to trial.³⁹⁷

The South Australian Government also stated it had received a number of claims where proceedings had not been issued. It said that most of these had been resolved by way of settlement by the payment of damages, by the payment of ex gratia compensation under the *Victims of Crime Act 2001* (SA) or by the claim not proceeding.³⁹⁸

What we have heard

It is not surprising that we have heard from many survivors, survivor advocacy and support groups and lawyers about the difficulties survivors have faced in pursuing civil litigation. These have included difficulties arising from defendants raising limitation issues and the time and costs of dealing with preliminary issues without a hearing on the merits of the claim, as discussed above, and other issues such as defendants declining to mediate or enter into settlement discussions.

What is perhaps more surprising is the evidence we have heard from defendants and their lawyers in a number of our case studies reflecting on the approaches they have taken to defending civil litigation involving child sexual abuse allegations. We have heard evidence from a number of defendants and defendants' lawyers to the effect that they now, at the time of giving evidence, consider that the litigation should have been handled differently.

For example, in case study 8 on Mr John Ellis's civil litigation, Cardinal Pell gave the following evidence:

The legal battle was hard fought, perhaps too well fought by our legal representatives who won a significant legal victory. I would now say, looking back, that these legal measures, although effective, were disproportionate to the objective and to the psychological state of Mr Ellis as I now better understand it.³⁹⁹

Cardinal Pell also gave the following evidence:

With any litigation, my approach overall is always to retain competent lawyers and to expect that they will conduct the litigation in an appropriate, professional manner, relying on their expertise in that field. I do not consider myself to have the experience or the knowledge to make decisions about the day-to-day running of legal claims.

I have reflected on the course of the litigation and there were several steps taken in the course of the litigation which, as a priest, now cause me some concern.⁴⁰⁰

Cardinal Pell gave the following evidence on legal advice and mediation:

Q. Lawyers act on instructions, don't they?

A. Yes, they do, but generally they advise what the instructions should be.

Q. Did you feel unable to take any action that was not consistent with what you were advised you should do?

A. Not really. I'm not suggesting for a minute that our lawyers did anything contrary to instructions. In retrospect, our surveillance and our instructions would be much more extensive.

THE CHAIR: Q. Cardinal, you may not have this experience, but is it within your knowledge that many executives of major corporations who became involved in litigation – that is, their companies do – see a need to ensure that the litigation doesn't have the effect of disproportionately breaking the relationship between that company and the company they're litigating with? Do you understand that?

A. I do understand what you're saying. We now have our in-house lawyer who, if we're involved in any court cases, sits in on all the court cases precisely to avoid the sort of mess we got into.

Q. What the executives of those companies do, of course, is agree to mediate and try to sort out their problems in a mediation rather than let it become a complete contest in the court?

A. And we usually did that, and I very much regret we didn't try to do it more than we did in this case.

Q. You rejected the prospect of mediation here, didn't you?

A. I did.

Q. Why?

A. Because we were so advised.

Q. But, you see, what I'm saying to you is that executives of major companies, notwithstanding the advice they may get that they're going to win, nevertheless see a need to ensure that there's an ongoing relationship and so will mediate and settle. Do you understand that?

A. I certainly do. I'm not the executive of a major company. I'm not – I haven't regularly been involved in this. You might say that there was more of an onus on me to seek mediation than perhaps in a company, and I would have to accept that.⁴⁰¹

Mr Daniel Casey gave the following evidence as to why he joined in saying that there should be no counteroffer to Mr Ellis's offer to settle:

A. We were advised that we had very strong prospects, and we accepted that advice.

Q. So you thought the proper course was to say nothing, offer him nothing?

A. Your Honour, looking back on this, I think that was a mistake. The extent to which I could have influenced things back then – I wish I had done more. Certainly today things would proceed on a very different path.⁴⁰²

In case study 11 concerning the Christian Brothers institutions in Western Australia:

- Brother Shanahan gave evidence that, if the litigation were to occur now, the Christian Brothers' response would be different – there would be more vigorous early efforts to try to find a non-litigious outcome and they would try to reach a settlement earlier⁴⁰³
- Brother Shanahan gave evidence that he now thought the Christian Brothers had got the settlement wrong in terms of the amount and that it should have been a more liberal settlement⁴⁰⁴
- Brother McDonald gave evidence that he now considers that the \$5 million settlement was inadequate⁴⁰⁵
- Brother Shanahan gave evidence of the Christian Brothers' fear of the future waves of litigation, concern about the cost of litigation to the Christian Brothers and concern to maintain resources to fund the ongoing work of the Christian Brothers⁴⁰⁶
- Brother McDonald gave evidence of his concern for the viability and future of Christian Brothers schools⁴⁰⁷

- Brother Shanahan gave evidence that there were moneys available within the Christian Brothers Order to contribute to a fund and expressed regret that, when they did settle, they were looking at their own interests more than the gravity of the offences against the claimants.⁴⁰⁸

In case study 19 concerning Bethcar Children's Home, the Secretary of the Department of Family and Community Services, Mr Michael Coutts-Trotter, gave evidence that the department breached a number of clauses of the model litigant policy in its conduct of the litigation commenced by former residents of the children's home. The breaches involved:

- issuing the requests for particulars⁴⁰⁹
- attempting to require the claimants to separately file a statement of claim and to have each claimant separately run their case⁴¹⁰
- requiring the plaintiffs to prove that the sexual abuse alleged in the statements of claim occurred⁴¹¹
- not agreeing to attend a mediation by mid-2010⁴¹²
- attempting to run an application for a permanent stay application on evidence the department knew omitted matters relevant to the issues in dispute⁴¹³
- not offering an apology by mid-2010.⁴¹⁴

The Crown Solicitor, Mr Ian Knight, also gave evidence in case study 19 concerning Bethcar Children's Home that the Crown Solicitor's Office breached a number of clauses of the model litigant policy in its conduct of the litigation. The breaches involved:

- asking the plaintiffs to provide particulars of matters that were in the department's knowledge⁴¹⁵
- requiring the plaintiffs to prove that the sexual abuse alleged in the statements of claim occurred⁴¹⁶
- not recommending that the department explore the possibility of attending a mediation by mid-2010.⁴¹⁷

Options for reform

The Productivity Commission considered model litigant rules in its recent inquiry into access to justice arrangements. It found that evidence on the effectiveness of model litigant rules is mixed. It said:

While good in theory, in practice it appears that they are not always enforced.⁴¹⁸

The Productivity Commission recommended that governments, their agencies and legal representatives should be subject to model litigant obligations and that compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met.⁴¹⁹

The Productivity Commission also considered whether model litigant rules should apply to non-government litigants where there are power imbalances between the parties. It concluded as follows:

The Commission's view is that the practical difficulty in establishing whether there is a situation of 'resource disparity', coupled with the special role of government, mean that model litigant rules should not be extended to private parties. While there are compelling grounds for ensuring that resource disparities do not determine case outcomes, other duties on parties, such as overarching obligations, are better suited to tackling this issue.⁴²⁰

While there might be no harm in non-government institutions choosing to comply with model litigant principles in responding to civil claims for institutional child sexual abuse, these principles may not be sufficiently specific to help institutions, and their lawyers, to respond more appropriately to such claims.

Both governments and non-government institutions that receive civil claims for institutional child sexual abuse would benefit from adopting more specific guidelines for responding to claims for compensation in relation to allegations of child sexual abuse. Victoria's *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse* and the New South Wales Guiding Principles provide useful models to consider.

Such guidelines would be of assistance to institutions in instructing their external lawyers on the approach they wish to take to these claims and the principles that they wish their external legal advice to be based on. They could assist both institutions and their lawyers in avoiding unnecessarily adversarial approaches in favour of more cooperative and effective approaches. They might also assist those lawyers who do not understand the nature and impact of child sexual abuse to understand the more unusual features of such claims, such as delay.

Such guidelines might also usefully include a requirement that institutions and their lawyers assist claimants in identifying a proper defendant to the claim, as discussed above.

We welcome submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions on:

- the options for reforming limitation periods and whether any changes should apply retrospectively
- the options for reforming the duty of institutions and whether any changes should apply retrospectively
- how to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts
- whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed
- whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims
- whether any changes may have adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them.

Appendix A: Australian redress schemes

This is summary information about examples of current and former government and non-government redress schemes in Australia.

Defence Abuse Response Taskforce/Defence Abuse Reparation Scheme

Eligibility:	For persons who suffered sexual abuse, physical abuse, sexual harassment or workplace harassment and bullying; who had lodged a complaint about the alleged abuse with DLA Piper or the Taskforce by 31 May 2013; and who were employees of Defence at the time of the alleged abuse; where the alleged abuser was an employee of Defence; where there is a connection between the alleged abuse and the applicant's employment in Defence; and where the alleged abuse occurred before 11 April 2011. (To be eligible for a mismanagement payment, the applicant must also have made a complaint or report about the alleged abuse to Defence before 11 April 2011, regardless of when the mismanagement occurred or if it is continuing.)
Point of access:	Taskforce, by making a complaint
Process to verify:	Claimants complete an Application for Reparation Payment Form, including a Personal Account in a statutory declaration, and other documentation. Information from the claimant must be verified by statutory declaration, and proof of identity is also required. The Reparation Payments Assessor (Assessor) may seek additional information from the claimant, Defence and other Commonwealth agencies. The Assessor must be satisfied that a claim is within the scope of the Terms of Reference (type of abuse, date of abuse, claimant and abuser both Defence personnel) and 'plausible'.
Standard of proof:	Plausibility. The Assessor must be satisfied the person 'may have, plausibly, suffered abuse...'
Process to quantify:	The Assessor determines whether the person qualifies for any of the five categories of reparation payment, based on recommendations from the Taskforce's Reparation team.
Appeal rights:	Internal reconsideration process allows the claimant to provide new or additional material, particularly in relation to decisions that the claim is not within the Terms of Reference or is not plausible. If the Assessor makes a preliminary assessment that the claimant does not qualify for the maximum payment of \$50,000, claimants are given 28

	days to provide further information or comment before the final assessment is made.										
Previous accounts:	Claimants can rely on their previous accounts given to the DLA Piper review, provided they verify them by statutory declaration, or they can give a new account.										
Counselling:	The Defence Abuse Counselling Program is available to claimants once their matter has been assessed as within scope and plausible. The Program applies while the claimant's matter is before the Taskforce. There is one nominated provider. Generally, counselling will be face-to-face, but in some circumstances, only telephone or video link counselling will be available. There is provision for five counselling sessions, with an additional five sessions if required. More than 10 sessions may be considered, if required. If a claimant is already seeing a registered psychologist or accredited mental health social worker and would prefer to continue with him or her, the Taskforce may be able to fund some sessions. In exceptional circumstances, a claimant may be able to access the Counselling Program while their matter is still being assessed by the Taskforce. There are also other counselling services available to Defence and former Defence members and employees.										
Legal advice:	No funding is provided for legal advice.										
Releases:	There is no requirement for a deed of release or confidentiality agreement.										
Access to records:	No special provision.										
Monetary payments - rationale:	<p>A Reparation Payment is 'made in acknowledgement by the Australian Government including the Department of Defence (Defence) and the Australian Defence Force (ADF), that sexual or other abuse within Defence is wrong and should not have occurred. A Reparation Payment is an acknowledgement by Defence that:</p> <ul style="list-style-type: none"> • the abuse was wrong • the abuse can have a lasting and serious impact, and • mismanagement by Defence of verbal/written reports or complaints about abuse is unacceptable. <p>A Reparation Payment is not paid as compensation for any physical, psychological, emotional or financial injury, or loss or damage suffered by a person as a result of abuse.'</p>										
Monetary payments - amounts and categories:	<p>The scheme covers sexual abuse, physical abuse, sexual harassment and workplace harassment and bullying. A claimant's allegations are considered as a whole in making an assessment.</p> <p>There are five categories of Reparation Payment:</p> <table> <tr> <td>Category 1 Abuse:</td><td>\$5,000</td></tr> <tr> <td>Category 2 Abuse:</td><td>\$15,000</td></tr> <tr> <td>Category 3 Abuse:</td><td>\$30,000</td></tr> <tr> <td>Category 4 Abuse:</td><td>\$45,000</td></tr> <tr> <td>Category 5 Mismanagement by Defence:</td><td>\$5,000</td></tr> </table>	Category 1 Abuse:	\$5,000	Category 2 Abuse:	\$15,000	Category 3 Abuse:	\$30,000	Category 4 Abuse:	\$45,000	Category 5 Mismanagement by Defence:	\$5,000
Category 1 Abuse:	\$5,000										
Category 2 Abuse:	\$15,000										
Category 3 Abuse:	\$30,000										
Category 4 Abuse:	\$45,000										
Category 5 Mismanagement by Defence:	\$5,000										

The four Abuse categories allow for recognition of increasingly serious abuse, relative to other allegations of abuse, with Category 4 acknowledging the most serious forms of individual or collective abuse. A single incident of physical assault with no serious injury might fall in Category 1 or 2; a serious sexual assault such as a rape might fall within Category 4. The circumstances of individual cases can vary almost infinitely, and no criteria are prescribed to be applied in an absolute manner when assessing the seriousness of abuse.

Relevant factors could include:

- the nature and extent of the abuse;
- whether a single instance, or multiple instances, occurred on the same occasion;
- whether a single instance, or multiple instances, occurred on multiple occasions;
- the period of time over which the alleged abuse occurred;
- whether there was an individual perpetrator, or multiple perpetrators acting together; and/or
- whether the abuse occurred in the presence of peers, subordinates or other persons.

Redress WA (and WA Country High School Hostels ex gratia scheme)

Eligibility:	Redress WA was open to adults who, as children, were abused (including physical, sexual, emotional or psychological abuse or neglect) in State care before 1 March 2006. State care included facilities that were subsidised, monitored, registered or approved by the WA Government, including foster homes and other residential settings and institutions such as group homes, hostels or orphanages. Persons who had been resident in Country High School Hostels were eligible for Redress WA but some did not realise this, and so an additional scheme was later run for them.
Point of access:	Redress WA in the Department of Communities, by registering interest and, in due course, making an application.
Process to verify:	Application form considered, with certified proof of the applicant's identity. Redress WA sought departmental records to verify State care, but applicants were not to be disadvantaged if records could not be found to verify that they were in care and staff were instructed, within reason, to believe the applicant's claim if there was a valid reason why no record existed. Informal telephone conferences were conducted to ensure applicants had provided all the information they wished to provide. There was no 'right of reply' for any individual or organisation against whom abuse was alleged.
Standard of proof:	Described as balance of probabilities, but appears to have been closer to plausibility. The scheme guidelines state that the scheme 'is based on the principle that the applicant's statements will be acknowledged as their personal experience in State care unless there is evidence to the contrary.'

Process to quantify:	An assessor with Redress WA considered the application, relevant records and any medical reports and assessed the claim and payment level. Telephone conferences could be conducted with applicants, but were not required. Assessments were subject to approval by a Team Leader for level 1 and 2 abuse and the Independent Review Panel for level 3 and 4 abuse. The Independent Review Panel could include legal, social work, health and community knowledge and expertise. Any prior payment of compensation, including criminal injuries compensation, was deducted.
Appeal rights:	The quantum of the ex gratia payment could not be the subject of a complaint. Complaints could be made about errors of process or fact, and were subject to escalating reviews conducted by the Independent Review Panel, the Department of Communities, and the Ombudsman.
Previous accounts:	N/A.
Counselling:	A number of services were funded to provide assistance, including counselling, to applicants through the application and assessment process. Information was also provided to applicants about Medicare rebates for counselling.
Legal advice:	Independent legal advice to a value of \$1,000 was to have been funded when a deed of release was to have been required, but the requirement for a deed was removed when the maximum payment was reduced.
Releases:	Requirement for deed of release was removed when the maximum payment was reduced.
Access to records:	The scheme guidelines excluded any right to records from Redress WA (as opposed to applying under Freedom of Information laws to the agency that held the records). Apparently, however, over one-third of applicants were given their care records.
Monetary payments - rationale:	In announcing Redress WA, the then Minister said 'Money cannot make up for the abuse some people suffered in State care. However, the experience of abuse may have resulted in missed opportunities in life, together with emotional pain and suffering. It is appropriate therefore, that some payment is made available.'
Monetary payments - amounts and categories:	<p>Initially, ex gratia payments were set at up to \$10,000 if an applicant showed they experienced abuse while in State care, and up to \$80,000 where there was medical or psychological evidence of loss or injury as a result of the abuse. Fewer applications were received than expected, but the severity and impact of the abuse was higher than expected.</p> <p>Payment levels were then changed, with four levels of payment set to enable claims to be quantified and paid within the budget (which was increased by some \$27 million for additional ex gratia payments) as follows:</p> <p>\$45,000 - Level 4 – <u>Very Severe</u> abuse or neglect with ongoing symptoms and disabilities</p> <p>\$28,000 - Level 3 – <u>Severe</u> abuse or neglect with ongoing symptoms and disabilities</p>

\$13,000 - Level 2 – Serious abuse or neglect with some ongoing symptoms and disabilities

\$5,000 - Level 1 – Moderate abuse or neglect

An Assessment Matrix required the assessment of:

- the severity of abuse and/or neglect;
- compounding or ameliorating factors, including period of time in abusive care, age of child at first entry to the first abusive care placement, amount of contact with parents or extended family, and position or role of abuser in the placement or organisation;
- consequential harm, being the extent of injury, loss or harm resulting from the abuse or neglect, measured across physical harm, psychological/psychiatric harm, social harm and sexual impact;
- aggravating factors, including verbal abuse, racist acts, direct and indirect intimidation, humiliation etc.

Interim payments of up to \$10,000 could be made, and were deducted from any final payment.

Queensland ex gratia scheme

Eligibility:	Persons who experienced institutional abuse or neglect in detention or in a licensed government or non-government children's institution covered by the Forde Inquiry. That is, residential care only, not foster care and not adult institutions, and institutions providing care for children with disabilities or those suffering from acute or chronic health problems were also excluded. The applicant was required to have been released from care and to have turned 18 years of age on or before 31 December 1999.
Point of access:	Application to Redress Services in the Department of Communities, assistance in completing applications available at Lotus Place.
Process to verify:	All applicants were assessed for eligibility (in an institution covered by the Forde Inquiry, 18 years of age on or by 31 December 1999, and had experienced institutional abuse or neglect). Eligibility could be confirmed through a review of available records and documentary evidence of proof of identity. The application required a declaration that the information was true and correct. The assessment was an administrative assessment by Redress Services and Redress Services obtained available records.
Standard of proof:	<p>To be eligible at Level 1, the claimant must have indicated abuse or neglect at an eligible institution in the application form. There was no assessment of the plausibility of abuse or neglect for Level 1 payments (although verification procedures were carried out for proof of residency in an eligible institution and age requirements).</p> <p>For Level 2 payments, the assessment relied on summaries of descriptions of abuse and harm in the application form and in support documents. Stronger weighting was placed on the description of the abuse and immediate harm rather than on harm suffered in later life, in</p>

	recognition of the inability to test evidence and the difficulties in distinguishing between the credible and incredible.
Process to quantify:	Applications for Level 2 (i.e. higher) payments (having been determined as eligible for a Level 1 payment) were assessed on a case-by-case basis by a panel of experts, appointed by the Minister for Communities, against a set of guidelines. The panel of experts included personal injuries lawyers; psychologists, social workers and counsellors; an administrator with skills in project and financial management; and an indigenous representative with cultural and historical expertise. Applicants for Level 2 payments were required to provide more details about the abuse itself and/or the harm suffered and supporting information to assist the panel to determine their eligibility for the higher payments and the amount of the payment. A two-member panel considered each application, with a four-member panel to be convened if the two-member panel was unable to reach agreement.
Appeal rights:	Internal review of determination of ineligibility for Level 1, with administrative review available in the Supreme Court. No review of or appeal against determination of eligibility for or level of Level 2 payment.
Previous accounts:	No – application form had to be completed.
Counselling:	Reference was made to counselling being available through Aftercare Resource Centre, through Lotus Place.
Legal advice:	Independent legal advice to a set fee was funded for advice before signing the deed of release.
Releases:	Deed of release required before payment made.
Access to records:	Claimants were advised that records could be sought under FOI.
Monetary payments - rationale:	<p>The scheme completed the Queensland Government's response to recommendation 39 of the Forde Inquiry, which recommended: 'The Queensland Government and responsible religious authorities establish principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services.' Services were offered, and continue to be offered, through the Forde Foundation.</p> <p>The statement by the then Deputy Premier and relevant Minister referred to money never really being able to compensate for the harm suffered by some residents, and the hope that the scheme would offer some support and assistance and will help bring some closure to individuals and families. It also referred to the Government's decision to proceed with monetary payments instead of an alternative proposal based on a services access card because payments provide direct material assistance.</p> <p>The <i>Redress Scheme Internal Guidelines for the Assessment of Level 2 Applications</i> referred to the scheme not including economic loss or other losses of the kind compensated through personal injury proceedings. A Level 2 payment was not intended to represent full compensation or an award of damages.</p>

Monetary payments - amounts and categories:

Applicants for Level 1 payments (\$7,000) were assessed for eligibility (in an institution covered by the Forde Inquiry, 18 years of age on or by 31 December 1999, and had experienced institutional abuse or neglect) and, if eligible, offered the Level 1 payment.

Applicants for Level 2 payments (up to \$33,000, paid in addition to the Level 1 payment of \$7,000) were for the more serious cases of harm, including harm suffered at the time of the abuse or neglect and harm that existed later in life as a result of the abuse or neglect. Categories of harm were listed as physical injury, physical illness, psychiatric illness, psychological injury and loss or opportunity, with applicants able to include other types of harm.

Level 2 payments assessed by the panel of experts considering, among other matters, the nature and severity of abuse or neglect suffered while in institutional care; the nature and extent of harm suffered as a consequence of the abuse or neglect; length of time spent in institutional care; number of institutional placements and the period of time in which these placements occurred; age at entry into and exit from institutional care; and type and history of the institution in which the applicant was placed, including any information known about the treatment of residents in that institution.

The *Redress Scheme Internal Guidelines for the Assessment of Level 2 Applications* required greater weight to be placed on the abuse, neglect and harm suffered during the period of placement and less weight on the harm suffered in later life because applicants were considered better able to describe what happened and what they did or felt at the time that 'to divine the thread that such events have woven into the fabric of their often complex lives.'

The *Redress Scheme Internal Guidelines for the Assessment of Level 2 Applications* provided an Assessment Table for use in assessing Level 2 applications, with provision for seven types of harm, each with a weighting and a range (low, medium high) for the panel's assessment. Depending upon a final rating out of 100 across all types of harm, the claimant was allocated to a payment level. In summary, the assessment was as follows:

Type of harm	Weighting	% Range
Physical injury (including harm from Sexual Abuse and/or Neglect) – <i>During Placement</i>	0-20	Low 0-6% Medium 7-15% High 16-20%
Physical injury (including harm from Sexual Abuse and/or Neglect) – <i>Post Placement</i>	0-5	Low 0-1% Medium 2-3% High 4-5%
Physical illness – <i>During Placement</i>	0-5	Low 0-1% Medium 2-3%

		High 4-5%
Physical illness – <i>Post Placement</i>	0-5	Low 0-1% Medium 2-3% High 4-5%
Psychological injury/Psychiatric illness (including harm from Sexual Abuse, Systems Abuse and/or Neglect) – <i>During Placement</i>	0-34	Low 0-10% Medium 11-28% High 29-34%
Psychological injury/Psychiatric illness (including harm from Sexual Abuse, Systems Abuse and/or Neglect) – <i>Post Placement</i>	0-16	Low 0-4% Medium 5-12% High 13-16%
Loss of opportunity	0-15	Low 0-4% Medium 5-12% High 13-15%
Total	0-100%	

Once all Level 1 payments were finalised and all Level 2 applications were assessed, final apportionment of Level 2 payments was set as follows:

0-14%	No further payment	Level 1 payment only
15-24%	Very serious	\$6,000 (in addition to Level 1 payment)
25-39%	Severe	\$14,000 (in addition to Level 1 payment)
40-59%	Extreme	\$22,000 (in addition to Level 1 payment)
60-100%	Very extreme	\$33,000 (in addition to Level 1 payment)

Tasmanian Abuse in care ex gratia scheme

Eligibility:	Persons over 18 years of age who, as children, suffered abuse in State care. Abuse included sexual abuse, physical abuse and mental or emotional abuse.
Point of access:	Ombudsman, via a telephone hotline or by lodging a claim.
Process to verify:	Preliminary details of claims were recorded when initial contact with the Ombudsman's office was made. Claimants who appeared to meet the Review criteria were interviewed by two investigators from the Ombudsman's Child Abuse Review Team, who prepared a written

	<p>summary of the interview. Claimants were asked what outcomes they were seeking from their claim. Departmental files were analysed to verify that the claimant was in state care and to record any reported incidents of abuse. If departmental files could not be located, the claimant was invited to provide additional information to support their claim. There was no 'rigorous investigation' of individual claims (e.g. identifying and questioning witnesses) and the Ombudsman recognised that many claims were so old that there was little likelihood of obtaining sufficient corroborative evidence to prove allegations.</p> <p>The Ombudsman provided to the Department of Health and Human Services in respect of each claimant: details of their history while in state care; a summary of their interview; the Ombudsman's assessment of the strength of their claim; and recommendations to the Department for further action relating to individual reparation (but not ex gratia payments). The Ombudsman could also recommend that the Department make enquiries to corroborate a particular claim.</p> <p>When the scheme was extended to Phase 2, claimants were required to provide a statutory declaration in relation to the information they had given, consent to a police check and explain why they had delayed in claiming.</p>
Standard of proof:	Later descriptions of the scheme referred to balance of probabilities, but it appears to have been credibility or plausibility.
Process to quantify:	An independent assessor was appointed to assess claims and determine ex gratia payments. The first independent assessor was a QC and retired Crown prosecutor. The independent assessor offered claimants an opportunity for an interview with him before he determined their ex gratia payment.
Appeal rights:	Claimants were able to request a review of their assessment for an ex gratia payment, which was undertaken by the independent assessor.
Previous accounts:	N/A – the review and claims processes ran together.
Counselling:	Claimants were advised when they contacted the Ombudsman's office that they could seek counselling through the Department of Health and Human Services. For Rounds 3 and 4, three counselling sessions were funded for each claimant, with advice also given on obtaining counselling through the Medicare rebate scheme.
Legal advice:	For Rounds 3 and 4, \$300 per claimant was available for legal advice once claimants were informed of the outcome of their claim.
Releases:	Claimants were required to indemnify the state against claims arising from the claimant's abuse in care.
Access to records:	Guided access to the claimant's personal departmental file and assistance with locating 'lost' family members were included as outcomes that claimants might indicate they were seeking during their interview. These elements of individual reparation could be recommended to the Department by the Ombudsman, outside of the ex gratia payment process.

Monetary payments - rationale:	<p>The ex gratia payment was not compensation. Rather, it was a payment in recognition of the alienation claimants have felt, the feeling of being inferior and unworthy, their separation from society and community, support, schools and employers. The payment was seen as the final part of an attempt at a healing experience. It was a badge of re-acceptance as part of the community, a re-affirmation of belonging, and an attempt to undo a wrong.</p> <p>The then Premier said that the money was given 'in the spirit of a helping hand to enable these people to get on with their lives... We cannot change the events of the past but we can demonstrate that we are genuinely sorry and that we are willing to help these people move forwards.'</p>
Monetary payments - amounts and categories:	<p>Ex gratia payments of up to \$60,000, with the possibility for the independent assessor to recommend the payment of more than \$60,000 in exceptional circumstances for the consideration of the Premier and Cabinet. It was originally thought that many claims would be resolved by the Department of Health and Human Services through counselling, reimbursement of expenses and the giving of any apology, but it turned out that a payment was considered appropriate in all cases that were accepted as eligible.</p> <p>The independent assessor considered schemes in Ireland and Canada as possible guides to a monetary assessment, and looked at broad categories such as the severity and length of abuse; the medical consequences; the psycho-social consequences; the loss of life's opportunities; the possible need for future counselling and assistance; and future needs and problems. There were no formal categories or scales of payment. Later, guidelines were adopted, with \$5,000 increments in payment from \$5,000 to \$60,000 depending on type, severity and duration of abuse etc., although it appears that they were to be applied flexibly.</p> <p>Round 4 of the scheme (2011 to 2013) applied a cap of \$35,000, instead of \$60,000.</p> <p>For those who missed out on the ex gratia scheme, the Abuse in State Care Support Service makes available up to \$2,500 per person to pay for goods and services related to education, employment, counselling, personal development, family connection, medical and dental services.</p>

Towards Healing

Eligibility:	Where an alleged offender is a cleric, religious or another person appointed to a position of pastoral care by an agency of the Church, Church Authorities accept they have a responsibility to seek to bring healing to those who have been victims of abuse. Abuse includes physical, sexual and emotional abuse.
Point of access:	Written or verbal complaint to Church Authority or Director of Professional Standards.

Process to verify:	The Church Authority will seek a response from the accused in order to determine whether the facts of the case are significantly disputed. There does not need to be an assessment of the facts if the Church Authority is satisfied of the validity of the complaint. Where there is a significant dispute or uncertainty about the facts the Director shall have the matter investigated in accordance with the procedures set out in the protocol to the extent that it is possible to do so. The Director appoints two assessors, unless they consider one is sufficient in the circumstances. The Assessors are responsible for investigating the complaint, examining the areas of dispute and advising the Director of their findings. Where there is more than one Assessor, both should interview the complainant and the accused. A written or taped record is made of all interviews.
Standard of proof:	Balance of probabilities.
Process to quantify:	Financial reparation is negotiated through facilitation. The Church Authority and the victim will agree on a facilitator either from the approved panel or a qualified mediator approved by the Director who is suited by reason of training and experience to understand the needs of victims of abuse. No monetary limit is specified in the Towards Healing protocol. The Church Authority may seek such further information as it considers necessary to understand the needs of the victim, including a report from an independent professional concerning the impact of the abuse on the victim. This report is at the Church Authority's expense.
Appeal rights:	A review of the Towards Healing process, and/or the findings of the assessment, is available to the complainant, the accused and the Church Authority. The Church Authority bears all ordinary and reasonable expenses of the review.
Previous accounts:	No.
Counselling:	When a Church Authority is satisfied of the truth of the complaint the response may include the provision of counselling services or the payment of counselling services. Very few facilitated awards specify an amount for counselling. Typically, if counselling is provided, between five and ten sessions are included in the offer, and victims can approach the Church Authority to request additional sessions.
Legal advice:	The Church Authority will pay for the reasonable costs involved in obtaining legal advice on a deed of release, and may pay a contribution towards the reasonable costs of other professional advice or assistance that have been incurred in the process of reaching an agreement.
Releases:	The Church Authority does not require the victim to sign a deed of release unless the victim has had independent legal advice or has indicated in writing that he or she declines to seek legal advice.
Access to records:	No special provision.
Monetary payments - rationale:	Whenever it is established, either by admission or by proof, that abuse did in fact take place, the Church Authority shall listen to victims concerning their needs and ensure they are given such assistance as is demanded by justice and compassion. Responses may include the provision of an apology on behalf of the Church, the provision of

	counselling services or the payment of counselling costs. Financial assistance or reparation may also be paid to victims of a criminal offence or civil wrong, even though the Church is not legally liable.
Monetary payments - amounts and categories:	No monetary limits, or amounts and categories of payment, are specified in the Towards Healing protocol.

Melbourne Response

Eligibility:	People who have been abused sexually, physically or emotionally by priests, lay people and religious under the control of the Catholic Archbishop of Melbourne.
Point of access:	Telephone contact with the Office of the Independent Commissioner. Peter O'Callaghan QC and Jeffrey Gleeson SC are the Independent Commissioners.
Process to verify:	Independent Commissioner receives complaints and enquiries into allegations of sexual abuse by priest, lay people and religious who are or were under the auspices of the Catholic Archbishop of Melbourne. The complainant then attends a recorded interview with an Independent Commissioner who determines whether he is satisfied that the complaint is established on the basis of the evidence. If the Independent Commissioner finds that a complaint has been established, the complaint will be referred to the Compensation Panel which determines the amount of ex gratia payment to be offered to the complainant and recommends to the Archdiocese that that amount is paid. The Compensation Panel is intended to operate independently from the Archbishop and the Archdiocese. It is made up of a psychiatrist, a solicitor and a community representative. It is chaired by David Curtain QC. There is a 'Contested hearing' if the accused denies the abuse. Psychiatric assessment with Carelink's Consulting Psychiatrist.
Standard of proof:	Described by the Independent Commissioners as the test in Briginshaw.
Process to quantify:	The applicant meets with the Compensation Panel, which has before it the Independent Commissioner's report and also psychiatric reports prepared for the Panel by Carelink's Consulting Psychiatrist.
Appeal rights:	No appeal or review rights.
Previous accounts:	No.
Counselling:	Free counselling and professional support facilitated and funded by Carelink. Carelink refers clients to psychiatrists, psychologists and other health care providers. Carelink receives regular reports from treating therapists so that a client's treatment can be monitored.
Legal advice:	Generally not provided. Will be provided for a contested hearing if requested – if it is not requested it is not provided.
Releases:	Deed of release required to be signed before ex gratia payment is made.

Access to records:	No special provision.
Monetary payments - rationale:	The Melbourne Response is said to provide ex gratia compensation and support.
Monetary payments - amounts and categories:	Ex gratia payments capped at \$75,000 (previously \$50,000 and then \$55,000). Abuse involving penetration will always result in a maximum award of \$75,000.

Salvation Army – Eastern Territory

Eligibility:	<i>The Procedures for Complaints of Sexual and Other Abuse against Salvationists and Workers 1996</i> apply to 'sexual misconduct' by an 'officer or worker' against any person. Sexual misconduct includes any form of sexual behaviour involving a minor. Officer or worker includes any person who 'ministers' in the Salvation Army, or a person holding a position recognised in a corps, division or the territory, whether the person is lay, or a commissioned officer.
Point of access:	Contact is with an independent contact person or advocates. The independent contact person is to listen to the complainant, inform the complainant of their right to complain to government authorities, to seek legal advice and to make suggestions about the complainant's course of action, inform the complainant of the Salvation Army's procedure and assist them to prepare a statement of their abuse.
Process to verify:	A complainant is required to prepare a victim impact statement. The matter is then considered by the Personal Injuries Complaints Committee (PICC). Basic investigation of the claim will be undertaken. Salvation Army representatives will then arrange to meet with the victim to hear their story and provide an apology. Information obtained at the meeting with the victim and from the investigation will be presented to the PICC. PICC will then recommend an ex gratia payment, an apology and counselling, if considered appropriate.
Standard of proof:	'Basic fact checks' of the complainant's account.
Process to quantify:	PICC was established in 1997. Its members are either Salvation Army officers or members. PICC is responsible for dealing with complaints of sexual abuse and for determining ex gratia payments. PICC assesses the claim and usually recommends an ex gratia payment amount for approval by the Secretary for Personnel.
Appeal rights:	No clear appeal rights, however a complainant can ask for the PICC to reconsider their matter or offer. This process followed is not entirely clear.
Previous accounts:	N/A.
Counselling:	Counselling is offered as part of the response to the claim.
Legal advice:	No.
Releases:	A person is required to sign a deed of release in accepting an ex gratia payment.

Access to records:	No special provision.
Monetary payments - rationale:	'Restorative justice needs a tangible expression of regret so the Salvation Army makes ex gratia payments to people.'
Monetary payments - amounts and categories:	<p>The PICC uses a matrix to calculate ex-gratia payment amounts. This matrix is entitled <i>Guidelines for Assessment of Personal Injury Claims</i> and the current version was developed in 2010.</p> <p>The matrix requires an assessment of whether the applicant suffered:</p> <ul style="list-style-type: none"> • deprivation of liberty; • psychological/emotional abuse; • physical assault; or • cultural separation/discrimination. <p>The applicant qualifies for \$10,000 if one or two of these were suffered, and for \$15,000 if three or more were suffered.</p> <p>To this amount is added an amount based on age at time of entry into the home and length of stay, with the following options:</p> <ul style="list-style-type: none"> • aged 12 or above and stayed for less than one year – add \$5,000; • aged 12 or above and stayed for one to three years – add \$10,000; • aged 12 or above and stayed for over three years – add \$15,000; • aged under 12 and stayed for less than one year – add \$7,000; • aged under 12 and stayed for one to three years – add \$14,000; and • aged under 12 and stayed for over three years – add \$20,000. <p>To the new total amount is added additional amounts for any aggravated factors as follows:</p> <ul style="list-style-type: none"> • \$500 per day of isolation; • \$15,000 for indecent assault; • \$30,000 for sexual assault; • \$10,000 for profound impact; and • \$20,000 for personnel secretary's discretionary offer. <p>A further \$5,000 is then added for counselling.</p> <p>Amounts may be determined outside the matrix, however, with a substantial degree of discretion exercised in determining ex gratia payments.</p>

Appendix B: Overseas redress schemes

This is summary information about two overseas redress schemes.

Irish Residential Institutions Redress Scheme

Eligibility:	Persons who were resident in an institution included under the Act during their childhood, who were injured while so resident and the injury is consistent with any abuse alleged to have occurred while so resident. The Act includes a schedule of institutions, which can be added to by Ministerial order.
Point of access:	Residential Institutions Redress Board, by making an application.
Process to verify:	<p>Under the Residential Institutions Redress Act, the Board must make an award to a person who establishes proof of their identity, that they were a resident in an institution included under the Act during their childhood, and that they were injured while so resident and the injury is consistent with any abuse alleged to have occurred while so resident.</p> <p>The Board is appointed by the Minister, with a Chairperson and 10 ordinary members. The Board is independent in the performance of its duties. The Board obtains written information and reports from a variety of sources for each application, and notifies an applicant once it has received the documents. An application is heard in a sitting of at least two members of the Board. The Board hears evidence and submissions, and may request an applicant to provide oral evidence.</p> <p>The Board must take reasonable steps to inform any 'relevant person' (being a person named as carrying out the abuse and the manager of an institution named as the place where the abuse occurred) of an applicant being made. The Board will receive written evidence from the person and may allow the person to give oral evidence and to cross-examine the applicant or persons giving evidence for the applicant.</p>
Standard of proof:	The criteria must be established to the satisfaction of the Board. The Board can require evidence to be given on oath or affirmation. The Act provides that the making of an award to an applicant does not constitute a finding of fact relating to fault or negligence on the part of a 'relevant person'.
Process to quantify:	Once the Board makes a preliminary decision that an applicant is entitled to an award, persons with medical and related expertise who are appointed by the Board prepare a report on the injuries received by the applicant. These persons are required to consider the applicant's medical reports and evidence provided by the applicant and his or her medical advisers, and may carry out an assessment of the applicant, including

	interviewing the applicant and his or her medical advisers. The Board, when determining an award, must have regard to evidence from any hearing, the regulations setting out the weighting of factors and bands of payments, and the medical and related advisers' report. The Board may hear oral evidence from the applicant and his or her medical or other advisers relating to the Board's medical and related advisers' report.
Appeal rights:	A Review Committee, appointed by the Minister and independent in the exercise of its functions, reviews disputed awards, and may require further evidence to be given.
Previous accounts:	No. Persons who have already received damages or a settlement in respect of the abuse cannot claim. Where a court has determined what could be a claim (other than on interlocutory matters or for the limitation period), the person cannot claim.
Counselling:	The Board advised applicants that an award would include an amount for the expense of past and future reasonable medical treatment (including psychiatric treatment) for the injury resulting from the abuse. Separately, a National Counselling Service was established to provide counselling and support services for any adult who had suffered abuse in childhood.
Legal advice:	The Board pays successful applicants who accept an award a reasonable amount for expenses occurred in preparation and presentation of their application. To the end of 2012, the average costs and expenses paid to applicants' solicitors, including payments for medical reports, were €11,708 per application, or some 18.6% of the average award.
Releases:	A release is required if an award is accepted. Claimants have one month in which to decide whether or not to accept an award and give a release. There is also statutory protection under the Act to protect the State and public bodies for actions and claims for indemnity and contribution arising out of the same or substantially the same acts complained of in an application.
Access to records:	No special provision, although the formality and legalistic procedures of the Board meant that the applicant's legal representatives would receive copies of the documents and reports obtained by the Board.
Monetary payments - rationale:	<p>Under the Act, the Minister appointed a committee with medical and legal expertise to report on the amounts of awards for categories and abuse and how they were to be assessed. In its report, <i>Towards Redress and Recovery</i>, the committee made the following points of relevance to the rationale for the monetary payments:</p> <ul style="list-style-type: none"> • redress in the form of the monetary payment is, and is intended to be, only a part of the State's response to institutional child sexual abuse, following the public apology and a broad program of measures to meet the needs of those who had been abused and to prevent such abuse from occurring in the future; • direct financial assistance can perform two vital functions. 'It is unquestionably true that no amount of money can 'compensate' for a body which has been battered and a mind which has been

shattered; but the award of appropriate financial redress can at least provide some tangible recognition of the seriousness of the hurt and injury which has been caused to the victims of institutional child abuse. Secondly, suitable financial assistance may allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily attainable.' Some more elderly survivors want to provide their dependants with material benefits as a form of 'compensation' for the difficulties they underwent as a result of the abuse suffered by their parent(s);

- a system of guidelines or weightings is desirable for a degree of consistency and to help speed up the process of determining individual cases and making the amount of redress more predictable, even if the guidelines are arbitrary to some extent; and
- the best guidance for amounts was obtained by referring to the level of awards made by Irish courts for pain and suffering and loss of amenities arising from serious personal injury.

Monetary payments - amounts and categories:

The weighting scale for evaluation of the severity of abuse and consequential injury recommended by the Committee and adopted by regulation was as follows:

Constitutive elements of redress	Severity of abuse	Severity of injury resulting from abuse		
		Medically verified physical/psychiatric illness	Psycho-social sequelae	Loss of opportunity
Weighting	1-25	1-30	1-30	1-15

If the weighting was 100 and the case was considered an exceptional case, an award could be made in excess of €300,000. Also, 'aggravated damages' of up to 20% of the award could be ordered.

In each case, the award is to include an additional amount for reasonable past medical expenses for the effects of the injury. An award could also include an additional amount for reasonable future medical expenses, capped at 10% of the award determined by the weightings (with any additional amount for an exceptional case included). In assessing the severity of the injury, the Board could take into account the likelihood that the necessary treatment would have an ameliorative effect on the condition of the applicant in the future.

Interim awards of up to €10,000 could be made, to be deducted from any final award. Awards could also be paid by instalment on the application of the applicant, if the Board was of the opinion that the applicant is incapable of managing the money.

As at 17 December 2014, the average award was €62,237 and the largest award was €300,500. The breakdown of awards by Band was: 36.3% - Band 1; 48.3% - Band II; 13.3% - Band III; 1.8% - Band IV; and 0.3% - Band V.

Grandview Agreement – Ontario, Canada

Eligibility:	All former residents of the Grandview Training School for Girls and its predecessor, the Ontario Training School for Girls were eligible. Eligibility was not limited to those who suffered abuse and/or mistreatment at the institution.
Point of access:	Completion of a brief application form which was assessed by a team seconded from the Criminal Injuries Compensation Board.
Process to verify:	Initial investigation process to ensure applicant had attended institutions. Six independent female adjudicators were appointed to hear and assess the claims lodged. Oral hearing was held for each applicant. Hearings were designed to be informal and non-confrontational. Adjudicators relied on the written application and any supporting documentation, the oral evidence of the applicant, the Crown Ward file and any material supplied by the initial investigators
Standard of proof:	Balance of probabilities
Process to quantify:	Compensation was determined via a matrix divided into four tiers ranging from CAD\$3000 for mistreatment up to CAD\$60,000 for repeated serious sexual abuse. The matrix was designed to reflect the severity and chronicity of the harm/injury.
Appeal rights:	The adjudicators established a system in which another adjudicator would review decisions, to ensure not only consistency in awards but also clarity in expression and whether there was a need for greater elaboration. The final decision remained with the adjudicator who heard the case.
Previous accounts:	N/A.
Counselling:	Individual benefits included access to long term therapy/counselling.
Legal advice:	Before lodging an application victims were required to seek independent legal advice. Legal representation at hearings was allowed although few women chose to be represented.
Releases:	On submitting application claimants were required to sign a release stating that they would not be able to commence any civil action against the Government concerning Grandview however it did not limit rights to pursue criminal or civil claims against perpetrators.
Access to records:	N/A.
Monetary payments - rationale:	The agreement was developed with a view to helping each individual woman to move towards healing. It was about the impact of the act of violence and abuse rather than simply quantifying the act itself. The agreement is based on a recognition that society has a direct responsibility to provide the support necessary to facilitate the healing

	process of survivors of sexual and institutionalized abuse particularly when such abuse arises in the context of an institution housing children.
Monetary payments - amounts and categories:	Benefits included financial compensation, financial advice services, education and training assistance, counselling / therapy and an individual apology. Individual benefits ranged from monetary payments CAD\$3,000 to CAD\$60,000, with an average payment of just under CAD\$40,000. Various extra amounts were available for exceptional medical or dental costs, counselling, education or vocational training and contingencies. There were also group benefits of a crisis line, money for removal of self-inflicted tattoos and scars, acknowledgements, and research initiatives.

The Grandview Agreement is discussed in detail by Reg Graycar and Jane Wangmann in 'Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in "alternative" dispute resolution', Sydney Law School Research Paper No 07/50 (July 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001148.

Appendix C: Claims data notices

This is summary information about the notices or summonses the Royal Commission issued to obtain data for the claims data analysis.

Notice / Summons ID	Recipient	Date of Issue
S-VIC-8	State of Victoria	13 September 2013
S-QLD-8	State of Queensland	13 September 2013
S-NSW-61	Salvation Army – Eastern Territory	13 September 2013
S-VIC-9	Catholic Church Insurance Ltd	13 September 2013
S-VIC-10	Salvation Army – Southern Territory	13 September 2013
C-NP-68	Australian Capital Territory	13 September 2013
C-NP-69	Northern Territory	13 September 2013
C-NP-70	South Australia	13 September 2013
C-NP-71	Tasmania	13 September 2013
C-NP-67	Commonwealth of Australia	24 September 2013
C-NP-72	State of Western Australia	24 September 2013
S-NSW-60	New South Wales	24 September 2013
C-NP-74	State of Western Australia	24 September 2013
S-VIC-11	State of Victoria	24 September 2013
S-NSW-86	New South Wales	17 October 2013
S-TAS-3	Tasmania	29 November 2013
S-QLD-61	Queensland	19 August 2014
C-NP-444	Northern Territory	19 August 2014
S-TAS-12	Tasmania	20 August 2014
C-NP-442	Australian Capital Territory	22 August 2014
C-NP-446	Western Australia	26 August 2014
S-VIC-107	Salvation Army Southern Territory	26 August 2014

Notice / Summons ID	Recipient	Date of Issue
C-NP-443	Commonwealth of Australia	28 August 2014
S-VIC-106	Catholic Church Insurance Ltd	1 September 2014
S-NSW-279	Salvation Army Eastern Territory	5 September 2014
S-VIC-109	Victoria	8 September 2014
C-NP-445	South Australia	22 September 2014
S-NSW-278	New South Wales	29 September 2014

Victims of Crime Compensation Notices

Notice / Summons ID	Recipient	Date of Issue
C-NP-358	South Australia	17 June 2014
C-NP-343	Australian Capital Territory	4 June 2014
S-NSW-239	New South Wales	4 June 2014
C-NP-338	Northern Territory	4 June 2014
S-QLD-47	Queensland	4 June 2014
S-TAS-9	Tasmania	4 June 2014
S-VIC-69	Victoria	5 June 2014
C-NP-340	Western Australia	4 June 2014
C-NSW-369	New South Wales	3 December 2014

Other Catholic Notices

Notice / Summons ID	Recipient	Date of Issue
S-NSW-32	Provincial of Christian Brothers	26 June 2013
S-NSW-33	National Committee of Professional Standards	26 June 2013
S-NSW-46	Provincial of Marist Brothers	2 August 2013
S-VIC-66	Archdiocese of Melbourne	11 June 2014
S-VIC-67	Catholic Church Insurance Ltd	11 June 2014
S-VIC-73	Archdiocese of Melbourne	11 June 2014

Notice / Summons ID	Recipient	Date of Issue
S-VIC-82	Mr Peter O'Callaghan QC, Independent Commissioner for the <i>Melbourne Response</i>	2 July 2014
S-VIC-95	Carelink	10 July 2014

Appendix D: Claims data

notices general wording

This is summary information about the wording of the notices or summonses the Royal Commission issued to obtain data for the claims data analysis.

The recipients of the claims data notices were required to complete a spreadsheet with the following data for each claim resolved in the period from 1 January 1995 to 30 June 2014:

1. The name of the claimant;
2. The name of the perpetrator(s) or alleged perpetrator(s) of the child sexual abuse contained in the claim;
3. The specific institution(s) at which the acts of child sexual abuse or alleged acts of child sexual abuse the subject of the claim ('the acts') occurred or the specific institution with which the perpetrator was associated;
4. The date(s) on which the acts occurred;
5. The age of the claimant at the time of the acts;
6. The date on which the claim was received whether or not it was in the period between 1 January 1995 to 31 December 2010;
7. The date on which the claim was resolved;
8. The name of the insurer, if any, involved in resolving the claim;
9. The manner in which each claim was resolved specifying whether by apology, compensation, settlement, mediation, court order, withdrawal, discontinuance, abandonment or rejection or other methods;
10. Where the claim was resolved in such a way as to include a payment of money, the amount of the payment;
11. Where the claim was resolved by agreement or settlement whether there was a term of any such agreement which required confidentiality of any sort;
12. Whether the institution had legal representation during some or all of the receipt, consideration, determination and/or resolution of the claim;
13. Whether the claimant had legal representation during some or all of the receipt, consideration, determination and/or resolution of the claim;
14. Whether there was a psychologist, a psychiatrist or other allied health professional involved in the resolution of the claim and if so the nature of the profession;

15. Whether the claimant was counselled by any person with respect to the claim at the behest of the entity the subject of the notice or its predecessor;
16. Whether the claim was investigated or assessed and if so, by whom;
17. Whether any specific procedural principle, guideline or policy was used to respond to the complaint and, if so, the name of the principle, guideline or policy;
18. Whether the claim was referred to any law enforcement agency or state welfare departments at any stage of the claim and, if so, which organisation and when.

Appendix E: Claims data methodology and assumptions

This is information about the methodology used and the assumptions made in the claims data analysis.

In order to analyse the claims data, the data from all states and territories, together with data from CCI and Salvation Army Eastern Territory and Southern Territory were incorporated into a single data set. The data were then cleaned with certain assumptions applying and duplicate claims identified. The analysis consisted of unweighted descriptive statistics. The data were unweighted because it was assumed that the Royal Commission has collected all claims resolved between 1 January 1995 and 30 June 2014 that were made against the included jurisdictions, rather than having a sample of these claims.

The following assumptions were made when the claims data were cleaned:

- Cases from Northern Territory Department of Children and Families were not included as they appeared to be investigations into whether notifications of sexual abuse were substantiated or not.
- Cases were dropped from the data set if the claimant was 18 or older at the time of abuse. Note that this may include cases where the claimant was listed as the parent of the child abused.
- If a range of age at time of abuse was given (rather than one age), the youngest of these ages was taken as the age at time of abuse and the case was included if the youngest age was below 18.
- Where indicated, the total amount paid to the claimant was included, rather than the amount paid to the claimant by the particular institution.
- If a claim appeared twice (or even three times) in the dataset from the same operator, with an identical victim and abuser name, institution name, years of abuse, claim received and claim resolved and amount of compensation received, only one of the claims was retained and a marker included in the dataset to identify this retained claim. Additionally, claims from different operators also have duplicated claims. If, across operators, two claims have the same victim name, abuser name, institution of abuse, and years of abuse, claim received and claim resolved, the two claims are tagged as duplicates, but both are included in this analysis. The 'original' is tagged as that with the highest compensation paid, if there is a difference.
- When the later notices were issued in August and September 2014, requesting information on claims resolved from 2011 to mid-2014, some recipients included claims that had been resolved prior to 2011 and were included in the earlier data. These claims were removed from the later data so that they were not counted twice.

- Claims from Tasmania were not included in the analysis as these claims were paid through a state redress program.

Appendix F: Government redress scheme notices

This is summary information about the notices or summonses the Royal Commission issued to obtain data in relation to government redress schemes.

Notice / Summons ID	Recipient	Date of Issue
S-TAS-8	Tasmania	4 June 2014
S-QLD-49	Queensland	4 June 2014
C-NP-275	Western Australia	11 April 2014
C-NP-339	Western Australia	4 June 2014
C-NP-358	South Australia	17 June 2014
C-NP-590	Western Australia	5 December 2014
C-NP-591	Western Australia	10 December 2014
C-NP-597	Barton Consultancy ⁴²¹	5 January 2014

Appendix G: Government redress scheme notices wording

This is summary information about the wording of the notices or summonses the Royal Commission issued to obtain data in relation to government redress schemes.

Queensland

The following data were requested in relation to the Queensland scheme:

- (a) number of applications for Level 1 payments;
- (b) number of Level 1 payments offered;
- (c) number and total value of Level 1 payments made;
- (d) number of applications for Level 2 payments;
- (e) number of Level 2 payments offered;
- (f) number, total value and average of Level 2 payments made;
- (g) details of any other benefits or services paid or provided, including type of benefit or service, total cost or value, number paid or provided and average cost or value;
- (h) number of complaints made about the Scheme; and
- (i) total administration costs for the Scheme.

Western Australia

The following data were requested in relation to the Western Australia Country Hostels scheme:

- (a) the total and average payments made to eligible applicants;
- (b) the number of maximum payments of \$45,000 made to eligible applicants; and
- (c) details of any payment amounts other than \$45,000 offered to eligible applicants and the number of payments made of each such amount.

The following data were requested in relation to the Redress WA scheme:

- (a) all documents comprising the samples provided to Barton Consultancy and referred to in paragraphs 16 to 18 of the 'Report to Redress WA concerning Payment Distribution Regimes' dated 10 December 2009;
- (b) all relevant records contained in any database of claims made under the Redress WA Guidelines held by the Department of Local Government and Communities; and
- (c) all electronic files pertaining to Redress WA, including but not limited to all files with prefix 09058 which are understood to be those related to the analysis and investigations undertaken by Barton Consulting Pty Ltd for the redress scheme.

South Australia

The following data were requested in relation to the South Australian scheme:

- (a) the number of applications made;
- (b) the number of compensation offers made;
- (c) the number of compensation offers accepted;
- (d) the total and average amount of compensation paid; and
- (e) in each case where the compensation offered was not accepted, the amount of compensation offered.

Tasmania

The following data were requested in relation to the Tasmanian Abuse in care review:

- (a) number of applications for payments in the round;
- (b) number of payments made in the round;
- (c) total and average value of payments made in the round;
- (d) details of any other benefits or services paid or provided in connection with the scheme, including type of benefit or service, total cost or value, number paid or provided and average cost or value;
- (e) number of complaints made about the scheme; and
- (f) total administration costs for the scheme.

The following data in relation to ex gratia payments made under the *Stolen Generations of Aboriginal Children Act 2006 (Tas)* were requested:

- (a) the total and average amounts paid to Category 3 applicants; an

(b) the total and average amounts paid to Category 1 and 2 applicants.

Appendix H: Case studies data extracts

This is information about evidence given in certain case studies relevant to data about claims and redress.

In a number of the public hearings, the Royal Commission heard evidence in relation to data on numbers of claims for redress and amounts paid to victims.

- Case study 5 (Salvation Army Eastern Territory)
- Case study 8 (Towards Healing)
- Case study 11 (Christian Brothers)
- Case study 16 (Melbourne Response)
- Case study 19 (Bethcar).

In case study 5, Commissioner Condon gave evidence that The Salvation Army Eastern Territory had, as at March 2014 received 157 claims which reference sexual abuse. He gave the following evidence:

The vast majority of those had been made in the previous 12 years. Only eight claims had been rejected after investigations. A total of 133 people have received ex gratia payments, some with counselling costs as well.

Apology, counselling offered and restitution, 133 persons; apology and counselling costs, 6 persons; lost contact/persons who did not pursue claim, 3; 8 rejected; 1 apology; and 3 active cases or unresolved cases.

It has been interesting, too, if I may say so, during the course of the Royal Commission, that there have been a number of people, survivors from our children's homes, who have appeared here and given testimony that had never come forward and were not known to us.⁴²²

In case study 8, evidence was heard in relation to data produced by the Archdiocese of Sydney, which indicate that 204 claims in relation to child sexual abuse had been received by the Sydney Archdiocese since Cardinal Pell's appointment as archbishop on 26 March 2001. Evidence was given that these claims were brought through Towards Healing, civil process or by other means. Just under \$8 million was paid in relation to claims by the archdiocese of its insurer in relation to child sexual assault since Cardinal Pell's appointment in March 2001. The highest amount of reparation paid by the Sydney Archdiocese in a Towards Healing process was \$795,000.⁴²³

In case study 11, evidence was heard from Brother Julian McDonald, a former Provincial of the Christian Brothers about compensation paid by the Christian Brothers to victims of abuse. Between 1 January 1980 and 1 June 2013, the Christian Brothers paid over \$20

million to complainants who alleged sexual abuse or a combination of sexual abuse, physical or psychological abuse. Of that, \$3.34 million was paid to complainants who had been at the four institutions the subject of case study 11 (Bindoon, Castledare, Clontarf and Tardun). Complainants who had been at the four institutions and who received a monetary settlement were paid an average of \$36,700 each.⁴²⁴

In case study 15, data relating to the Melbourne Response was described as follows:

351 complaints have been made to the Melbourne Response in that time. Of these complaints, 326 were upheld by an Independent Commissioner, nine were not upheld and 16 were defined as being undetermined. The undetermined claims are either dormant, ongoing, the complainant is deceased or the complainant is described as considering civil proceedings. Of the 326 complaints which have been upheld six were subsequently settled outside of the Melbourne Response.

80 per cent of the 326 complaints related to alleged incidents of child sexual abuse that occurred from 1950 to 1980 inclusive. Fourteen per cent related to alleged incidents that occurred from 1981 to 1990 inclusive, and two per cent relate to alleged incidents that occurred from 1991 to 2006 inclusive.

The remaining four per cent of those upheld related to incidents that occurred from 1937 to 1949. No upheld complaints relate to incidents of child sexual abuse that is reported to have occurred after 2006. The totals of complaints settled in and out of the Melbourne Response up to March 2014 the amount is \$2.934 million, which is about \$2.5 million in compensation and just over 375 in counselling.

The data provided to the Royal Commission reveals that from October 1996 to 31 March 2014 the average compensation payment amount paid is \$36,100, \$33,187 for those claims settled within the response, \$168,000 for those that began within the Melbourne Response but settled outside, and just short of \$300,000 for those outside the Melbourne Response.

Since the cap increased to \$75,000 the total amount of compensation paid to 65 victims of child sexual abuse has been \$3.3 million, the average compensation payment being just over \$50,000. 201 of the 301 claims paid within the Melbourne Response were completely or partially indemnified by the Catholic Church insurance company. The data provided indicated that a third of the claims reported to be paid within the Melbourne Response were paid in full by the Archdiocese and were not indemnified by CCI.

The total amount paid until the end of March 2014 in the Melbourne Response is \$9.723 million by way of ex gratia compensation. \$1.63 million has been paid by way of compensation outside the Melbourne Response, with a total of \$11.354 million. Carelink medical consultation, counselling and treatment costs amounted to \$7.385 million, and medical consultation, counselling and treatment costs paid by the Archdiocese and not costed to Carelink amounted to an additional \$150,000-odd.

The calculation as a result of all of those figures is that the total of ex gratia payments made under the Melbourne Response for child sexual abuse claims and

amounts paid for medical counselling and treatment amounted to \$17.259 million. The cost of administering the Melbourne Response was \$17.011 million. This includes Independent Commissioner costs of \$7.794 million, Compensation Panel costs of just under half a million and Carelink costs of \$3.766 million.⁴²⁵

Exhibit 19-0023 which was tendered in case study 19 sets out data received from NSW Department of Family and Community Services (FACS) regarding civil litigation involving the Department and its predecessor departments concerning child sexual abuse. The data revealed that during the period 1995 to 31 October 2014, 81 individual plaintiffs commenced claims against FACS regarding allegations of child sexual abuse.

Of the above 81 individual claims, 34 were settled (including 15 of the individual plaintiffs in the Bethcar proceedings).

FACS reported that all civil litigation claims brought against FACS which involve child sexual abuse are conducted by the Crown Solicitor's Office.⁴²⁶

Appendix I: Redress WA

administrative costs

This is information about the administrative costs of Redress WA, obtained from Annual Reports of the Western Australian Department for Communities.

Redress WA administrative costs

Measure	2009-10	2010-11	2011-12
Total cost ('000)	\$6,963	\$8,986	\$1,936
Number of claims actively worked on	4,038	5,846	4,625
Number of claims paid	613	3,303	1,409
Average administrative cost per claim	\$1,724	\$1,536	\$419

According to the Department for Communities Annual Report 2011-12, the 2011-12 average administrative cost per claim actual was 158 per cent more than the target due to more payments falling within 2011-12 than was anticipated, requiring more administrative support. Additionally, funding for counselling to claimants continued as long as the redress applications process was ongoing to ensure an appropriate level of assistance was available.⁴²⁷

The average cost was calculated by dividing the total cost by the number of claims actively worked on. This was to include the extensive work conducted by the Redress WA team on those claims that progressed to payment and to provide an accurate picture of administrative efficiency.⁴²⁸

In addition to annual administrative and support cost per active claim, the cumulative average per confirmed claim is reported as a supplement. This is to show how Redress progressed towards the overall average administrative cost per claim over the life of the project. The cumulative average was calculated by adding the 2009-10, 2010-11 and 2011-12 administrative and support costs and dividing by the total number of confirmed claims.

Cumulative average administration and support cost per claim

2009-10	2010-11	2011-12
\$1,177	\$2,695	\$3,024

The final figure for 2011-12 represents the actual administrative and support cost per claim for the life of the project.⁴²⁹

According to the Department for Communities Annual Report 2012-13, Redress WA administrative costs included:

- operation of an information line for claimants
- funding to community organisations to provide advice, counselling and support with applications
- assessment of claims
- police referrals when requested by claimants
- promotion of scheme.⁴³⁰

Appendix J: Non-government mainstream service providers

These are some examples of the types of non-government organisations that provide initial points of contact for mental health services to the general population.

Type	Description	Service provider examples
24 hour crisis support and suicide prevention services	<ul style="list-style-type: none"> • Immediate counselling and support services for anyone in Australia experiencing a crisis and contemplating suicide. • Provide referral information and assistance to other specialised services in the person's local area. 	<ul style="list-style-type: none"> • Lifeline • Kids Helpline • Mensline • Suicide Call Back Service • National Hope Line
National mental health services	<ul style="list-style-type: none"> • These organisations raise public awareness and educate the general population about mental health issues through campaigns and information delivery. They also provide targeted programs to address specific groups of people. • Their telephone helpline and online services provide information and advice about mental health and can help direct survivors to specialist service providers in their local area. 	<ul style="list-style-type: none"> • beyondblue • headspace • Mental Health Australia • SANE
Community service organisations (CSOs)	<ul style="list-style-type: none"> • Generally, non-profit organisations with the purpose to promote or deliver welfare services in the community. • These organisations are diverse, some providing general services similar to national mental health services but at the local level, others are specialised and will overlap with specialist services and/or the broader support services network for survivors. 	<ul style="list-style-type: none"> • Benevolent Society – Post Adoption Resource Centre (NSW and the ACT); Post Adoption Support Queensland (Qld) • Life Without Barriers – Mental health and housing support • Community Mental Health Australia (CMHA) - a coalition of eight peak community mental health organisations from each state and territory in Australia,

Type	Description	Service provider examples
		<p>representing over 800 community-based, non-government organisations who work with mental health consumers and carers across Australia.</p>

Appendix K: Sexual assault services

These are some examples of sexual assault services.

Sexual assault services provide specialised therapeutic and support services for victims and survivors of sexual abuse and assault. In many cases, this includes adult survivors of child sexual abuse. This table provides examples of sexual assault services in each Australian jurisdiction. It is not intended to be comprehensive.

Jurisdiction	Overview
National	<ul style="list-style-type: none"> • 1800RESPECT National Sexual Assault, Domestic Violence Counselling Service: Free 24 hour telephone and online, crisis and trauma counselling service for sexual assault and domestic violence victims. • Rape and Domestic Violence Services Australia: Provides crisis counselling 24/7 for anyone in Australia who has experienced or is at risk of sexual assault, family or domestic violence and their non-offending supporters. It is also responsible for servicing the 1800RESPECT line, Sexual Assault Counselling Australia for people affected by the Royal Commission and the NSW rape crisis line. It receives funding from the Commonwealth Department of Social Services and NSW Health. • Adults Surviving Child Abuse: Professional phone support providing short-term counselling. Telephone counsellors can also assist survivors with options for additional help and support from its national database of practitioners and agencies with expertise. Majority of revenue provided by government grants. • Bravehearts: Provides an information and support line for people affected by child sexual assault. See also Queensland. • Mensline Australia: Professional telephone and online counselling available 24/7. Funded by the Australian Government to assist men affected by child abuse. Also receives support from charitable donations.
NSW	<ul style="list-style-type: none"> • NSW Rape Crisis Centre: 24/7 telephone and online counselling service for anyone in NSW who is at risk of or has experienced sexual assault. • Women's Health Centres: NSW Rape Crisis' specialist trauma counsellors are available in a number of Women's Health Centres throughout the state. They provide medium to long-term trauma counselling for women who experienced childhood sexual assault. • Victims Services' Approved Counselling Scheme's Victims Access Line: Victims of sexual assault or any other violent crime in NSW can receive free face-to-face counselling from experienced counsellors. Victims Services also runs a confidential enquiry line for Aboriginal and Torres Strait Islander victims of violent crime.

Jurisdiction	Overview
	<ul style="list-style-type: none"> • Sexual Assault Services: NSW Health Sexual Assault Services are based in hospitals or community health centres across NSW. They are staffed by specially trained counsellors and can provide 24 hour crisis counselling, medical care and forensic tests as well as counselling in the months after the assault. • Child and Adolescent Sexual Assault Counsellors (CASA): NSW peak body for community-based services providing child sexual assault counselling and support services to children, young people and adults, and their non-offending family members. Adult survivors may receive counselling from some services.
Vic	<ul style="list-style-type: none"> • Victorian Centres Against Sexual Assault (CASA): Comprises of 15 centres and the Victorian Sexual Assault Crisis Line (after hours). Services including short to medium-term counselling and support to child and adult survivors of sexual assault, and their non-offending family members and significant others. CASA also provides services to the Sexual Assault Response – The Royal Women’s Hospital. • Elizabeth Hoffman House Aboriginal Women’s Services: Women’s refuge for Aboriginal women and children experiencing family violence. Provides family violence counselling for women and a children’s counselling program. Outreach services also available to non-Aboriginal women who are mothers of Aboriginal women and/or have Aboriginal partners. • The Aboriginal Family Violence Prevention and Legal Service Victoria: Provides assistance including counselling to Aboriginal and Torres Strait Islander survivors of family violence and sexual assault.
Qld	<ul style="list-style-type: none"> • Sexual Assault Services: Queensland Health runs 10 metropolitan and regional sexual assault services that provides support to people who have been raped, sexually assaulted or are survivors of child sexual abuse. Services include crisis counselling and referral services. There is also a state-wide sexual assault helpline providing telephone counselling. • Centre Against Sexual Violence (CASV): Provides counselling and support for females aged 12 years and above in the Logan, Beenleigh and Beaudesert region who have experienced both recent and past sexual assault. Does not provide services to male survivors but can offer them information and referral options. • Gold Coast Centre Against Sexual Violence: Free and confidential counselling for women who have experienced sexual violence at any time in their lives. • Murringunyah Aboriginal and Torres Strait Islander Corporation for Women: Counselling for Aboriginal and Torres Strait Islander women and their families who are survivors of sexual violence. Funded by Qld Department of Communities, Child Safety and Disabilities. • Working alongside people with Intellectual and Learning Disabilities (WWILD): Works with people with disability who have been victims or are at risk of sexual violence, assault or exploitation. Has a Sexual Violence Prevention counselling program for people aged 13 years and over. Receives funding from Qld Department of Communities, Child Safety and Disability

Jurisdiction	Overview
	<p>Services and Department of Justice and Attorney-General for victims of crime advisory service.</p> <ul style="list-style-type: none"> • Living Well: Face-to-face counselling to any Qld man affected by sexual assault/abuse. Offers a national telephone counselling service to any man affected in Australia. Receives funding from the Qld Department of Justice and Attorney-General and private donations. • Men Affected by Rape and Sexual Assault: Self-help group for male survivors aged 16 years and over. Funded by the Qld Department of Communities. • ZIG ZAG – Young Women’s Resource Centre: Counselling and support to women aged between 12 to 25 years who have experienced sexual assault/abuse at some stage in their lives. Also offers medium-term housing. Receives funding from the Qld Department of Communities, Child Safety and Disability Services and Department of Communities Housing and Homelessness. • Immigrant Women’s Support Service: Community-based crisis and support service for immigrant women and children who have experienced rape and sexual assault. • Brisbane Rape & Incest Survivors Support Centre: Non-government organisation available for any woman 15 years and over who is a survivor of sexual violence. • Bravehearts: Provides face-to-face counselling services for children and young people who have experienced sexual assault or who are at risk. Adult survivors can also access services. • Laurel House and Laurel Place: Specialised counselling support for people who have experienced recent and past sexual assault in the Maroochydore, Gympie and Murgon regions. • Gladstone Women’s Health Centre: Sexual assault services for men and women including counselling and other practical support services such as personal growth and community education. Counselling services are provided free of charge while some programs and community education may involve a cost. • Phoenix House: Bundaberg based charitable community service organisation aiming to eliminate sexual violence within society. Services include counselling, 24 hour crisis response and other practical support services for people who have experienced sexual assault. Receives funding from the Qld Department of Communities, Commonwealth Government through the Department of Social Services, and other donations. • The Women’s Centre: Women’s services hub in the Townsville area incorporating sexual assault support services, specialist homelessness services and women’s health. Provides crisis and ongoing counselling services to women. Group programs are also available include therapeutic support groups and yoga and craft classes. Also has an outreach counselling service. Receives funding from several Qld Government departments, the Lady Bowen Trust and The Mercy Foundation.
WA	<ul style="list-style-type: none"> • Western Australia Sexual Assault Resource Centre (WA SARC): Emergency sexual assault service to anyone aged 13 years or over in metropolitan Perth

Jurisdiction	Overview
	<p>who has been sexually assaulted in the past 14 days. Counselling is also provided to survivors of past abuse.</p> <ul style="list-style-type: none"> • Incest Survivors Association: Therapeutic services to survivors of child sexual abuse including extra-familial experiences (e.g. baby sitter, priest, teacher, etc.). Services also available to survivors who are at risk of committing child sexual abuse. Funded by the WA Department of Child Protection and grants from Lotterywest. Fees are charged on a sliding fee scale. • Allambee Counselling: Counselling service for survivors and families of sexual abuse, sexual assault and family violence. • Yorgum Aboriginal Corporation: Indigenous specific community service providing a wide range of services including specialised cultural therapeutic practises for counselling. Funded by the Australian Government. • Goldfields Rehabilitation Services: Sexual assault support services including counselling to anyone 13 years and over who has been sexually assaulted/abused. Also provides 24 hour crisis intervention for anyone assaulted within the last 10 days. • Chrysalis Support Services: Sexual assault services to people in the Geraldton region. Counselling services also include long-term counselling where needed, a child sexual assault therapist, 24/7 crisis response and group programs. Also acts as a women's refuge. • Waratah Sexual Assault Service: Services to people aged 13 years and over from Bunbury and the South West Region. Types of counselling include trauma informed therapeutic intervention, 24/7 crisis intervention and specialised child sexual assault and child domestic violence services. • Anglicare WA Incorporated: Its sexual abuse therapy services comprise of the Kimberley Sexual Assault/Abuse Counselling Service, Child Sexual Abuse Therapy Service, Marooloo Child Sexual Response Service and Royal Commission Support Service. Counselling is available to survivors of sexual abuse and assault and include services that are culturally appropriate to Indigenous clients. Also provides support services including financial support and housing services. Royal Commission services available state-wide to anyone impacted by sexual abuse of children while in institutional care.
SA	<ul style="list-style-type: none"> • Yarrow Place: The lead public health agency in SA responding to rape and sexual assault. Services are limited to people who were aged 16 years and over at the time of assault. However, it also offers youth counselling services for people aged 12 to 18 years who are under the Guardianship of the Minister for Aboriginal and Torres Strait Islander people. Receives funding from the SA Department of Health and Department of Community Services. • Junction Australia Sexual Abuse Counselling Service: Counselling and support services in the City of Onkaparinga region available to survivors of child sexual abuse aged 12 years and over and family members affected. Receives funding from the Commonwealth and SA Governments. Most services are free but some attract a small fee. • SHine SA: Sexual health agency in SA for women and men under the age of 35 years. Counselling provided for concerns related to sexual health including effects of sexual assault and sexual abuse. Funding received from SA Department of Health and Aging. Counselling services are free for people

Jurisdiction	Overview
	<p>under the age of 25 years. For clients aged 25 years and over, fees are charged according to the appointment length and any client concessions.</p> <ul style="list-style-type: none"> • The Women's Health Services: Works with women to increase their health and wellbeing with specific services tailored to women who have experienced childhood sexual abuse and complex trauma. Therapeutic counselling services include face-to-face or telephone. There are also Aboriginal specific services and a medical clinic for newly arrived women refugees. Funded by the SA Department of Health. Services are free or bulk-billed by Medicare. • Victims Support Service (VSS): General services available to adult victims of crime but also offers Royal Commission support services to adult survivors. Offers face-to-face and telephone counselling and referrals to longer-term therapeutic support. Funded by the SA Attorney-General's Department from the Victims of Crime Fund.
Tas	<ul style="list-style-type: none"> • Laurel House: Provides therapeutic services to survivors of sexual violence as well as families, friends and support people in North and North-West Tasmania. Examples of counselling include medium to long-term face-to-face counselling, telephone counselling, and 24 hour crisis support and group programs. Funded by the Australian Government to assist people affected by child abuse. • Sexual Assault Support Service: Services to survivors of sexual violence as well as families, friends and support people in Southern Tasmania. Also provides Royal Commission support services for people who experienced child sexual abuse within an institution. Funded by the Australian Government and the Tasmanian Department of Health and Human Services.
ACT	<ul style="list-style-type: none"> • Canberra Rape Crisis Centre: Non-government organisation, partly funded by the ACT Government. Provides free counselling, crisis appointments, phone support, crisis call-out service, advocacy, and legal and medical support to survivors of sexual assault and their support people.
NT	<ul style="list-style-type: none"> • Sexual Assault Referral Centres (SARC): Five centres located in the NT providing free counselling and support to male and female victims of sexual assault, including adult survivors and children who have been recently sexually abused. Partners, family members and significant others of people who have been assaulted/abused are also covered. Darwin and Alice Springs SARC also provides 24 hour access to information regarding medical, legal and counselling/support options. Funding provided by NT Department of Health. • Ruby Gaea Darwin Centre Against Rape: Women and children's counselling and information service for survivors of sexual assault and their supporters. Also provides emergency relief services. Receives funding from the NT Government. • Victims of Crimes NT Inc.: Community-based organisation for any victim of crime who resides in the NT. Provides 24 hour phone helpline. Funded by the NT Department of Justice.

Appendix L: Support services for adults who were in institutional care as children

These are some examples of support services for adults who were in institutional care as children.

Adult survivors who as children were in institutional and other out-of-home care through the last century are today recognised by the Australian Government and state and territory governments as a vulnerable group. There are support service organisations in each state and territory that act as a 'one-stop shop' to assist this group. This table provides examples of these support services in each Australian jurisdiction. It is not intended to be comprehensive.

Jurisdiction	Name	Services
NSW	Wattle Place	<p>Services available for people who grew up in orphanages, children's homes, institutions and foster homes in NSW from the 1920s to the 1990s. Support services include Find & Connect and Royal Commission Support Service. For no charge, survivors can access:</p> <ul style="list-style-type: none"> • Counselling • Access to care records • Assistance with health and education • Support for family reunions and tracing • A drop-in centre • Social activities and events • Life skills workshops <p>Operated by Relationships Australia NSW (RANSW)</p>
Vic	Open Place	<p>Coordinates and provides direct assistance to address the needs and issues of people who grew up in Victorian orphanages and homes during the last century, irrespective of where they reside currently. Services are provided free of charge and include:</p> <ul style="list-style-type: none"> • Counselling • Assisting in accessing records, finding family and reuniting families • Social support groups • Support in accessing specialist services • Financial assistance • Individual advocacy

Jurisdiction	Name	Services
		<ul style="list-style-type: none"> Support for people engaging with the Royal Commission. <p>Operated by Berry Street in partnership with Relationships Australia Victoria (RAV). RAV also provides free support services for people affected by their engagement with the Royal Commission and our processes.</p>
Qld	Lotus Place	<p>Provides counselling for Forgotten Australians and Former Child Migrants in Queensland. Services include:</p> <ul style="list-style-type: none"> Access to professional support and counselling services Information resource centre and gateway Personal and skills development opportunities and peer support activities Individual advocacy and support to seek access to government and community services Help to seek redress of past abuse through the criminal justice system, civil processes, or internal church or religious institutional processes Help to obtain personal records, reconnect with family and trace history Support for regional peer networks and activities Information and referral to other services such as the Child Migrant Trust and Link-Up. Support for Forgotten Australian and Former Child Migrants that are affected by the Royal Commission. <p>Operated by Micah Projects Inc.</p>
	Relationships Australia Queensland (RAQ)	<p>Support services for people who have been affected through their engagement with the Royal Commission and our processes.</p>
WA	Tuart Place	<p>Services for people who experienced any form of out-of-home care in Western Australia. Free of charge services include:</p> <ul style="list-style-type: none"> Counselling Support groups Life skills Computer skills Family tracing Support with complaints Obtaining records Social activities. <p>Operated by Forgotten Australians Coming Together Inc. (FACT), an organisation representing people who were in out-of-home care during childhood, including Former Child Migrants from the UK and Malta, and</p>

Jurisdiction	Name	Services
		Indigenous and non-Indigenous Australian-born care leavers.
	Relationships Australia WA	Operates the WA branch of Find & Connect. Services include obtaining records and family tracing, and access to individual counselling and group support. Relationships Australia WA also provides support services for people affected through their engagement with the Royal Commission and our processes.
SA	Elm Place	<p>Offers services for individuals over 18 years whose lives have been affected by being in out-of-home care when they were children. Services are free of charge and include:</p> <ul style="list-style-type: none"> • Counselling and therapeutic services • Access to records • Find & Connect support services • Housing and financial management • Life skills • Drop-in support. <p>Operated by Relationships Australia SA who also provides counselling, assistance and support for people engaging with the Royal Commission and our processes.</p>
Tas	Relationships Australia Tasmania	<p>Runs the Find & Connect Support Services for Tasmania, to assist Forgotten Australians and Former Child Migrants:</p> <ul style="list-style-type: none"> • Access personalised support and counselling • Where possible, obtaining personal records and tracing history • Connecting survivors to other services and other support networks • Family reunions where possible • Drop-in centre to connect with other Forgotten Australians and Former Child Migrants. <p>Relationships Australia Tasmania also provides family and relationship counselling and specialist support services for individuals engaged with or affected by the Royal Commission and our processes.</p>
ACT	Relationships Australia Canberra & Region	<p>Operates the Find and Connect Support Services in the ACT to help Forgotten Australian and Former Child Migrants:</p> <ul style="list-style-type: none"> • Access personalised support and counselling • Obtaining personal records, tracing history • Connect with other services and support networks • Family reunions where possible. <p>Also provides support services for people affected by the Royal Commission and our processes.</p>

Jurisdiction	Name	Services
NT	Relationships Australia NT	Relationships Australia NT Find and Connect Support Service provides help with records searches, specialist counselling, referral to other services, and follow-up support including peer and social support. Also provides free support services for people who have made contact with the Royal Commission.

Appendix M: Current limitation periods in Australia

This is summary information about current relevant limitation periods in Australia.

Child sexual abuse claims are generally personal injury claims. Personal injury limitation periods are summarised below.

New South Wales: *Limitation Act 1969* (NSW)

Limitation period(s)

The basic limitation period applying in a child sexual abuse claim is:

- for an action which accrued before 1 September 1990, six years from when the action accrued;
- for an action which accrued between 1 September 1990 and 5 December 2002, three years from when the action accrued; and
- for an action accruing on or after 6 December 2002, the earlier of three years from when the cause of action was discoverable and 12 years from the time of the act or omission which resulted in the injury.

For actions accruing on or after 6 December 2002, if the injury to the child was caused by a parent, guardian or a parent or guardian's 'close associate', the action is discoverable only when the claimant turns 25, and the 12 year long-stop limitation period only begins running from when the claimant turns 25.

Suspension of time

The limitation period is suspended for as long as a person remains a child, except that for actions accruing on or after 6 December 2002, the suspension does not apply if the child had a capable parent or guardian.

The limitation period is suspended where a person is 'incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action ... by reason of ... any disease or impairment of his or her physical or mental condition'.

Extension of time

The court may extend time if:

- the action accrued before 1 September 1990, there is evidence to establish the action and the prospective plaintiff did not have the means of knowledge of a 'material fact of a

decisive character relating to the right of action' (here the court may extend the limitation period to one year after the plaintiff came to have the means of knowing that material fact);

- the action accrued on or after 1 September 1990 but before 6 December 2002, and the court considers it 'just and reasonable to do so', considering the length of and reasons for the delay; prejudice to the defendant; when the plaintiff came to know of the injury, its nature and extent, and the connection between the injury and the defendant's act or omission, any of the defendant's conduct inducing the delay, the steps the plaintiff took to receive advice, and the extent of the loss (here the court may extend the limitation period by up to five years); and
- it is 'just and reasonable to do so', being satisfied that the plaintiff did not know that personal injury had been suffered, was unaware of the injury's nature or extent or was unaware of the connection between the injury and the defendant's act or omission, and being satisfied that the plaintiff made the application within three years of becoming aware of all these things.

The limitation period must not be extended beyond 30 years running from the date which the original limitation period runs.

Victoria: *Limitation of Actions Act 1958 (Vic)*

Limitation period(s)

The basic limitation period applying in a child sexual abuse claim is the shorter of:

- 12 years from the act or omission from which the injury resulted; or
- six years from the date on which the cause of action is discoverable by the plaintiff.

If the injury to the child was caused by a parent, guardian or a parent or guardian's 'close associate', the action is discoverable only when the claimant turns 25, and the 12 year long-stop limitation period only begins running from when the claimant turns 25.

Suspension of time

The limitation period is suspended where a person is minor not in the custody of a capable parent or guardian or is 'incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action ... by reason of ... any disease or impairment of his or her physical or mental condition'.

Extension of time

The court may extend time 'if it decides that it is just and reasonable to do so'. It must consider all the circumstances of the case, including: the length and reasons for the delay; possible prejudice to the defendant; whether the defendant had taken steps to make available to the plaintiff means of ascertaining facts relevant to the cause of action; the duration of any disability or legal capacity of the plaintiff; the time within which the cause of

action was discoverable; whether the plaintiff acted promptly and reasonably once he or she knew that there might be an action for damages; the steps taken by the plaintiff to obtain medical, legal and other expert advice; whether the passage of time has prejudiced a fair trial of the claim; the nature and extent of the plaintiff's loss and the nature of the defendant's conduct.

Queensland: *Limitation of Actions Act 1974 (Qld)*

Limitation period(s)

The basic limitation period applying in a child sexual abuse claim is three years from when the action accrued.

If the person was under 18 when the action accrued, the limitation period is extended so that it ends six years from when the person turns 18 years of age.

Suspension of time

If the person was 'of unsound mind' when the action is accrued, the limitation period is extended so that it ends six years from when the person ceases to be under that disability.

Extension of time

The court may extend time if there is evidence to establish the action and the prospective plaintiff did not have the means of knowledge of a 'material fact of a decisive character relating to the right of action' (here the court may extend the limitation period to one year after the plaintiff came to have the means of knowing that material fact).

Western Australia: *Limitation Act 2005 (WA)*

Limitation period(s)

The cause of action accrues only when the plaintiff becomes aware that he or she has sustained a 'not insignificant personal injury', or there is a symptom, clinical sign or other manifestation of that injury.

If the person is less than 15 years old when the cause of action accrues, the limitation period is six years, although this period is suspended while the person is under 18 years of age and lacks a guardian, though it cannot be suspended past 21 years of age.

If the person is 15, 16 or 17 years old, the limitation period ends when the person reaches 21 years of age.

If the plaintiff was a minor and was in a 'close relationship' with the defendant, the limitation period ends when the plaintiff turns 25 years of age, unless a longer limitation period applies.

Suspension of time

The limitation period is suspended while the plaintiff is suffering a 'mental disability' and is without a guardian, but not for more than 12 years since the cause of action accrued. A mental disability is 'a disability suffered by the person (including an intellectual disability, a psychiatric condition, an acquired brain injury or dementia) an effect of which is that the person is unable to make reasonable judgments in respect of matters relating to the person or the person's property'.

Extension of time

The court may extend time if it is satisfied that when the limitation period expired, the plaintiff was not aware of the physical cause of the injury, that the injury could be attributed to someone's conduct, or the identity of the person to whose conduct the injury could be attributed. The court must consider whether the delay would 'unacceptably diminish the prospects of a fair trial of the action' and whether extending the time would 'significantly prejudice the defendant' (here the court may extend the period by up to 3 years from when the plaintiff became aware or ought reasonably to have become aware of the relevant fact).

South Australia: *Limitation of Actions Act 1936 (SA)*

Limitation period(s)

The basic limitation period is three years from when the cause of action accrued, but if the personal injury 'remains latent for some time after its cause', the limitation period commences when the injury comes to the person's knowledge.

The limitation period is extended for the period in which the plaintiff remains under 18 years of age.

Suspension of time

The limitation period is suspended by reason of disability where a person 'is subject to a mental deficiency, disease or disorder by reason of which he is incapable of reasoning or acting rationally in relation to the action or proceeding that he is entitled to bring'.

It may not be suspended for more than 30 years after the cause of action accrued.

Extension of time

The court may extend time if it is 'just' in 'all the circumstances of the case' to do so, and either the plaintiff instituted the claim within a year of ascertaining the case's material facts, or the failure to institute the claim within time resulted from the defendant's representations or conduct.

Tasmania: *Limitation Act 1974* (Tas)

Limitation period(s)

For an action which accrued before 1 January 2005:

- the basic limitation period applying in a child sexual abuse claim is three years from when the action accrued; and
- if the action accrued when the plaintiff was under 18 years of age, and not in the custody of a parent, the limitation period is suspended until the person turns 18.

For an action accruing on or after 1 January 2005:

- the basic limitation period applying in a child sexual abuse claim is the earlier of three years from when the cause of action was discoverable and 12 years from the time of the act or omission which resulted in the injury;
- If the action accrued when the plaintiff was under 18 years of age and not in the custody of a parent, the limitation period is suspended until the person turns 18; and
- if the plaintiff was a minor and the defendant was a parent or in a 'relationship' with the plaintiff, the limitation period is three years commencing from when the claimant turns 25 years of age.

Suspension of time

The limitation period is suspended for a person who has a disability at the time of the action's accrual in the sense of being 'incapable, by reason of mental disorder, of managing his property or affairs'.

Extension of time

For actions accruing before 1 January 2005, the court can extend time for up to six years from when the action accrued if 'in all the circumstances of the case it is just and reasonable to do so'.

For actions accruing on or after 1 January 2005, if 12 years from the date of the relevant act or omission have already elapsed, the court may extend the limitation period to three years from the date of discoverability 'having regard to the justice of the case', including whether the passage of time has prejudiced a fair trial, the nature and extent of the loss and the nature of the defendant's conduct.

Australian Capital Territory: *Limitation Act 1985* (ACT)

Limitation period(s)

The basic limitation period applying in a child sexual abuse claim is three years from when the action accrues.

If the action accrued when the plaintiff was under 18 years of age, the limitation period is suspended until the plaintiff turns 18 years of age. If notice has not been given to the defendant within six years of the relevant act or omission, however, the plaintiff cannot recover damages in relation to medical, legal or gratuitous services provided before the proceedings commenced.

Suspension of time

The limitation period is suspended where a person is 'incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action ... by reason of ... any disease or impairment of his or her physical or mental condition'. The limitation period cannot expire less than three years after when the disability ends, and it is extended if necessary to ensure this.

Extension of time

The court may extend time 'if it decides that it is just and reasonable to do so'. It must consider: the length of and reasons for the delay; prejudice to the defendant; when the plaintiff came to know of the injury, its nature and extent, and the connection between the injury and the defendant's act or omission, any of the defendant's conduct inducing the delay, the steps the plaintiff took to receive advice, and the extent of the loss.

Northern Territory: *Limitation Act* (NT)

Limitation period(s)

The basic limitation period applying in a child sexual abuse claim is three years from when the action accrues.

If the plaintiff was under 18 when the action accrued, the limitation period is suspended so that it ends three years after the person turns 18 years of age.

Suspension of time

The limitation period is suspended while a person remains 'disabled', in that 'by reason of age, disease, illness or mental or physical infirmity' he or she is 'incapable of managing his affairs in respect of legal proceedings'. The limitation period cannot expire less than three years after when the disability ends, and it is extended if necessary to ensure this.

Extension of time

The court may extend time if it is 'just' in 'all the circumstances of the case' to do so, and either the plaintiff instituted the claim within a year of ascertaining the case's materials facts, or the failure to institute the claim within time must be the result from the defendant's representations or conduct.

Endnotes

- ¹ *Royal Commissions Act 1902* (Cth) ss 2(1)(b), 2(3A); *Royal Commissions Act 1923* (NSW) s8; *Commissions of Inquiry Act 1950* (Qld) s 5(1)(b); *Royal Commissions Act 1917* (SA) s 10(c); *Commissions of Inquiry Act 1995* (Tas) s 22(1)(b); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 17(1); *Royal Commissions Act 1968* (WA) ss 8B(1)(b), 9. Note s 17(1) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) has been repealed but a transitional provision (s 164) provides for a grandfathering clause so that s 17(1) continues to apply to the Royal Commission.
- ² Care Leavers Australia Network (CLAN), Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 6: Redress Schemes*, released 23 April 2014.
- ³ Senate Standing Committee on Legal and Constitutional Affairs, 'Review of Government Compensation Payments', Parliament House, Canberra, 6 December 2010.
- ⁴ Alliance for Forgotten Australians, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 6: Redress Schemes*, released 23 April 2014.
- ⁵ For example, see J Cashmore & R Shackel, 'The long-term effects of child sexual abuse', *CFCA Paper No. 11*, 2013, <https://www3.aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf> (viewed 7 January 2015).
- ⁶ J Cashmore & R Shackel, 'The long-term effects of child sexual abuse', *CFCA Paper No. 11*, 2013, <https://www3.aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf> (viewed 7 January 2015).
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- ⁸ See the following submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No: 6 Redress Schemes*, released 23 April 2014: Victim Support Australia Inc; Aboriginal Legal Rights Movement Inc; Centre for Excellence in Child and Family Welfare Inc.
- ⁹ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly, 21 March 2006, A/RES/60/147, <http://www2.ohchr.org/english/issues/remedy/principles.htm> (viewed 23 January 2015).
- ¹⁰ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly, 21 March 2006, A/RES/60/147, VII, 11(a)-(c).

- ¹¹ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly, 21 March 2006, A/RES/60/147, Principles 19-23.
- ¹² M S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice', *Melbourne University Law Review*, vol 32, no 3, 2008, pp 1096-1126, p 1102.
- ¹³ T F Marshall, 'The Evolution of Restorative Justice in Britain', *European Journal on Criminal Policy and Research*, vol 4, no 4, 1996, pp 21-43, pp 21, 37.
- ¹⁴ J Braithwaite, 'Restorative justice and therapeutic jurisprudence', *Criminal Law Bulletin*, vol 38, no 2, 2002, pp 244-62, p 246.
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- ¹⁸ M King & D Wexler, 'Therapeutic Jurisprudence' in Jennifer M. Brown, Elizabeth A. Campbell (eds), *The Cambridge Handbook of Forensic Psychology*, Cambridge University Press, 2010, pp 126-33, at p 126.
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- ²⁰ Senate Community Affairs References Committee, *A report on Australians who received institutional or out-of-home care as children*, Parliament House, Canberra, 2004.
- ²¹ *Australian Government Response to Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*, Commonwealth of Australia, 2005.
- ²² J Breckinridge, J Cunningham & K Jennings, *Cry for help: Client and worker experiences of disclosure and help seeking regarding child sexual abuse*, Relationships Australia (SA), South Australian Government Department for Families and Communities, http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report_2008.pdf (viewed 7 January 2015).
- ²³ Royal Commission into Institutional Responses to Child Sexual Abuse *Interim Report Volume 1*, 2014, p6.
- ²⁴ Royal Commission into Institutional Responses to Child Sexual Abuse *Interim Report Volume 1*, 2014, pp 15-16.
- ²⁵ Exhibit 6-4, Statement of Wagstaff STAT.0131.001.0001_R; Exhibit 6-1, Statement of KO, STAT.0133.001.0001_R; Exhibit 6-1, Statement of KQ, STAT.0136.001.0001_R.
- ²⁶ Transcript of WP, T2331: 14-21 (Day WA21).
- ²⁷ Transcript of KR, TQ41:4 (Day Q1).
- ²⁸ The evidence in relation to financial settlements of the civil claims by the school in respect of all five complainants is subject to a suppression order restricting publication. The nature of the evidence in relation to the financial settlements was referred to in Counsel Assisting's opening at TWA2322:32-34 (Day WA21).
- ²⁹ The claims data produced by the Tasmanian Government relate only to claims under its government redress scheme, and so this data were not included in the claims data analysis.
- ³⁰ South Australia was not issued with an additional notice because its government redress scheme operates through its statutory victims of crime compensation scheme.
- ³¹ Western Australia, *Parliamentary Debates*, Legislative Council, Tuesday 14 August 2012, 4837-4839 (Hon Alison Xamon, Hon Michael Mischin); Western Australia, *Parliamentary Debates*, Legislative Council, Tuesday 14 August 2012, 4837-4839 (Hon Alison Xamon, Hon Robyn McSweeney).

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- ³² Material obtained by Royal Commission from Western Australian Government in response to notice to produce C-NP-339.
- ³³ Smart Service Queensland, Redress Scheme Project Closure Report, 28 June 2010, material obtained by Royal Commission from Queensland Government in response to summons to produce S-QLD-49.
- ³⁴ Smart Service Queensland, Redress Scheme Project Closure Report, 28 June 2010, material obtained by Royal Commission from Queensland Government in response to summons to produce S-QLD-49.
- ³⁵ Tasmanian Government Department of Health and Human Services, *Review of Claims of Abuse of Children in State Care, Final Report – Round 4*, November 2014, material obtained by Royal Commission from Tasmanian Government in response to summons to produce S-TAS-8.
- ³⁶ Material obtained by Royal Commission from South Australian Government in response to notice to produce C-NP-358.
- ³⁷ Transcript of E J Fretton, T9477: 7-8 (Day 89).
- ³⁸ Transcript of JC Ingham, T2831:17 - T2832:2 (Day 27).
- ³⁹ Transcript of JE, T6723:2-4 (Day 64).
- ⁴⁰ H Eldridge H & J Still, 'Apology and forgiveness in the context of the cycles of adult male sex offenders who abuse children', in Salter, A.C. (ed), *Transforming Trauma: A guide to understanding and treating adult survivors of child sexual abuse* (1995), p 134.
- ⁴¹ Research was carried out for the Law Commission of Canada by the Institute for Human Resource Development: S Alter, *Apologising for serious wrongdoing: Social, psychological and legal considerations*, 7 May 1999, pp 5-6.
<http://dalspace.library.dal.ca/bitstream/handle/10222/10273/Alter%20Research%20Apology%20EN.pdf>, quoting B Feldthusen, O Hankivsky & and L Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims By Victims of Sexual Abuse', *Canadian Journal of Women and the Law* vol 12 no 1, Winter 2000, pp 66-116.
- ⁴² H Eldridge and J Still, 'Apology and forgiveness in the context of the cycles of adult male sex offenders who abuse children', in Salter, A.C. (ed), *Transforming Trauma: A guide to understanding and treating adult survivors of child sexual abuse* (1995), p 132.
- ⁴³ A Lazare, 'Go ahead, say you're sorry', *Psychology Today* vol 28 no 1, January-February 1995, p 42.
- ⁴⁴ A Alter, *Apologising for serious wrongdoing: Social psychological and legal considerations*, 7 May 1999, pp 8-9.
- ⁴⁵ L Forde, *Report of the commission of inquiry into abuse of children in Queensland institutions*, August 1999, p 288.
- ⁴⁶ Exhibit 11-0002, Statement from Congregation of Christian Brothers, CTJH.056.05001.0041.
- ⁴⁷ Catholic Diocese of Maitland-Newcastle, *Public Acknowledgment and Apology from Bishop Wright, Bishop of Maitland-Newcastle*, <http://www.mn.catholic.org.au/news-events/news/2013/an-apology-from-bishop-bill-wright> (viewed 23 January 2015).
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- ⁴⁹ The Salvation Army Eastern Territory, *Official apology from The Salvation Army to former residents and care leavers*, [http://salvos.org.au/subscribe/sites/auaesalvos/files/documents/royal-commission//Apology from the General to Former Residents.pdf](http://salvos.org.au/subscribe/sites/auaesalvos/files/documents/royal-commission//Apology%20from%20the%20General%20to%20Former%20Residents.pdf) (viewed 23 January 2015). See also, Transcript of R J Condon, T4754: 26-43 (Day 46).
- ⁵⁰ Anglican Church of Australia, *Resolution 51/04 The Forgotten Australians*, http://www.anglican.org.au/home/about/social-issues/Pages/family_issues.aspx (viewed 23 January 2015).
- ⁵¹ Exhibit 7-0006, Statement of Robin Kitson, STAT.0162.001.0001_R at [66].

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- 52 Exhibit 4-0018 Statement of Jennifer Ingham, STAT.0074.001.0001_R_M at [54].
- 53 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 17-18.
- 54 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 17.
- 55 Transcript of JF, T6645: 4-13 (Day 63A).
- 56 Transcript of JE, T6717: 1-6 (Day 64).
- 57 Transcript of JE, T6730: 36-44 (Day 64).
- 58 Transcript of DG, T3098: 18-31 (Day 29).
- 59 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 17.
- 60 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 13.
- 61 Transcript of R A Campion, T1679: 23-29 (Day 16).
- 62 Transcript of E J Fretton, T9486: 18-30 (Day 89).
- 63 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 18.
- 64 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 18.
- 65 Transcript of H Gitsham, SA749:26-35 (Day SA7).
- 66 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 18.
- 67 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 18.
- 68 NSW Ombudsman, *Apologies: A practical guide (2nd edition)*, Sydney, March 2009, p 18.
- 69 Exhibit 11-0002, Statement from Congregation of Christian Brothers, CTJH.056.05001.0041.
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- 80 Anglicare Australia, *Anglicare Australia Provenance Project 2014*, http://www.anglicare.asn.au/site/provenance_project_2014.php (viewed 23 January 2015).
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- ²²⁴ Dr Ben Mathews, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No 5: Civil Litigation*, released 6 December 2013, p 8.
- ²²⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 7: Child sexual abuse at the Parramatta Training School for Girls and the Institution for Girls in Hay*, October, 2014, p 33.
- ²²⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 7: Child sexual abuse at the Parramatta Training School for Girls and the Institution for Girls in Hay*, October, 2014, p 34.
- ²²⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 7.
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- Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 46.
- ²²⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 48.
- ²³⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 49.
- ²³¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 50.
- ²³² Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 50.
- ²³³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 50.
- ²³⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 50.
- ²³⁵ Exhibit 11-0006, Statement of Clifford Walsh STAT.0232.001.0001_R.
- ²³⁶ [2004] QDC 21 (24 February 2004).
- ²³⁷ *Limitation of Actions Act 1974* (Qld) ss 5(2), 29.
- ²³⁸ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [26], [31], [33].
- ²³⁹ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [35].
- ²⁴⁰ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [32].
- ²⁴¹ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [46]–[47].
- ²⁴² *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [55]–[59].
- ²⁴³ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [86].
- ²⁴⁴ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [74]–[77].
- ²⁴⁵ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [79].
- ²⁴⁶ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [80].
- ²⁴⁷ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [81]–[85].
- ²⁴⁸ *Hopkins v Queensland* [2004] QDC 21 (24 February 2004) [42].
- ²⁴⁹ [2007] NSWSC 443 (7 May 2007)
- ²⁵⁰ *Limitation of Actions Act 1936* (SA) ss 36(1), 45.
- ²⁵¹ See *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [3]–[6].
- ²⁵² *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [69], [84]–[89].

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- ²⁵³ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [93]–[97].
- ²⁵⁴ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [98].
- ²⁵⁵ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [105], citing *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 547 (Toohey and Gummow JJ).
- ²⁵⁶ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [111].
- ²⁵⁷ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [64]–[68], [113].
- ²⁵⁸ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [115].
- ²⁵⁹ *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 (7 May 2007) [124].
- ²⁶⁰ *The Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347 (11 December 2008) [95]–[107] (McColl JA), [134]–[143] (Basten JA), [155]–[156] (Bell JA). While there was disagreement in the Court of Appeal for how the claim of breach of fiduciary duty interacted with s 36 of the *Limitation of Actions Act 1936* (SA), that disagreement is not presently relevant.
- ²⁶¹ See, eg, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 552–53 (McHugh J); New South Wales Law Reform Commission, *First Report on the Limitation of Actions*, New South Wales, 1967, p 133.; D Jackson, ‘The legal effects of the passing of time’, *Melbourne University Law Review*, vol 7, no 3, 1970, pp 407, 409.
- ²⁶² J Breckinridge, J Cunningham & K Jennings, *Cry for help: Client and worker experiences of disclosure and help seeking regarding child sexual abuse*, Relationships Australia (SA), South Australian Government Department for Families and Communities, http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report_2008.pdf (viewed 7 January 2015).
- ²⁶³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report, Volume 1*, Commonwealth of Australia, Sydney, 2014, p 6.
- ²⁶⁴ [2004] QDC 21 (24 February 2004).
- ²⁶⁵ [2007] NSWSC 443 (7 May 2007).
- ²⁶⁶ Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, pp 542–43 [26.3.2] and recommendation 26.3.
- ²⁶⁷ Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, pp 542–43 [26.3.2].
- ²⁶⁸ Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 (Vic) cl 1.
- ²⁶⁹ New s 27P(2).
- ²⁷⁰ New s 27Q(2).
- ²⁷¹ *Cole v Turner* (1704) 6 Mod 149 [87 ER 907]; *R v Cotesworth* (1704) 6 Mod 172 [87 ER 928].
- ²⁷² *Stanley v Powell* [1891] 1 QB 86.
- ²⁷³ See generally P Vines, ‘Negligence: Introduction’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts*, LawBook Co, 10th ed, 2011, p 119.
- ²⁷⁴ *Williams v Eady* (1893) 10 TLR 41, 42 (Lord Esher); *Victoria v Bryar* (1970) 44 ALJR 174; *Geyers v Downs* (1977) 138 CLR 91, 94 (Stephen J), 102 (Murphy and Aickin JJ); *New South Wales v Lepore* (2003) 212 CLR 511, 564 [141] (McHugh J).
- ²⁷⁵ *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 263 [198] (Gummow J); *Sullivan v Moody* (2001) 207 CLR 562, 579–80 [50]–[52] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597–98 [149] (Gummow and Hayne JJ).
- ²⁷⁶ *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 263 [198] (Gummow J).

- ²⁷⁷ *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Sullivan v Moody* (2001) 207 CLR 562; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.
- ²⁷⁸ *TC v New South Wales* [1999] NSWSC 31 (11 February 1999); *SB v New South Wales* (2004) 13 VR 527.
- ²⁷⁹ *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86; *Williams v The Minister Aboriginal Land Rights Act 1983* [2000] NSWCA 255.
- ²⁸⁰ However, in at least two decisions, courts have held that such a case was at least arguable for the purpose of deciding whether the limitation period for making a claim should be extended: *SDW v Church of Jesus Christ of Latter-Day Saints* (2008) 222 FLR 84; *Salvation Army v Rundle* [2008] NSWCA 347 (11 December 2008).
- ²⁸¹ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J).
- ²⁸² *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J).
- ²⁸³ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J). These requirements have been codified, and to a small extent modified, by state and territory civil liability legislation: *Civil Law (Wrongs) Act 2002* (ACT) s 43; *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 2003* (Qld) s 9; *Civil Liability Act 1936* (SA) s 32; *Civil Liability Act* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B.
- ²⁸⁴ *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 489 [158] (Hayne J).
- ²⁸⁵ *Wallace v Kam* (2013) 250 CLR 375, 382 [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).
- ²⁸⁶ *Civil Liability Act 2002* (NSW) s 5D; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 2002* (WA) s 5C; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Civil Law (Wrongs) Act 2002* (ACT) s 45; *March v Stramare* (1991) 171 CLR 506, 515–17 (Mason CJ); *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190–91 [18] (French CJ, Gummow, Crennan and Bell JJ); *Wallace v Kam* (2013) 250 CLR 375, 383 [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).
- ²⁸⁷ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, 426.
- ²⁸⁸ P Case, *Compensating child abuse in England and Wales*, Cambridge University Press, 2007, p 210.
- ²⁸⁹ See *TC v New South Wales* [2000] NSWSC 292 (12 April 2000) [66]–[81] (Studdert J).
- ²⁹⁰ *TC v New South Wales* [2000] NSWSC 292 (12 April 2000) [53]–[81] (Studdert J). Affirmed on appeal in *TC v New South Wales* [2001] NSWCA 380 (31 October 2001).
- ²⁹¹ (2004) 13 VR 527.
- ²⁹² *SB v New South Wales* (2004) 13 VR 527, 543 [94].
- ²⁹³ *SB v New South Wales* (2004) 13 VR 527, 543 [94].
- ²⁹⁴ *SB v New South Wales* (2004) 13 VR 527, 543–91 [96]–[308].
- ²⁹⁵ *SB v New South Wales* (2004) 13 VR 527, 588–91 [291]–[307].
- ²⁹⁶ *SB v New South Wales* (2004) 13 VR 527, 594–606 [395]–[525].
- ²⁹⁷ *SB v New South Wales* (2004) 13 VR 527, 599 [494].
- ²⁹⁸ *SB v New South Wales* (2004) 13 VR 527, 592–93 [382]–[389].
- ²⁹⁹ [2001] QSC 473 (7 December 2001).
- ³⁰⁰ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.
- ³⁰¹ *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.
- ³⁰² Although legislation in some states and territories provides that community organisations may be liable for torts committed by volunteers carrying out community work in good faith: *Wrongs Act 1958* (Vic) s 37(2); *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA) s 7(1); *Volunteers*

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- Protection Act 2001* (SA) s 5(1); *Civil Liability Act 2002* (Tas) s 48(1); *Civil Law (Wrongs) Act 2002* (ACT) s 9(1); *Personal Injuries (Liabilities and Damages) Act* (NT) s 7(3). See also *Commonwealth Volunteers Protection Act 2002* (Cth) s 7(1), which applies to volunteers working for the Australian Government or an Australian Government authority.
- ³⁰³ *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2006) 70 NSWLR 565, 573 [32] (Mason P).
- ³⁰⁴ *New South Wales v Lepore* (2003) 212 CLR 511, 535 [40].
- ³⁰⁵ *Lloyd v Grace, Smith & Co* [1912] AC 716.
- ³⁰⁶ *Deatons v Flew* (1949) 79 CLR 370.
- ³⁰⁷ *London CC v Cattermoles (Garages) Ltd* [1953] 1 WLR 997.
- ³⁰⁸ (2003) 212 CLR 511.
- ³⁰⁹ *New South Wales v Lepore* (2003) 212 CLR 511, 546 [74].
- ³¹⁰ *New South Wales v Lepore* (2003) 212 CLR 511, 561 [130].
- ³¹¹ *New South Wales v Lepore* (2003) 212 CLR 511, 592 [232].
- ³¹² *New South Wales v Lepore* (2003) 212 CLR 511, 618 [318] (footnotes omitted).
- ³¹³ *New South Wales v Lepore* (2003) 212 CLR 511, 544 [67].
- ³¹⁴ *New South Wales v Lepore* (2003) 212 CLR 511, 561 [132].
- ³¹⁵ *New South Wales v Lepore* (2003) 212 CLR 511, 594 [239].
- ³¹⁶ *New South Wales v Lepore* (2003) 212 CLR 511, 594 [232].
- ³¹⁷ *New South Wales v Lepore* (2003) 212 CLR 511, 621 [327].
- ³¹⁸ *New South Wales v Lepore* (2003) 212 CLR 511, 626 [345].
- ³¹⁹ New South Wales and Victorian legislation requires a claim for a breach of a non-delegable duty to be determined as if it were a claim for vicarious liability: *Civil Liability Act 2002* (NSW) s 5Q; *Wrongs Act 1958* (Vic) s 61.
- ³²⁰ *New South Wales v Lepore* (2003) 212 CLR 511, 532 [31] (Gleeson CJ).
- ³²¹ (2009) 240 CLR 1.
- ³²² *New South Wales v Lepore* (2003) 212 CLR 511, 534 [36].
- ³²³ *New South Wales v Lepore* (2003) 212 CLR 511, 571–72 [161].
- ³²⁴ *New South Wales v Lepore* (2003) 212 CLR 511, 601–3 [265]–[270].
- ³²⁵ *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983, 995 [25] (Major J, writing for the court).
- ³²⁶ *KLB v British Columbia* [2003] 2 SCR 403, 417 [19] (McLachlin CJ, writing for herself, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ).
- ³²⁷ *John Doe v Bennett* [2004] 1 SCR 436, 449 [27] (McLachlin CJ, writing for the Court).
- ³²⁸ *KLB v British Columbia* [2003] 2 SCR 403, 421 [25] (McLachlin CJ).
- ³²⁹ [1999] 2 SCR 534.
- ³³⁰ [1999] 2 SCR 534, 554 [31].
- ³³¹ *Bazley v Curry* [1999] 2 SCR 534, 558–59 [40].
- ³³² *Bazley v Curry* [1999] 2 SCR 534, 558–59 [40].
- ³³³ [1999] 2 SCR 534, 560 [41].
- ³³⁴ [1999] 2 SCR 570.

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- ³³⁵ *Jacobi v Griffiths* [1999] 2 SCR 570, 618–19 [80] (Binnie J).
- ³³⁶ *Jacobi v Griffiths* [1999] 2 SCR 570, 621 [84] (Binnie J).
- ³³⁷ *Jacobi v Griffiths* [1999] 2 SCR 570, 582–87 [13]–[22] (McLachlin CJ, writing for herself, L’Heureux-Dubé and Bastarache JJ).
- ³³⁸ See the discussion of the vicarious liability of an ‘agent’ in PS Atiyah, *Vicarious liability in the law of torts*, Butterworths, 1967, pp 99–144.
- ³³⁹ *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013) [3].
- ³⁴⁰ *E v English Province of Our Lady of Charity* [2013] QB 722, 745 [18], 765 [62] (Ward LJ), 786 [131] (Davis LJ).
- ³⁴¹ [2013] 2 AC 1.
- ³⁴² *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 20 [60].
- ³⁴³ *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 20 [56]–[58].
- ³⁴⁴ [2013] QB 722.
- ³⁴⁵ *E v English Province of Our Lady of Charity* [2013] QB 722, 769 [73].
- ³⁴⁶ *E v English Province of Our Lady of Charity* [2013] QB 722, 769–72 [74]–[81].
- ³⁴⁷ *E v English Province of Our Lady of Charity* [2013] QB 722, 784–86 [123]–[131].
- ³⁴⁸ *E v English Province of Our Lady of Charity* [2013] QB 722, 779 [105].
- ³⁴⁹ *E v English Province of Our Lady of Charity* [2013] QB 722, 787 [133].
- ³⁵⁰ [2002] 1 AC 215.
- ³⁵¹ P Giliker, ‘Making the right connection: Vicarious liability and institutional responsibility’, *Torts Law Journal*, vol 17, 2009, pp 35, 39.
- ³⁵² *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 24 [74] (Lord Phillips).
- ³⁵³ [2013] 2 AC 1.
- ³⁵⁴ [2013] 2 AC 1, 26 [86]–[87]. Cf *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441.
- ³⁵⁵ Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, p 552, Recommendation 26.4.
- ³⁵⁶ Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, p 552 [26.5.2].
- ³⁵⁷ *Amos v Brunton* (1897) 18 LR (NSW) Eq 184, 186–87 (Manning CJ).
- ³⁵⁸ *Rochford v Trade Practices Commission* (1982) 153 CLR 134, 146 (Mason J).
- ³⁵⁹ See *Williams v Hursey* (1959) 103 CLR 30, 53–5 (Dixon CJ).
- ³⁶⁰ *Salomon v A Salomon & Co Ltd* [1897] AC 22.
- ³⁶¹ Currently, these are: *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act 2009* (NSW); *Associations Act 2003* (NT); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Reform Act 2012* (Vic); *Associations Incorporation Act 1987* (WA).
- ³⁶² For example, see *Anglican Church of Australia Trust Property Act 1917* (NSW); *Roman Catholic Church Trust Property Act 1936* (NSW); *Christian Israelite Church Property Trust Act 2007* (NSW); *Anglican Trusts Corporation Act 1884* (Vic); *Coptic Orthodox Church (Victoria) Property Trust Act 2006* (Vic); *Presbyterian Trusts Act 1890* (Vic); *Roman Catholic Trusts Act 1907* (Vic); *The Salvation Army (Victoria) Property Trust Act 1930* (Vic).

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- ³⁶³ *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, 574 [35]–[36] (Mason P).
- ³⁶⁴ Exhibit 8-0004, Statement of John Ellis STAT.0179.001.0001_R para 241
- ³⁶⁵ Exhibit 8-0004, Statement of John Ellis STAT.0179.001.0001_R para 254.
- ³⁶⁶ (2007) 70 NSWLR 565.
- ³⁶⁷ *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, 587 [98], 589 [112] (Mason P).
- ³⁶⁸ *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, 590 [117] (Mason P).
- ³⁶⁹ *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, 597 [152]–[154] (Mason P).
- ³⁷⁰ Transcript of Dr Casey, T6088:9-15 (Day 58)); Transcript of Cardinal Pell T6669:37-43 (Day 63B).
- ³⁷¹ Exhibit 8-0002, DUG.080.033.0381 at 0381 – 0382.
- ³⁷² Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 7.
- ³⁷³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 51.
- ³⁷⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 51.
- ³⁷⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 54.
- ³⁷⁶ Transcript of Br Crowe, TACT4010:22-TACT4011:12 (Day ACT36).
- ³⁷⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 3: Anglican Diocese of Grafton's response to child sexual abuse at the North Coast Children's Home*, October, 2014, p 49.
- ³⁷⁸ Transcript of P Roland, TWA2032:10-16 (Day WA18)
- ³⁷⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 3: Anglican Diocese of Grafton's response to child sexual abuse at the North Coast Children's Home*, October, 2014, p 15.
- ³⁸⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 3: Anglican Diocese of Grafton's response to child sexual abuse at the North Coast Children's Home*, October, 2014, p 33.
- ³⁸¹ Family and Community Development Committee, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, Parliament of Victoria, 2013, p 536.
- ³⁸² *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

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- ³⁸³ See Attorney-General's Department, *Legal Services Directions and guidance notes*, <http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx> (viewed 23 January 2015).
- ³⁸⁴ *Model Litigant Policy for Civil Litigation*, New South Wales Government, Sydney, 2008.
- ³⁸⁵ *Guidelines on the State of Victoria's Obligation to Act as a Model Litigant*, State Government of Victoria, Melbourne, 2011.
- ³⁸⁶ *Model Litigant Principles*, Queensland Government, Brisbane, 2010.
- ³⁸⁷ *Law Officer (Model Litigant) Guidelines 2010 (No 1)*, (ACT).
- ³⁸⁸ Attorney-General's Department, *Legal Services Directions and guidance notes*, <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx> (viewed 12 January 2015).
- ³⁸⁹ *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse*, State Government of Victoria, Melbourne, 2014.
- ³⁹⁰ *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse*, State Government of Victoria, Melbourne, 2014, p 1.
- ³⁹¹ *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse*, State Government of Victoria, Melbourne, 2014, pp 1-2.
- ³⁹² Attorney-General's Department, *Assisting victims of child sexual abuse*, media release, Attorney-General's Department, Sydney, 3 November 2014.
- ³⁹³ *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse*, New South Wales Government, Sydney, 2014, p 1.
- ³⁹⁴ *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse*, New South Wales Government, Sydney, 2014, pp 1-2.
- ³⁹⁵ South Australian Government, *Fifth progress report in response to children in state care commission of inquiry report: Allegations of abuse and death from criminal conduct*, 2013, p 73. See also South Australian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 5: Civil Litigation*, released 6 December 2013.
- ³⁹⁶ South Australian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 5: Civil Litigation*, released 6 December 2013.
- ³⁹⁷ South Australian Government, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 5: Civil Litigation*, released 6 December 2013.
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- ³⁹⁹ Exhibit 8-0014, Statement of Cardinal Pell, STAT.0169.001.0001_R, [36].
- ⁴⁰⁰ Exhibit 8-0014, Statement of Cardinal Pell, STAT.0169.001.0001_R, [154]–[155].
- ⁴⁰¹ Transcript of Cardinal Pell, T6351: 8 – 6352: 8 (Day 60).
- ⁴⁰² Transcript of D Casey, T6477: 25-33 (Day 61)
- ⁴⁰³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 61.
- ⁴⁰⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 61.

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- ⁴⁰⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 61.
- ⁴⁰⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 61.
- ⁴⁰⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 61.
- ⁴⁰⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 61.
- ⁴⁰⁹ Transcript of M Coutts-Trotter, T10325:9-13 (Day 98)
- ⁴¹⁰ Transcript of M Coutts-Trotter, T10325:34-37 (Day 98).
- ⁴¹¹ Transcript of M Coutts-Trotter, T10323:10-23 (Day 98).
- ⁴¹² Transcript of M Coutts-Trotter, T10324:20-29 (Day 98).
- ⁴¹³ Transcript of M Coutts-Trotter, T10323:37-10324:7 (Day 98).
- ⁴¹⁴ Transcript of M Coutts-Trotter, T10326:11-13 (Day 98).
- ⁴¹⁵ Transcript of I V Knight, T10648:13-16 (Day 101).
- ⁴¹⁶ Transcript of IV Knight, T10634:26-37 (Day 101).
- ⁴¹⁷ Transcript of IV Knight, T10636:32-10637:16 (Day 101).
- ⁴¹⁸ Productivity Commission, *Access to Justice Arrangements*, Canberra, 2014, p 419.
- ⁴¹⁹ Productivity Commission, *Access to Justice Arrangements*, Canberra, 2014, p 442.
- ⁴²⁰ Productivity Commission, *Access to Justice Arrangements*, Canberra, 2014, p 442
- ⁴²¹ Barton Consultancy were contracted by the Western Australian Government to conduct an actuarial analysis on a sample of Redress WA applications.
- ⁴²² Transcript of R Condon, T4753:32-T4754:14 (Day 46).
- ⁴²³ Transcript of Senior Counsel Assisting Opening Address, T5304:6-30 (Day 52).
- ⁴²⁴ Transcript of R McDonald, TWA2223:29-TWA2224:8.
- ⁴²⁵ Transcript of M J Salmon T5651:25-30 (Day 55).
- ⁴²⁶ Exhibit 19-0023, EXH.019.023.0001.
- ⁴²⁷ WA Department for Communities, *Annual Report 2011-2012*, p 123, <http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities,%20Annual%20Report%202011-2012.pdf> (viewed 23 January 2015).
- ⁴²⁸ WA Department for Communities, *Annual Report 2011-2012*, p 123, <http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities,%20Annual%20Report%202011-2012.pdf> (viewed 23 January 2015).
- ⁴²⁹ WA Department for Communities, *Annual Report 2011-2012*, p 124, <http://www.communities.wa.gov.au/Documents/About%20us/Department%20for%20Communities,%20Annual%20Report%202011-2012.pdf> (viewed 23 January 2015).

⁴³⁰ WA Department for Communities, *Annual Report 2012-2013*, p 104,
<http://www.communities.wa.gov.au/Documents/About%20us/DfC%20Annual%20Report%202012-2013%20Final.pdf> (viewed 23 January 2015).



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