

2 June 2014

The Secretariat
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
SYDNEY NSW 2001



By email: solicitor@childabuseroyalcommission.gov.au

KINGSFORD
LEGAL CENTRE

Dear Madam/Sir,

ISSUES PAPER SIX – REDRESS SCHEMES

Kingsford Legal Centre (KLC) welcomes the opportunity to respond to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) on Issues Paper 6 – redress schemes.

KLC is of the opinion that traditional legal and court processes do not deliver satisfactory results for survivors. Survivor-designed redress schemes can provide the best opportunity for healing outcomes and wider benefits to the community.

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides general advice on a wide range of legal issues, including child sexual abuse, and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC's clients are economically and socially disadvantaged. Many KLC clients have experience in institutional care and are victims of sexual assault. We have had extensive contact with members of the Stolen Generation and acted in the Stolen Generations' case of Joy Williams.¹ It is through our experience providing advice to survivors that we base our recommendations to the Commission. We will be expanding on our submission made in relation to Issue Paper 5 – civil litigation.

Advantages and disadvantages of redress schemes

In our experience, there are some limited benefits to redress through civil litigation compared with redress and/or compensation through a redress scheme. One of the most important of these is the public nature of the civil proceedings, which for some survivors is important to achieving justice.

However, matters which are successfully litigated are exceptional in nature, and for each matter that is resolved positively for the survivor, there are many hundreds, if not thousands of cases which could not be litigated due to access to justice issues, lack of evidence or procedural barriers. We are also concerned that people experiencing severely from the impact of abuse in their childhood may be least likely to be able to engage a lawyer and

¹ *Williams v Minister Aboriginal Land Rights Act 1983 no 2 [1999] NSWSC 84* 26 August 1999.

Operated by the Faculty of Law of The University of New South Wales

F8-003, Kingsford Legal Centre, UNSW 2052 NSW AUSTRALIA

Telephone +61 (2) 9385 9566 • Facsimile +61 (2) 9385 9583 • TTY +61 (2) 9385 9572

pursue a civil case. The discrepancy between the number of successfully litigated matters in Australian Courts, and the overwhelming response of survivors giving evidence to the Commission indicates that civil litigation has failed as a way of providing redress, rehabilitation, restitution and justice for survivors.

While we support the right of any survivor to bring a matter to court through traditional legal processes, we think survivor orientated redress schemes would provide a better alternative to civil litigation for survivors seeking redress and/or compensation. The advantages of redress schemes as a means of providing redress and/or compensation to survivor in comparison to civil litigation can be:

- Less costly: Redress schemes are usually much less expensive than civil litigation. For example, in NSW there is no fee to make an application to NSW Victims Services for compensation. Survivors also face the risk of an adverse costs order if they lose. This can be a powerful disincentive to individuals when they seek to take action against institutions.
- Flexible time limits: Redress schemes typically do not abide by strict limitation periods. For example, in NSW there is no time limit for survivors of child sexual abuse to apply to NSW Victims Services for compensation. Whereas limitation dates² to initiate civil litigation is a huge barrier for potential litigants and provide an initial hurdle which must be overcome before cases can be heard. This makes it very difficult for claimants to feel that they have a case worth pursuing, as they must first be granted leave through a costly legal process in itself to proceed. In other cases individual perpetrators may have no assets to meet a judgment. In some instances, it is difficult to commence litigation against religious and non-government institutions on the basis of vicarious liability. Such institutions may have assets held in charitable trusts and/or may be structured in such a way that it is difficult ascertain which part of the organisation should be liable.
- Lower evidentiary requirements: Redress schemes typically require less evidence from survivors. For example, in NSW a survivor can rely on counselling and recent Police reports to support their victim's compensation claim. Potential litigants may seek to rely on the records kept by the institutions. However, these records may be non-existent, incomplete or not a true reflection of allegations and the institution's response. Oral evidence of survivors given in civil litigation proceedings is often discounted in the face of other written evidence considered contemporaneous. This reflects the experience of many members of the Stolen Generation that have litigated their matters.
- Less traumatising process: Seeking redress or compensation through redress schemes can be a less traumatising experience for survivors than civil litigation. Civil litigation requires survivors to revisit past traumas to satisfy evidence standards. This has the potential to be a re-victimising experience in itself. This is especially the case when the legal process does not adapt its processes to respond to the needs and experience of child sexual abuse survivors giving evidence in Court. This is exacerbated by the adversarial process of legal proceedings which can be particularly harrowing for victims subjected to cross-examination. Whereas survivors can rely on documentary evidence in support of their victims compensation application in NSW.

² Three years for personal injury, six years from the time of suffering for torts in NSW.

- **Quicker:** Redress schemes are usually able to process applications fairly quickly, whereas the Court process is slow and many potential claimants may in fact not live long enough to see the matter resolved.

Important features of redress schemes

Any redress scheme must be designed to acknowledge and provide redress and restitution for harm caused to survivors of child sex abuse in institutions. We believe that survivor designed redress schemes offer an effective way of providing healing, as well as providing wider benefits to the community more generally. The 'Grandview Agreement'³ in Canada offers some insight into how a process of restitution and reparation could work if survivors are placed at the centre of the design.

The 'Grandview Agreement' was born out of a survivors group (the Group) that was formed after two women went public about the abuse they had experienced. The Group began to collectively formulate what they wanted in terms of a response to their experience. Formal negotiations were undertaken with the Ontario Government and after ten months the 'Grandview Agreement' was reached. Prior to the finalisation of the agreement the Government adopted interim measures such as counselling access and funding to the Group.

The 'Grandview Agreement' settled the individual cases of many women seriously abused while in institutional care. What was notable about the scheme was that it provided a wide range of remedies, many which would not have been possible through traditional forms of litigation. All the remedies that were put forward were put forward by the women themselves and the women were involved in directly speaking about their experiences. The reparations to those directly affected by abuse included financial compensation, education and training, therapy and an individual apology. Reg Graycar and Jane Wangmann note, for example, that the removal of tattoos received while they were at Grandview was particularly important for the women and formed a key part of the scheme but would not have formed part of a traditional compensation package awarded by a Court or imposed by a government framed scheme.⁴

The unique approach of the 'Grandview Agreement' was to allow the survivors themselves to shape any legal or restorative process and to determine the manner in which their voices were heard. In allowing the survivors to create the potential outcomes there were clearly both symbolic and practical outcomes that would not have been contemplated by a compensation order from a court or through a statutory scheme conceived by the Government alone.

An explicit objective outlined in the 'Grandview Agreement' was the need for 'healing and recognition, of self-fulfilment for its beneficiaries'⁵, and as a result the forms of redress it contained did not conform to those remedies that could have been obtained in a litigation model.

The Law Commission of Canada identified, survivors often want acknowledgement of the harm done and accountability for that harm, and may want a range of measures, such as an apology, access to specialist education and therapy, financial compensation, some means of

³ The Agreement arose following revelations in the 1990s from former child attendees of widespread sexual, psychological and physical abuse at the Grandview Training School for Girls. The school operated as a court ordered residential home for Indigenous and non-Indigenous girls aged between 12 and 18 years old. The bulk of the allegations concerning abuse occurred in the 1960s and 1970s.

⁴ Ibid, p14.

⁵ Reg Graycar and Jane Wangmann 'Redress Packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution' *The University of Sydney Law School Legal Studies Research Paper No 07/50* July 2007 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001148 at p 8 – 9.

memorialising their experiences, as well as a commitment to raising public awareness of institutional child abuse and preventing its recurrence.⁶ We agree with the view of the Law Commission of Canada that any redress scheme developed should:

- respect, engage and provide information to survivors and all former residents of institutions about the process, while ensuring the privacy of former residents is respected;
- provide survivors with free access to counselling, independent legal advice and other support services throughout the process;
- be managed by those trained to understand the particular circumstances of survivors;
- help survivors uncover facts necessary to validate the abuse that took place and support their claim;
- have the authority to hold people and organisations accountable for their actions;
- be fair to survivors and all other parties affected by it, for example, by having a burden of proof that recognises the limits of available evidence;
- provide for acknowledgement, apology and reconciliation where the abuse has occurred;
- offer a wide range of benefits to address the needs of survivors, including compensation, counselling and education, either directly, or by funding access to community services outside the scheme;
- meet the needs of survivors' families and their communities; and
- contribute to public awareness and prevention.⁷

We believe that State and Federal governments should engage with survivors and survivor groups to design redress scheme/s that meet their needs. Survivor groups should be funded to allow them to engage, if necessary.

Availability of redress schemes

We believe that all those forced to live in institutions where abuse was widespread and systemic were affected by the culture of abuse, even if they were not themselves abused and should have access to redress schemes to address their needs. Equally families of those abused were harmed and should also have access to redress schemes to meet their needs.

A national redress scheme?

We believe that any new scheme/s should be based on the views of survivors and survivor groups. However, it's our view that an advantage of a national redress scheme would be that victim's across states and territories would have access to the same benefits, whereas currently options offered by victim's compensation schemes vary across jurisdictions. A disadvantage of a national redress scheme is that it may lack in depth local knowledge of particular institutions and support services.

⁶ Law Commission of Canada (2000) *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Minister of Government Works and Public Services.

⁷ Ibid, p 3-4.

Any redress scheme should be independent and have the appearance of being independent of the institutions which perpetrated abuse, which would include state-run institutions. The scheme should be funded by organisations that provide care to children. The amount of contribution should be relative to the size of the organisation.

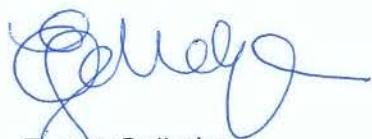
Independence and oversight of institutional redress schemes

The Victorian inquiry into the handling of child abuse by religious and other non-government organisations found that one of the reasons that many survivors were not satisfied with organisations' response to their allegations of child abuse was because the processes for responding to complaints and requests for internal reviews were not truly independent of the organisation.⁸

A lack of real and/or perceived independent complaints body can leave survivors feeling dissatisfied because they think that the organisations' response to their complaint is not genuine. Therefore, redress schemes operated by institutions should be independently managed, and/or survivors, including survivors who have already received compensation under an existing scheme, should have the option of appealing a decision of an organisation to an external oversight body.

KLC remains at the disposal of the Commission's convenience should you wish to further discuss any part of this submission. We thank the Commission for its ongoing invaluable work and wish you every success in your future investigations.

Yours Sincerely,
KINGSFORD LEGAL CENTRE



Emma Golledge
Principal Solicitor



Kellie McDonald
Solicitor

⁸ Victorian Government, Family and Community Development Committee, "Inquiry into the Handling of Child Abuse by Religious and Other Non Government Organisations" (November 2013) p 399.