

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)



**SUBMISSION IN RESPONSE TO THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES
TO CHILD SEXUAL ABUSE CONSULTATION PAPER: REDRESS AND CIVIL LITIGATION**

27 February 2015

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

INTRODUCTORY COMMENTS: ALSWA AND REDRESS WA

As the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Commission') is aware, *Redress WA* opened on 1 May 2008 and closed on 30 June 2009. ALSWA submitted over 1000 applications to *Redress WA* and, therefore, it is aware of many of the problems experienced in regard to the Western Australian scheme. One clear problem with the scheme was that the Western Australian government initially announced that the maximum amount payable to a successful applicant would be \$80,000. However, this upper limit was subsequently reduced to \$45,000. This decision caused a great sense of injustice for many of ALSWA's clients. Another difficulty encountered was the length of time available for making applications – ALSWA received numerous inquiries after the scheme had closed. Issues also arose because of the eligibility criteria and there were administrative problems in regard to confirming identities and records. Another significant issue was the trauma experienced by applicants in telling their accounts of abuse. Further, the stress and

trauma experienced by ALSWA staff who were required to repeatedly listen to and record accounts of abuse over many months should not be overlooked.

As a consequence of the experience in Western Australia, it is ALSWA's view that any new redress scheme will need to take into account the reality that some eligible survivors of institutional child sexual abuse will be reluctant to lodge a claim for redress because of concern that the parameters of the scheme will change during the process and that experiencing additional trauma in these circumstances is not worth it. Measures will be required to ensure that survivors have faith that any new redress scheme will be administered properly and that adequate and culturally appropriate supports are available for Aboriginal survivors. Furthermore, appropriate supports must be available for lawyers and support services involved in assisting potential applicants under any new redress scheme.

SUBMISSION IN RESPOSNE TO THE CONSULTATION PAPER

Scope of the Consultation Paper

The Commission published its Consultation Paper in January 2015 in response to its term of reference that provides that the Commission is 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.

The Commission explains that this term of reference is broader in regard to the range of institutions covered than the range of institutions covered by past government redress schemes such as Redress WA. Redress WA covered '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'.¹ In contrast, the Commission's 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'.² The Commission further explains that the term of reference is arguably narrower because it is restricted primarily to child sexual abuse. As outlined above, it refers to 'child sexual abuse and *related matters*'. In contrast, Redress WA covered physical, sexual, emotional or psychological abuse and neglect.

These differences will need to be accommodated under any new redress scheme recommended by the Commission. In particular, culturally appropriate information and education will be essential so that Aboriginal survivors of institutional child sexual abuse that may have been ineligible for redress under a previous scheme are fully informed and aware of their rights under any new scheme and not

¹ Royal Commission into Institutional Responses into Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (January 2015) 235.

² *Ibid* 49.

discouraged from seeking redress because of past ineligibility or because of past negative experiences.

ALSWA notes that the Commission is conducting a separate project in relation to support services and, therefore, the Consultation Paper does not include proposals or options in relation to support services for survivors of institutional child sexual abuse.

Chapter Two: general principles

ALSWA is broadly in agreement with the general principles outlined in regard to providing redress and, in particular, supports the principle that:

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.³

ALSWA also agrees that the key components of any redress scheme should be a direct personal response; counselling and psychological care; and monetary payments.

Likewise, ALSWA supports the Commission's preliminary view that the ideal position would be for the establishment of a single national redress scheme led by the Australian government and with participation of state and territory governments and non-government institutions. This approach best reflects the goals of ensuring equality of access for survivors, independence and consistency. As the Commission highlights, this ideal position will be dependent on federal government and state/territory government support. ALSWA also agrees that if such a national scheme cannot be established the Commission should recommend a national framework to maximise consistency between any different state and territory schemes.

Future institutional child sexual abuse

The Commission seeks submissions about whether it should recommend redress processes and outcomes for future institutional child sexual abuse. Future institutional child sexual abuse is defined by the Commission as 'child sexual abuse that occurs on or after the date that any reforms we recommend to civil litigation commence'.

Later in this submission, ALSWA comments on particular proposals for reform to the civil litigation system and acknowledges that if appropriate reforms are implemented, civil litigation is likely to provide better outcomes for victims of future child sexual abuse. However, ALSWA is of the view that there are two clear impediments to relying on civil litigation as the only mechanism to seek

3 Ibid 53.

compensation for future child sexual abuse. First, as noted by the Commission, some victims of future child sexual abuse may not wish to undertake civil litigation. Civil litigation may be time consuming, costly, stressful and public. In contrast, redress schemes may be faster, less daunting and provide a degree of privacy. Second, even if reforms to the civil law are implemented, laws may be subsequently changed for competing policy reasons and to the detriment of survivors of institutional child sexual abuse. Accordingly, as ALSWA explains in more detail in relation to Chapter Seven, alternative redress options such as statutory victims of crime compensation schemes must be reformed to accommodate future institutional child sexual abuse.

Chapter Three: data

Chapter Three contains various data in relation to redress outcomes to date and ALSWA makes no comment in relation to that data.

Chapter Four: direct personal responses

The Commission explains that a direct personal response can only effectively 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 acknowledgement from the institution, or a meeting with senior representatives of the institution, must involve the institution itself.⁴

It is further observed that it is not possible to regulate or mandate a genuine apology and the quality of any direct personal response will depend, in part, on the institution's understanding of child sexual abuse and its impact on survivors. ALSWA agrees and strongly supports appropriate training in this regard, especially for those senior representatives of institutions who are likely to be involved in providing direct personal responses to survivors. Furthermore, as stated in the Consultation Paper, institutional staff who are providing a direct personal response to Aboriginal survivors 'should receive cultural awareness or sensitivity training to ensure that they are able to engage appropriately with these survivors, their families and broader communities'.⁵

Specifically, in relation to Aboriginal survivors of institutional child sexual abuse the Commission recognises that many Aboriginal survivors 'were also subjected to policies of forced removal from their families and resultant dislocation from their kin, country and culture'.⁶ It is further stated that some Aboriginal survivors may wish for a 'collective personal response' in the form of traditional healing for specific groups of survivors. ALSWA agrees that flexibility is required to ensure that different and culturally appropriate forms of 'personal responses' are available for survivors but also that an individual survivor must retain the choice. For example, if a number of Aboriginal survivors who suffered abuse at a particular institution wish for a collective personal response in the form of

4 Ibid 80.
5 Ibid 102.
6 Ibid 97.

traditional healing, this should not mean that each and every Aboriginal survivor from that institution should be required to participate. Individual survivors must retain the choice about how they wish to receive a personal response from the relevant institution.

The Commission also comments that although a direct personal response can only come from the institution itself, a redress scheme might be able to facilitate the provision of the direct personal response (eg, send a survivor's request for a written apology to the institution or passing on contact details). It is stated that apart from this type of involvement, 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'.⁷

While ALSWA acknowledges that the Consultation Paper is not intended to deal with the issue of support services for survivors, it is suggested that consideration should be given to including within the scope of a redress scheme the provision of support for survivors who are receiving a direct personal response from an institution. For example, if a meeting is scheduled between a senior representative of the institution and a survivor, the survivor may wish for a trained support worker (funded and provided by the redress scheme) to attend the meeting.

Chapter Five: counselling and psychological care

Chapter Five discusses counselling and psychological care.

ALSWA strongly supports the view that counselling and psychological care provided through a redress scheme should be available throughout the survivor's life and should be flexible to accommodate differing needs at different stages of the survivor's life. Further, survivors should not be required to decide at the time of seeking a monetary payment or direct personal response under a redress scheme whether they require counselling and psychological care because survivors may not need or recognise the need for counselling until a subsequent time.

In general terms, ALSWA highlights that there are insufficient Aboriginal specific services for survivors of institutional child sexual abuse in Western Australia and submits that additional resources are required in this regard.

Chapter Six: monetary payments

Chapter Six considers issues in regard to monetary payments under any new redress scheme. The Commission explains that *full* compensation for loss or damage suffered as a consequence of institutional child sexual abuse should be sought via civil litigation. In contrast, monetary payments under redress schemes are designed to provide *ex gratia* payments without proof of legal liability to the ordinary civil standard.

7 Ibid 103.

The Commission observes that in determining the appropriate amount of any monetary payment under a redress scheme, it is necessary 'to have regard to both the severity of and the consequences of the abuse for the individual'.⁸ It is suggested that a table or matrix which provides for differing levels for the severity of abuse, the severity of impact and distinctive institutional factors would be a possible method of determining the appropriate amount of any monetary payment. However, as the Commission also observes 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'.⁹ Given the experience with *Redress WA*, ALSWA agrees that processes must be employed to ensure that expected payment levels are not reduced during the operation of the scheme.

ALSWA acknowledges that the appropriate minimum and maximum amounts of any individual payment under a new redress scheme will be restricted due to limited available resources. However, ALSWA agrees with the Commission's observation that monetary payments must be 'meaningful' for survivors and capable of making a 'tangible difference in their lives'.¹⁰

Lump sum payments vs. payments by instalments

The Commission notes that some survivor advocacy and support groups have mentioned that some survivors may experience difficulties if they receive lump sum payments. In particular, it is stated that some Aboriginal survivors 'may come under pressure from other community members to share payment or to spend it in particular ways that may not be how the survivor wishes to spend it'.¹¹ On the other hand, it is stated that some survivors may wish for a lump sum payment and to be in a position to make decisions about managing and using the money themselves. The Commission observes that a redress scheme could provide for an option for payments to be paid in instalments rather than as a lump sum; however, this would increase administrative costs of the scheme.

ALSWA is of the view that successful applicants under a redress scheme should have a choice to decide between a lump sum payment and payments by instalments (subject to any issues regarding legal capacity). However, there will be situations where people would benefit from financial management advice and the assistance of a trustee (private or public) to assist in administering funds for their benefit over time. ALSWA submits that greater resources are required for financial advice and support for Aboriginal people in remote areas.

8 Ibid 148.

9 Ibid 150.

10 Ibid 151.

11 Ibid 159.

Previous payments under past redress schemes, criminal compensation schemes or civil litigation

The Commission expresses the view that survivors who have obtained some form of monetary payment under a previous redress scheme, criminal injuries compensation scheme or through civil litigation should be eligible to apply under a new redress scheme; however, any past monetary payments should be taken into account under a new redress scheme.

ALSWA agrees with this general proposition; however, it will be vital that processes are employed to ensure that potential applicants under any new scheme are fully aware and understand that any past payments will be taken into account (and how these past payments will be taken into account) so that they are able to decide whether a further application is warranted in their individual circumstances.

Chapter Seven: redress scheme processes

This chapter discusses various redress scheme processes and ALSWA makes specific comments in relation to the following areas:

Type of abuse

An important issue raised by the Commission 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'.¹² The Commission observes that 'physical abuse and neglect may accompany, and make worse, sexual abuse, particularly in residential institutions' and that physical abuse accompanying sexual abuse should be taken into account when assessing the severity of abuse for the purpose of determining the appropriate monetary payment under a redress scheme. However, given the Commission's terms of reference, it has determined that it is not in a position to make recommendations about redress for physical abuse or neglect that is unrelated to sexual abuse.

In response, ALSWA highlights that the Commission's terms of reference refer to 'child sexual abuse and *related matters*'. The phrase 'related matters' is defined as 'any unlawful or improper treatment of children that is, either generally or in any particular instance, connected or associated with child sexual abuse'. *Redress WA* was open to applicants who were abused in state care and abuse included physical, sexual, emotional or psychological abuse or neglect.¹³ Consistent with the Commission's terms of reference, ALSWA submits that any new redress scheme should cover physical abuse, emotional or psychological abuse and neglect where those forms of abuse are connected to child sexual abuse. In other words, it should not be limited to physical abuse or neglect only as suggested by the Commission when it states that 'it would not be appropriate for us to consider making recommendations about redress for physical abuse or neglect that is unrelated to sexual abuse'.

Having said that, ALSWA strongly advocates for the federal and/or state and territory governments to establish a new national redress scheme that covers all forms of abuse in institutional settings

12 Ibid 163.

13 Ibid 235.

irrespective of whether those forms of abuse include or are connected to child sexual abuse. From ALSWA's experience with *Redress WA* it is clear that there was often serious physical abuse of children in state institutions and that the impact of this abuse may have been just as traumatic and lifelong as child sexual abuse.

Cut-off date by which the abuse must have occurred

The Commission's preliminary view is that a new redress scheme should cover past abuse but should not apply to future institutional child sexual abuse. In particular, it is noted that a 'sustainable' approach would be to establish a redress scheme that applies to past child sexual abuse where the first episode of abuse occurred prior to the cut-off date so that if there was abuse prior to and following the cut-off date, the survivor would be eligible for redress.¹⁴ As discussed above, one of the issues being considered by the Commission is whether a redress scheme should apply to any future child sexual abuse. ALSWA acknowledges the practicalities and resourcing issues and therefore accepts that there should be a cut-off date by which the abuse must have occurred. The cut-off date should be the date on which the redress scheme commences. However, it is also imperative that other options for redress (as distinct to civil litigation) are available for victims of future institutional child sexual abuse. Accordingly, ALSWA submits that the Commission should recommended that the Western Australia government review its *Criminal Injuries Compensation Act 2003 (WA)* to ensure that it applies fairly and appropriately for victims of future institutional child sexual abuse. Some possible reforms include changes to the standard of proof required under the Act; relaxation of the current limitation periods; increasing awareness of the right to claim criminal injuries compensation; removal of the current barrier that precludes compensation if a person is acquitted of the offence; and ensuring that payment caps are fair and reasonable bearing in mind the reality that victims of child sexual abuse may take many years to disclose the abuse.¹⁵

Whether those who have already received redress may apply

The Commission proposes that people who have already obtained redress through past redress schemes, statutory victims of crime compensation schemes or civil litigation should be eligible to apply for redress under a new scheme; however, any past payments should be adjusted for inflation and deducted from any future monetary payment. ALSWA agrees with this approach and, as stated earlier, emphasises the importance of ensuring that accessible and appropriate information is provided to potential applicants so they are aware of and fully understand how past payments will be dealt with and whether, given the amount of any past payments, they are likely to be eligible for further monetary payments and/or access to counselling and psychological services provided under a new redress scheme.

14 Ibid 164.

15 These issues were raised by the ALSWA in its earlier submission: ALSWA, *Submission* to the Royal Commission into Institutional Child Sexual Abuse in Response to Issues Paper No. 7 (14 July 2014).

Duration

The Commission discusses the arguments in favour of an open-ended redress scheme as opposed to a redress scheme with a fixed closing date. The key argument for a fixed closing date is that eligible survivors may fail to benefit from a new redress scheme because they are unaware of the scheme prior to the closing date.¹⁶ As the Commission outlined, this occurred with *Redress WA*, in particular for Aboriginal survivors living in remote areas. ALSWA had many inquiries from potential applicants after the scheme was closed and this was often due to lack of knowledge about the scheme and lack of accessibility to obtain legal assistance (in particular, for persons in remote areas). The Commission also highlights that with a fixed closing date scheme, applicants may experience difficulties in completing the application in time and, further, some applicants may not be ready to disclose their past abuse within the allocated time. In this regard, ALSWA notes that *Redress WA* was open for a period of only 13 months. In contrast, the Commission explains that an open-ended scheme will be more difficult to administer and will require greater administration costs.

The Commission favours an open ended scheme with no fixed closing date in recognition of the difficulties experiences with fixed closing date schemes and the reality that many survivors of institutional child sexual abuse will take years (eg, up to 20 years) to be in a position to disclose the abuse and seek redress. It is observed that:

If applications dwindle to the point where the need for 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 application to be made has been allowed.¹⁷

ALSWA strongly support this approach.

Publicising and promoting the availability of the scheme

As highlighted by the Commission it is vital that any scheme includes a comprehensive communication strategy. ALSWA strongly supports the proposition that there should be specific strategies for Aboriginal communities and for regional and remote communities. If organisations such as ALSWA are to be provided with funding to provide legal advice and representation to applicants under a new redress scheme (discussed further below), sufficient funding should also be provided to enable ALSWA staff to visit remote communities and provide accessible and culturally appropriate information to community members in relation to the scheme.

Application process

The Commission observes that the application process should be 'as simple as possible to minimise the risk of re-traumatisation' but, at the same time, there must be sufficient information to enable

¹⁶ Royal Commission into Institutional Responses into Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (January 2015) 165.

¹⁷ Ibid 166.

eligibility and the amount of any monetary payment to be assessed.¹⁸ It is also noted that additional evidence may be required (eg, medical and psychological reports) to assess applications seeking a higher payment. It is suggested that applications should be in written form (and applicants should verify their claim by completing a statutory declaration) and oral hearings possibly only required if additional material is required to assess claims for higher levels of payments. Further, an application document submitted under a past redress scheme could be submitted along with any additional information and verified by statutory declaration.

Specific reference is made to applications under *Redress WA* and that some applications were 'not adequately completed because of time pressures'. The Commission comments that a scheme with no fixed closing date should assist in this regard. ALSWA agrees that the inability to complete applications due to time pressures will be reduced by the provision of an open-ended scheme. However, the ability of organisations such as ALSWA to assist all applicants in a timely manner will depend on the level of funding provided for that purpose. For *Redress WA*, the lawyers that were allocated to assist clients with applications were excessively overworked and under enormous pressures. In some instances, it may be appropriate for applications to be submitted with the best available information at the time and for the redress scheme to assist applicants and their representatives by seeking additional information where required. The requirements should be flexible to accommodate differing circumstances and needs. As just one example, it may be possible for an applicant to sign an authority form to enable the new redress scheme to obtain a copy of a previous application submitted under a past redress scheme.

Standard of proof

ALSWA is in favour of the suggested 'reasonable likelihood' standard of proof (which is described by the Commission as higher than plausibility but lower than the balance of probabilities). ALSWA agrees that the civil standard of proof should not apply because monetary payments under a redress scheme are not intended to operate as full compensation. Such a standard may require the testing of an applicant's allegations and result in contested hearings. ALSWA considers that the reasonable likelihood standard is fair but at the same time will minimise re-traumatisation for victims.

Deeds of release

The Commission states that if successful applicants are not required to sign a deed of release, as a minimum the '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 judgement), the applicant will cease to be eligible for any counselling and psychological care through redress. However, the Commission questions whether this is sufficient suggesting that arguably a deed of release should be required with the power to have the deed set

18 Ibid 167.

aside in cases where significant new evidence has come to light. Further, a new redress scheme would have to provide funds for legal advice for the applicant before he or she could accept the offer of redress and sign the deed of release.¹⁹

ALSWA disagrees that applicants should be required to sign a deed of release before accepting an offer for a monetary payment under a new redress scheme. Survivors of institutional child sexual abuse should not be required to give up their common law rights to pursue civil litigation – new evidence may become available or circumstances may change that result in the option of civil litigation being more viable than it was at the time of accepting the offer of redress. However, ALSWA agrees that any payments received under a redress scheme should be reimbursed out of any award of damages obtained through civil litigation and applicants should be required to enter into a written agreement to that effect before receiving any redress payments.

Legal and support services

The Commission states that it is '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'. It is further stated that the redress scheme should offer counselling sessions to applicants throughout the application process and a limited number of counselling sessions should be offered to family members (especially for those cases where survivors are disclosing their abuse to family for the first time).

In Chapter Eight of the Consultation Paper the estimated funding requirements for a new redress scheme based on an average monetary payment of \$65,000 are discussed. The estimated administration costs for Western Australia are \$19 million. ALSWA emphasises that the funding provided for it to assist applicants under *Redress WA* was insufficient with lawyers and other staff working excessively long hours over many months to ensure applications were submitted in time. Further, ALSWA does not currently have capacity to provide legal advice and assistance to potential applicants under a new redress scheme in the absence of sufficient additional resources.

ALSWA submits that funding to community legal centres should include funding to Aboriginal and Torres Strait Islander Legal Services such as ALSWA to provide culturally appropriate legal assistance and support to Aboriginal clients who wish to lodge a claim for redress under a new scheme.

19 Ibid 174.

Chapter Eight

Chapter Eight discusses funding models for a new redress scheme and ALSWA does not have any specific comments in regard to funding arrangements other than to emphasise that it agrees with the view that governments (both federal and state) should be the 'funder of last resort' on the basis that governments have a degree of responsibility as 'regulators of institutions and for government policies that encouraged or required the placement of children in institutions'.²⁰

Chapter Nine

The Commission has agreed to make recommendations in relation to redress and civil litigation in mid-2015 because many survivors are 'anxious to obtain justice' and because institutions have indicated a 'willingness to receive guidance' from the Commission as to how they should approach redress for survivors.²¹ The Commission recognises that the implementation of its recommendations will take time (or may not be implemented at all) and, therefore, the Commission intends to make recommendations to guide institutions about how they should provide redress in the meantime. In addition to the general principles, approaches and processes suggested in earlier chapters of the Consultation Paper, the Commission identifies additional principles that should be considered by institutions in regard to interim arrangements, namely:

Independence from the institution

ALSWA agrees that the determination of any claim for redress should be made by a person or persons who are independent of the institution and who are appropriately trained in regard to child sexual abuse and, where appropriate, in relation to specific issues affecting Aboriginal survivors of institutional child sexual abuse.

20 Ibid 152
21 Ibid 190.

Cooperation on claims involving more than one institution

The Commission suggests that if a survivor has a claim against more than one institution, the institutions should, with the survivor's consent, cooperate when dealing with the claim to provide as far as possible a 'one-stop shop' process for that individual survivor. ALSWA agrees with this approach but highlights the importance of ensuring that the institution that is predominantly responsible for the redress process is able to ensure that processes are culturally appropriate for Aboriginal survivors.

Counselling and psychological care

The Commission's ideal position is that survivors' counselling and psychological needs would be met through a trust fund as part of new national or state/territory redress scheme. However, in the interim it is suggested that institutions should assist survivors to 'gain access to suitable public services or by funding counselling and psychological care where public services are inadequate or not available'.²² It is also observed that:

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.²³

ALSWA agrees that it is vital that the institution does not itself make determinations about the appropriate level of counselling and psychological care and institutions should endeavour to provide as much support as possible to enable survivors to access appropriate services.

Chapter Ten

This chapter considers reforms to civil litigation. The Commission recognises that redress schemes provide an alternative to civil litigation but 'they do not offer monetary payments in the form of compensatory damages obtained through civil litigation'.²⁴ The Commission considers specific issues that adversely impact on survivors' ability to access the civil litigation system while acknowledging that even with appropriate reforms there will still be some survivors who may not wish to pursue civil litigation because of the difficulties associated with giving evidence and being subject to cross-examination, legal costs and other difficulties in bringing class actions.

Limitation periods

It is well understood that limitation periods do not adequately accommodate the experiences and circumstances of victims of child sexual abuse and that the current limitation periods are a significant barrier for survivors commencing civil litigation. From an analysis of its private sessions, the Commission found that it took survivors, on average, 22 years to disclose the abuse.

22 Ibid 193.

23 Ibid 194.

24 Ibid 196.

The Commission suggests the current limitation periods could be extended as follows:

- set a basic limitation period of 12 years from the time the survivor turns 18 years of age
- after 12 years (that is, 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.²⁵

Alternatively, it is suggested that limitation periods could be removed altogether with the proviso that courts could stay proceedings for reasons of unfairness to the defendant.

ALSWA favours the first option, that is, an extension of existing limitation periods because this option would provide more certainty. ALSWA is also strongly in favour of retrospective application given the extent of historical institutional child sexual abuse in Australia.

ALSWA also submits that the institutions which have been found by the Commission to have breached their duty of care and failed to respond appropriately in both the prevention of, and the failure to report, instances of child sexual abuse, should be involved in setting up a litigation fund for victims. A litigation fund would alleviate some fear that victims may have about the costly exercise in obtaining legal advice about the merits of their case and commencing proceedings.

Duty of institutions

As the Commission observes, causes of action against institutions (as distinct to perpetrators of abuse) are difficult because 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'.²⁶ Further, '[d]ifficulties arise because civil litigation against the institution seeks to have the institution found liable for another person's deliberate criminal conduct'.²⁷ The Commission put forward three possible options for reform: an express duty to take reasonable care to prevent child sexual abuse of children in their care; a reversal of the onus of proof so that institutions are liable for child sexual abuse committed by their employees or agents unless the institution can prove it took reasonable precautions to prevent this abuse; and absolute liability whereby institutions would be liable for abuse regardless of any steps they had taken to prevent it.

ALSWA favours the second option, namely that institutions are liable for child sexual abuse committed by their employees or agents unless the institution can prove it took reasonable

25 Ibid 206.
26 Ibid 207.
27 Ibid.

precautions to prevent this abuse. This option is fair and reasonable to both survivors and institutions but also serves to encourage institutions to actively adopt child safe processes and procedures.

Identifying a proper defendant

Survivors of institutional child sexual abuse may experience difficulties in identifying a proper defendant because the perpetrator is deceased or has no assets; because the relevant institution is not incorporated or has been deregistered and wound up; or because the institution does not have any assets. A number of suggested options for reform are discussed by the Commission. ALSWA favours the approach whereby children's services that are authorised or funded by government (eg, non-government schools, out-of-home care services and out-of-school-hours care) should be incorporated entities and adequately insured. ALSWA also suggests that further consideration should be given to the other options discussed, namely:

- State or territory legislation could be amended to provide that the liability of religious bodies for institutional child sexual abuse can be met from the assets of the property trust associated with the religious body and the trust is a proper defendant for any litigation involving claims of child sexual abuse.
- State or territory legislation could provide for an entity to be established as a nominal defendant.
- State and territories could be required to ensure that their policies require them not to enact legislation that provides unincorporated bodies with the benefit of succession unless adequate provision is made to ensure assets are available to meet any damages awards for child sexual abuse.

Model Litigant Approaches

The Commission notes that 'the Australian government and some state and territory governments have adopted written model litigant policies' which require the relevant government and its agencies to act as a model litigant.²⁸ Further, Victoria has adopted the *Common Guiding Principles for Responding to Civil Claims involving Allegations of Child Sexual Abuse* and these principles are intended to reduce further trauma for victims; encourage a less adversarial approach; ensure consistency between claimants in similar circumstances; and 'respond to the different circumstances of different claims brought against the State'. Also New South Wales has announced it will introduce guidelines for how agencies should respond to civil claims for child sexual abuse.

The Commission observes that the Productivity Commission has recently 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

28 Ibid 225-226.

complaint to government ombudsmen for parties who consider model litigant obligations have not been met'.²⁹ The Commission suggests that both government and non-government institutions that are subject to civil claims for institutional child sexual abuse should adopt specific guidelines along the lines of those established in Victoria. ALSWA supports this approach and also agrees that for government institutions there must be a process for reporting and enforcing non-compliance with the guidelines.



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