

Response to the Royal Commission
Into Institutional Responses to Child Sexual Abuse
Consultation Paper – Redress and civil litigation
By
Lutheran Church of Australia

Background:

The Lutheran Church of Australia has a presence in all states and territories. The church is divided into five 'districts': Western Australia, South Australia/Northern Territory, Victoria/Tasmania, New South Wales/Australian Capital Territory and Queensland. There is a Bishop of the Church and a Bishop in each District.

Introduction:

The Lutheran Church has provided out of home care for children in the past in institutions and in foster care. Currently, there is a foster care program that is run by Lutheran Community Care in South Australia. The Lutheran Church has programs for children and young people in most congregations. Camps are run for young people on a regular basis.

As we contemplate the notion of redress schemes as one way of acknowledging and rectifying some of the pain and distress caused by sexual abuse in institutions, we recognise the many people who have been affected by abuse in situations where redress and compensation schemes do not exist or where there are no formal structures in place to facilitate the path to healing.

We also acknowledge that sexual abuse – indeed all forms of abuse – can cause lifelong hurt.

The offer or provision of redress is a tangible expression that people have been hurt. Redress is provided so that those who have been hurt may have that hurt acknowledged and receive some recompense for that as well as having access to care and actions that may provide some healing. The path to healing differs for each person, and each person has the right to determine whether or not they accept what is offered from the institution.

An underlying principle of this response is that the needs of victims must be paramount at all times.

It will also be important that the design of any redress scheme recognises that it will be material not to just past events, but those that are yet to occur in our society.

The Lutheran Church of Australia welcomes the Royal Commission's paper regarding suggestions of redress provisions for survivors of sexual abuse of children in institutions.

We note that the Commissioners have identified the responsibility of the entire community for the prevailing social attitudes which create the environment in which children were abused.

The Lutheran Church of Australia abhors abuse of any child – in their home, whilst undertaking activities in any group or engaging with or in the care of an organisation. The Lutheran Church believes that any person who has been abused, physically, psychologically, sexually or spiritually should have equal access and equal opportunity in seeking redress.

We have some concerns that the redress scheme suggested by the Royal Commission seems to have absolved perpetrators from any responsibility in providing redress in any form, either financially or in any other way.

Our further concerns relate to any proposed funding regime should a separate redress Authority/Tribunal be established. Any funding regime should reflect not only the size of the organisation but also the nature of the activities it undertakes with children and any claims or insurance history of the organisation. A clear and fair process must be developed which does not disadvantage small entities even to the point of the entity ceasing to exist due to the financial burden of contributing to any proposed regime.

We address the matters raised in the consultation paper as follows:

Chapter 2 – Structural issues

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.

We wish to respond to the second issue above.

Having regard to future redress processes, it would appear to be more appropriate for greater emphasis to be given to the role of civil litigation to ensure consistency and certainty of approach into the future.

A State-based structure, where all necessary support structures, including legal frameworks, would provide the greater flexibility to provide continuous support to survivors over a longer period of time, including access to civil litigation if required, similar to the existing Victim Compensation Tribunals. Any redress scheme should not remove the right of any individual to access justice under the courts.

A State-based redress scheme would benefit from structures already in place that could be built upon thus generating enhanced benefits across a wider community and maximising the efficient use of resources. This also supports the longevity of the processes beyond the current concerns.

We therefore support a State-based redress approach based on principles and guidelines established at a national level.

Chapter 4 – Direct personal response

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.

The redress scheme should allow for a direct personal relationship between the survivor and the institution in any circumstance of harm where requested by the survivor.

Any apology, whether face-to-face or in writing, should also be at the request of the survivor, heart-felt, and acceptable to the survivor.

We agree with the principles set out for a direct personal response.

As a faith-based institution, we would always welcome an opportunity to have an on-going personal engagement with the survivor to provide pastoral care and support.

Chapter 5 – Counselling and psychological care

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.

We refer to the principles for counselling and psychological care as contained in 5.3 onwards of the report.

Counselling should be available throughout a survivor's life - We concur that a survivor should be able to commence counselling from the time of submitting a claim for redress, whenever that may occur in their life.

Counselling should be available on an episodic basis - We concur that counselling may occur on an episodic basis.

Survivors should be allowed flexibility and choice – We concur with this principle on the basis that such counselling or other service is of an acceptable standard and quality to meet the requirements of the survivor.

No fixed limits on services provided to a survivor – To enable such a principle to be applied, it would require all certified counselling services to be provided through Medicare and thereby provide a framework for measurement and review. Over a long period in a person's life there are many circumstances and events that could give rise to the need for counselling. By utilising Medicare as the funding source, such counselling could be provided in a more holistic manner. In addition, as an established funding agency for care, the use of Medicare would support the principle of utilising already-established agencies to support redress.

We support the remaining principles pertaining to psychological care and capabilities of practitioners, assessment and review and services for family members, if necessary.

Chapter 6 – Monetary payments

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.

A principle of the Royal Commission was to enable the individual voice of a survivor to be heard. A future process should recognise the uniqueness of each survivor and their individual pain in responding to their claim for redress.

Openness and transparency will be key to the acceptance and viability of any redress scheme as it relates to monetary payments.

The assessment process together with the average and maximum monetary payments available through redress should manage the expectations of survivors.

Provision should be made within the monetary payment calculation and process for the apportionment of liability between multiple parties, including the perpetrator. There are circumstances where a foster child, under the guardianship of the State, is placed in a foster home administered by an institution and where the abuse occurs in a school. The parties that could be co-joined are therefore the State, Institution, School and perpetrator.

The processes should also consider the perpetrator being held responsible for any assessed monetary payment to survivors. The operator of the scheme should have powers to seek such contributions from perpetrators.

If payments have been made under past redress schemes, any impacted survivors should have access to the new redress scheme where any previous monetary payments are included for consideration based on current values.

We would support the application of payment by instalments where deemed appropriate by the tribunal or at the request of the survivor.

Chapter 7 – Redress scheme process

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

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.

The report states on page 162, “...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.”

Whilst accepting the validity of the above statement as it applies to this report and related submission, we also submit that consideration needs to be given to a process for redress for those children who experience abuse in a non-institutional environment to ensure that in our society there is no discrimination or differentiation of abuse purely based on where the abuse may have occurred. We encourage the Royal Commission to give consideration to this matter.

The issue of multiple parties to any claim for redress is also a factor to be taken into account in the redress process, ensuring that all relevant parties are included, particularly the perpetrator where possible.

We would encourage the Royal Commission to review the impact on the proposed scheme as documented of widening the access to redress to include those survivors of harsh physical and/or psychological abuse. The expansion of the scheme would enhance the integrity of the redress scheme and its acceptance in the wider survivor community and community at large.

Standards of proof

We consider that those who have been involved in situations where criminal charges have proceeded to court but the alleged perpetrator was found not guilty, should not be excluded from eligibility for redress through redress schemes. This should apply regardless of whether the abuse occurred within the framework of an institution or not.

We therefore support the application of the balance of probabilities as the basis for the determination of proof for any claim. This is well understood in the community in respect to such claims.

Deeds of Release

We would support a Settlement Agreement that sets out all the elements of the redress, including counselling and other support services, as well as the monetary payment in lieu of a Deed of Release. There should be no requirement for a confidentiality agreement except in specific circumstances to protect the interests of the survivor.

Chapter 8 – Funding 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.

Appropriate funding arrangements

It is our proposal that the funding of the scheme by small institutions with a low risk profile, should be on a case-by-case basis.

Where such institutions receive notification of a claim against them, they could be required to file a deposit/guarantee with the scheme in relation to that claim to offset administrative charges and towards any monetary payment pending settlement.

No funding arrangement should include any process that puts at risk the viability of any institution being a party to the scheme or being able to continue to operate. To this end we recommend a clear and fair process that does not disadvantage small entities to the extent of the entity ceasing to exist due to the financial burden of contributing to any financial regime.

Appropriate funder of last resort

Where it is not possible to identify a direct historical party to any claim, the funder of last resort should be the State government in which the named institution was originally registered and operated.

Flexibility of arrangements

As stated above.

Chapter 9 – Interim arrangements

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.

In the interim, we propose that the current access to civil litigation with parties being encouraged to seek settlement without recourse to the courts, be encouraged.

Survivors should have access to legal advice to ensure they have independence of input into the negotiation process and protection from institutional pressure. Legal representation also provides advocacy on behalf of the survivor.

Chapter 10 – Civil litigation

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 available or coverage for institutions, including specific details of the adverse effects and the reasons for them.

Limitation periods

Limitation periods should take account of the delays experienced by survivors in seeking legal redress.

Reforming the duty of institutions

We support the recommendation of the Commission relating to the review by the Victorian Government of the *Wrongs Act 1958* to 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 abuse.

The key responsibility of an institution is that of a duty of care. Issues arise in relation to where a child is a ward of a State that is placed in a foster care home administered by an institution. The institution has a direct responsibility for the home and the foster parents, whereas the State has the responsibility for the child and their guardianship.

When considering the duties of institutions care needs to be taken, therefore, in regard to the duty of other parties who have an association with any survivor as it pertains to any claim of abuse.

Most insurance companies do not cover employees who commit a criminal offence.

Identification of defendants within faith-based institutions with Property Trusts

Legal structures that separate assets from entities to limit liability should not preclude a survivor from being able to make a claim for redress.

Civil litigation relating to child sexual abuse

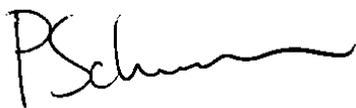
The Commission should consider developing such principles and guidelines that can be utilised through civil litigation as it would aid in providing an equity of access to redress for survivors of abuse both within and outside institutions.

Conclusion

Thank you for the opportunity to contribute to this discussion.

Should you require further information from us, please contact the Executive Officer, Peter Schirmer by email on peter.schirmer@lca.org.au or by phone on 08 8267 7319

Submitted on behalf of the Lutheran Church of Australia



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