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# KELSO LAWYERS

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Redress & Civil Litigation

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## INTRODUCTION

The Royal Commission into Institutional Responses into Child Sexual Abuse is an important initiative, examining a terrible history of abuse and trauma inflicted on many thousands of children. It is only by conducting this in-depth and broad ranging investigation that Australia can hope to enhance the safety of all children, and to heal the wounds of those abused. Kelso Lawyers applauds the quality of the work of the Royal Commission to date and looks forward to the outcome of the hearings, private sessions and extensive research currently being undertaken. In particular we commend the excellent standard of the Consultation Paper on Redress and Civil Litigation (the Consultation Paper), which demonstrates a thorough understanding of the issues that must be considered and addressed in devising a redress scheme and making changes to litigation for childhood sexual abuse.

Recognising the trauma and impact of child sexual abuse through a formal process can be key for survivors in the healing process. A redress scheme can be an invaluable avenue to achieve this recognition, by way of an official acknowledgement of and apology for the abuse, as well as monetary payments. Civil litigation can also be an important avenue available to survivors seeking to assert their rights.

For a redress scheme to have this healing impact, it is essential that the experience and needs of survivors are at the forefront of developers' minds. Survivors of child abuse will often have complex relationships with authority and State apparatus, resulting from being abused by an authority figure, possibly while living in an institution. As such, any proposed redress scheme must respect this background, retaining flexibility in the avenues available to assist survivors in the healing process. Ensuring monetary payments are adequate to allow survivors to feel that their experiences have been fully acknowledged will be key to the ability of the proposed scheme to offer healing. To this end, claimants should be funded in accessing the independent legal representative of their choice in preparing their claim and navigating the redress scheme. Institutions responsible for the abuse should fund the costs of these lawyers.

Our submission is structured in line with the Consultation Paper circulated by the Royal Commission. We have included responses to Chapters 2, 3, 5, 6, 7, 8 and 10. The same headings have been used as can be found in the Consultation Paper, for ease of navigation. Where we do not have responses to sections of the Paper we have not included those headings. The reader will accordingly notice that headings are numbered identically to the Consultation Paper, which is not strictly sequential in this paper. We have also included recommendations at the end of our responses to each Chapter, which distil discussion into distinct proposals. We hope these recommendations are helpful to the Royal

Commission in framing its own recommendations regarding a proposed redress scheme and changes to civil litigation.

Regarding terminology, we have used the terms ‘survivor’, ‘claimant’ and ‘victim’ as appropriate to refer to individuals who have experienced abuse as children. There are a number of redress models discussed throughout the Consultation Paper and in our responses to it. To that end, when referring to suggestions for any redress scheme proposed by the Royal Commission in the outcome of this consultation, we tend to refer to the ‘proposed redress scheme’ or the ‘proposed scheme’. This is to be distinguished from discussion of other redress schemes that have been established in the past by various Australian or international jurisdictions.

Most of our recommendations are made directly with regard to survivors of childhood sexual abuse. It is important to acknowledge, however, that sticking too strictly to abuse of a sexual nature may give rise to an arbitrary barrier to survivors of other types of abuse who are equally deserving of healing by way of redress or litigation. While respecting the mandate of the Royal Commission to make recommendations relating to “child sexual abuse and related matters”, this mandate should not prevent acknowledgment of the often complex and intertwining nature of abuse directed toward children and the impact that abuse has. To that end, Kelso Lawyers recommends that any redress scheme proposed by the Royal Commission be available to claimants who have experienced child sexual or physical abuse. For those who have experienced abuse of that nature, evidence of emotional or psychological abuse and neglect should be taken into account as aggravating factors during the process of assessing claims.

Kelso Lawyers hope that you find our responses to the Consultation Paper helpful in framing your own recommendations with regard to redress and civil litigation.

## EXECUTIVE SUMMARY

Kelso Lawyers appreciates the opportunity to respond to the Consultation Paper on Redress and Civil Litigation (the Consultation Paper), published by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in January 2015.

Kelso Lawyers is a successful specialist law firm with a large compensation practice acting for survivors of clergy and institutional child abuse. The firm acts for witnesses appearing at the Royal Commission. The founder and Director of Kelso Lawyers, Peter Kelso is an external auditor for the NSW Department of Family and Community Services and advises the Department on the compensation rights of children in State care. We also have extensive experience in making claims with Victims Services in New South Wales (NSW). The firm is very active in strategic litigation and research on behalf of people abused in institutional care. We take a close interest in law reform and publicly agitate for change.

This specialisation give us unique insight into the needs of survivors of abuse and the challenges they have faced to date in asserting their rights and seeking healing for past violations against them. Through this work we understand the strengths and challenges that exist currently in the scheme operating in NSW to provide redress in the form of victims' compensation to vulnerable clients. As such we hope that our responses to the Consultation Paper are of interest and assistance to the Royal Commission.

We have prepared a comprehensive response to many of the Chapters of the Consultation Paper, outlining what we consider to be important issues in developing recommendations on these issues, and including insight from our own work in this field. A brief summary of these responses and recommendations made follows.

### Chapter 2

Justice for victims will require fairness and equality to underpin all elements of a proposed redress scheme. As such, individuals who have received compensation previously for childhood abuse should continue to have access to the scheme. All claims should be assessed equally, with any previous award being considered only after a figure for a monetary payment has been determined. At that point, any deduction for a previous award should be made on a net basis, considering only that portion of the previous award that was received by the claimant.

Any redress scheme proposed by the Royal Commission should be able to assess claims for both sexual and physical abuse. Emotional abuse or neglect that might have coincided with sexual or physical abuse should be seen as aggravating factors. As recognised in the Consultation Paper, where sexual

abuse has been accompanied by other forms of abuse or neglect, the injuries that result are often more severe.

It is appropriate that the proposed scheme be administered by the Federal Government. It is likely this will require uniform legislation across all Australian jurisdictions. Relevant government ministers across these jurisdictions should coordinate to ensure there is equality across Australia.

Justice for victims will also require a fair appeals process to be available to claimants who engage with the proposed scheme. This is essential to ensure the integrity of the scheme, as well as the perception of fairness that will be key to any scheme being able to offer healing to survivors. Both internal review and external appeals are appropriate.

### Chapter 3

The data provided in Chapter 3 of the Consultation Paper suggests that the figures modelled in Chapter 6 are below what would be considered reasonable to offer healing for survivors of childhood abuse.

### Chapter 5

Counselling and psychological care will be an essential component for a proposed redress scheme. Usually this would be provided by staff employed by the proposed scheme, or services that the scheme refers claimants to. It might also be appropriate to provide funding for a claimant to continue to see their own therapist if they have an established relationship of trust with them. This will support both claimants and staff members of the scheme, who might otherwise be the target for frustration or stress being experienced by claimants. Ensuring the wellbeing of staff of the scheme will also be important. To that end, the proposed scheme should ensure that staff have access to vicarious trauma support to assist in minimising and managing the trauma experienced by dealing with claimants' traumatic stories.

### Chapter 6

Monetary payments will be an essential component of any proposed scheme. The purpose and method of calculation of monetary payments should focus on healing for survivors by restoring their freedom of choice. These payments represent a tangible recognition of the abuse suffered by claimants, as well as a practical support in view of the impact that childhood sexual abuse can have on the trajectory one's life subsequently takes. They also offer a means to institutions for redemption, by demonstrating that they recognise their part in abuse and that they must make amends for this. To this end, payments must be substantial enough that survivors see them as adequate in recognising the trauma and injuries they have suffered.



The Irish Scheme presents a good model for how payment levels should be decided, in terms of the scaling system employed and the involvement of independent lawyers to support claimants and assist in preparing claims. In making assessments according to the scaling system, account should be taken of the severity of psychological and physical harm as well as loss of opportunity. The vulnerability of claimants should also be considered. In assessing the distinctive institutional factors as proposed in the Consultation Paper, and the activities of the institution in response to disclosure of abuse will be relevant.

Maximum and average payments available under the scheme should be determined in line with those achieved in out of court settlements in recent years. These settlements are an indication of what survivors have felt was a fair sum and what institutions have been willing to pay. To the extent that any payments should be offset against previous payments, only the net sum received by the claimant should be considered.

## Chapter 7

For engagement with the proposed redress scheme to have maximum healing potential for survivors, they must have access to independent legal assistance. Claimants who have been abused in State institutions will not appreciate the State dictating the most appropriate lawyer to assist them in their claims. It is also important for the integrity of the scheme that lawyers who are independent of government funding are engaged with the scheme, to ensure no conflict of interest arises in their work with survivors. This legal assistance should be paid for by the institution responsible for the abuse. To that end, sufficient provision for legal costs will be essential at all stages of engagement with the proposed scheme.

The proposed scheme should be available to both primary and secondary victims. Assessing injuries to secondary victims, such as family members, will possibly take a different approach. It is important to recognise the impact that the abuse has had on them, especially where the primary victim of abuse is deceased.

## Chapter 8

Ensuring that the proposed scheme is funded adequately and from the appropriate sources will be key to the healing impact and integrity of payments offered. To that end, the institutions responsible for the abuse should fund the vast majority of the costs of the proposed scheme, in terms of payments made to survivors, administrative and other costs. To the extent that governments are liable to make payments in response to claims for abuse, that funding should come from a separate source to that

used for other purposes in the scheme. This will ensure that there is no avenue for actual or perceived conflicts of interest in decision making on claims.

## Chapter 10

The proposed changes to civil litigation processes contained in the Consultation Paper are essential to improving official responses to childhood sexual abuse. Survivors of abuse may choose to pursue civil litigation for any number of reasons. Litigation has the potential to have a significant healing impact if the legal landscape allows for fair assessment of claims. Currently, however, survivors of abuse confront numerous obstacles if they choose to pursue civil litigation in response to the harm the abuse has caused.

Limitations periods have been a primary barrier in this regard. The proposal to remove this barrier, including retrospectively, will allow survivors to access justice in the courts. Deeds of release prepared in the current legal landscape have the potential to undermine this development, however, by entrenching limitation periods and the negotiations that were possible in their shadow. To that end, claimants should be able to have these deeds set aside relatively simply if they seek to litigate a matter which has been the subject of a deed of release.

Discussion of altering burdens of proof in the Consultation Paper are positive and should be implemented. In particular, introducing absolute liability or a reversal of the burden of proof depending on the context in which abuse occurred would enhance fairness for victims and encouraging greater care in the future. Likewise, ensuring that institutions can be sued, including ensuring the proper defendant is known to claimants and that assets are accessible to them, is important. Where model litigant policies apply, there should be repercussions to the institution if they are not followed.



## CHAPTER 2 – STRUCTURAL ISSUES

*In response to discussion in the Consultation Paper in Chapter 2, Kelso Lawyers would like to make the following comments:*

### 2.1 Justice for victims

The legitimacy of any redress scheme will be measured by how fair victims find the scheme to be, and to what extent they find engagement with the system to be a satisfying process. Without fairness and satisfaction, any proposed redress scheme will result in the same complaints of inadequacy that have been directed to earlier redress schemes.<sup>1</sup>

Fairness requires treating victims equally, both in term of accessibility and outcomes. While different levels of abuse should give rise to different payment amounts, it will be important in the interests of justice for reasons to accompany those payments. This will ensure that victims can clearly see why payments offered differ from those afforded to others and what elements have been considered in arriving at the figure they have been offered. This would also assist in the event that a mistake has been made in the assessment, by giving victims a tangible basis on which to appeal if they chose to (see below comments in response to this chapter and chapter seven for further discussion of appeals).

The Royal Commission should ensure that fairness underpins every element of a proposed redress scheme. If this is achieved, victims will be largely satisfied with their engagement with the process, enabling them to finally move forward with their lives. Fairness must be the deciding factor where questions arise as to the direction any redress scheme proposed by the Royal Commission might take for this scheme to have a lasting and positive impact.

### 2.2 Current failings

Many victims who have received payments to date have achieved these in out of court settlements. Many feel they were effectively forced to settle due to the availability of limitations periods and other defences to claims, as noted in the Consultation Paper.<sup>2</sup> The desire to avoid ongoing contact with the institution in question, combined with the need to move forward with their lives, left victims feeling

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<sup>1</sup> Victims have reported that sums of money offered by State or institution-based redress schemes were inadequate given the impact of the abuse on their lives (Consultation Paper on Redress and Civil Litigation, 135). Particularly with institution-based schemes, it has emerged that the procedures for these schemes are not followed uniformly, and are occasionally contravened, by the institutions that have established them: see Royal Commission into Institutional Responses to Child Sexual Abuse *Report of Case Study No. 4: the experience of four survivors of the Towards Healing Process*, January 2015, findings 16, 38; Royal Commission into Institutional Responses to Child Sexual Abuse *Report of Case Study No. 8: Mr John Ellis's experience of the Towards Healing process and civil litigation*, January 2015, findings 2-4, 6, 8, 13, 14.

<sup>2</sup> Consultation Paper on Redress and Civil Litigation, 45.

that settling for an inadequate amount and signing a deed of release to extinguish any future rights to claim was the best outcome that would ever be available to them. It is important in this context that victims who have signed deeds of release are able to access payments through the redress scheme. Such deeds should be *void ab initio* save for any quantum paid, which could be accounted for in determining any monetary payment to be made. Institutions engaging with the redress scheme must not rely on deeds of release that have left victims inadequately compensated. Eligibility to participate in the proposed redress scheme ought not to be denied on the basis of a deed of release. Deeds of release also have significant impacts on civil litigation. Please see comments in response to Chapters seven and ten for exploration of the issues that arise in that context.

### 2.3 The complexity of the task

The Consultation Paper acknowledges that most redress schemes that deal with child sexual abuse also cover physical abuse, with some also covering emotional abuse or neglect. While acknowledging the terms of reference for the Royal Commission, which invite examination “child sexual abuse *and related matters* in institutional contexts”,<sup>3</sup> the importance of fairness for survivors must not be forgotten. The government must ensure it takes a comprehensive view of the harms caused by institutions when it comes to child abuse. Sexual and physical abuse should give rise to successful compensation claims, with emotional abuse and neglect considered as aggravating factors in such claims. See discussion under ‘types of abuse included’ in Chapter seven for further elaboration of this point.

### 2.4 Elements of redress

Kelso Lawyers agrees with the three elements of redress that are suitable in responding to child sexual abuse identified in the Consultation Paper, namely the direct personal response, counselling and monetary payments. In particular we note the strong positive impact that adequate provision of these forms of redress can have on the lives of survivors, and the negative impact inadequate provision of each of these elements can have. As noted in the Consultation Paper, inadequate monetary payments can leave survivors with negative feelings, if they sense that the level of their trauma has been undervalued.<sup>4</sup>

It may also be appropriate to consider additional elements of redress as appropriate for the individual claimant. For survivors who have grown up in institutional care, for example, assistance with services could be particularly helpful. In the experience of Kelso Lawyers, such claimants have indicated that

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<sup>3</sup> Consultation Paper on Redress and Civil Litigation, 50 (emphasis in original).

<sup>4</sup> Consultation Paper on Redress and Civil Litigation, 45-46, 60.

assistance with medical and dental bills, legal assistance, funeral plans and free or discounted public transport would all be considered useful forms of redress.

It is positive to see reference to the van Boven Principles in the Consultation Paper.<sup>5</sup> These Principles provide a useful framework for State and institutional responses to the widespread occurrence of child sexual abuse being revealed by the Royal Commission. Among other things, they acknowledge family members as “victims” of human rights violations,<sup>6</sup> that survivors should be treated with special consideration to avoid re-traumatisation in the course of seeking justice,<sup>7</sup> require that all appropriate legal means be available to ensure the survivor can receive a remedy,<sup>8</sup> that national reparations programs ensure survivors can access compensation even if the perpetrator cannot or will not pay it,<sup>9</sup> and that compensation for, *inter alia*, lost opportunity, moral damage and legal assistance should be provided.<sup>10</sup> The Principles also state that statutes of limitations should not apply to gross violations of human rights that constitute crimes under international law, and should not be unduly restrictive for other types of violations.<sup>11</sup> It is arguable that the level of sexual abuse of children revealed by the Royal Commission could be seen as a crime against humanity (that is, a crime under international law to which statutes of limitations should not apply), due to its widespread and systematic nature, although there is not scope here for a full legal analysis of that argument.<sup>12</sup> These Principles serve as a useful guide as to appropriate responses to such egregious crimes as child sexual abuse. They should underpin both the design and the work of the proposed scheme.

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<sup>5</sup> Consultation Paper on Redress and Civil Litigation, 51.

<sup>6</sup> UN General Assembly, *Basic Principles and Guidelines on the Rights 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, V, 8.

<sup>7</sup> UN General Assembly, *Basic Principles and Guidelines on the Rights 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, VI, 10.

<sup>8</sup> UN General Assembly, *Basic Principles and Guidelines on the Rights 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, VIII, 12(d).

<sup>9</sup> UN General Assembly, *Basic Principles and Guidelines on the Rights 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, IX, 16.

<sup>10</sup> UN General Assembly, *Basic Principles and Guidelines on the Rights 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, IX, 20(b), (d), (e).

<sup>11</sup> UN General Assembly, *Basic Principles and Guidelines on the Rights 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, IV, 6-7.

<sup>12</sup> See *Criminal Code (Cth)*, ss 268.12-268.14. Note that prominent Australian QC, Geoffrey Robertson, has made a similar argument: Geoffrey Robertson, “Put the pope in the dock”, 3 April 2010 *The Guardian*, <http://www.theguardian.com/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law> (accessed 9 February 2015).

## 2.6 Possible structures for redress

Kelso Lawyers supports proposals for a single national redress scheme established by statute and administered by the Federal Government. A scheme administered by the Federal Government would be free from accusations of bias that can plague schemes set up by the authority or institution against which a claim might be made. There have been complaints made against most, if not all, previous schemes seeking to provide redress for child sexual abuse, with claims that the schemes have prioritised reducing negative publicity for institutions over ensuring justice and adequate redress for survivors.<sup>13</sup> Institutionally based redress schemes have also not been uniformly followed, indicating they offer little in terms of certainty or predictability for survivors.<sup>14</sup> Whether these complaints were well-founded or not, they demonstrate the risks of leaving open any avenue by which accusations of bias might be made.

Our experience supports the finding in the Consultation Paper that survivors distrust State governments to provide adequate redress, given the State was often the institution that facilitated their abuse, funded that institution, or refrained from protecting them from it.<sup>15</sup> With the Federal Government being largely free from a history of administering institutions in which child sexual abuse has occurred, a scheme administered by it will have the greatest legitimacy for survivors.<sup>16</sup>

An effective appeal mechanism would be a critical element of a redress scheme to ensure accountability. A survivor's right to have the scheme administered according to law should not be undermined by barriers of inefficiency, delay, technical constraints on grounds of appeal, unavailability of costs, rigidly formal processes, or absence of assistance with the cost of legal advice to ensure that the decision was the correct and preferable one. We discuss this in greater detail under 'Review and appeal' in Chapter seven. In short we propose that decisions be reviewable first by internal review by a more senior assessor, then to the Administrative Appeal Tribunal (AAT), and then if necessary to a federal court. To this end, it might be appropriate to establish a National Redress Tribunal as a part of the Commonwealth AAT.

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<sup>13</sup> The inclusion of confidentiality clauses in deeds of release required under the Catholic Church's *Towards Healing Process* indicates such a prioritisation: see Royal Commission into Institutional Responses to Child Sexual Abuse *Report of Case Study No. 4: the experience of four survivors of the Towards Healing Process*, January 2015, finding 8.

<sup>14</sup> It was acknowledged in the Royal Commissions reports on case studies four and eight that *Towards Healing* protocols were not followed by the Catholic Church.

<sup>15</sup> Consultation Paper on Redress and Civil Litigation, 56.

<sup>16</sup> The role of the Federal Government in some institutions in which indigenous children and child migrant were abused, however, must be borne in mind.

See our submission in response to Issues Paper 6, Redress Schemes,<sup>17</sup> for a detailed explanation of possible structures for such a scheme, including suggestions for rights to appeal. We submit that rights to appeal both on questions of fact and law should be available to survivors who feel that a decision as to their entitlement to redress has not been the correct or preferable one.

### Suggested recommendations

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- Fairness and survivor satisfaction should underpin all decision making in designing and implementing a proposed redress scheme;
- The elements of redress proposed by the Royal Commission are an essential minimum of what might be required for healing. It might be appropriate to consider additional elements of redress based on the personal circumstances of the survivor;
- Survivors who have previously signed deeds of release must have access to any proposed redress scheme;
- Any redress scheme must facilitate compensation for sexual and physical abuse, with emotional abuse and neglect being aggravating factors in assessing the appropriate level of payment;
- A single national redress scheme should be established by statute in all relevant jurisdictions and administered by the Federal Government;
- The structure of a proposed scheme should incorporate an appeals process to ensure fairness. There should be access to internal review and appeal to the AAT and federal courts.

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<sup>17</sup> Submission No. 43.



## CHAPTER 3 – DATA

*In response to discussion in the Consultation Paper in Chapter 3, Kelso Lawyers would like to make the following comments:*

### **3.3 Analysis of claims data**

The figures presented in Table four in Chapter three indicates that the maximums proposed in the Consultation Paper are significantly below what has been considered fair in the past. It is not clear, however, whether these maximum figures relate to litigation or out of court settlements. Given the modelling specifies that maximum award amounts do not impact on the overall cost of the scheme, it is unclear why they are considered necessary. This table indicates that the maximum payments suggested in the Consultation Paper would be significantly below what would be considered reasonable in all circumstances: in all years but one, the maximum payments made vastly exceeded \$200,000. To this end, it would be interesting to see a breakdown of payment amounts resulting from civil litigation compared to out of court settlements.

See discussion under the heading ‘Amounts of monetary payments’ under Chapter six for further suggestions on this point.

### **Suggested recommendations**

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- Any maximum payment suggested by the Royal Commission should be sufficiently high to match maximum payments made in out of court settlements to date, and flexible to ensure that survivors will not be limited in achieving a just outcome.

## CHAPTER 5 – COUNSELLING AND PSYCHOLOGICAL CARE

*In response to discussion in the Consultation Paper in Chapter 5, Kelso Lawyers would like to make the following comments:*

### General comments Chapter 5

When dealing with survivors of childhood abuse, it is essential to prioritise their mental health. Whether pursuing litigation or engaging with a redress scheme, the process of making a claim can be traumatic. People start to remember events from their childhood that they have often been trying to actively repress throughout their adult lives. As such, it may be appropriate to request that all individuals engaging with a redress scheme or pursuing civil litigation have counselling of their choice in place before they commence the claims process. Some may prefer not to engage with counselling: in those cases after explaining to them why it is important, their choice to pursue the claim without support should be respected. Those who are interested in receiving counselling should be referred to an appropriate free service with a specialisation in assisting survivors of trauma, such as Wattle Place or other equivalent State-based organisations. Where there is an existing relationship of trust between the applicant and their counsellor or therapist, the redress scheme should provide funding to facilitate the continuation of that treatment.

It is also important to support the staff members of the redress scheme. Some claimants might come to depend on the staff members. On rare occasions, this might result in threatening behaviour on the part of claimants when they feel that their claim is moving too slowly or is not being taken seriously. Such threats might take the form of threats to self-harm, or threats to the safety of others. A variety of other less serious behaviours characteristic of people with mental illness might also emerge. As such it is important that staff members are trained to ensure that claimants are aware of the boundaries of the relationship, by emphasising they are not trained in psychological care if that is the case.

Staff must be adequately supported in working with survivors of childhood sexual abuse. All staff who are regularly exposed to abuse stories will experience some level of vicarious trauma. In addition to exposure to traumatic material, case load is the biggest predictor of the impact of vicarious trauma.<sup>18</sup> As such it will be fundamentally important to ensure that staff members of the redress scheme have

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<sup>18</sup> Zoe Morrisson “‘Feeling heavy’: Vicarious trauma and other issues facing those who work in the sexual assault field”, (September 2007) *ACSSA Wrap: Australian Centre for the Study of Sexual Assault*, 5; Andrew P Levin and Scott Greisberg “Vicarious Trauma in Attorneys” 24(1) (2003) *Pace Law Review* 245, 250.

access to support in managing their vicarious trauma. This is essential both in terms of the impact that it has on those staff as individuals, as well as on their ability to support claimants through the claims process.

Vicarious trauma support can take the form of regular supervision (on a fortnightly or monthly basis) and training in managing both clients' and one's own trauma. Staff could be offered well-being days, where time is taken out of the work place to focus on well-being. While the focus of such a program should be on those staff members with the highest caseloads or greatest exposure to traumatic materials, it is important to ensure that all staff members have access to support.

### **Suggested recommendations**

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- All survivors engaging with the redress scheme must have access to specialist counselling services, or funding support for their own therapist if they prefer;
- Staff members of the redress scheme must also be supported by setting proper boundaries with claimants and ensuring they have access to adequate vicarious trauma support.

## CHAPTER 6 – MONETARY PAYMENTS

*In response to discussion in the Consultation Paper in Chapter 6, Kelso Lawyers would like to make the following comments:*

### 6.2 Purpose of monetary payments

Ascertaining the purpose of the payment and the method of calculation will be key to determining the appropriate monetary compensation available to survivors of abuse. Monetary payments are important in the healing process for survivors. The offer of money can act as a genuine act of recognition of the trauma of abuse. For some it can be more meaningful than an apology, as the institution is offering them something substantive in recognition of the wrong that was done to them. They are also of immense practical use. Many of those abused as children have been prevented from pursuing their financial ambitions in a number of ways. Many were deprived of an education, permanently limiting their earning potential. Others found relationships with authority figures challenging, after their ability to trust was undermined when someone in authority abused them. This may have led to an inability to maintain stable employment or to advance up the career ladder. As such, provision in a redress scheme for adequate recognition payments will be key to its ability to assist in healing for survivors.

Kelso Lawyers submits that the purpose of redress payment stated for the Irish Residential Institutions Redress Scheme (hereafter referred to as the Irish Scheme) is the preferable one.<sup>19</sup> The purpose of a redress scheme recommended by the Royal Commission should be to facilitate healing for survivors. To that end, the scheme should aim to restore the capacity for self-determination, or freedom of choice, to survivors of child abuse.

For those abused in a school or institutional care context, their power to make choices in their own best interests was taken from them (or their parents) and handed to those institutions – who in turn placed that power of choice in the hands of its agents. Powerless and voiceless, these children were then abused by the actions or choices of those agents. The psychological and physical injuries caused by that abuse thereafter deprived these survivors of the choices they would otherwise have liked to have made for their lives as adults.

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<sup>19</sup> The purpose of the Irish Scheme was “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”, Consultation Paper on Redress and Civil Litigation, 134.

Others will have been abused outside of the strict institutional context, for example by a local religious or lay authority figures in the community. In those circumstances, while the ability to make choices to protect their own best interests might persist generally, an inadequate institutional response was equally disempowering. For those abused in the community, these inadequate responses had dramatic impacts on survivors' control over their own lives, again ultimately undermining their freedom of choice.

The primary purpose of the payments should therefore be to restore that power of choice to survivors as a primary tool for healing. The payments should expressly take into account the degree to which the abuse deprived them of the ability to choose the course of their lives. The severity of the harm (psychological and physical) and the opportunities that they lost (education, career, relationships, societal engagement, travel) because of the abuse should all be taken into account. In fact, the exercise of identifying the things that they would have liked to have done may assist survivors in deciding how to use their awards. In this way the scheme can facilitate a shifting of focus from past wrongs to future opportunities.

Monetary payments also play an important role for institutions seeking to make amends for past abuse of children. Many of the institutions in which children were abused were charities or religious organisations, founded to seek amelioration of social ills. By facilitating child abuse, however, they ultimately caused great distress that has impacted not only the individuals abused, but also their children, families and society at large. It was the convergence of the community respect these institutions enjoyed and promoted with the chicanery that often characterised responses to child sexual abuse that facilitated the ongoing abuse of children.

Acknowledging culpability by way of making adequate monetary payments to survivors will thus also offer institutions an opportunity to rebuild their own integrity and community standing. For those institutions that continue to work in the charity and/or spiritual sectors, restoration of integrity is likely to be a priority, to ensure they are best positioned to be able to continue their work in supporting the most vulnerable. As such, an ancillary purpose of restoring the integrity of institutions may be appropriate. This will be particularly relevant where institutions have actively sought to prevent children from reporting abuse or to protect abusers by moving them around when complaints of abuse arose.

### 6.3 Monetary payments under other schemes

As mentioned above, Kelso Lawyers supports the model of redress scheme established in the Irish Scheme. There are a number of elements of this scheme that we think would be important to replicate in any redress scheme recommended by the Royal Commission.

The scaling system used by the Irish Scheme is similar to the system proposed by the Royal Commission in the Consultation Paper.<sup>20</sup> The scheme proposed in the Consultation Paper calculates damages in terms of severity of abuse, impact of the abuse and institutional factors. The Irish Scheme considers severity of abuse, medical and psychosocial impact and loss of opportunity. While medical and psychosocial impact would clearly be within 'impact of the abuse' for the scheme proposed in the Consultation Paper, Kelso Lawyers would also strongly encourage loss of opportunity to be included in that category as well.

We acknowledge the Royal Commission's position regarding past and future economic loss being more adequately assessed during the civil litigation process. Kelso Lawyers submits that loss of opportunity is clearly distinct from past and future economic loss, and is an essential component for ensuring survivors feel adequately compensated for what they endured as children. As mentioned above, survivors' opportunities were often irretrievably altered when they were abused. As such, any payment granted under a redress scheme that does not acknowledge this loss would be seen as hollow by survivors, failing to address the injustice many feel regarding the impact that abuse has had on the course of their lives. Any payment made in recognition of lost opportunity would not seek to fully compensate for that loss, but rather to acknowledge and recognise it. Including a component for loss of opportunity as seen in the Irish Scheme to acknowledge that loss would ensure that survivors feel that justice has been afforded to them.

The use of both medical and legal expertise by the Irish Scheme ensured both legal rigour and important medical expertise contributed to findings. Many survivors of abuse in institutions suffered injuries as a result of sexual or physical abuse. Some have scars or physical injuries which persist into later life. Many have damaged teeth due to inadequate dental care in institutions. Survivors of abuse were often denied adequate medical care, being prevented from seeing a doctor or sometimes being forced to endure 'home remedies' which did nothing to treat, and often exacerbated, injuries. Medical expertise that could assess the impact of such actions would ensure the impact of abuse was more accurately recorded. These medical experts must include individuals with expertise in psychological injuries, given the high incidence of this form of injury in survivors of childhood abuse.

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<sup>20</sup> Consultation Paper on Redress and Civil Litigation, 144.

It is also important to note that psychological injuries often manifest in physical ways, such as self-harming behaviours. Physical ailments such as ulcers and migraines can also be secondary to mental illnesses such as anxiety and depression.

The role of lawyers in the Irish Scheme is another important element that should be replicated in any redress scheme recommended by the Royal Commission. Most of our submissions relating to access to lawyers is contained in our responses to Chapter seven. Here, we would simply like to state that it is important, both as a sign of respect to survivors and to ensure that they have access to the best quality support to make their claim, that claimants are funded to access an independent lawyer of their choosing. In circumstances where survivors have been abused by the operation of State apparatus, it would be disrespectful in the extreme for the State to then prevent them from accessing their chosen legal representative while confronting traumatic memories from their past. It would also be a false economy, as experienced specialist lawyers would be able to navigate the system more quickly and simply with less risk of mistake, ultimately minimising costs. Lawyers in the Irish Scheme were key to ensuring rigour in assessing the appropriate payment for survivors.

#### **6.4 A possible approach**

Kelso Lawyers supports the proposed matrix for assessing the compensation payable to survivors, with amounts of money offered to survivors being assessed on a scale of 1-40 for severity of abuse, 1-40 for impact of abuse and 1-20 for distinctive institutional factors, resulting in a total score out of 100. The severity of abuse might be relatively easy to assess, with factors such as nature of the abuse, frequency of the abuse and characteristics of the abuser all being factors that would impact on the outcomes.

Impact of the abuse, on the other hand, is likely to be much more difficult to assess. This would need to include both direct impacts such as ongoing medical conditions, and less easily measured considerations such as loss of opportunity, discussed above. Lawyers with experience making such assessments would be essential to ensuring a fair and transparent assessment took place for each claim. There are a number of factors that contribute to getting a clear picture of impact, including outcomes for other family members, other traumatic experiences the individual might have had during their lives and the impact of injuries caused or exacerbated by abuse. Without expert legal assistance claimants are unlikely to be able to clearly demonstrate the full impact that the abuse has had on their lives. This could ultimately lead to further claims in the future as those impacts become apparent, or alternatively claimants may feel the scheme has been unfair in not acknowledging the full impact of the abuse.

The Royal Commission has acknowledged the varying levels of vulnerability to abuse for children living in institutional settings. Many of these children were from deprived backgrounds, some having already been abused in the family home.<sup>21</sup> Some abusers exploited this disadvantage in selecting victims and persisting in abuse. It is thus appropriate for this factor to be considered in assessments of both the severity and the impact of abuse: for children without external support structures to assist them in seeking help in the aftermath of abuse, their ability to protect themselves was severely compromised. The immediate and ongoing impact is therefore likely to be greater.<sup>22</sup>

In assessing distinctive institutional factors, the nature of the institution will be relevant. The response of the institution to any disclosure of abuse will also be important to include in this assessment. Where the institutional response has exacerbated the trauma of the child concerned, or facilitated the abuser continuing to abuse children, a higher score in this part of the matrix would be appropriate.

#### Amounts of monetary payments

It is positive to see that the Royal Commission has not fixed its view on what the payments should be at this stage. Kelso Lawyers believes that payments must be adequate to ensure survivors feel that their trauma has been acknowledged and that represents justice for them. As mentioned above, this must serve the purpose of restoring freedom of choice to survivors as a means of healing, recognising the impact and nature of the abuse and any aggravating factors. The Consultation Paper acknowledges that the maximum payment available will not affect the total cost of the scheme. As such, it should remain open to decisions makers in the scheme to award what is considered adequate on a case-by-case basis.

Kelso Lawyers acknowledges that it may be necessary to attach a maximum figure to the decision making matrix proposed in the Consultation Paper. If so, the figure should be much closer to maximums achieved in similar out of court settlements to date. The figures provided in the Consultation Paper do not differentiate between awards achieved from litigation and awards achieved in negotiated settlements. Reflecting on our own work, in claims against institutions for child abuse settled since 2013, Kelso Lawyers has achieved out of court settlements in excess of \$200,000 in over a quarter of claims, in excess of \$300,000 for nearly 14% of claims, with a maximum achieved of \$500,000. The vast majority of these claims were for childhood sexual abuse. Our median payment achieved for these claims was over \$100,000 during that period, with an average of over \$140,000. These figures suggest that the figures proposed in the Consultation Paper are significantly below what is considered fair, and what institutions are willing to pay, outside of the redress scheme paradigm.

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<sup>21</sup> Consultation Paper on Redress and Civil Litigation, 149.

<sup>22</sup> Consultation Paper on Redress and Civil Litigation, 149.



If the Royal Commission elects to recommend a maximum figure, it would also be appropriate, as was done with the Irish Scheme, to provide grounds for an assessor to award an additional payment in special circumstances. Those special circumstances might include (drawing from the existing three factors in the matrix proposed in the Consultation Paper):<sup>23</sup>

- Where the abuse was of a particularly cruel or unusual nature;
- Where the abuse caused or contributed to the development of both severe physical and psychological injuries;
- Where the institution's conduct in relation to the abuse was exceptionally reckless or wilfully blind to the wellbeing of the victim – whether in guarding against the occurrence or continuation of the abuse, or in handling requests for redress and assistance after the abuse;
- Any other matters that the assessor considers relevant.

The Consultation Paper raises affordability as a consideration that is relevant in proposing adequate payment levels. Kelso Lawyers suggests that affordability has no place in determining the appropriate monetary payment for survivors of abuse. It is the institutions that have facilitated child abuse that have created the need for these payments, and it is appropriate that those needs be adequately addressed by the institutions. The primary consideration must be the needs of survivors in their quest for healing. Diocese abroad have filed for bankruptcy due to the level of payments they have had to make in response to claims for childhood abuse: if that is the level of culpability that exists, that is a fair consequence. The financial viability of institutions should not trump the needs of victims in determining appropriate payments.

Kelso Lawyers would like to point out that, since the Royal Commission announced the proposed average payment of \$65,000, we have been approached multiple times by institutions suggesting that this is a reasonable cap for paying out survivors, due to the Chair of the Royal Commission naming this figure. This view should be publically corrected by the Royal Commission.

Clarity regarding how claims for separate instances of abuse are assessed will also be important. Survivors must be able to make separate claims for separate instances of abuse, particularly where maximum payments are imposed by the redress scheme. It would be important for the Royal Commission to be clear on where these separate instances might arise. The involvement of separate institutions or separate abusers might be the appropriate distinguishing factor. These claims could of

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<sup>23</sup> Consultation Paper on Redress and Civil Litigation, 147.

course be assessed at the same time, so long as the maximum amounts available increased to sufficiently recognise the different instances.

## 6.5 Other payment issues

### Treatment of past monetary payments

Kelso Lawyers supports the availability of the proposed redress scheme to all survivors of institutional child abuse, including those who may have accessed compensation from other sources in the past. We agree that it would be reasonable to adjust these payments in recognition of past payments, accounting for inflation. We do not, however, believe that adjustments for these payments should account for the gross amounts of past payments. Costs associated with previous payments would be inconsistent – some may have had significantly higher costs deducted from them than others. In the interests of fairness it would be important to only factor in that portion of any payment that was received by the claimant. Reductions for past payments should therefore account only for net payments received by claimants and be adjusted for inflation. To the extent that previous payments were small, and only significantly related to the ‘pain and suffering’ head of damages, assessors should have discretion not to set this off against any subsequent award. This issue is discussed further in our response to Chapter seven, under the heading ‘Whether those who have already received redress may apply’.

### Suggested recommendations

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- The purpose of any payments made by a redress scheme should be to heal survivors of childhood abuse. That healing will require the restoration the capacity for survivors’ self-determination through psychological support and monetary payments.
- An ancillary purpose could be for institutions to acknowledge wrong doing and demonstrate sincerity in apologising. Institutions should recognise the power of making adequate redress payments in restoring their integrity in the work they do currently and plan for the future;
- The Irish Scheme represents a good model for deciding payments in terms of the scaling system employed and the involvement medical experts in assessing claims and of independent lawyers to assist claimants;
- In assessing the impact of the abuse, the scheme should account for the severity of psychological and physical harm as well as lost opportunities. The vulnerability of the victim at the time of the abuse will also be relevant to consider, to the extent that this might have

exacerbated the impact. Survivors should have access to the lawyer of their choice in seeking to demonstrate impact, which should be funded by the institution responsible for the abuse;

- In assessing distinctive institutional factors, the activities of the institution in response to disclosures both toward the child and the perpetrator of abuse will be relevant factors;
- Any maximum payment set by the proposed redress scheme should be sufficiently high to ensure adequate recognition of the abuse and its impact, bearing in mind amounts that institutions have paid in out of court settlements in recent years. Kelso Lawyers proposes a maximum of at least \$500,000 would be appropriate;
- The Royal Commission should publically correct any perception that it has recommended \$65,000 is an appropriate cap on payments to survivors of childhood sexual abuse;
- Any proposed redress scheme should be clear on how separate instances of abuse will be dealt with by the scheme, including adjusting maximum payments available as appropriate;
- Payments offered under the proposed redress scheme should only be offset for the net amount of past payments received by claimants.

## CHAPTER 7 – REDRESS SCHEME PROCESSES

*In response to discussion in the Consultation Paper in Chapter 7, Kelso Lawyers would like to make the following comments:*

### General Comments Chapter 7

#### *Access to legal advice*

While commending the rigour demonstrated in the Consultation Paper generally, Kelso Lawyers notes the absence of separate discussion of the availability of legal advice to survivors of abuse engaging with a redress scheme. While periodic suggestions that survivors should have access to “support services and community legal centres, to assist applicant to apply for redress”,<sup>24</sup> it is important that the proposed redress scheme fully explore the level of legal assistance that will be required to ensure applicants can best present their case.

Kelso Lawyers believes that all survivors engaged with any redress scheme should have access to high quality independent legal representation of their choice. This is essential to ensure claimants are able to navigate any scheme to their maximum advantage. Any legal assistance provided directly by the scheme or government funded lawyers, while potentially beneficial, could have split loyalties between the scheme and the claimant. It would not be able to fulfil the obligation of loyalty that would be so important for survivors making claims through the scheme. Claimants are entitled to have a legal representative who is able to diligently represent their interests exclusively, without perceived or actual loyalties to any other entity.

Restricting funding for legal advice to particular classes of lawyers might give rise to unforeseen challenges, as governments can attach conditions on how that funding might be used. We have seen examples of this across Australia. In NSW, the government has restricted the ability of government-funded NSW legal assistance services from engaging in any activities related to political advocacy or activism, lobbying for law reform, or providing legal representation or advice to groups involved in activism.<sup>25</sup> In Queensland, the government cut funding from legal services directed to particular

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<sup>24</sup> Consultation Paper on Redress and Civil Litigation, 168.

<sup>25</sup> Principles for Funding of Legal Assistance Services ([http://www.naalc.org.au/cb\\_pages/files/Principles%20for%20Funding%20of%20Legal%20Assistance%20Services.pdf](http://www.naalc.org.au/cb_pages/files/Principles%20for%20Funding%20of%20Legal%20Assistance%20Services.pdf)). See concerns raised by former federal Attorney General Mark Dreyfus QC in 2013 regarding these Principles in a speech given at the Queensland University of Technology, Brisbane: *Defending justice in Australia*, 3 May 2013.

causes or groups of clients.<sup>26</sup> Federally, changes were announced last year which would exclude the ability of community legal centres to engage in law reform and legal policy activities.<sup>27</sup>

If the proposed scheme restricted funding to a particular class of legal service, restrictions such as those described above might mean that legal representatives would be limited in their ability to vigorously pursue their clients' interests. If problems were to emerge regarding how the proposed scheme was being run, for example, there might be no independent professionals engaged with the scheme who would be able to voice concerns. All support persons for claimants would either be employees of the scheme (with a clear conflict of interest) or of government funded legal centres, who would be restricted in their ability to speak out. The only way to ensure claimants' rights can be protected is to fund independent legal representation for them. Independent lawyers are free to advance claimants' interests – regardless of whether it is in the interests of the government – and can exercise their ethical duty to their clients unencumbered by the political whim of the government of the day.

Choice in legal representative is also critical to respecting the dignity of claimants. It is not appropriate to select lawyers for them, or dictate that a claimant must choose a lawyer from any particular class. In circumstances where claimants have been abused while in government care, for the government to then dictate the standard of legal assistance they are entitled to in seeking to enforce their right to reparations against governments is particularly insensitive and degrading. To insist on particular legal advisers would be reminiscent of other instances where institutions presumed to make choices to safeguard their interests as children, which resulted in abuse.

Access to this legal assistance of choice should be free of charge to claimants. Provision should be made in the redress scheme for adequate legal assistance to be provided in addition to any payment made for the abuse and its impacts, paid for by the institution responsible for the abuse. Child sexual abuse has significant, lifelong impacts on victims. Some of these impacts can include distrust of government or institutional processes. Furthermore, as many institutions failed to respect a child's right to education, many claimants will be poorly educated, meaning navigating a government redress scheme might be more difficult for them than for others. It therefore, becomes especially important to empower survivors of abuse to make their own choice as to the lawyer they would like to accompany them through the claim process. When grappling with such troubling memories, claimants will likely want to draw on the support of a trusted legal adviser; especially where that legal adviser

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<sup>26</sup> Speech given by former federal Attorney General Mark Dreyfus QC, Queensland University of Technology, Brisbane: *Defending justice in Australia*, 3 May 2013.

<sup>27</sup> House of Representatives Hansard, Member for Bruce (Alan Griffin), 26 June 2014, 7637.

has assisted them with other claims related to, or completely separate from, the abuse they suffered as a child.

Lawyers who are expert in supporting survivors of childhood abuse will be best placed to gather persuasive evidence to support their client's claim. There are many sources of evidence that can substantiate a claim or lend weight to a finding as to severity of abuse. Lawyers who have a strong background in this area of law will be most effective in assisting in an efficient and respectful manner to ensure that survivors are fairly compensated, both for the abuse that they suffered and for the impact the abuse has had throughout their lives.

While acknowledging the finding in the Consultation Paper that the Irish system was "more onerous than they would support in an Australian redress scheme", Kelso Lawyers note a paucity of academic material on this issue with regard to the Irish Scheme. Other sources suggest that the Irish Redress Scheme was in fact relatively un-legalistic, due to the absence of findings of guilt.<sup>28</sup> Regardless of assessments of the Irish Scheme's legalism, however, important reasons exist for clients to have access to independent lawyers of their choice, as outlined above.

#### *Legal costs*

To ensure claimants can have access to their preferred legal adviser, it is important that the proposed redress scheme makes adequate provision for legal costs. These costs should be borne by the institution responsible for the abuse.

Our experience with NSW victims compensation claims have pointed to four main obstacles to independent law firms assisting claimants:

1. The quantum of costs paid by the scheme is economically unviable for independent firms;
2. Costs are only payable for certain stages of the process and not others;
3. Costs orders are highly discretionary and the statute expressly prohibits the review of costs orders;
4. Costs provisions make insufficient allowance for the wide variance in complexity between applications.

We submit that scheme should devise a scale of fees that could be added to any payment offered to survivors. This scale should include different levels of payment accounting for different levels of legal assistance required. The scale could comprise of the following stages:

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<sup>28</sup> Hall, M. 2006. 'Institutional tortfeasors: Systemic negligence and the class action', (2006), *Torts Law Journal*: 14(1) 135, 151-152.

1. Costs for the preparation of the initial application, advice on whether to accept an offer of payment and explaining the scheme's decision;
2. Costs for an internal review;
3. Costs for an application to the AAT;
4. Costs for an appeal to a federal court.

Furthermore, there should be provision for firms to apply for additional costs where the claim is particularly complex.

It would be appropriate for the actual legal fees to be agreed between the claimant and their chosen solicitor and then to be deducted from the any payment offered. The scale would offer some guidance to solicitors and claimants as to the appropriate fees to set, without being binding.

## 7.2 Key redress scheme processes

### Eligibility for redress

It is important to note the impact that abuse has on the people surrounding the direct survivor of abuse. In our submission, secondary victims ought to be eligible to participate in the scheme in certain circumstances. Secondary victims of child abuse can suffer significantly, along with the primary victims. The Consultation Paper acknowledges the particular pain caused to family members of victims who have suicided or are otherwise deceased.<sup>29</sup> We look forward to consideration of this issue by the Royal Commission in future. At this point, we would like to suggest that a redress scheme could be an appropriate avenue for secondary victims to seek acknowledgement for the abuse that their loved ones suffered, the failures of institutions in responding to the abuse, and order compensation in recognition of the pain this has caused them as well as the primary victim.

### *Connection required between the institution and abuse*

One of the advantages of a redress scheme would be absence of the need to establish liability on the part of the institution for negligently exposing an individual to abuse. Kelso Lawyers supports the links suggested in the Consultation Paper that would give rise to an obligation on the part of institution to make recognition payments for the abuse of children based on strict liability or reversing the onus of proof.<sup>30</sup> This issue is discussed further in our responses to Chapter ten. In particular we agree that payments for peer-on-peer abuse is appropriate in situations of residential care.

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<sup>29</sup> Consultation Paper on Redress and Civil Litigation, 51.

<sup>30</sup> Consultation Paper on Redress and Civil Litigation, 162-163.

In terms of “any other circumstances” that might give rise to liability, Kelso Lawyers suggests that institutions should also be liable for abuse that is facilitated by an official of an institution, whether or not it is directly engaged in by that official. A significant challenge faced by survivors pursuing civil litigation has been in demonstrating that institutions are responsible for abuse conducted by people who are not necessarily employees. Unpaid workers, including religious office holders, or volunteers, are examples. It is essential that any redress scheme ensure that such abuse is captured in its mandate for ordering redress.

As noted under the heading ‘Types of institutions included’ in the Consultation Paper, it would be appropriate to ensure abuse in foster care or kinship care be covered by a redress scheme, as the placement of children in these schemes was generally organised and overseen by institutions. In these circumstances, the abuse was not taking place on the premises of an institution and was generally not engaged in by an official of the institution.

Where the responsible institution has regularly monitored the placement and made adequate notes without picking up on abuse occurring in the placement may present a challenge. This might arise, for example, when the child hides the abuse because they would prefer to stay in a foster placement than to return to their parents’ home.

The existence of such a situation would point to an inadequate vetting process undertaken by the institution in selecting appropriate placements, or that monitoring staff were not adequately trained to pick up on indicators of abuse. The impact of the abuse on the child will be no less severe simply because they were being inadequately monitored. As such, any redress scheme should ensure that compensation is available to individuals who were abused in such circumstances.

A second challenge might arise when an institution has removed a child from an unsafe foster placement and returned them to an unsafe family environment. While on the one hand the institution in this situation might be seen to have taken appropriate action to protect themselves from liability by removing a child from an abusive situation they are responsible for, returning them to an unsafe family environment should still attract an obligation to make a payment. Once an institution has taken on responsibility for a child’s safety, that responsibility should extend to abuse that happens in a family environment if the actions or omissions of the institution caused the child to be in that environment.<sup>31</sup>

#### *Types of abuse included*

Children in institutional care have of course suffered many forms of abuse, including sexual, physical and emotional abuse and neglect. The Terms of Reference for the Royal Commission require the

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<sup>31</sup> For a case where liability has been found in these circumstances, see *SB v State of NSW* [2004] VSC 514.



investigation of “child sexual abuse and related matters in institutional contexts”. The Consultation Paper acknowledged that previous and current redress schemes have usually covered sexual and physical abuse, and some have included emotional abuse or neglect.<sup>32</sup>

To ensure fairness for all individuals abused in an institutional context, it is essential that physical and emotional abuse or neglect be included along with sexual abuse. It is unfair to exclude purely physical abuse from the propose scheme. A child beaten with a pony whip and caged for a week in solitary confinement should not be excluded, while a child subjected to a one-off fondling, also traumatising, is included. The impact of sexual abuse can also be exacerbated by other abuse or neglect.<sup>33</sup> A recommendation of this type would fit within the “related matters” in the Terms of Reference. It may be appropriate to require that emotional abuse or neglect be accompanied by sexual or physical abuse to qualify for redress under any proposed scheme. If that limitation is considered to be necessary, emotional abuse or neglect must be seen as an aggravating factor where sexual or physical abuse has existed.

If other forms of abuse are not recognised by the redress scheme, assessors will ignore forms of abuse that coincided with, or facilitated, sexual abuse. Such an approach would appear arbitrary, devaluing survivors’ experiences and undermining the effectiveness of the scheme. Furthermore, sexual abuse should be construed broadly to include exposure to acts of sexual abuse committed on others. The failure to include other forms of abuse has been criticised in previous redress schemes.<sup>34</sup>

Physical abuse should be understood to include forced medical treatment. Some children were forced to take medications such as sedatives whilst in State institutions. As acknowledged in the Royal Commission’s Report on Case Study seven into Parramatta Girls Home, numerous inmates there were forcibly drugged with antipsychotics to sedate them, including having their tea spiked. This sedation would sometimes be used to enable sexual or further physical abuse to take place. This report also acknowledged that some of the inmates had their teeth forcibly removed as punishment. Including forced medical treatment in the definition of physical abuse for which compensation could be available under a redress scheme would ensure that individuals subjected to such abuse had access to justice.

One of the most egregious forms of emotional abuse suffered by girls in decades past was the forced or attempted forced removal of babies from unmarried teenage mothers. Many of these girls were in

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<sup>32</sup> Consultation Paper on Redress and Civil Litigation, 163.

<sup>33</sup> Consultation Paper on Redress and Civil Litigation, 163.

<sup>34</sup> Senate Legal and Constitutional Affairs References Committee Report: ‘Review of Government Compensation Payments’, [2.46].

institutional care during their pregnancies. Sometimes these pregnancies themselves were the result of rape in an institutional setting. For others, the pregnancies were used as reasons to detain girls in institutions such as Parramatta Girls Home, as it was used as evidence that they were at risk of ‘moral danger’.

Where girls were in institutional care when they went into labour, they would often be taken to hospital by an officer of that institution. They would have continued to be the responsibility of the institution by virtue of the *Child Welfare Act 1939* (NSW).<sup>35</sup> They would then be handed by the officer of the institution to the hospital. Babies would be removed by hospital staff, possibly with the support or acquiescence of the institutional officer. Girls asking to see their babies would often be forcibly medicated, given sedatives to stop them from insisting on seeing their child.<sup>36</sup> According to the legislation in force at the time in NSW, the *Adoption of Children Act 1965* (NSW), it was an offence to seek to use or threaten to “use any force or restraint... to induce [a] parent or guardian to offer... [their] child for adoption”.<sup>37</sup>

In the official apology on this phenomenon offered by the former Prime Minister Julia Gillard in 2013, it was acknowledged that these practices were unethical and often illegal. A commitment was also made to ensuring those affected had access to the help that they needed.<sup>38</sup> Where babies were removed, either temporarily or permanently, from new teenage mothers simply because of the mother’s marital status, compensation should be available to both the mother and the child. The forced medical treatment and any other physical restraints or restrictions, such as placing a pillow over a labouring woman's face so that she would not see her baby,<sup>39</sup> should be understood as physical abuse. The intimidation tactics that were used and the deprivation of a new mother from access to her baby should certainly be understood as emotional abuse and should give rise to a right to compensation under a redress scheme, or a cause of action in civil litigation.<sup>40</sup>

*Whether those who have already received redress may apply*

Kelso Lawyers strongly supports the contention that those who have already received redress through other redress schemes should be eligible to benefit from any redress scheme set up as a result of this

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<sup>35</sup> Section 4 (see definition of “ward”).

<sup>36</sup> *W’ v State of New South Wales* (Unreported, Supreme Court of New South Wales, Greenwood M, 13 December 1996), 9.

<sup>37</sup> *Adoption of Children Act 1965* (NSW), s 57.

<sup>38</sup> Julia Gillard, *National Apology for Forced Adoptions*, 21 March 2013.

<sup>39</sup> Evidence was presented of a pillow being placed in front of a labouring woman’s face in the case of *W’ v State of New South Wales* (Unreported, Supreme Court of New South Wales, Greenwood M, 13 December 1996), 9.

<sup>40</sup> In *W’ v State of New South Wales* (Unreported, Supreme Court of New South Wales, Greenwood M, 13 December 1996), it was accepted that a cause of action for this type of behaviour could have existed had the passage of time not acted to unfairly prejudice the defendant: 33-34.

Royal Commission. This is discussed briefly in our responses to Chapter six, and with respect to civil litigation in our responses to Chapter ten. We agree that in such circumstances, it is reasonable to consider any previous award in determining the amount of an award under this scheme. In such circumstances, claims should be assessed according to the standard criteria, with the net amount of any previous award being deducted. Any part of a previous award that was paid in legal fees or fees reimbursing the government or other bodies should not be counted in reducing the award made by the redress scheme.

The legislation creating the redress scheme should expressly state that a survivor is not prevented from applying to the scheme by virtue of any deed of release signed in relation to the acts of abuse subject of the deed of release. To this end, please also see discussion below under the heading 'Deeds of release' in this Chapter for discussion of how survivors who have signed such deeds might navigate a proposed redress scheme, and Chapter ten for further discussion regarding deeds of release in civil litigation. Significant inequality between survivors would emerge if deeds signed under existing legislation were able to be relied on to prevent access to the proposed scheme.

#### Publicising and promoting the availability of the scheme

Independent law firms play an important role in promoting and improving participation rates in redress schemes. The past abuse that makes an individual eligible for redress under a proposed scheme might also significantly undermine their ability to engage available avenues of redress; including even being aware of a scheme's existence.

The following difficulties in making survivors aware of redress schemes have been identified:

1. Higher rates of illiteracy among survivors of institutional child abuse – many survivors do not regularly read newspapers or listen to the news;
2. Higher mobility than the general population – many survivors do not live in the State or Territory where the abuse took place;
3. Higher degree of social isolation – many survivors are not members of local community or support groups;
4. Poor health and isolation from mainstream services.<sup>41</sup>

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<sup>41</sup> Senate Legal and Constitutional Affairs References Committee Report (2010) *'Review of Government Compensation Payments'*, [2.29]. These difficulties were identified in submissions to the Senate Committee by Wings for Survivors and the Alliance for Forgotten Australians.

The effect on participation rates in redress schemes is illustrated from the findings of the 2012 Price Waterhouse Coopers report on the NSW Victims Compensation Scheme (hereafter, the PWC report).<sup>42</sup> The report was commissioned to identify ways to address the rising cost of the scheme and the rising backlog of undetermined claims.<sup>43</sup> The scheme was governed by the *Victims Support and Rehabilitation Act 1996* (NSW), and provided funding for legal representation.

In the 12 month period of 2010/11, 71% of applications were filed by private legal representatives. In the 12 month period of 2011/12 that dropped to 66%.<sup>44</sup> During that 2011/12 period, on 1 January 2011, the rules on legal costs were amended.<sup>45</sup> The changes made costs more discretionary and reduced the amounts available for legal costs at various stages. The PWC report made the following observations:

Based on recent trends in the claims data to 30 June 2011, we expected 10,153 claims to be lodged in the 12 months to 30 June 2012. The actual number of lodgements were 28% less than expected, with only 7,263 claims lodged in the 12 month period. This experience was broadly consistent across each offence category.

This is a significant reduction in the number of lodgements in comparison to past years and to the projections as at 30 June 2011. **The most likely reason for the drop in claims is the recent reduction to legal fees paid to claimant solicitors resulting in fewer solicitors advocating the scheme to their clients.**<sup>46</sup>

As the PWC report observes, 2,890 fewer claims were received in 2011/12 than expected – a 28% reduction. The average award in 2011/12 was \$7,871.<sup>47</sup> The average dismissal rate in 2011/12 was 42%. We have calculated that this 28% reduction in claims would have saved the scheme \$13,193,370.20, accounting for the dismissal rate.

These figures indicate that reticence to adequately fund legal representation has a significant impact on the ability of survivors to access redress schemes. Where lawyers are involved, any significant

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<sup>42</sup> NSW Department of Attorney General and Justice: *Review of the Victims Compensation Fund Report* completed by Price Waterhouse Coopers ('the PWC report'), [http://www.victimsservices.justice.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report\\_pwc-vcf-review.pdf](http://www.victimsservices.justice.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report_pwc-vcf-review.pdf)

<sup>43</sup> PWC report, 10.

<sup>44</sup> Victims Compensation Tribunal New South Wales, Chairperson's Report, 2011/2012, 14: [http://www.victimsservices.justice.nsw.gov.au/agdbasev7wr/assets/vss/m754252l8/chairpersons\\_2011-12.pdf](http://www.victimsservices.justice.nsw.gov.au/agdbasev7wr/assets/vss/m754252l8/chairpersons_2011-12.pdf).

<sup>45</sup> *Victims Support and Rehabilitation Amendment Rule 2010* (NSW).

<sup>46</sup> PWC report, [5.6.1] (emphasis added).

<sup>47</sup> PWC report, 35.

increase in costs is actually a reflection of a greater participation rate for survivors – lawyers’ fees represent a small fraction of this figure.

If decision-makers are serious about engaging survivors of institutional child sexual abuse, facilitating real change and restoration for survivors of child sexual assault through a national redress scheme, there must be adequate provision for private legal representation for the entire lifecycle of a claim. The level of funding available must enable survivors to choose from the best in the legal profession.

#### Application process

Preparing quality applications for redress schemes requires a specialist set of skills – in the obtaining of the evidence, presentation of the application, and ensuring the accountability of the scheme. Due to the nature of historical child sexual abuse, and the complex impacts this experience has on the rest of a victim’s life, obtaining the evidence will rarely be a simple affair. Obtaining evidence typically requires navigating the bureaucracies of the various public and private record access services, chasing down supporting witnesses, drafting time-consuming statements about highly sensitive matters, and trawling through voluminous records of varying decipherability. Records of this nature will be essential in determining the impact the abuse has had on an individual.

The presentation of effective applications also requires special legal and communication skills. The preparation of an application will require expertise in statutory interpretation and administrative law – without this, a person is at risk of not properly understanding their options under the scheme, or not realising that they have grounds for a higher payment. An effective application requires more than just ticking boxes on a downloadable form; concise written submissions also needed to walk the decision-maker through the evidence and provide guidance on the applicable law.

The importance of these aspects of the application process being completed to a high standard has been demonstrated by both the NSW victims’ compensation and Western Australian redress schemes. In the PWC report discussed above, it was noted that the availability of private legal representation removed “a significant administrative burden from the scheme.”<sup>48</sup> In Western Australia (WA), restricting the option to obtain legal assistance to available community legal centres resulted in “considerable variability in the quality of written applications” when implemented for Redress WA.<sup>49</sup> This ultimately resulted in a massive workload for Redress WA, as the varying standard of applications meant that all claimants had to be contacted and given an opportunity to clarify their claim. While this process was “critical in balancing out the varying quality of the initial applications”,<sup>50</sup> it does not ensure

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<sup>48</sup> PWC report, 69.

<sup>49</sup> Consultation Paper on Redress and Civil Litigation, 168.

<sup>50</sup> Consultation Paper on Redress and Civil Litigation, 168.

that claimants had the opportunity to present their claims as fully as possible. The Consultation Paper suggests that this will be ameliorated by refraining from imposing a closing date for any redress scheme proposed by the Royal Commission, although the Key Learnings from the WA scheme are not available for public analysis.<sup>51</sup> If the scheme is to prefer written applications as indicated, lessons from Redress WA indicate any national redress scheme would be most efficiently assisted by engaging expert independent law firms to assist claimants prepare their claims.

### Standard of Proof

We agree with the consultation paper that the standard of proof is best set at the level of ‘plausibility’; and that in government schemes where it has been set at, or interpreted to be, the civil standard, in practice the plausibility standard has generally been applied – perhaps due to the beneficial nature of the legislation that creates such schemes.

The case of *Yaghoub v Victims Compensation Fund Corporation* may be of assistance as to how the standard of plausibility should be applied. In that case, a claims assessor had effectively treated corroborative evidence as a prerequisite to accepting a claim. Justice Nash stated:

There is no such requirement under the civil common law or the relevant statute and consequently, while corroboration in a civil case of this nature is desirable and frequently provided, it is an error of law for it to be required. **It is certainly not required where there is no evidence to the contrary of what is stated by the claimant.**<sup>52</sup>

The applicant’s statement of events should be accepted as true, unless there is something inherently implausible about the core claims that it makes. Where an apparent implausibility arises claimants must be given the opportunity to clarify their evidence.

### Decision making on a claim

It has been a strange feature of some victims of crime schemes, such as the one in NSW, that child sexual assault survivors may succeed in establishing that they were raped, but have their claim dismissed for lack of a psychologist’s report demonstrating injury. The absence of a report is often due to the decision of a concerned parent who does not desire the child to relive the abuse any further; or as a result of the child’s young age, disabilities, or limited language abilities.

The following judgment excerpts support the good sense in allowing decision-makers the freedom to assume harm in the absence of express medical evidence:

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<sup>51</sup> See Consultation Paper on Redress and Civil Litigation, endnote 218. This document does not appear to be publically available.

<sup>52</sup> [2000] NSWDC 16, [18] (Nash A/DCJ) (emphasis added).

This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the "long term and serious harm, both physical and psychological, which premature sexual activity can do". The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: *Clarkson v R* [2011] VSCA 157; 32 VR 361 at 364 [3], 368-372 [26]-[39].<sup>53</sup>

Assessors should accordingly be allowed to infer the severity of the harm in the absence of a report from a health professional. Such a practice should improve the efficiency and reduce the cost and trauma of a proposed redress scheme.

#### Review and appeals

When dealing with the number of claims that will no doubt come before any redress scheme once it is established, it is inevitable that mistakes will be made in some decisions. If claimants are to see the scheme as fair, they should be able to ask for a review where they feel their experiences have not been adequately understood.

To this end, it will be important for claimants to have access to reasons for the decisions made by the scheme. Transparency will be key for claimants to understand why the scheme has arrived at a particular figure, and to assure them that their experiences were fully considered. They will also provide a means of appeal, if it is clear in the reasons that there has been a mistake or misunderstanding in the consideration of a survivor's claim.

To improve understanding of the scheme and enhance consistency in decision-making, the proposed scheme should publish and maintain guidance on the assessment of claims. Decisions of the scheme should also be published (with names anonymised) to promote consistency in decision-making; applicants should of course have the option to prevent publication.

In the experience of Kelso Lawyers, an internal review mechanism has proved to be a quick and inexpensive means of correcting the vast majority of errors in first instance decisions. Under the *Victims Rights and Support Act 2013* (NSW) the process is as simple as sending an email to Victims

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<sup>53</sup> *R v Gavel* [2014] NSWCCA 56, [110].

Services requesting an internal review of the decision. The process allows for further evidence and submissions to be provided, and for review on the merits.

While the internal review process has been highly effective in the NSW victims' compensation scheme, there has still been the occasional need to appeal to NSW Civil and Administrative Tribunal (NCAT). Appeals to NCAT have mainly been necessary where the Department as a whole had adopted a wrong interpretation of the law, or applied policies too inflexibly. The Tribunal has thus far proved to be a just, quick, and cheap means of maintaining the accountability of the scheme. The low cost and flexible formalities of a tribunal are well suited to redress schemes; for a mere \$25 an applicant on social security can have their claim reviewed on the merits (\$96 if the applicant is not entitled to a concession)<sup>54</sup> – providing that legal fees are paid by the scheme.

Kelso Lawyers suggests that a similar model should be provided in any redress scheme recommended by the Royal Commission. For a national redress scheme, the appropriate tribunal for appeal would be the Administrative Appeals Tribunal. Appeals to this Tribunal will be available if this avenue is provided for in the establishing legislation. Disputes that are not resolved at this level could be appealed to a federal court on a point of law.

Guidance for decision-makers on the correct interpretation of the law is especially important where the scheme is new. In the experience of Kelso Lawyers, without independent legal representation clients whose claims were brought under the *Victims Rights and Support Act 2013* (NSW) (having been lodged under the *Victims Support and Rehabilitation Act 1996* (NSW)) would have been adversely affected by assessor decisions on at least 19 different grounds, including:

1. The time within which an internal review must be requested;
2. The correct category of award;
3. The availability of a category of award for certain classes of applicant;
4. The availability of legal costs for tribunal appeals;
5. When corroborative evidence is required;
6. Orders that were logically incompatible with the factual findings;
7. What sources of evidence can be used to prove harm;
8. The scope and meaning of undefined terms in the Act;

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<sup>54</sup> See NSW Civil and Administrative Tribunal (NCAT) *Fees and Charges* as at 30 July 2014, [http://www.ncat.nsw.gov.au/Pages/apply\\_to\\_ncat/fees\\_and\\_charges/fees\\_and\\_charges.aspx](http://www.ncat.nsw.gov.au/Pages/apply_to_ncat/fees_and_charges/fees_and_charges.aspx).



9. The power of assessors to correct jurisdictional errors;
10. The availability of the slip rule to correct wrong orders where unintentionally made;
11. When claims should be combined and when they should not; and
12. Various breaches of the rules of natural justice – including irrelevant considerations, the fair hearing rule, and failure to consider key pieces of evidence.

In view of these mistakes, which required internal reviews – and, in some cases, appeals to NCAT – restricting access to the legal adviser of choice from the outset for a claimant would be a false economy. Of greater concern, it would lead to injustice for claimants, whose awards might become more a measure of their ability to navigate a complex system, rather than fair redress for abuse that they have suffered and the impact of that abuse.

The effectiveness of independent legal representation is demonstrated by our success rate in representing children and young people in care in victims' compensation proceedings. Between 2012 and 2014, Kelso Lawyers lodged 551 claims with Victims Services with an 85% success rate. On internal review we had a 47% success rate in overturning dismissals, and a 63% success rate when seeking a higher category of recognition payment. Had we not vigorously pursued our clients' claims for greater recognition of the injuries they suffered or the crimes committed against them, they would have been left with an unjust outcome.

The susceptibility of government funded lawyers and legal services to be unduly influenced by government is also of significant concern in this respect (see discussion above under the heading 'Access to legal advice', above). Survivors must have access to legal assistance unfettered by possible restrictions imposed by governments. This can only be guaranteed by independent legal practitioners.

#### Deeds of release

Deeds of release have the potential to complicate the engagement of survivors in a redress scheme. The effect of these deeds is to bar any future legal claim for compensation from the institution, or from any third parties including the offenders personally. However, as discussed above, these deeds have frequently been entered into in unequal circumstances. The Royal Commission has received evidence from several witnesses about representatives of the institutions who attend the survivor's home with a deed of release in hand. As the Royal Commission has heard, many survivors are under-educated or have mental health issues as a result of their abuse. They are asked to sign the deed of release without adequate or any explanation of the purpose of the document. There is no opportunity to obtain independent legal advice. In these circumstances, several survivors have described the

experience of entering the agreement as another source of trauma. In approaching the institutions directly for compensation, some institutions take the view that a deed of release is fatal to the claim. Other institutions consider the fact of the deed of release diminishes their moral responsibility to pay anything to the claimant.

Throughout the hearings to date, Counsel Assisting the Royal Commission have repeatedly suggested that responses by institutions to allegations of abuse have been inadequate. Legal hurdles to civil litigation have meant that survivors have had very few options to seek redress. This reality has meant that innumerable survivors of abuse have felt pressured to accept inadequate sums in compensation for the abuse. They have often signed deeds of release to get access to sums of money that in no way recognise the abuse they suffered or the damage this caused them. While some of these survivors have done so with the benefit of legal advice, others have not. Regardless of their access to legal advice, however, the legal landscape was such that adequate compensation was generally not available. Limitations periods, finding the right entity to sue and vigorous litigation strategies of institutions have all operated to make claimants believe that they must accept an inadequate sum and sign away all future rights, or receive nothing at all.

In recognition of the emphasis placed upon fairness, it is essential that those claimants who have already signed deeds of release under the current legislation be able to access any redress scheme. Regardless of whether they would meet the high bar set by the tests of legal duress or unconscionable conduct. They could potentially be set aside on grounds of unfairness or duress. It appears that this is in line with the thinking of the Royal Commission as outlined in the Consultation Paper. Deeds of release and civil litigation are discussed further below, in our responses to Chapter 10.

Kelso Lawyers supports suggestions in the Consultation Paper that deeds of release should not be required, and applicants should agree to offset payments against common law damages.<sup>55</sup> If deeds are required, any lawyers funded to advise on their terms must be involved throughout the claim. In terms of any deeds of release arising from engagement with a proposed redress scheme, Kelso Lawyers believe provision of legal advice for this stage alone would be insufficient. If this restriction were in place, it would benefit only the institution, not survivors, by serving to reduce any risk of the deed being set aside without ensuring the claimant was being adequately compensated.

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<sup>55</sup> Consultation Paper on Redress and Civil Litigation, 174.

### Support for survivors

The giving of evidence about sexual abuse is an inherently traumatic experience for survivors.<sup>56</sup> In the criminal justice system, countries that allow a survivor to be legally represented throughout the trial have achieved significant reductions in the stress<sup>57</sup> of complainants and improvements in their treatment by the representatives of other parties.<sup>58</sup> The impact of legal representation on participation rates in the NSW victims' compensation scheme suggests that independent legal representation would have a similar impact on the concerns of prospective applicants under a redress scheme. See discussion in our responses to Chapter five for further thoughts regarding supporting survivors in engaging with a redress scheme.

### Suggested recommendations

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- Survivors of child sexual abuse and related matters in institutional contexts must have access to the independent lawyer of their choice in engaging with the redress scheme, to be funded by the institution responsible for the abuse. This is essential both for the integrity of the scheme and to ensure that claimants feel their choice and dignity is respected;
- Legal fees should be agreed between the claimant and their chosen solicitor, with a scale devised by the proposed scheme that would be added to the payment offer to fully or substantially offset those fees;
- In terms of eligible claimants, secondary victims should also have access to the scheme;
- A broad interpretation of institutional responsibility for abuse should be included in defining parameters for eligibility. This should include those whose abuse was facilitated by an institution, including in foster placements;
- Any redress scheme should be comprehensive in the types of abuse for which that survivors can apply for compensation, in the interests of fairness. In particular, compensation for physical abuse should be available, including for forced medical treatment, and emotional abuse and neglect should be seen as aggravating factors in calculating the appropriate level of compensation for childhood sexual or physical abuse. Forced or attempted forced removal

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<sup>56</sup> Kerstin Braun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?", (2014) 25(3) *Current Issues in Criminal Justice*, 821.

<sup>57</sup> Kerstin Braun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?", (2014) 25(3) *Current Issues in Criminal Justice*, 822.

<sup>58</sup> Kerstin Braun, "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?", (2014) 25(3) *Current Issues in Criminal Justice*, 823.

of babies from teenaged mothers should also be considered to be emotional abuse, often combined with physical abuse, that would qualify the claimant for compensation under the proposed scheme;

- Individuals who have received redress from other sources should be free to apply to this scheme, with any net previous award being offset against the award determined by the proposed scheme. This option should be available even when a deed of release has been signed prior to the scheme's establishment;
- Evidence shows that the involvement of independent law firms are key to publicising and promoting redress schemes. Costs available for legal representation should be sufficient to make this involvement viable for independent firms;
- Independent lawyers will be key to assisting claimants in preparing applications and ensuring greater efficiency for the scheme;
- Plausibility is an appropriate standard of proof;
- Severity of harm should be inferred where experts accept that a particular harm inevitably results from childhood sexual abuse, even where evidence of that harm is not available;
- Internal review and external appeals should be available to ensure consistency and integrity of the scheme;
- Claimants should be able to apply to have deeds of release signed under existing legal arrangements set aside so that they can access the redress scheme.

## CHAPTER 8 – FUNDING REDRESS

*In response to discussion in the Consultation Paper in Chapter 8, Kelso Lawyers would like to make the following comments:*

### 8.3 Possible approaches to funding redress

To the fullest extent possible, the redress scheme should be funded by the institutions responsible for the abuse and its impacts. In addition to funding payments under the scheme, these institutions should also contribute to funding the administration of the scheme, in proportion to the number and value of claims made against them under the scheme, as suggested in the Consultation Paper.<sup>59</sup> In this way, the funding burden on the Federal Government should be negligible, other than any direct liability it might have under the proposed scheme. One way to ensure that religious institutions pay their share could be to suspend the enjoyment of government tax exemptions until financial obligations to the scheme are met. This would provide a strong incentive for them to contribute, as well as functioning as a means of enforcement.

For claims against institutions that are unable to pay, either because they have ceased to exist or they are not able to meet their obligations financially, the Consultation Paper has identified three options. The payments could be made up by the institutions funding the scheme, by governments or some combination of the two.

Kelso Lawyers suggests that it should be institutions that have been the subject of allegations under the scheme that should fund this short fall. This would minimise any perceived or actual bias on the part of the scheme to seek to reduce awards against these institutions, due to the costs to the government. Secondly, it would reduce the financial burden on governments in running the scheme.

Regardless of where these funds come from, it is important that any awards made by governments come from a separate budget to that being used to fund administration of the scheme. There should be no scope for decision makers to be influenced by the impact any award will have on their own budget or operation costs.

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<sup>59</sup> Consultation Paper on Redress and Civil Litigation, 188.

## Suggested recommendations

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- The vast majority of funding for the scheme should come from institutions responsible for child sexual abuse, including payment of a fee to facilitate administration of the scheme. Where the institution responsible no longer exists or is not in a financial position to pay, other institutions should contribute to funding redress payments for abuse by those institutions;
- Religious institutions should have their right to enjoy tax exemptions suspended until they make full contribution to the scheme;
- Any funding for awards to be paid by the government administering the scheme must come from a separate budget to that being used for scheme administration, to avoid the risk of a conflict of interest arising in deciding claims.

## CHAPTER 10 – CIVIL LITIGATION

*In response to discussion in the Consultation Paper in Chapter 10, Kelso Lawyers would like to make the following comments:*

### General Comments Chapter 10

There are many reasons that survivors of abuse would want to avoid civil litigation, as the Royal Commission is aware. It may be possible, however, that a survivor decides that it is in their interests to pursue civil litigation. In such circumstances, it must be open to survivors to make that choice instead of, or as well as, seeking redress through the redress scheme.

If a claimant is unsuccessful in a claim in civil litigation, it should still be open to them to seek compensation for childhood abuse through a redress scheme. There are many reasons that someone might be unsuccessful at civil litigation without the truth of the abuse being questioned. If this situation did arise, it would be reasonable for evidence led in the litigation to be used in assessing the claim made under the redress scheme. Seeking to pursue litigation after an offer of a recognition payment by a redress scheme was accepted by a survivor would be an unusual situation that should be assessed on its merits.

### 10.2 Limitation periods

Removing limitations periods for claims of child sexual abuse, including retrospectively, would be an important step in ensuring justice for survivors. The average delay in reporting childhood sexual abuse is 22 years, as acknowledged in the Consultation Paper;<sup>60</sup> from there it can then take even longer to recover the psychological fortitude to commence proceedings. Steps have been taken to remove limitations periods in Victoria, as noted in the Consultation Paper.<sup>61</sup> New South Wales may also be making progress in this area.<sup>62</sup> Recommending that this trend be replicated nationally would be important to ensure fairness for survivors, regardless of where they were abused.

It is not our intention to embark on a lengthy examination of the law surrounding limitation periods. However, some reference must be made to the underlying rationales for limitations periods, to

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<sup>60</sup> Consultation Paper on Redress and Civil Litigation, 61.

<sup>61</sup> Consultation Paper on Redress and Civil Litigation, 205.

<sup>62</sup> NSW Department of Justice (January 2015), *Discussion Paper: Limitation periods in civil claims for child sexual abuse*, <http://www.justice.nsw.gov.au/legal-services-coordination/Documents/Discussion%20paper%20on%20amendments%20to%20Limitations%20Act%201969.pdf>.

identify the source of currently failings, and ensure that the proposals advanced will consistently and effectively address the shortcomings. As Dr Ben Matthews puts it:

Cases of child sexual abuse and their psychological sequelae were little known (or acknowledged), much less envisaged, when limitation rationales were formulated and when limitation statutes were designed.<sup>63</sup>

The prejudice to the defendant through the decay of evidence is often advanced as the primary rationale for limitation periods.<sup>64</sup> However, the absence of a limitation period for criminal prosecutions for crimes like sexual assault and assault, suggests that this is not an insurmountable prejudice. Clearly the consequences of any prejudice, via decaying of the evidence, can be far more severe for defendants in criminal trials than in civil cases. This incongruence is highlighted in the observations of Botting DCJ:<sup>65</sup>

It may perhaps trouble some that in a case where a criminal trial has taken place, and convictions ensued, that our legal system should deny the complainants the right to pursue their violator for compensation by civil action. It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity. My task is to apply the law as I understand it to the facts as I find them.

Statutes of limitations are ultimately instruments of rough justice, setting an arbitrary marker at which point the interests of the defendant are prioritised over the interests of the victim. They employ an estoppel approach, assuming that the delay on the part of the claimant acts as a promise that they will not sue in the future. However, it should now be accepted that such an assumption is not appropriate in cases of child sexual abuse; as the wrong itself long hinders the individual's capacity to face the subject-matter of the resulting cause of action. When it comes to child sexual abuse, this rough justice approach gives rise to no justice at all.

Principles of ongoing violation in international law are perhaps more appropriate considerations here. It has been found in a number of cases regarding sexual violence in conflict and enforced disappearances before international courts and tribunals that the failure to investigate the crimes and pay reparations is in itself an ongoing violation.<sup>66</sup> As such, the payment of compensation for these

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<sup>63</sup> Matthews, Ben 'Limitation periods and child sexual abuse cases: Law, psychology, time and justice' (2003) 11(3) *Torts Law Journal* 218, 246.

<sup>64</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, [4], [6] (McHugh J).

<sup>65</sup> *Applications 861 and 864* (Unreported, Botting DCJ, District Court of Queensland, 21 June 2002), 49.

<sup>66</sup> See, for example, Inter-American Court of Human Rights case *Velazquez Rodriguez v Honduras*, 4 Inter-Am. Ct. H.R. (Ser.C), No. 4, [174]: "the State has a legal duty to take reasonable steps ... to ensure the victim adequate compensation"; International Law Commission *Draft Articles on State Responsibility* (2001): breach of an international obligation has a continuing character, extending "over the entire period during which the act



crimes itself is a component of the cessation of the violation. Similarly, the continued denial of the truth of childhood sexual assault acts to perpetuate harm for survivors of abuse. Institutions acknowledging that the crime has been committed, as evidenced by an apology and the payment of compensation to survivors, have the power to assist in resolving ongoing trauma related to the abuse.

Drawing on Deane J's words in *Hawkins v Clayton* (1988) 164 CLR 539 at [42]:

If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first.

#### *Retrospectivity*

Any change to limitations periods must be applied retrospectively to effectively ensure justice for survivors. Institutions frequently knew of the abuse, of the risk, or shut their eyes to matters that would have led to its discovery. There can be little sympathy for organisations that would prefer that a child be violated than to see its own interests affected. As such, it is essential that limitations periods be lifted retrospectively.

#### *Deeds of release*

As with survivors engaging with a redress scheme, deeds of release could be fatal to civil litigation regarding child sexual abuse.<sup>67</sup> These deeds would ultimately have the potential to serve as a means of enforcing limitations periods long after they were removed by legislation. Where deeds of release have been signed in the shadow of limitations periods, they will preserve the power imbalances between institutions and survivors. These deeds will serve as 'circuitous devices'<sup>68</sup> by which offenders and institutions will circumvent the changes in the law, and shirk their social responsibilities.

Survivors signing deeds in these circumstances will have had little choice but to accept what was offered, as discussed in our responses to Chapter seven of the Consultation Paper; they had no reason to anticipate that their ability to seek redress for their abuse might be changed in the future.

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continues and remains not in conformity with the international obligation", including the obligation to make reparation by way of compensation, articles 14(2); 31; 34.

<sup>67</sup> See discussion of this point under our responses to Chapter seven regarding deeds of release and redress schemes.

<sup>68</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349.

The situation is akin to the doctrine of economic duress – where one party forces another to enter an unfair agreement in circumstances where the only lawful alternative is to suffer significant economic detriment.

We submit that the injustice of this situation favours the adoption of a statutory ground of relief. Where a deed is raised by an institution in defence of a claim, such a ground could allow a person to apply to a court to have the deed declared void – as is currently the case with existing grounds like undue influence, unconscionable conduct, duress, and the grounds provided under the *Contracts Review Act 1980* (NSW).

Such a ground should be available regardless of whether the applicant had legal representation at the time of executing the deed. The unfairness of an agreement made in the absence of leverage or options is not mitigated simply because the person was better informed of the impossible nature of their situation.

The court should be able to take into account all relevant factors – such as the sum of the award, provision for costs, whether the relevant cause of action was time-barred, and the gravity of the abuse that was alleged at the time of the agreement. After weighing the relevant factors the court could then make a finding on whether the deed was unjust in the circumstances, or substantially disproportionate to the likely impact of the abuse, and, if so, declare the deed to be void.

Kelso Lawyers recognises the broader legal policy concerns that might arise from setting aside validly formed contracts that have been entered into with the benefit of legal advice. Child sexual abuse, however, is an exceptional and egregious crime, and adequate compensation in recognition of the abhorrent nature of the crime and the lifelong impacts that it has, is often essential in seeking to repair the harm caused. The legal policy interests in recognising and rectifying this harm should in this circumstance outweigh the interests of the courts in enforcing contracts.

These policy considerations are explored in *David Jones Limited v Cukeric* (1997) 78 IR 430, 455 (full bench):

We accept there is a significant public interest in parties being held to settlements which they reach in or in relation to litigation. Releases, which generally provide benefits to each of the parties, are however not immune from legal challenge - either under the general law or in proceedings under s 275 (the predecessor to s 106 of the Act). When a challenge to a release is mounted, the conduct of the party mounting the challenge is relevant, as is that of the party seeking to rely on it as a bar...

## 10.3 Duty of institutions

### Options for reform

Institutions should have an absolute liability for child sexual abuse committed by employees or agents, as suggested in the Consultation Paper.<sup>69</sup> This should be applied to as broad a selection of institutions as possible, and should at least include those institutions that offer to accommodate children over night on premises controlled by the institution – residential institutions as described in the Consultation Paper.<sup>70</sup>

For institutions responsible for abuse where a child has not spent a night on their premises, reversing the onus of proof so that institutions must demonstrate that they took all reasonable precautions to prevent abuse would be appropriate. Liability for such institutions should be presumed in the case of abuse by any person the child comes into contact with through that institution, unless the institution has taken active steps to prevent that person from having contact with children.

## 10.4 Identifying a proper defendant

There are many reasons a survivor will seek to sue an institution rather than the direct perpetrator, as the Royal Commission is well aware. The benefit of making institutions liable extends not just to the plaintiff, but to society as well. As the institutions will often outlast the tenure of any offenders who serve as its agents, it is in the best position to detect risks, learn from mistakes, and facilitate the long term improvement of child safety. Their motivation to do so, however, has been undermined by institutions seeking to minimise their liability or acting to discourage further survivors from seeking compensation through civil litigation.<sup>71</sup>

It will be important for survivors that they are able to sue the institution that they see as responsible for the abuse that they suffered. Survivors need to know that any redress is coming to them from the organisation they blame for the injuries they have suffered. As such, in determining the proper defendant for civil litigation, it is essential that a clear link is identifiable between that entity sued and the institution the survivor identifies as responsible for the abuse.

It is illogical to hold that an entity, whose core role is to put its assets to the use and advancement of an organisation, bears no responsibility for the actions of that organisation and its agents. The

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<sup>69</sup> Consultation Paper on Redress and Civil Litigation, 219.

<sup>70</sup> Consultation Paper on Redress and Civil Litigation, 219.

<sup>71</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 8: Mr John Ellis's experience of the Towards Healing Process and civil litigation*, findings 20, 27.

situations as it stands facilitates recklessness – it allows organisations to engage in activities that introduce risks to society to leave people without remedy when those risks materialise.

We support the following proposals:<sup>72</sup>

- Amendment of the various trusts created by statute for religions to provide that any liability of the associated religion can be met with the assets of the relevant property trust, and that the trust is a proper defendant for any litigation involving claims of child abuse;
- As a mandatory condition for receiving government funding or tax exemptions, organisations that work with children must demonstrate that they are incorporated and adequately insured. On this point see also our proposals regarding being eligible for government tax exemptions discussed in our responses to Chapter eight;
- Statutorily provide that any assets held for the benefit of unincorporated associations can be made available to pay damages for child sexual abuse that arise from its activities;
- Implementation of a levy to be paid by medium to large size organisations to fund a nominal defendant to cover instances of child sexual abuse in small organisations with insufficient assets.

State, Territory, and federal governments should coordinate to ensure legislation in this area uniform.

## 10.5 Model litigant approaches

Model litigant principles are a positive approach to ensuring that survivors of abuse in government institutions are treated respectfully throughout the litigation process, so that the process reduces the risk of re-traumatisation. Unfortunately, as has been demonstrated in Royal Commission hearings, these principles have not been followed in many claims for child sexual abuse to date.<sup>73</sup> These breaches were acknowledged by the NSW government officers in the Royal Commission Case Study 19 into Bethcar Children's Home. It is of utmost importance that these principles are followed by governments for claims made in the future. The Productivity Commission has accordingly recommended that there be a formal avenue for complaint when these policies are not followed, as a minimum development.<sup>74</sup> Claimants should in fact have a formal avenue for redress in cases where model litigant policies have not been followed, giving rise to costs orders in favour of survivors for the costs incurred responding to demands that would not be permitted by these policies.

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<sup>72</sup> Consultation Paper on Redress and Civil Litigation, 218-219.

<sup>73</sup> See, for example, *Case Study 19: Submissions of Counsel Assisting the Royal Commission*, [238]-[247].

<sup>74</sup> Productivity Commission, *Access to Justice Arrangement* (2014), 442.

Recently we have seen Victoria and NSW propose changes to the model litigant policy. The Victorian Principles outlined in the Consultation Paper<sup>75</sup> would be positive developments that could usefully be adopted by all Australian jurisdictions. Some elements of these Principles are replicated in the Guiding Principles announced by the NSW Government in November 2014, also outlined in the Consultation Paper.<sup>76</sup> These NSW Guiding Principles incorporate broader structural reforms that would make the claims process easier for survivors, including making “training available to lawyers who deal with child sexual assault matters”, considering “resolving matters without a formal Statement of Claim” and seeking to “resolve all claims as quickly as possible”.<sup>77</sup> Again, to ensure consistency across Australia, such reforms should be replicated Australia-wide.

### Suggested recommendations

Kelso Lawyers respectfully makes the following suggestions for recommendations by the Royal Commission:

- If a survivor of childhood sexual abuse chooses to pursue civil litigation, this should be respected. A failure in this process should not preclude a claimant from engaging with the proposed redress scheme;
- Limitation periods for civil litigation regarding child sexual abuse should be removed by all States, including retrospectively;
- Deeds of release concluded under existing laws, should be *void ab initio* and not enforced by any redress scheme;
- Institutions should have absolute liability for all child sexual abuse that occurs in a residential context. For those responsible for child sexual abuse outside of a residential context, the onus should be on that institution to demonstrate that they took all reasonable precautions to prevent abuse;
- Proposals made in the Consultation Paper to facilitate litigation against institutions should be implemented, including ensuring that assets held in trust by faith-based institutions are available to survivors and that organisations working with children receiving government benefits are able to be sued;
- States should adhere to their own model litigant policies, seeking to minimise re-traumatisation for survivors of child sexual abuse. Where those policies are not followed,

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<sup>75</sup> Consultation Paper on Redress and Civil Litigation, 227.

<sup>76</sup> Consultation Paper on Redress and Civil Litigation, 228.

<sup>77</sup> NSW Department of Justice, *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse* 3 November 2014, Principles 2, 3, 11.

survivors should be able to recover costs incurred and compensation for any additional trauma caused as a result of this failure;

- Positive developments in individual States in responding to allegations of child sexual abuse should be implemented consistently around Australia. This could be facilitated by having regular meetings of relevant ministers of various State and Territory governments to compare systems and outcomes for survivors' claims.



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