INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE: THE LATEST ON THE PROPOSED REDRESS SCHEME

By Matthew Shepherd*

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The Royal Commission into Institutional Responses to Child Sexual Abuse has issued a Redress and Civil Litigation Report which includes 650 pages and 99 recommendations. The recommendations have great significance for survivors and institutions, and also lawyers from whom survivors and institutions will seek advice.

The Report recommends a redress scheme that would offer sexual abuse survivors a direct personal response from institutions; counselling and psychological care; and monetary payments. The Report provides estimates of claim numbers and costs, and suggests how the costs should be funded. It also recommends removal of limitations for civil claims and the imposition of a non-delegable duty on institutions for child abuse occurring within their care.

The number of eligible survivors who will make claims is estimated at 60,000. The Report recommends that a single national redress scheme be established to ensure equal and transparent justice for all, rather than state or institutional based schemes. It proposes a timetable by which the scheme would be established and running by the first half of 2017. It estimates that it might take up to ten years to complete all claims.

The closest precedent for the scheme is the Defence Abuse Response Taskforce, (Defence Taskforce) which since 2013 has provided a range of outcomes, including counselling, a reparation payment scheme (capped at $50,000) and participation in a restorative engagement conference with a senior representative from Defence. The outcomes provided are for former and existing Australian Defence Force members who have suffered abuse (ranging from workplace bullying and harassment to serious sexual assault) during their service. It is useful to compare the recommendations of the Royal Commission with the success of the Defence Abuse Restorative Engagement Program.*

Snapshot

- In October, the Royal Commission into Institutional Responses to Child Sexual Abuse issued its final Redress and Civil Litigation Report. The Report's recommendations are relevant to practitioners advising clients who may be either survivors of abuse, or individuals and institutions responsible for abuse.
- The Report recommends a scheme be up and running by 2017, under which 60,000 estimated claimants would be eligible for direct personal responses from institutions along with counseling and psychological support and monetary payments.
- The Report also recommends the removal of limitation periods for civil claims and the imposition of a non-delegable duty on institutions for child abuse occurring within their care.
- A scheme to fund fixed price legal consultations for claimants offered payments is also recommended.

Royal Commission's proposed direct personal response

The Report recommends that institutions should offer survivors:

1. an apology;
2. an opportunity to meet with a senior representative of the institution and receive an acknowledgement of the abuse and its impact;
3. an assurance from the institution that it has taken, or will take, steps to protect against further abuse of children.

The Defence Taskforce's restorative engagement conferences between complainants and senior members of the Defence Force are an important feature of the outcomes provided by the Taskforce. Unlike the Taskforce, which has contracted the services of facilitators which it has specially trained and accredited to facilitate conferences, the Royal Commission's Recommendations do not include a central body to organise meetings, or the use of neutral third parties to facilitate them. The Recommendations suggest guidelines for institutions, but leaves it up to institutions to organise and implement meetings. Institutions could consider engaging the services of trained facilitators, but survivors might have concerns about the impartiality of facilitators engaged or employed by the Institution. A striking feature of the evidence given by survivors to the Royal Commission is the additional harm done by the mishandling of abuse complaints by institutions, including poorly structured apologies and meetings facilitated 'in house'. The harm done by the mishandling of complaints is often described by survivors as being as damaging as the original sexual abuse.

As with the Defence Taskforce, consideration of reparations is separate from restorative or apology meetings. This avoids past difficulties complained of by survivors in attending meetings organised by institutions to discuss both financial compensation, and apologies and acknowledgement of the abuse and its impact.

Counselling and psychological care

The Report recommends that counselling and psychological care should be available throughout a survivor's life, to be provided by existing Medicare funded psychologists. The current caps on psychological sessions would be removed for survivors of institutional child abuse.

Monetary payments

The Report recommends a system of monetary payments to provide tangible recognition of the seriousness of the hurt and injury that a survivor has suffered. Features of the proposed scheme include:

- Maximum payments of $200,000 for the most severe cases, with an average payment of $60,000 and a minimum payment of $10,000.
- Those who have already received monetary payments in the past will still be eligible, but that earlier payment (including any amount reimbursed to Medicare or paid in legal fees, but excluding cost of any counselling services adjusted for inflation) will be deducted from that offered by the redress scheme.

Costs and funding

The Report estimates the total monetary payments of $3.5 billion based on 60,000 claims, average payments of $60,000 and allowing for adjustments for past payments. The cost of counselling and psychological services is estimated at $3.3 billion. Administrative costs are estimated at $1.8 billion. The total cost would therefore be $4.01 billion over ten years.

These costs are recommended to be funded as much as possible by the relevant institution in which the abuse occurred. Where a particular institution no longer exists but was part of a larger group or where there is a successor, the larger group or successor should fund the costs. The Australian, state and territory governments should be the funders of last resort and provide any shortfall where the institution no longer exists, or there is no successor or larger group, or the institution has no assets.

The Royal Commission justifies this on the basis that the problems faced by abuse survivors are the responsibility of our entire society. It was governments that had the responsibilities as regulators and guardians of children, and society generally that failed to protect children.

The Report estimates that of the total cost of $4.01 billion, governments (including as funder of last resort) will meet approximately $1.869 billion and non-government institutions will meet $2.14 billion.

Process for seeking redress

Applications will be made via completion of a written form, and accounts of abuse will be verified by statutory declaration. This is consistent with the existing practice of the Taskforce where the account of the complainant is not tested by Defence during the restorative engagement conference (having already been established as plausible by the Taskforce - see below).

Applications will be assessed by a body to be established by the scheme – not the institution. The scheme shall not make 'findings' that any alleged abuser was involved in any abuse. It shall comply with any legal requirements to report abuse to child welfare agencies and police. The standard of proof to be satisfied is recommended to be 'reasonable likelihood' which is less than 'balance of probabilities'. The Taskforce assesses whether an allegation of abuse is plausible – that is, whether it has the appearance of reasonableness. Satisfaction of the plausibility test means that the Taskforce accepts – to that standard – that the alleged abuse occurred. The assessment process will result in a statement of decision, including an offer of payment and counselling services. The applicant would have three months to seek an internal review, and the offer would remain open for a year.

Significantly, if the applicant accepts the offer of monetary payment, they are required to release the scheme, the contributing government and the relevant institution from any further liability. This is in contrast to the Defence Taskforce's approach where an acceptance of reparation, counselling or participation in a restorative engagement conference does not prevent the complainant from pursuing any other legal claims they may have. Given the requirement in accepting an offer of reparation to waive any further claim, the Report recommends that the scheme fund at a fixed price a legal consultation for the applicant to decide whether to accept.

Reforms to civil litigation

The report recommends that state and territory governments should legislate to:

- retrospectively remove limitation periods applying to claims arising from child abuse occurring in an institutional setting;
- impose a non-delegable duty on institutions for child abuse occurring within their care. The Report states that this is necessary to overcome current uncertainty about the liability of institutions for actions of individual perpetrators; and
- where a survivor wishes to commence proceedings for damages where the institution is alleged to be a property trust, unless the institution nominates a proper defendant that has sufficient assets, the property trust is the proper defendant and any liability can be met from the assets of the trust.

These reforms are not relevant if a survivor accepts a reparation offer from the proposed redress scheme and in doing so is required to waive any further civil claim.

The next step

The Report recommends the scheme be operating by 2017.
The Commonwealth Government is currently considering the ninety-nine Recommendations and preparing a response which is expected by the end of 2015. Bill Shorten has indicated that the ALP supports the implementation of the scheme.
Input is also needed from the state and territory governments given the recommendations for civil litigation reforms. **LSJ**

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*The writer is a facilitator of restorative engagement conferences for the Defence Assault Response Taskforce. This article expresses the views of the author, not the Taskforce.

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