SUBMISSION IN RESPONSE TO THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE CONSULTATION PAPER: REDRESS AND CIVIL LITIGATION
9 MARCH 2015

1. Introduction:

This is a submission from the peak body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). ATSILS were established in every State and Territory over 40 years ago to provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. ATSILS are Aboriginal and Torres Strait Islander community controlled not-for–profit organisations which, through funding from the Australian Commonwealth Attorney-General's Department, provide legal assistance services in the areas of criminal, family and civil law in addition to undertaking community legal education, prisoner through-care and law reform and advocacy activities.

The individual ATSILS have had a wealth of experience in institutional abuse and redress, for example, through *Redress WA* and submissions for redress for the Stolen Generations. NATSILS as the peak body is therefore well placed to identify potential issues and factors for success in the discussed redress scheme.

2. Possible structures for providing redress:

The Royal Commission identifies a number of possible redress structures. One possible structure would be a self-administered redress scheme by the concerned institutions. NATSILS in is agreement with the Commission that such an approach is problematic as there is a need for external and independent oversight. It is also clear that many survivors would not want to have to approach the institution in which they were abused. Additionally, some survivors were abused at multiple institutions and under such a structure survivors may have to make multiple applications. On this basis NATSILS does not believe that a self-administered structure is a viable alternative.

NATSILS supports the Commission's preliminary view that the ideal position would be for the establishment of a single national redress scheme led by the Australian government with participation of state and territory governments and non-government institutions. This approach best reflects the goals of ensuring equality of access for survivors, independence and consistency. Additionally, some survivors suffered abuse in institutions in different jurisdictions, or no longer live in the jurisdiction in which they were abused. A national scheme will avoid survivors having to navigate different schemes

in such circumstances. Should a national scheme be established, it will need to be sufficiently flexible to cater for the particular needs of Aboriginal people, particularly those from remote communities.

However, as the Commission highlights, this ideal position will require considerable political leadership from the federal government and a high level of buy-in from the state/territory government. NATSILS also agrees that if such a national scheme cannot be established the Commission should recommend a national framework to maximise consistency between any different state and territory schemes.

i) Funding Arrangements:

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

3. General principles

In general, NATSILS supports reparation schemes for persons who have suffered sexual abuse in institutions, in line with the "van Boven principles".[1] In particular, we refer to Principle 7 which states: "reparations shall render justice by removing or repairing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition." NATSILS is broadly in agreement with the general principles outlined and supports the survivor focused approached to redress.

4. Key components of redress:

NATSILS agrees that the key components of any redress scheme should be a direct personal response; counselling and psychological care; and monetary payments. These key components will now be addressed in further detail.

a) Direct Personal Response:

The importance of an apology for survivors of child sexual abuse offered by the institution or its representative can be a powerful part of an individual's healing. Any apology should be conducted in a way that maximises the survivors control over the experience.

NATSILS is in agreement with the Commission that the quality of any direct personal response will depend, in part, on the institution's understanding of child sexual abuse and its impact on survivors.

[1] The van Boven Principles are referred to in Appendix 8 of the *Bringing Them Home Report* published by the Australian Human Rights Commission.

NATSILS therefore agrees and strongly supports appropriate training for senior representatives of institutions who are likely to be involved in providing direct personal responses to survivors. Furthermore, NATSILS agrees that staff who are providing a direct personal response to Aboriginal survivors 'should receive cultural awareness or sensitivity training to ensure that they are able to engage appropriately with these survivors, their families and broader communities'.[2] Specifically, in relation to Aboriginal survivors of institutional child sexual abuse the Commission recognises that many Aboriginal survivors 'were also subjected to policies of forced removal from their families and resultant dislocation from their kin, country and culture'.[3]

i) Collective redress

NATSILS strongly agrees with the need for cultural healing programs and funding assistance to facilitate a direct personal response to Aboriginal survivors as a group. It is important to recognise the wider ripple effects of individual instances of institutional child sex abuse and the intergenerational effects of institutional child sex abuse. It is also important to acknowledge and address the reality that within many Aboriginal communities and for many Aboriginal victims/survivors, institutional child sex abuse is intimately connected to broader historical disenfranchisement, isolation and abuse as committed by state and non-state institutions, and the historical lack of accountability of such institutions. This is particularly so for those members of the Stolen Generations.

However, while NATSILS agrees that flexibility is required to ensure that different and culturally appropriate forms of 'personal responses' are available for survivors, it is also important that the individual survivor retain the choice. For example, if a number of Aboriginal survivors who suffered abuse at a particular institution wish for a collective personal response in the form of traditional healing, this should not mean that each and every Aboriginal survivor from that institution should be required to participate. Individual survivors must retain the choice about how they wish to receive a personal response from the relevant institution.

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

b) Counselling and Psychological Care

NATSILS strongly supports the view that counselling and psychological care provided through a redress scheme should be available throughout the survivor's life and should be flexible to accommodate differing needs at different stages of the survivor's life. Further, survivors should not be

2 Royal Commission into Institutional Responses into Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (January 2015) at 102.
3 I*bid* 97.

required to decide at the time of seeking a monetary payment or direct personal response under a redress scheme whether they require counselling and psychological care because survivors may not need or recognise the need for counselling until a subsequent time.

NATSILS wishes to emphasise that there are insufficient Aboriginal specific services for survivors of institutional child sexual abuse, particularly in remote areas and submits that additional resources are required in this regard. Funding for support services needs to reflect the distances required to travel to access these remote areas.

A range of options for support should be made available including having access to mainstream services. However, in smaller remote communities the only support/counselling service may be a visiting service. Access to counselling and support for Aboriginal people in remote communities should be made available through existing services. This includes, but should not be limited to, local Health Centres and Aboriginal Controlled Health organisations. The Social and Emotional Wellbeing teams that are part of Aboriginal Controlled Health Organisations is a good example of the type of existing services that should be utilised.

Services provided should be available to the individual, their family and the whole of community and should include counselling, group work and whole of community healing activities. Developing culturally appropriate services requires flexibility that maximises community control. Funding for these services need to reflect this and allow for healing camps, food and travel expenses. Furthermore, acknowledgement of the impacts of intergenerational trauma experienced by Aboriginal people should shape any support and healing programs offered.

Experience from previous redress schemes such as *Redress WA*, shows that a significant issue is the trauma experienced by applicants in telling their accounts of abuse. On this basis the redress scheme should offer counselling sessions to applicants throughout the application process and a limited number of counselling sessions should be offered to family members (especially for those cases where survivors are disclosing their abuse to family for the first time).

c) Monetary Payments

NATSILS agrees that monetary payment is an appropriate form of redress as a tangible means of recognising the wrong survivors have suffered. However, NATSILS does not have a firm view on what level the maximum payment should be set at. What is important is that monetary payments are 'meaningful' for survivors and capable of making a 'tangible difference in their lives'.

NATSILS concurs with the Commission that in determining the appropriate amount of any monetary payment under a redress scheme, it is necessary 'to have regard to both the severity of and the consequences of the abuse for the individual' and that a table or matrix is a reasonable method of determining the appropriate amount. However, as the Commission also observes any table or matrix would 'need to be accompanied by detailed assessment procedures and manuals to enable staff to

apply the factors consistently across claims, and consistently with any actuarial modelling on which the level of monetary payments is based. A failure to ensure that the assessment is consistent with funding expectations may result in an under-funded scheme or significant pressure to reduce payment levels'.

In this regard it is important to learn from the experiences of *Redress WA.* Under this scheme the maximum payment amount for a successful claimant was initially announced at $80,000, but was subsequently reduced to $45,000. This decision caused a great sense of injustice for many actual and potential claimants. In order to guarantee that this is not repeated, processes must be employed to ensure that expected payment levels are not reduced during the operation of the scheme as this would significantly undermine the value of the scheme.

i) *Lump sum payments vs. payments by instalments*

The Commission notes that some survivor advocacy and support groups have mentioned that some survivors may experience difficulties if they receive lump sum payments. In particular, it is stated that some Aboriginal survivors 'may come under pressure from other community members to share payment or to spend it in particular ways that may not be how the survivor wishes to spend it'.[4] The risk of losing any compensation received by Aboriginal people due to demands made by family and community members is real and should be considered in setting up such a scheme.

On this basis NATSILS submits that there should be flexibility around how payments are made. Among other options, this should include the option of direct payments to be made to rent or mortgages or assistance in setting up separate accounts to manage payments. Provision should also be made for individuals to have access to financial management advice. This will mean that greater resources are required to support those who need such advice, particularly in remote areas.

On the other hand, some survivors may wish for a lump sum payment and to be in a position to make decisions about managing and using the money themselves. NATSILS is of the view that successful applicants under a redress scheme should have a *choice* to decide between a lump sum payment and payments by instalments (subject to any issues regarding legal capacity).

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

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

4 I*bid* 159.

NATSILS agrees with this general proposition. However, it will be imperative that accessible and appropriate information is provided to potential applicants so they are aware of and fully understand how past payments will be dealt with and whether, given the amount of any past payments, they are likely to be eligible for further monetary payments and/or access to counselling and psychological services provided under a new redress scheme.

5. Duration:

NATSILS is in strong agreement with the Commission that the redress scheme should be open ended with no fixed closing date.

There are a number of reasons why NATSILS believes a redress scheme must be open ended:

- An open ended scheme recognises the reality that many survivors of institutional child sexual abuse will take years (e.g, up to 20 years) to be in a position to disclose the abuse and seek redress.

- Eligible survivors may fail to benefit from a new redress scheme as they may be unaware of the scheme or lack accessibility to legal services or support services prior to the closing date.[5] As the Commission noted this was a major issue for *Redress WA*, in particular for Aboriginal survivors living in remote areas.

- Applicants may experience difficulties in completing the application in time.

It is observed that:

> If applications dwindle to the point where the need for continued operation of the scheme is questioned, it may be that the scheme can be closed. However, this should only occur after the closing date has been given widespread publicity and at least a further 12 months for application to be made has been allowed.[6]

NATSILS agrees with this approach.

6. Publicising and promoting the availability of the scheme:

As highlighted by the Commission it is vital that any scheme includes a comprehensive communication strategy. NATSILS strongly supports the proposition that there should be specific strategies for Aboriginal communities and for regional and remote communities and that this should include messaging in local languages, use of local Aboriginal radio and media. This promotion needs to be ongoing. Furthermore, a communication strategy should also ensure that potential and actual applicants of past redress schemes are fully informed and aware of their rights under any new

5 I*bid* 165.
6 *Ibid* 166.

scheme and not discouraged from seeking redress because of past ineligibility or because of past negative experiences

7. Standard of proof

NATSILS is in favour of the suggested 'reasonable likelihood' standard of proof (which is described by the Commission as higher than plausibility but lower than the balance of probabilities). NATSILS agrees that the civil standard of proof should not apply because monetary payments under a redress scheme are not intended to operate as full compensation. It is considered that the reasonable likelihood standard is fair, but at the same time will minimise re-traumatisation for victims.

8. Legal and support services:

i) Legal Support:

NATSILS submits that funding to community legal centres should include funding to Aboriginal and Torres Strait Islander Legal Services to provide culturally appropriate legal assistance and support to Aboriginal clients who wish to lodge a claim for redress under a new scheme. Past experience of the Aboriginal Legal Service of Western Australia under *Redress WA* was that funding was insufficient with lawyers and other staff working excessively long hours over many months to ensure applications were submitted in time.

It should also be emphasised that many Aboriginal people live in remote areas. Providing assistance and support to these people will require funding that reflects the distances required to travel to access these remote areas.

The ATSILS do not currently have capacity to provide legal advice and assistance to potential applicants under a new redress scheme in the absence of sufficient additional resources. This issue of a lack of capacity to assist potential claimants will be further compounded if the planned $13.4 million dollars in funding cuts to ATSILS take effect on 30 June 2015. The ability of organisations such as the ATSILS to assist all applicants in a timely manner will depend on the level of funding provided for that purpose.

ii) Other support services:

In order for such a redress scheme to be effective for Aboriginal survivors of institutional child sexual abuse a number of other support services will be necessary. In particular, interpreters will need to be an integral part of this service. Many Aboriginal people in remote areas speak a number of languages and for some English may be their 4th or 5th language. Information about redress needs to be provided in local languages.

Accessing records will also be an important aspect of applying for compensation. Services that currently do this work are inadequately resourced and should be funded adequately to do this work. This includes Find and Connect.

9. Interim Arrangements:

The Commission has agreed to make recommendations in relation to redress and civil litigation in mid-2015 because many survivors are 'anxious to obtain justice' and because institutions have indicated a 'willingness to receive guidance' from the Commission as to how they should approach redress for survivors.[7] The Commission recognises that the implementation of its recommendations will take time (or may not be implemented at all) and, therefore, the Commission intends to make recommendations to guide institutions about how they should provide redress in the meantime. In addition to the general principles, approaches and processes suggested in earlier chapters of the Consultation Paper, the Commission identifies additional principles that should be considered by institutions in regard to interim arrangements, namely:

i) Independence from the institution

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

ii) Cooperation on claims involving more than one institution

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

iii) Counselling and psychological care

7 *Ibid* 190.

The Commission's ideal position is that survivors' counselling and psychological needs would be met through a trust fund as part of new national or state/territory redress scheme. However, in the interim it is suggested that institutions should assist survivors to 'gain access to suitable public services or by funding counselling and psychological care where public services are inadequate or not available'.[8] It is also observed that:

> Institutions would also need to ensure that a survivor's need for counselling and psychological care is assessed independently of the institution. It may be that institutions should simply accept the advice of a survivor's treating practitioner as to what the survivor needs.[9]

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

10. Reforms to Civil Litigation:

The Commission recognises that redress schemes provide an alternative to civil litigation but 'they do not offer monetary payments in the form of compensatory damages obtained through civil litigation'.[10] The Commission considers specific issues that adversely impact on survivors' ability to access the civil litigation system while acknowledging that even with appropriate reforms there will still be some survivors who may not wish to pursue civil litigation because of the difficulties associated with giving evidence and being subject to cross-examination, legal costs and other difficulties in bringing class actions. The overwhelming evidence from South Australia with the Stolen Generations cases is that it is exceedingly difficult for indigent and distressed Aboriginal persons and families to institute civil litigation on their own, even with an Aboriginal Legal Service to assist them.

This being noted there are reforms that could be made to improve civil litigation.

i) Limitation periods

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

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

- set a basic limitation period of 12 years from the time the survivor turns 18 years of age
- after 12 years (that is, the survivor turns 30 years of age), the claim could proceed unless the institution defendant establishes actual prejudice in defending the proceedings

8 *Ibid* 193.
9 *Ibid* 194.
10 *Ibid* 196.

- with an absolute bar or 'long stop' of 30 years from the time the survivor turns 18 years of age so that no civil action could be brought by a survivor against an institution after the survivor turns 48 years of age.[11]

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

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

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

ii) Duty of institutions

As the Commission observes, causes of action against institutions (as distinct to perpetrators of abuse) are difficult because survivors 'need to establish that the institution owed them a duty, the breach of which caused their damage, or that the institution is vicariously liable for the perpetrator's acts'.[12] Further, '[d]ifficulties arise because civil litigation against the institution seeks to have the institution found liable for another person's deliberate criminal conduct'.[13] The Commission put forward three possible options for reform: an express duty to take reasonable care to prevent child sexual abuse of children in their care; a reversal of the onus of proof so that institutions are liable for child sexual abuse committed by their employees or agents unless the institution can prove it took reasonable precautions to prevent this abuse; and absolute liability whereby institutions would be liable for abuse regardless of any steps they had taken to prevent it.

NATSILS favours the second option, namely that institutions are liable for child sexual abuse committed by their employees or agents unless the institution can prove it took reasonable precautions to prevent this abuse. This option is fair and reasonable to both survivors and institutions but also serves to encourage institutions to actively adopt child safe processes and procedures.

11 *Ibid* 206.
12 I*bid* 207.
13 *Ibid.*

iii) Identifying a proper defendant

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

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

iv) Model Litigant Approaches

The Commission notes that 'the Australian government and some state and territory governments have adopted written model litigant policies' which require the relevant government and its agencies to act as a model litigant.[14] Further, Victoria has adopted the *Common Guiding Principles for Responding to Civil Claims involving Allegations of Child Sexual Abuse* and these principles are intended to reduce further trauma for victims; encourage a less adversarial approach; ensure consistency between claimants in similar circumstances; and 'respond to the different circumstances of different claims brought against the State'. Also New South Wales has announced it will introduce guidelines for how agencies should respond to civil claims for child sexual abuse.

The Commission observes that the Productivity Commission has recently recommended that 'governments, their agencies and legal representatives should be subject to model litigant obligations and that compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met'.[15] The Commission suggests that both government and non-government institutions that

14 *Ibid* 225-226.
15 *Ibid* 231.

are subject to civil claims for institutional child sexual abuse should adopt specific guidelines along the lines of those established in Victoria. NATSILS supports this approach and also agrees that for government institutions there must be a process for reporting and enforcing non-compliance with the guidelines.

11. Future institutional child sexual abuse

The Commission's preliminary view is that a new redress scheme should cover past abuse, but should not apply to future institutional child sexual abuse. NATSILS acknowledges the practicalities and resourcing issues and therefore accepts that there should be a cut-off date by which the abuse must have occurred. The cut-off date should be the date on which the redress scheme commences.

However, it is also imperative that other options for redress (as distinct to civil litigation) are available for victims of future institutional child sexual abuse. Accordingly, NATSILS submits that the Commission should review the laws relating to criminal injuries compensation in the states and territories to ensure they apply fairly and appropriately for victims of future institutional child sexual abuse. Some possible reforms include changes to the standard of proof required; relaxation of the current limitation periods; increasing awareness of the right to claim criminal injuries compensation; removing barriers that preclude compensation if a person is acquitted of the offence; and ensuring that payment caps are fair and reasonable bearing in mind the reality that victims of child sexual abuse may take many years to disclose the abuse.

12. Concluding Comments:

NATSILS wishes to thank the Royal Commission for the opportunity to submit on this important issue.

Kind Regards,

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