

Submitted electronically

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Royal Commission into Institutional Responses to Child Sexual Abuse Submission to consultation paper on redress and civil litigation

Thank you for providing Northcott with the opportunity to provide a submission to the current consultation on the issues of redress and civil litigation.

About Northcott

Northcott was established as The NSW Society for Crippled Children in 1929 by the Rotary Club of Sydney. Northcott's purpose is to build an inclusive society where people can live the life they choose. This is achieved by assisting people with disability to develop their skills and achieve their goals - including their potential for independence and ability to participate in their community. Northcott supports over 13,000 people with disability and their families across NSW and the ACT. Northcott employs over 700 staff, providing more than 100 services from 34 sites and offices across NSW and the ACT. Northcott provides services to people with a broad range of disabilities including physical, intellectual, sensory, acquired and degenerative disabilities.

Northcott has been providing support to people with a disability for over 85 years. Today, our services broadly fit into six streams: Accommodation; Individual and family support; Employment and life skills; Recreation and respite; Therapy; Equipment and technology. Historically, we have also run hospital schools and holiday homes for children with polio, social clubs for adolescents with physical disabilities, home-based schooling, special schools, public orthopaedic hospitals, long-term residential care for young people, 'sheltered workshops' for young people, a pre-school kindergarten, and a hostel for children. Northcott moved to its model of community-based services which support people to access mainstream education, healthcare, employment and community life during the 1980s.

About this submission

This submission makes some general comments and responds to a number of the chapters contained within the discussion paper. Specifically, we look at:

- Chapter 2: Structural issues
- Chapter 5: Counselling and psychological care
- Chapter 6: Monetary payments
- Chapter 7: Redress scheme processes
- Chapter 8: Funding redress
- Chapter 9: Interim arrangements
- Chapter 10: Civil litigation

Northcott's submission is written from the perspective of a service provider. It should be noted, however, that much of what we have to contribute is written from our experience of supporting a

specific cohort of people whose needs should be represented in any discussion of how a scheme to support survivors ought to be delivered. Our over-arching concern regarding the discussion paper is that there has been very little reference to people with disability and how their needs and choices in a redress scheme ought to be considered, despite significant research indicating that this is a cohort of people more likely than any other to have experienced abuse in institutions^{1 2}.

General comments

Northcott supports whole-heartedly the general principles for providing redress which are outlined in the consultation paper. We agree that it should be survivor-focused and are committed in our own work with any survivors to ensure that they are able to choose the means by which they seek and attain a sense of justice or amends. Survivors should be informed of their options and be supported to pursue the options that they choose to achieve and maintain wellbeing, access reparation, receive an apology and reach a place of healing.

In particular, we affirm the statement in the consultation paper that ‘all redress should be offered, assessed and provided having appropriate regard to the needs of particularly vulnerable survivors and ensuring access to redress can be obtained with minimal difficulty and cost and with appropriate support or facilitation if required³.’

In reading through the consultation paper, we were struck that there was little reference to the needs of people with disability as a distinct group within those who might seek redress or choose to pursue civil litigation for past experience of child sexual abuse while in the care of an institution. Most reference to people with disability in the consultation paper concerns people who have been deemed to have acquired a disability as a result of abuse. While these people’s needs should certainly also be addressed, this should not be at the exclusion of people who had a disability prior to experience of abuse.

For many people with disability, intimate personal care such as assistance with showering or toileting are necessarily part of the services provided by institutions. This presents a complicating factor in determining whether or not a civil litigation case can be brought. Questions may arise around touch of intimate areas in terms of the nature of the touch and whether this was abusive or whether it was part of genuine personal care. Doubt in this area can be a barrier to justice.

We know that people with disability may be more vulnerable to all forms of abuse than people without disability due to mobility and communication factors, and are significantly over-represented in survivor populations^{4 5}. We also know from our significant experience as an organisation that supports people with high and complex needs that there are many barriers to mainstream services and supports which can make them inaccessible, or inequitably accessible, to people with disabilities.

¹ Robinson, S (2011). *Enabling and Protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability*. Children With Disability Australia.

² Gibbons, J (1996). *Services for adults who have experienced child sexual assault: Improving agency response*. Social Science and Medicine, Vol 43, Issue 12, pp 1755-1763.

³ Consultation paper, page 9

⁴ Singh, A. A. & Sikes, A (2009). Understanding Child Sexual Abuse: Prevalence, Multicultural considerations and Lifespan Effects. In: Bryant-Davis, T. (Ed). *Surviving Sexual Violence: A Guide to Recovery and Empowerment*.

⁵ Higgins, M. & Swain, J. (2010). *Disability and Child Sexual Abuse: Lessons from Survivors’ Narratives*. Jessica Kingsley Publishers.

It is of concern to us that a paper which focuses so strongly on developing a redress scheme which ‘fills the gaps’ in the existing service system fails to account for how great those gaps can be for some of the people most likely to be survivors of sexual abuse in institutions.

Structural issues

Northcott affirms that any system of redress must include an option for survivors to engage with the institution where they experienced abuse if they choose. Organisational response must be swift and sincere and include an apology from a senior representative. In Northcott’s case, this is the responsibility of our Chief Executive Officer.

Organisational response

Organisations can develop internal structures to ensure that any approaches for redress can be responded to quickly and respectfully. Our experience has been that the NSW Ombudsman has been highly supportive in ensuring we have the knowledge and access to expertise required to implement these strategies. Another range of useful tools and practice guidance for disability organisations seeking to prevent or respond to abuse or neglect of people they support is the Zero Tolerance Project, delivered by national Disability Services⁶.

Third-party arbitration

Northcott supports the proposal of a third party to arbitrate between a person and an institution as an option that a survivor may choose if they wish to seek redress from an institution but do not wish to make direct contact. Clearly, any body officially established or funded for this purpose must have a good understanding of survivor issues and trauma-informed responses to requests for support. Equally, we view that such a body must also have a high level of competency in working with people with a range of disabilities. This should include staff who are comfortable in communicating with people that use augmentative and alternative communication (AAC) systems, as well as staff who have the skills required to support both a survivor and their communication partner in discussing difficult and sensitive issues.

A cornerstone of the current disability reform agenda is the focus on mainstream participation for people with disability. Northcott fully supports this philosophy. As such, we view that survivors with disability should be supported through mainstream survivor services. These services will require specialists in trauma-informed care who also have skills in working with people with disability. We view that there should also be broader disability awareness for generalist services that operate alongside any scheme that is developed as a result of this Royal Commission.

Measures of severity

We note some concerns regarding the proposed measures of severity of abuse experienced and severity of its impact as these might apply to a person with disability. There is a risk that the fairness and equity of the redress scheme may be undermined if the complex intersection between a person’s disability and other features of their health and wellbeing is not appropriately addressed. For example, research shows us that it can be difficult to assess the mental health of a person with intellectual disability⁷, so the impact of abuse on a person in this cohort may be under-estimated. Similarly, for people with rare or complex conditions there may often be times when it is difficult to

⁶ Refer to <http://www.nds.org.au/projects/article/194>

⁷ Department of Developmental Disability and Neuropsychiatry, (2014). Accessible Mental Health Services for people with an intellectual disability. University of New South Wales.

gauge which aspects of their experience, presentation or behaviour are a feature of their disability and which of these are in fact part of a post-traumatic response⁸.

Access to files and implications of incomplete records

We will willingly cooperate in any request by a survivor, or by an arbitration body on their behalf, to provide access to records. There will be a need, however, for people to be given specific supports when the records they are seeking either were not made or were not kept. For some survivors this may signal further abuse by the system, or may reinforce feelings of being disbelieved. For organisations, this creates the potential to be asked to provide redress to people who may not have been clients of the service. The design of the redress scheme must be very clear in ensuring that survivors are not made victims of systems abuse through being required to provide proof that does not exist as a guard against opportunistic claims, which may be very few in contrast to the many legitimate claims that are anticipated.

National scheme

Northcott's preferred model for a redress scheme, of those tabled in the consultation paper, is a single national scheme which provides equity between states and territories and allows supports to be carried with a person if they move. We note that there is an amount of discussion within the consultation paper which focuses on the fact that this requires agreement and participation of all governments, which may be difficult to achieve. A significant example of all jurisdictions cooperating to deliver a national scheme is the National Disability Insurance Scheme. While still at trial stage, this scheme already shows that all Australian governments can work together to establish a fair and equitable approach to human service delivery which has been previously fragmented and inconsistent.

The NDIS can offer a number of lessons to the Royal Commission in terms of how a national scheme can be legislated and implemented. It should be noted that the scale of the NDIS, which will be a permanent scheme and which will provide support across all life domains to 460,000 Australians at full-scheme, is greater than the expected scale of the redress scheme and as such the timelines to deliver the redress scheme ought not to be conflated with the time to implement the NDIS.

Counselling and psychological care

Needs basis

Northcott advocates strongly for a model of psychological support for survivors which is provided on a needs basis, rather than an episodes-per-survivor model. We support people with complex communication needs who may take much longer than their verbal peers to communicate their message. In addition, some of these people may take much longer to build rapport and trust with their counsellor or psychologist. This should not be penalised.

The consultation paper notes that existing Medicare schemes such as Better Access could be used to procure psychological supports for survivors⁹. For a person who needs three hours to say what someone else can say in one, the 12 hours per year of Medicare funded support may amount to four sessions. For some people four sessions may be ample to discuss and try some cognitive strategies to

⁸ Ferguson, A., Howley, M. & Rose, R. (2008). *Responding to the mental health needs of young people with profound and multiple learning disabilities and autistic spectrum disorders: Issues and Challenges*. Mental Health and Learning Disabilities Research and Practice, Vol 5, Issue 2, pp 240-251.

⁹ Consultation paper, pages 118 – 130

manage distress. For others, four sessions would not come close to allowing them to feel safe enough to tell their story.

In addition, people with complex needs may find that there are other demands on their Medicare entitlements. A person should not have to choose between a behaviour support plan to assist them in the workplace or treatment for their complex trauma. Similarly, people who have access to the Medicare-funded five sessions of allied health intervention should not be forced to choose between investing this in counselling support or assessment and prescription of a new wheelchair.

Northcott applauds the recognition in the discussion paper that there will be a high variability in what is needed for individual survivors, but the scheme design must take into account the very high needs some people will have as a function of their communication needs. Reliance on the Medicare system will not cover this.

Trauma-informed frontline response

We note that many survivors with disability may still be in a position of requiring day to day assistance with such intimate activities as personal care, showering, toileting, etc. It is absolutely not appropriate that each person's history should be made known to every staff member that may support them. Instead, there is an imperative for models of trauma-informed care to be employed across disability service provision.

Frontline staff need, in the first instance, to be educated to ensure they ask a person about how they would like to receive care and then meet that person's request. They then need to be equipped to identify and respond to any signs of trauma, including but not limited to direct disclosures. This should not be a replacement for specialist clinical intervention, but workers across the sector do have a responsibility to act as a first point of response and to help survivors feel believed and validated before then supporting them to access counselling or psychological care.

At a workforce planning level, greater diversity is needed within the workforce so that all survivors who have a specific requirement regarding who delivers their self care can have this requirement met. The disability and community care industry has long faced difficulties in attracting staff due to low pay and community assumptions about the nature of the work. Investment is being made through national projects such as CareCareers to increase community awareness of this industry as a sector of choice, though cost pressures remain.

Current gaps

We have outlined above the limits of the Medicare-funded system in terms of providing sufficient hours of support for some people with particular communication needs or people who need to stretch their Medicare sessions across multiple areas of need. In addition, our practice experience highlights the following gaps or barriers to access for survivors with disability to appropriate counselling or psychological care:

- Specialist sexual assault or trauma counsellors with experience in working with people with complex communication needs are in short supply. A solution to this could be the delivery of telehealth services which link people with specific needs to counsellors who have the appropriate specialisation in trauma-informed care as well as the skills to communicate effectively with these survivors wherever they are.
- Accessible transport to and from appointments can be difficult to obtain, or may have to be provided by family members or private taxis. This can compromise privacy for some survivors who do not want their families or communities to know they are seeing a counsellor or psychologist, and can be worse for people living in regional areas.

- Access to advocacy appears to be a gap for many of the people we support in regional areas. Greater access to advocacy services with specialisation in responding to trauma and linking people with psychological supports would be highly valuable, as would further work in determining communication channels which will have a broad reach as a key mechanism for educating survivors with disability about their rights and options.

Since the introduction of the National Disability Insurance Scheme (NDIS), we have observed trends in the thinking of some other social service agencies that gaps in their own services to people with disability do not need to be resolved as the NDIS will solve the problem. Filling these gaps can't be assumed to be something that the NDIS will do, and this applies equally to the development of any new schemes or services for the general community. Most importantly, the NDIS at its very core is about enabling people to access and participate in mainstream society¹⁰. By design, the scheme does not replicate services which are part of the universal system. Rather, it provides the bridge between a person and the normal life experiences they wish to access. So, if a service is provided to the general population by Medicare, for example, the NDIS will not provide it to a person with disability. In addition, the NDIS is at this time only in its trial phase and only available to people within certain age cohorts or geographical locations dotted around Australia. The ability for the scheme to have any role in supplementing services to survivors across the country is still four years away¹¹.

Monetary payments

Institutional factors

Northcott views that there has been insufficient exploration in the consultation paper as to what the concept of 'institutional factors' may mean when determining the rating of a person's claim for monetary payment when that person was abused in a disability service.

The consultation paper appears to present a view that children who were in certain types of institution were automatically more likely to be adversely impacted by sexual abuse due to their history of past trauma. This may be so; however what is not covered is the fact that some children may have been made vulnerable to abuse because of their disability. In these cases, it is the child's disability more so than the nature of the institution which interplays with the overall impact of the abuse on the adult survivor. A more holistic assessment may be more appropriate – in fact this could apply to all survivors and not just those with disability.

Assumption of capacity, right to choose

We note the discussion paper raises the possibility of payments by instalment for those who may not have the financial skills to manage a lump-sum payment. We strongly assert our view, which is that all people with disability should be assumed to be capable of managing their funds and making this choice. In cases where a person has an appointed financial guardian, the focus of the scheme should be on ensuring that guardians have access to a range of materials to assist them in communicating with the person they support about the options available.

In allowing people to choose the means by which they receive a monetary payment – whether as a lump sum or by instalments – it is important that a cost-effective method of payment is used but that

¹⁰ Council of Australian Governments, 2013. NDIS – Principles to Determine the Responsibilities of the NDIS and Other Service Systems.

¹¹ Council of Australian Governments, 2012. Intergovernmental Agreement for the NDIS Launch.

this is not the only driver of decisions around how a person will be paid. The guiding principles here should include consideration of what is fair, including the person's right to choose. Payments should also be made in such a way as to prevent continual reminders to a person that they are a survivor or child abuse each time they look at their bank statement, for example.

Redress scheme processes

Communication as a driver of equal access

It is important that access to the scheme not be limited to people who are able to complete complex forms or written applications. This has implications for many people with disability and could also affect other groups such as Indigenous communities or other survivors who have low literacy due to low educational attainment. Alternative application methods should be accepted. These may include audio or video submissions, interviews by telephone or in person and outreach models to support applications from remote areas.

Northcott supports the suggestion that use of advocates and interpreters should be available to those who choose them. People acting in these roles, however, should be supported to understand the parameters of their role. It is important that a person's story is conveyed in the way in which they wish it to be conveyed, rather than presented in the way that the interpreter or advocate chooses. Use of family members in such roles could be a complicating factor if the family member has their own strong feelings about the abuse that was suffered. This should not negate a person's right to choose who supports them in their application, but should be a flag for assessors to make sure the support person's needs are separately addressed.

Community education to reach unknowing survivors

It is a reality in the disability sector that there will be survivors of sexual abuse who do not identify themselves as such. Some choose this. Others will not identify themselves as survivors as they do not understand that sexual abuse has been perpetrated against them, or do not understand that it was wrong¹². The scheme should not ignore these people. It is not enough to say a person's right to redress applies only when they know it is a right that applies to them.

There is a significant ongoing piece of work to be continued in educating people with disability about healthy relationships, bodily integrity and the right to say no. This responsibility is currently held by disability service providers and advocacy agencies, but neither of these groups reaches everyone. Significant investment in advocacy agencies is not currently being seen¹³ but would be a critical factor in reaching unknowing survivors. Public communication through accessible print media, television, radio and social media should also be considered.

Funding redress

Northcott is aware that there is a high likelihood that a claim for redress may be brought to us under this scheme. We take a view that we will do what is necessary to support a person seeking redress, from apology to supplying records, through to support to obtain psychological care.

¹² Murray, S. & Powell, A. (2008). Sexual assault and adults with disability: Enabling recognition, disclosure and a just response. Australian Institute of Family Studies.

¹³ Innes, G. (2014). Keynote address. Strengthening Disability Advocacy Conference, 4 August 2014, Melbourne

We do take a view, however, that the scheme must be fair for all survivors, including those who were abused in institutions which no longer exist or who were abused in institutions which may not take a conciliatory approach to claims brought against them. As such, the better approach to funding redress may be through establishment of an insurance scheme into which all existing entities which have historically provided care or services to children make payment. This could also see greater access to redress for survivors as it would likely lead to fewer cases of institutions defending against claims.

Structures under which the amount to be paid by relevant institutions can be determined require further consideration by those people and bodies appointed to work on the design of the scheme. Some workable options may include an overall cap on liability commensurate with the amount to which a claimant would be eligible under the scheme, or a fee-for-service approach where all institutions pay a levy for access to the scheme and then pay additional amounts when elements of the scheme need to be used.

In addressing these and other design issues, there will be need to consider what is fair and workable. Without removing the need for the redress scheme to be survivor-focused, it is a reality that some institutions may not be able to afford to continue operations if the redress for survivors becomes too costly. An unintended consequence of a scheme which fails to take this into account could be the loss of critical services to people across the community. A fair and workable scheme will take these issues into account, as well as the need for lead-time which will allow organisations to respond meaningfully while operating in the context of significant other reforms.

Peak representation

Northcott welcomes the suggestion in the consultation paper that institutions likely to see a high number of claims brought to them should be involved in the redress scheme design process, without negating the principle of redress being victim-centred and the redress scheme being about the interests of victims rather than institutions. It is our view, however, that for disability service providers the ability to estimate the number of claims likely to be brought is complicated by factors such as: the high number of small organisations that may each have a few claims but may collectively represent a great many; the features of the client group meaning both that vulnerability to sexual abuse is higher and that access to the means to make a claim is lower.

As such, our view is that a peak representative should be appointed to the design work, in whatever form this working group takes. As our view is that a national scheme is the preferred structure for this scheme, a national peak would be the most appropriate body to represent our sector.

Interim arrangements

If it is the recommendation of the Royal Commission that organisations voluntarily adopt an interim redress scheme while the national scheme is established, Northcott will willingly participate. In order to do so and to do a good job, the following guidance or resources will be required:

- Avenues for workforce skills development, in receiving claims, assessing claims and providing trauma-informed complaints handling techniques – this may be able to be delivered through state/territory government agencies such as Ombudsman, Public Advocate, etc;
- Access to appropriate specialist legal advice – this is something we may be able to procure through our existing relationships which provide us with pro bono support, but given the specialisation other firms may need to be approached. At a sector level this will require planning and funds;

- Designated roles within our organisation, as well as support for all staff to provide ‘no wrong door’ entry for survivors wishing to make a claim.

Civil litigation

Vicarious liability

It is appropriate that any organisation that was or is negligent in its responsibilities to screen employees, protect children in its care from harm, etc should be held responsible for this to the extent permissible by law. Northcott’s position is that we will voluntarily adopt model litigant approaches in any case that is brought before us where a person claims that we were negligent within what was considered reasonable at the time.

It is our view that organisations should not be held vicariously responsible for any wrongdoing by an employee when all appropriate protective measures have been taken and the employee has acted inappropriately despite these. Examples include wilful neglect of codes of conduct, failure to disclose relevant criminal history (particularly in other jurisdictions), etc. In any such cases, Northcott will still seek to work in a conciliatory manner with the claimant, however views that the employee should hold criminal liability.

Considerations for people we support

A complicating factor in determining whether or not abuse has occurred and whether or not a case can be brought can arise in cases where intimate care was necessarily part of the service to be provided. Questions may arise around touch of intimate areas in terms of the nature of the touch and whether this was abusive or whether it was part of genuine personal care.

We are raising this issue not with a view to obfuscating our responsibility as an organisation, but to flag the fact that specific support will need to be put in place for people with disability who have experienced sexual abuse within this context.
