Consultation Paper: Redress in Civil Litigation

Submission

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Introduction

This is a comprehensive Paper which sets a very good direction for future policy in terms of redress for victims of child sexual abuse in institutional settings. The process for achieving the policy directions outlined in this consultation paper have been exemplary, and I know that the Commission has given very careful thought to every aspect of this complex and difficult issue.

While supporting the general direction of the reforms, I see it as necessary to address a number of complex issues in order for the Royal Commission's recommendations to attract sufficient government and non-government support. For these reasons, the focus of the submission is on some of the more difficult issues involved in setting up a redress scheme of the kind proposed.

Reflections on Towards Healing

It is perhaps appropriate, given my involvement on two occasions, ten years' apart, in helping to revise the policy in *Towards Healing*, that I make some observations on what we can learn from this history. The first iteration of the policy in 1996 was, to my mind, a bold, impressive, and ethical policy aimed at trying to address the issues arising from the Church's very sad history in this area. I believe it was genuinely intended by its primary authors as a means of providing a just and compassionate response to victims.

The principles which underlie *Towards Healing* have not changed markedly from that first iteration. The Catholic Church in Australia was years ahead of its time in promoting the idea of restorative justice for victims and in setting up an ex gratia compensation scheme. Other churches did not do this until many years later.

Certain of the features which were established in *Towards Healing* also find expression in the Royal Commission's consultation paper. In particular the importance of a meeting with a senior member of the organisation, and receiving a genuine and heartfelt apology, were key features of *Towards Healing*, and are also important features of the Royal Commission's proposals. I say this only because *Towards Healing* has had quite a lot of bad press over the

years, much of it well-deserved, and some of its very good features have not been acknowledged as well as they might have been.

One of the weaknesses undoubtedly is that, as many have complained, 'the Church investigates itself'. In my review of the policy in 1999-2000 I endeavoured to provide a measure of independence in the process through the creation of the office of Director of Professional Standards. Nonetheless the key decisions about levels of reparation or other support for victims needed to be made by those who had charge of the funds. A voluntary ex-gratia scheme could not easily have been an independent scheme; but it would undoubtedly have been better if my recommendation for a compensation panel had been adopted, to provide some consistency in outcomes across the country. The proposed national redress scheme will achieve this.

What has been so disappointing about *Towards Healing* is the gulf that has become apparent between intention and implementation. While there have been some good practices and substantial reparation payments under the auspices of *Towards Healing*, there have been too many accounts of poor processes and unsatisfactory outcomes. This is evident in the Royal Commission's case studies, particularly in relation to the early implementation of *Towards Healing*. From these, it is clear that the values that inspired the primary authors of the document were not shared by all those who were involved in its implementation, and nor was the intention well understood. Consequently, many of these cases progressed as if they were no different to a negotiation between lawyers in the shadow of threatened litigation. Too often, the Church paid out compensation at a level it could get away with rather than at a level which was just, and which helped meet the needs of the victim in the circumstances. Lawyers, and the insurance company, were in the shadow of so many of these negotiations even if they were ostensibly being conducted by a bishop or leader of a religious order. As the Ellis case showed, in some matters, the manner in which the case was defended betrayed the values of the Church. The Royal Commission has done much to uncover these practices. This calls to mind what Jesus is recorded as saying in Luke 12:3:

> What you have said in the dark will be heard in the daylight, and what you have whispered in the ear in the inner rooms will be proclaimed from the roofs.

One lesson of this amongst many, is that one cannot talk like Mother Teresa and behave like Machiavelli, for the end result will be worse than if nothing had been said at all.

Counselling and psychological care

In my view, one of the most important proposals of the Royal Commission is that provision be made for the long-term to provide counselling and psychological care to victims for as

long as they need it. Counselling to address the issues arising from childhood sexual abuse is unlikely to be effective if provided in just 10 sessions at a particular moment in time. The effects of childhood sexual abuse frequently last for decades, and awareness of these effects can be quite episodic, as triggers and crises bring various issues to the front of consciousness. This is well-discussed in the CP.

There is nonetheless an important issue to consider in terms of funding for this counselling and psychological support. I may have misunderstood this, but the impression one gains from p.127 and p.131 of the CP, for example, is that the institutions will be required to provide all the funding for this, either to reimburse Medicare for its future costs (actuarially assessed) or in a stand-alone trust fund. The earlier discussion on p.126 gives a different impression. In any event, there is no mention that I could find of the role of private health insurance companies where people have extras cover, to meet psychologists' costs.

That focus on institutional responsibility may well flow from the Terms of Reference for the Royal Commission. However, there are problems with this.

1. As is clearly acknowledged on p.105, treating child sexual abuse is not like treating a cancer or any other form of bodily injury or disease which is located in a particular place and has known effects. If a person were physically injured as a result of some tortious behaviour within an institutional care environment, there would be no difficulty in making the institution liable to meet the costs of treatment of the injury. The difficulty with child sexual abuse however is in working out cause-and-effect. Many of the children who were abused were in institutional care as a result of removal from parents or because a parent, usually a single mother, was unable to look after them. For some of these children there may well have been traumagenic effects arising out of the circumstances that led them into the orphanage or children's home, and traumagenic effects from the absence of being raised by a loving mother and father.

   Furthermore, when we have problems in our adult lives, this may result from a whole variety of causes and aspects of our genetic make-up and character. Is a marriage breakdown, which can cause great grief and difficulty, to be attributed to a childhood trauma, or to lack of compatibility with a partner, or a combination of a lot of factors?

   It follows from this that it is extremely difficult to isolate the effects of child sexual abuse from other difficulties in our lives both before and after the abuse occurs. This is illustrated by a study in which I participated led by Prof Kim Oates, the former CEO of the Children's Hospital at Westmead. We studied the outcomes for a cohort

of sexually abused children nine years after the abuse has been identified.[1] We found that while sexual abuse was a predictor of a range of adverse outcomes in comparison with a control group, many other factors also influenced the long-term outcomes for these children of which the sexual abuse was just one. Family functioning, parental alcohol or drug abuse, and subsequent adverse life events, for example, also played roles in how these young people were coping nine years on from the abuse.

Are the institutions then to take responsibility for all counselling and psychological care needs of victims of child sexual abuse? Quite possibly, but it must be recognised that they are thereby being asked to take responsibility for funding much more than a treatment program to deal with the effects of childhood sexual abuse. Although in many cases no doubt, an adult's experience of distress and dysfunction will be closely related to dealing with unresolved abuse trauma, it is probably impossible to draw boundaries around counselling by reference to causation.

2. As a society, we already socialise the cost of much medical, psychological and psychiatric care irrespective of responsibility for that injury, illness, or problem. True, when somebody receives a compensation payment, some part of that must be paid to the Health Insurance Commission which goes to reimburse Medicare costs. However a redress scheme is different to a compensation scheme, inasmuch as it is intended as a strict liability scheme, with institutions taking responsibility whether or not they could be deemed culpable for the actions of the employee or volunteer.

   In any redress scheme with tens of thousands of applicants, a wide variety of circumstances will be considered and a large number of organisations will be responsible for paying redress. Among them will be some organisations which have a very high level of responsibility for allowing the abuse to occur, since the evidence indicates that the abuser's behaviour was known to people in leadership positions, at least to some extent. Other organisations might be considered to bear a lot of the responsibility because their institutional culture created conditions that led to a greater likelihood of abuse than would otherwise have been the case. Other organisations could probably have done little or nothing to prevent the abuse even if better screening procedures and selection processes had been in place at the time. Sexual abuse is typically a secret crime, and it is a common experience for those working in this field to discover men who have been abusing multiple children over

[1] Swanston, H, Plunkett, A, O'Toole, B, Shrimpton, S, Parkinson, P and Oates, K, "Nine Years After Child Sexual Abuse" (2003) 27 *Child Abuse and Neglect: An International Journal* 967-984.

many years when nothing was known or suspected until the first victim disclosed the abuse decades later.

This is the context in which proposals for the institutions concerned to take responsibility for the lifetime care and support of victims needs to be understood. In many cases, it will be entirely appropriate. In other cases, where the abusive behaviour could not reasonably have been known or prevented, the question of responsibility becomes more difficult.

3. There are many costs borne by Medicare arising from intentional behaviours which are socialised. We even socialise the cost of treating a lot of self-harm. For example, we treat those who are harmed as a consequence of their smoking or who were injured as a consequence of being intoxicated while driving; those who engage in risky activities, and those who are injured while committing criminal offences. The question then arises whether there's something special about child sexual abuse in the context of institutional care or activity that sets it apart from other sources of harm for which as a society we pay through Medicare and through the partial socialisation which occurs in the context of a substantial private health insurance industry. It is difficult to identify what that feature might be, particularly when the issue of causation is likely to be so problematic in many cases.

It is probable that the cost of providing lifetime psychological care will not be insignificant. It is a key aspect of the Royal Commission's proposals and so we need to find a way to fund this. I would certainly support the idea that the institutions in which abuse occurred should be asked to provide gap funding to the level of recommended reasonable rates for counselling and psychological support. However I cannot see the case for asking institutions, some of which may have had no reason to know that the abuse was occurring, to meet all the costs of counselling arising from the multiple adversities that victims of child sexual abuse have so often suffered. It is appropriate that much of this cost continues to be socialised through Medicare and, where applicable, private health funds.

Having said this, any effective approach nationally would require some revision of Medicare's current scheme for funding psychologists' appointments. The current system allows for only certain kinds of therapy (which may not be all that suitable for dealing with traumatic memories) and involves monitoring by GPs in ways which arguably are not all that cost-effective for Government. It follows that if Medicare is to cover a lot of the cost of therapy for childhood sexual abuse, and institutions are to cover the gap where people were victimised in an institutional context, then a lot of work will need to be done to ensure that the counselling support provided is 'fit for purpose' in addressing this form of childhood trauma.

Another possibility to consider is that the federal government should take responsibility for this funding as its contribution towards the total cost of the redress scheme. For the most part, it is the states and territories rather than the Commonwealth, that had responsibility for the children who were abused in institutions. There are only a few areas where the Commonwealth responsibility is clear. These include where migrant children were brought to Australia on the basis of Commonwealth programs. However even in relation to Aboriginal children, the abuse typically occurred in State institutions or in charitable institutions for which the State had responsibility.

The Commonwealth is already in the field of providing psychological and psychiatric care through Medicare and through its funding for hospitals. Clearly, it would defeat the purpose of the Royal Commission's recommendations if there were not a special fund set up to provide this lifetime care beyond that of the existing healthcare system. The best way might be through a trust fund which is not subject to the exigencies of future budget adjustments. If victims of child sexual abuse in institutional care were provided with lifetime psychological and psychiatric care through Medicare and gap funding provided by a Commonwealth-funded trust fund it may well be the best way to meet the goals of the Royal Commission while also achieving some equity between the Commonwealth, the states, and the non-government institutions in terms of the overall costs of the redress scheme.

This could be operationalised by setting a counselling payment for each case at the time that the redress claim is processed. This could be based on a sliding scale calculated in accordance with the assessment of impact of abuse (CP, p.147). The amount could then be placed into a trust fund (guaranteed by Govt.) from which

1. Gap funding for treatment costs could be paid out, and

2. Specialised training could be facilitated to ensure that the quantity and quality of health professionals are available for the expected increase in the need for these services.

This will give certainty to both the victim and the institution in terms of availability of these life time services.

Should the redress scheme require Deeds of Release?

It may seem obvious at first, that there should be no deed of release required in order to receive a redress payment, because the levels of payment under the redress scheme are unlikely to be nearly as high as would be the case were the claimant able to prove all that needs to be proved in civil litigation.

It may seem obvious also, that the compensation paid under the redress scheme should be deducted from any damages award in the event that there is subsequent civil litigation.

While recognising the strength of that position, I think that it is necessary to ask victims to provide a deed of release as a condition of receiving the compensation payment. This is for three reasons:

1. There needs to be a way of tying in the commercial insurance companies to the redress scheme. The nature of the redress scheme proposed is that there will be no findings of liability against any person. Even if the allegation is clearly against a named individual, the redress scheme decision-makers will make no findings in relation to the truth or otherwise of those allegations beyond the question of plausibility.

   The difficulty arises because insurance contracts have for years been based upon liability. That may have been modified in practice, in terms of the approach taken by Catholic Church Insurances, but even now I understand, it takes a commercial view when deciding whether and how to settle claims against organisations of the Catholic Church. Even within the Catholic Church, not all insurance contracts were placed with CCI. I understand that some Church Authorities had commercial insurers, at least at certain points in time.

   It is probable that most other churches and faith-based organisations, as well a secular organisations, have had insurance cover through the commercial insurers. Many of those insurers will be subsidiaries of overseas multinational corporations.

   The CP identifies the likely cost of the redress scheme in the billions of dollars. I may have missed something, but I could not find anywhere a discussion of how the insurance companies might be asked to contribute to this sum.

   If the redress scheme works on the basis of ex gratia payments, as it must do, then a commercial insurance company may take the view that the payout is not covered by insurance. In order to come within the policy, there must be at least the credible threat of litigation. Even if the large Australian-based insurance companies were to agree with the Royal Commission that they would meet redress claims on the basis of the existing insurance policies, it is at least questionable whether their overseas' managers would take the same benevolent view of corporate responsibility in this area.

The incentive for insurance companies to meet a redress claim would probably need to come from obtaining a deed of release. Indeed, unless legislation required insurance companies, which had taken premiums to cover the relevant risk, to make payments under the redress scheme irrespective of liability, it is difficult to see any other way in which they could be made to participate. If they are not required to participate, then they are unfairly 'off the hook' for a liability for which they have contracted.

2. I also have concerns about the possibility of exploitation of victims by some lawyers who might persuade them to use their redress money in order to fund litigation in circumstances where the likelihood of success is not high. Regrettably, we have already seen various instances of unscrupulous behaviour by lawyers whose primary or sole practice has been in supporting victims to litigate against institutions in relation to childhood sexual abuse. It must be emphasised of course, that there are also many decent and ethical lawyers working in this field. Even so, it is not uncommon for us as lawyers to be much more optimistic about the prospects of success when we first hear our client's story, than we are after we have been able to see much more of the evidence and documentation, months down the track.

3. From a psychological point of view, (and I must acknowledge that I am not qualified in this area) I think there is value in having closure. A redress payment which ends the claim against the institution will bring a form of closure at least in relation to the monetary aspects of the issue. That may have some value in terms of healing and being able to move on. There is no unfairness involved as long as the possible end points of a redress claim, including a Deed of Release, are in view at the beginning.

   It goes without saying that no one should be required to sign a deed of release unless they have had legal advice on the issue and on their prospects of success in civil litigation. It should also be absolutely clear that no part of a deed of release should include an obligation of confidentiality in relation to the victim's story about the abuse. Another disappointing aspect of *Towards Healing* was that it seems long after we put into the 2000 version of the document a specific prohibition of this kind, such silencing clauses were still being included in deeds of release. This issue is of course dealt with on p. 174 of the CP.

Features of a Redress Scheme

a) Criteria for inclusion

In my view the conditions for inclusion on page 162 of the CP are sensible. I would modify them only a little by making it an overriding criterion that the institution has, or its activities have, created, facilitated, increased, or in some way contributed to the risk of child sexual abuse or the circumstances or conditions giving rise to that risk, in one of the three situations listed. I say this because child sexual abuse may happen on the premises of an institution, for example in a churchyard which is part of the grounds of a church, when the offender has no connection to the activities of the institution. Furthermore, church premises, such as halls, are often rented out on a commercial basis, or offered to community groups, when the activity has no connection with the life and work of the Church.

b) Type of abuse included

I agree with the view expressed in chapter 6 that while the redress should take into account all the abuse which has occurred in terms of its effect upon the victim, to come within the scheme there must have been at least some sexual abuse. While some conduct of institutions was deplorable on any criteria and whatever the era in which it occurred, the reality is that standards have changed over time in regard to such matters as corporal punishment. It is quite difficult to devise criteria which properly cover physical abuse. My proposal, which was accepted by the church in relation to *Towards Healing*, was that physical abuse means:

> Behaviour by a person with responsibility for a child or young person which causes serious physical pain or mental anguish without any legitimate disciplinary purpose as judged by the standards of the time when the behaviour occurred.

This definition might be considered also in relation to governing documents for the redress scheme, where the threshold criterion, of a claim of sexual abuse, is met.

I would counsel against the inclusion of emotional or psychological abuse within the compass of the redress scheme. It is very hard to define, for while it had a clear meaning in the child protection literature in the 1980s, the term has been given a wider and wider application over the years, and I'm not sure that it is capable any more of being used as an objective criterion to determine liability. To illustrate this, in one major study of free,

court-mandated mediation in Arizona, 98% of women and 97% of men reported at least one incident of 'psychological abuse' by their former partner in the last 12 months.[2]

c) Duration of the redress scheme

I agree in principle that a redress scheme should have no time limit, but there needs to be a balance, in my view, between that principle and the cost of maintaining institutional schemes with fewer and fewer 'clients'. It seems to me that the graph of likely claims will look much as is predicted in the CP (p.183). That is, if a scheme commences in 2016, it will reach a peak in the first three years and thereafter taper off. A certain amount of institutional infrastructure is required to keep any scheme in place even if the staffing is greatly reduced over time. There will usually be premises to be maintained, a website, an annual report, an annual set of accounts, and a myriad other such features.

For this reason, my proposal is that the scheme be established for five years as an independent scheme. After the five years has expired, then claims could be made directly to the institution concerned, but it would draw upon the features of the scheme, including some independent assessment of the level of redress to be paid, using the criteria established under the scheme. To put it differently, the central features of the redress scheme would have no time limit, and some personnel with the expertise to deal with different aspects of the redress scheme would continue to be available after the expiry of the five years; but the scheme itself would have a definite closing date. In my view, a proposal of this kind is much more likely to get support from governments than an open-ended scheme.

d) Institutional involvement and structure of the scheme

I have some concern that if the scheme is set up by statute in the manner in which victims' compensation schemes have been, then victims may well get their money, but the process will be bureaucratic and relatively cold. Inevitably, the focus will be on processing claims efficiently and as speedily as possible, particularly in the first three years of operation when application numbers are likely to be high and waiting periods long. If that is the case, and it is a very realistic scenario, then much will have been lost in comparison with some of the better examples of restorative justice that can be found in this field.

I would also be concerned if the scheme were to be governed by administrative law principles, with rights of review of the decision in relation to a redress claim by a court or tribunal. While this has advantages in terms of fairness and due process, much will be lost

[2] Connie Beck, Michele Walsh & Rose Weston, 'Analysis of Mediation Agreements of Families Reporting Specific Types of Intimate Partner Abuse' (2009) 47 *Family Court Review* 401.

in terms of the therapeutic focus of such a scheme. The redress scheme should not be like Social Security based upon complex legislation, defined entitlements and detailed procedural manuals.

One way perhaps to avoid this is for the scheme to be set up cooperatively by contract between participating state and territory governments and institutions. The independence of the decision-makers must of course be assured. Nonetheless, I think it is important that the institutions responsible have some ownership of the process and its ongoing effectiveness. The redress scheme proposed by the Commission could all too easily become a means whereby institutions wash their hands other than in terms of financial responsibility, with victims being out of sight and out of mind unless they accept an offer of a meeting with a senior member of the institution.

If the redress scheme is set up by contract with a governing board which is representative of some of the major stakeholders, then there may be more ownership than would otherwise be the case. It would be essential nonetheless that no one organisation involved in the scheme has a significant presence on the board sufficient to dominate its processes. Furthermore, the governing body would have no involvement in determining individual cases.

I would also suggest that there be two tiers of involvement by non-government institutions. In the first tier would be organisations with a large exposure to victim claims which choose to be institutional participants in the scheme. I would envisage that other smaller organisations or those with relatively few claims, may simply contract with the redress organisation on a fee-for-service basis. In this way, the small organisation could take advantage of the independence and integrity of the redress scheme without being a full institutional member with a role in governance.

Civil liability

a) Limitation periods

I support the removal of limitation periods on a retrospective basis and do not support long stop provisions. I do not see that a serious injustice would arise from moving the goalposts in terms of the limitation period. The basis for liability is unaltered. It is only the period within which the claim can be pursued that changes.

I recognise entirely that the longer the time that has elapsed since the events, the harder it is for the plaintiff to prove the claim or indeed for the defendant to mount a defence. However I consider that this issue is best dealt with by individual judicial discretion to bar a claim if the institution establishes actual prejudice in defending the proceedings due to

the effluxion of time. I see this as a sufficient safeguard for institutions without creating an arbitrary long stop period. My experience is that some men in particular take more than 30 years to reveal their abuse. Some may take 50 years. They should not be barred from a claim on the basis of some arbitrary period. In some situations there may well be enough documentation and other evidence to corroborate aspects of their account.

b) Retrospective changes to liability rules

I do not support retrospective changes to the liability rules, in particular concerning vicarious liability. There has long been a presumption against retrospectivity in statutory interpretation, and legal philosophers for good reason dislike the notion of retrospective legislation. The case has been put very well in Prof. Lon Fuller's *The Morality of Law* (1964), in which he posits a king known as Rex who engages in rulemaking which is immoral not because of the content of the rules but because of the manner in which they are made.

There has to be a compelling case for retrospective legislation, and usually it cannot be made, for there is an inherent unfairness in creating liabilities which organisations could not have insured against, or for which insurers become liable where that level of risk was not factored into the calculation of the premium.

c) Reasonable precautions

The proposal on page 219 of the CP that institutions could be made liable for child sexual abuse unless they took reasonable precautions does seem to be a sensible compromise between different interests. For the reasons given above, I do not think this can be retrospective. Indeed, apart from the moral problem of retrospectivity, there could be a great deal of controversy about what constituted reasonable precautions at any given moment in time. Child protection standards have, fortunately, improved greatly over the last 15 years.

d) Volunteers

There is a question as to what is meant by the term 'agents' in the proposals on p. 219. In my view, and notwithstanding the limitations this involves, I do not think that institutional liability should include responsibility for volunteers. The CP is largely silent on this issue, although I note the comment on p.224:

> A requirement for incorporation and insurance, particularly for small, temporary, informal unincorporated associations, may deter people from forming such associations, potentially losing the various sporting, cultural and other activities they provide in the community.

Regrettably, much of the abuse that does occur in institutional settings is result of abuse by volunteers; however the risks involved in extending a form of vicarious liability to volunteers in my view outweigh the benefits of ensuring a more comprehensive coverage to provide civil compensation for victims.

As Andrew Leigh, the federal MP and former ANU Professor of Economics, has shown in his book *Disconnected*, there has been a significant loss over many years in the social capital that comes from community organisations. There has been a massive decline over the last century in regular church attendance, involvement in organisations such as Rotary or the Lions, and other forms of community engagement. This has coincided with greatly increased levels of family breakdown. The consequences for the health of the community as a whole have been serious.

I would be very concerned indeed if the result of attempting to provide better remedies for victims of child sexual abuse - a very laudable objective – were to drive voluntary organisations out of providing the facilities for children which are so important in the community. An example of this would be the various sports organisations that exist in every community providing multiple age-based teams and which are the major providers of sport for children and young people. Churches also are in the vanguard of providing important services to the community in terms of mothers and toddlers playgroups, holiday activity camps and the like. If the fear of liability drives out volunteers and voluntary organisations, then the whole community will be much the worse for it.

A lot will depend of course on the reaction of insurance companies, but my prediction would be that in the first few years after any significant change in liability rules, premiums would be conservatively high rather than conservatively low, and this may in itself deter smaller organisations from providing the kind of important and relatively low risk activities that they do.

This is not to say that we should not do everything possible to ensure that there are proper child protection screening processes in place for volunteers. However it is important to recognise the difficulties in doing so. In churches for example, there is typically quite a high degree of turnover in volunteers to staff Sunday school classes, help with the youth group, and lead mother and toddler activities. Disproportionately, these activities are run by women who present little or no risk to children in terms of child sexual abuse.

We need to find ways to build up our social capital again and despite the tragic history of child sexual abuse in some churches, and other non-government organisations, the reality is that it is these organisations which have in the past provided and will in the future

provide so many of the activities and services which are vital to a healthy and caring society.

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