



# **UNITING CHURCH IN AUSTRALIA**

**Royal Commission into Institutional Responses to  
Child Sexual Abuse**

**Consultation paper: Redress and civil litigation**

Released 30 January 2015

**Uniting Church in Australia submission**

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## Introduction

The Uniting Church in Australia is the third largest Christian denomination in Australia and the first church to be created in and of Australia. Uniting Church congregations throughout the country strive to be caring communities to which all people can belong. There are around 2,500 congregations with 243,000 members and adherents; around 1.3 million Australians claim an association with the church. The Uniting Church is governed by a series of inter-related councils, each of which has its tasks and responsibilities in relation to both the Church and the world.

The Uniting Church in Australia submits this response to the Royal Commission into Institutional Responses to Child Sexual Abuse's 'Consultation Paper: Redress and Civil Litigation', which was released on 30 January 2015.

The Church, and its agencies, is committed to doing all that it can to provide fair, consistent and compassionate redress for past and future wrongs committed towards children in its care.

### **Note**

This submission follows the headings and specific points for consultation as they appear in the consultation paper in boxes. The discussion beneath each box is the Church's response.

The eight chapters to which responses can be made are:

- Structural issues;
- Direct personal response;
- Counselling and psychological care;
- Monetary payments;
- Redress scheme processes;
- Funding redress;
- Interim arrangements; and
- Civil litigation.

## STRUCTURAL ISSUES, pp.43-62

We welcome submissions that discuss the issues raised in Chapter 2.

In particular:

- We seek the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternative approach
- We welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse.

The Uniting Church is supportive of a single national scheme which would meet the needs of survivors. We acknowledge that past support for survivors has been inconsistent and incomplete, and has caused anger and frustration for survivors. Some survivors (and perpetrators) move between institutions and jurisdictions. Survivors ask for equal access and equal treatment, regardless of where the abuse took place.

Noting and acknowledging that the Royal Commission's Terms of Reference limit its scope to child sexual abuse, the Uniting Church's experience in working with survivors is that they often have experienced, and require assistance with, consequences of a range of childhood abuse and trauma. A scheme that imposes a division between sexual and other abuse experienced in childhood may miss out on an opportunity to provide a more holistic response to all forms of child abuse.

Regarding 'future child sexual abuse' which is child sexual abuse that occurs on or after the date that any reforms the Royal Commission recommends to civil litigations commence (p.60), the Church acknowledges that the need for a redress scheme for future abuse will be diminished if survivors can have greater opportunity recover damages at common law (p.61). Subject to the degree of the changes made in favour of enhancing survivor access to the civil litigation process, the Uniting Church supports the Commission's proposal that redress be used to address claims of past abuse and civil litigation for claims of future abuse.

We note, however, that all stakeholders have acknowledged that civil litigation can be challenging for survivors and is not always an option they are willing to pursue, regardless of law reforms that improve access to that process.

The Royal Commission may need to consider what options may be available for a survivor who seeks financial redress in an environment of civil law reform, if the survivor does not wish to pursue civil litigation and would rather not engage directly with the institution.

The Uniting Church submits that any reformation of the civil litigation in this area should include as a mandatory prerequisite to participation in the court process that mediation has been entered into as a first step.

## DIRECT PERSONAL RESPONSE, pp.80-104

We welcome submissions that discuss the issues raised in Chapter 4, including the principles for an effective direct personal response and the interaction between a redress scheme and direct personal response.

The Uniting Church supports the Commission's principles for an effective direct personal response which include:

- Re-engagement between a survivor and institution should only occur in, and to the extent that, a survivor desires it;
- Institutions should make clear what they are willing to offer and provide by way of direct personal response and they should ensure that they are able to provide what they offer;
- At a minimum, all institutions should offer and provide on request by a survivor
  - an apology (pp.83-89),
  - an opportunity to meet with a senior representative (pp.89-91),
  - an assurance as to steps taken to protect against further abuse (p.91);
- Be responsive to a survivor's needs (there is no one size fits all);
- Institutions that already offer a broader range of direct personal responses to survivors and others should consider continuing to offer those forms of direct personal responses (pp.92-93);
- Providing access to records (p.94); and
- Other projects, including
  - Family tracing and family reunion (p.94),
  - Memory projects (p.95),
  - Collective forms of direct personal response (pp.95-100),
  - Memorials,
  - Reunions and commemorative events,
  - Collective redress for Aboriginal and Torres Strait Islander survivors (p.97-100).

While supportive of these principles, the Uniting Church observes that it is important for institutions to actively pursue their implementation. The experience of the Uniting Church is that many survivors struggle to advocate for their own needs in these areas and that the support provided by survivor groups is important to ensuring individuals are able to access these direct personal responses. If survivors are to access the healing benefits that can come from the application of these important principles then it is essential that survivor support groups are adequately funded to facilitate the access of survivors to these resources.

- Institutions must ensure that direct personal responses are delivered by people who have the appropriate skills and attributes that enable them to respond with empathy, and have the capacity to engage with survivors in a way that exhibits best practice. Certain types of training may be an appropriate vehicle to support developing the skills of those in institutions engaged in providing the direct personal responses to survivors.
- Institutions should welcome feedback from survivors about the direct personal response they offer and provide (pp.102-103)

If a survivor does not wish to interact with the institution personally but seeks a written apology, acknowledgement and/or assurance, a redress scheme could facilitate this if the survivor agrees to have their details passed on to the institution with a request detailing the outcomes they seek. This could be done through the redress scheme or through a survivor advocacy or support group.

## COUNSELLING AND PSYCHOLOGICAL CARE, pp.105-131

We welcome submissions that discuss the issues raised in Chapter 5, including the principles for counselling and psychological care, existing services and service gaps and the principles for supporting counselling and psychological care through redress.

In particular:

- We seek the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors
- We welcome submissions on the relative effectiveness and efficiency of the options in meeting survivors' needs.


The Uniting Church is of the view that the perspectives of survivors should be given primacy in any system of care and support that is developed. On the premise that survivors have indicated that they are seeking the following elements of support, the Uniting Church supports the following principles for counselling and psychological care (pp.111-117) for survivors and their families:

- Flexibility and choice;
- Counselling and relevant activities - including peer group support programs - that assist them in their life should be available throughout a survivor's life, particular to their needs at the time;
- Counselling should be available on an episodic basis;
- No fixed limits on services provided to a survivor;
- Psychological care should be provided by practitioners with the right capabilities to work with complex trauma clients;
- Suitable ongoing assessment and review; and
- Services for family members if necessary for survivors' care.

The Uniting Church endorses the principles for supporting the costs of counselling and psychological care that focus on meeting the needs of survivors and their families through redress, as outlined by the Royal Commission (pp.122-123)

Counselling and psychological care can be provided to groups and communities. There are some individuals and communities who will have specific needs that may require significant adaption of the care model in order for it to be effective. A conventional clinical medical





model may not adequately address these needs. This includes those who are survivors from Indigenous and other cultures.

Recognising the principles outlined in Chapter 5 of the Royal Commission's Consultation Paper, the Uniting Church believes that robust, effective, efficient and sustainable arrangements are best placed to meet survivors' counselling and psychological care needs.

The Uniting Church encourages the Royal Commission to explore further alternative models and how they can be funded and delivered.

## MONETARY PAYMENTS, pp.132-160

We welcome submissions that discuss the issues raised in Chapter 6, including the purpose of monetary payments.

In particular we welcome submissions on:

- The assessment of monetary payments, including possible tables or matrices, factors and values
- The average and maximum monetary payments that should be available through redress
- Whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme
- The treatment of past monetary payments under a new redress scheme.

### PURPOSE OF MONETARY PAYMENTS UNDER A REDRESS SCHEME

The Uniting Church supports the consultation paper's observation that if a survivor wishes to obtain a monetary payment that is compensatory, then civil litigation is the appropriate avenue to pursue. A monetary payment under a redress scheme is a tangible means of recognising a wrong suffered (p.132).

Under a redress scheme (as distinct from civil litigation):

- There is no requirement to prove legal liability;
- Not all parties are required to participate;
- The proof of any element is lower than that required by civil litigation; and
- Any amount available to a survivor is capped and may therefore be lower than might be attained under civil litigation (p.133).

Clearly stating the purpose of monetary payments under a redress scheme helps claimants understand and make an informed choice.

### ASSESSMENT OF MONETARY PAYMENTS

The Uniting Church acknowledges that payment under a scheme should provide benefit to the claimant, be fair to all claimants, and be sustainable.

The Uniting Church would be able to adopt a matrix which was aligned with the matrix proffered by the Commission for assessing the payment to be made under the redress scheme. It is important that there be a single, uniform, fair assessment of the severity of abuse, regardless of jurisdiction or institution. For it to be fully effective, it may need to take account of:

- Cultural considerations, particularly regarding Indigenous survivors and their diverse communities; and
- Other forms of neglect and abuse, not just sexual abuse.

Any assessment matrix should be tested and evaluated across a range of communities and groups, before being formalised into the final scheme.

With respect to the matrix proposed in the Consultation Paper, the Uniting Church believes it is important that the methods of assessment adopted by the Scheme do not impose on the survivor an analysis of their experience at a level of detail that has the potential to traumatise them.

It is important that the Redress Scheme design and administration is informed by existing schemes, including overseas, and implement best practice that minimises harm to survivors and is as efficient as possible.

The Uniting Church supports the use of the three factors: severity of abuse, impact of abuse and distinctive institutional features.


The Uniting Church notes that some survivors may have experienced severe abuse and may not outwardly exhibit severe impacts from that abuse. It will be important for the Scheme to communicate with survivor organisations and individuals to ensure acceptance of the matrix approach, so that survivors who are not exhibiting evidence of severe impacts do not feel penalised because they are seen as ‘coping relatively well’ despite their abuse.

On the basis that any entitlements under a redress scheme will take into account previous payments already made to a survivor, and that all parties relevant to the claim will be assessed at the same time, the Uniting Church supports a range of payments to a maximum payment of \$200,000. This range signals to claimants and the wider community acknowledgement of the seriousness of the impact of child sexual abuse.

Some state schemes have used minimum payment amounts; other schemes, including the Irish scheme and some state victim of crime schemes, do not. The Uniting Church does not have a view on a minimum payment, except to query whether setting a minimum is compatible with operating an assessment matrix of the type proposed by the Commission.

Assessment of payment amount should acknowledge the responsibilities of governments as well as institutions. Where governments had oversight of the institutions and were responsible for the welfare of children (for example, wards of the state) those government authorities should accept their responsibility for placing the child into the care of institutions.

Regarding availability of payments by instalments (p.159), the Uniting Church supports flexibility for the method in which the payment is made, at the discretion of the survivor.



The Uniting Church has concerns that the model of payments to individual applicants for redress may not achieve the same healing outcomes that it does in other cultural contexts. This is not to argue against financial payments being made but to be alert to the fact that the way in which healing and recovery happens in some cultures is not the same as it is in individualistic western culture. The Royal Commission is encouraged to continue to be sensitive to these cultural issues as it makes recommendations across a range of areas that seek to address the healing and support of survivors.

## REDRESS SCHEME PROCESS, pp.161-177

We welcome submissions that discuss the issues raised in Chapter 7, including any aspects of redress scheme processes.

In particular, we welcome submissions on:

- Eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included
- The appropriate standard of proof
- Whether or not deeds of release should be required.

### ELIGIBILITY FOR REDRESS (pp.161-162)

Given that there is the possibility that any directions set for eligibility for redress under a scheme recommended by the Royal Commission may create expectations for an interim period, the issue of eligibility needs to be carefully considered where there may be claims for abuse from persons who have not been the focus of the Royal Commission.

Further work needs to be done in order to understand and articulate the responsibility of an institution when there is child to child abuse. The key to the scope for the scheme is that it should address cases where the institution in its various forms exercised responsibility for the setting in which abuse occurred. The Uniting Church accepts that it must take responsibility to make children as safe as possible in these settings.

Regarding types of abuse included (p.163), as providers of out-of-home care, the agencies of the Uniting Church are open to hearing allegations of any form of abuse or neglect, particularly if they are related to sexual abuse, and informing survivors of their options for redress. This also contributes to The Uniting Church's out-of-home care's commitment to prevent child sexual abuse and promote environments of safety for children.

Regarding standard of proof (pp.170-171) the Uniting Church supports an approach of being satisfied that the allegations are plausible.

The methods for assessing plausibility may vary depending on the circumstances. It will be important that the redress scheme, when testing the plausibility of a claim, does not use methods of testing that inadvertently elevate the standard of proof.

### DEEDS OF RELEASE (pp.173-174)

A form of release is not likely to be necessary for matters of historical abuse if amendments to civil litigation are made which affect the forum for resolution of claims for future abuse.

The Uniting Church also believes that any deed of release should be capable of being set aside by a court in the event that significant new evidence is discovered relating to the level of knowledge of the abuse by the institution or the impact on the survivor was not disclosed at the time of resolving the claim between the survivor and the institution.

The Uniting Church agrees that there should not be a requirement for confidentiality on the part of the survivor and it should only exist to the extent it would give comfort to the survivor.

The Uniting Church supports the rights of survivors to retain control of how they deal with the harms they experience. If survivors wish to pursue litigation or alternative schemes, that should be their choice. However, in order to maintain the efficiency of the court and redress systems, and the effective targeting of funding, the Uniting Church believes that a survivor should access one or the other system, rather than both. However, a prior unsuccessful civil claim should not prevent access to the redress scheme. It is standard for redress schemes in this area to require survivors to waive the right to pursue civil action.


It is in the interest of all the parties who are acting in good faith to be clear as to when a particular process of negotiation has reached a conclusion. The end of a negotiation for redress gives certainty to the parties and allows the survivor to move on to further stages of their recovery. Some survivors have said that it has been helpful to them to be able to 'sign off' on this stage of their journey through the use of documentation. In the interim period it is appropriate that there be some form of documentation in which both parties declare that, having worked through the process in good faith, they consider that the redress process has been concluded. Whether this is called a Deed of Release or some other name, the only objective is to indicate that the parties intend to pursue no other action in relation to the matter, except as qualified below.

Should a deed of release be executed in the interim redress period, the Uniting Church believes that a survivor should have access to financial and legal advice (at no cost to them) to ensure that they are fully informed before they execute any deed which limits their ability to take action in the future.

#### DURATION OF A REDRESS SCHEME (pp.165-166)

The Uniting Church understands that a scheme with a closing date may disadvantage survivors who may apply for redress after that date. A fixed closing date may also flag to survivors and the wider community that such a scheme is insensitive to the fact that child sexual abuse often inflicts life-long damage and survivors need to deal with it in their own time, not a time imposed by the scheme.

However, it is also the case that an indefinitely open scheme may become difficult to sustain because it is administratively inefficient. A scheme with an appropriate time limit may also



encourage survivor support groups, media, institutions and governments to focus on ensuring justice for survivors as early as possible. Ensuring the scheme operates for an adequate period of time is a difficult balancing act, as evidenced by the extensions of eligibility granted by various past schemes.

On balance, the Uniting Church believes that the scheme should operate for a fixed period of time. The length of time should be influenced by the Commission's recommendations and its findings regarding the period of time taken by survivors to be able to raise the issue of their past experience with sexual abuse.

## FUNDING REDRESS, pp.178-189

We welcome submissions that discuss the issues raised in Chapter 8, including the modelling of required funding and the possible approaches to funding redress.

In particular, we seek the views of the Australian Government, state and territory governments and institutions on:

- Appropriate funding arrangements
- Appropriate funder of last resort arrangements
- The level of flexibility that should be allowed in implementing redress schemes and funding arrangements.

### FUNDING ARRANGEMENTS (p.184)

The Uniting Church agrees that governments and institutions with responsibility for individuals at the time they experienced abuse should fund the cost of:

- Counselling and psychological care, to the extent it is provided through redress;
- Any monetary payment; and
- Administration in relation to determining the claim.

The Uniting Church believes that responsibility must be shared between the non-government institution providing a service and the government that has mandated, funded, regulated, and/or referred a child into that service.

Where abuse occurs in more than one institution, the Uniting Church agrees that costs should be apportioned between relevant institutions, taking account of varying features of the abuse across institutions to calculate monetary payment. The Uniting Church also agrees that where institutions no longer exist, the successor institution should fund the costs. Where there is no successor institution, the Uniting Church believes that the payment of costs should become the responsibility of government.

Suggested interim funding arrangements proposed by the Royal Commission require institutions to act without governments. This arrangement does not recognise the significant proportion of obligation of government agencies' responsibility for the welfare of children, particularly those placed by government agencies in non-government out-of-home care services.

### FUNDER OF LAST RESORT (p.186)



The Uniting Church believes that a funder of last resort should be government institutions that fund redress. This position rests on the consultation paper's observation that governments have had a substantial role in regulating and overseeing institutions providing children's services in Australia, including institutions that are not government run, as governments have for many decades had legal guardianship of children in state care (p.185).

## INTERIM ARRANGEMENTS, pp.190-195

We welcome submissions that discuss the issues raised in Chapter 9, including the additional principles for interim arrangements and possible structures.


In particular, we seek the views of survivors, survivor advocacy and support groups and institutions as to whether there are other issues on which direction or guidance might be required for interim arrangements.

The Uniting Church is committed to the principles put forward by the Royal Commission regarding interim arrangements. However, as acknowledged in the consultation paper, there will be difficulties in the absence of government leadership.

We commit to exploring within the Uniting Church how we could come together nationally to operate a nationally consistent interim redress scheme. We note however that it may be more beneficial for survivors, and a more efficient use of resources, to apply the interim redress principles and cooperate with other institutions within states/territories, given that the same historical context and redress history is common across these institutions. We are committed to exploring both of these options.

However, from the outset we are extremely concerned about what can be achieved in the absence of government leadership. There are significant complexities to be overcome in considering interim arrangements. A major logistical issue is presented by the need for independent administration and decision making as there is little infrastructure available currently to allow this and for it to be provided in a way that can be quality assured for both survivors and institutions. Further issues include:

- A lack of infrastructure to support ongoing counselling and psychological care;
- Insurance continuing to operate in the current unreformed civil litigation environment, which may put limits on what institutions can achieve for survivors;
- Interim arrangements could bring uncertainty around the legal standing of past and future deeds of release;
- Consistency of institutions engaging in the interim redress process without legislative requirement/protection in doing so;
- A risk of increasing trauma to survivors in an interim scheme and a subsequent state run scheme; and
- The manner in which survivors would be invited to engage in an interim scheme and whether institutions should proactively invite participation of survivors currently known.



As these issues are common across all institutions, we request the Royal Commission to convene a roundtable as soon as possible for these issues to be discussed and that guidance be provided to institutions in the Commission's final report on redress.

We note also that the interim arrangements proposed by the Royal Commission would require institutions to act without governments. This does not recognise government's role in placing children into the care of institutions and the policy and societal context in which historical abuse occurred. This is another issue where we would welcome some guidance from the Commission to ensure that it is a fair and just process.

## CIVIL LITIGATION, pp.196-232

We welcome submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions on:

- The options for reforming limitation periods and whether any changes should apply retrospectively
- The options for reforming the duty of institutions and whether any changes should apply retrospectively
- How to address difficulties in identifying a proper defendant in faith-based institutions in faith-based institutions with statutory property trusts
- Whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed
- Whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims
- Whether any changes may have adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them.

To date, the Uniting Church's position regarding civil litigation has been that there is need for reform. Such reform should include:

- Limitation periods should be significantly extended;
- The capacity for legal action to succeed should depend on the quality of the evidence, and it is not clear that current limitation periods reflect this; and
- Evidentiary problems that arise with claims made long after abuse took place highlights the need for effective record keeping and management processes in institutions.

### LIMITATION PERIODS (pp.205-206)

The Uniting Church believes that any limitation period should be long enough to ensure justice for all parties, with particular weight being given to the interests of survivors given the power imbalances that they have experienced. Any limitation period must accommodate when the survivor is ready to articulate the harm experienced, which could be longer than the fixed times suggested.

The Uniting Church's position is that there is no need for any changes to limitation periods to apply retrospectively, as all cases of past child sexual abuse will be part of the redress scheme.

## DUTY OF INSTITUTIONS

The Uniting Church believes that institutions and their agents should take active steps to prevent child sexual abuse by ensuring that their policies, procedures and practices are aimed at prevention of abuse. A mechanism should be found which holds institutions responsible for a failure to ensure that such policies, procedures and practices are in place.

There is a distinction between fault-based duties (duty of care and non-delegable duty, to ensure care is taken) and no-fault based duties (vicarious liability). The Uniting Church supports the Commission's proposals to:

- Codify the duty of care (to make express the existing common law position); and
- Codify the standard of care, to make institutions liable for child sexual abuse which is committed by their employees and agents, unless they can prove that they took reasonable care to prevent abuse.

Any legislative changes in relation to duty should be prospective and not retrospective.

## IDENTIFYING A PROPER DEFENDANT (pp.220-225)

The Uniting Church supports the principle that institutions must publicly identify a legal entity which is capable of suing and being sued. This will assist survivors to identify the responsible legal entity. The Uniting Church believes that one legal structure should not be imposed on all institutions so that organizations can continue to express their understanding about how their community should be organized while still providing for certainty for defendants.

These approaches reflect an awareness of the need for a variety of ways in which a proper defendant can be identified. They are examples of the flexibility that is required and they are worthy of careful consideration by the Uniting Church.

## GUIDING PRINCIPLES (p.226-228)

The Uniting Church believes that non-government organisations should adopt a set of values based principles.

The principles that the Uniting Church commits to adopt in relation to the resolution of claims of child sexual abuse which are brought to their attention include a commitment to:

1. Act at all times to minimise potential further trauma to survivors;
2. Support the survivor in undertaking a redress process;
3. Attempt to resolve matters without the need for litigation;
4. Respect that survivors are individuals and will require different responses to their different circumstances and needs;

5. Ensure that all survivors are treated in a manner which is consistent with claimants in similar circumstances;
6. Ensure that those dealing with child sexual abuse matters have appropriate skills;
7. Provide survivors with early information about available services and supports;
8. Facilitate survivors receiving access to records; and
9. Not act or instruct representatives to act in a manner which is unnecessarily adversarial.

## INSURANCE

The complex relationships between insurance policies, insurers, church agencies in different jurisdictions, the possible design of a redress scheme, and interim arrangements for that scheme (or schemes) present extremely complex and challenging issues. The different jurisdictions of the Uniting Church have different insurers, with different conditions. In the time available, the Uniting Church was unable to analyse and present the issues raised, and their implications for redress and civil litigation.