Tasmania's response to the Royal Commission into Institutional Responses to Child Sexual Abuse in relation to the Redress and Civil Litigation Consultation Paper

Tasmania welcomes the opportunity to provide a submission in response to the Royal Commission's Redress and Civil Litigation Consultation Paper.

The Tasmanian Government acknowledges that survivors of institutional child sexual abuse should be able to seek appropriate redress and have the opportunity for justice through redress and civil litigation.

However the establishment of redress schemes and the introduction of statutory civil litigation reforms have broad impacts beyond the terms of reference of this Royal Commission that require careful consideration.

In considering redress and civil litigation it is important to recognise that not only governments and larger institutions will be impacted but also many smaller, less well-resourced entities will be affected. Any policy response will need to take into account the capacity of smaller entities to meet financial impacts.

In an environment where the outsourcing of services relating to children is routinely undertaken, government must be careful not to adopt policies that may ultimately diminish the capacity of service providers to deliver necessary services for children. Increasing regulatory and financial burden on the community sector and family based care may come at a cost in terms of a reduction in service providers (market reduction).

Redress

The Royal Commission's work to date demonstrates survivors come to redress schemes with very different expectations such that it is unlikely that all survivor needs will be met by any scheme. Tasmania is concerned that some overarching policy issues relating to redress schemes remain unresolved, particularly in relation to the proposed interaction between completed or on-going state schemes and any future national scheme or national approach.

The Tasmanian Government Abuse in State Care scheme, which operated between July 2003 and February 2013, helped more than 1800 survivors who were the subject of sexual, physical or emotional abuse whilst in State care as children. In total, the State made ex gratia payments worth over $54 million. Those payments were wholly funded by the State regardless of whether or not the claimants were abused in wholly State-run institutions or institutions operated by non-government organisations on behalf of the State. In so doing, the State provided equal access for claimants.

It is not clear how the Tasmanian redress scheme would be recognised in any future national scheme or how similar schemes in other states, both completed and ongoing, will be treated. The State is concerned that the decision whether or not to provide another opportunity for redress to previous claimants of the Tasmanian scheme requires careful analysis of the benefits that would accrue to the participating claimants.

The purpose of a monetary payment under redress is primarily about providing "a tangible means of recognising the wrong survivors have suffered". Once a survivor's claim is accepted under a state scheme, the wrong is acknowledged and a range of benefits and services, including monetary payments, provided. Potentially a claimant to a second redress process may only accrue an additional monetary payment. There are substantial risks to claimants of re-traumatisation through participation in a second scheme and these risks should not be disregarded.

Equality in the provision of redress is a central issue in shaping the structure of a redress scheme. In particular the State is concerned that, to date, survivor groups have expressed vastly different views in relation to many elements identified as necessary for effective redress. Specifically:

- the level of monetary payment available under redress;
- the absence of a finding that the survivor was abused; and
- divergence in relation to each survivor's view of an appropriate personal response (such as the wording of an apology) by the institution (where it is even available).

Tasmania notes the Royal Commission's position that equality for survivors may be aided through a single national redress scheme and accepts that the redress schemes already conducted by some states (South Australia, Queensland, Western Australia, and Tasmania) differed significantly from one another. The State supports as a general principle that survivors should as far as possible be equally able to seek redress.

However it is the State's view that the question of whether or not equity can be achieved by a single national scheme remains academic in the absence of a commitment by the Australian Government to support such a scheme. As the consultation paper notes to establish a national redress scheme there will be a need for either the assertion of an appropriate constitutional head of power by the Australian Government or referrals of power by all states to the Australian Government. To date the Australian Government has not indicated a willingness to adopt such a course, nor have the states indicated agreement to refer powers to the Commonwealth.

The State is concerned that the administrative costs to government, in comparison to the cost of direct payments and other benefits to survivors, of a nationally run

scheme will be disproportionally high and diminish the funding available to meet claims.

On a policy basis the State is also concerned that the majority of survivors of child sexual abuse will be excluded from proposed redress schemes noting that most child sexual abuse occurs within the extended family environment. In the State's view it is undesirable to create two classes of survivors of child sexual abuse.

The State acknowledges the Royal Commission's work that highlights the need for survivors of child sexual abuse to access counselling and psychological assistance at different times in their lives. The experience of the State during the Tasmanian Abuse in State Care scheme indicates that significant benefits to survivors can be achieved by the provision of ongoing services aimed at reducing the impact of child sexual abuse on their lives.

Although applications to the Tasmanian Government's Abuse in State Care scheme closed in 2013 the Tasmanian Government established the Abuse in State Care Support Service which provides an ongoing scheme available for eligible survivors who experienced abuse in State care. The Service is aimed at assisting survivors to overcome the impacts of the abuse and improve their lives. The Service is administered by the Tasmanian Department of Health and Human Services and claimants can be awarded up to $2,500 for goods and services to assist with education, employment, counselling, family connection, medical and dental services.

The Tasmanian Government agrees that counselling and psychological services have the capacity to assist all survivors of child sexual abuse to improve their life circumstances. The State will consider the appropriate means of extending those types of services to survivors of institutional child sexual abuse.

Alternative structures for delivery and provision of redress

The State believes that existing state and territory victims of crime schemes could be reviewed and reformed to provide appropriate redress to survivors of historical institutional child sexual abuse as well as providing the vehicle for ongoing provision of redress. This would need to occur on a nationally consistent basis in order to achieve the desired equality and consistency for survivors and institutions alike.

Some of the benefits of using existing victims of crime schemes are:

- ease of access through a common point for all survivors of child sexual abuse;
- acknowledgment that the harm done to survivors was a crime;
- administrative efficiencies by utilising and expanding upon an existing services and structures;
- equity between all survivors of child sexual abuse regardless of whether the abuse occurred in a family or institution;
- transparent and robust assessment processes.

In order to use pre-existing victims of crime schemes, reforms would be necessary. They include, in the case of Tasmania:

- review of monetary payments for all victims;
- appropriate mechanisms for recovery from perpetrators and institutions;
- case management to facilitate a personal direct response from institutions where desired by the survivor;
- extending the existing psychological and counselling services in line with the Royal Commission's observations;
- removal of current time constraints to allow for past child sexual abuse;
- review of the standard of proof and matters to be taken into account to support the making of historical claims; and
- ability for previous claimants to reapply for monetary payment (offset by previous payments) and access to restorative justice elements and counselling when needed.

Tasmania is reluctant to create a special class of victims. Reform of statutory victims of crime schemes to accommodate claims for historical child sexual abuse has the capacity to address many of the Royal Commission's observations in relation to the elements of appropriate redress, but more importantly will not create a class of survivors based on whether abuse occurred in an institution. Additionally, reforming the victims of crime scheme structure will provide future victims of child sexual abuse with an ongoing redress scheme and an appropriate alternative to civil litigation.

The Tasmanian Government resists the Royal Commission's observations that governments ought to be funder of last resort and notes the Royal Commission's observations that institutions' liability for monetary payments and ongoing costs are very important to survivors of institutional child sexual abuse to reflect the wrong that they have suffered. The State's view is that appropriate mechanisms for recovery from perpetrators and institutions are essential to the operation and viability for governments to extend the existing victims of crime scheme to allow for claims of past abuse. One option the State would consider is requiring non-government institutions to contribute to a fund to cover claims of child sexual abuse relating to those institutions.

To achieve national consistency the State's view is that the Royal Commission might assist state and territories by recommending a set of guiding principles incorporating the effective elements of redress to shape legislative reform to existing state and territory victims of crime schemes.

Civil Litigation

It is clear that the majority of survivors expect the level of monetary payment offered under redress to be comparable to damages that may be obtained at

common law without the requirement to establish liability to the standard required. The availability of higher levels of damages at common law appropriately depends on a higher standard of proof of liability and quantification of loss. As the majority of survivors of historical child sexual abuse will be unable to meet the standard required at common law, redress schemes provide an opportunity for justice based on plausibility of account and as a result of the lower standard the level of payment is lower. This is unlikely to satisfy some survivors. Civil litigation should continue to require the higher standard of proof and provide access to higher levels of compensation.

The State is of the view that that the civil litigation system does not always provide adequate redress for the majority of survivors of historical institutional abuse and supports the Royal Commission's consideration of recommendations for reforms to make the civil litigation system accessible to future victims of child sexual abuse. To reform the civil litigation system to accommodate historical institutional abuse risks the creation of a special class of victims as plaintiffs. The State does not favour retrospective reforms and the creation of inequality between potential plaintiffs.

Generally the State has no objection to reforming limitation periods to accommodate what has been learned in relation to the behaviours of survivors of child sexual abuse.

The State made amendments to limitation periods in 2004 to make it easier for persons suffering latent disease to take action by providing a limitation period for personal injury that commences on the "date of discoverability". Significant consideration needs to given to the Royal Commission's observations in relation to limitations and how those observations interact with limitation periods based on "date of discoverability". As a matter of policy the State did not restrict the operation of the 2004 amendments to a particular class of plaintiffs. In Tasmania policy in relation to civil litigation reforms has been to treat all plaintiffs equally with appropriate exceptions for minors and persons under a legal disability. The State will consider further review of limitations noting what has been learned in relation to survivors of child sexual abuse, but does not favour creating a limitation period specific to a special class of plaintiffs.

The State does not favour removing limitation periods altogether. The general principles of setting a limitation period are to promote justice, fairness and certainty. A plaintiff has a moral obligation to either bring an action or allow the defendant to carry on without the threat of potential litigation in the future. Likewise, commercial or charitable dealings of institutions and insurers benefit from clear rules with respect to limitation periods so that risks can be calculated and reserves set aside for potential claims.

Limitation periods are tempered to account for special circumstances, for example delayed discoverability or persons under a legal disability, who would be denied justice altogether if limitation periods were too strict. A well-crafted limitation

period strikes a careful balance between access to justice for the plaintiff, fair treatment for the defendant, and freer and more certain daily commerce for society.

The State considers that effective reforms to limitations that create concessions to allow for delayed reporting and review of the current requirement that the parent/guardian take action on behalf of a minor may address the Royal Commission's observations of the behaviour of survivors of institutional child sexual abuse.

The Royal Commission's suggestion to introduce a limitation period of 12 years from the age of 18 disregards the possibility that a plaintiff may be unaware of the identity of the defendant or that the injury 'was sufficiently significant to warrant bringing proceedings' until after this period. The State also notes that a requirement to apply to the court for leave to bring proceedings (even with the proposed reversal of proof) is an additional impost on a plaintiff. The State suggests that further consideration needs to be given to framing an appropriate extension, and how such an extension will work in relation to a limitation period that commences on the date of discoverability as recommended by the *Final Report of the Review of the Law of Negligence* headed by the Honourable Justice David Ipp and adopted by Tasmania and other states.

The State acknowledges the difficulties outlined by the Royal Commission that currently face a survivor of institutional child sexual abuse in bringing an action at common law. The State's view is that the imposition of a statutory duty on institutions has the capacity to promote the creation of child safe institution through risk management much as amendments to worker's compensation laws improved workplace health and safety.

The State notes with interest recent developments in the manner in which the common law in some countries approach liability of institutions for sexual abuse of children under their care. The proposition that today's community standards demand that institutions, where a parent entrusts the care of their child and provide for the welfare and development of a child, expect the institution ought to be liable if a child is abused.

However the State does not support absolute liability for institutions for the conduct of a member of the institution. An absolute duty has the potential to result in clearly unjust results where no fault or failing from the institution occurs.

The State would consider a duty that makes institutions liable for child sexual abuse committed by their employees or agents unless the institution is able to prove that it took all reasonable precautions to prevent the abuse. A reversal of the onus on institutions to prove that they took all reasonable steps is most likely to promote child safe institutions as institutions put in place rigorous checks and balances to ensure that they can meet the onus and has the effect of promoting good governance and risk mitigation in the future.

The State does not support a new duty on institutions in respect of past conduct. Retrospectivity in relation to a duty will significantly expand an institution's potential liability and institutions will inevitably face considerable prejudice to proceedings when trying to produce evidence to discharge their onus for an action that arises decades ago.

The State notes that the considerable community outrage at institutions holding significant assets in a way that prevents access to satisfy any court judgment.

It is noted that faith-based institutions are often international entities and may seek to protect assets in other ways. As was seen with James Hardie, institutions may find it in their interest to transfer assets internationally or otherwise organise their legal entities and structure to ensure significant assets are unavailable for local claims.

The State is prepared to consider legislative reforms that examine ways to hold institutions to account financially for their actions.

The State is concerned that the consultation paper does not exhaustively discuss the issue of retrospectivity in relation to civil law reforms. To make changes to limitation periods retrospective is a fundamental challenge to the common law system of legal rights and duties, and it may result in lobbying to extend such retrospectivity to other types of claims. Retrospective action, even for noble causes, erodes certainty generally and reduces trust in the rule of law.

It is the State's view that creating civil law reforms that are retrospective will not resolve the issue that only a small percentage of survivors will be able to successfully make a common law claims as the majority will not meet the civil law standard of proof. In addition, the State is concerned that retrospective reforms to limitations and the imposition of a statutory duty on institutions has the potential to trigger another 'insurance crisis' if there are a large number of historic claims for which no provision has been made by insurance companies and defendants can claim the benefit of historic insurance policies. Insurers allocate a reserve against a possible claim and remove this allocation when the limitation period expires. Once the reserve allocation is removed the insurer no longer collects a premium on the basis of that reserve. The introduction of a provision allowing for the abolition or extension of the limitation period will revive previously expired claims and those claims may be unfunded. Governments may suffer significant financial impacts as self-insurers.

It is contemplated that prospective application of civil law reforms may result in an increase in premiums. However the State suggests that the imposition of a statutory duty on institutions and the likely resulting premiums and policy conditions placed on institutions to obtain insurance will mean that insurers have a key role in regulating institutional risk management and support the Royal Commission's aim to create child safe institutions.

The Tasmanian Government acknowledges that the mechanisms for survivors of institutional child sexual abuse to be able to seek justice through redress and civil litigation reforms ought to be considered but maintains that any schemes or reforms must be critically considered in the context of broader public policy.

The Tasmanian Government is concerned that any redress that creates a special class of victims (i.e. children sexually abused within institutions) may be seen as inequitable by others in the community.

The Government considers redress may be achieved by building on existing victims of crime schemes to deliver both redress and ongoing assistance to survivors of institutional child sexual abuse. The State is also of the view that civil litigation reforms should considered for claims of future abuse and does not favour retrospective application due to the resulting prejudice suffered by defendant institutions.