



**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES
TO CHILD SEXUAL ABUSE
AT SYDNEY**

ISSUES PAPER 6

REDRESS SCHEMES

RELEASED 23 APRIL 2014

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Executive Summary

Kelso's The Law Firm is in a unique position to comment on the effectiveness of previous redress schemes, and a proposal for a new National Redress Scheme. We work directly with survivors of institutional abuse and other victims of crime, therefore we understand acutely the desired objectives of any proposed redress scheme and the need for a unified response to Australia's history of institutional abuse.

In section four of this submission, we put forward our proposal for a National Redress Scheme or 'Proposed Agency.' In so doing, we answer questions two, four to six, and eight to eleven of the questions in Issues Paper six.

In section five we discuss the advantages of providing redress through the Proposed Agency. In particular, the enabling legislation could be drafted in such a way that applicants are spared rigorous and invasive testing of evidence. Determinations could be provided quickly with concentrated resources, admitted facts, and deeming provisions.

In section six, we discuss the proposed forms and features of redress. We discuss the recommendations and subsequent redress schemes established by previous Inquiries; in particular, the *Forgotten Australians* Report 2005. We discuss the significance of apologies, and argue that the Proposed Agency should not become depersonalised merely by virtue of being a Federal agency. We offer some practical suggestions for redress for individuals.

In answer to question four, we discuss some of the constitutional and political obstacles that would face governments in establishing the Proposed Agency.

In section eight, we suggest the enabling legislation of the Proposed Agency should make decisions of the agency appellable to the Administrative Appeals Tribunal.

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1. Introduction

1. It is with great pleasure that Kelso's The Law Firm provides a submission in response to the Issues Paper 6 on Redress Schemes.
2. The Director of Kelso's The Law Firm, Mr Peter Kelso, was admitted to practice in 1984. After working in banking law and finance for nine years in Sydney, Mr Kelso founded Kelso's The Law Firm in Newcastle in 1986.
3. Mr Kelso has extensive experience in victims of crime work. Kelso's The Law Firm is now the largest victims of crime law practice in New South Wales. Mr Kelso practices extensively in the area of compensation for victims of clergy and institutional abuse. We employ six other highly skilled solicitors with various specialisations in the victims of crime practice area.
4. Mr Kelso runs Australia's largest and most frequently visited social network page specifically designed for victims of institutional abuse.
5. The work we undertake in the area of clergy and institutional abuse is highly sensitive. Victims of clergy abuse are among the most vulnerable people in society. They are often highly traumatised and suffer a variety of mental health issues. They often experience difficulty maintaining long term relationships with people in positions of relative authority. They often experience financial hardship due to long periods of unemployment.
6. The fee agreement we enter into with these clients is a fixed fee "no win, no fee" style agreement for institutional abuse clients. An explanation of the conditional costs agreement is on the firm's website.
7. These claims are generally unlitigated and involve a direct approach to the institutions for compensation. Each claim is unique, however typically the work provides the clients with an important opportunity to tell their story and to receive an apology from a

representative of the institution. Following a successful settlement meeting, clients typically report feeling “set free” from the experience, and that they can finally move on with their lives.

8. We have represented several witnesses during public hearings of this Royal Commission. These witnesses have also engaged us to obtain compensation directly from the relevant institutions.
9. There are and have been a variety of redress schemes available to address the terrible history of institutional child abuse in Australia. Many of our clients have participated in various redress processes during their lives, including *Towards Healing, the Melbourne Response* and various statutory and state schemes. Peter Kelso has represented more than ten thousand applicants for victims’ support. Kelso’s The Law Firm is accordingly in a unique position to comment on the proposed content of future redress schemes, their effectiveness, and levels of satisfaction experienced by users of the schemes.
10. Kelso’s The Law Firm sees itself as well positioned to make this submission in the best interests of our clients who are the beneficiaries of any proposed redress scheme.
11. Mr Kelso is himself a ‘Forgotten Australian’ having grown up in institutional care in NSW from 1962 to 1979.
12. The Royal Commission presides over a seminal and transitional moment in Australian legal history. The Royal Commission has already received evidence during earlier case studies of the prevalence of institutional child abuse in State-run institutions. The Royal Commission is faced with the task of assessing and evaluating the broad issue of historical prevalence, and in disentangling distorting factors such as delays in reporting abuse. Preliminary studies have focussed on the disproportionate culpability of the Catholic Church compared with that of other religious institutions.¹ Other studies have focussed on other institutions. This submission explores the possibility of a wide ranging,

¹ Prof. Patrick Parkinson, ‘*Child Sexual Abuse and the Churches: A Story of Moral Failure?*’ Sydney Law School, Legal Studies Research Paper No 13/78, November 2013.

all inclusive redress solution capable of mitigating the suffering of victims of abuse at all religious and secular Australian institutions.

2. Objectives of a Redress Scheme

13. The effectiveness of anything can only be judged by reference to what it was intended to achieve. This one foundational question must guide the design, implementation, and development of any prospective redress scheme if it is to be effective.
14. In our experience, users of previous redress schemes commonly report feeling left out of the process; that it lacked meaning, and that compensation awards were manifestly inadequate. Users of previous schemes have been able to download an application form, fill it out and send it to the relevant agency. Some months later a payment acceptance form is received in the mail sometimes without any need to speak to someone face-to-face. There is a nominal amount of compensation offered without any explanation about how that amount represents a meaningful figure for the particular individual survivor of abuse.
15. It is evident that clear elucidation of the objectives, and means to attract loyalty to them, has been lacking in many past redress schemes. The effect has been that they have not achieved meaningful benefit to any party to the process; not the victims, not the institutions, and not the public at large. The absence of clear objectives and real accountability for decision-makers has led to inefficient expenditure of resources and dissatisfaction amongst the stakeholders.
16. The starting point for any submission on effective redress schemes must therefore focus on the question: what is the core result that a redress scheme should aim to achieve?
17. We submit that the answer to this question – in order of importance – is: firstly, to achieve the fullest possible mitigation of the harm inflicted on victims of institutional

abuse. Secondly, to shift the cost of the harm from the public to the offending institution. Thirdly, to restore mutual trust between offending institutions and the public.

18. With these aims in mind, the success of the redress scheme will depend upon two core components: the effectiveness of the redress and the effectiveness of the means of delivering that redress. The substance of the elements of the redress (to be discussed as sections four and six below) must be effective in achieving the fullest possible mitigation of the harm, and the means (to be discussed at section six below) by which the redress is delivered must enhance and not detract from the redress achieving that end.

3. The Need for a Unified Approach

19. Previous case studies have examined the adequacy of the responses of individual institutions. The Commissioners will be acutely aware, as are legal practitioners practicing in this area, of the diversity of the responses from institutions. This diversity gives rise to a perception of inequity and injustice among victim groups. We submit it should be the focus of any redress scheme to provide justifiably equitable outcomes for survivors of institutional abuse.
20. During Case Study 7, we submitted that the NSW State government's response has focused on its own interests to the exclusion of providing real assistance to victims. The NSW government is out of step with other States in Australia by failing to set up a redress scheme. Rather victims' entitlements under the *Victims Rights and Support Act 2013* were significantly reduced by the Attorney General's office within four months of the commencement of this Royal Commission. The State-government response has been one of reducing its economic exposure rather than seeking to recognise and restore the dignity of victims.
21. Unlike Western Australia, Tasmania, South Australia, and Queensland, NSW has never attempted to provide targeted redress to those who were abused under its care.

22. As it stands, there is a glaring inequality between the position of those who were abused in religious institutions and those who were abused in State-run institutions in NSW. Most victims of abuse at State-run institutions are left to seek assistance through Victims Services where the most they can hope for is \$10,000 plus counselling and some out of pocket expenses.
23. However, there is also considerable inequity between responses of religious institutions. Religious institutions have been increasingly rising to the challenge of providing meaningful redress to victims; providing formal apologies and compensation that recognises the impact of the damage done. The Royal Commission recently heard evidence from Cardinal George Pell during the hearing of Case Study 8 that the \$75,000 cap for the *Melbourne Response* was probably insufficient to compensate child abuse victims. Earlier the Royal Commission received evidence in relation the *Towards Healing* process during Case Study 4. The prevailing view among the submissions was that *Towards Healing* is primarily a cost minimisation strategy.

4. Proposal: National Redress Scheme: Question 2

24. We recommend that a Federal Government agency be created whose statutory purpose is to provide redress to proven victims of institutional abuse; hereafter referred as the 'Proposed Agency'. There are many advantages to the Proposed Agency administering a national uniform scheme. In particular is its simplicity and consistency.
25. The Proposed Agency would function as a 'one-stop-shop' for claims by survivors of institutional abuse.
26. Survivors of institutional abuse would not have to worry about which scheme to access. They would not have to worry about differing application forms and procedures. We submit the Proposed Agency should be so clearly superior to any alternative redress

schemes that users of the scheme are left in no doubt they have achieved the best result possible.

27. The Proposed Agency would promote consistency of outcomes. Awards of compensation should be comparable to awards of damages in civil proceedings. Awards of damages in civil proceedings are based on precedent established through hundreds of years of legal history. Applicants for redress will be disappointed as long as grants of redress obviously fall short of this standard. The Assessors should do their best to quantify claims and to provide a breakdown of calculations of awards. These should be in-line with common law Schedules of Damages, and should be subject to review.
28. Private entities and State governments should contribute financially to the Proposed Agency. The level of financial contribution should be calculated with reference to the level of culpability. Survivors of abuse at institutions with lower economic means should not be penalised simply because of the financial means of their institution. The Federal government should offer a guarantee to such applicants to the effect they will be no worse off than survivors from other institutions. However, affordability for an offending institution should generally be no obstacle to the obligation of institutions to contribute.
29. Participation on the part of institutions should be mandatory. To the extent that a prospective applicant would be unsuccessful due to the non-participation of an institution, or there being no clear successor organisation, the Commonwealth government should offer a guarantee to the Proposed Agency for funding their otherwise successful award. However, if private and state institutions are faced with a 'level playing field' created by mandatory participation, the level of Commonwealth guarantee would be reduced.
30. The Proposed Agency is of such historical and symbolic importance as to warrant the intervention of the Federal Parliament. Since the Commonwealth Government lacks a direct managerial history with State-run child welfare institutions as well as private

institutions, the Proposed Agency, as a Federal entity, would be isolated from any accusation of bias or cost cutting.

31. It is important to note that sexual abuse of a child inevitably leads to harm, especially long-term psychological harm that may extend across their entire lives.² This needs to be considered when creating such a scheme to ensure that victims are not re-traumatised when they apply for redress via the Proposed Agency.
32. We recommend that an unbiased panel of multi-disciplinary expert members be appointed to the Proposed Agency to hear and determine applications.³ It could be chaired by current or retired judicial officers. Applicants should be granted the freedom to elect a quasi-judicial tribunal setting. This would be accompanied by an appropriate degree of formality and ceremony. Similarly, applicants should be free to elect to have their application determined with minimal intrusion or interaction. These applications could even be determined on the papers. This would allow applicants to determine how directly involved they wish to be in proceedings. Survivors of institutional abuse frequently have differing attitudes as to how their claims should be handled. It would also ensure the appropriate level of sensitivity regarding their claims. A quasi-judicial tribunal would offer a formal process from which their claims, if they so elect, could be tested and corroborated.
33. The enabling statute for the Proposed Agency itself could set the standard of proof to be applied by its assessors.⁴ Attempts must be made to afford ‘substantial justice’ to both the applicants and the private or State-run institutions they seek redress from.⁵ The

² *Gavel v R* [2014] NSWCCA 56 [110].

³ See Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 149-151.

⁴ See Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 195.

⁵ *R v War Pensions Entitlement Appeals Tribunal* (1933) 50 CLR 228; *Re Kevin and Minister for Capital Territory* (1979) 2 ALD 238, 242.

responding party, the State-run or private institution, would also be offered procedural fairness in order to respond to such claims in a respectful and dignified manner.

34. The level of proof required, particularly in relation to harm caused, could be managed by using a presumption-based system whereby the existing research on the degree of harm resulting from the nature of the sexual assault (relationship of the offender, number of instances, number of offenders, actual or attempted penetration, etc.) are deemed to be proven based on relevant research in the area.⁶ This would establish a standard level of financial redress. The payout can be increased by presenting additional evidence of the real extent of the harm in addition to this standard.
35. The purpose of any embodying statute would be determined by policy makers in a ‘sympathetic and imaginative’ process to benefit survivors of institutional abuse, not to ‘make a fortress out of a dictionary’ of statutory terms to arbitrarily exclude them from redress.⁷ This would avoid the Proposed Agency assessors interpreting legislation to exclude applicants when that is against the beneficial purpose of the legislation. Policies could be implemented in the form of non-statutory soft law in terms of guidance notes, codes of practice and other conventions to help the Proposed Agency be consistent in its determinations regarding redress.⁸ This consistency would help ensure fair outcomes for survivors of institutional abuse and that those outcomes are seen to be fair. A board might be constituted to review and amend these soft law instruments. The membership of the board should include representatives from victim’s groups.
36. Lawyers should not be excluded from assisting applicants through the Proposed Agency. While the redress scheme should not be too complicated and labyrinthine for the

⁶ See Forster, Christine, ‘Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions’ (2005) 32(2) *University of Western Australia Law Review* 264, 296.

⁷ See *Thies v Collector of Customs* [2014] HCA 12 [23].

⁸ See Greg Weeks, ‘The use and enforcement of soft law by Australian public authorities’ [2014] UNSWLRS 11. See also Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 669-696.

applicants, the role of lawyers should be preserved to help victims gather evidence and other materials and to present their case in the best possible light. The Proposed Agency should make separate provision for the payment of legal fees of a legal practitioner of the applicant's choosing.

37. The process may be confronting and harrowing in the absence of legal representation. The lawyer would be the support person that enables the applicant to engage in the legal system and to ensure the applicants feel their voice is heard. Many potential applicants would not be aware of the various avenues including redress available to them were it not for the work of lawyers. In section seven we submit the decisions of the Proposed Agency should be appellable to the AAT. The participation of lawyers is particularly important in circumstances of merits or judicial review of primary decisions.
38. The enabling legislation should nominate a senior member of the private entity or state government to act as liaison or contact person with the respondent to the claim. To the extent preferred by the applicant, this contact person should respond to the particular needs of the applicant by, for example, acknowledging the harm caused to the applicant, stating that the applicant's claim is believed, and giving expressions of regret and personalised apologies. This would ensure the process is not depersonalised by becoming a Federal agency. The involvement of the contact person would be determined in advance and scheduled to occur at a specific time during the process.
39. The Proposed Agency assessors' decisions could be appealed to the Administrative Appeals Tribunal ('AAT'). This is further discussed in section seven.

5. Advantages of Redress Schemes: Question 1

40. The Royal Commission has received submissions into the advantages and disadvantages of civil litigation particularly for survivors of historic institutional abuse. Plaintiffs to civil proceedings are faced with statutes of limitations, remoteness of liability, and the non-

existence of a respondent. However, obtaining a successful result in a civil proceeding carries enormous symbolic advantages. The Proposed Agency should endeavour to imbue itself with those symbolic advantages by offering a process involving formality and competent legal representation, with testing of evidence etc. Applicants should be provided a 'judgment' or 'reasons for decision' at the conclusion of their application.

41. The process of Proposed Agency can be tailored to suit the individual needs of the applicant. A redress scheme can involve a high degree of confidentiality and privacy. The personal details of an applicant can remain private.
42. The Proposed Agency can avoid the distress to the applicants of having their evidence 'tested' in the public realm. The applicants should be able to avoid intrusive and degrading cross-examination. The enabling legislation should articulate the degree to which the rules of evidence apply. A set baseline criteria of participation should be met. For example, respondent institutions should be required to submit their records to the Proposed Agency for examination. These and other means could be utilised by applicants to corroborate their enrolment or placement etc. at the relevant institution at the relevant time.
43. The Proposed Agency would be administratively more expedient than civil litigation. With a specialised board of assessors and administrative staff, speedy determinations could be achieved by directing resources into concentrated areas, such as familiarisation of records from offending institutions, and lists of well-known individual offenders. A great deal of procedural work could be circumvented by institutions providing agreed histories of their respective institutions including admitted names, dates and other facts. The Proposed Agency would be involved in broad historical information and statistical gathering.
44. During consideration of these claims, it should be remembered that sexual abuse is seldom carried out in the presence of witnesses. A further complicating factor is that

victims of institutional abuse typically take a long time to report since people in positions of authority were often the offenders. The Proposed Agency could take such matters into account applying its reasoning, and would be capable of not drawing any adverse inferences from these circumstances.

45. If the Proposed Agency had an experienced board of assessors with wide discretion to grant redress, the Proposed Agency would avoid the absurd results which occasionally arise in applications in the overly legislative victims of crime statutory framework.⁹

Economic Advantages of Redress

46. There is economic justification in a redress scheme, in that the longer the harm is allowed to go untreated (both the economic setback of lack of education and infliction of harm to mental health) the greater the impact on productivity. The Royal Commission should consider the cost of failing to offer redress.
47. In 2008, Child Abuse Prevention Research Australia published a report on the economic cost of child abuse in Australia. The report identified that:¹⁰
 - a. In 2007, it is estimated that 177,000 children under the age of 18 were abused or neglected in Australia. Based on these numbers, the best estimate of the actual cost of child abuse incurred by the Australian community in 2007 was \$10.7 billion;
 - b. The annual cost of child abuse and neglect that occurred in 2007 was nearly \$4.0 billion. In addition, the value of the burden of [mental] disease represents a further \$6.7 billion.
48. Another study completed by the Monash University Department of Econometrics and Business Statistics in 2006 examined the cost to the State of not providing sufficient

⁹ See for example Young JA, *Victims Compensation Fund Corporation v JM* [2011] NSWCA 89, [38].

¹⁰ P Taylor, P Moore, L Pezzullo, J Tucci, C Goddard and L De Bortoli, *The Cost of Child Abuse in Australia*, (2008, Australian Childhood Foundation and Child Abuse Prevention Research Australia, Melbourne).

support to institutional care leavers. The cost to the state of Victoria in lost revenue and increased expenditure on services was \$332.5 million. Over the average life span of an institutional care leaver the average cost to the state is \$738,741 more than the average person.¹¹

6. Forms and Features of Redress: Questions 2 & 3

Other Inquiries and Redress Schemes

49. These submissions take account of the recommendations of previous Inquiries. We consider it important to point out the extent to which Australian Governments have implemented the recommendations of previous Inquiries.
50. On 17 March 2005, the *Forgotten Australians* Report included 39 recommendations. For present purposes, we focus on the following recommendations:

Recommendation 2: That all State governments and Churches and agencies, that have not already done so, issue formal statements acknowledging their role in the administration of institutional care arrangements; and apologising for the physical, psychological and social harm caused to the children, and the hurt and distress suffered by the children at the hands of those who were in charge of them, particularly the children who were victims of abuse and assault.

Recommendation 6: That the Commonwealth government establish and manage a national reparations fund for victims of institutional abuse in institutions and out-of-home care settings and that:

- The scheme be funded by contributions from the Commonwealth and State governments and the Churches and agencies proportionately;

¹¹ Forbes, C., Inder, B., & Raman, S. (2006). *Measuring the cost of leaving care in Victoria*. Children Australia, 31(3), 26–33.

- The Commonwealth have regard to the schemes already in operation in Canada, Ireland and Tasmania in the design and implementation of the above scheme;
- A board be established to administer the scheme, consider claims and award monetary compensation;
- The board, in determining claims, be satisfied that there was a 'reasonable likelihood' that the abuse occurred;
- The board should have regard to whether legal redress has been pursued;
- the processes established in assessing claims be non-adversarial and informal; and
- Compensation be provided for individuals who have suffered physical, sexual or emotional abuse while residing in these institutions or out-of-home care settings.

Recommendation 21: All State government, Churches and agencies provide a comprehensive range of support services and assistance to care leavers and their families.¹² The Commonwealth government left this to state and territory governments to consider.¹³

Recommendation 22: All State government funded services for care leavers be available to all care leavers in the respective State, irrespective of where the care leaver was institutionalised; and that funding provisions for this arrangement through the Community and Disability Services Ministerial Council.¹⁴ The Commonwealth government left this to state and territory governments to consider.¹⁵

¹² Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2005) [10.77].

¹³ Australian Government Response to *Forgotten Australians*.

¹⁴ Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2005) [10.78].

¹⁵ Australian Government Response to *Forgotten Australians*.

Recommendation 23: All State governments, Churches and agencies fund counselling services for care leavers and their families, and that those currently providing counselling services maintain and, where possible, expand their services including into regional areas.¹⁶ The Commonwealth government left this to state and territory governments to consider.¹⁷

Recommendation 31: Commonwealth and States develop data collection procedures on people that have been in care that are already used to gather client information such as Medicare and Centrelink forms and admission forms to prisons, mental health care facilities and aged care facilities.¹⁸ The Commonwealth government indicated that it would examine this proposal and how it would be appropriate.¹⁹

Recommendation 32: Commonwealth and State programs across social policy areas recognise care leavers as a sub-group with specific requirements in the publications and other material disseminated about programs.²⁰ The Commonwealth government did not support this recommendation.²¹

Recommendation 33: Commonwealth and States commit (via COAG) to implement a whole-of-government approach to provision of programs and services for care leavers across policy areas such as health, housing and welfare and community services and other relevant policy areas.²² The Commonwealth government responded that these issues were worthy of further discussion and referral to Ministers' Conferences but not to COAG.²³

¹⁶ Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2005) [10.106].

¹⁷ Australian Government Response to *Forgotten Australians*.

¹⁸ Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2005) [10.159].

¹⁹ Australian Government Response to *Forgotten Australians*.

²⁰ Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2005) [10.160].

²¹ Australian Government Response to *Forgotten Australians*.

²² Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2005) [10.164].

²³ Australian Government Response to *Forgotten Australians*.

51. The extent of the implementation of the recommendations within the *Forgotten Australians* Report became the subject of review by the Senate Reference Committee on Community Affairs. They published a report on 25 June 2009, entitled *Lost Innocents and Forgotten Australians Revisited* (2009).
52. The report found that the recommendation for an apology had not been met sufficiently by the NSW Premier's apology as it did not "adequately involve care leavers and clearly lacked an appropriate spirit of bipartisanship and ceremony" and "unimpressed" by it being "cursory and lacking in sensitivity." However, noting that the NSW government would reissue an apology with these concerns taken into account.²⁴
53. Importantly, recommendation 6 was not supported by the Commonwealth government and not put in place.²⁵ The Senate Committee made note that Queensland, Western Australia, Tasmania (but not NSW) had set up a redress fund.²⁶ The NSW government was criticised for its reliance on the Commonwealth to establish a national scheme. It was criticised that as a consequence of its approach, victims in NSW had to face the institution directly; that is the Department of Community Services, to obtain compensation.²⁷ It was noted that the avenues under ordinary law provide so many obstacles to victims.²⁸
54. The response from the NSW government towards victims was considered "the most lacklustre."²⁹
55. The Senate Committee raised concerns about the inequitable outcomes from those states that do have redress schemes in place in terms of access, limited timeframes, differing amounts awarded and conditions of redress in these schemes.³⁰ As a result it suggested a

²⁴ Senate References Community on Community Affairs, Parliament of Australia, *Lost Innocents and Forgotten Australians Revisited* (2009) [6.16]-[6.24].

²⁵ Ibid, [6.26]-[6.39].

²⁶ Ibid, [2.103].

²⁷ Ibid, [2.105]-[2.112], [6.28].

²⁸ Ibid, [2.105]-[2.112], [6.28].

²⁹ Ibid, [2.107].

³⁰ Ibid, [6.29]-[6.34].

tiered payment structure to address re-traumatisation issues based on graded standards of proof by the provision of suitable support and counselling for claimants to prepare applications, communication of reasons and processes of receiving and resolving complaints.³¹ While noting that “money could never compensate for the childhood abuse and neglect,” the Senate stated that awards (especially when coupled with individual apologies to claimants) are a worthy source of vindication and recognition.³² The Commonwealth government’s response to the Senate Committee’s review of the *Forgotten Australians* Report was that States and Territories should address this reparation issue and not the Commonwealth.³³

56. The Senate Committee found that States are collectively underfunding services required for care leavers and thus urged coordinated strategies by the Council of Australian Governments (COAG) and the Community and Disability Services Ministers' Advisory Council (CDSMAC).³⁴ Recommendations 25-28 were supported by the Commonwealth government.³⁵ Recommendation 33 was supported by the Commonwealth government in the form of a database, funding to organisations that tackle child abuse while noting State and Territory support to programs.³⁶
57. We submit the NSW and Commonwealth governments should again be criticised by the Royal Commission for inadequate implementation of the recommendations of the *Forgotten Australians* Report.
58. The NSW government in particular should be criticised for its apparent lack of compassion towards, and commitment to rebuilding the shattered lives of victims.

³¹ Ibid, [6.31].

³² Ibid, [6.33]

³³ Australian Government Response to *Lost Innocents & Forgotten Australians Revisited*, 7.

³⁴ Senate References Community on Community Affairs, Parliament of Australia, *Implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports* (2009) [6.10]-[6.13].

³⁵ Australian Government Response to *Lost Innocents & Forgotten Australians Revisited*, 11

³⁶ Ibid, 8-11.

The Forde Inquiry

59. The Forde Inquiry was established on 13 August 1998 in accordance with the *Commissions of Inquiry Act 1950* (QLD) by Queensland's then Minister for Families, Youth and Community Care, Ms Anna Bligh. The Inquiry reported its findings in May 1999.
60. A key recommendation of the Forde Report was:
- That the Queensland Government and responsible religious authorities establish principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services.³⁷
61. In May 2007 the Queensland government set up a \$100M redress scheme.³⁸
62. The scheme provided for two levels of payment. Level 1 payments of \$7,000 were offered to applicants who:
- i. were placed in a detention centre or licensed government or non-government children's institution in Queensland covered by the terms of reference of the Forde Inquiry; and
 - ii. had been released from care, and had turned 18 years of age on or before 31 December 1999; and
 - iii. had experienced institutional abuse or neglect.³⁹
63. An additional level 2 payment of up to \$33,000 was made to applicants who suffered more serious abuse or neglect.
64. Applicants were required to sign a deed of release which prevents them from making a further claim against the Queensland government in relation to their abuse or neglect.
65. The scheme received over 10,200 applications between 1 October 2007 and 30 September 2008 (the closing date for applications to the scheme). Of these, over 7,400

³⁷ Queensland, Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) 288.

³⁸ Kathryn Roberts, 'Qld to compensate abuse victims' (31 May 2007), *ABC News*.

³⁹ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) [2.8]-[2.11].

were assessed as eligible for a level 1 payment. Approximately 3,500 applicants were offered an additional level 2 payment, ranging from \$6,000 to \$33,000.

*The Tasmanian Redress Scheme*⁴⁰

66. The Tasmanian redress scheme ceased operating on 15 February 2013.
67. The Tasmanian redress scheme operated via a Protocol Agreement between the Ombudsman and the Department of Health and Human Services. The scheme was set up in 2003 shortly after the Tasmanian government tasked the Ombudsman to investigate a number of allegations being made by former state wards of sexual abuse experienced while in state care.
68. Under the Tasmanian scheme, claims must first be made to the Ombudsman.⁴¹ A review team investigates the claim, which includes record-checking and interviews. Part of the interview process involves finding out what the claimant wants from the process. Desired outcomes can include:⁴²
 - i. An apology;
 - ii. Official acknowledgment that the abuse occurred;
 - iii. Assistance finding lost family members;
 - iv. Guided access to Departmental files;
 - v. Professional counselling;
 - vi. Payment of medical expenses;
 - vii. Compensation.

⁴⁰ Tasmania, Parliamentary Debates, Legislative Council, 28 August 2003, (Michael Aird, Leader of the Government in the Council); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) [2.4]-[2.7]; Stephen Winter, 'Australia's Ex Gratia Redress' (2009) 13(1) *Australian Indigenous Law Review* 51.

⁴¹ Tasmania, *Parliamentary Debates*, Legislative Council, 28 August 2003, (Michael Aird, Leader of the Government in the Council).

⁴² Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) [2.4]-[2.7].

69. Completed files for each claimant are referred to the Department of Health and Human Services for further action if recommended. An independent assessor then assesses claims and decides whether an ex gratia payment is made. The assessor can determine payments of up to \$60,000 or more in exceptional circumstances.⁴³
70. In order to receive an ex gratia payment applicants were required to sign a deed releasing the state against all current and future claims arising from the applicant's abuse in care.⁴⁴
71. As at 2 July 2013, the scheme paid out more than \$52 million to 1,600 people who suffered abuse as children.⁴⁵

The Western Australian Redress Scheme

72. On 17 December 2007, the Western Australian Government announced the establishment of the \$114 million Redress WA Scheme to provide adults who, as children, were abused or neglected in state care in Western Australia whether or not they were state wards.⁴⁶
73. The WA Redress Scheme included:⁴⁷
 - i. An ex gratia payment;
 - ii. An acknowledgement of the abuse and/or neglect;
 - iii. An apology;
 - iv. Counselling services;
 - v. An opportunity for victims to record their personal story.⁴⁸
74. Application for a payment under the scheme can relate to harm caused by sexual, physical or emotional abuse, or neglect.⁴⁹ Applications were assessed to determine the

⁴³ Ibid.

⁴⁴ Stephen Winter, 'Australia's Ex Gratia Redress' (2009) 13(1) *Australian Indigenous Law Review* 51.

⁴⁵ Care Leavers Australia Network, *Compo for abuse to end soon*. This article is a copy of the Dinah Arndt article published in the *Examiner* published in January 2013.

⁴⁶ Care Leavers Australia Network, *Redress – Western Australia*.

⁴⁷ Care Leavers Australia Network, *Redress – Western Australia*; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) [2.12]-[2.14].

⁴⁸ Care Leavers Australia Network, *Redress – Western Australia*.

level of abuse or neglect the claimant suffered and were categorised as either moderate, serious, severe or very severe abuse or neglect.⁵⁰ The scheme included people who suffered abuse or neglect in foster care as well as those placed in institutions. There was provision under the scheme for interim payments, of up to \$10,000, to be made to eligible applicants who have a terminal illness, prior to a final offer to the applicant.⁵¹ Applications to the scheme had to be received by 30 April 2009.⁵²

75. In February 2010, the Western Australian government made the first offers of ex gratia payments to 100 applicants under the scheme, ranging from \$5,000 to \$45,000. The recipients of ex gratia payments are not required to waive their rights to seek further legal redress.⁵³ By June 2010, Redress WA had paid over \$13 million to eligible applicants.⁵⁴

Review of Redress Schemes in Australia

76. In December 2010 The Senate Legal and Constitutional Affairs References Committee published their *‘Review of Government Compensation Payments’*. As part of this review they took submissions from stakeholders in relation to the problems experienced by victims with existing redress schemes. The four main areas of criticism were:⁵⁵
- i. The time limits for making claims;
 - ii. The quantum of compensation available under the schemes;
 - iii. The limits on eligibility for compensation;
 - iv. The application process.

⁴⁹ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) [2.12]-[2.14].

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid. There was provision to extend this to 30 June 2009 where a person had indicated an intention to lodge an application by 30 April 2009.

⁵³ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010) [2.12]-[2.14].

⁵⁴ Ibid.

⁵⁵ Ibid.

77. It was submitted that, as a class, victims of child abuse are generally more socially isolated and do not regularly watch the news or read newspapers (in some cases, as identified by the Forde Inquiry⁵⁶, higher illiteracy rates resulting from the poor quality of education received while in care would contribute to this). For these reasons, many have not been aware of the existence of the relevant redress scheme until after it had closed.
78. Criticisms were made of redress schemes (such as the one operating in South Australia) that limit eligibility to those who suffered sexual abuse, making no provision for those who suffered other forms of abuse such as physical, psychological or emotional abuse. Further, it was argued that it was unfair that such schemes allow for reduction or refusal of compensation where the applicant has a criminal record. It was contended that in many cases victims would not have been exposed to such a course in life if not for having been in state care.
79. Many submissions also drew attention to two main difficulties that arise in applying for compensation. Firstly, the distress of having to recount in vivid detail those events that many victims had spent their lives trying to forget. Secondly, where schemes place the onus wholly on the victims to prove their claim there can be great difficulty in obtaining the requisite records which are often in the control of state institutions.
80. By way of assistance to the Royal Commission, we refer to two documents; both serve as existing efforts to provide guidance on the appropriate guiding principles to be applied in implementing redress schemes for victims of abuse:
- i. *'Restoring Dignity: Responding to Child Abuse in Canadian Institutions –Executive Summary'* published in March 2000 by The Law Commission of Canada.⁵⁷
 - ii. *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.*⁵⁸

⁵⁶ Queensland, Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) vi.

⁵⁷ Canada, Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions – Executive Summary* (2000).

Redress: Further Realistic Options

81. Survivors of institutional abuse come from diverse backgrounds and relate diverse life stories. The Proposed Agency should be aware of the reality that survivors each require redress in different forms and in different ways.
82. There are challenges faced by survivors of institutional abuse which are unique to their lives. The following options are offered as practical means to address those challenges and to practically improve their lives, in addition to the forms of redress already discussed:
 - i. Funeral insurance plan. This would be particularly available to those survivors who have no savings, superannuation or are homeless. This could include a wake for friends and family, and a personalised headstone.
 - ii. Free private medical insurance. The bodies of the survivors are particularly worn out given the extreme physical conditions to which they were subjected during their childhood.
 - iii. A survivor's 'gold card' similar to that available to war veterans. This would entitle the card holder to a variety of privileges and concessions, such as free public transport, free medical and dental benefits to the extent not already available under Medicare, respite care, assistance with accommodation at granny flats, retirement villages, travel accommodation, assistance with basic living essentials such as water gas and electricity bills, food and clothing.

Apologies

83. A victim of child sexual abuse has suffered physical harm, psychological harm, and – by the violation of the human rights they expected to enjoy as an equal member of society –

⁵⁸ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/34 (1985).

harm to their self-perception relative to society at large. This often results in a sense of alienation and disaffection.

84. Apologies are as much for the benefit of the oppressor - or its successor - as they are for the victim. They affirm that the past ways were wrong, have been learned from, and are a demonstration of change in the right direction. Without effective recognition and accountability the debt is left unpaid and the fight still ongoing in the mind of the victim. Financial redress in the absence of an apology is sometimes ineffective.

85. In discussing what has become known as ‘the age of the apology,’ Murphy writes:⁵⁹

Apology’s role in the present is to acknowledge and pay respect to the survivors who may continue to suffer the scars of their encounters with past injustice. Although an apology is unlikely to bring an end to this suffering, it may at least bring a measure of comfort to survivors by publicly acknowledging that this burden was brought upon them unjustly and by legitimizing their belief that those responsible for their pain are morally accountable for their actions.

86. Academic research indicates that apologies are effective, that is, most likely to achieve victim forgiveness, when the components of the apology align with the victim’s self-construal.⁶⁰ Broadly, meaningful redress should comprise three core elements:

- a. an offer of compensation;
- b. an expression of empathy; and
- c. an acknowledgment of violated rights or social standards.

87. Effective apologies also serve to repair the damage to the trust reposed by the public in offending institutions. It demonstrates to the victims and broader public that the attitudes and policies that led to the abuse have been abandoned as wrong, that it accepts responsibility, and affirms that the victim has always had the same rights as every other member of society (regardless of what social values and beliefs may have persisted at the

⁵⁹ Murphy, Michael, ‘Apology, Recognition, and Reconciliation’ (2011) 12(1) *Human Rights Review* 47, 54.

⁶⁰ R. Fehr, M.J. Gelfand ‘When apologies work: How matching apology components to victims’ self-construals facilitates forgiveness’ (2010) 113 *Organizational Behavior and Human Decision Processes* 37–50.

time of the abuse). It is an opportunity for each institution to publically ‘draw a line in the sand.’

88. An apology and an offer of financial redress should be delivered with an air of importance and gravity, rather than at arm’s length. The location of the apology is also important.⁶¹

The perceived legitimacy of an apology is also crucially linked to the location of its delivery. Like an apology delivered by the wrong person, an apology delivered in the wrong place can send the message that the injustice is not taken all that seriously or that the government is not sincere in its intentions to seek reconciliation.

89. Efforts to include survivors as partners in negotiating the content of the apology to be offered can also yield many benefits. This practice has been followed in the Treaty of Waitangi settlement process in New Zealand and in the apologies offered by the Australian and Canadian governments for the coercive assimilation of Aboriginal children. This form of inclusion is a valuable means of demonstrating respect for survivors and their sense of agency within the process of reconciliation. It also provides a valuable opportunity for mutual education and understanding and may help relieve the suspicion that an apology is being offered insincerely, thereby increasing its legitimacy in the eyes of those to whom it is being offered.⁶²

7. Constitutional Issues Associated with Establishing the Proposed Agency: Question 4

90. As discussed at section six above, the recommendations of previous Inquiries have been met with political resistance among the State and Commonwealth jurisdictions. Any recommendation for the introduction of a National Redress Scheme should be

⁶¹ Murphy, Michael, ‘Apology, Recognition, and Reconciliation’ (2011) 12(1) Human Rights Review 47, 51.

⁶² Murphy, Michael, ‘Apology, Recognition, and Reconciliation’ (2011) 12(1) Human Rights Review 47, 51.

accompanied by a consideration of the constitutional and political issues associated with such an ambitious initiative.

The Scope of Section 51

91. The Proposed Agency should be established via some form of co-operative scheme between the Commonwealth, States and Territories to allow the scheme to be legislated.⁶³ The first question is what form of legislative scheme should be created. Consultation with private institutions would also be necessary to create the scheme since they will be responsible for partially funding the scheme. It would be a matter of negotiation between the State parties.
92. A co-operative scheme between the states would need to be established if the Commonwealth does not have the power to legislate in respect of compensation schemes that have no connection to its s 51 powers.⁶⁴ While Australia is a signatory to the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*⁶⁵ ('UN Declaration'), this would not allow the external affairs power under s 51(xxix) to pass a national compensation scheme when the UN Declaration is not yet ratified and incorporated into Commonwealth legislation.⁶⁶
93. For the Proposed Agency to be embodied in Commonwealth legislation it would be subject to the requirement that 'acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.⁶⁷

⁶³ Attorney-General's Department, Office of Constitutional Law, *Co-operative Federal Schemes A guide for Commonwealth Agencies* (2013) 4.

⁶⁴ *Ibid*, 7; *Constitution* s 51.

⁶⁵ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/34 (1985). See Articles 12-13 of this UN Declaration.

⁶⁶ *Constitution* s 51(xxix); *Barton v Commonwealth* (1974) 131 CLR 477; *Horta v Commonwealth* (1994) 181 CLR 183. See Sam Garkawe and Michael O'Connell, 'The need for a federal, Australia-wide approach to issues concerning crime victims' (2007) 18(3) *Current Issues in Criminal Justice* 488, 491-492.

⁶⁷ *Constitution* s 51(xxxi).

A Proposed Levy

94. If a levy was imposed on State governments and private institutions to provide funds to a national scheme, there may be constitutional implications. If the levy can be classified as a tax,⁶⁸ it may not discriminate against the States.⁶⁹ It may not be considered a tax when its purpose is not to raise revenue but to provide a compensation fund; whether this is for public purposes is a crucial question.⁷⁰ Any questions of discrimination in terms of disproportionate funding would become more relevant in a political context such that a State may not refer their powers if they find the levy discriminatory. A State referring its powers would resolve questions of funding at COAG and SCLJ meetings.⁷¹
95. A levy against the State-run institutions and the relevant private institutions would extract money to support the scheme. The Proposed Agency would require a method of extracting redress from private institutions. The appropriate private institution and the relevant legal structure would need to be located by the Commonwealth and potentially action taken against them; especially since their unincorporated associations have been unable to be sued for the sexual abuse committed by their priests in the past like in the *Ellis* case.⁷²

If the States Agree to the Proposed Agency: The Referral Power

96. The States could refer their powers to the Commonwealth if they agree to the establishment of the Proposed Agency.⁷³ The Commonwealth may pass laws superseding the Territories to create the Proposed Agency to administer the national scheme.⁷⁴ Not

⁶⁸ *Knight v State of Victoria* [2014] FCA 369 [65]-[78].

⁶⁹ *Constitution* s 51(ii).

⁷⁰ *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97, [16], [18]-[25], [36]-[42], [49]-[51] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷¹ See *Fortescue Metals Group Limited v The Commonwealth* [2013] HCA 34.

⁷² See *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117. Compare *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56 [20].

⁷³ *Constitution* s 51(xxxvii).

⁷⁴ *Constitution* s 122.

all states have to refer their power for such a law to be passed but they should do so to achieve consistency, regardless of whether institutional abuse occurred more in certain jurisdictions than others. But the problem remains that the States may withdraw their references.⁷⁵ Such a law is a co-operative arrangement that can be further strengthened by an inter-governmental agreement ('IGA') governing how the referral will apply and consultation will occur.⁷⁶ Policy approval for such a scheme would be sought from the Federal Attorney-General when developing an IGA.⁷⁷

97. The main advantage of a national uniform scheme created via State referrals is its simplicity and that it is not fraught with technical problems associated with the mirror or applied law schemes.⁷⁸ One State can lead the process and pass the legislation before the Commonwealth can proceed.⁷⁹
98. As we have seen with the *Forgotten Australians* recommendations, creating a co-operative scheme is largely a political initiative. It would involve meetings of the Council of Australian Governments ('COAG') and its twelve standing councils to determine the best legislative option for a scheme.⁸⁰ The Standing Council on Law and Justice ('SCLJ') would arguably be the most appropriate to determine how such a scheme would operate when the outcome is delivering compensation to survivors of institutional abuse.⁸¹
99. The referral power can be achieved by subject, text or hybrid referral.⁸² A subject referral occurs when the States refer their powers relating to a specific subject matter without

⁷⁵ Attorney-General's Department, Office of Constitutional Law, *Co-operative Federal Schemes A guide for Commonwealth Agencies* (2013) 10; Robert French, 'The referral of state powers' (2003) 31(1) *University of Western Australia Law Review* 19, 30.

⁷⁶ *Ibid*, 10, 13.

⁷⁷ *Ibid*, 14.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*, 13.

⁸⁰ Attorney-General's Department, Office of Constitutional Law, *Co-operative Federal Schemes A guide for Commonwealth Agencies* (2013) 4-5.

⁸¹ *Ibid*, 5-6.

⁸² Attorney-General's Department, Office of Constitutional Law, *Co-operative Federal Schemes A guide for Commonwealth Agencies* (2013) 11.

detailing exactly how the Commonwealth will deal with it.⁸³ It could be suggested that the States would want more detail than a mere subject matter referral since they have to pay into a compensation fund. The States would also be concerned with how the relevant private institutions would fund such a scheme. The States could seek any conditions they deem to be necessary to be part of the referral to make the referral process acceptable by all relevant parties.

100. A text referral may be preferred due to how specific they can be and provide for amendment referrals in the future.⁸⁴ This would help prevent the technical legal issues that affect whether the survivors of institutional abuse can obtain compensation, how much and at what time.
101. A hybrid referral is when the State adopts the Commonwealth law after it has been referred, a process which the States would likely prefer.⁸⁵
102. We recommend the States work towards achieving consent to referring their relevant powers to legislate in regards to a Proposed Agency and a national scheme to compensate victims of institutional abuse. The agreement of the States is crucial to a referral being successful. The underlying questions are essentially political.

If the States do not Refer Their Powers to Create the Proposed Agency: The Applied Law Scheme

103. The States and Territories could co-operate with the Commonwealth to create an applied law or mirror scheme if some or all of the States do not refer their powers to the Commonwealth to legislate for the Proposed Agency. An applied law scheme would be preferred to the mirror scheme as one model law is agreed to and adopted by the participating jurisdictions.

⁸³ Ibid, 11-12.

⁸⁴ Ibid, 12.

⁸⁵ Ibid, 13.

104. Applied law schemes or complementary law schemes occur when a jurisdiction passes a law that it is then put in place by other States or Territories participating in the scheme.⁸⁶ The initiating jurisdiction enacts the model law, following which the other participating jurisdictions enact a law stating that the model law applies in their jurisdiction.⁸⁷ One model law would still ensure the same law applies in the participating jurisdictions, achieving some level of consistency for applicants at the Proposed Agency.
105. It is probably preferable that the Proposed Agency be put in place in the form of a referral scheme, especially since the Proposed Agency is not regulatory but compensatory, to ensure national consistency.

The Mirror Scheme

106. Mirror schemes occur where one jurisdiction enacts a law using the same or like terms in other jurisdictions.⁸⁸ Adopting such an approach requires precision to ensure that legislation commences without time lags, reduce any cross-jurisdictional problems and avoid amendments imposed by the Parliaments of each jurisdiction.⁸⁹ Inconsistency can occur if this process is not followed.⁹⁰ In such a contentious area involving State and Territory government agencies awarding compensation payments; it can be readily assumed that each jurisdiction may put amendments in place, especially if their State-run institutions are open to paying a multiplicity of such compensation claims. It can still lead to political issues where some State-run institutions may be more culpable and thus pay more than similar institutions in other States. Creating a fair, agreed funding structure may be more complicated when the States themselves have an agenda in reducing the amount of compensation paid.

⁸⁶ Attorney-General's Department, Office of Constitutional Law, *Co-operative Federal Schemes A guide for Commonwealth Agencies* (2013) 8.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, 7.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

8. Appeals to the Administrative Appeals Tribunal

107. The enabling legislation of the Proposed Agency should stipulate that decisions of the Proposed Agency should be appealable to the AAT. The AAT is often posited as an arm of the executive government with quasi-judicial characteristics that should be viewed as independent from the government, which also provides a far more informal, efficient option compared to courts to resolve disputes.⁹¹
108. The applicants should not have to pay the costs of an application to the AAT. The AAT's application fees could be waived in appeals against the Proposed Agency assessors' original decisions.
109. The AAT's role is to 'provide a mechanism of review that is fair, just, economical, informal and quick'.⁹² It can review a decision on its merits as well as exercise power and direction conferred on the original decision-maker – it may affirm, vary or set aside a decision or remit for reconsideration.⁹³ The AAT's decision on review is taken to be the decision of the original decision-maker.⁹⁴ It may then be appealed to the Federal Court of Australia on a question of law,⁹⁵ and then subsequently to the Full Federal Court and the High Court of Australia.
110. The AAT is free to create its own procedures since it lacks formality and does not apply the rules of evidence. It will apply the civil standard of proof, which is 'on the balance of probabilities'.⁹⁶ The AAT is bound to consider the relevant facts proven by sufficient, persuasive evidence and then decide what a 'correct or preferable decision' was on the

⁹¹ Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 132-138, 143-149.

⁹² *Administrative Appeals Tribunal Act 1975* (Cth) s 2A. See also Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 151-166.

⁹³ *Administrative Appeals Tribunal Act 1975* (Cth) s 43. See also *Repatriation Commission v Owens* (1996) 70 ALJR 904.

⁹⁴ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(6).

⁹⁵ *Administrative Appeals Tribunal Act 1975* (Cth) s 44; *Phillips v Inspector-General in Bankruptcy* (2011) 121 ALD 564, [58]-[59]; *Repatriation Commission v Owens* (1996) 70 ALJR 904; Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 142-143.

⁹⁶ *Administrative Appeals Tribunal Act 1975* (Cth) s 33. See Robin Creyke, John McMillan and John Smyth, *Control of Government Action* (LexisNexis Butterworths, 3rd ed, 2012) 187-195.

basis of those facts.⁹⁷ This will ensure that if the applicants' claims are not properly heard by the Proposed Agency that the AAT will properly consider their claim.

111. The AAT must afford procedural fairness to both sides and provide reasons.⁹⁸ An applicant would have the opportunity to make submissions,⁹⁹ although it can proceed in the absence of a party if reasonable notice is given.¹⁰⁰ Either option would likely respect the sensitivity of the survivors of institutional abuse when they appeal a determination made by the Proposed Agency to the AAT.

112. The AAT could look at all substantive issues and apply powers available to the original decision-maker that were not available under review.¹⁰¹ This would provide a sufficient accountability mechanism for how the Proposed Agency operates for those applicants that become aggrieved by a decision made against their interests. It also provides the necessary flexibility to meet their needs.

113. A system of independent government agency assessors followed by an appeals process to the AAT may provide a consistent and comprehensive redress scheme.



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2 June 2014

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⁹⁷ *FCT v Swift* (1989) 18 ALD 679.

⁹⁸ *Administrative Appeals Tribunal Act 1975* (Cth) ss 28, 43.

⁹⁹ *Administrative Appeals Tribunal Act 1975* (Cth) ss 35, 36, 36B, 39, 40.

¹⁰⁰ *Administrative Appeals Tribunal Act 1975* (Cth) s 40.

¹⁰¹ *ASIC v Donald* [2003] FCAFC 318.