

Submission by the State of Tasmania
to the
Royal Commission into Institutional Responses to Child Sexual Abuse
Issues Paper 6 – Redress Schemes

I. What are the advantages and disadvantages of redress schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts, particularly in comparison to claims for damages made in civil litigation systems?

Tasmania's Abuse in State Care Review was first announced by the Tasmanian Government in July 2003. The review operated for 10 years over four separate Rounds, and has helped more than 1800 people with ex gratia payments worth over \$54 million. The scheme closed to new applicants in February 2013.

The focus of the Tasmanian process was to enable individuals who suffered abuse (sexual, physical and/or emotional) in government care as children to have their pain and suffering recognised and support provided.

The redress process conducted in Tasmania had the advantage of providing reparation to individuals in a context that promoted healing and closure for the individual, with less emphasis on exhaustive testing of evidence, as would occur in civil litigation systems. However, one disadvantage of such a process is that, for some claimants, it doesn't provide the clear outcome or apparent justice that a Court decision may.

At the outset of the Tasmanian process, claimants were asked what outcomes they were seeking as part of the process, this included:

- An apology;
- An official acknowledgement that the alleged abuse most likely occurred;
- An assurance that today's system prevents the sort of abuse they have suffered;
- Guided access to personal departmental file;
- Professional counselling.

These elements all featured in the Tasmanian scheme. It was also recognised that for many people the process of recounting their experiences would be traumatic and difficult, and trained interviewers were used to allow claimants to tell their story face-to-face.

In Tasmania, the use of this type of redress process, in comparison to claims for damages made in civil litigation systems, provided the opportunity for all claimants

deemed eligible to be assessed for ex gratia payments, as opposed to being reliant on the capacity of the individual to fund a claim through the civil system.

Claimants also face a number of legal hurdles as part of any civil claim for compensation; the most obvious being the expiration of the period of time for pursuing an action under relevant State statutes of limitations. The experience of many claimants reported through the Tasmanian Abuse in State Care process is that it is often many years before they are able to speak of their experiences. Other examples of the barriers claimants face are: the difficulty in identifying the appropriate legal entity or perpetrator to bring an action against; the perpetrator may be dead; the entity providing services may not be incorporated and are unable to be effectively sued; the expense of legal representation; and the complexity and adversarial nature of the process.

The difficulties of the passage of time are compounded by the evidentiary barriers associated with proving injury, with trauma suffered during and after care, and with the requirement that is often placed on those who have since left care (care leavers) to provide detailed evidence on instances of abuse, the production of which can be hampered by the passage of time and the loss or destruction of records and other material documents.

2. What features are important for making redress schemes effective for claimants and institutions? What features make redress schemes less effective or more difficult for claimants and institutions?

The Tasmanian process indicated that victims of institutional abuse are generally concerned that the process allows some flexibility to meet the claimant's needs. While reparations schemes vary, there are common components including the provision of apologies/acknowledgment of the harm done, counselling, education programs, access to records and assistance in reunifying families. A further common feature of redress schemes is also the implementation of financial compensation schemes. While the designs of the schemes vary, they have as a common goal, the need to respond to survivors of institutional child abuse in a way that is more comprehensive, more flexible and less formal than existing legal processes.

The claims process, put in place by the Tasmanian Ombudsman in 2003, has formed the basis for the four rounds of the Tasmanian redress scheme. This process provided for a timely response to claimants; placed less of a burden on claimants to provide detailed information to support their claim by allowing them to tell their story face-to-face; provided access to counselling from the point of application; guided access to relevant records, and financial support to participate in the process (counselling, travel, etc). The Tasmanian review process also provided for an independent determination of any ex gratia payment. While claimants may have met

with an officer of the department to help in the preparation of information, the department did not place any undue pressure on people to retell their story or go over information that had already been recorded by the Ombudsman.

A single point of contact was provided for claimants throughout the process, which allowed the establishment of trust with trained staff who were able to support claimants through what was a difficult process for many. The provision of an apology and information about their time in care was important to many applicants, and in many cases provided missing information on how they came to be in care. The acknowledgement and apology provided also meant that claimants' experiences were validated and the involvement of the relevant Department, Minister and Premier in the process of acknowledgement provided a degree of accountability and recognition for what happened to them.

While the scope of the Tasmanian review was very broad, concerning all forms of child abuse and covering children in both institutional and foster care, eligibility was limited to those who were in State care. This meant that the process of accepting applications under the scheme, as well as gathering information from government and non-government sources (where placements of children had been made to non-government organisations), as part of the assessment process, was the responsibility of the Government.

However, applying this limited scope also presented some difficulties, with siblings in a number of cases having been placed under different care arrangements, not necessarily State care and therefore not all being eligible under the Tasmanian review. The length of time associated with the Tasmanian review also presented some problems, particularly with the change in the level of payment for round four. In a State the size of Tasmania, claimants under all four rounds often discovered each other and shared experiences, including the level of redress received. Due to the individual approach and varying maximum amounts, claimants from the same institution often received different amounts, leading to angst, confusion and complaints.

3. What forms of redress should be offered through redress schemes? Should there be group benefits available to, say, all former residents of a residential institution where abuse was widespread? What should be the balance between individual and group redress?

In establishing the Tasmanian review process, the focus was on a healing process for individuals, which would assist adults who had been abused to gain closure. Group benefits were not considered as part of the program. That was because the ability of care leavers to speak about their time in care and seek redress varies greatly, dependent on individual experiences. Redress schemes should therefore respond to

the needs and experiences of individuals, rather than be based on the particular institution they were placed in.

The Tasmanian Ombudsman was tasked with reviewing claims and making a determination as to whether they *prima facie* had substance. Claims found to have substance were referred to a dedicated unit established within the Department of Health and Human Services for a more detailed investigation to be undertaken. While this process changed over subsequent rounds to allow the Department to receive claims, the assessment process was largely the same.

Further to the review, in August 2003, the then Premier, Mr Jim Bacon MP, announced the appointment of an independent assessor. The assessor received referrals from the department and where appropriate made an assessment of an ex - gratia compensation payment. In the first three rounds, there was a limit of \$60 000 for individual payments, with this amount becoming \$35,000 for Round 4 (2010 – 2013). It should be noted that there was capacity for the assessor, if faced with a case where the abuse and its consequences have been quite exceptional, to make a recommendation to the Government for payments over and above the maximum (to support health or other needs).

From the outset of the process, each claimant was also advised by the department of their potential rights, including the right to such compensation under the provisions of the *Criminal Injuries Compensation Act 1976*, and of the alternative right for the claim to be considered by the independent assessor.

The provision of ex gratia payments was a subsequent addition and only a part of the overall system response. Indeed for many claimants, it was not a matter of seeking financial compensation, but rather such things as understanding the reasons for their being placed in care, information about their childhood circumstances or acknowledgments that they were the victims of past abuse. Claimants were also supported with access to records, access to counselling services and received an acknowledgment and apology.

4. What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims? If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?

Legislative responsibility for child protection in Australia has rests primarily with the States and Territories as there is no legislative power over children or child protection in the Commonwealth Constitution. While not all Australian States have established redress schemes for adults who were in State care as children, even

amongst those who have, considerable inequity has been observed due to different eligibility criteria, timeframes and amounts.

These variations are one disadvantage of adopting a State-led approach. In part, these variations are driven by the differing circumstances that have led to the establishment of such schemes. In Tasmania's case, the immediate catalyst for the Abuse in State Care Review related to a case of sexual abuse from decades before where an individual, who had been in State care as a child, alleged abuse by the foster carer with whom he had been placed. This undoubtedly influenced the decision to limit access to the scheme to those adults who had been in State care as a child ('State care' refers to a child or young person who was in the care of the Tasmanian Department of Health and Human Services (the Department) or its predecessors – in most cases subject to legal orders).

However, while adopting a national scheme, as has been recommended by a number of inquiries, would avoid such discrepancies, it would also seemingly reward those States that have not established redress schemes to date and penalise those majority of states that have made significant efforts to address past abuse in care. For example, Tasmania has spent almost \$55 million over the last ten years on its Abuse in State Care Review and could potentially be asked to contribute to a national scheme. It would be inequitable for Tasmania to be asked to contribute at the same level as church or non-government institutions that abused children and other States who have yet to establish such schemes.

Within the Tasmanian process, many of the adults who were interviewed were people living with: broken relationships; welfare dependency; substance abuse; incarceration and mental illness. Unfortunately, such outcomes as a result of childhood abuse are not limited to experiences in institutional care, with many children coming to care being already traumatised as a result of abuse suffered in the family home. While this Royal Commission is focused on institutional sexual abuse, the fact remains that the majority of abuse is other than sexual, and occurs within the extended family environment.

5. If institutions have established internal redress schemes, should all or any part of the decision-making of the scheme be independent of the institution? Should the schemes be subject to any external oversight? If so, what?

In establishing redress schemes, it is important to recognise the lack of trust claimants may have for the institution against which they are making claims. While institutions may establish internal redress schemes, and indeed there are some advantages to this in terms of accessing client information and providing supported

file access, there is merit in establishing an independent decision-maker, particularly with regard to any payment to be made to claimants.

This is particularly the case in the absence of any national or State legislative framework providing for the regulation of such internal redress schemes apart from the established common law in relation to damages.

In July 2003, when the Tasmanian Government announced its review, the Ombudsman's office undertook to review the individual's claim before their referral to the Department for redress. This was done in the belief that the Ombudsman's independence and impartiality would lend credibility to the review process and provide reassurance to the people who came forward that their stories would be listened to impartially and in confidence. The Office of the Ombudsman continued to have this role during round one and two of the process. For rounds three and four, the function of receiving and assessing claims was undertaken by a unit within the Department of Health and Human Services. This same unit also undertook the file research and prepared summary reports for the consideration of the Independent Assessor.

6. Should establishing or participating in redress schemes be optional or mandatory for institutions?

Given that a redress scheme is a process which addresses a 'wrong' suffered by a complainant; we consider it meritorious that where such a scheme exists, it should be an ongoing component of complaints management processes for any client-orientated agency. However, there is a difference between what is considered a 'best practice' complaints process and making redress schemes mandatory.

Certainly, it would seem reasonable for institutions to provide some form of support for children who were subject to abuse in their care. For example, following the closure of the Tasmanian Abuse in State Care Review in 2013, an ongoing support service was established to provide support to people who experienced abuse in State care when they were children.

7. Should seeking redress or compensation through a redress scheme be optional for claimants? Should claimants retain the ability to pursue civil litigation if they wish?

As noted previously, the ability of care leavers to speak about their time in care, and seek redress, varies greatly, dependent on individual experiences. So it would seem reasonable that seeking redress should remain optional as the time period to seek redress, as well as what is considered to constitute redress, will vary amongst claimants.

As noted in the Tasmanian Ombudsman's 2004 report, many of the adults who came forward as part of the Tasmanian review process confessed that they had never told anyone of their childhood experiences. In some cases these painful memories had lain hidden for 30, 40 and 50 years, while others who had told someone in authority at the time were still bitter that they were not listened to, or were not believed.

Based on this experience, it is important to be mindful of the approach adopted for claimants to seek redress and that such processes, as noted earlier, should be focused on providing healing and closure through support, information and redress.

Claimants in the Tasmanian Abuse in State Care Review were provided with financial assistance towards legal costs when considering whether to accept an offer of ex gratia payment and were required to sign a deed of waiver regarding further civil litigation.

8. How should fairness be determined in redress schemes when some institutions have more assets than others? How should fairness and consistency between survivors be achieved in these circumstances? What should be the position if the institution has ceased to operate and has no clear successor institution?

In considering this question, some thought must be given to what constitutes 'fairness'. Each individual event/incident will be unlikely to contain the same constituent parts or have the same emotional, physical or mental health effect upon the individual survivor. Certainly, while there were common themes among claimants in the Tasmanian Abuse in State Care Review, the journey for each individual was different, as was the outcome.

There is a danger in focusing only on the monetary component of redress schemes that are intended to address a 'wrong'. In considering the notion of fairness, equal weight can be given to considerations of equity of access (to information, records, support and counselling), honest acknowledgement of the pain and suffering caused as a result of the wrong, and the fairness of actions taken in response. Fairness in this context does not necessarily depend on the assets of the institution in question.

9. What are the advantages and disadvantages of offering compensation through a redress scheme which is calculated on the same basis that damages are awarded by courts in civil litigation systems? Should affordability for institutions be taken into account? If so, how?

There are clear advantages and disadvantages for claimants in adopting a model where compensation is calculated on the same basis as damages through civil litigation system. The adoption of a damages compensation model as suggested

would allow for the award of damages on the basis of established practice with clear legal principles that can be applied. To a certain extent this would address some of the criticism of inconsistency between existing schemes, particularly those within different states.

A redress system based upon the same legal principles for quantifying damages in civil litigation would be understood and agreement might be reached quickly between the parties, with the advantage of costs being kept comparatively low. However, this agreement is most likely to be without the benefit of evidence obtained from good examination and cross examination, which would, under usual circumstances, test the veracity of a claim.

Such an approach would be dependent on the capacity of individual institutions to fund such claims unless, as noted elsewhere, some form of common funding pool was established and contributed to.

Redress schemes, such as the Tasmanian Abuse in Care process, where ex gratia payments are not calculated on the same basis as damages are awarded by the Courts, have the advantage of positioning financial redress as simply part of a broader response that hopefully provide closure, validation and some financial support.

10. Given that the sexual abuse of children mostly occurs where there are no witnesses, what level of verification or proof should be required under a redress scheme to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation?

There will be problems of verification by institutions, as far as redress is concerned, where evidence is required to satisfy the institution of the offence on the balance of probabilities. For this reason, among others, the verification of claims made as part of a redress process must be treated holistically within the process, with the intention of acknowledging and addressing a past wrong.

The focus of the Tasmania review was on healing and closure, rather than on retribution or pursuing the 'truth' of the allegations. As a consequence, across all four rounds of the process, there was no attempt to test the information through rigorous investigation, such as the identification and questioning of possible witnesses. However, there was considerable research into files, cross referencing of information and other means of inquiry normally employed in investigations. In fact, during the Tasmanian process, many of the claims were so old as to preclude the likelihood of obtaining sufficient corroborative evidence to prove allegations in a legal sense.

This focus on healing largely dictated the way that information would be collected. It was recognised that for many people the process of recounting their experiences would be traumatic and difficult. For these reasons trained interviewers were used to provide claimants with an opportunity to tell their stories in a face-to-face situation.

This does not change the fact that investigation of allegations of sexual abuse, separate to any redress determination, is a police matter and should remain so. Once the police have investigated, a decision may be made by them to prosecute on the basis of beyond reasonable doubt if a criminal offence might be proved. Indeed, as part of the Tasmanian process, a protocol was established with Tasmania Police for the referral of potentially criminal matters.

In the event an institution decides to contest a claim, it would seem that it should become a matter for litigation in the court system. The outcome of the police investigation would probably lead to subsequent action by either party depending upon the results of the investigation.

It should not be overlooked that an institution may consider the reputation of the institution to be a significant factor to be considered in the decision as to the quantum of any offer of settlement or otherwise. Such a consideration is not necessarily a component part of calculating any compensation by the courts.

11. What sort of support should be available for claimants when participating in a redress scheme? Should counselling and legal advice be provided by any redress scheme? If so, should there be any limits on such services?

The experience of the Tasmanian review process is that while monetary compensation can compensate victims to some extent it is unlikely to achieve healing for many care leavers, so other forms of redress, especially counselling, are important.

In Tasmania, all claimants were offered psychological counselling as soon as the claimant made contact to begin the process. It was also recognised that for many people the process of recounting their experiences would be traumatic and difficult, and trained interviewers were used to allow claimants to tell their story face-to-face, including claimants who resided interstate. Financial assistance was also offered to claimants to enable them to attend counselling and interviews related to the process. Limitations were placed on the period of counselling, providing for a number of sessions while the claim process was underway, but ceasing once the ex gratia payment had been made.

As part of the Tasmanian process, claimants were also provided with guided access to relevant records and for many claimants, regret for lost opportunities was a recurring theme in interviews conducted as part of the process. Amongst claimants there remained a sense of bitterness about their lost childhoods with often little or no memorabilia of their family life. The process adopted in Tasmania provided the opportunity for claimants to be guided through their personal files, which was a revealing experience, often uncovering for the first time why it was that they were placed in care.

12. If a claimant has already received some financial compensation for the abuse through one or more existing schemes or other processes, should the financial compensation already received be taken into account in any new scheme?

In Tasmania, during the 10 year period that the Abuse in State Care Review was conducted, a similar process was in place between 2007 and 2008 under the *Stolen Generations of Aboriginal Children Act 2006* (Tas), which established a \$5 million fund to enable the Tasmanian Government to make ex gratia payments to members of the stolen generations.

As noted in the Report of the Stolen Generations Assessor (2008), Tasmanian welfare laws and practices were used to separate Aboriginal children from their families during the period 1935-1975. For this reason, there is some overlap between the claimants in this process and the Abuse in State Care Review. Claimants who received some financial compensation through one scheme were not excluded from the other, subject to them meeting the relevant eligibility criteria for each scheme.

In addition, the nature of compensation is effectively recognition of a wrong regardless of how it might be couched. It would seem to be contrary to established law for a non-party to the initial agreement to set the agreement aside, and more than likely after the compensation has been spent, in order to undertake a review. If the 'new' decision found that the survivor was, in fact, bogus or that the sum paid was above that which is decided upon review then recovery of the initial overpayment might be sought by the institution, further prolonging the anguish suffered by the survivor.

A new redress scheme should take into account any previous payments under any other schemes. However, the receipt of payment under another scheme ought not to be a bar to applying under a new scheme, but should be a factor for consideration.