



The **Salvation** Army

Australia

The Salvation Army Australia

*Submissions made on behalf of The Salvation Army Australia Eastern Territory and
The Salvation Army Australia Southern Territory*

Response to the

Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 6 - Redress Schemes

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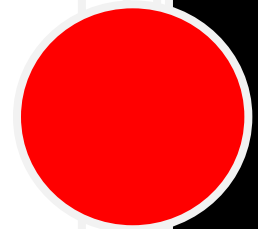
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About The Salvation Army

The Salvation Army is an international movement, recognised as part of the Christian church, and one of the world's largest Christian social welfare organisations. It has more than 1,680,000 members at work in 126 countries and is supported by the efforts of many thousands of employees and volunteers.

Operating in Australia since 1880, The Salvation Army is one of the largest national providers of welfare services, and is the largest provider of homelessness services in Australia. The Salvation Army has a significant history of working with and advocating for the rights and needs of disadvantaged people in our community. Consistent with our values of human dignity, justice, hope, compassion and community, The Salvation Army is committed to the promotion of social justice and the protection of the rights of disadvantaged and marginalised people.

The Salvation Army, with an annual operating budget of approximately \$700 million, provides over 1,000 social programs and activities through a network of social support services, community centres and churches across the country.

Key services provided by The Salvation Army Australia network include:

- Accommodation and homelessness services
- Aged care services
- Children and youth at risk programs
- Drug and alcohol support and treatment services
- Education, training and employment support services
- Family and domestic violence support and accommodation services
- Financial counselling and assistance
- Material aid and emergency relief
- Migrant and refugee services
- Out of home care services, and
- Personal counselling and support.

The Salvation Army Australia has an established reputation for providing these services across the spectrum of disadvantage - working with individuals and families impacted by poverty, deprived of opportunities and activities considered part of everyday Australian life. The Salvation Army works with individuals who, due to life experiences and events, have inadequate education and training, poor health, and a sense of powerlessness that compromises their capabilities and opportunities to participate in the community.

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Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse made on behalf of The Salvation Army Australia Eastern Territory and The Salvation Army Australia Southern Territory.

Submissions in response to Issues Paper 6 – Redress Schemes

The Salvation Army welcomes the opportunity to respond to the sixth issues paper released by the Royal Commission into Institutional Responses to Child Sexual Abuse.

These submissions are made on behalf of both Salvation Army Territories (Australia Eastern Territory and Australia Southern Territory) in Australia.

Introduction

These submissions address the questions raised in Issues Paper 6 released by the Royal Commission on 23 April 2014. The issue identified by the Royal Commission is the question of redress and the means by which survivors of historical child sexual abuse are able to access remedies to secure an appropriate form of redress, as identified in the Issues Paper.

Perspective of The Salvation Army

The Salvation Army recognises that it can only contribute to this Issues Paper from its perspective as an institution. However, whilst The Salvation Army gives its views in this Issues Paper as an institution, its comments below are also informed by what it has observed and learned in seeking to assist survivors to find healing and justice in cases of extreme trauma and loss. The Salvation Army recognises and respects the fact that individual survivors and / or advocacy groups on behalf of survivors may have very different views on concepts of redress and in this regard, The Salvation Army is committed to learning from those views in order to enhance a survivor focussed redress for child sexual abuse. In responding to this Issues Paper, The Salvation Army has had particular regard to the various submissions made in response to Issues Paper 5, that are publicly available on the Commission's website.

Purpose of a Redress Scheme

The Salvation Army believes that in order to consider issues of redress it is critical to first identify the purpose of any proposed redress scheme. That purpose will determine the manner in which such a scheme is established, how the scheme is administered, who administers the scheme and the outcomes available to the survivors. The Salvation Army recognises the importance of survivors

having a range of avenues in which to seek redress, and believes each survivor's circumstances should be considered on a case-by-case basis.

Fundamentally, The Salvation Army considers that any redress scheme, whether internal or external, should have as its primary objective the capacity to resolve claims in the best interests of a survivor.

1. 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?

Redress schemes are an important way of addressing historical child sexual abuse. Inherent in the operation of any redress scheme is recognition that traditional legal models of redress will not always be appropriate.

As Sir Gerard Brennan observed in an article entitled "Reconciliation" (1999) 22(2) *University of New South Wales Law Journal* 595:

Even if the law identifies the cause of a past injustice, it cannot undo the hurt, the alienation, the loss of dignity, the self-abnegation which the injustice (and particularly institutionalised and repetitive injustice) has produced. The law does not provide, indeed cannot provide, remedies for every kind of injustice or for every aftermath of an injustice suffered. It provides remedies only for an infringement of a legal right and its remedies are too blunt to undo all the effects of past injustices. Although, in the absence of reconciliation, injustice festers with the passing of time, in that time there may be such a change in relationships and rights that a remedy for the first injustice would be productive of a later injustice. In such a situation, if a compromise of rights is impossible or inadequate, no legal remedy is available. There may be a moral claim on the State for some form of compensation in those cases.

Definitions and expressions used

The Salvation Army believes that the language used to describe the nature of a redress scheme is important. The Issues Paper describes 'redress' as meaning 'remedy or compensation'. However, the expressions 'remedy' and 'compensation' are not defined in the Issues Paper. Assuming these terms bear their ordinary meanings and reflect legal concepts of remedies or compensation, these expressions may not adequately describe the objectives of a redress scheme. For example, the expression 'compensation' has a legal meaning and creates an expectation that a financial outcome will be assessed by reference to legally determined criteria for loss that can be demonstrated as causally related to the wrong. It also creates an expectation that a redress scheme is a de facto court or tribunal.

To the extent that a redress scheme has as its primary purpose the capacity to resolve claims in the best interests of a survivor, then the expression 'reparation' may be a preferable expression to 'remedy' or 'compensation'. The expression 'reparation' reflects a longstanding principle that a

wrongdoing party should seek to restore justice and make amends for its conduct. The concept of reparation embraces the importance of the wrongdoer acknowledging moral culpability, not simply legal responsibility. The expression is commonly used to describe the approach taken to address serious breaches of an individual's human rights.¹

Internal and External Schemes

The Issues Paper traverses the utility of both internal and external redress schemes.

For the purpose of these submissions, The Salvation Army speaks of internal redress schemes by reference to the schemes operated by each of The Salvation Army Australian Territories, the Eastern Territory and the Southern Territory. The redress schemes employed by each Territory are informed by the following common principles:

- (a) to act with complete propriety and fairness towards survivors of child sex abuse and their representatives;
- (b) to seek to resolve any claim through negotiation, without requiring the survivor to issue proceedings in court;
- (c) to make an early assessment of The Salvation Army's liability and, where appropriate, to concede liability;
- (d) not to require a survivor to prove any matter which The Salvation Army knows, or reasonably suspects, to be true;
- (e) not to take advantage of a survivor who lacks resources;
- (f) where liability is conceded, to offer redress that is fair and reasonable and, to the best of The Salvation Army's knowledge, comparable to the redress provided to other survivors in similar circumstances; and
- (g) to apologise where The Salvation Army is aware that it has, or its past or present officers, employees or volunteers have, acted wrongfully or improperly.

¹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

See also Part 4 of the *Bringing Them Home: Stolen Generation Report* of the Human Rights and Equal Opportunity Commission 1997 <http://www.humanrights.gov.au/publications/bringing-them-home-report-1997>

Buti, A 'Reparations, Justice Theories and Stolen Generations' (2008) 34 UWA Law Review 168

For the purpose of these submissions, The Salvation Army speaks of external redress schemes as schemes which operate independently of the relevant institution/s, and are developed and run by a government agency.

'Historic' Claims

The Salvation Army uses the expression 'historic' claims to describe the claims brought by survivors who were in the care of The Salvation Army either as residents in boys or girls homes, or through engagement with Salvation Army Officers or staff, to about the mid 1990's. The Salvation Army has adopted this framework because it has come to understand that the experience of children as survivors of abuse often takes time to manifest and, by the time the claims are brought, the survivor is no longer a child but an adult speaking to their childhood experience. This distinction is raised not to diminish a survivor's experience but to highlight that the time elapsed between an event of abuse and the bringing of a claim has a bearing on the assessment of the claim, and the fact that the impact on a survivor's life can only properly be determined when the profound impact has crystallised.

Advantages

The following advantages are relevant to both an internal and an external redress scheme, particularly in comparison to claims for damages made in civil litigation systems. It is assumed that an internal or external redress scheme will operate without unnecessary constraint or adherence to legal procedures and requirements.

First, such a scheme places survivors at the forefront and allows interested parties to work toward achieving a mutually satisfactory outcome, rather than requiring parties to assume adversarial positions designed to protect their own interests.

Secondly, for those survivors who seek outcomes other than (or in addition to) financial payments, such a scheme provides for a range of outcomes. Financial payments should not be the sole focus of a redress scheme. To have financial payments as the sole focus of such a scheme would undervalue the other critical elements, described below.

Thirdly, such a scheme provides the measure of protecting the privacy of survivors and their families. The Royal Commission has used both public and private hearings to facilitate survivors telling their stories. Where a survivor seeks a private resolution, then a scheme that protects the survivor and his/her family members' privacy, should be available.

Fourthly, such a scheme may provide a cost-effective alternative to civil litigation.

Fifthly, if such a scheme is appropriately resourced and operates efficiently, then it would provide for timely treatment of claims and the means of achieving mutually satisfactory outcomes. Also, the scheme may allow for a process to take its course over a period of time, rather than the pressures

faced by survivors having ‘a day in court’. Timetables may be adapted to meet the needs of the parties.

Finally, an internal redress scheme (one specific to the relevant institution) ensures that the institution is responsive to the needs of all interested parties. An internal scheme is amenable to flexible change and may be developed and improved regularly over time to respond to the particular circumstances of the survivors engaging with it.

Disadvantages

The Salvation Army recognises that there are disadvantages of a redress scheme for both survivors and institutions (both in the internal and external schemes).

First, the private nature of the outcomes of a redress scheme may compromise the transparency of how outcomes are achieved. There is a risk that there may not be consistency and equity in the outcomes. This ‘disadvantage’ may be overcome, however, by the publication of relevant data in a de-identified form and making that information available to the public.

Secondly, there may be a perception that where financial payments are made, the quantum achieved may be lower, inconsistent among survivors, or otherwise not calculated by reference to traditional forms of damages. This ‘disadvantage’ may be overcome, however, by the establishment of an external body with the responsibility of setting national guidelines as to financial reparation sums relative to the harm suffered by a survivor. It is considered that guidelines set independently of the institutions may give survivors a sense of relief that the figures ultimately determined in those guidelines have been deemed to be fair and just by the government authority that set them.

Thirdly, for an institution, a disadvantage of an external scheme is the loss of its capacity to develop the scheme over time, taking into account the institution’s particular circumstances, including confronting its own history.

Finally, and of great importance, such a scheme may not provide finality and certainty for the respective parties. If a scheme does not finally determine the parties’ respective rights and liabilities, there is a risk that legal action may be pursued at some point in the future. The consequence of this is that any benefits accrued by recourse to a scheme that engages the survivor in a non-adversarial, more therapeutic way, may be lost.

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 features of a scheme that will make it effective, or otherwise create impediments for interested persons, will depend on a clear identification of the purpose of the scheme and a scheme structure that facilitates redress. The comments in this section of the paper are relevant to both internal and external redress schemes.

Survivors

In order to make a redress scheme effective for survivors, a scheme must operate in a relatively simple, transparent and non-legalistic manner. Further the existence of the scheme, and the way in which a survivor may opt to utilise the scheme, must be readily apparent, or made known to a survivor making a complaint in respect of an institution.

Survivors need to have confidence that their claims will be treated seriously and in good faith. They need to know that they will be heard.

A redress scheme should have a guiding principle that it does no more harm. The 'do no more harm' approach means that any person who engages with a survivor seeking redress conduct themselves in a manner that will, as far as possible, cause no further harm to the survivor. It also means that when assessing a claim an approach should be taken that seeks to do no further harm to the survivor.

For survivors, an effective scheme will be one that has the following features:

- where the survivor wishes, gives the survivor a 'voice' and provides for their participation at each stage of the scheme;
- allows the survivor to determine what forms of redress they wish to pursue;
- provides support for the survivor;
- provides individualised redress;
- provides appropriate information and contact points;
- where appropriate, reaches out to a survivor through healing and reconciliation;
- where appropriate, restores a relationship with the survivor;
- addresses claims in a timely manner; and
- maintains confidentiality and seeks to protect the survivor and his/her family members' privacy.

Features of a redress scheme which may be less effective or more difficult for survivors would be:

- an absence of transparency;
- failure to achieve equity of outcomes;

- a process that leaves the survivor angry, frustrated or damaged; and
- failure to achieve finality of a claim.

Institutions

The features of an effective scheme from an institution's perspective include:

- clear terms of reference;
- placing survivors at the forefront and respecting the survivors, to ensure that the process of resolving the claim does no further harm;
- the involvement of senior and appropriately skilled/qualified persons;
- an understanding of the interests of both the survivors and the institution;
- a willingness to accept moral and legal responsibility;
- being proactive in addressing claims;
- following a fair, transparent and consistent process in working through survivors' claims;
- providing an appropriate personalised apology or statement of regret to the survivor;
- clear guidelines or policies to work through forms of address;
- a willingness and ability to address systemic issues;
- providing for review and reflection of how any scheme may be improved;
- a clear understanding of the regulatory and legal environment in which claims need to be considered;
- providing for referral of aspects of claims to the police, other regulatory agencies or for internal investigation/action;
- promoting finality, in the sense that all parties have certainty of outcomes and the process delivers peace of mind to a survivor; and
- appropriate record keeping.

It is acknowledged that all of these features may not be able to be met by a proposed redress scheme, and that certain aspects, such as healing and maintaining a relationship with the survivor, may be best achieved by the relevant institution engaging meaningfully with the survivor. Once again, the purpose of a scheme is instrumental in addressing this question. A scheme with a discrete or modest objective may present a benefit (such as streamlining the monetary claims process) when operating in tandem with the broader redress processes established by the relevant institution.

Features of a redress scheme which may be less effective or more difficult for institutions would be:

- the absence of certainty or finality of outcome;
- failure to address the needs of all interested parties;
- the absence of appropriately qualified or skilled persons; and
- a lack of resources.

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?

Forms of redress

Any reparation should be proportionate to the gravity of the abuse and the harm suffered by a survivor. This necessarily means that not all claims will result in the same outcome.

The elements set out below are all important aspects of appropriate redress. The Salvation Army strongly believes that if there was to be an external scheme that at the very least some of the matters set out below should still be able to be provided by the institution as a direct response to the survivor. The Salvation Army does not say that institutions should be able to force survivors to receive their engagement if a survivor does not wish to do so, but it strongly feels that the survivor and the institution should be given the opportunity to engage in as much of the process as possible if they are comfortable doing so.

The forms of address may involve:

- Restitution
 - Achieving a sense of justice;
 - Assistance with accessing historical records;
 - Assistance with restoring family and social relationships;
 - Acknowledgement of the wrongs done through the giving of a personalised apology.
- Financial reparation directed to:
 - Acknowledging harm and damage;
 - Addressing the specific needs of a survivor – medical, educational, housing and the like;
 - Reasonable legal costs.

- Rehabilitation
 - Counselling services;
 - Assistance with identifying and accessing services.
- Validation / Vindication
 - Measures aimed at ensuring that past wrongs are not repeated;
 - Verification of the facts, public disclosure where appropriate, and meeting the wishes of the survivors;
 - Public apologies, where requested by a survivor;
 - Commemorations and recognition of survivors;
 - Documentation of past history.
- Offender Accountability
 - Referral of individuals for disciplinary action, where appropriate.

Group benefits

The provision of group benefits is a difficult issue.

Firstly, the provision of group benefits assumes that there is a common interest or experience as between survivors. On that assumption, it forces individuals to be treated in common with others. This may not be their wish or desire. Further, while the experience of survivors may have common factors, the experience of each survivor is profoundly personal.

Secondly, this approach also overlooks the fact that other children may have been abusers. The line between victim and perpetrator may not be clear.

Finally, to provide a benefit to all former residents of a residential institution where abuse was widespread assumes that most or all of the residents experienced abuse. The experience of The Salvation Army in dealing with survivor claims to date indicates that this is not the case.

The Salvation Army would resist any scheme that diminishes an individual's experience and seeks to treat the survivor as simply a 'member of a group'. Having said this, acknowledging a group and any shared experiences is important in a holistic approach to redress. Using a reparation model, the 'group benefits' may be developed around acknowledgement, commemoration and support for

reunions of the survivors. For example, the suggestion of Barbara Cummings in response to Issues Paper 5² of the establishment of appropriate memorials.

Balance between individual and group redress

It is not clear what is meant by the question concerning balance between individual and group redress.

The Salvation Army would not advocate any scheme that seeks to 'balance' or trade off the interests of an individual for the interests of a broader group. The interests of each individual survivor are paramount and ought not to be diminished by reason of membership of a particular group.

- 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?**

Advantages of a national redress scheme

The advantages of establishing a national redress scheme would be consistency, transparency, accountability and funding of costs.

Disadvantages of a national redress scheme

A disadvantage of establishing a national redress scheme may be the taking of a less holistic approach to each survivor and a corresponding focus on the provision of financial assistance, at the expense of individual redress by personal engagement. This would also have the effect of taking the survivor out of the driver's seat as to the particular redress being sought.

Furthermore, such a scheme would not discipline or address individual offenders. There is also a concern as to the provision of procedural fairness to survivors.

Role of government institutions

There is no proper basis to exclude government institutions from the operation of a national redress scheme – indeed, survivors of abuse occurring in government run institutions should have the same expectations of consistency of outcome as survivors of abuse occurring in non-government run institutions. This is an important principle of parity which should not be over-looked otherwise it would inevitably create a significant tension amongst survivors that some are able to achieve fairer outcomes than others.

² 'Knowmore', on behalf of Barbara Cummings, submission to Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 5: Civil Litigation, page 1.

Funding of a national redress scheme

This question may 'put the cart before the horse'. If there was a national scheme, then two primary issues of funding arise: Firstly, the funding of the scheme and the agency administering the scheme, which is assumed to be a Commonwealth agency. Secondly, the funding of payments made to survivors.

The Salvation Army would resist having to contribute to funding the operation of a Commonwealth agency if it had no authority or capacity to engage the personnel, determine structures or question the costs. The funds which will inevitably be contributed by State, private or charitable institutions should not be used to fund the administration of a Commonwealth agency. Those funds would be better directed to survivors themselves. Therefore, the Commonwealth should bear the costs of creating and operating any national scheme.

The relevant institution or individual offender should be responsible for payments to survivors. Further, liability for such payments should not be apportioned between institutions - each institution should be responsible for their own wrongdoing. Then, such a scheme could operate on a debt-basis. An analogy may be found in the funding provided to the Administrative Appeals Tribunal to review a range of decisions made under the National Disability Insurance Scheme (NDIS).

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?**

Decision making - independent of the institution

This question does not identify what types of 'decisions' are being referred to but appears to presuppose a decision about the form of redress, not all the numerous decisions which are involved in administering a scheme. An internal redress scheme may take various forms and so it is difficult to determine hypothetically whether and to what extent decision-making of a redress scheme should be independent of the institution.

The Salvation Army does not support the suggestion that an internal scheme provide for decision making independent of the institution. The Salvation Army does not agree that an independent decision maker would better address the needs of, or achieve a better outcome for, survivors.

The additional resources and logistics in creating and operating such a scheme would be significant, and would likely impact upon the advantages of a redress scheme such as addressing claims in a timely manner. Further, if some decisions were to be made by an independent body, the survivor would be subjected to a further process by which they risk being re-traumatised.

In addition, the decision of an independent body may appear to a survivor to be imposed on the institution, whereas a voluntary allocation of funds to provide financial reparation to a victim has the advantage of demonstrating to a survivor acknowledgement by the institution of its moral responsibility.

External oversight

Again, it is not clear what is meant by 'external oversight'. The question does not provide any indication as to what body or organisation might exercise such oversight. There are a range of State agencies which oversee aspects of The Salvation Army's conduct.

If this question is really directed to transparency rather than decision making, then oversight could be achieved in a number of ways:

- regular reporting;
- auditing;
- oversight akin to an Ombudsman.

The Salvation Army believes that any final decision about quantification of a compensation payment to be made to a survivor should be made by the institution.

However, subject to the precise details, The Salvation Army may support a national protocol that establishes a 'best practice' redress scheme that each organisation is required to adopt. In this way, an external body (akin to an Ombudsman) could have regular oversight to ensure that the protocol is being adhered to and comprehensively implemented.

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

Again, the answer to this question will depend upon the purpose, nature and scope of any proposed redress scheme.

While, as a matter of general principle, an institution should be given the option of opting in or out of such a scheme, it is conceivable that the success of such a scheme and certain objectives (such as consistency of outcome) may depend upon the level of participation of institutions. Institutions should be consulted as to the actual mechanics and scope of any proposed mandatory redress schemes so that at the very least, they can provide empirical evidence to feed into the development of such a scheme, based on the successes and failures of claims handled by them in the past.

Again, subject to the precise details, The Salvation Army may support a national protocol that establishes a 'best practice' redress scheme that each organisation is required to adopt. In this way, an external body (akin to an Ombudsman) could have regular oversight to ensure that the protocol is being adhered to.

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?

Participation in a redress scheme should be optional for survivors and they should be free to reject such a scheme and elect to pursue civil litigation if they wish. It is a fundamental tenet of the common law that each person be free to pursue justice before a court, if they so desire. The Salvation Army notes the comments of the New South Wales Bar Association in response to Issues Paper 5, that participation in the establishment of a national compensation fund should be optional and not compulsory, and that such funds should not be used to replace or preclude common law remedies.³

That being said, if a survivor participates in a redress scheme, then they should not be permitted to 'double dip'; that is, to make a claim from the redress scheme and then bring a common law claim against the institution. This is not to say that the healing process and building of relationships is not ongoing, but that redress in the form of financial reparation (whether it occurs through a redress scheme or through the courts) should be made final. The Salvation Army would resist a survivor receiving a payment from a redress scheme and then using that payment to fund a common law claim and receive a further damages award. Allowing that to occur would be antithetical to a redress scheme and would only encourage litigation, possibly leading to re-traumatisation of survivors, risks of adverse costs orders and uncertainty of outcomes for all. In practical terms, a survivor who received money from a redress scheme and then chose to use that money to pay lawyers to bring a common law claim, could ultimately end up far worse off (i.e. he or she could spend all the money received from redress on legal fees, lose the court case and owe the institution a costs order).

³ New South Wales Bar Association, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 5: Civil Litigation, page 7

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?

It is not clear what is intended by reference to 'fairness'. It appears that the expression is used as a reference to equity or equality between all survivors regardless of the institution concerned. The Salvation Army submits that this is an unrealistic aspiration and again detracts from the individual experiences of survivors. The form of appropriate reparations should depend on the survivor, and not the perpetrator, the institution or the institution's capacity to pay.

The Salvation Army makes no submission on the question of successor institutions.

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?

Advantages

The advantages of including 'compensation' as an outcome of a redress scheme will depend on a number of factors.

First, the manner for calculating compensation commensurate with the method used by courts or tribunals means that questions of causation of claimed loss or different heads of loss would be taken into consideration. There may need to be a means of testing conflicting expert opinion about the onset of any claimed condition, the extent of the loss and any failure on the survivor's part to mitigate any loss.

Secondly, what standard of proof should apply? For example, there are a range of schemes that address onus with respect to historic claims. The assessment of pensions under the *Veterans Entitlements Act 1986* (Cth) is such an example.

Thirdly, the extent and form of payment of compensation. Consideration needs to be given to whether compensation is paid in the form of a lump sum or a pension. There should be a discussion on whether there should be a cap on the compensation available. A compensation scheme that alleviates the survivor of the burden and the costs of litigation may mean that it is appropriate to cap the amount of compensation available. A scheme which will not result in legal costs and the risks associated with litigation should be taken into account when determining the compensation 'awarded' to a survivor. In effect, a form of discount may be appropriate.

Finally, compensation of the kind determined by a court should result in finality of a claim.

The predominant benefits to adopting a substantive compensation scheme for all parties are finality, certainty and consistency.

Disadvantages

For survivors, compensation lump sum payments may lead to other issues with respect to taxation and for those in receipt of social security, the imposition of a lengthy preclusion period under the *Social Security Act 1991* (Cth).⁴ There would be a need for survivors to receive some legal advice as to the implications of pursuing a claim under such a scheme.

For institutions, the calculation of compensation under a non-adversarial redress scheme in the same manner as an award by courts in civil proceedings may be to unfairly prevent institutions from raising legal defences to claims and to completely ignore the benefit of any such defences they are entitled to raise.

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?

Once again, the answer to this question will depend on the purpose, nature and scope of any proposed redress scheme.

A scheme that is focused on the individual survivor and healing would not adopt stringent standards of proof, but perhaps rely upon the plausibility of the claims on the basis of certain fundamental inquiries into the circumstances of the claimed abuse. Guidance may be obtained from the administrative law notion of a duty of inquiry in the context of procedural fairness, where the courts enforce a duty to make an obvious inquiry about a critical fact, the existence of which could be easily ascertained.⁵

However, in the interests of promoting finality of outcome, an interminable cycle of inquiry (where inquiries are made and further information is sought from the claimant, whereupon further inquiries are made and further information is sought, and so on) should be avoided.

⁴ See ss 93V, 1164 and 1169 of the Act.

⁵ *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330; *C v T* (1995) 58 FCR 1, (1995) 136 ALR 703; *X v McDermott* (1994) 51 FCR 1 and *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429.

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?

Support may be in the form of counselling, education and other practical assistance. The Salvation Army's experience of the Esther Centre and later Lotus Place has been positive. These services provide valuable support to survivors.

The utility of the provision of legal advice (for the operation of a non-legal redress scheme) is not clear. The provision of legal advice in relation to the pursuit of alternative, legal means of redress may be considered, but it may also serve to undermine the objectives of the redress scheme. The provision of legal advice as regards the execution of any agreements which have the effect of extinguishing rights however, is an appropriate support service which could be made accessible to survivors (either through the provision of information relating to community based free legal services or reimbursement of limited costs for assistance being provided).

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?

The survivor should be required to disclose any sources of redress, compensation or ex gratia payments. All participants in a scheme (survivor and institution) should contribute to the principle of transparency. The scheme should prevent double dipping or unnecessary expenses being incurred. However, the disclosure of other payments does not necessarily mean there will be a deduction to payments that may be made.

The financial compensation obtained by a claimant via another scheme or process should be taken into account in determining whether and to what extent a claimant is to receive reparations under any proposed redress scheme. The Salvation Army does not support a scheme whereby there is no finality for all parties concerned. Any payment made under a redress scheme must extinguish common law rights, or it will possibly lead to re-traumatisation of persons through a litigation process.

Concluding comments

The Salvation Army welcomes the opportunity to make submissions on these important issues. The questions raised in Issues Paper 6 are a start.

There is a need for all relevant parties to come together to continue the dialogue and discussions about these important matters once more specific proposals have been identified through the Royal Commission.

Dated: 2 June 2014