COMMISSIONER FOR VICTIMS' RIGHTS, SOUTH AUSTRALIA – REDRESS AND CIVIL LITIGATION

Chap	Issue	Submission
2	**STRUCTURAL ISSUES**	
2	Whether they favour a single, national redress scheme led by the Australian Government or an alternative approach.	I favour a national redress scheme to ensure equity. The aims should be to acknowledge the offending (inappropriate) act or omission and to address the harm resulting from such. The sum paid should not be determined by the 'State' or 'Territory' where the offending act or omission happened. Discrimination based on geo-politico borders is neither just nor fair.
2	Whether we should recommend redress processes and outcomes for future institutional child sexual abuse	A sound legislative framework that is enduring is needed. One cannot rely on governments and other interests to do 'what is right by victims because it is right'. The Australian Law Reform Commission recommended a 'federal' state-funded compensation scheme in the early 1980s yet no Australia Government has acted on that recommendation. The possibility of a federal or national state-funded compensation scheme for victims of violent crime was omitted from the final discussions on the National Charter on Victims' Rights in the mid-1990s because such crime was identified 'constitutionally' with the States; therefore, not a federal concern. During negotiations for the National Framework on Victims' Rights and Victim Assistance the concept of national 'binding' standards, as exists in Europe, was removed from the agenda in order to progress other elements of the Framework. The suggestion in the early 2000s that a federal scheme might be examined was later removed from the agenda by representatives for the Australia Government. Similarly, one cannot rely on non-government institutions to treat victims fairly and with equity across jurisdictions. Case studies identified by the Royal Commission reveal unequal treatment and inequitable responses within institutions divided by geo-politico borders. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, as endorsed by Australia, stipulates that provision should be made for victims of crime to attain restitution from their offenders but also that when victims of violent crime cannot attain such restitution nation-states should provide compensation.

		This obligation is ongoing; so too must the scheme be ongoing. Furthermore, victims are entitled to material, practical, medical, psychological and other assistance to address their needs. Thus, redress should not be confined to monetary compensation. It requires, instead, a comprehensive suite of 'assistance' available and accessible when victims require rather than when those obliged believe appropriate. I am also mindful of Prof Kathy Daly's observation that "According to United Nations data, at least 8 million children (conservatively) were in institutional care in 2006. The next generation of institutional abuse survivors is growing up today. What will we be saying some decades from now, when they come of age and begin to tell their public victim stories" (2014, p198) Hopefully, these victim story tellers will encounter respect, compassion and a myriad of assistance to meet their needs without the need for a Commission of Inquiry to stir those obligated to help to act accordingly.
3	**DATA**	
4	**DIRECT PERSONAL RESPONSE**	
4	We welcome submissions that discuss the issues raised in Chapter 4, including the principles for an effective direct personal response and the interaction between a redress scheme and direct personal response.	Redress (including support services, restorative process and compensation) should be wrapped around victims. In other words, it should be driven by victims' needs; however the 'interventions' should be informed by victimological research (that is evidence-based). 'Do no more harm' should be paramount. It is evident that the process of seeking redress has caused victims a 'second injury' Reparations rather than redress might be a term that warrants consideration. Victims should not be misled into believing that 'redress' means 'full' compensation as one might expect via suing the 'actual' offender and/or others civilly liable for an act or omission giving rise to an entitlement to 'damages'.
5	**COUNSELLING AND PSYCHOLOGICAL CARE**	
5	on options for expanding the public provision of counselling and psychological care for survivors	There is no 'one service' fits all, so diversity is essential. Victimological research should inform the development of victim assistance programmes. A national Office for Victims of Crime as exists in the USA could be created to, among other functions, administer a grants programme to pilot and evaluate victim assistance programmes. The Office could also devise national standards for service delivery, training and education and so

		on.
5	on the relative effectiveness and efficiency of the options in meeting survivors' needs	The mix of services established to assist victims whilst the Royal Commission conducts its inquiry provides a 'platform' on which to build a comprehensive suite of victim assistance.
6	**MONETARY PAYMENTS**	
6	on the assessment of monetary payments, including possible tables or matrices, factors and values	Maims tables, matrices, point scales are intended to assist both the applicant and the assessor. They should help the applicant identify an approximate sum with his or her 'personal' or other injury (harm or hurt), so manage expectations, and to comprehend the basis for any offer. They should also guide decision-making and mitigate the adverse of assessor bias (such as stereotyping), misunderstanding or misconceptions, and serve as a yard-stick to hold decision-makers to account on review of their decisions. It is also important that processes, including decision-making, are visible (transparent) to those affected, primarily victims. The most frequent grievances raised with me as Commissioner are: victims not understanding how the sum of offered as redress was reached; challenging why another victim received a greater sum of money; and, anger because there is no independent review process. I hasten to add that in making such report on victims' grievances, I do not suggest any impropriety by the Crown in South Australia. Victims have been betrayed by those who perpetrated the abuse. They hold a sense of distrust that should not be ignored by those tasked with helping victims as well as those tasked with administering redress. No assessment tool is perfect – each has been tried in Australia under state-funded compensation and other schemes. It is important that clarity is provided to the victim-applicant, and in particular that redress is clearly distinguished from civil litigation / civil damages. Victims' expectations need to be managed, otherwise there is risk that they will feel they have been betrayed yet again by an 'institution'. Importantly, the introduction of an assessment tool should begin from a benevolent perspective and not as a means to manage costs or keep in a budget. Redress must first and foremost be about victims, their rights and their needs. With this in mind, I urge

		that the trend towards having a 'national' definition of 'catastrophic injury' be taken into account. The bar for such injury in road crash compensation and workers rehabilitation compensation and under examination for a national injury scheme is too high to benefit properly the majority of victims, especially those who suffer serious mental problems as a result of victimisation. Consider for example a young adult (innocent of any wrong-doing) who is shot at his or her workplace. Medical evidence confirms that the young person will not be capable of returning to work in the field in which he or she is trained. Under workers compensation, mindful of the concept of catastrophic injury, the permanent disability rates only 15-20%, which is less than the necessary 30%. The young adult is facing a maximum of 2 years financial and other assistance under the workers compensation scheme but then will have to argue a case for assistance under the national disability insurance scheme. The 'potential threat' that the young adult will not be able to afford to maintain his or her standard of living as well as quality of life has compounded his or her mental anguish. I urge therefore that a whole of person – whole of life approach be adopted and that victim assistance be case-managed, so victims are assisted in navigating the suite of assistance (including redress). Furthermore, I recommend that serious psychological incapacity (or prolonged mental illness) be incorporated any concept of catastrophic injury. I hasten to add that the example is not intended to demean the seriousness of the violence inflicted on those in care; it is not intended to set one category of victim of violence against another category; rather, it is intended (drawing on a 'case study') to illustrate the point on which I conclude above.
6	The average and maximum monetary payments that should be available through redress	I tend to favour the $100,000 cap because in South Australia, if agreed, that sum would match that proposed as the 'new' maximum for victims eligible to apply for state-funded victim compensation. Victims of sexual assault, like other victims of violent crime will be entitled to apply for a 'compensation' payment up to a maximum of $100,000. As a consequence of both the national redress scheme and the SA state-funded compensation scheme having a like maximum, a sense of equity will be

		apparent to victims of sex offences, no matter whether in an institution, in a domestic setting or other context. In a clinical sense, the effects are similar: for example, depression, anxiety, and post-traumatic stress disorder. I also suggest that provision be made under the redress scheme for a solatium payment. Under South Australia state-funded victim compensation, parents of child victims of homicide and spouses of homicide victims are entitled to apply for a solatium payment for grief – that is a payment in addition to compensation for pain and suffering, financial loss etc. It is proposed to extend eligibility for the grief payment to children (under 18 years of age) of homicide victims. It is also proposed to increase the grief payment maximum to $20,000. Furthermore, there is provision for the payment of funeral expenses, which is proposed to increase from $7,000 to $14,000. Solatium payments are intended to pay an additional sum to victims in more serious cases, which in SA are defined to be homicide. Under a national redress scheme, provision could be made so that the 'adjudicating authority' can make a payment for 'exceptional' effects. I hasten to add that monetary payments should be taken as one element of redress or 'reparations'. The monetary maximum could therefore be $100,000, plus treatment costs and/or solatium.
6	Whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme	Some of the victims I have encountered are so 'mentally unwell' due to the victimisation that they are 'incompetent' to manage their affairs, so help to do so should be available, including payments by instalments. Further, if a whole of person – whole of life approach is to be taken then payments might be needed to be staggered over a period of the victim's life.
6	The treatment of past monetary payments under a new redress scheme.	For equity, these payments should be taken into account; however, that victims have received payments should not preclude them from applying for further 'redress'.
7	**REDRESS SCHEME PROCESSES**	
7	Eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included	Any abuse that equates with a criminal offence should be covered. The focus has been on sexual abuse but some victims were tormented, illegally deprived of their liberty, subjected to unreasonable / unjustifiable violence under the 'guise of discipline. I reiterate the United Nations Declaration of Basic Principles of Justice for Victims of

		Crime and Abuse of Power obliges nation-states to compensate victims of violence if these victims cannot attain restitution from their offenders.
7	The appropriate standard of proof	The criminal burden of beyond reasonable doubt is too high. Reasonable belief seems too low given – assuming there is no sense of litigation woven into the scheme. In a few cases those accused might assert that the civil balance of probabilities is too low. That said, balance of probabilities is the test for most state-funded victim compensation schemes. If victims are being asked to compromise, then the scheme, including the burden of proof, should complement the compromise.
7	Whether or not deeds of release should be required	There should be provision to allow for a 'new' application or civil prosecution if 'fresh and compelling evidence' that was not reasonably available to either the victim or the redress authority at the time of settlement. A witness (unknown at the time of settlement) might come forward sometime after a victim has signed a 'deed' or 'discharge'; and that witness might have compelling evidence that would allow the victim to pursue civil litigation. The option should not be beyond reach. In certain criminal matters, both the State and the 'convicted' offender can apply for a new hearing on grounds that fresh and compelling evidence is available. Perhaps a like test could be devised for the redress to civil litigation cases. Offenders should not be able to shy away or avoid being called to account for the harm caused simply because a victim signed a 'deed' or 'discharge' in good faith based on his or her knowledge and advice at that point in time.
8	**FUNDING REDRESS**	
8	The modelling of required funding and the possible approaches to funding redress.	A national fund will be needed. Perhaps lessons might be learnt from the operation of the Victims Fund within the jurisdiction of the International Criminal Court.
8	Appropriate funding arrangements	All money collected for or assigned to redress should be expendable. Governments should not be permitted to use the money for any other purpose and they should also be prohibited from holding it to off-set other expenditures.
8	Appropriate funder of last resort arrangements	Payer of last resort is another element necessary to ensure equity among victims of violence throughout Australia.
8	The level of flexibility that should be allowed in implementing redress schemes and funding arrangements	Flexibility – benevolence – payments as acts of grace: these are among the key tenets that should underpin redress. As well, I urge clarity regarding the model litigant. On the one hand, it suggests that the 'legal authority or entity' acts justly and fairly, even to its own detriment in order to help the applicant attain justice. In South Australia, the

		Crown administers the state-funded victim compensation scheme and the redress scheme. The former Attorney-General, Hon Michael Atkinson MP, instructed the Crown to be a model litigant. The Crown has been described as "the fountain and head of justice and equity": *Dyson v Attorney General* [1911] 1KB 410 at 421. The Crown's Practice Guideline states, "Put simply, this means that because the State has created the courts and the legal system it must set an example for the community which it leads and governs." On the other hand, Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342 stated, "I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date." It is this alternative view that worries victims and me, as Commissioner for Victims' Rights. Model litigants should not delay justice for victims by turning to overly technical legal points. Some victims have encountered responses – obstacles – that from their perspectives are contrary to their non-legal concept of the model litigant. Positive terms and phrases associated with model litigant are: acting with complete propriety, acting fairly and ethically, not contesting liability if 'institution' knows that the dispute is really about quantum, (importantly from the victim-perspective) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim, and apologising where the 'institution' is aware that it or its lawyers have acted wrongfully or improperly.
9	**INTERIM ARRANGEMENTS**	
9	Issues raised in Chap 9, including the additional principles for interim arrangements and possible structures	Interim payments are important and necessary to help victims in necessitous circumstances. By necessitous, I do not mean exclusively financial hardship. It is my understanding that the Australian Tax Office has a broader understanding (ruling) on necessitous, which takes into account the personal circumstances of the 'victim', the nature of the 'incident', and the effects of the 'incident'. Victims should not be 'forced' to 'jump through hoops' to get help when they need it, including financial assistance to deal with an effect of the victimisation. I reiterate my

		point on the model litigant because the 'positive principles' as well as the notion that an 'institution' should not rely on overly technical point to take advantage of a victim who often does not have the knowledge and skill in addition to financial resources to compete with the institution.
9	The views of survivors, survivor advocacy and support groups and institutions on whether there are other issues on which direction or guidance might be required for interim arrangements.	
10	**CIVIL LITIGATION**	
10	The options for reforming limitation periods and whether any changes should apply retrospectively	Limitation of time law should be amended and such amendment should apply retrospectively.
10	The options for reforming the duty of institutions and whether any changes should apply retrospectively	Retrospectivity should no longer be a 'shield' behind which guilty people hide. Assault has been a crime since 'white settlement' (colonisation) when Australia inherited the British law and legal systems. Those who perpetrated abuse on children in care, for instance, knew their acts were illegal. That they escaped prosecution and often continued to offend with impunity should not be excused by a 'legal barrier' that acts as a 'legal fiction' insofar as it ignores the reality for the victim and excuses the perpetrator from being called to account. Many victims were children – disenfranchised and disempowered and confronted with adversity and disbelief – so it is understandable that they did not pursue their victimisers within 3-years or so of the abuse.
10	How to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts	Perhaps consideration might be given to the USA law on suing third parties, especially on grounds of negligence of entrustment, negligence of supervision, negligence of training, and so on.
10	Whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed	Perhaps consideration might be given to the USA law on suing third parties, especially on grounds of negligence of entrustment, negligence of supervision, negligence of training, and so on
10	Whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims	A set of guidelines or principles governing treatment of victims and such cases should be formulated and enforceable via a hierarchy of sanctions.
10	Whether any changes may have adverse effects on insurance availability or coverage for institutions, including	Insurance companies manage risk. Risky institutions will have to pay higher premiums – so be it. Under workers compensation schemes, those organisations that tackle

	specific details of the adverse effects and the reasons for them.	workplace dangers and the like pay lesser premiums than those that do not manager dangers. This approach to sharing the cost of risk is common. Institutions should be required to hold insurance, or if self-insured they should be hold money in trust for payments to victims. Professionals (such as surgeons) have to hold insurance or subscribe by payments into a whole of profession fund (such as funds covering lawyers). Options exist – so this issue should not be allowed to blur the primary aim to help victims.