



Anglican Church of Australia

Royal Commission Working Group

CONSULTATION PAPER - REDRESS AND CIVIL LITIGATION SUBMISSION

This submission is made by the Royal Commission Working Group (RCWG) appointed by the Standing Committee of the General Synod of the Anglican Church of Australia (**ACA** or **Anglican Church**) to coordinate a response on its behalf of to the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**). The submission responds to questions in the *Consultation Paper: Redress and civil litigation* issued by the Royal Commission in January 2015 (**Consultation Paper**).

The ACA operates under a decentralised structure and its core units of organisation are the 23 dioceses. There are also mission agencies, social welfare agencies, Anglican schools and parachurch organisations with varying degrees of autonomy. A detailed document outlining the structure of the Anglican Church of Australia was provided to the Royal Commission in June 2013 and it is attached again for your information.

While the RCWG, in preparing this submission has consulted with all dioceses and some Anglican agencies, it should not be assumed that all views expressed in this submission are commonly held by all 23 dioceses and agencies. It should be noted that each diocese has responsibility for the development, adoption and implementation of redress schemes operating within their jurisdiction. Each autonomous agency, school and organisation has a similar responsibility.

PREFACE

The ACA is committed to responding to the needs of survivors of abuse. There has been a common approach to developing consistent procedures for supporting those who come forward through the Church's complaints and investigation processes. In many dioceses this has extended to the development of redress schemes to provide pastoral support and practical assistance, including monetary payments, to people who have been abused. These schemes are promoted as an alternative to civil proceedings but the ACA acknowledges the right of a survivor to choose how they wish to engage with the Church and their right to initiate civil proceedings at any time.

Redress schemes offer the opportunity to provide a timely, holistic and compassionate response to survivors. While in this submission the RCWG has focussed on the operational implications of the questions in the Consultation Paper this should not be seen as a retreat from its commitment to support a process designed to address the financial, emotional and spiritual needs of survivors.

STRUCTURAL ISSUES

1. Should there be a single, national redress scheme led by the Australian government or an alternative approach?

The ACA considers that whatever model for the delivery of redress is adopted it is essential that there be consistency in outcomes for survivors irrespective of which institution is involved or where the abuse occurred. A fundamental principle of any redress scheme must be that survivors are treated in substantially the same manner where their abuse and its impact are similar and ideally a scheme which operates consistently within a jurisdiction.

The ACA favours a model for the delivery of redress that responds in a timely manner to survivors and does not divert resources from their support into the administration of the scheme. The ACA favours an holistic model which provides an opportunity for survivors' views to be acknowledged and honoured (for example meetings with representatives of institutions at which their stories can be heard and an apology received). The more that the administration and implementation of redress is removed from institutions, including the ACA, the more difficult it will be to ensure that the three important elements of redress identified in the Consultation Paper can be effectively implemented.

The RCWG considers an effective model for the delivery of redress is through a universal joint scheme for government and non-government institutions and survivors that contains the following features:

- (a) institutions in each jurisdiction to establish a corporate vehicle along the lines of the Financial Ombudsman Service (**the Scheme**);
- (b) the applicable State or Territory government to provide the necessary legislative underpinnings for the Scheme;
- (c) the Scheme through its constitution and policies and procedures to give effect to the mandated elements and principles of redress such as outlined in this submission;
- (d) the Scheme to be implemented by its officers (where an institution does not have an accredited scheme or where a survivor does not wish to deal with an institution), or by accredited institutions (where an institution satisfies the criteria set by the Scheme in its own redress processes); and
- (e) the operation of the Scheme to be subject to regular audit to ensure delivery conforms to the mandated elements and principles of redress.

2. Should there be redress processes and outcomes for future institutional child sexual abuse?

The ACA supports redress processes and outcomes for future institutional child sexual abuse. Redress schemes within the ACA do not distinguish between past and future child sexual abuse. They are designed to provide an holistic response to survivors and in particular to respond to their personal needs.

It is important that survivors of future child sexual abuse have a choice whether to engage in civil litigation or in a redress scheme. One aspect of a redress scheme is a monetary payment. It is important to the ACA that a redress scheme also offers a pastoral approach to survivors that provides other outcomes such as the opportunity to hear an apology from a Bishop or a senior Anglican Church officer in the relevant diocese, to receive counselling and spiritual support, and to have other needs addressed.

Some survivors will not wish to engage in civil litigation which by its nature is adversarial. Further, some survivors will have desired outcomes beyond monetary compensation and accordingly will wish to participate in a redress scheme. It is of paramount importance that this choice is maintained for survivors.

DIRECT PERSONAL RESPONSE

3. What are the principles for an effective direct personal response?

The ACA supports the opportunity, through a redress scheme, to provide a direct and genuine personal response to survivors should they wish to engage with the Anglican Church. The seven principles identified in the Consultation Paper as they are applied in the dioceses and agencies of the ACA are critical to ensuring such a direct personal response to survivors is effective. In some cases being responsive to survivors' needs will involve an on-going process over a considerable time.

It is important that training, professional supervision or other similar supports for institutional leaders are put in place to ensure that direct personal responses continue to be effective for survivors.

4. What are the principles for the interaction between a redress scheme and direct personal response?

The ACA is committed to providing an holistic personal response to survivors of child sexual abuse whether or not the survivor participates in a redress scheme. The direct personal response begins when the survivor makes contact with the Anglican Church and continues for as long as the survivor wishes to engage with the Anglican Church. Usually the first response will be provided by an experienced person with responsibility for guiding survivors through the relevant diocesan or agency complaint and redress processes.

An essential component of responding to survivors is offering an empathetic, direct personal engagement. This will commonly involve a meeting with a senior officer of the Anglican Church (usually a Bishop) in which the survivor can choose to tell their story and describe the impact of the abuse, be listened to, receive an apology and be informed as to how the Anglican Church has responded to the abuse to make every effort to ensure there is no reoccurrence. The survivor will have control as to the timing and extent of the direct personal response and will be offered support throughout the process.

COUNSELLING AND PSYCHOLOGICAL CARE

5. What are the options for expanding the public provision of counselling and psychological care for survivors?

and

6. What are the relative effectiveness and efficiency of the options in meeting survivors' needs?

The provision of counselling and psychological care to survivors by appropriately trained and accredited counsellors is essential. The training should include information about child sexual abuse, post-traumatic stress disorder, trauma, the effects of child sexual abuse in the family and other relationships, and issues that arise from child sexual abuse occurring in institutions. The accreditation should be provided by professional bodies for counsellors and psychologists such as the Psychotherapy and Counselling Federation of Australia and the Australian Psychological Society.

Counselling and psychological care for survivors should encompass:

- (a) specialised counsellors being made accessible to rural, remote and indigenous communities;
- (b) specialised family and relationship counselling when required; and
- (c) on-going episodic counselling on a needs basis during the survivor's lifetime.

It is also essential that the provision of counselling and psychological care for survivors be adequately funded. It is not possible for the RCWG to assess the relative effectiveness and efficiency of the three options identified in the Consultation Paper to meet survivors' needs without knowledge of the qualifications and experience required of those providing this specialised care and the extent of available funding from the Australian government and other sources.

It is likely to be unsustainable for institutions to provide counselling and psychological care for survivors without limit as to time and amount. One method to ensure the provision of on-going counselling and psychological care would be the one off payment by institutions, of an actuarially determined amount for each survivor, into a dedicated, externally managed fund, with any shortfall in the fund to be met by government.

MONETARY PAYMENTS

7. What are the principles for the assessment of monetary payments, including possible table or matrices, factors and values?

The principles for assessment of monetary payments must be uniform irrespective of which institution is involved and where the abuse occurred. The use of clear criteria in tables or matrices will ensure that like cases are treated in like fashion and that the amount of monetary payment is the same or similar for survivors in similar circumstances.

The severity of the abuse and its impact are the principal relevant factors and accordingly should form part of the table or matrix. The meaning of the term “distinctive institutional factors” referred to in the Consultation Paper is unclear. Further, it would be unsatisfactory for the monetary payment to vary according to the institution in which the abuse occurred. This would potentially undermine the acceptance of a redress scheme by survivors.

It is essential that there be acceptance by all institutions of the prescribed factors included in such tables or matrices, and that they are applied in a consistent way. Otherwise there will be disparity in the amount of monetary payments for survivors.

8. What should be the average and maximum monetary payments that should be available through redress?

In order for redress schemes to be effective, fair and viable long term the sustainability of individual institutions’ contributions to monetary payments should be taken into account. It will be important for institutions to know the quantum of average payments in addition to a specified maximum cap. This is reflected in the statements in the Consultation Paper about the quantum of average payments and the broad assumptions that underpin the actuarial modelling.

The RCWG cannot yet express a view on the amount of the maximum payment that should be available through a redress scheme. Before any particular maximum amount is determined, further research and consultation should occur.

Whatever maximum cap is recommended by the Royal Commission the overall cost of providing redress should remain the same. The RCWG considers that a higher level of proof should be satisfied for payment in a higher range and that additional procedures may need to be applied.

If the overall cost of monetary payments is too high it may jeopardise the viability of some institutions which currently provide valuable services to children and the broader community.

9. Whether there should be an option for payments by instalments which should be offered by a redress scheme?

The RCWG supports the availability of payments by instalments should survivors wish to receive instalments. The Anglican Church's experience has been that survivors prefer lump sum monetary payments. The RCWG suggests that this option could be coordinated by an externally managed fund into which institutions pay a lump sum and from which instalments could be paid to survivors.

10. How should past monetary payments be treated under a new redress scheme?

The present value of past monetary payments should be taken into account under any new redress scheme. Otherwise there will be inequities between survivors in the level of monetary payments received.

REDRESS SCHEME PROCESSES

11. What should be the eligibility for redress, including the connection required between the institution and the abuse and the types of the abuse that should be included?

Eligibility

There should be clear criteria for assessing the connection between the abuse suffered by the survivor and the institution. The Consultation Paper suggests three possible connections:

- (a) the abuse occurs on premises of the institution or where activities of an institution take place or in connection with the activities of the institution, in circumstances where the institution is or has been treated as being, responsible for the contact in which the abuse was committed between the abuser and the survivor;
- (b) the abuse is engaged in by an official of the institution in circumstances where the institution has or its activities have, created, facilitated, increased or in any way contributed to the risk of the abuse or the circumstances or conditions giving rise to that risk;
- (c) the abuse happens in any other circumstance where an institution is or should be treated as being responsible for adults being in contact with children.

These suggested connections include circumstances in which the ACA should not be seen as responsible for the abuse as set out in the circumstances below (the paragraph numbers corresponding to the paragraph numbers above):

- a) the ACA commonly makes its premises available to the community through licensing or similar arrangements. It should be clear that the ACA is not responsible for any child sexual abuse that occurs on its premises when a licensee or other person is undertaking an activity on its premises, such as in the case of a community or business activity operating independently out of a church hall.
- b) the ACA undertakes its ministry through its “officials” being clergy, paid employees and volunteers. The suggested connection will generally exist in the case of clergy by virtue of their status. However, the suggested connection in the case of paid employees and volunteers is too wide and would inevitably encompass situations where the abuse occurs in circumstances completely unrelated to any responsibility of that person. In these cases the responsibility of the ACA should be limited to situations where the person is acting within the course of their responsibility.
- c) the other circumstances giving rise to the responsibility of the actual/deemed responsibility of the institution require clear definition as otherwise there will be a lack of clarity as to whether a survivor is eligible for participation in a redress scheme.

Types of Abuse

The Consultation Paper queries whether a redress scheme should be extended to other forms of abuse including “physical assault, exploitation, deprivation and neglect”. Some dioceses in the ACA have experience in responding to complaints of abuse in these categories, particularly historical abuse occurring in children’s homes.

While it is possible to respond to other forms of abuse on an individual basis, a redress scheme designed to encompass the broadest definition of abuse would require complex eligibility criteria and assessment processes. The RCWG supports a redress scheme designed to respond to the needs of survivors of sexual abuse, and physical abuse which was unlawful at the time the abuse took place.

12. What should be the appropriate standard of proof?

In the redress schemes operated by the ACA there is a distinction as to the standard of proof between past child sexual abuse where the perpetrator is dead or is no longer connected with the Church or cannot be identified, and such abuse where the alleged perpetrator denies its occurrence.

In the former situation, the standard of proof is “plausibility” in the sense that there will be acceptance that the abuse occurred where it is clear that the survivor participated in Anglican Church activities and the alleged perpetrator was connected with the Anglican Church.

In the latter situation, the standard of proof is “the balance of probabilities“. The rationale for the higher standard of proof in these circumstances is one of fairness, given that in cases where the abuse is denied, that denial can be tested in a disciplinary process.

13. Should deeds of release be required?

The RCWG supports a deed of release being signed by a survivor, when agreement has been reached about the amount of monetary payment. A deed of release will bring finality as to the monetary payment for both the survivor and the relevant diocese or agency of the Anglican Church.

It may be necessary to review the amount of monetary payment if there is a material change in circumstances. Where that situation is established a previously signed deed of release should not prohibit a further response.

Before signing a deed of release, a survivor should be required to obtain independent legal advice. The relevant diocese or agency of the Anglican Church should pay for that advice up to a specified reasonable amount.

The ACA acknowledges the pain that many survivors have experienced from the silence surrounding their abuse. In acknowledgement of the additional trauma inflicted by this silence, the RCWG supports deeds of release containing no confidentiality obligation on the part of the survivor. Nor would any deed of release preclude payments for any on-going counselling and psychological care through the fund referred to in the answer to Questions 5 and 6 above.

14. Are there any other key elements of redress scheme processes?

The RCWG does not consider that there are any other key elements of redress scheme processes.

FUNDING REDRESS

15. What are appropriate funding arrangements?

The RCWG accepts that the relevant diocese or agency of the ACA should fund the various elements of redress for survivors who satisfy the eligibility requirements including the connection with the ACA.

16. What are appropriate funder of last resort arrangements?

The funder of last resort should be government: whether the Australian government or the government of the jurisdiction where the institution existed. It would not be appropriate for institutions to fund redress for survivors who were not abused in their institutions. One of the important functions of government is to provide community services which otherwise would not be available. In this respect the government would be acting on behalf of the community and in a role similar to paying compensation for crimes.

17. What level of flexibility that should be allowed in implementing redress schemes and funding arrangements?

The RCWG supports flexibility in implementing redress schemes provided there is consistency in the provision of redress to survivors irrespective of the institution or the jurisdiction in which the abuse occurred.

18. Are there are other issues on which direction or guidance might be required for interim arrangements?

It is likely that there will be some delay between the recommendations of the Royal Commission for redress schemes and their implementation. In the intervening period institutions should review their redress schemes in the light of the issues outlined in the Consultation Paper, and publish details of their redress scheme on their websites.

19. Should limitation periods be reformed and any changes applied retrospectively?

The RCWG supports the reform of limitation periods to provide a greater period of time for survivors to commence civil litigation. This reform would recognise the significant delay for survivors in coming to terms with their abuse and deciding to commence civil litigation.

There are significant difficulties in making any changes to limitation periods retrospective. These difficulties include prejudice for institutions where, through the loss of records and/or the unavailability of relevant witnesses, they will be unable to obtain a fair trial. At the very least there should be an opportunity for the court to refuse an extension of the limitation period, or to dismiss proceedings, where there is actual prejudice such that the institution is unable to obtain a fair trial.

20. Should the duty of institutions be reformed and any changes applied retrospectively?

Statutory duty of care

The creation of a statutory duty of care requiring institutions to take reasonable care to prevent sexual abuse of children in their care is unlikely to extend the scope of the duty of care which applies to institutions under the general law.

Vicarious liability

Reversing the onus of proof for institutions' vicarious liability for child sexual abuse would create incoherence in the law as other employers are not vicariously liable for other torts unless it was proved that the tort occurred in the course of employment.

Absolute liability

Imposition of strict liability upon institutions for sexual abuse is likely to work unfairly. It would impose liability upon those institutions which have put in place proper systems to care for children, where without fault on their part, abuse has occurred. Any such reform is likely to impair the ability of institutions to obtain affordable insurance and may even cause some institutions to cease providing particular services that benefit the community.

Retrospectivity

Any such changes should not be applied retrospectively as institutions have arranged insurance on the basis of the existing law.

21. How should difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts be addressed?

The RCWG accepts that each diocese and agency of the ACA should ensure that there is a corporation or a nominal defendant which can be sued where there is child sexual abuse. A condition for an institution providing services to children should be that there is adequate insurance for child sexual abuse by its officials. Further consultation with the insurance industry will be required to determine whether such insurance cover will be available to all institutions.

A proposal to make the assets of property trusts available to meet claims of child sexual abuse creates complex legal difficulties. Those trusts are in many instances for specific religious charitable purposes, the assets of which, under the current law, are not available to meet such claims.

22. Should non-government institutions adopt principles for how they will handle civil litigation in relation to child sexual abuse claims?

All institutions should handle both mediation and civil litigation in relation to child sexual abuse claims sensitively and compassionately. The ACA is committed to handling mediation and litigation in relation to child sexual abuse claims in a timely and responsible way. The ACA is open to exploring how adoption of model guidelines for litigation could significantly reduce the stress associated with civil litigation for survivors.

23. Will any changes have any and if so what adverse effects on insurance availability or coverage for institutions?

While it is likely that any reforms to civil litigation will have an effect on insurance, at least the level of premiums and perhaps the inclusion of additional exclusionary conditions, it is not possible to obtain advice from the insurers of the ACA without knowing details of any particular reform.

Dated: 9 March 2015