

# A Victorian redress scheme for institutional child abuse

Public Consultation Paper

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## Foreword

The Family and Community Development Committee of the Victorian Parliament's Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations (the Parliamentary Inquiry) delivered its final report, *Betrayal of Trust*, on 13 November 2013.<sup>1</sup>

*Betrayal of Trust* is a landmark report. It found that there was a "serious incidence" of institutional child abuse "in some of our most trusted and important non-government institutions and organisations", and contains crucial findings and recommendations that have brought the issue of institutional child abuse to the forefront of public attention.<sup>2</sup> The report is a critical step toward righting the wrongs of the past.

The release of this consultation paper is the next step in the Victorian Government's public commitment to implement all outstanding recommendations from *Betrayal of Trust*. Action has already been taken on a substantial number of the recommendations, including the recent removal of the "statute of limitations" for civil actions founded upon child abuse, via the *Limitation of Actions Amendment (Child Abuse) Act 2015*. Further detail about the Government's progress on *Betrayal of Trust* can be found in this paper at section 10.

The Government also recognises that institutional child abuse is an issue that is not limited to Victoria, and continues to support the work of the national Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). The Government has taken an active role in Royal Commission processes, including at roundtables, public hearings, and other discussions regarding redress and civil litigation.

Later this year, the redress and civil litigation recommendations of the Royal Commission will be released, and the Government will respond to those recommendations. Recognising that some issues are best resolved with a national approach, the Victorian Government remains prepared to consult and work with other Australian governments to address the harms of institutional child abuse.

Adequate consultation is critical to dealing with the many issues raised by institutional child abuse, particularly those contained within the scope of this consultation paper. The Government thanks you for your interest in this area of policy and reform, and will consider all submissions received as it continues to progress its commitment to respond to *Betrayal of Trust*.

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<sup>1</sup> The full text of the *Betrayal of Trust* report is available at <http://www.parliament.vic.gov.au/fcdc/article/1788>

<sup>2</sup> *Betrayal of Trust*, page 3.

# 1 Introduction

## 1.1 Recommendation 28.1 from *Betrayal of Trust*

The Parliamentary Inquiry considered the possibility of creating an alternative avenue for resolving institutional child abuse claims outside of civil litigation, due to the practical and legal barriers often encountered by survivors of abuse within the civil justice system.

Recommendation 28.1 of *Betrayal of Trust* proposed the establishment of what is commonly known as a “redress scheme”, normally established to deliver financial payments and other forms of redress (such as counselling) as an alternative to traditional avenues of litigation. The recommendation stated:

*That the Victorian Government review the functions of the Victims of Crime Assistance Tribunal (VOCAT) to consider its capacity to administer a specific scheme for victims of criminal child abuse<sup>3</sup> that:*

- enables victims and families to obtain resolution of claims arising from criminal child abuse in non-government organisations;
- is established through consultation with relevant stakeholders, in particular victims;
- encourages non-government organisations to voluntarily contribute a fee to administer the scheme; and
- ensures non-government organisations are responsible for the funding of compensation, needs and other supports at amounts agreed through the process.

The Victorian Government has committed to implementing all outstanding recommendations from *Betrayal of Trust*, including recommendation 28.1.

## 1.2 The work of the Royal Commission

Since its establishment in 2013, the Royal Commission has been examining avenues of civil justice for survivors of institutional child sexual abuse, including the provision of redress.

On 30 January 2015, the Royal Commission released a public consultation paper on redress and civil litigation, setting out options for potential recommendations, and inviting submissions in response. The Royal Commission subsequently held a public hearing on 25-27 March 2015, allowing selected parties to speak to their submissions and answer questions from the Commissioners.

The Victorian Government responded to the Royal Commission’s consultation paper, and appeared at the subsequent public hearing. The Government indicated that it supported the work of the Royal Commission, and was continuing to develop options for a potential Victorian redress scheme in response to *Betrayal of Trust*, including the pending public release of this paper.

## 1.3 Participation in a national redress scheme

The current favoured position of the Royal Commission is a national redress scheme, led by the Commonwealth, with the participation of all other Australian governments and relevant non-government organisations (NGOs).<sup>4</sup>

The Victorian Government continues to be open to participating in a national redress scheme or cooperating with other Australian governments. However, it is by no means clear that a national scheme will eventuate. It appears that the broad support required for a national redress scheme is missing amongst many other Australian governments, particularly from the Commonwealth.

Given this uncertainty, the Victorian Government recognises the importance of continuing to fulfil its commitment to work on the implementation of *Betrayal of Trust*. The release of this consultation paper is a critical step in that process, and the input received will be of great value to the Government in determining what form of redress scheme is adopted in Victoria.

<sup>3</sup> The Parliamentary Inquiry defined “criminal child abuse” as including (but not being limited to) unlawful physical assaults; sexual abuse offences such as rape or indecent assault under the *Crimes Act 1958*; acts of criminal neglect; and the facilitation of such offences by others: *Betrayal of Trust*, page 29-30.

<sup>4</sup> Royal Commission redress and civil litigation consultation paper, page 10.

The Government will respond to and pay close attention to the redress and civil litigation recommendations of the Royal Commission, expected in August 2015. The work of the Royal Commission has proven invaluable to the Government as it continues to respond to *Betrayal of Trust*.

## 2 An introduction to redress

### 2.1 What is a redress scheme?

In the context of institutional child abuse, redress schemes provide a mechanism to address harms or wrongs against an individual or group. Redress schemes are an alternative to traditional, adversarial models of compensation, such as civil litigation. A redress scheme aims to provide a holistic response to survivors of institutional child abuse.

### 2.2 Advantages of a redress scheme

When compared to other civil justice options (such as civil litigation), a redress scheme:

- can be designed in consultation with stakeholders, including abuse survivors, institutions that will provide redress, and legal and advocacy groups that may assist people to claim redress;
- avoids a number of the anti-therapeutic consequences of the civil justice system, including delay, cost, formality, and adversarial processes such as cross-examination;
- has the potential to allow greater flexibility of outcomes, offering a broad range of needs-based benefits beyond financial compensation, such as counselling and an acknowledgment and apology for harms suffered;
- acknowledges that survivors of abuse often seek more than just a financial payment; and
- can respond to a wider range of survivors and harms than traditional legal processes.

### 2.3 The scope of redress

#### 2.3.1 Past and existing schemes

Redress schemes have been established in the past by both governments and NGOs. The Royal Commission provides a concise overview of selected redress schemes at Appendices A and B of their redress and civil litigation consultation paper.<sup>5</sup>

Past government-run schemes in Australia have been targeted in their scope. For example, the Western Australian government set up Redress WA in May 2008 to provide redress to survivors of child abuse and neglect in state care, and the Commonwealth launched the Defence Abuse Reparation Scheme in April 2013, to assess and respond to cases of abuse in Defence.

Similarly, NGO-run redress schemes in Australia have been limited to resolving claims of abuse within that particular organisation—for example, the Catholic Archdiocese of Melbourne has operated the Melbourne Response since 1996, to respond to claims of abuse against diocesan personnel, and provide financial and non-financial benefits to survivors.

By contrast, redress schemes with a larger scope have operated overseas. In Canada and Ireland, governments have established and administered schemes to address claims of abuse across *both* government and non-government institutions.

#### 2.3.2 The scope of recommendation 28.1

Due to the terms of reference of the Parliamentary Inquiry—which was not tasked with examining child abuse within state institutions, or government responses to abuse—recommendation 28.1 proposed a redress scheme that would *only* encompass NGOs.

However, unlike many other Australian states, Victoria has not operated a government-run redress scheme for survivors of institutional child abuse. The absence of a state-run redress scheme in Victoria presents a unique opportunity to respond to the diverse needs and experiences of a wider group of survivors than has been done in other Australian jurisdictions.

<sup>5</sup> The Royal Commission's redress and civil litigation consultation paper is available online at: [http://www.childabuseroyalcommission.gov.au/documents/redress/final\\_complete\\_consultation-paper-redress-and-civi.pdf](http://www.childabuseroyalcommission.gov.au/documents/redress/final_complete_consultation-paper-redress-and-civi.pdf)

Whereas past Australian government-run redress schemes have been targeted in their scope, and only addressed harms suffered in specific government institutions, the Victorian Government is considering options for a redress scheme to address abuse that occurred in *both* government and non-government institutions, with funding responsibilities shared across all participating organisations.

This paper therefore goes beyond the scope of *Betrayal of Trust* and proposes, for reasons of fairness and equity, a redress scheme in which the Victorian Government would also participate. It would not be appropriate for the Government to establish a redress scheme in which it did not itself participate—both in terms of equality of outcomes for survivors of institutional child abuse across Victoria, and in terms of fairness for the wide range of NGOs that will be expected to participate in the scheme.

The Victorian Government sees the process of redress as sitting alongside Victoria's long-standing commitment to respond to claims of institutional child abuse in an appropriate manner. Since 2001, the State has managed litigation in accordance with its Model Litigant Guidelines,<sup>6</sup> which guide the State to act fairly, consistently, and without resort to unnecessary legalism when dealing with claims.

Since 2014, the State has also adopted the Common Guiding Principles, which are policy guidelines that complement the Model Litigant Guidelines, and support the State in responding to all child sexual abuse claims in a way that is consistent across Government, and responsive to the needs of survivors.<sup>7</sup> The Victorian Government also funds counselling and services where appropriate, including about \$2.4 million a year for the provision of counselling and support services by Open Place to Victorian Forgotten Australians.

The redress scheme contemplated by this paper is therefore likely to be wider in scope than any institutional child abuse redress scheme previously seen in Australia. To the extent that it is possible, the proposed scheme will aim to provide equal access and treatment to survivors of institutional child abuse across Victoria.

This is consistent with the options being examined by the Royal Commission. The Royal Commission's consultation paper envisions a scheme that would encompass a broad range of governments and NGOs, with funding contributions from all participating institutions.

## 2.4 The essential elements of a redress scheme

The Royal Commission has stated that a redress scheme should contain three essential elements:<sup>8</sup>

- 1) A "direct personal response" that recognises the differing wishes of those who seek redress from an institution—some wish to re-engage with an institution, others seek an apology and an acknowledgement of their abuse, while others want no further contact with an institution.
- 2) Access to counselling and psychological care.
- 3) A financial payment.

The Victorian Government notes the importance of these three elements.

Further, the Royal Commission has proposed general principles to guide the provision of redress:

- redress should be survivor-focused;
- there should be a "no wrong door" approach to redress;
- all redress should be offered and assessed with appropriate regard to what is known about the nature and impact of abuse, as well as the cultural needs of survivors; and
- all redress should be offered and assessed with appropriate regard to vulnerable survivors.<sup>9</sup>

The Victorian Government supports these principles.

## 2.5 The importance of consultation

An effective redress scheme cannot be developed without adequate consultation from a variety of stakeholders—including the NGOs that will participate in a scheme, the people that wish to make claims through a scheme, and legal and advocacy groups that may assist people to claim redress.

<sup>6</sup> The Model Litigant Guidelines are available online at: <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines>

<sup>7</sup> The Common Guiding Principles are available online at: <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/common+guiding+principles+child+sexual+abuse+civil+claims>

<sup>8</sup> Royal Commission redress and civil litigation consultation paper, page 50-51.

<sup>9</sup> Royal Commission redress and civil litigation consultation paper, page 53.

Experience in Canada, for instance, suggests that it is crucial that the designers and administrators of a redress scheme must sufficiently understand the circumstances of survivors of abuse. Proper consultation can go a long way toward achieving this goal, and may help minimise any potential harms to claimants within the redress process.<sup>10</sup>

Given the broad number of institutions that a Victorian redress scheme could potentially cover, it is also essential that the Government hear from a wide variety of NGOs to ensure the scheme is workable and is supported by those organisations.

A redress scheme cannot be implemented without proper input from the people and groups that will participate in it. The Government wishes to ensure that, as far as possible, any future scheme meets the needs of the people it is designed to assist, and that the NGOs and institutions who will be involved in the scheme are willing participants in the process of redress.

### 3 The purpose of a Victorian redress scheme

The Royal Commission has noted the importance of clearly identifying the purpose of a redress scheme.<sup>11</sup> A statement of purpose helps claimants, institutions and other participants understand the operation of a redress scheme and the benefits it offers.

Past redress schemes generally have offered a financial payment on an *ex gratia* basis, meaning that the payment is benevolent and made out of goodwill, on the understanding that legal responsibility does not attach to the payment and that the payment does not represent full compensation.

This stands in contrast to a compensatory approach based on an award of damages under the common law, which compensates for economic and non-economic loss by seeking to place the aggrieved party, as nearly as possible, in the position that he or she would have been in had the wrong not occurred.

The Royal Commission has indicated, and the Victorian Government agrees, that redress payments cannot—and should not—be compensatory, in the sense of common law damages:

*If a survivor wishes to obtain a monetary payment that is as fully compensatory for their loss as possible, then civil litigation is the appropriate avenue for them to consider pursuing.*<sup>12</sup>

A Victorian redress scheme should be seen as an alternative, non-adversarial, mechanism to obtain recognition of harm suffered for survivors of institutional child abuse. It is likely to be easier to access than common law and provide for reduced standards of evidence, proof, and formality. Given this, it is also likely to provide a lower financial payment than would be available through the court system.

While it may be appropriate to treat redress payments as *ex gratia* (particularly in the context of institutional child abuse where survivors face significant barriers in bringing or establishing a common law cause of action, for reasons including difficulties in establishing a duty of care, absence of a proper defendant to sue, or insufficient evidence available to make out a claim), it is also misleading to label redress as wholly *ex gratia*, given that institutional participation in redress carries some implication of responsibility. It is also true that a redress scheme cannot be cast as wholly compensatory (as redress payments will nearly always be lower than what is available at common law). It is therefore important that a redress scheme be accompanied by a statement of purpose.

The Victorian Government is of the view that redress should be offered as “recognition” that harm was suffered. Implicit within this wording is an acknowledgment that abuse occurred—a validation process that has been highlighted as extremely important by the Parliamentary Inquiry and the Royal Commission—which is given weight and backing by a financial payment from the relevant institution.

The Government proposes the following statement of purpose:

*The purpose of the redress scheme is to recognise the harm caused by institutional child abuse. The scheme should support survivors to address the impacts of the abuse on their lives and obtain justice in a non-adversarial forum. It should provide a means for the institution to acknowledge the harm suffered by the survivor, and accept responsibility for its role in contributing to the abuse.*

<sup>10</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, page 109-113.

<sup>11</sup> Royal Commission redress and civil litigation consultation paper, page 133.

<sup>12</sup> Royal Commission redress and civil litigation consultation paper, page 132.



### Discussion Question 1

The Government seeks views on whether the above statement of purpose for a Victorian redress scheme is appropriate.

## 4 The scope of a Victorian redress scheme

### 4.1 Exclusion of non-institutional child abuse

It is not proposed that a Victorian redress scheme would cover child abuse that has occurred in non-institutional settings (such as abuse within the family, or other “private” settings).

Given that *Betrayal of Trust* (and the Royal Commission) is based on an examination of abuse occurring in institutional settings, it is appropriate that the proposed Victorian scheme retain that focus.

### 4.2 Participation of non-government organisations

Due to the limitations of existing avenues of justice for survivors of institutional child abuse in Victoria, particularly in relation to survivors who had experienced abuse in NGOs, *Betrayal of Trust* found that the Government should create a redress scheme to deal with claims of abuse in NGOs.<sup>13</sup>

However, the Parliamentary Inquiry did not identify the particular NGOs that this scheme should cover. *Betrayal of Trust* instead examined a broad class of NGOs, including “secular, religious and community organisations... clubs, associations, agencies and any other entity or group of entities”.<sup>14</sup>

Likewise, the Royal Commission’s terms of reference are clear that its examination of responses to institutional abuse is not limited to specific institutions:

*“Institution” means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described.*

While the Government is committed to participating in any redress scheme it establishes, the broad scope of *Betrayal of Trust* does not, in and of itself, clearly identify which NGOs should or should not be covered by a redress scheme.

This stands in contrast to past Australian redress schemes. For example, in 2007 the Queensland Government set up a redress scheme in response to the Forde Inquiry.<sup>15</sup> This scheme covered instances of abuse and neglect occurring within institutions established or licensed under the *State Children Act 1911* (Qld), the *Children’s Services Act 1965* (Qld), or the *Juvenile Justice Act 1992* (Qld).

The Government must therefore determine the extent of NGO participation, noting that the number of NGOs covered by the scheme may affect the range and amount of payments and benefits available. Given the need for equity amongst survivors within a redress scheme, a scheme that covers a large range of NGOs will have to ensure that redress can be provided equitably by *all* NGOs within the scheme. This may require restricting payment amounts to ensure that smaller, less-resourced NGOs are able to participate in the scheme. Conversely, a scheme comprised of a narrower set of well-resourced NGOs may be able to offer higher payments and a broader range of benefits.

Discussed immediately below are three broad options for defining the scope of NGO participation.

#### 4.2.1 Voluntary participation

Participation could be voluntary for any organisation subject to claims of child abuse within scope. This alleviates the need to exhaustively define the membership of the scheme, and ensures that all institutional participants in the scheme do so voluntarily and willingly. It is more likely that meaningful, good-faith redress will be provided by an institution when that institution has made a genuine, *voluntary* commitment to make amends to survivors of past abuse.

<sup>13</sup> *Betrayal of Trust*, page 563.

<sup>14</sup> *Betrayal of Trust*, page 30.

<sup>15</sup> Formally known as the *Commission of Inquiry into Abuse of Children in Queensland Institutions*, this inquiry ran from 1998 to 1999 and was presided over by Ms Leneen Forde AC.

It is expected that voluntary participation would be encouraged by the weight of public opinion, as well as internal pressures to resolve claims of abuse in an efficient and compassionate manner (as compared to civil litigation).

However, this option also carries a risk that organisations may refuse to join the scheme, leading to a lack of certainty and equality in outcomes for potential claimants, which is of critical importance. If institutions refuse to join the scheme, voluntary participation may also fail to meet the expectations of many survivors and members of the public that institutions be held to account for past failings.

#### 4.2.2 Mandatory participation for all organisations

Participation could be mandatory for all organisations subject to claims of child abuse within scope. Any institution faced with an in-scope claim of child abuse would be required to participate in the redress scheme upon a claimant lodging an application for redress.

This option would provide equitable outcomes for survivors, and hold all relevant institutions to account for the past abuse of children. However, it may cause difficulties if institutions refuse to cooperate (for example, in making evidence or funds available in a timely fashion), or if institutions have insufficient assets to meet awards of redress ordered by the scheme.

Furthermore, compelling participation may reduce the extent to which institutions engage with the scheme in good faith, or are willing participants in the process of healing. However, for some survivors, even the reluctant participation of an institution may be better than no participation at all.

Requiring unwilling institutions to participate in a scheme will also likely require greater natural justice to be afforded to those organisations—for example, the power to dispute a claim of abuse, question the evidence of a claimant, or question an order of redress made by the scheme. These issues are discussed further below at sections 5.8.2 and 5.10.

Finally, unilateral action by the Victorian Government to secure NGO participation may prove ineffectual for large NGOs that have assets in multiple Australian jurisdictions—co-operation with the Commonwealth and other Australian governments may instead be required in this regard.

#### 4.2.3 Mandatory participation for selected organisations

Participation could be mandatory for selected organisations subject to claims of child abuse within scope. This option would compel *selected* institutions to participate in the redress scheme, and may allow redress to be focused upon groups of survivors who most require assistance—for example, people who were resident in institutional care as children, or people with a claim against a religious organisation that cannot be otherwise pursued due to legal barriers. This option is largely a practical compromise between the above two options.

However, drawing the line between participating and non-participating institutions will ultimately be a difficult and arbitrary affair, and will run contrary to the goal of providing equitable and transparent redress to all survivors of institutional child abuse.

If certain NGOs are not covered under this option, it is likely that claimants who have valid claims of abuse against those NGOs will be unable to participate in the redress scheme. The work of the Royal Commission has shown that child abuse can occur in both large and small organisations. This option also carries the drawbacks of compulsion, addressed directly above at section 4.2.2.

#### **Discussion Question 2**

**The Government seeks views on how NGO participation in the scheme should be determined.**

**The Government is particularly interested to hear whether NGOs that will likely fall within the scope of the scheme are willing to voluntarily participate in redress.**

### 4.3 Forms of abuse covered by the scheme

It is clear from both *Betrayal of Trust* and the Royal Commission that children in institutions have been subjected to a range of harms that extend beyond sexual abuse.<sup>16</sup>

<sup>16</sup> *Betrayal of Trust's* recommendations were made in respect of the “criminal abuse of children”, which included unlawful physical assaults, sexual abuse offences such as rape or indecent assault under the *Crimes Act 1958*, acts of criminal neglect, and the

A redress scheme could potentially cover the following forms of abuse:

- **sexual abuse;**
- **physical abuse;**
- **psychological abuse;**<sup>17</sup>
- **cultural abuse**, which, for indigenous claimants, can be understood as the cessation of the ability to continue cultural practices that would have been handed down by parents to children but for the fact of institutionalisation—including spiritual practices, language, cultural practices, understanding of kinship relations, and other traditions; and
- **neglect**, a term that is subject to a multitude of interpretations—for example, the Department of Health & Human Services’ Child Protection Practice Manual states that:
  - “Neglect” includes failure to provide the child with an adequate standard of nutrition, medical care, clothing, shelter or supervision to the extent where the health or development of the child is significantly impaired or placed at risk. A child is neglected if they are abandoned or left uncared for over unreasonable periods of time that is inconsistent with their age, stage and development.
  - “Serious neglect” potentially constitutes a criminal offence on the part of a parent and includes situations where a parent fails to meet the child’s basic needs for food, shelter, hygiene or adequate supervision to the extent that the child’s health and physical safety is jeopardised.<sup>18</sup>

The Law Commission of Canada has stated that a redress scheme “can be designed to address a wider variety of harms than those covered by the judicial process”.<sup>19</sup> As an alternative means of justice, a redress scheme is an opportunity to address harms which may not be legally compensable (or may be difficult to prove), including neglect, psychological abuse, and cultural abuse.

Redress schemes established by Australian governments have generally addressed a broader range of harms—the Queensland scheme addressed physical abuse, sexual abuse, and neglect; the Western Australian and Tasmanian schemes addressed physical, sexual, psychological abuse and neglect; whilst the South Australian scheme (which is still operational) is limited to sexual abuse only.

Earlier this year, the Victorian Government introduced legislation that removed limitation periods in respect of civil actions for damages founded upon child sexual abuse or child physical abuse, as well as psychological abuse where that form of abuse arises from an instance of physical or sexual abuse.<sup>20</sup>

It is important to bear in mind the wide range of government and non-government institutions that are expected to participate in a Victorian redress scheme. This wide organisational scope means that survivors with vastly differing experiences of institutional child abuse will apply for redress—for example, ranging from people who lived in institutional residential care, to people who suffered harm in a sporting or community organisation. It is therefore important to consider the potential group of redress claimants broadly, and not solely through the lens of any one particular group of survivors.

### **Discussion Question 3**

**The Government seeks views on the forms of institutional child abuse that a Victorian redress scheme should cover.**

facilitation of such offences by others: *Betrayal of Trust*, page 29-30. The Royal Commission’s fifth case study heard evidence of serious physical abuse perpetrated on residents of Salvation Army children’s homes.

<sup>17</sup> This term can be given many meanings. As an example only, the Australian Institute of Family Studies defines “psychological abuse” as including situations where an adult “verbally assaults the child, creates a climate of fear, bullies and frightens the child, and makes the child believe that the world is capricious and hostile. See <https://www3.aifs.gov.au/cfca/publications/what-child-abuse-and-neglect>.

<sup>18</sup> See <http://www.dhs.vic.gov.au/cpmanual/practice-context/child-protection-program-overview/1008-abuse-and-harm-legal-and-practice-definitions>

<sup>19</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, page 309.

<sup>20</sup> The *Limitation of Actions Amendment (Child Abuse) Act 2015* has now become law. It commenced on 1 July 2015.

## 4.4 Defining “abuse”

In addition to determining the *forms* of abuse covered by the scheme, there is a question of what conduct actually constitutes “abuse” for the purposes of redress. Options for addressing this question could include:

- conduct that is criminal in nature;
- creating a definition for the purposes of the scheme; or
- leaving the terms undefined, and open for interpretation on a case-by-case basis.

Past government-run redress schemes in Australia have all provided some form of definition for what constitutes abuse or neglect (for example, the Queensland scheme adopted the definitions used by the Forde Inquiry, whilst Western Australia prescribed specific definitions within the scheme’s guidelines).<sup>21</sup>

Leaving “abuse” undefined could result in uncertainty in interpretation and application, potentially resulting in people being denied access to the scheme on definitional grounds only *after* they have submitted their application. But while a clear definition offers certainty with regard to eligibility, it is difficult to create a definition that exhaustively encompasses all potential harms without inadvertently excluding otherwise deserving claimants.

The Government would therefore appreciate submissions on how to address this issue.

### **Discussion Question 4**

**The Government seeks views on whether “abuse” or similar terms should be defined, and if so, the form of any definition.**

## 4.5 A connection between the abuse and an institution

Separate from identifying the organisations that will participate in the redress scheme, a scheme must also implement criteria to determine whether a particular case of child abuse is “institutional”, and is therefore eligible for redress under the scheme.

Such criteria will aid potential claimants and participating organisations to determine in advance whether a particular case of abuse will or will not be covered by the scheme. This may mean that not all cases of abuse that appear to be “institutional” will be covered under the scheme. For example, the Royal Commission has suggested that if a child abuses another child on empty school premises during school holidays, the school should not be responsible for providing redress in that situation.<sup>22</sup>

Past and existing redress schemes, due to their targeted scope, have had relatively narrow criteria. Past government schemes have, for example, defined eligibility by reference to residency in a particular institution, whereas the Melbourne Response requires that priests, religious and laypersons under the control of the Catholic Archbishop of Melbourne must have perpetrated the alleged abuse.

As has already been discussed, the redress scheme contemplated by this paper will likely address a variety of harms and organisations. Eligibility criteria may therefore need to be similarly broad.

The Royal Commission has proposed criteria that can be used as an example. Under the Royal Commission’s approach, abuse should be included for redress if:

- it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution, in circumstances where the institution is, or should be treated as being, responsible for the contact in which the abuse was committed between the abuser and the applicant; or
- it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where the institution has, or its activities have, created, facilitated, increased, or in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk; or

<sup>21</sup> For example, Redress WA defined sexual abuse as: “any sexual activity involving a person for which consent is not or cannot be given, where a person has been exposed or subjected to sexual behaviours that are exploitative and/or inappropriate to their age and developmental level as a consequence of that person being in the care of the State”.

<sup>22</sup> Royal Commission redress and civil litigation consultation paper, page 162.

- it happens in any other circumstances where the institution is or should be treated as being responsible for the adult abuser having contact with the applicant.<sup>23</sup>

The Government notes that some submissions in response to the Royal Commission’s consultation paper suggested that these criteria were inappropriately broad and would capture scenarios where an institution should not be held responsible for abuse. The final dot point above, for instance, appears to be extremely discretionary, and lacks guidance as to when the criterion would be satisfied.

#### **Discussion Question 5**

**The Government seeks views on whether the Royal Commission’s criteria for a “connection” between the abuse and the institution is sufficient for the purpose of a Victorian redress scheme.**

## **4.6 Time period of abuse addressed by the scheme**

A redress scheme may operate prospectively—that is, able to receive claims of abuse that have not yet occurred as of the scheme’s establishment, or purely retrospectively, only addressing abuse that has *already* occurred (up to a set point in time).

The Royal Commission has noted that reforms to civil litigation and the work of the Royal Commission itself may contribute to a substantial change in the power imbalance between institutions and survivors, and may remove the need for a redress scheme to continue prospectively into the future.<sup>24</sup> It is also impossible to accurately predict the circumstances or needs of future abuse victims.

The Victorian Government concurs that a redress scheme should address past, rather than future harms. Therefore, a scheme will need to operate by reference to an eligibility date—for example, the date of establishment of the scheme, or the commencement date of related civil law reforms that allow survivors better access to avenues of civil litigation, such as the recent *Limitation of Actions Amendment (Child Abuse) Act 2015* (which commenced on 1 July 2015).

#### **Discussion Question 6**

**The Government seeks views on an appropriate eligibility date for a redress scheme, including whether such a date should be set by reference to:**

- The date of establishment of the redress scheme***
- The date of related civil law reforms (for example, recent Victorian reforms to limitation periods)***
- Other***

## **4.7 Additional beneficiaries**

It is also necessary to consider whether a scheme should provide redress to individuals (or communities) who were not the primary victims of institutional child abuse.

For example, the Victorian Victims of Crime Assistance Tribunal offers benefits to family members and other individuals who are not the primary victim of a crime, but have nevertheless been affected, and the Victorian service for Forgotten Australians, Open Place, offers counselling for eligible family members, and assistance accessing records and family searches.<sup>25</sup>

Generally, past Australian redress schemes have not offered benefits to these secondary victims (with limited exceptions—the Western Australian redress scheme offered \$5,000 in funeral expenses to eligible family members). While providing redress to additional beneficiaries (such as secondary victims) may better address institutional child abuse that has created harms extending beyond the primary victim, this may limit the amount of resources that are available to address the needs of primary victims—particularly in the case of smaller NGOs, who may have limited financial capacity.

<sup>23</sup> Royal Commission redress and civil litigation consultation paper, page 163.

<sup>24</sup> Royal Commission redress and civil litigation consultation paper, page 164.

<sup>25</sup> Open Place provides up to 12 free counselling sessions to Forgotten Australians’ family members.

The Royal Commission is not examining secondary victims within its work on redress. Instead, it will examine the needs of secondary victims via a separate research project on existing support services.<sup>26</sup>

**Discussion Question 7**

**The Government seeks views on whether a scheme should provide redress to any individuals or groups beyond the primary victims of abuse.**

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<sup>26</sup> Royal Commission redress and civil litigation consultation paper, page 51.

## 5 Redress scheme processes and validation of claims

It is important for a scheme to be based on a clear and credible validation process, with a focus on establishing what harms were suffered, the effect of those harms, and the appropriate award of redress.<sup>27</sup> The Royal Commission has highlighted how important a redress scheme's internal processes are to survivors.<sup>28</sup>

The way a redress scheme handles claims should be based on objective, consistent and transparent criteria that balance the interests of survivors and participating organisations.<sup>29</sup> On one hand, in order to encourage confidence and participation by institutions, a scheme's processes must be adequately rigorous to ensure that only genuine claims are approved. On the other hand, the goals of redress must be kept in mind—to provide an alternative to traditional adversarial forms of compensation (such as civil litigation) and to provide a holistic and tailored response to the needs of survivors.<sup>30</sup>

### 5.1 The application process

The redress process normally begins with an application to the scheme. Past redress schemes have generally required a written application, but have varied with respect to the type and level of information required in that application, from initially requiring only minimal information from the claimant (such as personal information and a non-detailed account of the abuse) to immediately requiring full evidence and documentation at the application stage.

The Royal Commission believes that the application “must obtain the information necessary to assess eligibility and determine the amount of any monetary payment”.<sup>31</sup> However, the Victorian Government is cautious of requiring a comprehensive application at the first instance, particularly because many survivors who are expected to approach the scheme may be vulnerable or may have difficulty coming to terms with their abuse, and may therefore be put off by an overly onerous application process.

The Government's preliminary view is that the application process should be as simple as possible, requiring only initial administrative information from the claimant in order to establish a point of contact. The scheme should then initiate further contact at a subsequent date to determine the goals and outcomes sought by the claimant, the basis of the survivor's claim and the likely evidence available to support it, and the support needs of the claimant. These support needs may include interim counselling, legal assistance, or assistance with documentation or other aspects of the redress process. The Government also believes that it is helpful to ascertain the outcomes the claimant seeks from the redress process as soon as possible, as the needs and goals of survivors will often vary.

This means that a claimant will not be required to submit evidence in support of their claim, including a detailed account of the alleged abuse, until later in the process. This will help to minimise the re-traumatisation that might occur if claimants are required to provide detailed descriptions of abuse before receiving adequate assistance or counselling.

The Government further believes that a Victorian redress scheme should adopt a “no wrong door” policy—meaning that no manner of approach to the scheme should be deemed incorrect, whether through (for example) the scheme's advertised application process, through a referral from an institution, or through some other contact with the scheme.

Finally, the Government does not believe that it is necessary for alleged abusers to be named on an application,<sup>32</sup> nor is it necessary that the alleged abuse had previously been reported to police.

#### **Discussion Question 8**

**The Government seeks views on:**

- **the proposed application process; and**
- **the support services that should be available during the application process.**

<sup>27</sup> Law Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian institutions*, page 338.

<sup>28</sup> Royal Commission redress and civil litigation consultation paper, page 52.

<sup>29</sup> Law Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian institutions*, page 325.

<sup>30</sup> Law Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian institutions*, page 316.

<sup>31</sup> Royal Commission redress and civil litigation consultation paper, page 167.

<sup>32</sup> The Irish scheme required (where possible) for claimants to identify their alleged abusers (persons that were named in an application were notified of the allegations by the scheme and were presented with a redacted copy of the claimant's application, whereas the schemes previously run by Australian governments did not require the provision of specific names.

## 5.2 Gathering of evidence

### 5.2.1 Responsibility for evidence gathering

Unlike civil litigation, where the opposing parties are entirely responsible for gathering and presenting the evidence that supports their respective cases, a redress scheme has considerable flexibility regarding the approach it takes in the gathering of evidence.

For example, a scheme can gather evidence on behalf of the claimant and the relevant organisation, or it may leave evidence gathering as the responsibility of individual claimants (and organisations).

In past schemes, claimants have been primarily responsible for the sourcing and gathering of evidence and information to support their claim, with the scheme providing guidance regarding the type of evidence, level of detail, and supporting documentation that is required.

However, past schemes have also had their own evidence-gathering role. In the Tasmanian redress scheme, instead of requiring all relevant information to be provided through a written application, an initial phone interview was conducted to establish eligibility, with further interviews conducted (on paper or in person) in order to gather the required information.

If the scheme itself is required to take on a more active role in the gathering of evidence, it is likely that the subsequent administrative costs of the scheme will increase. On the other hand, if parties are required to play an active role in the search for and presentation of evidence, it may be appropriate for the scheme to provide support and assistance.<sup>33</sup>

#### **Discussion Question 9**

**The Government seeks views on who should be responsible for gathering evidence:**

- a) *Mainly the claimant and/or the relevant organisation***
- b) *Mainly the redress scheme***

### 5.2.2 Written or oral evidence

Evidence itself may be gathered and verified in two main ways: in written form, or orally.

A written process might require a written account of the alleged abuse, accompanied by supporting documents and other material such as medical records, reports, personnel records and institutional correspondence. The scheme might then request further documentation if required.

By contrast, information may be received and gathered orally—over the phone, or via face-to-face interviews, hearings, or informal discussions. Interviews or hearings can be conducted either by the ultimate decision-maker, or by designated scheme interviewers/researchers/case managers.

In all Australian government redress schemes (other than the Tasmanian scheme), information was received primarily through written evidence, with face-to-face interviews only conducted in exceptional cases in order to clarify issues. This is in contrast to the experience in Ireland and in several Canadian redress schemes, which allowed for a substantial degree of in-person contact.

A key issue in determining whether information is gathered in written form or orally is the needs and concerns of claimants. For example, a written process may be suitable for less complex claims that do not require substantial questioning or investigation. Some survivors may also prefer the arms-length approach of a written application, and may not want to describe their experiences (or face questions) orally—noting, of course, that a written process requires that individuals have the necessary skills to present their case clearly, or have adequate support services available to assist.

On the other hand, many survivors have noted positive experiences in having their claims processed in a face-to-face setting, including being given the opportunity to describe their experiences out loud and in their own words, which can provide a sense of self-worth and self-confidence, and may encourage the healing process. Oral hearings also allow the assessor(s) to directly ask questions and assess the claimant's evidence, which can minimise delay and the need for survivors to re-tell their story.<sup>34</sup>

The Canadian Grandview Agreement successfully used oral hearings. The scheme provided for a hearing process that was specifically tailored to survivors' concerns. For example, the hearing room

<sup>33</sup> For example, legal representation and assistance is discussed further at section 5.7.

<sup>34</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 229-232.



was laid out in a non-hierarchical way, support persons were allowed to be present, and hearings were conducted in an informal manner with minimal questioning and probing.<sup>35</sup>

However, oral hearings may necessitate greater administrative costs, and may slow down the redress process. In Redress WA, aside from “clarifying details” over the telephone after a written application had been submitted, there was no provision for hearings, as the scheme wished to “avoid the expense, delay, and stress that any such processes necessarily involve”.<sup>36</sup>

The Royal Commission has indicated that some survivor groups have called for oral hearings, in order to allow survivors to tell their story, but has also heard of bad experiences experienced by survivors during oral hearings. The Royal Commission currently favours a written process, noting that oral hearings carry substantial administrative and time costs, and “should not be needed for applications to be fairly and properly assessed”. However, the Royal Commission has indicated that oral hearings may be required to determine validity for higher payments.<sup>37</sup>

### **Discussion Question 10**

**The Government seeks views on the way evidence should be gathered:**

- a) *In writing***
- b) *Orally***
- c) *A combination of both***

## **5.3 Testing of evidence and verification of claim**

### **5.3.1 What evidence will be “tested”, and how**

Once evidence has been gathered, should that evidence (or parts of it) be “tested” or verified? If so, how should this testing process occur? Should a statutory declaration of abuse coupled with evidence that the claimant (and alleged perpetrator) was in fact present in the relevant institution be sufficient? Or should particular facts be tested, such as the claimed occurrence and impact of the abuse?

It seems clear that claims should be subject to some level of verification in order to minimise any exploitation of the redress scheme—whilst avoiding re-traumatising survivors. The verification process must also take into account the time and resources available to devote to the process.

The Royal Commission seems to suggest that, as a starting position, claimants should be required to verify their accounts of abuse by way of statutory declaration, with further verification required as payment amounts increase.<sup>38</sup> However, it may be difficult for claimants who have suffered significant trauma (and are therefore eligible for greater payments) to undergo a tougher verification process.

A common way of testing a claim is through a search and comparison of relevant records. Search strategies used in the Queensland scheme involved searches of relevant government databases, state archival records, historical files (such as admission books and discipline books), and information provided by institutions. As evidence is often unavailable, a scheme may need to provide for alternative means of assessment (or lower standards of verification/proof) in these instances.

Any scheme that encompasses both government and non-government institutions, such as that being considered by Victoria, will also need to consider how files will be accessed from relevant institutions. Arrangements will need to be made to require the provision of relevant documents by institutions.

In addition to the search and comparison of records, verifying a claim may involve:

- interviews or written correspondence with the claimant to clarify any issues;
- psychological and other assessments; and
- requests for documentation from relevant third parties.

The testing of evidence may also take place through an oral hearing process (if provided for) wherein the claimant submits evidence and the assessor not only listens to the claimant’s story but also tests the evidence through a series of questions.

<sup>35</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 178.

<sup>36</sup> Redress WA Guidelines, page 22.

<sup>37</sup> Royal Commission redress and civil litigation consultation paper, page 168-169.

<sup>38</sup> Royal Commission redress and civil litigation consultation paper, page 169.

The verification process does not have to necessarily mirror the adversarial process used in the courts. Most of the Canadian schemes conducted hearings in an informal and non-adversarial way (in private and in the absence of the alleged abuser/institution, and without lawyers). These hearings generally involved claimants recounting their experiences in a narrative form, or in response to a series of questions. For example, the Grandview scheme allowed claimants to present evidence in any way they chose, subject to follow-up questions by the adjudicator ensuring that the hearing canvassed all the relevant issues contained in the written submissions, and clarified any inconsistencies.

By contrast, the oral hearing process in Ireland was conducted in a much more adversarial manner, with legal representation allowed, and the evidence tested by both the adjudicators and by any “relevant person” (a person or institution named by the claimant in relation to the abuse). The claimant could present orally if he or she chose to, but could also be required by the scheme to give further oral evidence in support of their application. In addition, “relevant persons” (with leave) were allowed to provide evidence and submissions, as well as cross-examine the claimant for the purposes of correcting a mistake or defending an allegation. The Irish scheme took into account both the written application and the results of the oral hearing in forming its decision regarding the redress claim.

### Discussion Question 11

The Government seeks views on what aspects of a claim should be “tested”, and the way in which this should occur.

## 5.3.2 Standard of proof

Given the above discussion at section 5.3.1, it is likely that a scheme will require, at a minimum, *some* testing of the presented evidence. To what standard should this evidence be tested?

In civil litigation, plaintiffs are required to satisfy the court on the “balance of probabilities” that the evidence as presented supports the elements of the plaintiff’s claim. A common understanding of the “balance of probabilities” standard is that it is *more likely than not* that the alleged facts occurred.<sup>39</sup>

However, the common law recognises that satisfying the balance of probabilities standard requires more than a “mere mechanical comparison of probabilities” where serious or grave allegations are made, such as an allegation of child abuse.<sup>40</sup>

In such situations, the court must not only be satisfied that the available evidence makes it *more likely than not* that the facts as the plaintiff alleges are true, but also that the very evidence available is of a sufficient quality and standard to enable such a finding to be made.

This heightened standard is known as the *Briginshaw* test. *Briginshaw* is usually applied where questions of serious moral wrongdoing are in question, where a finding made against an alleged wrongdoer (for example, relating to sexual abuse, fraud, or gross medical negligence) could have grave consequences for that individual.

In the *Briginshaw* case itself, Justice Dixon observed (emphasis added):

*...the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

Plainly, there will be cases contemplated by a redress scheme that would lack, at common law, a sufficient robustness of evidence to satisfy the *Briginshaw* standard, particularly where institutional records have been lost, witnesses are deceased, and memories have faded. Nevertheless, *Briginshaw* has been used within the confines of redress—the Melbourne Response, for example, is a scheme that utilises the *Briginshaw* test.<sup>41</sup>

The Royal Commission has cautioned against a “balance of probabilities” test, noting that (in addition to the rigors of the *Briginshaw* test and the likelihood of evidentiary deficits in institutional child abuse cases) a finding of “more likely than not” raises issues of procedural fairness for the accused institution or perpetrator.<sup>42</sup> This is especially significant where an alleged perpetrator is still alive.

<sup>39</sup> *Miller v Minister of Pensions* [1947] 2 All ER 372, 374 (Denning J).

<sup>40</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-2.

<sup>41</sup> Bearing in mind, however, that the Melbourne Response also has elements of an internal disciplinary procedure.

<sup>42</sup> Royal Commission redress and civil litigation consultation paper, page 170-171.

To afford procedural fairness to these parties, however, would likely require a rigorous testing of survivors' allegations, which is not palatable to many survivors (and runs contrary to the goals of redress). For the same reasons, the Royal Commission has suggested that a redress scheme should *not* involve any finding of guilt or culpability against an individual.<sup>43</sup>

To date, the Royal Commission appears to favour a standard of “plausibility”, which requires “that the decision maker be satisfied that the allegations are plausible and may be true”.<sup>44</sup>

Some past redress schemes appear to have used the “balance of probabilities” standard, such as the South Australian scheme. The balance of probabilities is also the standard used in the Victorian Victims of Crime Assistance Tribunal. The Royal Commission has noted that due to the limited evidence often available in institutional child abuse cases, schemes that purport to apply the “balance of probabilities” test actually apply something closer to a “plausibility” test.<sup>45</sup>

It may therefore be more appropriate to avoid the trappings of the common law and provide for a scheme-specific standard of proof, by reference to “plausibility” or set factors. For example, the Commonwealth Defence Abuse Reparation Scheme must have been satisfied that the claimant “may have, plausibly, suffered abuse”. Other examples similar to “plausibility” could be the Western Australian redress scheme, where a claim was accepted “unless there was evidence to the contrary”, or the standard of “reasonable likelihood of abuse”, which has been used in Canada.<sup>46</sup>

It is also important to recognise the greater context of the standard of proof. There is a correlation between the amount of benefits offered (particularly financial compensation) and the standard a claimant is required to satisfy to succeed in a claim—for example, a standard of proof that requires little more than a declaration that a claimant was resident in a particular institution is not likely to result in any more than a small payment.

It is, however, open to a scheme to provide for differing standards of proof for different tiers of claim, where a claimant is able to gain more generous redress if they agree to go through a more rigorous process of evidentiary assessment and scrutiny. Similarly, the Royal Commission has suggested that while a scheme might prescribe a higher standard of proof for higher payments, it could instead require *more evidence* for higher payments (with all payments assessed under the same standard of proof).<sup>47</sup>

### **Discussion Question 12**

**The Government seeks views on the standard of proof a scheme should use.**

### **5.3.3 Further rules of liability**

The above discussion of standards of proof assumes that what must be proven to that standard is simply *that abuse occurred*. However, a scheme may require additional rules of liability in order for a claim to be “successful”.

For example, an institution might not be required to provide redress unless it is shown that the institution knew or should have known of the abuse but failed to act.

### **Discussion Question 13**

**The Government seeks views on whether the scheme should require any further rule of liability, beyond proof of abuse itself.**

## **5.4 The decision-maker**

The choice of persons who will evaluate the validity of a claim and decide upon an award of redress is crucial to the credibility and success of a scheme.

It is clear that the majority of survivors of institutional child abuse believe that an effective redress scheme must have an ultimate decision-maker that is as independent from the organisations providing

<sup>43</sup> Royal Commission redress and civil litigation consultation paper, page 171.

<sup>44</sup> Royal Commission redress and civil litigation consultation paper, page 170.

<sup>45</sup> Royal Commission redress and civil litigation consultation paper, page 171.

<sup>46</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 175.

<sup>47</sup> Royal Commission redress and civil litigation consultation paper, page 167, 170-171.

redress as possible. Some NGOs have also indicated a willingness to participate in a redress scheme where an independent decision-maker will have jurisdiction over the assessment of claims.

The Government supports the use of an independent decision-maker, noting that the Government will necessarily have to play a role in selecting (and funding) the decision-maker, or, at the very least, the process through which the decision-maker is selected. It should be noted that the Royal Commission has heard no complaints about a lack of independence (perceived or otherwise) in the government-run redress schemes that have operated in Australia.<sup>48</sup>

A scheme does not have to have only one decision-maker. A scheme may provide for a panel of decision-makers, each with differing fields of expertise. The Law Commission of Canada has noted:

*...because the claims process is non-adversarial and because adjudicators will not normally have the benefit of argument from lawyers to assist them in sifting facts, two- or three-person panels should be preferred over adjudicators sitting alone.*<sup>49</sup>

A redress decision-maker must possess both independence as well as sufficient expertise and judgment to determine the claims before the scheme. It is suggested that decision-makers should therefore be selected from professions that *already* possess the public's trust as independent and impartial decision-makers, including:

- retired judges;
- lawyers with relevant expertise in institutional child abuse;
- medical and mental health professionals, particularly with expertise in child abuse cases; and
- other appropriate professionals, such as social workers.

The background and expertise of decision-makers will significantly affect the credibility of the program, the fairness and impartiality of the scheme, and the stress of the process for claimants.<sup>50</sup> For example:

- Legal professionals can provide meaningful expertise in relation to the assessment of claims, particularly in determining compensation amounts. Survivors who assisted in the design of the Canadian Grandview scheme chose to have claims heard and determined by lawyers.
- Medical professionals can play an important role as decision-makers given their understanding of the effects of child abuse and the needs and sensitivities of survivors.<sup>51</sup>

It is also important that decision-makers are chosen with respect to the cultural needs of potential claimants, or are appropriately trained in cultural issues. In the Canadian Grandview scheme (which related to an all-girls home), the decision-makers were all women, including Aboriginal representatives to appropriately reflect the claimant group. Eighty-five per cent of Grandview claimants reporting feeling comfortable, "listened to", and "believed" in front of their adjudicators, who were described as respectful, considerate, empathetic, patient, fair, and sincere.<sup>52</sup>

If a panel approach is chosen, all panel members need not be involved with every claim. For example, a panel of ten members could be retained, with one to three members sitting on any given claim, with extra (or rotated) panel members brought in for appeals or other special circumstances.

The Royal Commission has heard that there is "strong support for a mix of expertise in decision making", potentially with levels of delegation (so that more complex claims are determined by senior decision makers). The Royal Commission has also noted that a mix of skills and expertise amongst the decision-makers would be highly beneficial.<sup>53</sup>

### **Discussion Question 14**

**The Government seeks views on:**

- **who should be the scheme's ultimate decision-maker(s); and**
- **whether one decision-maker should adjudicate claims, or a panel.**

<sup>48</sup> Royal Commission redress and civil litigation consultation paper, page 169.

<sup>49</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, page 319.

<sup>50</sup> Law Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian institutions*, page 319-320.

<sup>51</sup> Law Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian institutions*, page 319, also see Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 330-335.

<sup>52</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 330.

<sup>53</sup> Royal Commission redress and civil litigation consultation paper, page 171.

## 5.5 Evidence assessors

The ultimate decision-maker need not be the same person that initially collates the evidence in support of each claim (or assists with the gathering of evidence, as discussed above at section 5.2.1).

A scheme may instead separate its decision-maker(s) from those who receive and gather evidence to support claims. The decision-maker would then be “briefed” on the claim before making an adjudication, after being presented with the claim file and a summary of all relevant information and evidence. The decision-maker may also receive initial advice in relation to eligibility, the severity and impact of the abuse, and a potential payment and other benefits.

This may help to promote independence, objectivity, and the particular expertise of the decision-maker. Dividing responsibilities amongst different roles will likely enable more claims to be processed in less time, and will focus the expertise of the scheme’s personnel in the most appropriate fashion.

Separating the roles in this manner will also allow the scheme to provide a larger range of appropriately qualified assessors, depending upon the claimant—as it may not be possible to retain a large enough panel of decision-makers to address every particular need of certain claimants. For example, certain assessors with appropriate cultural knowledge could be used to assess the applications of Aboriginal claimants, whilst other assessors with particular psychological training could be used for particularly traumatised or vulnerable claimants.

### **Discussion Question 15**

**The Government seeks views on whether a scheme should separate its ultimate decision-makers from the people that receive, collate, and assess evidence. If so, what particular training or expertise should these people have?**

## 5.6 Other uses of evidence

A scheme should also consider what other uses can be made of the evidence and information gathered during the process of redress.

The Parliamentary Inquiry heard that obtaining historical records can be therapeutic for survivors of institutional child abuse.<sup>54</sup> It may be appropriate to allow people to keep copies of records and other pieces of evidence gathered throughout the process for their own personal use.

However, should a claimant (or an institution) be able to make use of the gathered evidence in a later civil proceeding? It is quite possible that a claimant will wish to pursue civil litigation in addition to—and potentially concurrently with—a redress claim. How should a redress scheme deal with a claimant who wishes to utilise information gathered by the scheme in subsequent civil litigation?

Appropriate limits on the evidence gathered and produced by a redress scheme may also be necessary to ensure that any related criminal trials are not prejudiced.

### **Discussion Question 16**

**The Government seeks views on whether limits should be placed upon the evidence gathered and produced by a redress scheme.**

## 5.7 Legal representation and support

Some survivors have expressed a preference for a simple, non-legalistic scheme that is easy to navigate without representation, and *Betrayal of Trust* recommended that a redress scheme should “not be bound by legal parameters in determining outcomes that respond to [survivors]”.<sup>55</sup>

However, past schemes that depended heavily on lawyers (such as the Irish scheme) were quite predictable in regard to outcomes—that is, the participation of lawyers helped claimants, at the outset of the process, to gain a fair idea of their likely award of redress. This in turn led to higher satisfaction with the redress process in general, as opposed to a less-predictable scheme where claimants might be disappointed with the redress amounts received.

<sup>54</sup> *Betrayal of Trust*, page 68-70.

<sup>55</sup> *Betrayal of Trust*, page 564.

Conversely, the involvement of lawyers can, among other things, encourage an overly adversarial process, or risk a substantial portion of a claimant's award of redress being lost to legal fees.

While claimants should have a right to legal representation within a redress scheme, the extent that representation should be provided for or funded by the scheme is uncertain. If legal representation is not funded (or funding is limited), the scheme should be simple enough to navigate without the assistance of a lawyer.

Although some past redress schemes have not provided funding for legal representation, other schemes have. For example:

- The South Australian scheme provides funding for legal advice in relation to its deed of release, capped at \$750.
- The Queensland scheme provided funding for legal advice in relation to its deed of release, capped at \$550. Claimants were provided with a list of solicitors who practised in the area of personal injuries and were willing to accept a fixed fee of \$550.
- Both the WA and Queensland governments funded legal and community support services to assist potential claimants to apply for redress.
- The Canadian Indian Residential Schools Settlement Agreement funded legal representation, capped at 15 percent of the compensation received by the claimant.
- The Irish scheme paid a “reasonable amount” for expenses incurred by the claimant in the preparation and presentation of the application.<sup>56</sup>

Internal redress schemes have taken varying approaches to legal representation. The Melbourne Response advises claimants they have a right to legal representation at their own expense.<sup>57</sup> In contrast, Towards Healing funds claimants to seek legal advice before signing a deed of release.

The Royal Commission believes that a scheme should fund legal advice to assist a claimant to decide whether to accept an offer of redress (particularly if a deed of release is required), as well as provide services to assist people during the redress process,<sup>58</sup> analogous to how *knowmore* was established as a legal assistance service to help people speak to and make submissions to the Royal Commission.

A more rigorous and complex assessment procedure may result in an increased need for claimants to be legally represented. In addition, the need for representation varies considerably depending on the needs of claimants—for example, in circumstances where the claimant is particularly vulnerable, the need for legal representation may assume increased importance.

If legal representation is funded or provided by the scheme, there are numerous options for delivering these services. A scheme could offer “in-house” legal assistance, refer claimants to existing community legal services at no cost, or fund claimants to obtain a lawyer of their choosing. If the last of these options is chosen, it may be appropriate for the scheme to maintain an accreditation program to provide claimants with a list of lawyers who are familiar with the scheme (and with the nature of institutional child abuse), and who charge reasonable fees that are able to be paid by the scheme.

In addition to (or instead of) a legal practitioner, a support person (which may be a counsellor, a close friend, or a family member) has been allowed in past schemes to assist claimants through the process. The Government supports the participation of a support person.

### **Discussion Question 17**

**While redress claimants should always have the option of legal representation, the Government seeks views on whether legal representation should be funded by the scheme for all claimants. If yes, how should this be delivered?**

<sup>56</sup> No set figure was given, but “reasonable assistance” was limited to no more than one solicitor and one barrister.

<sup>57</sup> The Melbourne Response will provide legal advice—but only if requested—for the purposes of a contested hearing. See Royal Commission redress and civil litigation consultation paper, page 244.

<sup>58</sup> Royal Commission redress and civil litigation consultation paper, page 172, 174.

## 5.8 Participation of alleged perpetrator or institution

### 5.8.1 Perpetrators

The Royal Commission has been clear that a redress scheme should *not* involve any finding of guilt or culpability against an alleged perpetrator of abuse.<sup>59</sup> Such findings would require procedural fairness to be provided to the accused, which may necessitate a rigorous testing of survivors' allegations (including potential cross-examination), which is not palatable to many survivors and runs contrary to the goals of redress.

The manner that a scheme treats with allegations against institutions and individuals must be restrained enough to avoid issues of procedural fairness—for example, the degree to which allegations are made public must be limited, especially where the alleged perpetrator has not been convicted.

The Government is therefore hesitant to support a redress scheme that would make “findings” against individuals. The Government further believes that alleged perpetrators should not have a role within a scheme, for reasons including:

- involvement of an alleged perpetrator raises issues of procedural fairness and may require a claimant's account to be tested against that of the alleged perpetrator (by way of cross-examination or other means, as occurred in the highly legalistic Irish scheme);
- the presence or participation of an alleged perpetrator may re-traumatise claimants; and
- the presence of an alleged perpetrator will likely be contrary to the stated purpose of the redress scheme, which will likely be about *an institution* making amends for past abuse.

### 5.8.2 Institutions

An adjudicated award of redress may require little else from an institution other than the provision of relevant records upon request, the funding of awards made by the scheme, and the provision of any apologies or additional services that the scheme requires (or sets standards for).

However, the degree to which an institution will be actively involved in the processes of a redress scheme can vary. For example, should institutions have a role in the adjudication of a claim, be able to contest a claim (or parts of a claim), or be able to investigate cases of their own volition if an institution wishes to assist with the passage of a claim?

The Royal Commission has identified several issues with respect to institutional participation, primarily relating to the diverse wishes of survivors. Some survivors wish to reconnect with an institution and would appreciate institutional involvement within a scheme, while other survivors wish for a scheme to be completely independent of institutions and are wary of any sort of perceived or actual bias toward institutions within a redress scheme.<sup>60</sup> This has been a particular concern for past redress schemes that have been run by the very institutions that many survivors see as the “perpetrator” of their abuse.

The Royal Commission's consultation paper suggests that a scheme should provide an institution with details of the relevant claim, and seek any relevant records, information, or comment. Institutions should be allowed to accept the allegations to speed up the redress process, but may also challenge the allegations via records (for example, that the alleged abuser was not present at the time).<sup>61</sup>

If it was decided that institutions should not be allowed to personally contest allegations put to the scheme, an option could be to provide for a “common contradictor”, charged with testing evidence where appropriate in an independent and objective fashion, on behalf of *all* participating organisations. Alternatively, the decision-maker (or panel) could make such decisions as part of a final adjudication.

#### **Discussion Question 18**

**The Government seeks views on:**

- **the extent that organisations should be involved in the scheme; and**
- **whether organisations should have a role in the investigation, testing, and adjudication of claims.**

<sup>59</sup> Royal Commission redress and civil litigation consultation paper, page 171, 176.

<sup>60</sup> Royal Commission redress and civil litigation consultation paper, page 80-81.

<sup>61</sup> Royal Commission redress and civil litigation consultation paper, page 169-170. The Royal Commission has also stated that organisations should be informed of all relevant claims, as many past instances of abuse will not have been reported internally.

## 5.9 Provision of reasons

A redress scheme may simply provide an award of redress, or it may also provide reasons accompanying that award.

The Canadian Grandview agreement provided written reasons that accompanied an award of redress. This process has been described as beneficial to scheme participants, as it “ratified the claimants’ experiences in some detail, using their own words”, and provided official acknowledgment and vindication of the abuse that occurred.<sup>62</sup>

However, while the benefits of reasons have been acknowledged, the giving of reasons may lead to a desire from survivors to have findings made against perpetrators or institutions in those reasons. This raises issues of procedural fairness.

The provision of reasons, if allowed, may therefore have to be strictly regulated and confined, or may require institutions to be given the chance to dispute any findings that might potentially appear in those reasons. This may prove disappointing to certain claimants.

Whether or not the provision of written reasons is appropriate for a redress scheme will largely depend on the way in which redress is offered by the scheme. For example, a scheme that encourages parties to reach a mediated settlement will not be suitable for the giving of reasons. Likewise, there will be little benefit to providing reasons in a scheme that awards financial payments by reference to a clear and transparent matrix or table, as the reasons for the financial payment will be evident (via the matrix) in the payment amount itself. However, reasons may be more appropriate in a scheme that gives the decision-maker a substantial amount of discretion in the awarding of benefits. The calculation of redress payments is discussed in greater detail below at section 6.1.

If reasons are provided, they should explain the rationale behind an award of redress without being re-traumatising. Conversely, reasons should not be so abstract that they have no personal meaning to claimants, but should be individualised to the particular claimant, and should assist with the process of healing by reflecting the stated purpose of the redress scheme

It is important to note that even if reasons are not available, this does not mean that beyond an official acknowledgement of the abuse or an apology from the relevant institution cannot be provided. Indeed, the Government believes that these measures are a critical component of an effective redress scheme.

### **Discussion Question 19**

**The Government seeks views on whether written reasons should be provided. If yes, in what manner should reasons be provided?**

## 5.10 Appeals

The right to an appeal may be important for claimants who are found to be ineligible for the scheme, for claimants who are unhappy with an award of redress they receive, or for institutions that may wish to question an outcome under the scheme. *Betrayal of Trust* recommended that a redress scheme should have a clear avenue of appeal.<sup>63</sup>

But while an appeal mechanism encourages independence and objectivity, it can also add another layer of process and administration to a scheme, which requires additional resources and funding. The Law Commission of Canada has noted that the design of appeal processes must take into account the effects on those funding the redress scheme, as well as the scheme’s intended beneficiaries.<sup>64</sup>

Some past redress schemes and similar bodies have provided forms of appeal mechanisms:

- The Queensland scheme allowed an internal review of eligibility for its basic level of payments, and an administrative review in the Supreme Court for its higher discretionary payments.
- The Western Australian scheme allowed appeals concerning errors of process or fact. These progressed through an escalating review process involving an independent review panel, the Department of Communities, and the Ombudsman.
- The Tasmanian scheme allowed an independent assessor to review its *ex gratia* payments.

<sup>62</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 233.

<sup>63</sup> *Betrayal of Trust*, page 564.

<sup>64</sup> Law Commission of Canada, *Restoring Dignity: Responding to child abuse in Canadian institutions*, page 318.



- Some Victorian compensation schemes (including the Transport Accident Commission and the Victims of Crime Assistance Tribunal) provide for a legislative right of appeal to the Victorian Civil and Administrative Tribunal (VCAT).

Appeals might be made on various grounds, including:

- decisions about a claimant's eligibility under the scheme;<sup>65</sup>
- errors in process;
- the decision to grant redress or the amount of the award itself;<sup>66</sup> and
- if new evidence arises that was not previously available to the redress scheme.

An appeal process can take a number of forms, including an internal review, a review by an administrative or legislative appeal body, or a review to a court or tribunal. The Royal Commission has noted that appeal mechanisms are in large part determined on how schemes are established (for example, by legislation, administratively, or by contract). The Royal Commission has suggested that it may not make recommendations on a specific appeal mechanism, and may leave the question open for the decision of those establishing a redress scheme, depending upon what is appropriate.<sup>67</sup>

Internal reviews can be conducted in a number of ways. For example, if a decision is made based on a written application, an oral hearing might form part of the appeal process. Similarly, if the original decision is made by an individual decision-maker, the scheme could provide for internal review by a panel (if available), or a re-constituted or larger panel if the original decision was also made by a panel.

Alternatively, a separate independent body could be set up to conduct appeals. In the Irish scheme, an independent review committee was established by legislation to review redress awards.

Finally, appeal could take place in an external court or tribunal.<sup>68</sup> Whilst a process of external review may provide a formal sense of accountability, the establishment of a formal appeal process via a judicial body could blur the distinction between a redress scheme and the courts, and may defeat the goal of resolving claims more quickly than in court proceedings.

It is also important to decide whether appeal rights should just be afforded to claimants, or also to the institutions responsible for funding redress. The Royal Commission appears to suggest that appeal rights should only be afforded to claimants, rather than institutions.<sup>69</sup> The Government acknowledges that there is a risk of survivor re-traumatisation if institutions are given a right of appeal.

### **Discussion Question 20**

**The Government believes claimants should have appeal rights, and seeks views on:**

- **how appeals should be conducted, and by whom;**
- **what aspects of a claim should be eligible for an appeal; and**
- **whether institutions should have a right of appeal.**

## **6 Benefits available under a redress scheme**

### **6.1 Financial payments**

#### **6.1.1 Introduction and principles**

Past redress schemes in Australia and internationally have provided a financial payment, unattached to the provision of services. Survivors have expressed that this payment is important for a variety of reasons, including personal validation, a symbolic acknowledgement of the abuse by the relevant

<sup>65</sup> In a submission to the Royal Commission, the Actuaries Institute noted that the principles of natural justice require that an appeal mechanism be available to a claimant who is refused eligibility to a scheme.

<sup>66</sup> Review rights relating to the amount of an award may be much more important where a redress scheme involves an individualised assessment approach that allows the decision-maker a broad discretion to determine payments.

<sup>67</sup> Royal Commission redress and civil litigation consultation paper, page 173.

<sup>68</sup> Some submissions to the Royal Commission have recommended an appeals function to the Commonwealth Administrative Appeals Tribunal. While this would not be appropriate for a Victorian scheme, VCAT could fulfil a similar function in Victoria.

<sup>69</sup> Royal Commission redress and civil litigation consultation paper, page 173.

institution, self-esteem, financial security, and allowing opportunities for themselves and their families that might not otherwise be available. Along similar lines, the Australian Senate has noted:

*No amount of money can adequately compensate victims for the pain and suffering experienced while in institutions and other forms of care, [but can go] some way towards acknowledging past abuse and affording a sense of justice and closure for many victims.<sup>70</sup>*

The Victorian Government believes that a redress scheme should deliver financial payments by reference to the following principles:

- *Reasonable consistency and fairness*: survivors who have suffered similar harms should be treated equally and receive reasonably consistent monetary offers.
- *Transparency*: the process of calculating payments should be made clear to claimants in advance of applying for a payment, so that claimants are aware of the rough amount they are likely to receive, and are able to understand the rationales behind the amount offered.
- *Timeliness*: the method of calculation should easily understood and applied. This ensures compensation is provided in a timely and efficient manner, and avoids administrative burdens, delay, and the re-traumatisation of survivors.
- *Attractiveness*: the level of payments should be attractive enough to encourage potential claimants to apply to the scheme, while remaining affordable for participating institutions.
- *Sustainability*: monetary payments must be reasonable, affordable and fiscally viable over time, to ensure that the scheme is sustainable and remains available to all likely claimants.

### 6.1.2 Calculation of financial payments

Past redress schemes have used different approaches to calculate financial payments. These approaches include:

- a flat payment where each successful claimant receives the same amount regardless of their individual experience;
- an individualised assessment where the decision-maker has a discretion to determine the payment amount (but may be guided by broad criteria or guidelines); and
- an individualised assessment that uses a “matrix” to award redress based on set factors;

#### Flat payment

Some past schemes have offered a flat payment to all successful claimants. This approach does not require the probing of claimants’ experiences of abuse, as this is not relevant to the financial award.

There are different ways of approaching this model. Flat payments can be universal (\$7000 was offered in the Queensland redress scheme for all successful claimants), or organised into tiers (the Canadian Indian Residential School Settlement Agreement offered a flat payment of \$10,000, plus an additional \$3,000 for every year spent within an institution).

However, given the potential scope of a potential Victorian scheme, encompassing a substantial number of organisations, time periods, and harms, a flat payment may not adequately address the differing experiences of likely claimants to the scheme, and would likely be far too low in relation to claimants who have suffered severe abuse.

While there may be a role for flat payments to address the particular harms suffered by particular groups of survivors (for example, those who grew up in institutional residential care), it may not be appropriate for a universal flat payment to apply across the entire scheme.

#### Discretionary assessment

This approach allows the decision-maker a broad discretion to determine payment amounts. The decision-maker may have an absolute discretion, or may be guided by a set of factors.

A discretionary approach may provide decision-makers with more flexibility over the factors they consider to be relevant in determining a payment amount.<sup>71</sup> This approach also avoids having to attempt the difficult task of allocating specific payment amounts to specific factors.

<sup>70</sup> Australian Senate, Legal and Constitutional References Committee, *Review of Government Compensation Payments* (2004), page 226.

However, whilst this approach may provide for more flexibility, it may lead to inconsistent outcomes for claimants, particularly if different amounts are awarded to survivors that suffered similar harms. A pure discretionary approach may disappoint claimants' expectations, as claimants might be unable to predict in advance the likely amount of redress they might receive.

Given that the redress scheme contemplated by this paper may encompass a range of government and non-government institutions, the Victorian Government does not favour an approach that may not allow for equity across the scheme.

Furthermore, decision-makers themselves may find a discretionary approach challenging. Some adjudicators in the Canadian Grandview scheme noted that the use of a matrix assisted in enhancing fairness across claims, and relieved decision-makers' stress regarding any potential (unintended) unfairness that may have arisen from a discretionary approach.<sup>72</sup>

This does not mean that there is not room for elements of discretion within a scheme. For example, discretion could be worked into a matrix-based approach—the matrix would set a range of payment for particular harms suffered, whilst giving the decision-maker discretion to award amounts within that range depending upon the circumstances of the case.

### Matrix approach

The matrix-based approach uses a table containing a range of factors to determine the amount of financial redress a claimant should receive. The matrix may contain factors such as type, severity, impact, and duration of abuse. By referring to the matrix, a claimant should be roughly able to determine in advance of applying to the scheme the financial payment he or she might receive.

The Royal Commission appears to favour a matrix-based approach, commenting favourably on its consistency, openness, and objectivity. A significant number of submissions to the Royal Commission's consultation paper, including those of major NGOs, also supported the use of a matrix to determine payment amounts. The Royal Commission's discussion paper proposes a matrix that would, as key factors, take into account the severity of abuse, the impact of the abuse, and any distinctive factors that exacerbated the abuse (or its impact).<sup>73</sup>

This approach has been used extensively in the past, including in Queensland, Ireland, and Canada, although some survivors have been critical of the use of matrices in past schemes, stating that a matrix dehumanises individuals, creates arbitrary categories of harm,<sup>74</sup> and creates comparisons between survivors, whereby one survivor's experience was identified as being worse than another.<sup>75</sup> The risk of comparison, however, is a risk that eventuates amongst almost any model of payment calculation.

There are considerable benefits for using a matrix to determine financial payments within a redress scheme. The benefits of a matrix align with the broad principles for financial payments stated earlier, as a matrix is:

- *Consistent*, as claimants who suffered similar harms will receive similar levels of payment.
- *Transparent*, as claimants can determine in advance the rough payment amount that they may receive under the scheme.
- *Timely*, providing decision-makers with a clear guide of the amount that should be awarded.<sup>76</sup>
- *Attractive and sustainable*, as those funding and administering the scheme are better able to estimate the potential costs of the scheme than with a purely discretionary approach.

A matrix also provides for a validation process that can have therapeutic outcomes for survivors, as it provides an acknowledgement of the harm suffered—because payments under a matrix are awarded

<sup>71</sup> Reg Graycar & Jane Wangmann, *Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution*, Sydney Law School, Legal Studies Research Paper, No 70/50, page 40.

<sup>72</sup> Reg Graycar & Jane Wangmann, *Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution*, Sydney Law School, Legal Studies Research Paper, No 70/50, page 40.

<sup>73</sup> Royal Commission redress and civil litigation consultation paper, page 147, 150. The "distinctive factors" could include, for example, whether an institution was "closed" (such as a 24-hour residential care facility where children were isolated and subject to continuous authority), or "open" (for example, where a child attends Scouts once a week).

<sup>74</sup> Reg Graycar & Jane Wangmann, *Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution*, Sydney Law School, Legal Studies Research Paper, No 70/50, page 40.

<sup>75</sup> Reg Graycar & Jane Wangmann, *Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution*, Sydney Law School, Legal Studies Research Paper, No 70/50, page 39; also see Deborah Leach & Associates, *Evaluation of the Grandview Agreement Process: Final Report (1997)*, page 58.

<sup>76</sup> Reg Graycar & Jane Wangmann, *Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution*, Sydney Law School, Legal Studies Research Paper, No 70/50, page 39-40.

for varying levels of abuse, the scheme implicitly acknowledges that the particular form of abuse occurred in awarding a financial payment.<sup>77</sup>

As mentioned earlier, a matrix can be customised to address the needs of specific groups of survivors. The factors contained in a matrix do not have to apply to every single claimant. Using the Royal Commission's proposed criteria as an example, a matrix might assess *all* claimants with regard to the severity and impact of their abuse, but also contain factors such as "time spent in a residential institution" (which will be relevant to survivors who grew up in residential care), or "loss of culture" (which will be relevant to indigenous claimants who were disconnected from family and culture).

A matrix can also be flexible to respond to the unique circumstances of a particular case. As noted above, decision-makers could be given a set payment range by a matrix, and then have discretion to award a financial payment within that range.

Finally, there is provision for a matrix to apply different payments to different standards of proof. For example, while it is inappropriate for a single flat payment to be awarded universally to *all* claimants, a scheme may nevertheless wish to give claimants—who do not wish to be subjected to a more prolonged and rigorous assessment process—the option of receiving a smaller flat payment as recognition of their abuse, without requiring them to engage in a detailed assessment of their abuse (noting that such claimants would still be eligible for counselling and an apology). This was the approach used in Queensland, which provided a base \$7,000 payment with minimal verification, and up to a further \$33,000 for claimants prepared to go through a more rigorous assessment process.

A matrix therefore offers a great deal of flexibility, and can be customised to account for survivors with differing experiences and needs. With this in mind, the Government is interested to hear submissions on what factors might be contained within a matrix, having regard to the proposed factors put forth by the Royal Commission. The Government acknowledges that a broader scheme may necessitate a more complex matrix, to take into account a wider variety of institutional contexts and harms.

### **Discussion Question 21**

**The Government seeks views on:**

- **whether a matrix-based approach to payment calculation is appropriate; and**
- **the key factors that should determine payment amounts within a matrix.**

### **6.1.3 Lump-sum or managed payments**

Past redress schemes have generally provided successful claimants with the autonomy to make decisions about how a payment is spent. However, it is open for a scheme to put in place financial safeguards, such as the provision of financial counselling or the mandatory management of financial payments, to protect the financial security of people who receive financial payments.

As noted above, providing a lump-sum financial payment unattached to the provision of services is an important element of redress. But while a payment is important to many survivors, it may lead to a wide range of inadvertent impacts.

The effect of lump-sum payments on survivors of abuse was considered by the Canadian Aboriginal Healing Foundation.<sup>78</sup> For many recipients, these payments provided a positive opportunity to help family members, purchase needed items, acquire goods or engage in activities that they previously could not afford, access health and educational services, clear debts, and invest.

However, there were also negative impacts for some recipients, particularly those from vulnerable socio-economic backgrounds and remote communities with limited access to facilities, services, and resources. Many recipients in small communities also reported demands from their family and community to share the money received.

The Royal Commission has indicated that it may recommend (as an option for claimants) a managed approach to the delivery of financial payments, to protect claimants with insufficient financial knowledge, as well as claimants who may feel culturally obliged or pressured to share their payment amongst their community (as happened in Canada).<sup>79</sup>

<sup>77</sup> This was noted by some of the participants in the Canadian Grandview Agreement.

<sup>78</sup> In its 2007 report: *Lump Sum Compensation Payments Research Project: the Circle Rechecks Itself*.

<sup>79</sup> Royal Commission redress and civil litigation consultation paper, page 159.

But the imposition of a managed payment necessarily involves a value judgment as to who is or is not “vulnerable”. It may be more appropriate to simply provide the *option* of a managed payment, following financial counselling and advice.

Past redress schemes, including the Queensland and Tasmanian schemes in Australia, have offered financial counselling as part of the benefits offered to claimants. This service was provided on an optional basis—in some cases upon entry into the scheme, and in other cases after an award is made.

The Canadian Aboriginal Healing Foundation recommended a range of financial supports, including financial counselling/planning services and workshops. Underpinning these recommendations was the principle that survivors have the ultimate right to make their own decisions as to how they spend a financial payment. Therefore, it may be more appropriate that these supports be *offered* to claimants rather than being imposed as mandatory requirements of receiving any payment.

### **Discussion Question 22**

**The Government seeks views on:**

- **how financial payments should be paid; and**
- **whether the scheme should offer financial counselling.**

#### **6.1.4 Impact of payments on Medicare or Centrelink**

An award of redress may affect government benefits such as Medicare or Centrelink.

For example, under the Medicare Compensation Recovery Program, a claimant who receives a redress award may have to pay money back to the Commonwealth for services received under Medicare. Likewise, Centrelink payments may be affected if the relevant individual receives a payment for personal injury, illness, or disease that replaces lost income or earning capacity.

The Victorian Government is aware of this issue, and intends to consult with the Commonwealth to determine and reduce the potential impacts in this area. For example, the Royal Commission has noted that the Queensland and Western Australian redress schemes made arrangements with the Commonwealth to avoid successful redress claimants having to pay back Medicare amounts.<sup>80</sup>

## **6.2 Non-financial benefits**

Both the Parliamentary Inquiry and the Royal Commission have heard of the debilitating effects abuse has on survivors’ physical, psychological, social, and economic well-being.

Some past redress schemes have provided appropriate support services in responding to institutional child abuse. Such services are intended to reduce the likelihood of any further trauma. For example, 80 percent of surveyed participants that received counselling from the Canadian Grandview Agreement said that the counselling helped them to make positive changes in their lives.<sup>81</sup>

### **6.2.1 Types of non-financial benefits available**

The Royal Commission has singled out counselling<sup>82</sup> and psychological care<sup>83</sup> as the primary shared needs of all survivors of institutional child abuse. In the view of the Royal Commission, counselling and psychological care must be available to *all* claimants as a necessary part of redress.<sup>84</sup>

However, beyond counselling, there are many other supports that could be made available under a redress scheme. These include:

<sup>80</sup> Royal Commission redress and civil litigation consultation paper, page 151.

<sup>81</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), page 235.

<sup>82</sup> Counselling involves professional activities that utilise an interpersonal relationship to enable people to develop self-understanding and to make changes in their lives. Counsellors are not a registered profession under the Australian Health Practitioner Regulation Agency. However, counsellors can be registered with the Australian Counselling Association or the Psychotherapy and Counselling Federation of Australia, which provide practitioner standards: see Psychotherapy and Counselling Federation of Australia “Counselling & Psychotherapy Definition”, <http://www.pacfa.org.au/practitioner-resources/counselling-psychotherapy-definitions/>

<sup>83</sup> Psychologists have specialist training in the assessment and diagnosis of major mental illness. Psychologists are experts in human behaviour. They use scientific methods to study the factors that influence the way that people think, feel and learn, and evidence-based strategies and interventions to help people to overcome challenges and improve their performance: Australian Psychology Society “What does a psychologist do?” <http://www.psychology.org.au/studentHQ/careers/what-does-a-psychologist-do/>

<sup>84</sup> Royal Commission redress and civil litigation consultation paper, page 105-106.

- medical and dental care;
- support groups;
- educational support;
- parenting services;
- housing services;
- funeral services;
- employment/career counselling;
- drug and alcohol supports;
- aboriginal services; and
- financial counselling.

The Royal Commission considers that non-financial services *other than* counselling and psychological care should not be universal within redress. Instead, these should be delivered as part of an institution's "direct personal response" to a survivor (discussed further at section 6.3). In other words, while a redress scheme might facilitate the referral of a claimant to such additional services, it would not require that those services were provided. The Royal Commission has also noted that successful claimants are free to spend their financial payments on whatever they choose, including alternative therapies and services not offered by a redress scheme.<sup>85</sup>

It is important to note that the amount and extent of non-financial benefits provided by a redress scheme may affect the amount of financial payments available under the scheme. A redress scheme that comprehensively addresses the non-financial needs of survivors may need to have lower financial payments in order to be financially sustainable.

Furthermore, not all needs will be universal across all groups of survivors of institutional child abuse. For example:

- dental care is often necessary for people who lived in residential care as children, and were not properly taught the basics of dental hygiene;
- some survivors of institutional care seek family reunification or access to their historical records, whereas survivors of institutional child abuse in a sporting organisation or in a local religious congregation are unlikely to have such needs;
- indigenous survivors may seek reconnection and collective healing opportunities.<sup>86</sup> This may include education in culture, knowledge and values, counselling from traditional healers, or learning an Aboriginal language.

It may therefore be more appropriate for certain services to be administered separately at the discretion of individual institutions participating in the scheme (including government institutions), as part of that institution's "direct personal response".

### **Discussion Question 23**

**The Government seeks views on what non-financial benefits should be offered universally by the scheme, rather than being provided directly by relevant institutions as part of a "direct personal response".**

## **6.2.2 Counselling and psychological care**

As mentioned above, the Royal Commission has identified counselling and psychological care as the common shared need of all survivors of institutional child abuse. In its consultation paper, the Royal Commission outlines the positive effects that adequate counselling and psychological care can have on a survivor's well-being.<sup>87</sup>

In regard to counselling and psychological care, the Royal Commission has suggested that:

<sup>85</sup> Royal Commission redress and civil litigation consultation paper, page 111.

<sup>86</sup> Royal Commission redress and civil litigation consultation paper, page 97.

<sup>87</sup> Royal Commission redress and civil litigation consultation paper, page 107-110.

- counselling should be available on a life-long basis;
- counselling should be available on an episodic basis if required;<sup>88</sup>
- survivors should be able to choose between counselling options provided by appropriately capable professionals (who have the right capabilities to work with complex trauma clients);<sup>89</sup>
- subject to regular review, there should be no fixed limit on the number of counselling sessions available to a survivor; and
- family members should receive counselling through existing Medicare services, and not through redress.<sup>90</sup>

The Victorian Government is interested to hear submissions on the appropriateness of these general principles for counselling and psychological care.

#### **Discussion Question 24**

**The Government seeks views on whether the above principles governing the provision of counselling are appropriate. If not, in what manner should counselling be offered? Should there be any limits on the provision of counselling?**

Please note that this discussion is separate from the issue of providing counselling and related supports as a claimant progresses through the application and redress process. As indicated above at section 5.1, the Government believes that all claimants should be adequately supported throughout the redress process, regardless of whether they ultimately succeed in their claim.

## **6.3 “Direct personal response”: acknowledgement, apology, and other services**

### **6.3.1 Introduction**

The Royal Commission has adopted the term “direct personal response” to describe the range of services, support, assistance and other measures that institutions may provide to survivors of institutional child abuse, outside of counselling or monetary payments. For the sake of consistency, this paper will adopt the same term.

The most important element of a direct personal response is an institutional acknowledgement of the abuse that occurred, accompanied by a genuine apology. Other elements of a direct personal response are usually provided outside of the redress process (that is, at the discretion of both the survivor and the relevant institution), and may include:

- drug and alcohol, employment, or education programs;
- assistance to obtain records, photographs, and publications;
- assistance to find family and facilitate reunions;
- providing “pastoral care”, in the sense of spiritual guidance, support, or re-engagement with a faith-based institution;
- collective redress, such as memorials and commemorative events; and
- case management to assist in accessing support services.<sup>91</sup>

The Royal Commission has indicated that because not all institutions will be able to provide the above elements, it is up to individual institutions to make clear what they can and cannot offer to survivors as part of a direct personal response.<sup>92</sup>

<sup>88</sup> While there is a need for counselling that is accessible throughout a survivor’s life, it is not necessarily needed continuously. The episodic nature of many harms needs means that needs cannot be predicted accurately for individual survivors.

<sup>89</sup> Some survivors may prefer support groups convened by broader support services, while other survivors may prefer private referrals. Some survivors do not want to use counselling services associated with the institutions in which they were abused, while other survivors prefer such services.

<sup>90</sup> Royal Commission redress and civil litigation consultation paper, chapter 5.

<sup>91</sup> Royal Commission redress and civil litigation consultation paper, page 81.

<sup>92</sup> Royal Commission redress and civil litigation consultation paper, page 82.

### 6.3.2 Acknowledgement and apology

There is a wide acceptance that an apology is a necessary part of the healing and reconciliation process of redress.

In a survey conducted by the Queensland Department of Communities, the two most frequently cited outcomes sought by survivors of institutional child abuse were a financial payment of redress, and the obtaining of an apology from the relevant institution.

The Royal Commission has identified three minimum measures in this area:

- an apology by the institution;
- an opportunity for the survivor to meet with a senior representative of the institution to allow the survivor to give an account of their experiences and to receive acknowledgement; and
- an assurance as to the steps the institution has taken or will take to protect against similar abuse in future.<sup>93</sup>

For many survivors, an apology provides a sense of validation that they have been listened to, believed and respected, and indicates that institutions have taken some kind of responsibility for past wrongs. The Parliamentary Inquiry noted that many survivors who have approached internal institutional redress schemes have done so solely for the provision of an apology.<sup>94</sup> The Royal Commission has found that the strongest theme emerging from survivors' accounts of apologies is the importance placed upon an institution "taking responsibility for the wrong and the harm caused".<sup>95</sup>

It is important to note that apologies will always be received differently. The Royal Commission has "heard from survivors, who, having received the same form of private apology or having heard the same public apology, have reacted very differently".<sup>96</sup>

Redress schemes to date, both in Australia and internationally, have generally involved an offer of apology. A number of governments and major religious and non-religious institutions in Australia have also publicly apologised for harms perpetrated against children within their institutions.<sup>97</sup>

On 9 August 2006, the former Victorian Premier Steve Bracks delivered an apology on behalf of the Government to people abused and neglected in state care:

*For those who were abused and neglected, the message we wish to give to them is that we acknowledge their pain and hurt... we apologise sincerely to all of those who as children suffered abuse and neglect whilst in care and to those who did not receive the consistent, loving care that every child needs and deserves.*<sup>98</sup>

If an apology is provided, it must be decided who issues the apology, to whom it is addressed, how it is provided, and how it is worded. The Royal Commission has indicated that apologies should be carefully made so as not to reinforce any power imbalance between institution and survivor—in particular, institutions should not "dictate the agenda" for making apologies.<sup>99</sup>

The apology itself may be in an oral or written form, and may be addressed (privately or publicly) to individual survivors, their families, or whole communities. The apology itself may acknowledge general or specific wrongs, may express regret and/or may include an undertaking to make all possible efforts to prevent the abuse from occurring again.

The apology must be worded in a manner that is viewed by survivors as sincere and a genuine acknowledgement of the wrongs suffered. In the past, some apologies have been criticised by survivors as being insincere and guarded and legalistic in nature. However, the Royal Commission has acknowledged—and the Government agrees—that it is impossible to require institutions to produce a "genuine" apology.<sup>100</sup> By definition, apologies must be voluntary if they are to be genuine.

<sup>93</sup> Royal Commission redress and civil litigation consultation paper, page 82

<sup>94</sup> *Betrayal of Trust*, page 97, 118.

<sup>95</sup> Royal Commission redress and civil litigation consultation paper, page 87.

<sup>96</sup> Royal Commission redress and civil litigation consultation paper, page 84.

<sup>97</sup> Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave Macmillan (2014), Appendix 4. For example, in the Canadian Indian Residential Schools scheme, a Statement of Reconciliation was issued by the Government of Canada, stating that "the Government of Canada ... formally expresses ... our profound regret for past actions ... The Government of Canada acknowledges its role [in the schools] ... and to those ... who suffered [sexual and physical abuse] ... we are deeply sorry".

<sup>98</sup> Media release, Department of Human Services, *Victorians apologise to abused former wards*, 9 August 2006.

<sup>99</sup> Royal Commission redress and civil litigation consultation paper, page 83.

<sup>100</sup> Royal Commission redress and civil litigation consultation paper, page 80.



It is clear also that for an apology to be meaningful, it should be provided by a person with an appropriate level of responsibility, who possesses sufficient skills to be able to deliver an apology in an appropriate manner. For example, in the case of indigenous survivors, it has been suggested that an apology should be culturally appropriate, and delivered by people with culturally appropriate training.

It may be appropriate that standards are set by the redress scheme in this area, ensuring, for example, that face-to-face meetings are held in an appropriate and non-traumatic environment, perhaps with the involvement of an independent facilitator (if requested by the survivor) to manage the discussion and follow up on any agreed outcomes with the institution.

### **Discussion Question 25**

**The Government seeks views on whether, as a minimum, an institution should provide (where requested):**

- **an apology;**
- **an opportunity to meet with a senior member of the institution; and**
- **an assurance of the steps the institution has taken (or is taking) to prevent similar harms occurring in future.**

**The Government also seeks views on whether a redress scheme should set any further standards or requirements in this area.**

## **7 Deeds of release**

It is important to note that a survivor's participation in a redress scheme is always a voluntary decision. Both the Parliamentary Inquiry and the Royal Commission have stressed the importance of allowing survivors the choice to pursue civil justice via either civil litigation or a redress scheme.

But should individuals be allowed to pursue *both* civil litigation and redress? Deeds of release play an important role in answering that question. In the past, survivors who have received a civil settlement or an award of redress have often been required to sign a deed of release, under which the survivor agrees to give up their right to sue in relation to that particular claim.

Deeds of release raise two distinct issues in the design of a redress scheme:

1. Will claimants who have *already* received some form of compensation or redress (for example, in a court judgement, in a settlement, or in a previous redress scheme) and are subject to a deed of release or similar legal barrier be allowed to access a new redress scheme?
2. Will claimants who receive redress through the scheme retain the right to seek *future* compensation through the courts?

It is important to note that no aspect of redress scheme development can be addressed in isolation. As has been clear from this paper, there is considerable overlap between the different decisions to be made—the choice of one option may impact a variety of other options. In considering the use of deeds of release, it is particularly important to keep in mind the range and amount of benefits that a scheme might offer, as well as the degree to which the scheme robustly “tests” the claims before it.

### **7.1 Existing deeds of release**

People subject to existing deeds of release may wish to access a new redress scheme for a variety of reasons—for example, to obtain counselling or an apology, or to gain a “top up” on a past payment.

An existing deed of release need not be a complete barrier to individuals who wish to apply to a new redress scheme. For example, built into the scheme could be a mechanism by which a claimant and an institution agree to waive or create an exception under an existing deed of release.

The Western Australian redress scheme required assessors to take into account any past civil settlements or *ex gratia* payments when assessing redress payments. In Ireland, however, a previous court award or civil settlement acted as a complete bar to claimants accessing the scheme.

The Victorian Government believes that, at a minimum, a redress scheme should take into account any past payments, including from civil litigation, redress, and statutory victims of crime schemes.

This accords with the thinking of the Royal Commission, which has also indicated that, depending upon the nature of past settlements, recipients of past payments may be excluded from eligibility for non-financial services under a new redress scheme.<sup>101</sup>

A new redress scheme may therefore be open to all claimants, however, claimants who have previously received generous compensation would be eligible for little (if any) benefits under the new scheme, but may still participate to obtain remedies such as an apology or access to records.

If past payments *are* taken into account, the manner in which this is done requires consideration. For example, what should a claimant who has previously received \$50,000 in a civil settlement be eligible for under a redress scheme that would provide that person \$20,000 in a financial payment, as well as counselling? Would the hypothetical claimant receive:

- no financial payment but the full entitlement of counselling;
- no financial payment and a reduced amount of counselling;
- no financial payment and no counselling; or
- the full financial payment and counselling services offered by the new scheme?

A scheme must also determine whether it should treat claimants differently depending upon the manner in which they received their past payment. For example, should there be a difference (in terms of both eligibility for financial payments and non-financial services) between a claimant who has successfully received redress in a past redress scheme, and a claimant who has previously pursued a civil claim in the courts and received true “compensation” across all common law heads of damages?

### **Discussion Question 26**

**The Government seeks views on how the scheme should deal with claimants subject to an existing deed of release.**

## **7.2 Future deeds of release**

Past redress schemes have largely provided benefits to claimants contingent on a deed of release (or an indemnity) that protects the relevant institution or government against any future legal claims.

In Australia, all of the existing state government-run redress schemes required claimants to commit to a deed of release or indemnity, with the exception of the Western Australian redress scheme.<sup>102</sup>

While requiring a deed of release may make a redress scheme more palatable to many institutions, such a requirement may necessitate making more generous benefits and financial payments available.

The Royal Commission’s thinking on whether to recommend a deed of release is unclear. In its consultation paper, the Royal Commission indicates a minimum position of requiring claimants to agree that any redress payment will be offset against future common law damages, and that if common law damages are obtained, the claimant will cease to be eligible for counselling and any other benefits provided by the scheme. A further option suggested by the Royal Commission is to require a deed of release, but with the power to have the deed set aside if significant new evidence comes to light regarding the institution’s responsibility for the alleged abuse.<sup>103</sup>

Given the range of organisations that may potentially be covered by a Victorian redress scheme, the Victorian Government is very aware of the need to make the scheme helpful for prospective claimants as well as viable for organisations.

While it may be appropriate to require no deed of release for a scheme that provides a low level of benefits, a redress scheme that provides substantial financial and non-financial benefits may tend toward requiring a deed of release—particularly where the redress scheme aims to provide a holistic response that addresses a broad range of survivors’ needs in order to provide finality and closure.

However, the Government is aware that while the goal of “finality” may be achievable for institutions participating in a redress scheme, it is dangerous to assume that a survivor’s participation in redress with necessarily bring with it a sense of finality and closure, although it is hoped that some survivors will receive a degree of closure from a well-designed redress scheme.

<sup>101</sup> Royal Commission redress and civil litigation consultation paper, page 159-160.

<sup>102</sup> Redress WA initially required a deed of release. That requirement was removed after the maximum compensation available under the scheme was significantly reduced.

<sup>103</sup> Royal Commission redress and civil litigation consultation paper, page 173-174.

It is not possible to raise all of the arguments for and against a deed of release without greatly expanding the length and complexity of this paper. Some of these arguments are less apparent than others. For example, the Government has heard a concern that without deeds of release, plaintiff lawyers may encourage their clients to use the money received from redress to then pursue subsequent legal action alongside redress—to the extent that (in a worst-case scenario) the money received from redress might be wiped out in an unsuccessful civil claim.

The Victorian Government is therefore interested in hearing, at first instance, the views of stakeholders and the public about whether it is appropriate to require a deed of release as a condition of receiving redress, and if so, whether any conditions should attach to that deed.

An example of a condition could be a clause that allows the deed to be set aside if new evidence arises. Alternatively, a claimant could be allowed to put an offer of redress "on hold" while a civil action is commenced, as a trade-off for requiring a deed of release.

Certainly, if a deed of release is required, claimants should be allowed to obtain legal advice on the effect of the deed. Other schemes have usually allowed for a small allowance for a claimant to obtain legal advice on the operation of the deed of release. The Tasmanian scheme provided \$300 for such costs, Redress WA (when it required a deed) allowed \$1000, while Towards Healing provides "reasonable costs" in relation to legal advice. Legal representation is discussed further at section 5.7.

### **Discussion Question 27**

**The Government seeks views on whether a deed of release will be required when a claimant obtains redress. If yes, should any conditions attach to the deed?**

**The Government is also interested to hear whether NGOs within the potential scope of the scheme would be willing to participate if a deed of release was not required.**

## **8 Administrative arrangements for a redress scheme**

Once the scope, processes, and available benefits of a redress scheme are determined, the scheme will need to be administered by either a new or existing entity. This section explores three possible options for the administration of a Victorian redress scheme.

While the recommendation from *Betrayal of Trust* stated that the Victorian Government consider expanding the Victims of Crime Assistance Tribunal (VOCAT) to accommodate a redress scheme, this paper considers two additional administrative structures for a scheme.

Again, no aspect of redress scheme development can be considered in isolation. The choice of an administrative structure will necessarily influence other scoping decisions, and vice versa—for example, choosing the VOCAT option would likely guide the choice of decision-maker for the scheme (as VOCAT is currently constituted by magistrates).

The Royal Commission has indicated that a redress scheme can be established in a number of ways: by legislation, by administrative arrangements within government, or by contract. The Royal Commission may not recommend a particular administrative arrangement or means of establishing a scheme, noting that as long as "the outcome from any scheme meets our recommendations, there may be no benefit in prescribing how the scheme must be implemented".<sup>104</sup>

### **8.1 Expansion of Victims of Crime Assistance Tribunal**

Recommendation 28.1 of *Betrayal of Trust* explicitly recommended a review of VOCAT to consider its capacity to administer a redress scheme. Building upon VOCAT-type infrastructure may be a way to get redress schemes up and running more quickly.

To enable VOCAT to implement effective redress for survivors of institutional child abuse, VOCAT's jurisdiction would need to be modified or expanded, via statutory amendments to the *Victims of Crime Assistance Act 1996* (VOCA Act), which governs the operation of VOCAT.

<sup>104</sup> Royal Commission redress and civil litigation consultation paper, page 59.

Currently, VOCAT is accommodated through Magistrates Court venues, with magistrates as decision-makers. Victims of a violent crime<sup>105</sup> committed in Victoria can apply to VOCAT for financial assistance and other benefits, even where no one has been charged with or found guilty of an offence.

It is important to note that this option does *not* propose that redress claimants would be required to go through the current VOCAT process. This option simply discusses the feasibility of placing a redress scheme within the administrative bounds of VOCAT. In all likelihood, if VOCAT was used to support a redress scheme, a separate “stream” of VOCAT would have to be created. For example, the following changes to VOCAT may be necessary if it is to accommodate a redress scheme:

- Modifying the standard of proof, which is currently the “balance of probabilities”.
- Amending the validation process to prevent re-traumatisation, for example, by conducting hearings in private (if at all) and softening the evidentiary burden placed on the claimant.
- Providing a range of financial and non-financial benefits tailored to the needs of survivors, different to what VOCAT currently offers (which is meant to cater to all victims of violent crime generally). For example, a mechanism to receive an acknowledgement of the harm suffered and an apology should be included.
- Removing “legalistic” elements of VOCAT process that may be inappropriate for survivors, such as the need to make applications to court registries, and the holding of directions hearings.

In proposing a new “stream” of VOCAT, this option therefore envisions the creation of a tailored response to survivors of institutional child abuse that has the advantage of relying on the existing resources and expertise of VOCAT.

This option is the closest to that envisioned by recommendation 28.1 from *Betrayal of Trust*. It would draw the existing workforce and systems of VOCAT, which may aid in reducing set up costs and time. In addition, the VOCAT magistrates are already well-versed in dealing with claimants who have experienced trauma, which will be particularly important in the case of institutional child abuse claimants. VOCAT’s magistrates are also adept at resolving claims on limited amounts of evidence.

The independence of VOCAT may also be of particular value to many survivors. As VOCAT is a tried-and-tested impartial and independent avenue, with magistrates as decision-makers, it will likely safeguard against any potential power imbalance between institutions and survivors.

This option may also better provide for the non-financial support envisioned by the Royal Commission, especially an order of lifelong access to counselling, as VOCAT (or its successor) is likely to exist into the future, and be able to continue administering these supports.

## 8.2 Co-operative “industry” model

A scheme could be established as a co-operative venture between its participants—including the Government, NGOs, and survivors’ groups. This option is similar to “industry” alternative dispute resolution models (such as the financial ombudsman service) where relevant stakeholders come together to create an independent alternative dispute resolution body.

The result would be the establishment of an independent company (or similar entity), potentially following negotiation and agreement between the Government, NGOs, and survivor and legal groups. The scheme (once established) would be independent, and would not be controlled by any one group.

The collaborative yet independent nature of this model sets it apart from the traditional models of redress that have been seen in the past, which are largely established and administered solely by either government or a relevant NGO.

The scheme could be governed by terms of reference. The terms of reference would address the issues canvassed in this paper, such as how the scheme operates and what redress is available.

A board could be responsible for managing the scheme, and could be comprised of representatives from the Government, NGOs, and survivors’ groups, led by an independent chair. The board would not have a decision-making role in the assessment of individual claims—these would instead be investigated and assessed by impartial decision-makers.

<sup>105</sup> Section 5 of the VOCA Act defines a violent crime as a criminal act, or series of criminal acts, that would constitute an offence involving assault, injury or a sexual offence, and that has directly resulted in physical or mental injury, or death.

### 8.3 A statutory or administrative scheme

This option would involve the Government establishing and operating a new body through statutory or administrative arrangements. This is similar to how governments have established redress schemes in the past (but with a broader scope that would encompass NGOs as well as government institutions).

The terms of reference or relevant legislation would set out the NGOs that are subject to the scheme; the application, investigation, and decision-making processes; the types of redress available; and other relevant matters. The terms of reference or legislation could be drafted by government or negotiated amongst participants, and the governance structure could be determined by government, or could involve a board comprised of government, NGO, and survivor representatives.

As this model is largely similar to what governments have established in the past, the administrative set-up and operation of the scheme would be facilitated by the experience of those past schemes. The result would be a new statutory or administrative body that is independent from the NGOs participating in it. If there are concerns about this model not being sufficiently independent from government itself, these can be alleviated by constituting the scheme as an independent statutory authority with an independent chair or office-holder.

#### **Discussion Question 28**

**The Government seeks views on potential administrative arrangements for redress:**

- a) an expansion of VOCAT**
- b) a co-operative “industry” model**
- c) a statutory or administrative scheme, established by government and administered by government or an independent authority**

## 9 Next steps

This consultation paper is an important step in the development of a redress scheme for Victoria. The input received from interested parties will significantly assist the Government in assessing options and in raising further issues for consideration.

The Government may undertake targeted consultation with a range of government agencies, NGOs, survivor advocacy and support groups, academics and experts, and other relevant parties.

The Government is also closely monitoring the work of the Royal Commission and welcomes any further opportunities to engage with the Royal Commission on this important issue.

## 10 Other progress on *Betrayal of Trust*

The Government has committed to implementing all outstanding recommendations from *Betrayal of Trust*. A website outlining the progress of the implementation of *Betrayal of Trust* has been set up by the Department of Justice & Regulation, and is available at:

<http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+trust+implementation>

Substantial progress has already been made in implementing the recommendations from *Betrayal of Trust*, particularly in relation to criminal and civil law reform, and creating child safe organisations.

### 10.1 Civil law reform

The Government acknowledges that redress cannot be considered in isolation, and is aware of the importance of progressing civil law reforms to provide survivors with appropriate access to justice.

In response to recommendation 26.3, the *Limitation of Actions Amendment (Child Abuse) Act 2015* passed through the Victorian Parliament in April, and became active on 1 July 2015.

This reform completely removes the limitation periods that apply to civil actions founded upon child abuse, and is an important step in allowing greater access to justice. Survivors are able to take advantage of the reform no matter when their alleged child abuse occurred.

The Government is currently developing options for the remaining civil law reform recommendations from *Betrayal of Trust*, and will develop and release further public consultation materials as work

continues, noting that many of these recommendations overlap with matters being examined by the Royal Commission, which may make similar recommendations in August of this year.

## 10.2 Criminal law reform

In 2014, the Government introduced three new criminal offences in response to recommendations 22.1, 23.1, and 23.2, to help protect children from abuse.

The offences prohibit behaviour including:

- the “grooming” of a child in preparation for abuse;
- adults failing to disclose child sexual abuse to police; and
- failing to protect a child from the risk of sexual abuse within an organisation.

Furthermore, Victoria’s Working with Children Check scheme has been strengthened in response to recommendation 10.1. All ministers of religion are now required to obtain a valid Working with Children Check unless their contact with children is incidental to their work.

## 10.3 Child safe organisations

The Government is also developing new child safe standards for organisations, addressing recommendations 12.1, 13.1, and 13.2 of *Betrayal of Trust*, as well as portions of recommendation 10.1. These child safe standards are aimed at creating child safe environments and improving the way organisations manage allegations of abuse. Victorian Government departments are working with stakeholders to develop the standards.

In addition, the Government has already introduced legislation that will require schools to adopt these standards, and implement policies to respond to allegations of child abuse.

A new “reportable conduct scheme” is also being developed that will require organisations with a high responsibility for children to report allegations of child abuse to a central oversight body.

# 11 Call for submissions

## 11.1 Instructions

This consultation paper was released by the Victorian Government on Wednesday 5 August 2015.

The Government invites stakeholders and members of the public to make a submission in response to this consultation paper by Monday 5 October 2015 at the latest.

Submissions are welcomed in respect of any matter raised by this consultation paper.

The paper also contains a number of specific discussion questions. The discussion questions are provided to assist stakeholders and community members in formulating their submissions. They reflect areas where the Government is particularly interested to hear the views of stakeholders and the public.

A short summary version of this paper will also be made available on the Department of Justice & Regulation website.

## 11.2 How to make a submission

Submissions may be provided in two ways.

You may **email** your submission to [redress@justice.vic.gov.au](mailto:redress@justice.vic.gov.au).

Any attachments to your email should be provided in Microsoft Word format (.doc or .docx), or in Rich Text Format (.rtf). Please ensure that the file size of any attachments is less than 5MB.

Alternatively, you may **post** your submission to:

Redress Consultation Paper  
C/- Department of Justice & Regulation  
GPO Box 4356  
Melbourne VIC 3000

Submissions may be made public unless otherwise requested.

If you require assistance making a submission, please call the Victims Support Helpline between the hours of 8am and 11pm at 1800 819 817 (free call).

The Government thanks you for your assistance in this important matter.