



**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES
TO CHILD SEXUAL ABUSE
AT SYDNEY**

**PUBLIC HEARING INTO
REDRESS AND CIVIL LITIGATION**

Case Study 25

OPENING ADDRESS OF SENIOR COUNSEL ASSISTING

INTRODUCTION

1. This is the twenty-fifth public hearing by the Royal Commission.
2. This public hearing is to enable invited persons and institutions to speak to the written submissions they have made to the Royal Commission's Consultation Paper on redress and civil litigation, which was published on 30 January 2015.
3. Unlike other public hearings, this hearing is not examining particular experiences of redress or civil litigation. Its primary purpose is to allow oral submissions on the policy issues and areas for reform raised in the Consultation Paper.

4. The purpose of the public hearing is:
 - a. to enable invited persons and institutions to:
 - i. speak to their written submissions to the Royal Commission's Consultation Paper on Redress and Civil Litigation and/or otherwise comment on the issues raised in the Consultation Paper, and
 - ii. respond to questions asked by the Royal Commission.
 - b. any related matters.

ISSUES RAISED IN THE CONSULTATION PAPER

5. It was made clear when the Consultation Paper was released that Commissioners had no firm views about any of the issues in the Consultation Paper and that informed comment was sought to assist Commissioners in forming their final views. The Consultation Paper sought submissions on any and all of the issues raised.
6. Particularly for the benefit of those in the public gallery and those following this hearing online, I will briefly outline some of the key issues raised in the Consultation Paper and which are likely to be the subject of comment by many of those speaking at this public hearing.

7. The Consultation Paper discussed a number of complexities that arise in determining an approach to redress that will achieve ‘justice for victims’. Some complexities arise from what has already been done in terms of previous and current redress schemes. There is also the issue of existing support services, which are often intended to support broader groups than survivors of institutional child sexual abuse. The Consultation Paper referred to the Royal Commission’s separate project to investigate how adequate support services are in meeting survivors’ needs, and this issue not being addressed in the Royal Commission’s work on redress. There is also the complexity of the Royal Commission’s Terms of Reference, including both the breadth of the institutions covered, and the focus on sexual abuse. Finally, reference was made to the need to make recommendations that can be implemented.
8. The Consultation Paper suggested that the appropriate elements of redress for survivors appear to be:
- a direct personal response by the institution if the survivor wishes to engage with the institution, including an apology, an opportunity for the survivor to meet with a senior representative of the institution and an assurance as to the steps the institution has taken, or will take, to protect against further abuse

- access to therapeutic counselling and psychological care as needed throughout a survivor's life, with redress to supplement existing services and fill service gaps so that all survivors can have access to the counselling and psychological care that they need
- monetary payments as a tangible means of recognising the wrong survivors have suffered.

9. The Consultation Paper identified general principles that should guide the provision of all elements of redress as being:

- redress should be survivor-focused
- there should be a 'no wrong door' approach for survivors in terms of gaining access to redress
- all redress should be offered, assessed and provided having appropriate regard to what is known about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular, and to the cultural needs of survivors
- all redress should be offered, assessed and provided having appropriate regard to the needs of particularly vulnerable survivors and ensuring access to redress can be obtained with

minimal difficulty and cost, and with appropriate support or facilitation if required.

10. The Consultation Paper discussed a number of possible structures for providing redress, and their possible advantages and disadvantages. In particular, institutional schemes, national schemes and state or territory-based schemes were discussed. The Consultation Paper suggested that the ideal position for survivors would be a single national redress scheme led by the Australian Government and with the participation of state and territory governments and non-government institutions. The Consultation Paper also suggested that the ideal position will be difficult to reach if the Australian Government, or state and territory governments, do not favour it. State and territory government-led schemes were discussed as an alternative.
11. The Consultation Paper queried whether the Royal Commission should recommend a redress scheme for child sexual abuse in an institutional context that has not yet occurred, particularly if civil litigation reforms are implemented that make it more likely that survivors can recover damages at common law.
12. The Consultation Paper included a detailed discussion of possible principles for the provision of an effective direct personal response

including elements of an effective apology and considerations relevant to meetings between survivors and senior institutions representatives. There was also discussion of the range of assistance that could be provided through direct personal response, including culturally appropriate collective redress for Aboriginal and Torres Strait Islander survivors.

13. The Consultation Paper included a detailed discussion of possible principles for counselling and psychological care, and identified key gaps in current services for survivors. It discussed possible principles for how counselling and psychological care could be supported through redress, and discussed options for service provision and funding. The options identified included changes to Medicare or other publicly provided services, and submissions were sought particularly from governments on options for expanding the public provision of counselling and psychological care for survivors.
14. In relation to monetary payments, the Consultation Paper discussed a possible approach to assessment, including a possible table or matrix for assessing severity of abuse, severity of impact and distinctive institutional factors. It included actuarial modelling commissioned by the Royal Commission to show the possible spread of payments based on

assumptions of 65,000 eligible survivors, maximum payments of either \$100,000, \$150,000 or \$200,000 and average payments of either \$50,000, \$65,000 or \$80,000. It also raised whether payments should be offered by instalments, and how past monetary payments should be treated under a redress scheme.

15. The Consultation Paper discussed a number of elements of redress scheme processes. These included: eligibility criteria; whether a scheme should be open-ended or have a fixed closing date; the standard of proof; and whether or not deeds of release should be required.
16. In relation to funding, the Consultation Paper included modelling of the funding that may be required to pay for the counselling and psychological care and monetary payments elements of redress, as well as administration costs. Possible adjustments for governments taking on 'funder of last resort' responsibilities to cover institutions that no longer exist or that could not themselves fund redress were also modelled. There was also discussion of the level of flexibility that should be allowed in implementing redress schemes and funding arrangements.
17. The Consultation Paper raised possible interim arrangements for the period before the Royal Commission's recommendations could be implemented, or if the recommendations are not implemented. It

discussed possible additional principles to guide institutions, and possible structures.

18. In relation to civil litigation, the Consultation Paper discussed possible reforms to limitation periods and the duty of institutions. It sought submissions on how to address difficulties in identifying a proper defendant in relation to faith-based institutions and whether the difficulties extend beyond faith-based institutions. It discussed model litigation approaches, and it also sought submissions on whether any changes in civil litigation may have adverse effects on insurance availability or coverage for institutions.

19. All interested parties were invited to make written submissions responding to the Consultation Paper. The Chair has already indicated the number of submissions we received responding to the Consultation Paper and the process for publishing them. The Chair also indicated the number of responses we received through the online form.

SURVIVOR INPUT

20. Through private sessions, the Royal Commission has heard many accounts directly from survivors of their experiences of redress and civil litigation. Many survivors have made suggestions as to how redress or civil litigation might have been made more effective for them. These

direct experiences and views of survivors informed the Consultation Paper. As more survivors tell their stories to Commissioners in further private sessions, they are also informing the Royal Commission's work on redress and civil litigation.

21. The actuaries engaged by the Royal Commission used the Royal Commission's private sessions data, among other inputs, in their modelling of the possible number of eligible claimants for redress. The private sessions data helped to identify from what institution types claims might be expected to arise. The private sessions data show that the Royal Commission has heard from many survivors of abuse in out of home care – including both residential care and foster care – as well as from many survivors of abuse in educational and religious institutions. The Royal Commission has also heard from survivors of abuse in recreational and sporting institutions, and health and other institutions. The range of experiences and views heard directly from survivors through private sessions is continuing to inform the Royal Commission's work on redress and civil litigation.
22. A number of survivors have made submissions to the Consultation Paper, including through using the online form. Some survivor advocacy and support groups have also provided submissions to the Consultation

Paper which provide input from consultations they held with survivors and other relevant groups.

23. Many of the Royal Commission's public hearings to date have also heard evidence from survivors or family members as to their experiences in seeking redress and in pursuing civil litigation. Some of this evidence was discussed in the Consultation Paper, and it continues to inform the Royal Commission's work on redress and civil litigation.

GOVERNMENT SUBMISSIONS

24. The Royal Commission invited all governments to speak at this public hearing, including those governments that did not make written submissions responding to the Consultation Paper. These invitations were made in recognition of the importance of the role of governments in relation to at least some of the options for structuring and funding redress, and more generally in implementing any reforms.
25. The Governments of Victoria, South Australia and Tasmania have accepted the Royal Commission's invitation to speak at this public hearing. Each of these governments has made a written submission in response to the Consultation Paper, and these are published on the Royal Commission's website.

26. In light of the importance of the role of governments in relation to options for redress and civil litigation reforms, I will briefly outline the responses of those governments that have declined the Royal Commission's invitation to speak. All submissions received from governments have been published on the Royal Commission's website.

Commonwealth

27. The Australian Government Solicitor wrote to the Royal Commission on behalf of the Commonwealth Government on 20 March 2015, enclosing the Commonwealth's submission. The Australian Government Solicitor stated that the submission 'encapsulates the Commonwealth's position on the question of redress at this time', and that 'the Commonwealth does not propose to add to its written submission at the public hearing and therefore respectfully declines' the Royal Commission's invitation.

28. The Commonwealth's submission is available on the Royal Commission's website. It states that, at this time, it 'is strongly of the view that the institutions in which child sexual abuse occurred should bear responsibility for providing redress to survivors of that abuse'. In summary, the Commonwealth states that a single national redress scheme would be extremely complex and would require significant time and resources to establish. The Commonwealth also refers to the

significant negotiations that it says would be required if a redress scheme was to operate in a consistent manner nationally, over the top of existing state and territory measures. The Commonwealth also refers to uncertainties in relation to its legislative power to operate a redress scheme, and the new bureaucracy that would need to be created to administer the scheme.

29. In relation to counselling and psychological care, the Commonwealth expresses its recognition of the 'importance of sufficient and appropriate counselling and psychological care for survivors of child sexual abuse, regardless of the context or environment in which they were abused'. It refers to a number of services and programs that are already available. It also refers to a core principle of Medicare being to provide universal support based on need rather than the cause of the condition. The Commonwealth submits that it 'is difficult to identify guiding principles that would support a separate scheme for victims of child sexual abuse, but not standalone schemes for victims of other types of trauma (or for survivors of child sexual abuse that did not occur in institutions falling within the Royal Commission's terms of reference).' It suggests that awareness of existing services, or survivors' confidence in those services, might be improved.

30. As to funding arrangements, the Commonwealth submits that responsibility for providing redress should lie with the institution that failed to protect the individual survivors. The Commonwealth also states that it does not see itself as having a role as funder of last resort.

New South Wales

31. The New South Wales Crown Solicitor wrote to the Royal Commission on behalf of the New South Wales Government on 19 March 2015. The letter refers to the New South Wales State election being held on 28 March 2015 and to the New South Wales Government being in caretaker mode. The letter states that:

‘The caretaker conventions are such that it would be inappropriate for any representative of the NSW Government to express opinions in respect of any possible future policy. Given the matters likely to be canvassed at the public hearing, it is the State’s view that it would not be appropriate for any representative of the State to speak at the public hearing. Representatives of the State will be attending the public hearing as observers and the matters canvassed at the hearing will be considered closely in advising the incoming NSW Government following the outcome of the election.’

The letter also refers to New South Wales' commitment to assisting the work of the Royal Commission and advises that the State can answer questions from the Royal Commission in respect of its submission or related matters following the end of the caretaker period.

32. The New South Wales Government provided a submission responding to the Consultation Paper and it is available on the Royal Commission's website. The submission states that New South Wales has announced that it is examining options for a redress scheme and that New South Wales 'would be open to discussing with other jurisdictions the potential for a national scheme, including contributions from Commonwealth, state and territory governments and non-government organisations.' It also 'acknowledges the potential benefits for survivors of a national scheme, including consistency of approach and less complexity for survivors.' The submission outlines actions the New South Wales Government has taken to date to support survivors.
33. In relation to counselling and psychological care, the New South Wales Government submits that, while it intends that any New South Wales survivor should already be able to access counselling through its existing Victims Support Scheme, it supports further consideration of expanding existing services through Medicare or a stand-alone Australian

Government scheme, and the potential to seek financial contributions towards counselling from institutions.

34. The New South Wales Government submission also discusses broader support services, arguments for and against considering the severity of the impact of abuse in assessing monetary payments, and a number of considerations in relation to redress scheme processes. The submission refers to the need to consider ‘the sustainability of the scheme, including the level of recognition payments that will provide effective redress while being financially sustainable, acknowledging the potential costs to the State of implementing other recommendations of the Commission’ and the ‘financial impact on NGOs, including the potential impacts on NGO services providers’ ongoing capacity to partner with Government in the delivery of key community services.’

Queensland

35. The Queensland Crown Solicitor’s office wrote to the Royal Commission on behalf of the Queensland Government on 20 March 2015. The letter advised that the Queensland Government does not intend to appear at this public hearing and that it will not be making a submission in response to the Consultation Paper. The letter referred to the recent change of government in Queensland and stated that: ‘While the subject

matter of this hearing is of course important to the Government, it is among a number of priorities which are currently receiving attention.’

Western Australia

36. The Western Australian Government wrote to the Royal Commission on 17 March 2015, respectfully declining the invitation to attend and speak at this public hearing.
37. The Western Australian Government provided a submission responding to the Consultation Paper and it is available on the Royal Commission’s website. The submission states that the ‘Consultation Paper is a substantial piece of work on the nature of redress and civil litigation reform, and the Government of Western Australia notes its content and considerations’. The submission also expresses the Western Australian Government’s support for the ongoing work of the Royal Commission.

Australian Capital Territory

38. The Australian Capital Territory Government informed the Royal Commission by telephone that it would not attend this public hearing. The Australian Capital Territory Government did not provide a submission in response to the Consultation Paper.

Northern Territory

39. The Northern Territory Government wrote to the Royal Commission on 23 March 2015, respectfully declining the invitation to participate in this public hearing. The Northern Territory Government referred to its written submission and advised that, at this stage, it ‘has nothing further to add beyond what has already been covered in the written Submission.’
40. The Northern Territory Government’s submission is available on the Royal Commission’s website. The submission states that ‘a key challenge in the design and implementation of a redress scheme is to strike an equitable balance between the provision of monetary payments to survivors of institutional child sexual abuse that provides adequate recompense to victims and the ability of governments and private institutions to conduct their programs and activities without excessive and potentially disabling cost burdens.’
41. The submission describes existing arrangements and services for victims of crime in the Northern Territory. In relation to implementing a redress scheme, it states that ‘[s]ubject to the final recommendations of the Royal Commission and joint agreement by relevant parties in relation to the development of a national redress scheme, the Northern Territory

would support, in-principle, the establishment of a single national scheme funded by weighted contributions from institutional bodies, according to the number of victims residing in institutions under the administration, or former administration, of the liable body.’ The submission refers to a number of possible advantages of a national scheme.

42. The Northern Territory submits that a national scheme should not exceed ten years in duration and that it should operate as a transitional arrangement to provide for historical claims only, while future arrangements should focus on reforms to the common law system and the introduction of compulsory insurance.
43. The Northern Territory’s submission states it support for expanding the public provision of counselling and psychological care, but notes that ‘there are some entrenched and intractable service delivery gaps to remote and regional communities, particularly in the provision of counselling services to victims of crime in remote areas.’ The submission also discusses monetary payments, including the advantages and disadvantages of payments by instalment, and a number of redress scheme processes.

44. In relation to funding, the Northern Territory refers to the constitutional arrangements applying in the Northern Territory before self-government on 1 July 1978, and submits that the Commonwealth is responsible for contributing funding for victims residing in Commonwealth-administered institutions in the Northern Territory before July 1978. The submission suggests that the methodology for calculating funding contributions could be developed through a national working group comprised of the Commonwealth, the states and territories and peak non-government organisations. The submission also discusses possible civil litigation reforms.
45. I note again that all government submissions are published in full on the Royal Commission's website. Those who wish to understand the stated positions of those governments who are not speaking at this public hearing but who provided written submissions should refer to those submissions in full, as published on the Royal Commission's website.

FURTHER PUBLIC PARTICIPATION

46. In recognition of the continuing widespread interest in issues of redress and civil litigation, the Royal Commission is providing an online form on its website for the duration of this public hearing. This will allow anyone

who is following the public hearing to provide short comments to the Royal Commission on any of the issues discussed during the hearing.

47. I am advised that a link to the online form can be found on the Royal Commission's home page or through the redress pages. Any comments received through the online form will be considered in preparing the Royal Commission's final recommendations on redress and civil litigation.

NEXT STEPS IN REDRESS AND CIVIL LITIGATION

48. There will be no findings made as a result of this public hearing. No parties have been granted leave to appear and there will be no submission process.
49. The next step for the Royal Commission will be to prepare its final recommendations and report on redress and civil litigation. The report will be submitted to the Governor-General in the middle of this year.

Gail Furness SC

Senior Counsel Assisting the Royal Commission

25 March 2015