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Submission to the Joint Select Committee on Oversight of the Implementation of Redress Related Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

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Introduction

Judy Courtin Legal is a Victorian legal practice that acts for victims of institutional child sexual and other abuse. Dr Judy Courtin is also a public advocate for victims and survivors, drawing on her recent PhD research, *Sexual Assault and the Catholic Church: Are victims finding justice?*.[1]

We supported the recommendations of the Royal Commission into Institutional Responses to Child Abuse (the Royal Commission) pertaining to redress for survivors, including the specific recommendations concerning a national redress scheme, although the recommended cap of $200,000 was considered by us as falling far short of the amount required to address the justice and other needs of victims and survivors of institutional abuse.

While we consider a nationwide redress scheme to be critical, we do have a number of significant concerns about the scope and operation of the current National Redress Scheme.

Although we support the legislated review of the National Redress Scheme ('the Scheme') after two years,[2] this will not assist those survivors who have already had their claims adjudicated by the Scheme.

We therefore welcome the opportunity to have input into the Joint Select Committee's Inquiry into the Australian Government policy, program and legal response to the redress-related recommendations of the Royal Commission into Institutional responses to Child Sexual Abuse, including the establishment and operation of the National Redress Scheme and ongoing support of survivors.

Maximum redress payment

We refer the Committee to the public submission of the Australian Lawyers' Alliance ('the Alliance') concerning the maximum redress payment, including the Act's provision of the $150,000 maximum payment compared to the $200,000 recommended by the Royal Commission.[3] We fully support the criticisms made by the Alliance.

Our practice has already experienced what we consider to be a cynical advantage taken by one potential defendant institution of the fact that the maximum payment under the scheme is lower than that recommended by the Royal Commission.

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[1] Dr Judy Courtin, *Sexual Assault and the Catholic Church: Are victims finding justice?* (2015) file:///Users/jude/Downloads/monash_162364%20(19).pdf.
[2] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), s 192.
[3] Submission, Australian Lawyers Alliance, 31 July 2018 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Submissions, pp 5-6.

Prior to the commencement of the Scheme, the institution was engaged in pre-litigation communication with us concerning a claim by our client, but has recently refused to continue this process towards a possible settlement and has instead referred to the Scheme.

We believe that this expression of lack of good faith would have been less likely if the maximum repayment had been the higher amount recommended by the Royal Commission. Consequently, our client has no choice but to endure further delay and trauma.

Maximum liability of institutions

As the Royal Commission noted, one in five child sexual abuse survivors is estimated to have been abused at more than one institution.[4] It is also not unusual for more than one institution to have knowledge of the same abuse events.

The Act provides for sharing of the costs of a redress payment by multiple responsible institutions.[5] Although we are mindful of the Royal Commission's view that considerations of an institution's culpability should not form part of a redress scheme,[6] the reality is that most survivors will never pursue either criminal or civil litigation.

The Royal Commission concluded that terms such as 'recognition' and 'acknowledgement' are likely to best express the purpose of monetary payments under a redress scheme.[7] At the same time, they noted that a redress scheme 'recognises that institutions have a degree of responsibility for the harm done to survivors', even if this may not necessarily be a legal liability.[8]

The lower cap for redress payments, and the fact that an individual can only make one application, combine with the limitations of the Scheme's assessment framework discussed below to mean that in cases where more than one institution is responsible for the abuse, it may be doubtful whether any meaningful recognition of responsibility is actually achieved. A maximum payment of $50,000 or even as low as $20,000 could be shared between three or more institutions.

We believe that this result will send the wrong message to survivors and institutions, that somehow individual institutional responsibility is less significant in these cases because that institution is only required to pay a portion of the financial accountability they would have had if they had solely had responsibility for the abuse. On the contrary, there may be good reasons to

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[4] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p 311.
[5] Section 30.
[6] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), pp 242-3.
[7] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p 224.
[8] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p 248.

hold that a context in which yet another institution failed the child is actually worse, or at least as bad, as a situation where only one institution is responsible.

Because we understand the rationale of equality of treatment for applicants and the necessity of a cap on payments, one strategy might be to require institutions who are apportioned payment to pay the remainder of what they would have been required to pay had they been held solely responsible, into a pool for funding of last resort, or to a separate fund designated for the provision of appropriately qualified sexual assault services and child sexual abuse prevention.

Scheme eligibility, including special assessment requirements for applicants with serious criminal convictions

We strongly support the Alliance's submission to the Select Committee regarding the exclusion of children in immigration detention and the additional application process required for people who have been sentenced to imprisonment for five years or more for a criminal offence.[9]

In this regard, we further strongly support the public submission of Knowmore Legal Service to the Joint Select Committee.[10]

Lack of access to external review of the Scheme's decisions

The Act provides for some internal review of decisions, although it is as yet unclear what personnel will act as the independent decision makers,[11] and whether any specialist expertise concerning the dynamics and trauma of sexual assault will be required.

However, there is no access to external review. We regard this lack of access as inconsistent with the Royal Commission's recommendations for survivor-focused, accountable, procedurally fair and transparent redress processes.[12]

Power to request information from the applicant

We strongly support Knowmore's submission to the Joint Select Committee.[13]

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[9] Submission, Australian Lawyers Alliance, pp 6-9.

[10] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Submissions, pp 7-8.

[11] Part 4-1, especially s 75. See also s 185.

[12] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), pp 133-5.

[13] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Submissions, p5.

Disclosure of protected information to the responsible institution

We strongly support Knowmore's submission to the Joint Select Committee.[14]

The National Redress Scheme Assessment Framework

Because at this stage we have no direct information about how survivors have experienced the Scheme's decision making process, the remainder of our submission focuses on how redress payment decisions seem likely to be made under the Act.

Lack of publicly available details of decision making criteria

The National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 ('Assessment Framework') is a legislative instrument under the Act, and accordingly is publicly available. Section 32 of the Act empowers the Minister for Human Services to declare the Assessment Framework as 'a method, or matters to take into account, for the purposes of working out' the amount of redress payment and counselling and psychological component of redress for a person.

The Explanatory Statement states that the Assessment Framework 'will be supported by assessment framework policy guidelines which will provide further detail and examples to assist decision makers to apply the Assessment Framework to the range of circumstances.'[15]

Section 33 of the Act further clarifies that the Minister may make those assessment framework policy guidelines ('Guidelines') for the purposes of applying the Assessment Framework, and that the Secretary of the Department of Human Services may take such Guidelines into account when applying the Assessment Framework in working out the redress components and amounts.

The Guidelines are not publicly available. Indeed, section 104 of the Act makes it an offence for an unauthorised person to use or disclose information in the Guidelines, with an associated penalty of two years' imprisonment.

The Amount of Redress Payment Table

As we have no access to the Guidelines for our analysis of how the Assessment Framework is likely to work in practice for survivors seeking meaningful and equitable redress, we must use

[14] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Submissions, pp 8-10.
[15] National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 Explanatory Statement, no page number ('Explanatory Statement').

only the Assessment Framework itself and the interpretive assistance provided in the associated Explanatory Statement.

In contrast to the considerable attention paid in both the Act and the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 to the methods by which institutions are to be allocated their share of financial obligation, the Assessment Framework consists of only three and a half substantive pages, the centrepiece of which is an Amount of Redress Payment table ('the Table').[16]

A hierarchy of abuse

The Table sets up a hierarchy of sexual and related abuse which is of serious concern to us. It is clear that claimants who have suffered penetrative abuse (Row 1) are the only survivors who can possibly be granted the maximum payment of $150,000. Even in these cases, the maximum payment reduces to $100,000 unless there were additional 'extreme circumstances' (Column 6).

Such 'extreme circumstances' may allow decision makers to distinguish between years of penetrative abuse and a single incident, but without access to the Guidelines and other details of the decision making process – including any appropriate experience and training requirements for decision makers – we are not confident that even the redress payments for survivors who 'qualify' for Row 1 will be the result of appropriate deliberations and delineations.

For those who have suffered non-penetrative assault, there is no provision for a possible 'top up' due to extreme circumstances. Hence, for example, those survivors whose experience was 'only' contact abuse (non-penetrative sexual assault – Row 2), can at most receive a payment of $50,000.

The Table categories and associated possible maximum payments do not reflect survivors' experience, including those of our clients. For example, while some survivors have endured horrific penetrative abuse, there are many others who have suffered years of arguably equally horrific 'contact abuse', with associated fear and trauma, from which psychiatrists' reports have concluded they will never completely recover. The existing redress scheme dismisses such life-long egregious impacts on survivors, unless the child was 'penetrated'. Such distinctions are fictitious and wholly unjust.

An example of the absurdity of such distinctions involves a child who was sexually assaulted by a priest on almost a weekly basis for 5-6 years. This also involved physical and psychological abuse. This man, who has attempted suicide on several occasions, has alcohol abuse problems, cannot study or work and lives alone. Because the priest did not 'penetrate' this boy, the maximum amount he can be awarded by the redress scheme is $50,000.

[16] Section 5, Assessment Framework.

The third and final category, 'exposure abuse' (Row 3), is defined as not involving physical contact, including by an object. As is now recognised in at least Victorian family violence law and policy, for a child to witness abuse is itself also a form of violence that can have profoundly distressing and long-term impacts. A survivor of institutional abuse may have had such experiences over a period of years, but the most redress payment they can ever receive is $20,000, with, again, no provision for a 'top up' to recognise contexts such as spending night after night in a dormitory bed frightened that it will be 'their turn next'.

Other examples that will fall into this category and may have severe long-term impacts include grooming that does not progress to actual sexual contact, and long-term exposure to online pornography.[17]

The Royal Commission carefully considered the best methods to assess the severity and impacts of abuse in any redress scheme,[18] in order to achieve 'the appropriate balance between fair, consistent and transparent assessment (on the one hand) and recognition of the individual's experiences and their impact (on the other hand).'[19] The Act and the Assessment Framework do not reflect this.

Counter to victims' experiences

We have other and equally grave concerns about the manner in which the Assessment Framework establishes the hierarchy of abuse. Communication with our clients and the findings of the Royal Commission emphasise that there is no neat correlation between, for example, Row 1 of the Table and a certain degree of impact on the victim, compared to Row 3.[20]

Analogous to the 'eggshell skull' of criminal common law, how one victim experiences the trauma of assault may be different in degree from the impact on another, and the onus is on the entity responsible to bear that specific burden.

As with physical assault, impacts vary most at the supposedly 'less serious' end of the spectrum. For example, feminist research into sexual violence has long documented the trauma of supposedly 'minor' sexual violence, including the potentially harmful impact on women and children of exhibitionism (previously often only thought of as the subject of humour).[21] Yet the Table not only allocates lower fixed amounts as we descend the rows, but by implication already pre-assesses the abuse as 'lesser' in Columns 2, 3 and 6.

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[17] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (2015), pp 33-4, 35-6.
[18] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), pp 231-245.
[19] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p 243.
[20] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (2015), pp 24-50, 73-201.
[21] See eg Diana Russell, *Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment* (1984); Liz Kelly, *Surviving Sexual Violence* (1988).

Issues for claimants with deeds of release

Finally, the maximum possible payments in the table are particularly troubling in the light of those survivors who have previously accepted some form of direct settlement from the institution and signed a deed of release. The Act requires such payments to be deducted from the redress payment after being adjusted for inflation.[22]

A time limitation on claims meant that a significant number of victims of historical institutional abuse were forced into accepting what the offending institution offered, particularly because, as is now well known and was part of the rationale for legal reform, many victims do not disclose the abuse until many years afterward. In this sense, victims who were already vulnerable, traumatised and often suffering psychiatric harm were pressured into accepting profoundly inadequate compensation – in effect, a 'take it or get lost' ultimatum.

There are likely to be several thousand such past settlements and associated deeds of release within the state of Victoria alone. For instance, the Catholic Church's internal complaints processes, the Melbourne Response and Towards Healing, settled up to about 700 ex gratia payments for which deeds of release were mandatory. This was between about August 1996 and June 2012, and does not include informal settlements with church authorities before 1996 and since June 2012. Victims have entered into similar deeds releasing multiple other religious institutions, non-government organisations and the State of Victoria.

The vast majority of these settlements were for payments which we submit were patently inadequate and thereby trivialised the abuse and devalued the victim. For example, we act for a client who was pressured into signing a deed of release for around $12,000.

Ex gratia payments from the Archdiocese of Melbourne for 10 victims of now deceased Father Kevin O'Donnell ranged from about $20,000 to $33,000. Some of these victims were sexually assaulted by O'Donnell over a period of 5-6 years. The maximum amounts payable under the Assessment Framework Table for Rows 2 and 3 will mean that such clients could end up with, at most, $30,000, and at worst, nil.

Broader impacts

We submit that the deeply flawed structure of decision making pertaining to redress payments and the lack of public access to the Scheme's detailed process are highly inconsistent with the groundswell of public opinion, led by survivors, that produced the political will to establish the Royal Commission.

Further, the approach of the Table and the opacity of the process mean that there is a high risk of repeating and exacerbating the very dynamics that operated during the abuse itself and

[22] Section 30(2). See also Explanatory Statement.

institutional responses to it. These dynamics include trivialising survivors' experiences via inadequate appreciation of the complexities of the trauma endured and undervaluing the redress payment that should be made, so that survivors may well continue to feel that they 'don't count'.

In these respects, the experience of at least some survivors who go through the Scheme may echo Dr Courtin's PhD research, which found that for more than half of the victims who attended the Towards Healing process, there was an outcome-driven and aloof process in which their truth was minimised and dismissed.

The lack of public access to information about how decisions will actually be made under the Scheme also reinforces the culture of secrecy of the abuse environment, and the silence and lack of transparency and accountability of the institutions responsible. Once again, this risks placing survivors 'at the mercy' of powerful decision makers.

Many victims who engaged with both the Melbourne Response and Towards Healing processes described to Dr Courtin how they felt overwhelmed, intimidated and traumatised. Alarmingly, the main reason that more than three-quarters of the victims wanted counselling was to deal with the harm and trauma they suffered as a result of engaging in these processes.[23]

If this is to be the experience of even some applicants to the Redress Scheme, it will undercut the Assessment Framework itself, which is 'designed to provide a framework to bind decision makers but to avoid re-traumatising survivors.'[24]

It will also be profoundly inconsistent with the objects and general principles of the Act. The Act's main objects are to recognise and alleviate the impact of past institutional child sexual abuse and related abuse; and to provide justice for the survivors of that abuse.[25]

In order to achieve the main objects, further objects of the Act include providing redress under the scheme including a monetary payment to survivors as a *tangible means of recognising the wrong survivors have suffered* (our emphasis).[26]

General principles of the Act guiding the actions of officers under the Scheme include that redress should be:

- survivor-focussed
- assessed, offered and provided with appropriate regard to:
    - what is known about the nature and impact of child sexual abuse, particularly institutional child sexual abuse; and
    - the cultural needs of survivors; and
    - the needs of particularly vulnerable survivors.

[23] Courtin, *Sexual Assault and the Catholic Church*, p 169.
[24] Explanatory Statement.
[25] Section 3(1).
[26] Section 3 (2)(b)(i).

- assessed, offered and provided:
    - so as to avoid, as far as possible, further harming or traumatising the survivor;
    - in a way that protects the integrity of the scheme.

Conclusion

Judy Courtin Legal thanks the Joint Select Committee for the opportunity to provide our submission, and the extension of time enabling us to do so. We would appreciate any further opportunity to address the Committee on our submission.

We have no issue with our submission being made public.

In addition to the implications flowing from our comments above, we make the following specific recommendations:

1. The Guidelines should be publicly released as a matter of urgency.

2. A requirement for specialist training in child sexual abuse dynamics and impacts, for all decision makers under the Act, should be introduced.

3. An understanding of the dynamics and impacts of child sexual assault to inform all Scheme decision making, including determination of payment amounts, should be expressly incorporated into the Act and subordinate legislation.

4. The Act should be amended to provide for external review of decisions.

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