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Alternative report on the remaining issues for victims of institutional abuse in
Australia after the Royal Commission into Institutional Responses to Child Sexual
Abuse

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1. Introduction

Dr Judy Courtin is an Australian legal practitioner who represents victims of institutional child sexual and other abuse. Dr Courtin is also a public advocate for victims and survivors, and campaigns for legal and other reforms in the area of institutional sexual abuse, drawing on her recent PhD research, *Sexual Assault and the Catholic Church: Are Victims Finding Justice?*¹

The Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission') was announced in 2012 as a national inquiry into institutional responses to allegations and incidents of child sexual abuse. In its final report, delivered in December 2017, the Royal Commission found that public, private and non-government institutions across Australia, including the Catholic Church, have failed to protect children from abuse.

In light of the Royal Commission's findings and recommendations, Dr Courtin welcomes the opportunity to report on the outstanding issues of concern for victims of institutional child sexual and other abuse in Australia. In doing so, Dr Courtin identifies inconsistencies in Australia's adherence to its human rights obligations under the *Convention on the Rights of the Child* ('the CRC').² This report focuses on the failure by both federal and state and territory governments to deliver adequate justice to victims and survivors of institutional sexual and other abuse.

The report identifies three paramount issues of concern for victims of institutional sexual abuse: The Australian Government's National Redress Scheme; non-secular decision-making processes; and deeds of release.

2. National Redress Scheme

2.1 Overview

The Royal Commission made recommendations pertaining to redress for survivors, including specific recommendations concerning a national redress scheme. While a national redress scheme is crucial, there are a number of significant concerns about the scope and operation of Australia's current National Redress Scheme ('the Scheme').

The Scheme, designed by Australia's Federal Government in conjunction with the Catholic Church, other religious institutions and state governments, is an adulterated version of that recommended by the Royal Commission. The current Scheme not only does not deliver justice, but retraumatises victims.

It is beyond dispute that Australia has historically failed to uphold articles 19 and 34 of the CRC, which provide children with the right to be protected from sexual and other forms of abuse. The Scheme does not adequately recognise or address this failure because it does not adequately recognise a survivor's experiences and falls short in delivering justice to

¹ Dr Judy Courtin, *Sexual Assault and the Catholic Church: Are victims finding justice?* (PhD Thesis, Monash University, 2015)

<https://figshare.com/articles/Sexual_assault_and_the_Catholic_Church_are_victims_finding_justice_/4697455>.

² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

victims of institutional child sexual abuse. As such, the right to state-supported recovery for victims of institutional abuse guaranteed by article 39 of the CRC is trivialised.

2.2 Maximum redress payment

Appropriate redress includes monetary payment ‘to provide a tangible recognition of the seriousness of the hurt and injury suffered by a survivor’.³ It is therefore important that the redress paid adequately reflects the seriousness of a survivor’s experiences and the impact of the institutional abuse on their lives. Article 39 of the CRC defines adequate redress as an ‘appropriate measure’ to promote the recovery of victims.

The maximum redress payment, capped at \$150,000, falls short of the maximum amount of \$200,000 recommended by the Royal Commission.⁴

The maximum amount recommended by the Royal Commission was found to recognise ‘the most severe cases’ of abuse.⁵ The Australian Government’s reasons for reducing the maximum redress payment recommended remain unexplained.

Similarly, the Royal Commission recommended that the minimum payment of redress be set at an appropriate level. The Royal Commission found \$10,000 to be large enough to provide a tangible recognition of a person’s experiences as a survivor less seriously affected by abuse.⁶ However, the Scheme does not prescribe a minimum amount, meaning that a redress payment of less than \$10,000 will be possible.

2.3 Maximum liability of institutions

The Royal Commission noted that a redress scheme ‘recognises that institutions have a degree of responsibility for the harm done to survivors’, even if the responsibility may not be a legal liability.⁷ In cases where more than one institution is responsible for the abuse, the operation of the Scheme means that it is doubtful whether any meaningful recognition of responsibility is actually achieved.

The Royal Commission noted that one in five child sexual abuse survivors is estimated to have been abused at more than one institution.⁸ It is also not unusual for more than one institution to have knowledge of the same abuse events.

The Scheme provides for sharing of the costs of a redress payment by multiple responsible institutions.⁹ Although the Royal Commission noted that it is not appropriate to consider the institution’s culpability, a maximum payment as low as \$20,000 could be shared between three or more institutions.

³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 225 (*‘Redress and Civil Litigation Report’*).

⁴ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) [*‘Redress Scheme Act’*] s 16(1); *Redress and Civil Litigation Report*, above n 3, 22.

⁵ *Redress and Civil Litigation Report*, above n 3, 22.

⁶ *Ibid* 23.

⁷ *Ibid* 248.

⁸ *Ibid* 311.

⁹ *Redress Scheme Act* s 30.

This potential outcome sends the wrong message to survivors and institutions that 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.

2.4 Scheme eligibility

In its submission to the Committee, the Australian Human Rights Commission ('the AHRC') outlined its concerns relating to the Scheme's exclusion of some survivors from accessing redress, including the counselling and psychological component of redress.¹⁰

The Scheme excludes:

- non-citizens and non-permanent residents;¹¹
- survivors with serious criminal convictions;¹² and
- children currently under eight years old.¹³

The Royal Commission did not make recommendations for such manifestly unjust discrimination in the Scheme's operation. Further, the Scheme's exclusion of these survivors is inconsistent with its object to 'recognise and alleviate the impact of past institutional child sexual abuse' and 'provide justice for the survivors of that abuse'.¹⁴

The exclusions are also inconsistent with Article 2 of the CRC, which provides for the right of children to freedom from discrimination in the upholding of their rights in the CRC.

Dealing with each form of exclusion more specifically, survivors who are not citizens or permanent residents are excluded from accessing redress because the Australian Government claims that the verification of identity documents would be 'very difficult' and that such an exclusion will mitigate risks of fraudulent overseas claims.¹⁵ Thus non-citizens and non-permanent residents who are survivors have been excluded from the Scheme for reasons the Australian Government equates with ensuring its integrity.¹⁶ However, no evidence is provided to support these claims. Any such risks could be eliminated by adequate assessments during the application process.

The Royal Commission did not see a need for any citizenship or residency requirements, whether at the time of the abuse or at the time of application for redress.¹⁷

¹⁰ Australian Human Rights Commission, 'Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict', Submission to the Committee on the Rights of the Child, 1 November 2018, [174] <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRC_Report2018.pdf>.

¹¹ Redress Scheme Act s 13.

¹² Redress Scheme Act s 63(2).

¹³ Redress Scheme Act s 20(1)(c).

¹⁴ Redress Scheme Act s 3.

¹⁵ Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Cth).

¹⁶ Ibid.

¹⁷ *Redress and Civil Litigation Report*, above n 3, 347.

Survivors who have been convicted of an offence and sentenced to imprisonment for five or more years may also be unable to access redress.¹⁸ Redress can only be obtained by survivors in this group if approval is given by the relevant Attorney-General after being satisfied that providing redress would not 'bring the Scheme into disrepute' or 'adversely affect public confidence in the Scheme'.¹⁹

Excluding this group of survivors is particularly unacceptable given the growing body of research that indicates a potential relationship between child sexual abuse and subsequent criminal offending.²⁰ For example, female survivors of child sexual abuse are seven times more likely, and male survivors more than four times more likely, to be charged with a criminal offence, when compared with the general population.²¹

Again, the Royal Commission did not recommend what may be better characterised as further punishment for victims of institutional abuse.

The AHRC has stated its concern that children who do not turn 18 during the ten-year life of the Scheme cannot make an application for redress.²² This blanket exclusion is regarded by the AHRC as being incompatible with a proper inquiry into the best interests of the child (Article 3 of the CRC requires this proper inquiry to be a primary consideration of the Australian Government).²³

The AHRC notes that the rationale of excluding this group of survivors 'appears to be to safeguard against the Scheme unduly preventing a child survivor from limiting their future rights by permitting ... uninformed decisions about redress'.²⁴ Nevertheless, the AHRC considers that there will be instances where it is in the best interests of the child to seek redress under the Scheme, and in particular the counselling and therapeutic support component of redress.²⁵ The AHRC noted that helping child survivors to access 'early intervention and ... specialised trauma-informed care' as soon as possible after the abuse is in their best interests.²⁶

¹⁸ Redress Scheme Act s 63(2).

¹⁹ Redress Scheme Act s 63(5).

²⁰ Tamara Blakemore et al, *Impacts of institutional child sexual abuse on victims/survivors: A rapid review of research findings*, report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, December 2017, 61-2 <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_impacts_of_institutional_child_sexual_abuse_on_victims_survivors_-_treatment_and_support_need.pdf>.

²¹ Ibid 61.

²² Australian Human Rights Commission, above n 10, [174].

²³ Australian Human Rights Commission, Submission No 23 to the Senate Standing Committee on Community Affairs, *Inquiry into the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and Related Bill*, 1 June 2018, 9.

²⁴ Ibid.

²⁵ Ibid 9-10.

²⁶ Ibid 11.

2.5 Assessment framework

2.5.1 Hierarchy of abuse

The Royal Commission produced a carefully considered matrix to guide redress determinations. The matrix consisted of 100 points:²⁷

- 40 points would go to the severity of the sexual abuse;
- 40 points to the severity of the impacts of the sexual abuse; and
- 20 points to other circumstances, including whether the survivor was in an orphanage or boarding school at the time or particularly vulnerable because of disability.

Instead, the Scheme disregards these critical elements of assessment and uses a framework which imposes a hierarchy of abuse. The hierarchy consists of three levels:

- Claimants who have suffered penetrative abuse (level 1) are the only survivors who can be granted the maximum redress payment of \$150,000.²⁸ Even in these cases, the amount reduces significantly to \$100,000 unless there were additional 'extreme circumstances';
- For survivors whose experience was 'only' contact abuse, that is, non-penetrative sexual assault (level 2), the maximum redress payment is \$50,000;²⁹ and
- Claimants who have suffered 'exposure abuse' (level 3) which does not involve physical contact can only ever receive a maximum redress payment of \$20,000.³⁰

The Scheme's assessment framework, unlike that proposed by the Royal Commission, does not reflect survivors' experiences. The Scheme dismisses the severity of a survivor's sexual abuse and its impacts on his or her life in favour of creating unjust and absurd distinctions between 'types' of sexual abuse.

An example of such a distinction involves a child who was sexually assaulted by a priest on a weekly basis for five to six years. This abuse 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 Scheme is \$50,000.

The highly flawed assessment framework is supported by policy guidelines which provide further detail and examples to assist decision-makers.³¹ However, these guidelines are not publicly available and it is an offence, punishable by imprisonment, for the information in the guidelines to be used or disclosed by an unauthorised person.³²

Accordingly, there is no transparency to the decisions made under the Scheme.

²⁷ *Redress and Civil Litigation Report*, above n 3, 21-2.

²⁸ National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 (Cth) s 5 (row 1).

²⁹ *Ibid* s 5 (row 2).

³⁰ *Ibid* s 5 (row 3).

³¹ Redress Scheme Act s 33.

³² Redress Scheme Act s 104.

2.5.2 Additional issues for claimants

The maximum possible payments available in the Scheme are particularly troubling for those survivors who have previously accepted some form of direct settlement from the institution. The Scheme requires such payments to be deducted from the redress payment, after being adjusted for inflation.³³

The vast majority of these settlements were entered into in unjust circumstances (discussed below) and for inadequate payments. For example, ex gratia payments from the Archdiocese of Melbourne for ten victims of Father Kevin O'Donnell ranged from \$20,000 to \$33,000. Some of these victims were sexually assaulted over a period of six years. The maximum amounts payable under the assessment framework for levels 2 and 3 mean that such victims could end up with, at most, \$30,000, and at worst, nil.

2.6 External review of decisions

There is no access to external review of the Scheme's decisions. Although survivors may seek internal review of determinations on their application for redress, the lack of access to external review is inconsistent with the Royal Commission's recommendations for survivor-focused, accountable, procedurally fair and transparent redress processes.³⁴

2.7 Lifelong counselling

The Royal Commission recommended that counselling and psychological care should be funded as needed over a victim's lifetime.³⁵

Instead, the Scheme assesses the amount of counselling and psychological care available to a victim against the hierarchy of abuse detailed above. Depending on the level of the abuse, a victim will receive a maximum amount of between \$5,000 and \$1,250 for counselling.³⁶ This means that, at best, a victim could attend a psychologist a maximum of about 25 times, but also as little as 4 times. As such, the Scheme once again shuns the evidence-based recommendations of the Royal Commission in that it does not recognise the lifelong impacts of sexual abuse.

3. Non-secular decision-making processes – the Catholic Church in Australia

3.1 Overview

There are two internal processes which investigate allegations and complaints about sexual and other abuse by Catholic clergy. Towards Healing, a national process, was established by the Australian Catholic Bishops' Conference and Australian Conference of Leaders of Religious Institutes in 1996. The Melbourne Response, established, also in 1996, by Cardinal Pell, Archbishop of Melbourne at the time, deals with allegations about priests within the Archdiocese of Melbourne in the state of Victoria.

Existing legal barriers to access to justice (discussed below) forced clergy victims to rely on the Catholic Church and its internal complaints processes in a final attempt to find some

³³ Redress Scheme Act s 30(2).

³⁴ *Redress and Civil Litigation Report*, above n 3, 133-4.

³⁵ *Ibid* 16-7.

³⁶ National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 (Cth) s 6.

justice. However, the lived experiences of clergy victims demonstrate that these non-secular decision-making processes are procedurally unfair.

As a pathway to justice for victims of clergy abuse, the Church's internal processes have failed to consider the best interests of the child and provide adequate remedies for the Catholic Church's failure to protect children from sexual and other abuse, thereby violating Article 3 of the CRC and other human rights conventions.³⁷

Dr Courtin's PhD research identified the following four themes which emerged from the experiences of primary and secondary victims, and legal and non-legal advocates engaging in the Catholic Church's internal processes.³⁸

3.2 Minimisation of the truth

The truth was minimised and dismissed by the Church processes in several areas: victims' accounts of what happened lacked acknowledgment; victims' needs were ignored and shunned; and the impacts of the abuse on victims and the severity of the sex offences were minimised.

Victims who engaged with Towards Healing also reported being pressured to settle their claim quickly so the file could be closed.

In many cases, the institutional abuses were covered up and the perpetrator was protected by the institution. Such concealment and silence was often wittingly maintained by the institution during these processes.

3.3 Negative impacts on victims

Victims suffered further trauma as a result of engaging with the Church's internal complaints processes.³⁹ While a primary aim of the Church's processes is stated to be healing for the victims, the processes were described by victims as having no semblance of healing. In some cases, victims reported that mental health problems became more severe as a result of engaging with the Church's processes.⁴⁰

3.4 Legalistic approaches

Towards Healing and the Melbourne Response were highly legalistic and adversarial. Victims found the processes to be distrustful, defensive, condescending and highly conflicted. The absence of compassion, love and Christianity also meant victims felt overwhelmed, intimidated and traumatised.⁴¹

The Church processes actively denied victims legal representation, subjected victims to overly forensic examinations together with unnecessary and repetitive investigations, and bullied victims who did not acquiesce to the demands placed on them.

³⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3.

³⁸ Dr Courtin, above n 1, 132-3.

³⁹ *Ibid* 152.

⁴⁰ *Ibid* 148-9.

⁴¹ *Ibid* 153-4.

3.5 Discretionary decision-making

The discretionary decision-making processes employed by the Church's internal complaints processes were inconsistent, unpredictable and, critically, unreviewable.

The ultimate decision-maker for the institution within which the sexual crimes were committed was the provincial or bishop of the particular church authority. These decision-makers ruled with unfettered discretion as to what to pay the victim, if anything at all.

Unregulated processes, combined with the unfettered discretion, power and often capriciousness of the decision-maker, led to inconsistent, grossly inadequate and unfair financial and other outcomes.

3.5.1 Adequacy of compensation

Despite Towards Healing claiming there is no cap on compensation and the Melbourne Response capping payments at \$75,000, some victims were offered amounts as low as \$5,000, and some were offered nothing.

There is also a significant discrepancy between financial settlements from within these processes and those negotiated outside the processes. In settlements negotiated outside of the internal processes, two victims received more significant payments of \$1.25 million and \$750,000, after each being offered between \$40,000 and \$50,000 at Towards Healing.

All financial settlements are ex gratia payments. No admission of liability is made by the Catholic Church. In order to access this unjust 'remedy', victims also had to sign a legally enforceable deed of release – an ongoing issue for many victims of clergy abuse, discussed below.

3.5.2 Review of decisions

The completely discretionary decision-making processes at both Towards Healing and the Melbourne Response do not provide for an internal or external mechanism of appeal.

4. Remedies: past institutional sexual abuse settlements and deeds of release

4.1 Overview

As outlined above, previous legal barriers to access to justice meant that a significant number of victims of historical institutional abuse were forced into accepting what the offending institution offered as financial settlement.

Previous time limitations on claims worked to the advantage of institutions because 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 by institutions into accepting profoundly inadequate compensation. The deeds of release which victims were required to sign to access this 'remedy' denied them the ability to issue future legal proceedings and thereby blocked access to more equitable terms of settlement.

A crucial reform in all Australian jurisdictions has been the abolition of time limits on legal actions, which has enabled many victims of historical abuse to access the courts. However,

deeds of release associated with past settlements remain a national issue for many other victims. Not only the Catholic Church, but all institutions, including state governments, are currently relying on the legal enforceability of these deeds of release. For example, the position of the Catholic Archdiocese of Melbourne is that its internal complaints process was just, fair, compassionate and independent and if victims want to do anything, they must take the Archdiocese to court. The deeds of release associated with such past settlements, however, continue to deny victims access to the court and justice.

Deeds of release associated with past settlements for institutional sexual and other abuse have failed to uphold the right to an effective remedy for victims. The *International Covenant on Civil and Political Rights* ('the ICCPR') provides this right for those whose rights outlined in the ICCPR have been violated, including for the failure to guarantee the right of every child to protection.⁴² The circumstances of past settlements and associated deeds of release, including the unfair internal complaints processes discussed above, make it unjust and unconscionable for all institutions and state governments to rely on their legal enforceability.

4.2 The extent of the injustice

In the state of Victoria alone, between August 1996 and June 2012, the Catholic Church's internal complaints processes settled up to 700 ex gratia payments for which deeds of release were mandatory. Other victims have entered into similar deeds releasing multiple other religious institutions in Victoria, and the Victorian State Government.

The Royal Commission noted that 1,501 claims of child sexual abuse resulted in monetary compensation via Towards Healing and the Melbourne Response.⁴³

4.3 Necessary reform

The unjust circumstances in which the institutions and state governments took advantage of the vulnerability of victims outlined in this report support the argument for setting aside deeds of release associated with past settlements. Equal access to justice is critical for victims who have signed deeds of release for past settlements that were unjust.

A legislative provision to provide judicial powers and discretion for the setting aside of deeds of release associated with past settlements is critical to provide equal access to justice for victims of historical institutional abuse.

Queensland and Western Australia are currently the only Australian jurisdictions which have empowered their courts to set aside past settlement agreements where it is just and reasonable to do so.⁴⁴

⁴² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 3, 24.

⁴³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of claims of child sexual abuse made with respect to Catholic Church institutions in Australia* (2017) 33.

⁴⁴ *Limitations of Actions Act 1974* (Qld) s 48(5A); *Limitations Act 2005* (WA) s 92(3).

Further, in Queensland it was noted that it would be an ‘affront to reason to remove the unjust time limit [as all Australian jurisdictions have done] but not remove the product of those unjust time limits.’⁴⁵

4.3.1 Additional comments

In addition to the unjust circumstances discussed above, institutions should not be able to rely upon past settlements entered into where legal barriers to access to justice existed. That is, where the institution did not legally exist or it was claimed the institution did not exist in a form capable of being sued (the ‘Ellis Defence’).⁴⁶ Reform of the limitation period, and the overturning of the Ellis Defence in Victoria specifically, have recognised that institutions have availed themselves of mechanisms that despite being lawful on their face, produced substantively unfair outcomes and ineffective remedies.

The Royal Commission’s recommendation to overturn the ‘Ellis Defence’ has been accepted by most other Australian jurisdictions, but legislation has not yet changed the operation of the defence other than in Victoria.

5. Conclusion

Victims and survivors of institutional abuse in Australia continue to face barriers to access to justice following the Royal Commission. The National Redress Scheme, the Catholic Church’s two internal complaints processes and subsequent deeds of release associated with past settlements have failed to recognise the impact of institutional sexual and other abuse and fall short of delivering justice to victims.

With respect to Australia’s human rights obligations, victims and survivors in Australia have the right to appropriate state-supported recovery (redress) that does not discriminate.⁴⁷ Victims and survivors also have the right to an effective remedy.⁴⁸

⁴⁵ Explanatory Note, Limitations of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016 (Qld) 5.

⁴⁶ See Transcript of Proceedings, *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese for Sydney* [2007] HCATrans 697 (16 November 2007).

⁴⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 39.

⁴⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3.