Law Council
OF AUSTRALIA

Redress and Civil Litigation: Consultation Paper

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

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Table of Contents

Acknowledgements

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Introduction

1. The Law Council is pleased to provide this submission in response to *Consultation Paper: Redress and Civil Litigation* (the Consultation Paper), which was released on 30 January 2015 by the Royal Commission.

2. The Law Council represents over 60,000 Australian lawyers through its Constituent Bodies: the State and Territory Law Societies and Bar Associations, as well as the Large Law Firm Group. Further details of the Law Council's structure and aims are included at **Attachment A**.

3. The Law Council strongly supported the establishment of the Royal Commission and the work of the Royal Commission to date which provides an important opportunity for Australians to better understand:

    a) the experiences of survivors, their families and the community who have been effected by child sexual abuse within an institutional context;

    b) what should be done by institutions and governments to better protect children against such abuse in the future;

    c) what should be done to respond appropriately to child sexual abuse in institutional contexts; and

    d) what institutions and governments should do to address or alleviate the impact of past or future child sexual abuse in an institutional context.

4. This submission focuses on the following issues:

    a) structural issues of a redress scheme;

    b) monetary payments for a redress scheme;

    c) processes involved in a redress scheme;

    d) funding for a redress scheme; and

    e) civil litigation.

5. The Law Council supports alternative redress schemes but emphasises that internal redress schemes or complaints processes should not undermine survivors' rights to pursue claims through civil litigation, should they choose to. Similarly, the Law Council emphasises any statutory compensation scheme, if established for survivors of child sexual abuse within institutions, should be complimentary to and not replace the rights of survivors to pursue a claim in common law.

6. To achieve access to justice, citizens and other legal entities must have not only the formal right to access legal institutions to enforce their rights and defend their interests, but the practicable ability to do so, regardless of geographic location, economic capacity, health, education, race, sex, social status or any other factor.

7. For some survivors institutional redress schemes may be the only opportunity to receive compensation and obtain 'justice', due to the inability to access civil litigation on the grounds of financial incapacity, statute of limitation issues or the psychological impact of bringing a civil case.

8. The Law Council views redress schemes as an element of a broader response to survivors of institutional child sexual abuse, which includes reforms to civil litigation. Some of these issues have already been identified in the Law Council's past submissions to the Royal Commission.[1]

Chapter 2: Structural Issues

General Principles for Providing Redress

9. The Law Council supports the proposed General Principles to guide the provision of all elements of redress as contained on pages 53-54 of the Consultation Paper. The establishment of general principles is important to provide a guide for survivors on how a redress scheme will be approached. To that end, other guiding documents that may assist the Royal Commission include the:

    - United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law, 2006 (also known as the "Van Boven Principles"); and

    - European Commission, Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law, 2011.

10. The Law Council recommends that specific reference should be made to the provision of legal assistance in the General Principles. Principle 4 could be modified so that it states:

> "all redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable people. It should be ensured that survivors can get access to redress with minimal difficulty and cost and with appropriate support**, including legal assistance,** or facilitation if required"

11. Further details on the provision of legal assistance are provided below.

[1] Law Council of Australia, Civil Litigation: Issues Paper 5 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, 21 March 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2802_-_Civil_Litigation_Issues_Paper_5.pdf; Law Council of Australia, Towards Healing: Issues Paper 2 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, 13 September 2013, available at: http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/12.-Law-Council-of-Australia1.pdf; Law Council of Australia, Working With Children Checks: Issues Paper 1 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, 12 August 2013, available at: http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/09/66.-Law-Council-of-Australia.pdf; Law Council of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse: Submission regarding Draft Practice Guidelines, 19 April 2013, available at: http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2713%20-%20Draft%20Practice%20Guidelines.pdf and Law Council of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse, 28 November 2012, available at http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2664%20-%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20Consultation%20Paper.pdf.

Possible Structure for Redress

National Redress Scheme

12. The Law Council supports a national scheme which provides a consistent procedure to facilitate redress for survivors, including apologies or restorative mechanisms, access to counselling and compensation.

13. The lack of consistency between organisational responses (and between different sections of the same organisation)[2] has created inequality between survivors of abuse in institutional settings according to feedback from the Law Council's Constituent Body members. A national redress scheme is an appropriate mechanism to ensure claimants throughout Australia can achieve some level of consistency in terms of process, compensation and appeal rights, thus ameliorating some of the differences that could be evolve through different State and Territory models. More systematically, a national redress scheme will enable survivors to obtain some semblance of justice, through a recognised process involving the institution and complainants, particularly for those who may face challenges achieving a similar outcome under the civil justice system.[3]

14. A national scheme should:

    a) provide a fair, expeditious and transparent process for responding to claims;

    b) be simple and clear for survivors and their families;

    c) not be overly bureaucratic or create unnecessary barriers for survivors;

    d) have safeguards to ensure that it does not become mechanistic and undermine the efficacy of any pastoral response the survivor may be seeking; and

    e) not impede any other legal rights enjoyed by survivors, including civil justice mechanisms.

15. A redress scheme may be the only mechanism available for many survivors who, even if civil litigation reforms were introduced, may be unable or unwilling to pursue matters through the court system. Historical claims typically present challenges with respect to evidence and meeting the requisite standard of proof, may encounter many other procedural or legal obstacles and present obvious challenges for survivors forced to relive the trauma of their abuse.

16. However, it is preferable that survivors be empowered to make an informed decision on whether they wish to engage with a redress scheme and any decision to do so should not impact any subsequent right to pursue their rights more fully through litigation. Any redress scheme should have a range of objectives and it is noted that achievement of a number of those objectives may be difficult in the course of an adversarial litigation process.

[2] For example, the Towards Healing process compared to the Melbourne Response. While both schemes were run by the Catholic Church and of a similar size, each had different processes to qualify, appeal rights, counselling services, size of monetary payments and caps.
[3] As noted in the Law Council's response to Issues Paper 5. See n2.

17. In addition to the matters identified in the Royal Commission's Consultation Paper, the Law Council points to the following issues which should be addressed in the establishment of a redress scheme:

    a) delay in the establishment of a scheme if referral of State power to the Commonwealth is required;

    b) the identification of those institutions covered by a scheme, including institutions which no longer exist;

    c) whether the scheme will be mandatory or voluntary for institutions;

    d) whether there is a role for the institutions' insurers;

    e) whether individual perpetrators should have any involvement in a scheme with respect to financial contributions or providing apologies;

    f) the funding of the administration of such scheme and payments for survivors;

    g) the extent and the nature of the institutional involvement or governance of the scheme;

    h) any eligibility requirements with respect to survivors;

    i) whether the scheme is directed to redress for historic child sexual abuse and, if so, whether the scheme is intended to provide redress for future claims;

    j) whether there will be any limitation period within which claims must be made to the redress scheme;

    k) the treatment of past payments or other redress measures;

    l) whether a redress scheme will require a survivor to forgo all rights to commence civil proceedings;

    m) the role of the survivors' legal representatives and advocates;

    n) the capacity for apologies to be given to survivors;

    o) development of restorative justice mechanisms; and

    p) the duration of the scheme.

18. In addition to the redress schemes listed in Appendix A of the Consultation Paper, the Law Council encourages the Royal Commission to further investigate the applicability of the Australian Securities and Investment Commission (ASIC) model for consumer compensation (the Commonwealth Financial Planning Limited), the Defence Abuse Reparation Scheme (DART) and the Canadian redress scheme for survivors of institutional child abuse in residential schools run for First Nations peoples.

19. The Law Council also notes Recommendations 15 and 16 of the 1997 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, (the "Bringing Them Home Report") with respect to a National Compensation Fund based on human rights principles concerning reparations. The

Royal Commission may be assisted by the approaches recommended by the then Human Rights and Equal Opportunity Commission with respect to engagement with Indigenous survivors. This is discussed in further detail from paragraph 74.

Alternative Structure

20. If a national redress scheme cannot be achieved, the Law Council would support an alternative structure based on the redress model proposed by the LIV to the 2012 Victorian Inquiry into the Handling of Child Sexual Abuse by Religious and other Organisations.[4] In its 2012 submission, the LIV proposed that a statutory oversight body be established to provide an external review mechanism for internal response processes of religious and other non-government organisations (eg by imposing common standards, guidelines and procedural fairness requirements) and that the statutory oversight body could also consider claims for compensation made directly to it (eg where there is no internal process).

21. The Law Council suggests the following features of an alternative model for resolving historical wrongdoing, drawn in significant part from the recommendations of the LIV to the Victorian Inquiry:

    a) Ensuring procedural fairness through perceived and actual independence from the defendant organisations.[5]

    b) Informal dispute resolution processes, designed to limit stress and disturbance for complainants.[6]

    c) Efficient resolution of claims involving an active mediator (or other referee) with appropriate powers to ensure unnecessary delays are limited.[7]

    d) Entirely voluntary participation in services, mediation and other processes.[8]

    e) Where internal complaints or restorative processes are established by institutions, consideration should be given to establishing a voluntary code or guidelines, setting down minimum standards and clarifying that such processes cannot abrogate any civil law rights enjoyed by a participant or survivor.

    f) Clarification that survivors and other participants are entitled to be represented or supported, whether by a legal practitioner, McKenzie friend or any other person.

[4] Law Institute of Victoria, *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations*, Parliament of Victoria, Family and Community Development Committee, 21 September 2012.
[5] Graeme Orr and Joo-Cheong Tham, Work and Employment (2011) *Australian Journal of Administrative Law* 18, 127. One complaint often cited by participants in the Melbourne Response processes, for example, is that the system is too close to the Church itself (promoting its own case services, for example), in circumstances where the Church is trying to protect one of its own (see Case Study in LIV submission to the Victorian inquiry, p32). Ensuring that any resolution mechanisms are separate from the entities to which the allegations relate, helps relieve this difficulty.
[6] Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, The Helping Court Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia (2007) *Journal of Judicial Administration* 17, 93.
[7] Ibid.
[8] Ibid.

Inadequacy of existing modes of redress

22. The Law Council considers it appropriate to establish a statutory redress scheme, given potential problems faced by victims in pursuing remedies through existing frameworks.

23. As the Royal Commission has noted, survivors of childhood sexual abuse face significant challenges in bringing a common law claim including issues involving limitation periods, vicarious liability, identification of defendants, establishing an employment relationship, the availability of funds to either bring the case or to support a speculative/conditional costs claim and the existence of relevant evidence, witnesses and the alleged perpetrator.

24. Even if these practical obstacles can be traversed, in reality many survivors may not bring a common law claim for a multitude of reasons, such as avoidance of stress and uncertainty associated with court proceedings and the wish to avoid reliving their past in a public forum.

Chapter 6: Monetary Payments

25. From the perspective of many survivors, no sum of monetary compensation will ever be sufficient recognition of the trauma survivors have endured throughout his/her lifetime. However, monetary payments are a tangible means of recognising the wrong suffered by survivors of abuse and should be distinguished from provision of counselling and psychological services. Funding for counselling and psychological services should be provided in addition to any monetary payment.

26. The Law Council supports the flexibility of allowing survivors to access lump sum payments.

Eligibility for Monetary Payments where Previous Payments Received

27. Claimants who have already received monetary payments, whether directly from institutions or other sources such as survivors of crime compensation, should still be eligible to receive monetary payments. Based upon the feedback from the Law Council's Constituent Bodies, many claimants who have obtained ex gratia payments have received vastly inadequate sums because of the barriers they faced to bringing civil litigation (including the stress of litigation, even where liability arguments are strong).

Maximum Payments

28. The Law Council does not currently adopt a position whether there should be a cap and/or the minimum or maximum redress payments, but notes that any payment should appropriately reflect the seriousness of the abuse. If there is a cap on maximum payments under the redress scheme, this should be sufficiently high to allow a real alternative to seeking common law damages.

Chapter 7: Redress Scheme Process

Standards of Proof

29. The Law Council adopts no position on the standard of proof at this stage of consultation, noting that it will depend in part on the amount of funding for a redress scheme, the size of the cap and the goals of the redress scheme. One of the issues in adopting a lower standard of proof, such as plausibility, could be the consequences for survivors who subsequently pursue civil litigation where they will be faced with a substantially higher burden of proof, such as balance of probabilities. Another issue would be the effect of the standard of proof on the ability of institutions to obtain insurance in respect of scheme payments. However, these issues will need to be considered in the broader context of the redress scheme.

30. The Law Council notes that the LIV has supported lowering the standard of proof respectively to either the standard of plausibility (which has been adopted under the DART scheme); or reasonable likelihood, as recommended by the Senate Community Affairs References Committee. These standards are regarded by the LIV and LSNSW as appropriate, given the likelihood of lower levels of compensation available, the lack of reference to the harm caused to the complainant/survivor and the low-disputation experience under existing schemes.

Evidence of connection with an institution

31. Australian government redress schemes (such as the Queensland Government Redress Scheme, 2007-2008) have had a requirement that basic proof of the relationship between the survivor and the institution should be established. In out-of-home care/school cases this is may be appropriate. It is more likely to be problematic in clerical abuse claims, scouts, sporting or other types of organisations where there may be no documentary evidence of attendance, particularly many years after the events.

32. Statutory declarations and witness statements should be accepted as proof of the connection/relationship between the claimants and the responsible organisation. The scheme should provide any institution that is the subject of an allegation with details of the allegation, and should seek from the institution any relevant records, information or comment.

Evidence of abuse and injury

33. Evidence of abuse could be corroborated through witness statements and affidavits or statutory declarations from the claimant and their family members, friends or other relevant associates. Again, the institution should be provided with the opportunity to comment on the allegation and should be required to provide any relevant records.

34. Unless payments under the scheme are linked to some level of victim-impact, detailed proof of injury as a result of the abuse should not be required. However, victims should be given every opportunity to outline the impact of the abuse without the requirement for detailed expert reports. A statement from the survivor/claimant's treatment practitioners should be sufficient.

Legal Assistance

35. The Law Council supports the inclusion of legal assistance funding in any scheme. Legal assistance should be available during the application process, prior to acceptance of any offer made and, if a release is included, prior to signing a release and where a review is sought. Many survivors may be either unable to participate on their own or unable to present their case in the most appropriate manner to achieve justice.

36. This will require additional funding for legal aid commissions, Aboriginal and Torres Strait Islander legal services and appropriate community legal services.

Access to Documents and Records

37. A national redress scheme must have the ability to seek records, information or comment to verify or substantiate a claim.

Chapter 8: Funding Redress

Funding Framework

38. In any redress scheme, it is important to maximise funding available for survivors by minimising administration costs, ameliorate the number of schemes and minimise transaction costs.

Appropriate Funding Arrangements

39. Ideally, the scheme should be Commonwealth funded, with appropriate arrangements to enable the scheme to recover payments from institutions or State/Territory governments. The Commonwealth should be funder of last resort, to ensure that survivors of abuse in institutional settings can obtain redress, regardless of whether an institution continues to exist or is solvent or impecunious.

40. The availability of insurance cover will be an important consideration in the scheme design.

41. The NSWLS has noted the problems with having numerous and diverse redress schemes in each of the Australian states and territories. For survivors who were abused in more than one state or territory, variations between schemes may add unnecessary complexity.

Chapter 10: Civil Litigation

42. As noted previously, any proposed statutory redress scheme should be in addition to, and not a substitute for, and must not abrogate, any rights or entitlements at common law. To enable survivors of child sexual abuse to achieve redress and a sense of justice it is vital that all options for compensation are available at their election. This includes the continuation of the availability of civil litigation as an option for seeking compensation.

43. Notwithstanding this, there may be benefits in implementing civil law reforms, where appropriate, to remove unnecessary obstacles to common law compensation.

44. Further, survivors and their families require access to skilled and independent legal advice and services so as to ameliorate the possible power imbalance against the institution against which a claim is made. One significant concern is that restrictions on legal aid are now so severe that civil law assistance is virtually unavailable for most Australians due to restrictive means tests, and entirely unavailable in broad range of matters. Accordingly, many of those who might seek to litigate and retain a lawyer will be required to do so at significant personal expense, which presents a significant barrier to proceeding and seeking access to civil litigation as a means of achieving justice.

45. Effective access to justice can only be achieved if there is significant additional investment of funding in legal assistance services, to ensure the legal needs of victims of institutional child sexual abuse can be met.

Limitation Periods

46. The Royal Commission has noted that many survivors and survivors' advocacy and support groups have told it that limitation periods are a significant, sometimes insurmountable, barrier to pursuing civil litigation. The Royal Commission also points to a lack of uniformity in State and Territory legislation prescribing limitation periods.

47. Limitation periods are inconsistent across Australia and, in a number of jurisdictions, are inappropriately short for claims arising from child sexual abuse because of the unique nature of the impacts of child abuse on survivors, leading to the typical pattern where survivors do not find themselves in a position to take action until many years into their adulthood, well outside even the most generous limitation periods currently available. Legislative amendment is required to address this barrier to fair redress.

48. The Law Council referred to these differences in detail, in its Position Paper titled *A Model Limitation Period for Personal Injury Actions* (the Position Paper). The Law Council has adopted the position that child sexual abuse cases form a special category of intentional tort, where policy consideration strongly favour allowing proceedings to continue where there is possibility of a fair trial.

49. Across the States and Territories, limitation provisions vary enormously as does the availability for extending the time limitation provisions. There have also been recent moves to amend limitation periods in response to the Royal Commission, for example:

    a) The New South Wales Department of Justice has recently published a Discussion Paper on Limitation Periods in Civil Claims for Child Sexual Abuse (NSW Discussion Paper); and

    b) The Victorian Government recently introduced the *Limitation of Actions Amendment (Child Abuse) Bill 2015*, which will remove limitation periods for personal injury (and death) claims arising from physical, sexual or psychological abuse.[9]

50. Whilst most jurisdictions have provision for an extension of time, any application for extension of time must meet the test set out in *Brisbane South Regional Authority v Taylor* (1996) 186 CLR 541, requiring the plaintiff to establish that a fair trial is still

possible. However, in a number of jurisdictions the limitation period is subject to a "long-stop" provision.

51. It is noted that policy considerations have led to changes to limitation periods generally in the past, for example to manage claims associated with latent onset diseases such as mesothelioma.

52. The process involved in an application for an extension of time can itself be traumatic experience for survivors. The case of *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2006] NSWSC 109 and *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347 highlight the obstacles for survivors seeking to commence civil claims where the limitation periods may be raised to resist the claims. The Law Council notes the extensive work on these issues by the Royal Commission through its Case Study on Ellis ("the Royal Commission Ellis Case Study").[10] The Royal Commission Ellis Case Study identifies a number of systemic issues on redress and civil litigation grounds.

53. While there are reasons for the retention of limitation periods, as outlined at page 204 of the Consultation Paper, the policy considerations in favour of a limitation period for conduct considered under the criminal justice system compared to the civil justice system are different.

54. Further, the Law Council does not consider certainty for insurers (affecting premiums) provides an adequate justification for determining justice policy in relation to such claims. On balance, it is reasonable that there be some form of limitation, but it should be sufficiently flexible to enable the Court to arrive at a just and reasonable decision in the circumstances. Limitation periods should be revised consistently in all jurisdictions to provide a special limitation period for those whose injuries (the subject of the claim) have arisen from alleged sexual abuse as children.

55. As noted in the Law Council's submission on Issues Paper 5 and recommended in its Position Paper on a model limitation period, the general features could include:[11]

    a) a special limitation period for child sexual abuse survivors (including that the period could be extended to three years after the relevant facts become discoverable);

    b) no long-stop periods; and

    c) that time should not run for a minor or a disabled person until they cease to be a minor or under a disability.

56. If such measures were adopted consistently across Australia they should operate prospectively as well as retrospectively.

57. The Law Council considers its position constitutes a rare exception to the general opposition to retrospectivity of legislation because the gross injustice that might

[10] Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No.8: Mr John Ellis's experience of the Towards Healing process and civil litigation*, January 2015. The proposed Victorian approach, similar to that adopted in British Columbia, has the significant advantage of removing the trauma and expense of litigation involved to obtain an extension of time or establish a disability. The NSW Discussion Paper Option A is similar to the approach in the *Limitation of Actions Amendment (Child Abuse) Bill 2015* (Vic).

[11] Ibid n1, p17-18.

result if perpetrators of child sexual abuse could be protected by the law in this way. Moreover, none of the victims who have told their stories to the Royal Commission to date would benefit from a purely prospective amendment. The Irish example suggests that providing a remedy retrospectively is possible and there is certainly evidence that major institutions, such as the Roman Catholic Church, are able to meet common law damages. The Law Council notes that the Victorian Bill is expressly retrospective and that is has the support of the NSWLS and the LIV.

Vicarious Liability

58. The Law Council is supportive of reforms clarifying the vicarious liability of institutions, where a person commits abuse in the course of service or utilising an office held by the person in the institution. The Law Council's submission to Issues Paper 5 noted that the extent to which an institution, particularly a religious organisation, can be vicariously liable in civil law for the criminal acts of its personnel was unclear in Australian law.

59. As a result of *New South Wales v Lepore* (2003) 212 CLR 511, the relevant principles include that:

    a) As part of the well-settled approach to vicarious liability, the limiting or controlling concept remains the 'course of employment' or 'scope of employment';

    b) Sexual abuse is 'so obviously inconsistent with the responsibilities of anyone involved with the instruction and care of children' that historically it was unlikely ever to be treated as within the course of employment, but 'such conduct may take different forms';

    c) There are some circumstances in which teachers, or persons associated with school children, have responsibilities of a kind that involve an undertaking of personal protection, and a relationship of such power and intimacy, that sexual abuse may properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers;

    d) One cannot dismiss the possibility of a school authority's vicarious liability for sexual abuse merely by pointing out that it constitutes serious misconduct on the part of the teacher;

    e) Intentional criminal wrongdoing may be within the scope of legitimate employment; and

    f) Whether such conduct is within the scope of employment depends on whether there is 'sufficient connection' between what the employee is engaged to do and the alleged misconduct so as to conclude that such misconduct is fairly to be regarded as occurring in the course of employment.

60. The Law Council also notes recent judicial consideration of the issue in *Withyman v New South Wales* [2013] NSWCA 10 and *DC v Prince Alfred College Inc* [2015] SASC 12.

61. The NSWLS has referred to the case of in *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2013] 2 AC 1, in which Lord Phillips

accepted that an employment-like relationship could be sufficient for vicarious liability to arise. Therefore an unincorporated association could be vicariously liable for the tortious conduct of its members, and a defendant could be vicariously liable for the tortious act of another defendant even though the act in question constituted a violation of the duty owed and even if the act in question was a criminal offence. It was held that vicarious liability could extend to a criminal act of sexual assault.

62. The Law Council notes the three options for reform identified by the Royal Commission namely:

    a) Institutions could have an express duty to take reasonable care to prevent child sexual abuse of children in their care.

    b) Institutions could be made liable for child sexual abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent the abuse. This approach reverses the onus of proof, so that the institution is liable for the abuse unless it can prove that the steps it took to prevent abuse were reasonable.

    c) Institutions could be made liable for child sexual abuse committed by their employees or agents. This would establish absolute liability, so that institutions would be liable regardless of any steps they had taken to prevent it.

63. The Law Council supports the first and second proposals.

Identifying Defendants

64. The Law Council supports reforms in this area. If obtaining fair compensation through civil litigation is to be a realistic option for survivors of child sexual assault, legislative reform is required to address some of the barriers to access to justice which presently exist in relation to the identification of an appropriate defendant likely to have the means to pay compensation.

65. The Law Council's submission on Issues Paper 5 highlighted the lack of a defendant to sue as a key issue, noting that perpetrators may be deceased at the time a claim is made, while some institutions cannot be sued because they are not incorporated bodies or they no longer exist. The submission referred particularly to the decision in *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2006] NSWSC 109 as illustrating the problems involved in suing religious organisations. This point was also discussed in detail in the Royal Commission Ellis Case Study as a systemic issue.[12]

66. It is not considered appropriate that such legislative reform should apply to small, temporary, informal unincorporated associations or 'clubs' formed to pursue a shared interest in sporting, cultural or other interests. In such organisations it is more likely to be possible to identify and pursue individual perpetrators of child sexual abuse for civil liability than in faith-based organisations.

67. Faith-based associations may also be distinguished from 'club' type associations for the reasons set out at page 223 of the consultation paper, including that:

    a) faith-based associations will often behave as a legal entity;

[12] Ibid n10, p119.

b) it is more likely to exist for the long term;

c) its associated bodies will frequently have significant assets in property trusts and enjoy the benefit of succession; and

d) individual perpetrators within the organisation may have few assets of their own, so that civil suit against them will be pointless.

68. The Law Council agrees with the proposition at page 224 of the consultation paper that the necessary outcome of any legislative reform should be that survivors should be able to sue a readily identifiable entity that has the financial capacity to meet claims of institutional child sexual abuse.

69. One suggestion from the Law Council's Constituent Bodies and Committees to deal with this issue, is to amend state and territory legislation to provide that any liability for institutional child sexual abuse by an institutional body with which a property trust is associated, can be met from the assets of the trust, and that the trust is a proper defendant to any litigation involving claims of child sexual abuse for which the religion or religious body is alleged to be liable.

70. The NSWLS has recommended a legislative process with respect to institutions lacking an identifiable body to be sued that would provide that the present leadership of the body be responsible in law for the conduct of their predecessors and the organisation (whether or not under the same name) to which they have succeeded as leaders.

71. With respect to 'club' type associations, which provide services to children that are funded or authorised by government, the Law Council endorses the suggestion on page 225 of the consultation paper that if government proposes to fund or authorise them, then government would first be required to ensure that they are incorporated entities with appropriate insurance.

Model Litigant Approaches

72. The work of the Royal Commission has highlighted the role of legal representatives for survivors and institutions in accessing civil litigation and the conduct of civil litigation.

73. The Law Council agrees that the model litigant guidelines provide appropriate standards for the legal representatives of all parties to observe. The Law Council encourages the legal representatives of governments, institutions and survivors to adhere to the principles in the conduct of civil litigation concerning institutional child sexual abuse. The Law Council also notes the important oversight provided by the courts in the conduct of civil proceedings.

Comments Specific to Aboriginal and Torres Strait Islander Survivors of Abuse

74. The Law Council suggests it may assist the Royal Commission to consider the recommendations in the Bringing Them Home Report.

Adopting a Reparation Model

75. Recommendation 3 of the Bringing Them Home Report is for "compensation" to be widely defined to mean "reparation." Recommendation 4 is that reparations be made

to all who suffered from forced removal policies, including individuals removed, family members who suffered, communities affected through cultural and community disintegration, and descendants who also suffered. The approach taken in the Consultation Paper appears to be consistent with a model that seeks to make reparations.

Heads of Damage

76. Recommendation 14 of the *Bringing Them Home* Report sets out Heads of Damages to be considered, and some of these will continue to be relevant for Aboriginal and Torres Strait Islander survivors of institutional child sexual abuse.

National Compensation Fund and Procedural Principles

77. Recommendations 15 and 16 of the *Bringing Them Home* Report recommend that the Council of Australian Governments (COAG) establish a joint National Compensation Fund, and that a board be established to administer the fund. The board should be comprised of both Indigenous and non-Indigenous people appointed in consultation with Indigenous organisations. This approach is generally consistent with the Royal Commission's comments in the Consultation Paper, and the Commission may be assisted by the recommendations in the *Bringing Them Home* Report in respect of the composition of the body administering the fund.

78. Recommendation 17 sets out procedural principles to be applied in the operation of the monetary compensation mechanism. This approach is to ensure that access to the monetary aspect of reparation should not be fettered by a lack of knowledge about available redress on the part of the survivors, or a lack of access to legal assistance, or limitation periods and other procedural formalities.

Indigenous Well-Being

79. Culturally-appropriate services will be necessary to inform the psychological support of reparations. In this regard, recommendations 33a, 33b and 33c of the *Bringing Them Home* Report are relevant. These recommendations provide that the services and programs for survivors should emphasise local Indigenous healing and well-being perspectives, and that therapeutic service providers should be community based and be respected by Indigenous peoples for their healing skills.

Conclusion

80. The Law Council considers the development of a national, statutory redress scheme would be an historic and necessary step towards providing justice for survivors of institutional child sexual abuse in this country. The Law Council emphasises that any proposed statutory redress scheme should be in addition to any rights or entitlements at common law. Civil law reforms will need to form part of the broader response to survivors of child sexual abuse. While the Law Council has developed a position on some of the issues associated with a redress scheme, it believes that further research and consultation is still required. The Law Council appreciates the detail of research contained in the Consultation Paper.

81. The Law Council looks forward to further engagement with the Royal Commission as it continues to examine justice for survivors of child sexual abuse within institutional contexts.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of over 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.