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A Victorian redress scheme for institutional child abuse.

Consultation feedback

SCOUTS AUSTRALIA - VICTORIA BRANCH

RESPONSE

Scouts Australia- Victoria Branch (Scouts Victoria) and each of the State and Territory branches of Scouts Australia, welcomed the Federal Government's decision to establish a Royal Commission into institutional responses to instances and allegations of child sexual abuse in Australia. Scouts Victoria also welcomed the Victorian Parliamentary Inquiry into the Handling of Child Abuse and the *Betrayal of Trust* report in November 2013.

Scouts Victoria supports a National or State based redress scheme which is equitable, simple, clear and sustainable for all Australians – especially our young people. Above all it should be non-discriminatory in the survivors to whom redress is made available.

Scouts Victoria

Scouts Victoria is a not-for profit volunteer organisation which heavily involves families in all activities to provide its 17,000 Victorian youth members (aged 6-25 years) with educational, fun and challenging opportunities to grow and develop self-reliance and resilience.

Scouts is a part of nearly every Australian community. Our members come from a wide variety of cultural and religious backgrounds, across the socio-economic spectrum and include individuals with intellectual and physical disabilities.

The aim of Scouting is to encourage the physical, intellectual, emotional, social, and spiritual development of young people, so they may play a constructive role in society as responsible citizens and as members of their local and international communities. This is achieved through a series of strong and active non-formal education programs that inspire young people to do their best and to always be prepared.

Child welfare is the top priority of Scouts Victoria

As a thriving, modern volunteer organisation, we strive to be vigilant in identifying and eradicating child abuse.



We note and affirm that the safety and welfare of the youth in our care has at all times been of paramount concern.

Our efforts over the past 5 decades have been focussed on reducing the potential for abuse in Scouting through even tighter checking, strong training, immediate suspension, police involvement, and developing a culture of reporting.

All forms of child abuse are both intolerable and inexcusable. We continue to have a zero tolerance policy on child abuse. If any allegation of child abuse is made, we deal with it, as we have done for over half a century, by reporting any such allegation to the police and immediately standing down any leader in respect of whom such an allegation is made. Our contribution in 1995 to the Victorian Parliament report *Combatting Child Sexual Assault* emphasised our belief in such procedures: see http://www.parliament.vic.gov.au/images/stories/committees/dccp/isoaca/First_report_Combating_Child_Sexual_Assault.pdf . Victoria Police are on record as confirming Scouts Victoria's cooperation with police in investigating allegations of abuse.

Despite our efforts and commitment, it is a tragic fact of history that children in the care of many institutions and also in a private environment have been sexually abused. This has sometimes occurred in circumstances where, if institutions like ours had even better practices, or been more alert, that abuse may have been avoided or at least detected earlier than was the case.

Both now and in the past we have sought to ensure that all our youth members were adequately insured for any harm they might experience as part of a Scout program. In particular we have endeavoured to ensure that in any instance of child abuse by any of our leaders there was adequate insurance cover to provide compensation to the youth members within the then legal framework in which Scouts operated.

Through paying increased premiums, we have sought to provide for youth who might be injured/abused in circumstance where unfortunately we may not have lived up to the required standard the community rightly expected of us. Therefore it is important in our view that the costs of a redress scheme should also be borne by insurers who have in the past taken on the risk of abuse claims.

Volunteer community organisations are vitally needed but they are not wealthy

Community institutions such as Scouts are not wealthy. We are a volunteer organisation with over 4000 volunteer leaders the majority of whom are parents of our youth members who run the programs that form the core of our organisation's activity. We have relatively few salaried staff members whose function it is to look after administrative matters. We operate on the basis that annual fees, miscellaneous income and donations cover annual expenses with relatively little capital. Those assets we have are dedicated to the Scout program and making Scouting affordable for our youth members.

It is tough for many families whose children take part in Scout programs to pay even minimal fees or activity costs.

If formal community based institutions such as Scouts are required to pay continually increasing insurance premiums and a significant contribution to a redress scheme the programs offered by these community based organisations will become unaffordable to those who may need them most. In some cases the organisations may cease to exist.

Not only would this deprive very many young Australians of an established and proven learning and development program each year, it will also encourage informal, unregulated activities to fill the void of youth programming.

Government has over the past decades sought to shift the provision of services to the community or private sector. This should not restrict the liability of the public sector (or the community as a whole) and pass on retrospective liability to community groups for what is essentially a whole of community issue. To do so is neither equitable nor sustainable as an Australian system.

A national redress scheme

Scouts supports a national redress scheme and is keen to be part of a program which may bring better relief and healing to survivors/victims of child sexual abuse with minimal bureaucratic process and stress. If a national scheme is not adopted Scouts Victoria supports a State based scheme.

Scouts Victoria agrees with the recommendations that a redress scheme should not have its principal focus on the monetary payment, other measures such as counselling, support and proper apologies can greatly assist in a healing process and so should be at the forefront of any proposed scheme. Scouts Victoria accepts these recommendations and has in the past, and will continue in the future to offer personal apologies, meetings and counselling.

We support the view that all victims of child sexual abuse, and not only those in respect of which institutions owed a duty of care, should be able to receive some monetary compensation provided in the context of a non-adversarial scheme if they seek it.

There are three crucial issues to discuss regarding a sustainable and fair monetary compensation aspect of a redress scheme:

1/ **Source of funds:** who will pay for the bulk of the costs of a redress scheme? If the level of payments is above that which can be afforded, and if they are not covered by insurance, a redress scheme could threaten the existence or viability of community organisations which exist to assist and educate our youth. If an organisation ceases to exist, it cannot make payments at all and cannot continue to provide services for the benefit of the community.

2/ **Retrospectivity:** in circumstances where an institution which relies almost entirely on volunteer help is sought to be made retrospectively liable for financial compensation above the levels required by the legal framework in which they operated and covered by contemporaneous insurance, what limits will be applied that are fair and reasonable?

3/ **Equity:** any scheme must be equitable for all victims. Those who experienced abuse in a government institution are no less deserving than those who were abused in a community institution or family setting. Redress should be equitable, based on the human suffering and transparent for all victims. While the position of the survivor is clearly paramount, a redress scheme should also be equitable for the institution, and the current community members of that institution.

Source of Funds

Scouts Victoria has in the past, and will continue in the future, to offer both monetary and non-monetary redress to victims as these situations arise. Both Scouts Victoria and our insurers have sought to adopt a non-adversarial approach and do not delay claims or take unreasonable technical points including points of limitation. A decision that a monetary amount should be paid by way of

retrospective liability under a redress scheme and in recognition of the obvious and horrendous injury suffered by a victim/survivor will require State legislation. The funding of such contributions, especially in the context of a community based volunteer organisation which is not asset rich, should be seen to a reasonable degree as a shared community responsibility for which the community should contribute through our taxes.

In the case of our organisation we have over the years developed very clear child protection policies and required all leaders not only to abide by a strict code of conduct but also to undertake specific child protection training. Scouting and other similar organisations are vital in educating our youth to become resilient and self-reliant members of our community. We, with other similar organisations, provide vital non classroom education the benefit of which is clearly recognised by leading child psychologists as increasing resilience and self-reliance.

If significant funding for a national or state based redress scheme were sought from organisations such as ours it would severely inhibit the education of future generations and could frankly make things worse not better. Young people will be at greater risk.

Retrospective liability

If volunteer not for profit organisations are to be made retrospectively liable for compensation in circumstances where the current law of negligence does not provide liability, for example on a no fault basis, it will be at a very significant cost, and could cause closure of the organisation. At the very least such retrospective liability would lead to a significant curtailment of programs. If mandated redress payments by community organisations such as ours are beyond the financial and operational framework which is currently in place, the funds will not be available. Not only is such retrospective liability inequitable, it will hurt those most in need of our programs.

If on the other hand a redress scheme sought to provide a streamlined non adversarial dispute resolution system in the context of the present scheme of liability that would be a great achievement and would be wholeheartedly supported by Scouts.

The blunt question is: should the provision of retrospective compensation beyond that which the organisation would otherwise be liable for be at the expense of current and future program delivery to future generations? The financial capacity, in our case and that of similar organisations, is simply not large enough to provide extensive monetary redress on a retrospective basis beyond that payable under the existing legal framework and also maintain ongoing program delivery for the future education of our youth.

We note that the Royal Commission has recognized this fact in recommending that not-for-profit or volunteer institutions should not generally be liable for the criminal acts of its members that cause harm to children. The Royal Commission said (at p 54 of its Executive Summary):

To do so may discourage members of the community from coming together to provide or create facilities that offer opportunities for children to engage in valuable cultural, social and sporting activities.

If as the Royal Commission recommends, volunteer and not for profit organisations should not be made prospectively liable for the criminal acts of their members they should not be made so liable on a retrospective basis. Child abuse will inevitably be criminal behaviour.

Equity

We believe all survivors of child abuse should be treated equally.

Child abuse is likely to be equally horrendous whether it occurs in the context of an institution or in another context such as a family. Further, many cases of abuse appear to have occurred in situations where it is not clear whether it occurred in a private or institutional setting. It appears that many abusers had a family connection with the survivor although he or she may also have been involved in an institution. Making redress available to all will avoid complex and hurtful arguments about relationships and cause and effect. Compensation / redress whether for past abuse or future abuse should be available regardless of the context and be available on a no fault basis.

The Consultation Paper

We now turn to consider some, but not all, of the questions raised in the Consultation paper.

Discussion Question 1

Purpose of a redress scheme

The suggested purpose of a redress scheme as set out in the Discussion paper is:

The purpose of the redress scheme is to recognise the harm caused by institutional child abuse.

In our opinion a redress scheme should provide redress on a wider basis to all victims of abuse regardless of attributing responsibility to any particular organisation or person. Such a system would provide equity to all survivors and focus on the survivor rather than any particular institution. Such a wide ranging system would obviously need to be funded by the whole community.

If the proposed system has its focus on “*harm caused by institutional child abuse*” we would obviously support such a system as institutions should accept responsibility for any abuse they have caused. We certainly accept such responsibility. The position however, is that such cases would be ones where by and large the current law would make the institution liable in negligence. If this is to be the focus and purpose of the scheme it will need to focus on the role of the institution and its responsibility for the abuse. We would certainly not oppose such a scheme but it runs the real risk that it will need to focus on the culpability or breach of duty of the institution rather than the harm suffered by the survivor.

Discussion Question 2

Compulsory or Voluntary Scheme

We believe that once an appropriate and equitable scheme is developed it should be compulsory. If the scheme is voluntary it is likely that insurers may escape liability.

In our view it is important that bodies, such as ours, who have historically provided for appropriate insurance cover, should be able to ensure that insurers do not escape liability on the footing that payments are voluntary. An equitable redress scheme should not overlook the financial contribution insurers should make.

Discussion Question 3**What forms of child abuse should be covered?**

While all forms of abuse are inexcusable and may have horrendous effects it is our view that the broader the definition of child abuse the less effective the scheme will be. If the scheme simply provides a streamlined non-adversarial method of quantifying a common law the definition may not be so important. If it imposes liability where it did not previously exist it would be more appropriate to limit the definition of child abuse to that which is criminal in nature yet without a criminal burden of proof.

Discussion Question 4**Connection between abuse and the institution.**

Our principal submission is that all victims of abuse should receive equal treatment and that compensation beyond that which would arise under a common law duty of care should be funded by the community. If however the institution is to be made retrospectively liable under such a scheme it should be for abuse which the institution was realistically responsible for. It will be recalled that such abuse will invariably be of a criminal nature. Notably the Royal Commission has recommended that not-for-profit or volunteer institutions should not be made vicariously liable for the criminal acts of its members (p 54 of the Royal Commission's Executive Summary). It seems obvious that if institutions such as ours should not be liable for the criminal acts of their members on a prospective basis they should not be made so liable on a retrospective basis. While it is clear that we have a duty to provide a safe environment for our young folk, liability should be limited to those cases where the abuse occurred on activities of, or organised by, the institution

A redress scheme to which a not for profit volunteer organisation is required to contribute should be limited to cases where the institution has clearly failed in its responsibility to take reasonable care of the survivor.

The mere fact that a child was abused by a person who was a member of the institution or that the abuser initially met the victim as a result of his membership of the institution is not in our view a sufficient basis to be entitled to monetary redress from the institution unless the amount will, as we recommend, be payable to all survivors on a no fault basis and funded by the community as a whole.

Discussion Question 6**Prospective operation of a redress scheme**

The proposed scheme should operate prospectively as well as retrospectively as we see one of the advantages of a scheme is to provide a non-adversarial framework in which to resolve claims.

Discussion Question 9**Evidence**

All parties and the scheme itself should be able to adduce evidence but the nature of the evidence should be at the discretion of the scheme decision maker.

Discussion Question 12

Standard of proof

We very much doubt that any significant number of survivors are likely to fabricate evidence of abuse. Therefore the evidence of whether there was abuse will in most cases not be controversial and by and large the evidence of the survivor should be accepted except perhaps in the most extreme case. Thus a standard of reasonable likelihood would be appropriate. The greater difficulty will arise in distinguishing where and in what precise circumstances the abuse occurred and whether the institution could reasonably have taken steps to prevent the abuse occurring. In some cases such as residential institutions this may not be difficult, but in other cases where the abuser may have had contact with the victim both through an institution and through a family or private relationship the issue becomes more difficult.

If it is proposed to make institutions liable for abuse that occurs in a private setting but where the abuser was a member of an institution in question and the victim also had contact with the abuser through activities of the institution, the issue of liability becomes problematic.

In our view if one adopts a scheme whereby the institution is made liable to pay a monetary amount based on the role it played and what it might have or should have done to prevent the abuse there will need to be a reasonably rigorous system to fairly apportion responsibility.

If a scheme is to be adopted where compensation is paid regardless of the culpability of the organisation then a similar and fairer scheme will develop but one where the community should accept a greater responsibility.

Discussion Question 14

The decision maker.

The decision maker should be a body such as VOCAT (see Question 28) obviously using specialists.

Discussion Question 18

Representation by the institution

If the institution is to be made liable for compensation it should be able to be represented at the hearing/enquiry if it so chooses. No fair and equitable system could see someone made liable without the opportunity to be heard.

Discussion Question 19

Written Reasons

Short confidential reasons should be provided. This will ensure integrity of the scheme and help ensure better practices in the future.

Discussion Question 20

Appeals

The scheme should generally discourage appeals but they may be necessary in some cases.

Discussion Question 21

Basis of calculation of monetary redress

In our view any recommendation about a proposed redress scheme will need to come to grips with whether it is voluntary and truly results in ex gratia payments, or whether it will impose retrospective legal liability on organisations.

A preferable scheme should the Government favour retrospective liability on a no fault or limited fault basis, is for the Commonwealth/State to pay survivors out of the public purse so that all survivors can be treated equally regardless of the circumstance in which they were abused.

The maximum monetary payment will depend on a number of factors. If retrospective liability is imposed on institutions, then the higher the maximum sum the more unfair it will be on the institution. On the other hand nominal payments will not provide adequate redress.

We are not in a position to express a view about the appropriate level of payment under a redress scheme as the hurt suffered is simply not capable of being converted into a monetary amount. Any amount will to some extent be arbitrary and should not be seen as compensation but as practical recognition of the suffering as a consequence of criminal activity. We are of the view that previous payments made by an organisation either through litigation, settlement, or redress should be deducted from payments under a redress scheme.

We would prefer a matrix approach as suggested in the Discussion paper, although the more complex the payment calculation system, the greater is the danger that it will descend into a calculation and determination of culpability which really belongs in the area of common law damages.

Those designing the scheme must at an early stage ask what the scheme intends to achieve by way of monetary payment. It is clear no amount of money can compensate a survivor for the abuse s/he may have suffered. Once the scheme payment varies with the culpability of the institution, the scheme will be seen to be determining blame which such a scheme should avoid.

Discussion Question 22

Mode of payment

Generally payments should be by way of lump sum assuming that the amounts are not of such magnitude as would cause difficulty for the recipient.

Discussion Question 24

Counselling

We support the provision of ongoing counselling and feel this should be coordinated as part of a holistic program to address the needs of the survivor. Medicare should be utilised and if need be an increased levy to provide support for the mental health of all Australians.

It is our practice to source recognised, independent counselling and psychological support services that are outside any Scout organisation. We believe it is crucial to have a clear, external support service rather than attempt to employ staff within the organisation for the situation of sexual abuse. It must be independent and accredited with recognised government authorities.

Discussion Question 25**Apology**

We support the view that survivors of child sexual abuse in an institutional context should have the opportunity to meet with a senior representative of the institution, in our case the Chief Commissioner and the Chairman. Survivors should be given a genuine oral and written apology and be given an opportunity to engage with those representatives, to tell their story, and hear what steps the organisation has, and is taking, to protect children from child sexual abuse.

We also understand that at times the victim/survivor prefers to remain anonymous or refrain from direct contact. In cases such as these, organisations can reach out to the victim/survivor through a third party such as the police. This is a process which could be formalised in cases where victims do not wish direct contact but would benefit from receiving an acknowledgement and apology in written form.

Discussion Question 26**Deed of Release**

Survivors who receive an “award” through a formal and compulsory redress scheme should not have to sign a release as the payment will be the result of an assessment by an independent body without any form of compromise. However in calculating such “award” survivors who have already received a payment/settlement through a common law or other claim should have this payment taken into account in calculating any financial award via a redress scheme.

Discussion Question 28**Administrative Arrangements**

We would support the scheme being administered through VOCAT as suggested in the discussion paper

Contact for further information or discussion

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