Berry Street
Submission

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related bill

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Berry Street has been supporting, assisting and caring for children and young people who are the victims of abuse, violence and neglect since 1877. Berry Street provides a range of services including Out-of-Home Care (OOHC) (foster, kinship and residential), family violence services and community based services that support vulnerable families.

Berry Street is also the auspice for Open Place, the Victorian state wide service for Forgotten Australians.

Berry Street has been an active participant in the proceedings of the Royal Commission into Institutional Responses to Child Sexual Abuse providing evidence at public hearings into Redress and Out-of-Home Care, participating in roundtable discussions on Redress and writing submissions to number of the Commission’s consultation and issues papers. The Royal Commission has provided authoritative guidelines for institutions such as Berry Street to implement in relation to child safe practices and for interim redress arrangements.

Berry Street acknowledges that abuse has occurred to children and young people while in the care of Berry Street. Berry Street is one of only two OOHC agencies in Victoria (the other is Anglicare Victoria) who have implemented internal redress arrangements that follow the recommendations of the Royal Commission. Berry Street regards the policy Past Abuse Complaints (attached) as an interim measure waiting on the implementation of an inclusive national redress scheme. Please note the Berry Street approach is inclusive of all forms of abuse; physical, sexual, cultural and emotional abuse.

Berry Street’s position in relation to the eligibility, scope and structure of a redress scheme has been made very clear in our representations and our written submissions to the Royal Commission. Berry Street provided a submission to the Royal Commission’s Issues Paper 6 (June 2014) and a submission to the Royal Commission’s Consultation paper – Redress and Civil Litigation (March 2015). Both these documents are attached for reference.

This submission will reiterate our preferred position within the context of the current legislation before the Senate; the Commonwealth Redress Scheme.

**Features of the proposed legislation**

Under this legislation there are four elements to redress:

1. Eligibility is restricted to only those who suffered sexual abuse. Other forms of institutional abuse, such as physical or emotional abuse, are excluded.
2. A tax free payment capped at $150,000 that does not affect welfare payments
3. Access to psychological and counselling services
4. If requested by the survivor, a direct personal response from the relevant institution

The scheme includes all Commonwealth institutions and provides for all States, Territories, churches or charities to opt in. Entities which opt in must fund the cost of redress claims made against them.

The proposed scheme has the following concepts:

- Uses the test of “reasonable likelihood” to assess applications. In other words the assessor must be satisfied that there is a reasonable likelihood that the person applying did suffer sexual abuse at a participating institution;
Applicant can bring only one claim. Applicant cannot bring any further claim against the participating institution and the applicant must undertake not to bring any civil claim against the institution;

A redress offer will be open for acceptance for a three month period;

Survivors can apply for redress even if they have previously received a redress payment or a lump sum payment for the same abuse. Prior payment will be taken into account. Survivors cannot apply if have previously been awarded damages from a court;

There is no judicial and external review in relation to the decision made about redress;

Survivors of sexual abuse who have been committed of sex offences, or who have received a custodial sentence of five years or more, are excluded from making an application.

Response to Proposed Legislation

Berry Street’s submission is in two parts:

1. Comments relating to the **eligibility** of applicants who can access the proposed scheme
2. Comments relating to the **specific components and features** of the proposed scheme

Berry Street’s position in relation to redress is summarised below. Further detail is provided in the Berry Street submissions to the Royal Commission in relation to the Commission’s **Redress and Civil Litigation Issues Paper** and the **Consultation Paper**.

**Eligibility:** Open to all who suffered abuse (physical, sexual, cultural or emotional) while in institutional care; a scheme inclusive of all abuse.

**Scope:** Includes a monetary payment, a personal apology and access to services, including counselling and health.

**Structure:** Preferably a national scheme administered by an independent authority covering all States and Territories, all churches and all non-government agencies, with institutions liable for redress costs associated with claims implicating their agency.

1. **Eligibility of applicants**

Eligibility, or who is ‘in” and who is “out" sits at the core of the proposed national redress scheme. If a national redress scheme is part of a healing process for those who have suffered abuse at the hands of institutions then the scheme’s current eligibility definition is completely inadequate. Berry Street’s view is that current eligibility status, ‘sexual abuse” excludes and discriminates against a large cohort of institutional care survivors.

Berry Street along with a number of other not for profit agencies, peak bodies and advocacy groups has consistently advocated for a national redress scheme that is open to all survivors of out of home “care” abuse; **a redress scheme that is inclusive of all forms of institutional care abuse**.

This call for a national redress scheme for those who suffered abuse (in all its forms) in institutional care is not new. Public inquiries into institutional abuse include the **Commission of Inquiry into the Abuse of Children in Queensland Institutions** (Forde Inquiry), 1999, **Inquiry into Children in Institutional Care** (Senate Report), 2004 and Victoria’s **Betrayal of Trust**, 2013. These investigations recommended the implementation of a redress scheme. In some States a scheme has been
implemented. Many of these schemes have been criticised for problems relating to limited duration, limited awareness amongst potential applicants that the scheme existed, changes of rules mid scheme, onerous application and assessment requirements and low levels of redress payments.

It is now 14 years since the Senate report recommended a national redress scheme for survivors of abuse, neglect, deprivation and maltreatment in institutional care. People who gave evidence at this hearing are ageing. Many Forgotten Australians have died over the past 14 years waiting for redress to be delivered, many have died since the Royal Commission released their final report on redress in 2015. Their voices have not been heard. Many that remain say: You are only waiting for us to die. As a community we cannot now say we do not know about the childhood experiences of the survivors of institutional care.

The nature of institutional care has been well known for decades. For example:

Gil (1982) describes the environment as follows:

*Institutional maltreatment refers to acts and policies of omission and commission that inhibit or insufficiently promote the development of children or that deprive or fail to provide them with the material, emotional and symbolic stimulation needed for their normal development.*

Gil continues:

*The institutional setting itself is in most cases pathogenic and should be classified as a type of child maltreatment, particularly in the form of structural neglect.*

By structural neglect Gil is suggesting:

- A minimum of physical resources
- Unfavourable staffing patterns
- Socially and emotionally inadequate care-giver child interactions

Rutter (1990) argues that structural neglect should be located at the extreme end of the cumulative risk continuum and as such may be considered a special case of child maltreatment.

Another commentator (Maclean 2003) suggests that there is no area in which, as a group, institutionally reared children remain unscathed.

The lifelong impact of institutional care abuse has also been well documented. There is academic literature, 100s of personal accounts (written and oral) and countless inquiries, over a 50 year period (see Swain 2014). All are relentlessly in consensus about the damage institutional care inflicted(s) on children.

14 years ago the Senate Report (2004) had this to say:

*The outcomes for those who have left care have, in the main, often been significantly negative and destructive.....It is imperative to recognise and acknowledge the magnitude of contemporary social problems which are the long term effects stemming from the past experiences of fear, intimidation, humiliation and abuse endured by the care leaver as a child (p.145).*

The Senate Report describes, with quotes from submissions and evidence, stories of lost lives, stoic endurance and the endless quest for love, relationships and belonging that had been denied as a child. It describes the trials and tribulations of adulthood where the effects of family separation and institutional neglect, poor education and brutality leave, often, what is an intractable scar.
The Royal Commission devoted much of its time to collecting evidence about and listening to, accounts of the experience of institutional care: 11 of the 57 public hearings were directly concerned with particular agencies and care facilities; 36% of survivors who presented at a private session told of abuse (in all forms) at historic residential care facilities; a number of research reports were commissioned to describe and understand the circumstances that had enabled these facilities to practise such widespread abuse; Volume 11 of the Final Report, *Historic residential institutions* describes (again) the nature and impact of institutional abuse.

*Childhoods were marked by trauma, brutality and violence. Many survivors described being physically and emotionally abused, and as a result carried lifelong physical and mental scars (p.11)*

How many more inquiries, reports and studies are needed into the lifelong impact of institutional care before there is a national approach, along with State and Territory support, to address this social disaster?

Berry Street has previously argued (see Berry Street response to *Redress & Civil Litigation March 2015*) that the predominance of OOHC among the many institutional settings examined by the Royal Commission is very significant. Berry Street’s strong view is that this predominance of evidence should frame how the Commission recommends that redress arrangements be structured.

Berry Street now argues that this evidence and the overwhelming evidence from previous inquiries and reports should frame how the national redress legislation is framed. The recommendations of all these inquiries needs to inform the establishment of just and comprehensive redress scheme.

It is unthinkable and unjust that a national scheme be created, responding to the needs of some survivors, survivors of institutional sexual abuse, while excluding other survivors who endured the same circumstances and other abuses in institutional care but somehow escaped being sexually abused.

Berry Street has previously proposed a model for an inclusive (covering all forms of abuse) and national (universally available regardless of where abuse took place) approach to redress. In this model the national redress scheme would assess claims from people who grew up in institutional and provide redress for all forms of abuse. Briefly this approach sees a national redress scheme being established with the primary purpose of responding to institutional child sexual abuse but with the option to deal with other matters arising in out of home care. Victims of Crime Tribunals provide an example of a model under which various harms suffered can be assessed and responded to through a single authority. For further details see Berry Street submission to *Redress and Civil Litigation Consultation paper (2015)* p.3 & 4

2. **Specific components and features of the proposed legislation**

**Concerns about the voluntary opt in component.**

The voluntary 'opt in” component of the scheme will result in a patchwork of State and Territories and institutions participating. No State has yet committed to opting in and one State, South Australia has made it clear that it will not participate. This patchwork approach to redress will only perpetuate the existing opaque and challenging processes that face survivors when they seek justice for past wrongs.
Berry Street recommends that a comprehensive and inclusive national redress scheme be established and that institutions be compelled to participate.

Concerns about the limited time period (three months) for acceptance

The proposed legislation allows three months for an applicant to consider an offer. The appropriateness of this time period must be considered in the light of other components of the legislation; namely that an applicant is allowed to make only one claim (all or nothing) and that there is no independent review capacity.

 Berry Street recommends that the legislation be amended to provide a 12 months acceptance period which is the time period recommended by the Royal Commission.

Concerns about the management and administration of the scheme

The operator of the scheme is named as the Secretary of the Department of Human Services. Ideally a scheme awarding payments for the deeds of omission and commission committed by governments and powerful institutions should be seen to be clearly operating outside the binds and allegiances of government. Any redress scheme needs to be structurally independent from the public service to be truly independent, transparent and able to manage the sensitive nature of redress claims without real or imagined institutional bias.

 Berry Street recommends that an independent authority that is accountable to Federal Parliament be established for administering any Commonwealth or national redress scheme.

Concerns about the exclusion of those with sexual and criminal offences

The scheme excludes those survivors who have been committed of a sex offence or who have been sentenced to more than five years jail. This will impact a significant number of survivors. Criminal offences are not to be condoned. However, it must be recognised that criminal behaviours can stem from the psychological injury suffered from abuse experienced in institutional care. Many survivors of institutional care were ill equipped for life as an adult. Criminal activities including property offences were for some a survival strategy. It is particularly judgemental for those who were negligently complicit in allowing institutional abuse to continue to now exclude persons damaged by this negligence when children.

Excluding people from the scheme who have already been punished via the criminal justice system is imposing a further punishment.

 Berry Street recommends that the scheme be non-discriminatory and open to all survivors.

Concerns about the current lack of detail relating to the redress assessment process

Berry Street understands that much of the detail will be provided by regulation and Ministerial order. The detail that is of utmost importance relates to assessment process and decision making. Berry Street notes, with approval, the standard of “reasonableness” as the basis for acceptance of a claim. What is less clear is the construction and the application of the matrix that will determine the amount of redress to be provided.

 Berry Street recommends that the legislation apply the matrix as described in some detail in the Royal Commission into Institutional Responses to Child Sexual Abuse Final Report, Redress and Civil Litigation.
Conclusion

Notwithstanding the commentary above the Commonwealth is to be commended for providing a redress model for debate and discussion. However, as outlined, there are major flaws and injustices in the proposed Commonwealth scheme.

Again we return to the issue of eligibility.

The survivors of institutional care abuse were placed as children in care arrangements not of their choosing. The level and type of abuse they experienced as children was capricious and hidden from public view. It has lasted a life time.

The status of all survivors of institutional abuse must be recognised as being worthy of justice.

Distinction of worthiness for redress must not be made on the grounds of the nature of the abuse suffered. If this distinction holds, it will be a decision that is regarded by those excluded from the scheme as capricious as the abuse suffered, when they were children.

Berry Street cannot support the Commonwealth redress scheme as proposed.

Attachments

Berry Street, Past Abuse Complaints, 2017

Berry Street, Submission in response to Issues paper 6: Redress Schemes, June 2014

Berry Street, Submission in response to Consultation paper – Redress & Civil Litigation, March 2015

References

Gil E. Institutional Abuse of Children in Out of Home Care, Child and Youth Care Review, 1982


Rutter M. quoted in Monographs of the Society for Research in Child Development, December 2011

Royal Commission into Institutional Responses to Child Sexual Abuse. Final Report, Redress and Civil Litigation, 2014

Royal Commission into Institutional Responses to Child Sexual Abuse. Final report, Historical residential institutions, 2017

Swain S. History of inquiries reviewing institutions providing care for children, report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2014