

**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES
TO CHILD SEXUAL ABUSE**

**RESPONSE TO THE ROYAL COMMISSION CONSULTATION PAPER:
REDRESS AND CIVIL LITIGATION**

INTRODUCTION

The Alliance for the Forgotten Australians (AFA), as the national peak body which promotes the interests of the estimated 500,000 people who experienced institutional or other out-of-home care as children and young people, sees this Royal Commission as an important opportunity for Forgotten Australians to finally receive justice.

We believe it may be the last formal opportunity for all of the institutions involved in out of home care over the last century to be held jointly responsible. So it is vital that the Commission's recommendations ensure that the Church agencies, non-government organisations and the governments for which they have acted as proxies in 'caring' for children are held accountable.

The Forgotten Australians are a significant proportion of the groups most directly affected by the Royal Commission's inquiry into institutional responses to child sexual abuse; our members hold the lived experience of institutional 'care' and the abuses that occurred.

AFA has worked for nearly a decade advocating for the development of policy and services which are person centred and strengths-based and which create opportunities and pathways that improve the lives of Forgotten Australians. We have participated in multiple inquiries into the issues that affect our members and provided carefully considered submissions to 14 state and federal government consultations, drawing on the lived experience of our members; through this activity we have built up a deep and well informed perspective on the complex issues that this Royal Commission is addressing.

AFA was instrumental in advocating for the Royal Commission, attended the launch and responded to many of the papers issued to date for consultation – the expectations of our members, the Forgotten Australians for a positive outcome from the work of the Commission are enormous.

AFA is pleased that the Commission's processes have placed redress and compensation at the centre of attention. This meets one of the fundamental needs of Forgotten Australians – to be seen and understood. Previous inquiries have ultimately focussed on recommendations for the future, and paid inadequate attention to correcting the impact of historical abuse; time and time again the needs of the Forgotten Australians have been ignored, disbelieved or left out. It is no accident that our members have adopted the title 'Forgotten'. Our members are ageing and time is running out to provide any justice for them. We are acutely aware of the risk of re-traumatisation if the Commission's recommendations do not meet their needs.

AFA applauds the attention this consultation paper pays to the significant issues facing the Forgotten Australians; we support the majority of the recommendations about redress and civil

litigation. However, where AFA sees gaps where government needs to be reminded of other issues, the following submission spells out our response.

PRINCIPLES UNDERLYING AFA'S SUBMISSION

AFA's response to the questions posed in this consultation paper are based on the following principles:

- Forgotten Australians must not be overlooked any longer – they must be seen and understood, with their history recognized and the circumstances of their childhoods and its impact understood
- Action must be swift and decisive to demonstrate this recognition and support Forgotten Australians to live the best life possible in their remaining years
- Survivors of all forms of abuse must be supported, not only those who experienced sexual abuse
- Redress for Forgotten Australians must actively involve the institutions in whose 'care' the abuses occurred, including government, church and non-government organisations, and this involvement must occur to a degree that provides a financial incentive to prevent future abuse
- Existing specialist support services for Forgotten Australians must be resourced on a long term basis to maintain the trust they have earned from people who have been repeatedly let down
- State and territory governments must be held publicly accountable for the failures in their role in institutional care

AFA'S RECOMMENDATIONS

1. That the Commission recommend the formation of a single national redress scheme, led by the Australian Government with participation by state and territory governments.
2. AFA urges the Royal Commission to include social services in its recommended redress scheme, including practical forms of compensation that will make a real difference to the life chances of survivors of institutional abuse and neglect including:
 - Dedicated support services – provided by trusted skilled professionals with specialist knowledge about the specific challenges experienced by survivors of institutional abuse and neglect, providing informed and individual support that is particular to the needs of Forgotten Australians, targeted to the most vulnerable in this group; these services play an important role in ensuring that other services such as housing, aged care and medical services are able to respond appropriately to the needs and vulnerabilities of Forgotten Australians
 - Priority access identification for medical, dental and health services including mental health services – recognising the extreme disadvantage suffered by survivors who had poor medical and dental treatment as children and who now have high needs for which they cannot afford to pay
 - Counselling and emotional support services linked to drop-in facilities and support
 - All services accessible across state boundaries to overcome State Government focus on supporting people for whom they had direct responsibility - Forgotten Australians often choose to live in a different state to that in which they experienced abuse, so services must be accessible across state boundaries

- Help with literacy and numeracy as required
 - Priority access to housing
 - Help with TAFE and university fees; classification as special needs for alternative entry to high school, TAFE and higher education courses
 - Access to legal support
 - Access to records – survivors have the right to find out who they are and where they came from; Births Deaths and Marriages, electoral rolls and institutional records are vital sources in the search for the identity that was stripped away by institutionalisation; we draw the attention of the Commission to the Senate Community Affairs References Committee 2004 report *Forgotten Australians* and its comprehensive recommendations to government and non-government agencies on preserving all records of children in ‘care’ and facilitating access
 - ‘special needs categories’ for Forgotten Australians to ensure access to the full suite of social services they urgently require, in order to ensure a better response from those services – governments should fund this as redress for past maltreatment in institutional and other forms of ‘care’.
3. It is vital that the Royal Commission recommend immediate investment in implementation of the recommendations for a robust redress scheme including funding for the full suite of social support services in addition to apologies, counselling and financial compensation.
 4. That the amount of compensation payable to survivors of abuse in institutional ‘care’ be increased if a stronger financial incentive is required to reduce the frequency of incidents of abuse of children in ‘care’.
 5. In addition to the principles of an effective direct personal response outlined in the Paper, AFA recommends a protocol of respect for the survivor and active support for the attendance of a trusted support person.
 6. That the Redress Scheme be given a formal role in actively monitoring feedback from survivors on the direct personal responses provided to them by the institutions in which they suffered; also to hold the institutions accountable for demonstrating real improvements to their approach to direct personal contact in response to this feedback.
 7. That the Royal Commission ensure that any recommendations it makes about future development of the service system for survivors of abuse in institutional settings support the retention and expansion of the existing system of specialist services for the Forgotten Australians.
 8. AFA believes that survivor testimony combined with the historical record is sufficient to establish the severity of the abuse. Further the impact of the abuse should be determined by a free, non-intrusive professional assessment by an expert chosen by and trusted by the survivor.
 9. AFA strongly recommends that the Royal Commission ensure that its recommendations on the amount of monetary payments to survivors will have sufficient financial impact on the institutions to act as a powerful incentive to improve their practices to minimise the risk of future abuse of children in their care.

10. AFA proposes a guaranteed minimum payment of \$10,000 to all survivors who can establish that they were resident in an institution and report that they experienced suffering as a result.
11. That a two-tier payment scheme be established with a minimum payment at \$10,000 which is indexed to CPI.
12. That survivors be granted the respect to make decisions in their own best interests about management of a lump sum redress payments, with support from expert advisors specifically trained to work sensitively with survivors of childhood trauma. A choice of receiving a payment in instalments should be offered but must not be mandatory.
13. That the purpose of monetary payments in a redress scheme include:
 - Resources to overcome survivors' missed opportunities
 - Financial incentive to the institutions to prevent future abuse of children in their care
14. That the minimum, average and maximum monetary payments available through redress be determined in light of the adequacy of investments in specialist social and psychological support services.
15. That survivor organisations be adequately funded on an ongoing basis to ensure they can maintain networks of communication to support access to a redress scheme by isolated people.
16. That the Redress Scheme takes a broad definition of 'institutions' to enable the Scheme to include abuse in:
 - foster care should be covered where this care is overseen by institutions
 - detention centres,
 - people who were not State wards
17. That a broad eligibility definition be used, that includes all types of abuse experienced, including neglect, psychological, physical and emotional abuse as well as sexual abuse.
18. That the Commission ensures that all aspects of its recommendations on a Redress and Civil Litigation system for complaints of sexual abuse are tested against their applicability to complaints of other forms of abuse and neglect.
19. That 'plausibility' be the accepted standard of proof in assessing redress claims.
20. Survivors of childhood abuse in institutional care should not be required to sign deeds of release in order to access redress.
21. AFA believes that a public hearing should be held at which governments are called to give evidence about their role in responding to sexual abuse of children in their care.
22. AFA recommends that the Royal Commission propose a formal role for survivor groups in an ongoing dialogue with the institutions about how an interim redress scheme operates. Further that specialist social and psychological services for survivors be resourced for the additional responsibilities that will fall to them in facilitating and supporting access to an interim redress scheme operated by the institutions.

23. That limitations periods be abolished for criminal child abuse and that this should apply retrospectively
24. That institutions should be liable for any abuse to children in their 'care' regardless of any steps they had taken to prevent it.
25. That the Commission adopt the recommendations of the Victorian Parliament's 2013 *Betrayal of Trust* report to:
 - Require non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements (recommendation 26.1)
 - Require religious and other non-government organisations that engage with children to adopt incorporated legal structures (recommendation 26.2)

STRUCTURAL ISSUES (Section 2 in the Consultation Paper)

Possible Structures for Redress

AFA is pleased to note the acknowledgement by the Royal Commission of our concerns about the unfairness arising from the inconsistencies between the various redress schemes across Australia.

We welcome the acknowledgement that a single national redress scheme, led by the Australian Government with participation by state and territory governments is ideal for survivors. We understand the challenges in achieving agreement between all governments in Australia; but we note that this level of agreement has been achieved in a number of policy areas¹, and that the Council of Australian Governments provides an effective forum to build this consensus.

Recommendation 1: That the Commission recommend the formation of a single national redress scheme, led by the Australian Government with participation by state and territory governments.

Elements of redress

The consultation paper suggests that redress should consist of three elements:

- A meaningful apology from the institution, if the survivor wishes
- Lifetime access to therapeutic counselling and psychological care
- Monetary payment that recognizes the wrong a survivor has suffered

These elements recognize the importance of a range of redress responses. However they fail to consider other supports that need to be provided alongside therapeutic counselling and psychological care, such as priority access to medical and dental assistance.

The Executive Summary asserts that elements of appropriate redress 'appear' to be a direct personal response, therapeutic counselling and monetary payments. However the detailed discussion of this issue in section 2.4 of the Consultation Paper notes international support (through

¹ For example, the Early Childhood Quality Reform Agenda and the resultant National Quality System required a difficult process of compromise to bring together widely varying state regulations and diverse funding sources across three levels of government and widely varying service systems across jurisdictions.

the UN) for the inclusion of legal and social services as part of a robust set of principles and guidelines for remedies for people affected by violations of their human rights. It notes the UN van Boven principles for remedy for victims of gross violation of human rights include:

‘Rehabilitation: should include medical and psychological care as well as legal **and social services**’. (emphasis added)

AFA is disappointed that the Commission has rejected calls for legal and social services to be elements of what it sees as an appropriate redress system. The Consultation Paper clearly states that it does not intend that resources be diverted from social services to services that are included in its proposed redress scheme – however AFA is deeply concerned that this may be the unintended consequence of omitting social services from the essential components of a redress scheme.

AFA believes that in order to avoid this, the Commission must ensure that its recommendations actively support continued funding for specialist social support services for survivors, and further, that increased resources be dedicated to expand the capacity of these services.

The Forgotten Australians who inform the view of AFA report the lifelong consequences of institutional abuse in restricting their fair access to social services that are sensitive to their needs.

We see specialist social services as vital elements of a robust redress scheme.

In particular, many survivors are now ageing and experiencing poor health due to their childhood experiences in ‘care’. These difficulties are often compounded by limited income due to a poor employment history arising from inadequate education. Many survivors are semi-institutionalised through homelessness and imprisonment. Psychological support is important, but it cannot address the practical needs of ageing people who face enormous barriers to living a full and satisfying old age.

Many Forgotten Australians fear abuse in aged care facilities. Forgotten Australians require priority of access to services which support people to stay in their own homes so they do not find themselves once again helpless in an institution. When it is no longer safe for them to stay in their own homes, aged care service providers need to recognise this fear and consult with them and their families to ensure they feel empowered and supported wherever they go.

Recommendation 2: AFA urges the Royal Commission to include social services in its recommended redress scheme, including practical forms of compensation that will make a real difference to the life chances of survivors of institutional abuse and neglect.

These services should include:

- Dedicated support services – provided by trusted skilled professionals with specialist knowledge about the specific challenges experienced by survivors of institutional abuse and neglect, providing informed and individual support that is particular to the needs of Forgotten Australians, targeted to the most vulnerable in this group; these services play an important role in ensuring that other services such as housing, aged care and medical services are able to respond appropriately to the needs and vulnerabilities of Forgotten Australians
- Priority access identification for medical, dental and health services including mental health services – recognising the extreme disadvantage suffered by survivors who had poor medical and dental treatment as children and who now have high needs for which they cannot afford to pay

- Counselling and emotional support services linked to drop-in facilities and support
- All services accessible across state boundaries to overcome State Government focus on supporting people for whom they had direct responsibility - Forgotten Australians often choose to live in a different state to that in which they experienced abuse, so services must be accessible across state boundaries
- Help with literacy and numeracy as required
- Priority access to housing
- Help with TAFE and university fees; classification as special needs for alternative entry to high school, TAFE and higher education courses
- Access to legal support
- Access to records – survivors have the right to find out who they are and where they came from; Births Deaths and Marriages, electoral rolls and institutional records are vital sources in the search for the identity that was stripped away by institutionalisation; we draw the attention of the Commission to the Senate Community Affairs References Committee 2004 report *Forgotten Australians* and its comprehensive recommendations to government and non-government agencies on preserving all records of children in ‘care’ and facilitating access
- Recognition of ‘special needs categories’ for Forgotten Australians, to ensure access to the full suite of social services they urgently require, in order to ensure a better response from those services – governments should fund this as redress for past maltreatment in institutional and other forms of ‘care’.

The Senate *Lost Innocents* report noted that there is ‘unequivocal evidence of the[se] needs’² but a decade later governments continue to fail to adequately recognise the needs of Forgotten Australians in the design and advertising of services.

It is important to acknowledge that the current suite of specialist services for the Forgotten Australians is highly valued by survivors, who are starting to feel at home in these venues, sometimes for the first time in their lives. It is crucial that ongoing funding is provided to enable these services to offer continuity to the Forgotten Australians, who have endured stop-start experiences throughout their lives and to expand the service offering to meet growing needs.

After the Royal Commission completes its work the social support services trusted by the Forgotten Australians will be left to support our members to deal with the inevitable disappointment and frustrations. It is vital that specialist services are adequately resourced to provide this intensive support.

AFA notes that the Australian Government has implemented 10 year funding agreements between government and Aboriginal community service agencies³. AFA believes that 10 year funding is a reasonable expectation for services to vulnerable people such as the Forgotten Australians.

Recommendation 3: It is vital that the Royal Commission recommend immediate investment in implementation of the recommendations for a robust redress scheme including funding for the full suite of social support services in addition to apologies, counselling and financial compensation.

² Senate Community Affairs References Committee 2009, *Lost Innocents and Forgotten Australians Revisited* p.220

³ See https://www.dss.gov.au/sites/default/files/documents/09_2012/stronger-futures-booklet-jul2012.pdf

Redress processes and outcomes for future institutional child sexual abuse

AFA believes that if the Royal Commission is successful, the frequency of abuse in institutional 'care' should reduce; however it is unlikely to be completely eliminated.

Where an accusation of abuse is made, there must be immediate criminal charges laid to ensure the full impact of the law to investigate and if proven, for the perpetrator to be removed and punished. In addition to this, AFA believes that the best mechanism to maximise the protective impact on out of home care institutions is to set the amount of compensation they must pay survivors at a level which creates a financial incentive to work vigorously to eliminate abuse on their watch.

Recommendation 4: That the amount of compensation payable to survivors of abuse in institutional 'care' be increased if a stronger financial incentive is required to reduce the frequency of incidents of abuse of children in 'care'.

DIRECT PERSONAL RESPONSE - Section 4

AFA is aware of many instances of very poor personal responses to survivors of abuse – with institutions cutting short meetings, verbally attacking the support people brought to the meeting by the survivor, and even falling asleep during the meeting.

AFA supports the proposed principles of an effective direct personal response outlined in the Consultation Paper:

- Re-engagement between a survivor and institution should only occur if, and to the extent that a survivor desires it.
- Institutions should make clear what they are willing to offer and provide by way of direct personal response. They should ensure that they are able to provide what they offer. At a minimum, all institutions should offer and provide on request by a survivor:
 - an apology
 - an opportunity to meet with a senior representative of the institution
 - an assurance as to steps taken to protect against further abuse.
- In offering direct personal response, institutions should try to be responsive to survivors' needs; there is no 'one size fits all' approach to an appropriate personal response
- Direct personal response should be delivered by people who have received some training about the nature and impact of child sexual abuse and the needs of survivors. Institutional staff may also require cultural awareness or sensitivity training to support particular survivor groups.
- Institutions should welcome feedback from survivors about the direct personal response they offer and provide.

Recommendation 5: In addition to the principles of an effective direct personal response outlined in the Paper, AFA recommends a protocol of respect for the survivor and active support for the attendance of a trusted support person.

The Consultation Paper proposes a limited interaction between a redress scheme and a direct personal response:

- If a survivor seeks a written response from the institution then the Redress Scheme could convey that request to the institution
- If the survivor seeks a face to face response then the Redress Scheme could offer to provide contact details for the survivor or their representative, or give the survivor contact details for the relevant person in the institution
- Other than that, the Paper proposes no further role for the Redress Scheme in seeking a direct personal response

AFA believes that the institutions responsible for the 'care' of the Forgotten Australians will need external support to improve their poor record of listening actively to feedback from survivors about their direct personal responses. The Redress Scheme could have a formal role in providing this support to ensure real change comes from reflection on feedback from survivors.

Recommendation 6: That the Redress Scheme be given a formal role in actively monitoring feedback from survivors on the direct personal responses provided to them by the institutions in which they suffered; also to hold the institutions accountable for demonstrating real improvements to their approach to direct personal contact in response to this feedback.

COUNSELLING AND PSYCHOLOGICAL CARE - Section 5

Principles for counselling and psychological care

AFA supports the proposed principles for the provision of counselling and psychological care:

- Counselling should be available throughout a survivor's life
- Counselling should be available on an episodic basis. Counselling is not necessarily needed continuously throughout a survivor's life
- Survivors should be allowed flexibility and choice. Different groups of survivors have differing needs in terms of counselling and psychological care. Survivors also have differing needs at an individual level.
- There should be no fixed limits on services provided to a survivor.
- Psychological care should be provided by practitioners with the right capabilities to work with complex trauma clients.
- There should be suitable ongoing assessment and review.
- Counselling and psychological care should be available through redress for family members if it is necessary for the survivor's own treatment and there are no other sources of funding available.

Existing services and service gaps

AFA supports the proposed principles for supporting counselling and psychological care through redress:

- Supplement existing services – through filling service gaps
- Provide funding not services
- Fund as needed by survivors – by funding service providers, not including it in a lump sum payment to a survivor, to ensure the funding is available when the care is needed
- Institutions to fund where possible

Below we provide further comment on the best way to supplement existing services. Here we reiterate our view that the institutions that are responsible for the abuse of children in their care must carry a financial consequence in order to experience an incentive to prevent future abuse of

children; requiring the institutions to fund the filling of gaps in services to survivors is one important component.

Relative effectiveness and efficiency of the options for service provision and funding in meeting survivors' needs

AFA supports the proposal for the establishment of a trust fund as part of a redress scheme; in particular AFA agrees with the proposal that a trust fund could supplement existing services by funding to increase the availability of existing state-funded specialist services, especially where these services are well regarded and well located for a number of survivors who need counselling and psychological care.

AFA is pleased to report that the existing specialist social and counselling support services for the Forgotten Australians are working well, with steady increases in the number of survivors who are accessing these services and engaging over time to benefit from participating in a range of support systems customised to meet their needs. In particular Open Place in Victoria and Lotus Place in Queensland, and increasingly the newer services in other states and territories are establishing a proven track record of how to train counsellors and deliver support in a way which is the preferred model for survivors.

These services are supported in their capacity to provide effective psychological support by the suite of social supports that they offer – a safe and supportive social environment for survivors to build a sense of community and ultimately sufficient trust to open up their inner trauma to a skilled counsellor with specific expertise in responding to the experiences of the Forgotten Australians. Many of the practitioners have lived experience combined with professional training.

This system of services needs to be retained and adequately resourced to continue to fulfil this vital functions.

Recommendation 7: That the Royal Commission ensure that any recommendations it makes about future development of the service system for survivors of abuse in institutional settings support the retention and expansion of the existing system of specialist services for the Forgotten Australians.

MONETARY PAYMENTS - Section 6

Assessment of monetary payments

The Consultation Paper asks how a reasonable redress amount can be arrived at for individual survivors. It proposes a possible approach in which the amount of a redress payment is assessed using the combination of severity of abuse (what happened), the impact of the abuse (what the abuse has meant) and distinctive institutional factors such as the impact of a 'closed' institution in which children sleep, play and work in the same facility and so may feel more trapped and unable to seek help.

Recommendation 8: AFA believes that survivor testimony combined with the historical record is sufficient to establish the severity of the abuse. Further the impact of the abuse should be determined by a free, non-intrusive professional assessment by an expert chosen by and trusted by the survivor.

Amounts of monetary payments

AFA believes that it is not possible to pay enough to compensate someone for the lifelong suffering inflicted by childhood abuse in an institution. Any payment will be a token for the survivor. However, it can and must be set at a level which has a real impact on the institution which is paying the compensation.

Recommendation 9: AFA strongly recommends that the Royal Commission ensure that its recommendations on the amount of monetary payments to survivors will have sufficient financial impact on the institutions to act as a powerful incentive to improve their practices to minimise the risk of future abuse of children in their care.

The Consultation Paper presents a range of redress payments, with a minimum of \$10,000 and an average of \$65,000 and proposes that:

- Monetary payments should not be affected by any deductions e.g. Medicare repayments would be paid by the redress scheme in addition to the redress paid to the survivor
- Those who have already received a payment(s) should still be eligible to apply; previous payments should be taken into account
- A redress scheme should not prevent a survivor pursuing civil litigation

AFA sees these proposals as improvements to the existing processes of redress, preferable to going to a lawyer and waiting a very long time for an uncertain outcome. AFA understands and accepts that a range of payment options means that not everybody eligible for redress would receive the average payment; payments will be different.

AFA accepts the assumption in the Paper that priority should be given to survivors who are most seriously affected; however, as stated in our previous submissions to the Royal Commission, AFA believes that all children who experienced institutionalisation are traumatised by the experience and they all require some financial compensation for the wrong done to them when they were unable to defend themselves.

The Commission asks for comments on average and maximum payments that should be available through redress; AFA wishes to also comment on the minimum amount so as to ensure that all survivors of institutional abuse are able to claim a financial payment which represents the moral obligation to right past wrongs in a fair and just manner.

Forgotten Australians have lived with uncertainty and disappointment all their lives – a compassionate and fair redress scheme must offer some certainty to all survivors of institutional ‘care’.

Recommendation 10: AFA proposes a guaranteed minimum payment of \$10,000 to all survivors who can establish that they were resident in an institution and report that they experienced suffering as a result.

AFA believes that two-tier schemes like those introduced by Queensland and Western Australia are a good way of ensuring all survivors can relatively easily claim a base amount without having to go

through the additional trauma of producing a more detailed and documented account of their suffering. Those who are able and ready to do so can claim the higher level of reparation, with appropriate support and guidance. The decision about whether to proceed to claim the higher level of reparation must be made in the knowledge that support in the preparation of the claim is available and that unreasonable levels of detail will not be required.

Recommendation 11: That a two-tier payment scheme be established with a minimum payment at \$10,000 which is indexed to CPI.

Payment by Instalments

The Consultation Paper asks whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme. AFA believes that a small number of people may choose this option; however it must not be mandated.

It is important to avoid paternalistic judgements of the capacity of people who have survived abusive childhoods to make decisions in their own best interests. Removing control over a lump sum can constitute financial abuse. A lump sum payment may be the first time a survivor has had the resources to be the best person they can be. Even the most damaged person can show wisdom, insight, generosity and pragmatism.

Recommendation 12: That survivors be granted the respect to make decisions in their own best interests about management of a lump sum redress payments, with support from expert advisors specifically trained to work sensitively with survivors of childhood trauma. A choice of receiving a payment in instalments should be offered but must not be mandatory.

The purpose of monetary payments

AFA believes that a key rationale for a monetary payment is the very practical reality that Forgotten Australians have missed opportunities in life as a result of the abuse they experienced in 'care' and so some financial payment is appropriate to enable them to build a fulfilling life (similar to the rationale for monetary payments in Redress WA).

However, AFA believes that the Report misses another important purpose for monetary payments as part of a redress scheme – we believe that monetary payments must also serve the purpose of providing sufficient financial burden on the institution to act as an incentive to work vigorously to improve their future performance to minimise the risk of further abuse of children in their care.

Recommendation 13: That the purpose of monetary payments in a redress scheme include provision of resources to overcome survivors' missed opportunities and a financial incentive to the institutions to prevent future abuse of children in their care.

The average and maximum monetary payments that should be available through redress

Again, AFA observes that the amount of a monetary payment will never be sufficient to compensate.

The experience of our members strongly suggests that the impact of a monetary payment hinges on what else is provided to support the survivor. A financial payout cannot enable an individual survivor to access specialist support services if those services do not exist; survivors are best able to use a monetary payment to rebuild their lives when they can also access a high quality social and psychological support service specialising in working with survivors of institutional abuse.

Recommendation 14: That the minimum, average and maximum monetary payments available through redress be determined in light of the adequacy of investments in specialist social and psychological support services.

The treatment of past monetary payments under a new redress scheme

AFA does not believe that survivors should be required to repay another redress scheme if they receive a higher payout from the proposed new redress scheme. However we believe it is reasonable for past payments to be taken into account and deducted from any payment awarded by the new scheme.

AFA supports the proposal that past monetary payments will be deducted from a payment awarded under the new redress scheme.

REDRESS SCHEME PROCESSES - Section 7

AFA agrees with the proposals for how a redress scheme should be administered:

- The scheme should not have a fixed closing date
- Specific communication strategies are needed for people who are more difficult to reach
- Application and assessment should be kept as simple as possible with funded support services for applicants; survivors should not be required to provide evidence in person; a test of reasonable likelihood is more reasonable than a standard of proof used in civil litigation
- There should be no confidentiality obligations imposed on survivors
- Higher levels of payment may have additional requirements
- The costs of the scheme should come from both government and institutions; the scheme should be independent from both government and institutions

AFA agrees that the scheme should be open-ended, as eligible survivors are all at different stages in the acknowledgement process and should not be rushed into public declarations before they are ready. Forgotten Australians working in government departments fear discrimination if they disclose and will often elect to wait until retirement before claiming redress. There are also issues of awareness for people who cannot read because an education was denied them, so they may take

Publicising the Availability of the Scheme

AFA agrees that specific strategies are needed to reach people who cannot read, those who have relocated interstate or overseas to escape the environment of their traumatic childhood and others who are more difficult to reach. Networks such as AFA are useful ways to spread the word via survivor networks.

Recommendation 15: That survivor organisations be adequately funded on an ongoing basis to ensure they can maintain networks of communication to support access to a redress scheme by isolated people.

Eligibility - Types of institutions:

AFA agrees with the Commission that abuse in foster care and kinship care should be covered where this care is overseen by institutions. AFA also believes that survivors of abuse in detention centres, people who were not State wards or people who were only in 'care' for short periods should also be eligible. This avoids undesirable divisions and the administrative burden of the need to make judgements about who 'fits' the criteria and who doesn't, and then to defend those judgements through an appeals system.

Recommendation 16: That the Redress Scheme takes a broad definition of 'institutions' to enable the Scheme to include abuse in the full range of settings.

These include:

- foster care should be covered where this care is overseen by institutions
- detention centres,
- people who were not State wards
- people who were only in 'care' for short periods

Eligibility - Types of abuse:

AFA is disappointed that the Royal Commission has concluded that it would not be appropriate to consider making recommendations about redress for physical abuse or neglect that is unrelated to sexual abuse. We recognise the limited terms of reference in this regard but ask that the Commission acknowledge that this definition of eligibility does not include all those Forgotten Australians who have experienced criminal abuse in 'care' other than sexual abuse. If this eligibility definition is used in a national scheme it will exclude many Forgotten Australians.

The Senate Community Affairs References Committee Inquiry in 2004 documented a history of neglect and cruelty experienced by children in 'care' – even those who weren't abused have suffered from their experiences, from the sense of abandonment, confusion, self blame and stigma, often exacerbated by harsh treatment, humiliations, lack of education or adequate health care, and for many, physical, sexual and emotional abuse and assault.

The Senate report *Forgotten Australians* recommended a national reparations fund with 'compensation provided for individuals who have suffered physical, sexual or emotional abuse while residing in these institutions and out-of-home care settings.' (Recommendation 6)⁴

To separate out those who experienced overt sexual abuse from all the other traumas that were experienced by children in 'care' is illogical, impractical and heartless – all children in 'care' are traumatised by the experience. The state failed in its duty of care to all of these children. A redress scheme must respond to the whole person, not restrict its attention to the damage caused by sexual abuse.

⁴ Senate Community Affairs References Committee 2004, *Forgotten Australians, A report on Australians who experienced institutional or out-of-home care as children* p. xx

Recommendation 17: That a broad eligibility definition to be used, that includes all types of abuse experienced, including neglect, psychological, physical and emotional abuse as well as sexual abuse.

If the Royal Commission concludes that it is restricted to making recommendations about redress for physical abuse or neglect only where it is related to sexual abuse, AFA believes that a redress scheme must be capable of being adapted to respond to all aspect of the abuse and neglect experienced by children in 'care'. This is vital so that the Australian Government is not similarly restricted in its policy response and is in fact able to immediately enact a Redress system that responds to all forms of abuse and neglect of children in 'care'.

Recommendation 18: That the Commission ensures that all aspects of its recommendations on a Redress and Civil Litigation system for complaints of sexual abuse are tested against their applicability to complaints of other forms of abuse and neglect.

Standard of proof

The Consultation Paper suggests that the standard of proof for assessing redress claims could be "plausibility". This standard begins with the belief that the allegation may be true; the onus of proof is not on the survivor. Higher standards of proof are also options.

AFA supports the use of "Plausibility" as level of proof, at it avoids the need for the survivor to prove beyond doubt that abuse has occurred. It also eliminates the need for contested hearings, with rebutting or testing of the applicant's allegations. AFA believes that this is vital as the possibility that the applicant may have to face a combative representative of the institution which abused them would act as a significant disincentive to Forgotten Australians pursuing their rights to redress.

Recommendation 19: That 'plausibility' be the accepted standard of proof in assessing redress claims.

Whether or not deeds of release should be required

Recommendation 20: Survivors of childhood abuse in institutional care should not be required to sign deeds of release in order to access redress.

FUNDING REDRESS – Section 8

AFA agrees with the observations in the Consultation Paper about the high level of responsibility held by governments due to their diverse responsibilities - for funding and regulating out of home care, running their own institutions and assuming guardianship of children when the parents care is deemed to be inadequate. AFA believes that the State continues to fail in its role *in loco parentis*.

The Consultation Paper considers this in the context of the level of responsibility for funding a redress scheme. AFA wishes to raise an associated question – given what the Paper refers to as

'substantial responsibility' why have governments not yet been called to give evidence in a public hearing.

Once the State assumes care of a child it is incumbent upon it to do better. A large number of children brought in to care for reasons of poverty and neglect were traumatised by the care they received; there was no state oversight in church/benevolent institutions despite the fact that the children were largely wards of state. The agencies were also receiving grants from the state for the upkeep of the institutions.

Recommendation 21: AFA believes that a public hearing should be held at which governments are called to give evidence about their role in responding to sexual abuse of children in their care.

INTERIM ARRANGEMENTS - Section 9

AFA supports the proposed principles for an interim redress scheme operated by the institutions while any national or state and territory arrangements are being implemented, or if such arrangements are not implemented:

- Decision making should be sufficiently independent of institutions to reduce the risk of bias
- Survivors should be able to make a claim for redress and receive any support needed to pursue their claim without having to engage with the institution or its representatives
- Institutions which receive a small number of claims can join with a larger institution which is more able to set up an independent process
- Institutions should provide information on the application process, including online so that survivors do not need to approach the institution to make a claim
- administration of receiving and determining a claim should be independent
- Appropriate training for anyone engaged to handle claims in child sexual abuse, its impacts and relevant cultural awareness issues
- respectful and empathetic processes that are not legalistic
- institutions should cooperate with each other to facilitate survivors alleging abuse in more than one institution
- Processes must minimise the risk of re-traumatising the survivor
- Institutions to accept the treating practitioner's assessment of the need for counselling and fund this where public services are not available

Other issues on which direction or guidance might be required for interim arrangements

AFA is concerned that the institutions in which children have been abused may struggle to apply these principles to a redress scheme; their inherent conflict of interest will complicate their role in such an interim arrangement. Further, we believe that specialist support services will be called upon to provide a higher level of support for survivors to access an interim scheme operated by the institutions themselves than a national scheme operated by governments.

AFA does not wish to have a role in delivery of the interim redress scheme as this would create a conflict of interest for our role as advocates for survivors. However we wish to offer our advice and unique insights to support an interim redress scheme to manage the complex issues it will inevitably face. We can offer a contribution to the planning and oversight of an interim redress scheme and

provide independent commentary on the impact of its operations. These functions will need to be resourced.

Recommendation 22: AFA recommends that the Royal Commission propose a formal role for survivor groups in an ongoing dialogue with the institutions about how an interim redress scheme operates. Further that specialist social and psychological services for survivors be resourced for the additional responsibilities that will fall to them in facilitating and supporting access to an interim redress scheme operated by the institutions.

CIVIL LITIGATION - Section 10

Options for reforming limitation periods and whether any changes should apply retrospectively

AFA agrees with the observation in the Consultation Paper that standard limitations periods (usually 3 years after the complainant turns 18 years of age) are clearly inadequate for survivors of child abuse and act as a significant barrier to commencement of civil litigation. Survivors may not be able to disclose abuse for many years and when they do, civil litigation will not be their first priority.

Notwithstanding the Commission's observations about risks to defendants in removing limitations periods, AFA is of the view that the Victorian Parliament's *Betrayal of Trust* report is correct in its conclusion that limitations periods should be abolished for criminal child abuse and that this should apply retrospectively. We welcome the recent action by the Victorian Government to implement this change.

Recommendation 23: That limitations periods be abolished for criminal child abuse and that this should apply retrospectively

Options for reforming the duty of institutions and whether any changes should apply retrospectively

The Consultation Paper notes the recommendations of the Victorian Parliament's *Betrayal of Trust* report to amend legislation to ensure organisations are held accountable and have a legal duty to *take reasonable care* to prevent criminal child abuse. It suggests that this is not a significant advance asks if changes to the law should go further and make institutions liable for abuse by their employees/agents unless they can prove they took *reasonable precautions* to prevent it; or further, if they should be liable for any abuse *regardless of any steps* they had taken to prevent it. [Emphasis added]

Recommendation 24: That institutions should be liable for any abuse to children in their 'care' regardless of any steps they had taken to prevent it.

This does not prevent the perpetrator of the abuse from being held accountable for their criminal actions.

How to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts

Recommendation 25: That the Commission adopt the recommendations of the Victorian Parliament's 2013 *Betrayal of Trust* report requiring incorporation of religious and other non-government organisations.

Specifically to:

- Require non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements (recommendation 26.1)
- Require religious and other non-government organisations that engage with children to adopt incorporated legal structures (recommendation 26.2)

CONCLUSION

AFA is pleased to offer our responses to the Consultation Paper on Redress and Civil Litigation. We see this is an important moment in history where finally, justice can come to those who suffer the lifelong impact of abuse in out-of-home care.

Through our recommendations AFA seeks greater recognition for Forgotten Australians by advocating for national policies and high quality services available in each State and Territory which are tailored to meet their needs and interests.

We urge the Royal Commission to be courageous in their recommendations, to ensure that this vital opportunity is not missed and survivors are not re-traumatised by a failure to build the best system of redress possible.

Yours sincerely,



Caroline Carroll OAM
Chair, Alliance for Forgotten Australians
6 March 2015