4 March 2015

Leigh Sanderson
Royal Commission into Institutional Responses to Child Sexual Abuse
PO Box 5283
SYDNEY NSW 2001

email: redress@childabuseroyalcommission.gov.au

Dear Leigh

## Royal Commission Consultation Paper: Redress and Civil Litigation

The actuarial profession is pleased to respond to the January consultation paper on redress and civil litigation.

You will recall that the Actuaries Institute wrote on 8 August 2014 with input on principles and issues that the Commission may consider. Our working party has continued to meet to discuss progress, and we appreciate your invitation to participate in relevant round tables.

We congratulate the Commission on the thorough and well-reasoned consultation paper. We also commend the decision to engage your own actuarial adviser. We believe that the information in the actuarial report, and its incorporation into the consultation paper, greatly assists the process.

Should you wish to discuss any aspects of this submission or make arrangements for a meeting with Institute representatives please contact the CEO, Mr David Bell on (02) 9239 6100 or by e-mail david.bell@actuaries.asn.au.

Yours sincerely

Lindsay Smartt
Senior Vice-President

**Institute of Actuaries of Australia**
ABN 69 000 423 656
Level 2, 50 Carrington Street, Sydney NSW Australia 2000
**t** +61 (0) 2 9239 6100 **f** +61 (0) 2 9233 3446
**e** actuaries@actuaries.asn.au **w** www.actuaries.asn.au

## The Actuaries Institute's previous submission

In nearly all respects, we regard the content of the consultation paper as being consistent with the issues raised in our 8 August 2014 submission. Clearly the Commission has thought through all the issues very carefully and we are pleased to see that it has reached similar conclusions to our submission.

In the paragraphs below we respond specifically to the questions raised in the consultation paper. We spend most time on civil liability, which we regard as a major risk to the financial sustainability of the redress scheme.

### Chapter 2

Like most stakeholders, actuaries would prefer to see a single, national redress scheme if that can be achieved.

Regarding future abuse, we believe it will be helpful if the Commission is able to recommend redress arrangements for future as well as past cases.

### Chapter 3

We have one observation on the claims data discussed in this chapter. The data is only for claims that proceeded to the point of receiving some monetary payment. It does not give any indication of the number of survivors who considered or commenced the process of making a claim but were deterred from doing so by all the barriers discussed by the Commission. Evidence to the Commission includes cases where the clear legal advice was not to pursue a claim.

We suggest that the Commission extend its actuarial analysis to give indicative estimates of survivors who may pursue a civil litigation claim, the additional cost to institutions and the associated legal costs for plaintiffs and defendants.

### Chapters 4, 5

We have nothing to add on Chapters 4 and 5.

### Chapter 6

We agree with the Commission's analysis of the issues involved with setting the monetary payment scales.

Based on our views of civil litigation (below) we suggest that a higher rather than lower monetary scale would be appropriate so that redress becomes a satisfactory alternative to civil litigation.

We agree that past monetary payments should be offset against redress payments, but there are two detailed issues that need to be considered:

a) Whether there needs to be some adjustment for the time value of money – an inflation or interest earnings allowance

b) Many survivors will have paid legal costs out of their past payments and may believe that it is unfair to in effect deduct these costs from any redress payment.

## Chapter 7

We support the suggested approaches to redress scheme processes. However, the issue of deeds of release is directly related to civil litigation and we return to this issue below.

## Chapter 8

There is one important point that we think has been omitted from the funding discussion (and the actuarial report). The Commission assumes that if a non-government entity runs an institution on behalf of, funded by or authorised by government, the non-government entity will be responsible for the funding.

We think this is unlikely to be the outcome in practice. The degree of responsibility of governments in these situations will mean that financial responsibility for redress will not be fully transferred to the non-government operator.

We suggest that the Commission needs to be clear about this point. Otherwise the indications of funding responsibility are misleading.

The Commission has been careful to emphasise that the funding estimates are indicative and needs to continue to do so. It is obvious, but frequently not recognised by observers, that the cost will depend on the design and execution of the scheme.

In response to the specific questions asked:

- With the exception of the issue of government versus non-government responsibility mentioned above, we regard the proposed arrangements as suitable
- Governments need to be the funder of last resort, and as a matter of practicality the Australian Government may have to pick up more than its fair share of the last resort funding
- Scheme implementation and funding arrangements should not have much flexibility. Despite broad goodwill at present, all elements of flexibility will lead to more disputation and attempts to optimise each survivor's and each institution's own position. There is an exception regarding the timing of financial contributions, which can be somewhat flexible with interest adjustments. We do not think there is a high risk of a large short term spike in funding needs, partly on the grounds that the scheme will only have so much capacity to deal with survivors and partly because of the experience in other schemes.

## Chapter 9

We have no comments on Chapter 9.

## Chapter 10

The main concern of the Actuaries Institute is with the sustainability of parallel redress and civil litigation schemes. The Commission drew attention to this concern on Page 174 of the paper where it quotes from the Actuaries' submission.

Before returning to the sustainability question, we have some views on the particular questions asked:

- Retrospectivity – the logic of considering whether civil liability changes should be retrospective or only prospective is important. We think, though, that making any changes prospective only will not succeed. It will raise the ire of many stakeholders because it actually does nothing to deal with the perceived injustice of civil litigation in the past. Therefore we think that if any changes are made they should be retrospective as well as prospective

- Statute of limitations – we agree that the arguments for removing the limitation period barriers for the survivors are compelling, but the exception for this category of claim needs to be narrowly framed (and could have a sunset period)
- Duty of care – we regard this as extremely problematic and discuss it further below
- Legal personality – we support the proposals to overcome the barrier of legal personality
- Model litigant – we regard this as a moot point for reasons discussed below
- Insurance – retrospective changes to civil liability will be costly to insurance companies that have issued cover in the past. Consideration should be given to how insurers might respond to changes to existing policies. Regarding future insurance availability we regard this as a manageable issue, although premiums can be expected to rise significantly, at least for a few years.

## The Common Law

The Commission gave excellent summaries and discussion of a number of litigated cases. With the exception of limitation periods, it is our understanding that the principles such as duty of care and vicarious liability are in case law not in statute. That being the case it would only take one case in the High Court to change the law.

## The prospect of parallel systems

Based on our experience with compensation and civil liability, there is a very real risk (perhaps likelihood) that there will be a massive increase in the amount of civil litigation with parallel systems. The reasons include:

- The attraction of a 'free option' to increase the monetary amount received – i.e. redress payments could be used to fund civil litigation
- The moral (as well as practical) difficulty of an institution mounting a defence – civil litigation is usually hard fought in the adversarial system
- The enthusiasm of many personal injury lawyers to take on such cases on a no-win no-fee basis, particularly when the prospect of achieving a negotiated settlement is high
- The fact that the Commission has done most of the work of finding and documenting evidence
- The potential impact of litigation funders in commencing class actions against Institutions and governments.

## The better alternative

In our view the best option would be to institute an election process. Survivors can choose one path or the other, but not both (subject to a limited safety net discussed below). Deeds of release would be superseded by the election documentation at the start of the process.

This option would be accompanied by a recommendation that the law regarding duty of care and vicarious liability not be changed. The option becomes more acceptable the larger the monetary amounts available from redress. It also avoids having more 'carve-outs' in civil liability legislation – at present the main carve-out is for asbestos-related diseases.

Those survivors who can demonstrate negligence to Australia's legal standards will be free to pursue civil litigation.

A safety net should be considered if a survivor chooses civil litigation and fails. A failed civil litigant could then apply to the redress scheme and would be at least entitled to the recognition and counselling components.

We recognise that this alternative would not be welcomed by many stakeholders and would be against the basic philosophy of most lawyers. Nevertheless it is a compromise that will greatly improve the financial sustainability of a redress scheme and in our view would be acceptable to many survivors and to society as a whole.

From a lay perspective the issues raised such as reasonable care being based on the standards at the time are real and important. The law has consistently said that many institutions were not negligent.

It is fair to say that the civil liability system has failed abysmally in serving the needs of survivors, which is why redress has been on the table since the start of the Commission. From a social perspective it does not seem helpful to try to change the civil liability system at this stage to serve those needs.

If the Commission wishes to make changes to common law, then we recommend that actuarial modelling be undertaken to show the indicative changes to the liability of Institutions, their insurers and governments. Additional awards from civil litigation may have significant impact on the affordability of the Commission's recommendations when taken as a whole, and will certainly have an impact on the sustainability of the scheme for the funders.

Further, if parallel systems are to be considered, then we recommend that actuarial modelling be undertaken to show the increased liability for funders from civil litigation claims arising from victims using the redress payments to fund civil litigation. Whilst it would be impossible to predict this cost accurately, indicative estimates would assist in understanding the affordability and sustainability of the proposed approach.