



Abuse in Care

Royal Commission of Inquiry

PUBLIC HEARING – MARCH 2020
**CIVIL CLAIMS AND CIVIL LITIGATION REDRESS PROCESSES RELATING
TO ABUSE IN STATE CARE**

BRIEFING PAPER:

**FINDINGS AND RECOMMENDATIONS ON
REDRESS AND REHABILITATION PROCESSES
IDENTIFIED IN RECENT INTERNATIONAL REVIEWS OR INQUIRIES
INTO CHILD SEXUAL ABUSE IN CARE**

INTRODUCTION

This briefing paper contains a summary of findings and recommendations on redress and rehabilitation processes identified in international reviews or inquiries into Child Sexual Abuse in Care (**reviews or inquiries**), or in the case of Canada, the outcome of proceedings relevant to the civil litigation component of the redress investigation. This is in accordance with clause 20(d) of the Abuse in Care Royal Commission of Inquiry's Terms of Reference.

The information comes from publicly available sources, or information disclosed to the Royal Commission and available for publication. It has been produced to provide context or other information that may be relevant to the public hearing into civil claims and civil litigation redress processes relating to abuse in State care to be held in March 2020.

The international reviews or inquiries covered in this briefing paper are the:

- Australian Royal Commission into Institutional Responses to Child Sexual Abuse;¹
- Canadian Indian Residential Schools Settlement Agreement²
- England and Wales Independent Inquiry into Child Sexual Abuse;³
- Northern Irish Historical Institutional Abuse Inquiry;⁴
- Republic of Ireland Commission to Inquire into Child Abuse⁵; and
- Scottish Child Abuse Inquiry;⁶

A number of common themes emerged from this analysis of international reviews and inquiries.

¹ <https://www.childabuseroyalcommission.gov.au/>

² <http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf>

³ <https://www.iicsa.org.uk/>

⁴ <https://www.hiainquiry.org/>

⁵ <http://www.childabusecommission.ie/>. Note that the redress and rehabilitation provisions of the Residential Institutions Redress Act 2002 were developed separately from the Commission. The Compensation Advisory Committee was established in 2001 by the Minister for Education and Science.

⁶ <https://www.childabuseinquiry.scot/>

A. AUSTRALIA

Australian Royal Commission into Institutional Responses to Child Sexual Abuse

1. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**), announced in November 2012, was preceded by a Senate Inquiry into Children in Institutional Care, conducted in late 2003 and 2004 (**Senate Inquiry**). The Senate Inquiry made a number of recommendations to State and Commonwealth Governments. Those relevant to redress and rehabilitation or civil litigation, set out in the first report titled “Forgotten Australians: A Report on Australians who Experienced Institutional or Out of Home Care as Children”, published on 30 August 2004⁷, included:
 - Giving apologies and acknowledgments of wrongs done;
 - Amending legislation that time-bars civil litigation;
 - Promoting a national reparation fund;
 - Removing barriers to a full and open inquiry into specific complaints;
 - Providing open access by individuals to their personal records held by institutions;
 - Providing adequate social services; and
 - Establishment of a board to consider claims and to award monetary compensation.
2. The Letters Patent required the Royal Commission, under paragraph (d), to inquire into “*what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.*” The Royal Commission was not asked to look into physical abuse, neglect or other forms of harm.
3. The Royal Commission issued a separate “Redress and Civil Litigation Report” in 2015.⁸ The full list of the Royal Commission’s recommendations are at 61-78 of this report. They are broken down into the following categories:
 - Justice for victims
 - Redress elements and principles
 - Direct personal response
 - Counselling and psychological care
 - Monetary payments

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https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/inst_care/report/index

⁸ https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf

- Redress structure and funding
 - Redress scheme processes
 - Limitation periods
 - Duty of institutions
 - Identifying a proper defendant
 - Model litigant approaches
4. The Royal Commission concluded that *“A process for redress must provide equal access and equal treatment for survivors – regardless of the location, operator, type, continued existence or assets of the institution in which they were abused – if it is to be regarded by survivors as being capable of delivering justice”* (Recommendation 1).
 5. The Royal Commission was satisfied that appropriate redress for survivors should include three elements:
 - (a) A monetary payment;
 - (b) Access to counselling and psychological care as needed throughout the survivor’s life; and
 - (c) A direct personal response from the responsible institution. The direct response should be provided on request from the survivor.
 6. Further, any institution or redress scheme that provides or offers any form of redress should do so consistently with the following principles:
 - (a) Redress should be survivor-focused;
 - (b) There should be a 'no-wrong door' approach for survivors in gaining access to redress;
 - (c) All redress should be offered, assessed, and provided with appropriate regard to what is known about the nature and impact of child sexual abuse - and institutional child sexual abuse in particular - and to the cultural needs of survivors; and
 - (d) All redress should be offered, assessed and provided with appropriate regard to the particular needs of particularly vulnerable survivors.
 7. The Royal Commission recommended that monetary compensation should be assessed and determined using a matrix comprised of five factors:
 - (a) The severity of the abuse;
 - (b) The severity of the impact of the abuse;
 - (c) Whether there were additional considerations such as whether the survivor suffered other forms of abuse in conjunction with the sexual abuse – including physical, emotional or cultural abuse or neglect;
 - (d) Whether the survivor was particularly vulnerable to abuse because of a disability; and
 - (e) Whether the survivor was in a ‘closed’ institution, or in state care, or without the support of family or friends at the time of the abuse.

8. The survivor would receive a score based on the factors listed above with the total score being positioned within a band. The bands determine the monetary amount to be awarded.
9. In assessing the payment amounts, the Royal Commission had regard to the payments made under state schemes and advice from actuaries⁹ as a way of managing issues of affordability. The Royal Commission recommended a maximum payment of \$200,000 and minimum payment of \$10,000, with an average payment of \$65,000 (p.23).
10. The Royal Commission considered however *“that attempting to prescribe a detailed redress scheme to apply to future abuse, potentially stretching decades into the future, is not now warranted or appropriate”* (p.6)
11. With respect to civil litigation, the Royal Commission found:
 - (a) Current civil litigation systems and past and current redress processes had not provided justice for many survivors;
 - (b) While redress schemes may provide a suitable alternative to civil litigation, they do not offer monetary payments in the form of compensatory damages;
 - (c) Where survivors had already received redress through civil litigation, they should remain eligible to apply under any new redress scheme, provided that any previous payments were taken into account;
 - (d) Current limitation periods are inappropriate given the length of time that many survivors take to disclose their abuse. Limitation periods for commencing civil litigation relating to child sexual abuse should be removed, and such removal should be retrospective in operation;
 - (e) The aim of civil litigation should be to allow claims to be determined on their merits, but recognising national consistency is also desirable;
 - (f) Institutions can take steps to limit expensive and time-consuming civil litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims;
 - (g) State and territory governments should introduce legislation removing obstacles survivors encounter in identifying the proper defendant and/or who has sufficient assets to meet any liability arising from the proceedings;
 - (h) Governments are expected to act as model litigants. As model litigants the governments are encouraged to adopt principles for how they will handle civil litigation in relation to child sexual abuse claims. The governments should publish those guidelines or otherwise make them available to claimants and their legal representatives. These guidelines should be designed to minimise potential re-

⁹ National Redress Scheme Participant and Cost Estimates, Finity Consulting Pty Ltd, July 2015
https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/national_redress_scheme_participant_and_cost_estimates_report.pdf

traumatisation of claimants and avoid unnecessarily adversarial responses to claims.

National Redress Scheme for Institutional Child Sexual Abuse

12. The Australian Government has largely adopted the recommendations of the Royal Commission, with some modifications. As a consequence, the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (**the Act**) has given statutory effect to the National Redress Scheme for Institutional Child Sexual Abuse (**NRS**).
13. The Act has a sunset provision, which means that the Act ceases to have effect 10 years after commencement (depending on any further extension). The NRS is operated by an independent Government department.
14. The NRS became operational on 1 July 2018. Survivors of child sexual abuse can approach the NRS at any time until 30 June 2027 (unless extended).
15. The NRS provides a legislative basis for:
 - Entitlements;
 - Participant;
 - How to obtain access;
 - Offers and acceptance of redress;
 - Provision of redress;
 - Specialist support services, counselling and psychological care;
 - Funding;
 - Funder of last resort;
 - Release from civil liability; and
 - Other administrative matters.
16. Redress and rehabilitation under the NRS is comprised of:
 - a maximum payment of \$150,000;
 - access to counselling and psychological services up to a maximum value of \$5,000 (or cash of a similar value if specific services are unavailable in that location);
 - a direct personal response to the survivor from the participating responsible institution (if the survivor requests such a meeting).
17. State and Territorial governments and institutions implicated in sexual abuse were provided an opportunity to sign up to the scheme, with participating State and Territorial governments and institutions contributing to the costs. Institutions are required to pay a proportion of the redress depending on whether they are found to be primarily or equally responsible for the abuse that occurred.

18. Redress is provided for the sexual abuse and related non-sexual abuse of a person that is within the scope of the scheme. Redress is not provided if no sexual abuse occurred.
19. Applications must be in writing. The claimant must provide the operating agency with any relevant supporting information to support the application. No oral hearings or interviews are held with the claimant. The agency that operates the NRS has the power to require the claimant to produce additional information. The operator may also require participating agencies to provide relevant information.
20. A survivor may be eligible for redress if:
 - the person was sexually abused;
 - the abuse is within the scope of the scheme;
 - the abuse is of a kind where the maximum redress payment would be more than nil;
 - one or more participating institutions was responsible for the abuse; and
 - the claimant was an Australian citizen or permanent resident at the time of the abuse.
21. A claimant who accepts any offer under the NRS is unable to pursue a claim for damages through civil litigation against the same institution for the same events. A claimant is also not able to lodge a new application if they have rejected an earlier offer.

Legislative amendments: Limitation periods

21. The Royal Commission made the following recommendations relating to limitation periods for commencing civil litigation relating to child sexual abuse:
 - 21.1. that the State and Territory governments progress legislation to remove any limitation periods that apply to claims for damages for personal injury caused by sexual abuse in an institutional context when the person was a child;
 - 21.2. that the legislation should apply retrospectively and regardless of whether the person had made a claim, which was subject to a limitation period previously;
 - 21.3. that the courts should also retain the power to stay proceedings if such an act was necessary in the interests of justice.
22. As a consequence of the Royal Commission recommendations all State governments (except for Tasmania) and Territories have enacted

legislation that removes limitation periods. In each case the legislation applies retrospectively.

23. The scope of that legislation differs amongst States and Territories. In some cases (NSW, Queensland, and Western Australia) the removal of the time limit only applies in the case of child sexual abuse. In the case of the remaining States and Territories limitation periods do not apply to injuries from sexual abuse, physical abuse or psychological abuse that arise from sexual or physical abuse of a minor.
24. The State of Tasmania is currently undertaking consultation on its' proposed approach.

Legislative amendments: Identifying a Proper Defendant

25. The Royal Commission made the following recommendation:
 - 25.1. State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings, then:
 - a. the property trust is a proper defendant to the litigation; and
 - b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.
26. Australian State Governments have taken varying approaches to implementing this recommendation:
 - The State of Victoria has legislated to allow child abuse survivors to sue an organisational defendant in respect of unincorporated non-governmental organisations (NGO) that use trusts to conduct their activities. The Act also provides that an entity that is not capable of being sued can nominate another legal party to be the defendant for the purposes of a claim brought under the Act. The legal party must consent to the nomination. The legal person incurs any liability arising from the claim.
 - The State of New South Wales now permits child abuse proceedings to commence or continue against an unincorporated organisation in the name of the organisation. The organisation has 120 days within which to appoint a legal person as a proper defendant. If no proper

defendant is appointed after this time, the court may appoint an associated trust or former associated trust of the organisation as the proper defendant.

- The State of Queensland has enacted legislation that provides if an institution is not capable of being sued - or is not in a financial position to meet a current or future claim - the institution must nominate a proper defendant who is capable under law of being sued and has the financial capability to meet the claim. The nominee must be related to or associated with the institution. If the institution fails to nominate a proper defendant a trustee of an associated trust may be considered responsible for any liability arising out of the breach of duty of care. In such cases the trustee is only liable to the value of the trust property.
- The State of Western Australia has enacted legislation that provides that proceedings may be commenced against the holder of office of an unincorporated organisation and any liability arising out of the proceedings would be held by the holder of the office. The assets of the institution, including the assets of any trust of the institution, can be used to satisfy the liability but the personal assets of the holder of office cannot be used for this purpose. The Act also protects the interests of the plaintiff in the event that the form and structure of the institution has changed since the time the cause of action accrued. This protection applies even if the successor institution is substantially different.
- The Tasmanian Government released an exposure Bill seeking feedback on proposals that would allow child abuse proceedings to be brought against unincorporated institutions. Such institutions would be able to satisfy any liabilities from those proceedings using assets from an associated trust.

Legislative amendments: Duty of institutions

27. The Royal Commission also made recommendations to hold the institution liable to compensate survivors of child sexual abuse for deliberate criminal acts of its members or employees.
28. These recommendations included that:
 - 28.1. State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions¹⁰ for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.

¹⁰ The Royal Commission also recommended the classes of institutions that should be subject to the duty.

- 28.2. State and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse.¹¹
- 29 The recommendations have been implemented by two State governments with other State governments and Territories taking steps to introduce similar legislation.
- The State of Victoria has enacted legislation that:¹²
 - Imposes a statutory duty on organisations to prevent the abuse of a child while the child is under the care, supervision or authority of that organisation.
 - Requires organisations to prove that they took steps to prevent the abuse in situations where there is proof that abuse has occurred and committed by an individual associated with the relevant organisation.

 - The State of New South Wales has enacted legislation that:
 - Imposes a duty on organisations if it (or any part of it) exercises care, supervision or authority over a child (**care**) to take reasonable precautions to prevent an individual associated with the organisation perpetrating child abuse even if the organisation has delegated the exercise of that care to another organisation.
 - Prescribes factors that the courts can consider when determining whether an organisation took reasonable steps to prevent the abuse in situations where there is proof that abuse has occurred and committed by an individual associated with the relevant organisation.
 - Provides that organisations might be held vicariously liable for child abuse committed by an employee of the organisation if the organisation places the employee into a position that supplies the opportunity for the perpetration of the abuse and the employee takes advantage of the opportunity to perpetrate the abuse.¹³

¹¹ The Royal Commission made recommendations on the institutions subject to the reversed onus of proof and persons considered to be associated with the institution.

¹² The Act implementing the Royal Commission's recommendations also implements the findings of the Family and Community Committee Development report *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, Victoria Parliament (November 2013).

¹³ The legislation prescribes factors that the court can consider in determining whether the performance of the employee's functions placed them in a position to carry out the abuse. Those factors include: the perpetrator's authority, power and control over the child; the trust of the child in the perpetrator; and the perpetrator's ability to establish intimacy with the child.

- Defines an “employee” to include persons in a relationship with the organisation akin to an employee.
- A Private Members’ Bill was introduced into the Queensland Parliament on 31 October 2018 but has not progressed to date. The proposals in the Bill are intended to operate retrospectively. The Bill proposes to amend the Queensland Civil Liability Act by:
 - Introducing a statutory duty for institutions to take steps to ensure that a child who is either –
 - involved in activities, facilities, programs, or services of any kind provided by the institution,
 - who is otherwise in the care, or under the supervision or authority of the institution, and
 - who is under the care, supervision, or authority of another individual or organisation as a result of the delegated authority of the institution -

does not suffer child abuse perpetrated by an official of the institution.
 - Providing institutions with a defence if the institution can prove that it took reasonable precautions and exercised due diligence to prevent the child suffering child abuse. The Bill provides the courts with guidelines as to when the institution may have taken reasonable precautions and exercised due diligence.
- The Governments of Tasmania, Western Australia, and Northern Territory have all released discussion papers on proposals to respond to the Royal Commission’s recommendations.

Civil Litigation: Model Litigant guidelines

- 30 The Royal Commission recommended that appropriate Government and non-government institutions should adopt guidelines for responding to claims for compensation arising from allegations of child sexual abuse and make these guidelines accessible.
- 31 The intention of such guidelines was to minimise potential re-traumatisation of claimants including by avoiding unnecessarily adversarial responses to claims.
32. The Royal Commission recommended that the institutions be placed under an obligation to assist claimants and their legal representatives in identifying the proper legal defendants to a claim.
33. Some Australian States have developed guiding principles that are to be used by Government departments when responding to civil claims of child

abuse. These principles *are in addition to* the generic Model Litigant rules.¹⁴

34. The NSW Government has set down 19 principles that are designed to facilitate the claims process and minimise the potential re-traumatising of the survivor. These principles:
 - are binding on Government Departments
 - place obligations on the importance of Departments assisting claimants through the litigation process as much as possible to minimise the risk of re-traumatising survivors
 - confirm the responsibility of the agencies to protect the State's interest in defending claims that are without merit.
35. The Governments of Western Australia, Queensland and Northern Territory have developed principles similar in nature and scope to those of NSW. However, these principles are non-binding. The Western Australian Government has included the principle that other parties are to be held to account for child sexual abuse, either in the criminal or civil courts.
36. The Department of Health and Human Services and the Department of Education and Training in Victoria have developed non-binding guidelines to inform their responses to civil claims involving allegations of child sexual abuse in connection with State institutions. These guidelines are permissive in nature.

¹⁴ The Model Litigant Rules and Guiding Principles are attached as an appendix to this report

B. CANADA

The Independent Assessment Process – Indian Residential Schools Settlement Agreement

37. The Independent Assessment Process (IAP) is part of a wider settlement agreement that arose in respect of a class action taken against the Canadian Government and faith-based entities by First Nations peoples and Inuit representatives. The class action was taken in response to specific findings in the 1996 report of the Royal Commission on Aboriginal Peoples¹⁵ relating to the abuse of Aboriginal children and young people in Indian Residential Schools.
38. The terms of the Settlement Agreement reached between the Crown, faith-based institutions and Aboriginal people sets out the basis for compensation.¹⁶ Included amongst that package of items¹⁷ was monetary compensation for individuals who had been abused. Individuals could seek redress in the form of financial compensation through the IAP.
39. The design of the IAP was completed as part of the settlement process and therefore had significant input from First Nations and Inuit representatives. The scheme has also been amended over time following representations from First Nations and Inuit representatives.
40. The IAP is administered by an independent body set up for this purpose – the Indian Residential Schools Adjudication Secretariat (IRSAS). Applications for compensation opened in 2006 and had to be filed by September 2012. IRSAS has produced guidelines to support applicants through the process.
41. One hundred and forty schools and institutions have been determined to be within scope.
42. The Settlement Agreement provides the basis for:
 - Entitlements;
 - Participation and representation;
 - The application and hearing process, including settlements;
 - Evidence, including the use of expert witnesses and burden of proof;
 - Offers and acceptance of redress;

¹⁵ <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>

¹⁶ The Settlement Agreement also includes separate agreements between the Crown and Canadian Churches and Church-based entities. These 'side-agreements' set out as to the size of the contribution of the Churches and Church-based entities to the compensation package.

¹⁷ Other aspects of the redress package include funding healing (\$125 million to establish an Aboriginal Healing Foundation); truth and reconciliation processes (\$60 million for the establishment of a Truth and Reconciliation Commission); commemoration programmes (\$20 million); and 'common experience' payments.

- Reviews of decisions;
 - Provision of redress;
 - Specialist support services, counselling and psychological care;
 - Funding;
 - Indemnity;
 - 'Opting-out' of the agreement;
 - Release from civil liability; and
 - Other administrative matters.
43. Under the IAP applicants' claims are assessed and determined using a matrix similar to that adopted by Australia and the Republic of Ireland. The IAP model uses four factors to assess and determine the amount of compensation:
- a) The nature of the abuse
 - b) The severity of the harm caused
 - c) The presence of any (if any) aggravating feature, such as verbal abuse, threats or breach of trust
 - d) Any consequential loss of opportunity, such as diminished work capacity or chronic inability to retain employment.
44. The survivor would receive a score based on the factors listed above with the total score being positioned within a band. The bands determine the monetary amount to be awarded.
45. The maximum payment using this formula was \$275,000 and the minimum was \$5,000. Additional compensation could be provided for actual lost income of up to \$250,000.
46. In addition to the compensation awarded using the matrix, survivors could also receive:
- a) Compensation for ongoing medical care or counselling of up to \$10,000
 - b) Psychiatric treatment, cumulative total of up to \$15,000
 - c) A contribution of up to 15% of the award to meet legal costs.
47. In order to be eligible under the scheme:
- The individual must either have been a resident of a specified residential school within the relevant period (this appears to have fluctuated depending on the residence) or permitted to be on the grounds of the school before turning 21 years of age;
 - The individual experienced physical or sexual abuse or experienced another wrongful act that caused serious psychological consequences, and;
 - Had not previously received settlement monies or had a claim of abuse dismissed by a court.

48. Hearings have a cultural component:
- Grants are available to incorporated entities established by groups of individuals who are considered eligible for the IAP process.
 - The "Group IAP" process allows for individuals who were in the same residence or from the same tribe to support each other by, for example, running cultural healing activities or the provision of counselling or therapeutic services or prepared the person before they went through the IAP process.
49. As at 30 September 2019, IRSAS had received 38,262 applications under the IAP process and resolved 38,243 of these applications (99%).
50. Of the claims resolved:
- 26,703 were resolved following a hearing;
 - 4,165 claims were resolved prior to the hearing through a negotiated settlement;
 - 89% of the claims resulted in compensation being paid either as a result of a negotiated settlement or from an award by an adjudicator;
 - The average IAP payment awarded by adjudicators was \$91,471 including legal costs and ongoing medical/supervision costs.

Civil litigation

51. The settlement agreement does not cover changes to civil litigation processes. However, judgements of the Canadian Supreme Court have, over time, been influential in making the civil litigation process more accessible in some areas. These are outlined below.

Civil litigation: Limitation periods

52. All Provincial Governments have removed limitation periods for causes of action based on misconduct of a sexual nature or based on sexual assault following the decision of the Canadian Supreme Court in *M(K) v M(H)* [1992] 3 SCR 6. Furthermore, the Nova Scotia Government in 2015 enacted the Limitation of Actions Act which provided that no limitation period applied in cases of historical sexual abuse.
53. Some Provincial Governments have removed limitation periods for causes of action based on physical abuse¹⁸ if at the time of the assault, the person with the claim was a minor or if the parties had an intimate

¹⁸ The decision to remove limitation periods also extends to psychological harm caused by the physical or sexual abuse.

relationship or there is a relationship of dependence.¹⁹ The removal of the limitation period applies retrospectively.

Civil litigation: Vicarious liability

54. The Canadian courts apply vicarious liability broadly and have adopted an 'enterprise risk' theory of liability. The theory is premised on the notion that the organisation who creates or exacerbates an existing risk should bear the loss when the risk becomes real and harm eventuates. The leading cases remain *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570. The court held that employers should be held liable for unauthorized acts of its employees where the acts of the employee falls within the ambit of the risk.
55. The test applied by the courts is whether there is a 'significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires.'

¹⁹ Ontario Bill 132 Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment) 2015.

C. ENGLAND AND WALES

England and Wales Independent Inquiry into Child Sexual Abuse

56. In September 2019 the Independent Inquiry into Child Sexual Abuse (IICSA) issued its' Accountability and Reparations Investigation Report²⁰ (**Accountability and Reparation Report**). The matters relevant to redress and rehabilitation processes, including civil litigation, included:
- (a) Ensuring victims and survivors are aware of their rights to compensation within the criminal and civil justice systems and provided with assistance with applying for compensation should they require it
 - (b) Processes for referring victims and survivors to organisations who can provide specialised help and assistance
 - (c) Recognising the special circumstances of victims and survivors of child sexual abuse and the need to treat claims differently from other forms of personal injury litigation
 - (d) Limiting the use of defences such as the defence of limitation to exceptional circumstances
 - (e) Assisting victims and survivors (and their legal representatives) with identifying whether a defendant has access to appropriate insurance
 - (f) Ensuring calculations of compensation for victims and survivors of child sexual abuse reflect full range of harms and their long-term impact
 - (g) Providing protection for victims and survivors who give evidence during civil claims cases
 - (h) Minimising trauma associated with assessment of injuries by medical experts
 - (i) Ensuring those responsible for handling compensation claims by victims and survivors of child sexual abuse receive appropriate training
57. In the Accountability and Reparation Report, IICSA signalled its' intention to inquire further into:
- (a) Whether the law of limitation should be reformed to make it easier for victims and survivors to bring claims in respect of non-recent child sexual abuse.
 - (b) The potential for a redress scheme to offer accountability and reparations to victims and survivors of child sexual abuse.

²⁰ Independent Inquiry into Child Sexual Abuse *Accountability and Reparations: Investigation Report* September 2019

58. IICSA received further evidence about these matters at a public hearing held in November 2019.
59. IICSA has, however, recommended that:²¹

The Government should introduce legislation revising the Compensation Act 2006 to clarify that section 2 facilitates apologies or offers of treatment or other redress to victims and survivors of child sexual abuse by institutions that may be vicariously liable for the actions or omissions of other persons, including the perpetrators.

Civil litigation: Establishing liability of institutions for abuse

60. The United Kingdom courts have taken a similar approach to the Canadian courts in adopting an approach to vicarious liability based on risk management. The law on vicarious liability in the UK has been described by the Courts as being “on the move”.²²
61. The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.²³

Civil litigation: Identifying a proper defendant

62. The UK courts have previously found unincorporated bodies can be vicariously liable for the acts of one or more of its members that involve child sexual abuse. The approach set out in *The Catholic Child Welfare Society and others v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 suggests that this will be context specific but the structure of the organisation, including its financial assets, and the ability to identify a specific community of members amongst a wider group of members may be informative.

²¹ Recommendation 3, Independent Inquiry into Child Sexual Abuse *Accountability and Reparations: Investigation Report* September 2019

²² For a comparative analysis of the UK and Australian approaches, see Paula Giliker “Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention” in *Cambridge Law Journal* 77(3), November 2018, pp 506 - 535

²³ *Cox v Ministry of Justice* [2016] UKSC 10, paragraph 24

Civil litigation: Model litigant guidelines

63. IICSA has also recently recommended²⁴ that the Local Government Association and the Association of British Insurers should produce codes of practice for responding to civil claims of child sexual abuse.
64. IICSA considers that these codes should:
 - (a) Include recognition of the long-term emotional and psychiatric or psychological effects of child sexual abuse on victims and survivors
 - (b) Acknowledge that the effects of child sexual abuse may make it difficult for victims and survivors to disclose that they have been abused and initiate civil claims for that abuse
 - (c) Include guidance about the need to treat claimants with sensitivity throughout the litigation process
 - (d) Include guidance on the appropriate use of the defence of limitation
 - (e) Include guidance on the use and instruction of expert witnesses
 - (f) Include guidance on the provision of redress.

²⁴ Recommendation 2, Independent Inquiry into Child Sexual Abuse *Accountability and Reparations: Investigation Report* September 2019

D. NORTHERN IRELAND

Historical Institutional Abuse Inquiry

65. The Northern Ireland Executive Inquiry and Investigation into Historical Institutional Abuse (**the Historical Institutional Abuse Inquiry**) was established to examine if there were systemic failings by institutions or the state in their duties towards those children in their care between the years of 1922-1995.
66. The Inquiry Panel was asked to make findings and recommendations on matters including the requirement or desirability for redress to be provided by the institution and/or the Executive to meet the needs of victims.
67. The Historical Institutional Abuse (Northern Ireland) Act (**HIA Act**) received the Royal assent on 5 November 2019. The HIA Act implements the recommendations of the Historical Institutional Abuse Inquiry.
68. The HIA Act establishes the Historical Institutional Abuse Redress Board (**the Redress Board**). The Redress Board is an independent body established for the purposes of making determinations on awards of compensation.
69. A person has five years within which to make an application from the time the Redress Board is established. A person can only make one application, but that application may be in respect of more than one institution.
70. The HIA Act (and any rules made under the HIA Act) provide the basis for:
 - Entitlements and eligibility;
 - Participation and representation;
 - The application and hearing process;
 - The hearing of evidence;
 - The production of information;
 - Offers and acceptance of monetary compensation;
 - Reviews of decisions;
 - Provision of monetary compensation;
 - Release from civil liability; and
 - Other administrative matters.
71. The level of compensation available under the HIA Act falls under three heads:
 - (a) A standard sum of £10,000 is available in most cases;
 - (b) Additional compensation of £70,000 is available if there are sufficient aggravating factors that warrant the awarding of additional compensation;
 - (c) An amount of £20,000 is available if the person was sent to Australia under the Child Migrants Programme.
72. The term abuse is defined broadly to include having:
 - (a) Suffered sexual, physical or emotional abuse or neglect or maltreatment,

- (b) Witnessed one or more other children suffer abuse of a kind referred to in paragraph (a),
 - (c) Otherwise been exposed to a harsh environment, or
 - (d) Been sent to Australia under the programme commonly known as the “Child Migrants Programme”.
73. The HIA Act also establishes a new statutory position of Commissioner for Survivors of Institutional Childhood Abuse (**the Commissioner**). The principal role of the Commissioner is to act as an advocate for the interests of survivors of institutional child abuse.
74. The Commissioner may respond to requests for advice on issues of interest to victims and survivors or provide such advice independently. The Commissioner is also responsible for:
- monitoring decisions of the Redress Board
 - assisting and supporting persons wanting assistance with making applications to the Redress Board
 - advocating for survivors to ensure they have access to services, including education and employment opportunities.
75. The Commissioner must appoint an Advisory Panel. The Panel acts as a forum for consultation and discussion purposes. The Panel is be comprised of victims and survivors of abuse.

E. REPUBLIC OF IRELAND

Commission to Inquiry into Child Abuse

76. The Commission to Inquire into Child Abuse was established on 23 May 2000 (**CICA**). CICA was given three primary functions:
- to hear evidence of abuse from persons who allege they suffered abuse in childhood, in institutions, during the period from 1940 or earlier, to the present day;
 - to conduct an inquiry into abuse of children in institutions during that period and, where satisfied that abuse occurred, to determine the causes, nature, circumstances and extent of such abuse; and
 - to prepare and publish reports on the results of the inquiry and on its recommendations in relation to dealing with the effects of such abuse.
77. However, CICA has no role in relation to financial compensation. The Irish Government instead introduced the Residential Institutions Redress Act (**the 2002 Act**) and the Compensation Advisory Committee (**the CAC**) to provide recommendations on mechanisms for calculating financial compensation for survivors of abuse.
78. The CAC determined that payments should be consistent with what courts would award under tort law.
79. The recommendations of the CAC were adopted and incorporated within the 2002 Act and the Residential Institutions Redress Act 2002 (section 17) Regulations (**the section 17 regulations**).
80. The 2002 Act established the Residential Institutions Redress Board (**the RIRB**) which administers the redress scheme.²⁵
81. Applications needed to be submitted within 3 years of the establishment of the RIRB under legislation, although the Board had discretion to extend time limits if the person was under a legal disability. Guidance material is available on the RIRB website to support survivors through this process.
82. The 2002 Act was subsequently amended to allow late applications to be received until 17 September 2011.
83. The 2002 Act, as amended, provides the basis for:
- Entitlements;
 - Participation and representation;
 - The application and hearing process;
 - The hearing of evidence, including expert witnesses and burden of proof;
 - The production of information;

²⁵ The catholic church in Ireland agreed in 2002 to pay €128 million which went into a special State fund for victims of abuse. In return, the State arranged that people seeking compensation from the Residential Institutions Redress Board were barred from suing the Church directly.

- Offers and acceptance of monetary compensation;
 - Reviews of decisions;
 - Provision of monetary compensation;
 - Release from civil liability;
 - Regulation-making powers relating to assessment of compensation; and
 - Other administrative matters.
84. The RIRB provides redress is available for four forms of harm: physical; sexual; emotional, and neglect.
85. The section 17 regulations set out a methodology for awarding compensation based on the model recommended by the CAC. That is, applications would be scored according to:
- severity of abuse;
 - extent of physical and mental injury;
 - psycho-social sequelae of injury, and;
 - loss of opportunity.²⁶
86. The survivor would receive a score based on the factors listed above with the total score being positioned within a band. Aggregated scores would be placed into bands ranging in value from €25,000 up to €300,000.
87. The RIRB can award interim payments of up to €10,000 where the person was eligible to receive compensation, the compensation would be at least an equivalent value, and the payment is reasonable considering the age and health of the applicant.
88. In order to be eligible for redress, the individual must:
- have been a resident of one of the institutions listed in the 2002 Act;
 - have been under 18 years of age at the time;
 - have suffered abuse while at the institution and suffered some form of injury consistent with that abuse, and;
 - not have previously settled a claim for compensation.
89. Media reports²⁷ show that:
- 16,650 applications have been received
 - less than 10% (1,069) of applications were withdrawn, refused or resulted in no compensation being awarded
 - awards totalled almost €1 billion
 - the average payment was €62,000
 - most applications (12,016) were resolved through settlement rather than proceeded to a hearing (2,994 claims were resolved following a hearing, with 571 awards following an appeal)

²⁶ The head of compensation for “loss of opportunity” is to recognise lack of development and access to education, the impacts of abuse on development of family relations, including intimate relations, and relationships with dependents.

²⁷ <https://www.thejournal.ie/redress-board-annual-report-4350936-Nov2018/>

- the scheme cost a further €1.1bn to administer.
90. The Irish Government established the position of Education Coordinator within the National Office for Victims of Abuse. The Coordinator was employed to assist those victims and survivors who wished to return to education.
 91. The Irish Government enacted the Residential Institutions Statutory Fund Act 2012 and established the Residential Institutions Statutory Fund Board (now known as **Caranua**).²⁸
 92. Caranua oversees the use of cash contributions pledged by the religious congregations to support the needs of survivors of residential institutional child abuse. These survivors have received awards from the Residential Institutions Redress Board or equivalent court awards.
 93. The key functions of Caranua include:
 - The payment of grants to former residents in order that they may avail of approved services, which include: mental health services, health and personal social services, educational services and a housing support service.
 - It will also promote understanding, among persons involved in the provision of approved services and publicly available services to former residents, of the effects of abuse on former residents.

Civil litigation: Limitation period

94. The Statute of Limitations Act was amended in 2000 to extend the time within which a person may bring a claim for damages for negligence or breach of duty where the damages claimed consist of or include damages for personal injuries caused by sexual abuse in cases where the person was precluded from bringing such a claim due to the provisions of the Statute of Limitations Act.
95. Such a person has 12 months within which to bring a claim from the time the Amendment comes into force. The claim can only be brought if the plaintiff believed he or she was prevented from bringing a claim because of the statutory bar acting on advice from a lawyer or a complaint was made to the Garda Síochána.

Civil litigation: Identifying a proper defendant

96. The Irish Supreme Court (*Hickey v McGowan* [2017] IESC 6) has held that an unincorporated organisation cannot be held vicariously liable for the actions of one of its members. This is because there was no statutory intervention or other exception that would justify a departure from the common law position. The Irish Supreme Court declined to follow the approach previously taken in the UK (see above).

²⁸ <http://caranua.ie/what-is-the-fund/what-we-can-do>

97. However, individual members of the order could be held vicariously liable if they were members of the order at the time the action accrued.
98. Religious-based orders differ from other forms of unincorporated entities due to the closeness or intensity of the relationship between members of the order and the extent they are subsumed into a collective entity.

F. SCOTLAND

Scottish Child Abuse Inquiry

99. The Scottish Government has recently released a consultation paper on the detailed design of a statutory financial redress scheme for historical survivors of abuse in care.
100. The Scottish Government has previously launched the Advance Payment Scheme for survivors of historic abuse in care who are over 70 years of age or have a terminal illness.
101. The Scottish Government has undertaken initiatives that are dedicated to providing survivors of abuse in care with access to a range of counselling, psychological and rehabilitation services. These initiatives include:
 - establishing a fund to help organisations improve access to services which can reduce the impact of inequalities and disadvantage experienced as a result of childhood abuse.
 - providing funding to enable service providers to expand their capacity and capability by partnering with local statutory and/or other third party sector services
 - establishing an umbrella network of services providers that support survivors by navigating access to a range of services, such as counselling / therapy, assisting with gaining access to records, and work and education
 - developing a national training programme, to support over 5000 frontline workers across all sectors of the Scottish workforce who are responding to psychological trauma.

Civil litigation: Limitation periods

102. The Limitation (Childhood Abuse) (Scotland) Act 2017 provides that the statutory limitation period for bringing civil claims based on personal injury do not apply if the person was a child under the age of 18 years at the time the abuse commenced, the injuries are attributable to abuse of the person concerned, and the person is bringing the claim.
103. Abuse is defined to include sexual, physical and emotional abuse and abuse in the form of neglect.
104. The provision applies retrospectively if a person's previous claim has been denied because of the time bar or if the person has settled the claim as they believed the claim would be disposed of on the basis of the limitation period.
105. The provision does not apply in the case of abuse which occurred prior to 26 September 1964.

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