



**CREATE Foundation Submission to the  
Royal Commission into Institutional  
Responses to Child Sexual Abuse  
Response to Consultation Paper: Redress  
and Civil Litigation**

**CREATE Foundation**

**A** Suite 3, 56 Peel Street  
Brisbane, QLD 4101

**T** 07 3255 3145

**F** 07 3255 3126

**E** [info@create.org.au](mailto:info@create.org.au)

# Contents

About CREATE Foundation.....	3
Executive Summary .....	4
Introduction .....	7
Discussion Issues.....	8
Past and future abuse .....	8
Should the Royal Commission recommend redress processes and outcomes for future institutional child sexual abuse? .....	8
Data .....	9
Record keeping and accountability .....	9
Direct personal response.....	9
Counselling and psychological care.....	9
Supporting survivors in care and/or exiting care .....	10
Monetary Payments.....	11
Redress scheme processes .....	11
Eligibility for redress.....	11
Interim arrangements .....	16
Funding redress.....	16
Possible Structures.....	17
Civil Litigation .....	17
Limitation periods and duty of institutions .....	17
Identifying a proper defendant .....	18
Approach to access civil litigation .....	18
Conclusion .....	18
References.....	19

# About CREATE Foundation

CREATE Foundation is a peak consumer body representing the voices of all children and young people in out-of-home care.

CREATE Foundation is national and has offices in all of Australia's states and territories. As the national consumer body advocating for children and young people with a care experience, CREATE seeks to provide opportunities for children and young people to have a voice and be heard. CREATE is unique in that it is one of only a handful of organisations in the world, and the only organisation of its kind in Australia expressly established to advocate on behalf of children and young people in care.

CREATE's mission is to create a better life for children and young people in care, including those who are or have been the subject of care and protection orders. CREATE achieves its mission by **connecting** children and young people with a care experience to each other and their community, **empowering** them to develop in order that they may realise their potential, and **changing** the care system, in consultation with children and young people through advocacy to improve policies, practices and services.

CREATE engages with children and young people at fun events. It holds regular Youth Advisory Group meetings to discuss ideas and issues generated by children and young people, and conducts formal consultations with children and young people who have input into resource development, programs and policies. CREATE trains young people to be advocates for themselves and others within child protection systems, and provides financial help and skills development to assist young people in transitioning to independence.

Young Consultants participate in child protection conferences and meetings to provide their direct experiences of child protection systems to child protection workers, senior staff and politicians. It is CREATE's view that improvements to the system must be informed by the knowledge and experiences of the children and young people who live or have lived in out-of-home care.

# Executive Summary

Every year children and young people in out-of-home care in Australia are sexually abused and they should be assisted to access reparation. CREATE welcomes the upcoming hearing of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) to further examine issues in out-of-home care specifically. This Royal Commission for the most part, like Queensland's Forde Inquiry (1999), is looking into abuse in institutional care. However, the vast majority of children and young people (93%) in out-of-home care in Australia are in home-based care. This includes 43% in foster care and 48% in relative/kinship care (Australian Institute of Health and Welfare, 2014).

Children and young people in home-based care, like their peers in residential and other institutional statutory care, are part of overarching state and territory child protection systems. They are in care through no fault of their own and are reliant on the system and those who administer it to keep them safe.

CREATE believes consideration of reparation processes for abuse suffered while in care should apply in all placements in out-of-home care, including home based care, and residential and institutional care. This will require independent processes that are child-friendly, and appropriate record keeping to ensure their case files are accurate and accessible to them. The redress scheme should have the capacity to address claims from children and young people who are currently in the out-of-home care system and for potential future claims.

This submission focuses on the importance of including everyone who has spent time in Australian care systems, including in the past, at present and in the future. Furthermore CREATE reinforces the importance of child friendly communication, and the establishing of legal systems, and support networks to allow the redress scheme to be responsive to the current and future claims made by people who have been sexually abused while in care.

CREATE acknowledges and supports the principles for direct personal response suggested in the paper; however, it is emphasised that any apology should not absolve or preclude further action for redress.

CREATE draws attention to the impact of future claims likely to be made by children and young people currently living in out-of-home care and the importance to regularly review the monetary payments to take future needs into account. (Clearly, it would be preferable for the system to be operated in an effective and efficient way that would make any future redress unnecessary.)

CREATE supports the removal of fixed closing dates for both historical and future survivors of abuse, and for claimants to be provided all of the relevant documentation to support their applications. We hope that such measures will encourage an environment less adversarial and more empathic to the complexities involved in dealing with child sexual abuse; especially from the perspective of the child that suffered the abuse, including issues of power imbalance, and individual capacity to understand what has happened and to seek help.

We support the development of a strong promotional campaign that is conducted Australia wide, is culturally appropriate, and uses resources available in many languages. Due to the over-representation of Aboriginal and Torres Strait Islander children and young people in out-of-home care, CREATE recommends particular attention be paid to cultural issues when promoting and publicising the redress scheme.

CREATE supports the establishment of a nationally consistent redress scheme to ensure equitable processes for all survivors of abuse in care, regardless of the state or institution in which the abuse occurred.

The recommendations below are in response to the questions posed in the Royal Commission's *Consultation Paper: Redress and civil litigation* to develop a robust redress scheme that is accessible to all survivors of abuse including children and young people who are currently in out-of-home care.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

Develops and implements a redress scheme that is child friendly to be accessible for children and young people who have been abused while in care, whether past, present, or in the future.

Resources Ombudsman's offices in each state and territory to conduct more critical data collection and analysis into the abuse of children and young people in care.

Requires state and territory child protection agencies to develop systems and processes to:

- ensure accurate record keeping for children and young people in care about sexual abuse they have experienced and the appropriate treatment provided; and
- include discussion of redress when planning for future support for those transitioning, if abuse has been demonstrated while they were in care.

Factors future redress claims into any financial model developed.

Ensures the redress scheme eligibility criteria includes all children and young people who have been abused while in out-of-home care, including home based care as well as residential and institutional care.

Ensures any redress scheme:

- does not have fixed closing dates for both historical and future survivors; and
- recognises a wide range of evidence (for example, doctor's records, child protection investigations) when considering claims for compensation for victims of child sexual abuse.

Develops and implements an Australia-wide comprehensive communication strategy for promoting the redress scheme that is culturally appropriate and uses youth-friendly, plain language information resources that are available in a wide range of languages.

Ensures people who have experienced sexual abuse are supported to lodge an application to the redress scheme. This support should include technical, financial and emotional.

Establishes an independent authority with the powers to investigate complaints, make redress decisions and compel institutions to comply with orders for information and other requests as deemed necessary. This could be achieved by either setting up a new authority, or perhaps more economically, through employing existing structures such as the state and territory Ombudsman's offices, provided these agencies are adequately resourced for undertaking the extra responsibilities.

Establishes a national redress scheme to provide independence from the institutions in which abuse occurred. Any state or territory managed redress scheme must include a majority of independent expert representatives in the decision-making-processes.

Ensures that the redress scheme is resourced to provide counselling support for child applicants (and their family members) through services employing staff with appropriate expertise working with children and young people.

Ensures any redress scheme protects children and young people in out-of-home care from future harm by alleged abusers by requiring:

- institutions to pursue appropriate investigation and disciplinary processes when they receive advice from the scheme about the allegations; and
- the adoption of a mandatory reporting policy, and compliance with legal requirements to report or disclose the abuse.

Encourages governments to assume responsibility as "funders of last resort."

Ensures the redress scheme:

- removes fixed closing dates for both future and historical survivors of child sexual abuse; and
- requires that institutions provide claimants with any requested relevant information of their time in out-of-home care.

Ensures civil litigation is accessible for children and young people who have been abused while in care.

# Introduction

CREATE Foundation appreciates the opportunity to provide a response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) Consultation Paper on Redress and Civil Litigation. CREATE believes that children and young people with a care experience play an important role in providing the Royal Commission an insight into their experiences within Australia's statutory care system.

While it is reported (AIHW, 2014) that 13% of the substantiated notifications to child safety departments (representing 4900 children) involve sexual abuse, it is unclear how many children and young people have been or are being sexually abused while in care. While there are no reliable national figures for the number of children and young people sexually abused while in care, it is clear from the incomplete data presented in the Report on Government Services (SCRGSP, 2015), and reports prompting the current inquiries in South Australia and Victoria, that it continues to occur.

CREATE acknowledges and commends the Royal Commission's efforts to highlight that sexual abuse of children in institutions is occurring now and welcomes the upcoming hearing to specifically examine the incidence, and prevention of child sexual abuse in out-of-home care in all Australian jurisdictions.

CREATE also commends the Royal Commission for considering further the important issues of redress and civil litigation with this consultation paper. CREATE believes some elements of this part of the Royal Commission's inquiry would be best answered by the survivors, who are best placed to evaluate them; namely the amounts for redress payments, eligibility in regard to types of abuse, and whether deeds of release should be required. CREATE's response has focussed on the broader issues of redress including systemic structures, data, support, eligibility, scheme processes, and interim arrangements, as well as some parts of civil litigation regarding limitation periods and model litigant approaches.

# Discussion Issues

## Past and future abuse

### Should the Royal Commission recommend redress processes and outcomes for future institutional child sexual abuse?

Yes. CREATE welcomes the Royal Commission's acknowledgement that child sexual abuse is not only an historical problem; it is happening today. There have been numerous inquiries into the institutional care of children and young people across Australia and there are several inquiries running concurrent to this Inquiry (in different state jurisdictions as well as a Federal Senate Committee Inquiry into Out-of-Home Care). The ongoing need for these inquiries and horrific media stories demonstrates that even with the best of intentions, abuse is likely, and therefore there is also need to ensure there is access to reasonable and just redress for future institutional child sexual abuse survivors.

CREATE notes the Royal Commission's assertion in the discussion paper that "...It is unlikely that there will be many applications for a redress scheme made by or on behalf of those who are still children, as children are more likely to be able to obtain compensation through civil litigation."

The *Seen and heard: Priority for children in the legal process* report (Australian Law Reform Commission, 1997) notes that redress and civil litigation was predominantly initiated on behalf of children, particularly in legal processes involving family law, care and protection, and criminal law systems. It also highlights the formidable barriers that prevent children's participation in legal process, most notably that:

*Even where a child has developmental and legal capacities to participate in legal processes, appropriate participation can be extremely difficult because the processes themselves are not designed for participation by children. Laws and regulations are made and implemented by adults, and the attributes, decision-making processes and language used in legal processes reflect this fact.*

(Australian Law Reform Commission, 1997)

More recently, evidence to the Queensland Child Protection Commission of Inquiry (2013) noted that although the principle of children being able to have a say in decisions that affect their lives is becoming more recognised in Australian policy and practice, in reality children's voices are not often heard in court and decisions are generally made for them, without their input.

The United Nations Convention on the Rights of a Child (1989) includes a requirement that children and young people have the right to have a say in decisions that impact their lives. CREATE believes children should be encouraged to participate in legal processes (including redress) through access to independent, supportive and child-friendly services.

When governments intervene to protect children from serious harm and remove them from their family, they have a duty of care to ensure that the safety and wellbeing of the children



are of paramount importance. CREATE believes that when governments and other institutions fail in their duty of care, they should be held accountable.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Develops and implements a redress scheme that is child friendly to be accessible for children and young people who have been abused while in care, whether past, present or in the future.**

## Data

### Record keeping and accountability

The Royal Commission noted there is very little data on redress and compensation paid to survivors of child sexual abuse in institutions in Australia publicly available, and addressing this gap required summonses or notices to produce.

Data collected on the sexual and other abuse of children in Australia is presented through a number of sources, including state and territory child protection agencies, the Report on Government Services from the Productivity Commission and Child Protection Australia from the Australian Institute of Health and Welfare. CREATE recognises there are state and territory Ombudsmen that report on these data as well.

It could be useful for the Royal Commission to support the Ombudsmen in the states and territories to do more critical analysis of the child protection data that have been collected.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Resources Ombudsman's offices in each state and territory to conduct more critical data collection and analysis into the abuse of children and young people in care.**

### Direct personal response

CREATE acknowledges and supports the principles for direct personal response suggested in the paper; however, it is emphasised that any apology does not absolve or preclude any further action for redress. Any monetary consideration provided under the direct response approach should be taken into account when any further redress is considered.

### Counselling and psychological care

CREATE agrees that the effects of child sexual abuse on mental health functioning have been well documented, and that many survivors will need counselling and psychological care from

time-to-time, throughout their lives. Counselling and psychological care is a necessary part of ensuring justice for victims.

CREATE agrees with the principles for counselling and psychological care as outlined in the consultation paper and acknowledges there are key gaps in services available to survivors. In addition, CREATE notes there are limited services that specialise in child survivors of abuse, and that have the expertise to work with complex trauma in children. Enhancing the availability and access to child specialist services is likely to improve the life outcomes for many young people in care and after leaving care.

## Supporting survivors in care and/or exiting care

While CREATE acknowledges that redress outcomes should include suitable access to counselling and psychological services, CREATE believes that children and young people in care should not have to wait until they exit care or reach adulthood to get the support they require to recover from the trauma of sexual abuse while in care. For children and young people in care, other than their caseworkers and carers, their most tangible resource for securing the support they need is their care plan. Governments espouse in legislation and or policy that children and young people should be involved, where appropriate, in the making of decisions affecting their lives.

Future planning or leaving care planning is essential to ensure that young people leaving care are able to maintain or have access to the support they require to continue their healing and overcome the impacts of abuse in care. This is critical, when as noted by the Royal Commission, victims generally do not seek help until well after they leave care at 18 years of age.

The CREATE Report Card 2013 showed that about a third of the 15–17 year-old respondents ( $n = 325$ ) claimed to know about some form of official “leaving care plan” that had been developed for them. Of these, less than half (48.4%) claimed to have been “Quite “or “Very involved” in its preparation (McDowall, 2013).

CREATE believes children and young people in care should have documented care plans that include access to appropriate support for all aspects of their life (especially to address the effects of sexual abuse if it has occurred) while in care; furthermore, that support must be ongoing after care. Transitioning to independence also means transitioning to the use of adult rather than children’s services; adult mental health can be particularly difficult to navigate. CREATE believes young people should have ongoing support services at least until they are 25 years of age to smooth their transition to independence and ensure they have the best opportunity to fulfil their potential.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Requires state and territory child protection agencies to develop systems and processes to:**

- **ensure accurate record keeping for children and young people in care about sexual abuse they have experienced and the appropriate treatment provided; and**
- **include discussion of redress when planning for future support for those transitioning, if abuse has been demonstrated while they were in care.**

## Monetary Payments

CREATE supports monetary payments for survivors as part of a redress scheme and optional payment of the compensation by instalments. CREATE supports the inclusion of survivors who have received previous monetary payments, provided any previous payments are taken into account when determining final redress. CREATE draws attention to the impact of future claims made by children and young people currently living in out-of-home care and the importance to regularly review the monetary payments to take future needs into account.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Factors future redress claims into any financial model developed.**

## Redress scheme processes

### Eligibility for redress

CREATE believes some elements of this part of the Royal Commission's inquiry would be best answered by the survivors, who are best placed to evaluate the issues of concern; namely eligibility in regard to types of abuse, and whether deeds of release should be required.

With regard to eligibility more broadly, appropriate standard of proof and other issues, CREATE offers the following for consideration.

### Types of institutions included

The *Review of Government Compensation Payments* (The Senate, Legal and Constitutional Affairs References Committee, 2010) highlighted continuing issues surrounding eligibility that is defined by care type. This Royal Commission for the most part, like Queensland's Forde Inquiry in 1999, is looking into abuse in institutional care; however, the vast majority of children and young people (93%) in out-of-home care live in home-based care (including 43% in foster care, and 48% in relative/kinship care; Australian Institute of Health and Welfare, 2014). As evidenced by media reports and other inquiries into government practices and policies in child protection, there are many children and young people who have experienced sexual abuse in home-based care. The Royal Commission highlights a foster care situation in *Hopkins v Queensland* in the District Court of Queensland in 2004. The claimant, who was born in 1974, alleged that, between 1984 and 1987, she was sexually abused by the foster father with whom the Queensland Department of Families had placed her.

Children and young people in home-based care, like their peers in residential and other institutional statutory care, are part of an overarching child protection system. They are in care through no fault of their own and are reliant on the system and those who administer it

to keep them safe. They, like the survivors of abuse in institutions, are often deterred from litigation as a means of seeking reparation for the harm done to them for a range of reasons including affordability.

CREATE believes redress for abuse in out-of-home care needs to include access for those who were abused in non-institutional care placements such as foster and kinship care.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures the redress scheme eligibility criteria includes all children and young people who have been abused while in out-of-home care, including home based care as well as residential and institutional care.**

### Duration of redress scheme

CREATE agrees with the Royal Commission's observation that fixed closing dates may create significant difficulties for survivors and risk excluding eligible applicants. A redress scheme should not be limited by having a fixed closing date. CREATE believes this is particularly important to ensure that survivors of future child sexual abuse are readily able to seek redress when they are prepared to and in the right frame of mind to do so.

The age of the child or young person at the time of being sexually abused will impact on their ability to seek redress, either at the time of abuse or later, depending on circumstances. *The Royal Commission's Interim Report (Volume 1)* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2014, p. 6) notes that "on average it took victims 22 years to disclose the abuse, men longer than women". With this in mind, removing time constraints would provide survivors of abuse (historical and future) with a higher probability of being able to pursue redress when they are ready and able to cope with the additional strain it would likely cause them.

CREATE also acknowledges that placing the onus of proof on survivors, who are reliant on the record keeping of the institution responsible for their care and subsequent failure to keep them safe, is also a significant barrier to their participation in redress and litigation processes.

CREATE supports the removal of fixed closing dates for both historical and future survivors of abuse; and suggests adopting a test of reasonable likelihood rather than a standard of proof used in civil litigation (providing as wide a range of evidence is reviewed as possible).

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures any redress scheme:**

- **does not have fixed closing dates for both historical and future survivors; and**
- **recognises a wide range of evidence (for example, doctor's records, child protection investigations) when considering claims for compensation for victims of child sexual abuse.**

## Publicising and promoting the availability of the scheme

CREATE agrees with the Royal Commission that a key feature of an effective redress scheme is a comprehensive communication strategy. To this end, CREATE is concerned that survivors living away from the state where the abuse occurred may miss opportunities to seek redress because they are unaware that access to a redress program is available. They could consequently be deemed ineligible because of expiration of the program time limits.

CREATE proposes that all redress schemes, including the national scheme being considered by the Royal Commission (if implemented), should be comprehensively promoted Australia-wide to ensure that survivors have the best opportunity to seek redress for the harm done to them.

Information should also be readily available in “youth friendly,” plain language; Victims of Crime schemes should have specific information for children and young people who have experienced sexual abuse while in care that tell people how they can be supported to pursue compensation. This communication strategy should be culturally appropriate and be able to meet the needs of culturally and linguistically diverse groups. Due to the over-representation of Aboriginal and Torres Strait Islander children and young people in out-of-home care, CREATE recommends particular attention be paid to cultural issues that may arise during the promoting and publicising of the redress scheme.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Develops and implements an Australia-wide comprehensive communication strategy for promoting the redress scheme that is culturally appropriate and uses youth-friendly, plain language information resources that are available in a wide range of languages.**

## Application process

CREATE agrees that the application process for redress should be as simple as possible, while obtaining the information necessary to assess eligibility and determine the amount of any monetary payment. Applicants will need to be supported and provided with legal advice to successfully lodge a claim to the redress scheme. This support can be technical, financial, and/or emotional.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures people who have experienced sexual abuse are supported to lodge an application to the redress scheme. This support should include technical, financial, and emotional.**

## Institutional involvement

CREATE supports the Royal Commission's suggestion that decisions about redress should be made by an independent authority. This independent authority should have the power to seek any relevant records, information or comment from institutions subject to an allegation and in turn be able to supply information of the allegation to the institution. The independent authority should have the powers to investigate claims for redress, make redress decisions and compel institutions to comply with orders for information and other requests as deemed necessary.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Establishes an independent authority with the powers to investigate complaints, make redress decisions, and compel institutions to comply with orders for information and other requests as deemed necessary. This could be achieved by either setting up a new authority, or perhaps more economically, through employing existing structures such as the state and territory Ombudsman's offices, provided these agencies are adequately resourced for undertaking the extra responsibilities.**

## Decision-making on a claim

CREATE supports a national redress scheme to provide independence from the institutions in which abuse occurred. In addition, CREATE suggests that separate state and territory redress schemes should include in their decision-making processes a majority of independent experts to ensure that claims against government-run facilities are considered with equal measure to non-government facilities. CREATE agrees that involving people with a mix of legal, medical, psychosocial, and similar skills, including experience in issues relating to institutional child sexual abuse, is likely to ensure that properly informed decisions are made. It is imperative that, if separate state and territory schemes are operating, they follow consistent guidelines.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Establishes a national redress scheme to provide independence from the institutions in which abuse occurred. Any state or territory managed redress scheme must include a majority of independent expert representatives in the decision-making-processes.**

## Support for survivors

CREATE agrees that counselling support should be available for applicants throughout the redress process, and include support for an applicant's family, particularly where survivors are disclosing their abuse to their family for the first time as part of the redress scheme.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures that the redress scheme is resourced to provide counselling support for child applicants (and their family members) through services employing staff with appropriate expertise working with children and young people.**

## Transparency and accountability

CREATE agrees with the principles outlined by the Royal Commission to ensure transparency and accountability by:

- Making its processes and timeframes as transparent as possible;
- Allocating each applicant to a particular contact officer who they can speak to with any queries;
- Operating a complaints mechanism and welcoming any complaints or feedback; and
- Publishing data, at least annually, about applications and their outcomes (with due regard to client confidentiality).

## Interaction with the alleged abuser, disciplinary process, and police

CREATE reinforces the fact this scheme should cover children and young people who are currently in out-of-home care. Therefore, when the institution is contacted by the scheme about allegations regarding current staff members and/or affiliated individuals, it should immediately commence investigation and disciplinary processes. The scheme should adopt a mandatory reporting policy and comply with any legal requirements to report or disclose the abuse.

**CREATE recommends the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures any redress scheme protects children and young people in out-of-home care from future harm by alleged abusers by requiring:**

- **institutions to pursue appropriate investigation and disciplinary processes when they receive advice from the scheme about the allegations; and**
- **the adoption of a mandatory reporting policy, and compliance with legal requirements to report or disclose the abuse.**

## Interim arrangements

### Funding redress

#### Funding required for redress

CREATE believes this issue is best answered by financial experts, governments, and the institutions responsible. However, it is unclear from the information provided whether the estimations include projections for future survivors of abuse not yet reported or experienced. CREATE believes any redress scheme must include capacity and planning to address future institutional sexual abuse.

#### Possible approaches to funding redress

CREATE agrees that a reasonable starting point for funding redress may be that the institutions in which the abuse occurred should fund the cost of:

- Counselling and psychological care, to the extent it is provided through redress;
- Any monetary payment; and
- Administration in relation to determining the claim.

CREATE supports the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. The broad social failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse.

CREATE agrees with arguments supporting governments assuming responsibility as “funders of last resort” on the basis of governments’ social, regulatory, and guardianship involvement. The extent to which governments might take on some or all of the responsibility for funding of last resort might depend in part upon actions they have already taken on redress.

CREATE believes that in cases where an institution no longer exists, and it was not part of a larger group of institutions or there is no successor institution, governments must step up to support those who society, and its systems for the protection of children, has failed.

**CREATE recommends that the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Encourages governments to assume responsibility as “funders of last resort.”**



## Possible Structures

CREATE believes consideration of redress must include addressing accessibility of information as well as opportunity and accountability. Without proper record keeping of their experience in care, and timely access to information that has been compiled about them, children and young people that experience sexual abuse in care may be substantially hindered in their ability to seek redress for the harm done to them.

Clear and consistent policies and processes across jurisdictions are needed to ensure that individuals are able to access personal records detailing abuse that occurred while in care, and any actions taken as a result. When children and young people are discharged from care, no matter what age, they or their parent/guardian need to know whether they may have a case for redress for harm committed against them while in care.

**CREATE recommends the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures the redress scheme:**

- **removes fixed closing dates for both future and historical survivors of child sexual abuse; and**
- **requires that institutions provide claimants with any requested relevant information of their time in out-of-home care.**

## Civil Litigation

### Limitation periods and duty of institutions

CREATE supports the removal of fixed closing dates for both historical and future survivors of abuse; and to make it less onerous for survivors to demonstrate abuse. However, CREATE submits that there are others, including survivors, that are better placed to more specifically define what is practicable and reasonable (from a survivor perspective), and how these changes should be implemented.

In their *Review of Government Compensation Payments*, The Senate Legal and Constitutional Affairs Committee (2010) noted the concerns of Mr Frank Golding who explained that, in addition to statutory limitation periods, legal hurdles include:

[t]he difficulty in proving injury with claimants facing significant evidentiary barriers due to their vulnerability while in care, trauma both during and after care and the passage of time since the events. It is exceedingly difficult to prove even on the balance of probabilities that abuse occurred after so many years when possible witnesses are dead, difficult to find, or when found have become frail or ill ... Yet Care Leavers have been confronted with extraordinary demands for detailed evidence such as the exact date and time of the abuse. Well-paid lawyers are instructed by government to set unreasonably high demands on claimants to demonstrate that their current injuries, including mental health problems, were causally connected to their alleged childhood abuse. Care Leavers find it extraordinarily hard to find evidence because of the difficulties in establishing the

required onus of proof with the passage of time and the loss or destruction of records and material documents.

(The Senate, Legal and Constitutional Affairs References Committee, 2010, p. 26)

These barriers are in addition to the considerable trauma caused to claimants, having to endure the pain, shame, and humiliation involved in having to re-live their experiences in order to apply for redress.

## Identifying a proper defendant

CREATE acknowledges the difficulty survivors have had in finding a proper defendant to sue, particularly with regard to church-run services and activities. CREATE agrees, that it would be reasonable for state and territory governments to require that certain children's services that are authorised or funded by government be provided only by incorporated entities and that those entities be insured against malpractice. This is particularly necessary for entities delivering out-of-home care services.

## Approach to access civil litigation

CREATE supports the development of any model that supports children and young people who have been sexually abused in care to ensure they can access civil litigation.

CREATE respects the right of governments and other agencies to dispute claims against them. CREATE hopes that any guidelines for handling disputes would encourage an environment less adversarial and more empathic to the complexities involved in dealing with child sexual abuse, especially issues of power imbalance and an individual's capacity to understand what has happened to them and to seek help.

**CREATE recommends the Royal Commission into Institutional Responses to Child Sexual Abuse:**

**Ensures civil litigation is accessible for children and young people who have been abused while in care.**

## Conclusion

CREATE thanks the Royal Commission for the opportunity to provide input into this important aspect of its inquiry into Institutional Responses to Child Sexual Abuse. Children and young people who have been sexually abused while in care will require support to address their physical, psychological, and emotional needs for many years. It is our hope that the outcomes of this inquiry overall will help smooth the processes for the survivors of sexual abuse to seek reparation, and also implement systemic change that prevents the occurrence of sexual abuse and enables children and young people in care to reach their full potential.

# References

- Australian Institute of Health and Welfare. (2014). *Child Protection Australia 2012-13. Child Welfare Series No. 58*. Canberra: AIHW.
- Australian Law Reform Commission. (1997). *Seen and heard: priority for children in the legal process*. Canberra: Commonwealth of Australia. Retrieved February 5, 2015, from <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>
- Flatau, P., Thielking, M., MacKenzie, D., & Steen, A. (2015). *The cost of youth homelessness in Australia study*. Melbourne: The Swinburne Institute for Social Research.
- Forde Inquiry. (1999). *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions*. Brisbane: Queensland Government.
- McDowall, J. J. (2009). *CREATE Report Card 2009 - Transitioning from care: Tracking progress*. Sydney: CREATE Foundation.
- McDowall, J. J. (2013). *Experiencing out-of-home care in Australia: The views of children and young people (CREATE Report Card 2013)*. Sydney: CREATE Foundation.
- Queensland Child Protection Commission of Inquiry. (2013). *Taking Responsibility: A Roadmap for Queensland Child Protection*. Brisbane: State of Queensland (Queensland Child Protection Commission of Inquiry).
- Royal Commission into Institutional Responses to Child Sexual Abuse. (2014). *Royal Commission into Institutional Responses to Child Sexual Abuse Interim Report Volume 1*. Canberra: Commonwealth of Australia.
- SCRGSP. (2015, January 28). *Australian Government Productivity Commission*. Retrieved January 30, 2015, from Report on Government Services 2015 Community Services: <http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community-services>
- The Senate, Legal and Constitutional Affairs References Committee. (2010, December 6). *Review of Government Compensation Payments*. Retrieved February 5, 2015, from Parliament of Australia: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/govtcomp/report/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2010-13/govt\\_comp/report/report.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/govtcomp/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/govt_comp/report/report.ashx)