Responses to Questions on Notice

Arising from Briefing to Parliamentary Committee 14 September 2016

Responses due 21 September 2016

Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016

Mr Rob Pyne MP, Independent Member for Cairns

As at time of supplying these answers to Questions on Notice, 21 September 2016, the transcript of the briefing of 14 September is yet to be provided and so exact wording of all questions in not available.

This document provides answers to the Questions on Notice as recalled.

Once the transcript is made available, any remaining outstanding questions will at that time be promptly addressed. We look forward to receiving the transcript.

Question from the Chair regarding application of Recommendation 87:

I refer the Committee to my Opening Statement in which I address this question, in particular the Supplement to the Opening Statement, tabled during my briefing to the Committee on 14 September 2016, which answers this question thoroughly.

The provisions put forward in this Private Member's Bill do not contravene Recommendation 87 of the Royal Commission's Redress and Civil Litigation Report for the reasons stated, namely, that the provisions which seek to inform the court on resolving certain applications to stay proceedings are *not* a consequence of the removal of the time limits (it being the essence of Recommendation 87 that stay of proceedings should not be effected *as a consequence of the removal of time limits*).

In fact, the provisions regarding stays of proceedings put forward by the Private Member's Bill are unrelated to the mere removal of time limits; they are not a 'consequence of the removal of time limits'.

The proof of this, is that if the impact to stay of proceedings were a direct consequence of the removal of time limits, then the specific provisions in the Bill would not be needed; yet the provisions are needed to bring about the intended outcome. Put another way, the fact that the issue needs to be addressed specifically, above and beyond the removal of the time limits elsewhere in the Bill, is proof that the stay of proceedings provisions are not a consequence of the removal of time limits.

Instead, these are specific and purposeful provisions included intentionally in the Bill to address a grave matter of social injustice that would otherwise occurs if such provisions were not included.

Question from the Chair regarding transitional arrangements for a person in a specific scenario. The scenario raised by the Chair was that of a victim of abuse receiving health care treatment via a 'Deed of Release' or 'Settlement Agreement' asking what would be the impact on the provision of healthcare during any process whereby the old unjust Deed of Release was revisited or renegotiated:

The person should receive no disruption to healthcare under the provisions of the Private Member's Bill.

This is because the health care is not being provided by virtue of the deed or settlement being revisited, but in fact is being provided (or should be being provided) in compliance with Recommendation 9 of the Royal Commission's *Redress and Civil Litigation Report* – the provision of healthcare to victims of abuse.

Recommendation 2 of the Royal Commission's *Redress and Civil Litigation Report* clearly states that provision of health care and financial compensation are to be two separate matters. This means that institutions or other negligent parties are required to provide health care in compliance with the minimum standards as set out in Recommendation 9 and that this is non-negotiable. Any litigation or redress negotiations for financial compensation are unrelated from the institutions duty to provide healthcare.

The hypothetical person in the Chair's scenario should receive no interruption to provision of healthcare while renegotiating their existing unjust settlement deed.

The question from the Chair highlights the urgency for private and government institutions to immediately begin to properly and more formally comply with Recommendation 9, which has been made public for 12 months now.

The Chair's question highlights that presently the Government's policies do not comply with Recommendation 9 of the *Redress and Civil Litigation Report* of the Royal Commission.

The fact is, that were Recommendation 9 properly applied (such as through the "Health Care Deed" that has been provided at the Committee's request as an attachment to this document) then the majority of victims of abuse would experience an *improvement* in the health care provided to them during any period of transition from an old, unjust settlement deed to a new, just settlement deed (and beyond).

This is because the majority of settlement deeds in existence either do not provide any provision for ongoing healthcare (instead being a small lump sum payment leaving the victim to otherwise fend for themself) or the health care provisions provided in the settlement deed falls far short of the health care requirements of Recommendation 9.

The Committee requested to see a copy of the Health Care Deed and to receive more background information on Recommendation 9 and this is duly provided at the end of this response paper.

Question regarding figures provided by the Attorny-General's department on estimated cost of implementation of policy objectives:

Government modelling and estimate not provided to us

The figures we were asked to comment on during the briefing of 14 September were described as being estimates of the cost of implementing the policy objectives as provided to the Committee by the Attorney-General's office in response to the Committee's request for these figures on 31 August 2016, taken by the Attorney-General's office as a Question on Notice.

The figures subsequently provided by the Attorney-General's office to the Committee have not yet been provided to us prior to being asked to comment on the figures.

It is impossible to comment on the figures mentioned during the briefing of 14 September as the figures were mentioned for the first time and with no context and without description of the underlying modelling that produced the figures.

An analysis of the figures requires an analysis of the underlying modelling that led to those figures.

We are yet to be provided with a copy of the modelling used by the Attorney-General's office.

We request the Committee provide us with all written submissions of the Attorney-General's office to the Committee so that we may provide objective review, for the benefit of the Committee.

A general observation about costs estimates

What we are able to say is this: Any modelling that arrives at a single estimate figure is questionable as there are multiple variables in modelling this policy objective and the potential ranges of those variables may be substantial. More accurate or reliable modelling should arrive at an estimates *range,* stating modelled minimum and maximums.

Variables include: the number of victims, the extent of injury, the degree of liability, the number of victims who can prove a case to a legal standard, the number of victims who would choose redress over litigation, any consideration of shared culpability (such as between state and private institutions), any reduction for previous paid settlements, etc. There will be further variables.

I refer the Committee to my comments on costs in my Opening Statement of 14 September. In this I state that the majority of victims of child abuse would prefer a fair redress scheme over litigation, and I state the reasons for this assumption and note this is an assumption also adopted by the Government and by other learned stakeholders including NGOs and Royal Commission submissions.

This substantially reduces the potential financial liability arising from the implementation of the policy objectives.

It does not however reduce the imperative of empowering victims of abuse with the right to litigate for those who should choose to do so.

Question regarding options for redress or compensation for victims of abuse who lack the evidence to prove a litigation (noting that child abuse often occurs in private without witnesses):

I refer the Committee to my Opening Statement in which I address this very question.

The short answer is: any victim of abuse with a right of action, who finds themselves unable to meet the standards of proof, should have the option of participating in redress, such as a National Redress Scheme, or any state alternative should a National Redress Scheme not eventuate.

We support the creation of a National Redress Scheme as per the recommendations of the Royal Commission and as per common sense and a fair go to survivors of abuse.

Particularly we support a National Redress Scheme that places the cost for redress with the abusive or negligent party, as this maintains accountability for misconduct. In other words, the institutions responsible for the abuse, should be responsible for the financial cost of redress.

A specific private institution would therefore be responsible for meeting the cost of redress of victims of that specific private institution. A government institution would be responsible for meeting the cost of redress of victims of that government institution. We support the principle that, in the case of private institutional abuse, that governments be the redress financier of last resort – namely that tax payers should not be asked to bail out institutions who have abused children, lied for decades, and who continue to own millions to billions of dollars in property assets (often gifted to them by the Crown in the first place).

Many victims would prefer to participate in redress (provided it is fair and reasonable) rather than the stress of litigation. Some victims may want to litigate however lack the evidence or even the emotional strength to litigate. For all of these people a properly structured redress scheme offers appropriate restitution, provided the calculation of quantums of damages reasonably reflects the injury and needs for recovery.

However this should not preclude those victims who are motivated to litigate, and have the evidence to litigate, from so doing.

Removing time limits for all victims, and allowing past unjust settlement deeds is an essential component to enabling this dark chapter of Queensland's history to begin to be resolved.

It also acts as a Quality Assurance measure to institutions including governments to ensure that any redress scheme is created with fair and reasonable quantums. A government tasked with establishing a redress scheme, whose alternative payment liability is 'zero dollars' is less likely to be properly motivated to established fair quantums than a government who faces the real potential of litigation for full damages if the redress scheme does meet the 'fair and reasonable' test.

Recommendation 9 of the 2015 *Redress and Civil Litigation Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse

I thank the Committee for its interest in this crucial policy issue for improving the Health Care and well-being of survivors of abuse.

Recommendation 2 of the Report, states that responses to survivors should comprise three elements: apology, health care and financial compensation.

Recommendation 9 then lays out the minimum health care considered reasonable.

For the Committee's benefit Recommendation 9 is reproduced here:

> *9. Counselling and psychological care should be supported through redress in accordance with the following principles:*
>
> *a) Counselling and psychological care should be available throughout a survivor's life.*
>
> *b) Counselling and psychological care should be available on an episodic basis.*
>
> *c) Survivors should be allowed flexibility and choice in relation to counselling and psychological care.*
>
> *d) There should be no fixed limits on the counselling and psychological care provided to a survivor.*
>
> *e) Without limiting survivor choice, counselling and psychological care should be provided by practitioners with appropriate capabilities to work with clients with complex trauma.*
>
> *f) Treating practitioners should be required to conduct ongoing assessment and review to ensure treatment is necessary and effective. If those who fund counselling and psychological care through redress have concerns about services provided by a particular practitioner, they should negotiate a process of external review with that practitioner and the survivor. Any process of assessment and review should be designed to ensure it causes no harm to the survivor.*
>
> *g) Counselling and psychological care should be provided to a survivor's family members if necessary for the survivor's treatment.*

Many institutions currently provide some form of health care but I am yet to see evidence of any institution who provides health care that complies with Recommendation 9. They all fall far short, such

as by offering a capped number of psychologists visits (usually limited to the Medicare funded "10 visits" under a mental health plan) or dictate the choice of practitioner to one provided by the institution, or other similar inappropriate restrictions.

This is despite Recommendation 9 being in existence now for over 12 months.

I am yet to be made aware of any institution, including the Government, making any policy announcement or statement of intent to work towards complying with Recommendation 9.

This is despite private institutions and governments making public commitments more generally to 'comply with the recommendations of the Royal Commission'. Such words are yet to be translated into action.

One could be forgiven for interpreting this as indicating that the institutions are hoping to ignore Recommendation 9 for as long as possible and hope no-one notices.

Survivors have noticed.

The formalisation of the provision of health care, such as a signed Deed committing to health care in compliance with Recommendation 9 would provide assurance and safe guards to survivors, which is important to provide in a tangible way for the healing of damaged persons to truly take the injury of the past, and the damage of the present, to create the healing of the future.

By providing the commitment that health care will continue to be provided into the future provides dignity to victims of abuse.

Victims/survivors would be provided with the comfort and security of knowing that their health care needs into the future shall be provided as appropriate and without any further legal battles.

The removal of the need for further litigation is a cost saving for the institution as much as for the survivor and is a preservation of the image of the institution as caring and committed to reform.

A provision such as the Health Care Deed is a very positive and bridge-building commitment that focuses on actions required *moving forward* to assist survivors to begin to reach their full potential: to become healthy balanced people, partners, parents and to become productive contributors to society as all survivors want and deserve to be.

An important element of this method of providing for health care (as opposed to lump sum payments), is that the institution provides the cost of health care direct to the health care provider, and so there can be no doubt that the cost is an investment that goes towards the sole purpose to which it is intended.

This is to everyone's benefit not least of all the victim who may be particularly vulnerable to issues of addiction, abusive relationships, or other vulnerabilities. Payment of health care costs directly to providers prevents this expenditure from unintended diversion.

This reduces costs to institutions in the situation where a survivor fails to engage with treatment: no treatment will mean no expense to the institution. This is not the case under current lump sum arrangements.

An often cited barrier to victims engaging with health care is the knowledge that they cannot afford ongoing care. The provision of health care under Recommendation 9, such as via the Health Care Deed, removes this barrier.

Greater compliance with health care should be predicted to result in improved clinical outcomes and subsequent decreased injury or loss.

This could potentially reduce the financial liability of the institution (private or government) with regards projected losses.

Perhaps most importantly of all, the Health Care Deed, in its current recommended form, allows for survivors to be well. This is the true dynamic of injury arising from child abuse.

Recommendation 9 allows for the true episodic nature of such injuries to be provided for; ie that persons are not either 100% sick all of the time, or 100% well all of the time, but that survivors do naturally go through periods of wellness as well as episodes of recurrence of symptoms.

This is normal, this a natural dynamic, this is well observed medically. It is not well recognised in the current Australian litigation framework (designed by lawyers not doctors) that assumes that injuries must be present persistently to have meaning and fails to recognise the true impact of *episodic recurring symptoms* on families and employment.

People lose jobs when they are unfit for duty on regularly recurring episodic basis, not simply because they become permanently unfit for duty.

The benefits for formally complying with Recommendation 9 are significant. It is a win-win-win for victim, institution and community, and can be summarised as follows:

Benefits to survivor:

- Genuine access to health care (for injuries arising from the abuse)
- Best possible likelihood of true recovery and long term maintenance of recovery
- Freedom to recover and become well – not trapped in 'victim' status
- Provision exists for episodic need, ie occasional relapse
- Not provided a lump sum at a time when potentially most vulnerable
- Access to health care = better engagement with health care = better recovery
- Flow on benefits to family, relationships, stability, economic productivity and self respect

Benefits to institution:

- Reengage stakeholder trust – being seen to take most morally appropriate action
- Significant reduction in financial liability overall
- Only actual health care costs are paid out – not an anticipated lump sump for life time costs
- Do not pay for costs that do not exist
- Money paid is guaranteed to go towards intended purpose (health care) avoiding the risk of diversion of a lump sum (such as to addiction or other risks)
- Expenditure on direct health care may be more welcomed by taxpayers than lump sum payment for health costs
- As a survivor recovers – due to genuine engagement with health care – costs should reduce
- Provision of better quality and better guaranteed health care could potentially reduce calculation of long term liability or risk for other costs such as future lost earnings (due to better anticipated recovery/protective factors)

Benefits to community

- Greater medical recovery of the individual
- Less public health care cost to the community, such as crisis services
- Potential greater productivity of the individual, becoming an economic contributor
- Healthier family relationships – interruption of the inter-generational cycle of mental health
- Rebuilding of trust in society's institutions

I urge the Committee to embrace Recommendation 9, and the Health Care Deed, and to recommend that the government make formal commitment to comply with Recommendation 9 and I ask that Committee endorse the Health Care Deed to the House and to recommend the government, and private institutions to begin to adopt it for survivors of abuse.

Mr Rob Pyne MP

Independent Member for Cairns

21 September 2016

Attached: Health Care Deed exemplar

INSTITUTION NAME

AND

SURVIVOR'S NAME

DEED OF AGREEMENT

This Deed is made:

BETWEEN **INSTITUTION NAME** of address ("**……..**")

AND **SURVIVOR'S NAME** of [insert address] ("**……..**")

BACKGROUND

A. [statement of fact that survivor attended …the institution… with dates of attendance]

B. [statement of fact that offender was in X role at …the institution… and employed by the …the institution…]

C. [statement of fact as to the Sexual Abuse]

D. The …the institution… failed to take reasonable steps to prevent the Sexual Abuse.

E. The …the institution… has agreed to abide by the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, in particular paragraph 9 of the Final Report titled 'Redress and Civil Litigation Report'.

F. The …the institution… agrees to pay for ...Survivor's name...'s Counselling and Psychological Care Costs for Medical Conditions on the basis of the Terms set out in this Deed.

G. The …the institution… has a right to review ongoing Counselling and Psychological Care and the exercise of this right is described and limited in the Terms of this Deed.

THE PARTIES AGREE:

1. DEFINITIONS

In the interpretation of this Deed the following definitions shall apply:

The Institution… means the …the institution…, and includes its subsidiaries, substitutes and assigns.

Family Member means the spouse, partner, parent, child, sibling, grandparent, grandchild of ...Survivor's name....

Counselling and Psychological Care Costs means the costs of Counselling and Psychological Care for Medical Conditions including but not limited to psychological and psychiatric care, counselling, Medical Practitioner's fees, hospital fees, costs of medication, and the costs of parking at or costs of public transport to and from attendances at medical appointments.

Medical Condition means any medical condition caused or exacerbated by the Sexual Abuse.

Medical Practitioner means 'health practitioner' as that term is defined by section 5 of the Health Practitioner National Law and for the purposes of this Deed includes counsellors.

Report means the 2015 Final Report of the Royal Commission titled 'Redress and Civil Litigation Report'.

Royal Commission means the Royal Commission into Institutional Responses to Child Sexual Abuse.

Sexual Abuse means the criminal sexual abuse perpetrated by XXXX against ...Survivor's name....

2. TERMS

(a) The …the institution… will pay ...Survivor's name...'s Counselling and Psychological Care Costs for Medical Conditions suffered by ...Survivor's name..., for the term of his life, commencing from the date of the Sexual Abuse.

(b) The …the institution… agrees that ...Survivor's name...'s need for Counselling and Psychological Care may be on a continuous basis or may be on an episodic basis depending on the Medical Condition.

(c) The …the institution… agrees that ...Survivor's name... is allowed flexibility and choice in relation to Counselling and Psychological Care. This includes, but is not limited to, flexibility as to choice of practitioner, frequency and modality of Counselling and Psychological Care.

(d) The …the institution… agrees there are no fixed limits on the Counselling and Psychological Care to be provided to ...Survivor's name.... This includes, but is not limited to, there being no fixed limits on cost, frequency or modality of Counselling and Psychological Care.

(e) The …the institution… will pay the Counselling and Psychological Care Costs of a Family Member of ...Survivor's name... if a Medical Practitioner confirms the Counselling and Psychological Care is necessary for ...Survivor's name...'s Counselling and Psychological Care.

(f) The …the institution… will pay the Counselling and Psychological Care Costs upon receipt of a tax invoice from a Medical Practitioner, or if required by the Medical Practitioner, prior to the provision of the Counselling and Psychological Care.

(g) The …the institution… agrees that payment by The …the institution… of the Counselling and Psychological Care Costs confers no right of access by The …the institution… to ...Survivor's name...'s medical records in whole or in part and the …the institution… waives all rights of access to medical records express or implied, conferred by any other Act, law, or rule of law.

(h) ...Survivor's name... agrees that The …the institution… is entitled to request a review of ...Survivor's name...'s Counselling and Psychological Care and The …the institution… agrees that this entitlement is limited to one request every two years. The …the institution… agrees that its request for a review will be satisfied upon receipt of a letter from ...Survivor's name...'s Medical Practitioner stating words to the effect "...Survivor's name... requires ongoing Counselling and Psychological Care for Medical Conditions caused or exacerbated by the Sexual Abuse". The …the institution… agrees that requesting or receiving a review confers no right of access by The …the institution… to ...Survivor's name...'s medical records in whole or in part.

(i) ...Survivor's name... agrees that The …the institution… is entitled to request a second opinion of ...Survivor's name...'s Counselling and Psychological Care and The …the institution… agrees that this entitlement is limited to one request every five years. The …the institution… agrees that ...Survivor's name... will choose the Medical Practitioner who will perform the second opinion. The …the institution… agrees its request for a second opinion will be satisfied upon receipt of a letter from the Medical Practitioner performing the second opinion

stating words to the effect "...Survivor's name... requires ongoing Counselling and Psychological Care for Medical Conditions caused or exacerbated by the Sexual Abuse". The …the institution… agrees that requesting or receiving a second opinion confers no right of access by The …the institution… to ...Survivor's name...'s medical records in whole or in part.

(j) The parties agree to be bound by the terms of this deed, and agree that any amount due under this deed is enforceable as a debt.

(k) The parties agree this deed does not in any way affect or limit rights or entitlements ...Survivor's name... has or may have under the law or pursuant to recommendation 2(c) of the Report as this Deed is limited to providing for payment of ...Survivor's name...'s Counselling and Psychological Care pursuant to recommendations 2(b) and 9 of the Report.

3 GENERAL

(a) This deed may be executed in counterparts. An exchange of signed counterparts of this deed by email or facsimile shall constitute a valid and binding deed between the parties.

(b) This deed shall be governed by and construed in accordance with the laws of Queensland and the parties submit to the non-exclusive jurisdiction of the courts of that state.

(c) In the event that any provision of this deed, or any part thereof, is held to be void or invalid, such provision or part thereof shall be severed from the whole and the balance of the deed or the provision (as the case may be) shall remain in full force and effect.

(d) Each party must take all steps, execute all documents and do everything necessary or desirable to give full effect to the terms of this deed.

(e) This deed is the entire agreement between the parties on the subject of payment for ...Survivor's name...'s Counselling and Psychological Care Costs pursuant to recommendations 2(b) and 9 of the Report, and supersedes all communications, negotiations, arrangements and agreements, whether oral or written, between the parties in respect of the matters that are the subject of this deed.

EXECUTED AS A DEED ON DAY OF 2016

SIGNED SEALED & DELIVERED BY THE INSTITUTION NAME by its authorised officer in the presence of:))	..... Signature of authorised officer
..... Signature of witness	Authorised officer's name:
..... Print name of witness	Authority of officer:

SIGNED SEALED & DELIVERED BY)
SURVIVOR NAME in the presence of:)

.....
Signature

.....
Signature of witness

.....
Print name of witness