



Law Council  
OF AUSTRALIA

# Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017

Senate Community Affairs Legislation Committee

12 February 2018

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful to its National Criminal Law Committee, National Human Rights Committee, as well as the Law Society of South Australia, the Law Society of New South Wales, the Law Institute of Victoria and the Queensland Law Society, for their assistance with the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Community Affairs Legislation Committee regarding the proposed measures contained in the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (**the Bill**). The Bill seeks to give effect to the recommendations of the Royal Commission into Institutional Responses to Child Sex Abuse (**Royal Commission**) by establishing a national redress scheme for survivors of child sexual abuse (**Scheme**).
2. The Law Council welcomes the introduction of the Bill and the recent announcement by the Prime Minister that a national apology will be issued to survivors before the end of the year. The Law Council has long supported the establishment of a national redress scheme for survivors of institutional child sexual abuse.<sup>1</sup> In the view of the Law Council, the Scheme should be guided by the following principles, namely it must:
  - provide a fair, expeditious and transparent process for responding to claims;
  - be simple and clear for survivors and their families;
  - not create unnecessary barriers for survivors;
  - have safeguards to ensure that it does not become mechanistic and undermine the efficacy of any pastoral response the survivor may be seeking; and
  - not impede any other legal rights enjoyed by survivors, including civil justice mechanisms.
3. Further, the Law Council notes that ‘the purpose of the Bill is to implement the Commonwealth’s, and each participating institution’s response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse’s Redress and Civil Litigation Report’.<sup>2</sup> Therefore, the Law Council considers that the Scheme, and the Bill, should be guided by the recommendations of the Royal Commission. Where it departs from those recommendations, the justification for doing so should be clear and reasonable.
4. To that end, the Law Council has concerns with the following aspects of the Bill:
  - a. the use of delegated legislation within the proposed measures;
  - b. current and future eligibility for redress under the Scheme;
  - c. the process for reviewing decisions made under the Scheme;
  - d. the legal effects of an offer made under the Scheme; and
  - e. privacy concerns regarding disclosure of protected information.
5. Noting that the Bill will require amendment should the States refer their powers to the Commonwealth and opt-in to the Scheme, the Law Council has made a number of recommendations directed at improving the Bill and by extension, the Scheme. These recommendations are listed throughout this submission. The Law Council has also commented on a variety of other matters raised by the Bill and the Scheme.

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<sup>1</sup> Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse - Redress and Civil Litigation Consultation Paper* (19 March 2015) <[www.lawcouncil.asn.au/resources/submissions/royal-commission-into-institutional-responses-to-child-sexual-abuse---redress-and-civil-litigation-consultation-paper](http://www.lawcouncil.asn.au/resources/submissions/royal-commission-into-institutional-responses-to-child-sexual-abuse---redress-and-civil-litigation-consultation-paper)>.

<sup>2</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 4.

6. Finally, it is noted that while the Royal Commission was restricted by Letters Patent to only make recommendations about sexual abuse, governments and institutions are not so limited and can and should extend the findings to all forms of child abuse, including serious physical abuse that occurred in or around institutions and caused serious and long-term damage. The Law Council suggests that the Government should consider appropriate reform so that victims of severe physical abuse and neglect, deprivation of education or separation from culture, which can also have lifelong implications, can access appropriate redress.

## Key measures

7. The Scheme created under the Bill consists of three forms of redress: a monetary payment of up to \$150,000, access to counselling and psychological services, and the ability for survivors to receive a direct personal response from responsible institutions.
8. The main objects of the Bill are set out at proposed section 3, clarifying that the Scheme seeks to recognise and alleviate the impact of past institutional child sexual abuse and related abuse, and to provide justice for the survivors of that abuse.
9. Entitlement to redress is dealt with under proposed Division 2 of Part 2-2 of the Bill, with eligibility defined at proposed section 16 as an Australian citizen or permanent resident that was sexually abused within the scope of the scheme. Elaborating on the decision to limit the scheme in this way, the Explanatory Memorandum states:

*This eligibility requirement is included to mitigate the risk of fraudulent claims and to maintain the integrity of the Scheme. It would be very difficult to verify the identity of those who are not citizens, permanent residents or within the other classes who may be specified in the Rules. Removing citizenship requirements would likely result in a large volume of fraudulent claims which would impact application timeliness for survivors.<sup>3</sup>*

10. The Scheme covers abuse that has occurred prior to the start of the Scheme (proposed as 1 July 2018), and a responsible institution participating in the Scheme must be considered responsible for that abuse pursuant to proposed section 21.
11. Proposed section 15 states that there must be a 'reasonable likelihood' that a person is eligible for redress under the scheme, a threshold that the Explanatory Memorandum defines as 'the chance of an event occurring or not occurring which is real – not fanciful or remote'.<sup>4</sup> This standard is aligned with the recommendations of the Royal Commission.<sup>5</sup>
12. If an application is accepted, proposed sections 33 and 34 of Bill discuss the 'assessment matrix' which the operator will use to determine redress payable.
13. Under proposed section 40, if an offer of redress is accepted, a person must release all participating institutions that have been deemed responsible for the abuse from liability for the abuse that is within the scope of the Scheme.
14. Additional rules relating to the Scheme may be determined by the Minister under proposed section 117 in the form of a legislative instrument. Such rules may be developed across a range of prescribed matters, or as necessary or convenient for

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<sup>3</sup> Ibid 13.

<sup>4</sup> Ibid 12.

<sup>5</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendation 57.

carrying out or giving effect to the scheme. This will include the power to make rules determining:

- whether a person is eligible for redress under the scheme (proposed subsection 16(2));
- whether a participating institution is responsible for the abuse of a person (proposed subsection 21(7));
- whether an institution is a Commonwealth institution (proposed subsection 24(c));
- whether an institution is a Territory institution (proposed paragraph 25(2)(b));
- whether an institution is a non-government institution of a Territory (proposed subsection 26(3));
- requirements prescribing how the Operator must determine the proportion of each liable institution's share of the cost of providing the person with access to counselling and psychological services (proposed paragraph 32(2)(d) and proposed subsection 48(1));
- the assessment matrix for the purposes of working out the amount of redress payment for a person (proposed subsection 34(1));
- matters relating to the payment of redress payments (proposed subsection 44(2));
- matters relating to counselling and psychological services (proposed subsection 48(1)); and
- the Operator's power to disclose protected information (proposed subsection 77(3)).

15. These rules will constitute a 'legislative instrument' (see proposed subsection 117(1) of the Bill), and as such, the rules will be subject to the provisions of the *Legislation Act 2003 (Legislation Act)*. Section 42 of the Legislation Act outlines the process for disallowing legislative instruments.

## The use of delegated legislation

16. The Law Council accepts that there is a need for a reliance on legislative instruments to provide the flexibility for the Scheme to respond to additional matters that may arise in the future. However, the Law Council has concerns with the reliance on delegated legislation to address matters integral to the Scheme, which would more appropriately be addressed in primary legislation.

17. On this point, the Law Council notes the general concerns of the Senate Standing Committee for the Scrutiny of Bills (**Committee**) outlined in its 2016 Annual Report regarding the inappropriate delegation of legislative power for matters that ought to be exercised by Parliament, noting that 'significant matters should be undertaken directly by Parliament and not left to the subordinate legislation disallowance process'.<sup>6</sup>

18. The Committee has also raised specific concerns in relation to the current Bill, noting that 'a number of important elements of the [redress] scheme are proposed to be left to delegated legislation to determine'.<sup>7</sup> The Committee identified that:

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<sup>6</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report (2016)* [33].

<sup>7</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2017* (2017) 8.

*... significant matters, such as who is or is not eligible under the redress scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no explanation as to why it is necessary to allow the rules to prescribe persons who are or are not eligible under the scheme.*<sup>8</sup>

19. The Committee suggested that the legislation as proposed ‘undermines effective parliamentary scrutiny as it avoids detailed parliamentary debate on the content of important provisions’.<sup>9</sup> The Law Council shares this concern, noting that it is extremely difficult to meaningfully assess the appropriateness of the Scheme without additional detail on important matters such as rules regarding eligibility and institutional responsibility.
20. In light of these observations, the Law Council considers it inappropriate to delegate eligibility for redress and institutional responsibility to subordinate legislation and recommends that such matters are dealt with in primary legislation.

#### **Recommendation**

- **Rules regarding substantive matters such as Scheme eligibility and institutional responsibility should be provided for in primary legislation.**

## Forfeiture of rights upon acceptance of offer

21. The Bill provides that an offer of redress will remain open for a period of no less than 90 days,<sup>10</sup> and that when an eligible person accepts such an offer, the person releases all institutions participating in the Scheme from all civil liability claims arising from the abuse.<sup>11</sup> That is, after accepting an offer of redress, a person cannot bring a civil suit (either individually or as part of a class) against institutions participating in the Scheme, for abuse covered by the Scheme.
22. The Law Council supports the establishment of a redress scheme but considers that it should not undermine survivors’ rights to pursue claims through civil litigation if they so choose. The Law Council views any redress scheme as forming part of a broader response to institutional child sex abuse, which includes reforms to civil litigation to facilitate survivors’ access to a civil remedy. This is a long-standing position the Law Council has previously detailed in numerous submissions to the Royal Commission.<sup>12</sup>
23. For some survivors, redress schemes may be the only opportunity to receive compensation and obtain ‘justice’, due to the inability to access civil litigation on the grounds of financial incapacity, statute of limitation issues or the psychological and emotional impact of bringing a civil case.<sup>13</sup> Other survivors may be willing and able to

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 17.

<sup>10</sup> Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) proposed subsection 38(1).

<sup>11</sup> Ibid proposed subsection 40(1).

<sup>12</sup> Some of these issues have already been identified in the Law Council’s past submissions to the Royal Commission: see Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse - Redress and Civil Litigation Consultation Paper* (19 March 2015) <[www.lawcouncil.asn.au/resources/submissions/royal-commission-into-institutional-responses-to-child-sexual-abuse--redress-and-civil-litigation-consultation-paper](http://www.lawcouncil.asn.au/resources/submissions/royal-commission-into-institutional-responses-to-child-sexual-abuse--redress-and-civil-litigation-consultation-paper)>.

<sup>13</sup> Ibid 3.

bring a civil case, and therefore will need to assess whether they are likely to fare better financially (and otherwise) by taking civil action or by accepting an offer of redress. It is a decision for which survivors require adequate time to consider, based on their personal circumstances. It also requires survivors to have access to appropriate legal advice, so they can be fully informed about the adequacy of the offer compared with the prospects of success in civil litigation.

24. The Law Council acknowledges that this aspect of the Bill reflects the recommendation of the Royal Commission that acceptance of an offer discharge Scheme participants of further civil liability.<sup>14</sup> Further, the Law Council notes that a mechanism to release participating institutions from further civil claims once an offer of redress has been made may be practically necessary to procure the involvement of institutions in the Scheme. However, the Law Council can only support survivors being required to release institutions from civil liability upon acceptance of an offer of redress where:
- a. survivors are afforded adequate time to consider whether or not to accept an offer; and
  - b. survivors are guaranteed free legal advice as to whether to accept the offer or pursue a civil claim instead.
25. The Law Council's suggestions as to how these recommendations can be implemented into the Bill are set out below.

### **Timeframe for acceptance of offer**

26. Proposed subsection 38(1) provides that the acceptance period for an offer of redress to a person is the period determined by the Operator, which must be at least 90 days, starting on the date of the offer. While the Bill allows for an application to extend the acceptance period, it stipulates that these will only be granted in 'exceptional circumstances'.
27. The Royal Commission recommended that an offer of redress should remain open for a period of one year.<sup>15</sup> The Law Council agrees with this recommendation and considers that a 90-day acceptance period is inadequate. A decision to accept an offer of redress will be a significant decision for many survivors. Notably, it is legally significant decision, given that accepting an offer of redress waives a survivor's rights to bring a civil claim.
28. Given the legal implications of accepting an offer, it is essential that survivors have the opportunity to seek and receive independent legal advice as to whether they should accept an offer or pursue a civil claim. The provision of expert legal advice as to whether a person should accept an offer of compensation or pursue a civil claim involves assessing prospects of success by taking into account and balancing a myriad of complex factors, for example, limitation periods, whether sufficient evidence is available given the passage of time, ability of the survivor to finance a legal case to fruition, ability of an institution to pay out, and the emotional and psychological impact. In the Law Council's experience, it does not consider that it is feasible for this to occur in 90 days, especially given the volume of survivors predicted to come forward to make an application for compensation under the Scheme.

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<sup>14</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendation 63.

<sup>15</sup> *Ibid* recommendation 59.

29. The Law Council considers the 90-day time period to be especially unrealistic, noting that current providers are overburdened and the Bill does not establish how the free expert legal support services will be funded nor how they will operate in the context of the Scheme. The Law Council considers that the Bill should be amended to extend the acceptance period to one year, in line with the recommendation of the Royal Commission.

#### **Recommendation**

- **The Bill should be amended to extend the period for acceptance of an offer of redress from 90 days to one year.**

## **Expert legal support services**

### **Requirement to fund legal support services**

30. The Explanatory Memorandum acknowledges that legal advice is necessary for survivors to make an informed decision on whether or not to accept an offer of redress and provides that:

*... the Scheme will deliver free, trauma informed, culturally appropriate and expert Legal Support Services. These services will be available to survivors for the lifetime of the Scheme at relevant points of the application process, and will assist survivors to understand the implications of releasing responsible institutions from further liability. This means that survivors will be able to make an informed choice as to whether they wish to accept their offer and in doing so release the institution from civil liability for abuse within the scope of the Scheme or seek remedy through other avenues.<sup>16</sup>*

31. The Law Council welcomes this undertaking by the Government that the Scheme will deliver legal support services. However, the Law Council notes that there is no actual requirement in the Bill that the Scheme fund or deliver legal support services. The Law Council considers that this requirement should be enshrined in the Bill and, in line with the Royal Commission's recommendations, should at a minimum create a requirement for the Scheme to:

- a. fund support services and community legal centres to assist applicants to apply for redress; and
- b. select support services and community legal centres to cover a broad range of likely applicants, taking into account the need to cover regional and remote areas and the particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.<sup>17</sup>

32. Further, between the text of the Bill and Explanatory Memorandum, it is not clear whether funding for legal support services will extend to the overall process or only to assist a survivor to decide whether to accept an offer of redress. The Royal Commission recommended that the scheme should fund support services and community legal centres to assist applicants 'to apply' for redress. The Explanatory Memorandum provides that these services will be available to survivors at relevant points of the application process. However, the only other mention of legal services in

<sup>16</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 70-71.

<sup>17</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendations 52 and 53.

the Bill is in proposed subsection 37(1)(g), which requires the Operator to provide information about how to access legal services under the scheme for the purposes of obtaining legal advice about whether to accept an offer of redress.

33. The Law Council considers that the provision of free legal support services to survivors is essential to the success of the Scheme in providing meaningful redress. Further, the Law Council considers that these legal support services should be funded by the Scheme to be available at all relevant points of the application process, not just after an offer of redress is made.
34. For example, the Law Council considers that there would be considerable value both for survivors and the Scheme if survivors have access to legal support services to assist with submitting an application. First, it will likely reduce the administrative burden on the Scheme and the operator, as community legal centres and other providers will be able to advise survivors as to whether or not they are eligible to apply for redress, assist with identifying and collating relevant documents, and ensure the application is made in the correct form.
35. Second, managing this process for the survivor may reduce the trauma that a survivor may experience in the application process, which can be emotional and fraught with uncertainty. Third and finally, given that some survivors of child sexual abuse may be particularly vulnerable and face other barriers to access to justice, such as confusion about their legal rights, trauma, disabilities, mental health issues, illiteracy or difficulties with technology, access to the redress may be impossible without legal assistance.
36. Therefore, the Law Council considers that the Bill should be amended to require the Scheme to fund legal support services to provide survivors with legal support throughout relevant points of the application process.

#### **Further considerations regarding legal support services under the Scheme**

37. The Law Council commends the Government for identifying that survivors must be provided with free, trauma-informed, culturally appropriate legal advice, which the Law Council has also identified as being 'what works' when advising vulnerable persons, such as survivors of child sex assault.<sup>18</sup>
38. The Law Council considers it appropriate for the details of how legal support services under the Scheme will be established to be included in the rules, as noted in proposed subsection 117(1). However, the Law Council has some concerns at this stage due to the lack of detail as to how 'trauma informed, culturally sensitive, free legal advice' will be provided to survivors, and considers that further explanation should be provided as to how these services will be funded and delivered.

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<sup>18</sup> See for example, Law Council of Australia, *Justice Project Consultation Paper: Children and Young People* (2017) 17-19, 38, 46 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Children%20and%20Young%20People.pdf>>; *Justice Project Consultation Paper: Aboriginal and Torres Strait Islander Persons* (2017) 4-5, 23, 46-49 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples.pdf>>; *Justice Project Consultation Paper: Person Who Have Been Trafficked and Exploited* (2017) 4-5, 42-43 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/People%20Who%20Have%20Been%20Trafficked%20and%20Exploited.pdf>>.

39. First, the Law Council is concerned that current providers are overburdened based on their current funding levels. For example, it is estimated that up to 60 000 persons may apply to the Scheme for redress. Knowmore, the leading provider of legal services to survivors, has been able to help 8000 survivors in 4 years.<sup>19</sup> Based on those figures, at current capacity and funding levels, it would take Knowmore 30 years to assist all the persons that are estimated to apply to the Scheme.
40. While there may be other providers beyond Knowmore, the Government has not yet identified who those other providers will be, nor how Knowmore or any other providers will be funded on an on-going and reliable basis. For legal advice to remain free to survivors, it is essential that expert Legal Support Services are funded on a reliable and on-going basis. Given the persistent underfunding of legal aid and legal assistance services, especially for civil matters,<sup>20</sup> it is unlikely that survivors will otherwise be able to obtain free legal advice outside the Scheme.
41. Second, there is also the matter of expertise. As noted in the Royal Commission's recommendations and the Explanatory Memorandum, the expert legal support services provided to survivors must be 'trauma informed' and 'culturally appropriate'. This is essential, but there are limited legal support service providers with experience working with survivors and which are able to provide such trauma informed and culturally appropriate responses.
42. Further, the Law Council notes that Aboriginal and Torres Strait Islander people accounted for 14.3% of survivors,<sup>21</sup> and that Aboriginal and Torres Strait Islander peoples make up relatively large proportions of the total population in remote (16%) and very remote (45%) areas.<sup>22</sup> Law Council's Justice Project has revealed a dearth of providers that can deliver trauma informed and culturally appropriate legal advice to vulnerable persons, especially in regional, rural and remote areas, and the deficit in funding for legal providers that do provide these services.<sup>23</sup>
43. It is not clear to the Law Council how the Scheme intends to address the real likelihood that expert Legal Support Services, once identified, may be overwhelmed with requests for assistance and lack capacity to handle those requests, at current funding levels, and within the tight 90-day timeframe afforded to survivors for deciding whether or not to accept an offer for redress. The Law Council also notes that the Parliamentary Joint Committee on Human Rights has commented that this lack of detail 'raises questions' as to whether the provision of free legal advice operates as a sufficient safeguard on the potential restriction on the right to an effective remedy, caused by the requirement for survivors to discharge participating institutions from civil liability.<sup>24</sup>
44. As neither the Bill nor Explanatory Memorandum address these matters, the Law Council is unable to advise on, for example, the feasibility of the funding model and

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<sup>19</sup> Knowmore, *Service Snapshot September 2017* (2017) 1 <<http://knowmore.org.au/wp-content/uploads/2016/01/KNO045-Infographic-Update-Sept-FA.pdf>>.

<sup>20</sup> See Productivity Commission, *Inquiry Report 75, Access to Justice Arrangements* (2014) 30 <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>>.

<sup>21</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and Executive Summary* (2017) 9.

<sup>22</sup> See Law Council of Australia, *Justice Project Consultation Paper: Rural, regional and remote Australians* (2017) 10 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/RRR%20Australians.pdf>>, citing Productivity Commission, *Overcoming Indigenous Disadvantage 2016* (2016) 3.4.

<sup>23</sup> See *ibid* 16.

<sup>24</sup> See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report 13 of 2017* (2017) [1.41].

capacity of legal professionals to provide the service required by the Scheme. Therefore, the Law Council considers that further explanation should be provided as to how the Scheme intends to deliver legal services which are trauma informed, culturally appropriate and responsive to the needs of those in regional, rural and remote areas.

### Recommendations

- **The Bill should be amended to include a requirement for the Scheme to:**
  - **fund support services and community legal centres to assist applicants to apply for redress; and**
  - **select support services and community legal centres to cover a broad range of likely applicants, taking into account the need to cover regional and remote areas and the particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.**
- **Further explanation should be provided as to how legal services under the Scheme will be adequately funded, trauma informed, culturally appropriate and responsive to the needs of those in regional, rural and remote areas.**

## Disclosure of protected information

45. Proposed Part 4-2 of the Bill establishes a regime for protecting information under the Scheme. 'Protected information' is information about a person collected for the purposes of the Scheme.<sup>25</sup> The Bill allows disclosure of information:

- by the Operation of the Scheme in certain circumstances (proposed section 77);
- for the purposes of law enforcement or child protection (proposed section 78);
- for insurance purposes (proposed section 79); and
- to the nominee (of a person who has applied for redress) (proposed section 80).

46. The Law Council agrees that it is appropriate to disclose relevant information in circumstances such as child protection, as provided for by proposed section 78. However, the discretionary power vested in the Operator by proposed section 77 is very broad. The Operator can disclose protected information to 'such persons and for such purposes as the Operator determines'<sup>26</sup> if the Operator considers it necessary in the public interest.

47. As the Parliamentary Joint Committee on Human Rights has identified, it is not clear why it is necessary to include such a broad category of persons to whom disclosure may be made, and what circumstances will constitute a 'public interest'.<sup>27</sup> The Law Council shares these concerns.

<sup>25</sup> Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) proposed section 75.

<sup>26</sup> Ibid proposed subsection 77(1)(a).

<sup>27</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report 13 of 2017* (2017) 12-13.

48. Likewise, there appear to be few safeguards for disclosure of information under proposed section 77 of the Bill. By way of comparison, under proposed section 78, the Operator is required to consider ‘the impact the disclosure might have on a person [to whom the information relates]’.<sup>28</sup> A similar requirement appears in proposed section 79. However, this is not required for disclosures made under the Operator’s broad power conferred by proposed section 77. The Explanatory Memorandum does not provide any further detail as to why the power in proposed section 77 is so broad and lacks the safeguards present in the sections detailing the other exceptions.
49. The Explanatory Memorandum also does not discuss how the disclosure of protected information will be managed once a decision to disclose has been made. Conversely, in relation to disclosure under proposed section 78, the Explanatory Memorandum states that survivor consent will be sought for disclosure to authorities, and where that consent is not obtained, then information will be de-identified and provided to authorities.<sup>29</sup> The Explanatory Memorandum does not indicate whether these same practices will be followed in relation to disclosures under proposed section 77.
50. The Law Council also notes that, where information is disclosed for a prescribed purpose under the Bill, then it should not be available to be used, for example by an institution, in a manner detrimental to the applicant to whom it relates.<sup>30</sup>

#### Recommendations

- **Proposed section 77 be amended to require the Operator to consider the impact disclosure might have on a person to whom the protected information relates and guidance included as to the circumstances that constitute disclosure ‘in the public interest’.**
- **If a decision to disclosure information under proposed section 77 is made, the consent of the survivor should be sought prior to disclosure and, where that consent is refused, information should only be provided where it is de-identified.**

## Assessment of redress payments

### Minimum and maximum compensation amounts

51. The Law Council notes that the Royal Commission recommended that there be a minimum payment amount of \$10,000.<sup>31</sup> However, the proposed Bill does not provide for any minimum payment amount which means that applicants can receive no monetary compensation at all under the scheme. The Law Council considers that the Bill should be amended to set the minimum payment amount at \$10,000, as recommended by the Royal Commission.<sup>32</sup>

<sup>28</sup> Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 proposed subsection 78(3).

<sup>29</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 72-73.

<sup>30</sup> The Law Council adopts this input from the Queensland Law Society.

<sup>31</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report recommendations* (2017) recommendation 19(a).

<sup>32</sup> The Law Council adopts this input from the Law Institute of Victoria.

52. Proposed paragraph 18(1)(a) of the Bill provides that the maximum amount of a redress payment is \$150,000. The Law Council supports the Royal Commission's recommendation that the maximum amount of the redress payment be \$200,000.<sup>33</sup> No explanation is provided in the Explanatory Memorandum as to why the maximum payment, for the most serious cases, is set at an amount \$50,000 lower than the Royal Commission's recommendation.
53. Nonetheless, the Law Council recognises that there are challenges involved in procuring participation in, and funding for, the Scheme. The Law Council therefore recommends that in the final Bill, the maximum amount of compensation available be no lower than the currently proposed \$150,000. Further, an explanation should be provided in the Explanatory Memorandum as to why the amount of \$150,000 was selected rather than the Royal Commission's recommendation of \$200,000.

#### Recommendations

- **The maximum amount for a redress payment should be lifted to \$200,000, in accordance with the Royal Commission's recommendation;**
- **Alternately, if the maximum amount for a redress payment is not lifted to \$200,000:**
  - **it should be set no lower than the currently proposed \$150,000; and**
  - **an explanation should be provided in the Explanatory Memorandum as to why the cap was set at \$150,000 rather than the Royal Commission's recommendation of \$200,000.**
- **The minimum compensation amount to be set at \$10,000.**

#### Timeframe for providing additional information

54. Proposed section 69 of the Bill establishes the process for the Operator to request information from an applicant and sets a production period of 'at least' 14 days.<sup>34</sup> The Law Council is concerned that 14 days may be not be sufficient to produce documents in many cases. This concern is exacerbated in circumstances where the Scheme relates to historical child sexual abuse and documents may be difficult to identify and locate.
55. The Explanatory Memorandum notes that 'as the 14-day time period is a minimum requirement, it would be open to the Operator to allow a longer time period'.<sup>35</sup> However, the Law Council is concerned that 14 days may nonetheless become the default time period. While it is open to the survivor to apply for an extension, proposed section 69(4) states that these will only be granted where there are 'exceptional circumstances'.
56. What qualifies exceptional is not defined in the primary legislation nor the Explanatory Memorandum. As noted, there are many ordinary (and therefore not 'exceptional') circumstances where a survivor would be unable to respond to a notice to produce in

<sup>33</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report recommendations* (2017) recommendation 19(b).

<sup>34</sup> Commonwealth Redress Scheme for Institutional Child Sex Abuse Bill 2017 (Cth) proposed section 69.

<sup>35</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 40.

14 days or more. Therefore, the Law Council considers that the 14-day time limit does not appear to be survivor-focused particularly when the consequence of failure to comply is that the Operator may make a determination about assessment in the absence of the information and this could result in a denial of eligibility or inappropriate reduction of quantum under the Assessment Matrix.

57. The Law Council considers that a time period of 'at least' 28 days would be more appropriate and that extensions should be able to be granted by the Operator where there are 'reasonable grounds' to do so rather than exceptional circumstances.

58. Further, the Law Council does not consider that the penalty outlined in proposed subsection 71(1) for refusal or failure to comply with a request for information should apply to an applicant. As the purpose of the Scheme is to provide compensation and other forms of redress to survivors, it seems inimical to that objective to apply a civil penalty to a survivor for failure to complete their own application for compensation.

#### **Recommendations**

- **Proposed section 69 should be amended to extend the production period from at least 14 days to at least 28 days.**
- **Proposed subsection 69(5) should be amended to allow the Operator to grant an extension where there are 'reasonable grounds' rather than 'exceptional circumstances'.**
- **Civil penalties for an applicant's failure to produce information should be removed.**

### **Calculation of the 'original amount'**

59. Proposed section 33 sets out how the Operator can calculate the amount of a redress payment. The method statement provides that the Operator must, after calculating the amount owed under the assessment matrix and the institution's share of that amount ('gross liability amount'), work out the amount of any payment ('relevant payment') that was paid by the institution to the person for abuse within the scope of the scheme, referred to as the 'original amount'.<sup>36</sup> The Operator must adjust the 'original amount' for inflation and then deduct this adjusted 'original amount' from the institution's 'gross liability amount'.

60. The Law Council considers that proposed section 33 should be amended to clarify that the 'original amount' excludes any legal costs and outlays paid by the survivor to procure the institution's previous relevant payment. For example, if the applicant formerly received an amount of \$50,000 plus costs fixed at \$10,000, the \$50,000, representing the compensation/damages should be the 'original amount' for the purposes of this scheme. This is consistent with other schemes where it is the damages that are deducted or otherwise considered when assessing claims and will ensure an assessment is not unfairly reduced.

#### **Recommendation**

- **'Original amount' in proposed section 33 of the Bill should be amended to exclude any legal costs and outlays paid as part of a previous compensation payment.**

<sup>36</sup> Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) proposed section 33.

## Timeframe in which to make a determination

61. Proposed section 32 provides that the operator must make a determination to approve or not to approve an application for redress, however, there is no timeframe by which this determination is to be made. The Law Council considers that a balance needs to be struck between applicants to be given sufficient time to respond to requests for information and the need to provide certainty to all parties.
62. The Law Council suggests that a period of, for example, 60 – 90 days from receipt by the operator of all of the requested information (unless there has been confirmation that the information cannot be provided because, for example, it does not exist) may be appropriate. The operator should have an ability to extend the timeframe if further information is needed to make a decision.

### Recommendation

- **A timeframe in which a decision whether or not to grant an application for redress should be included in the Bill, or at least in associated rules.**

## Review rights

63. The Law Council understands that pursuant to proposed section 87, the ability to review a decision made under the Scheme is limited to internal review. There is no access to merits review in the Administrative Appeals Tribunal (**AAT**) or judicial review in the Federal Circuit Court or Federal Court.

## Internal review procedure

64. The Bill provides that the internal review is to be conducted by an independent decision-maker who was not involved in the making of the determination.<sup>37</sup> The Law Council is concerned that the Bill does not provide sufficient guidance as to the qualification or standing of those that may be appointed to perform an independent review, nor does it provide substantial detail on the procedure under which a review must follow.
65. The Law Council notes the Minister's response to the Standing Scrutiny of Bills Committee that 'the Department intends to recruit appropriately qualified independent assessors as independent decision makers and that criteria detailing appropriate skills and attributes for these positions are being developed'.<sup>38</sup> However, as noted by the Senate Standing Committee on the Scrutiny of Bills, 'while the intention may be to appoint appropriately qualified persons as independent decision makers, there is nothing in the bill to require this'.<sup>39</sup> The Law Council considers that this detail should be set out in the primary legislation to assure the integrity of the Scheme. This is especially important if no external review mechanism is provided.

### Recommendation

<sup>37</sup> Ibid proposed subsection 88(1).

<sup>38</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2017* (2017) 31.

<sup>39</sup> Ibid 32.

- **The Bill should provide further details on the internal review procedure, including processes and suitability of reviewer.**

### Timeframe in which to seek a review

66. The Royal Commission recommended that a period of three months should be allowed for an applicant to seek a review of an offer of redress after the offer is made.<sup>40</sup> The Law Council notes that proposed subsection 35(3)(a) states that a notice of determination must specify the day by which an application for review must be made, being between 28 and 90 days.

67. The Law Council is concerned by the potential for a shorter timeframe to be provided to applicants in which to review a decision, given that survivors of child sexual abuse may require time and assistance to make such an informed decision.

#### Recommendation

- **The Bill should be amended to provide for at least three months to apply for review of a determination.**

### Additional information during the internal review process

68. Proposed subsection 88(3) provides that when an internal review of a determination is requested, the reviewer may only have regard to the information and documents that were available to the person who made the original determination.

69. The Law Council considers this limitation to be unjustified. This proposed restriction on introducing new material at the review stage prevents applicants from producing information that may be critical to their claim, yet omitted from the original application either by, for example, oversight or a lack of understanding as to its relevance at the time. It also undermines ordinary procedural fairness in the review process.

70. Further, the Law Council notes that proposed section 30 of the Bill only permits survivors to make one application for redress under the Scheme. Therefore, the Law Council considers that to deny the ability to present additional relevant information upon review is an unreasonable restriction that could lead to unjust outcomes, denying survivors access to redress.

71. The Law Council notes that the Senate Standing Committee on the Scrutiny of Bills also considered that this restriction should be removed and did not consider that it would add significantly to the burden of administering the Scheme.<sup>41</sup>

#### Recommendation

- **Proposed subsection 88(3), which restricts the provision of additional information to an internal review process, should be removed.**

<sup>40</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and civil litigation report* (2015) recommendation 60.

<sup>41</sup> *Ibid* 31.

## Availability of external review

72. The Scheme does not provide for external review. The Law Council notes that the Minister has stated that '[t]he lower evidentiary thresholds under the Scheme and the broad discretion of the decision-makers mean that merits review and judicial review under the ADJR Act are not appropriate for decisions under the Scheme'.<sup>42</sup>
73. The Law Council acknowledges that overly legalistic processes, such as judicial review, may not be appropriate to review decisions made under the Scheme. However, this is not the only option available for external review. Law Council notes that the Royal Commission recommended that a redress scheme established on an administrative basis should be made subject to oversight by the relevant ombudsman through the ombudsman's complaints mechanism.<sup>43</sup> The Law Council supports this recommendation and submits that an external review mechanism, such as through the Ombudsman, promotes integrity and should be made available within the Scheme.
74. The Law Council also notes that observation of the Standing Committee for the Scrutiny of Bills that 'AAT review is designed to be an alternative and less legalistic form of review than judicial review'.<sup>44</sup> The Law Council notes that the jurisdiction of the AAT has been expanded to include a review of disputes under the National Disability Insurance Scheme and as such, this could provide a useful model.

### Recommendation

- **There should be an independent review process available to applicants that is external to the Scheme.**

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<sup>42</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 7.

<sup>43</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and civil litigation report* (2015) recommendation 62.

<sup>44</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2017* (2017) 32.

## Psychological and counselling services

### Length of entitlement to psychological and counselling services<sup>45</sup>

75. Under the Scheme, counselling and psychological services are provided to persons who accept an offer of redress, as well as monetary compensation and a direct personal response from responsible institutions. Proposed section 48 provides that the Minister may make rules prescribing matters about counselling and psychological services under the scheme, and therefore most of the detail around how these services will operate under the scheme will be subject to legislative instrument.
76. Proposed section 49 outlines the general principles guiding the provision of services under the scheme. This includes three principles:
- a. Survivors should be empowered to make decisions about their own need for counselling and psychological services;
  - b. Survivors should be supported to maintain existing therapeutic relationships to ensure continuity of care; and
  - c. Counselling and psychological services provided through redress should supplement, and not compete with, existing services.
77. It is unclear from the Bill and the Explanatory Memorandum how long an applicant will be entitled to access these services, whether the Commonwealth government or participating institutions will be responsible for payment of these services, and whether there are any budgetary limitations on the provision of these services.
78. Notably, the Explanatory Memorandum refers to an additional principle which provides that counselling and psychological services should be available throughout the life of the Scheme.<sup>46</sup> This principle is absent from the text of the Bill. In addition to this, the Minister's Second Reading Speech on the Bill states that the scheme will provide survivors with 'access to counselling or psychological services of their choice throughout their lives'.<sup>47</sup>
79. It is therefore unclear whether it is the Government's intention that the scheme will provide counselling and psychological services throughout the life of the scheme (10 years), throughout the lives of survivors, or for some other limited duration. It is also unclear whether the Government intends to amend the Bill to reflect the Explanatory Memorandum or vice versa.
80. The Law Council notes that the Royal Commission recommended that the provision of counselling and psychological care should be guided by a number of principles, including that 'counselling should be available throughout a survivor's life', 'counselling should be available on an episodic basis', and 'there should be no fixed limits on the counselling and psychological care provided to a survivor'.<sup>48</sup>

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<sup>45</sup> The Law Council adopts this input from the Law Institute of Victoria.

<sup>46</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 31.

<sup>47</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 26 October 2017, 12129 (Christian Porter).

<sup>48</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendation 9.

81. The Law Council therefore recommends that the Bill be amended to reflect the Royal Commission's recommendation that counselling and psychological services be available for the applicant's lifetime and subject to no fixed limits.

**Recommendation**

- **The Bill should clarify that counselling and psychological services offered under the Scheme are to be available for the applicant's lifetime and subject to no fixed limits.**

## Details of psychological and counselling services

82. The Law Council submits that further details should be included as to the nature of counselling and psychological services provided under the Scheme. In particular, what survivors will be able to access, and the process by which services may be obtained.

83. While these may be appropriately left to rules developed under the Scheme, it is submitted that a period of consultation on these proposed rules should be provided. The rules should be reviewed by stakeholders before they are released. For example, if access to a service is limited due to a person's location, the rules need to provide for this access to be provided and funded.

84. The rules will need to set out how survivors will gain timely access to counselling and psychological services and how this will work for survivors living in rural, regional and remote areas. The Bill currently only seems to imply that funding for health care will be administered via the Scheme (as opposed to Medicare or other arrangements).

85. Further, there is nothing to indicate that survivors will not still be subjected to unhelpful wait times for access to services, or that rural, regional or remote survivors, such as Aboriginal and Torres Strait Islander survivors, will be provided with any greater access to services either through increased services locally or increased access to funded travel.

86. The Law Council's view is that consideration needs to be given to a system whereby services can be accessed, authorised and funded using a claim number or similar scheme or whether the provision of something similar to a health card, DVA Gold card, would be appropriate.

**Recommendation**

- **Proposed rules detailing how psychological and counselling services will be administered should be released with a public consultation period and take into account how service will be provided to survivors located in regional, rural and remote Australia.**

## Access to support services for family members of deceased survivors<sup>49</sup>

87. The Law Council notes the Royal Commission's observations that:

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<sup>49</sup> The Law Council adopts this input from the Law Society of New South Wales.

*Victim's families are often deeply affected by child sexual abuse. Even when they are not aware that the victim has been abused, because the sexual abuse has not been disclosed, they may still be significantly affected by the physical and mental health and behaviour of the victim.*<sup>50</sup>

88. The Royal Commission recommended that 'a redress scheme should offer and fund a limited number of counselling sessions for family members of survivors if reasonably required'.<sup>51</sup> However, under the Bill, if a survivor dies before they accept or decline an offer of redress, the offer of redress is taken to be withdrawn,<sup>52</sup> although the survivor's estate may be able to receive the redress payment.<sup>53</sup>
89. The Law Council has interpreted this as meaning that the other forms of redress that would otherwise be included with the offer, being counselling services and a direct personal response from the institution, will not be available if the survivor has died. However, the Law Council suggests that consideration be given to making non-monetary redress, such as counselling services that would have been otherwise offered to a deceased survivor, available to the family of the survivor.
90. The impacts of child sexual abuse and the related trauma can be felt even beyond a survivor's death. In some cases, survivors' deaths can be directly or indirectly linked to the abuse they experienced. The Royal Commission heard from many families who spoke of a loved one whose life was cut short by suicide,<sup>54</sup> noting the profound impact this had on families and their support needs:

*The mother of a man who was sexually abused and subsequently died by suicide told us about the importance of skilled therapeutic treatment: 'We all desperately need high-quality therapy. I have had two sessions with a local provider but I have felt as if the person has no understanding of my horrendous trauma and grief.'*<sup>55</sup>

91. Further, research has demonstrated that the effects of child abuse trauma can be intergenerational.<sup>56</sup> In particular, the Law Council notes that Aboriginal and Torres Strait Islander people accounted for 14.3% of survivors,<sup>57</sup> and in relation to this group of survivors, the Royal Commission reported that:

*Survivors said the trauma associated with their removal and sexual abuse in institutional settings manifested in relationship difficulties passed from*

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<sup>50</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 3, 203.

<sup>51</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendation 68.

<sup>52</sup> Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth), proposed section 114(2)(a).

<sup>53</sup> *Ibid* proposed section 115.

<sup>54</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 9, 31.

<sup>55</sup> *Ibid* 134.

<sup>56</sup> See for example, M Glasser et al, 'Cycle of child sexual abuse: links between being a victim and becoming a perpetrator' (2001) 179 *Br J Psychiatry* 482-94; Adam M Tomison, 'Intergenerational transmission of maltreatment' (June 1996) *National Child Protection Clearinghouse Issues No 6* <<https://aifs.gov.au/cfca/publications/intergenerational-transmission-maltreatment>>, noting particularly findings in respect of child sexual abuse.

<sup>57</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and Executive Summary* (2017) 9.

*generation to generation. They spoke of the importance of connecting to culture to support their resilience and healing.*<sup>58</sup>

92. Beyond redress, the Law Council considers that the support needs of families of deceased survivors should not be overlooked. In this respect, the Law Council endorses the recommendations made by the Royal Commission in volume 9 of its Final Report regarding advocacy, support and therapeutic services. The Law Council urges the Government to implement these recommendations and consider how these services should be made available.
93. In particular, the Law Council draws attention to the recommendation that family members of Aboriginal and Torres Strait Islander survivors should have access to culturally safe and appropriate healing services. Although mainstream services should strive for culturally competent service delivery, the Law Council emphasises the need to fund Aboriginal Community-Controlled Organisations, which have the experience and expertise in dealing with Aboriginal and Torres Strait Islander survivors, such as Healing Foundation.<sup>59</sup>

#### **Recommendation**

- **Consideration be given to amending proposed subsection 114 to make family members of deceased survivors eligible to receive counselling services that would otherwise have been offered to the deceased survivor.**

## Eligibility for redress

94. The Law Council considers that the following recommendations from Royal Commission's Redress and Civil Litigation Report are relevant to and should guide eligibility:
- 'a process for redress must provide equal access and equal treatment for survivors'; and
  - 'redress should be survivor focused' and 'all redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors'.<sup>60</sup>
95. The Law Council appreciates that when designing rules around eligibility it may be appropriate to apply certain limits to the Scheme to enable it to be administered effectively. Nonetheless, the Law Council considers that those rules should be guided by the above principles, and as noted above, be clearly stated in the primary legislation, given the impact eligibility will have on survivors and administration of the Scheme.
96. Proposed section 16 sets out a person's eligibility for redress and proposed subsection 16(3) provides that subsequent rules may be made to exclude people from eligibility under the scheme. This means that, with the exception of persons who are

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<sup>58</sup> Ibid 13.

<sup>59</sup> See Healing Foundation, *Royal Commission Specialist Support Project* (2017) <<https://healingfoundation.org.au/royal-commission-specialist-support-project/>>.

<sup>60</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendations 1 and 3.

not Australian nationals and permanent residents, who are excluded from the Scheme pursuant to proposed subsection 16(1)(c), there is no guidance in the Bill as to which survivors will be eligible for redress.

97. Without detail on the proposed eligibility criteria, it is difficult for the Law Council determine whether the criteria appropriately reflect the Royal Commission's recommendations.
98. Further, the Law Council notes that, in addition to reflecting the Royal Commission's recommendations, Australia's human rights obligations are also relevant to assessing the appropriateness of eligibility requirements. Relevant obligations include the right to State-supported recovery for child victims of abuse, pursuant to article 39 of the *Convention of the Rights of the Child (CRC)*,<sup>61</sup> and the right to effective remedy for those whose rights outlined in the *International Covenant on Civil and Political Rights (ICCPR)* are violated, pursuant to article 3 of the ICCPR.<sup>62</sup>
99. Eligibility requirements which exclude certain survivors of child sexual abuse from redress may engage and limit these rights. Many rights, such as those set out above, can validly be restricted in certain circumstances. As per the Law Council's *Policy Statement on Human Rights and the Legal Profession*, the Law Council adopts the approach to assessment of limitations on rights followed by the Parliamentary Joint Committee on Human Rights.<sup>63</sup> Namely, this approach asks:
- a. whether and how the limitation is aimed at achieving a legitimate objective;
  - b. whether and how there is a rational connection between the limitation and the objective; and
  - c. whether and how the limitation is proportionate to that objective.<sup>64</sup>
100. Therefore, the Law Council considers that eligibility limitations for survivors to access the redress scheme are reasonable and appropriate where they:
- a. are compatible with the relevant recommendations from the Royal Commission;
  - b. pursue a legitimate objective, are rationally connected with that objective and proportionate to that objective; and
  - c. are clearly set out in the primary legislation.
101. The Law Council has assessed the extent to which proposed eligibility restrictions achieve these objectives below.

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<sup>61</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified on 17 December 1990.

<sup>62</sup> See Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 71.

<sup>63</sup> Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key principles and commitments* (2016) [19].

<sup>64</sup> *Ibid.*

## Eligibility based on nationality and residency

102. Proposed subsection 16(1)(c) of the Bill states that redress is limited to survivors that are either Australian citizens or permanent residents at the time of application.
103. As noted in the Explanatory Memorandum,<sup>65</sup> determining eligibility under the Scheme on the basis of a survivor's nationality and residency status raises questions as to whether the Scheme is discriminatory and in conflict with Article 2 of the CRC, specifically the right to be free from discrimination when upholding of another right in the CRC. In this instance, the relevant right within the CRC is enshrined in Article 39, which as noted above, provides for the right to State-supported recovery for child victims of abuse.
104. The Statement of Compatibility acknowledges that 'there may be a perception that the Bill discriminates in upholding Article 39 of the CRC on the basis of survivors' nationality and residency status'.<sup>66</sup> In justifying the exclusion of non-citizens and non-permanent residents from the Scheme, the Explanatory Memorandum states that 'removing citizenship requirements would likely result in a large volume of fraudulent claims which would impact application timeliness for survivors'<sup>67</sup> and 'opening the Scheme to all people overseas could result in organised overseas groups lodging large volumes of false claims in attempts to defraud the Scheme'.<sup>68</sup>
105. While reducing 'large scale fraud'<sup>69</sup> may be a legitimate objective, it is not clear to the Law Council on what basis the conclusion has been drawn that opening up eligibility to non-citizens/permanent residents 'would likely' lead to a high volume of fraudulent claims.<sup>70</sup> No evidence or explanation is provided in the Explanatory Memorandum or elsewhere. Further, this restriction seems apposite to the view of the Royal Commission, which saw 'no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of the application for redress'.<sup>71</sup>
106. Noting also that the primary objective of the Scheme is to 'recognise the wrong and alleviate the impact of past institutional child sexual abuse', it is not clear how a person's citizenship status, if they experienced institutional child sexual abuse, is relevant to that objective. Further information should be provided to the Joint Parliamentary Committee on Human Rights and included in the Explanatory Memorandum as to why this restriction, departing from the approach of the Royal Commission, is appropriate.
107. The Explanatory Memorandum acknowledges that the rule-making power within the Bill may be used in the future to deem additional groups eligible for redress, namely those currently living in Australia, those who were child migrants, and those who were formerly Australian citizens or permanent residents.<sup>72</sup> The Law Council supports extending the Scheme to persons that meet these criteria. Further, the Law Council considers that, as these amendments to the eligibility criteria can be foreseen,

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<sup>65</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 70.

<sup>66</sup> Ibid 70-71.

<sup>67</sup> Ibid 13.

<sup>68</sup> Ibid 71.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid 70-71.

<sup>71</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) 347.

<sup>72</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 71.

they should be included in the primary legislation. For the reasons stated above, the Law Council considers that the rule making power should be reserved for minor matters or unforeseen developments, not substantive matters which have already been identified.

### Recommendations

- **The Bill should not be passed until the concerns of the Parliamentary Joint Committee on Human Rights regarding limiting access to the Scheme to citizens and permanent residents only have been adequately resolved.**
- **Eligibility to access the Scheme should be extended to those currently living in Australia, those who were child migrants, and those who were formally Australian citizens or permanent residents. The Bill should be amended to include these eligibility criteria rather than including them in the rules.**

### Eligibility based on criminal record

108. Former Minister for Social Services, the Hon Christian Porter MP, has been reported as stating that persons with 'serious criminal records' may be excluded from accessing the Scheme.<sup>73</sup> Namely, those persons convicted of a sex offence, or any person imprisoned for a period of five years or more, for crimes such as murder or serious drug and fraud offences, would be excluded from accessing the Scheme.<sup>74</sup> No information or justification has provided for this reported exclusion except reports that the former Minister claimed that 'a line' had to be drawn somewhere.<sup>75</sup> Further, there is no mention of this proposed exclusion in the Bill, Explanatory Memorandum or Second Reading Speech.

109. The Law Council is concerned that an exception to eligibility which has the potential to impact thousands of survivors has not been included in the primary legislation, nor mentioned in the Bill or Explanatory Memorandum. As has been noted above, important matters such as eligibility rules should be included in primary legislation, where it can receive the full benefit of legislative scrutiny.

110. The Law Council is also concerned about this exception to eligibility for survivors with certain criminal convictions, including because:

- a. no justification has been formally provided as to why it is necessary to limit the Scheme in this way, and to the extent that there is a need to 'draw a line somewhere', the Law Council queries if this is a legitimate objective;
- b. given the objective of the Scheme is to recognise the wrong and alleviate the impact of institutional child sexual abuse, and provide justice to survivors, it is not clear to the Law Council why a person who has experienced institutional child sexual abuse would be precluded from having this wrong recognised, its

<sup>73</sup> See ABC Online, 'Child sex abuse redress scheme to cap payments at \$150,000 and exclude some criminals' <[www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256](http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256)> and Megan Neil, 'Sex offenders will not get abuse redress' (26 October 2017) *The West Australian* <<https://thewest.com.au/politics/sex-offenders-wont-get-abuse-redress-ng-s-1789707>>.

<sup>74</sup> Ibid.

<sup>75</sup> Riley Stuart and Philippa Macdonald, *Royal commission: Decision to block redress for some prisoners put under microscope* (16 December 2017) <<http://www.abc.net.au/news/2017-12-16/royal-commission-government-criticised-for-blocking-jail-redress/9264970>>.

impact alleviated and receiving justice, based on their actions later in life following the abuse, which may be a result of that abuse; and

- c. the reported exclusion does not appear proportionate, as it could potentially exclude tens of thousands of survivors from access to the Scheme, given the strong established connection between experiencing child sexual abuse and offending in later life. In addition, given that Aboriginal and Torres Strait Islander persons are disproportionately represented in Australian prisons, and as having experienced institutional child sexual abuse, it may also amount to indirect racial discrimination.

111. The Law Council has elaborated upon these concerns in more detail below and provided recommendations on how they might be addressed.

#### **Whether proposed exclusion achieves a legitimate objective**

112. It is difficult for the Law Council to assess whether the proposed exclusion is aimed at achieving a legitimate objective, given that no explanation as been provided in the Bill, Explanatory Memorandum or Second Reading Speech as to its purpose.

113. To the extent that the rights of persons with certain criminal convictions are to be excluded from the Scheme because 'a line' has to be drawn somewhere,<sup>76</sup> the Law Council questions if this qualifies as a legitimate objective.

114. In this respect, Law Council also notes remarks by the Parliamentary Joint Committee on Human Rights that 'reducing administrative burdens or administrative inconvenience alone will generally be insufficient for the purposes of permissibly limiting human rights under international human rights law'.<sup>77</sup>

#### **Whether proposed exclusion has a rational connection with a legitimate objective**

115. Based on the available information, the Law Council is not satisfied that there is rational connection between a survivor being convicted of a sex offence or a crime liable to five years imprisonment and exclusion from access the Scheme. The Law Council notes remarks in the Explanatory Memorandum that the objective of the Scheme is 'to recognise the wrong and alleviate the impact of past institutional child sexual abuse, and related non-sexual abuse, and to provide justice for the survivors of that abuse'.<sup>78</sup>

116. If a person was subjected to sexual abuse as a child in an institution, and the Scheme seeks to acknowledge that the abuse was wrong, then it is not clear to the Law Council why that person's actions later in life, which may be linked to that abuse, should affect their eligibility for redress. The Law Council reiterates that access to a State-supported remedy for child abuse is a right, not a privilege. The Law Council considers it inappropriate for survivors of institutional child sexual abuse to be subjected to a character test before being entitled to redress and justice.

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<sup>76</sup> Ibid, quoting Minister Porter's statement as to why persons with criminal convictions subject to five years imprisonment or more are to be excluded from access to the Scheme.

<sup>77</sup> Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Scrutiny Report 13 of 2017* (2017) [1.15].

<sup>78</sup> Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 4.

### Whether proposed exclusion is proportionate to a rational objective

117. Insofar as the objective is to draw ‘a line’ somewhere, the Law Council does not consider that restricting survivors convicted of sex offences or offences liable to imprisonment for five years or more from accessing the Scheme is proportionate to this objective. As noted above, the Law Council is unable to determine whether this objective is legitimate in light of available information.
118. As noted by the Attorney-General Department guidance, when considering whether or a measure is proportionate, questions such as ‘has sufficient regard been paid to the rights and interests of those affected?’, ‘does a less restrictive alternative exist’ and ‘does the limitation destroy the very essence of the right in issue?’ may be relevant.<sup>79</sup> These questions have been used to inform the Law Council’s analysis of whether excluding survivors with certain criminal conviction is proportionate to a legitimate objective.
119. The Law Council does not consider that sufficient regard has been paid to the rights and interests of those affected, namely, prisoners and former prisoners that have suffered child sexual abuse, especially in youth detention, and Aboriginal and Torres Strait islander people. Knowmore has reported that 18% of its clients are prisoners.<sup>80</sup> The Royal Commission’s Final Report noted that over 10% of survivors interviewed in private session were in prison.<sup>81</sup> Applying these figures, based on the estimated 60,000 survivors may apply to the Scheme for redress, an exclusion based on criminal record could potentially exclude 6,000 – 10,800 survivors from access to redress.
120. In this respect, the Law Council notes that the Royal Commission did not recommend that eligibility to access the Scheme be limited to exclude survivors with criminal records. Rather, the Royal Commission recommended that the Scheme should consider adopting particular communication strategies for people who might be more difficult to reach, including people who are in correctional or detention centres.<sup>82</sup> This recommendation implies an intention for the inclusion of such persons in the Scheme.<sup>83</sup>
121. The Royal Commission:
- a. noted that a number of survivors had reported that the impacts of child sexual abuse had contributed to their criminal behaviour as adolescents and adults;
  - b. highlighted the profound and lasting effect of child sexual abuse on a person’s life and referred to a number of studies which indicate a higher rate

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<sup>79</sup> Attorney-General’s Department, ‘Permissible limitations’ *Australian Government* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rightsscruity/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>>.

<sup>80</sup> Knowmore, *Service Snapshot September 2017* (2017) 2 <<http://knowmore.org.au/wp-content/uploads/2016/01/KNO045-Infographic-Update-Sept-FA.pdf>>.

<sup>81</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and Executive Summary* (2017) 9.

<sup>82</sup> See Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (2017) recommendation 50.

<sup>83</sup> The Law Council adopts this input from the Law Society of South Australia.

of experiences of child sexual abuse amongst prisoners compared with the general population;<sup>84</sup> and

- c. acknowledged the growing body of research that examines the potential relationship between child sexual abuse and subsequent criminal offending.<sup>85</sup>

122. The Law Council's Justice Project has also identified how prevalent experiences of sexual, physical and/or emotional abuse are highly prevalent across adult prisoners in Australia.<sup>86</sup>

123. The exclusion of survivors from the Scheme who have been convicted of sex offences or offences liable to five years imprisonment or more means that survivors that have been abused in youth detention while serving those sentences will not have access to redress. This particularly concerning in light of the Royal Commission's findings that:

*The majority of survivors who were in prison when we spoke to them described entrenched disadvantage when they were growing up. From a young age, many were subjected to multiple types of sexual and other abuse... as children these survivors were frequently moved in and out of out-of-home care placements, sometimes homeless, and often spent time in youth detention. Many said youth detention centres were violent places and physical abuse of children by staff was tolerated as a means of enforcing rules. Frequently, we were told that the institutional cultures of youth detention and prison made it impossible to disclose any kind of abuse, especially to authorities and police.<sup>87</sup>*

124. The Law Council considers that exclusions from eligibility on the basis of certain criminal convictions effectively creates 'impunity' for child sexual abuse committed in youth detention centres, insofar that survivors who served sentences for criminal convictions which exclude them from eligibility will be unable to access redress for abuse suffered while serving those sentences. This seems inimical to the objective of the Scheme to address institutional child sex abuse in all its forms.

125. Further, the Law Council is also concerned that an exclusion of those with certain criminal convictions from access to the Scheme may give rise to potential indirect discrimination on the basis of race.<sup>88</sup> The Royal Commission noted that Aboriginal and Torres Strait Islander children were more likely to encounter abuse in institutions, less likely to disclose or report abuse, and if they did disclose or report, less likely to receive an adequate response.<sup>89</sup> Knowmore, an independent and specialised service giving free legal advice to assist survivors of institutional child sexual abuse, reports

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<sup>84</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 3.

<sup>85</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (2017) 143-6.

<sup>86</sup> Law Council of Australia, *Justice Project Consultation Paper: Prisoners and Detainees* (August 2017) 8 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Prisoners%20and%20Detainees.pdf>>.

<sup>87</sup> *Ibid* 14.

<sup>88</sup> The Law Council adopts this input from the Law Society of New South Wales.

<sup>89</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 15, 3.

that nearly a quarter (23%) of their clients identify as being of Aboriginal and Torres Strait Islander descent.<sup>90</sup>

126. It is well-established that Aboriginal and Torres Strait Islander people are overrepresented in Australian prisons,<sup>91</sup> with 23.7% of the Australian prison population recorded as being Aboriginal and Torres Strait Islander as at 30 June 2016.<sup>92</sup> This is despite Aboriginal and Torres Strait Islander people making up only 2.8% of the general Australian population.<sup>93</sup> Aboriginal and Torres Strait Islander women make up 34% of the female prison population, an increase of 121% since 1991, and are imprisoned at a rate 21 times the rate of non-Indigenous women.<sup>94</sup> High numbers of women in prison are survivors of sexual violence, and a 2003 study of women in prison in New South Wales found that 70 per cent of Aboriginal and Torres Strait Islander women in prison were survivors of childhood sexual abuse.<sup>95</sup>

127. Therefore, it seems likely that there may be significant numbers of Aboriginal and Torres Strait Islander people represented in the group of survivors excluded from redress should this eligibility policy be implemented. The Law Council considers that this could amount to indirect discrimination for the purposes of the *Racial Discrimination Act 1975* (Cth)<sup>96</sup> and pursuant to Australia's international human rights obligations.<sup>97</sup> It would also be inconsistent with the Royal Commission's recommendation that a process for redress must provide equal access and equal treatment for survivors

128. The Law Council strongly supports evidence-based policy making and therefore cannot support excluding persons with criminal convictions from eligibility to apply for redress unless it can be shown how it is compatible with the Royal Commission's

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<sup>90</sup> Knowmore, *Service Snapshot September 2017* (2017) 2 <<http://knowmore.org.au/wp-content/uploads/2016/01/KNO045-Infographic-Update-Sept-FA.pdf>>.

<sup>91</sup> See for example, Change the Record, *The Issue* <<https://changetherecord.org.au/get-the-facts>>; Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017); Senator the Hon George Brandis QC, Attorney General and Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, 'ALRC inquiry into incarceration rate of Indigenous Australians' (Media Release, 27 October 2016) <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2016/FourthQuarter/ALRC-inquiry-into-incarceration-rate-of-indigenous-australians.aspx>>; Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous people, 'Australia's Aboriginal peoples face "tsunami" of imprisonment, UN expert finds' (Media Release, 4 April 2017) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21475&LangID=E#sthash.Bqrwjzi2.dpuf>>; Referendum Council, *Uluru Statement from the Heart* (2017) <[https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart\\_0.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF)>.

<sup>92</sup> Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016*, cat no 2024.0 (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>>.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> See Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017) 19 <[https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented\\_online.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf)>.

<sup>96</sup> See *Racial Discrimination Act 1975* (Cth) s 10, which implements the obligation imposed on Australia under the *International Convention on the Elimination of All Forms of Racial Discrimination*, article 5, to ensure equality before the law: see *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). Australia ratified on 30 September 1975.

<sup>97</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2017) art 2.

recommendations, or if not, the Government can explain why it is necessary and proportionate to a legitimate objective, and it is enshrined in primary legislation.

129. Further, if the Government intends to exclude survivors with certain criminal convictions from redress payments, at the very least, those survivors should be given access to counselling, psychological and healing services. Redress payments that would have been payable to these individuals should be redirected to the provision of support services. A direct personal response should also be available to these survivors.

130. Given the strong link between trauma and offending behaviour, the provision of trauma-informed and culturally-appropriate counselling provides an opportunity to explore the effect of therapy on recidivism. For example, a 'counselling in prison' pilot operated by the NSW Department of Justice in 2015 reported positive outcomes and provided recommendations as to how program of counselling in prison might operate.<sup>98</sup>

#### Recommendations

- **Survivors with criminal convictions should not be excluded from accessing the Scheme.**
- **If survivors with certain criminal convictions are excluded from access to the Scheme, then:**
  - **this exclusion should be set out in the primary legislation;**
  - **the Explanatory Memorandum should include detail as to why this exclusion is necessary and proportionate; and**
  - **survivors that are excluded from accessing the redress payment under the Scheme, should still be entitled to apply for and receive counselling, psychological and healing services, and a direct personal response from the responsible institution. The redress payment that would have been payable to these individuals should be redirected to the provision of those services.**

## Other issues relevant to the Bill

### Funders of last resort<sup>99</sup>

131. Under the Scheme, the institution where the abuse occurred will be responsible for compensation and redress. If the institution no longer exists or is unable to finance redress, the Scheme gives the Commonwealth or self-governing Territories (being the ACT and Northern Territory) the capacity to be responsible for compensation and redress, making them 'funders of last resort'. Proposed subsection 66(1) provides that 'The Commonwealth is the funder of last resort for a non-government institution of a Territory if a declaration under subsection (2) is in force to that effect'. Proposed

<sup>98</sup> See generally Thomas Dornan and Elyse Aird, 'An evaluation of the counselling in prison trial' (2015) *NSW Department of Justice* <[http://www.victimsservices.justice.nsw.gov.au/Documents/eval\\_counselling-in-prison.pdf](http://www.victimsservices.justice.nsw.gov.au/Documents/eval_counselling-in-prison.pdf)>.

<sup>99</sup> The Law Council adopts this input from the Law Institute of Victoria.

subsection 66(2) is in identical terms but refers to self-governing Territories (being the ACT and Northern Territory) being the funder of last resort.

132. It is envisaged that States will also 'opt in' to the Scheme to become funders of last resort. However, no State has yet made the referral of powers constitutionally required to facilitate this arrangement. The Federal Government has stated that it is confident of reaching an agreement with the States, but to date has been unsuccessful.

133. It appears that a central concern of the States is the issue of 'funders of last resort'.<sup>100</sup> In 2015, the Royal Commission put the estimated cost of last resort funding at \$613 million, to be divided between the Commonwealth, States and Territories.<sup>101</sup> It has been reported that States are concerned they will be responsible for being a funder of last resort more often than the Commonwealth and therefore that the majority of the cost that will therefore have to be borne by the States.<sup>102</sup>

134. The Law Council considers that the Bill should clarify the circumstances in which the Commonwealth intends to become a funder of last resort. As noted, currently it states that a government is a funder of last resort where the Minister has made a declaration to that effect. Although the Explanatory Memorandum provides that a funder of last resort will only be required where there is 'no responsible participating institution for a particular instance of abuse because the relevant institution no longer exists or cannot opt into the Scheme because it does not have sufficient assets or resources', this is not incorporated into the text of the Bill.

135. The Law Council considers that the Bill should be amended to specify that a government is a funder of last resort where a responsible institution no longer exists or has capacity to fund a redress payment. The Law Council considers that this may provide some comfort to the States as to how 'funders of last resort' arrangements will operate under the Scheme.

#### Recommendation

- **The Bill should specify that a government will be the funder of last resort when a responsible institution no longer exists or no longer has capacity to fund a redress payment.**

### Applications not made in the prescribed form

136. Proposed section 127 identifies instances where the Scheme is not required to process an application if it is not made in the prescribed format. While it is

<sup>100</sup> For a summary of each State's position on opting into the Scheme as at December 2017, see Samantha Donovan, 'A national compensation scheme for abuse victims was supposed to be up and running by now. Why isn't it?' (15 December 2017) *ABC News* <<http://www.abc.net.au/news/2017-12-15/states-reluctant-to-sign-up-to-national-redress-scheme/9259032>>. See also John Ferguson, 'States alarmed over \$613m abuse bill for redress scheme' (12 September 2017) <<https://www.theaustralian.com.au/national-affairs/in-depth/royal-commission/states-alarmed-over-613m-abuse-bill-for-redress-scheme/news-story/2e83d0b3b6bdc6cab18fb61e6101d047>>.

<sup>101</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) 34.

<sup>102</sup> See Samantha Donovan, 'A national compensation scheme for abuse victims was supposed to be up and running by now. Why isn't it?' (15 December 2017) *ABC News* <<http://www.abc.net.au/news/2017-12-15/states-reluctant-to-sign-up-to-national-redress-scheme/9259032>> and John Ferguson, 'States alarmed over \$613m abuse bill for redress scheme' (12 September 2017) <<https://www.theaustralian.com.au/national-affairs/in-depth/royal-commission/states-alarmed-over-613m-abuse-bill-for-redress-scheme/news-story/2e83d0b3b6bdc6cab18fb61e6101d047>>.

understandable that an application in a certain form is preferable, the Law Council notes that the Royal Commission's principles for a redress scheme which includes that there 'should be a 'no wrong door' approach for survivors in gaining access to redress'.<sup>103</sup>

137. In particular, if the Scheme does not fund legal assistance to assist survivors with the application process, or a person does not have legal assistance, then it is likely the Scheme will receive many applications not in the required form. The Law Council notes that survivors may include, for example, older persons, persons from culturally and linguistically diverse backgrounds, persons with disabilities, persons who are illiterate, and therefore may have difficulty making an application in the prescribed form without assistance. The Law Council considers that it would be unfair to deny these persons access to the Scheme for failure to complete an application in the prescribed form, and function as another barrier to access to justice.
138. The Law Council considers that section 127 should be amended to require the Operator to make reasonable attempt to contact a person who submits information and assist that person to provide the information in the required form.
139. The Law Council considers that this is not overly burdensome and is consistent with the stated policy objectives of the Bill to be survivor-focused. It is also consistent with existing legal obligations in other professional fields such as obligations upon doctors and health services to follow up patients.

#### **Recommendation**

- **Proposed section 127 should be amended to require the operator to 'make reasonable attempt' to contact a person who submits information and assist that person to provide the information in the required form.**

### **Right to confidential legal advice**

140. Proposed subsection 71(3) should be removed from the Bill on the basis that it erodes the fundamental right to claim privilege against self-incrimination. Any breach of a fundamental right should be a last resort.
141. If proposed subsection 71(3) is to remain in the Bill, then strong and specific protections of the admissibility and use of that evidence must be included in the statute. Proposed subsection 71(4) should be amended to read 'any proceeding' and not solely relate to criminal proceedings and should provide clear and explicit protections against the derivative use of evidence.
142. The Law Council queries whether other usual reasonable excuse grounds such as client legal privilege should also be added, to make clear that client confidentiality and privilege is preserved under the Scheme.

#### **Recommendation**

- **Proposed subsection 71(3) should be removed from the Bill. If it is to remain, then strong and specific protections of the admissibility and use of that evidence must be included in the statute**

<sup>103</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) recommendation 4(b).

## Concerns raised by the Senate Scrutiny of Bills Committee

143. The Law Council notes that a series of concerns regarding the Bill have been raised by the Senate Scrutiny of Bills Committee, namely regarding the omission of certain information instructive for legislative interpretation from the Explanatory Memorandum. Aside from those concerns already raised in this submission, the Committee identified the following additional issues with the Bill:

144. In relation to the offence supply of protected information (proposed section 84) and the offence of failure or refusal to comply with a relevant notice (proposed subsection 100(6)):

- i. the Explanatory Memorandum does not explain why the evidential burden of proof in relation proposed subsections 84(3) and 100(7) has been reversed;
- ii. the Explanatory Memorandum does not explain why proposed subsection 100(8) creates a strict liability offence (that is, fault is not required to be proved); and

b. In relation to the offence of the failure of a financial institution to respond to a notice (proposed section 109(3)), the Explanatory Memorandum does not explain why the legal burden of proof is reversed.

145. The Committee recommended that the key information provided by the Minister to the Committee to respond to these concerns be included in the Explanatory Memorandum.<sup>104</sup> The Law Council agrees with this recommendation.

### Recommendation

- **The Explanatory Memorandum should be amended to include the Minister's response to the Scrutiny of Bills Committee in respect of proposed sections 84, 100(6) and 109(3).**

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<sup>104</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 15 of 2017* (2017) [2.68], [2.91].

## Additional issues raised by the Queensland Law Society

146. The Law Council supports the survivor focus of the Scheme, and also notes the importance of creating a framework that encourages institutions to opt-in to it. Noting that the Royal Commission was also aware of the need to ensure institutional buy-in, the Law Council considers that a Bill that faithfully implements the Royal Commission's recommendations would be sufficient to procure institutional participation.

147. The Law Council notes below the views of one of its constituent bodies, the Queensland Law Society, which has identified areas in which the Bill might be adjusted in order to increase the likelihood of institutions opting into the Scheme. Due to the timeframe for preparing this submission, the Law Council has been unable to consult more widely to determine if these views are shared by its other constituent bodies, and therefore raises these issues on behalf of the Queensland Law Society for consideration of the Community Affairs Legislation Committee only.

### Ability to opt-out of the Scheme

148. Proposed section 27 of the Bill outlines the way in which the Minister can declare an institution is participating in the scheme but it is noted that it is intended that this only be after the institution seeks to opt-in. It is unclear from this drafting, however, whether institutions will have the ability to opt-out of the scheme after they have opted-in.

149. The intention of the Bill seems to be that once a participating institution opts-in, that opt-in is or may be confirmed by legislative instrument, which is likely to mean that the participating institution cannot then opt-out in respect of future redress applications if the institution perceives that the redress awards against them are manifestly unfair.

150. The Queensland Law Society considers that clarification is required as to whether an institution is able to opt-out of the Scheme, and if so, under what circumstances.

### Potential right of review

151. The Queensland Law Society considers that there may a need to be consideration given to limited rights of review by participating institutions. Such limitations, with a view to not causing further suffering to survivors, and the Scheme remaining survivor focused could for example:

- have a very short time in which an election for review needed to be made (given that participating institutions are likely to have ready access to legal advice); and
- be on the basis that no reasonable decision maker could have reached the decision the original decision maker made.

152. The Queensland Law Society notes that the Royal Commission only recommended a right of review by the applicant, but underlines that an institution's involvement in the Scheme is critical to its operation. It considers that a limited right of review would enhance institutional faith in the integrity of the Scheme. The Queensland Law Society considers that consideration should be given to a participating institution having a limited right of review and the Bill requires further work in this regard.

### Potential right of response to an application

153. Pursuant to proposed section 41 of the Bill, a liable institution is provided with notice of the acceptance of redress by an applicant. The Bill is silent on whether the institution is notified or provided with the application at the time that it is made, or only when an offer of redress is made. The Queensland Law Society notes that the Royal Commission recommended:

*A redress scheme should inform any institution named in an application for redress of the application and the allegations made in it and request the institution to provide any relevant information, documents or comments.*<sup>105</sup>

154. The Royal Commission also noted that the Royal Commission Redress and Civil Litigation Report commented that it was particularly important that institutions were provided with details of these allegations. This would ensure that the institution was aware of the allegations, that the institution could take action against any person still involved in the institution and that the institution could take steps in respect of the institution's policies and procedures.<sup>106</sup>

155. The Queensland Law Society recommends that consideration should be given to whether institutions should be afforded a right to be provided with a copy of the application as recommended by the Royal Commission and a limited (but reasonable period) of time to respond by written submission. The Scheme should require the Operator to take the institution's response into account in the decision of the original decision maker, and on review. The applicant should, of course, be provided with a copy of the response of the institution.

156. The Queensland Law Society considers that there are legitimate concerns about the willingness of institutions to opt-into the Scheme if they did not have at least a limited right to be heard on the specific allegations being made against them. As such, it is submitted that a limited right of response by the institution is not inconsistent with the Scheme being survivor focused. In fact, ensuring survivors are able to access redress payments, through securing institutional participation, is a central way of achieving a survivor focus to the Scheme.

157. The Queensland Law Society submits that consideration should be given to a participating institution having the ability to respond to applications concerning it.

### Unincorporated associations

158. In relation to applications against unincorporated associations in proposed section 124 of the Bill, the Queensland Law Society recommends that the drafting be amended to make the intention clear that it be the 'committee of management' at the time the application for redress is made (and as changed from time to time),<sup>107</sup> as opposed to the time of the alleged abuse. To the contrary, the Queensland Law Society recommends that the offence provisions in proposed subsection 124(3) should be as against the 'committee of management' at the time the offence was committed (given their nature as offence provisions).

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<sup>105</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation report* (2015) recommendation 56.

<sup>106</sup> Ibid 366-367.

<sup>107</sup> Changes from time to time should be contemplated so that if the 'committee of management' composition changes during the time of the application the respondents to the application should accordingly change.

159. The current law in relation to which “committee of management” is the appropriate respondent to tortious liability (as opposed to contractual liability), is the “committee of management” at the time of the alleged wrong.<sup>108</sup>
160. It is the current “committee of management” who have control of the assets and *officials* of the institution in order to give effect to the order for redress provided by the Operator.
161. The Bill does not clearly deal with whether the intention is that liability of the committee of management of an unincorporated association be *personal* or *representative* in nature, and then whether the liability is limited to the assets of the unincorporated association, or can be enforced as against the personal assets of members of the committee of management (jointly or jointly and severally).
162. Additionally, given that many committee of management members are volunteers, the Bill or the Explanatory Memorandum does not seem to deal with the interaction with liability protection that volunteer committees of management receive under state and territory based civil liability legislation.<sup>109</sup>
163. It seems to the Queensland Law Society that the intention of *representative* liability, which was also the substantive outcome in the *Bathurst* case,<sup>110</sup> is that the liability attaching to the committee of management, be limited to the extent of the assets of the incorporated association assets that they control.
164. Some of the assets of unincorporated associations may be held pursuant to specific charitable trust terms and not for the general purpose of the association. In our submission it would be contrary to the public policy of upholding the intentions of settlors of charitable trusts (and encouraging charitable giving), and by implication the doctrine of *cy pres* of saving charitable trusts; that specific purpose trust assets, the terms of which are not within the power of amendment of the committee of management, ought to be susceptible to responding to meeting a relevant monetary award by the Operator. This line was not crossed in the *Bathurst* case with only assets in general purpose trusts considered controlled and susceptible to responding to the liability in that case.
165. Finally, the Queensland Law Society queries the Constitutional basis for proposed section 124 of the Bill absent a referral of powers from the states and territories (or each of those states and territories enacting legislation for the limited recognition of unincorporated associations as legal persons, able to sue and be sued, with succession for asset holding purposes).<sup>111</sup> The Queensland Law Society considers that proposed section 124 requires further consultation as it relates to unincorporated associations.

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<sup>108</sup> *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117. Cf contractual liability *Anglican Development Fund Diocese of Bathurst in its own capacity and in its capacity as trustee of the Anglican Development Fund Diocese of Bathurst (receivers and managers appointed) –v– The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst; Commonwealth Bank of Australia –v– The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst* [2015] NSWSC 1856 (10 December 2015)

<sup>109</sup> Civil Liability Act 2003 (QLD) s 39; NSW - Civil Liability Act 2002 (NSW) s61; SA - Volunteers Protection Act 2001 (SA) s 4; WA – Volunteers and food and other donors (Protection from Liability Act) 2002 (WA) s 6; TAS - Civil Liability Act 2002 (TAS) s 47; NT - Personal Injuries (Liabilities and Damages) Act 2015 (NT) s 7; ACT - Civil Law (Wrongs) Act 2002 (ACT) s 8; VIC - Wrongs Act 1958 (VIC) s 37.

<sup>110</sup> *Ibid.*

<sup>111</sup> This has been done in various states of the United States of America.

### Assessment matrix

166. Proposed sections 33 and 34 of Bill discuss the 'assessment matrix' which the operator will use to determine redress payable. However, the assessment matrix is not provided in the primary legislation nor have the rules yet been released.
167. The Queensland Law Society considers that consultation with relevant stakeholders is essential to ensure that the assessment matrix set out at proposed sections 33 and 34 is fair and reasonable and will give proper effect to the Scheme.
168. Given the central nature of the of the assessment matrix to the Scheme, the Queensland Law Society is of the view that consideration should be given as to whether this matrix should be contained in the primary legislation.
169. If the matrix is to remain the subject of statutory instrument, the Queensland Law Society considers that the Minister publish the assessment matrix for a 90-day period of public consultation prior to enactment of the matrix.
170. The Queensland Law Society considers that it would be appropriate to amend section 34 in the following terms:

*34(4) The Minister must publish the Assessment Matrix for a period no less than 90 days and undertake public consultation by way of Parliamentary Committee and must amend the Assessment Matrix in accordance with any recommendations of the Parliamentary Committee prior to any implementation of the Assessment Matrix.*