Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Inquiry into the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and related bill

Submission to Senate Community Affairs Legislation Committee

23 May 2018

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

CONTENTS

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Committee's inquiry into the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and related Bill. The ALA supports the existence of a national redress scheme with the objective of minimising litigation and stress for the victims of child sexual abuse. However, there are aspects of the present proposed Scheme which cause us great concern.

Repayment amounts

2. The Royal Commission recommended that the maximum redress payment that should be available under the Scheme should be $200,000, with an average payment of $65,000 and a minimum payment of $10,000. However, under clause 16(1) of the Bill, the maximum payment will be $150,000. There is no average amount specified, but a minimum payment of $0 will be possible. There is no reason given for this divergence in figures in the Explanatory Memorandum.

3. The ALA believes that maximum amounts in line with those recommended by the Royal Commission, indexed for CPI over the lifetime of the Scheme, are appropriate. As the Royal Commission noted, a maximum amount of $200,000 'is appropriate to allow recognition of the most severe cases, taking account both of the severity of the abuse and the severity of the impact of the abuse'.[2]

4. It is important that the amount of redress paid adequately reflects the seriousness of the survivor's experiences and the impact of the abuse on their lives. Particularly in the most serious cases, some survivors might not feel that what they are offered

[2] Redress and Civil Litigation Report, 252.

adequately reflects the impact of the abuse on their lives if the maximum redress payment is restricted to $150,000.

5. While the Scheme is not intended to offer the level of payment that might be available through civil litigation, applicants will compare what is available through each route. While many will be happy to accept a lower payment to avoid the stress of litigation, the greater the gap between the two potential amounts, the less attractive the Scheme will be to survivors.

6. If maximum redress payments are so significantly below what might be achievable through civil litigation, some survivors might feel forced to pursue civil litigation even though they would prefer not to. In turn, this will mean that fewer institutions will benefit from the still dramatically lower redress payments available under the Scheme, as well as accruing significant legal fees that will arise should survivors choose to pursue litigation.

7. The equivalent Irish scheme had a cap of 300,000 EUR, which could be exceeded in some circumstances. The Royal Commission proposed a cap of $200,000. The Commonwealth has proposed a $150,000 cap. South Australia has previously indicated it would prefer to stick with an existing scheme, which offers much lower compensation and has some further procedural challenges for applicants. We are clearly concerned that an average payout of less than half the maximum is likely to force more of the severely injured litigants, particularly those with economic loss claims, to go to pursue civil litigation, contrary to the objectives of the bill.

8. Whilst it is reasonable that previous payments be taken into account when working out the amount of redress payment (clause 30(2)), institutions should not be able to rely upon settlements of claims entered into where they did not legally exist

(particularly in the case of the Catholic Church) or, as in the *Ellis*[3], it was claimed the institution did not exist in a form capable of being sued.

Participation by institutions

9. At present, there appears to be no means of effectively encouraging institutions to participate. It is likely that ultimately major organisations, such as the Catholic and Anglican churches, will support participation if only because they will see it as a much cheaper solution, both in respect of damages and legal costs, than forcing victims to go to law.

10. NGOs should be encouraged to participate. We believe that the best way to achieve this is provide for the charitable status of all NGOs against whom a claim is made to be made subject to their participating in the scheme. If an institution is named as being responsible for abuse, and it chooses not to participate in the Scheme, it should lose its charitable status.

11. The ALA believes that this will be the most effective means of encouraging states and territories to participate in the Scheme, given that they will be payers of last resort in their own jurisdiction, and thus will be liable if institutions do not choose to participate in the Scheme.

Exclusions from the Scheme

12. It has been suggested that those guilty of significant criminal offences should be deprived of compensation. This has provoked an outcry from NGOs because there appears to be a strong correlation between abuse and criminality consequent, at least in part, upon that abuse. For many, the sexual abuse that they suffered as

[3] [2007] NSWCA 117

children will have contributed to the life of crime they later embarked on, or the single criminal offence (which could be relatively minor, with no sentence imposed, if the maximum possible was five years). In relation to drug crimes, for example, the Royal Commission heard evidence from survivors who explained that they were driven to drug and alcohol misuse as a means of blocking out memories of the abuse that they suffered.

13. No such provision was recommended by the Royal Commission and it is both inappropriate and unjust. Those whose lives were ruined and led into crime directly or indirectly by the abuse should not be further punished by being discriminated against.

14. The Commonwealth also proposes to exclude children sexually abused in immigration detention. The Commonwealth has made it clear that this is purely to save money. However, Volume 15 of the Royal Commission's final report made detailed findings that conditions in immigration detention are particularly conducive to the risk of child sexual abuse materialising. As with any institutional abuse, it is the power of the institution over the individual that has given rise to the opportunity for abuse of these children.

15. The Royal Commission found that refugee children are at high-risk of suffering abuse: 'research suggests that specific impacts associated with the refugee experience and prior trauma can complicate the development of adult identity among adolescent refugees and may lead to acting out through sexual behaviour… Prior experience of or witnessing rape and sexual violence is commonly reported among refugee children.'[4]

[4] Volume 15, 189.

16. The Royal Commission's report was also clear that the 'Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention… This includes children in community detention.'[5] Further, the Royal Commission was clear that 'it is the [Department of Immigration and Border Protection, now the Department of Home Affairs (referred throughout as the Department)] that carries ultimate responsibility for responses to child sexual abuse within Australia's immigration detention network'.[6] Where child abuse has occurred in offshore detention, the same Department is responsible for both the abuse and preventing the survivor from coming to Australia. As such, it is completely inappropriate to exclude this group of survivors from accessing the Scheme.

17. There are several institutional factors that might enable child sexual abuse in immigration detention. The culture of secrecy and isolation that exists, especially in immigration detention, the normalisation of harmful and dehumanising practices and the prioritisation of the Department's reputation over children's safety all increase the risk of abuse, and decrease the likelihood that it will be noticed and appropriately responded to.[7]

18. In relation to onshore detention, 'the Australian Federal Police [submission] to the [Royal Commission] notes instances in which known offenders convicted of child sexual abuse were released from corrective service facilities in Australia and placed into immigration detention centres pending the assessment of their immigration status or awaiting deportation. At times, this detention was alongside children.'[8]

[5] Volume 15, 172.

[6] Volume 15, 172.

[7] Volume 15, 190 (references omitted).

[8] Volume 15, 188.

19. These practices clearly demonstrate that the Department, as an institution, could potentially be found to be at least equally responsible for any abuse of children in detention overseen by it. It is only fair that anyone abused in such circumstances has access to redress under the Scheme.

20. Given that the children were placed in immigration detention by the Commonwealth and are owed a non-delegable duty of care[9], the Commonwealth should compensate these victims. After all, the children did not choose to be in immigration detention and committed no crimes. It is understood that the children who came out under the Child Migrant scheme or through the Fairbridge Farm scheme will not be discriminated against in this way and indeed, the Commonwealth has already shared in a payout to the Fairbridge Farm victims. Those in immigration detention or on certain forms of visa should not be discriminated against. This would be a clear breach of the non-delegable duty of care owed to these children and leave the Commonwealth open to common law proceedings for breach of that duty of care, which might end up costing the Commonwealth a great deal more than the very modest benefits provided for under the scheme.

Conclusion

21. The ALA refers the Committee to its submission and supplementary submission in relation to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related Bill, dated 2 February 2018 and 22 February 2018. These submissions provide further details regarding the issues raised in the current submission and are relevant to the current Bill. They are attached to this submission.

[9] *NSW v Bujdoso* (2005) 227 CLR 1; [2005] HCA 76. *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Conceded by the Commonwealth in *AS v Minister for Immigration and Border Protection* [2014] VSC 593 at [24].

22. The Australian Lawyers Alliance (ALA) would be happy to appear before and explain its views to the Committee.

Recommendations

23. The ALA makes the following recommendations:

    a. The maximum amount of redress available under the Scheme should be in line with that proposed by the Royal Commission. There should be complete transparency regarding the proposed spread of payments and reasons provided for any divergence from the maximum, average and minimum amounts proposed by the Royal Commission;

    b. When working out the amount of redress payment (clause 30(2)), institutions should not be able to rely upon settlements of claims entered into where they did not legally exist (particularly in the case of the Catholic Church) or where it was claimed the institution did not exist in a form capable of being sued. Institutions should, however, be entitled to credit for previous payments.

    c. The only eligibility requirement should relate to having suffered abuse that is the responsibility of a participant institution. Matters of citizenship or past criminal convictions are not relevant;

    d. There should be no sunset date in the Bill; and

    e. Institutions' charitable status should be connected to their participation in the Scheme.

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related Bill

Submission to Senate Standing Committees On Community Affairs

2 February 2018

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Contents

WHO WE ARE

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

INTRODUCTION

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry being conducted by the Senate Standing Committees on Community Affairs into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the Bill) and related Bill.

2. We believe that the establishment of a Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Scheme) has the potential to have a genuine positive impact on the lives of thousands of people whose lives have been affected by sexual abuse when they were children. We particularly support the objects of the Bill, being to:

> '(a) recognise and alleviate the impact of past institutional child sexual abuse and related abuse; and
>
> (b) provide justice for the survivors of that abuse.'[2]

3. Many aspects of the Scheme will provide meaningful redress for survivors. Providing three forms of redress – a monetary payment, access to counselling and psychological services, and a direct personal response – will all contribute to healing, and ensure that survivors know that what has happened to them has been acknowledged as wrong, and that there are also practical tools provided to assist with their healing. The proposed standard of 'reasonable likelihood' is appropriate and will minimise the level of re-traumatisation that is likely to arise as a result of engaging with the Scheme.

4. However, for this potential and these objects to be fully realised, the ALA believes that the Scheme should more closely follow the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), which provided its final reports in December 2017, and its report on Redress and Civil Litigation in 2015. We also have a number of additional recommendations to those that were made by the Royal Commission.

5. In particular, the ALA has concerns about: the maximum redress payment proposed; how ongoing counselling and psychological support will be facilitated after the Scheme winds up; the exclusion from the Scheme of those who have been physically but not sexual abused; the introduction of eligibility criteria beyond having experienced abuse

[2] Proposed s3(1).

connected to a participating institution (in relation to citizenship/residency or criminal record); lack of access to external review of the Scheme's decisions; inadequate access to legal advice; and the sunset date. We also make recommendations in relation to survivors withdrawing applications and declining offers.

ELEMENTS OF REDRESS

Maximum redress payment

6. The Royal Commission recommended that the maximum redress payment that should be available under the Scheme should be $200,000, with an average payment of $65,000 and a minimum payment of $10,000. However, under the Bill, the maximum payment will be $150,000. There is no average amount specified, but a minimum payment of $0 will be possible. There is no reason given for this divergence in figures in the Explanatory Memorandum.

7. The ALA believes that maximum amounts in line with those recommended by the Royal Commission, indexed for CPI over the lifetime of the Scheme, are appropriate. As the Royal Commission noted, a maximum amount of $200,000 'is appropriate to allow recognition of the most severe cases, taking account both of the severity of the abuse and the severity of the impact of the abuse'.[3]

8. The Bill does not clarify what the average amount envisaged would be. We believe that it is important that this detail is made clear in the legislation, to ensure that Scheme transparency is maintained. If it is envisaged that a higher or lower average than that recommended by the Royal Commission would apply, it is important for that to be made clear, along with the reasons for the divergence.

9. It is important that the amount of redress paid adequately reflects the seriousness of the survivor's experiences and the impact of the abuse on their lives. Particularly in the most serious cases, some survivors might not feel that what they are offered adequately reflects the impact of the abuse on their lives if the maximum redress payment is restricted to $150,000.

[3] Redress and Civil Litigation Report, 252.

10. While the Scheme is not intended to offer the level of payment that might be available through civil litigation, applicants will compare what is available through each route. While many will be happy to accept a lower payment to avoid the stress of litigation, the greater the gap between the two potential amounts, the less attractive the Scheme will be to survivors.

11. If maximum redress payments are so significantly below what might be achievable through civil litigation, some survivors might feel forced to pursue civil litigation even though they would prefer not to. In turn, this will mean that fewer institutions will benefit from the still dramatically lower redress payments available under the Scheme, as well as accruing significant legal fees that will arise should survivors choose to pursue litigation.

12. The ALA applauds the clarification provided in the Bill that any redress payment is not compensation, and will not affect social security payments or veterans entitlements, or be available in the event of bankruptcy.

Counselling and psychological services

13. The ALA strongly supports the right of survivors to access counselling and psychological services in line with proposed s18(b) of the Bill. It is unclear, however, how these ongoing services will be paid for by the institutions in the event that the Scheme ends on the sunset date (see our comments in this regard below). Clarifying such details will be essential to ensuring confidence in and viability of the Scheme.

Direct personal response

14. The ALA supports the proposal that a direct personal response be made if the survivor seeks one, and that the survivor should be consulted to determine what this response should consist of.

RESTRICTION TO SEXUAL ABUSE

15. The ALA notes the broad definition of sexual abuse proposed under the Bill, along with the fact that once sexual abuse is established, other associated abuse, such as physical or psychological abuse, could be factored into assessing the severity of the abuse.

16. While we acknowledge that this Scheme is a response to the Royal Commission, we feel that restricting access to the Scheme in this way is likely to give rise to injustice. Some institutions are responsible for many children suffering years of horrific physical and psychological abuse. To prevent them from accessing redress will give rise to feelings of injustice.

ELIGIBILITY

17. The objects of the Bill are to 'recognise and alleviate the impact of past institutional child sexual abuse and related abuse' and 'provide justice for the survivors of that abuse'.[4] Further guidance is provided by the general principles outlined in proposed s13, which stipulates that 'Redress under the scheme should be survivor focussed', and that 'Redress should be assessed, offered and provided so as to avoid further harming or traumatising the survivor'.

18. The ALA is concerned about the eligibility requirements that both exist in the Bill and have been mooted in the media. We believe that the sole eligibility requirement should be that a person was abused as a child in an institutional context. Any further restriction on eligibility is unfair, and in conflict with objects and general principles of the Bill. As such, the question arises as to whether these restrictions are merely a cost cutting exercise, which will ultimately benefit institutions and perpetuate injustice for survivors of child abuse.

Requirement for citizenship or permanent residency

19. The ALA strongly objects to the requirement in the Bill that eligibility will depend on an applicant's citizenship or permanent residency. The Royal Commission made it clear that it sees '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'.[5]

20. The Explanatory Memorandum anticipates that the Rules for the Scheme will allow former child migrants, non-citizens and non-permanent residents currently living in Australia, and former Australian citizens and permanent residents to apply to the

[4] Proposed s3 of the Bill.

[5] Redress and Civil Litigation Report, 347.

Scheme for redress.[6] While it is argued that this rule 'is included to mitigate the risk of fraudulent claims and to maintain the integrity of the Scheme [as] 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', no evidence is provided to support this claim.

21. The ALA has no doubt that the Scheme would be able to establish adequate processes to eliminate the risk of fraudulent applications from both residents and non-residents alike, and believes the appropriate point at which to assess this risk is during the application process, rather than making it an additional eligibility requirement. Asylum seekers, refugees and stateless people, for example, will have been through extensive identity checks as a part of their protection application. There is no reason that those checks could not also be used by the Scheme to verify identity.

22. Asylum seekers, refugees and stateless people who suffered abuse in immigration detention (including community detention, and both onshore and offshore detention) would be particularly affected by this exclusion. Other members and former members of migrant could also be affected, particularly if they have been deported according to recently enhanced powers to deport migrants holding valid visas.[7]

23. Volume 15 of the Royal Commission's final report made detailed findings that conditions in immigration detention are particularly conducive to the risk of child sexual abuse materialising. As with any institutional abuse, it is the power of the institution over the individual that has given rise to the opportunity for abuse of these children.

24. The Royal Commission found that refugee children are at high-risk of suffering abuse: 'research suggests that specific impacts associated with the refugee experience and prior trauma can complicate the development of adult identity among adolescent refugees and may lead to acting out through sexual behaviour… Prior experience of or witnessing rape and sexual violence is commonly reported among refugee children.'[8]

[6] Explanatory Memorandum, 13.

[7] This push commenced with the passage of the *Migration Amendment (Character and General Visa Cancellation) Act* 2014 (Cth), which introduced s501(3A) into the *Migration Act* 1958 (Cth), requiring the removal of certain visa holders and expanding the circumstances in which a migrant might fail to meet the character requirements.

[8] Volume 15, 189.

25. The Royal Commission's report was also clear that the 'Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention… This includes children in community detention.'[9] Further, the Royal Commission was clear that 'it is the [Department of Immigration and Border Protection, now the Department of Home Affairs (referred throughout as the Department)] that carries ultimate responsibility for responses to child sexual abuse within Australia's immigration detention network'.[10] Where child abuse has occurred in offshore detention, the same Department is responsible for both the abuse and preventing the survivor from coming to Australia. As such, it is completely inappropriate to exclude this group of survivors from accessing the Scheme.

Department practices and heightened risk

26. The Child Protection Panel (CPP) was constituted following the release of the Australian Human Rights Commission's *Forgotten Children* report and the Moss Review in May 2015, to inquire into child safety in immigration detention. This Panel reported a number of concerns regarding way that the immigration detention system operations might perpetuate the risk of child abuse occurring, and reduced the likelihood that abuse would be reported (which as the Royal Commission identified, is essential if it is to be eradicated).

27. According to the CPP, the Department prioritised security and order over child welfare and safety. Responses to reports of abuse focused on perpetrators rather than on supporting survivors. The harm that this caused was exacerbated by complex intra-government structures, meaning that protections and supports that exist in the community are absent in immigration detention. Finally, reporting requirements were focused on speed rather than accuracy, meaning that incomplete or inaccurate reports might have overlooked or minimised child abuse in detention.[11]

28. There are also a number of institutional factors that might enable child sexual abuse in immigration detention. The culture of secrecy and isolation that exists, especially in immigration detention, the normalisation of harmful and dehumanising practices and

[9] Volume 15, 172.

[10] Volume 15, 172.

[11] Volume 15, 187, 210-215.

the prioritisation of the Department's reputation over children's safety all increase the risk of abuse, and decrease the likelihood that it will be noticed and appropriately responded to.[12]

29. The CPP, for example, noted that 'the department and its service providers failed to ensure staff at the Nauru Regional Processing Centre maintain appropriate professional boundaries in their dealings with children'.[13] In this regard, the Moss Review found that 'four local service provider staff had allegedly used their position of authority to offer [children] marijuana and other items in return for sexual favours. They also disclosed that these officers had been on duty while under the influence of alcohol.' [14]

30. In relation to onshore detention, 'the Australian Federal Police [submission] to the [Royal Commission] notes instances in which known offenders convicted of child sexual abuse were released from corrective service facilities in Australia and placed into immigration detention centres pending the assessment of their immigration status or awaiting deportation. At times, this detention was alongside children.'[15]

31. These practices clearly demonstrate that the Department, as an institution, could potentially be found to be at least equally responsible for any abuse of children in detention overseen by it. It is only fair that anyone abused in such circumstances has access to redress under the Scheme.

Immigration policy and child sexual abuse

32. The broader policy environment was also identified by the Royal Commission as potentially related to the risk of child sexual abuse, and the risk that it might not be reported: 'The service provider's submission stated that official government policies and Departmental procedures that brand held detention as a deterrence measure have the potential to create or validate false perceptions among detention staff that children

[12] Volume 15, 190 (references omitted).

[13] Volume 15, 187 (references omitted).

[14] Volume 15, 187.

[15] Volume 15, 188.

seeking asylum are criminals, morally inferior, in need of punishment, control and reform and not deserving of Australia's care and protection.'[16]

33. The remoteness of detention centres, especially those offshore, is also a risk factor: 'Institutions that are isolated from public and external scrutiny have also been associated with a higher risk of child sexual abuse.'[17] The secrecy provisions of the *Australian Border Force Act* 2015 (Cth) perpetuate this risk, as disclosure of abuse, and inadequate responses to abuse, were effectively silenced. While this Act has been reformed to limit secrecy, the fact remains that prison sentences exist for some disclosures which could discourage reporting.[18]

34. The prioritisation of 'stopping the boats' has meant that all responses by the Department to allegations of abuse are framed through this lens. When Senator Sarah Hanson-Young revealed her suspicions that women and children had been sexually abused on Nauru, for example, the Department's response was to accuse Save the Children workers on Nauru of encouraging detainees to self-harm. The subsequent inquiry (the Moss Review) investigated both the allegations of abuse and the suspected whistleblowers.

35. No evidence of such encouragement was found in two subsequent reviews,[19] and Save the Children and the workers were eventually compensated by the government in resolution of the matter, but not before Save the Children offices were raided by

[16] Volume 15, 191 (references omitted).

[17] Volume 15, 191 (references omitted).

[18] See Australian Lawyers Alliance, *Australian Border Force Amendment (Protected Information) Bill 2017: Submission to Senate Legal and Constitutional Affairs Committee* (2017) https://www.lawyersalliance.com.au/documents/item/950 for our concerns related to the amended *Australian Border Force Act* 2015.

[19] The Moss Review and the Doogan Review both recommended that compensation be paid to the Save the Children workers who lost their jobs: P Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru: Final Report* (2015), https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf; Adj. Prof C M Doogan, *Review of Recommendation Nine From the Moss Review* (2015), https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/doogan-report.pdf.

Nauruan police.[20] This response is a clear indication to those who might reveal abuse that they, not the abuse that they reported, will be the focus of any government response. The fact that the Moss Review went on to find that sexual and other abuse was in fact likely to have occurred on Nauru does not detract from this message to people who might seek to report abuse.

36. While a policy is unlikely to directly cause or facilitate abuse, it can create an environment in which abusive practices are more readily condoned, or not identified as abuse. Children abused in such circumstances should be as entitled to redress as any other.

Exclusion of persons convicted of certain crimes

37. The ALA is extremely concerned by reports that individuals convicted of certain crimes would be prevented from accessing the Scheme (sex offenders and anyone else convicted of crimes for which the maximum sentence is five or more years in prison).[21]

38. For many, the sexual abuse that they suffered as children will have contributed to the life of crime they later embarked on, or the single criminal offence (which could be relatively minor, with no sentence imposed, if the maximum possible was five years). In relation to drug crimes, for example, the Royal Commission heard time and again evidence from survivors who explained that they were driven to drug and alcohol misuse as a means of blocking out memories of the abuse that they suffered. A blanket ban on sex offenders will also capture some people who have engaged in low-level offending, a concern raised by the Law Council of Australia (LCA) recently in relation to mandatory sentencing proposals (the LCA used the example of a relationship between a 15 and 17 year old becoming criminalised once the older party turns 18).[22]

---

[20] Sarah Whyte, 'Government pays compensation to Save the Children workers removed from Nauru', *ABC News 7.30*, 31 January 2017, http://www.abc.net.au/news/2017-01-31/save-the-children-workers-government-pays-compensation/8217686.

[21] John Ferguson, '$150,000 individual cap on decade-long sex abuse redress scheme', 26 October 2017, *The Australian*, http://www.theaustralian.com.au/national-affairs/150000-individual-cap-on-decadelong-sex-abuse-redress-scheme/news-story/9e56d46ce1df59968fed8d7ded101944.

[22] Law Council of Australia, *Media Release: Senate urged to reject mandatory sentences in bills*, 16 October 2017, https://www.lawcouncil.asn.au/media/media-releases/senate-urged-to-reject-mandatory-sentences-in-bills.

REVIEW AND APPEAL

39. The definitions regarding abuse and responsibility for abuse are rightfully broad. It is appropriate that as many people as possible who were abused as children have access to the Scheme, and that the Scheme will be best placed to establish parameters when confronted with unusual claims.

40. However, these broad definitions also give rise to a need for an external review mechanism in addition to the internal review option currently found in the Bill. This will ensure that the Scheme, which will be staffed by bureaucrats rather than judges, is interpreting its mandate correctly.

41. The ALA believes that the most appropriate venue for review is the Administrative Appeals Tribunal (AAT), and that any reviews undertaken at that tribunal be published (having due respect for the needs for privacy for applicants, by making publication at the discretion of the applicant). As such, we believe that the exemption of Scheme decisions from the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) is inappropriate and should be removed from the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017.

42. As some submissions to the Royal Commission's Consultation Paper on Redress and Civil Litigation noted, survivors of abuse have often been disempowered by institutional (including government) administrative processes that were opaque and not open to oversight. As such, it is especially important that the Scheme does not inadvertently repeat this experience for survivors, particularly if the motivation is to ensure that survivors are not re-traumatised by their engagement with the Scheme. A survivor who believes that a decisions has been wrongly made according to the law, and cannot appeal that decision to an external tribunal, is likely to feel that the powerful are again operating to rob them of their rights.

43. As a second alternative, we would also support oversight by the relevant ombudsman, as recommended by the Royal Commission. However, we feel that this would not adequately cater for the needs of survivors in the same way that external appeals would.[23]

[23] Redress and Civil Litigation Report, recommendation 62.

44. We agree that these appeal rights should only be made available to survivors of abuse, not institutions.

45. It might also be relevant to consider granting applicants the right to waive their right to review in circumstances where having access to their redress payment quickly is a priority for them.

Withdrawal of applications and internal review

46. If an application is to be denied, survivors should be informed of this, and the reasons for the imminent denial, prior to final determination, so that they can withdraw their application pursuant to proposed s31 and resubmit it if they so choose.

47. Similarly, if an application is internally reviewed, survivors should have access to full reasons for the decision that is being reviewed, so that they can respond to any concerns. Proposed s88(3) should be amended to ensure that applicants have an opportunity to provide further evidence when a decision is reviewed. This will be particularly important given that, once a determination of an application is made, it will no longer be possible to withdraw the application and resubmit it.[24]

Declining offers

48. In addition to the notices required by proposed s42, the ALA believes it would be valuable to require the form to state clearly that this is the only offer the person will ever receive from the Scheme, and that they can also seek to have the offer reviewed.

INSTITUTIONS

49. The ALA is concerned that the definitions contained in the Bill do not adequately account for the complex relationships that some institutions develop, which might obscure responsibility for abuse. In particular, children who were abused while resident in a facility run or owned by a corporation, but who were sent there and forced to remain

[24] Proposed s31(1).

there by the Commonwealth or a Territory, may find contracting arrangements act as a barrier to receiving redress.

50. These complexities are likely to arise in circumstances of immigration detention or other private facilities where young people are detained. Proposed s21(3)(c) might cover such circumstances. However, we have seen with immigration detention a confusing array of statements from the Department regarding who is responsible for the health and safety of children or others living in immigration detention. This matter becomes even more complex for those detained on Nauru or Manus Island, who have been sent there by the Australian government and whose care is paid for by Australia, but who are living in the communities, and are thus arguably not strictly 'detained'.[25]

51. The Explanatory Memorandum does appear to suggest that, where a child is being detained under government order, then that government will at least be equally responsible for any abuse. However, we do not believe that this explanation is adequate to protect vulnerable children from abuse, or ensure their access to redress if they are abused.

52. While there are hurdles for people currently held in immigration detention facilities in the current Bill (which the ALA believes must be remedied, see above), we note that there are likely to be survivors of abuse who were formally abused in contractor-run facilities who are now Australian citizens. For these people, it is essential that the responsibility of the Commonwealth is clear, particularly if the contractor in question no longer exists or has an Australian presence. In such circumstances, the role of the Commonwealth as funder of last resort is essential.

53. It should be clarified in the Bill that children abused in institutions run by contractors but paid for by the Commonwealth or a Territory, including where those institutions are located outside of Australia, will have access to the Scheme. Further, it should be made clear that where abuse occurs because a child is forced to live in an offshore detention country by the Commonwealth, it would then be open to the Commonwealth to pursue

[25] In *Plaintiff S99/2016 v Minister for Immigration and Border Protection*[2016] FCA 483, it was acknowledged that the Commonwealth had a duty of care toward a refugee woman living in the community in Nauru, but the content of that duty remained undefined: see Kaldor Centre, *Case note* (2016) http://www.kaldorcentre.unsw.edu.au/sites/default/files/casenote_plaintiffs99_2016.pdf. Note the discussion about the Commonwealth's attempts to dispute the applicability of Australian law, giving rise to concerns that similar attempts to avoid the jurisdiction of the Scheme might be employed.

the contractor for reimbursement of the costs related to the application if it chose to do so.

ACCESS TO LEGAL ADVICE

54. While reports regarding legal advice throughout the application process have been noticed in the media,[26] the only mention of legal advice in the Bill relates to offers of redress: applicants must be informed about their opportunity to access legal services under the Scheme so they can discuss whether to accept the offer.

55. The ALA believes that it is essential that applicants under the Scheme have access to legal advice throughout the process. Applicants will need to be guided throughout their application by someone with legal expertise. They will need advice on how to present their application in the strongest possible light; whether any supporting documentation will assist them; and what the legal ramifications of making the application and accepting an offer of redress will be for them.

56. The services that knowmore[27] provided during the Royal Commission could usefully be replicated by the Scheme. Access to legal advice should be guaranteed in the Bill, rather than in the Rules that will be established under proposed s117 of the Bill.

57. The involvement of lawyers throughout the process will not mean that the Scheme becomes overly legalistic. What legal representation will ensure, however, is that survivors are properly informed of their rights and the legal ramifications of pursuing a claim with the Scheme. It will also ensure that claims that are assessed by the Scheme will be clearly structured and complete, minimising the need for internal or external review, or reverting to the applicant to ask them for more information throughout the claims process. In this way, funding legal advice for applicants is likely to save the Scheme money in terms of efficiencies.

---

[26] John Ferguson, '$150,000 individual cap on decade-long sex abuse redress scheme', 26 October 2017, *The Australian*, http://www.theaustralian.com.au/national-affairs/150000-individual-cap-on-decadelong-sex-abuse-redress-scheme/news-story/9e56d46ce1df59968fed8d7ded101944.

[27] Knowmore was a legal triaging service set up to assist individuals who were considering engaging with the Royal Commission to provide them with information and advice about their legal options: http://knowmore.org.au/.

NOMINEES

58. It would be useful if the purpose of nominees were more clearly spelled out in the Bill, along with the criteria to be used by the Operator in appointing the person as a nominee, and any redress that might be available to the applicant if the nominee is appointed against their wishes.

SUNSET DATE

59. The Royal Commission did not recommend a sunset date for the Scheme. It acknowledged that there would be a natural diminishment of claims over time, and that it may be relevant to review the Scheme at some point in the future.

60. Further, evidence presented at the Royal Commission made it clear that the average time taken for survivors of abuse to feel ready to disclose their experiences is approximately 22 years.[28] Many will take much longer than this before they feel ready to confront what has happened to them. The reason for the delay frequently relates to the actions of the institution or the abuser – for example, by not taking a child's reports of abuse seriously or otherwise threatening the child. Other survivors will consciously decide not to relive their experiences during particular times of their lives – for example, when raising their own children – preferring to put off what they know will be a traumatic process until such time as they no longer feel depended on by those who need them most.

61. As such, a ten-year window in which claims can be brought will exclude many survivors from accessing the redress payment that they deserve, potentially unfairly benefitting institutions that have acted improperly when faced with initial reports of abuse.

ENCOURAGING PARTICIPATION

62. The ALA understands the complexity of establishing a Scheme of this nature. It is fundamental to the success of the Scheme that all relevant institutions opt in, to ensure both proper accountability for institutions and the Scheme's financial viability. We believe that the best way to achieve this is to link institutions' charitable status to their

[28] Royal Commission, *Redress and Civil Litigation Report* (2015), 444.

participation in the Scheme, as an additional component of the Consequential Amendments Bill. If an institution is named as being responsible for abuse, and it chooses not to participate in the Scheme, it should lose its charitable status.

63. The ALA believes that this will be the most effective means of encouraging states to participate in the Scheme, given that they will be payers of last resort in their own jurisdiction, and thus will be liable if institutions do not choose to participate in the Scheme.

RECOMMENDATIONS

64. The ALA makes the following recommendations:

a) The maximum amount of redress available under the Scheme should be in line with that proposed by the Royal Commission. There should be complete transparency regarding the proposed spread of payments and reasons provided for any divergence from the maximum, average and minimum amounts proposed by the Royal Commission;

b) The only eligibility requirement should relate to having suffered abuse that is the responsibility of a participant institution. Matters of citizenship or past criminal convictions are not relevant;

c) Applicants under the Scheme should be given advance warning that their application is about to be denied and the reasons for that denial, so that they can withdraw and amend their application if they so choose;

d) Applicants should have access to external merits review at the AAT if they are unhappy with the outcome of internal review;

e) If an applicant wants to decline an offer made under the Scheme, the form should remind them that instead of rejecting the offer they can ask for a review, and that this is the only offer that they will ever receive under the Scheme unless they seek a review;

f) The responsibility of government institutions for abuse committed where contractors are involved should be clarified;

g) Applicants should have access to legal advice through the claims process, to be provided by an organisation similar to knowmore;

h) The reasons for the use of nominees, and the rights of principals in that regard, should be clearer;

i) There should be no sunset date in the Bill; and

j) Institutions' charitable status should be connected to their participation in the Scheme.

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017

Supplementary Submission to Senate Standing Committees on Community Affairs

22 February 2018

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

CONTENTS

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and individual rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) makes this submission as a supplementary submission to that provided to the Senate Community Affairs Legislation Committee in relation to its ongoing inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse 2017 and Related Bill on 2 February 2018.

2. We thank the Committee for considering this supplementary submission. It adds to the comments made in our original submission in relation to eligibility criteria, and our recommendation that '[t]he only eligibility requirement should relate to having suffered abuse that is the responsibility of a participant institution. Matters of citizenship or past criminal convictions are not relevant'.[2]

3. The ALA agrees with the Prime Minister's statement that '[w]e owe it to the survivors not to waste this moment'.[3] We also support former Minister for Social Services Christian Porter's comments that:

> '[a]ll responsible institutions and each state and territory and the Commonwealth government should be ashamed of what occurred on their watch and … all of them [should] join with the Commonwealth's best-practice approach to delivering redress that is set out in this legislation'.[4]

4. Unfortunately, we are concerned that without remedying the eligibility requirements in line with discussion below, the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Scheme) will fall short of the promise of offering a best practice response to the tragedy of child sexual abuse for some of the most vulnerable children.

[2] ALA, Submission 47 to the Senate Standing Committees on Community Affairs, 2 February 2018, [64(b)].

[3] Prime Minister Malcolm Turnbull, *House of Representatives Hansard*, 8 February 2018, 1.

[4] Minister for Social Services Christian Porter, *House of Representatives Hansard* (Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 Second Reading Speech), 26 October 2017, 12129.

5. Our focus here is on cl16(1)(c), although we refer back to our original submission in also expressing concern about the mooted exclusion of persons convicted of certain crimes,[5] which would be facilitated by cl16(3). Given former Minister Porter's statement that:

> 'the scheme paves the way for all governments and institutions across Australia to take responsibility and provide long-awaited redress to survivors who suffered sexual abuse as children while in their care and protection. It is of course now time to acknowledge these shameful wrongs and finally provide survivors with the recognition they deserve',[6]

any exclusion of this nature would also be inappropriate.

6. Of course, a primary reason that this Scheme is attractive to institutions is that it will remove claims for compensation from the courts and thereby likely significantly minimise costs.[7] Any individuals that are excluded from the Scheme will effectively be forced to litigate. As such, any exclusions will likely increase costs to institutions, including the Commonwealth, as well as increasing the harm and trauma that litigation is likely to cause for the survivor, in direct conflict with the purposes of this Bill. As such, exclusions should be equally opposed by survivors and institutions alike.

---

[5] ALA, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related Bill: Submission to Senate Standing Committees on Community Affairs*, 2 February 2018, [37]-[38].

[6] Minister for Social Services Christian Porter, *House of Representatives Hansard* (Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 Second Reading Speech), 26 October 2017, 12133.

[7] It is clear that some severe abuse in Australia has led to successful common law claims of almost $1million. According to ABC News, for example, Daughters of Our Lady of the Sacred Heart paid an average of $901,000 to the nine survivors who made successful claims for historical abuse: ABC News, 'Catholic Church paid out $276m over child sexual abuse claims, royal commission hears', 17 February 2017, <http://www.abc.net.au/news/2017-02-16/catholic-church-paid-almost-300m-to-victims-survivors-rc-hears/8276104>. While it is difficult to get reliable figures on informal settlement amounts received by people who were sexually abused in an institutional context as children, including children in immigration detention and those who have gone on as adults to be convicted of a crime, anecdotal evidence suggests that in some of the more serious abuse cases, survivors of abuse regularly receive figures of around $500,000 or more, including costs.

Eligibility criteria

7. The ALA is concerned that the eligibility criteria in cl16(1)(c) (namely that the person must be a citizen or permanent resident at the time of their application) will introduce uncertainty and potentially unfairness into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (the Scheme).

8. As noted in our previous submission, we are not persuaded that cl16(1)(c) is necessary to prevent widespread fraud.[8] We recall former Minister Porter's statement:

> 'that the horrific circumstances that we are now dealing with came to be because of excuses – excusing the monstrous conduct of individuals and excusing the failures and outrageous wilful blindness of the institutions. What we cannot do now, at this critical point of creating a national redress scheme, is accept any more excuses. Excuses for failing to join the scheme must end.'[9]

9. Unfortunately, it appears to us that this provision allows for the very excuses that former Minister Porter said must end.

10. This criteria could undermine the Scheme's ability to achieve the objects of recognising and alleviating the impact of past institutional child sexual and related abuse, and providing justice for survivors of that abuse: cl3(1). The principle that redress should be survivor-focused, and be assessed, offered and provided with regard to what is known about the nature and impact of child sexual abuse, the cultural needs of survivors and the needs of particularly vulnerable survivors will also be undermined if cl16(1)(c) and cl16(3) are retained.

[8] ALA, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related Bill: Submission to Senate Standing Committees on Community Affairs*, 2 February 2018, [20]-[21].

[9] Minister for Social Services Christian Porter, *House of Representatives Hansard*, 8 February 2018, 60.

11. We believe that the best way to avoid these potential outcomes is to remove these provisions from the Bill. The only eligibility criteria should be that found in cl16(1)(a) and (b), that is, that a person was sexually abused within the scope of the Scheme.

12. As a second but less preferable alternative, we recommend that the rules better cater for the needs of every survivor of child sexual abuse in Australian institutions, to ensure that the objects and principles of the Bill can be fully implemented.

Children abused in immigration detention

13. As discussed in our original submission, the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) devoted significant work to the experience of children abused in immigration detention.

14. The Explanatory Memorandum (EM) for the current Bill explains that the rules to be established by the Scheme will temper the impact of cl16(1)(c) by creating exemptions for 'former child migrants who are non-citizens and non-permanent residents, non-citizens and non-permanent residents currently living in Australia, and former Australian citizens and permanent residents'.[10] Elsewhere in the EM, 'former child migrants who are no longer residing in Australia or children abused in Australian institutional settings outside Australia who are not citizens or permanent residents'[11] are identified as groups that might be granted eligibility under the rules.

15. There are two problems with these propositions.

16. Firstly, the ALA believes that eligibility should be clearly spelled out in the legislation, rather than in the rules. It should not be subject to rule changes: any amendments to eligibility should require a bill to be presented to Parliament. The rules should be reserved for clarifying details and procedural matters, rather than fundamental elements of the Scheme, given the reduced scrutiny that the rules will be subjected to and the ease with which they can be changed. This accords with the fundamental rule of law concept that law must be known and knowable. It is also essential to ensure that survivors of abuse are able to clearly understand their eligibility to apply.

[10] Explanatory Memorandum, 13.

[11] Explanatory Memorandum, 4-5.

This will avoid the risk that survivors spend time on applications and endure the inevitable trauma that will accompany that process if they are not eligible, and are instead able to focus their energies on civil litigation if they choose that path.

17. Secondly, it is not entirely clear who will comprise these additional groups. The two extracts appear to describe different groups of people. While former child migrants are referred to in both, one refers to non-citizens and non-permanent residents currently living in Australia, while the other refers to children abused in an institutional setting outside Australia, with no mention of where they currently reside. Depending on which of these statements is implemented in the rules (or indeed if both or neither are ultimately implemented), different groups of survivors will be eligible for redress. It is important that this lack of clarity is not apparent in the Bill that is ultimately passed into law.

18. Asylum seekers or refugees living in the Australian community on temporary protection visas (TPVs) or bridging visas (BVs) will be directly affected by this lack of clarity. There will be others who sought asylum from, or were granted refugee status by, Australia who are not currently in Australia[12] just as there will be child migrants who have left Australia, whose eligibility also remains in doubt. This group will include people deported pursuant to s501 of the *Migration Act* 1958 (Cth).

Similarity between child asylum seekers/refugees and child migrants

19. Child asylum seekers and child migrants share many common traits. They were brought to Australia as children, generally with little regard to what they wanted and often against their wishes, due to circumstances outside of their control. Very few made the choice to travel here themselves.[13] On arrival, they were sent to an institution, again without reference to what they wanted and in conflict with their

[12] This group will of course include those who have tried to seek asylum from Australia but have been prevented from doing so, even though they have been detained and sexually abused in Australian-run facilities abroad.

[13] Even children seeking asylum who came alone will generally have had the plans made for them and costs borne by a parent or guardian.

best interests.[14] In those institutions, some were horrifically abused, and will carry the physical and psychological scars of that abuse throughout their lives. Just as with all survivors of institutional child sexual abuse, these are the scars that the Scheme is designed to address.

20. Despite these similarities, eligibility criteria both in the Bill and discussed in the EM appear to treat these two groups of children differently. It is inconsistent to grant access to the Scheme to former child migrants living in countries other than Australia, but not to grant access to children who were abused in Australian immigration detention facilities who do not meet cl16(1)(c) requirements.

Purpose of asylum seeker policy

21. Seeking asylum has been an area of significant policy fluctuation over the previous 16 years. People seeking asylum in Australia have been assessed under different systems, in different countries, and entitled to different visas, depending on when they sought asylum and how they arrived to make the application. While many children have passed through immigration detention in this process, some have had relatively easy paths to citizenship, while others are currently barred from ever accessing permanent residency or even setting foot in Australia, while being held in Australian-run detention facilities abroad.

22. These policy fluctuations and variations mean that the same cohort may or may not have access to redress under the Scheme, depending on factors entirely out of their control: being the timing of the decision of their parent or guardian to bring or send them to Australia, their path to Australia, and the corresponding policy priorities of the government of the day.

23. Ultimately, these children could have their eligibility determined by policy fluctuations that seek to achieve an entirely separate policy outcome: namely management of Australian refugee flows and stopping deaths at sea. The ALA does not believe that, at the time these policy changes were discussed or implemented,

[14] The UN Special Rapporteur on the human rights of migrants, François Crépeau, has stated that '[d]etention is never in the best interest of a child': Office of the High Commissioner for Human Rights, *In the best interest of migrant children*, 16 September 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/MigrantChildren.aspx>.

decision-makers considered the risk that children affected by them would experience sexual abuse in immigration detention, or indeed their ability to seek redress if such 'horrific'[15] abuse did occur. Where a child was abused in an immigration detention facility, just as where they were abused as child migrants, this is a tragedy for which an Australian government institution is responsible. All of these children are equally deserving of redress. As former Minister Porter said, the time for excuses has passed.[16]

Impact on migrant settlement outcomes

24. Depending on which groups are included or excluded by the rules, it is possible that cl16(1)(c) could have negative migrant settlement outcomes for survivors of abuse currently living on TPVs and BVs. As noted above, the Bill as currently drafted would appear to exclude all children living on TPVs, as they are not eligible for permanent residency or citizenship. Even if the policy were to change in the future, there is no guarantee that permanent residency would become available prior to the sunset date of the Scheme in 2028.

25. This uncertainty has the potential to impact on the settlement outcome of new migrants, including those who will ultimately stay in Australia long-term or even permanently. The Royal Commission was clear that the repercussions of child sexual abuse are lifelong and serious. For asylum seekers and refugees, these repercussions often compound trauma sustained in their home country and/or during their asylum seeking journey.[17] The uncertainty could thus exacerbate the impact of the abuse

[15] This was the term used by Minister Porter when explaining that we can accept no more excuses as we now take the opportunity to establish the Scheme: Minister for Social Services Christian Porter, *House of Representatives Hansard*, 8 February 2018, 60.

[16] Ibid.

[17] For example, the Royal Commission noted that 'Refugee girls and women, for example, are exposed to epidemic levels of sexual and gender-based violence throughout their displacement… and we know where they're coming from – areas of extreme conflict in Syria, Iraq and African countries': Royal Commission, *Final Report: Volume 15, Contemporary detention environments* (2017) 197, quoting the Victorian Multicultural Commission. See also 203: 'victims of abuse in immigration detention are especially at risk of [the impact of ongoing distrust and fear of

for these survivors, including in relation to their ability to trust, engage with authority figures and/or develop relationships in the community. It could also lead to or exacerbate lifelong mental illness, which the various forms of redress would tangibly mitigate if this group were eligible to apply for redress.

26. As the Royal Commission stated, there are many reasons that it is harder for asylum seeker and refugee children to disclose abuse, including: cultural factors; fear that the disclosure will impact on the outcome of their asylum claims; the impact that disclosure will have on them in the face of ongoing detention; the impact that the disclosure will have on others; and communication barriers.[18]

27. Ensuring that these children and adults have access to the Scheme could provide a meaningful incentive to disclosing abuse, and provide survivors with the confidence that they need to take the risk of disclosure. This in turn could have a real impact on eliminating child sexual abuse in immigration detention, as well as providing reparations for those who have been abused in the past. Moreover, ensuring all survivors of institutional child sexual abuse have access to the Scheme will ensure that the 'best practice' promise of this Scheme will be realised.

Recommendations

28. The ALA makes the following recommendations:

a) The only eligibility requirement for the Scheme should be having been sexually abused as a child in connection with a participating institution;
b) Clause 16(1)(c) should be removed before the Bill becomes law;
c) If this clause is not removed, the rules should ensure that children seeking asylum/child refugees and former child migrants are treated identically, with reference to the many similarities that exist between these cohorts;

institutions and authority] because of negative experiences with institutions and authorities in the past'.

[18] Royal Commission, *Final Report: Volume 15, Contemporary detention environments* (2017) 200, 203, 204, 206-209.

d) The government should consider the impact of eligibility requirements on migrant settlement outcomes for all children sexually abused in Australian institutions; and
e) Institutions should consider the likely increase in costs, both in terms of compensation payments and legal fees, that any exclusions will give rise to.