



Law Council
OF AUSTRALIA

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

Senate Community Affairs Legislation Committee

1 June 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.

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- 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 the Law Society of New South Wales, the Queensland Law Society and its National Criminal Law Committee for assistance in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Senate Community Affairs Legislation Committee (**the Committee**) regarding the proposed measures contained in the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (**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 (**the Scheme**).
2. The Law Council has long supported the establishment of a national redress scheme for survivors of institutional child sexual abuse and welcomes the introduction of legislative measures to give effect to the Scheme, as well as the statement from the Prime Minister that a national apology will be issued to survivors by the end of the 2018. It is also pleasing to see recent announcements indicating that there is now a majority of states and territories that have opted into the Scheme, together with the Commonwealth and a range of prominent non-government institutions.
3. The Committee will be aware that on 12 February 2018, the Law Council provided a comprehensive submission in relation to the initial legislative proposals contained in the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (**the 2017 Bill**). This previous submission is attached at Attachment A for the Committee's reference, and the Law Council refers to this submission on a number of matters that remain outstanding.

Principles underpinning the Scheme

4. As set out in the Law Council's earlier submission to the 2017 Bill, it is critical that the Scheme 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.
5. These principles have formed the basis for the Law Council's earlier submission on the 2017 Bill and continue to underpin this further response to the Committee in relation to the latest proposals.
6. The Law Council's key position remains that considering an object of the Scheme is to implement the Commonwealth's response to the recommendations of the Royal Commission,¹ the legislative framework should at all times be guided by those recommendations. Where it departs from the recommendations of the Royal Commission, the justification for doing so must be clear and reasonable.

¹ National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, proposed paragraph 3(2)(d).

Reflections on the Bill

7. The Law Council considers the proposed measures before the Committee to be an improvement on the 2017 Bill and acknowledges that there has been progress in relation to several of the earlier concerns raised by the Law Council and others, both through legislative change and additional information contained in the Explanatory Memorandum. Of these improvements from the 2017 Bill, the Law Council notes the following:
- (a) there has been an identifiable attempt to integrate important elements of the Scheme (such as eligibility for redress and institutional responsibility) into the primary legislation as opposed to deferring to delegated legislation,² noting however there are still some concerns as outlined further in this submission;
 - (b) the period for acceptance of an offer of redress has been increased from at least 90 days to at least six months, noting that the Law Council still believes one year to be an appropriate timeframe;³
 - (c) the time in which a survivor has to apply for a review of a determination under the Scheme has been extended from a maximum of 90 days to a maximum of 6 months;⁴
 - (d) in relation to the timeframes for providing additional information to the Operator:
 - (i) the minimum period in which to produce additional material has been extended from 14 days to 8 weeks, or 4 weeks for urgent matters;⁵
 - (ii) an extension of time in which to produce additional material no longer needs to be granted only in exceptional circumstances, and may be provided where the Operator considers it appropriate to do so;⁶ and
 - (iii) civil penalties for an applicant's failure to produce information have been removed;
 - (e) there is greater clarity as to the extent of counselling and psychological services offered under the scheme, noting that the Law Council has concerns with the proposed treatment of survivors located in regional, rural and remote Australia, including the provision for a capped payment as noted below;⁷
 - (f) there is improved clarity as to when a participating government institution becomes a funder of last resort, particularly in instances where a responsible institution is defunct;⁸
 - (g) the potential for a survivor to be required to produce material upon request by the Operator where such disclosure may be self-incriminating has been

² See for example proposed Chapter 3 regarding entitlement to redress, and proposed Chapter 5 regarding participating institutions, groups and jurisdictions.

³ National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, proposed subsection 40(1).

⁴ Ibid, proposed subsection 34(3).

⁵ Ibid, proposed subsection 24(4).

⁶ Ibid, proposed subsection 24(5).

⁷ Ibid, proposed section 31.

⁸ Ibid, proposed Part 6-2.

amended,⁹ noting however there are still some concerns as outlined further in this submission; and

- (h) the Scheme will now be subject to a review on its second anniversary, with that review being required to regard to a wide range of aspects relating to the operation of the Scheme.¹⁰

8. While the Law Council endorses these improvements, there are several outstanding concerns, with a number of the previous recommendations made in relation to the 2017 Bill still relevant for the Committee's consideration of the current Bill. The key concerns of the Law Council are articulated further in this submission, and are supplemented by the following recommendations that have been extracted and updated from the Law Council's submission to the 2017 Bill:

- (a) the maximum redress amount for a redress payment should be raised to \$200,000, in accordance with the Royal Commission's recommendation;¹¹
- (b) the minimum redress amount should be set at \$10,000, in accordance with the Royal Commission's recommendation;¹²
- (c) the 'original amount' in proposed section 30 of the Bill should be amended to exclude any legal costs and outlays paid as part of a previous compensation payment;
- (d) a timeframe in which a determination on an application for redress should be included in the Bill, or at least in associated rules. Currently this is proposed as 'as soon as practicable' at proposed subsection 29(1), without further guidance;
- (e) proposed section 19 should be amended to require the Operator to 'make reasonable attempt' to contact a person who submits an incomplete application and assist that person to provide the information in the required form;
- (f) proposed subparagraph 93(1)(e)(ii) of the Bill should be amended to remove the words 'express or implied' so that the consent of the person or institution to which the information relates is required before the information is used or disclosed in the manner outlined in the Bill;
- (g) similarly, in proposed subparagraph 95(1)(b)(i) the words 'expressly or impliedly' should be removed;
- (h) proposed section 95 should be amended to require the Operator to consider the impact disclosure of protected information might have on a person to whom that information relates;
- (i) proposed section 95 should also be amended to specifically identify the classes of persons or entities to whom the Operator may disclose protected information 'in the public interest'. At present, the proposed section is too wide and has no limit on disclosure, other than the standard (which is undefined) that it be in the public interest. In addition, guidance should be included as to the circumstances that constitute disclosure 'in the public interest';

⁹ Ibid, proposed section 26.

¹⁰ Ibid, proposed section 192.

¹¹ Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015), rec 19(b).

¹² Ibid, rec 19(a).

- (j) if a decision to disclose protected information under proposed section 95 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;
- (k) proposed sections 96(1)(a) and 97(1)(e)(i) and (iii) should be removed. This drafting potentially abrogates the right to claim privilege against self-incrimination and raises concerns around the derivative use of evidence in other proceedings. Proposed subsection 105(1) as it is currently drafted may assist in protecting this information, however it is noted that the effectiveness of proposed subsection 105(1) may be eroded by the operation of proposed subsection 105(2); and
- (l) consideration should be given to amending proposed sections 58 and 59 of the Bill to make family members of deceased survivors eligible to receive counselling services that would otherwise have been offered to the deceased survivor.

Further submissions

9. As noted above, while the present Bill contains some improvements from the previous legislative proposals contained in the 2017 Bill, the Law Council reiterates its position in relation to a number of key points. The Law Council makes the following submissions and recommendations regarding those key areas of concern.

Eligibility based on criminal record

10. The Law Council's previous submission raised a number of concerns with the suggestion that the Scheme will be inaccessible to survivors with serious criminal records.¹³ The Law Council continues to hold the view that access to the Scheme should not be restricted on the basis of criminal record and refers to the Law Council's earlier submissions in support of this position.
11. Further, the proposal to exclude survivors with a criminal record particularly affects Aboriginal and Torres Strait Islander people who are disproportionately represented in the criminal justice system. By virtue of being forcibly and systematically removed from their communities and placed into institutions, Aboriginal and Torres Strait Islander children are a group which were particularly vulnerable to the abuses identified by the Royal Commission. Excluding these survivors from the Scheme appears to be contrary to the intent of a redress scheme.
12. While the Law Council continues to oppose any limitation of the Scheme to survivors based on criminal record, the point was previously made that at the very least, if such measures were to form part of the Scheme then they should appear in the primary legislation and should be accompanied by details as to why such measures are considered necessary and proportionate. In justifying the continued exclusion of survivors with serious criminal convictions, the Explanatory Memorandum now states:

... restricting eligibility on the basis of criminal history is necessary to achieve the legitimate aim of the Scheme aligning with community expectations around who should receive redress payments from Government, with flexibility to make relevant persons entitled to redress on a case-by-case basis, where appropriate

¹³ Law Council of Australia, submission to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (12 February 2018) submission 82, [108]-[130].

*to do so. There is a risk the public would not support a Scheme that paid redress to perpetrators of serious crimes. In particular, victims of those crimes may strongly object to redress payments being made to people who have committed serious crimes against them.*¹⁴

13. The Law Council notes the inclusion of proposed section 63 of the Bill, which sets out a framework that proposes to restrict applicants with serious criminal convictions from accessing the Scheme. Here, an applicant with a 'serious criminal conviction' is one that has been convicted of an offence which received a custodial sentence of five or more years.¹⁵
14. However, under this section, a person with a serious criminal conviction may still be able to access the Scheme where the Operator determines that the provision of redress would not:
 - bring the Scheme into disrepute; or
 - adversely affect public confidence in, or support for, the Redress Scheme.¹⁶
15. This is a broad discretion, and while the Bill provides for matters that must be considered by the Operator prior to forming a determination, there remains significant uncertainty as to what will ultimately be deemed to bring the Scheme into disrepute or adversely affect public confidence or support for the Scheme. The Law Council continues to oppose such a restriction, however submits that if the restriction is to be retained, it is recommended that there be further guidance and consultation as to how this discretion will be exercised.
16. The Law Council further notes the Government's response to the Senate Community Affairs Legislation Committee on this issue, where it continued to justify its position by stating:

*... the Government will balance the need to ensure the Scheme does not suffer reputational damage should a survivor with a particularly notorious history of violent or heinous offending receive a redress payment, with the value of the Scheme as a tool for the rehabilitation of offenders.*¹⁷
17. The Law Council acknowledges that a valid aim of redress payments may be to assist in the rehabilitation of survivors with criminal pasts, however notes the core intention of redress as identified in the Explanatory Memorandum as being to 'recognise the wrong the person has suffered' without reference to subsequent behaviour.¹⁸
18. Finally, the drafting of proposed section 63 suggests a default position whereby a person with a serious criminal conviction will be ineligible for redress under the Scheme, requiring that a positive determination be made under proposed subsection 63(5) to reverse this position only after taking into account factors including advice from the Attorney-General, the nature of the offence, length of the sentence, time passed since the sentence was completed, rehabilitation of the person.

¹⁴ Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, 118.

¹⁵ National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, proposed paragraph 63(1)(b).

¹⁶ Ibid, proposed subsection 63(5).

¹⁷ Government's response to the Senate Community Affairs Legislation Committee (May 2018), page 9.

¹⁸ Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, 8.

19. The Law Council submits that if such a provision is to be included in the Bill, the default position should be that survivors with criminal convictions are eligible unless it is determined otherwise.

Recommendations:

- **Survivors should not be excluded from accessing the Scheme on the basis of a past criminal conviction.**
- **Alternatively, if survivors with serious criminal convictions are to be excluded from access to the Scheme, the default position should be that survivors are eligible unless it can be demonstrated that the provision of redress would bring the Scheme into disrepute, or adversely affect public confidence in or support for the Scheme.**

Eligibility based on nationality and residency

20. The Law Council has previously raised concerns with the limitation of the Scheme to Australian citizens and permanent residents. This restriction again appears in the latest version of the Bill and continues to be a cause for concern for the Law Council.¹⁹
21. Noting that this position seems apposite to the Royal Commission which saw ‘no need for any citizenship, residency or other requirements, whether at the time of abuse or at the time of the application for redress’,²⁰ the Law Council continues to hold the view that as a minimum, the Bill should extend the scheme to cover child migrants and those that were formerly Australian citizens or permanent residents.
22. The Law Council notes that the Law Society of New South Wales has previously made submissions to the Senate Standing Committees on Community Affairs on this issue,²¹ taking the view that the redress scheme should not exclude survivors based on citizenship or permanent residency. In the Law Society’s view, the only relevant nexus for eligibility should be whether a person was sexually abused as a child, and that abuse is the responsibility of a participating institution.
23. Such a move would be consistent with the main objective of the Bill 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’.²² The Law Council refers to its earlier arguments in support of this position.²³

Recommendation:

- **Eligibility to access the Scheme should be extended, at least, to those currently living in Australia, those who were child migrant, and those who were formally Australian citizens or permanent residents.**

¹⁹ National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, proposed paragraph 13(1)(e).

²⁰ Royal Commission on Institutional Child Sex Abuse, ‘*Redress and Civil Litigation Report*’ (2015), 347.

²¹ Law Society of NSW, ‘Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse Bill 2017 and related Bill’ (13 March 2018), submission 90.

²² National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, proposed subsection 3(1).

²³ Law Council of Australia, submission to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (12 February 2018) submission 82, [102]-[107].

Rules improperly determining key concepts and criteria for the Scheme

24. The Law Council considers that eligibility for the Scheme is a critical and fundamental aspect of the Scheme, and as such, the eligibility criteria should be established by the primary legislation.
25. The effect of proposed subsection 13(3) of the Bill is that despite what the Bill otherwise prescribes in proposed subsections 13(1) and 13(2) with respect to eligibility, the foreshadowed rules can override the eligibility criteria. If the eligibility criteria will need to change, it is submitted that any changes should be by way of legislative amendment and be subject to an appropriate level of Parliamentary scrutiny. Whilst the Explanatory Memorandum suggests that these issues should be dealt with in the rules because of the need for flexibility, it is considered that prescribing eligibility criteria for such an important Scheme is not something that should be delegated to rules.
26. In a similar way:
- (a) proposed subsections 14(1) and 14(2) provide that the Bill or the rules may prescribe abuse that is not 'within the scope' of the Scheme. However, proposed subsection 14(3) then permits the rules to override anything in proposed subsections 14(1) and 14(2); and
 - (b) proposed section 15 sets out the circumstances in which an institution may be 'responsible', 'primarily responsible' or 'equally responsible' for identified abuse. Proposed subsections 15(5) and 15(6) of the Bill then appear to allow for rules to be created setting out circumstances of 'responsibility' which could contradict and override the provisions of proposed section 15 of the Bill.
27. By potentially permitting the rules to prescribe the definitions of 'within the scope' and 'responsibility', the rules purport to amend the scope and application of proposed subsections 14(1) and 14(2), and proposed subsections 15(1) to 15(4) of the Bill.
28. By potentially permitting the rules to override provisions in the primary legislation, the rules would be permitted to amend eligibility criteria for the Scheme and the key concepts of 'responsibility' and 'within the scope' that are otherwise established by the Bill. It is submitted that a subordinate legislative instrument should not legally override the operation of the primary legislation.

Recommendations:

- **The eligibility criteria for the Scheme should be established in the Bill and not be subject to amendment by way of the rules.**
- **Proposed subsections 14(3), 15(5) and 15(6) should be removed with Scheme eligibility defined in the primary legislation.**

Timeframe for acceptance of offer

29. Whether to accept an offer of redress will be a significant decision for many survivors. Notably, it is a legally significant decision given that accepting an offer of redress will waive a survivor's rights to bring a civil claim pursuant to proposed section 43 of the Bill.
30. Proposed section 40 of the Bill provides that the acceptance period for an offer of redress is the period determined by the Operator, which must be no less than six months

from the date of the offer. While the Bill allows for an application to extend the acceptance period to be made, it stipulates that extensions will only be granted in 'exceptional circumstances'.²⁴

31. The Law Council acknowledges that this provision is an improvement from the position proposed in the 2017 Bill which suggested an acceptance period of at least 90 days. However, the Law Council continues to support the recommendation of the Royal Commission that an offer of redress should remain open for a period of one year.²⁵
32. 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.
33. In the Law Council's experience, it does not consider that it will always be feasible for this to occur in six months, especially given the volume of survivors predicted to come forward to make an application for compensation under the Scheme.

Recommendation:

- **Proposed section 40 of the Bill should be amended to extend the period for acceptance of an offer of redress from six months to one year.**

Access to legal support services

34. In acknowledging the need for survivors to have access to legal advice in order to adequately engage with the Scheme, the Explanatory Memorandum states:

*... 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 four key stages of the application process: prior to application so survivors understand eligibility requirements and the application process, during the completion of a survivor's application, after a survivor has received an offer of redress and elects to seek an internal review, and on the effect of accepting an offer, including its impact on the prospect of future litigation.*²⁶

35. As noted in the Law Council's earlier submission,²⁷ the Law Council has concerns that there is no actual requirement in the Bill that the Scheme fund or deliver legal support services. In the absence of this legislative backing, or further details about how the legal assistance scheme will be maintained and delivered, the Law Council continues to hold concerns about how the Scheme will ensure adequate funds for support services and community legal centres to assist applicants to apply for redress.

²⁴ National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, proposed subsection 40(2).

²⁵ Royal Commission on Institutional Child Sex Abuse, 'Redress and Civil Litigation Report' (2015), rec 59.

²⁶ Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, 123.

²⁷ Law Council of Australia, submission to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (12 February 2018) submission 82, [30]-[34].

36. Further, there is a need for support to be provided to select 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.
37. The Law Council repeats its request for further information to 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.

Recommendations:

- **Information should be provided as to how legal services under the Scheme will be adequately funded, trauma informed, culturally appropriate and responsive, including in relations to the needs of those in regional, rural and remote areas, as well as the particular needs of different groups of survivors such as Aboriginal and Torres Strait Islander survivors.**
- **The Commonwealth and participating States and Territories should be encouraged to increase funding to their legal aid services and relevant community legal centres to increase the availability of legal assistance for persons seeking redress.**
- **State and Territory legal aid services should consider reviewing their eligibility criteria to allow for a greater number of applicants to obtain legal advice on a potential claim under the Scheme.**
- **The Commonwealth and participating States and Territories should ensure there is a public education campaign supporting the launch of the Scheme which informs survivors of how they can access legal assistance.**

Availability of external review

38. The Law Council has previously called for an independent review process to be made available to applicants that is external to the scheme.²⁸ While the latest Bill has again not allowed for this, the Explanatory Memorandum has included the follow commentary on the appointment and role of the independent reviewer:

*The Scheme will appoint appropriately qualified, independent assessors, known as Independent Decision Makers, who will make all decisions on applications made to the Scheme. Independent Decision Makers will not report or be answerable to Government. These Independent Decision Makers will be able to provide survivors with access to independent and impartial internal review without subjecting them to potential re-traumatisation.*²⁹

39. While somewhat reassuring, the Law Council again notes that there is nothing in the Bill that requires appointments of independent reviewers at this level, and reiterates its earlier recommendation that the Bill should contain further details on the internal review procedure, including the suitability of reviewer.

²⁸ Ibid, [63]-[74].

²⁹ Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018, 126-127.

40. Further, the Law Council notes that under proposed subsection 75(3), a reviewer is still unable to have regard to new information that has come to light since the original determination. The Law Council defers to its earlier submissions on this point, noting that such a limitation appears unjustified and may lead to unjust outcomes.³⁰
41. The Law Council also reiterates the concerns expressed in its earlier submission in relation to the need for granting limited rights of review by participating institutions. Such limited rights need to be carefully crafted with a view to not causing further suffering to survivors and the earlier submission includes suggestions on how this could be achieved. A right of review for a participating institution would encourage participation by non-government institutions in the Scheme by enhancing institutional faith in the integrity of the Scheme.³¹

Recommendations:

- **The Scheme should allow for an independent review mechanism that is external to the Scheme.**
- **The Bill should include further details about the review process, including in relation to the suitability of the independent reviewer.**
- **Proposed subsection 75(3), which restricts the provision of additional information to an internal review, should be removed.**
- **Consideration should be given to granting limited rights of review by participating institutions, to encourage participation by non-Government institutions in the Scheme by enhancing institutional faith in the integrity of the Scheme.**

Length of entitlement to psychological and counselling services

42. The Bill has included additional information in relation to the counselling and psychological services component of the Scheme, clarifying that a survivor who lives in a jurisdiction that is not a declared provider of counselling and psychological services under the Scheme will be entitled to a counselling and psychological services payment of up to \$5,000.
43. The Bill does not, however, appear to provide details as to the length or extent of the entitlement for those persons that are located within a jurisdiction that is a declared provider of counselling and psychological services. There is a concern that by fixing the financial entitlement for those located outside of declared jurisdictions at \$5,000, the intention will be to cap the value of services to those within declared jurisdictions to the same amount.
44. In this regard, 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'.³² This principle also raises questions as to the adequacy of a \$5,000 cap for those located in a jurisdiction that is not a declared provider of counselling and psychological services, as

³⁰ Law Council of Australia, submission to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (12 February 2018) submission 82, [68]-[71].

³¹ Ibid, [151]-[152].

³² Royal Commission on Institutional Child Sex Abuse, '*Redress and Civil Litigation Report*' (2015), rec 9.

this amount will almost certainly be inadequate to cover such services over a prolonged period.

45. The Law Council is pleased to see that the Government's response to the Senate Community Affairs Legislation Committee report indicates in-principle agreement to the recommendation that counselling offered through redress packages be available for the life of the survivor.³³ However, as previously recommended, the Law Council submits that there should be greater clarity as to the length of entitlement to psychological and counselling services with the view that it be available for the applicant's lifetime, as well as how the administration of this component of the Scheme will be managed.³⁴

Recommendations:

- **The Bill should clarify that the counselling and psychological services offered under the Scheme are to be available for the applicant's lifetime and subject to no fixed limits.**
- **Consideration should be given to the adequacy of the proposed \$5,000 cap for psychological and counselling services for those located in a jurisdiction that is not a declared provider of counselling and psychological services.**

Additional matters raised by the Queensland Law Society

46. Further to the above submissions, the Queensland Law Society has also raised the following two matters in relation to the 2018 Bill for the consideration of the Committee:

- (a) proposed subsection 29(7) should include a requirement that the Operator must give a reason for revoking the determination; and
- (b) proposed sections 58 and 59 of the Bill set out what occurs if an applicant dies either after making an application or after an offer has been made. The intent of the legislation is that a redress determination is to be made and payment then made to the person's estate. However, proposed sections 58 and 59 are both silent on how the amount of redress is determined and do not allow for any review rights on the death of the applicant. This should be clarified to ensure that a process for determining the amount of redress is included in these provisions.

Recommendations:

- **Proposed subsection 29(7) of the Bill should include a requirement that the Operator must give a reason for revoking the determination.**
- **Proposed sections 58 and 59 of the Bill should be clarified to ensure that a process for determining the amount of redress is included in these provisions.**

³³ Government's response to the Senate Community Affairs Legislation Committee (May 2018), page 9.

³⁴ Law Council of Australia, submission to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (12 February 2018) submission 82, [75]-[86].

47. In addition, it is noted that the following issues that were raised by the Queensland Law Society and highlighted in the Law Council's previous submission to the 2017 Bill have not been addressed in the present Bill:

- (a) **Institution to be provided with a copy of the application for redress at the time it is made.** As noted in the previous submission, this recommendation is consistent with the recommendation of the Royal Commission;³⁵ and
- (b) **Assessment framework to be made available for consultation.** As noted in the previous submission, this is a critical aspect of the Scheme, to be used to determine redress payable. Consultation with relevant stakeholders is essential to ensure that the assessment framework is fair and reasonable and will give proper effect to the Scheme. Consideration should also be given as to whether the framework must be contained in the primary legislation or at least made available for a 90-day period of consultation. Further comments are made in paragraphs [166] to [170] of the previous submission made in response to the 2017 Bill.

48. It is submitted that the Committee should have regard to these additional concerns that have been raised by the Queensland Law Society.

Attachment A

Law Council's submission to the Senate Community Affairs Legislation Committee on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, dated 12 February 2018.

³⁵ Ibid, [153]-[156].