Additional Comments by the Australian Greens

1.1 The Australian Greens strongly support the establishment of the National Redress Scheme (Scheme) for survivors of institutional child sexual abuse as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). We want to see it based on fairness, equity and justice and want it to be survivor focused and trauma and culturally informed.

1.2 The Australian Greens submitted a dissenting report to this committee's inquiry into the provisions of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Commonwealth Bill) and related bill as we could not support those bills passing in their current form at that stage.

1.3 This inquiry is looking at the provisions of the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (National Bill) and related bill, the bills that will give effect to the Scheme across the country.

1.4 The Australian Greens acknowledge that some progress has been made since the inquiry into the provisions of the Commonwealth Bill and its related bill, specifically:

- the Government agreed with the recommendation of the Committee in its report on the provisions of the Commonwealth Bill and related bill that Redress Support Service incorporate referral of affected family members, in cases where it is necessary to meet the critical needs of the survivor;
- the period of acceptance for an offer of redress has been increased to at least six months (though the Australian Greens would still like to see this extended to a year);
- the timeframes for applying for a review of a determination and for providing additional information have been extended to six months and eight weeks (or four weeks for urgent matters) respectively; and
- there will now be two reviews of the operation of the Scheme and there is a list of matters that the reviews must consider.

1.5 While a small number of the issues canvassed during the previous inquiry have been addressed, many of those issues still remain. These include:

- significant items to be left to the rules (though we acknowledge that some items that were previously going to be left to the rules have been included in the National Bill);
- the maximum redress payment being capped at $150 000, rather than the $200 000 recommended by the Royal Commission;
- the lack of a minimum monetary payment of $10 000 as recommended by the Royal Commission;
- uncertainty of whether or not counselling and psychological services will be available to survivors for the duration of their life as recommended by the Royal Commission;

- the need for flexibility with regards to the timing of a direct personal response;
- the scope of eligibility for the Scheme (specifically, that survivors of institutional non-sexual abuse will not be eligible, unless they were also sexually abused);
- the exclusion of certain groups of survivors, particularly those who are not an Australian Citizen or permanent resident at the time they apply for redress, including former child migrants and asylum seekers, refugees and stateless people;
- the ability for survivors to submit only one application;
- the timeframe for institutions to opt in to the Scheme being set at two years;
- survivors needing to complete a statutory declaration to verify the information contained in their application for redress under the Scheme;
- the timeframe for accepting or rejecting an offer (though we acknowledge that the Government has increased this from the initial 90 days to six months);
- the lack of external merits review or judicial review of a determination;
- the need for adequate funding for additional support services for survivors;
- the need for supported decision-making principles to be included and nominees used only as a last resort; and
- the need for a funder of last resort in all circumstances.

1.6 Additionally, other new issues have arisen in the National Bill and its related bill. These include, but are not limited to:

- changes to the counselling and psychological component of redress, including the removal of the Commonwealth Bill's 'General principles guiding counselling and psychological services';
- the need for a survivor's application to specify where they live and applications needing to be made 12 months before the Scheme sunset date unless the Operator determines that there are exceptional circumstances;
- provisions for those with serious criminal convictions and the inability for those in gaol to apply for redress;
- the prevention of children applying for redress;
- provisions relating to security notices;
- the application of prior payment and indexation provisions; and
- changes to the funder of last resort model and the requirement for the Government institution to be 'equally responsible'.

1.7 The scope of this report is limited to the new issues listed above. The issues outstanding from the Commonwealth Bill and related bill were extensively canvassed in the Australian Greens' Dissenting Report to the previous inquiry. This report can be

found at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AbuseRedressScheme/Final_Report/d02.

Counselling and Psychological Services

1.8 The provisions for counselling and psychological services have changed in the National Bill. Survivors will either be provided counselling and psychological services under the Scheme, if they live in a jurisdiction that is a declared provider of these services, or they will receive a tiered lump sum payment of either $1250, $2500 or $5000, depending on the severity of the sexual abuse they experienced. Where survivors receive counselling or psychological services under the Scheme, their jurisdiction will receive the tiered counselling payment directly.

1.9 The National Bill does not seem to provide any details around the length of the entitlement of those who will receive services under the Scheme. There is concern that this approach will also see survivors unable to choose the service they attend and that they may be unable to continue existing therapeutic relationships, which is in contradiction to the Royal Commission's recommendations.

1.10 It is worth noting here that the 'General principles guiding counselling and psychological services' that appeared in the Commonwealth Bill do not appear in the National Bill. As knowmore says in its submission to the inquiry, the principles:

> … provided (as the very first principle) that "survivors should be empowered to make decisions about their own need for counselling or psychological services" have been removed from the current Bill. Those principles also emphasised that "survivors should be supported to maintain existing therapeutic relationships to ensure continuity of care."[1]

1.11 The approach taken in the National Bill does not align with the principles.

1.12 There is concern that the services to be provided by the different jurisdictions that will be declared providers will also vary. There is also no clarity around what will happen if a survivor moves from a jurisdiction that is a declared provider to a jurisdiction that is not a declared provider. Will they subsequently receive a lump sum so that they can continue to receive counselling and psychological services in the new jurisdiction? From the Australian Government Departments' Submission, it appears not. Specifically, it says, 'Survivors will only be able to access one of the above options based on the jurisdiction they reside in at the time of submitting an application for redress.'[2]

1.13 The Australian Greens are also concerned that survivors who receive redress late in the life of the Scheme may only be able to access these services for a short period of time compared with those survivors who are granted redress early in the life of the Scheme.

1.14 There is also concern around the adequacy of the payments for counselling and psychological services for those who will receive a lump sum payment for

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1 knowmore, *Submission 20*, p. 6.

2 Australian Government Departments, *Submission 1*, p. 6.

counselling and psychological services. As was canvassed during the Commonwealth Bill's inquiry, this is not a significant amount of money.

1.15 The Australian Greens note the agreement of the Government to the recommendation of the Committee in its report into the provisions of the Commonwealth Bill and related bill that counselling offered should be available for the life of the survivor; however, this does not appear to translate to the provisions in the National Bill or the arrangements being made for the Scheme.

Applications

1.16 The National Bill requires a survivor's application to specify where they live. It is assumed that this is so they can be referred to the State or Territory government for the provision of counselling and psychological services, where the State or Territory is a declared provider of these services. However, we are concerned for those survivors who are experiencing homelessness and do not have a fixed address. Such survivors should not be excluded from applying and should be able to provide merely the State or Territory that they live in for this purpose. Survivors should also be able to supply a nominated address (for example, the residential address of a friend or family member or of a support service they attend) for the receipt of correspondence.

When an application cannot be made

1.17 Under the National Bill, a survivor cannot make an application where they have already made an application, a security notice is in force (see below), the survivor is a child who will not turn 18 before the Scheme sunsets, the person is in gaol or the application is being made in the period of 12 months before the Scheme sunsets.

Survivor is a child who will not turn 18 before the Scheme sunsets

1.18 The consequence of this provision is that children who are not yet eight years old will be excluded from applying to the Scheme. There is also no Operator discretion with regards to this provision (as there is for a person in gaol and an application being made in the period of 12 months before the Scheme sunsets, outlined below). This provision is not in line with the view of the Royal Commission.

1.19 As the Australian Human Rights Commission (Commission) says in its submission:

> The rationale of s 20(1)(c) therefore appears to be to safeguard against the Scheme unduly preventing a child survivor from limiting their future rights by permitting them to make an uninformed decision about redress. However, the Commission does not consider a blanket exclusion of children to be proportionate to the achievement of such a purpose. **To the contrary, the Commission considers that the blanket exclusion of children is contrary to requirement to ensure the best interests of the child, especially in relation to vulnerable children.**
>
> Although there might be instances where it is in the child's best interest *not* to apply for redress, there are also instances where it *will* be in the best interests of the child to seek redress under the Scheme. The Commission

> considers that it is ultimately children, with relevant specialist support, that should make that decision for themselves. The operation of the Scheme should not unduly restrict their freedom to do so, but should rather accommodate for a proper inquiry into the best interests of the individualised child in their particular circumstances, as required by international human rights law.[3]

1.20 Concern was also raised over the requirement, which will be set out in the Rules, for the Operator to wait until a child, where they apply to the Scheme while underage, is 18 before making a determination to approve or not approve their application. In this regard, the Commission said 'children should not be forced to wait until 18 to receive that redress as a matter of course.'[4]

The person is in gaol

1.21 The rationale for this in is the Explanatory Memorandum to the National Bill, which states:

> This restriction is necessary as the Scheme will be unable to deliver appropriate Redress Support Services to incarcerated survivors…[and] institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated.[5]

1.22 As the Commission says in its submission:

> The Commission does not accept that difficulties in delivering appropriate redress, including an appropriate direct personal response from relevant institutions, is reason enough to exclude incarcerated survivors from making an application for redress. If the particulars of a survivor's situation are such that aspects of redress cannot reach the survivor while in gaol, the Commission considers that redress can be delivered to the survivor at a time when reasonably practicable. It is not necessary for the relevant survivor to be barred from *applying* for redress altogether.
>
> Although the 10-year life of the Scheme will allow some incarcerated survivors to apply for redress upon their release, this will not always be the case. The Commission notes that, as the lifespan of the Scheme continues to run, this exclusion would apply more readily to incarcerated survivors serving decreasingly serious sentences.[6]

1.23 It is unclear why a direct personal response could not be provided by the relevant institution/s in gaol, or why survivors would not be able to receive counselling and psychological services while they are in gaol.

1.24 As Blue Knot Foundation says in its submission:

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3 Australian Human Rights Commission, *Submission 23*, p. 10.

4 Australian Human Rights Commission, *Submission 23*, p. 10.

5 *Explanatory Memorandum*, p. 119.

6 Australian Human Rights Commission, *Submission 23*, p. 8.

> If it is difficult to secure appropriate redress services in gaol, this needs to be addressed, rather than a survivor being punished for a system not being fit for purpose.[7]

1.25 We do not want to see survivors penalised for choosing to apply for redress later in the life of the Scheme and this provision will see that happen in some cases. This provision will also discriminate against Aboriginal and Torres Strait Islander survivors, who are over-represented in the criminal justice system.

1.26 As Tuart Place says in its submission:

> The proposed exclusion of this group of applicants misses an important opportunity to assist in protecting children from future sexual abuse.[8]

1.27 The Australian Greens note that this provision is subject to the discretion of the Operator and that the Operator may determine that there are exceptional circumstances justifying the application being made; however, there needs to be more clarity around what those circumstances might entail.

The application is being made in the period of 12 months before the Scheme sunsets

1.28 The effect of this provision is to limit the time survivors will be able to apply to the Scheme to 9 years, rather than the full 10 years the Scheme will be operating for. The Australian Greens acknowledge that this provision is subject to the discretion of the Operator and that the Operator may determine that there are exceptional circumstances justifying the application being made in the final year; however, we are of the view that this has not been adequately communicated to survivors and needs to be.

Criminal histories

1.29 Under the National Bill, survivors who have been convicted of an offence and sentenced to imprisonment for five years or more will be excluded from the Scheme, unless a determination by the Operator is made that the provision of redress would not bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme.

1.30 The Australian Greens do not support this exclusion. We believe that redress should be available to all survivors of institutional child sexual abuse.

1.31 Allowing a category of survivors to be excluded from the Scheme will see their experiences go unrecognised and, arguably, will see the relevant institutions not held to account for this abuse.

1.32 As Care Leavers Australia Network (CLAN) says in its submission:

> The Royal Commission went into prisons & opened up the wounds of these Care Leavers & now the goal posts have been shifted for them[.][9]

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7 Blue Knot Foundation, *Submission 12*, p. 2.

8 Tuart Place, *Submission 14*, p. 3.

9 Care Leavers Australia Network, *Submission 31*, p. 2.

1.33 As Blue Knot Foundation says:

> Making these decisions subjective and in the hands of different Attorneys-General means that the decisions will vary, depending on levels of understanding and values and can potentially be unfair and also mean that if found against a survivor, that institutions are not needing to provide redress for their crime. This is clearly inequitable.[10]

1.34 It was also pointed out in the course of the inquiry that the 'special assessment' model in the National Bill is opaquer than the model under the Commonwealth Bill and survivors who fall into this category will not know whether they are eligible or not, creating considerable uncertainty and likely causing distress.

1.35 This provision will also disproportionately affect Aboriginal and Torres Strait Islander survivors, who are over-represented in the criminal justice system.

1.36 The Law Council of Australia says in its submission:

> 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.[11]

1.37 knowmore makes the observation that:

> … given the confidentiality provisions in the Bill, we anticipate that in most cases it would be unlikely that a decision to provide redress to a person with a serious criminal conviction could adversely affect public confidence in, or support for, the scheme, as rarely would the outcomes of such cases come to the public's knowledge.[12]

1.38 There was also concern expressed that it appeared that a determination made under Clause 63 could not be subjected to review.

1.39 While the Operator can override the blanket exclusion for individual cases, we are concerned that the starting point is one of exclusion. We believe that where the Government is adamant that there needs to be the ability to exclude some survivors that fall into this category, the starting point should be one of eligibility and that the Operator could then determine on a case by case basis whether an individual should be excluded. Exclusion should only be considered 'where granting redress to that person would 'bring the scheme into disrepute' or 'adversely affect public confidence in, or support for, the scheme'.'[13]

1.40 The submissions of the National Aboriginal and Torres Strait Islander Legal Services and the Law Council of Australia contained similar suggestions, where such a provision is to be included at all.

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10 Blue Knot Foundation, *Submission12*, p. 3.

11 The Law Council of Australia, *Submission 18*, p. 9.

12 knowmore, *Submission 20*, p. 7.

13 Australian Human Rights Commission, *Submission 23*, p. 8.

1.41 The Commission says it:

> …considers that this exclusion is primarily driven by the provision of redress *funds* to certain criminals. The Operator should be able to separate out and provide the non-monetary aspects of redress, namely counselling services and a direct personal response, while also precluding payment of redress funds to criminal survivors whose receipt of redress funds would 'bring the scheme into disrepute' or 'adversely affect public confidence in, or support for, the scheme'.[14]

Security notices

1.42 The National Bill includes provisions that exclude a survivor from accessing redress where it may prejudice the security of Australia or a foreign country. Where a security notice is issued by the Minister for Home Affairs in relation to a survivor, they cannot apply for, and are not entitled to, redress. The Minister for Home Affairs can issue a security notice when:

- The survivor has had their passport cancelled or refused; or
- The survivor's visa has been revoked or refused on national security grounds.

1.43 In the Australian Government Departments' Submission to the inquiry, it says:

> A person's access to redress will only be impacted in circumstances where the receipt of redress is relevant to the assessed security risk posed by the individual and the receipt of redress would adversely impact the requirements of security. … It is not intended that every person whose passport or visa has been refused or cancelled would lose access to redress, rather only in cases where it is appropriate or justified on security grounds.[15]

1.44 As the Commission says in its submission, it:

> …does not challenge the legitimacy of this purpose. However, the Commission notes that the stated justification for this exclusion only refers to the use of 'funds' and is therefore confined to the redress 'payment'.
>
> The Commission notes the importance of the other aspects of redress, namely a personal response and counselling services. Given the object of the Scheme to recognise and alleviate the past injustices of institutional child sexual abuse, the Commission considers that non-monetary aspects of redress could still be offered to survivors the subject of security notices.[16]

Prior payments and indexation provisions

1.45 When working out a survivor's redress payment, the process requires taking into account relevant prior payments by each institution and adjusting for inflation.

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14 Australian Human Rights Commission, *Submission 23*, p. 8.

15 Australian Human Rights Commission, *Submission 23*, p. 10.

16 Australian Human Rights Commission, *Submission 23*, p. 12.

The indexation of prior payments is of deep concern to the Australian Greens. Prior payments should not be indexed.

1.46 As Tuart Place says in its submission:

> The primary problem with indexing redress payments however, is that these payments are not 'proper compensation', and upscaling is inappropriate when dealing with amounts that bear no direct relationship to the 'true value' of the damage, as is the case in civil claims. It is accepted that redress payments are significantly lower than common law damages, which makes upscaling particularly unfair.[17]

1.47 If the Government is not willing to remove the indexation provisions from the National Bill, then at the very least, the redress payments survivors will receive should be indexed over the duration of the Scheme to ensure the value of the payment remains equivalent.

1.48 We are also concerned about how prior payments will be taken into account. We are of the view that only the amount that ended up in the survivor's pocket (as put forward in the submission of the Blue Knot Foundation)[18] and is in recognition of the abuse or the harm caused by the abuse for which the institution is responsible should be taken into account. Where the survivor received an amount in recognition of the abuse or the harm caused by the abuse for which the institution is responsible and then subsequently had to pay legal fees from this, the legal fees should be deducted from the amount they received so that only the amount they were left with is taken into account. However, it appears to us from an answer we received to a question on notice that where a prior payment was not broken down into monetary components i.e. a specific amount of the prior payment being listed for legal fees, the entire payment will be taken into account (and adjusted for inflation), which is very concerning.

1.49 The Australian Greens acknowledge that '[i]n cases of shared responsibility, the Scheme will only deduct prior payments from the liability for redress of the institution that made the payment'.[19]

1.50 As Tuart Place says in its submission:

> In the interests of justice, it is essential that the Operator's assessment of 'relevant prior payments' does not include any part of a previous redress settlement that is not specifically and manifestly identified as being related to sexual abuse [though later in its submission Tuart Place expands on this to say 'unless the non-sexual abuse is demonstrably related to the sexual abuse, and is specifically redressed in the NRS payment], and, as recommended by the Royal Commission, "any uncertainty as to whether a payment already received related to the same abuse for which the survivor

17 Tuart Place, *Submission 14*, p. 6.

18 Blue Knot Foundation, *Submission 12*, p. 3.

19 Australian Government Departments Submission, *Submission 1*, p. 16.

> seeks a monetary payment through redress should be resolved in the survivor's favour."[20]

Funder of last resort

1.51 Under the National Bill, there is a revised funder of last resort model. In order for a Government institution to be the funder of last resort for a defunct institution, the institution must be equally responsible with the defunct institution for the abuse of the survivor. As knowmore says in its submission, 'This is a higher test than that of "shared responsibility" that was in the previous Bill.'[21]

1.52 They go on to say:

> Having regard to some of the cases we have seen, we are concerned that this change may operate to exclude some survivors where the participating Government had some role in their placement in an institution, but seeks to establish to the Operator that these acts did not amount to "equal responsibility" on its part for the abuse of the person.[22]

1.53 In addition, it is not clear who, if anyone, will be the funder of last resort where the responsible non-government institution is now defunct, and there was no Government institution involvement whatsoever in the abuse.

Conclusion

1.54 The Greens want to see the Scheme operating from the nominated date of 1 July 2018, at the same time we are very concerned that the Scheme will not be the best it can be given the issues that remain unresolved. Following commencement of the Scheme, we will continue to advocate and work for subsequent reforms to make the Scheme the best it can be.

Senator Rachel Siewert

20 Tuart Place, *Submission 14*, p. 9.

21 knowmore, *Submission 20*, p. 8.

22 knowmore, *Submission 20*, p. 8.