

2 February 2018

Our ref NFP – ACC/TL

Dr Natasha Molt
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Law Council of Australia
By email: [REDACTED]

Dear Natasha

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

Thank you for the opportunity to comment on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related bill, the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017.

Queensland Law Society appreciates being consulted on this important issue. The Queensland Law Society (the Society) is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

This response has been compiled with the assistance of our policy committees who are the engine rooms for the Society's policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise.

In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

The Society supports the introduction of redress scheme and other reforms directed at addressing the cause and effect of abuse of children. The Commonwealth is to be commended for taking the lead in producing the first Bill for the provision of a redress scheme; however, in our view the Bill requires further substantive consideration and amendment in order to achieve its stated purpose.

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The QLS submission

The effects of abuse can be far reaching into our community, including our Aboriginal and Torres Strait Islander community. The Society, through the Reconciliation and First Nations Advancement Policy Committee (RFNAC), recognises the contribution child sexual abuse, and abuse generally, has had on the unacceptable levels of Indigenous incarceration in this country.¹

The denial of rights, dignity and cultural connection continue to be perpetuated as child victims have now become adults. The contemporary denial extends to limits on appropriate and equitable access to the legal system and or appropriate financial compensation.

Some survivors will find it difficult to succeed in a common law claim for damages against these institutions and are therefore essentially forced to participate in the redress scheme. Accordingly, such a scheme must be “survivor-focused”.

This submission has also been prepared with the assistance of the Accident Compensation and Tort Law Committee and the Not-for-Profit and Charity Law Committee of the Society.

1. Limitation periods, civil litigation and the scheme

Recommendation 46 of the Royal Commission’s final report states:

Those who operate the redress scheme should specify the cut-off date as being the date on which the Royal Commission’s recommended reforms to civil litigation in relation to limitation periods and the duty of institutions commence.

Recommendations 85 to 99 relate to the removal of limitation periods and the duty of institutions in claims arising from institutional child sexual abuse. While some state and territories have removed these limitations, others have not. We call on the Commonwealth Government to give effect to these recommendations by encouraging all states and territories to remove the appropriate limitation periods from their statute books.

The Society considers that access to compensation from the Scheme should not prohibit access to compensation by civil litigation especially if the maximum compensation under the Scheme is to be capped at \$150,000.00.

Recommendation 1

The Commonwealth Government should continue to encourage and facilitate all states and territories to remove limitation periods for civil litigation arising from child sexual abuse.

¹ Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Discussion Paper, The Australian Law Reform Commission July 2017 - https://www.alrc.gov.au/sites/default/files/pdfs/publications/discussion_paper_84_compressed_cover2.pdf

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2. Assessment Matrix

Clauses 33 and 34 of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (**the Bill**) discuss the “assessment matrix” which the operator will use to determine redress payable.

Given the central nature of the assessment matrix, the Society is of the view that the matrix should be contained in the primary legislation and so, subject to greater level of consultation, scrutiny and debate before having legislative affect.

Consultation with relevant stakeholders will ensure that the matrix is fair and reasonable and will give proper effect to the scheme. If the matrix is to remain the subject of statutory instrument, we call on the Committee to recommend amending the Bill for the Third Reading to include in section 34 a requirement that the Minister publish the Assessment Matrix for a 90 day period of public consultation with due amendment of the Assessment Matrix as indicated by the consultation process, prior to enactment of the Assessment Matrix.

We suggest the following amendment:

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

Recommendation 2

- a) The Bill should be amended to include details of the assessment matrix.**
- b) Further or in the alternative, the assessment matrix should be a released for a 90-day consultation period.**

The assessment matrix should consider the full impact of the abuse on the applicant including actual loss suffered by the applicant and any future loss that is likely to be suffered. There must be provision to allow for medical reports and records to be obtained and provided. The current drafting suggests that the redress will be assessed, at least initially, independently of liability however, this should be clarified. The matrix also needs to intersect with the other elements of the scheme for example the provision of access to counselling and psychological services.

The assessment matrix should list factors that the operator is to use to consider the amount of redress payable. The fact that a child had an increased vulnerability at the time of the abuse should be factored into the assessment. For example, the operator should consider factors such as whether the applicant was, at the time of the abuse:

- a child for whom the institution was acting *in loco parentis*;
- a child with a medically defined physical or intellectual disability;
- or a child whose cultural background increased their vulnerability. For example, if he or she was of Aboriginal or Torres Strait Islander descent.

Recommendation 3

The assessment matrix should include factors about the increased vulnerability of the child who suffered the abuse.

3. Calculation of the “original amount”

Pursuant to clause 33, the meaning of the term *original amount* needs to be amended to clarify that this amount excludes any legal costs and outlays paid as part of the settlement/judgment. This is consistent with other schemes where it is the damages that are deducted or otherwise considered when assessing claims and will ensure an assessment is not unfairly reduced.

We note that legal costs are not payable under the scheme and therefore, the amount given to a survivor needs to provide them with adequate redress in circumstances where the amount for legal costs was paid over and above the amount awarded/given to the claimant at a previous time.

For example, if the applicant formerly received an amount of “\$50,000 plus costs fixed at \$10,000”, the \$50,000, representing the compensation/damages should be the “original amount” for the purposes of this scheme.

Recommendation 4

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

4. Limiting the scheme to only sexual abuse

The Royal Commission made official statements in handing down its findings that, while it was restricted by Letters Patent to only make recommendations about sexual abuse, governments and institutions are not so limited and can and should extend the findings to all forms of child abuse.

During the Royal Commission's inquiry, and through other claims and reports, it is clear that child abuse, other than only sexual abuse, occurred in or around institutions and caused serious and long-term damage. This Bill is an opportunity to ensure redress is provided to all survivors via amendment at the Third Reading to include a broader definition of child abuse, which include serious physical abuse. The definition of “serious physical abuse” should be a matter of fact determined by the Operator in each case.

This would be consistent with New South Wales and Victorian legislation which removes statutory time limitations in response to Royal Commission recommendations.

Should this recommendation not be adopted by the Committee, we call on the government to consider appropriate reform so that victims of severe physical abuse and neglect, deprivation of education or separation from culture, which can have lifelong implications every bit as much as sexual abuse, can access appropriate redress.

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5. Maximum quantum conflicts with the Royal Commission recommendations

Pursuant to clause 18(1) of the Bill, the scheme can assess compensation at a maximum of \$150,000 per person and each person is only able to make one application for redress. We note this cap conflicts with the Royal Commission's recommendation of \$200,000 as maximum redress. The Royal Commission's extensive final report has provided reasons for this figure whereas, the explanatory memorandum to this Bill has not provided any justification for this reduction. Unless sufficient detail is inserted into the explanatory memorandum to justify why the Bill is proposing a figure different, in fact 25% less than the figure recommended by the Royal Commission, then it is appropriate that the cap should mirror the recommendations of the Royal Commission.

It may of course be that negotiations between the states and the Commonwealth have resulted in a reduction of the recommended \$200,000.00, and assessment of the degree of financial exposure of *funders of last resort*, but again we query the reasons behind this reduction.

Even if the right to litigate for civil damages is preserved for those who accept redress under the Scheme, there are likely to be many survivors who are unable to bear the burden of engaging in civil litigation.

Recommendation 5

The Explanatory Memorandum should be amended to justify why the maximum compensation figure is 25% less than the figure recommended by the Royal Commission. If this cannot be done, then it is appropriate that the cap should mirror the recommendations of the Royal Commission.

6. Unreasonable timeframes

The Society is concerned that some of the timeframes set out in the Bill are unreasonable and may conflict with section 13 of the Bill and Recommendation 4(b) of the Royal Commission's report which states there should be "no wrong door".

Clause 38

We note the acceptance period for an offer is to be at least 90 days, pursuant to clause 38 of the Bill. The explanatory memorandum does not provide a rationale for the 90-day timeframe, nor does it say that it will be universally applied.

We note from the Royal Commission's inquiry that victims of child sex abuse may face significant difficulties in reporting and making decisions in respect of their abuse. These difficulties flow from:

- Emotional avoidance and the confronting nature of dealing with such matters;
- Lower education levels of many survivors leading to difficulties understanding legal or administrative matters;
- Distrust in authority or government;

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- Mental health issues that may cause delay;
- Survivors who live in rural or remote Australia (such as Indigenous Australians) without ready access to adequate legal advice.

As such, we do not consider that timeframe for accepting an offer, which as drafted has the effect of releasing the institution from any further claim, is sufficient, noting that the Royal Commission recommended 1 year.

Further, this period may not allow all applicants the opportunity to seek and obtain legal advice about their alternate, civil litigation remedies, if they do not accept the offer of redress. The Society supports survivors be given the opportunity to receive legal assistance “before making a decision as to whether to accept the offer of redress.”² We consider that further information is necessary to clarify:

- If assistance will be provided before and during the process with the Operator?
- How that assistance will be independent of the Operator? That is, who will provide it?
- How that assistance will be funded?

It is noted that the Royal Commission recommended:

Recommendation 9.4

The Australian Government should establish and fund a legal advice and referral service for victims and survivors of institutional child sexual abuse. The service should provide advice about accessing, amending and annotating records from institutions, and options for initiating police, civil litigation or redress processes as required. Support should include advice, referrals to other legal services for representation and general assistance for people to navigate the legal service system.

*Royal Commission into Institutional Responses to Child Sexual Abuse 31
Funding and related agreements should require and enable these services to be:*

- a. trauma-informed and have an understanding of institutional child sexual abuse*
- b. collaborative, available, accessible, acceptable and high quality.*

And from the Redress and civil litigation report recommendations (2015)

52. A redress scheme should fund support services and community legal centres to assist applicants to apply for redress.

53. A redress scheme should select support services and community legal centres to cover a broad range of likely applicants, taking into account the need to cover regional and remote areas and the particular needs of different groups of survivors, including Aboriginal and Torres Strait Islander survivors.

We also note that an acceptance period can be extended by the operator, on its own initiative, or at the request of the applicant providing the applicant makes this request before the period

² P 6 of the Explanatory Memorandum

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expires. Again, we raise the issue of whether this will be fair and reasonable for all applicants taking into account the factors listed above

We consider that in accordance with the Royal Commission's report and the objective of this legislation, every applicant should be afforded every reasonable opportunity to seek and obtain redress.

Recommendation 6

- **The Bill should be amended to provide applicants with a 1-year timeframe for accepting offers made by the operator and to allow sufficient time for applications to seek a review of the operator's decision.**
- **Further detail is required to clarify the legal assistance that will be provided.**

Clause 69

We are also concerned that the timeframe imposed by clause 69 of 14 days may be not be sufficient in many cases. Again, we refer to the above-listed factors.

The consequences to the applicant failing to provide the information in 14 days, or apply for an extension of time before the end of 14 days, are substantial including that this may lead to an application being accepted or a lower offer of redress.

Only exceptional grounds are listed as being cause for an extension and what is exceptional is not defined. There are many ordinary (and therefore not 'exceptional') circumstances where a survivor would legitimately be away for a period of 14 days or more and so would not receive the production request in time to respond within the 14 day time frame. For example, a person who works interstate or away from home (for example a truck driver, remote area nurse, locum or contract worker, mines worker, seasonal agricultural worker) or a person on holiday, or a person in hospital, or a person visiting kin or participating in cultural practice, or a person studying which requires living during term in another town, or simply a person living in a rural or remote Indigenous community with unreliable mail service.

The 14-day time limit is not survivor-focused particularly when the consequence of failure to comply is that the Operator may make a determination about assessment in the absence of the information and this could result in a denial of eligibility or inappropriate reduction of quantum under the Assessment Matrix.

Further, we do not consider that the penalty outlined in clause 71(1) for refusal or failure to comply with a request for information should apply to an applicant. As stated, if the applicant does not provide necessary information, their application will not be accepted. There is no need for a civil penalty to be applied and doing so would contravene the purpose of this scheme.

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Recommendation 7

- **The period under clause 69 of 14 days should be extended to 28 days**
- **Applicants should be able to provide information after this time where it is appropriate that the operator take this information into account when determining the application and the assessment.**

Clause 88(3)

Clause 88(3) provides that the person reviewing the determination may not request or view any new documentation. We do not consider that this is reasonable and we support the reviewer having discretion to accept new information particularly if the applicant did not have access to this information at the time of the original determination.

Recommendation 8

- **The Bill should be amended to allow the reviewer to accept new information**

Clauses 127

Clause 127 identifies instances where the Scheme is not required to process an application if it is not made in the prescribed format. While it is understandable that an application in a certain form is preferable, to require this contravenes Recommendation 4(b) which states:

Any institution or redress scheme that offers or provides any element of redress should do so in accordance with the following principles:

(b) There should be a 'no wrong door' approach for survivors in gaining access to redress

Clause 127 would be more appropriate if it created an administrative onus upon the Operator to 'make reasonable attempt' to contact a person who submits information and assist that person to provide the information in the required form.

We submit that this is not overly burdensome and is consistent with the stated policy objectives of the Bill, rather than merely ignoring the information received to the detriment of the survivor. It is also consistent with existing legal obligations in other professional fields such as obligations upon doctors and health services to follow up patients.

Recommendation 9

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

7. Health care provisions do not meet the recommendations of Royal Commission

Royal Commission Recommendation 9 states:

Counselling and psychological care should be supported through redress in accordance with the following principles:

(a) Counselling and psychological care should be available throughout a survivor's life

...

(d) There should be no fixed limits on the counselling and psychological care provided to a survivor

Clause 49(1) limits health care to the life of the Scheme, which runs for a period of ten years until 2028. There is no provision for providing essential services past the ten-year conclusion of the Scheme. This is clearly inconsistent with the recommendation and with section 13 of the Bill. The explanatory memorandum does not provide any rationale for this inconsistency. We call for either the explanatory memorandum to be amended or the Bill to be made consistent with the final report.

8. Health care provisions require detail

We note that clause 18(1)(b) provides that "redress" includes access to counselling and psychological services. Further details should be included, either in the act or in the regulation or rules, to explain what people will be able to access and the process. This is again set out in clauses 47 to 49 (inclusive).

Similarly, with respect to clause 32(d), further details in relation to how services are to be accessed and paid for need to be included in the rules. A period of consultation on these proposed rules should be provided. The "rules" should be reviewed by stakeholders, including the Society, before they are released. For example, if access to a service is limited due to a person's location, the rules need to provide for this access to be provided and funded.

The rules will need to set out how survivors will gain timely access to counseling and psychological services and how this will work for rural and remote victims. The Bill as it stands only seems to imply that funding for health care will be administered via the scheme (as opposed to Medicare or other arrangements). Further, there is nothing to indicate that survivors will not still be subjected to unhelpful wait times for access to services, or that rural or remote survivors, such as Indigenous Australians will be provided with any greater access to services either through increased services locally or increased access to funded travel.

Consideration needs to be given to a system whereby services can be accessed, authorised and funded using a claim number or similar scheme or whether the provision of something similar to a health card, DVA Gold card, would be appropriate.

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9. Institutions' interaction with the scheme and privacy concerns

We support the survivor-focus of the Scheme, and while we note that the Royal Commission only recommended a right of review by the applicant, we query if there should be right of review by the institution.

The intention of the Bill seems to be that once a participating institution opts-in, that opt-in is or may be confirmed by *legislative instrument*, which is likely to mean that the participating institution cannot then opt-out in respect of future redress applications if the institution perceives that the redress awards against them are manifestly unfair. We query in these circumstances whether, given the 'lock in' once opt-in occurs, there may need to be consideration given to limited rights of review by participating institutions. Such limitations, with a view to not causing further suffering to survivors, and the Scheme remaining survivor focused could for example:

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

An institution's involvement in the scheme is clearly critical to its operation. Such involvement needs to be measured and needs to consider the rights of an applicant survivor. We consider that the Bill requires further work in this regard.

Recommendation 10

Consideration should be given to a participating institution having a limited right of review

Clause 79 may also require review once the above issue has been addressed. This clause allows an institution to access and use personal information relating to a survivor.

While we consider that the Operator has a clear right to request information to be able to properly assess the application by a survivor, we are concerned that the operator can then provide this information to an institution where a survivor has not consented to this.

Further, as to clause 76(2)(d)(iii), given the likely nature of the information that may be obtained to determine applications under this scheme, consideration should be given to whether implied consent is appropriate and is consistent with privacy principles. To avoid unnecessary delay, appropriate authority should be obtained to access information at the commencement of the determination process.

Recommendation 11

- **All clauses in the Bill should be amended to provide that personal information of the applicant is not released without express consent.**

10. Better protection of vulnerable people (people with Guardians or Powers of Attorney)

We consider that clause 100(1) should be automatically applied to all nominee payments rather than merely at the discretion of the Operator. This will ensure better protection for vulnerable people as well as responsible management of public funds. The payment of any redress where a nominee arrangement is in place should be subject to increased scrutiny to ensure the redress is distributed to the best interests of the survivor.

11. Deceased victims of institutional child abuse

The Bill currently has no provision to enable a dependency claim to be brought. This may be because of the challenges of evidence, even with the lower standard of proof required by the Scheme. It is noted that the Royal Commission recommended that offer of redress only be made if the application is alive at the time of the offer³, and that the Bill does take this further.

However given the proposed lower standard of proof, there may well be sufficient evidence preserved to allow a child, spouse or other dependent to access redress in circumstances where they have been left vulnerable due to a death of a victim, where the death can be attributed to the abuse

We note that the proposed Scheme allows an already commenced application to be continued by the estate of the deceased. What we have suggested above is perhaps just a logical extension of this.

Further, we are cognisant that there have been calls for a Royal Commission and redress scheme since 2000 and that since this time, many survivors have died, a large number of these have been indigenous survivors. This wrong almost certainly would have impacted this group's entrenched social disadvantage. It has also led adverse impacts on their family (children, grandchildren), causing intergenerational impact.

Accordingly, we recommend that consideration be given to expanding the scheme to create a provision for the child of a person who suffered sexual abuse as a child, who is now deceased, to apply on that deceased person's behalf for redress.

The Operator would still be required to assess the application in same way; that is, be satisfied that there is a "reasonable likelihood" that the abuse occurred. This could be done, for example, where there are records of a person's attendance at a certain orphanage available and where there was a record of the person's statements, such as to police or previous government inquiries.

We suggest that a reduced rate of redress under the Assessment Matrix could be applied to limit cost, therefore providing for the symbolic healing of acknowledging the harm caused to the deceased person throughout their life. In addition, the provision of a direct person response to the child would also be valuable and critical in providing redress for surviving families and communities. Redress could then be offered via the estate consistent with existing provisions at Part 5-1.

³ Recommendation 47, Redress and civil litigation report recommendations (2015)

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Recommendation 12

The Committee consider:

- a) Expanding the scheme to cover dependency claims;
- b) Expanding the scheme so that a claim can be made by the child of victim of abuse where that victim is now deceased.

12. Need for a program embedded into the Scheme for survivors to self-identify as “at risk” and receive additional support with managing their monetary payment

Clause 117(2) enables the Minister to provide legal services and support services to applicants under the Scheme. We suggest that a formalised scheme, offering survivors the opportunity to self-identify as ‘at risk’ (for example due to addiction, mental health, or abusive relationships) should be established and should provide dignified opt-in mechanisms to assist with protection of the monetary payment for the survivor.

13 Unincorporated Associations

In relation to applications against unincorporated associations in clause 124 of the Bill, we recommend that the drafting be amended to make the intention clear that it be, the “*committee of management*” at the time the application for redress is made (and as changed from time to time)⁴, as opposed to the time of the alleged abuse. To the contrary, we recommend that the offence provisions in sub-clause 124(3) should be as against the “committee of management” at the time the offence was committed (given their nature as offence provisions).

The current law in relation to which “committee of management” is the appropriate respondent to tortious liability (as opposed to contractual liability), is the “committee of management” at the time of the alleged wrong.⁵

It is the current “committee of management” who have control of the assets and *officials* of the institution in order to give effect to the order for redress provided by the Operator.

The Bill does not clearly deal with whether the intention is that liability of the “committee of management” of an unincorporated association be *personal* or *representative* in nature, and then whether response the liability is limited to the assets of the unincorporated association, or can be enforced as against the personal assets of members of the “committee of management” (jointly or jointly and severally).

Additionally, given that many “committee of management” members are volunteers, the Bill or the Explanatory Memorandum does not seem to deal with the interaction with liability

⁴ Changes from time to time should be contemplated so that if the “committee of management” composition changes during the time of the application the respondents to the application should accordingly change.

⁵ *TRUSTEES OF THE ROMAN CATHOLIC CHURCH v ELLIS & ANOR* [2007] NSWCA 117. Cf contractual liability *Anglican Development Fund Diocese of Bathurst in its own capacity and in its capacity as trustee of the Anglican Development Fund Diocese of Bathurst (receivers and managers appointed) –v– The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst; Commonwealth Bank of Australia –v– The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst* [2015] NSWSC 1856 (10 December 2015)

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protection that volunteer committees of management receive under state and territory based civil liability legislation.⁶

It seems to the QLS that the intention of *representative* liability, which was also the substantive outcome in the *Bathurst case*⁷, is that the liability attaching to the “committee of management”, be limited to the extent of the assets of the incorporated association assets that they control. This is also consistent with the volunteer protections referred to in the previous paragraph and with the intentions of the Scheme with *funders of last resort*.

Some of the ‘assets of’ unincorporated associations may be held pursuant to specific charitable trust terms and not for the general purpose of the association. In our submission it would be contrary to the public policy of upholding the intentions of settlors of charitable trusts (and encouraging charitable giving), and by implication the doctrine of cy pres of saving charitable trusts; that specific purpose trust assets, the terms of which are not within the power of amendment of the of the “committee of management”, ought to be susceptible to responding to meeting a relevant monetary award by the Operator. This line was not crossed in the *Bathurst case* with only assets in general purpose trusts considered controlled and susceptible to responding to the liability in that case.

The QLS queries the Constitutional basis for clause 124 of the Bill absent a referral of powers from the states and territories (or each of those states and territories enacting legislation for the limited recognition of unincorporated associations as legal persons, able to sue and be sued, with succession for asset holding purposes⁸).

The QLS would urge further consultation of further proposed amendments to clause 124 of the Bill.

Recommendation 13

- That the drafting of clause 124(2) of the Bill be amended to make the intention clear that it be, the “committee of management” at the time the application for redress is made (and as changed from time to time).
- To the contrary, the offence provisions in sub-clause 124(3) should be as against the “committee of management” at the time the offence was committed and that the drafting be amended to make this clear.
- That the drafting be amended to make it clear that monetary awards be limited to the extent of the general purpose assets of the unincorporated association that the “committee of management” controls.

14 Other recommended amendments.

- a) Clause 27 of the Bill outlines the way in which the Minister can declare an institution is participating in the scheme but note that it is intended that this only be after the institution

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

⁷ See citation in immediately previous note.

⁸ This has been done in various states of the United States of America.

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seeks to opt-in. It is unclear from this drafting, however, whether institutions will have the ability to “opt out” of the scheme after they have opt-ed-in. This should be clarified.

- b) Further, clause 29(2) states that an application for redress under the scheme must be in the form approved by the operator and include information and documents. It is critical that applicants are given appropriate instruction about what information will be necessary to provide to enable their application to be accepted. Further, it would be beneficial for relevant stakeholders, including the Society, to be consulted on any proposed form.
- c) Clause 32 provides that the operator must make a determination to approve or not to approve an application for redress, however, there is no timeframe by which this determination is to be made. We note that a balance needs to be struck between our submissions made above which call for applicants to be given sufficient time to respond to requests for information and the need to provide certainty to all parties. We suggest that a period of say 60-90 days from receipt by the operator of all of the requested information (unless there has been confirmation that the information cannot be provided because, for example, it does not exist) is appropriate. The operator should have an ability to extend the timeframe if further information is needed to make a decision.
- d) In addition to the power given to the operator under clause 32(e), we contend that the operator should also be able to correct, or ask the applicant to correct, the identity of a responsible institution, to the extent that this is a technical or administrative correction to amend a name, rather than a substantive correction. This will allow applications to be processed in line with the objects and purpose of the scheme.
- e) Clause 37(g) provides that the operator must give information to the applicant about the opportunity to access legal services under the Scheme. In this regard, the Society calls on the government to confirm that what additional funding will be provided; for example, will additional funding be given to community legal services. Consideration should also be to the accessibility of this advice in a timely manner to those in rural and remote areas, and other like services, for this purpose. It is critical that this includes legal services that can be accessed by people in regional, rural and remote areas.
- f) If the right to civil litigation is to be lost, clause 40 should be amended to provide that an institution will be released from further action upon the payment/completion of the redress and not from the time of acceptance of the offer. This will bring the scheme in line with most settlement deeds following the resolution of a compensation claim.
- g) Pursuant to clause 41 of the Bill, a liable institution is provided with notice of the acceptance of redress by an applicant. The Bill is silent on whether the institution is notified or provided with the application at the time that it is made, or when an offer of redress is made. We refer to our above comments in respect of clause 79.

The Royal Commission recommended⁹:

⁹ Redress and civil litigation report recommendations (2015)

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

The Royal Commission Redress and Civil Litigation Report also commented:

"... it seemed to us to be particularly important that institutions should be provided with details of the allegations to ensure that institutions are aware of abuse that is alleged to have occurred in connection with their operations. ...

... It does not seem to us to be desirable that institutions not know as early as possible about any allegations involving them that are made through a redress scheme. In particular, if an allegation is made against a person who is still involved with the institution, the institution may have to act on the allegation independently of any issues of redress.

... We remain satisfied that it is particularly important that institutions should be provided with details of the allegations to ensure that institutions are aware of abuse that is alleged to have occurred in connection with their operations. This is important both in respect of any named alleged abuser and more generally in respect of the institutions policies and procedures."¹⁰

Despite the lower onus, institutions should be afforded an enshrined right to be provided with a copy of the application as recommended by the Royal Commission (after consideration has been given to the privacy issues raised earlier in this submission) and a limited (but reasonable period) of time to respond by written submission (sworn by Statutory Declaration in the same manner as applicants). The Scheme should oblige the Operator to take the institution's response into account in the decision of the original decision maker, and on review. The applicant should of course also be provided with a copy of the response of the institution. The QLS has concerns about the willingness of institutions to opt-into the Scheme if they did not have at least a limited right to be heard on the specific allegations being made against them.

A limited right of response by the institution is not inconsistent with the Scheme being survivor focused.

- h) Clause 44 dictates that "the operator must pay the redress payment to the person as soon as practicable". This should be amended to "within 21 days of acceptance of the offer of redress". The same amendment should be made to clause 115(2)(b). It may also be appropriate that interest becomes payable if the amount is not paid within this timeframe.
- i) The Society strongly supports clause 45 and, in clause 49(3), that counselling and psychological services should be provided in addition to, and not replace or remove current funding given to applicants. We refer to our comments in sections 7 and 8 above.

¹⁰ P 336-367

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

- j) Clause 50(2) is unclear. We suggest that clause be amended to clarify which institutions are required to provide a direct personal response. Further, the clause requires an institution to take reasonable steps and some guidance should be provided as to what constitutes "reasonable steps".
- k) Clause 71(3) should be removed from the Bill on the basis that it erodes the fundamental right to claim privilege against self-incrimination. Any breach of a fundamental right should be a last resort.

If clause 71(3) is to remain the Bill, then strong and specific protections of the admissibility and use of that evidence must be included in the statute. Clause 71(4) should be amended to read "any proceeding" and not solely relate to criminal proceedings and should provide clear and explicit protections against the derivative use of evidence.

The Society queries whether other usual reasonable excuse grounds such as legal professional privilege should also be added. The right to confidential legal advice needs to be preserved.

- l) Clause 78 allows the operator of the scheme to disclose information to the police or a state or federal institution "necessary for the enforcement of criminal law or for the purposes of child protection". The clause limits the use of the information to enforcement and protection actions. "Enforcement of criminal law" is not defined further but tends to suggest this relates to the prosecution of criminal offences. On this basis, we consider the clause should be amended to remove the term, "enforcement of criminal law" on the basis that it is a further abrogation of the right to claim privilege against self-incrimination.

We do not raise an issue with the provision of information to assist in child protection provided there are appropriate safeguards in place.

The drafters and the scheme's operator need to give further consideration as to how they will give effect to clause 78(3). Clause 78(6) should be amended to allow for a reasonable excuse to be provided.

The other offence provisions in clauses 81 to 84 (inclusive) should be also amended to allow for a reasonable excuse to be provided.

- m) The Society does not support the imposition of strict liability offences without appropriate justification. Clause 100(8) should be amended to remove this term. There should also be provision for reasonable excuse to be provided.
- n) The Society queries how a determination under clause 106(3) will be made. Further information should be provided about this process. In addition, clause 106(4) should be amended to state that the debt arises from the time the person is notified, rather than the time the amount was made to the recipient.

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- o) Clause 114 provides that if an applicant dies after submitting an application for redress and after an offer of redress has been made, the offer, and any application for review, is taken to be withdrawn. The clause refers the matter to clause 115 however, this clause only provides for how payment is to be made when the person dies. It does provide a process for an offer to be accepted or a right of review.

- p) Clause 121 provides for an independent decision maker to be appointed. It is crucial to the success of this scheme that the operator and anyone else appointed have the required qualifications and experience necessary to assess liability and the amount payable pursuant to the assessment matrix. We refer to the reasoning in the LCA submission about the desirability for an independent review.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Principal Policy Solicitor, Wendy Devine on [REDACTED] or [REDACTED] or our Senior Policy Solicitor, Kate Brodnik on [REDACTED] or [REDACTED]

Yours faithfully


[REDACTED]
Ken Taylor
President

1. The first part of the document is a list of names and addresses of the members of the committee who have been appointed to investigate the matter.

2. The second part of the document is a list of the names and addresses of the members of the committee who have been appointed to investigate the matter.

3. The third part of the document is a list of the names and addresses of the members of the committee who have been appointed to investigate the matter.

4. The fourth part of the document is a list of the names and addresses of the members of the committee who have been appointed to investigate the matter.