



Law Council
OF AUSTRALIA

Oversight of redress related recommendations

**Joint Select Committee on the Royal Commission into Institutional Responses to
Child Sexual Abuse**

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	5
Law Council’s engagement with the national redress scheme	5
Eligibility for redress	6
Eligibility based on criminal record	6
Eligibility based on nationality and residency	8
Length of application form for redress	8
Timeframe for acceptance of offer	8
Provision of counselling and psychological care	9
Minimum and maximum payment amounts	9
Direct personal response framework	9
Redress and Stolen Generations survivors	10
Definition of sexual abuse	10
Declaration of institution	11
Redress for Stolen Generation survivors	11
Issues with the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018	12

About the Law Council of Australia

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

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

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

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

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

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

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

- Mr Morry Bailes, President
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- 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 Law Society of South Australia and the Queensland Law Society for their assistance in the preparation of this submission, as well as input from its National Human Rights Committee and National Criminal Law Committee.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse (**Joint Select Committee**) in relation to its oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**).
2. The Law Council understands that the Joint Select Committee is inquiring into:
 - (a) the Australian Government policy, program and legal response to the redress related recommendations of the Royal Commission, including the establishment and operation of the Commonwealth Redress Scheme and ongoing support of survivors; and
 - (b) any matter in relation to the Royal Commission's redress related recommendations referred to the Joint Select Committee by a resolution of either House of the Parliament.
3. This submission is therefore focussed on those aspects of the national redress scheme that appear inconsistent with the recommendations of the Royal Commission and continue to cause concern to the Law Council.

Law Council's engagement with the national redress scheme

4. The Law Council has long supported the establishment of a national redress scheme for survivors of institutional child sexual abuse and has welcomed the introduction of a national redress scheme as recommended by the Royal Commission.
5. The Law Council and its Constituent Bodies have been actively engaged in the development of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) (**Redress Act**), having provided two detailed written submissions to the Senate Community Affairs Legislation Committee prior to its enactment.¹ These previous submissions are referred to throughout this submission, and the Joint Select Committee is encouraged to revisit the material provided as part of earlier parliamentary inquiries into the establishment of a national redress scheme.
6. A key guiding principle underpinning the Law Council's advocacy in relation to the establishment of a national redress scheme for survivors of child sexual abuse has consistently been that any legislative framework should be guided by the recommendations of the Royal Commission. Where the redress scheme departs from the recommendations of the Royal Commission, the Law Council submits that the justification for doing so should be clear and reasonable.
7. Regrettably, the Law Council is aware of several instances where the national redress scheme has departed from the recommendations of the Royal Commission which, in the view of the Law Council, are unreasonable and lacking in justification. These areas are highlighted within this submission.

¹ See, 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, and Law Council of Australia submission to the Senate Community Affairs Legislation Committee on the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (1 June 2018) submission 18.

8. On a final preliminary point, it is noted that legislative instruments that have been developed to support the redress scheme (e.g. the *National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018*, the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* and the *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018*) were not open for a period of public consultation prior to being made. Such consultation should have been conducted to ensure the scheme is survivor-focused, and it is submitted that future measures should be developed only after an adequate period of public engagement.

Eligibility for redress

9. In forming a view as to the eligibility for redress under a national scheme, the Royal Commission made the following broad recommendation:

A person should be eligible to apply to a redress scheme for redress if he or she was sexually abused as a child in an institutional context and the sexual abuse occurred, or the first incidence of the sexual abuse occurred, before the cut-off date.²

10. Further, upon setting out the principles that should underpin a national redress scheme, the recommendations of the Royal Commission highlighted the need for:

- the process for redress to provide equal access and equal treatment for survivors;³
- redress to be survivor focused;⁴ and
- all redress to be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors.⁵

11. There are several aspects of the current redress scheme that are not aligned with the views of the Royal Commission and the above principles that it has put forward when forming its recommendations. In this regard, the following areas in relation to eligibility under the scheme continue to cause concern to the Law Council:

- (a) eligibility for survivors with serious criminal convictions; and
- (b) eligibility for non-citizens and non-permanent residents.

Eligibility based on criminal record

12. The Law Council notes that under the Redress Act, applicants with serious criminal convictions are not entitled to redress under the scheme unless there is a determination in force under subsection 63(5) that the person is not prevented from being entitled to redress.

13. The Law Council's previous submissions have raised concerns with the potential inaccessibility of the redress scheme for survivors with a serious criminal record, and the Law Council continues to hold the position that access to the scheme should be primarily guided by the Royal Commission's views, which did not recommend any restriction to accessing redress on grounds relating to criminal history. The Joint Select

² Royal Commission on Institutional Child Sex Abuse, 'Redress and Civil Litigation Report' (2015), rec 43.

³ Ibid, rec 1.

⁴ Ibid, rec 4(a).

⁵ Ibid, rec 4(d).

Committee is directed to the Law Council's earlier submissions to the Senate Community Affairs Legislation Committee in support of this position.

14. It is noted that not only does the Royal Commission not suggest that eligibility for redress be limited with reference to criminal record, it expressly envisages that survivors may be in correctional or detention centres when stating that the redress scheme should consider adopting particular communication strategies for people who may be difficult to reach.⁶ This approach is consistent with an acknowledgement that criminality may be linked to trauma suffered as a result of child sexual abuse, which in addition to impacting on the development of the child, often manifests in subsequent mental health issues.
15. On this issue, the Law Council further notes that the Senate Community Affairs Legislation Committee's report on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 made the following recommendation:

The committee recommends that in finalising the position on the exclusion of serious criminal offenders from the Redress Scheme, the Australian, state and territory governments should consider the value of the Redress Scheme as a tool for the rehabilitation of offenders, and that excluding criminal offenders can have the unintended consequence of institutions responsible for child sexual abuse not being held liable.⁷

16. The Government's response to that recommendation is as follows:

The Government agrees with this recommendation. In finalising the position on access to the Scheme by survivors with serious criminal convictions, 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 offender. Consideration will be given to the nature of the offence, length of sentence, length of time since the person committed the offence, and any rehabilitation of the person.⁸

17. While it appears that there may be some flexibility on a case-by-case basis for survivors who have committed certain criminal offences, it also appears that those survivors who have served a sentence of five years or more may have difficulty in reversing the existing presumption against eligibility.
18. The Law Council continues to hold the view that access to redress should not be limited on the basis of criminal record, and that there is no reasonable justification for this exclusion. At the very least, applications should be assessed on a case-by-case basis with greater weight accorded to the purpose of redress than to concerns about potential reputational damage for the scheme.
19. It is also not clear from the national redress scheme website whether survivors will be given an opportunity to comment if the Attorney-General does not support their application, or if the scheme operator forms an adverse view about rehabilitation or community expectations. The Law Council therefore seeks greater clarity in respect of the appeal process associated with a decision to refuse redress on the basis of criminal record.

⁶ Ibid, rec 50.

⁷ Senate Community Affairs Legislation Committee 'Report on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017' (March 2018), 94.

⁸ Australian Government response to the Senate Community Affairs Legislation report (May 2018), 7.

Eligibility based on nationality and residency

20. The Law Council continues to hold concerns with the limitation of the national redress scheme to Australian citizens and permanent residents as a result of subparagraph 13(1)(e) of the Redress Act. The Joint Select Committee is directed to the Law Council's earlier submissions which further detail these concerns.
21. In particular, the Law Council notes that the adopted policy position under the redress scheme seems apposite to the conclusions of 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'.⁹ Consistent with the view of the Royal Commission, the Law Council continues to hold the position that citizenship and residency should not be a requirement for eligibility, and that the only relevant nexus for redress should be whether a person was sexually abused as a child, and that abuse is the responsibility of a participating institution.
22. Noting also that the main objects of the Redress Act are to 'recognise and alleviate the impact of past institutional child sexual abuse and related abuse' and 'provide justice for the survivors of that abuse',¹⁰ it is not clear how a person's citizenship status, if they experienced institutional child sexual abuse in Australia, is of relevance.

Length of application form for redress

23. The Law Society of NSW has raised concerns with the length and complexity of the application process for redress under the scheme, noting that the current form creates a risk of re-traumatising survivors. When considering the appropriateness of the application form's length, consideration should be given to the Royal Commission's view that the 'application process for redress should be as simple as possible while obtaining the information necessary to assess eligibility and determine the amount of any monetary payment'.¹¹
24. In relation to concerns of re-traumatisation in the application process, the Law Society of NSW has pointed to the notes at question 44 of the application form as providing an indication as to the level of detail that is required and has also suggested that question 58 on the form as it relates to the impact of the abuse may be unnecessary.

Timeframe for acceptance of offer

25. A further point of departure from the Royal Commission's view is the redress scheme's period for acceptance of an offer of at least six-months as per subsection 40(1) of the Redress Act, noting that the Royal Commission had recommended that an offer of redress should remain open for a period of one year.¹²
26. The Law Council has endorsed the recommendation of the Royal Commission in this respect, and notes that a decision to accept an offer of redress will be a substantial one for many survivors. Notably, it is a legally significant decision, given that accepting an offer of redress waives a survivor's rights to bring a civil claim.
27. The Law Council does acknowledge that the six-month acceptance period in the Redress Act is an improvement from the position proposed in earlier legislative drafts

⁹ Royal Commission on Institutional Child Sex Abuse, 'Redress and Civil Litigation Report' (2015), 347.

¹⁰ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), 3(1).

¹¹ Royal Commission on Institutional Child Sex Abuse, 'Redress and Civil Litigation Report' (2015), 40.

¹² *Ibid*, rec 59.

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.

Provision of counselling and psychological care

28. 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'.¹³ It is submitted that a maximum amount of \$5,000, which attaches to the type of abuse, rather than the loss or need, is inadequate.¹⁴
29. 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.¹⁵ However, as previously submitted, the Law Council suggests 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.¹⁶

Minimum and maximum payment amounts

30. The Law Council takes this opportunity to again point out that the Royal Commission had recommended a maximum redress payment of \$200,000 and a minimum of \$10,000 for applicants under the scheme.¹⁷ The scheme established by the Redress Act has instead introduced a maximum payment of \$150,000 and is silent on any minimum payments.¹⁸
31. The Law Council appreciates that these amounts are unlikely to change now that the redress scheme is functional and has the support of all states and territories, however wishes to raise this inconsistency for the benefit of the Joint Select Committee in light of the inquiry's terms of reference.

Direct personal response framework

32. The Law Council notes that the Royal Commission recommended that the scheme operator should offer to facilitate the provision of a written apology, a written acknowledgement and/or a written assurance of steps taken to protect against further abuse for survivors who seek these forms of direct personal response, however do not wish to have any further contact with the institution.¹⁹
33. It is submitted that the *National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018 (Personal Response Framework)* does

¹³ Ibid, rec 9.

¹⁴ See *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018*, section 6.

¹⁵ Government's response to the Senate Community Affairs Legislation Committee (May 2018), page 9.

¹⁶ 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].

¹⁷ Royal Commission on Institutional Child Sex Abuse, Redress and Civil Litigation Report (2015), rec 19(b).

¹⁸ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), 16(1)(a).

¹⁹ Royal Commission on Institutional Child Sex Abuse, Redress and Civil Litigation Report (2015), rec 6.

not align with the above recommendation. First, section 5 of the Personal Response Framework only requires the operator to provide the contact details for the institution, requiring that the survivor must contact the institution to commence the direct personal response process. No flexibility appears to be available if this is not possible. A direct personal response will not be required, under paragraph 13(1)(b) of the Personal Response Framework, unless requested by the survivor.

34. Noting the recommendations of the Royal Commission on this issue, it is recommended that the scheme operator should facilitate the provision of these forms of direct personal responses by conveying survivors' requests for a direct personal response to the relevant institution.
35. Further, in section 6 of the Personal Response Framework the survivor is required to agree with the institution's methods for engaging with the institution to obtain a direct personal response. Again, there is no provision for the operator to assist in facilitating this if the survivor cannot or does not wish to agree to the proposed method. The Law Council submits that this should be amended, and that legal assistance and support services should be funded to provide assistance to the survivor in this regard.
36. Finally, it is noted that section 6 of the Personal Response Framework as it is currently drafted appears to contradict section 54 of the Redress Act which does not mandate the provision of a direct personal response, but rather provides that the institution should take reasonable steps to do so. The Law Council considers that an institution should, at the very least, inform the survivor about what steps it has taken however it is noted that the Personal Response Framework must correlate with the primary legislation.

Redress and Stolen Generations survivors

37. The Law Council has received the following additional input from the Law Society of NSW which raises several issues in relation to the accessibility of the national redress scheme for Stolen Generation survivors.

Definition of sexual abuse

38. Sexual abuse is defined at section 6 of the Redress Act as including 'any act which exposes the person to, or involves the person in, sexual processes beyond the person's understanding or contrary to accepted community standards'. The Law Society of NSW has submitted that there is a need for greater clarity in relation to whether this definition covers children who were groomed, and/or witnessed the sexual abuse of other children, particularly in the context of Stolen Generations survivors.
39. By way of example, the Law Society of NSW has identified past instances where 'training homes' for Aboriginal boys allowed the wives of managers and staff to stand in the shower rooms while the boys were showering, watching them. This was an experience that some of the survivors have described as confusing and shameful, especially when they were going through puberty.
40. Arguably, such experiences would fall within the definition of 'sexual abuse' under the current provisions of the Redress Act, however there is uncertainty in this area. It would therefore be helpful if the Joint Select Committee were able to promote the need for additional guidance material to be produced for individual assessors which addresses the parameters of the definition of sexual abuse, allowing for discretion to be applied on a case-by-case basis to avoid unjust outcomes.

Declaration of institution

41. Section 115 of the Redress Act provides that the Minister may declare an institution to be a participating institution. In the case of state institutions, the state must agree to that institution participating in the scheme pursuant to subparagraph 115(3)(a).
42. The Law Society of NSW has noted that in the context of NSW, there were a number of Aboriginal missions and reserves in existence prior to disbanding of the Aborigines Welfare Board in 1969, and there remains a question as to whether these missions and reserves are identifiable as institutions within the redress scheme. This issue will be relevant to the ability for Stolen Generation survivors to access the redress scheme where they have experienced sexual abuse while under the control of the then Aborigines Protection and Welfare Board.
43. The Law Society of NSW is therefore of the view that, at least in NSW, the state government should declare missions and reserves participating institutions and has requested that the Joint Select Committee draw attention to this issue and its potential application across other states and territories.

Redress for Stolen Generation survivors

44. The Law Society of NSW has further submitted that many Stolen Generation survivors are uncertain about what course of action they should take to ensure they receive the most monetary compensation to which they are entitled. It is understood that while survivors are aware of the redress scheme, there are some individual law firms advocating that individuals pursue legal avenues.
45. In this context, the Law Society of NSW has advised that some survivors have already received some level of compensation as a result of group action, however it is understood that there was a misapprehension of the fact that quantum awarded would turn on experience of sexual assault (and its severity), and as such, some survivors either did not disclose, or did not fully disclose, their experiences of sexual assault that took place while they were wards of the state. It is further understood that not insignificant legal fees were deducted out of those survivors' final settlements.
46. The Law Society of NSW reports that some survivors that took part in earlier group action are of the view that the process did not result in fair outcomes and are further concerned that this process will negatively impact on their ability to receive redress under the scheme.
47. Other survivors are reportedly remaining uncertain about whether to pursue legal action, and/or to seek redress under the scheme. This is an issue of some urgency, given that many Stolen Generation survivors are of advanced age, or are in ill health, or both.
48. In light of these matters, the Law Society of NSW has requested that the following aspects of the redress scheme be addressed in relation to the scheme's application to Stolen Generations survivors:
 - (a) the need for direction to be issued in respect of assessing the applications of Stolen Generations survivors, with particular attention to be paid to the facts and circumstances of each application, and for discretion to be exercised in the interests of justice to ensure that survivors receive proper redress; and
 - (b) that oversight of the redress scheme should include oversight of the provision of independent accessible and culturally appropriate advice to Stolen

Generations survivors so that they can make informed decisions about what course of action they wish to pursue, and to limit their exposure to legal and other fees/costs.

Issues with the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018

49. Finally, the Law Council notes the additional points that have been raised by the Queensland Law Society in relation to inconsistencies and deficiencies in the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (the Rules)*. These points are as follows:

- (a) The Rules seek to determine and apportion liability between institutions, however it is submitted that these determinations ought to be set out in the primary legislation.
- (b) Sections 11 and 14 of the Rules contain awkward drafting and should be re-drafted for clarity.
- (c) Section 17 of the Rules, which allows the operator to revoke a decision based on new information, may create uncertainty for the survivor, especially as there is no express requirement for the scheme operator to afford procedural fairness and disclose the new information to the survivor before the determination is revoked.
- (d) There is a concern that subsection 43(3) of the Rules may not adequately protect personal information. Further sections 44 to 54 outline when disclosure is permitted in certain circumstances. Some of these circumstances are quite necessary to ensure safety, however, there is a concern that others may be used to circumvent the requirement to obtain either consent or a warrant/court order.