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Committee Secretary
Senate Standing Committees on Community Affairs
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14 March 2018

Dear Ms Radcliffe,

### Re: Inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related bill

Thank you for the opportunity to respond to the following questions on notice for the Community Affairs Legislation Committee.

***Senator Watt:*** *Does this legislation set any, if you like, thresholds for levels of impairment that people need to meet, or is it more a concept that's being imported from other legislation?*

From PWDA's analysis of the legislation, it appears that the use of nominees within the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill* 2017 has been imported from other legislation. As explained in our original submission, the continued use of nominee provisions in legislation demonstrates that the concept of legal capacity[1] remains unrealised by law and policy makers.[2]

PWDA considers the provisions in Part 4-4 regarding nominees to be a form of substitute decision-making, and as such does not support this section of the legislation. Our views on substitute decision-making are underpinned by the rights

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[1] For additional information regarding legal capacity, see: People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre). 2014 *Australian Law Reform Commission (ALRC): Equality, Capacity and Disability in Commonwealth Laws Discussion Paper,* Available: http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc;NGO Coalition, 2015, *Australia's UPR 2015: Fact Sheet Legal Capacity*, available: http://www.pwd.org.au/documents/Word/AusUPRFactSheetSupportedDecisionMaking.docx

[2] As outlined in: Lea, M., & Sands, T., (2017), '*Disabled People's Organisations Australia (DPO Australia) Submission to the Australian Law Reform Commission Discussion Paper: Protecting the Rights of Older Australians from Abuse'*, DPO Australia, Sydney, Australia.

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We have a vision of a socially just, accessible and inclusive community, in which the human rights, belonging, contribution, potential and diversity of all people with disability are recognised, respected and celebrated with pride.

outlined in the Convention on the Rights of Persons with Disabilities (CRPD). Article 12 of the CRPD in particular states that people with disability must be recognised as having legal capacity, and must be appropriately supported to exercise their capacity and express their will and preference. The legislation fails to uphold these rights.

As we stated in our submission, we are particularly concerned that Part 4-4 Division 2 Section 94 Subsection 3 outlines that:

> 'The Operator must not appoint a nominee for a person (the *principal*) under this section except: (a) with the written consent of the person to be appointed; and (b) after taking into consideration the wishes (if any) of the principal regarding the making of such an appointment'.

PWDA reads this as the only requirements made of the Operator in relation to appointing a nominee. Nowhere in the legislation is there a mandatory requirement for the Operator to discuss a potential appointment with the survivor, or to ensure that the survivor is provided with the appropriate supports for them to engage with the Redress Scheme. It subsequently appears that (as the legislation is currently written) the appointment of a nominee could occur before appropriate supports are provided and other less restrictive options are pursued, and troublingly, could occur without the consent of the survivor themselves. This does not reflect the overarching principles of the legislation to be survivor focused and to avoid further harm or trauma to the survivor.

Furthermore, we believe that there is significant potential for conflicts of interest and for abuse and exploitation of survivors by their nominee. Indeed, as is currently outlined in the legislation, the Operator may appoint a body corporate to be the nominee for a survivor. This could pose a substantial conflict of interest, yet there is currently no consideration in the legislation for how such conflicts of interest may be dealt with to ensure that nominees do not exploit or financially abuse survivors. In addition, relationships between survivors and their appointed nominees may be abusive or dysfunctional. By not giving the survivor a true say in the matter, while also stipulating that the nominee must act in the 'best interests' of the survivor, the rights, will and preference of survivors may not be upheld or prioritised by all nominees.

By way of explanation, we would like to offer additional information to make clear the difference between a 'best interests' approach as outlined in the legislation, and a 'will and preferences' approach as enshrined within the CRPD. 'Best interests' focuses on the substitute decision-maker (in this instance, the nominee) determining what the 'best interests' are for the survivor. An approach based on the 'will and preferences' of the survivor requires that the necessary and appropriate supports are provided to enable a survivor to express their own views, decisions and preferences.

As stated in our submission, PWDA rejects the notion of 'best interests' and requests that the legislation be appropriately amended to address our abovementioned concerns. Supported decision-making principles should instead be embedded throughout this legislation. This first and foremost involves the promotion of information about supported decision-making models and supports to survivors, families, independent advocacy and/or representative organisations and Redress Scheme staff. All survivors must be appropriately supported to participate in all aspects of the Redress Scheme, should they choose to do so.

In a supported decision-making regime, a nominee would only be appointed where the survivor clearly expresses that it is their will and preference to appoint a nominee to act on their behalf. Where supports have been repeatedly unsuccessful in supporting a survivor to express their will and preference, then, as a last resort measure, a representative could be appointed to determine the will and preference (as distinct from best interests) of the survivor. Where the will and preference of the survivor cannot be determined, the representative must make decisions based on the human rights of the survivor. Appropriate safeguards must be written into legislation to adequately support and protect individuals who self-appoint nominees or where representatives are appointed.

**CHAIR:** *A final one from me, and I'm happy for you to take this on notice. This is framework legislation. It won't truly become a national scheme unless the states opt in. As a peak body, have you been having discussions with the various state governments? If so, could you give the committee some feedback. I'm happy for you to take this on notice in the interest of time. Could you give the committee some feedback on what those communications have been and the sort of response you've been getting from various state governments?*

PWDA has not had extensive conversations with state governments regarding their position on the Redress Scheme, although we have been public in calling for states to sign up to the Scheme. Since appearing at the public hearing on 6th March, we note that New South Wales and Victoria have opted in to the Redress Scheme. We have publicly welcomed this announcement and look forward to discussing this important Scheme with other state governments and hope that they follow in the footsteps of Victoria and New South Wales.

Thank you again for the opportunity to contribute to this Inquiry. PWDA welcomes any further consultation on the matters covered in our response.

Yours sincerely,

**MATTHEW BOWDEN**
Co-Chief Executive Officer
People with Disability Australia