Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Inquiry into the Australian Government response to the redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

Submission to the Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse — oversight of redress related recommendations

31 July 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Joint Select Committee's inquiry into the Australian Government policy, program and legal response to the redress-related recommendations of the Royal Commission into Institutional responses to Child Sexual Abuse, including the establishment and operation of the National Redress Scheme and ongoing support of survivors.

2. The ALA has previously provided submissions to the Senate Standing Committee on Community Affairs regarding the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* and related Bill, and also the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018* and related Bill. Several of the concerns the ALA raised in those submissions are also included this submission.

3. In addition, the ALA wrote to the Chair of the Joint Select Committee on 20 June 2018 regarding specific concerns in relation to the recommendations of the Royal Commission regarding the removal of all limitation periods arising out of child abuse in an institutional context, and the impending expiry on 30 April 2019 of the legal services directive issued by the Commonwealth on 4 May 2016. That directive states that the Commonwealth is not to plead a defence to a time-barred child abuse claim and should not oppose any extension of time. A copy of that correspondence is attached to this submission.

4. The ALA supports the existence of a national redress scheme for institutional child sexual abuse (Scheme) with the objective of minimising litigation and stress for the victims of child sexual abuse. We believe that the establishment of the national scheme has the potential to have a genuine positive impact on the lives of thousands of people whose lives have been affected by sexual abuse when they were children.

5. Many aspects of the Scheme will provide meaningful redress for survivors. Providing three forms of redress – a monetary payment, access to counselling and psychological services, and a direct personal response – will all contribute to healing, and ensure that survivors know that what has happened to them has been acknowledged as wrong and that there are also practical tools provided to assist with their healing. The proposed standard of 'reasonable likelihood' is appropriate and will minimise the level of re-traumatisation that is likely to arise for survivors as a result of engaging with the Scheme.

6. However, for this potential and these objectives to be fully realised, the ALA believes that the Scheme should more closely follow the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), which provided its final reports in December 2017, and its report on Redress and Civil Litigation in 2015.

7. There are aspects of the Scheme which cause us great concern. In particular, the ALA has concerns about the maximum redress payment proposed; how ongoing counselling and psychological support will be facilitated after the Scheme winds up; the exclusion from the Scheme of those who have been physically but not sexually abused; the introduction of eligibility criteria beyond having experienced abuse connected to a participating institution (in relation to citizenship/residency requirements or having a criminal record); and lack of access to external review of the Scheme's decisions.

Repayment amounts

8. The Royal Commission recommended that the maximum redress payment available under the Scheme should be $200,000, with an average payment of $65,000 and a minimum payment of $10,000. However, under s16(1) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act), the maximum payment will be $150,000. There is no average amount specified, but a minimum payment of $0 will be possible. There is no reason given for this divergence in figures in the Explanatory Memorandum.

9. The ALA believes that maximum amounts in line with those recommended by the Royal Commission, indexed for CPI over the lifetime of the Scheme, are appropriate. As the Royal Commission noted, a maximum amount of $200,000 'is appropriate to allow recognition of the most severe cases, taking account both of the severity of the abuse and the severity of the impact of the abuse'.[2]

10. It is important that the amount of redress paid adequately reflects the seriousness of the survivor's experiences and the impact of the abuse on their lives. Particularly in the most serious cases, some survivors might not feel that what they are offered adequately reflects the impact of the abuse on their lives if the maximum redress payment is restricted to $150,000.

[2] Redress and Civil Litigation Report, 252.

11. While the Scheme is not intended to offer the level of payment that might be available through civil litigation, applicants will inevitably compare what is available through each route. While many will be happy to accept a lower payment to avoid the stress of litigation, the greater the gap between the two potential amounts, the less attractive the Scheme will be to survivors.

12. If maximum redress payments are significantly below what might be achievable through civil litigation, some survivors might feel forced to pursue civil litigation even though they would prefer not to. In turn, this will mean that fewer institutions will benefit from the still dramatically lower redress payments available under the Scheme, as well as accruing significant legal fees that will arise should survivors choose to pursue litigation.

13. The equivalent Irish scheme had a cap of 300,000 EUR, which could be exceeded in some circumstances. The Royal Commission proposed a cap of $200,000. The Commonwealth has proposed a $150,000 cap. We are clearly concerned that an average payout of less than half the maximum is likely to force more of the severely injured litigants, particularly those with economic loss claims, to pursue civil litigation, contrary to the objectives of the Act.

14. While it is reasonable for previous payments to be taken into account when working out the amount of redress payment (s30(2)), institutions should not be able to rely upon settlements of claims entered into where they did not legally exist (particularly in the case of the Catholic Church) or, as in the *Ellis* case[3], it was claimed the institution did not exist in a form capable of being sued.

Eligibility for redress under the National Redress Scheme

Children in immigration detention

15. There are some other issues which are also of concern. In respect of the redress scheme, contrary to the Royal Commission's recommendations, those children who have been sexually abused in immigration detention, whether offshore or onshore, are excluded from the scheme.

16. The Commonwealth has made it clear that this is purely to save money. However, Volume 15 of the Royal Commission's final report made detailed findings that conditions in immigration

[3] [2007] NSWCA 117.

detention are particularly conducive to the risk of child sexual abuse materialising. As with any institutional abuse, it is the power of the institution over the individual that has given rise to the opportunity for the abuse of these children.

17. Those in immigration detention have committed no crime. For the most part they have been accepted as genuine refugees and they are detained for arriving by boat. Whether the common law claim is in respect of vicarious liability based upon the close connection test [*Prince Alfred College* case dicta in the High Court[4]] or whether it is in negligence based on lack of supervision and protection, in either event the opportunity to litigate the claim should be extended in exactly the same way as for all other victims.

18. The Royal Commission found that refugee children are at high risk of suffering abuse: 'research suggests that specific impacts associated with the refugee experience and prior trauma can complicate the development of adult identity among adolescent refugees and may lead to acting out through sexual behaviour… Prior experience of or witnessing rape and sexual violence is commonly reported among refugee children.'[5]

19. The Royal Commission's report was also clear that the 'Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention… This includes children in community detention.'[6] Further, the Royal Commission was clear that 'it is the [Department of Immigration and Border Protection, now the Department of Home Affairs (referred throughout as the Department)] that carries ultimate responsibility for responses to child sexual abuse within Australia's immigration detention network'.[7] Where child abuse has occurred in offshore detention, the same Department is responsible for both the abuse and preventing the survivor from coming to Australia. As such, it is completely inappropriate to exclude this group of survivors from accessing the Scheme.

20. There are several institutional factors that might enable child sexual abuse in immigration detention. The culture of secrecy and isolation that exists, especially in immigration detention, the normalisation of harmful and dehumanising practices and the prioritisation of the

[4] *Prince Alfred College Incorporated v ADC* [2016] HCA 37.

[5] Volume 15, 189.

[6] Volume 15, 172.

[7] Volume 15, 172.

Department's reputation over children's safety all increase the risk of abuse, and decrease the likelihood that it will be noticed and appropriately responded to.[8]

21. In relation to onshore detention, 'the Australian Federal Police [submission] to the [Royal Commission] notes instances in which known offenders convicted of child sexual abuse were released from corrective service facilities in Australia and placed into immigration detention centres pending the assessment of their immigration status or awaiting deportation. At times, this detention was alongside children.'[9]

22. These practices clearly demonstrate that the Department, as an institution, could potentially be found to be at least equally responsible for any abuse of children in detention overseen by it. It is only fair that anyone abused in such circumstances should have access to redress under the Scheme.

23. Given that the children were placed in immigration detention by the Commonwealth and are owed a non-delegable duty of care,[10] the Commonwealth should compensate these victims. The children did not choose to be in immigration detention and committed no crimes. It is understood that the children who came out under the Child Migrant scheme or through the Fairbridge Farm scheme will not be discriminated against in this way. The Commonwealth has already shared in a payout to the Fairbridge Farm victims. Those in immigration detention or on certain forms of visa should not be discriminated against. This would be a clear breach of the non-delegable duty of care owed to these children and leave the Commonwealth open to common law proceedings for breach of that duty of care, which might end up costing the Commonwealth considerably more than the modest benefits provided for under the Scheme.

Special assessment of applicants with serious criminal convictions

24. Under s63 of the Act a person who has been sentenced to imprisonment for five years or longer for a criminal offence can obtain redress under the Scheme only if approval is given by the relevant State/Territory Attorney-General or the Commonwealth Attorney General. In considering whether to approve redress for that person, the relevant Attorney-General must

[8] Volume 15, 190 (references omitted).

[9] Volume 15, 188.

[10] *NSW v Bujdoso* (2005) 227 CLR 1; [2005] HCA 76. *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Conceded by the Commonwealth in *AS v Minister for Immigration and Border Protection* [2014] VSC 593 at [24].

be satisfied that providing redress to the person under the Scheme would not bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme.

25. The ALA considers that this additional step for people who have been abused as children and who have been sentenced to imprisonment for five years or longer for a criminal offence is unfair and unacceptable, given that there appears to be a strong correlation between abuse and criminality consequent, at least in part, upon that abuse. The ALA submits that excluding any person convicted of a serious offence from the redress scheme amounts to double punishment.

26. For many, the sexual abuse that they suffered as children will have contributed to the life of crime they later embarked on, or the single criminal offence. In relation to drug crimes, for example, the Royal Commission heard evidence from survivors who explained that they were driven to drug and alcohol misuse as a means of blocking out memories of the abuse that they suffered.

27. No such provision was recommended by the Royal Commission. Those whose lives were ruined and led into crime directly or indirectly by the abuse should not be further punished by being discriminated against. The Royal Commission clearly made its recommendations without excluding such categories because it is manifestly unjust to discriminate in this sort of way. Those who underwent an abusive childhood may well have turned to drugs and alcohol and become involved in crime. In many cases their education will have been seriously harmed by the abusive situation.

28. The ALA is particularly concerned that this provision may operate in a discriminatory manner against Aboriginal or Torres Strait Islander people who have been abused as children, given that they are disproportionately represented in the Australian prison population. Given the history of forced child removals of Aboriginal and Torres Strait Islander children and their subsequent institutionalisation, the ALA submits that this additional barrier to securing redress for any sexual abuse suffered by Aboriginal and Torres Strait Islander people in institutions is manifestly unfair and effectively represents a further level of abuse.

Participation by institutions

29. The ALA welcomes the announcements that several large institutions have agreed to participate in the Scheme including: the Catholic and Anglican churches, the Salvation Army, the Uniting Church, Scouts Australia, and the YMCA.

30. However, the ALA notes that at present there appears to be no means of effectively encouraging institutions to participate. NGOs should be encouraged to participate. We believe that the best way to achieve this is to provide for the charitable status of all NGOs against whom a claim is made to be made subject to their participation in the Scheme. If an institution is named as being responsible for abuse and it chooses not to participate in the Scheme, it should lose its charitable status.

Limitation periods in respect of child abuse claims

31. The Royal Commission recommended that all limitation periods arising out of child abuse in an institutional context be removed. New South Wales and Victoria have removed all limitation periods for child abuse whether physical, sexual or associated psychological abuse of a significant nature. Queensland and probably Western Australia are going to adopt or have adopted the removal of limitation periods in respect of sexual abuse only, leaving it unclear whether associated physical abuse can be sued for. South Australia provides the remedy only in respect of institutions but not against the abusers themselves, which is absurd and restricts it to sexual abuse but not necessarily the physical abuse which might have led to the opportunity for sexual abuse or accompanied it.

32. A legal services directive issued by the Commonwealth on 4 May 2016 states that the Commonwealth is not to plead a defence to a time-barred child abuse claim and should not oppose any extension of time. This directive expires on 30 April 2019.

33. The Commonwealth claims to act to as a model litigant. However, it clearly does not do so in respect of claims arising out of the Royal Commission Institutional Responses to Child Sexual Abuse in a number of respects. The Commonwealth ought to be the role model. While the legal services directive issued by the Commonwealth on 4 May 2016 directs that the Commonwealth is not to plead a defence to a time-barred child abuse claim or oppose any extension of time, this expires on 30 April 2019.

34. After examining some 6,000 witnesses in private session, the Royal Commission accepted that the average time from last abuse to first reporting is 22 years. It follows that most litigants for the next 20 or so years will be left without a remedy against the Commonwealth, if it was a Commonwealth institution in which the abuse occurred. That is not an acceptable outcome and is manifestly unjust.

Conclusion

35. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry being conducted by the Joint Select Committee's inquiry into the Australian Government policy, program and legal response to the redress-related recommendations of the Royal Commission into Institutional responses to Child Sexual Abuse. We believe that the establishment of a national redress scheme for institutional child sexual abuse has the potential to have a genuine positive impact on the lives of thousands of people whose lives have been affected by sexual abuse when they were children.

36. However, the ALA is concerned that many aspects of the scheme do not accord with the recommendations of the Royal Commission. These include: the maximum redress payment proposed; the exclusion from the Scheme of those who have been physically but not sexually abused; and the introduction of eligibility criteria beyond having experienced abuse connected to a participating institution (in relation to citizenship/residency requirements or exclusion from the Scheme of those survivors with a criminal record).

37. The ALA is also concerned about how ongoing counselling and psychological support will be facilitated after the Scheme winds up, and the lack of access to external review of the Scheme's decisions.

38. In addition, the ALA notes that after 30 April 2019, the Commonwealth will be able to plead a defence to a time-barred child abuse claim and oppose any extension of time, unless a legal services directive that states the contrary is extended beyond that date.

39. The Australian Lawyers Alliance (ALA) would be happy to appear before and explain its views to the Committee.

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Senator Derryn Hinch
Chair, Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse
PO Box 33241
Melbourne, VIC, 3004

20 June 2018

By email:

Dear Senator Hinch,

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE RECOMMENDATIONS AND THE COMMONWEALTH AS A MODEL LITIGANT

I refer to the above and to our recent conversation following my appearance before the Senate Legal and Constitutional Affairs Committee hearings into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017 in Sydney on Thursday 14 June 2018. At that time you indicated that in your capacity as Chair of the Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, you wanted to receive more information regarding concerns I raised during the hearing regarding the legal services directive issued by the Commonwealth on 4 May 2016. This directive states that the Commonwealth is not to plead a defence to a time-barred child abuse claim and not oppose any extension of time. As advised, this directive expires on 30 April 2019.

The Commonwealth claims to act to as a model litigant. However it clearly does not do so in respect of claims arising out of the Royal Commission Institutional Responses to Child Sexual Abuse in a number of respects.

The Royal Commission recommended that all limitation periods arising out of child abuse in an institutional context be removed. New South Wales and Victoria have removed all limitation periods for child abuse whether physical, sexual or associated psychological abuse of a significant nature.

Queensland and probably Western Australia are going to adopt or have adopted the removal of limitation periods in respect of sexual abuse only, leaving it unclear whether associated physical abuse can be sued for. South Australia provides the remedy only in respect of institutions but not against the abusers themselves, which is absurd and in any event is restricted to sexual abuse but not necessarily the physical abuse which might have led to the opportunity for sexual abuse. This is crazy.

The Commonwealth ought to be the role model. The legal services directive issued by the Commonwealth on 4 May 2016 directs that the Commonwealth is not to plead a defence to a time-barred child abuse claim and not oppose any extension of time. So far so good. However this expires on 30 April 2019.

After examining some 6,000 witnesses in private session, the Royal Commission accepted that that the average time from last abuse to first reporting is 22 years. It follows that most litigants for the next 20 or so years will be left without a remedy against the Commonwealth, if it was a Commonwealth institution in which the abuse occurred. That is not an acceptable outcome and is manifestly unjust.

There are some other issues which are of concern as well. In respect of the Redress Scheme, contrary to the Royal Commission's recommendations, it is proposed to exclude those who have been convicted of a serious criminal offence and those who were abused in immigration detention, whether offshore or onshore (though some exceptions are to be made in respect of the child migrant scheme largely involving Western Australia and the Fairbridge Farm children, largely New South Wales).

The Royal Commission clearly made its recommendations without excluding such categories because it is manifestly unjust to discriminate in this sort of way. Those who underwent an abusive childhood may well have turned to drugs and alcohol and become involved in crime. In many cases their education will have been seriously harmed by the abusive situation.

Those in immigration detention are in even a worse situation. They have committed no crime. For the most part they have been accepted as being genuine refugees and they are detained for arriving by boat. That is not a crime and in any effect could not apply to children. Whether the common law claim is in respect of vicarious liability based upon the close connection test [*Prince Alfred College*

case dicta in the High Court[1]] or whether it is in negligence based on lack of supervision and protection, in either event the opportunity to litigate the claim should be extended in exactly the same way as for all other victims.

We would strongly encourage you to refer these matters to the Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse for further consideration. The ALA is prepared to provide further submissions where required and to further assist the Committee in any way it requires in relation to its deliberations.

Yours Sincerely,

Dr Andrew Morrison RFD SC
On behalf of the Australian Lawyers Alliance

[1] *Prince Alfred College Incorporated v ADC* [2016] HCA 37.