SHINE LAWYERS

RIGHT WRONG.

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

Submission to the Senate Standing Committee on Community Affairs

JUNE 2018

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1. Introduction

Shine Lawyers are pleased to provide this further submission in response to the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Bill) and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (Consequential Amendment Bill).

We refer to and maintain the views contained in our February 2018 submission regarding the 2017 redress Bills. The below additional comments in relation to the 2018 Bills should be read in addition to the views contained in our February 2018 submission to this Committee.[1]

2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors seeking redress in every institutional redress scheme in Australia. These include but are not limited to the Defence Abuse Response Taskforce, *Victims of Crime Act 2001* (SA), Queensland ex gratia scheme, Tasmanian Abuse in Care ex gratia scheme, the WA Redress, Defence Force Ombudsman reparation scheme, Melbourne Response and Towards Healing.

Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) and made a submission in response to the Redress and Civil Litigation Consultation Paper in March 2015.[2]

The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

Neerkol Group Litigation
The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, operated by the Sisters of Mercy.

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[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AbuseRedressScheme/Submissions
[2] https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation%20-%20Submission%20-%20174%20Shine%20Lawyers.pdf

Nudgee Orphanage Group Litigation
This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

Brisbane Grammar Sexual Abuse Litigation
This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

St Paul's Sexual Abuse Group Litigation
The claim involved some 25 former students of St Paul's School in Brisbane who were subjected to sexual abuse during their school years.

Scriven v Toowoomba Preparatory School
This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

Australian Defence Force
Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Shine Lawyers worked closely with the legal representatives of the Australian Defence Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal Responses (apologies and acknowledgement of the harm done). The psychological welfare of the abuse survivor is central to the process.

3. Submissions

We maintain our support for the urgent implementation of a survivor-focused national redress scheme for survivors of institutional child sexual abuse. All children deserve a safe and happy childhood and any form of abuse of children, including in institutional contexts, is a gross violation of a child's rights.

This submission will address concerns regarding the eligibility requirements for survivors to be entitled to redress under the scheme. In particular, we outline our concerns regarding the exclusion of survivors who were sentenced to a period of imprisonment of 5 years or more.

The Royal Commission conducted private sessions receiving over 8,000 personal stories of institutional child sexual abuse. 10.4% of survivors who were interviewed by the Royal Commission were in prison.[3] There may be many more. It is anticipated that approximately 60,000 survivors will participate in the Redress Scheme.[4] This would suggest that over 6,000 people are potentially excluded from redress unless this element of the proposed scheme is amended.

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[3] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and executive summary* (2017) 9.
[4] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *National Redress Scheme Participant and Cost Estimates* (July 2015).

4. Eligibility for redress

Clause 63 of the Bill provides that a person is not entitled to redress if they have been sentenced to a period of imprisonment of five years or more, unless the scheme operator is satisfied that providing redress to that survivor will not bring the scheme into disrepute, or adversely affect public confidence or support for the scheme.

The redress scheme proposed under the 2017 Bills did not specifically make reference to excluding people with serious criminal convictions. However, those survivors were to be excluded by way of the Redress Scheme Rules. Shine Lawyers are deeply troubled by the exclusion of people with criminal convictions and the uncertainty around the possible exemptions from that exclusion. These provisions are inappropriate and have no place in a survivor-focused redress scheme.

If there is to be any exclusion at all, it is appropriate that the exclusion be in the Bill where it can be subject to public scrutiny and debate and not hidden in the, to date unpublished, Rules.

Background

Clause 63 of the Bill excludes from entitlement for redress, a person who, either before or after making an application for redress, is sentenced to imprisonment for five years or longer for an offence against a law of the Commonwealth, a State, a Territory or a foreign country.

The Operator is allowed to determine that a person is not prevented from being entitled to redress if satisfied that providing redress to the person would not bring the scheme into disrepute or adversely affect public confidence in, or support for, the Scheme. We understand that upon becoming aware of the sentence after receiving an application for redress, the redress scheme Operator will contact the relevant Attorney General for an opinion.[5]

Public confidence and support is unclear

The Bills do not define what constitutes *public confidence* or *support* or identify how these concepts will be measured. It is unclear exactly how the public's confidence or support in the scheme will influence a person's eligibility for redress. The redress scheme must be transparent and predictable. It is unclear how perceptions of public confidence and support will be applied equitably to survivors across the scheme.

Placing survivors of child sexual abuse in a situation where they do not know whether they are eligible based on subjective interpretations of concepts of public confidence in the scheme, exposes survivors to further distress and trauma.

Even if appropriately defined and objectively measured, public confidence and support and disrepute are concepts which have no place in determining eligibility in a survivor-focused redress scheme.

Mr Mark Speakman, Attorney General for NSW, said 'this eligibility exclusion was made in the interests of maintaining public confidence in the scheme by ensuring that redress payments

[5] According to subclause 63(4).

are not paid to those whose actions may not meet prevailing community standards.'[6] Alleged failures to meet community standards are best judged according to law and not according to the opinion of Attorneys General about public confidence in the redress scheme. Survivors with criminal convictions were judged and sentenced according to law and ought not to be further punished by virtue of an opinion of an Attorney General regarding 'prevailing community standards'.

The focus of this scheme ought to be the needs to the survivor and not the nebulous concepts of *public confidence* and *support* as judged by an individual in a decision not subject to external review or appeal.

Factors to be considered

Clause 63 includes a number of factors which the Operator must take into account when considering whether to exempt a person with a sentence of five years or more from the eligibility exclusion. The factor to be given the most weight is the opinion of the relevant Attorney(s) General.

The Explanatory Memorandum[7] gives the example of Person C who the Operator does not determine is entitled to redress under the scheme on the basis that Person C is 'a person of notoriety that could bring the Scheme into disrepute'.

Neither the example, the Explanatory Memorandum or any other supporting material provides any explanation for what 'a person of notoriety' is defined to be or how a consideration of notoriety will ensure justice and equity between survivors.

The media substantially influence which stories receive public attention and consequently people might be considered to be notorious or not based on matters irrelevant to the eligibility for redress. It would be unjust and inequitable to treat survivors whose convictions received media attention differently to survivors whose conviction and sentence passed without public notice.

We remain concerned that the opinion of the Attorney General about the ill-defined concepts of public confidence and support and apparently an individual's 'notoriety' will be given any weight at all given the scheme has no external appeal mechanism for a survivor to dispute assumptions about public confidence and notoriety. If the opinion of an Attorney General is to be included at all, it should be given no greater weight than any other factor in clause 65(5).

Conclusion

The Royal Commission did not recommend that survivors with criminal convictions be excluded from redress and no compelling reason has been provided to do so. Shine Lawyers remain opposed to excluding survivors from eligibility for redress based on criminal convictions

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[6] NSW Legislative Assembly Hansard, 15 May 2018.
[7] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6101_ems_3475681d-40d9-44dd-8d46-19dc713fce13/upload_pdf/672609.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r6101_ems_3475681d-40d9-44dd-8d46-19dc713fce13%22

as outlined in our previous submission.[8] Excluding survivors who have been sentenced to at least 5 years imprisonment will mean those survivors will instead have to seek compensation through traditional means at common law. Bizarrely, this might result in higher payments being made to survivors than are available under the redress scheme. It might bring the scheme into disrepute if survivors with serious criminal convictions were to receive higher payments than survivors without such convictions.

The exemption from the exclusion available under Clause 63 is susceptible to misuse for political reasons, lacks transparency and will create an unpredictable, unjust and otherwise unsatisfactory redress scheme. It would stand in direct contrast with the protection of the integrity of the scheme, for the scheme to assess eligibility of survivors on such unclear, inconsistent and ill-defined grounds.

In order to achieve justice, it is imperative that survivors be treated equitably and that they not achieve different outcomes depending on the personal opinion and perception of notoriety by Attorney(s) General.

5. Observations from our previous submission

Our previous submission addressed a number of issues which remain relevant to the current version of the Bills. These are as follows:

We raised several examples of abuse considered to be sexual abuse but which may not meet the current definition of sexual abuse. We requested to be advised in the event that any of those particular examples would not be considered to be sexual abuse as it is important that survivors be informed, prior to the commencement of a scheme, of their likely eligibility. The scheme must be equitable and predictable in order to meet the objective of being survivor-focused.

We maintain our concern that the monetary payment for redress is substantially lower than the Royal Commission's recommendation. It is unreasonable not to follow the Royal Commission's recommendation in this respect and no adequate explanation has been offered for the reduced amount or divergence from the considered view of the Royal Commission. We urge the Government to revisit the amount of the monetary payment for redress as the Bills are considered by the Senate.

We maintain our view that the scheme ought to make available a payment for survivors who choose to access private legal advice. Considered legal advice is even more important with the inclusion of clause 63 of the Bill. Survivors may require detailed advice about how to address each of the clause 63 factors in anticipation of issues the Attorney General or scheme Operator might raise when deciding whether to exempt a survivor from the criminal convictions exclusion. Expecting survivors of child sexual abuse to prepare submissions about whether payment of redress will bring the redress scheme into disrepute or impugn public confidence and support for the scheme and that the person is not a person of notoriety is well beyond

[8] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AbuseRedressScheme/Submissions

what might be expected of many survivors without the assistance of legal advice.[9] These submissions however are necessary at the outset because a decision to refuse redress cannot be appealed.

The Bill allows survivors to access state provided counselling and psychological services for 10 years only or a payment of $5,000. It is well known that abuse has lifelong consequences and neither option for counselling and psychological services within the Bill meets survivors' desperate needs. We ask that this aspect of the scheme be revisited as a most urgent priority.

We reiterate our request that the assessment matrix outlining the basis on which payments of redress will be calculated be made available for consultation prior to the redress scheme coming into effect. The redress scheme must be transparent and predictable before it can claim to be survivor-focused.

6. Conclusion

Child sexual abuse has an ongoing and profound effect on a person's life. The Royal Commission received reports from survivors that child sexual abuse had contributed to subsequent criminal behaviour. The Royal Commission observed these reports are supported by a growing body of research examining the relationship between child sexual abuse and criminal behaviour in later life.[10]

A survivor-focused redress scheme must complement and not replace the rights of survivors to pursue remedies available at common law through civil litigation and further reform to civil litigation must accompany the creation of a national redress scheme. Access to redress for those survivors who so choose is a right and not a privilege which ought not to be limited based on criminal offences in part caused by abuse.

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact Lisa Flynn, National Special Counsel – Abuse Law at lflynn@shine.com.au or on 13 11 99.

[9] In addition to the known clause 63 factors survivors will be required to address.

[10] We note further research on this issue undertaken by the Law Council of Australia, *Justice Project Consultation Paper: Prisoners and Detainees* (August 2017) 8.