

Senate Community Affairs Legislation Committee

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

The work of Relationships Australia

This submission is written on behalf of Relationships Australia's eight member organisations, and complements the submission we provided to this Committee, dated 2 February 2018, on the 2017 Bills to give effect to a national redress scheme.

We are a community-based, not-for-profit Australian organisation with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, cultural background or economic circumstances.

Relationships Australia has been a provider of family relationships support services for more than 60 years and today provides a range of family support services, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to achieve positive and respectful relationships. We also believe that people have the capacity to change their behaviour and how they relate to others.

The core of our work is relationships – through our programs, we aim to enhance and improve relationships in the family, whether or not the family is together, with friends and colleagues, and within communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable. We respect the rights of all people in all their diversity to live life fully within their families and communities with dignity and safety, and to enjoy healthy relationships. These principles underpin our work.

Relationships Australia is committed to:

- Transparency with clients. Violence is named for what it is and there are no excuses for it. Our practitioners make reports of concern to child protection agencies. Unless there is a safety concern, clients

are informed about what is happening, encouraged to self-report, given explanations and supported through the reporting process.

- Supporting children affected by violence and abuse, recognising the harm it does to them, regardless of whether they are the direct or indirect victims.
- Working with people who have experienced violence and abuse to ensure they are safe, and supporting them to take control of their lives.
- Working with people who have been violent or abusive in their relationships to keep their family members safe and with the belief that they can, and do, change existing patterns of behaviour.
- Respecting cultural differences, but not accepting them as an excuse for violence or abuse.
- Working in rural and remote areas, recognizing that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres.
- Collaboration. We work collectively with local and peak body organisations to deliver a spectrum of prevention, early intervention and tertiary intervention programs with men, women, young people and children. We recognise that often a complex suite of services (for example, drug and alcohol services, family support programs, mental health services and public housing) is needed by people affected by violence and abuse.
- Enriching family and community relationships and encouraging good and respectful communication.
- Ensuring that social and financial disadvantage is not a barrier to accessing services.
- Contributing its practice evidence and skills to research projects, to the development of public policy and to the provision of effective programs.

Introduction

As noted in relation to the 2017 Bills, Relationships Australia supports many of the overarching principles captured in the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018* and the related bill to make consequential amendments (the Bills). These include the Commonwealth's commitment to elements of redress that provide more than monetary compensation — redress payments, direct personal response and ongoing support of survivors. We also support the general principles, including those that recognise the need to minimise re-traumatisation of claimants, but would like more guidance and strengthened wording to make the meaning of other principles more explicit. Relationships Australia acknowledges the extensive and complex work that has been done to progress the Bills.

In relation to the 2017 Bills, Relationships Australia expressed a range of concerns grouped around particular themes, including:

- the types of services to be funded
- the level of payments to be made to recipients
- limits on who can receive payments, even though they are otherwise eligible
- potential infringements of human rights (including, for example, through time limits)
- potential inequity in application and in outcomes for clients exposed to the same damage and abuse, and
- independence, transparency and accountability of administration.

This submission further explores these themes.

Specific comments

Consultation

Relationships Australia notes the involvement of the Independent Advisory Council in developing the Bills. As acknowledged in the Explanatory Memorandum to the principal Bill, the Scheme will operate for 10 years and, consequently, the Bills have been framed in a way to afford flexibility to make adjustments in policy and operations as unforeseen contingencies and circumstances arise. Accordingly, Relationships Australia would encourage the Government to retain the Council as a standing body to provide advice and input on proposed adjustments throughout the life of the Scheme. The Council should be formally established in the Bill.

Administration of the Scheme

Relationships Australia notes that Division 4 of Part 7-3 provides for the appointment of independent decision-makers, and the expectation that these individuals will have expertise in trauma-informed practice. Relationships Australia welcomes the emphasis on the involvement of professionals who are suitably qualified, and acknowledges the intent of making decision-making independent by ensuring that they cannot be directed by the Operator (see subclause 184(4) and clause 185). However, the extensive role to be played by the Operator, who is the Secretary of the Department of Social Services and thus subject to public service accountability rules, continues to give us some disquiet.

As an aside, we note (and acknowledge that we did not previously comment on this), that the terminology of 'Operator' has a strongly institutional feel, and may prove confronting to some survivors. More broadly, Relationships Australia cautions against the Scheme relying on delivery of processes and services that may re-traumatise survivors by taking an approach that 'looks and feels' institutional in its character. (See also the 'Current services and service gaps' section in our previous submission.)

Relationships Australia notes the principles to guide actions taken under the Scheme, set out in clause 10. Relationships Australia suggests that consideration be given to according explicit legislative primacy to the principle set out at subclause (4), that

- (4) Redress should be assessed, offered and provided so as to avoid, as far as possible, further harming or traumatising the survivor.

Processes

Our earlier submission expressed concern with timeframes for seeking review and for acceptance of offers, as well as for providing the Operator with requested information (see clause 24). We acknowledge the Government's intent to keep the process as simple and fast as possible, to minimise harm to survivors and to provide timely redress in view of the lengthy wait survivors have experienced to date, and the parlous health conditions of many. We also note that, under clause 40, the Operator can, on their own initiative or in response to a request to do so, extend time for receiving a response to an offer of redress. Nevertheless, we remain concerned that, particularly where traumatised survivors need to engage with support services to both understand the process and to engage with it effectively, these time frames may be unrealistically short, for the reasons set out in our earlier submission. This is of particular concern given that:

- inaction within the timeframe can be taken to be rejection of an offer of redress (cf subclause 45(2)), and
- once an offer is made and rejected, no subsequent application for redress can be made (clause 20).

In relation to the provision of information, Relationships Australia notes that the Operator can shorten the time within which a survivor must provide requested information, if the Operator considers the application to be urgent. We are concerned that the Operator could shorten time this way, potentially to the disadvantage of survivors, even though the Operator can give an extension of their own motion or in response to a request from a survivor. This seems particularly anomalous when read with clause 25, which imposes the same timeframes on institutions.

Relationships Australia notes that clause 42 sets out the requirements of an acceptance document. These include that the applicant identify the components of redress sought. While the Bill is clear that a survivor may only make one application for redress, the Bill is less clear on whether there is a similar 'once and for all' dimension intended to underpin this aspect of acceptance. If a survivor initially accepts only one or two components, may that be revisited later? For example, if a survivor initially only accepts counselling and psychological supports but, as a result of receiving these services, then feels able to (and wishes to) receive a direct personal response, can this later be nominated by the survivor? In any event, the Bill should make the intent clear. Relationships Australia would urge that a broader and more flexible approach should be adopted.

Eligibility

Requirement of citizenship/permanent residency

Relationships Australia welcomes the provision of mechanisms by which survivors who are not citizens or permanent residents can be eligible for redress (subclause 13(2): rule-making power, Explanatory Memorandum pp 7, 20, 117).

Exclusion of survivors who are in gaol at the time of applying – paragraph 20(1)(d)

Relationships Australia acknowledges the difficulties, expressed in the Explanatory Memorandum to the Bill (see p 27), of providing key elements of the Redress Scheme to persons incarcerated in gaol. We also acknowledge that the Bill does provide a discretionary mechanism to allow access to redress in these circumstances, and in this context we draw to the Committee's attention the prisoner welfare support services recommended in our previous submission.

Exclusion of survivors with serious criminal convictions – Part 3-2, Division 2

This is a complex set of provisions, seeking to balance important policy considerations which will underpin the public legitimacy of the Scheme. Relationships Australia acknowledges the flexibility built into this Division (cf subclause 63(5)), and the recognition that exclusion of survivors is a grave matter, to be implemented only on the basis of considered and pertinent advice.

Relationships Australia also acknowledges the critical importance that the Scheme retains public confidence and support, and that provision of redress to some individuals could compromise that confidence and support. We nevertheless maintain our position that if an individual has been subjected to institutional sexual abuse as a child, then that person remains deserving – at least of psychological services and (where desired) a direct personal response – regardless of what they have subsequently done. This is particularly critical given the breadth and depth of data, outlined in our previous submission, demonstrating the association between the experience of this kind of trauma as a child and subsequent criminal offending as an adult.¹

Relationships Australia remains open to an option in which survivors should be required to use redress payments to repay debts related to criminal injuries, or to provide child support.

Exclusion of survivors who are subject to a security notice – paragraph 20(1)(b); Part 3-2, Division 3

Relationships Australia notes that survivors are not entitled to redress while they are subject to a security notice given by the Minister for Home Affairs to the Minister for Social Services pursuant to clause 65. Such notices appear to be available on the basis of cancellation of travel documents by the Minister for Foreign Affairs or cancellation of visas on security grounds. Accordingly, and having regard to what we understand

¹ See also Appendix A to our previous submission.

are the processes by which such cancellations can occur, ineligibility for redress can be grounded in processes which themselves may be opaque and unaccountable to the survivors – thus risking further harm and traumatisation.

The policy basis for such exclusion seems to be reflected at subclause 65(2) – the risk that payments under the Scheme may be used in a way that prejudices the security of Australia or a foreign country.² Such a purpose seems to Relationships Australia to be irrelevant to the question of whether the person was, as a child, sexually abused in an Australian institution, and thus signally fails to recognise both the inherent wrong of that abuse, as well as the well-established and understood consequences for that person's long-term behaviour.

Critically, the exclusion undermines the proposition that child sexual abuse is always, absolutely and unconditionally, a wrong done to the child. Child sexual abuse, and its impact, cannot be retrospectively diminished or disregarded, or its blameworthiness to any degree attenuated, by subsequent acts of the victim.

Further, as the Bill makes clear, redress payments are not compensation or damages. They are simply a recognition of the wrong done to the child. And, in any event, why should institutions be excused from the obligation to make redress payments in respect of particular groups of survivors? Why should institutions be any less accountable for the wrongs done to those survivors when they were children?

To mitigate the risk to which subclause 65(2) averts, and any risk of public outrage occasioned by payments to wrongdoing survivors, Relationships Australia suggests that survivors should be eligible for those elements of redress relating to (with appropriate security safeguards) direct personal response and access to counselling and psychological support (which may include countering violent extremism components). In addition, we respectfully submit that it would be desirable to confer on the Operator a power similar to that conferred in relation to persons in gaol and persons with a history of serious criminal convictions. This would offer a proportionate, suitably nuanced and potentially therapeutic response to survivors of child sexual abuse. Finally, the Operator should be empowered, in respect of such survivors, to make a determination of an amount of redress payments, and that should be payable as part of the institution's contribution to the costs of administering the Scheme, if payment to the survivor is, for public policy reasons, unpalatable.

Exclusion of survivors who are under 18 at the time of applying – paragraph 20(1)(c)

Relationships Australia notes the provision, in clause 21 of the Bill, of a mechanism by which a child who will turn 18 before the scheme sunset day, may apply for redress. Relationships Australia notes that this would occur by way of rules.

² See also Explanatory Memorandum, p 27.

Multiple instances of abuse

While we understand the desirability of clarity, timeliness, and certainty in administering the Scheme, Relationships Australia notes with concern retention of the 'one application only' approach, for the reasons set out in our earlier submission.

Family members

Relationships Australia acknowledges the desirability of ensuring finality in claims, but remains concerned that the Scheme does not acknowledge the reality of intergenerational trauma in excluding family members from accessing support under the Scheme where a survivor is deceased.

Citizenship issues – deportation on character grounds

Relationships Australia continues to press for exclusion from deportation, on character grounds, of survivors of institutional child sexual abuse in Australia, who have gone on to commit offences. This is for the reasons outlined above, and in our previous submission, in relation to eligibility limits, and potential inequities between pre and post 2018 survivors.

Duration

Relationships Australia continues to press that the Scheme not have a fixed closing date, for the reasons outlined in our previous submission.

Inequities in quantum of payments

Relationships Australia remains concerned about the potential for unjustified inequities between survivors and, in particular, continues to press for a universal base payment for *all* survivors who meet the eligibility criteria as a pragmatic and principled way to mitigate against such inequities.

Counselling and psychological services; the National Service Standards - Part 5-3

Relationships Australia remains concerned about the lack of detail in these sections of the Bill. For example, it is not clear from the face of the Bill whether those survivors who will have access to a declared provider³ will also be subject to a cap of \$5000 in the value of services which they can receive under the Scheme. In any event, Relationships Australia continues to recommend the life-long provision of therapeutic counselling and psychological care, and a flexible, client-centred approach to the kinds of services offered, so that these are tailored to the needs of each survivor. We continue to recommend the intensive case management services described in our previous submission.

³ Cf clause 146.

It appears from the Bill that the National Service Standards will be contained in the inter-governmental agreement which will underpin the Scheme. Will there be consultation on these standards? If so, when and with whom? Relationships Australia continues to emphasise the need for principles of trauma-informed practice to govern the provision of counselling and psychological services. If trauma-informed practice does not sit at the heart of the Standards and the implementation of the Scheme, it is probable that survivors will be unnecessarily re-traumatised.

Direct personal response – Part 2-5, Division 4

Relationships Australia notes that the Minister may declare guidelines about how direct personal responses are to be provided, having regard to principles set out in clause 56. We welcome a flexible approach being taken, so that institutions have the benefit of lessons learned as the Scheme progresses. However, we respectfully urge that the Government consider including in the Act some core requirements, including (but not limited to) that direct personal responses be provided by persons of seniority and authority, who have had the benefit of training in trauma-informed practice, and that a neutral person be present to support all participants in engaging in a meaningful and therapeutic process.

Review of decisions

Relationships Australia understands that the limitation of reviews to internal review aligns the recommendation of the Independent Advisory Council on redress (cf eg Explanatory Memorandum, p 10).

Relationships Australia acknowledges the reasoning that underpins exclusion of external review in the Scheme as a whole, as outlined in the Explanatory Memorandum.⁴ We also acknowledge the intent to ensure that independent decision-makers, to be appointed under Part 7-3, will have appropriate expertise to engage in a therapeutic way with survivors, and will promote 'supportive, survivor-focussed and non-legalistic' decisions, to be made expeditiously. However, we continue to have reservations about the exclusion of review, given the 'once and for all' nature of decisions to be made on applications for redress.⁵ If a rejection of a claim, perhaps based on inaction by a survivor, forever extinguishes the eligibility of a survivor to make a further claim, it seems that complete exclusion of review may be unduly harsh.

Nominees – Part 4-2

Subclause 81(1), as currently framed, suggests that a person may be the assistance nominee of an applicant or the legal nominee of the applicant. Can a person (natural or corporate) be appointed to act in both of these capacities? The inclusion of a note, clarifying the intention, might be of assistance.

⁴ By way of comparison, Relationships Australia notes that the Bill excludes from *both* internal and external review a determination by the Operator of an institution's quarterly contribution for the administration of the Scheme (clause 152, Explanatory Memorandum, p 90). Review is available of decisions under clause 156 relating to the waiver of funding contributions (in whole or part) or late payment penalties (see also Explanatory Memorandum, p 91).

⁵ See paragraph 20(1)(a).

Accountability and transparency – rule-making powers

The survivor cohort that will engage with the Scheme has struggled with a lifetime of opaque institutions that, until very recently, were utterly unaccountable for the egregious wrongs they perpetrated. In this context, the more transparent and accountable the Scheme and its supporting mechanisms, the more readily will survivors be able to engage with the Scheme in a constructive and restorative way, and the more likely that the Scheme will achieve its purpose.

Relationships Australia acknowledges the imperative of enabling administration of the Scheme to be modified quickly to survivor needs, and that this objective can be well-served by the use of rules, rather than regulations. Relationships Australia also acknowledges the complexities of national arrangements underpinned by referrals of Constitutional powers, and that these can render disallowance measures unsuitable. We note the comments at p 101 of the Explanatory Memorandum in this regard. However, it would be helpful if further detail could be provided about the proposed governance arrangements, which should ensure real time and dynamic accountability, particularly for mechanisms which can operate to exclude persons from eligibility, and impose timeframes and other administrative burdens on vulnerable survivors.

As presently framed, however, the Bill presents some significant concerns; in particular, by making actual operation of the Scheme significantly the matter for the making of rules that will be out of reach of ordinary means of Parliamentary scrutiny. A particular concern is presented by subclauses 12(3) and (4), which provide that rules may both extend eligibility and exclude eligibility. The Explanatory Memorandum rightly notes that, in a Scheme intended to operate over the course of a decade, unforeseen circumstances (including unforeseen groups of survivors) may come to light, and that it is highly desirable that there be a mechanism for quickly recognising their entitlements. However, while an absence of the scrutiny to which Bills and regulations are ordinarily subject may be prudent and compassionate when applying to the benefit of survivors, it should occasion disquiet where exclusionary measures, which will operate to the detriment of individuals, are concerned.

Other examples include:

- subclauses 13(3) and (4) – Act or rules may prescribe that a person is not eligible for redress under the Scheme; the Explanatory Memorandum explains the benefits of using rules to quickly include unanticipated cohorts of survivors and exclude unanticipated cohorts of applicants whom the Act would have excluded from eligibility (see p 21), we are concerned that exclusion of cohorts from eligibility should be subject to scrutiny to ensure appropriate procedural fairness and other safeguards, and believe that this could be achieved without bringing the Scheme into disrepute, or undermining public confidence in, and support for, the Scheme, while proposed exclusions are examined
- subclause 14(3) – Act or rules may prescribe that abuse of a person is not within the scope of the Scheme

- subclauses 15(5) and (6) – rules may prescribe the circumstances in which an institution is responsible, primarily responsible, or equally responsible for the abuse of a person; this may conversely exclude responsibility, and thus operate to the detriment of survivors
- clause 33 – the Minister may make written guidelines to apply the assessment framework described at clause 32; these guidelines are not a legislative instrument: subclause 33(4). This is not, of itself, problematic. However, we are concerned that unauthorised obtaining, recording, disclosure or use of information in the guidelines is an offence punishable by two years or 120 penalty units, or both: see clause 104. In particular, we are concerned at the lack of transparency this creates. We acknowledge the need to mitigate the risk of fraudulent applications, to protect the integrity and sustainability of the Scheme. Relationships Australia further acknowledges that the low evidentiary threshold and liberal test of ‘reasonable likelihood’ do create a risk of greater magnitude than might be the case in other compensation arrangements. Relationships Australia suggests that an appropriate balancing of the interests of transparency and open justice (which are also key to the Scheme’s enjoyment of good repute and public confidence) and fraud mitigation is achievable. Perhaps the Government could consider enacting an arrangement under which the Minister is required to submit the guidelines to an appropriate oversight agency (such as the Ombudsman or the Australian Human Rights Commission), and is required to take into account any comments they may have and, if necessary, vary the guidelines from time to time. This should happen ‘in real time’, rather than retrospectively.

Overall, Relationships Australia supports the use of rules to modify operation of the Scheme when this is to the benefit of survivors, but has serious concerns about the lack of scrutiny of new arrangements that may operate to the detriment of survivors. Relationships Australia urges the inclusion of a ‘real time’ and dynamic mechanism (eg not an annual report, or the second and eighth anniversary reports)⁶ by which Parliament can consider rules and raise concerns with the Minister, and by which the Minister can be asked to take these into account and consider altered arrangements. We do not consider that such a mechanism would undermine the benefits of the Scheme as a timely, credible and effective alternative to a lengthy civil litigation process, as described at p 21 of the Explanatory Memorandum.

Relationships Australia acknowledges the limitations on the rule-making powers at subclause 179(5). These appear to reflect well-accepted principles relating to delegated instruments and are thus uncontroversial.

⁶ Relationships Australia notes that clause 187 provides for annual report on the Scheme. See also the Explanatory Memorandum, p 64.

Closing comments

Thank you for the opportunity to provide a submission on these Bills. Should you require any clarification of any aspect of this (or our previous) submission, or need information on the services that Relationships Australia provides, please contact me or Dr Susan Cochrane, National Policy Manager – Family Law, Relationships Australia.

Yours sincerely,

Alison Brook
National Executive Officer

31 May

2018