

Additional Comments by Labor Senators

1.1 Labor Senators on this Committee note the recommendation of the majority report, and wish to make the following additional comments.

1.2 The advent of a National Redress Scheme is due to the courage of Survivors who told their stories to the Royal Commission, and those who advocated for justice for so long.

1.3 Labor Senators on this Committee note that the Government has responded to some of the recommendations made by the Committee in the Final Report of its Inquiry into the Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse Bill 2017.

1.4 However, Labor Senators remain disappointed that a number of recommendations have not been addressed in the National Redress Scheme for Survivors of Institutional Child Sexual Abuse Bill 2018.

1.5 Details of these recommendations are outlined in this report.

1.6 Labor has been committed to establishing a National Redress Scheme for Survivors of Institutional Child Sexual Abuse since 2015. Many Survivors are ageing and have been waiting most of their life to receive justice.

1.7 Labor Senators on the Committee note the Royal Commission's recommendation that a National Redress Scheme be in operation from 1 July 2017¹ and are of the view that the Redress Scheme must not be delayed any longer.

1.8 Further, Labor Senators on the Committee note the advice of Australian Government Departments that:

Any changes made to the National Bill would mean the National Bill would not align with the Schedule included in state referral Acts. This would render the referral ineffective and means that the National Bill could not operate in States which had passed their referral Bills before the changes were made to the National Bill. Any amendments to the National Bill in the Commonwealth Parliament would require the negotiation, reintroduction and passage of a State referral Bill through any State Parliament that has passed its legislation, thereby delaying the 1 July 2018 Scheme start date.²

1.9 Labor Senators on the Committee still hold a number of serious concerns regarding this legislation, including the arbitrary lowering of the maximum payment, the adequacy of counselling and the equality of all Survivors of child sexual abuse before the Scheme.

1.10 Notwithstanding these very important issues, Labor Senators note that for many Survivors time is of the essence.

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report in to Redress and Civil Litigation*, recommendation 31.

2 Australian Government Departments, *Submission 1*, p. 2.

1.11 Labor Senators also note the high likelihood that any attempt to amend the legislation in the Commonwealth Parliament would jeopardise the scheduled Scheme start date of 1 July 2018.

1.12 Therefore, for this reason alone, Labor Senators on the Committee do not recommend any amendments to the Bill.

Payment cap

1.13 Labor Senators on the Committee wish to draw attention to the cap on payments made under the Scheme of \$150 000.

1.14 This is significantly less than the \$200 000 maximum payment that was recommended by the Royal Commission.

1.15 Labor Senators on the Committee note widespread support between submitters and witnesses to increase the cap to \$200 000.

1.16 The Alliance for Forgotten Australians has indicated that lowering the cap without explanation threatens the credibility of the entire Scheme:

...this reduction is assumed to be the result of pressure brought to bear by the Catholic Church. Most seriously, such decisions undermine faith in the design of the scheme. Where design decisions appear arbitrary, or unexplained, people lose confidence in the totality of the scheme.³

1.17 Care Leavers Australasia Network (CLAN) was also of the view that 'the Federal Government should respect the Royal Commission recommendations'.⁴

1.18 The Committee also received a large number of submissions from the legal profession, which advocated for an increase to the maximum payment.

1.19 The Australian Human Rights Commission wrote:

...the efficacy of the Scheme depends on the availability of adequate redress to recognise the significance of the abuse from the perspective of the survivor. Inadequate redress may cause more survivors to pursue civil litigation, which undermines the efficacy of the Scheme and may not be in the best interests of the survivor.⁵

1.20 The Australian Lawyers Alliance also considered the reduced cap to challenge the effectiveness of the proposed Scheme:

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 \$150,000.⁶

3 Alliance for Forgotten Australians, *Submission 13*, p. 1.

4 Care Leavers Australasia Network, *Submission 31*, p. 2.

5 Australian Human Rights Commission, *Submission 23*, p.13.

6 Australian Lawyers Alliance, *Submission 2*, pp. 4-5.

1.21 Shine Lawyers also highlighted:

...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.⁷

1.22 Others also called for the maximum payment to 'be adjusted to reflect the recommendations of the Royal Commission'.⁸

1.23 These include Maurice Blackburn, as well as Victorian Aboriginal Legal Services, who wrote:

...given that the scheme is designed to redress both sexual abuse and related physical abuse, a maximum cap of \$200,000 is not unreasonable.⁹

1.24 And also the Law Council of Australia which stated:

...the maximum amount for a redress payment should be raised to \$200,000, in accordance with the Royal Commission's recommendation.¹⁰

1.25 A number of other submitters to this Inquiry highlighted the lower maximum cap as an issue of concern.

1.26 Labor Senators are of the view that the Redress Scheme would be enhanced by raising the maximum payment to \$200 000.

Lifelong counselling

1.27 Labor Senators on this Committee support the recommendation of the Royal Commission that access to lifelong counselling be made available to those Survivors who accept an Offer of Redress.

1.28 Labor Senators remain concerned that the counselling arrangements detailed in the National Bill continue to fall short of this standard.

1.29 Further, Labor Senators on the Committee note that the arrangements in the legislation are inconsistent with the Government's Response to the Committee's Final Report from the Inquiry in to the earlier Commonwealth Bill which accepted the recommendation that counselling provided to Survivors as part of Redress should be lifelong.¹¹

1.30 The Committee received evidence that adequacy of counselling continues to be an issue.

7 Shine, *Submission 19*, p. 6.

8 Maurice Blackburn, *Submission 29*, p. 6.

9 Victorian Aboriginal Legal Services, *Submission 3*, p. 3.

10 Law Council of Australia, *Submission 18*, p. 7.

11 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report in to Redress and Civil Litigation*, recommendation 9.

1.31 Shine Lawyers wrote that 'It is well known that abuse has lifelong consequences and neither option for counselling and psychological services within the Bill meets survivors' desperate needs'.¹²

1.32 Additionally the Law Council of Australia wrote that they question '...the adequacy of a \$5000 cap...as this amount will almost certainly be inadequate to cover such services over a prolonged period'.¹³

1.33 The Australian Psychological Society are also concerned that placing a \$5000 cap on counselling 'falls short of the Commission's recommendation that survivors should have access to counselling and psychological services across their lifetime'.¹⁴

1.34 The Alliance for Forgotten Australians has indicated that whilst this cap:
...may be sufficient for some; for others it will be inadequate to support a survivor for whom the impact of childhood abuse has lasted a lifetime...the scheme limits access to a key aspect of healing, appearing to make what for many will be a token contribution for a lifetime of pain, poverty, lost opportunities and poor health.¹⁵

1.35 According to Knowmore Legal Services, specialists in assisting Survivors of institutional child sexual abuse, limited access to counselling will:

...come at a high cost to survivors who, every day are trying to deal with the continuing impacts of their childhood sexual abuse and who need ongoing and appropriate counselling support to do so. Under these arrangements, many will not be able to access sufficient or acceptable support.¹⁶

1.36 Labor Senators on the Committee understand that adequate counselling is of critical importance to Survivors, and urge the Government to clarify the precise arrangements for counselling under the Redress Scheme as a matter of priority.

Residency requirements

1.37 The Committee received further evidence that Survivors who are not Australian Citizens of permanent residency should not be barred from accessing the Redress Scheme.

1.38 Labor Senators on the Committee support the view of the Australian Human Rights Commission:

12 Shine, *Submission 19*, p. 7.

13 Law Council of Australia, *Submission 18*, pp. 14–15.

14 Australian Psychological Society, *Submission 17*.

15 Alliance for Forgotten Australians, *Submission 13*, p. 3.

16 Knowmore, *Submission 20*, p.7.

In the Commission's view it is the occurrence of abuse in Australia, rather than the citizenship or residency status of the person affected, that should determine eligibility.¹⁷

1.39 This is in line with the recommendation of the Royal Commission, which stated that:

We see no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of application for redress.¹⁸

1.40 Labor Senators on the Committee also support the recommendation of the Australian Association of Social Workers that:

...people who were sexually abused as children while they were in immigration detention be eligible for redress under the Scheme.¹⁹

1.41 Labor Senators are seriously concerned that Survivors who were abused in the care of an Australian institution, such as former child migrants and those who have been in immigration detention, may not be able to access the Redress Scheme because they no longer live in Australia.

1.42 Labor Senators call on the Government to urgently address this issue by committing to ensuring that there will be provision in delegated legislation to enable former child migrants and former immigration detainees to access the Redress Scheme.

Criminal history exclusion

1.43 Labor Senators on the Committee are deeply disappointed by the Government's commitment to treat Survivors with a criminal history differently to others.

1.44 The provisions in the legislation continue to present a number of serious concerns, including the negative impact these could have on the mental health of Survivors, the disregard of fairness and the disproportionate effect of these provisions on Indigenous and Torres Strait Islander Survivors.

1.45 A number of submitters have referred the Committee to strong evidence of a link between traumatic childhood experiences and criminal offending in later life.

1.46 Knowmore Legal Services estimated that during the Royal Commission: 19% of the nearly 9000 clients assisted...were in prison or other places of detention.²⁰

1.47 Shine Lawyers further explained that:

The Royal Commission conducted private sessions receiving over 8,000 personal stories of institutional child sexual abuse. 10.4% of survivors who

17 Australian Human Rights Commission, *Submission 23*, p. 6.

18 Maurice Blackburn, *Submission 29*, p. 3.

19 Australian Association of Social Workers, *Submission 27*, p. 3.

20 Knowmore, *Submission 20*, p. 4.

were interviewed by the Royal Commission were in prison. There may be many more. It is anticipated that approximately 60,000 survivors will participate in the Redress Scheme. This would suggest that over 6,000 people are potentially excluded from redress unless this element of the proposed scheme is amended.²¹

1.48 The Committee received an abundance of evidence that potentially excluding some Survivors from the Redress Scheme due to historical criminal offending either misunderstands, or denies, the impacts of childhood sexual abuse in later life.

1.49 Maurice Blackburn explained:

...any such exclusion demonstrates a lack of understanding about the role childhood abuse can play in the causality of future criminal behaviour. We lend our voice to the many survivor groups which have expressed profound disappointment in this apparently populist course of action.²²

1.50 The Australian Human Rights Commission wrote that the Bill:

...fails to recognise that a survivor's later criminal behaviour may be directly or indirectly connected to the experience of child sexual abuse in the first place [and] ignores that survivors have a right to an effective remedy for human rights violations experiences through child sexual abuse irrespective of any later criminal conduct.²³

1.51 The Australian Psychological Society argued:

Given that the reason for incarceration was likely related to a person's experience of abuse, and moreover given that access to appropriate redress, including psychological counselling, might be expected to contribute to their rehabilitation, which is in the whole community's interest.²⁴

1.52 Additionally, the Royal Australian and New Zealand College of Psychiatrists wrote that:

Excluding criminal offenders from the Scheme is of profound concern considering the high rates of subsequent sexual offending in males who have been sexually abused as older children, as well as the strong relationship between sexual abuse and subsequent substance use, which may be associated with drug offending.²⁵

21 Shine, *Submission 19*, p. 3.

22 Maurice Blackburn, *Submission 29*, p. 5.

23 Australian Human Rights Commission, *Submission 23*, p. 7.

24 Australian Psychological Society, *Submission 17*, p. 2.

25 Royal Australian and New Zealand College of Psychiatrists, *Submission 21*, p. 1.

1.53 Ryan Carlisle Thomas has called these provisions 'manifestly unjust'²⁶ and explained that:

...a significant portion of our clients have substantial criminal records, and this is almost always attributable to the abuse suffered by them while in care. Preventing these clients from making a claim at all, amounts to a double punishment, as these people have served their sentences.²⁷

1.54 Jesuit Social Services told the Committee that:

The status of victim and offender are often intertwined, and it is only fair that all people have the right to access compensation, have support to rehabilitate, and have an opportunity to heal.²⁸

1.55 Victorian Aboriginal Legal Services and the Law Council of Australia argued that the exclusion will disproportionately affect Indigenous Survivors, due to historical practices of institutionalising Indigenous children and the overrepresentation of Indigenous people in the justice system.

1.56 Victorian Aboriginal Legal Services wrote that:

We are...strongly opposed to the provision that people who are currently serving a custodial term are prevented from applying for the scheme, regardless of the nature of their offence or length of sentence. As has been well documented, the rate of Aboriginal and Torres Strait Islander people in prison across the country far exceeds that of non-Indigenous people.²⁹

1.57 The Law Council of Australia submitted:

...access to the Scheme should not be restricted on the basis of criminal record...Further, the proposal to exclude survivors with a criminal record particularly affects Aboriginal and Torres Strait Islander people who are disproportionately represented in the criminal justice system. By virtue of being forcibly and systematically removed from their communities and placed into institutions, Aboriginal and Torres Strait Islander children are a group which were particularly vulnerable to the abuses identified by the Royal Commission. Excluding these survivors from the Scheme appears to be contrary to the intent of a redress scheme.³⁰

1.58 The Committee heard from a number of submitters that excluding some Survivors on the basis of previous criminal offending is unfair, particularly where the Survivor may have already served a sentence for those actions.

1.59 The Blue Knot Foundation told the Committee that:

...whether a person is in gaol or not is irrelevant to whether they were sexually abused as a child within an institution. As a crime was committed

26 Ryan Carlisle Thomas, *Submission 16*, p. 2.

27 Ryan Carlisle Thomas, *Submission 16*, p. 2.

28 Jesuit Social Services, *Submission 26*, p. 2.

29 Victorian Aboriginal Legal Services, *Submission 3*, p. 1.

30 Law Council of Australia, *Submission 18*, p. 8.

against them they should have equal access to redress, as any other survivor.³¹

1.60 The Australian Lawyers Alliance told the Committee:

...those whose lives were ruined and led into crime directly or indirectly by the abuse should not be further punished by being discriminated against.³²

1.61 The Sexual Assault Support Service argued that the treatment of Survivors with criminal histories is particularly unfair due to the state based nature of criminal law. They wrote:

Sentences vary from judge to judge, and from jurisdiction to jurisdiction. This means that in a case where two people commit similar crimes, but where one receives a sentence of less than five years, and one a sentence of more, the former will automatically be eligible under the Redress scheme whilst the latter will not.³³

1.62 The Service further noted the detrimental effect these provisions would have on Survivors. They explained:

...a rejection of their application on the basis of their conviction would be extremely detrimental to their mental health, and in many cases could lead them to feel suicidal. Survivors of institutional child sexual abuse almost always feel that they have been let down by 'the system', and this is likely to be seen by survivors as definitive proof of this. SASS counsellors have expressed that they would be hesitant even telling some survivors with serious criminal convictions about the scheme if there was a risk that they would be rejected.³⁴

1.63 Labor Senators on the Committee note advice that the inclusion of a general prohibition against Survivors making an application to the Scheme while incarcerated was driven by a concern for the safety and privacy of Survivors themselves, as well as a difficulty in providing supports within closed institutional settings.

1.64 Labor Senators on the Committee are unconvinced that these issues are insurmountable, and refer to the submission of Sexual Assault Support Service which acknowledges that:

...allowing incarcerated survivors to apply to the Scheme is complex, and in particular that there are risks associated with the confidentiality of applicants in a closed institutional setting. Regarding the concern that it would be difficult to secure appropriate redress support services for this environment, we note that we have been successfully providing advocacy

31 Blue Knot Foundation, *Submission 12*, p. 2.

32 Australian Lawyers Alliance, *Submission 2*, p. 7.

33 Sexual Assault Support Service, *Submission 11*, p. 5.

34 Sexual Assault Support Service, *Submission 11*, p. 6.

and counselling services to incarcerated survivors of institutional child sexual abuse for some time.³⁵

1.65 Labor Senators on the Committee agree with the expert advice provided in evidence to this Inquiry, and are of the view that all Survivors of childhood sexual abuse in institutions should be eligible to apply to the Redress Scheme on equal footing with one another.

Indexation

1.66 Since the Committee tabled its Final Report for the Inquiry into the earlier Commonwealth legislation, Labor Senators have become aware of the serious concerns held by many Survivors regarding the indexation arrangements recommended by the Royal Commission.

1.67 CLAN provided the Committee with a case study of how one of their members would be impacted by these provisions.

1.68 CLAN wrote that the Care Leaver and Survivor received a \$39 000 from another Redress Scheme many years ago, and that at the time, the Care Leaver and Survivor used \$12 000 of that payment to settle legal expenses incurred in obtaining the redress.

1.69 Labor Senators on the Committee understand that although a portion of the payment was used to cover legal fees, the sole purpose of the payment made was compensation, and as a result, the entire sum would be subject to the indexation provisions in the National Bill.

1.70 CLAN wrote that it is 'grossly unfair to index the gross amount...indexing is like robbing the poorest of abuse victims...the Government's children'.³⁶

1.71 Another Survivor advocacy organisation, Tuart Place, submitted to the Committee that their members believed:

...upscaling of past payments is mean-spirited, unfair and clearly intended to cut costs for past provider institutions.³⁷

1.72 Labor Senators on the Committee are deeply concerned that the implementation of these provisions may reduce some Survivors' redress payments to \$0.

1.73 Labor Senators on the Committee believe the Redress Scheme would be improved by removing the provisions which relate to adjusting previous amounts of compensation received by Survivors.

35 Sexual Assault Support Service, *Submission 11*, p. 4.

36 Care Leavers Australasia Network, *Submission 31*, p. 2.

37 Tuart Place, *Submission 14*, p. 7.

Decision time frame

1.74 Labor Senators note that the legislation currently before the Committee extends the timeframe for a Survivor to accept an Offer of redress from ninety days to at least six months.

1.75 Notwithstanding this improvement, Labor Senators continue to be of the view that Survivors should have one year to be make this decision, as recommended by the Royal Commission.

1.76 Submitters to the present Inquiry were also of the view that '12 months...is a reasonable period for acceptance'.³⁸

1.77 The Law Council of Australia explained that:

...given the legal implications of accepting an offer, it is essential that survivors have the opportunity to seek and receive independent legal advice as to whether they should accept an offer or pursue a civil claim...in the Law Council's experience, it does not consider that it will always be feasible for this to occur in six months, especially given the volume of survivors predicted to come forward to make an application for compensation under the Scheme.³⁹

1.78 Labor Senators maintain their view that Survivors should have one year to respond to an Offer of Redress.

Funder of last resort

1.79 Legislation before the Committee limits Funder of Last Resort provisions to only apply where the Government had equal responsibility for the abuse that occurred in the defunct organisation.

1.80 Labor Senators remain concerned that some Survivors may miss out on redress entirely as a result of this formation.

1.81 Submitters to the Inquiry also raised this issue.

1.82 Maurice Blackburn submitted that it is necessary to:

...ensure that the Commonwealth would still be the funder of last resort even if it had no direct involvement with the claimant, or the defunct institution at all. Failure to do so creates a class of survivor who misses out on redress merely because the abuse occurred in an independent institution which is now defunct.⁴⁰

1.83 The Centre for Excellence in Child and Family Welfare has also expressed concern that Survivors:

38 Maurice Blackburn, *Submission 29*, p. 7.

39 Law Council of Australia, *Submission 18*, p. 12.

40 Maurice Blackburn, *Submission 29*, p. 10.

... will have no recourse in respect of the abuse suffered, either through the redress scheme or by civil litigation.⁴¹

1.84 Labor Senators on the Committee maintain the view that the Funder of Last Resort provisions should be expanded.

Inclusion of all forms of abuse

1.85 Labor Senators note submissions from a number of individuals and organisations which advocate for eligibility for Redress to be extended to people who were not sexually abused, but survived other forms of abuse as children in the care of an institution.

1.86 Labor Senators have confined their comments to issues that are explicitly raised in the legislation and the recommendations of the Royal Commission.

Recommendations

1.87 Labor Senators on the Committee are cognisant of the challenges that amendments to the legislation would pose to the constitutional integrity and timeliness of the Redress Scheme.

1.88 For that reason, and notwithstanding a range of serious concerns, Labor Senators support the recommendation of the majority report that the Bill be passed and make the following additional recommendation:

Recommendation 1

1.89 That current and future Governments continue to negotiate with States and Territories in good faith to continue to strengthen the Redress Scheme.

Senator the Hon Lisa Singh

Senator Murray Watt

41 Centre for Excellence in Child and Family Welfare, *Submission 10*, p. 2.

