



In pursuit of justice

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Senator Rachel Siewert
Chair of Community Affairs References Committee
C/- Committee Secretariat
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Via digital upload, email to seniorclerk.committees.sen@aph.gov.au and express post

Dear Senator Siewert,

Submission in response to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017

Thank you for the opportunity to provide a submission concerning the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* ('the Bill').

The release of the Bill is an important step towards achieving justice for survivors of child sexual abuse and we commend the Federal Government for its commitment to a redress scheme. We nevertheless hold a number of serious concerns about the fairness of the redress scheme proposed by the current Bill.

This Submission is structured as follows:

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1. About Waller Legal

Established in 2007 Waller Legal is a law firm located in Collingwood, Victoria. We represent sexual abuse survivors. We assist survivors to obtain compensation and, if desired, a pastoral response usually in the form of an apology. Predominantly, our cases are against institutional defendants.¹ Our firm does not do any other kind of legal work. We understand that Waller

¹Where an individual has sufficient assets from which to pay compensation we also conduct claims against individual perpetrators.

Legal is the only incorporated legal practice in Australia that solely performs work on behalf of sexual assault survivors.

The Principal Solicitor of our firm is Dr Vivian Waller. Waller Legal currently employs eight full-time solicitors, with another two employees to be admitted to practice shortly. Waller Legal has a total staff of 22. At present, Waller Legal performs legal work for survivors who were abused in Western Australia, the Northern Territory, New South Wales, Tasmania and Victoria.

Waller Legal currently represents 1,031 clients seeking compensation for childhood sexual abuse. Waller Legal represented 20 survivor and related witnesses in five different Case Studies for the *Royal Commission into Institutional Responses to Child Sexual Abuse* ('the Royal Commission').² We play a significant role in debated law reform and have been invited to consult in a number of law reform initiatives. We have provided written submissions to the *Victorian Parliamentary Inquiry Into the Handling of Child Abuse by Religious and Other Non-Government Organisations* and the *Royal Commission*.

Waller Legal adopts a trauma informed practice model in its provision of legal services. Trauma informed practice is a way of working with survivors that acknowledges that they have had deeply traumatic experiences and that they may be triggered by their contact with a legal service. This practice model requires us to find ways to deal sensitively with our clients to try and minimise the possibility of triggering traumatic experiences for them. Our team has received specialist training.

Our practice is structured such that we accommodate the needs of survivors. For example, we;

- (a) ensure all clients have access to appropriate support services;
- (b) work with our clients' support workers, counsellors and case workers;
- (c) empower our clients to choose how and when they receive communication from us;
and
- (d) try to minimise the number of times a client will have to give an account of the abuse.

² *Royal Commission into Institutional Responses to Child Sexual Abuse* ('Royal Commission'), Case Studies 16, 22, 28, 30 and 38.

We act for survivors in negligence and strict liability claims against institutions. We act for survivors in common law claims against individuals and in applications for compensation pursuant to section 85B of the *Sentencing Act 1991* (Vic)³.

We usually recommend that a client attempt to resolve a matter prior to litigation. Most matters are resolved prior to trial and often without recourse to litigation at all. We explore ways to resolve sexual abuse matters through **alternative dispute resolution** processes; (**“ADR”**). This avoids the acknowledged pitfalls of litigation – namely stress, expense and length of time until conclusion. Common law rights can therefore lead to negotiated outcomes of substantial amounts of compensation without the expense of litigation. Common law rights should not be understood to be synonymous with civil litigation as litigation is often not required in order to resolve a matter. If a matter does not resolve by way of ADR then litigation can be pursued in appropriate circumstances. We currently have on foot litigated compensation claims against the Roman Catholic Diocese of Ballarat, the Roman Catholic Archdiocese of Melbourne and the Christian Brothers.

Waller Legal continues to provide cost effective services to sexual assault survivors. In some matters we act in a pro bono capacity. Predominantly, Waller Legal acts on a ‘No Win, No Charge’ basis.⁴ This means that a client will not be asked to pay for professional fees unless they achieve a successful outcome. We do not ask clients to pay for disbursements upfront. We believe that access to justice should not be predicated on the financial resources of the survivor. The Attorney General’s Department provided funding for the legal representation of survivor witnesses by Waller Legal at the Royal Commission.

2. About Dr Vivian Waller

Dr Vivian Waller has worked in the sexual assault field since her admission to practice in 1995. She completed her articles at Slater & Gordon in 1994 and worked for that firm during the early litigation against the Christian Brothers and the Order of St John of God. She subsequently worked at Maurice Blackburn for 10 years. In 2005, she established the Sexual Assault Unit at Maurice Blackburn. We understand that this was the first department of its kind in Australia dedicated to the provision of legal services to those who had been sexually abused.

³ Where the convicted offender has sufficient assets to meet an award of compensation.

⁴ ‘No Win No Charge’ arrangements are universally offered in meritorious cases.

In 2005, Dr Waller completed a PhD on Limitation Periods in Child Sexual Assault Litigation in Victoria and Post Traumatic Stress Disorder. She started Waller Legal in 2007. In 22 years of legal practice she, and Waller Legal, have successfully resolved thousands of compensation claims for sexual abuse survivors. Dr Waller provides continuing professional development lectures and is frequently consulted by government in relation to law reform initiatives. She is a member of the Law Institute of Victoria.

3. General Comments About the Proposed Redress Scheme.

Waller Legal supports the concept of a redress scheme.

Ideally, the scheme would be comprehensive and national and apply equally to all survivors of institutional abuse. The Commonwealth Government, however, lacks the Constitutional basis to compel national application. Accordingly, all efforts should be made to secure the voluntary participation of the States and relevant institutions within the States.

It is accepted that a Redress Scheme will not and should not deliver the same benefits as a common law claim. Rather, it is a more readily available alternative for those who cannot or who do not wish to pursue civil litigation or alternative dispute resolution in the common law context.

A Redress Scheme should offer a fair, simple, cost effective and non-adversarial process to provide acknowledgement, pastoral and psychological care and a payment of redress to survivors who have been advised that they have no better options available to them or who freely chose not to use other available avenues. It should do the survivor no additional harm. It should be trauma informed in its processes.

A Redress Scheme should not diminish a survivor's common law rights unless the basis upon which it does so and the likely value of a common law claim is clearly explained to the survivor who then exercises a free and informed choice.

It is submitted that the proposed Redress Scheme risks a significant disservice to survivors as it requires a common law release to be signed in circumstances where the Scheme:

- Has a cap of \$150,000 and the average payment is anticipated to be \$50,000 - 60,000;

- Does not provide for past or future loss of earnings;
- Does not provide past or future medical expenses;
- Does not allow punitive or exemplary damages; and
- Provides a timeframe in which the offer must be accepted. This timeframe may be as short as 90 days. If the offer is not accepted during this timeframe, the offer will be considered to have been declined.

Accordingly it is incumbent upon the Federal Government to ensure that survivors have access to funded expert legal advice.

A redress scheme should be an avenue of last resort for those who cannot access justice through other means more likely to deliver a better result. Redress is welcome and appropriate in a number of situations such as:

- Circumstances where it cannot be proven that the institution was negligent or otherwise liable;
- A defendant cannot be identified;
- Where the survivor lacks the emotional resources for ADR or litigation;
- Where the survivor is unwell and requires a quicker, simpler process; and/or
- Where the survivor otherwise makes a fully informed choice to apply for Redress at the expense of other better options.

If survivors are not advised carefully of their common law rights they will suffer a significant miscarriages of justice. This is the real and most significant risk of the Redress Scheme as proposed by the Bill.

4. Risk to Common Law Rights – Commentary.

A release will be required.⁵ The operation of the Redress Scheme will therefore restrict or extinguish common law rights for those survivors who accept an offer. This is a matter of importance. It is incumbent upon the Parliament to ensure that survivors have access to expert legal advice before the execution of any release.

⁵ *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 39(2)(c).

It appears that there will be legal services available under the scheme.⁶ A written offer of redress facilitates access to legal services under the scheme.⁷ It appears that the Bill only expressly requires the provision of legal advice about whether to accept the offer.⁸ If this is the case, then it is inferred that legal advice is to be provided about the meaning and impact of the release – presumably that it extinguishes common law rights to seek compensation via other means. This information in the abstract is of little value to the survivor. The critical legal assessment is whether a survivor has a potential common law claim and the estimated value of that claim.

It seems that legal support services might be more broadly provided to facilitate the application process. The Statement of Compatibility notes that;

*To acknowledge the extent that this Bill may limit this right [to civil litigation] the Scheme will deliver free, trauma informed, culturally appropriate and expert **Legal Support Services**.*

This falls short of the provision of independent and experienced legal advice. There is no reference to legal advice being provided to assess the viability or otherwise of a potential civil claim as a threshold question about whether the survivor should make an application under the Redress Scheme at all.

It is critical that survivors have access to experienced legal advisers who can explain not only the impact of any potential deed of release *but also investigate and advise as to the likely value of the common law rights that are to be signed away.*

It is only once such advice has been given that a survivor can understand the rights that are to be extinguished by the signing of a release and therefore understand the consequences of decision they are making.

A survivor may well choose the redress payment over a common law ADR process or litigation but it is important for a survivor to understand the value of the option they are extinguishing.

⁶ Explanatory Memorandum, page 6.

⁷ *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 37(1)(g).

⁸ *Ibid.*

Alternatively a survivor might be advised that they don't have a viable common law claim in which case they will have the confidence of knowing that the Redress Scheme is the best option for them.

If a common law claim is possible a survivor would be entitled to many benefits not offered under the proposed Redress Scheme such as:

- Uncapped General Damages for pain and suffering (compensation);
- Exemplary and punitive damages (in some circumstances);
- Past and future medical expenses;
- Past and future loss of earnings; and/or
- Legal costs.

Two recent decisions of the Supreme Court of Victoria demonstrate that, with recent legislative reform, sexual assault survivors can achieve significant awards of damages.

Hand v Robert Leonard Morris & Anor [2017] VSC 437

In *Hand v Robert Leonard Morris & Anor* [2017] VSC 437 the Plaintiff, Mr Hand, alleged that:

- He was sexually assaulted by the First Defendant, his school teacher;
- The Second Defendant, who owned and operated the Plaintiff's school and employed the first Defendant, was negligent and vicariously liable for the abuse by the First Defendant; and
- As a result of the abuse he suffered psychiatric injury, depression, anxiety and pecuniary loss.

The Court ordered that the Plaintiff should receive:

- General Damages assessed at \$260,000;
- Past pecuniary loss of \$100,000;
- Future pecuniary loss of \$320,000; and
- Future medical expenses of \$36,400.

If Mr Hand had participated in the proposed Redress Scheme the most he could have recovered would be \$150,000. It is unlikely, however, that Mr Hand would actually receive

that amount as his injuries were not at the most severe end of the spectrum. It is likely that Mr Hand would have received an average or below average payment in the vicinity of \$50,000 – \$60,000. It is also important to note that Mr Hand would not have been able to recover the cost of past and future medical expenses or past and future loss of earnings through the Redress Scheme.

Erlich v Leifer & Anor [2015] VSC 499

Similarly, in *Erlich v Leifer & Anor* [2015] VSC 499, the Plaintiff, Ms Erlich, alleged that:

- She was sexually assaulted by the First Defendant, the Principal of her former school;
- The Second Defendant, the school, was directly and vicariously liable for the First Defendant's actions; and
- As a result of the abuse, she suffered psychiatric injury and claimed damages for that injury and subsequent losses. Ms Erlich also claimed aggravated and exemplary damages against both the First and Second Defendants.

The Court ordered that the Plaintiff receive:

- Non-economic loss assessed at \$300,000 (general compensatory damages) ;
- Past pecuniary loss of \$50,358;
- Future pecuniary loss of \$501,422;
- Past medical expenses of \$156,007; and
- Future medical expenses of \$16,641.

Importantly, in *Erlich*, the Court also awarded exemplary damages in the sum of \$150,000 against the First Defendant and \$100,000 against the Second Defendant. Exemplary damages were awarded to reflect the Court's disapproval of the Defendants' conduct.⁹

If the Plaintiff in *Erlich* had applied for Redress under the current proposed scheme the most she could have recovered would have been the cap of \$150,000. She would not have recovered the cost of past and future medical expenses nor past and future loss of earnings. The Redress scheme could not have awarded her exemplary damages.

⁹ The Second Defendant assisted the First Defendant to leave the jurisdiction to avoid police investigation.

The decisions in *Erich* and *Hand* demonstrate that where a common law claim is available the value of the common law rights can be substantial. The value of those rights is likely to be substantially in excess of what is available under the proposed Redress Scheme. It is therefore incumbent upon the Parliament to ensure that great care is taken around the execution of the release required for the Redress payment to be made. It is critical that survivors have access to expert legal advice.

Expert legal advice will be critical to survivors abused multiple times in multiple locations. Many survivors have been abused in a series of different homes or orphanages run by different organisations. At common law a plaintiff may contemplate litigation against multiple defendants. Alternatively a plaintiff may contemplate a series of cases against different defendants. Questions of causation and apportionment of injury may arise but there is no cap on the compensation that can be recovered from each defendant. Conversely, under the Redress Scheme, a survivor may make only **one** application for Redress no matter how many different episodes of abuse he or she has suffered in different institutions.¹⁰ Survivors who have suffered multiple abuses across separate institutions require expert advice to assess their situation. It is likely that an application for Redress would not be in their best interests if a common law claim were possible.

The legal advice that survivors will need is not uniform across Australia. Each State and Territory has fundamentally different laws that affect the assessment of a survivor's common law claim.

Areas of law that differ in each state and territory include:

- Whether there is a limitation period;
- If a limitation period has expired, whether there is a process by which an exemption may be sought;
- Definitions of 'disability';
- Whether or not previous deeds of release can be set aside;
- Differences in the criminal codes between jurisdictions;
- The existence or not of compensation processes attached to criminal cases (such as applications under the *Sentencing Act 1991* in Victoria); and
- Rules of evidence and civil procedure.

¹⁰ *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 30.

Expert legal knowledge specific to each jurisdiction is therefore required in order to assess a survivor's potential common law claim.

It has been suggested that the Knowmore Legal Service ('Knowmore') might be expanded to assist survivors to make applications for Redress. Knowmore is a well-regarded trauma informed and culturally sensitive organisation that performs important work. Waller Legal holds Knowmore, together with other community legal services, in high regard. Knowmore has no experience, however, in the investigation and assessment of potential common law claims across each Australian jurisdiction. It has never performed this role. In order for Knowmore to fulfil this role it would need to be staffed with multiple expert lawyers with experience in each jurisdiction. It seems unlikely that any legal service would be adequately resourced or experienced to investigate and assess each and every possible common law claim arising in the different jurisdictions throughout Australia for every survivor seeking Redress. While Knowmore would be well placed to assist survivors with their applications perhaps Knowmore would be ill equipped to investigate and advise on potential common law claims. It is submitted, therefore, that Knowmore may be unable to give meaningful advice as to the true impact of the signing of a release.

Civil litigation and ADR processes are increasingly available and accessible to survivors. There are significant law reform projects progressively under way in a number of jurisdictions. This ongoing process of law reform will continue to facilitate survivors to use common law ADR processes or litigation.

It is anticipated that Western Australia may soon abolish limitation periods for child sexual assault matters as part of a civil law reform project as a bill to this effect has been introduced.¹¹

In 2015, Victoria abolished time limits for child sexual abuse matters.

In 2016, Queensland made legislative reform to facilitate survivors being able to commence common law proceedings for compensation and overturn previous releases.

We understand that Victoria's law reform project flowing from the *Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations* is not yet complete and that improvements will continue to be made.

¹¹ *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 (WA)*.

At a time when governments across Australia are moving to make compensation claims more accessible to sexual abuse survivors it would be a travesty of justice of the highest order to fail to advise survivors of the viability and potential value of their common law rights.

The Victorian Parliamentary Inquiry and the Royal Commission have criticised many “in house” church schemes that offered survivors compromised amounts of money in exchange for the signing of a release in circumstances where independent legal advice was not provided. It is submitted that the redress scheme as proposed by the Bill poses a significant risk that we will repeat the harms of the past rather than learn from them. It is submitted that it would add insult to injury if the common law rights of survivors were unfairly diminished by the operation of the Redress Scheme.

5. Risk to Common Law Rights – Recommendations.

It is recommended that the Bill be amended to include the provision of funded expert legal advice to survivors.

It is recommended that funding for the provision of expert legal advice be provided on the same basis that funding was provided for survivors during the Royal Commission. That funding was provided upon application through the Attorney General's office and was essentially capped legal aid type funding.

It is recommended a nation-wide panel of expert lawyers with proven commitment and experience in sexual abuse matters be established.

6. Overuse of Delegated Legislation - Commentary

The structure of the Bill indicates that important aspects of the Redress Scheme will be determined by legislative instrument rather than primary legislation. This is concerning insofar as it circumvents the role of parliamentary oversight and scrutiny. The Bill provides the Minister the power to make rules over many important matters such as:

- Who is eligible to apply¹²;

¹² *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 16(2).

- The assessment matrix for working out how much a redress payment should be¹³;
- Matters relating to the payment of redress payments¹⁴;
- Matters relating to counselling and psychological services¹⁵; and
- Rules prescribing the provision of legal services.¹⁶

These are very important matters that should be covered by the legislation and not subject to the changing whims of ministerial direction. Importantly, the Redress Bill does not outline who will be eligible to apply for Redress nor does it clarify the provision of ongoing counselling and psychological treatment. These aspects are discussed in more detail below.

The establishment of Redress Scheme is an historic and important step in Australia's history, recognising significant harms done in our past and attempting to salve the ongoing suffering of survivors. It is worthy of the respect of parliamentary attention and oversight.

7. Overuse of Delegated Legislation - Recommendations

It is recommended that important aspects of the Redress Scheme be outlined in the legislation, especially the eligibility criterion, the assessment matrix, the provision of legal advice and the provision of counselling and psychological services.

8. Eligibility - Commentary

Eligibility to apply for redress is not comprehensively addressed in the Bill.

It has been reported that those who have been convicted of a sex offence or have served a term of imprisonment of five years or more will not be eligible to apply for redress. This is contrary to the recommendations of the Royal Commission. The Commission recommended equal access and equal treatment for all survivors. It is disturbing that such an important matter is to be determined by legislative instrument and not subject to the scrutiny of parliamentary processes. It undermines certainty in the application and administration of the Redress Scheme.

¹³ Ibid s 34(1).

¹⁴ *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 44(2).

¹⁵ Ibid 48(1).

¹⁶ Ibid s 117.

In our experience, children abused in institutional settings may be more likely to commit crime as adults. This seems especially so for those who were socially, emotionally and economically impoverished in their families of origin, were made state wards, institutionalised and then abused by their 'care givers.' Many have difficulty dealing with persons in positions of authority, many struggle with interpersonal relationships and have anger management issues, many succumb to self-soothing behaviours involving drug and alcohol abuse and related crime. The Royal Commission found that some survivors of abuse became abusers themselves due to the nature of the abuse they have suffered and that about 10% of survivors were currently serving a term of imprisonment.

There is no excuse for criminal behaviour and harming others, yet a civilised society is capable of reaching an understanding of why some criminal conduct occurs.

Waller Legal notes that each and every survivor was a child at the time of the abuse and was not capable of controlling their environment. Many children were placed in an institution by a state government where adults abused them. Mostly likely they have been impaired in attaining the usual personal, social, educational and work related developmental milestones. Perhaps such continuous depravation contributes to the likelihood of subsequent criminal behaviour.

To exclude convicted sex offenders or those imprisoned for five years or more seems to lack compassion and understanding. It undermines the concept of equal access and equal treatment. It seems unfair not only to block a survivor's access to redress, but also to block their access to an acknowledgement and ongoing counselling. They are not in any less need of such acknowledgement and services than a person without a criminal history. The provision this kind of help may assist in their recovery.

9. Eligibility - Recommendations

It is recommended that eligibility criteria be included in the Bill to facilitate parliamentary oversight and democratic debate.

It is recommended that eligibility criteria be included in the Bill to facilitate certainty in the application and availability of Redress.

It is recommended that Redress provide equal access and equal treatment for all survivors.

10. Counselling and Psychological Services - Commentary

Although general principles guiding the provision of counselling and psychological support services are in the Bill¹⁷ it is left to the Minister to make rules prescribing matters about counselling and psychological services.¹⁸ Accordingly, there is very little information available about the provision of counselling and psychological support services. It is unclear:

- How long counselling or psychological support will be provided;
- Who will pay for the services;
- Whether there are any ongoing eligibility criteria; and
- Whether the services can be limited or withdrawn by the minister after acceptance of an offer of Redress.

It is submitted that these issues will likely be of paramount importance to survivors. Many survivors are vulnerable and in need of long term and reliable counselling and psychological services. Many survivors are in need of episodic counselling and psychological services.

The Explanatory Memorandum states that counselling and psychological support services will be available for the duration of the scheme (10 years.) This is absent from the Bill.

Minister Porter's Second Reading Speech refers to the providing survivors with "access to counselling or psychological services of their choice throughout their lives." This is absent from the Bill.

It is important that survivors have some security about the provision of these services. It is especially important that survivors understand how long psychological support services will continue to be provided for and whether or not they might be arbitrarily withdrawn. This information would be critical in the decision making process as to whether or not to accept an offer of Redress.

11. Counselling and Psychological Services - Recommendations

It is recommended that the Bill clarify and safeguard the provision of counselling and psychological services to survivors.

¹⁷ Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, s 49.

¹⁸ Ibid s 48.

It is recommended that the Bill reflect the recommendations of the Royal Commission¹⁹ that:

- *Counselling should be available throughout a survivor's lifetime;*
- *Counselling should be available on an episodic basis; and*
- *There should be no fixed limits on the counselling and psychological care provided to a survivor.*

12. Establishing a Nexus – Commentary

The Bill's current "relevant circumstances" for determining institutional responsibility are too narrow. The current definition will in all likelihood limit responsibility to matters directly arising within an institutional setting, for example, abuse by a teacher within a classroom during school hours.²⁰

Current vicarious liability law suggests that institutions could also be liable where the conduct of their business, their systems, and engagement of individuals, indirectly gives rise to the abuse.²¹ For example, where a teacher meets and grooms a student at school but abuses the child outside of school hours and off school grounds.

Broadening the range of relevant circumstances would also accord with principles of fairness. It is unpalatable to think that a survivor who was abused by a teacher or a priest outside of a strict institutional setting would be denied equal access to redress.

13. Establishing a Nexus - Recommendation

It is recommended that current relevant circumstances for determining institutional responsibility under the Bill be expanded so as to accord with current vicarious liability law and fair treatment of survivors.

14. Absence of a Hearing - Commentary

Under the Bill the Operator is required to provide an applicant with written notice of the outcome of his or her application for Redress, the reasons behind that determination and information regarding internal review of that decision.²² The Bill does not make provision for any sort of hearing where an applicant could attend and receive the determination.

¹⁹ Royal Commission Final Report Recommendations, Recommendation 9, page 75.

²⁰ Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, s 21(2).

²¹ See, for example, *New South Wales v Lepore* (2003) 212 CLR 511; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11; *Cox v Ministry of Justice* [2016] UKSC 10.

²² Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, s 35.

Many of our clients have commented upon the therapeutic benefit of attending a private session with a Commissioner from the Royal Commission. Our clients reported that these meetings gave them a sense of engagement in the process and a sense that their experiences were acknowledged. Our clients reported feeling like they mattered. They mattered to someone as important as a Royal Commissioner. Our clients were universally proud that they had attended a private session. The letters of acknowledgement and thanks survivors received following those sessions have become treasured items of importance and meaning. We note that no findings of fact were made in such sessions. Nonetheless, the sessions achieved significant therapeutic and healing effects.

Waller Legal is concerned that by failing to offer applicants the option of a hearing the proposed Redress Scheme is missing a significant opportunity to mark an occasion of acknowledgement and healing for survivors.

15. Absence of a Hearing - Recommendations

It is recommended that applicants for Redress be provided with the option of attending a hearing and receiving the Operator's decision regarding their applications for Redress in person.

16. Time for Acceptance of Offer of Redress and Reinstatement of Withdrawn Applications - Commentary

The Bill stipulates that the Operator is responsible for the administration of the Scheme. While the Operator can determine the period during which an offer can be accepted the Bill states that an offer of redress must be open for at least 90 days.²³

This is contrary to the Royal Commission which recommendation that an offer of redress should remain open for one year.²⁴

It is submitted that many survivors will need longer than three months to consider whether to accept the offer of redress. This is because:

²³ Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, s 35(3)(a).

²⁴ Royal Commission Final Report Recommendations, Recommendation 59, page 84.

- They may have communication difficulties caused by itinerant lifestyles, housing difficulties, lack of financial resources or physical ill health;
- They may have psychological or psychiatric injuries such as depression or post-traumatic stress disorder which make thinking about the abuse and decision making more difficult;
- They may require assistance and guidance in making a decision; and/or
- If they are seeking legal advice about potential common law options, three months is insufficient for a thorough investigation of a potential common law claim and communication of that advice in a trauma informed way.

The proper investigation of a common law claim may take many months. It might be necessary to apply for state ward records, school records, police records and the like. While many organisations strive to respond to record requests within 30 days in practice this is rarely achieved.

The average investigation of a common law claim requires the following:

- Ensuring the client is well supported and in a good space to engage with legal advisers;
- Taking a statement in a trauma informed way;
- Requesting records from multiple sources such as state ward files, school records, police statements, transcripts of evidence from criminal matters and so on;
- Requesting and reviewing clinical notes from treating doctors;
- Requesting medical reports and medico legal assessments so as to assess injury and causation; and
- Investigations into the organisational defendants and assessing liability.

This material is then reviewed and advice provided. Three months is insufficient to complete this process with an expert standard of diligence.

Survivors should not face time pressure from an institution or authority figure in the making of a decision about whether to accept an offer of Redress. This is inappropriate given the well-documented difficulties that survivors are likely to be experiencing.

A survivor cannot simply withdraw their application while they contemplate their position or seek legal advice about an offer of redress. If an application is withdrawn after a

determination is made the applicant is barred from all future applications. This is unnecessarily harsh and punitive.

17. Time For Acceptance of an Offer of Redress And Reinstatement of Withdrawn Applications - Recommendation

It is recommended that an offer of Redress remain open for one year.

It is recommended that if a survivor withdraws their application at any time that the application may be reinstated at any time within one year of the withdrawal.

18. Amount of Redress – Commentary

The Bill provides that the maximum amount of Redress available to each applicant not be more than \$150,000.

This is contrary to the Royal Commission's recommendations of a maximum payment of \$200,000.²⁵

The Bill does not stipulate a minimum payment of Redress. This implies that an application can be successful but no monetary amount of redress is offered.

For the psychological safety and wellbeing of survivor applicants, a minimum payment of \$10,000 should be stipulated in the Bill.

19. Amount of Redress - Commentary

It is recommended that the Bill should provide a maximum payment of \$200,000 and a minimum payment in the sum of \$10,000.

²⁵ Royal Commission Final Report Recommendations, Recommendation 19(b), page 78.

20. Internal Review Period - Commentary

The Operator determines the time within which a person might apply for internal review of a determination.²⁶ The Bill proposed that the period be at least 28 days but no longer than 90 days.²⁷

This is contrary to the Recommendations of the Royal Commission. The Commission recommended a three-month period within which to seek review.

For the reasons outlined earlier, a survivor may need additional time to consider their position due to symptoms caused by the abuse. In addition three months may be too short a time to seek expert legal advice, especially if the investigation of a potential common law claim is to be undertaken.

21. Internal Review Period – Recommendation

It is recommended that the period for internal review be extended to a period of one year.

22. Direct Personal Responses - Commentary

The Bill does not make provision for the way in which Direct Personal Response meetings should take place and whether any assistance will be provided to the survivor.

We have attended hundreds of pastoral meetings with clients as part of the resolution of their common law claims. Not every client wants a meeting with a representative of the relevant institution. For those who do it can be a powerful and healing experience, provided that the representative of the institution behaves compassionately and in a way consistent with a trauma informed approach.

Most clients, even when willing to engage in a pastoral meeting, feel a great deal of apprehension about the meeting. In a majority of cases they feel great trepidation and are reminded of the significant power imbalance between a child and an authority figure. Almost universally they have requested the attendance of their solicitor at the meeting to “level the playing field” and help them address the continuing psychological power imbalance. In

²⁶ *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 35(3)(a).

²⁷ *Ibid.*

addition, we have attended some pastoral meetings where the representative of the institution has behaved in a dismissive, rude or invalidating way. In some circumstances we have had to terminate meetings due to the inappropriate behaviour of the representative of the institution. Thus it is important that the meeting is “psychologically safe” for survivors. While it is not necessary for legal representation to be present, some accommodation should be made to ensure that the survivor is well supported and that third parties can intervene on the survivor’s behalf should the meeting become psychologically unsafe. This person could be a counsellor, social worker, case worker, psychologist, solicitor or other representative of a law office or legal service. There should be some provision for monitoring feedback and reporting about the conduct of representatives who give direct personal responses, so that any inappropriate or psychologically harmful conduct can be addressed and remedied.

23. Direct Personal Responses – Recommendations

It is recommended that the Bill regulate the manner in which Direct Personal Responses are provided to survivors.

It is recommended that the Bill provide survivors with funded assistance so that they can take an appropriate support person to a Direct Personal Response meeting.

It is recommended that the Bill make provision for monitoring feedback about Direct Personal Response meetings so that representatives of institutions are accountable.

24. Absence of External Review - Commentary

The Bill provides for an internal review of a determination of an application for Redress.²⁸

It is submitted that internal review is insufficient because:

- It does not provide the capacity to take into account any new information;
- It does not provide transparency in decision making; and
- It fails to hold decision makers accountable for their decisions.

²⁸ Ibid Part 4-3.

25. Absence of External Review - Recommendation

It is recommended that the Bill enshrine a right of appeal to the Administrative Appeals Tribunal and judicial review.

26. Debt Recovery Provisions – Commentary

The Bill currently enables the Commonwealth to recover a Redress payment from a recipient if the payment was provided because of a false or misleading statement or misrepresentation.²⁹ For instance, the Explanatory Memorandum provides the example of where an individual receives a Redress payment but information later comes to light that contradicts the material provided in that person's Redress application.

This provision is concerning. There are a number of understandable circumstances where survivors, given their psychological symptoms and the fact that they were children when they were sexually abused, may make mistakes in the provision of information. A survivor might suffer from Post Traumatic Stress Disorder and actively avoid reminders of the abuse. There may be issues of compartmentalised or repressed memory. There may be genuine mistakes made. A survivor might misunderstand a question that has been asked. It is not uncommon for a survivor to be confused about dates that they were at particular institutions due to their young age at the time. A survivor might have limited literacy skills.

It would be highly unequitable for a survivor to have to repay their Redress payment in the event of an honest mistake, potentially years later.

It is submitted that debt recovery provisions should only be triggered where the Applicant has been intentionally fraudulent.

27. Debt Recovery Provisions - Recommendations

Debt recovery provisions should only be triggered in the event that it is reasonably apparent that the Applicant intended to defraud the Operator.

²⁹ *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017*, s 106(3).

28. Retention of Certain Provisions in the Bill

It is recommended to keep the following aspects of the Bill;

- Absence of any requirement to repay the Department of Veterans' Affairs;
- Absence of any requirement to repay Medicare;
- Redress payments will not affect eligibility for Social Security; and
- Institutions that opt in agree not to rely on previous deeds of release.

These provisions are particularly helpful to survivors.

29. Conclusion

Thank you for considering our concerns in relation to the Bill and our recommendations. We would be pleased to meet with you to discuss our submission further.

Should you wish to discuss this matter, please contact Dr Vivian Waller on (03) 9415 9999 or by email to info@wallerlegal.com.au.

Yours faithfully,



Dr Vivian Waller

WALLER LEGAL