



THE LAW SOCIETY  
OF NEW SOUTH WALES

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13 March 2018

Committee Secretary  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [community.affairs.sen@aph.gov.au](mailto:community.affairs.sen@aph.gov.au)

Dear Committee Secretary,

**Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse Bill 2017 and related Bill**

Thank you for providing the Law Society of NSW the opportunity to make a supplementary submission. This submission should be considered in addition to the written and oral submissions already made by the Law Council of Australia. The Law Society's supplementary submission is informed by its Human Rights Committee and deals only with the issue of the eligibility of non-citizens and non-permanent residents. The Law Society's views on the eligibility of survivors who have gone on to commit certain offences have been represented in the Law Council's submission.

In respect of the eligibility of non-citizens and non-permanent residents, in its submission, the Law Council made recommendations that the Government should:

- defer passing the Bill until there has been adequate resolution of the concerns stated by the Parliamentary Joint Human Rights Committee on Human Rights; and
- amend the Bill so that eligibility to access the scheme should be extended to those currently living in Australia, those who were child migrants, and those who were formerly Australian citizens or permanent residents.

However, the Law Society's view differs from the Law Council's view in this regard. We submit that there is no level of fraud risk that would justify the exclusion of victims of child sexual abuse from accessing redress where participating institutions are responsible for that abuse. In our view, citizenship and residency status should not be a requirement for eligibility for redress, and that cl 16(1)(c) should be simply removed from the Commonwealth Redress Scheme for Institutional Responses to Child Sexual Abuse Bill 2017 ("Bill").

For the reasons set out below, the Law Society strongly submits that the redress scheme should not restrict the eligibility of non-citizens and non-permanent residents. In our view, the only relevant nexus for eligibility for redress should be if someone was sexually abused as a child, and that abuse is the responsibility of a participating institution. The Royal Commission's position is clearly that neither citizenship nor residency status should be an

eligibility requirement for redress, either at the time of the abuse, or the time of application for redress.<sup>1</sup>

In our view, the exclusion of non-citizens and non-permanent residents is a dangerous provision, both as a precedent as well as in its effect on non-citizen and non-permanent resident children abused in immigration detention and other institutional settings. We understand that no other redress scheme has included such a provision. Further, under international human rights law, a state party is legally responsible for all persons within its territory or subject to its jurisdiction, power or control regardless of citizenship.

## **1. Australian responsibility for harm caused to children in immigration detention centres**

The Law Society's view is that the Australian Government and its contractors bear responsibility for the safety of children in immigration detention, both mainland and offshore. This is the view expressed in the Royal Commission's Final Report, which goes further to include responsibility for those abused in community detention:

The Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention who have been detained, sometimes for prolonged periods. This includes children in community detention. The department is responsible for maintaining adequate supervision of its contractors, to ensure proper care is provided.<sup>2</sup>

In respect of offshore detention centres, we note the positions reached by a number of Senate committees in previous Senate inquiry reports, in respect of the question of Australia's effective control and domestic duty of care owed in the regional processing centres at Manus Island and at Nauru. In relation to the Manus Island detention centre, the Senate Standing Committees on Legal and Constitutional Affairs concluded that:

the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the centre clearly satisfies the test of effective control in international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations.

The committee agrees with the view put to it by international human rights law experts that, even if Australia did not exercise 'effective control', Australia would still be liable for breaches of international human rights law that occur in respect of asylum seekers held at Manus Island under the doctrine of joint liability. [footnotes deleted]<sup>3</sup>

In respect of the regional processing centre at Nauru, the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru accepted the evidence from a range of legal and human rights experts that Australia holds obligations under international and domestic law, as well as responsibilities under the

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<sup>1</sup> Commonwealth, Royal Commission on Institutional Child Sex Abuse, *Redress and Civil Litigation Report* (2015) 347

<sup>2</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 15 Contemporary Detention Environments*, 172, online at:

[https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_15\\_contemporary\\_detention\\_environments.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_15_contemporary_detention_environments.pdf)

<sup>3</sup> Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry report into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, 11 December 2014, [8.33] – [8.34], online at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Manus\\_Island/Report/c08](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report/c08)

Memorandum of Understanding with Nauru, in relation to asylum seekers at the detention centre.<sup>4</sup> That Committee went on to say that:

In the committee's view, the Government of Australia's purported reliance on the sovereignty and legal system of Nauru in the face of allegations of human rights abuses and serious crimes at the RPC is a cynical and unjustifiable attempt to avoid accountability for a situation created by this country.<sup>5</sup>

In our view, given the volume and nature of evidence available to the Government through the Royal Commission process, and the various public inquiries and reports, it is clear that Australia bears responsibility for the sexual abuse of children in community, onshore and offshore immigration detention centres, regardless of citizenship or residency status.

## **2. Risk of fraudulent claims**

We note the contention made in the Explanatory Memorandum that opening the scheme to non-citizens and non-permanent residents would give rise to fraud. However, without any evidence publicly available to support this contention, it is difficult to ascertain what weight, if any, should be accorded to this concern.

In any event, assessing the merits of claims for redress on a case-by-case basis can and should adequately deal with any risk of fraudulent claims. In the Law Society's view, the risk of fraud should be dealt with as a matter of procedure and is irrelevant in respect of eligibility criteria.

## **3. Children on temporary protection visas**

The Law Society suggests consideration of the impact the proposed exclusion will have on migrant settlement outcomes for those children on temporary protection visas (TPVs). While those on TPVs might be eligible if the rules allow for applications from people currently living in Australia, the Explanatory Memorandum (EM) is not consistent on this point.

It says both that the rules will allow for "former child migrants who are no longer residing in Australia or children abused in Australian institutional settings outside Australia who are not citizens or permanent residents" and for "former child migrants who are non-citizens and non-permanent residents, non-citizens and non-permanent residents currently living in Australia, and former Australian citizens and permanent residents" to apply to the scheme (pp 4-5 and 13 of the EM). While child migrants are referred to in both extracts, the other groups are different. There is no clarity as to whether these proposed exceptions to the cl 16(1)(c) exclusion are in the alternative or cumulative. Ultimately, there is no guarantee that any such exemptions will be included in the rules.

Even if children on TPVs are ultimately granted permanent residency, this is likely to be after the sunset date of the scheme, in 2028, and thus they will be excluded from redress. Of course, it will also impact on children in offshore detention and those deported under s 501 of the *Migration Act 1958* (Cth), who were abused in immigration detention as children.

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<sup>4</sup> Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Final report: Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru*, 31 August 2015, [5.15], online at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Final%20Report/c05](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final%20Report/c05)

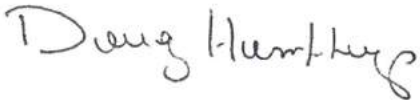
<sup>5</sup> *Ibid*, [5.19]

#### 4. Conclusion

There is significant evidence publicly available in respect of Australia's responsibility for the harm caused to children in immigration detention. In the Law Society's view, there is no level of fraud risk that would justify the exclusion of non-citizens and non-permanent residents from the redress scheme. In our view, the risk of fraud can and should be dealt with at the time of assessing applications for redress on a case-by-case basis. We reiterate that the only relevant nexus for eligibility should be whether a person was sexually abused as a child, and that abuse is the responsibility of a participating institution. The Law Society strongly recommends that cl 16(1)(c) be removed from the Bill.

Thank you for the opportunity to make this submission. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or (02) 9926 0354.

Yours sincerely,



Doug Humphreys OAM  
**President**