



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/HRC/DHvk:1569530

3 August 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: nathan.macdonald@lawcouncil.asn.au

Dear Mr Smithers,

Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse - oversight of redress related recommendations

Thank you for your memo dated 10 July 2018 seeking the contribution of the Law Society of NSW in respect of a possible Law Council submission to the Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse (the "Joint Select Committee") in relation to its oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the "Royal Commission"). The Law Society's response is informed by its Indigenous Issues and Human Rights Committees. We raise the following issues for the Law Council's consideration.

We understand that the Joint Select Committee has been requested to inquire into the following:

- the Australian Government policy, program and legal response to the redress related recommendations of the Royal Commission, including the establishment and operation of the Redress Scheme and ongoing support of survivors; and
- any matter in relation to the Royal Commission's redress related recommendations referred to the committee by a resolution of either House of the Parliament.

To the extent that the following issues fall within the scope of the Joint Select Committee's mandate, the Law Society requests that the Law Council raises the following issues:

- Eligibility of survivors who have gone on to commit certain criminal offences;
- Redress for non-citizens and non-permanent residents;
- Concerns in respect of the application form;
- Redress available to Stolen Generations survivors in NSW.

The Law Society continues to hold the view that survivors' access to the redress scheme should be guided by the Royal Commission's views, which do not recommend any restrictions to access to redress on grounds related to criminal history or citizenship.

1. Restriction on the grounds of criminal offending

We note that the Senate Inquiry report on the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 made the following recommendation:

The Committee recommends that in finalising the position on the exclusion of serious criminal offenders from the Redress Scheme, the Australian, state and territory governments should consider the value of the Redress Scheme as a tool for the rehabilitation of offenders, and that excluding criminal offenders can have the unintended consequence of institutions responsible for child sexual abuse not being held liable.

The Government's response to that is as follows:

The Government agrees with this recommendation. In finalising the position on access to the Scheme by survivors with serious criminal convictions, the Government will balance the need to ensure the Scheme does not suffer reputational damage should a survivor with a particularly notorious history of violent or heinous offending receive a redress payment, with the value of the Scheme as a tool for the rehabilitation of offender. Consideration will be given to the nature of the offence, length of sentence, length of time since the person committed the offence, and any rehabilitation of the person.¹

Both the Senate Committee's recommendation and the Government's response are fairly equivocal. While it appears that there may be some flexibility on a case by case basis for survivors who have committed certain criminal offences, it also appears that those survivors who have served five years or more may have a very difficult task ahead of them. It is not clear from the website whether survivors will be given an opportunity to comment if the Attorney-General does not support their application – or if the scheme operator forms an adverse view about 'rehabilitation' or 'community expectations'.

The Law Society suggests that the Law Council continue to advocate that access to redress should not be restricted in this way, but suggest that at the least, each application should be assessed on a case-by-case basis, with more weight accorded to the purpose of redress than to concerns about reputational damage. We ask the Law Council to seek clarification in respect of appeal processes.

2. Restriction on the grounds of citizenship or permanent residency

We note that the Senate Committee did not make any recommendations in respect of the eligibility of non-citizens and non-permanent residents for redress, but the Labor members of the Senate Committee did recommend that all survivors should be eligible. The Government, in its response, remains opposed to allowing non-citizen and non-permanent resident survivors access to redress.

We request that the Law Council continue to advocate strongly that citizenship and permanent residency should not be a requirement for eligibility, consistent with the Royal Commission's view.

¹ Australian Government response to the Senate Community Affairs Legislation Committee report: Inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions], May 2018, 7, available here: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AbuseRedressScheme/Government_Response.

3. Application form for redress

Our members are concerned that the application form is very long, and that there are risks of re-traumatising survivors. Members have expressed concern in relation to whether survivors will be able to complete the form, with or without assistance, for literacy reasons as well as for reasons related to re-traumatising.

In relation to the latter concern, the notes to question 44 give an indication as to the level of detail that is required, and question 58 also seems unnecessary. The Law Society requests that the Law Council raise these concerns.

4. Redress for NSW Stolen Generations survivors

The Law Society is aware that in NSW, many Stolen Generations survivors are concerned about the redress available to them in respect of this scheme and a number of questions are outstanding.

- a) Are people, who as children, who were groomed, and/or witnessed the sexual abuse of other children, eligible for redress?

At the Kinchela Aboriginal Boys Training Home for example, wives of the managers and staff would at different times stand in the shower rooms while the boys were showering, watching them. This is an experience that some of the survivors have described as confusing and shameful, especially when they were going through puberty.

Sexual abuse is defined in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* ("Act") to include "any act which exposes the person to, or involves the person in, sexual processes beyond the person's understanding or contrary to accepted community standards." Arguably such experiences would fall within the definition. The Law Society seeks clarity on this point and is of the view that redress should be available in these circumstances. It would be helpful for the Joint Select Committee to produce guidance material for individual assessors addressing the parameters of the definition of sexual abuse, allowing for discretion to be applied on a case by case basis to avoid unjust outcomes. We consider that ongoing support for survivors should include education and information in respect of what constitutes grooming activity.

- b) In NSW, are the former Aboriginal missions and reserves (up until the 1969 disbanding of the Aborigines Welfare Board) identified as institutions within the redress scheme?

The Act provides that the Minister may declare a state institution a participating institution (s 115) where, in the case of NSW institutions relevant to Stolen Generations survivors, NSW must agree to that institution participating in the scheme (s 115(3)(a)).

If NSW does not address this issue of its own accord, the Law Society requests that the Joint Select Committee seek that NSW declare missions and reserves participating institutions, such that people who, as children under the control of Aborigines Protection and Welfare Board managers/staff experienced child sexual abuse there, can be eligible for redress. If applications for redress are made for redress in respect of an institution prior to that institution being declared a participating institution, those applications should be revisited once the declaration is made (without further need for survivors to re-activate the application). We also seek information on whether there will be a process for requesting that the Minister declare an institution a participating institution.

- c) Survivors are uncertain about what course of action they should take to ensure they receive the most monetary compensation to which they are entitled. Survivors are aware

of the redress scheme, but we understand that some individual law firms are advocating that individuals pursue legal avenues.

Some survivors have already received some compensation as a result of a group action. However, we understand that there was misapprehension of the fact that the quantum awarded would turn on experience of sexual assault (and its severity), and as such, some survivors either did not disclose, or did not fully disclose, their experiences of sexual assault that took place while they were wards of NSW. We also understand that not insignificant legal fees were deducted out of those survivors' final settlements.

There are a number of issues arising out of this situation. Some of the survivors who took part in the group action are of the view that the group action did not result in fair outcomes, and are further concerned that this process will negatively impact on their ability to receive redress under the scheme.

Other survivors remain uncertain about whether to pursue legal action, and/or to seek redress under the scheme. This is obviously an issue of some urgency, given that many Stolen Generations survivors are of advanced age, or are in ill health (or both).

The Law Society requests that the Law Council advocate on the following issues in respect of the redress scheme's oversight:

- That direction be issued in respect of assessing the applications of Stolen Generations survivors that particular attention be paid to the facts and circumstances of each application, and for discretion to be exercised in the interests of justice to ensure that survivors receive proper redress.
- That oversight of the redress scheme include oversight of the provision of independent accessible and culturally appropriate advice to Stolen Generations survivors so that they can make informed decisions about what course of action they wish to pursue, and to limit their exposure to legal and other fees/costs.

Thank you for the opportunity to comment. Any questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Doug Humphreys OAM
President