BAR ASSOCIATION OF QUEENSLAND

20 July 2018

Health, Communities, Disability Services and
Domestic and Family Violence Committee
Parliament House
George Street
Brisbane Qld 4000

By email: health@parliament.qld.gov.au

Dear Committee Secretary

Re: National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Qld)

Thank you, on behalf of the Bar Association of Queensland ('the Association'), for the invitation to make a submission in relation to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee's ('the HCDSDFVP Committee') review of the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018* (Qld) ('the Queensland Bill').

The Queensland Bill proposes to enable the Federal Government's National Redress Scheme for Institutional Child Sexual Abuse ('the National Scheme'), established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) ('the Commonwealth National Redress Act'), to operate in Queensland.

The Queensland Bill also proposes to introduce a framework to enable information sharing by Queensland Government agencies for the purposes of the National Scheme, and amend the *Victims of Crime Assistance Act 2009* (Qld) so that redress payments may not be deducted from victim assistance payments.

The Association has restricted its submission to particular aspects of the Commonwealth National Redress Act which, if adopted in Queensland, will have a significant and unfair impact on applicants to the National Scheme with criminal histories. The Association asks that the HCDSDFVP Committee bring these matters to the attention of the Federal Government so that they may be addressed within the National Scheme directly.

Section 63 - applicants with criminal histories

Context and legislative history

Following the announcement of the National Redress Scheme, there was a considerable lack of clarity surrounding the Commonwealth Government's intention to introduce an exclusionary provision for applicants with certain criminal histories.

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On 26 October 2017, the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* (Cth) ('the 2017 Bill') was introduced. The 2017 Bill contained no such exclusionary provision.

However, on 6 February 2018, the Commonwealth Government submitted to the Senate Community Affairs Legislation Committee's review of the 2017 Bill that persons 'convicted of any sexual offence or another serious crime, such as serious drug, homicide or fraud offences for which they received a custodial sentence of five or more years' would be excluded from the National Scheme.[1] The Senate Community Affairs Legislation Committee subsequently recommended in its report of March 2018 that (emphasis added):

> *"...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 consequences of institutions responsible for child sexual abuse not being held liable".*[2]

On 10 May 2018, the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2018* (Cth) ('the 2018 Bill') was introduced, with a 'special assessment of applicants with serious criminal convictions' proposed at s. 63. This provision was not subject to amendment prior to the 2018 Bill being passed by the Commonwealth Parliament.

The Commonwealth National Redress Act

Section 63 of the Commonwealth National Redress Act provides:

(a) if a person makes an application for redress under the National Scheme; and
(b) before or after making that application that person is sentenced to imprisonment for five years or longer for an offence against a law of the Commonwealth, a State, a Territory or a foreign country;

that person is not entitled to redress under the National Scheme, unless there is a determination that the person is not prevented from being entitled to redress.[3]

There is no obligation on the Commonwealth Redress Scheme Operator ('the Operator') to make such a determination. The Operator is only obliged to *'consider whether to make a determination'*.[4]

The Operator may only make a determination if satisfied that providing redress to the applicant will not:

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[1] Department of Social Services, Submission No 27 to the Senate Community Affairs Legislation Committee, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (2018) 4.
[2] The Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (2018) 94.
[3] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63(1).
[4] Ibid s 65(3).

(a) bring the National Scheme into disrepute; or
(b) adversely affect public confidence in, or support for, the National Scheme.[5]

Further, in making a determination, the Operator must take into account:

(a) any advice given by a specified advisor[6] in the period referred to in the notice;[7] and
(b) the nature of the offence; and
(c) the length of the sentence of imprisonment; and
(d) the length of time since the person committed the offence; and
(e) any rehabilitation of the person; and
(f) any other matter that the Operator considers is relevant.[8]

This provision effectively establishes a default position whereby a person who has been subjected to sexual abuse as a child in an institutional setting is not entitled to redress (which includes access to counselling and psychological services).

The Association's position

The Association is opposed to s 63 of the Commonwealth National Redress Act. Applicants to the National Scheme who have been sentenced to imprisonment for five years or longer for an offence against a law of the Commonwealth, a State, a Territory or a foreign country should be treated equally when applying for redress, for the following reasons.

First, the objective of the National Scheme, according to the Explanatory Memorandum of the 2018 Bill, is to 'recognise and alleviate the impact of past institutional child sexual abuse'.[9] The Association is of the view that restricting an applicant's entitlement to recognition, and alleviation, of past institutional child sexual abuse due to subsequent criminal acts is inconsistent with this objective.

Second, it is the experience of criminal law practitioners that a significant proportion of offenders report having suffered sexual abuse, in an institutional setting, as a child. This anecdotal experience is supported by the following findings of the Royal Commission into Institutional Responses to Child Sexual Abuse's Final Report ('the Final Report') (emphasis added, footnotes omitted):

> *A number of survivors in private sessions and public hearings described how the impacts of child sexual abuse had contributed to their criminal behaviour as adolescents and adults. Of the survivors who discussed impacts of abuse in private sessions, 22.7 per cent said they committed one or more types of criminal offence.*
> ...

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[5] Ibid s 63(5).
[6] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63(3)(b) provides that the specified advisor is the Commonwealth Attorney-General, or the Attorney-General of the State or Territory, depending on where the abuse of the person occurred.
[7] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) ss 63(3)(b) and (4) require the Operator to give written notice to the specified advisor, providing information and requesting that they provide advice on whether a determination should be made.
[8] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63(6).
[9] Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Cth), National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (Cth) 7.

> *There is a growing body of research that examines a potential relationship between child sexual abuse and subsequent criminal offending. While the vast majority of child sexual abuse victims do not go on to commit crimes, some research suggests a higher prevalence of offending than for people in the general community. According to one large-scale Australian study, child sexual abuse victims were almost five times more likely to be charged with an offence than their peers in the general population. Studies of victims of child sexual abuse in institutional contexts have also suggested increased rates of criminal behaviour, charge and conviction ...* ".[10]

A large cohort of individuals, many of whom have performed criminal actions which may be linked to themselves being victims of the sexual abuse which the National Scheme is intended to recognise, will be unfairly prejudiced by the default position in s 63 of the Commonwealth National Redress Act. From an individual and societal point of view this exclusion is both unjust and counter-productive.

The Association's opposition to s 63 of the Commonwealth National Redress Act is shared by a number of interdisciplinary organisations, including those who made submissions to the Community Affairs Legislation Committee on the 2018 Bill such as the Law Council of Australia, the Australian Human Rights Commission, the Australian Psychological Society, and the Royal Australian and New Zealand College of Psychiatrists.

The Association is concerned that the Queensland Bill proposes to adopt the 'special assessment of applicants with serious criminal convictions' in s 63 of the Commonwealth National Redress Act to the significant detriment of Queensland applicants.

Sections 34 & 73 – review procedure

The Association is conscious that there is some debate over the proper construction of ss. 34 and 73 of the Commonwealth National Redress Act. It is not clear whether the review procedure is only available to someone whose application is rejected, or whether it is also available to someone who is successful (i.e. offered redress) but who wishes a review of the quantum of redress on offer. It appears that the applicant only has the choice of accepting or rejecting the offer of redress, and it also appears that the review mechanism references only the rejection of an application. In order to remove any ambiguity or scope for avoidable litigation, it may be of assistance to specifically provide in s. 73 for a review of the quantum of redress that is offered to the applicant whilst still (for the purposes of the litigation) "accepting" the offer.

Church institutions which no longer in operation/existence

The Association considers there is a potential lacuna in the Commonwealth National Redress Act in respect of those church institutions which are no longer in operation or existence. Whilst a number of church hierarchies have offered to *"stand in the shoes"* of the defunct church agency or religious order, there is still a potential problem with the operation of the National Scheme. This is because whilst the church hierarchy might offer to *"stand in the shoes"* of the defunct agency for the purposes of contribution to the National Scheme, there is the issue of the provision of information to the Operator for the purposes of determining an application for redress.

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[10] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) vol 3, 143-144.

For example, the Commonwealth National Redress Act provides very limited guidance as to what is to occur in the event that the relevant liable institution is unable/incapable of providing the requested information (ss 13, 26(2), 29(1)). In the Association's view, clearer guidance to the Operator as to how to proceed in this scenario should be provided.

Family law proceedings – protected information

It is clear that for the purposes of ss 79 and 90SM of the *Family Law Act 1975* (Cth) ('the Family Law Act'), that any monetary redress paid under the National Scheme would constitute *"property"* (once received) or a *"financial resource"* (if determination of the application is pending). However, it is very clear that the redress is not to be deemed in any civil proceedings, under the Commonwealth National Redress Act, as being by way of compensation or damages (s. 49(1)(b)). This has the potential to complicate proceedings under the Family Law Act for the alteration of property interests in circumstances where one of the parties has received/anticipates receiving redress.

An option for a Court determining applications under ss. 79 or 90SM of the Family Law Act is to treat any redress as akin to a windfall or gift. The potential significance of this question arises because a necessary imperative for the Court when determining such applications is to assess the significance of a party's contributions to the acquisition, conservation or maintenance of property – which would include the redress. Another necessary imperative for the Court when determining such applications is to assess the significance of any future needs of a party, per ss. 75(2) and 90SF(3) of the Family Law Act, which again potentially includes the stated reasons for the redress which would include the redress payment.

However, first, it is clear that the information which informed the Operator's decision to grant the redress is *"protected information"* (s. 92 of the Commonwealth National Redress Act) and that even if the applicant for redress consents to the release of that information, it is not necessarily then released by the Operator, per ss. 93-96. Second, it is unclear whether the fact and amount of monetary payment by way of redress (as distinct from the information which informed the reasons to offer the redress) is itself something which falls under the definition of *"protected information"*, per s. 92(2)(a)(ii) of the Commonwealth National Redress Act. Third, an applicant who receives redress under the National Scheme cannot be required/must not be required to disclose protected information in any civil proceedings, including proceedings in the family law jurisdiction, per ss. 105(1) and 175(1). Yet, in the family law jurisdiction, both the rules and the jurisprudence are clear that it is essential to applications under ss. 79/90SM of the Family Law Act that parties' provide full and frank disclosure of their financial circumstances.

Accordingly, in order to both respect the privacy concerns the Commonwealth National Redress Act has for the survivor and to facilitate subsequent family law proceedings, it would be appropriate for the release of that protected information to be allowed (both the information provided by the applicant for redress, the information from the responsible institution and the reasons which led to the offer of redress) limited to the purposes of those proceedings. Similar limited use of protected information is countenanced in the Commonwealth National Redress Act in litigation relating to the Department of Human Services.

In the alternative, it may be appropriate to allow for the release of that protected information (both the information provided by the applicant for redress and the information from the responsible institution and the reasons which led to the offer of

redress) limited to the purposes of those proceedings if, and only if, on the application to the Operator of a party to those family law proceedings, the Operator determines that there is no other reasonable alternative for the acquisition of that information.

In either case, there would be a need to exempt the operation of s. 105(1) of the Commonwealth National Redress Act in respect of civil litigation in the family law jurisdiction.

Similar problems arise in respect of protected information in parenting matters in the family law jurisdiction. Statistically, if not casually, there is a correlation for a significant proportion of survivors of childhood sexual abuse to themselves, as adults, then engage in the abuse of children. Accordingly, it is probable that in the family law jurisdiction, it would be relevant for the Court to have access to the protected information which the Commonwealth National Redress Act would, in its present form, not permit being disseminated to the parties involved in litigation under the Family Law Act.

The relevance of protected information to proceedings in the family law jurisdiction is exemplified in matters in which the Court has to make findings as to whether a parent has sexually abuse a subject child or poses an unacceptable risk of sexually abusing a subject child. A matter that can appropriately be taken into account by a Court, and which would be of vital concern to any psychiatrist tasked with assessing a parent involved in family law litigation (as commonly occur as in these kinds of cases), would be the history of childhood development and experience of suffering sexual abuse in a parent's background. In such cases, the protected information would cast light on either the propensity of the accused (to sexually abuse a child) or the hyper vigilance of the accuser (to misinterpret innocent actions as being sexual abuse of a child).

The Association's suggested changes regarding disclosure of protected information in property proceedings in the family law jurisdiction would also apply in relation to the use of protected information in parenting proceedings in the family law jurisdiction. The Commonwealth National Redress Act does permit some limited release of protected information to *"... prevent or lessen a serious threat to an individual's life, health or safety"* per s. 93(1)(f), however, under s. 93 such information can only be then released/used in an "aggregated form".

The Commonwealth National Redress Act also permits the Operator to disclose protected information if the disclosure is necessary in *"the public interest in a particular case"* per s. 95(1); or is reasonably necessary for the safety and well-being of a child per s. 96(1)(b). However, that exercise of discretion by the Operator is subject to the mandatory consideration of the impact such disclosure may have on the application for redress per s. 96(3).

However, the Association considers that provisions ss. 93-6 of the Commonwealth National Redress Act are inadequate to the task of putting relevant information before a Court in the family law jurisdiction which is charged with investigating historical harm to a child and assessing the risk of future harm to a child. Whilst it is possible that the information may be obtainable from other sources via other means, there is a potentially unique quality or forensic value or the protected information. This is because it would be one of the rare occasions in which both the applicant/parent and that person's abuser (via the responsible institution) have gone on the record as to the particulars of that sexual abuse and its sequelae.

Conclusion

Thank you for the opportunity to provide our comments in relation to the Queensland Bill, which proposes to implement the Commonwealth National Redress Act in Queensland.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

G A Thompson QC
President