

**Commonwealth Redress Scheme for  
Institutional Child Sexual Abuse Bill  
2017 and Commonwealth Redress  
Scheme for Institutional Child Sexual  
Abuse (Consequential Amendments)  
Bill 2017**

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Submission to the Senate Standing Committee on Community Affairs  
FEBRUARY 2018

## 1. Introduction

Shine Lawyers are pleased to provide this submission in response to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (Consequential Amendment Bill).

We refer to and endorse the submissions to this Committee made by Dr. Cathy Kezelman AM on behalf of the Blue Knot Foundation.

## 2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors seeking redress in every institutional redress scheme in Australia. These include but are not limited to the Defence Abuse Response Taskforce, *Victims of Crime Act 2001* (SA), Queensland ex gratia scheme, Tasmanian Abuse in Care ex gratia scheme, the WA Redress, Defence Force Ombudsman reparation scheme, Melbourne Response and Towards Healing.

Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) and made a submission in response to the Redress and Civil Litigation Consultation Paper in March 2015.<sup>1</sup>

The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

### **Neerkol Group Litigation**

The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, operated by the Sisters of Mercy.

### **Nudgee Orphanage Group Litigation**

This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

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<sup>1</sup><https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation%20-%20Submission%20-%20174%20Shine%20Lawyers.pdf>

### **Brisbane Grammar Sexual Abuse Litigation**

This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

### **St Paul's Sexual Abuse Group Litigation**

The claim involved some 25 former students of St Paul's School in Brisbane who were subjected to sexual abuse during their school years.

### **Scriven v Toowoomba Preparatory School**

This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

## **3. Submissions**

We support the urgent implementation of a survivor-focused national redress scheme for survivors of institutional child sexual abuse. Avoiding further delay implementing a national redress scheme is imperative. Amongst our clients are survivors who suffer terminal illnesses who may not survive until the proposed date applications open of 1 July 2018. Any further delay by the government securing the participation of state and territory governments and non-government institutions worsens the prospects these survivors can access justice in their lifetime. Many of our clients suffer from significant psychiatric illnesses and require access to medical and allied-health services, services which in some instances will only become available through redress. Further delay implementing a redress scheme delays access to psychiatric treatment and has tangible impacts on survivor's health.

A survivor-focused redress scheme must complement and not replace the rights of survivors to pursue remedies available at common law through civil litigation and further reform to civil litigation must accompany the creation of a national redress scheme.

This submission will address the following issues:

- Support for a national scheme;
- Definition of sexual abuse;
- Counselling and psychological care;
- Amount of monetary payments for redress;
- Legal assistance provided to survivors;
- Eligibility requirements for survivors; and
- Funders of last resort.

## **4. A national scheme**

As a law firm with branches in four states and clients in each state and territory, Shine Lawyers strongly supports the implementation of a single national redress scheme. To establish multiple independent schemes in each state and territory would create confusion amongst survivors and advisors in terms of:

- which scheme is appropriate for applicants;
- potential inconsistencies in relation to application processes;

- potential inconsistencies between schemes in relation to timeframes/cut-offs/deadlines;
- schemes using different eligibility or assessment criteria, or rule, or otherwise applying the schemes inconsistently from one scheme to the next;
- potential inconsistency in relation to the payments available under different schemes creating injustice for and between survivors;
- potential for some survivors to access multiple redress payments and other survivors to have access to none depending on arrangements in each state for institutions which no longer exist or which have no or inadequate assets to satisfy judgment; and
- potential inconsistency in relation to any other assistance that is available to survivors in order to access the scheme.

In order to achieve justice, it is imperative that survivors be treated equitably and that they not achieve different outcomes depending on the state the survivor resides in or the nature of the institution response for their abuse.

## **5. Definition of sexual abuse**

Clause 9 of the Bill defines sexual abuse as follows:

Sexual abuse of a person who is a child include[s] 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 (for example exposing a child to pornography).

Shine Lawyers represents clients who experienced the following sexual abuse which, consistent with the objective of non-legalistic decisions, we consider to include sexual abuse:

One survivor was in a classroom with a teacher and other pupils when his pants were pulled down exposing his genitals to the teacher and other pupils. The teacher proceeded to strike our client a number of times on his buttocks.

Another survivor was required to shower naked while being watched by a teacher.

Yet another survivor was required to be in close proximity to a priest and to watch while the priest fondled the priest's genitals.

Each of these examples exposed the child in question to sexual processes beyond the child's understanding including voyeurism, sadism and public humiliation and certainly any forced public nudity is contrary to accepted community standards.

We request to be consulted in the event any of the above circumstances is considered not to be sexual abuse in advance of the scheme commencing operation, particularly as the proposed scheme allows no external review mechanism. This may minimize distress and further trauma to survivors.

## 6. Counselling and psychological care

The Bill makes inadequate provision for redress to support counselling and psychological care. The Redress and Civil Litigation report recommended the following principles regarding psychological care and treatment:

- a. Counselling and psychological care should be available throughout a survivor's life.
- b. Counselling and psychological care should be available on an episodic basis.
- c. Survivors should be allowed flexibility and choice in relation to counselling and psychological care.
- d. There should be no fixed limits on the counselling and psychological care provided to a survivor.
- e. Without limiting survivor choice, counselling and psychological care should be provided by practitioners with appropriate capabilities to work with clients with complex trauma.
- f. Treating practitioners should be required to conduct ongoing assessment and review to ensure treatment is necessary and effective. If those who fund counselling and psychological care through redress have concerns about services provided by a particular practitioner, they should negotiate a process of external review with that practitioner and the survivor. Any process of assessment and review should be designed to ensure it causes no harm to the survivor.
- g. Counselling and psychological care should be provided to a survivor's family members if necessary for the survivor's treatment.

Unfortunately, the Bill only adopts the following more limited principles. We support each of these principles however these alone do not adequately cover the breadth of matters recommended by the Royal Commission:

### 49 General principles guiding counselling and psychological services

1. Survivors should be empowered to make decisions about their own need for counselling or psychological services.
2. Survivors should be supported to maintain existing therapeutic relationships to ensure continuity of care.
3. Counselling and psychological services provided through redress should supplement, and not compete with, existing services.

We support the Royal Commission recommendation that counselling and psychological care should be provided to recipients of redress throughout their lives and not merely for lifetime of the scheme or limited in some other manner as later provided for under clause 48. The Second Reading Speech suggests that access to counselling or psychological services of a survivor's choice will form part of redress throughout survivor's lives.<sup>2</sup> The Explanatory Memorandum says that psychological care services will be 'available throughout [survivor's] lives'<sup>3</sup> however

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<sup>2</sup><http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F6598e913-3fd0-4f8e-ba21-f6772226d702%2F0011%22>

<sup>3</sup>[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F6006\\_ems\\_4a12d8b2-12fa-40e7-9709-f72fcf515cd5%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F6006_ems_4a12d8b2-12fa-40e7-9709-f72fcf515cd5%22) at p5.

the same document also says that subclause 49(1) provides that counselling and psychological services should be 'available throughout the life of the Scheme'.<sup>4</sup>

Shine Lawyers represented several claimants under other redress schemes who experienced significant upheaval when their access to psychiatric and related care was withdrawn upon the conclusion of the scheme or when a monetary redress payment was made. We request to be consulted in relation to the creation of any Commonwealth Redress Scheme Rules (Rules) pursuant which would limit access to treatment, counselling or psychological care and would oppose any Rules which limit counselling or psychological care in any way inconsistent with survivor's needs.

## **7. Amount of payments for redress**

Shine Lawyers supports the recommendation of the Royal Commission as follows:

The appropriate level of monetary payments under redress is a maximum payment of \$200,000 and an average payment of \$65,000. We consider that the higher maximum payment is appropriate to allow recognition of the most severe cases, taking account of both the severity of the abuse and the severity of the impact of the abuse.<sup>5</sup>

The Bill adopts a substantially lower amount of \$150,000 as the maximum payment and also fails to give effect to the Royal Commissions recommendation that a minimum amount of a redress payment be set at \$10,000.

No amount of money can return a survivor of child sexual abuse to the position they would have been but for the abuse however the amount offered must be enough to make a tangible impact on a survivor's life. The amount of any monetary payment must also be high enough to give effect to the need to present the acceptance of a redress payment as a genuine alternative to civil litigation. Survivors should not be further traumatised by being placed in a position where they feel the only adequate recompense is available through the means of civil litigation.

Extensive data analysis and other research was undertaken by the Royal Commission and relied upon in order to reach the recommended maximum payment of \$200,000 and average payment of \$65,000. No justification has been forwarded for the failure for the Bill to accept the Royal Commission recommendation.

In the event the amount of a redress payment is to be reduced to take into account a relevant payment made to a survivor in the past, it is unjust for that amount to include amounts previously paid for legal costs. It is well known that various institutions including government and non-government institutions defended legitimate claims by survivors causing contributing to legal costs of survivors.

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<sup>4</sup> Ibid at p31.

<sup>5</sup>[https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_redress\\_and\\_civil\\_litigation.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf) at p252.

Survivors ought not to be punished by having their maximum redress payment reduced by the amount of legal costs the survivor was forced to incur due to the legal tactics of the culpable institution. This is inconsistent with the objects of the act being to achieve justice for survivors.

We note that Clause 34 provides for the Minister to declare, in writing, a method, or matters to take into account for the purposes of working out the amount of redress payment for a person. We request to be consulted in relation to the assessment matrix.

## **8. Legal assistance provided to survivors**

It is critical that the scheme have a mechanism for survivors to access legal assistance for completing the application form, deciding whether to accept and offer or to seek a review and properly understanding a release. This should include access to paid assistance from a private legal firm and ought not to be limited to advice regarding an offer of redress which has already been made at the conclusion of an application.

No matter how well a scheme is established, the process of applying for redress requires some degree of evidentiary and advocacy skills and may still be distressing to survivors. Based on our experience acting for survivors of abuse in other schemes, survivors often find it difficult to write about their experiences, both practically and emotionally. For example we acted for many survivors during the DART process who had initially tried to complete the DART forms themselves which required them to write about their experiences. Their limited level of literacy coupled with alcohol and other substance abuse meant that they found this process incredibly distressing, any many could not complete it effectively without assistance. Further, many of these survivors lived in remote locations which added to the challenge.

As indicated above, the method or matters to be taken into account to work out the amount of a redress payment is not yet known. It is not yet known whether for example, further evidence from witnesses or medical or counselling reports will be sought or relied upon by any decision-maker. If evidence is required from medical professionals, counsellors and social workers this may make it more difficult for survivors to properly prepare applications without legal assistance in coordinating and obtaining the suitable evidence. The Bill provides for a higher standard of proof than the DART scheme imposed suggesting a greater need for legal assistance throughout the course of an application. Access to skilled legal assistance contributes to the efficiency and speed of the application and decision making process in the proposed redress scheme and there is no such mechanism in the Bill.

There is a real risk that the quality of the application prepared will result in a disparity of outcomes. The consequences of consulting lawyers only towards the end of a matter is that survivors may lose the opportunity to present parts of their story which might have resulted in a higher payment. As there is no external appeal mechanism, this might result in survivors choosing to withdraw and resubmit applications for redress which is likely to increase the administrative costs of the scheme or to pursue civil litigation as an alternative by which legal costs are recoverable.

Survivors should receive an allowance to obtain legal assistance to prepare the application for redress. We proposed in our submission to the Royal Commission's Redress and Civil Litigation Consultation Paper that assistance should be provided on a fixed fee basis and must take into account the time required to take adequate instructions and prepare a detailed statement in relation to the abuse, and to provide assistance in the completion of the appropriate forms. These detailed instructions are required, even where a person seeks advice after an offer of redress is made, in order to enquire the advice provided is based on adequate information and is tailored specifically to a survivor's circumstances. Shine recognises the importance that survivors not be de-individualised in the process of seeking or accepting an offer of redress and consequently the time advising our clients is required accordingly.

The proposed redress scheme is complex and the absence of provision for paid legal assistance for survivors within the clauses of the Bill is concerning. We note that clause 117(2) provides for rules to be made including for the provision of legal services under the redress scheme and we respectfully request to be consulted regarding those rules in due course.

## **9. Eligibility requirements for survivors**

On 26 October 2017, the Government announced the exclusion from eligibility under the national redress scheme, people who had been convicted of sex offences or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences.<sup>6</sup>

The Royal Commission observed that there is a clear link between abuse and psychological and mental health issues in adult life.<sup>7</sup> It also reported a higher risk of imprisonment for survivors of child sexual abuse than the general population.<sup>8</sup> We represent many survivors whose lives were irreparably impacted by child sexual abuse and who went on to commit offences as children or adults who would be unfairly excluded from the redress scheme. One such example is as follows:

Our client was sexually abused as a child while attending weekend respite care including being forced to watch pornography and shown how to use sex toys. Despite reporting the abuse to the foster carers and to the department, our client was returned to the abuser where the abuse continued on numerous further occasions. No interventions were provided when our client, still a child, began to demonstrate harmful sexual behaviours themselves and went on to have disrupted schooling. Regrettably our client perpetrated child sexual abuse as an adult.

Our client served a sentence and underwent rehabilitation and counselling assisting them, for the first time, to understand the boundaries of acceptable behavior and address the thoughts causing them to perpetrate harmful behavior.

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<sup>6</sup><http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256>

<sup>7</sup>[https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_redress\\_and\\_civil\\_litigation.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf) p177.

<sup>8</sup> Ibid at 179.



Excluding people who have been convicted of sex offences or served prison terms would effectively punish a person twice. These people were justly punished through the criminal justice system where they paid the penalty for the wrongs committed. Their sentences were decided individually by a judge with the benefit of relevant information. It would punish these survivors twice, over and above the sentence imposed by the judge, by arbitrarily preventing them from accessing redress on an equitable basis to other survivors.

We strongly oppose the government proposal to exclude survivors from eligibility for redress based on wrongs committed by survivors. We are not persuaded that excluding these survivors from eligibility protects the integrity of the scheme and nor was the Royal Commission. To the contrary, it would stand in contrast with the integrity of a redress scheme if all affected survivors pursued civil litigation instead of seeking redress.

## **10. Funders of last resort**

Shine Lawyers supports the general framework for governments to be funders of last resort in circumstances where an institution no longer exists and a successor institution cannot be identified or where an institution has no or insufficient resources to fund redress.

It is essential to achieve justice for survivors that redress be available to survivors across every participating institution and should not depend on institution still existing or having sufficient resources available to contribute to the scheme.

Governments have a broader responsibility for the wide spread perpetration of sexual abuse against children which extends beyond government institutions.<sup>9</sup> Having regard to this broader responsibility, governments ought to be funders of last resort.

The Royal Commission commissioned estimated the likely cost to governments as funder of last resort would be approximately \$613 million or 15.3% of the total cost of the redress scheme. Shine Lawyers supports the view of the Royal Commission that this is 'a fair and reasonable amount to expect governments to pay given their social, regulatory and guardianship responsibilities'.<sup>10</sup> A responsibility at which, each and every government failed spectacularly.

## **11. Consequential Amendment Bill**

We support the provisions of the Consequential Amendment Bill in so far as it ensures that redress payments made to survivors do not impact on existing entitlements and benefits including under the *Social Security Act 1991* and the *Veterans' Entitlement Act 1986* (VEA). We are concerned however that the protections in the Bill do not go far enough. The Explanatory Memorandum says:

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<sup>9</sup> <https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation> at p32.

<sup>10</sup> Ibid at p34.

Payments made under the Scheme will be exempt from the income test under the Social Security Act and the Veterans' Entitlements Act and will not reduce income support payments to a person who receives redress. This is because any payment under the scheme will not meet the requirements for being ordinary or statutory income.<sup>11</sup>

We are concerned that it is still open to the Department of Veterans' Affairs to reduce income support payments by revoking liability for psychiatric illnesses already accepted under the VEA or the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA) on the basis the psychiatric illness results from abuse and not from other service incidents.

Consider the below example extracted from a letter from the Department of Defence in October 2016:

Based on your letter, this claim appears to be similar to [BLANK] in that Mr [BLANK] is receiving a DVA pension based on PTSD, presumably as a result of his service in Vietnam and related to [BLANK] on HMAS Brisbane, after which he was discharged unfit. A few things flow from that.

First, it undermines his claim that his PTSD is as a result of something that happened at HMAS Leeuwin. More importantly, if he is now saying that his PTSD is caused by something other than what he told DVA, it undermines his DVA claim and he is potentially in trouble if he has made a false statement to DVA...

We have also been contacted by at least one other survivor who feels unable to pursue redress, either through this scheme or the Defence Force Ombudsman as a result of child sexual abuse, on the basis that the veteran's hard-fought pension for war-caused PTSD under the VEA may be compromised. As outlined in the example above, these fears are not without reason. The above example indicates that a veteran who receives a pension for other psychiatric illnesses may be accused of giving false statements to the Department of Veterans' Affairs were they to seek reparation for child sexual abuse. We have no reason to think the Department of Veterans' Affairs will take a different approach following a payment of redress than they did in the above matter, particularly in light of the concerns the Royal Commission identified regarding the way DVA processes claims for victims of child sexual abuse.<sup>12</sup>

We recommend consideration be given to how to ensure existing entitlements and benefits are not impacted, even where those entitlements are received as a result of service-related psychiatric illnesses caused otherwise than by child sexual abuse.

Furthermore, veterans whose pensions are paid pursuant to the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* should receive the same protection as those veterans whose payments are made pursuant to the VEA.

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<sup>11</sup>[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6006\\_ems\\_4a12d8b2-12fa-40e7-9709-f72fcf515cd5%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6006_ems_4a12d8b2-12fa-40e7-9709-f72fcf515cd5%22)

<sup>12</sup> See [https://www.childabuseroyalcommission.gov.au/sites/default/files/case\\_study\\_40\\_-\\_findings\\_report\\_-\\_australian\\_defence\\_force.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/case_study_40_-_findings_report_-_australian_defence_force.pdf)

## 12. Conclusion

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact Lisa Flynn, National Special Counsel – Abuse Law at [lflynn@shine.com.au](mailto:lflynn@shine.com.au) or on 13 11 99.