know more

Submission to the Senate Committee for Community Affairs

The National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and related Bill

31 May 2018

1. Introduction

knowmore legal service has previously made a detailed submission[1] to the Committee's inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 ('the previous Bill'), and the related Bill. That submission was dated 2 February 2018 and addressed a number of concerns relating to the previous Bill. Those issues were further addressed in evidence given by knowmore's Executive Officer before the public hearing of the Committee in Canberra on 16 February 2018.

It is noted that the Bills which are the subject of the current inquiry by the Committee (that is, the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018) reflect significant drafting changes from the previous Bill.

This submission by knowmore will address some of the issues which are impacted by those drafting changes. Our submission will not reiterate the views we have previously raised about issues which have not been addressed in the redrafting of the current Bill; for example, the retention of the current cap of $150,000 for redress payments made under the National Redress Scheme ('the scheme'), and the requirement for applications for redress to be made in the form of statutory declarations. However, we continue to hold the concerns that we have previously raised about these matters and we rely on our earlier submission as reflecting those views.

We note also that the subordinate instruments which will accompany the redress legislation, such as the Assessment Matrix and the National Redress Scheme Rules, have not yet been published or made available (at least to our service) for consultation or feedback. These subordinate instruments provide for many important issues relating to the operation of the National Redress Scheme and, accordingly, we repeat our early request that drafts be made available as soon as possible, particularly in light of the intended commencement of the scheme on 1 July 2018.

We would be pleased to provide further information on any issue raised in this submission if the Committee requires.

We have no concern about the publication of this submission, and thank the Committee for the opportunity to provide our further comments.

[1] Submission number 31 to the Committee's inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse 2017 and related Bill

2. Future service provision by knowmore

On 19 February 2018 the Attorney-General and the Minister for Social Services announced that funding of $37.9 million over three years would be provided for legal support services to help survivors access redress under the scheme.[2]

It was announced also that this funding would be provided to knowmore:

> *"… to ensure survivors of abuse seeking to access redress are provided with quality, trauma-informed advice on their legal options. knowmore will help survivors by providing information and advice about the options available to them, including claims under the redress scheme, access to compensation through other schemes or common law rights and claims. Advice will also be provided on key steps in the redress process."*

3. Specific Clauses

Clause 19 – Application for redress

Clause 19 now requires, in subsection (2), that a person's application for redress must *"specify where the person lives."* Obviously the approved form of the redress application form will require an applicant to provide contact details, and presumably a contact address for receiving correspondence, offers and so on.

A significant number of survivors (around 7%) reported experiencing homelessness at the time of making contact with our service. Survivors who do not have a fixed residential address should be able to provide either a more general response as to where they live (for example, the locality where they usually are living, which would suffice for determining access to declared providers of counselling services[3]) and should also be able to provide a nominated address of a contact or representative, such as a support service that may be assisting the survivor, for receipt of correspondence.

Clause 20 – When an application cannot be made

It is noted that under clause 20(1)(d) a person cannot make an application for redress under the scheme if the person is in gaol (within the meaning of subsection 23(5) of the *Social Security Act 1991*).

As noted below, we welcome the inclusion in this Bill of specific provisions relating to applications by survivors with criminal convictions. This provides clarity and transparency as to how applications from relevant survivors will be treated under the scheme. Our earlier submission identified

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[2] See https://www.attorneygeneral.gov.au/Media/Pages/Legal-support-services-to-help-survivors-of-institutional-child-sexual-abuse-access-redress.aspx

[3] See the discussion below about Clause 51 of the Bill

numerous difficulties with the previous approach, whereby exclusion of some survivors because of certain criminal convictions was to be dealt with entirely under the National Redress Scheme Rules.

We note that the exclusion of survivors currently in gaol from making application for redress under the scheme is subject to the discretion of the Operator [clause 20(2)], and that the Operator may determine that there are exceptional circumstances justifying the application being made.

It is our recommendation that some guidance could be provided in the legislation, or at least in the Rules, as to what might constitute exceptional circumstances for the purposes of this clause. In this respect, we note that in his second reading speech the Minister for Social Services, the Hon. Mr Tehan MP, stated that in this context "*such circumstances might include when a survivor is unlikely to be released from prison before the end of the scheme."*[4]

We have previously provided the committee with some information relating to our service delivery to clients who were engaging, or were considering engaging, with the Royal Commission into Institutional Responses to Child Sexual Abuse. Our final Royal Commission related service delivery figures to 31 March 2018 indicate that 19% of the nearly 9,000 clients assisted by knowmore during the Royal Commission were in prison or other places of detention. In those circumstances, and as we anticipate ongoing interest by this client group in pursuing redress and other justice options, it would assist to better understand the circumstances in which the Operator may determine that "exceptional circumstances" might exist to justify the consideration of redress applications made by survivors in goal. Any additional guidance which could be provided would significantly assist survivors to understand their potential eligibility and would also assist our service in providing legal support services to clients in prison, and the operation of the redress scheme generally

Division 3 – Obtaining information for the purposes of determining the application

We note the revised form of the provisions allowing the Operator of the scheme to request information from a person who has applied for redress (Clauses 24-28).

Clause 26 of the Bill provides that if the Operator requests a person who has made an application for redress to provide further information, and the information requested is not provided by that person within the period for production as specified in the initial notice or as extended, "*then the Operator is not required to give a determination until the information is provided."* Clause 26(1) can be contrasted with Clause 26(2) relating to a similar failure to provide information by an institution, as opposed to the applicant. In the case of an institution, if the information requested is not provided in the relevant production period, the Operator may progress the application and make a determination on it, on the basis of the information that has been obtained by or provided to the Operator.

However, as noted above, if the applicant fails to provide information requested in the production period, the Operator is not required to make a determination on that application. The practical

[4] Hansard, House of Representatives, 29 May 2018 at p.67

effect of this is somewhat unclear; it would appear to be the case that the claimant's application will simply be held in abeyance?

We are concerned that despite the requirement that information only be sought by the Operator where there are reasonable grounds to believe that a person who has applied for redress has information relevant to determining the application, some survivors may not be in a positon to comply with such requests in a timely manner, because of intervening ill health or other reasons. In our submission, the legislation should allow for an application to proceed to determination on the available information, in these circumstances, after provision of notice to the applicant.

Clause 29 subsections (4) – (7) - Revoking a determination

This is a new section of drafting. These subclauses allow the Operator, where required or permitted in the Rules, to revoke a determination about a redress application made under Clause 29(2) and (3) where a person has not been given and accepted an offer of redress. Notice of this revocation must be given but the drafting in the Bill does not require reasons for the decision to revoke the determination to be provided.

It is unclear to us what circumstances may justify or warrant a decision by the Operator to revoke a determination. Again, we note that while the Rules may require or permit the Operator to revoke a determination, we have not sighted those Rules.

We submit that the legislation should provide some guidance or explanation as to the circumstances where the exercise of this power might occur.

Clause 40 – Acceptance period for offers of redress

We are pleased to see the change in drafting which provides that the acceptance period for an offer of redress must be at least six months from the date of the offer. While this period is still less than that recommended by the Royal Commission, which was 12 months, it is a necessary improvement on the original period of three months.

Part 2-5, Division 3 – Counselling and psychological component of redress

We note that the counselling and psychological component of redress is now to be in the form which:

> *"… depending on where the person lives, consists of access to counselling and psychological services or a counselling and psychological services payment (of up to $5,000)."*[5]

Under clause 51, if the person lives in a participating jurisdiction that is a declared provider of these services under the scheme the person is to be referred to that jurisdiction for the delivery of those services.

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[5] Clause 4 of the Bill

In his second reading speech the Minister noted that:

- these services will be in addition to Medicare funded services which continue to be available to survivors, and other government funded counselling and family support services;
- where a participating jurisdiction has elected to provide a lump sum payment for these services, the survivor will receive a tiered lump sum payment of up to that amount based on the severity of the sexual abuse they experienced; or
- where the jurisdiction has elected to provide state based counselling services (as opposed to a lump sum payment) survivors will be referred to the State or Territory government for the provision of these services; and
- survivors residing overseas will receive the lump sum payment.[6]

Through this drafting, the Bill effectively removes choice for many survivors as to who will provide counselling services to them. It is notable that the general principles for guiding counselling and psychological services which appeared in the previous Bill,[7] and which provided (as the very first principle) that *"survivors should be empowered to make decisions about their own need for counselling or psychological services"* have been removed from the current Bill. Those principles also emphasised that *"survivors should be supported to maintain existing therapeutic relationships to ensure continuity of care."*

The approach taken in the current Bill to the provision of this element of redress obviously does not align with those principles: the move to State and Territory services as the deliverers of counselling and psychological services under the scheme makes the upholding of these principles in service delivery incredibly difficult if not impossible. It is also inconsistent with the Royal Commission's recommendations.

As each State or Territory currently operationalises existing victim counselling services differently (and presuming they are keen to continue with the models that they have), it is therefore to be expected that a client's access to counselling and psychological services under the scheme will also vary, depending on the state or territory in which they reside. People should have an expectation that what is available to one person is available to another; this is fundamental to creating a sense of justice-making for victims and survivors. The importance of choice and maintaining existing therapeutic relationships is greatly reduced for clients with this proposed approach. It is also unclear about what happens when a person moves jurisdictions (which this client group is known to do quite frequently).

The provision of lump sum payments to applicants who live in a non-participating jurisdiction is also problematic. We make first the observation that the maximum sum will not go very far in funding the types of support survivors of complex childhood trauma may require throughout their life, and secondly that it must be anticipated that many survivors will receive a lump sum less than the maximum, thereby exacerbating the shortfall between client need and funded service provision.

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[6] Hansard, House of Representatives, 29 May 2018 at p.68
[7] Clause 49

Also, while it is acknowledged that some survivors manage money well, it has been knowmore's experience that many clients have had little opportunity to learn good financial management skills in life. Asking people to make a 'good' decision and utilise a lump sum to pay for ongoing counselling, given all of the barriers to such engagement that the Royal Commission identified in Volume 9 of its final report, is setting many people up to fail.

The changed approach to the provision of counselling services as reflected in the Bill's drafting will achieve some economies for participating jurisdictions. Those savings will come at a high cost to survivors (and more broadly to society), who every day are trying to deal with the continuing impacts of their childhood sexual abuse and who need ongoing and appropriate counselling support to do so. Under these arrangements, many will not be able to access sufficient or acceptable support.

Part 3-2 - Division 2 – Special assessment of applicants with serious criminal convictions

We remain of the view, as expressed in our earlier submission, that the scheme should not exclude classes of survivors. However, given the clear intent to impose some limits around eligibility by survivors with criminal convictions, it is preferable to include in the Bill specific provisions relating to claims by survivors with criminal convictions that may impact on eligibility. As we have previously submitted, it is appropriate that any policy position adopted in relation to access to redress by survivors with criminal convictions be contained in the relevant legislation rather than in any subordinate instrument.

In looking at the drafting of clause 63, we note that the language of subsection (5) implies a presumption of exclusion: that is, the person is excluded unless the Operator determines that they are not prevented from accessing the scheme having regard to the considerations listed in that subsection. Of those two considerations, we note there are parallels in administrative/disciplinary law where a person, often a member of a profession or a sportsperson, may face regulatory consequences for bringing their profession or sport "into disrepute". However, the second consideration, relating to whether providing redress to a person would *"adversely affect public confidence in, or support for, the scheme"*, is far more nebulous and really adds little, in our view, to the task of the Operator. Given the specific factors listed in subsection (6) that must be considered, we would suggest that some redrafting/consolidation of subsections (5) and (6) should be undertaken, to dispense with the two considerations in subsection (5) and incorporate those now in subsection (6) as the factors to be considered by the Operator in determining whether, having regard to the objects of the Act, it is appropriate that the survivor be eligible to apply for redress.

Further, given the confidentiality provisions in the Bill,[8] we anticipate that in most cases it would be unlikely that a decision to provide redress to a person with a serious criminal conviction could adversely affect public confidence in, or support for, the scheme, as rarely would the outcomes of such cases come to the public's knowledge.

[8] Part 4-3

A determination made under clause 63(5) that a person is prevented from being entitled to redress would seem to be a different determination to one made under clause 29 about whether a person's application for redress is approved or not. A determination under clause 29 carries with it a right of review by the person who has made an application for redress.[9] There appears to be no similar right of review of a determination made under Clause 63 that a person is not entitled to redress. There should be a right of review to ensure the wide discretion vested in the Operator is being exercised fairly and lawfully, with proper regard for the considerations contained in the Bill. Inherent in that right of review should be the requirement that an applicant who is determined not to be eligible under clause 63 is entitled to a statement of reasons for that decision and access to the material it was based on.

Part 4-2 – Nominees

We note the changes made to this Part, which improve upon the original drafting and address a number of the concerns raised in submissions.

It will be necessary for the efficient operation of the scheme that lawyers acting on behalf of applicant clients be able to receive notices etc on the client's behalf, when properly authorised to do so. This should be able to occur outside the nominee provisions, under the usual laws of agency.

Part 6-2 – Funders of last resort

It is noted that the revised drafting of the funder of last resort provisions now introduces the concept of "equal responsibility" as founding the participating Government's liability. This means that the Government institution will only become the funder of last resort for the defunct institution where it is equally responsible with the defunct institution for the abuse of the person.

This is a higher test than that of "shared responsibility" that was in the previous Bill. Having regard to some of the cases we have seen, we are concerned that this change may operate to exclude some survivors where the participating Government had some role in their placement in an institution, but seeks to establish to the Operator that these acts did not amount to "equal responsibility" on its part for the abuse of the person.

Thank you for considering our submission.

[9] Clause 73