

NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE (COMMONWEALTH POWERS) BILL 2018

ERRATUM TO

EXPLANATORY NOTES

Title of the Bill

National Redress Scheme for Institutional Child Sexual Abuse
(Commonwealth Powers) Bill 2018 (the Bill).

Reason for Erratum

The erratum to the Explanatory Notes for the Bill expands upon the assessment of consistency of the Bill with fundamental legislative principles in accordance with section 23(1)(f) of the *Legislative Standards Act 1992*. This includes an assessment of potential fundamental legislative principle issues in relation to Schedule 1 of the Bill.

Notes on Provisions

It should be noted that Clause 2 of the Bill defines the “National Redress Act” to mean a Commonwealth Act enacted in the terms, or substantially in the terms, of the scheduled text and as in force from time to time. Clause 2 further defines that “scheduled text” means the text of the Bill for a Commonwealth Act, as set out in Schedule 1. Schedule 1 includes the National Bill. Since the introduction of the Bill, the National Bill has since been passed by the Commonwealth Parliament and is now in operation as the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

These definitions are relevant for Clause 3 of the Bill that proposes to adopt the National Act and refer powers to the Commonwealth Parliament for the purposes of making amendments to the National Act in accordance with section 51 (xxxvii) of the *Commonwealth of Australia Constitution Act 1901* (Cth).

On page 3 of the Explanatory Notes under the heading “Consistency with fundamental legislative principles” add the following after the last paragraph of this section:

“Section 4(2)(a) Legislative Standards Act 1992 – Whether legislation has sufficient regard to the rights and liberties of individuals

Schedule 1 – Scheduled text of the Bill for a Commonwealth Act

(National Act, sections 42 and 43 – Accepting the offer of redress; effect of acceptance on civil liability)

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These sections of the National Act may present a potential departure from the fundamental legislative principle that sufficient regard be given to an individual's rights and liberties, by virtue of the requirement for a redress participant to forego a right to make a civil claim in relation to the alleged abuse in the future. Any breach is justified on the basis that an application for redress under the National Scheme for people who have experienced institutional child sexual abuse is voluntary, and people may choose not to accept an offer of redress and instead retain their legal rights to bring a future civil claim in relation to the abuse. Redress is an avenue that will be available to eligible applicants in addition to their existing (for example, common law) rights.

Requiring a release under the National Scheme is consistent with the recommendation made by the the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its Redress and Civil Litigation report that a redress scheme should require applicants to release the institution from any further liability for institutional child sexual abuse by executing a deed of release, as a condition of making a monetary payment.

Free, confidential and independent legal support services are also available under the National Scheme to ensure that people have access to legal support to assist them in understanding the legal implications of accepting a redress offer. This also aligns with the Royal Commission's recommendations.

Schedule 1 – Scheduled text of the Bill for a Commonwealth Act

(National Act, sections 13, 20, 63, 64 – When is a person eligible for redress; When an application cannot be made; Special assessment of applicants with serious criminal convictions; Person not entitled to redress while security notice in force)

Limiting the ability of certain groups to access redress may depart from the fundamental legislative principle that sufficient regard be given to an individual's rights and liberties as it could be considered unequal or unfair treatment that these people would need to seek redress or compensation through other avenues such as civil litigation. Any breach of fundamental legislative principles is justified on the basis that the approach does not penalise individuals by removing an existing entitlement.

Certain cohorts (people with certain serious criminal convictions or who are in prison) may still be able to access redress under the National Scheme, subject to a special assessment process being undertaken by the National Scheme Operator. Under the National Act, the National Scheme Operator may determine, after considering all available information in relation to the individual application, that the person is not prevented from being entitled to redress under the Scheme if the Operator is satisfied that providing redress to the person would not bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme. These persons will also retain the right to make a civil claim should they not receive redress under the National Scheme.

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Schedule 1 – Scheduled text of the Bill for a Commonwealth Act

(National Act, section 73 – Application for review of determination)

Under the National Act, applicants will be able to seek internal review of a redress determination, which must be undertaken by the National Scheme Operator or a new Independent Decision Maker under the National Scheme. Access to external review will not be available. The absence of external review mechanisms could be considered a breach of the fundamental legislative principle that sufficient regard be given to an individual's rights and liberties. Any breach of fundamental legislative principles is justified on the basis that the National Scheme is a low-threshold, applicant-focused administrative scheme. Should an applicant not be satisfied with the outcome of an internal review, they may choose not to accept an offer of redress and instead retain the right to make a civil claim.

Redress support services and legal services are being funded under the National Scheme and are freely available to ensure people are supported to fill out the application form correctly and comprehensively.

Schedule 1 – Scheduled text of the Bill for a Commonwealth Act

(National Act, Part 4-3, Division 2 – Use and disclosure of protected information)

Sharing protected information under the National Act is required to enable the effective operation of the National Scheme. The sharing of an individual's information could be seen as a departure from the fundamental legislative principle that sufficient regard be given to an individual's rights and liberties.

Any breach of fundamental legislative principles is mitigated by the fact that the National Act limits the way protected information may be used under the Scheme in order to appropriately protect an individual's privacy. Under the National Act, protected information may only be obtained, disclosed or used if it is done for the purposes of the National Scheme; with the express or implied consent of the person or institution to which the information relates; or if the person believes on reasonable grounds it is necessary to prevent or lessen a serious threat to an individual's life, health or safety. There are also penalty provisions in the National Act regarding unauthorised use or disclosure of protected information, or soliciting disclosure of information.

Information in the redress application form and on the National Redress Scheme website also makes it clear that information provided in an application may be shared by the National Scheme Operator, including with a responsible institution to enable the application to be determined. The Federal Department of Human Services has developed a secure portal to operationalise the information sharing arrangements with institutions.

Section 4(2)(b) Legislative Standards Act 1992 – Whether legislation has sufficient regard to the institution of Parliament

Schedule 1 – Scheduled text of the Bill for a Commonwealth Act

(National Act, section 32 and 33 – The assessment framework; the assessment framework policy guidelines)

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The Federal Minister for Social Services has declared a legislative instrument under the National Act that will be used to determine the amount of a redress payment an eligible applicant for redress should be offered. This legislative instrument is the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018. The creation of this instrument rather than including the framework within the primary legislation for the Scheme could potentially depart from the fundamental legislative principle that legislation have sufficient regard to the institution of Parliament.

The instrument has been created within Commonwealth drafting conventions and in accordance with the National Act. The instrument is publicly available and accessible online and applies consistently in relation to the National Scheme.

Inconsistencies with fundamental legislative principles

Any potential departures from fundamental legislative principles that arise in relation to the provisions of the National Act, as identified above, may be justified on the basis that the Scheme will enable eligible people who experienced institutional child sexual abuse in Queensland institutions to access redress under the National Scheme and enable institutions in Queensland to opt in to the Scheme.

The National Act is Commonwealth legislation that has been scrutinised and passed by the Commonwealth Parliament. The Queensland Parliament and the Queensland Government do not have any responsibility for or influence over legislative standards in Commonwealth legislation. As the Commonwealth Parliament has enacted the National Act, the policy question is now whether the Queensland Parliament wishes to adopt it to enable the National Scheme to apply in Queensland.

The establishment of a national redress scheme for institutional child sexual abuse is consistent with fulfilling the recommendations of the Royal Commission. The Royal Commission recommended that a single national redress scheme be established as the most effective structure for ensuring justice for survivors.

The Royal Commission found that people who have experienced institutional child sexual abuse regard equal access and equal treatment as essential elements of a redress scheme if it is to deliver justice. While this does not prevent recognition of different levels of severity of abuse, it does mean that the amount of redress available should not depend on factors such as the state or territory where the abuse occurred and whether a government or non-government institution was involved. Without a national scheme, it is unlikely that institutions across these sectors could offer the equal access and equal treatment that is sought from a national redress scheme.

The legal effect of clause 3 of the Bill is to adopt the National Act. Passage of clause 3 by the Queensland Parliament would enable the National Scheme to operate in Queensland, including enabling non-government institutions and Queensland Government agencies to opt in to the Scheme. This not only provides an avenue for eligible people to access redress for the institutional

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sexual abuse they experienced as children, but also for institutions to acknowledge these experiences of abuse and to take responsibility for them.

By institutions acknowledging their responsibility in this way, redress can be provided to eligible applicants not only through tangible recognition in a monetary payment, but through access to therapeutic counselling and psychological care, and a direct personal response. The Royal Commission found it essential to the direct personal response process that the institution provide an assurance as to the steps it has taken or will take to protect against abuse in the future. This process therefore provides a valuable experience for participating institutions to learn from the mistakes of the past and to prevent these abhorrent experiences of institutional child sexual abuse in the future.”