
# SUBMISSION

## Senate Community Affairs Legislation Committee

### Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017

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## Introduction

1. This submission has been prepared on behalf of the Catholic Church in Australia **(Church)** by the Truth Justice and Healing Council **(Council)**.

2. The Council is coordinating the response of the Church to the Royal Commission into Institutional Responses to Child Sexual Abuse **(Royal Commission)**. In this role the Council has had responsibility for the development of Church policy for the provision of fair and reasonable redress for victims and survivors of child sexual abuse that occurred in institutions of the Church.

3. The Council supports the establishment of a truly national redress scheme for survivors of institutional child sexual abuse, where all government and non-government institutions **(NGIs)** concerned with child-related services are active participants.

4. This position has been endorsed by multiple Church leaders, bishops and religious congregational heads, throughout the course of the Royal Commission. This commitment was restated following the recommendations of the Royal Commission for the establishment of a national redress scheme and again during the Royal Commission's final hearing into the Church, Case Study 50, in February 2017.

5. The Church is not organised under a single corporate structure. The works of the Church are conducted through Church authorities, either dioceses, religious orders or established juridic organisations. They are separate, autonomous entities. For the purposes of participation in a national redress scheme, each Church authority would need to formally join the scheme. The decision to do so rests with each of the entities.

6. The *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* **(Bill)** does not include the capacity for state government and non-government organisations, including Church authorities nationally, to participate. Only Commonwealth institutions, territory institutions or NGIs of a territory can participate. This falls significantly short of being a national scheme.

7. For the purposes of the Community Affairs Legislation Committee's deliberation the following submission raises issues that in the Council's view, if appropriately addressed, would improve the operation of the Commonwealth scheme and in turn provide a better foundation on which to construct a national redress scheme.

8. Significantly the Rules and the associated Intergovernmental Agreement that are to accompany this Bill are not yet available. Much of the detail around the scheme's operation and the terms under which institutions will participate and opt into the scheme are expected to be contained in these documents.

## Constitutional basis

9. Until such time as the state governments commit to opting in to a redress scheme administered by the Commonwealth, it cannot be a scheme which operates nationally. As presently understood, the ability of NGIs including Church authorities to opt in to the scheme established under the Bill is limited, as opt-in first requires the participation of, or referral of power by, the state(s) in which a particular NGI operates. As of 31 January 2018, no state government had chosen to opt in to the scheme.

10. It is clearly in the interests of NGIs with a multi-state or national presence, and indeed for survivors, for the redress scheme to be truly national.

11. The legal advice received by the Commonwealth in relation to the constitutional basis of the redress scheme has not been made available. Survivors and institutions alike are therefore left to trust that all options have been explored by the Commonwealth and its advisors in reaching the conclusion that it is not possible for the Commonwealth to legislate in its own right to establish a national redress scheme and thus enable participation by state-based NGIs.

12. In earlier discussions around the establishment of a national redress scheme it was never understood that a 'limited participation' scheme would suffice to meet the entitlement needs of survivors of institutional sexual abuse.

13. All state governments should commit to participation in the redress scheme as a matter of urgency.

## Entitlement to redress under the scheme

14. Clause 16(1)(a) provides that a person is eligible for redress in the scheme if the person was sexually abused.

15. It has always been understood that the scheme will not provide redress for physical abuse alone. The Royal Commission did not include physical abuse alone within its scope of inquiry, but did make provision in its redress recommendations for consideration of related physical abuse or neglect or emotional or cultural abuse where such abuse accompanied sexual abuse.

16. Clause 19 indicates that redress is for the sexual abuse and 'related' non-sexual abuse of the person. Non-sexual abuse includes physical abuse, psychological abuse and neglect. Clearly, physical abuse falls within the scope of this scheme if it is related to the sexual abuse of a person. So too does psychological abuse and neglect if 'related' to sexual abuse. Under the definition of 'related' in clause 9, sexual abuse need not have any connection with the non-sexual abuse other than that the same institution is responsible. Redress is available to a survivor who has suffered both sexual abuse and non-sexual abuse, whether by the same perpetrator, or multiple perpetrators, and whether or not connected, so long as the same institution is responsible.

17. Given clause 19 is designed to extend the scope of entitlement to occasions of abuse other than sexual abuse, what degree of relationship will sexual and non-sexual abusive behaviours hold to enable entitlement to the scheme? Will the Rules indicate the criteria of this relationship? Will occasions of non-sexual abuse by particular perpetrators be considered alongside occasions of sexual abuse by other perpetrators for the same victim? Will redress be calculated separately for instances of sexual and related non-sexual abuse?

18. The definition of 'related' should be amended so that the non-sexual abuse of a person is 'related' to sexual abuse if the commission of the non-sexual abuse was sufficiently connected to the sexual abuse of the person.

19. Clause 16(2) says a person is also eligible if the Rules so prescribe. Presumably the counter will also apply, ie that the Rules will prescribe classes of people who, as a result of certain characteristics, will not be eligible. The Church would not support any Rule which declared survivors of child sexual abuse who had been found guilty of child sexual abuse or other serious offence to be ineligible for redress under the scheme.

20. These issues speak to the broader concern about the form, nature and content of the Rules for the scheme. Given the significant implications of the Rules on both the operation and conduct of the scheme, it is appropriate that the Rules are made available to all stakeholders for consideration as soon as possible.

## Institutions participating in the scheme

21. In Clause 21(2) a participating institution is considered 'responsible' for abuse if the sexual abuse or (related) non-sexual abuse of a person occurred in circumstances where the participating institution is, or should be treated as being, primarily or equally responsible for the abuser having contact with the person.

22. This clause introduces a significant degree of subjectivity to the determination where a participating institution is deemed either primarily or equally responsible for an abuser having contact with a victim. Further, it does not prescribe a standard of proof for determining responsibility when there is more than one participating institution. Clause 21(6) allows for the Rules to also prescribe when a participating institution should be treated as being 'responsible' for the abuse. Clauses 21(2) and (6) leave this subjective determination open to on-going precedent in determinations made in relation to the entitlement to redress and in the allocation of payments by institutions.

23. Clause 21(3) outlines relevant circumstances whereby a participating institution would be deemed to be, or should be treated as being, primarily or equally responsible for the abuser having contact with the person abused.

24. A situation in which this degree of subjectivity has the potential to cause disputes over the apportionment of responsibility between institutions is the determination of the responsibility of an institution for abuse that occurred on the institution's grounds in circumstances where the perpetrator was not employed by the institution or connected with it in any way. For example, if a person was abused during a private party held on premises leased from the local church, the relevant church should not be 'responsible' under the scheme.

25. Clause 21(3)(a)(i) specifies that when determining if a participating institution is, or should be treated as being, primarily or equally responsible for the abuser having contact with the person, a relevant consideration is whether the abuse occurred 'on the premises of the participating institution'. If the institution's sole connection to the abuse is as the owner or lessor of those premises, then it should not be 'responsible'. To do so would result in a participating institution being 'responsible' for abuse that occurred in circumstances where it had no control over, or involvement in, the context in which the abuser came into contact with the survivor. In fact, whether or not the abuse occurred on the premises of the institution is not relevant. Abuse for which the institution is 'responsible' must occur in connection with the activities or operations of the participating institution.

26. The Bill should be amended to clarify the circumstances in which a connection to the institution's premises is a relevant factor in determining responsibility.

27. The structure of the Church is relatively complex. There will often be more than one Church authority working in a particular geographic region. Sometimes, the Church authority with primary responsibility for a particular area, geographic region or ministry within a region has changed over time. Historically, personnel from one Church authority might work in the school or premises of another Church authority, with the latter having no direct responsibility for them. In these circumstances, application of criteria for determining responsible participating institution that are geographically based may not generate the correct outcome.

28. Historically, many alleged perpetrators of abuse in Church authorities are priests or members of religious institutes, who were not employed by their Church authority. Clause 21(3)(b) contains a broad concept of the alleged perpetrator being 'an official of the participating institution when the abuse occurred'. This is appropriate. Any further criteria developed for the purposes of the Rules (cl. 21(3)(d)) should utilise this concept rather than being limited to concepts of employment.

29. The Bill does not provide any, or any sufficient, ability for participating institutions to provide information or make submissions in relation to the determination of the 'responsible' participating institution for a particular application. In clause 21(5) where more than one participating institution is involved in an abuse case, the Bill assumes equal proportion of responsibility between the institutions. This is maintained despite the fact that one institution may be more culpable than the other.

30. A more transparent process to allocate degrees of responsibility between participating institutions should be included in the Bill. It is submitted that the determination of 'responsible' participating institution may be simplified in the vast majority of cases by the inclusion of a requirement compelling the Operator to engage with relevant participating institutions in the determination of this issue.

31. The concepts of equal, shared and 'shared chains' of responsibility of institutions as these concepts appear in the Bill (cl. 21(5)) and Explanatory Memorandum (page 15) have been the subject of discussions between state and territory governments and the Commonwealth in the course of negotiations for the establishment of a national redress scheme.

32. Concerns have been raised that the decision-making framework implicit in clause 21 may operate to protect governments and minimise their exposure under the redress scheme, both as 'responsible' participating institutions and funders of last resort. This requires scrutiny. Transparency of decisions taken by the Operator will be essential to maintain trust in the scheme.

33. If it is deemed that in some instances a government was not a responsible party to a case and the remaining institution found to have 'responsibility' has not agreed to participate, no longer exists or is insolvent, the relevant survivor may well be left without a redress payment. Further, this determination also impacts on considerations around when a government institution will have sufficient responsibility for a declaration that it should be a funder of last resort in particular cases.

34. Church authorities have broad experience managing redress claims, and in many cases longstanding contribution agreements exist between Church authorities for abuse in particular Church institutions. In the absence of an ability to have input into the decision-making process, a determination of equal or shared responsibility, if it arbitrarily overrides those existing agreements, will be unacceptable. So too for situations where only one of the involved institutions is participating in the scheme.

35. Further, as a matter of natural justice, the Bill should impose an obligation on the Operator to seek information, and perhaps submissions from a participating institution identified in an application for redress, relating to the issues of 'responsible' participating institution and a survivor's entitlement to redress.

36. Clause 21(7) provides that the Rules can prescribe where and when a participating institution is not responsible for the sexual or non-sexual abuse of a person. The Bill should be amended to include these circumstances in the legislation rather than leaving this to prescription in the Rules.

37. The Bill contains a definition of ‘participating territory institution’ that will include most territory government institutions (cl. 24). The rule-making power will provide the Minister with the ability to prescribe certain institutions not to be territory institutions, thereby removing governmental responsibility for them for the purposes of the scheme (cl. 25(3)). Survivors and NGIs alike will need to trust that this element has been included in good faith, as indicated by the Explanatory Memorandum.

## Fundamentals of the scheme

38. The operational timeframes and the three elements of redress available under the Bill, being the lump sum redress payment, access to counselling and psychological services and an entitlement to a direct personal response from the participating institution (cl. 3, 18) are supported.

### Monetary payment (cl. 18)

39. The cap of $150,000 placed on lump sum redress payments is supported.

40. Clause 34 deals with the assessment matrix. It is the operation of the matrix and the average redress payments to be made that will be critical for survivors and participating institutions. The Royal Commission recommended an average of $65,000. Institutions considering opting in to the scheme will need to know the target average for redress payments.

### Access to counselling and psychological services (cl. 49)

41. Given its experience in the operation of redress schemes over the past twenty years, the Church supports the general principles guiding counselling and psychological services (cl. 49) and notes that these principles will be used by the Minister in drafting Rules around the provision of counselling under the redress scheme.

42. The Explanatory Memorandum (page 5) states that access to counselling is intended to provide survivors maximum flexibility to access services of their choice over their lifetime. However, it is not clear whether payment of the cost of such access by the responsible institution will be financially capped in any way. Institutions need certainty around this aspect.

43. Regardless, the counselling payments accessed by survivors over time should be monitored by the Operator, to ensure they have been applied for counselling purposes and used to beneficial effect, to support survivors on the path to healing.

### Direct personal response (cl. 52)

44. Despite advocating for the ability to move investigation and decision making in response to child sexual abuse complaints into an independent process, it has always been the Council's intention that individual Church authorities would continue to offer a direct, pastoral and personal response to survivors engaged in the redress process, and indeed, to those who choose a civil litigation or other claims resolution process.

45. The Church's redress scheme, *Towards Healing* has been criticised by the Royal Commission for inconsistency in outcomes for survivors, due primarily to differences in its application by various Church authorities. To avoid a similar outcome under the redress scheme, it will be necessary for institutions providing direct personal responses to be assisted by the Operator to understand their obligations and develop policies and procedures that will be both 'compliant' with the requirements of the redress scheme and in practical terms will as far as possible, prevent inconsistency of outcome for survivors.

46. It will be important for participating institutions to have full information about the survivor's experience as disclosed during the application. Full information is relevant to the decision institutions will need to make regarding the suitability of an individual survivor for participation in a direct personal response process, including in circumstances where the participating institution might dispute the claim and a prescribed form of direct personal response is not appropriate.

47. It is also necessary to ensure both that the survivor is not re-traumatised by any unnecessary retelling and that the institution can develop a shared understanding of the survivor's experience and fully respond.

## Funding arrangements

48. The arrangement contemplated by the Bill of participating governments and NGIs being invoiced quarterly for their redress payments and share of administrative costs is supported.

49. It is the Church's experience that administration costs per claim are unpredictable, as each presents its individual complexities. The method proposed for use to calculate administrative costs payable by participating institutions will require agreement, so that in opting in to a national redress scheme in due course, Church authorities can satisfy canonical requirements regarding use of funds.

### Funder of last resort provisions

50. As noted above, it appears that funder of last resort provisions (cl. 66-67) have limited, rather than general operation. This fact will need to be clearly communicated to survivors and the public, as survivors presently anticipate that there will be a government safety net operating if for any reason the institution with 'responsibility' for their abuse cannot pay redress.

51. It is to be hoped that the Commonwealth and territory governments take up funder of last resort responsibility in cases where it is warranted from a social, moral or any other perspective.

52. There is no provision in the Bill dealing with circumstances in which participating NGIs will be declared to be funders of last resort.

## Release from further liability

53. It is appropriate that survivors are required to sign a deed releasing the responsible participating institution(s) from civil liability for the abuse as a condition of accepting redress (cl. 40). It is also appropriate that such deeds not contain confidentiality provisions.

54. Deeds will however need to be carefully worded to ensure they will cover all abuse within the scope of the redress scheme that may have been suffered by the survivor while in the care of the relevant institution(s). This is necessary to eliminate any potential for a survivor to make a civil claim against the participating institution in respect of different sexual abuse suffered at that institution that was not disclosed in the redress claim. This is something that is not unheard of in the Church's experience.

55. Clause 40 limits the scope of the deed of release to responsible participating institutions. It is of concern that the release will not extend to the potential civil liability of alleged perpetrators. This may be problematic in circumstances where many of the state and territory governments have repealed limitation periods for civil claims for child sexual abuse. Without a release that includes the alleged perpetrator, there is a risk that a survivor may make a successful application for redress, sign a deed of release in favour of the responsible institution, but still be able to commence civil proceedings against the alleged perpetrator, who may join the responsible institution.

56. It is submitted that the deed of release should cover all of the responsible participating institutions, their officers, employees, members, volunteers and agents as well as the alleged perpetrators for any civil liability in respect of the abuse suffered.

## Eligibility and application

57. The Church has advocated in its submissions to the Royal Commission for a simplified redress application process.

58. The principles of natural justice should underpin the application process. The Bill provides for the form and content of the proposed method of application to be verified by statutory declaration (cl. 29). It is understood that Rules will provide for the Operator to have discretion to accept applications that are outside the eligibility criteria, and to exclude others that would otherwise be eligible. More information is required about these discretions and how and when they will be enlivened and used.

## Assessment and decision making

### Standard of proof

59. As has been made clear the Church does not support the proposed standard of proof of 'reasonable likelihood' (cl. 15).

60. Although this term is not a defined term in the Bill, the Explanatory Memorandum states that " 'reasonable likelihood', at Common Law, is understood to be 'the chance of an event occurring or not occurring is real – not fanciful or remote" (page 12).

61. The Church has successfully operated its redress schemes, *Towards Healing* and *The Melbourne Response,* applying the 'balance of probabilities test' for over twenty years. The vast majority of survivors approaching these schemes have been able to satisfy the higher standard.

62. It is submitted that the 'balance of probabilities', a well understood standard of proof that has community acceptance, will also eliminate many of the insurance issues currently faced by NGIs considering opting in to a national redress scheme if this is available in due course.

63. A further insurance issue related to clause 45 of the Bill is discussed below.

### Procedural fairness for institutions

64. It is important that participating institutions are accorded procedural fairness in the process of determining redress applications. As submitted above, institutions should be involved in the process of verifying claims for redress. At the very least they ought to have the ability to respond to claims made against them and to provide information and comment on applications for redress that identify them as 'responsible' for the abuse suffered. It should be compulsory, rather than optional, for the Operator to request information and submissions, from participating institutions identified as being potentially 'responsible' prior to any redress application being determined.

65. It is also of significant concern that participating institutions are being asked to trust the independent decision-makers to make fair and correct decisions without any ability to submit information in relation to the application, or challenge those decisions. This is inadequate. The redress scheme should not be established as a secret tribunal with secret rules and guidelines and no transparency in relation to its decision-making process. On a practical level, sound decisions on the veracity or otherwise of an application made to the scheme can only occur in the context of full information, including the views of the relevant participating institution.

66. Participating institutions ought to be notified of allegations made against them (or any person associated with them) in a redress application and given an opportunity to submit a response. This could be a streamlined response process for institutions that does not create, or result in, a legalistic process.

## Secrecy of assessment guidelines

67. The fair and equitable operation of the scheme must be built upon transparency.

68. It is intended that any assessment guidelines applying to redress determinations will not be made public and will be exempt from operation of the *Freedom of Information Act 1982* (Cth), to mitigate risk of fraud.

69. The Church has been subject to criticism in the Royal Commission about certain steps in the management of abuse claims that have remained secret. The Church is not in favour of any such information remaining secret. The risk of fraud associated with publication of the guidelines is acknowledged. However, on balance, it is submitted that there will be a lack of procedural fairness afforded to both survivors and institutions if the assessment guidelines, which will contain information about the basis of redress and responsibility determinations made are not public.

70. The fact that the independent decision makers appointed to the redress scheme will have discretion to determine the weight to be applied to available information in each application, exacerbates the problem of secrecy of the assessment guidelines. In order to disclose proper reasons for their decisions, independent decision makers should refer to relevant parts of the assessment guidelines.

71. It is submitted that if decision makers are to make transparent and fair decisions based on the assessment guidelines, those guidelines ought to be public.

## Status of alleged perpetrator

72. It is of great concern that there is no real account taken by the Bill of the status of the alleged perpetrator, particularly where that person may still be alive, and may pose a continuing risk to children.

73. Issues of police and mandatory reporting, and reporting under reportable conduct schemes arise if this is the case. As well as the reputational aspects discussed in the Explanatory Memorandum (page 72) there are also significant issues of procedural fairness for alleged perpetrators that will undoubtedly arise in the context of the consideration of applications, which the Bill does not presently contemplate.

74. There can be few more serious allegations made against an individual than that of the sexual abuse of a child. Where it is anticipated that the scheme standard of proof will be lower than the criminal standard, the necessity for procedural fairness to be afforded to living alleged perpetrators is amplified. This is especially so given that they will not be informed of the allegations made against them or have an opportunity to respond, will not be provided with the reasons for a determination or have any appeal rights.

75. The Bill should make it clear that a determination accepting a claim and/or payment of redress by the scheme is not a finding of fact that can be used in any civil or criminal case.

## Provision of decision and reasons to responsible participating institution(s)

76. The redress determination and accompanying reasons will form part of the information to be disclosed to responsible participating institutions under clause 79 of the Bill. The ability for disclosure of information to participating institutions for insurance purposes (cl. 79(2)(c)) is also positive.

77. In practical terms, it will be necessary for applicants to agree to disclosure of such information and the Operator will need to ensure that applicants' consent to disclosure of the information covered by clause 79 is obtained. It may be intended that this be included in clause 79(2), but given that the responsible participating institution(s) will be directly impacted by redress determinations, it is submitted that the Bill should make provision for at least the redress determination and reasons to be provided to the responsible participating institution as of right. Even where a direct personal response is not sought, and/or no insurance claim is necessary, responsible participating institutions are likely to require information about the determination for canonical, accounting and/or auditing purposes in order to justify payment of the redress amount.

## Review of decisions

78. It is clear that review mechanisms open to participants in the redress scheme are extremely limited. Participating institutions will not have the right to seek a review of decisions under the scheme, a condition of opting in.

79. Where more than one institution is determined to be 'responsible' and liable to contribute to a redress award, they should have a right to seek review of the determination of the allocation of responsibility.

80. If the decision-making process under the Bill is to be fair and robust then it ought to be able to withstand appropriate review of its decisions by any party with a material interest.

81. Following from the discussion of the release of the determination and reasons to responsible institutions, there also needs to be provision made in the Bill for any decision made on review and accompanying reasons to be provided to the responsible participating institutions.

## Information sharing

82. Information disclosure and use is dealt with in Part 4-2 of the Bill. The policy intent is provided at pages 42-47 of the Explanatory Memorandum.

83. The Royal Commission has recognised that information sharing in the context of child protection is a significant issue and has given much consideration to information sharing in the course of its deliberations.

84. As has been raised earlier in this submission, this is a fraught area given the conflict that arises between the need to balance individual privacy with the significant public interest in ensuring the protection of children.

### Information sharing with responsible institutions

85. Institutions are likely to have broad responsibilities in a number of different areas stemming from any redress application in which they are identified. These will be particularly important where the alleged perpetrator is still alive and still in a position to pose a threat to children.

86. For the reasons discussed elsewhere, it should be compulsory for the Operator to seek information from relevant participating institutions when an application for redress identifying them as 'responsible' is made.

87. Consent of the applicant to sharing of protected information in order for such information to be sought from a participating institution should be a condition of applying for redress.

88. Against this background, provided they are used as described in the Explanatory Memorandum, the provisions governing disclosure of the protected information as expressed in clause 79 should be largely adequate. They will allow participating institutions to:

- undertake mandatory reporting or reporting to police or child welfare authorities as appropriate
- investigate the substance of the application for the purposes of forming a view about the bona fides of the redress application
- conduct any employment-related or other required statutory investigation of the allegations made in the application, especially where the alleged perpetrator remains employed or is a current official of the institution, and/or
- consider whether there is sufficient evidence to establish legal liability on a balance of probabilities basis such that it may be possible for the institution to make an insurance claim in respect of the redress payment, regardless of the standard of proof of the redress scheme.

89. For any of these (necessary and/or mandatory) steps, in order to avoid involving the survivor in these processes, participating institutions will need access to all information that was before the scheme decision-maker.

## Penalties for misuse of information

90. There is no doubt that the information that will be gathered by the Operator will be extremely sensitive and should be protected as is provided for in the Bill. Penalties for mishandling of such information are also appropriate.

91. Participating institutions will need to have in place appropriate safeguards to ensure that protected information disclosed under the Bill is only used for identified purposes.

92. The inclusion of penalties for provision of false information leading to the determination of fraudulent claims should be considered.

## Alleged perpetrators

93. One aspect not specifically dealt with in the Bill and Explanatory Memorandum is the ability of the Operator and/or participating institutions to share information with alleged perpetrators. This is a complex issue. There is currently no provision in the Bill that would provide for the Operator to inform an alleged perpetrator of any application identifying them.

94. As raised earlier, the position of living alleged perpetrators under the Bill requires more consideration than that presently contained in the Explanatory Memorandum (page 72-3). For example, where an application for redress leads to employment-related or other required statutory investigation of the allegations, alleged perpetrators will necessarily become aware of the allegations made against them in the context of the redress application. Any determination (which despite the language of the Bill will be regarded as a 'finding' in relation to that person), given its implications, reputational or otherwise, will exercise the individual concerned.

## Consideration of 'responsible' participating institution

95. It is clear from the Bill that beyond responding to any request for information pursuant to clause 70, participating institutions will not be involved in the application or decision-making process. With survivor consent, responsible institutions will receive a copy of the redress decision and the reasons.

96. Similar to the position of alleged perpetrators raised above, a determination that a survivor is entitled to redress and a participating institution is 'responsible' will necessarily require consideration of the position of the relevant institution and may contain adverse 'findings' in relation to that institution.

97. For this reason, as submitted earlier, clause 70 of the Bill must place an obligation on the Operator to seek information, from the relevant institution both in the nature of any relevant background and an opinion in relation to whether the participating institution considers itself to be 'responsible' in the course of considering an application for redress.

## Penalties for non-compliance with information requests

98. While it may be appropriate to include penalties where third parties do not respond to requests from the Operator for information, it is unreasonable in circumstances where institutions have opted in to the Redress Scheme, to then impose sanctions and penalties for non-compliance with clause 70 (see cl. 71).

99. It is to be expected that if they opt in, participating institutions will be strongly motivated to cooperate and be open in an exchange of information and to use their best endeavours to comply with its requirements. The possibility of penalties being imposed for non-compliance with clause 70 requests will not encourage institutions to participate.

## Redress monetary payment

100. The Bill deals with the calculation of the redress payment at clause 57.

101. The assessment matrix (cl. 34) has not been provided and it is unclear whether or not it will reflect that proposed by the Royal Commission. The matrix should be made available.

102. Provision is made under clause 33 for past payments made to a survivor for abuse within the scope of the redress scheme by the responsible participating institution to be adjusted for annual inflation and taken into account, reducing any redress payment.

103. It is understood that the amount of any past payments to be considered at this point will not be 'unpacked', but will be included in full in the calculation of the 'reduction amount' for an application (cl. 32). This is supported. It is submitted however that the Operator will need to ensure that past payments include all lump sum payments made by all institutions to a survivor for any and all abuse in scope, including ex gratia and, where adequately substantiated, ad hoc payments made over time.

## Protection of the redress payment and implications on insurance

104. Clause 45(1)(a) provides that despite any law of the Commonwealth, a state or territory, 'a redress payment is not to be treated as being a payment of compensation or damages'. The intent of this section is to protect a redress payment from being alienated from the recipient and used to repay amounts already received by that person under other statutory regimes or schemes (Explanatory Memorandum page 30).

105. The intention of this section as set out in the Explanatory Memorandum is supported. Redress payments should not be subject to clawback from other statutory regimes or schemes.

106. The intention of the redress payment, and the scheme as a whole, is to provide an alternative to pursuing compensation or damages through civil litigation.

107. However, the terms of public liability insurance policies are usually predicated upon a legal liability to pay compensation or damages in respect of, for example, personal injury. It follows that an unintended consequence of clause 45(1)(a) is a strong risk that, where cover would otherwise be available, redress payments will be excluded from coverage under insurance policies that insure payments of 'compensation and damages'.

108. This (and the lower standard of proof of the scheme, discussed earlier in this submission), may give rise to situations where NGIs are unable to opt-in, as to do so would mean they are paying uninsured redress in circumstances where they would be insured for payments made for the same claim if brought as a legal demand or through the courts.

109. It is clear that the participating NGI's insurers will derive a benefit from a redress payment being made rather than having to indemnify the participating NGI for defence costs, compensation or damages awarded, or an agreed settlement amount stemming from civil proceedings.

110. Against this background, there is a clear imperative for the Bill to be amended to increase the potential for insurance policies held by participating NGIs to provide indemnity for redress payments made under the scheme.

111. In the absence of an amendment that addresses this concern, NGIs may determine that participation in the scheme is not viable. Two 'classes' of survivors will be created, with survivors falling within the scheme being treated differently to those who are left to pursue their claim through the civil courts.

112. The identified issue with clause 45(1) can be addressed by ensuring that the characterisation of the redress payment in clause 45(1)(a) as not being payment of compensation or damages only applies to laws that would otherwise require statutory repayment for social services or victims compensation to be made from the redress payment.

## Scheme governance

113. It is understood that scheme governance has been the subject of discussion between state and territory governments and the Commonwealth in the course of negotiations for the establishment of a national redress scheme and it is intended that an inter-governmental body with representatives from each participating government (but no survivor or NGI representation) will be established to oversee scheme governance.

114. It is submitted that a governance structure representative of the unique interests of all participants in the scheme should be established. Such a body could be constituted by representatives of the Commonwealth and each of the participating states and territories, as well as survivors and participating NGIs.

115. It is accepted that the terms of reference for this proposed body should be limited to consideration of governance issues. It would have no role in, or decision making power of any sort with respect to redress claims made under the scheme.

116. Given that it can be expected that a significant proportion of redress claims will relate to participating NGIs, which themselves have reporting and governance responsibilities, it is appropriate that NGIs are able to contribute to the scheme's effective functioning and good governance and to have access to financial and administrative data tracking its operation. This would also operate as a check and balance on the scheme and provide participants and the Australian public with confidence that the scheme is achieving its overriding purpose.

## Community based supports

117. It is inevitable that the proposed community-based services will need to be scaled to meet demand, at least initially. It would be of assistance for governments and participating institutions to engage with each other in relation to this, because the required services are of a kind in which some participating institutions, including agencies of Church authorities, are already engaged.

118. Whilst it may not be appropriate for Church agencies to provide such services to survivors of child sexual abuse for which the Church is responsible, it may be that such services can be provided via a pooling arrangement with other participating government institutions and NGIs. There may be some scope for cooperative arrangements for the supply of the services and that might be better for all parties, including survivors, than for participating institutions to simply contribute money.