

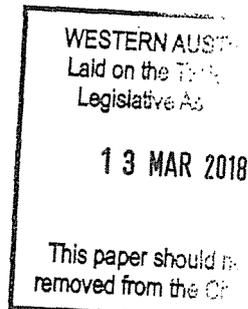


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ATTORNEY GENERAL

Our Ref: 67-04267/1

The Hon Dan Tehan MP
Minister for Social Services
Parliament House
CANBERRA ACT 2600



Dear Minister for Social Services

I am writing in response to your predecessor request at the 15 November 2017 Redress Ministers' Meeting for an update on the status of Western Australia's consideration of opting-in to the Commonwealth Redress Scheme (the Scheme) and referral of powers before its commencement on 1 July 2018.

As a matter of principle, a national approach to redressing institutional abuse, as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, remains Western Australia's preference rather than a Commonwealth scheme which will operate on terms largely determined by the Commonwealth, and in which States and Non-Government Institutions (NGIs) may agree to participate.

Notwithstanding this matter, Western Australia remains committed to working with the Commonwealth and other jurisdictions in the development of the Scheme to ensure that it is sustainable, fair, equitable and, most importantly, treats survivors with the compassion, dignity and respect that they deserve.

As I indicated to you at the Redress Ministers' meeting, it will not be possible for the Western Australian Government to make any decision in relation to referral of power and/or opting-in to the Scheme by 31 December 2017 as so many elements of the Scheme design, implementation and operation remain unknown.

Western Australia's consideration of opting-in to the Scheme will be subject to the resolution of the following issues:

1. Scheme Governance

Western Australia broadly supports the Commonwealth's proposal for establishment of a non-statutory Redress Governance Board (the Board) and Redress Scheme Committee on which participating jurisdictions would be represented.

Whilst I understand that the governance arrangements will be resolved through an intergovernmental agreement, Western Australia is seeking that: The Scheme legislation and Rules will only be modified with written agreement of a super-majority of jurisdictions; and that changes to the assessment matrix and funder of last resort categories require written agreement of all or at least a super-majority of jurisdictions.

Western Australia is also seeking for the Board to have strong oversight of Scheme costs, particularly in the first 12 months to ensure payments and costs align with the actuarial modelling and that the Scheme is sustainable.

2. Child Migrants

The Western Australian Government is concerned that the Commonwealth considers itself only tangentially responsible for the sexual abuse of child migrants, and will therefore not be responsible for contributing to redress for child migrants. As you will be aware, 2941 of the estimated 6500 children brought to Australia under the Commonwealth Child Migrant Scheme were settled in Western Australia. Under *Redress WA*, the then Government provided redress to child migrants who were abused in institutions located in the State, in recognition of the Western Australian Government's role in the care of child migrants.

Under the proposed parameters of the Scheme, subject to where the abuse occurred, the Western Australian Government would either have full responsibility, or share responsibility with NGIs, for the sexual abuse of child migrants who were settled within Western Australia. It is appropriate and fair for the Commonwealth to equally recognise their role in the abuse of child migrants, and share responsibility with the Western Australian Government for providing redress and/or acting as a funder of last resort. I am open to considering how our Governments can resolve this issue bilaterally.

3. Provision of support services that are culturally appropriate and accessible in rural and remote areas

The Western Australian Government is concerned that there has been no information provided that would satisfy it that the Scheme's support services will be provided in a way that is culturally appropriate and geographically accessible. This is particularly important as 40 per cent of *Redress WA* applicants were from rural and remote areas of the State, and over half of all applicants were of Aboriginal or Torres Strait Island descent. Further, a large number of *Redress WA* applicants were illiterate.

In this regard, Western Australia is seeking that the Commonwealth works transparently and closely with jurisdictions to develop a flexible model of delivery that leverages off existing service-based relationships, systems and networks, rather than displacing and competing with them.

The Western Australian Government also wishes to make comment on further matters which are important in Western Australia's consideration of opting-in to the Scheme

4. Referral of Power:

The Commonwealth's timeframes to introduce legislation to refer powers is unrealistic because it anticipates jurisdictions will refer powers before, or at the same time, as the Scheme Rules are provided for consultation. Additionally, Western Australian officials have not seen a revised version of the National Redress Scheme for Institutional Child Sex Abuse Bill 2017, despite providing extensive comments to the Commonwealth in September 2017.

The Western Australian Government needs to consider the Scheme legislation and Rules before it can consider opting-in to the Scheme.

Should Western Australia consider referring powers to allow NGIs to opt in by 1 July 2018, the earliest opportunity for the progression of new legislation will be after Parliament resumes sitting in mid-February 2018, noting that doing so is subject to other State legislative priorities.

5. Therapeutic counselling and psychological care

Given the challenges associated with delivering services in rural and remote areas, Western Australia supports a flexible approach that would allow jurisdictions to decide whether they will provide a lump sum payment, or State-based services for therapeutic counselling and psychological care.

Western Australian officials will advise the Commonwealth of its proposed model for delivering this aspect of the Scheme in due course, following consultation with key State-based stakeholders.

6. Western Australian-based Non-Government Institution engagement and opt in

The participation of NGIs in the Scheme is vital for ensuring greater access to redress for as many Western Australian survivors as possible. I note that the Commonwealth has focussed its efforts on engaging with the NGIs at a national level and is relying on national bodies to share information about the Scheme with State-based branches.

Western Australian based NGIs advise that they have not been provided with information about the Scheme's parameters, operation and costs, and are unable to make an informed decision about opting-in. In this regard, the Western Australian Government is formally requesting that the Commonwealth engage with State-based NGIs in order to remove potential barriers to them opting-in to the Scheme. The Department of the Premier and Cabinet can assist the Commonwealth with making the practical arrangements for this engagement.

7. Eligibility of incarcerated survivors

Western Australia is concerned about the impact of the Commonwealth's decision to exclude persons with criminal convictions for sexual offences and persons who have received particular sentences for other criminal offences from making a claim. I am concerned that it will disproportionately affect Aboriginal persons who made up the majority of *Redress WA* applicants, and are overrepresented in the criminal justice system generally. This policy decision may exclude a cohort of people from the Scheme, who are likely to have difficulty bringing a civil claim through the court system.

Further, the practical application of the Commonwealth's decision means every applicant must consent to a National Police History Check. This is likely to increase Scheme costs and timeframes for processing applications.

This decision is drawing strong criticism from some jurisdictions and a number of NGIs and survivor groups. The Western Australian Government is calling for a compassionate approach that would allow for flexibility within the Scheme's Rules to enable Western Australia, should it opt in to the Scheme, to make redress payments to incarcerated persons on a case by case basis. For example, in cases where the Western Australian Government accepts 100% responsibility and financial liability, it should be allowed to make redress payments to incarcerated persons at the discretion of the Attorney General. There is established precedent for this approach through existing jurisdictional victims of crime schemes.

8. Deed of Release

Western Australian officials have not seen the wording of the proposed deeds of release. The Western Australian Government is seeking an assurance either: that the deeds of release will include an indemnity clause to prevent the State being joined as a third party contributor in any action where the survivor sues another institution in relation to the same sexual abuse; or the National Bill will be amended to specifically deal with this issue in the sections covering the effect of the statutory deed of release on civil liability.

9. **Impact of the shared financial obligation and shared chain of responsibility framework on applicants**

Western Australia is broadly comfortable that the proposed framework appropriately constrains the Government's financial liability under the Scheme. However, the application of this framework where an institution hasn't opted in where there is shared responsibility is problematic as:

- It is unclear how shared responsibility can be assessed where there is no information regarding the claim against institutions that have not opted in. There will be an incentive for applicants to establish the full claim against institutions that have opted in (where possible).
- The application of the framework introduces an inherent unfairness to survivors. They will be required to decide whether to proceed with their application on the basis that they cannot reapply and may receive a lower or no monetary payment.
- By not reconsidering a person's application once an institution opts in to the Scheme, that institution is 'off the hook' for that claim. This may act as an incentive for institutions to delay participation or not opt in, and will penalise applicants for applying expeditiously.

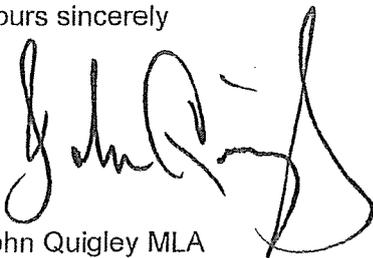
Western Australia is committed to working with the Commonwealth to reconsider the application process to ensure it is fair for survivors and ensures that responsible institutions contribute to redress, regardless of when they opt in to the Scheme. Further, Western Australia formally requests that the Commonwealth share the modelling of the costs of the proposed application process and alternatives with jurisdictions, in order for jurisdictions to contribute to this policy decision.

Western Australian officials will continue to work with the Redress Taskforce on a without prejudice basis to resolve these issues, in the hope that the final product is a Scheme in which the State may opt to participate in. It is therefore crucial that the issues outlined above are finalised as a matter of priority.

In order for the Western Australian Cabinet to consider opting in to the Scheme, a response to the above matters is required by 31 January 2018.

I would also like to take this opportunity to congratulate you on your appointment and I look forward to working with you on this important matter.

Yours sincerely



John Quigley MLA
ATTORNEY GENERAL

21 DEC 2017