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HOUSE OF REPRESENTATIVES

**NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE
BILL 2018**

**NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE
(CONSEQUENTIAL AMENDMENTS) BILL 2018**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Social Services, the Hon Dan Tehan MP)**

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OUTLINE

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

The Bill establishes the National Redress Scheme for Survivors of Institutional Child Sexual Abuse (the Scheme). The Scheme will commence in accordance with clause 2 of the Bill and will operate for a period of 10 years.

The Scheme will recognise and alleviate the impact of past child sexual abuse that occurred in an institutional context by providing three elements of redress to eligible survivors. Redress under the Scheme consists of a monetary payment of up to \$150,000 as a tangible means of recognising the wrong survivors have suffered, access to counselling and psychological services (either through a lump sum payment or through state or territory based services) and the option to receive a direct personal response from a responsible institution(s).

The Bill sets out the objects and principles under which the Scheme will operate, including the requirements for a participating government institution (that is, Commonwealth institutions, State institutions, and Territory institutions) and any participating non-government institution that agrees to participate in the Scheme.

A person will be eligible for redress under the Scheme if the person was sexually abused as a child prior to 1 July 2018, the abuse occurred inside a participating state, inside a territory, or outside Australia, one or more participating institutions are responsible for the abuse, and the person is an Australian citizen or a permanent resident at the time of their application.

If the Scheme establishes that a person suffered sexual abuse, any related non-sexual abuse will also be taken into consideration for the purpose of determining the amount of the redress payment that the person is entitled to receive.

Applicants can only make one claim under the Scheme. A person who accepts an offer of redress will be required to release a responsible participating institution(s) from liability for sexual abuse and related non-sexual abuse that is within scope of the Scheme. A person will also be required to release associates of the responsible institution(s) and institutional officials (other than an abuser of the person).

The Scheme administration cost (Scheme administration component) will be based on a proportionate share of the total amount of redress paid to each person, and is payable by participating institutions.

A review of the operation of the Scheme will commence as soon as possible after the second and eighth anniversaries of the start of the Scheme.

National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

This Bill provides for consequential amendments to be made to Commonwealth legislation for the purpose of the new Scheme.

Amendments to the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* will ensure the payments are not income tested, and so will not reduce the income support payments of survivors as a consequence of receiving a payment under the Scheme.

In addition, amendments are to be made to the *Bankruptcy Act 1966* to ensure payments are quarantined from the divisible property of a bankrupt person. These amendments have been included to ensure a survivor will receive the full benefit of their redress payment, and to ensure that the receipt of the redress payment does not adversely affect a survivor.

This Bill will also exempt decisions made under the Scheme from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. This amendment will ensure the Scheme remains survivor focused and trauma informed by maintaining the principles that the Scheme be a low threshold and non-legalistic process for survivors who have already suffered so much. These amendments are essential to implement the Scheme's policies and to ensure timely and appropriate decision making.

The Bill will also include an amendment to the *Freedom of Information Act 1982*. This amendment will ensure that 'protected information' would not be required to be disclosed under that Act. This exemption supports the trauma informed approach of the Scheme, ensuring that survivors' information is adequately protected. It also protects institutions' information to protect against fraudulent applications being made to the Scheme. The exemption protects the integrity of the operation of the National Redress Scheme, removes any uncertainty about the operation of the information publication scheme in relation to the assessment framework policy guidelines, and makes it transparent that protected information under the National Redress Scheme is exempt under the *Freedom of Information Act 1982*.

The Bill will amend Schedule 1 of the *Age Discrimination Act 2004* to allow the exclusion of children applying to the Scheme if they will not turn 18 throughout the life of the Scheme. Applying an age limit to the Scheme addresses the risk of children signing away their future civil rights when they may have limited capacity to understand the implications, and when the impact of the abuse may not fully be realised.

Financial impact statement

The Australian Government committed \$33.4 million in the 2017-18 Budget to establish the Scheme. The ongoing costs of the Scheme were accounted for in the 2017-18 Mid-Year Economic and Fiscal Outlook. \$54.7 million was reported over the

forward estimates, including funding for Redress Support Services. The remaining funding was not for publication due to legal sensitivities. The Scheme's funding arrangements will be made available after commencement through normal reporting mechanisms.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.

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NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- **Administrative Decisions Judicial Review Act** means the *Administrative Decisions (Judicial Review) Act 1977*.
- **Bankruptcy Act** means the *Bankruptcy Act 1966*.
- **Criminal Code** means the *Criminal Code Act 1995*.
- **Public Governance, Performance and Accountability Act** means the *Public Governance, Performance and Accountability Act 2013*.
- **Regulatory Powers Standard Provisions Act** means the *Regulatory Powers (Standard Provisions) Act 2014*.
- **Royal Commission** means the *Royal Commission into Institutional Responses to Child Sexual Abuse* established under the Commonwealth Letters Patent issued on 11 January 2013.
- **Scheme** means the National Redress Scheme for Institutional Child Sexual Abuse as established by the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018*.
- **Social Security Act** means the *Social Security Act 1991*.
- **Veterans' Entitlements Act** means the *Veterans' Entitlements Act 1986*

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

Background

Overview of the National Redress Scheme

The Bill establishes a National Redress Scheme for survivors of institutional child sexual abuse that is intended to operate for a 10 year period from 1 July 2018.

The purpose of the Bill is to implement the joint response of the Commonwealth Government, the government of each participating State and the government of each Territory, and each participating non-government institution's response to the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse's Redress and Civil Litigation Report*. The objective is to recognise and alleviate the impact of past institutional child sexual abuse, and related non-sexual abuse, and to provide justice for the survivors of that abuse.

The Scheme provides three elements of redress in the form of a redress payment, a counselling and psychological services component (which, depending on where a survivor lives, consists of access to counselling and psychological services or a monetary payment), and a direct personal response. Survivors will also have access to legal advice services that will be provided as part of the Scheme.

The Scheme will cover sexual abuse, and any related non-sexual abuse, that occurred when the person was a child and where an institution participating in the Scheme is primarily or equally responsible for the abuse. For abuse to be within the scope of the Scheme it must have occurred before the Scheme start day.

The Royal Commission

On 11 January 2013, Letters Patent were issued for a *Royal Commission into Institutional Responses to Child Sexual Abuse*. The Royal Commission inquired into how allegations and incidents of child sexual abuse and related matters that occurred in an institutional context were managed by the responsible institutions.

In 2015, the Royal Commission released its *Redress and Civil Litigation Report* which recommended, among other initiatives, the establishment of a national redress scheme for survivors of institutional child sexual abuse. This Bill introduces a National Redress Scheme for Survivors of Institutional Child Sexual Abuse.

Commencement

The Scheme will start the day the Act commences.

Entitlement to Redress

Survivors of child sexual abuse are able to apply to the Scheme, provided they are an Australian citizen or an Australian permanent resident. The rules may provide for persons with other citizenship status to apply. This, for example, could include

former child migrants who are no longer residing in Australia, or children abused in Australian institutional settings outside Australia who are not citizens or permanent residents. The sexual abuse suffered by the survivor must have occurred when the person was a child (that is, under the age of 18) and prior to commencement of the Bill. Sexual abuse includes any act which exposes the person, who is a child, to, or involves the person in, sexual processes beyond the person's understanding or capacity to provide consent, or contrary to accepted community standards. The survivor may also have suffered non-sexual abuse in connection with the child sexual abuse, which could include physical abuse, psychological abuse and neglect. Non-sexual abuse will be taken into consideration as an aggravating factor that contributed to the severity of the sexual abuse suffered. The sexual abuse, and related non-sexual abuse, must have occurred inside a participating State, inside a Territory, or outside Australia, and a participating institution must be responsible for the abuse.

A person will not be able to apply to the Scheme if: they have already made an application for redress under the Scheme, a security notice is in force in relation to the person, they are a child who will not turn 18 before the Scheme sunset day, they are in gaol, or the application is being made in the period of 12 months before the Scheme sunset day. If there are circumstances justifying an application being made from gaol, or in the period of 12 months before the Scheme sunset day, the Scheme Operator may allow the application to be made.

Eligibility for redress will be assessed on whether there is a reasonable likelihood the person suffered sexual abuse as a child in an institutional setting. A claim can be made at any time from commencement of the Scheme until 12 months before the closing date of the Scheme, which is 30 June 2028. Applications for redress under the Scheme are limited to one application per survivor, whether or not that person suffered sexual abuse in more than one institution. Survivors will be able to include multiple episodes of sexual abuse and related non-sexual abuse suffered in multiple institutions in the one application.

Redress consists of three components: a redress payment of up to \$150,000, a counselling and psychological services component, which, depending on where the person lives, consists of access to counselling and psychological services or a payment of up to \$5,000 and a direct personal response. Survivors will be able to choose whether to accept one, two or all three of the components of redress.

The amount of the redress payment will depend on the level of sexual abuse, and related non-sexual abuse, that a survivor suffered and will be an amount up to a maximum of \$150,000. The intention of this payment is to recognise the wrong the person has suffered. A survivor who has accessed redress under another Scheme, is not excluded from applying for redress under the Scheme. However, any prior payments made by a participating institution in relation to the abuse suffered by a survivor that is within the scope of this Scheme, will be deducted from the amount payable by that participating institution.

Access to counselling or psychological services is intended to enable survivors to access trauma-informed and culturally appropriate counselling or psychological services to assist with the impacts of the sexual abuse they experienced as a child. If a survivor lives in a jurisdiction that is not a declared provider of counselling and psychological services under the Scheme, they will be entitled to a counselling and psychological services payment of up to \$5,000. If the survivor lives in a jurisdiction that is a declared provider of counselling and psychological services under the Scheme, then they will be entitled to access those services.

The redress payment or counselling and psychological services payment will be inalienable and cannot be used to recover debts due to the Commonwealth. The payment will also not be subject to income tax.

Survivors will also have the opportunity, if they wish, to receive a direct personal response from the participating institution responsible for the sexual abuse. The survivor will have the chance to have their abuse acknowledged, tell their personal story of the abuse they suffered and the impact of the sexual abuse on them. The format of the direct personal response may include an apology, an acknowledgement of the impact of the abuse on the person, an opportunity to meet with an appropriately senior person from the relevant institution and an assurance as to the steps the institution takes to protect children in their care against abuse.

Survivors will also be given the opportunity to receive legal assistance provided by the Scheme, if they wish, before making a decision as to whether to accept the offer of redress. If an offer of redress is accepted, the survivor will be required to release the relevant participating institutions the Operator determines are responsible for the abuse, from any liability for the sexual abuse and any related non-sexual abuse, they suffered that is within scope of the Scheme. The survivor will also be required to release any institutions that are associates of the responsible institution, and officials of those institutions (other than an official that was an abuser of the survivor).

In the event that an offer of redress is made to a survivor, but the survivor dies before accepting the offer, the redress payment will be paid to the estate of the survivor. However, the other two components of redress (the counselling and psychological services component and direct personal response) will not be available to the survivor's estate.

Funding

The Scheme funding arrangements are based on the principle of the responsible entity pays. The Consolidated Revenue Fund will be appropriated for the purposes of paying the redress payment and the counselling and psychological services component of redress under the Scheme.

Non-Commonwealth entities (participating state and territory institutions and non-government institutions) will be invoiced quarterly in arrears with their funding contributions credited to the Consolidated Revenue Fund.

Internal review

Reviews of decisions made under the Scheme are limited to internal review. This follows the recommendation of the Independent Advisory Council on redress, appointed by the Prime Minister, which included survivors of institutional abuse, representatives from support organisations, legal and psychological experts, Indigenous and disability experts, institutional interest groups and those with a background in government. The Independent Advisory Council considered that providing survivors with external review would be overly legalistic, time consuming, expensive and would risk further harm to survivors.

The internal review processes will enable applicants to seek review of determinations on applications for redress. The person conducting the review must have had no involvement in the original decision and may affirm, vary or substitute the original decision.

Merits review in the Administrative Appeals Tribunal or judicial review in the Federal Circuit Court or Federal Court under the Administrative Decisions Judicial Review Act will not be available to survivors or participating institutions.

This is considered appropriate as redress is not intended to replicate civil litigation standards or processes. The Scheme is intended to be an alternative to civil litigation that avoids the risk of further harm to survivors. The lower evidentiary thresholds under the Scheme and the broad discretion of the independent decision-makers mean that merits review and judicial review under the Administrative Decisions Judicial Review Act are not appropriate for decisions under the Scheme. The Scheme is to be supportive, survivor-focussed and non-legalistic and decisions will be made expeditiously.

Participating institutions will also not have the right to seek a merits or judicial review under the Administrative Decisions Judicial Review Act of any decisions made under the Scheme. This is because institutions participate in the Scheme voluntarily and agree to participate in the Scheme with the understanding that certain matters will be decided by the Operator (or delegate).

Chapter 1 – Introduction

Part 1-1 – Introduction

Division 1 – Preliminary

Clause 1 sets out the short title of the Bill as the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* once it is passed and commences in accordance with clause 2.

Clause 2 provides that the Bill will commence as follows:

- (a) if the Bill receives Royal Assent before 1 July 2018 — 1 July 2018; or
- (b) if the Bill receives Royal Assent on or after 1 July 2018 — on a single day that is to be specified in a Proclamation instrument.

The clause also provides for a default commencement of the legislation. If paragraph (a) or (b) do not occur, the whole of the Act will commence the first day after a six month period that commences on the day the Bill receives Royal Assent.

Division 2 – Objects of this Bill

Clause 3 sets out the objects of the Bill.

Subclause 3(1) provides that the main objects of the Bill are to recognise and alleviate the impact of past institutional child sexual abuse and related abuse and to provide justice for the survivors of that abuse.

Subclause 3(2) states that for the purpose of achieving the objects mentioned in subclause 3(1) of the Bill, the objects of the Bill are also to: establish a National Redress Scheme for Institutional Child Sexual Abuse; provide redress under the Scheme; enable institutions responsible for abuse of survivors to participate in the Scheme to provide that redress to those survivors; and implement the joint response of the Commonwealth Government, and the government of each participating State and Territory to the recommendations of the Royal Commission in relation to redress.

Subclause 3(2) further specifies that redress consists of: a monetary payment to survivors as a tangible means of recognising the wrong they have suffered; access for the survivor to counselling and psychological services or a monetary payment depending on where the survivor lives; and a direct personal response to survivors from the participating institutions responsible.

Division 3 – Simplified outline of this Bill

Clause 4 provides a simplified outline of the Bill.

Part 1-2 – Definitions

Division 1– Simplified outline of this Part

Clause 5 provides a simplified outline of Part 1-2.

Division 2 – The Dictionary

Clause 6 provides a Dictionary that defines various technical words and phrases used in this Bill. The Dictionary also provides cross references to specific definitions throughout the Bill.

abuse means sexual abuse or non-sexual abuse.

abuser: a person is defined to be the **abuser** of another person if the person has abused the other person.

acceptance document is defined by a cross reference to subclause 42(2).

acceptance period is defined by a cross reference to clause 40.

adoption Act is defined by a cross reference to subclause 144(9).

amendment reference is defined by a cross reference to subclause 144(3).

approved form is defined to mean a form approved under clause 188.

assessment framework is defined by a cross reference to subclause 32(2).

assessment framework policy guidelines is defined by a cross reference to subclause 33(3).

assistance nominee is defined to mean a person who is appointed as an assistance nominee under paragraph 81(1)(a).

associate: when a participating institution is an **associate** of another participating institution, is defined by a cross reference to subclauses 133(3) and 135(5).

child is defined to mean a person under the age of 18.

civil penalty provision has the same meaning as in the *Regulatory Powers (Standard Provisions) Act 2014*.

Commonwealth institution is defined by a cross reference to clause 109.

component of redress means any of the three components of redress referred to in subclause 16(1).

counselling and psychological component of redress is defined to mean:

- (a) the counselling and psychological services payment; or
- (b) access to counselling and psychological services under the Scheme.

counselling and psychological services contribution is defined by a cross reference to clause 160.

counselling and psychological services payment is defined to mean a payment payable under subclause 51(3).

declared provider of is defined by a cross reference to clause 146(2).

defunct: an institution is **defunct** if it is no longer in existence.

direct personal response is defined by a cross reference to subclause 54(2).

direct personal response framework is defined by a cross reference to subclause 55(2).

eligible is defined by a cross reference to clause 13.

entitled is defined by a cross reference to subclauses 12(2), (3) and (4).

equally responsible: when a participating institution is **equally responsible** for abuse of a person, is defined by a cross reference to subclauses 15(3), (5) and (6).

express amendment is defined by a cross reference to subclause 144(9).

financial institution is defined to mean a body corporate that is an authorised deposit-taking institution for the purposes of the *Banking Act 1959*.

Foreign Affairs Minister is defined to mean the Minister administering the *Australian Passports Act 2005*.

funder of last resort: when a participating government institution is the **funder of last resort** for a defunct institution, is defined by a cross reference to clause 163.

funding contribution is defined by a cross reference to clause 150.

government institution is defined to mean a Commonwealth institution, State institution or Territory institution.

Home Affairs Minister is defined to mean the Minister administering the *Australian Security Intelligence Organisation Act 1979*.

Human Services Department is defined to mean the Department administered by the Minister administering the *Human Services (Centrelink) Act 1997*.

incorporated lone institution is defined by a cross reference to paragraph 124(3)(b).

independent decision-maker is defined by a cross reference to subclause 185(3).

initial referred provisions is defined by a cross reference to subclause 144(9).

institution is defined to mean: any body, entity, group of persons or organisation (whether or not incorporated), but does not include family or an individual.

legal nominee is defined to mean a person who is appointed as a legal nominee under paragraph 81(1)(b).

listed: when a defunct institution is **listed** for a participating jurisdiction, is defined by a cross reference to subclause 164(1).

lone institution is defined by a cross reference to subclause 124(2).

maximum amount is defined by a cross reference to step 1 of the method statement in subclause 30(2).

National Redress Scheme Agreement is defined to mean the Intergovernmental Agreement on the National Redress Scheme for Institutional Child Sexual Abuse, as in force from time to time.

National Redress Scheme Operator is defined by a cross reference to the definition of **Operator**.

National Service Standards is defined to mean the National Service Standards set out in the National Redress Scheme Agreement.

nominee is defined to mean an assistance nominee or a legal nominee.

non-government institution is defined by a cross reference to subclauses 114(2) and (3).

non-participating State is defined to mean a State that is not a participating State.

non-sexual abuse includes physical abuse, psychological abuse and neglect.

officer of the scheme is defined to mean

- (a) a person in the Department or the Human Services Department performing duties, or exercising powers or functions, under or in relation to this Bill (including the Operator); or
- (b) an independent decision-maker; or
- (c) a person prescribed by the rules.

official of an institution is defined to mean a person who is or has been an officer, employee, volunteer or agent of the institution.

Operator (short for National Redress Scheme Operator) is defined to mean the person who is the Secretary of the Department in the person's capacity as Operator of the Scheme (as referred to in clause 9).

original determination is defined by a cross reference to paragraph 73(1)(b).

original version of this Act is defined by a cross reference to subclause 144(9).

participating defunct institution is defined by a cross reference to clause 117.

participating government institution is defined to mean:

- (a) a Commonwealth institution; or
- (b) a participating State institution; or
- (c) a participating Territory institution.

participating group is defined by a cross reference to clause 133(2).

participating incorporated lone institution is defined by a cross reference to subclause 124(5).

participating institution is defined by a cross reference to subclauses 108(2) and 116(7).

participating jurisdiction is defined by a cross reference to subclause 143.

participating lone institution is defined by a cross reference to subclause 124(1).

participating non-government institution is defined by a cross reference to subclause 114(1).

participating State is defined by a cross reference to clause 144.

participating State institution: is defined by a cross reference to clause 110.

participating Territory is defined to mean the Australian Capital Territory or the Northern Territory.

participating Territory institution is defined by a cross reference to clause 112.

participating unincorporated lone institution is defined by a cross reference to subclause 124(4).

Permitted purpose is defined by a cross reference to paragraph 97(1)(e).

primarily responsible: when a participating institution is **primarily responsible** for abuse of a person is defined by a cross reference to subclauses 15(2),(5) and (6).

production period is defined by a cross reference to paragraphs 24(3)(c) and 25(4)(c).

protected information is defined by a cross reference to subclause 92(2).

quarter is defined by a cross reference to subclause 149(2).

reasonable likelihood in relation to a person being eligible for redress is defined to mean the chance of the person being eligible is real, is not fanciful or remote and is more than merely plausible.

redress is defined by a cross reference to subclause 16(1).

redress element is defined by a cross reference to clause 151.

redress payment is defined to mean a payment payable under clause 48 or 60.

referral Act is defined by a cross reference to subclause 144(9).

referred national redress scheme matters is defined by a cross reference to subclauses 145(1) and (2).

Regulatory Powers Act is defined to mean the *Regulatory Powers (Standard Provisions) Act 2014*.

related: non-sexual abuse, is defined to mean non-sexual abuse that is **related** to the sexual abuse of a person if a participating institution is responsible for both the sexual abuse and the non-sexual abuse of the person.

released institution or official is defined by a cross reference to paragraph 42(2)(c).

relevant prior payment is defined by a cross reference to step 3 of the method statement in subclause 30(2).

relevant version of this Act is defined by a cross reference to subclause 144(9).

representative for:

- (a) a participating defunct institution is defined by a cross reference to subclauses 118(2), (3), (4) and (5) and 120(4); or
- (b) a participating lone institution is defined by a cross reference to subclauses 125(2) and (3) and 128(4); or
- (c) a participating group is defined by a cross reference to subclauses 136(2), (3), (4) and (5) and 138(4).

responsible: when a participating institution is **responsible** for abuse of a person is defined by a cross reference to subclauses 15(1), (5) and (6).

responsible institution means an institution is a **responsible institution** in relation to abuse of a person if the Operator has determined under paragraph 29(2)(b) that the institution is responsible for that abuse.

review determination is defined by a cross reference to paragraph 75(2)(b).

rules is defined to mean the rules made by the Minister under clause 179.

saved amount is defined by a cross reference to subclause 50(2) for a redress payment or subclause 53(2) for a counselling and psychological services payment.

scheme is defined to mean the National Redress Scheme for Institutional Child Sexual Abuse established under clause 8.

scheme administration element is defined by a cross reference to subclause 152(1).

scheme start day is defined to mean the day this Act commences.

scheme sunset day is defined by a cross reference to subclause 193(1).

security notice is defined by a cross reference to subclause 65(1).

sexual abuse of a person who is a child is defined to include 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.

State institution is defined by a cross reference to clause 111.

State redress mechanism is defined by a cross reference to subclause 145(4).

survivor is defined to mean a person who has suffered sexual abuse that is within the scope of the Scheme.

Territory is defined to mean a Territory referred to in clause 122 of the Constitution. The note clarifies that a participating Territory is a type of Territory, but there are other Territories that are covered by this definition (for example, the Jervis Bay Territory).

Territory institution is defined by a cross reference to clause 113.

text reference is defined by a cross reference to clause 144(2).

this Act is defined to include the rules and any other instrument made under this Act.

unincorporated lone institution is defined by a cross reference to paragraph 124(3)(a).

wholly-owned Commonwealth company is defined as having the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

within the scope: when abuse is **within the scope** of the Scheme is defined by a cross reference to clause 14.

Chapter 2 – The National Redress Scheme for Institutional Child Sexual Abuse

Part 2-1 – Establishment of the Scheme

Division 1 – Simplified outline of this Part

Clause 7 provides a simplified outline of Part 2-1.

Division 2 – Establishment of the Scheme

Clause 8 establishes the National Redress Scheme for Institutional Child Sexual Abuse.

Clause 9 provides that the National Redress Scheme Operator (the Operator) is responsible for operating the Scheme. The Operator is the Secretary of the Department. The Operator may arrange for support and assistance (including legal assistance) to be provided to a person (including a person who is an applicant, or prospective applicant, for redress) under the Scheme and enter into a contract, agreement, deed or understanding on behalf of the Commonwealth in relation to the Scheme. The Operator may also vary and administer that contract, agreement, deed or understanding.

The note at the end of subclause 9(3) provides an example of the kind of assistance the Operator may provide.

Clause 10 provides a set of overarching general principles to guide the actions of officers under the Scheme.

Subclause 10(1) provides that principles in clause 10 must be taken into account by the Operator and other officers of the Scheme when taking action under, or for the purposes of, the Scheme.

Subclause 10(2) provides that redress under the Scheme should be survivor-focussed. This subclause links to the key objects of the Scheme (clause 3) which are to recognise and alleviate the impact of past institutional child sexual abuse and related abuse, and to provide justice for survivors of that abuse.

Subclause 10(3) provides additional principles that the Operator and other officers taking action under the Scheme have appropriate regard to when redress is assessed, offered and provided. These principles include:

- (a) what is known about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular; and
- (b) the cultural needs of survivors; and
- (c) the needs of particularly vulnerable survivors.

Subclause 10(4) provides that redress should be assessed, offered and provided to avoid, as far as possible, further harm or trauma to the survivor. Subclause 10(5) provides that redress should be assessed, offered and provided in a way that protects the integrity of the Scheme.

Part 2-2 – Entitlement to redress under the Scheme

Division 1 – Simplified outline of this Part

Clause 11 provides a simplified outline of Part 2-2.

Division 2 – Entitlement to redress under the Scheme

Clause 12 sets out when a person is entitled to be provided with redress.

Subclause 12(1) provides that a person can only be provided with redress under the Scheme if the person is entitled to redress.

Subclause 12(2) specifies the requirements that must be satisfied for a person to be **entitled** to redress under the Scheme. These are:

- (a) the person applies for redress under clause 19; and
- (b) the Operator considers that there is a reasonable likelihood that the person is eligible for redress under the Scheme (see clause 13 for eligibility); and
- (c) the Operator approves the application under clause 29; and
- (d) the Operator makes an offer for redress to the person under clause 39; and
- (e) the person accepts the offer in accordance with clause 42.

Reasonable likelihood is defined in clause 6 to mean that the chance of the person being eligible for redress is real and not fanciful or remote.

Example: Person A makes an application for redress in the approved form and verifies the information provided in the application by statutory declaration. The Operator, after reviewing the application and the statutory declaration, considers that there is a reasonable likelihood that the person is eligible, approves their application and makes an offer of redress. Person A accepts the offer by signing the acceptance document and is therefore entitled to redress.

Subclause 12(3) provides that a person is **entitled** to redress, or a component of redress, under the Scheme if this Bill or the rules prescribe that the person is entitled to it. The note cross references Part 3-1 which provides for special cases where this Bill prescribes that a person is entitled to redress, or a component of it (for example, where a person dies before accepting their offer of redress, the Bill allows for the redress payment to be made to other persons in certain circumstances).

Subclause 12(4) provides that if this Bill or the rules prescribe that a person is not **entitled** to redress, or a component of redress, under the Scheme then the person is not entitled to it, despite subclauses (2) and (3). The note cross references Part 3-2 which provides for cases where this Bill prescribes that a person is not entitled to

redress, or a component of it (for, example, where a person has a security notice in force against them, they will not be entitled to redress).

Clause 13 sets out when a person is eligible for redress.

Subclause 13(1) provides that a person is **eligible** for redress under the Scheme if the person was sexually abused, the sexual abuse is within the scope of the Scheme, the sexual abuse that could be payable to the person when worked out under the assessment framework would be more than nil, one or more participating institutions are responsible for the abuse and the person is an Australian citizen or a permanent resident (within the meaning of the *Australian Citizenship Act 2007*) at the time the person applies for redress. This eligibility requirement is included to mitigate the risk of fraudulent claims and to maintain the integrity of the Scheme. It would be very difficult to verify the identity of those who are not citizens, permanent residents or within the other classes who may be specified in the rules. Removing citizenship requirements would likely result in a large volume of fraudulent claims that would impact application timeliness and provision of redress to survivors.

Note 1 to subclause 13(1) clarifies that to be eligible for redress, a person must have been sexually abused. It clarifies that redress is for the sexual abuse (which must be present) and any related non-sexual abuse, of the person that is within the scope of the Scheme.

Note 2 to subclause 13(2) cross references subclause 108(2) that sets out which institutions are participating institutions.

Examples of eligibility for subclause 13(1) of the Scheme:

1. Person B is an Australian permanent resident who suffered sexual abuse as a child while in a Commonwealth institution before the Scheme start day. Person B is eligible for redress.
2. Person C is an Australia citizen who suffered physical abuse, but not sexual abuse, as a child while in the care of a participating institution, outside Australia before the Scheme start date. Person C is ineligible for redress as they did not suffer sexual abuse. For non-sexual abuse to be considered under the Scheme, it has to be related to the sexual abuse suffered.
3. Person D is an Australian Citizen who suffered sexual abuse at the age of 19 while in the care of a participating institution, inside Australia before the Scheme start day. Person D is ineligible for redress as the sexual abuse did not occur when Person D was a child.

Subclause 13(2) provides that a person is also **eligible** for redress if this Bill or the rules prescribe that the person is eligible for redress under the Scheme.

The findings and recommendations of the Royal Commission identified a lengthy period over which instances of child sexual abuse in an institutional context occurred. This means it is not possible, prior to the Scheme commencing, to identify or quantify the range of persons who are or should be eligible for redress. The

Scheme therefore needs to have suitable flexibility to analyse each individual application and respond quickly to survivor needs (declare a person eligible) over the life of the Scheme.

The need to respond quickly to survivor needs is a key feature of the Scheme as many survivors have waited decades for recognition and justice. The use of rules rather than regulations provides the necessary flexibility to respond more quickly to unforeseen factual matters as they arise, because rules can be adapted and modified more quickly than regulations or Acts. Prescribing in the Bill or rules that a person is eligible under the Scheme confers a benefit on a survivor to receive redress quickly rather than having to engage in a lengthy civil litigation processes, and additionally receive a direct personal response of acknowledgement and apology from a responsible institution, which would not be available through a litigation process.

Rules made under subclause 13(2) are therefore necessary to ensure that the Scheme can be appropriately flexible. There may be classes of survivors that the Scheme has not, or could not, envisage to include in the Bill, whom can be accommodated via this rule making power. This ensures participating institutions are able to provide redress to all survivors of abuse for which the institution is responsible. Governments and entities who elect to opt in to the Scheme do so to meet the objectives of the Scheme to ensure survivors prescribed under subclause 13(2) receive the same acknowledgement and redress as those eligible under subclause 13(1) where a participating institution is responsible for the abuse and agreed to participate in the Scheme.

Subclause 13(3) provides that despite a person meeting the eligibility requirement in subclauses 13(1) and (2), this Bill or the rules may prescribe that a person is not **eligible** for redress under the Scheme.

The capacity to prescribe a person is not eligible under the Scheme is required, as prior to commencement of the Scheme and receipt of applications, it is not possible to account for every category of person that should not be eligible for redress under the Scheme. The power under subclause 13(3) is intended to be used for exceptional cases to respond to classes of survivors that apply for redress that the Scheme has not, or could not, envisage would apply and that needed to be specified as not eligible under the Scheme. This may include circumstances where allowing a class of persons to be eligible for redress may bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme.

Learnings from past schemes have shown it will be necessary to adjust policy settings to mitigate against unintended outcomes. It is essential that the Scheme is flexible and adaptable to the realities of implementation, which requires some provisions, such as eligibility requirements, to be in the rules. Protections will be in place to balance this flexibility, including governance arrangements, to provide oversight of the operation of the Scheme.

The governance arrangements include a Ministerial Redress Scheme Board (the Board), as set out in the National Redress Scheme Agreement, that will comprise Ministers from participating States and participating Territories. The Board

must agree to any legislative or key policy changes required over time, including proposed amendments to the rules.

Clause 14 provides that abuse of a person is ***within the scope*** of the Scheme if the abuse occurred when the person was a child while inside a participating State, inside a Territory, or outside Australia and the abuse occurred before the Scheme start day (subclause 14(1)).

A child is defined in clause 6 to mean a person under 18.

Subclause 14(2) provides that this Bill or the rules under the Bill may prescribe that abuse is ***within the scope*** of the Scheme.

Subclause 14(3) provides that, despite subclauses (1) and (2), this Bill or the rules may prescribe abuse that is not ***within the scope*** of the Scheme.

Allowing the rules to prescribe types of abuse that is, or is not, within the scope of the Scheme makes it clear to potential applicants the instances of abuse that are not covered by the Scheme.

Initially, the rules will prescribe that where a person has received a favourable court award (excluding a settlement) in respect of abuse, that abuse is not within the scope of the Scheme insofar as the relevant participating institution is responsible for the abuse.

Clause 15 sets out when a participating institution is responsible for abuse.

Subclause 15(1) provides that an institution (whether or not a participating institution) is ***responsible*** for sexual abuse or non-sexual abuse of a person if the institution is primarily responsible or equally responsible for the abuse.

Subclause 15(2) provides for when an institution will be ***primarily responsible*** for sexual abuse and any non-sexual abuse of a person. Responsibility will arise if the institution is solely or primarily responsible for the abuser having contact with the person.

Examples:

1. Person A was abused in a church where the abuser was a priest at the church, and there was otherwise no connection to any other organisation. The church is likely to be considered to be primarily responsible for the abuse.
2. Person B was abused whilst participating in activities at a local sporting club, where the abuser was their coach. The sporting club received Territory government funding. The sporting club is likely to be primarily responsible for the abuse. The Territory only provided funding to the sporting club and is unlikely to be responsible for redress under the Scheme.

The above are illustrative examples only and the Operator of the Scheme is responsible for determining who will be liable to pay redress under the Scheme.

Subclause 15(3) provides for when an institution will be ***equally responsible*** with one or more other institutions, for sexual abuse and any non-sexual abuse of a person. Responsibility will arise if one or more institutions are approximately equally responsible for the abuser having contact with the person and no other institution is primarily responsible for the abuse of the person.

Examples:

1. Person A was abused in an orphanage run by a non-government institution, where the child was in the care of a participating State and the government placed the child into the orphanage. The abuser was a volunteer at the orphanage. The non-government institution and the participating State are likely to be considered to be equally responsible for the abuse.
2. A religious institution provided chaplaincy or religious instruction at a State institution, which was a public school, during school hours, and at the invitation of a school. An employee of the religious institution abused Person B on school grounds after the religious instruction class. The religious institution and the State are likely to be considered to be equally responsible for the abuse.

The above are illustrative examples only and the Operator of the Scheme is responsible for determining who will be liable to pay redress under the Scheme.

Subclause 15(4) provides circumstances that may be relevant for determining under subclause 15(2) or (3) whether an institution is primarily responsible or equally responsible for the abuser having contact with the person. The following list of circumstances is non-exhaustive and includes:

- (a) whether the institution was responsible for the day-to-day care and custody of the person when the abuse occurred;
- (b) whether the institution was the legal guardian of the person when the abuse occurred;
- (c) whether the institution was responsible for placing the person into the institution in which the abuse occurred;
- (d) whether the abuser was an official of the institution when the abuse occurred;
- (e) whether the abuse occurred:
 - (i) on the premises of the institution; or
 - (ii) where activities of the institution took place; or
 - (iii) in connection with activities of the institution;
- (f) any other circumstances prescribed by the rules.

The note at the end of subclause 15(4) clarifies that when determining the question whether an institution is responsible for abuse of a person, the circumstances listed in this subclause are relevant to that question, but none of them on its own is determinative of that question.

The rule making power in paragraph 15(4)(f) is required so that the Scheme can be responsive to survivors' and participating institutions' needs over the 10 year operation of the Scheme. As applications are processed, further circumstances that are relevant to determine whether an institution is primarily or equally responsible for an abuser having contact with the person are likely to arise. It is important that such circumstances can be included in the rules quickly in order to process applications without delays that an amendment to primary legislation would entail.

Examples:

1. Responsibility of an institution for abuse of a person may be determined where:
 - Person A was a student abused on school grounds, during school hours, by a teacher of the school (the school determined to be responsible).
 - Person B was a cadet abused at a cadet program during program hours, where the abuser was the program leader (the cadet unit determined to be responsible).
 - Person C was abused in a church, where the abuser was a priest at the church (the church determined to be responsible).

Note: for a person to be eligible under the Scheme the abuse had to occur at the time they were a child, defined in clause 6 to be a person under 18.

2. Responsibility of an institution for abuse of a person may not be determined where Person D was a child abused on school grounds, on a weekend, by a person not connected to the school.

Subclause 15(5) provides that, despite subclauses 15(1), (2) and (3), an institution is **responsible, primarily responsible** or **equally responsible** for sexual or non-sexual abuse of a person if the rules prescribe circumstances in which an institution is, or should be treated as being, responsible for the abuse of the person.

Initially, the rules will prescribe that a participating government institution will be equally responsible with a non-government institution where the government institution made an arrangement with the non-government institution to have responsibility for the day-to-day care of a child; at the time of the abuse, the government institution had parental responsibility for the child, or the child was a state ward; and the abuse occurred while the child was in the care of the non-government institution

Initially, the rules will also prescribe that a Commonwealth defence institution will be equally responsible with another institution(s) where the abuse occurred on or after 1 January 1977; the abuse was connected with the person's membership of a cadet unit provided for by Commonwealth legislation; and the other institution(s) would ordinarily be primarily or equally responsible (without the Commonwealth defence institution) for the abuse.

Example

In 1985, a child living in the Australian Capital Territory (ACT) (prior to self-government in the Territory) is under the parental responsibility of the Commonwealth government. The child is placed by an agency of the Commonwealth government in the care of an ACT based orphanage, run by a non-government institution. At the orphanage, the child was abused by an employee of the orphanage. In this case, whilst the non-government institution might ordinarily be found primarily responsible for the abuse, the application of this rule would see the Commonwealth and the non-government institution equally responsible for the abuse.

The rule making power in subclause 15(6) will allow the rules to prescribe circumstances in which an institution is not **responsible, primarily responsible or equally responsible** for abuse, despite subclauses (1), (2) and (3).

Initially, the rules will prescribe that a government institution is not responsible for the abuse of a person where another institution was responsible, and the only connection between the government institution and the abuse is that the government institution regulated the other institution, funded the other institution, or the other institution was established by or under the law of the relevant government.

Example

In 2004, a child in the care of a private hospital for an illness is abused by an employee of the hospital. The hospital complies with the regulation of the relevant State/Territory government and the company which owns the hospital is incorporated under the Corporations Act 2001. As the State/Territory government and the Commonwealth government otherwise have no connection to the abuse, the application of this rule means that they are not responsible for the abuse.

The rule making power in subclauses 15(5) and (6) is required so that the Scheme can be responsive to survivors' and participating institutions' needs over its 10 year operation. The rule making power in subclause 15(6) is intended to ensure that institutions that should be responsible, primarily responsible or equally responsible for abuse are held to be responsible for any abuse that occurred.

The rule making power in subclause 15(6) is intended to ensure that institutions are not found primarily responsible or equally responsible in circumstances where it would be unreasonable to hold the institution responsible for abuse that occurred.

Clause 16 sets out the redress that may be provided to a person.

Subclause 16(1) provides that redress consists of the following 3 elements:

- (a) a redress payment (of up to \$150,000); and
- (b) a counselling and psychological component which, depending on where the person lives (as stated in the person's application for redress) consists of:

- (i) access to counselling and psychological services provided under the scheme; or
 - (ii) a payment (of up to \$5,000) to enable the person to access counselling and psychological services provided outside of the scheme; and
- (c) a direct personal response from each of the participating institutions that are determined by the Operator under paragraph 29(2)(b) to be responsible for the person's abuse.

The note to subclause 16(1) cross references subclause 54(2) that specifies what may be contained in a direct personal response from a participating institution.

Subclause 16(2) makes it clear that a person entitled to redress under the Scheme can choose any or all of the three elements of redress.

Subclause 16(3) provides for the giving of direct personal responses where there are two or more participating institutions that are determined to be responsible for the person's abuse. In this situation, if the person chooses to be given a direct personal response, then the person may choose to be given a response from each of those institutions, or from only some of them or one of them.

Clause 17 provides that redress for a person is for the sexual abuse, and related non-sexual abuse, of a person that is within the scope of the Scheme. The note to clause 17 clarifies that while redress is for both sexual and related non-sexual abuse of a person that is within the scope of the Scheme, to be eligible for redress in the first place, there must have been sexual abuse within the scope of the Scheme. The note provides a cross reference with paragraph 13(1)(b) that provides the eligibility criteria for access to redress.

Part 2-3 – How to obtain redress under the Scheme

Division 1 – Simplified outline of this Part

Clause 18 provides a simplified outline of Part 2-3.

Division 2 – Application for redress under the Scheme

Clause 19 sets out the requirements for an application for redress.

Subclause 19(1) provides that a person must make an application to the Operator to obtain redress under the Scheme.

Subclause 19(2) sets out the requirements that must be complied with for an application to be valid, including that it must be in the approved form, specify where the person lives, include any information and be accompanied by any documents required by the Operator and be accompanied by a statutory declaration that verifies the information included in the application.

Subclause 19(3) provides that the Operator is not required to make a determination on an application that is not valid.

Clause 20 provides for when an application cannot be made.

Subclause 20(1) sets out that a person cannot make an application for redress if:

- (a) the person has already made an application for redress under the Scheme; or
- (b) a security notice is in force in relation to the person; or
- (c) the person is a child who will not turn 18 before the Scheme sunset day; or
- (d) the person is in gaol (within the meaning of subsection 23(5) of the Social Security Act); or
- (e) the application is being made in the period of 12 months before the Scheme sunset day.

Subclause 20(2) provides that paragraphs 20(1)(d) and (e) do not apply if the Operator determines there are exceptional circumstances justifying the application being made.

Paragraph 20(1)(b) is included to ensure the Scheme does not accept applications from people who may prejudice the security of Australia or a foreign country.

Paragraph 20(1)(c) is included as the Scheme cannot ensure adequate protections for children considering the significant nature of the statutory release and the potential amount of payments under the Scheme. Child survivors, and their families, including those who are unable to make an application to the Scheme, will be able to access the Scheme's legal support services in order to consider the child's legal rights, particularly if civil litigation may be a viable alternative.

Paragraph 20(1)(d) is included as it would be difficult to secure appropriate redress support services for this environment, and there are risks associated with the confidentiality of applicants in a closed institutional setting.

Subclause 20(2) provides that paragraphs 20(1)(d) and (e) do not apply if the Operator determines there are exceptional circumstances justifying the application being made. Exceptional circumstances may include where a person is in gaol for the last 12 months of the Scheme, or is in gaol for the life of the Scheme (in which case clause 63 will apply to the person).

Subclause 20(3) provides that before making a determination under subclause 20(2), the Operator must comply with any requirements prescribed by the rules.

Examples:

1. Person F experienced sexual abuse as a child in two institutions and submits two applications to the Scheme (one for each institution). One of the applications is valid and the other cannot be accepted as clause 20 provides only one application can be made. In this example, Person F should withdraw both applications and resubmit a new single application that includes both instances of abuse.

2. Person G applies for and receives redress. Five years later, Person G makes another application for a separate instance of institutional child sexual abuse. This application is invalid because Person G has already made an application to the Scheme and clause 20 provides only one application can be made to the Scheme.
3. Person H suffered sexual abuse in two separate instances as a child. Person H makes an application to the Scheme, although only one of the responsible institutions is a participating institution. Person H is advised about the one application only rule (clause 20) that he may benefit from withdrawing his application, and re-submitting once the second responsible institution agrees to participate in the Scheme. Person H chooses to wait and withdraws his application. One year later, the second responsible institution agrees to participate in the Scheme. Person H contacts the Scheme and submits his application in relation to the two separate instances of abuse. Person H's application is valid as he withdrew his initial application in the year prior. Person H receives an offer in relation to both instances of abuse because both responsible institutions are participating in the Scheme and determined responsible for the abuse.
4. Person J applies for redress. However, the Operator determines that Person J is ineligible to apply for redress as the Home Affairs Minister has issued a security notice against Person J. Two years later, the Home Affairs Minister revokes the security notice. Person J then applies for redress again, and has their application accepted and progressed to assessment.
5. Person K is 4 years old. Person K applies for redress under the Scheme, but their application is not accepted as they will not turn 18 before the Scheme sunset day. Person K, and their family, are referred to the Scheme's legal support service to consider whether civil litigation is a viable alternative.
6. Person L is remanded in a custodial centre. Person L applies for redress under the Scheme, but their application is not accepted. Four weeks later Person L is released from remand with no charge and again applies for redress under the Scheme. Person L's application is accepted and progressed to assessment

Clause 21 provides a special process for applications for redress by a child.

Under subclause 21(1), if a person makes an application for redress under the Scheme and the person is a child who will turn 18 before the Scheme sunset day, then the Operator must deal with the application in accordance with any requirements prescribed by the rules.

Subclause 21(2) provides that rules made for the purposes of subclause (1) apply despite subsection 29(1) (which requires the Operator to make a determination to approve, or not approve, the application as soon as practicable).

The special process for children applying to the Scheme, as prescribed in the rules, is necessary to ensure there are adequate protections in place for this cohort. Children who will turn 18 throughout the life of the Scheme may apply for redress; however, their application will not be determined until they reach 18 years of age. This will allow the Scheme to request information from the responsible institution(s) at the time of the application to ensure the information is current, especially in the circumstance where the responsible institution may go defunct before the claim can be determined. Once the child reaches 18, the survivor can choose to proceed with their application, withdraw their application and reapply, or withdraw their application completely. Those child survivors who are waiting for their redress application to be determined will have access to the Scheme's support services throughout this period.

Clause 22 provides that a person may withdraw their application at any time before the Operator makes a determination on the application under clause 29. An application that is withdrawn under subsection 21(1) is treated as not having been made (subclause 22(2)).

Clause 23 provides for the Operator to notify participating institutions of the withdrawal of an application. If a person withdraws an application under subclause 22(1) and, before the withdrawal, the Operator had requested a participating institution under clause 25 to provide information that may be relevant to a person's application, then the Operator must give the institution written notice that the person's application has been withdrawn. The notice must also comply with any requirements prescribed by the rules (subclause 23(2)).

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

Clause 24 gives the Operator the power to request information from applicants.

Subclause 24(1) provides that the Operator may request a person who applies for redress to give information if the Operator has reasonable grounds to believe that the person has information that may be relevant to determining the person's application. The note at the end of subclause 24(1) clarifies that the request for information may be accompanied by information that has been disclosed by an institution in relation to the application.

The request must be in writing (subclause 24(2)).

Subclause 24(3) sets out that the notice must specify the matters listed in the subclause, including the period in which the person is requested to give the information. This is referred to as the ***production period***. Subclause 24(3) also requires the notice to specify the nature of the information that is requested to be given, how the person is to give the information and that the notice is given under clause 24.

The production period must be at least 4 weeks if the Operator considers the application is urgent, otherwise 8 weeks beginning on the date of the notice (subclause 24(4)).

Subclause 24(5) provides that the Operator may, by written notice to the person, extend the production period where the Operator considers it appropriate to do so.

Subclause 24(6) makes it clear that an extension may be given on the Operator's own initiative or following a request from the person under subclause 24(7).

Subclause 24(7) sets out how a person can go about requesting an extension of the production period. Any request must be made before the end of the production period and must comply with any requirements specified in the rules.

The consequence of a person failing to comply with a request within the production period is that the Operator may make a decision about the application in the absence of that information.

Clause 25 gives the Operator the power to request information from participating institutions.

Subclause 25(1) provides that if an application for redress is made by a person, the Operator must request a participating institution to give any information that may be relevant to the application to the Operator. The Operator must request the information if the application identifies a participating institution as being involved in the abuse or the Operator has reasonable grounds to believe that the participating institution may be responsible for the abuse of the person.

Subclause 25(2) provides that if an application for redress is made by the person and the Operator has reasonable grounds to believe that a participating institution has information that may be relevant to determining the application, then the Operator may request the institution to give any information that may be relevant to the Operator.

The notes at the end of subclauses 25(1) and (2) clarify that the request for information may be accompanied by information that has been disclosed by the applicant or another institution in relation to the application.

The request under subclause 25(1) or (2) must be made in writing given to the institution (subclause 25(3)).

Subclause 25(4) sets out that the notice must specify the matters listed in the subclause, including the period in which the person is requested to give the information to the Operator. This is referred to as the ***production period***. Subclause 25(4) also requires the notice to specify the nature of the information that is requested to be given, how the institution is to give the information and that the notice is given under clause 25.

The production period must be at least 4 weeks if the Operator considers the application is urgent, otherwise 8 weeks beginning on the date of the notice (subclause 25(5)).

Subclause 25(6) provides that the Operator may, by written notice to the institution, extend the production period where the Operator considers it is appropriate to do so.

Subclause 25(7) makes it clear than an extension may be given on the Operator's own initiative or following a request from the institution under subclause 25(8).

Subclause 25(8) sets out how an institution can go about requesting an extension of the production period. The request must be made before the end of the production period and must comply with any requirements specified in the rules.

The consequence of an institution failing to comply within the required timeframe is that the Operator may make a decision about the application in the absence of that information.

Clause 26 sets out consequences for the applicant or institutions failing to comply with a request.

Subclause 26(1) provides that if, under clause 24, the Operator requests further information from a person who has made an application for redress and the information requested is not provided in the production period, the Operator is not required to make a determination on the application until the information is provided.

Subclause 26(2) provides that if, under clause 25, the Operator requests a participating institution to provide information in relation to an application for redress and the information is not provided in the production period, the Operator may progress the application and make a determination on the basis of the information that has been obtained by, or provided to, the Operator.

Clause 27 clarifies that the obligation for a person to give the requested information to the Operator for the purposes of the Scheme, is not prevented by anything in a law of a State or a Territory unless that law is prescribed by the rules.

Clause 28 provides that a person must not give information, produce a document or make a statement to an officer of the Scheme if the person knows, or is reckless as to whether, the information, document or statement is false or misleading in a material particular. The note clarifies that this is a civil penalty provision and that conduct prohibited by this clause may also be an offence against the Criminal Code to make false or misleading statements, give false or misleading information or produces false or misleading documents (see sections 136.1, 127.1 and 137.2 of the Code). The penalty is 60 penalty units.

This civil penalty is justified to ensure that Scheme is adequately protected against the risk of fraudulent applications. Large volumes of false claims from organised groups could overwhelm the Scheme's resources and delay the processing of legitimate applications. The Government is continually undertaking fraud detection activities to ensure the integrity of payments and it is important that the Scheme's policy settings support the integrity and appropriate targeting of payments made under the Scheme. Should the Scheme not safeguard against potential fraud, institutions may choose not to participate, or may seek to leave the Scheme, leaving legitimate survivors unable to access redress from those institutions. The level of

the penalty is sufficiently high to support the principle of deterrence, and ensure that applications made to the Scheme are legitimate and appropriate.

Division 4 – The Operator must determine whether to approve the application

Clause 29 sets out how the Operator must make a determination to approve, or not approve, the applications as soon as practicable (subclause 29(1)).

Under subclause 29(2), the Operator must comply with the following requirements if the Operator considers that there is a reasonable likelihood that the person is eligible for redress:

- (a) approve the application; and
- (b) determine each participating institution that is responsible for the abuse and therefore liable for providing redress to the person; and
- (c) determine (in accordance with clause 30 (method for calculating the amount of redress payment and sharing of costs)) the amount of the redress payment for the person and the amount of each responsible institution's share of the costs of the redress payment; and
- (d) determine (in accordance with clause 31 (working out the amount of the counselling and psychological component and sharing of costs)) the amount of the counselling and psychological component of redress for the person and the amount of each responsible institution's share of the costs of that component; and
- (e) determine whether the counselling and psychological component of redress for the person consists of access to the counselling and psychological services that are provided under the scheme or a counselling and psychological services payment; and
- (f) determine that the amount of the payment equals the amount of the counselling and psychological component of redress for the person, if that component of redress for the person consists of a counselling and psychological services payment; and
- (g) for each responsible institution that is a member of a participating group, determine each other participating institution that is an associate of the responsible institution at that time; and
- (h) for a participating institution that was identified in the application and is not covered by a determination under paragraph (b), determine that the participating institution is not responsible for the abuse and therefore not liable for providing redress; and
- (i) determine that the participating government institution is the funder of last resort for the defunct institution in relation to the abuse if:
 - (i) the Operator determines (in accordance with section 15) that a participating government institution is equally responsible with a defunct institution for the abuse; and
 - (ii) the defunct institution is listed for the participating jurisdiction that the participating government institution belongs to.

Note 1 clarifies the liability for costs if the Operator determines that the participating government institution is the funder of last resort for the defunct institution. In these circumstances the participating government institution will be liable to pay the defunct institution's (hypothetical) share of costs of providing redress to the person (see clause 165 (special rules for funder of last resort cases)). Those costs are in addition to the participating government institution's own share of the costs for providing redress to the person. For the funder of last resort provisions, see Part 6².

Note 2 clarifies that only defunct institutions that are both non-government institutions and not participating institutions can be listed for a jurisdiction (see subclause 164(1)).

If the Operator does not consider that there is a reasonable likelihood that the person is eligible for redress, the Operator must make a determination not to approve the application (subclause 29(3)).

Subclause 29(4) provides that the rules may require or permit the Operator to revoke, under this subclause, a determination made under subclause 29(2) or (3).

Subclause 29(5) provides that the Operator cannot revoke a determination made under subclause 29(2) if the person has been given an offer of redress and the person has accepted the offer in accordance with clause 42.

Subclause 29(6) sets out the consequences if the Operator revokes the determination. The effect of a revocation is:

- (a) every determination made under subclause 29(2) or (3) is taken never to have been made; and
- (b) if the person has not accepted or declined an offer that has been made – the offer is taken to be withdrawn; and
- (c) if the person has applied for a review of the determination – the review application is taken to be withdrawn; and
- (d) the Operator may make further requests for information relating to the person's application under clause 24 or 25.

Under subclause 29(7), the Operator must give a written notice to the person and each participating institution that was notified under clause 35 of the determination. The notice must state that the determination has been revoked, that the determination is taken never to have been made, the fact that an offer of redress has been withdrawn under paragraph 29(6)(b), the fact that an application for review of the determination has been withdrawn under paragraph 29(6)(c) and any other matter prescribed by the rules.

Clause 30 deals with working out the amount of the redress payment to the person and each responsible institution's share of the costs of that payment. Subclause 30(1) sets out how the Operator must make a determination under paragraph 29(2)(c) with respect to those amounts. The note clarifies that this clause only applies if the Operator approves the person's application for redress.

Subclause 30(2) provides the method for working out the share of costs. The subclause provides that the Operator must first work out, for each responsible institution, the amount of that institution's share of the costs of the redress payment by using the following method statement:

- Step 1 – Apply the assessment framework to work out the maximum amount of the redress payment that could be payable to the person. The maximum amount must not be more than \$150,000 regardless of the number of responsible institutions. The amount worked out is the **maximum amount** of the redress payment that could be payable to the person.
- Step 2 – Work out the amount that is the responsible institution's share of the maximum amount (in accordance with the rules). This amount is the **gross liability amount** for the responsible institution.
- Step 3 – Work out the amount of any payment (a **relevant prior payment**) that was paid by the institution to the person by, or on behalf of, the responsible institution in relation to abuse for which the institution is responsible. Any payment that is prescribed by the rules as not being a relevant payment is not to be included. This will allow certain payments (for example, statutory entitlements under veterans' legislation) to be disregarded so that they do not need to be offset against the redress payment amount. This amount is the **original amount** of the relevant prior payment.
- Step 4 – Multiply the original amount by $(1.019)^n$ where n is the number of whole years since the relevant prior payment was paid to the person. The resulting amount is the **adjusted amount** of the relevant prior payment of the institution. The note to step 4 clarifies that the adjustment is broadly to account for inflation.
- Step 5 – Add together the adjusted amount of each relevant prior payment of the institution. This amount is the **reduction amount** for the institution. The resulting amount should be rounded up if it is not a whole number of cents.
- Step 6 – The amount of the institution's share of the costs of the redress payment is the gross liability amount for the institution (in step 2) less the reduction amount for the institution (in step 5). The amount may be nil but not less than nil.

Subclause 30(3) provides that the Operator must then work out the amount of the redress payment for the person by adding together the amounts of each responsible institution's share of the costs of the redress payment. The amount may be nil but must not exceed the maximum amount of the redress payment (that is, \$150,000).

Note 1 to subclause 30(3) clarifies that the amount of the redress payment may be nil because the total amount of relevant prior payments that were paid to the person by the responsible institutions exceeds the maximum amount of the redress payment that could be payable to the person. The note goes on to provide that while a person may not be paid any redress payment in that case, the person will still be entitled to the other components of redress under the Scheme, such as access to the

counselling or psychological component and a direct personal response (see clause 16).

Note 2 to subclause 30(3) alerts the reader that where a funder of last resort is liable for the costs of redress, subclause 165(2) provides how the amount of the redress payment and share of the costs of the payment are worked out.

Examples:

1. Person X applies for redress on 3 September 2019. On 21 September 2019 the Operator considers that there is a reasonable likelihood that Person X is eligible so must determine the amount of the redress payment and the amount of each liable institution's share of the costs of the redress payment. Person X suffered abuse in two separate instances. Institutions H and J are equally responsible for the first instance of abuse and Institution L is primarily responsible for the second instance of abuse.

The Operator steps each institution through the method statement:

Step 1 & 2 – under the assessment framework the maximum amount payable to Person X is \$140,000. The gross liability amounts are:

Institution H - \$50,000

Institution J - \$50,000

Institution L - \$40,000

Step 3 – Person X has not received a relevant payment from Institution H, although Person X received a prior redress payment of \$5,000 from Institution J on 31 October 2015 and received a prior ex-gratia payment of \$700 from Institution L on 1 July 1999. Therefore the original amounts are:

Institution H – N/A

Institution J - \$5,000

Institution L - \$700

Step 4 – Institution J – It has been three full years since the original amount was received, therefore the sum is:

$$5,000 \times (1.019)^3 = 5,290.45$$

Therefore the adjusted amount for Institution J is \$5,290.45

Institution L – It has been 19 full years since the original amount was received, therefore the sum is:

$$700 \times (1.019)^{19} = 1,000.94$$

Therefore the adjusted amount for Institution L is \$1,000.94

Step 5 – As Institutions J and L each only made one relevant payment, the reduction amounts are the adjusted amounts in step 4.

Step 6 – Each institution's shares are:

Institution H - \$50,000

Institution J - \$50,000 - \$5,290.45 = \$44,709.55

Institution L - \$40,000 - \$1,000.94 = \$38,999.06

2. Person Y applies for redress on 7 July 2018. On 21 July 2018 the Operator considers that there is a reasonable likelihood that Person Y is eligible for redress and must determine the amount of the redress payment and the amount of each liable institution's share of the costs of the redress payment. Institution K is primarily responsible for the abuse.

The Operator steps Institution K through the method statement:

Step 1 & 2 – under the assessment framework the maximum amount payable to Person Y is \$45,000. The gross liability amount from Institution K is \$45,000.

Step 3 – Person Y received two relevant payments from Institution K, including:

a settlement payment of \$25,000 on 1 June 1991; and
an ex-gratia payment of \$5,000 on 1 November 2015.
Therefore the original amounts are \$25,000 and \$5,000.

Step 4 – It has been 27 full years since the settlement payment, therefore the sum is:

$$25,000 \times (1.019)^{27} = 41,556.88$$

Therefore the adjusted amount for the settlement payment is \$41,556.88

It has been two full years since the ex-gratia payment, therefore the sum is:

$$5,000 \times (1.019)^2 = 5,191.81$$

Therefore the adjusted amount for the ex-gratia payment is \$5,191.81

Step 5 – the reduction amount is the sum of Institution K's adjusted amounts:

$$\$41,556.88 + \$5,191.81 = \$46,748.69 \text{ (reduction amount)}$$

Step 6 – Subtract the reduction amount of \$46,748.69 from the gross liability amount of \$45,000. As the reduction amount is greater than Institution K's gross liability of \$45,000 and subclause 29(2) Step 6 provides that the amount may be nil but not less than nil, the result for Institution K is nil and the institution's share of the costs of the redress payment for Person Y is nil. Institution K will still have to pay for the costs of other elements of redress (access to counselling or psychological services and a direct personal response) if Person Y would like to receive them.

3. Person Q applies for redress on 5 September 2018. On 20 September 2018 the Operator considers that there is a reasonable likelihood that Person Q is eligible to receive redress, so must determine the amount of the redress payment and the amount of each liable institution's share of the costs of the redress payment. Person Q suffered abuse in two separate instances. Institution V is primarily responsible for the first instance of abuse and Institution D is primarily responsible for the second instance of abuse.

The Operator steps each institution through the method statement:

Step 1 & 2 – under the assessment framework the maximum amount payable to Person Q is \$120,000. The gross liability amounts are:

Institution V - \$100,000

Institution D - \$20,000

Step 3 – Person Q has not received a relevant payment from institution V, although received a prior ex-gratia payment of \$35,000 from Institution D on 30 June 2016. Therefore the original amounts are:

Institution V – N/A

Institution D - \$35,000

Step 4 - It has been two full years since the original amount was received, therefore the sum is:

$$35,000 \times (1.019)^2 = 36,342.64$$

Therefore the adjusted amount for Institution D is \$36,342.64

Step 5 – As Institution D only made one relevant payment, the reduction amount is the adjusted amount in step 4.

Step 6 – Subtract the reduction amount of \$36,342.64 from Institution D's gross liability amount of \$20,000. As the reduction amount is greater than Institution D's gross liability of \$20,000 and subclause 33(2) Step 6 provides that the amount may be nil but not less than nil, the result for institution is nil, therefore the institution's share of the cost of the redress payment are:

Institution V – \$100,000

Institution D – nil

Clause 31 deals with working out the amount of the counselling and psychological component of redress and the amount of each responsible institution's share of costs of that component. Subclause 31(1) sets out how the Operator must make a determination under paragraph 29(2)(d) with respect to those amounts. The note clarifies that this clause only applies if the Operator approves the person's application for redress.

Subclause 31(2) provides that the Operator must apply the assessment framework to work out the amount of the component, which must not be more than \$5,000, regardless of the number of responsible institutions.

Subclause 31(3) provides that the Operator must work out the amount that is each responsible institution's share of the cost of the component in accordance with the rules. The note cross references that for funder of last resort cases, subclause 165(3) affects how the amount of the counselling and psychological component and the share of costs of the component is worked out.

Clause 32 provides for a Ministerial declaration which is referred to as the assessment framework.

Subclause 32(1) provides that the Minister may declare, in writing, a method, or matters to take into account, for the purposes of working out the amount of the redress payment for a person and the amount of the counselling and psychological component of redress for a person. The note to subclause 32(1) notifies the reader that a declaration made under subclause 32(1) may be varied or revoked as provided for in subsection 33(3) of the *Acts Interpretation Act 1901*.

Subclause 32(2) provides that the declaration is the **assessment framework**.

Subclause 32(3) provides that a declaration under subclause 32(1) is a legislative instrument, but is exempt from section 42 of the *Legislation Act 2003*, which provides for disallowance. It is necessary to exempt this Ministerial declaration from disallowance so that the method or matters to be taken into account for the purpose of working out the amount of redress payment for a person are certain for applicants to the Scheme and decision-makers. This declaration would ordinarily be of an administrative character and would not be a legislative instrument without this provision. However, in order to ensure certainty and transparency it is appropriate to make this declaration a legislative instrument.

Clause 33 provides for the assessment framework policy guidelines. Clause 33 provides that, when applying the assessment framework for the purposes of clauses 30 and 31, the Operator may take into account the assessment framework policy guidelines (subclause 33(1)) which may be made by the Minister, in writing (subclause 33(2)). The guidelines are the **assessment framework policy guidelines** (subclause 33(3)).

Subclause 33(4) provides that the guidelines are not a legislative instrument. These guidelines are of an administrative character, the content of which will not be provided in a legislative instrument. The reason for omitting detailed guidelines is to mitigate the risk of fraudulent applications. Providing for detailed guidelines would enable people to understand how payments are attributed and calculated, and risks the possibility of fraudulent or enhanced applications designed to receive the maximum redress payment under the Scheme being submitted. The Scheme has a low evidentiary threshold and is based on a 'reasonable likelihood' test. These aspects of the Scheme are important and provide recognition and redress to survivors who may not be able or may not want to access damages through civil litigation.

Division 5 – Notice of determination to applicant and participating institutions

Clause 34 sets out the requirement for the Operator to notify the applicant about a determination under clause 29. Subclause 34(1) provides that the Operator must give a written notice to a person who has applied for redress, if the Operator makes a determination under clause 29 about the application. The notice must state:

- (a) whether or not the application has been approved; and
- (b) the reasons for the determination; and

- (c) that the person may apply for an internal review of the determination (clause 73 deals with internal reviews).

Subclause 34(2) provides that if the application has been approved, the notice mentioned in subclause 34(1) must include the offer of redress to the person under clause 39 (deals with the content of the offer of redress).

Subclause 34(3) provides that the notice must specify a day, which must be at least 28 days but no longer than 6 months after the date of the notice, by which the person may apply for review of the determination under clause 73. Subclause 34(3) also provides that the notice must comply with any matters prescribed by the rules.

Clause 35 applies if the Operator makes a determination under clause 29 in relation to a person and a participating institution is specified in the determination, the Operator must give the institution written notice of the determination in accordance with subclause 35(2) (subclause 35(1)).

Subclause 35(2) provides that the Operator must give the institution written notice of the determination stating:

- (a) whether or not the application has been approved; and
- (b) if the Operator determined under paragraph 29(2)(b) that the institution is responsible for the abuse and therefore liable for providing redress to the person under the Scheme:
 - (i) that fact; and
 - (ii) the amount of the redress payment for the person; and
 - (iii) the amount of the institution's share of the costs of that payment; and
 - (iv) the amount of the counselling and psychological component of redress for the person; and
 - (v) the amount of the institution's share of the costs of that component; and
- (c) the fact that the institution is an associate of a responsible institution, if determined by the Operator under paragraph 29(2)(g); and
- (d) the fact that the institution is not responsible for the abuse under the scheme, if determined by the Operator under paragraph 29(2)(h); and
- (e) the fact that the institution is the funder of last resort for a defunct institution, if determined by the Operator under paragraph 29(2)(i); and
- (f) the reasons for the determination as they relate to the institution; and
- (g) the day by which the person may apply under clause 73 for review of the determination.

Subclause 35(3) provides that the notice must also comply with any requirements prescribed by the rules.

Division 6 – Effect of the determination and admissibility of evidence in civil proceedings

Clause 36 sets out the effect of a determination by the Operator. A determination under clause 29 has effect only for the purposes of the Scheme (subclause 36(1)). Subclause 36(2) provides that, in particular, a determination under clause 29 that an institution is, or is not, responsible for the abuse of, or is, or is not, liable to provide redress to, a person is not a finding of law or fact made by a court in civil or criminal proceedings. The note clarifies that a determination under clause 29 is an administrative decision based on whether the Operator considers there to be a reasonable likelihood that the person is eligible for redress. It is not a judicial decision made by a court in civil or criminal proceedings which requires a higher standard of proof.

Subclause 36(3) provides that a determination under clause 29 that an institution is responsible for abuse of a person and therefore liable to provide redress may result in the imposition of a civil liability on the institution to make payments under the Scheme in relation to that redress. In other words, an institution's obligation to make payments under the Scheme may be enforced through the civil courts.

Clause 37 provides for the admissibility of documents in evidence in civil proceedings. Subclause 37(1) provides a list of documents that are not admissible in evidence in civil proceedings in a court or tribunal. These are a person's application for redress, a document created solely for the purposes of accompanying a person's application or a document created solely for the purposes of complying with a request for information made by the Operator under clause 24 or 25 in relation to the person's application.

Subclause 37(2) provides that subclause 37(1) does not apply if the admission of the document in evidence in civil proceedings is for the purposes of giving effect to this Bill.

Subclause 37(3) provides that, for the purposes of subclause 37(2) (and without limiting that subclause), if the admission of the document in evidence is in civil proceedings for judicial review of a decision made under this Bill, then the admission is for the purposes of giving effect to this Bill.

Subclause 37(4) provides that subclause 37(1) does not apply if the admission of the document in evidence is in civil proceedings under, or arising out of, clause 28 (which is about providing false or misleading document or information to an officer of the Scheme).

Part 2-4 – Offers and acceptance of redress

Division 1 – Simplified outline of this Part

Clause 38 provides a simplified outline of Part 2-4.

Division 2 – Offers of redress

Clause 39 sets out the matters that must be addressed in the written offer of redress to a person, where the Operator has approved a person’s application for redress under subclause 29(2). These are to:

- (a) provide an explanation of the 3 components of redress (that is, the redress payment, access to the counselling and psychological component, and the direct personal response); and
- (b) specify the amount of the redress payment; and
- (c) specify whether the counselling and psychological component of redress for the person consists of:
 - (i) access to the counselling and psychological services that are provided under the Scheme; or
 - (ii) the counselling and psychological services payment; and
- (d) if the counselling and psychological component of redress for the person consists of the counselling and psychological services payment, specify the amount of that payment; and
- (e) specify the participating institutions that the Operator has determined under paragraph 29(2)(b) to be responsible for the abuse and therefore liable for providing redress to the person under the Scheme. Although the Operator may determine that an institution is responsible for a person’s abuse, the institution may not be liable for redress if the funder of last resort provisions under Part 6- 2 apply; and
- (f) if any of those responsible institutions is a defunct institution that has a representative:
 - (i) specify the person who is the representative; and
 - (ii) explain that the representative is liable for providing redress to the person under the Scheme; and
- (g) if any of those responsible institutions is a member of a participating group, specify the participating institutions determined by the Operator under paragraph 29(2)(g) to be associates of any of those responsible institutions; and
- (h) specify the participating institutions identified by the person in their application but determined by the Operator as not responsible for the person’s abuse (see subclause 29(2)(h)) and therefore not liable to provide redress to the person under the Scheme; and
- (i) provide that where any of those responsible institutions is a participating government institution that is determined by the Operator under paragraph 29(2)(i) to be the funder of last resort for a defunct institution the offer of redress specifies the defunct institution, and explains that the participating government institution is liable for the defunct institution’s

(hypothetical) share of the costs of providing redress to the person. The offer must also explain that a direct personal response is not available to the person in relation to the abuse for which the defunct institution is responsible; and

- (j) state the date of the offer; and
- (k) specify the acceptance period in which the offer may be accepted (see clause 40); and
- (l) give information about the opportunity for the person to access legal services under the Scheme for the purposes of obtaining legal advice about whether to accept the offer; and
- (m) give information about other services available under the Scheme to help the person decide whether to accept the offer; and
- (n) explain how to accept or decline the offer, should the person decide to do so; and
- (o) inform the person that the offer expires at the end of the acceptance period; and
- (p) explain the effect of releasing responsible institutions, their officials, their associates and the officials of their associates from civil liability (clause 43), should the person accept the offer; and
- (q) inform the person that the person is not obligated to accept the offer and that by doing nothing the person is taken to decline the offer at the end of the acceptance period; and
- (r) inform the person that he or she cannot make another application for redress under the Scheme, whether or not the offer is accepted; and
- (s) inform the applicant they may request an extension of the acceptance period and how to make that application; and
- (t) comply with any other requirements that are prescribed by the rules.

Clause 40 provides for information about the acceptance period for offers of redress.

Subclause 40(1) provides that the **acceptance period** for an offer of redress to a person is the period determined by the Operator, which must be at least 6 months, starting on the date of the offer.

Subclause 40(2) provides the Operator with the power to extend the acceptance period before the end of that period, by written notice to a person, if the Operator considers there are exceptional circumstances that justify the extension.

Subclause 40(3) specifies that the extension may be given on the Operator's own initiative or on request of the person made under subclause 40(4).

Subclause 40(4) allows for a person to request the Operator to extend the acceptance period. The request must comply with any requirements prescribed by the rules.

Subclause 40(5) provides that, if the Operator extends the period, the **acceptance period** is the original period as extended by the Operator. These provisions mean that the acceptance period cannot be extended once that period has expired, and can only be extended before the acceptance period ends. As an extension can be given on the Operator's own initiative, or on a request made by the person, it will usually be incumbent on the person to request that the Operator extend the acceptance period, or to provide the Operator with information pertaining to the exceptional circumstances, before the end of the acceptance period. Without limiting what an exceptional circumstance is, an example of exceptional circumstances might be where a survivor has been hospitalised for ill health and is unable to presently consider the offer of redress.

Example:

Person K applies for redress, is found eligible by the Operator and receives an offer. Person K has 6 months to accept her offer. Person K provides her acceptance in writing seven months after she received the offer. As her acceptance period has expired, Person K was taken to have declined her offer after the 6 month period had expired. Person K is not entitled to redress.

Clause 41 provides for the Operator to give a notice of an offer to participating institutions. Subclause 41(1) provides that the Operator must give the institution or person written notice of the offer if the Operator gives an offer of redress under clause 39 and a participating institution or person referred to in paragraph 39(e), (f), or (g) is specified in the offer.

Subclause 41(2) provides that the notice must state the acceptance period for the offer and comply with any requirements prescribed by the rules.

Division 3 – Accepting or declining offers of redress

Clause 42 provides that a person may accept an offer of redress made by the Operator by complying with this clause (subclause 42(1)).

Subclause 42(2) provides that the person must give the Operator an **acceptance document** that:

- (a) is in the form approved by the Operator; and
- (b) states that the person accepts the offer; and
- (c) states that the person releases and forever discharges each of the following institutions and officials (a **released institution or official**) from all civil liability for sexual abuse, or related non-sexual abuse, of the person that is within the scope of the Scheme:
 - (i) all participating institutions that are determined by the Operator under paragraph 29(2)(b) to be responsible for the abuse of the person;
 - (ii) all participating institutions that are determined by the Operator under paragraph 29(2)(g) to be associates of those responsible institutions;
 - (iii) all officials of those responsible institutions (other than an official who is an abuser of the person); and

- (d) states that the person forgoes any entitlement to be paid damages by a released institution or official if the released institution or official were joined as a party to civil proceedings brought or continued by the person that is within the scope of the Scheme; and
- (e) states that the person will not, whether as an individual, a representative party or a member of a group, bring or continue any civil claim against a released institution or official in relation to that abuse; and
- (f) states the components of the redress that the person wishes to receive; and
- (g) if the person wishes to receive a direct personal response, specifies the participating institutions that the person wishes to receive a response from; and
- (h) acknowledges that the person understands the effect of accepting the offer; and
- (i) is signed by the person; and
- (j) complies with any requirements prescribed by the rules.

The acceptance document must be given to the Operator before the end of the acceptance period and in the manner (if any) prescribed by the rules (subclause 42(3)).

Subclause 42(4) provides that the rules made for the purposes of paragraph 42(2)(j) must not require the person to enter into a confidentiality agreement.

Clause 43 outlines the consequences in relation to civil liability of accepting an offer of redress under clause 42. From the time of giving the acceptance and by force of clause 43:

- (a) the person releases and forever discharges every released institution or official from civil liability for abuse of the person that is within the scope of the Scheme; and
- (b) the person cannot, whether as an individual, a representative party or a member of a group, bring or continue civil proceedings against participating released institution or official in relation to that abuse;
- (c) the release and discharge of civil liability of a released institution or official for that abuse does not:
 - (i) release or discharge another institution or person from civil liability for that abuse; and
 - (ii) prevent the person, whether as an individual, a representative party or a member of a group, from bringing or continuing civil proceedings against another institution or person in relation to that abuse; and
- (d) if a released institution or official would, apart from this clause, be liable to make a contribution to another institution or person in relation to damages payable to the person in civil proceedings brought or continued by the person, whether as an individual, a representative party or a member of a group, against the other institution or person in relation to that abuse, then:

- (i) the released institution or official is released and forever discharged from liability to make that contribution; and
- (ii) the amount of damages payable to the person in those proceedings is reduced by the amount of that contribution.

Clause 44 requires a notice to be given to participating institutions that the offer has been accepted. Subclause 44(1) provides that where a person accepts an offer of redress according to the requirements of clause 42, the Operator must give each institution that was notified under clause 41 about the offer, a written notice that specifies the following information:

- (a) the person's acceptance of the offer; and
- (b) the components of redress that the person has elected to receive (including whether the person wishes to receive a direct personal response from the institution); and
- (c) any matters prescribed by the rules.

Subclause 44(2) provides that the notice must be accompanied by a copy of the person's acceptance document.

Clause 45 provides for a person to decline an offer of redress. Subclause 45(1) provides that where an Operator makes an offer of redress to a person, the person may decline the offer before the end of the acceptance period by providing the Operator with a document that:

- (a) is in the approved form; and
- (b) states the person declines the offer; and
- (c) acknowledges that the person understands the effect of declining the offer (including that the person will not be able to make another application for redress under the Scheme);
- (d) is signed by the person; and
- (e) complies with any requirements prescribed by the rules.

Subclause 45(2) provides that if the person does not accept the offer in accordance with clause 42 within the acceptance period, the offer is deemed to have been declined by the person. This is an automatic ending of the claim to ensure all processes in relation to an application are able to be completed by a direct refusal of the offer of redress or termination of the claim through inaction.

Subclause 45(3) provides that subclause 45(2) does not apply if the person has applied for a review of the Operator's determination on their application for redress under clause 73 and the review has not been completed at the end of the acceptance period.

Example:

Person L applies for redress, is found eligible by the Operator and receives an offer. Person L decides to decline the offer of redress, and advises the Operator of this in the form approved one month into the acceptance period. Person L's acceptance period ends five months early. Person L changes her mind three weeks after

rejecting her offer. However, her acceptance period has ended, so she is not entitled to redress.

Clause 46 requires a notice to be given to participating institutions that the offer is declined. Subclause 46(1) provides that the Operator must give each institution that was notified under clause 41 of the offer, written notice that the person has declined the offer in accordance with clause 45.

Subclause 45(2) provides that the notice must comply with any requirements prescribed by the rules.

Part 2-5 – Provision of redress under the Scheme

Division 1 – Simplified outline of this Part

Clause 47 provides a simplified outline of Part 2-5.

Division 2 – The redress payment

Clause 48 specifies that the Operator must pay the redress payment. Subclause 48(1) provides that if a person is entitled to redress (see clause 12) and the person has stated in the acceptance document that the person wishes to be paid the redress payment, then the Operator must pay the payment to the person as soon as practicable.

Subclause 48(2) permits the rules to prescribe matters relating to the making of redress payments.

Clause 49 sets out the general rules relating to the protection of the redress payment. Subclause 49(1) provides that a redress payment is a payment of compensation under the Scheme. However, for the purposes of the Social Security Act, the Veterans' Entitlements Act and any other Commonwealth, State or Territory legislation, the payment is not to be treated as being a payment of compensation or damages. The note clarifies that this subclause prevents a redress payment affecting other payments that may be payable to the person under legislation (for example, when determining whether a social security payment is payable, or the amount of such a payment, the redress payment is not to be taken into account).

Subclause 49(2) provides that for the purposes of any law of the Commonwealth, a State or a self-governing Territory, in relation to a redress payment the payment and the entitlement to the payment are absolutely inalienable, whether by way of or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise and no amount may be deducted from the payment.

The effect of paragraph 49(2)(a) is to specifically exclude payments under the Scheme from the definition of 'compensation' or 'damages' for the purposes of any Commonwealth, State or self-governing Territory law so that benefits received under the Scheme will not be used to repay amounts paid under other regimes or schemes. For example, redress payments will not be compensation for the

purposes of the *Health and Other Services (Compensation) Act 1995*, the Social Security Act or the Veterans Entitlements Act. The intention of the redress payment is to acknowledge harm. It is not intended to compensate for loss or provide damages.

Paragraph 49(2)(b) makes it clear that a redress payment cannot be used to offset any other debt to the Commonwealth.

Subclause 49(3) provides that nothing in this Bill prevents a liability insurance contract from treating a redress payment as being a payment of compensation or damages. This subclause facilitates the insurers of participating non-government institutions to treat redress payments as compensation or damages under liability contracts. This allows non-government institutions to be assisted by insurers to meet their liability for redress under existing insurance contracts.

Clause 50 provides additional protection for redress payments from garnishee orders.

Subclause 50(1) specifies that if a redress payment is going to be, or has been, paid to the credit of an account and a court order in the nature of a garnishee order comes into force in relation to the account, the court order does not apply to the saved amount (if any) in the account.

Subclause 50(2) provides the following method statement to work out the **saved amount**.

- Step 1 – Work out the amount of the redress payment that has been paid to the credit of the account in the year immediately before the court order came into force.
- Step 2 – Subtract from the amount of the redress payment the total amount withdrawn from the account during that year. The result is the **saved amount**.

Division 3 – Counselling and psychological component of redress

Clause 51 deals with providing access to the counselling and psychological component of redress. Subclause 51(1) applies if a person is entitled to redress under the Scheme (see clause 12) and the person stated in the acceptance documents (under clause 42) that the person wishes to access the counselling and psychological component of redress.

Subclause 51(2) applies to the provision of counselling and psychological services if the person lives (as stated in their application) in a participating jurisdiction that is a declared provider of these services under the Scheme. In these circumstances:

- (a) the Operator must refer the person to the participating jurisdiction as soon as practicable after the person becomes entitled to redress; and

- (b) the participating jurisdiction must provide for the delivery of counselling and psychological services under the Scheme in accordance with the National Service Standards as soon as practicable after receiving the referral.

Subclause 51(3) provides that, if subclause 51(2) does not apply, then the Operator must pay the person a counselling and psychological services payment as soon as practicable after the referral. Subclause 51(4) provides that the rules may prescribe matters relating to the payment of counselling and psychological services payments.

Clause 52 provides general rules for the protection of the counselling and psychological services payment. Subclause 52(1) provides that a counselling and psychological services payment is a payment of compensation under the Scheme. However, for the purposes of the Social Security Act, the Veterans' Entitlements Act and any other Commonwealth, State or Territory legislation, the payment is not to be treated as being a payment of compensation or damages. The note clarifies that this subclause prevents a counselling and psychological services payment affecting other payments that may be payable to the person under legislation (for example, when determining whether a social security payment is payable, or the amount of such a payment, a counselling and psychological services payment is not to be taken into account).

Subclause 52(2) provides that for the purposes of any law of the Commonwealth, a State or a Territory, a counselling and psychological services payment:

- (a) the payment and the entitlement to the payment are absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise; and
- (b) no amount may be deducted from a counselling and psychological services payment.

Subclause 52(3) provides that this Bill does not prevent a counselling and psychological services payment being treated as a payment of compensation or damages under a liability insurance contract.

This subclause facilitates the insurers of participating non-government institutions to treat counselling and psychological services payments as compensation or damages under liability contracts. This allows non-government institutions to be assisted by insurers to meet their liability for redress under existing insurance contracts.

The effect of paragraph 52(2)(a) is to specifically exclude payments under the Scheme from the definition of 'compensation' or 'damages' for the purposes of any Commonwealth, State or self-governing Territory law so that benefits received under the Scheme will not be used to repay amounts paid under other regimes or schemes. For example, redress payments will not be compensation for the purposes of the *Health and Other Services (Compensation) Act 1995*, the Social Security Act or the Veterans Entitlements Act. The intention of the redress payment is to acknowledge harm. It is not intended to compensate for loss or provide damages.

Paragraph 52(2)(b) makes it clear that a counselling and psychological services payment cannot be used to offset any other debt to the Commonwealth.

Clause 53 provides additional protection for counselling and psychological services payments from garnishee orders.

Subclause 53(1) specifies that if a counselling and psychological services payment is going to be or has been paid to the credit of an account and a court order in the nature of a garnishee order comes into force in relation to the account, the court order does not apply to the saved amount (if any) in the account.

Subclause 53(2) provides the following method statement to work out the **saved amount**.

- Step 1 – Work out the amount of the counselling and psychological services payment that has been paid to the credit of the account in the year immediately before the court order came into force.
- Step 2 – Subtract from the amount of the counselling and psychological services payment the total amount withdrawn from the account during that year. The result is the **saved amount**.

Division 4 – Direct personal response

Clause 54 provides for a direct personal response to be given from responsible institutions. Subclause 54(1) provides that a participating institution must take reasonable steps to provide a direct personal response to a person who has expressed a wish, when accepting the offer of redress, to be given a direct personal response from the institution as part of their redress. The participating institution would have received a notice under clause 44 that indicated the components of redress the person wished to receive, including a direct personal response (paragraph 44(1)(b)).

Subclause 54(2) sets out what constitutes a **direct personal response** from a participating institution. These are:

- (a) an apology or a statement of acknowledgement or regret;
- (b) an acknowledgement of the impact of the abuse on the person;
- (c) an assurance as to the steps the institution has taken, or will take, to prevent abuse occurring again;
- (d) an opportunity for the person to meet with a senior official of the institution.

Subclause 54(3) provides that the participating institution must take into account the direct personal response framework when providing a direct personal response.

Clause 55 provides for the direct personal response framework. Subclause 55(1) provides that the Minister may declare, in writing, guidelines about how direct personal responses are to be provided under the Scheme. The note clarifies that a declaration made under subclause 55(1) may be varied or revoked as provided for in subsection 33(3) of the *Acts Interpretation Act 1901*.

Subclause 55(2) provides that the declaration is the ***direct personal response framework***.

Subclause 55(4) provides that when making the declaration, the Minister must have regard to the principles in clause 56.

Subclause 55(4) provides that a declaration under subclause 55(1) is a legislative instrument, but is exempt from section 42 of the *Legislation Act 2003*, which provides for disallowance. It is necessary to exempt this Ministerial declaration from disallowance so that the method or matters to be taken into account for the purpose of ensuring that institutions provide a consistent approach to giving direct personal responses to survivors. This declaration would ordinarily be of an administrative character and would not be a legislative instrument without this provision. However, in order to ensure certainty and transparency it is appropriate to make this declaration a legislative instrument.

Clause 56 outlines the general principles which guide the way in which a direct personal response is provided to a person under the Scheme.

Subclause 56(1) provides that all participating institutions should offer and provide on request by a survivor meaningful recognition of the institution's responsibility by way of a statement of apology, acknowledgement or regret and an assurance as to steps taken to protect against further abuse.

Subclause 56(2) provides that engagement between a participating institution and a survivor (being an applicant under the Scheme) should occur only if, and to the extent, a survivor desires it.

Subclause 56(3) requires participating institutions to be clear about what they are willing to offer and provide by way of a direct personal response to survivors. It also requires institutions to ensure they are able to provide the direct personal response that they offer to the survivor.

Subclause 56(4) requires participating institutions to be responsive to survivors' needs in offering a direct personal response.

Subclause 56(5) encourages participating institutions that already provide a broader range of direct personal responses to survivors should consider continuing this approach when participating in the Scheme.

Subclause 56(6) provides that direct personal responses should be delivered by people who have suitable training about the nature and impact of child sexual abuse and the needs of survivors (including cultural awareness and sensitivity training as required).

Subclause 56(7) provides that participating institutions should welcome feedback from survivors about the direct personal responses the institutions offer and provide.

Chapter 3 – Special rules to deal with exceptional cases

Part 3-1 – Special rules allowing entitlement to redress

Division 1 – Simplified outline of this Part

Clause 57 provides a simplified outline of Part 3-1.

Division 2 – Death of person before acceptance of redress offer

Clause 58 applies in circumstances where a person applies for redress under clause 19 of the Scheme, but dies before a determination on the application is made under clause 29 of the Scheme (subclause 58(1)).

Subclause 58(2) provides that in such circumstances the Operator must continue to deal with the application as if the person had not died.

Subclause 58(3) provides that if the Operator approves the application under paragraph 29(2)(a) the Operator must:

- (a) make a determination under paragraph 29(2)(b) about each participating institution that is responsible for the abuse; and
- (b) make a determination under paragraph 29(2)(c) as to:
 - (i) the amount of the redress payment for the person; and
 - (ii) the amount of each responsible institution's share of the costs of the redress payment; and
- (c) if paragraph 29(2)(i) applies to a participating government institution and defunct institution (that is, that they are equally responsible for the abuse)– determine, under that paragraph, that the participating government institution is the funder of last resort for the defunct institution.

Subclause 58(4) provides that the redress payment for the person under this clause is payable in accordance with clause 60.

A rule making power is provided in subclause 58(5) to allow rules to be made prescribing matters relating to giving notices to a person or participating institution in relation to the operation of this clause.

Clause 59 applies in circumstances where a person applies for redress under clause 19 and the person dies after an offer of redress is made under clause 39 but before the offer is accepted, declined or withdrawn. In such circumstances, the offer is deemed to be withdrawn immediately after the person dies (subclause 59(2)).

Subclause 59(3) provides that, if, before the person died, the person had not made an application under clause 73 for review or the review had completed, then the redress payment for the person is payable in accordance with clause 60.

Subclause 59(4) provides that if the person had made an application for review under clause 73 before their death, and the review had not been completed, then the application continues as if the person had not died. If the review approves the person's application for redress, the redress payment is payable in accordance with clause 60.

A rule making power is provided in subclause 59(5) to allow rules to be made prescribing matters relating to giving notices to a person or participating institution in relation to the operation of this clause.

Clause 60 will apply if a redress payment for a deceased person is payable under subclause 58(4), 59(3) or paragraph 59(4)(d).

Subclause 60(2) provides that the Operator must determine who should be paid the redress payment and pay the redress payment to that person or those persons as soon as practicable.

Subclause 60(3) specifies the Operator may, in determining who should be paid the redress payment, consider the people who are entitled to the property of the deceased person under:

- (a) the deceased person's will; and
- (b) the law relating to the disposition of the property of deceased persons.

Subclause 60(4) provides that the Operator may pay the redress payment without requiring the production of probate of the will of the deceased person, or letters of administration of the estate of the deceased person.

A rule making power is provided in subclause 60(5) to allow the rules to prescribe matters relating to the payment of redress payments under clause 60. Due to the 10 year length of the Scheme it is not possible to identify all matters relating to the payment of redress payments under clause 60. The rule making power provided in subclause 60(5) will ensure that any issues that would prevent payment of the redress payment to a person can be addressed.

Example:

Person A applies for redress under the Scheme, is determined to be eligible and an offer of redress is made, but the person dies before they have accepted the offer. Once the Operator of the Scheme is made aware of Person A's death, the redress payment for the person is payable to the person the Operator determines should be paid the redress payment. This may include Person A's next of kin, as stipulated in Person A's will. The redress payment is then paid to the Person A's next of kin.

Division 3 – Abuse for which a Commonwealth institution or participating Territory institution is responsible

Clause 61 extends the eligibility for redress for abuse occurring inside a non-participating State.

Subclause 61(1) sets out the circumstances in which a person can be eligible for redress under the Scheme if the person does not meet the condition in paragraph 13(1)(b) because the sexual abuse of the person occurred inside a non-participating State. A person is eligible for redress under the Scheme where the sexual abuse of that person occurred in a non-participating State if a Commonwealth institution or a participating Territory institution is primarily responsible for the abuse of the person, and they are otherwise eligible for redress under subclause 13(1).

Subclause 61(2) provides that if a person is eligible for redress under the Scheme because of subclause 61(1) then the abuse of the person is within the scope of the Scheme for the purposes of subclause 14(2).

Part 3-2 – Special rules excluding entitlement to redress

Division 1 – Simplified outline of this Part

Clause 62 provides a simplified outline of Part 3-2.

Division 2 – Special assessment of applicants with serious criminal convictions

Clause 63 allows for a determination to be made that a person with a serious criminal conviction is entitled to redress.

Subclause 63(1) provides that clause 63 applies to a person who applies under clause 19 for redress for abuse of the person, and who, either before or after making the application, is sentenced to imprisonment for five years or longer for an offence against a law of the Commonwealth, a State, a Territory or a foreign country.

Subclause 63(2) provides that for the purposes of subclause 12(4) (persons not entitled to redress where prescribed by the Act or rules), a person to whom clause 63 of the Scheme applies is not entitled to redress unless a determination that the person is not prevented from being entitled is in force under subclause 63(5).

Paragraph 63(3)(a) requires that as soon as practicable after becoming aware of a person's sentence, the Operator must consider whether to make a determination under subclause 63(5) that the person is entitled to redress. Paragraph 63(3)(b) provides that the Operator must give a notice in accordance with subclause 63(4) to each of the following (a ***specified advisor***):

- the Attorney-General of the State or Territory (or a person nominated in writing by the relevant State or Territory Attorney-General), if the abuse of the person occurred inside a participating State or Territory or if the person's conviction was for an offence against a law of a participating State or Territory;
- the Commonwealth Attorney-General, if the abuse occurred outside a participating State or Territory or if the offence was against a law not covered by subparagraph 63(b)(iii).

Subclause 63(4) sets out the requirements for a notice that is required to be given under subclause 63(3). A notice must request the specified advisor to provide advice about whether the Operator should make a determination under subclause 63(5) that the person is entitled to redress. The notice must include sufficient information to enable the specified advisor to provide the requested advice and must specify a period of at least 28 days from the date of the notice within which the advice may be provided.

Subclause 63(5) allows the Operator to determine that a person to whom clause 63 applies is not prevented from being entitled to redress if 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.

Subclause 63(6) requires the Operator, in making a determination under subclause 63(5), to take into account the following:

- (a) any advice given by the specified advisor in the period referred to in the notice given under subclause 63(3); and
- (b) the nature of the offence for which the person was convicted; and
- (c) the length of the person's sentence of imprisonment; and
- (d) the length of time since the person committed the offence; and
- (e) any rehabilitation of the person; and
- (f) any other matter the Operator considered to be relevant.

Subclause 63(7) provides that when taking into account the matters set out in subclause 63(6), the Operator must give greater weight to any advice that is given by a specified advisor from the jurisdiction in which the abuse of the person occurred and is given in the period referred to in the notice, that to any other matter..

A rule making power is provided in subclause 63(8) to allow rules to be made prescribing matters relating to the giving of notices to a person or a participating institution in relation to a determination under subclause 63(5).

Example:

Person B applies to the Scheme, and notifies the Operator that they have a previous criminal sentence of 5 years imprisonment. Person B provides the Operator with context of their offending, including information showing that their offence occurred 20 years ago, they have committed no further offending, and provides evidence of positive rehabilitation outcomes. As Person B's abuse and offending occurred in the Australian Capital Territory (ACT), which is a participating Territory, the Operator provides written notice, including Person B's contextual information, to the ACT Attorney General asking for advice on whether Person B should be entitled to redress under the Scheme. The ACT Attorney-General provides advice to the Operator that Person B should receive redress. The Operator, after taking into account the Attorney General's advice and the contextual information of Person B's prior offending, is satisfied that providing Person B with redress would not bring the Scheme into disrepute or adversely affect public confidence in the Scheme. The Operator determines that Person B is entitled to redress.

Person C applies to the Scheme and notifies the Operator that they have a previous criminal sentence of 15 years imprisonment. Person C provides the Operator with information about their offence, which includes information about further offending. Person C does not provide sufficient information demonstrating positive rehabilitation outcomes. Person C's primary offence occurred in Victoria, however Person C's abuse occurred in New South Wales, and both States are participating in the Scheme. The Operator provides written notice, including Person C's contextual information, to the Victorian and New South Wales Attorneys General asking for advice on whether Person C should be entitled to redress under the Scheme. The New South Wales Attorney-General does not provide advice during the specified period.

The Victorian Attorney-General nominates the Secretary of a Department of State of Victoria (the Secretary) to provide advice on their behalf. The Secretary provides advice to the Operator that Person C is a person of notoriety that could bring the Scheme into disrepute, and advises that they should not receive redress. The Operator, after taking into account the Secretary's advice, is satisfied that Person C could bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme. The Operator does not determine that Person C is entitled to redress under the Scheme.

Division 3 – Security notices

Division 3 provides circumstances where a person is not entitled to redress under the Scheme while a security notice is in force. These provisions ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups, or that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, would not be entitled to redress under the Scheme.

Subdivision A- No entitlement to redress while security notice in force

Clause 64 provides that for the purposes of subclause 12(4) (persons not entitled to redress where prescribed by the Act or rules), a person is not entitled to redress under the Scheme while a security notice is in force in relation to the person.

Subdivision B – Security notice

Clause 65 provides for the Home Affairs Minister to give a security notice requiring that Division 3 apply in relation to a specified person, meaning that person will not be entitled to redress.

Subclause 65(1) provides that the Home Affairs Minister may give the Minister a written notice requiring that Division 3 apply to a specified person in the following circumstances:

- (a) the Foreign Affairs Minister gives the Home Affairs Minister a notice under subclause 66(1) in relation to the person; or

- (b) the person's visa is cancelled under section 116 or 128 of the *Migration Act 1958* because of an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or
- (c) the person's visa is cancelled under section 134B of the *Migration Act 1958* (emergency cancellation on security grounds) and the cancellation has not been revoked because of subsection 134C(3) of that Act; or
- (d) the person's visa is cancelled under section 501 of the *Migration Act 1958* and there is an assessment by the Australia Security Intelligence Organisation that the person is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

Subclause 65(2) requires the Home Affairs Minister to have regard, before giving a security notice, to the extent (if any and as far as the Home Affairs Minister is aware) that any redress payments to the person have been or may be used for a purpose that might prejudice the security of Australia or a foreign country.

Subclause 65(3) clarifies that subclause 65(2) does not limit the matters to which the Home Affairs Minister may have regard before giving a security notice.

Subclause 65(4) provides that a security notice is not a legislative instrument. This is declaratory of the law as security notices would not meet the definition of legislative instrument in subsection 8(4) of the *Legislation Act 2003*.

Clause 66 gives the Foreign Affairs Minister the power to give the Home Affairs Minister a written notice setting out the following matters in relation to a person:

- (a) either:
 - (i) under subsection 14(2) of the *Australian Passports Act 2005*, the Foreign Affairs Minister refuses to issue a person an Australian travel document; or
 - (ii) under section 22 of that Act, the Foreign Affairs Minister cancels a person's Australian travel document; and
- (b) the refusal or cancellation was because of a refusal/cancellation request made in relation to the person under subsection 14(1) of that Act; and
- (c) the request was made on the basis of the circumstance mentioned in subparagraph 14(a)(i) of that Act (that the person might prejudice the security of Australia or a foreign country).

Subclause 66(2) provides that a security notice is not a legislative instrument. This is declaratory of the law as a written notice in this respect would not meet the definition of legislative instrument in subsection 8(4) of the *Legislation Act 2003*.

Clause 67 requires the Minister to give a copy of a security notice received from the Home Affairs Minister to the Operator and to the Secretary of the Human Services Department.

Clause 68 provides that a security notice comes into force on the day it is given to the Minister, and remains in force until it is revoked.

Clause 69 requires the Home Affairs Minister to consider whether to a revoke a security notice that is in force before the end of the following periods: 12 months after the notice came into force, and before 12 months after the Home Affairs Minister last considered whether to revoke the notice.

Clause 70 allows the Home Affairs Minister to revoke a security notice by written notice to the Minister, with effect from the day the notice is made. The Minister must give a copy of a notice of revocation to the Operator and to the Secretary of the Human Services Department.

Subdivision C – Other matters affected by a security notice

Clause 71 sets out the circumstances in which an application for redress is taken to be withdrawn and an offer taken to have been revoked, because of a security notice.

Subclause 71(1) deems a person's application for redress to have be withdrawn under subclause 22(1) if either a determination has not been made under clause 29 or an offer of redress has not been given to the person under clause 39. The withdrawal takes effect at the time the security notice comes into force.

Subclause 71(2) deems a person's offer to have been revoked by the Operator under subclause 29(4) and the application to have been withdrawn under subclause 22(1) if the person has made an application under clause 19 and an offer of redress has been given under clause 39, but the offer has not been accepted, declined or withdrawn. Revocation of the offer and withdrawal of the application takes effect at the time the security notice comes into force.

A rule making power is provided in subclause 71(3) to allow rules to be made prescribing matters relating to the giving of notices to a person or a participating institution in relation to the operation of Division 3 in relation to the person's entitlement to redress.

Chapter 4 – Administrative matters

Part 4-1 – Review of determinations

Division 1 – Simplified outline of this Part

Clause 72 provides a simplified outline of Part 4-1.

Division 2 – Review of determinations

Clause 73 provides that a person may apply to the Operator to review a determination made in relation to the person under clause 29. The determination made under clause 29 is the ***original determination***.

Subclause 73(2) provides that the application for review must be made before the day specified in the notice of the determination given under clause 34. Clause 34 requires the Operator to give a notice about the determination made under clause 29. The application must also be in the approved form.

Clause 74 provides for a person to withdraw their application for internal review under clause 73 at any time before the review has been completed. An application that is withdrawn is taken to have never been made. An application may be withdrawn by giving oral or written notice to the Operator.

Clause 75 sets out the process for review of a redress determination.

Subclause 75(1) provides that the Operator must, if an application is made under clause 73, review the original determination or cause the original determination to be reviewed by an independent decision-maker who has been delegated the power to make such a determination and who was not involved in making the original determination.

Subclause 75(2) provides that the person reviewing the original determination must reconsider the determination and either affirm or vary the determination or set aside the determination and substitute a new determination.

Subclause 75(3) clarifies that when reviewing the original determination, the person may only have regard to the information and documents that were available to the person who made the original determination. The limitation placed on the internal reviewer to only have regard to the information and documents that were available to the person who made the original determination is to balance the need for an expedited application process for survivors with the burden of administration. Further, allowing the internal reviewer to request further information from survivors will create a high level of administrative burden, add to the potential re-traumatisation of survivors having to seek additional material and increase the operational costs for institutions to participate in the Scheme.

Clause 76 provides that a determination to vary an original determination or to set aside an original determination and substitute a new determination takes effect on the day specified in the review determination. The review of the original determination as varied or substituted is taken to be the determination made by the Operator under clause 29 from the day the review determination takes effect.

Example:

Person A makes an application for redress and is made an offer, but disagrees with the offer made. They then have the determination reviewed internally, and a substituted offer is made. The review determination may specify a date (for example, 20 March 2020) when the new determination takes effect.

Clause 77 provides that the Operator must give the applicant written notice of the review determination, stating the reasons for it.

Clause 78 clarifies the interaction between review and the offer of redress. Clause 78 applies when a person is given an offer of redress under clause 39 and the person applies for a review of the original determination

Subclause 78(2) makes it clear that a person is taken to have withdrawn an application for review if they accept or decline an offer within the acceptance period but before the review is completed. In such circumstances, the application for review is taken to have been withdrawn immediately before the offer is accepted or declined.

Under subclause 78(3), if the original determination under subclause 29(2) is varied or substituted, the Operator must withdraw the original offer and notify the person in writing. If the varied or substituted determination approves the application for redress, the Operator must give the person a new offer in accordance with clause 39.

Under subclause 78(4), if the original determination under 29(2) is affirmed and approves the application for redress and the person has been given an offer of redress under clause 39, the Operator must extend the acceptance period under clause 40(2) for an additional two months.

Clause 79 requires the Operator to notify each institution that was notified of the determination under clause 35 if a person makes an application for review, withdraws an application for review or if a review determination is made. The notice must comply with any requirements prescribed by the rules.

Part 4-2 – Nominees

Division 1 – Simplified outline of this Part

Clause 80 provides a simplified outline of Part 4-2.

Division 2 – Appointment of nominees

Clause 81 provides for the appointment of nominees.

Subclause 81(1) allows the Operator to appoint a person, in writing, to be the assistance nominee or legal nominee of the applicant. A body corporate may be named as a person's assistance nominee or legal nominee.

The Operator cannot appoint a person to be the assistance nominee of the applicant unless the person and the applicant consent in writing to the appointment (subclause 81(2)).

Subclause 81(3) provides that the Operator cannot appoint a person to be an applicant's legal nominee unless:

- (a) under a law of the Commonwealth, a State or a Territory the person has power to make decisions for the applicant in all matters that are relevant to the duties of a legal nominee; and
- (b) the person gives written consent to the appointment; and
- (c) the Operator has taken into account any wishes of the applicant regarding the making of such an appointment.

The note to subclause 81(3) makes it clear that a person who may be eligible to be an applicant's legal nominee is a person who, under a guardianship order or power of attorney, has power to make decisions for the applicant in all relevant matters.

Under paragraph 81(3)(c), the Operator is only required to consider the wishes of the applicant, and does not require the applicant's consent. This is because it may not be possible for some applicants to provide consent where a legal nominee is to be appointed (for example, where the applicant has an existing power of attorney arrangement as a result of their incapacity).

Subclause 81(4) provides that a copy of an appointment under clause 81 must be given to the nominee and the applicant.

Clause 82 provides for the suspension and revocation of nominee appointments.

Subclause 82(1) specifies that the Operator must revoke the appointment of an assistance nominee or legal nominee if requested in writing by the nominee. The appointment of an assistance nominee must also be revoked if requested in writing by the applicant. Revocation must take place as soon as practicable.

Subclause 82(2) provides for the suspension or cancellation of a nominee's appointment. This may occur where the Operator gives the nominee a notice under clause 87 and the nominee subsequently informs the Operator that an event or change of circumstances has occurred, or is likely to occur, and that event or change of circumstances is likely to have an effect referred to in paragraph 87(1)(b) (that is, it will affect the ability of the nominee to act as the legal or assistance nominee of the person).

Subclause 82(3) provides that the Operator may suspend or revoke a nominee's appointment in circumstances where the Operator gives a nominee a notice under clause 88 and the nominee does not comply with a requirement of the notice.

While an appointment is suspended the appointment has no effect (subclause 82(4)). The Operator may revoke the suspension of an appointment that was suspended under subclause 82(2) or (3) at any time (subclause 82(5)). The suspension or revocation of an appointment and the revocation of a suspension must be in writing (subclause 82(6)) and has effect on and from the day specified (subclause 82(7)).

Subclause 82(8) provides that the Operator must give a nominee and applicant a copy of any suspension, revocation or revocation of a suspension of the nominee's appointment.

Division 3 – Duties, functions and responsibilities of nominees

Clause 83 sets out the duty of an assistance nominee or legal nominee of a person. The duty is to act in the best interests of the person at all times. Where the nominee reasonably believes that doing an act is in the best interests of the person, the nominee does not breach the duty by doing that act. Likewise, where the nominee reasonably believes that refraining from doing an act is in the best interests of the person, the nominee does not breach the duty by refraining from doing that act.

Clause 84 sets out the effect of actions of an assistance nominee.

Subclause 84(1) allows an assistance nominee of a person to perform any act that may be done by the person under or for the purpose of the Bill.

Subclause 84(2) provides that subclause 84(1) does not authorise a person's assistance nominee to do any of the following on the person's behalf:

- (a) make an application for redress under clause 19;
- (b) accept an offer of redress under clause 42;
- (c) decline an offer of redress under clause 45;
- (d) do an act for the purposes of Division 2;
- (e) do an act prescribed by the rules.

However, subclause 84(1) does not apply if the Operator gives a notice to a person who has an assistance nominee and the notice requires the person to do an act (subclause 84(3)).

The limitations set out under subclause 84(1) reflect the purpose of an assistance nominee – that is, to assist an applicant with the redress process but not make key decisions on their behalf. This is distinct from a legal nominee, as set out below.

Subclause 84(4) provides that an act done by a person's assistance nominee under clause 84 has effect as if it had been done by the person.

Clause 85 sets out the effect of actions of a legal nominee.

Subclause 85(1) allows a legal nominee of a person to perform any act that may be done by the person under or for the purpose of the Bill.

Subclause 85(2) clarifies, without limiting subclause 85(1), that a legal nominee for a person may make an application under the Bill on behalf of the person and the application will be taken to be made by the person. Similarly, a legal nominee for a person may accept an offer under clause 42 or reject an offer under clause 45 on behalf of the person and the offer will be taken to have been accepted or declined by the person.

The actions set out under subclause 85(2) are consistent with the higher 'threshold' required to appoint a legal nominee in the first instance. That is, the person will already have the power to make decisions for the applicant under an existing law,

and as a result, they will be able to make key decisions for the applicant in relation to redress such as accepting an offer.

Subclause 85(3) provides that an act done by a person's legal nominee under clause 85 has effect as if it had been done by the person.

Clause 86 provides for giving notices to an assistance nominee or legal nominee.

Subclause 86(1) enables the Operator to give any notice the Operator is required or authorised to give under the Bill, to a person's assistance nominee or legal nominee in place of the person. Any such notice must in every respect be in the same form and in the same terms as if it were being given to the person (paragraph 86(2)).

Clause 87 sets out the requirement for a nominee to inform the Operator of matters that affect their ability to act as a nominee.

Subclause 87(1) states that the Operator may give a nominee a notice that requires the nominee to inform the Operator if there is an event or change of circumstances or the nominee becomes aware that such an event or change of circumstances is likely to happen. The event or change of circumstances must be likely to affect the ability of the nominee to act, the ability of the Operator to give notices to the nominee or the ability of the nominee to comply with notices given by the Operator. An example of a relevant change of circumstances is that the nominee has changed address.

Subclause 87(2) sets out specific requirements for the notice. The notice must be in writing and must specify how, and the period within which the nominee is to inform the Operator and the period within which the nominee is to inform the Operator. A notice will not be invalid merely because it fails to specify how the information is to be given to the Operator (subclause 87(3)).

The period within which information must be provided to the Operator must not end any earlier than 14 days after the day of the event or change of circumstances or the day on which the nominee becomes aware that the event of change or circumstances is likely to happen (subclause 87(4)). However this does not apply to a requirement in a notice to inform the Operator that the nominee proposes to leave Australia (subclause 87(5)).

Division 4 – Other matters relating to nominees

Clause 88 protects a person against liability for actions of the person's nominee. This clause operates so that a person is not taken to have committed an offence against the Bill in relation to any act or omission of their nominee.

Clause 89 protects the nominee against criminal liability. This clause provides that a nominee of a person is not subject to any criminal liability under the Bill in relation to any act or omission of the person or anything done in good faith by the nominee in his or her capacity as nominee.

Clause 90 provides that if the Operator gives a notice to a person who has a nominee, the Operator may inform the nominee of the fact that the notice has been given and may inform the nominee of the terms of the notice.

Part 4-3 – Protecting information under the Scheme

Division 1 – Simplified outline of this Part

Clause 91 provides a simplified outline of Part 4-3.

Division 2 – Use and disclosure of protected information

Clause 92 sets out the purpose of Division 2 and defines protected information. A large amount of protected information will likely be acquired by the Operator through the operation of the Scheme, and the protection of that information and a person's right to privacy is considered paramount.

Subclause 92(1) provides that Division 2 deals with how protected information may be obtained, recorded, disclosed or used for the purposes of the Scheme.

Subclause 92(2) defines **protected information** broadly as information about a person or an institution that was obtained by an officer of the Scheme for the purposes of the Scheme and is or was held in the records of the Department (the Department of Social Services) or the Human Services Department (the Department of Human Services). Protected information includes information to the effect that there is no information about a person held in the records of the Departments referred to in paragraph 92(2)(a)(ii).

Clause 93 sets out the main authorisation for obtaining, recording, disclosing or using protected information.

Subclause 93(1) provides that a person may obtain protected information, make a record of protected information, disclose protected information to another person, or use protected information, if the obtaining, recording, disclosure or use of the information is done:

- for the purposes of the Scheme; or
- with the express or implied a consent of the person or institution to which the information relates; or
- if the person believes on reasonable grounds that doing so is necessary to prevent or lessen a serious threat to an individual's life, health or safety.

Subclause 93(2) provides that a person may use protected information to produce information in an aggregated form that does not disclose, either directly or indirectly, information about a particular person or institution.

Clause 94 provides that the Operator may disclose protected information that relates to a person who has applied for redress to the person's nominee.

Clause 95 gives the Operator the power to disclose protected information in the public interest or for another specified purpose.

Subclause 95(1) provides that the Operator may disclose protected information that was provided to, or obtained by, an officer of the Scheme for the purposes of the Scheme if:

- (a) the Operator certifies that it is necessary in the public interest in a particular case or class of cases (for example, if it is necessary for the investigation of a criminal offence or to locate a missing person) and the disclosure is to such persons and for such purposes as determined by the Operator; or
- (b) the disclosure is to:
 - (i) a person who is expressly or impliedly authorised by the person or institution to which the information relates to obtain it; or
 - (ii) the Chief Executive Centrelink for the purposes of a Centrelink program (within the meaning of the *Human Services (Centrelink) Act 1997*); or
 - (iii) the Chief Executive Medicare for the purposes of a Medicare program (within the meaning of the *Human Services (Medicare) Act 1973*); or
 - (iv) the head (however described) of a government institution, for the purposes of that institution.

Subclause 95(2) provides that a person to whom protected information is disclosed under subclause 95(1) may obtain, make a record or, disclose or use the information if the person does so for the purpose for which the information was disclosed under that subclause.

Subclause 95(3) provides that, if the Operator certifies that protected information may be disclosed in the public interest or to the head of a government institution for the purposes of that institution, then the Operator must act in accordance with any rules made for the purposes of subclause 95(4).

Subclause 95(4) provides that the rules may make provision for and in relation to the exercise of either or both of the following:

- (a) the Operator's power to certify for the purpose of disclosing protected information in the public interest (paragraph 95(1)(a)); or
- (b) the Operator's power to disclose information to the head of a government institution for the purposes of that institution (subparagraph 95(1)(b)(iv)).

The rule-making power in subclause 95(4) is necessary to ensure that the Scheme can be flexible in adapting to a range of circumstances not yet contemplated in this Bill where it may be necessary to disclose information. There will be scope for the use of this rule-making power to be scrutinised via the normal operation of the Scheme, including reports and reviews of the Scheme's implementation.

Subclause 95(5) clarifies that a certificate or determination under paragraph 95(1)(a) is not a legislative instrument. This is declaratory of the law as public interest certificates would not meet the definition of legislative instrument in subsection 8(4) of the *Legislation Act 2003*.

Clause 96 provides for the Operator to disclose protected information for law enforcement or child safety or wellbeing.

Subclause 96(1) provides that clause 96 applies if the Operator is satisfied that the disclosure of protected information is reasonably necessary for either the enforcement of the criminal law or the safety or wellbeing of children (a **relevant purpose**).

Subclause 96(2) provides that protected information may be disclosed by the Operator to a government institution that has functions that relate to the relevant purpose.

Subclause 96(3) provides that the Operator must have regard to the impact the disclosure might have on a person that has applied for redress before disclosing protected information that relates to the person.

Subclause 96(4) provides that if the information is disclosed to a government institution under subclause 96(2), then an employee or officer of the institution (**the government official**) may:

- (a) obtain the information; or
- (b) make a record of the information; or
- (c) disclosure the information to a person; or
- (d) use the information;

but only if the government official does so for a relevant purpose, and does so in their capacity as an employee or officer of the government institution.

Subclause 96(5) provides that the Operator may, in writing, impose conditions to be complied with in relation to protected information disclosed under subclause 96(2). It is an offence for a person, who is subject to a condition imposed under subclause 96(5), to engage in conduct (within the meaning of the Criminal Code) that breaches the condition. The penalty is two years imprisonment or 120 penalty units, or both (subclause 96(6)). The penalty reflects the importance of handling the sensitive information held by the Scheme appropriately and will deter a recipient of information from breaching a condition imposed by the Operator. This allows the Operator to continue to exercise control over protected information after it is disclosed.

Subclause 96(7) provides that an instrument under subclause 96(5) is not a legislative instrument.

Clause 97 provides for obtaining, recording, disclosing and using protected information for a permitted purpose.

Subclause 97(1) provides for disclosure by a person to a government official. If protected information is disclosed to a government institution, then an employee or officer of the institution (the **government official**) may obtain, make a record of, disclose or use the information, if:

- the government official does so for the enforcement of the criminal law, the safety or wellbeing of children, investigatory, disciplinary or employment processes related to the safety or wellbeing of children or a purpose prescribed by the rules (a **permitted purpose**); and
- the government official does so in their capacity as an employee or officer of that institution; and
- a law of the Commonwealth, a State or a Territory does not prohibit the government official from doing so.

For clarity and without limiting what protected information can be disclosed under clause 97, this clause would allow states and territories to comply with existing reportable conduct schemes. For example, this clause would allow the disclosure of protected information for the purpose of complying with Victoria's reportable conduct scheme under the *Child Wellbeing and Safety Act 2005* (Vic).

Subclause 97(2) provides that if:

- (a) a person is satisfied that the disclosure of protected information is reasonable necessary for a permitted purpose; and
- (b) a law of the Commonwealth, State or Territory requires or permits the person to disclose the information to a government institution that has functions that relate to that purpose;

then the person may disclose the information to that institution for that purpose.

Subclause 97(3) provides that subclause 97(2) does not apply if the person is:

- (a) an officer of the Scheme; or
- (b) an employee or the officer of a government institution.

Subclause 97(4) provides that the rules may prescribe that specified persons are officers of a government institution for the purposes of subclause 97(1) or paragraph 97(3)(b).

Clause 98 provides additional authorisation to persons engaged by participating institutions to obtain, make record of, disclose and otherwise use protected information for a specified purpose. Clause 98 will allow participating institutions to undertake certain activities related to their participation in the Scheme such as making claims against their insurance to cover the cost of redress payment. It will also allow participating institutions to use Scheme information to conduct internal investigations and disciplinary proceedings where, for example, an alleged perpetrator is still employed by, or associated with, the institution.

Subclause 98(1) provides that a person engaged by a participating institution, as an employee or otherwise, may obtain, make a record of, disclose or use protected

information if the person believes on reasonable grounds that it is reasonably necessary for one of the following purposes specified in subclause 98(2):

- (a) complying with a request under clause 25 to provide information; or
- (b) providing a direct personal response to a person under clause 54;
- (c) facilitating a claim under an insurance policy; or
- (d) undertaking internal investigation and disciplinary procedures.

Subclause 98(3) provides that the person must have regard to the impact the disclosure might have on a person that has applied for redress before disclosing protected information that relates to the person.

Clause 99 creates an offence if a person obtains, records, discloses or uses protected information and is not authorised or required by or under the Bill to obtain, make a recording of, disclose or use the protected information. The penalty is imprisonment for 2 years, 120 penalty units or both. This penalty is considered to be an appropriate deterrent against unauthorised recording, disclosure or use of protected information and recognises the sensitivity of information held by the Scheme. Subclause 99(2) provides that a person won't have committed an offence if the person did not obtain the information under, for the purposes of, or in connection with the Scheme, or the person had already obtained the information before they obtained the information in connection with the Scheme.

For clarity, information that is obtained by a person independently of the Scheme is not protected information for the purposes of this Part, even if that same information was also provided to an officer for the purposes of the Scheme and is protected.

For example, if an official of a government institution is provided with information through a complaints process set up under legislation, and that information was also provided to an officer for the purposes of the Scheme, the information that was provided to an official for the complaints process would not be protected information. However, the information that was provided to an officer for the purposes of the Scheme would be protected information (even if both the protected and non-protected information is identical). This means that this Part does not impose requirements or conditions on the usage of the non-protected information.

Clause 100 creates an offence if a person solicits the disclosure of information from an officer of the Scheme or another person, the disclosure would contravene Division 2 of Part 4-3 of Chapter 4 and the information is protected information. The penalty is imprisonment for 2 years, 120 penalty units or both. This penalty is considered to be an appropriate deterrent against soliciting the disclosure of protected information and recognises the sensitivity of information held by the Scheme. A person may commit an offence under subclause 100(1) even if no protected information is actually disclosed (see subclause 100(2)).

Clause 101 creates offences relating to an offer to disclose protected information.

Subclause 101(1) provides that a person commits an offence if the person offers to disclose information about another person (whether to a particular person or otherwise); the disclosure would be in contravention of this Division; and the

information is protected information. The penalty is imprisonment for 2 years, 120 penalty units or both. This penalty is considered to be an appropriate deterrent against offering to disclose protected information about another person and recognises the sensitivity of information held by the Scheme.

Subclause 101(2) provides that a person commits an offence if the person holds himself or herself out as being able to disclose information about another person (whether to a particular person or otherwise); the disclosure would be in contravention of this Division; and the information is protected information. The penalty is imprisonment for 2 years, 120 penalty units or both. This penalty is considered to be an appropriate deterrent against a person holding themselves out as being able to supply protected information about another person and recognises the sensitivity of information held by the Scheme.

Division 3 – Use and disclosure of the assessment framework policy guidelines

Clause 102 provides that the main authorisation for an officer of the Scheme to obtain, record, disclose (to another officer of the Scheme) or otherwise use information contained in the assessment framework policy guidelines, is where it is done so for the purposes of the Scheme.

Clause 103 provides additional authorisations to disclose and use information contained in the assessment framework policy guidelines.

Subclause 103(1) provides that the Minister or the Operator may disclose information contained in the assessment framework policy guidelines to a person where it is done so in accordance with the requirements set out in the National Redress Scheme Agreement.

Subclause 103(2) provides that a person who receives information under subclause 103(1) may obtain, make a record of, disclose to another person or use that information in accordance with the requirements set out in the National Redress Scheme Agreement.

Clause 104 provides that a person commits an offence if the person obtains, makes a record of, discloses or uses information that is contained in the assessment framework policy guidelines and the person is not authorised or required to do so under this Bill. The penalty is imprisonment for 2 years, 120 penalty units or both. This penalty is considered to be an appropriate deterrent against unauthorised access to protected information and recognises the sensitivity of information held by the Scheme.

This Division is necessary to ensure that the assessment framework policy guidelines are appropriately protected from unauthorised use and disclosure, as the guidelines provide additional matters that the Operator may take into account when applying the assessment framework (clauses 32 and 33), which may contain graphic and triggering descriptions of abuse. Further, protecting the assessment framework policy guidelines from unauthorised use and disclosure will assist with mitigating the risk of fraudulent and enhanced applications, as unauthorised disclosure of the

guidelines could enable people to understand how payments are attributed and calculated.

Division 4 – Other matters

Clause 105 provides for disclosures of protected information or information contained in the assessment framework policy guidelines to a court or a tribunal.

Subclause 105 (1) provides that provides that a person must not be required to disclose protected information or information contained in the assessment framework policy guidelines to a court or a tribunal in any civil proceedings.

However, subclause 105(2) creates an exception and provides that subclause 105(1) does not apply if the disclosure of the information is for the purposes of giving effect to the Bill. Subclause 105(3) provides that for the purposes of subclause 105(2), (without limiting subclause 105(2)), if the disclosure of the information is in civil proceedings for judicial review of a decision made under this Bill, then the disclosure is for the purposes of giving effect to this Bill.

Subclause 105(4) provides that subsection 105(1) does not apply if the disclosure of the information is in civil proceedings under, or arising out of clause 28 (which is about giving false or misleading information, documents, or statements to an officer of the Scheme).

Subclause 105(5) provides that subsection 105(1) does not apply if the person did not obtain the information under, for the purposes of, or in connection with the Scheme, or the person had already obtained the information before they obtained the information in connection with the Scheme.

Subclause 105(6) provides that the protected information and information contained in the assessment framework policy guidelines is not to be published by any person, court or tribunal.

The objects of the Scheme are to provide an avenue for a payment that acknowledges a wrong that might otherwise be pursued through civil litigation. The Scheme would be undermined if it were able to be used as a form of discovery in court proceedings. It would also overload the administrative arm of the Scheme which would result in delays to the process of assessing applications under the Scheme.

Clause 106 provides for disclosures of information in good faith. Subclause 106(1) provides that clause 106 applies if a person discloses information for the purposes of the Scheme in good faith.

Subclause 106(2) provides that if a person makes such a disclosure in good faith, they will not be liable to any civil or criminal proceedings, or any disciplinary action for disclosing the information. Further, subclause 106(3) provides that the person cannot be held to have breached any code of professional etiquette or ethics or departed from any accepted standards of professional conduct.

Chapter 5 – Participating institutions, participating groups and participating jurisdictions

Part 5-1 – Participating institutions

Division 1 – Simplified outline of this Part

Clause 107 provides a simplified outline of Part 5-1.

Division 2 – Institutions participating in the scheme

Subdivision A – Participating institutions

Clause 108 sets out what is a participating institution.

Subclause 108(1) provides that for a person to be eligible for redress for sexual abuse or non-sexual abuse, a participating institution must be responsible for the abuse.

Subclause 108(2) provides that a Commonwealth institution, a participating State institution, a participating Territory institution or a participating non-government institution is a ***participating institution*** for the purposes of the scheme.

Subdivision B – Commonwealth institutions

Clause 109 sets out what is a Commonwealth institution. Subclause 109(1) provides that an institution is a ***Commonwealth institution*** if it:

- (a) is or was part of the Commonwealth; or
- (b) is or was a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or
- (c) is or was a wholly-owned Commonwealth company; or
- (d) is or was a body (whether or not incorporated) established by or under a law of the Commonwealth; or
- (e) it is an institution that is prescribed by the rules as being a Commonwealth institution.

The rule making power in paragraph 109(1)(e) is intended to provide a safety net so that where there is any uncertainty as to whether an institution is covered by paragraphs (a) to (d); the institution may be prescribed as being a Commonwealth institution. This will ensure that the scheme is able to provide redress to as many survivors of abuse as possible.

Subclause 109(2) provides that an institution is not a ***Commonwealth institution*** if that institution:

- (a) is a body politic that is a participating Territory, or is or was part of a body politic that is a participating Territory; or

- (b) is or was body corporate (other than a wholly-owned Commonwealth company) that is or was registered under the *Corporations Act 2001* (including a body corporate taken to be registered under that Act because of the operation of Chapter 10 of that Act (which is about transitional provisions)); or
- (c) is an institution that is prescribed by the rules as not being a Commonwealth institution.

The rule making power in paragraph 109(2)(c) is intended to be used to exclude an institution where it is more appropriate for that institution to pay redress for a person (rather than the Commonwealth).

Subclause 109(3) provides that rules made for the purposes of paragraph 109(1)(e) or 109(2)(c) may prescribe that an institution is, or is not, a Commonwealth institution in relation to a period specified by the rules. This would, for example, allow an institution to be prescribed as not being a Commonwealth institution for a specific period that it was not under Commonwealth control.

Subdivision C – Participating State institutions

Clause 110 provides that an institution is a ***participating State institution*** if it is a State institution and a declaration by the Minister, under subclause 115(2) that the institution is a participating institution is in force. Subclause 115(2) allows the Minister to make declarations about participating institutions.

Clause 111 sets out what is a State institution. Subclause 111(1) provides that an institution is a ***State institution*** if it:

- (a) is or was part of a State; or
- (b) is or was a body (whether or not incorporated) established by or under a law of the participating State; or
- (c) is an institution that is prescribed by the rules as being a State institution.

Subclause 111(2) provides that an institution is not a ***State institution*** if the rules prescribe that the institution is not a State institution. This rule making power is intended to be used to exclude an institution where it is more appropriate for that institution to pay redress for a person (rather than the State).

Subclause 111(3) provides that rules made for the purposes of paragraph 111(1)(c) or subsection 111(2) may provide that an institution is, or is not, a State institution in relation to a period specified by the rules. This would allow, for example, the rules to prescribe an institution is not a State institution for a specific period that it was not under control of the State government.

Subdivision D – Participating Territory institution

Clause 112 provides that an institution is a ***participating Territory institution*** if it is a Territory institution and a declaration by the Minister, under subclause 115(2) that the institution is a participating institution is in force. Subclause 115(2) allows the Minister to make declarations about participating institutions.

Clause 113 sets out what is a Territory institution. Paragraphs 113(1)(a) to (c) provide that an institution is a ***Territory institution*** if it:

- (a) is or was part of a participating Territory; or
- (b) is or was a body (whether or not incorporated) established for a public purpose by or under a law of a participating Territory; or
- (c) is an institution that is prescribed by the rules as being a Territory institution.

The rule making power in paragraph 113(1)(c) is intended to provide a safety net so that where there is any uncertainty as to whether an institution is covered by paragraph 113(1)(a) or 113(1)(b) the institution may be prescribed as being a Territory institution. This will ensure that the Scheme is able to provide redress to as many survivors of abuse as possible.

Subclause 113(2) provides that an institution is not a ***Territory institution*** if the rules prescribe, that the institution is not a Territory institution. The rule making power may be used to exclude an institution in circumstances where it is more appropriate for that institution to pay redress for a person (rather than the Territory).

Subclause 113(3) provides that rules made for the purposes of paragraph 113(1)(c) or 113(2)(b) may provide that an institution is, or is not, a Territory institution in relation to a period specified in the rules. This would allow, for example, the rules to prescribe an institution is not a Territory institution for a specific period that it was not under control of the Territory government.

Subdivision E – Participating non-government institution

Clause 114 sets out what is a participating non-government institution. Subclause 114(1) provides that an institution is a ***participating non-government institution*** if the institution is or was a non-government institution and a declaration is in force under subclause 115(2) that allows the Minister to make declarations about participating institutions.

Subclause 114(2) provides that a ***non-government institution*** is an institution that is not a Commonwealth institution, State institution or a Territory institution.

Subclause 114(3) provides that an institution is not a ***non-government institution*** if the rules prescribe that the institution is not a non-government institution. This subclause covers the case where an institution was established, but not at the time the abuse occurred (for example, if the institution was established in the ACT, but was then incorporated in NSW at the time of the abuse).

Subclause 114(4) provides that rules made for the purposes of subsection 114(3) may provide that an institution is not a non-government institution in relation to a period specified by the rules. This would for example, allow an institution to be prescribed as not being a non-government institution of a State or Territory for a specific period that it was incorporated in another jurisdiction.

Division 3 – Ministerial declarations about participating institutions

Clause 115 provides for the Minister to make declarations about participating institutions. Subclause 115(1) provides that an institution becomes a participating institution of the Minister makes a declaration under subclause 115(2) in relation to the institution.

Subclause 115(2) provides that the Minister may, by notifiable instrument, declare that an institution is a participating institution.

This declaration will be done by notifiable instrument, rather than by legislative instrument, to allow for greater expediency when adding to or removing the institutions contained in the instrument. This is to allow for the timely processing of applications in the scheme and to ensure survivors have timely, up-to-date information about institutional participation in the scheme.

Note 1 to subclause 115(2) clarifies that an institution may be identified by name, by inclusion in a particular class, or in any other way. This means that, for example, the Minister could declare “all public schools in the state of New South Wales” rather than necessarily listing each individual public school by name.

Note 2 to subclause 115(2) provides that the Minister need not make a declaration under subclause 115(2) for a Commonwealth institution because all Commonwealth institutions are participating institutions automatically. This note also directs the reader to clause 108, which provides that a Commonwealth institution is a participating institution.

Subclause 115(3) provides that the Minister must not make a declaration under subclause 115(2) unless the Minister is satisfied of the following:

- (a) for a State institution – the participating State has agreed, in a way provided for in the State’s referral Act or adoption Act, to the institution participating in the Scheme; and
- (b) for a Territory institution – the participating Territory has agreed to the institution participating in the Scheme; and
- (c) for a non-government institution (other than a defunct institution or an unincorporated lone institution) – the institution has agreed to participate in the Scheme; and
- (d) for a non-government institution that is a defunct institution – a person has agreed:
 - (i) to the defunct institution participating in the Scheme; and
 - (ii) to be the representative for the defunct institution; and
- (e) for a non-government institution that is an unincorporated lone institution:
 - (i) the institution has agreed to participate in the Scheme; and
 - (ii) the institution has agreed to a person being the representative for the institution; and

- (iii) the person has agreed to being the representative for the institution; and

(f) in all cases – any requirements prescribed by the rules are satisfied.

A defunct institution is one that no longer exists, which is why there is no requirement for a defunct institution to agree to its own participation in the Scheme.

Note 1 to subclause 115(3) directs the reader to clause 186, which provides for how the agreement of a participating Territory, an institution or a person is given.

Note 2 to subclause 115(3) directs the reader to Divisions 4 and 5, which deal with representatives for defunct institutions and lone institutions.

Subclause 115(4) provides that the Minister must not make a declaration under subclause 115(2) in relation to an institution after the second anniversary of the commencement of the Scheme, or a later day prescribed by the rules, unless the institution is a defunct institution. This might allow, for example, the Minister to prescribe a later day if a number of institutions indicate their willingness to participate in the scheme after the second anniversary of the commencement of the Scheme.

Subclause 115(5) provides that if a State or Territory has agreed to a State or Territory institution participating in the Scheme and the institution is a body corporate, then the institution is taken to have also agreed to participate in the Scheme.

Clause 116 provides for when an institution ceases to be a participating institution. Subclause 116(1) provides that an institution ceases to be a participating institution if the declaration made under subclause 115(2) is revoked under subclause 116(2), (3), (4) or (5).

Subclause 116(2) provides that the Minister may revoke a declaration made under subclause 115(2) in relation to an institution.

The note to subclause 116(2) clarifies that if the declaration is revoked, the institution will cease to be a participating institution, however it will remain a participating institution in relation to an application for redress that is made before the revocation (see subclause 118(7)).

Subclause 116(3) provides that where a participating State, participating Territory or participating non-government institution (other than a defunct institution) requests, in writing, that the Minister revoke a declaration made under subclause 115(2), the Minister must do so as soon as practicable.

Subclause 116(4) provides that if a defunct participating non-government institution ceases to have a representative the Minister must revoke the declaration made under subclause 115(2) as soon as practicable.

As defunct institutions are required to have a representative in order to participate in the Scheme, it is appropriate that should the defunct institution not have a

representative, then its own participation in the Scheme is revoked. Should the defunct institution obtain another representative, the declaration of the defunct institution's participation can be re-made.

A defunct institution is one that no longer exists, which is why there is no requirement for a defunct institution to request that a declaration be revoked.

Subclause 116(5) provides that if a participating unincorporated lone institution ceases to have a representative, the Minister must revoke the declaration made under subclause 115(2) as soon as practicable.

As unincorporated lone institutions are required to have a representative in order to participate in the Scheme, it is appropriate that should the unincorporated lone institution not have a representative, then its own participation in the Scheme is revoked. Should the unincorporated lone institution obtain another representative, the declaration of the unincorporated lone institution's participation can be re-made.

Subclause 116(6) provides that despite subclauses 116(2), (3), (4) and (5), the Minister must not revoke a declaration made under subclause 115(2) in relation to an institution unless any requirements prescribed by the rules in relation to the revocation are satisfied.

Subclause 116(7) provides that if the Minister revokes a declaration made under 115(2), then, despite the revocation, the institution continues to be a **participating institution** in relation to a person who made an application for redress before the revocation, as if the declaration were still in force. This is to ensure that institutions cannot avoid obligations under the Scheme in relation to applications that are ongoing at the time that their participation is revoked.

Example

If the Operator determines that the institution is responsible for the abuse of the person, the institution will still be required to provide a direct personal response to the person (if the person chooses that component of redress) and pay funding contribution in relation to the person.

Division 4 – Participating defunct institutions

Subdivision A – Participating defunct institutions

Clause 117 sets out that a **participating defunct institution** is a participating institution (either a government or non-government institution) that is defunct. The note clarifies that the institution may be a government or non-government institution.

Subdivision B – Representatives for participating defunct institutions

Clause 118 provides for representatives for participating defunct institutions. Subclause 118(1) provides that a participating defunct institution must have a representative for the institution.

The note to subclause 118(1) clarifies that the Bill applies to the representative as if it were the defunct institution. The note references clauses 121, 122 and 123, which provide for the actions of representatives, giving notices to representatives and the obligations to be discharged by representatives for participating defunct institutions.

Subclauses 118(2), (3) and (4) provide that the representatives for a defunct Commonwealth institution, a defunct participating State institution and a defunct participating Territory institution is the Commonwealth, the participating State and the participating Territory, respectively.

Subclause 118(5) provides that the representative for a defunct participating non-government institution is the person in relation to whom a declaration is in force under clause 119.

Subclause 118(6) provides that a defunct institution may have only one representative. However, subclause 118(7) provides that a person may be the representative for more than one participating defunct institution.

Clause 119 provides for when a person becomes a representative for a defunct non-government institution. Clause 119 sets out that if a defunct non-government institution is declared a participating institution under subclause 115(2), then the Minister must, by notifiable instrument, make a declaration that the person who agreed to be the representative for the institution (as referred to in paragraph 115(3)(d)), is the representative for the institution.

Example

An orphanage closed down in 1980, and an institution wishes to be the representative for that orphanage to enable it to participate in the Scheme. The Minister makes a declaration that the institution is the representative for the orphanage.

Clause 120 provides for when a person ceases to be the representative for a defunct non-government institution.

Subclause 120(1) provides that the Minister may vary or revoke a declaration made under clause 119 in relation to a representative for a defunct non-government institution.

Subclause 120(2) provides that if the representative for a defunct institution requests the Minister in writing to revoke a declaration made under clause 119 the Minister must revoke that declaration as soon as practicable. Any requirements prescribed by the rules in relation to the person ceasing to be the representative must be satisfied prior to the revocation under subclause 120(2).

The note to subclause 120(2) clarifies that if a participating defunct institution does not have a representative, then the Minister must revoke the declaration made under subclause 115(2) that the defunct participating institution is a participating institution. The note references subclause 116(4) which sets out that if a participating defunct

non-government institution ceases to have a representative, the Minister must revoke the declaration made under subclause 115(2) as soon as practicable.

Subclause 120(3) provides that despite subclauses 120(1) and (2), the Minister must not vary or revoke a declaration made under clause 119 in relation to an institution unless any requirements prescribed by the rules in relation to the variation or revocation are satisfied.

Subclause 120(4) provides that if:

- (a) the Minister revokes a declaration made under subclause 115(2) in relation to a defunct institution; but
- (b) because of subclause 116(7), the institution continues to be a participating institution in relation to a person who made an application for redress before the revocation;

then the representative for the institution continues to be the **representative** for the institution in relation to the person (even if the declaration made under clause 119 for the representative have been revoked under this clause).

Clause 121 provides for actions of the representative for a defunct institution.

Subclause 121(1) sets out that any act that may be done by a participating defunct institution under, or for the purposes of, this Bill must be done by the representative for the institution on behalf of the institution. This might include, for example, providing a direct personal response or providing information to the scheme, or paying a funding contribution.

Subclause 121(2) makes it clear that where an act is done by the representative for a participating defunct institution on behalf of the institution, it is taken to have been done by the defunct institution.

Clause 122 states that any notice that the Operator is required or authorised by the Bill to give to a participating defunct institution must be given by the Operator to the representative for the institution.

Clause 123 states that any obligation or liability imposed by the Bill on a participating defunct institution is taken to be imposed instead on the representative for the institution.

Note 1 to clause 123 provides an example of an obligation that may be imposed on the defunct institution, which is the obligation under clause 54 to provide a direct personal response to a person. That obligation will be imposed on the representative.

Note 2 to clause 123 provides an example of a liability that may be imposed on the defunct institution, which is the liability under clause 149 to pay funding contribution. That liability will be imposed on the representative.

Division 5 – Participating lone institutions

Clause 124 sets out what is a participating lone institution. Subclause 124(1) provides that a ***participating lone institution*** is a participating institution that is a lone institution. Subclause 124 (2) provides that an institution is a ***lone institution*** if it is a non-government institution and is not a member of a participating group and is not defunct.

Subclause 124(3) provides that there are two types of lone institutions:

- (a) a lone institution that is not a legal person (which is an ***unincorporated lone institution***); and
- (b) a lone institution that is a legal person (which is an ***incorporated lone institution***).

Subclause 124(4) provides that a ***participating unincorporated lone institution*** is a participating institution that is an unincorporated lone institution.

Subclause 124(5) provides that a ***participating incorporated lone institution*** is a participating institution that is an incorporated lone institution.

Subdivision B – Representatives for participating lone institutions

Clause 125 provides for representatives for participating lone institutions. Subclause 125(1) provides that a participating incorporated lone institution may have a representative for the institution; however a participating unincorporated lone institution must have a representative.

The requirement for an unincorporated lone institution to have a representative (which is a legal person) provides the Scheme with a safeguard in the event that the unincorporated institution (which is not a legal person) cannot meet any of its obligations under the Scheme. Without this requirement, it would be difficult for the Scheme to allow the participation of unincorporated institutions. This does not apply to incorporated lone institutions.

Subclause 125(2) provides that the ***representative*** for a participating unincorporated lone institution is the person in relation to whom a declaration is in force under clause 126, which provides for when a person becomes a representative for an unincorporated lone institution.

Subclause 125(3) provides that the ***representative*** for a participating incorporated lone institution is the person in relation to whom a declaration is in force under subclause 127(1), which provides for when a person becomes a representative for the institution.

Subclause 125(4) provides that a participating lone institution may only have one representative for the institution. However, subclause 125(5) provides that a person may be the representative for more than one participating lone institution.

Clause 126 provides for when a person becomes a representative for an unincorporated lone institution. Clause 126 sets out that if an unincorporated lone institution is declared a participating institution under subclause 115(2), then the Minister must, by notifiable instrument, make a declaration that the person that agreed to be the representative for the institution (as referred to in paragraph 115(3)(e)), is the representative for the institution.

Clause 127 provides for when a person becomes the representative for an incorporated lone institution. Subclause 127(1) provides that the Minister may make a declaration that a person is the representative for a participating incorporated lone institution.

Subclause 127(2) provides that the Minister must not make a declaration under subclause 127(1) unless the Minister is satisfied that:

- (a) the institution has agreed to the person being the representative for the institution; and
- (b) the person has agreed to being the representative for the institution.

The clause reflects the intent that institutions (where incorporated and not in a participating group) may not want a representative and they may instead prefer to engage with the Scheme directly.

The note to subclause 127(23) directs the reader to clause 186, which provides for how the agreement of the institution or the person is given.

Clause 128 provides for when a person ceases to be the representative for a lone institution.

Subclause 128(1) provides that the Minister may vary or revoke a declaration made under clause 126 or 127 in relation to a representative for a lone institution.

Subclause 128(2) provides that if the institution or the representative requests the Minister in writing to revoke a declaration made under clause 126 or 127 the Minister must revoke that declaration as soon as practicable. Any requirements prescribed by the rules in relation to the person ceasing to be the representative must be satisfied prior to the revocation under subclause 128(2).

The note to subclause 128(2) clarifies that if a participating unincorporated lone institution does not have a representative then the Minister must revoke the declaration made under subclause 115(2) that the lone institution is a participating institution. The note references subclause 116(5) which sets out that if a participating lone institution ceases to have a representative, the Minister must revoke the declaration made under subclause 115(2) as soon as practicable.

Subclause 128(3) provides that despite subclauses 128(1) and (2), the Minister must not vary or revoke a declaration made under clause 126 or 127 in relation to an institution unless any requirements prescribed by the rules in relation to the variation or revocation are satisfied.

Subclause 128(4) provides that if:

- (a) the Minister revokes a declaration made under subclause 115(2) in relation to an unincorporated lone institution; but
- (b) because of subclause 116(7), the institution continues to be a participating institution in relation to a person who made an application for redress before the revocation;

then the representative for the institution continues to be the **representative** for the institution in relation to the person (even if the declaration made under clause 126 for the representative have been revoked under this clause).

Clause 129 provides for actions of the representative for a lone institution.

Subclause 129(1) sets out that the representative for the lone institution may do any act that may be done by a participating lone institution under, or for the purposes of, this Bill. This might include, for example, providing a direct personal response, providing information to the scheme, or paying a funding contribution.

Subclause 129(2) makes it clear that where an act is done by the representative for a participating lone institution on behalf of the institution it is taken to have been done by the institution.

Clause 130 states that any notice that the Operator is required or authorised by the Act to give to a participating lone institution must be given by the Operator to the representative for the institution (subclause 130(1)). Subclause 130(2) provides that a notice given under subclause 30(1) must, in every respect, be in the same form and in the same terms, as if it were being given to the institution.

Clause 131 provides that if a participating unincorporated lone institution is liable to pay funding contribution for a quarter, then the institution and the representative for the institution are jointly and severally liable to pay the funding contribution. This requirement provides the Scheme with a safeguard, in the event that the participating unincorporated lone institution is not be able to pay a funding contribution.

Part 5-2 – Groups of institutions participating in the Scheme

Division 1 – Simplified outline of this Part

Clause 132 provides a simplified outline of Part 5-2.

Division 2 – Participating groups

Clause 133 provides for how participating groups are formed. Subclause 133(1) provides that two or more participating institutions may form a participating group for the purposes of the Scheme.

Subclause 133(2) provides that a *participating group* is a group of participating institutions for which a declaration is in force under subclause 134(1). Subclause 133(3) provides that a participating institution that is a member of a participating group is an *associate* of each other member of the group.

The note to subclause 133(3) clarifies that particular provisions of this Bill apply in a special way for associates, and refers the reader to clauses 42 and 43, which are about releasing institutions and officials from civil liability for abuse.

Clause 134 provides for how institutions become members of a participating group.

Subclause 134(1) provides for the declaration that two or more participating institutions form a participating group by the Minister, in the form of a notifiable instrument.

Subclause 134(2) provides that the Minister must not make a declaration under subclause 134(1) unless the Minister is satisfied of the following:

- (a) for a group of Commonwealth institutions – the Commonwealth has agreed to each Commonwealth institution being a member of the group; and
- (b) for a group of State institutions – the participating State has agreed, in a way provided for in the State’s referral Act or adoption Act, to each State institution being a member of the group; and
- (c) for a group of Territory institutions – the participating Territory has agreed to each Territory institution being a member of the group; and
- (d) for a group of non-government institutions:
 - (i) each institution has agreed to be a member of the group and to each other institution being a member of the group; and
 - (ii) there is sufficient connection between each institution in the group; and
- (e) in all cases:
 - (i) each institution is not a member of another participating group; and
 - (ii) there is a representative for the group (as provided for in subclause 136(1)); and
 - (iii) any other requirements prescribed by the rules are satisfied.

The note to subclause 134(2) directs the reader to clause 186, which provides for how the agreement of the Commonwealth, a participating territory, an institution or a person is given.

Because of the implications of clauses 42 and 43, which is that all associates of a group are released from civil liability where one associate is liable, it is appropriate, particularly in relation to non-government institutions, that there is a sufficient connection between each institution in the group, and that each institution is only a member of one participating group.

Subclause 134(3) provides that if a State or Territory has agreed to a State or Territory institution being a member of a participating group, and that institution is a body corporate, then the institution is taken to have also agreed to be a member of the participating group.

Clause 135 provides for when institutions cease to be members of a participating group.

Subclause 135(1) provides that the Minister may vary or revoke a declaration made under subclause 134(1).

Subclause 135(2) provides that if:

- (a) a State requests the Minister in writing to vary or revoke a declaration made under subclause 134(1) in relation to a group of State institutions so that the group ceases to be a participating group; or a State institution ceases to be a member of the group; or
- (b) a participating Territory requests the Minister in writing to vary or revoke a declaration made under subclause 134(1) in relation to a group of Territory institutions so that the group ceases to be a participating group; or a Territory institution ceases to be a member of the group; or
- (c) all of the non-government institutions that are members of a participating group request the Minister in writing to revoke a declaration made under subclause 134(1) in relation to the group so that it ceases to be a participating group; or
- (d) a participating non-government institution that is a member of a participating group request the Minister in writing to vary a declaration made under subclause 134(1) in relation to the institution so that it ceases to be a member of the group;

then the Minister must, by notifiable instrument, vary or revoke the declaration as requested as soon as practicable.

Subclause 135(3) provides that if a participating group of non-government institutions ceases to have a representative, then the Minister must revoke the declaration made under subclause 134(1) as soon as practicable.

As participating groups are required to have a representative in order to exist in the Scheme, it is appropriate that should the group not have a representative, then the declaration that the institutions form a participating group is revoked. For clarity, this does not have the effect of revoking each institution's participation in the Scheme. Should the institutions appoint another representative, the declaration that the institutions are a participating group can be re-made.

Subclause 135(4) provides that despite subclauses 135(1), (2) and (3), the Minister must not vary or revoke a declaration made under clause 134(1) in relation to a participating group unless any requirements prescribed by the rules in relation to the variation or revocation are satisfied.

Subclause 135(5) provides that if:

- (a) the Minister revokes a declaration made under subclause 115(2) in relation to a participating institution that is a member of a participating group immediately before the revocation; but
- (b) because of subclause 116(7), the institution continues to be a participating institution in relation to a person who made an application for redress before the revocation;

then each of the associates of the institution continues to be an **associate** of the institution in relation to the person, as if the institution was still a member of the group.

Division 3 – Representatives for participating groups

Clause 136 provides for representatives for participating groups. Subclause 135(1) provides that a participating group must have a representative for the group.

Subclauses 136(2), (3) and (4) provide that the **representative** for a participating group of Commonwealth, State and Territory institutions is the Commonwealth, participating State or participating Territory respectively.

Subclause 136(5) provides that the representative for a participating group of non-government institutions is the person in relation to whom a declaration is in force under subclause 137(1)

Subclause 136(6) provides that a participating group may only have one representative for the group. However, subclause 136(7) provides that a person may be the representative for more than one participating group.

Clause 137 provides for a person becoming the representative for a participating group of non-government institutions. Subclause 137(1) provides that the Minister may, by notifiable instrument, declare that a person is the representative for a participating group of non-government institutions.

Subclause 137(2) provides that the Minister must not make a declaration under subclause 137(1) unless the Minister is satisfied of the following:

- (a) the person has agreed to be the representative for the group; and
- (b) each participating institution that is a member of the group has agreed to the person being the representative for the group; and
- (c) there is not a declaration in force under subclause 137 (1) declaring another person to be the representative for the group; and
- (d) any other requirements prescribed by the rules are satisfied.

The note to subclause 137(2) directs the reader to clause 186, which provides for how the agreement of an institution or a person is given.

Clause 138 provides for when a representative ceases to be the representative for a participating group of non-government institutions.

Subclause 138(1) provides that the Minister may revoke a declaration made under clause 137(1) in relation to a representative for a participating group.

Subclause 138(2) provides that if the representative or each of the members of the group (other than the representative, where the representative is a member) requests the Minister in writing to revoke a declaration made under subclause 137(1), the Minister must revoke that declaration.

The note to subclause 138(2) clarifies that if a participating group of non-government institutions does not have a representative then the Minister must revoke the declaration made under subclause 134(1) that the group is a participating group. The note references subclause 135(3) which sets out that if a participating group ceases to have a representative, the Minister must revoke the declaration made under subclause 134(1) as soon as practicable.

Subclause 138(3) provides that despite subclauses 138(1) and (2) the Minister must not revoke a declaration made under subclause 137(1) unless any requirements prescribed by the rules in relation to the revocation are satisfied.

Subclause 138(4) provides that if:

- (a) the Minister revokes a declaration made under subclause 115(2) in relation to a participating institution that is a member of a participating group immediately before the revocation; but
- (b) because of subclause 116(7), the institution continues to be a participating institution in relation to a person who made an application for redress before the revocation;

then the representative for the participating group continues to be the **representative** for the group in relation to that person, as if the institution was still a member of the group.

Clause 139 provides for the actions of the representatives for participating groups.

Subclause 139(1) provides that any act that a participating institution that is a member of a participating group may do under, or for the purposes of, this Bill may be done by the representative on behalf of that institution. This might include, for example, providing a direct personal response, providing information to the scheme, or paying a funding contribution.

Subclause 139(2) makes it clear that where an act is done by a representative for a participating group on behalf of participating institution that is a member of the group it is taken to have been done by that institution.

Clause 140 provides for giving notices to representatives for participating groups.

Subclause 140(1) states that the Operator must give a representative for a participating group a notice that the Operator is required or authorised to give to a participating institution that is member of the group.

Subclause 140(2) states that the notice given under subclause 140 (1) must, in every respect, be in the same form, and in the same terms, as if it were being given to the participating institution concerned.

Clause 141 provides that if a participating institution is liable to pay funding contribution for a quarter, and the institution is a member of a participating group, then that institution and the representative are jointly and severally liable to pay the funding contribution for the quarter.

Part 5-3 – Jurisdictions participating in the Scheme

Division 1 – Simplified outline of this Part

Clause 142 provides a simplified outline of Part 5-3.

Division 2 – Participating jurisdictions

Clause 143 provides that a jurisdiction is a ***participating jurisdiction*** if it is the Commonwealth, a participating State, or a participating Territory.

Clause 144 provides for when a State is a ***participating State*** for the purposes of the Scheme.

Subclause 144(1) provides a State is a ***participating State*** if the Parliament of a State has, for the purposes of paragraph 51(xxxvii) of the Constitution, either:

- (a) by a referral Act, referred to the Commonwealth Parliament the text reference and amendment reference, specified in subclause 144(2) and 144(3) respectively, before the commencement of this Bill; or
- (b) by an adoption Act, adopted the relevant version of this Bill and referred to the Commonwealth Parliament the amendment reference, specified in subclause 144(3), after the enactment of this Bill.

Subclause 144(2) provides that ***text reference*** means the matters to which the initial referred provisions relate, to the extent of making laws with respect to those matters, by including the initial referred provisions in the original version of this Bill, once enacted.

Subclause 144(3) provides that ***amendment reference*** means the referred national redress scheme matters, as defined in clause 145, to the extent of making laws with respect to those matters by making express amendments to this Bill, once enacted.

Subclause 144(4) sets out matters that do not affect a State's status as a participating State for the purposes of the Scheme. These include provisions in a State's referral Act or adoption Act:

- (a) allowing the text reference or the amendment reference to terminate in particular circumstances; or
- (b)
- (c) allowing the adoption of the relevant version of the legislation to terminate in particular circumstances; or
- (d) providing that the reference to the Commonwealth Parliament of the text reference or the amendment reference only has effect if the matter is not included in the legislative powers of the Commonwealth Parliament, or if and to the extent the matter is included in the legislative powers of the Parliament of the State.

Subclause 144(5) provides that a State is not a **participating State** if it has not become a participating State before the second anniversary of the Scheme start day or a later day prescribed by the rules. The subclause has been included to ensure each State elects to opt in to the scheme early in the 10-year duration of the Scheme, to enable redress be provided to survivors in a timely manner.

Subclause 144(6) provides that a State ceases to be **participating State** if, in the case where the State has referred the text reference, that reference terminates; or, in the case where the State has adopted the relevant version of the legislation, that adoption terminates.

Subclause 144(7) provides that a State ceases to be a **participating State** if the State's amendment reference terminates, subject to subclause 144(8).

Subclause 144(8) creates an exception to subclause 144(7) that allows States to continue as participating States despite the termination of their amendment references, if all States agree to do so on the same day and give more than 6 months' notice of that termination. In those circumstances, the Scheme will continue as in force on the date of the termination of the amendment references, and the States will continue to be participating States.

If the amendment references are terminated as envisaged by this subclause, the Commonwealth would not be able to amend the Act relying on the amendment references from the States. State referral or adoption Acts may contain complementary provisions making it clear that if the amendment reference terminates but the text reference or adoption do not terminate, then that termination does not affect the continuing operation of the Commonwealth Act, including provisions previously enacted in reliance on the amendment reference.

These mechanisms allow the future of the Scheme to be determined by the participating States and the Commonwealth in an orderly manner, without undue detriment to survivors, by permitting the Scheme to continue despite the termination of the amendment references.

Subclause 144(9) provides for definitions relevant to clause 144 that are contained in the Dictionary (clause 6).

Clause 145 provides for the referred national redress scheme matters. Subclause 145(1) provides that ***referred national redress matters*** are the matters relating to a redress scheme for institutional child sexual abuse.

Subclause 145(2) provides for matters that are not ***referred national redress matters***. These matters include:

- (a) the making of a law to the extent that that law would operate to prevent or limit the operation of, any State redress mechanism, whether or not the mechanism deals with the same or similar subject matters as those dealt with in any aspect of the Scheme;
- (b) the making of a law to the extent that that law would substantively remove or override a provision of this Bill once enacted that requires the agreement of the State.

Subclause 145(3) provides that paragraph 145(2)(a) does not cover certain matters, if they would otherwise be covered by subclause 145(1). These matters include:

- (a) any matter to which the initial referred provisions relate;
- (b) the matters of the release or discharge, in connection with the operation of the scheme, of relevant civil liability of institutions or officials;
- (c) the matter of the disclosure or use of evidence or other information provided or obtained in connection with the operation of the Scheme;
- (d) the matter of making, enforcement or protection (for example, protection against the operation of orders in the nature of garnishee orders) of payments in connection with the operation of the Scheme.

Subclause 145(4) provides that a ***State redress mechanism*** is the following:

- (a) a scheme, program or arrangement (temporary or otherwise) established (before or after the commencement of the State's referral Act or adoption Act) by:
 - (i) the Parliament or government of the State; or
 - (ii) an institution (whether governmental or non-governmental) or other entity;

for or in respect of persons who have suffered institutional child sexual abuse in the State (whether applying only to any such persons or applying to any class of victims of crime) and any associated matters; or

- (b) the jurisdiction of a court or tribunal to grant compensation or support for or in respect of victims of crime (including crime relating to institutional child sexual abuse) and any associated matters.

Division 3 – Participating jurisdictions providing counselling and psychological services under the Scheme

Clause 146 provides for participating jurisdictions to request, by notifying the Minister in writing, to become a declared provider of counselling and psychological services under the Scheme, where there are arrangements in place in that jurisdiction to deliver those services in accordance with the National Service Standards set out in the National Redress Scheme Agreement. Subclause 146(2) provides that a participating jurisdiction is a **declared provider** of counselling and psychological services if a declaration to that effect is in force under subclause 147(1).

Clause 147 provides for Ministerial declarations about declared providers. Subclause 147(1) provides that if the Minister receives a notice under subclause 146(1) from a participating jurisdiction, the Minister must, by notifiable instrument, declare that the jurisdiction is a declared provider of counselling and psychological services under the Scheme. Subclause 147(2) provides that the Minister must, as soon as practicable, revoke the declaration made under subclause 147(1) if a participating jurisdiction request the Minister to do so.

Chapter 6 – Financial matters

Part 6-1 – Liability for funding

Division 1 – Simplified outline of this Part

Clause 148 provides a simplified outline of Part 6-1.

Division 2 – Liability of participating institutions for funding contribution

The Scheme is intended to operate on a responsible entity pays basis as recommended by the Royal Commission. Division 2 sets out how funding contribution under the Scheme will be determined and collected by the Operator in order to achieve that objective. As the Commonwealth will be expending money that will be recovered from participating institutions in arrears, Division 2 also sets out late payment penalties and recovery mechanisms. It will be possible for the Operator to waive a funding contribution and late payment penalty in exceptional circumstances, which might arise where, for example, recovery would cause a participating institution that is a charitable organisation to cease operating. Where a participating institution applies for the waiver of funding contribution and late payment penalty and the Operator does not waive the amount owing, the affected institution may apply to have that decision reviewed internally.

Clause 149 sets out liability for funding contribution under the Scheme.

Subclause 149(1) provides that if in a quarter a person becomes entitled to redress for abuse that person suffered, each participating institution that is determined by the Operator under paragraph 29(2)(b) to be responsible for the abuse is liable to pay funding contribution for that quarter.

Note 1 clarifies that if the responsible institution is a defunct institution, its representative will be liable pay the funding contribution (see clause 123).

Note 2 clarifies that if the responsible institution is a defunct institution, its representative instead will be jointly and severally liable with the institution to pay the funding contribution (see clause 131).

Note 3 clarifies that if the responsible institution is a member of a participating group, the representative for the group will be jointly and severally liable with the institution to pay the funding contribution (see clause 141).

Subclause 149(2) defines a **quarter** as a period of 3 months beginning on 1 July, 1 October, 1 January or 1 April in any year.

Subclause 149(3) provides that subclause 149(1) does not apply to a Commonwealth institution.

Subclause 149(4) states that the rules may provide for the application of Part 6-1 to a Commonwealth institution. This will enable the rules to set out arrangements for the Commonwealth to allocate funding contributions if that becomes necessary.

Clause 150 defines **funding contribution** for a participating institution for a quarter. The funding contribution consists of the redress element for the institution for a quarter and the Scheme administration element for the institution for a quarter.

The note to this clause directs the reader to paragraph 29(2)(i) which provides that if the Operator determines that a participating government institution is the funder of last resort for defunct institution in relation to abuse of a person, the government institution will be liable for the defunct institution's (hypothetical) share of the costs of providing redress to the person. The note to this clause directs the reader to clause 165. Clause 165 outlines how the redress payment, counselling and psychological component, and Scheme administration costs are to be calculated when the Operator has determined under paragraph 29(2)(i) that a participating government institution is the funder of last resort for a defunct institution.

Clause 151 defines the **redress element** of funding contribution for a participating institution for a quarter. Clause 151 specifies that the redress element is the amount equal to the sum of the amount of the institution's share of the costs of the redress payment and the amount of the institution's share of the costs of the counselling and psychological component of redress for the quarter, for each person who is entitled to redress.

The note to this clause directs the reader to paragraphs 29(2)(c) and 29(2)(d). Paragraph 29(2)(c) provides for the Operator to determine the amount of the redress payment and the amount of each responsible institution's share of the cost of a redress payment. Paragraph 29(2)(d) provides for the Operator to determine the amount of the counselling and psychological component of redress and the amount of each responsible institution's share of the costs of that component.

Internal review is not available for this decision. By agreeing to participate in the Scheme a participating institution accepts that the Operator will make determinations in relation to the redress payment and the counselling and psychological component they are required to pay. Each participating institution is aware from when they agree to participate in the Scheme that the maximum redress payment is capped at \$150,000 and the counselling and psychological component of redress may consist of either access to counselling and psychological services or a payment, depending on the participating State where the applicant lives at the time of their application.

Clause 152 defines the *scheme administration element* of funding contribution for a participating institution for a quarter.

Subclause 152(1) specifies that the Scheme administration element is the amount equal to the participating institution's share of the administration of the Scheme for the quarter.

Subclause 152(2) provides that for subclause 152(1), the Operator must determine an institution's contribution to the costs of the administration of the Scheme for a quarter, in accordance with any requirements prescribed by rules.

Internal review is not available for this decision. By agreeing to participate in the Scheme a participating institution accepts that the Operator will make determinations in relation to the administration costs they are required to contribute. The Scheme administration cost of providing redress for the abuse of each person for which an institution is responsible will be determined as a proportionate share of the total amount of redress paid to each person.

Clause 153 sets out when funding contribution is due for payment. Funding contribution payable by a participating institution is due and payable on a business day specified in a notice that the Operator gives to the participating institution. The business day specified in the notice must be 30 or more days after the date of the notice.

Clause 154 outlines when a late payment penalty will be due in respect of any funding contribution payable by a participating institution.

Subclause 154(1) provides that where funding contribution payable by a participating institution remains unpaid at the start of a calendar month after it became due for payment, the institution is liable to pay the Commonwealth a penalty for that calendar month. The penalty is worked out by multiplying the amount of the unpaid funding contribution (as at the start of the calendar month) by 0.1 divided by 12.

Subclause 154(2) provides that a late payment penalty for a calendar month is due and payable at the end of the calendar month.

Subclause 154(3) allows the Operator to defer the payment of a late payment penalty. In order to defer the payment of a late payment penalty the Operator must give a written notice to the participating institution that specifies a later day for the late payment penalty to be paid. Such a notice may be issued before, on or after the

day on which the late payment penalty was originally due and payable and is taken to have effect, and have always had effect, according to its terms.

Example:

A participating non-government institution of a Territory was required to pay funding contribution in May, and the amount remained unpaid in June. As a result, a late payment penalty would apply. If the amount due to be paid was \$50,000, that amount would be multiplied by 0.1, and divided by 12. Therefore, the late payment penalty would be \$416.66, and would be due by the end of June, unless the Operator of the Scheme specified a later day that the penalty could be paid.

Clause 155 provides that funding contributions and late payment penalties are payable to the Operator on behalf of the Commonwealth.

Clause 156 enables funding contributions and late payment penalties to be waived in exceptional circumstances.

Subclause 156(1) provides that the Operator may waive the payment of the whole or part of funding contribution or a late payment penalty that is owed by a participating institution. The Operator must be satisfied that there are exceptional circumstances justifying the waiver.

Subclause 156(2) makes it clear that the Operator may grant a waiver on his or her own initiative or following a written application by a person (made on behalf of the participating institution). The application must be in the approved form.

Clause 157 provides for the review of decisions under clause 156 relating to the waiver of funding contribution (in whole or part) or late payment penalties.

Subclause 157(1) allows a participating institution that is affected by, and dissatisfied with a decision of the Operator under clause 156 (about a request to waive the payment of funding contribution (in whole or a part) or late payment penalty), to request the Operator reconsider the decision.

An internal review is a quick and inexpensive means of re-examining decisions. Clause 156 only provides for the waiver of the payment of funding contribution or late payment penalty in exceptional circumstances. The internal review permitted under clause 156 relates only to redress components and scheme administration components participating institutions were aware they would be liable for before agreeing to participate in the Scheme.

A waiver of funding contribution would result in the Commonwealth paying the redress component for the participating institution. This would undermine the policy that the responsible institution should pay the cost of providing redress to a person. The requirement for exceptional circumstances demonstrates that in most circumstances funding contributions and late payment penalties must be paid.

Subclause 157(2) provides that a request for reconsideration must be made by notice to the Operator in the approved form. The request must be made within 21 days after the day of the notice of the decision or within a further period as allowed by the Operator. The request must set out the reasons for making the request.

Subclause 157(3) requires the Operator to review the decision after receiving the request. The Operator can also cause the decision to be reviewed by another person that has been delegated power under subclause 157(3). That person must not have been involved in making the original decision.

Subclause 157(4) defines the **review period** as a period of 30 business days after receiving the request, or such longer period as is determined by the Operator in writing. Within the review period the Operator, or other person reviewing the decision, must reconsider the decision and either confirm, revoke or vary the decision.

Subclause 157(5) outlines what occurs in circumstances where the Operator or person reviewing the decision does not confirm, revoke or vary the decision within the review period. In such circumstances, the original decision will be taken to be confirmed immediately after the review period ends.

Subclause 157(6) provides that the person reviewing the decision must give written notice of the outcome of the review decision to the participating institution that made the request under subclause 157(1). The written notice must set out the results of the reconsideration and the reasons for the decision.

It was considered appropriate to make decisions on waiving funding contributions and late payment fees reviewable because these are decisions that directly affect a participating institution and their ability to effectively participate in the Scheme.

Example:

Institution A is given a notice from the Operator on 10 October 2018, which states that the institution's funding contribution for the quarter that commenced on 1 July 2018 comprises:

- a redress component of \$200,000; and
- a Scheme administration component of \$20,000.

The notice states that funding contribution is due and payable on 12 November 2018. Institution A pays \$20,000 on 12 November 2018 and \$200,000 remains unpaid on 1 December 2018. Institution A is liable to pay a penalty of \$1666.66 for December 2018, which is due and payable on 31 December 2018.

Institution A made an application for a waiver of the late payment penalty in the approved form. Institution A stated that they were late to pay their redress component for the quarter because the staff member assigned with the duty of paying the contribution was on holiday. The Operator was not satisfied that this was

exceptional circumstances and notified Institution A that their application was unsuccessful.

Institution A subsequently made a request for reconsideration to the Operator. A delegate of the Operator reviewed the decision 13 days after receiving the request (within the 30 business day period under subclause 157(4)) and provided a notice in writing to Institution A that the decision was confirmed, along with reasons for that decision.

Clause 158 provides for the liability of corporate State or Territory institutions for funding contribution. If a State institution or a Territory institution is a body corporate that is taken to have agreed to participate in the Scheme (see subclause 115(5)) and the imposition of liability on the institution to pay funding contribution would impermissibly impose taxation on the institution or acquire property of the institution otherwise than on just terms then the liability is taken to be imposed on the relevant State or Territory.

Division 3 – Liability of the Commonwealth for counselling and psychological services contribution

Clause 159 provides that the Commonwealth is liable to pay counselling and psychological services contribution to a participating jurisdiction, for a quarter, where the jurisdiction is a declared provider of counselling and psychological services under the Scheme and it is required under paragraph 51(2)(b) to provide counselling and psychological services to a person.

Clause 160 defines ***counselling and psychological services contribution***. The counselling and psychological services contribution, for a participating jurisdiction for a quarter, is the amount equal to the sum of the amounts of the counselling and psychological components of redress for each person that the jurisdiction becomes required to provide counselling and psychological services to under paragraph 51(2)(b) in the quarter.

Division 4 - Appropriation

Clause 161 provides that the Consolidated Revenue Fund is appropriated to the extent necessary for the purposes of the payment or discharge of the costs incurred by the Commonwealth in making the following payments, that is, redress payments, counselling and psychological services payments and counselling and psychological services contribution.

Part 6-2 – Funders of last resort

Division 1 – Simplified outline of this Part

Clause 162 provides a simplified outline of Part 6-2.

Division 2 – Funders of last resort

Division 2 sets out how funders of last resort will operate under the Scheme. In some circumstances there may be no responsible participating institution for a particular instance of abuse because the relevant institution no longer exists. Where there is an appropriate level of shared responsibility, it will be open to a participating government institution to step in to meet the cost of providing redress for survivors of that abuse. Division 2 provides the mechanism for the Operator to determine that a government institution is the funder of last resort for a defunct institution in relation to abuse of a person. The determination will be made under paragraph 29(2)(i).

A defunct institution for the purposes of this Division is not a participating defunct institution (which is set out in clause 117). While a participating defunct institution has a representative and is ‘participating’ in the Scheme, a defunct institution in this Division can only have a determination made in relation to it if it is listed for a participating jurisdiction (that is, a jurisdiction agrees to being the funder of last resort for the defunct institution’s share of redress, where applicable).

Example:

A now-defunct orphanage does not have a representative and is not declared a participating institution. However, it is listed for a participating jurisdiction. This means that funder of last resort obligations will arise in relation to that jurisdiction, where a government institution from that jurisdiction is equally responsible with the orphanage for abuse within the scope of the Scheme.

Clause 163 provides that a participating government institution will be the ***funder of last resort*** for a defunct institution in relation to the abuse of a person if a determination of the Operator to that effect is in force under paragraph 29(2)(i).

The note to this clause provides that the Operator can only make that determination if the participating government institution and defunct institution are equally responsible for the abuse and the defunct institution is listed for the jurisdiction which the government institution belongs to.

Example:

A participating government institution may be a funder of last resort in a case where: Person A was abused at a sporting club by a club employee, when they were taken to that facility as part of an Australian Defence Force cadets program. In this case, the participating government institution and the sporting club may be equally responsible entities, but the sporting club is defunct and unable to pay redress. Therefore, the Operator may make a determination that the participating government institution is a funder of last resort, making the participating government institution liable for what would have been the defunct institution’s share of the costs of providing redress to the person in relation to the abuse. The determination may only be made if the participating government institution and defunct institution are equally responsible and the participating government institution has agreed to be the funder of last resort for the defunct institution.

Clause 164 sets out how a defunct institution is listed.

Subclause 164(1) provides that a defunct institution is *listed* for a participating jurisdiction if the defunct institution is a non-government institution that is not a participating institution and a declaration that the defunct institution is listed for the jurisdiction is in force under subclause 164(2).

Subclause 164(2) provides for the declaration that a defunct institution is listed for one or more participating jurisdictions by the Minister, in the form of a notifiable instrument.

The note to this subclause provides that a defunct institution may be identified by name, by inclusion in a particular class, or in any other way.

The declaration to provide that a defunct institution is listed for one or more participating jurisdictions will ensure that each participating jurisdiction to the Scheme will have a list of defunct institutions that operated in the relevant jurisdiction. The Operator will be better able to identify if the person (the applicant to the Scheme) was placed in a defunct institution in more than one participating jurisdiction. This will make it easier for the Operator to identify instances where equal responsibility of a participating jurisdiction with a defunct institution has occurred. This will facilitate each participating jurisdiction to determine whether it should be the funder of last resort for the defunct institution (paragraph 29(2)(i)) or should be taken to be the funder of last resort (clause 163).

Subclause 164(3) provides that the Minister must not make a declaration under subclause 164(2) unless the Minister is satisfied that the relevant jurisdiction (the Commonwealth or a participating Territory) has agreed to the defunct institution being listed for the jurisdiction, in the way (if any) prescribed by the rules.

Subclause 164(4) provides that the Minister must not make a declaration under subclause 164(2) unless the Minister is satisfied that a participating State has agreed to the defunct institution being listed for the State, in the way provided for in the State's referral Act or adoption Act.

Subclause 164(5) allows the Minister to vary or revoke a declaration made under subclause 164(2) by notifiable instrument.

Subclause 164(6) specifies that if a declaration is made under subclause 164(2) that a defunct institution is listed for the Commonwealth or a participating Territory and the jurisdiction withdraws its agreement, in the way (if any) prescribed by the rules, to the defunct institution being listed for the jurisdiction, then as soon as practicable, the Minister must vary or revoke the declaration by notifiable instrument so that the defunct institution is no longer listed for the jurisdiction.

Subclause 164(7) specifies that if a declaration is made under subclause 164(2) that a defunct institution is listed for a participating State and the State withdraws its agreement, in a way provided for in the State's referral Act or adoption Act, to the defunct institution being listed for the State, then as soon as practicable, the Minister

must vary or revoke the declaration by notifiable instrument so that the defunct institution is no longer listed for the State.

Division 3 – Special rules for funder of last resort cases

Clause 165 sets out the special rules for funder of last resort cases.

Subclause 165(1) provides that if a determination made by the Operator under paragraph 29(2)(i) that a participating government institution is equally responsible with a defunct institution for abuse and the government institution is the funder of last resort for the defunct institution in relation to the abuse, then the government institution is liable (in accordance with clause 165) for what the defunct institution would have been liable to pay in relation to providing redress to the person had the defunct institution been a participating institution.

Subclause 165(2) sets out what the Operator must do when determining the amount of the redress payment for the person and the amount of the government institution's share of the costs of that payment under paragraph 29(2)(c).

Paragraph 165(2)(a) requires the Operator to apply subclause 30(2) as if the defunct institution were also a liable institution in relation to the abuse.

Paragraph 165(2)(b) requires the Operator to add the amount worked out under subclause 30(2) (as applying because of paragraph 30(2)(a)) as the amount of the defunct institution's share of the costs of the redress payment to the amount that, apart from this section, would have otherwise been the government institution's share of the costs of the redress payment.

Subclause 165(3) sets out what the Operator must do when determining, under paragraph 29(2)(d), the amount of the government institution's share of the costs of providing the counselling and psychological component of redress for the person.

Paragraph 165(3)(a) requires the Operator to determine, in accordance with clause 31, the proportion of the defunct institution's share of the cost, as if the defunct institution were also a responsible institution.

Paragraph 165(3)(b) requires the Operator to add the proportion from paragraph 165(3)(a) to the proportion that, apart from this section, would have otherwise been the proportion of the government institution's share of that cost.

Subclause 165(4) sets out what the Operator must do when determining the government institution's contribution to the costs of the administration of the Scheme for a quarter, under subclause 152(2).

Paragraph 165(4)(a) requires the Operator to determine the amount of the defunct institution's contribution to those costs, as if the defunct institution were a participating institution.

Paragraph 165(4)(b) requires the Operator to add that amount to what, apart from this clause, would have otherwise been the government institution's contribution to those costs.

Part 6-3 – Debt recovery

Division 1 – Simplified outline of this Part

Clause 166 provides a simplified outline of Part 6-3.

Division 2 – Debt recovery

Clause 167 sets out the recovery of amounts, other than funding contribution and late payment penalty. Subclause 167(1) provides that, if an amount has been paid to a person or an institution (the **recipient**) under this Bill, the amount is a debt due to the Commonwealth only to the extent that clause 167 expressly provides that it is.

Subclause 167(2) provides that if an amount paid to the recipient, should not have been paid in the circumstances set out in this subclause, then the amount paid, or the amount of the excess, is a debt due to the Commonwealth by the recipient. The circumstances are:

- (a) the amount was paid to the wrong person; or
- (b) the amount exceeds the amount payable to the recipient.

Example:

Person A accidentally provides incorrect bank details in their application form, and Person B (who has not applied for redress) is accidentally paid the redress payment intended to be paid to Person A. The Commonwealth can raise a debt from Person B, equal to the sum of the redress payment that was intended to be paid to Person A.

Subclause 167(3) provides that if an amount paid to the recipient was paid wholly or partly because of a false or misleading statement, or a misrepresentation, by the recipient or another person, then an amount equal to so much of the amount paid that is attributable to the false or misleading statement, or the misrepresentation, is a debt due to the Commonwealth by the recipient.

Example:

Person A applies for redress and is made an offer of redress, which is accepted and paid. However, one month later, information is made available to the Scheme that contradicts the information made in Person A's application, and that information confirms that the person is not in fact eligible for redress. The Commonwealth can raise a debt from Person A, equal to the sum of the redress payment that was paid to them.

Subclause 167(4) provides that a debt due to the Commonwealth will arise where the recipient was required to notify the Operator about a matter under clause 181, the recipient failed to comply and the amount that was paid to the recipient would not have been payable had the Operator been notified as required. The debt due to the Commonwealth will be an amount equal to so much of the amount paid as is attributable to the failure to comply with clause 181.

Subclause 167(5) provides that the debt due by the recipient arises at the time the amount was paid to the recipient.

Clause 168 provides that funding contribution or late payment penalty that is due and payable by the institution or a person may be recovered by the Commonwealth as debts due to the Commonwealth.

The note to this clause directs the reader to clauses 123, 131 and 141 for cases where a person may be liable to pay funding contribution.

Clause 169 provides that a debt due to the Commonwealth under this Part is recoverable by the Commonwealth in a court of competent jurisdiction. This will enable legal proceedings to be commenced in the most appropriate jurisdiction and allow the matter to be heard at the lowest level necessary.

Clause 170 provides for the Operator to enter into an arrangement for the payment of a debt.

Subclause 170(1) enables the Operator to enter into an arrangement with a person or institution under which the person or institution is to pay a debt owed to the Commonwealth under this Part, or the outstanding amount of such a debt in a way set out in the arrangement, for example by means of instalments.

Subclause 170(2) provides that the arrangement entered into under subclause 170(1) has effect, or is taken to have effect, on and after the day specified in the arrangement as the day the arrangement commences (whether that day is the day the arrangement is entered into or earlier or later day). If the arrangement does not specify a day (as mentioned in subclause 170(2)), it has effect on and after the day the arrangement is entered into (subclause 170(3)).

Subclause 170(4) provides that the Operator may terminate or alter an arrangement made under subclause 170(1) at the request of the person or institution, after giving 28 days' notice to the person or institution of the proposed termination or alteration, or without notice where the Operator is satisfied that the person or institution has failed to disclose material information about the person's or institution's true capacity to repay the debt.

Clause 171 provides for the recovery of amounts directly from financial institutions where a payment was made in error. Subclause 171(1) applies if an amount is paid under this Bill to a financial institution for the credit of an account kept with that institution and the Operator is satisfied that the amount has been paid to the account of a person who was not intended to obtain the payment.

Subclause 171(2) provides that the Operator may, by written notice, setting out the relevant matters referred to in paragraphs 171(1)(a) and (b) require the financial institution to pay the amount of the payment to the Commonwealth, within a reasonable period the lesser of the amount of the payment stated in the notice or the amount standing to the credit of the account when the notice is given to the financial institution.

Subclause 171(3) makes it an offence if a financial institution fails to comply with the notice. The penalty is 300 penalty units. The penalty is considered to be appropriate for a financial institution so as to deter the institution from failing to comply with a notice.

Subclause 171(4) provides a defence to prosecution if the financial institution proves that it was incapable of complying with the notice given under subclause 171(2). The note to subclause 171(4) provides that the burden of proving whether a person has a reasonable excuse is on the defendant and directs the reader to section 13.4 of the Criminal Code. This provision in the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

Subclause 171(5) provides that any amount that has been paid by a financial institution to the Commonwealth pursuant to this clause reduces the amount of any debt referred to in subclause 167(1) (as it relates to paragraph 167(2)(a)).

Clause 172 provides that if the Commonwealth recovers an amount under this Part (other than paragraph 167(2)(a)) and all or part of the amount relates to either a redress payment or a counselling and psychological services payment, or both; and a participating institution has paid funding contribution in relation to the payment, the Commonwealth must repay the institution so much of that funding contribution as the Operator considers relates to the amount recovered.

The note to this clause directs the reader to section 77 of the Public Governance, Performance and Accountability Act in relation to appropriation for the refund.

Chapter 7 – Other matters

Part 7-1 – Application of this Act

Division 1 – Simplified outline of this Part

Clause 173 provides a simplified outline of Part 7-1.

Division 2 – Application of this Act

Clause 174 provides the constitutional basis of the Bill.

Specifically, subclause 174(2) provides that where the abuse occurred inside a participating State, the Bill applies based on the legislative powers of the

Commonwealth Parliament (other than under paragraph 51(xxxvii) of the Constitution) and the legislative powers that have been given to the Commonwealth Parliament as a result of a reference or adoption by the Parliaments of participating States for the purposes of paragraph 51(xxxvii).

Subclause 174(3) provides that where the abuse occurred in a non-participating State, the application of the Bill is based on sections 51 (other than paragraph 51(xxxvii)) and 122 of the Constitution, and the other legislative powers that the Commonwealth Parliament has under the Constitution.

In respect of abuse that occurred within an internal or external Territory, subclause 174(4) provides that the Bill applies on the basis of section 122 of the Constitution which provides for the Commonwealth to make laws for the government of a Territory, and other legislative powers that the Commonwealth Parliament has under the Constitution.

Where the abuse occurred outside Australia, subclause 174(5) provides that the Bill applies on the basis of paragraph 51(xxix), section 122 and the other legislative powers that the Commonwealth Parliament has under the Constitution.

Clause 175 provides that the Bill does not exclude or limit the operation of a law of a State and Territory where the laws can operate concurrently. This seeks to provide for potential conflicts of law where section 109 of the Constitution may apply.

Subclause 175(2) provides that this extends to the concurrent operation of the Bill with a law of a State or Territory that also provides for redress (however described) to be provided to a person for abuse suffered by the person.

Clause 176 sets out that the Bill applies inside and outside Australia and extends to every external Territory, such as Ashmore and Cartier Islands.

Clause 177 provides that the Bill binds the Crown in each of its capacities.

Part 7-2 – The National Redress Scheme Rules

Division 1 – Simplified outline of this Part

Clause 178 provides a simplified outline of Part 7-2.

Division 2 – The National Redress Scheme Rules

Clause 179 provides for the making of rules by the Minister for the purposes of the Scheme.

Subclause 179(1) provides the Minister with the power to make rules, by legislative instrument prescribing matters:

- (a) required or permitted by the Bill to be prescribed by the rules; or
- (b) necessary or convenient to be prescribed for the carrying out or giving effect to the Bill.

The 'necessary and convenient' power provided in this subclause ensures that the Commonwealth is able to incorporate additional matters that arise over the 10 year course of the Scheme. However, this power cannot be used to extend the scope or general operation of the Bill. The power can be used to fill out the purposes of the Bill and support its effective operation, but it cannot be used to widen the Bill's scope.

Subclause 179(2) further provides that the rules may provide for matters relating to:

- (a) an institution ceasing to be a participating institution;
- (b) a participating group ceasing to be a participating group;
- (c) a participating State ceasing to be a participating State;
- (d) a person becoming, being or ceasing to be a representative for a defunct institution, a lone institution or a participating group;
- (e) overriding, for the purposes of the Scheme, any provisions of settlement agreements or deeds that relate to confidentiality or would inhibit access to, or the operation of, the Scheme.

Subclause 179(3) provides that the rules may apply, adopt or incorporate any matter contained in the assessment framework as in force from time to time. This is despite section 14 of the *Legislation Act 2003*. For example, the inclusion of this clause in the Bill relates to references about the methodology to be applied in calculating the maximum amount of the redress payment that may be payable to the person. Although the assessment framework is not subject to disallowance, it will be made available on the Federal Register of Legislation once registered.

It is essential that the Scheme is flexible and adaptable to the realities of implementation, which requires some provisions to be in delegated legislation, such as rules. The scale of this Scheme is different to other state-based schemes or overseas experiences, with greater coverage, scale and participating institutions than these other schemes (for example, the Irish Redress Scheme only included one institution). This is the reason the Scheme will need to be flexible to account for any unforeseen numbers of survivors, institutional contexts and other circumstances. Accordingly, it will be necessary to adjust policy settings to mitigate against unintended outcomes for survivors. This flexibility allows the Scheme to meet its objective of a survivor-focussed and expedient process, with a lower evidentiary threshold, to ensure a survivor experience less traumatic than civil justice proceedings. Protections will be in place to balance this flexibility, including governance arrangements to provide oversight of the operation of the Scheme.

Subclause 179(4) provides that the provisions of the Bill that provide for rules to deal with matters do not operate to limit each other.

Subclause 179(5) sets out what the rules may not provide for. This includes the following:

- (a) create an offence or civil penalty;
- (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
- (c) impose a tax;
- (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in the Bill;
- (e) directly amend the text of the Bill.

Using rules rather than regulations, or incorporating all elements of the Scheme in the Bill, provides appropriate flexibility and enables the Scheme to respond to factual matters as they arise. It is uncertain how many applications for redress the Scheme receive at the commencement of the Scheme, and whether there will be unforeseen issues requiring prompt responses. It is therefore appropriate that aspects of the Scheme are covered by rules that can be adapted and modified in a timely manner. The need to respond quickly to survivor needs is also a key feature of the Scheme.

Part 7-3 – Other matters

Division 1 – Simplified outline of this Part

Clause 180 provides a simplified outline of Part 7-3.

Division 2 – Giving notices for the purposes of the scheme

Clause 181 sets a requirement to notify the Operator of certain circumstances.

Subclause 181(1) requires a redress applicant to notify the Operator if they are sentenced to imprisonment for five years or longer for an offence against a law of the Commonwealth, a State, a Territory or a foreign country after making a redress application. The person must notify to Operator of that fact in accordance with any requirements prescribed by the rules. The rules may prescribe circumstances for when a person or a participating institution must or may notify the Operator of a matter and requirements relating to the giving of the notice (subclause 181(2)).

Clause 182 deals with the Operator giving notices to persons or institutions.

Subclause 182(1) provides that the rules may require or permit the Operator to give a notice to a person or an institution about a matter relating to the operation of this Bill.

Subclause 182(2) provides that if this Bill requires or permits the Operator to give a notice to a person or institution, the Operator may give the notice in any way that the Operator considers appropriate.

Division 3 – Delegation

Clause 183 enables the Minister to delegate his or her powers or functions under the Bill.

Subclause 183(1) provides that the Minister may, in writing, delegate all or any of his or her powers or functions under the Bill to the Operator or to a person who holds or performs the duties of an SES Band 3 position (or equivalent) in the Department. The Minister's powers and functions relating to exemptions for criminal convictions and making rules for the purpose of the Scheme or engaging independent decision makers, as set out in clause 179 or 185 respectively, cannot be delegated.

Subclause 183(2) provides that a delegate, exercising a power or function delegated by the Minister under subsection 183(1), must comply with any directions of the Minister.

Clause 184 enables the Operator to delegate any or all of his or her powers or functions to an officer of the Scheme. An officer of the Scheme is defined in clause 6 to mean a person in the Department or the Human Services Department performing duties, or exercising powers or functions, under or in relation to the Bill. A broad delegation of the Scheme Operator's powers is necessary to enable the Department of Human Services and the Department of Social Services to administer the Scheme in an efficient manner, which is responsive and flexible to address matters as they arise. The Operator will delegate functions for the ordinary administration of the Scheme and will determine the appropriate level of delegation commensurate with the administrative function being undertaken.

Subclause 184(1) requires that any delegation is to be made in writing and clarifies that powers and functions under clauses 29, 75 and 190 cannot be delegated.

The capacity for the Operator to delegate all or any of his or her powers or functions (other than those excluded) is due to the nature of the survivor cohort, such that timeliness in processing Scheme applications is critical. Over half of the survivors anticipated to apply to the Scheme are over 50 years of age, and so significant delays to the processing of applications may result in survivors passing away before they have the opportunity to receive redress. It is also widely recognised survivors of child sexual abuse also experience poorer health and social outcomes, amplifying the need for timely decision-making and for promoting the rights of survivors. Timeliness in the processing of applications is also critical to providing closure to survivors, and prolonging the processing of applications is likely to re-traumatise those survivors. These issues were highlighted by the Royal Commission.

Subclause 184(2) provides that a delegate must comply with any directions of the Operator when exercising delegated powers and functions.

Subclause 184(3) states that the Operator may, in writing, delegate his or her powers and functions under clauses 29 or 75 only to an independent decision-maker. These powers and functions are limited to being delegated only to an independent decision maker as they relate to making determinations on

applications and internal review of redress decisions. An independent decision-maker can be engaged under paragraph 185(1).

Subclause 182(4) makes it clear that an independent decision-maker does not need to comply with any directions of the Operator when making a determination on an application (clause 29) or reviewing a redress decision (clause 75). This ensures that independent decision-makers are able to act with genuine independence in making decisions when exercising a power or performing a function under those clauses.

Division 4 – Independent decision-makers

Clause 185 deals with engaging persons to be independent decision-makers.

Subclause 185(1) provides for the Operator to engage a person, under written agreement, to assist in the performance of his or her functions in relation to making a determination under clause 29 on an application for redress or clause 75 relating to internal review. The Operator may engage such a person on behalf of the Commonwealth only with the approval of the Minister.

Subclause 185(2) requires the Minister to consult with appropriate Ministers from the participating States and participating Territories in accordance with the National Redress Scheme Agreement before approving the engagement of a person as an independent decision-maker under subclause 185(1). The consultation process will include participating States and participating Territories nominating prospective decision-makers that are independent from responsible institutions to ensure fairness, transparency, and public trust in the Scheme. The selection of prospective independent decision-makers will include a probity and vetting process undertaken by the Department to identify suitable candidates. The engagement of suitable candidates will then be subject to agreement from participating States and Territories. This consultative process provides appropriate legislative guidance to engage appropriate independent decision-makers, whilst retaining flexibility to respond to cohorts of survivors coming through the Scheme as they present.

Subclause 185(3) provides that a person engaged under subclause 185(1) is an ***independent decision-maker***.

Subclause 185(4) makes it clear that Subdivision A of Division 3 of Part 2-2 of the Public Governance, Performance and Accountability Act, that deals with general duties of officials and any rules made under that Act for the purposes of that Subdivision, applies to an independent decision-maker in the same way as it applies to an official (as defined in section 13 of the Public Governance, Performance and Accountability Act).

The note to subclause 185(4) indicates that the duties of officials under the Public Governance, Performance and Accountability Act include the duty of care and diligence, the duty to act honestly, in good faith and for a proper purpose, the duties relating to the use of information and position, and the duty to disclose interests.

Division 5 – Miscellaneous

Clause 186 deals with giving agreement. It provides that a reference in the Bill to the Commonwealth, a participating Territory, an institution or a person agreeing to a matter is a reference to the body or person giving agreement in the way (if any) prescribed by the rules.

A note to clause 186 provides an example of where an agreement is required and directs the reader to paragraph 115(3)(b) that provides that the Minister must not make a declaration that a non-government institution is a participating institution unless the institution has agreed to participate in the Scheme. Under clause 186, the way the institution gives its agreement must be the way prescribed by the rules (if the rules prescribe a way).

Clause 187 sets out the requirements for annual reporting on the operation of the Scheme.

Subclause 187(1) requires the Operator to prepare and give an annual report on the operation of the Scheme during the year to the Minister for presentation in Parliament. This must be done as soon as practicable after the end of each financial year.

Subclause 187(2) specifies that the annual report must include any information about any matter prescribed by the rules and comply with any requirements prescribed by the rules.

Clause 188 states that the Operator may, in writing, approve one or more forms for the purposes of a provision of the Bill that provides for something to be done in an approved form.

Clause 189 provides that a determination by the Operator under the Bill must be made in writing, but is not a legislative instrument.

Clause 190 provides for the enforcement of civil penalty provisions.

Subclause 190(1) provides that each civil penalty provision of this Bill is enforceable under Part 4 of the Regulatory Powers Standard Provisions Act.

The note to subclause 190(1) alerts the reader that Part 4 of the Regulatory Powers Standard Provisions Act allows a civil penalty provision to be enforced by obtaining an order for a person to pay a pecuniary penalty for the contravention of the provision.

Subclause 190(2) provides that the Operator, an SES employee, or an acting SES employee, in the Department or the Human Services Department is an authorised applicant in relation to the civil penalty provisions of this Bill for the purposes of Part 4 of the Regulatory Powers Standard Provisions Act.

Subclause 190(3) provides that the Federal Court of Australia or the Federal Circuit Court of Australia is a relevant court in relation to the civil penalty provisions of this Bill for the purposes of Part 4 of the Regulatory Powers Standard Provisions Act.

Subclause 190(4) provides that Part 4 of the Regulatory Powers Act, as it applies in relation to the civil penalty provisions of this Bill, extends to every external Territory.

Subclause 190(5) provides that Part 4 of the Regulatory Powers Act, as that Part applies in relation to the civil penalty provisions of this Bill, does not make the Crown in right of the Commonwealth, a State or a Territory liable to a pecuniary penalty.

Clause 191 provides for compensation for acquisition of property, in circumstances where this could occur.

Subclause 191(1) sets out a requirement for reasonable compensation to be paid to a person where the operation of the Bill would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution).

Subclause 191(2) provides that where compensation is payable, and the Commonwealth and a person do not agree on the amount of compensation, the person may commence proceedings in the Federal Court of Australia or the Supreme Court of a State or participating Territory.

Clause 192 provides for mandated reviews of the Scheme, at two years after the commencement of the Scheme and another at eight years after the commencement of the Scheme.

Subclause 192(1) requires the Minister to cause a review of the operation of the Scheme to be commenced as soon as possible after the second anniversary of the Scheme start day or at a date specified in the rules, where this is done before the second anniversary and specifies a date after the second anniversary. The Scheme start day is defined in clause 6 as being the day the Bill commences.

Subclause 192(2) specifies that the second anniversary review must include consideration of the:

- (a) extent to which the States, participating Territories and non-government institutions have opted into the Scheme, including key facilitators and barriers to opting in;
- (b) extent to which survivors who are eligible for redress have applied for redress;
- (c) extent to which redress has been provided to survivors who are entitled to redress under the Scheme;
- (d) application, assessment and decision-making process, including user experiences of the process;
- (e) redress payments;
- (f) access to counselling and psychological services under the Scheme;
- (g) extent to which survivors access direct personal responses under the Scheme, including factors influencing the uptake and experiences with the direct personal response process;
- (h) availability and access to support services under the Scheme;

- (i) implications of the Scheme's design for survivors including Indigenous and child migrant survivors as well as those who are still children or who have a criminal conviction;
- (j) operation of the funding arrangements, including the Scheme administration element of funding contribution;
- (k) the operation of the funder of last resort provisions;
- (l) the extent to which the Scheme has been implemented as proposed by the National Redress Scheme Agreement;
- (m) views of key stakeholders on the Scheme, including representatives from survivor groups, non-government institutions, advocacy groups, support services provider groups, the Independent Advisory Council, the Commonwealth, the States and the Territories;
- (n) the impact and effectiveness of clause 37 (which is about the admissibility of certain documents in evidence in civil proceedings);
- (o) the question of whether an institution (the **first institution**) should be responsible for abuse that occurs in connection with another institution merely because the first institution regulates or funds the other institution or its activities;
- (p) the administration of the Bill and the Scheme;
- (q) any other matter relevant to the general operation of the Bill or the Scheme.

Subclause 192(3) provides for a review of the operation of the Scheme to be initiated by the Minister as soon as possible after the eighth anniversary of the Scheme start day or, if before the eighth anniversary and the rules prescribe a day that is after the eighth anniversary, then the review should be initiated that day.

Subclause 192(4) provides matters that the eighth anniversary review must consider, which include:

- (a) the matters referred to in subsection 192(2);
- (b) the results of any other review or evaluation conducted in relation to the operator of the Scheme.

Clause 193 provides the sunset provisions for the Scheme

Subclause 193(1) provides that the Scheme will cease to have effect at the end of the day that is the tenth anniversary of the Scheme start date or, if before the tenth anniversary, the rules prescribe a date that is after the tenth anniversary then the Scheme will cease to operate at the end of the date specified (the Scheme sunset day).

The note clarifies that the fact that the Bill ceases to have effect does not affect the operation of clause 43 in releasing and discharging an institution or official from civil liability (see section 7 of the *Acts Interpretation Act 1901*).

The capacity to extend the sunset day of the legislation is to ensure that all elements of redress (redress payment, counselling or psychological services and a direct personal response) under the Scheme have been delivered. It will also ensure that all funding contributions, redress components, Scheme administration elements and late payment penalty amounts have been paid by each participating institution.

Subclause 193(2) provides that despite subclause 193(1), prior to the first anniversary of the Scheme sunset day rules may be made for the Scheme (under clause 179) for the purposes of subclauses 193(3) and 193(4).

Subclauses 193(3) and 193(4) permit the rules to prescribe matters of a transitional nature (including prescribing any saving or application provisions) in relation to when the Bill will cease to have effect under subclause 193(1), and may (without limiting subclause 193(3)) provide that certain provisions of the Bill continue to apply after the sunset day for the purposes set out in the rules. The rules may also specify that certain provisions continue to apply after the sunset day in a modified way for the purposes set out in the rules.

Subclause 193(5) provides that subsection 12(2) (retrospective application of legislative instruments) of the *Legislation Act 2003* does not apply in relation to rules made for the purposes of this clause.

Subclause 193(6) provides that all legislative instruments made under this Bill (including the rules) are repealed immediately before the first anniversary of the Scheme sunset day.

National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

Background

The *National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018* makes consequential amendments to Commonwealth legislation for the purposes of the Scheme established under the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018*.

This Bill makes the following consequential amendments:

- 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. Any payment of redress is also not taxable because the payment is not included in the person's assessable income.
- Payments under the Scheme will not be capable of being divided among creditors for the purpose of recovering money under bankruptcy proceedings, regardless of whether the person receiving the payment was bankrupt before or after the payment was made.
- Decisions under the Scheme will not be subject to judicial review under the Administrative Decisions Judicial Review Act as the Scheme is not intended to be legalistic in nature and is intended as an alternative to civil litigation with a low evidentiary burden. Providing survivors with judicial review mechanisms would be overly legalistic, time consuming, expensive and would risk further harm to survivors.
- Protected information under the Scheme will not be required to be disclosed under the Freedom of Information Act. The amendment will also ensure that the assessment framework policy guidelines are not required to be published as part of the information publication scheme under Part II of the Freedom of Information Act.
- Amendments to the *Social Security (Administration) Act 1999* will be made so that a person may obtain, record, disclose and otherwise use protected information in relation to social security recipients, if it is done so for the purposes of the Scheme.
- Only adults will be permitted to apply to the Scheme. An amendment to the *Age Discrimination Act 2004* will allow for the exclusion of children applying to the Scheme if they will not turn 18 throughout the life of the Scheme to be exempted from unlawful age discrimination. Applying an age limit to the Scheme addresses the risk of children signing away their future civil rights when they may have limited capacity to understand the implications, and

when the impact of the abuse may not fully be realised. An age limit will also address the risk of the misuse of monetary payments made to minors.

Clause 1 provides that the short title of the Act is the *National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Act 2018*.

Clause 2 provides that the whole Act will commence at the same time as the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* commences, that is:

- (a) if the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* receives Royal Assent before 1 July 2018 — 1 July 2018; or
- (b) if the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* receives Royal Assent on or after 1 July 2018 — on a single day that is to be specified in a Proclamation instrument.

However if paragraph (a) or (b) do not occur the whole of the Act will commence the first day after a six month period that commences on the day the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* receives Royal Assent.

Clause 3 provides that legislation that is specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1 — National redress Scheme payments exempt from income tests

Social Security Act 1991

Item 1 inserts a new paragraph (jc) into subsection 8(8) of the Social Security Act. This means that payments made to a person under the Scheme will not be included in the definition of income for the purposes of the Social Security Act and other legislation that relies on the definition of income in the Social Security Act.

Veterans' Entitlements Act 1986

Item 2 insert a new paragraph (mb) into subsection 5H(8) of the Veterans' Entitlements Act. This means that payments made to a person under the Scheme will not be included in the definition of income for the purposes of that Act.

Schedule 2 — National redress Scheme payments non-divisible property in bankruptcy

Bankruptcy Act 1966

Item 1 inserts a new paragraph (ga) into subsection 116(2) of the Bankruptcy Act. This paragraph provides that a payment under the Scheme is not able to be divided among creditors for the purpose of recovering money under bankruptcy proceedings, regardless of whether the person receiving the payment was bankrupt before or after the payment was made.

The provision further provides that a payment under the Scheme is exempt from being able to be divided among creditors regardless of whether the payment was made to the person who suffered the sexual abuse to which the payment relates.

There may be instances where a payment due under the Scheme will be made to a person other than the person who suffered the sexual abuse to which the payment relates. This may occur where the eligible person dies prior to a decision being made on the application or dies before accepting or declining the offer (clauses 58 and 59 respectively of the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018*).

Schedule 3 — National redress Scheme decisions exempt from judicial review

Administrative Decisions (Judicial Review) Act 1977

Item 1 inserts a new paragraph (zg) into Schedule 1 to the Administrative Decisions Judicial Review Act. This amendment means that decisions under the Scheme will not be subject to judicial review under the Administrative Decisions Judicial Review Act.

Exempting a decision made under the Scheme from the Administrative Decisions Judicial Review Act promotes the objects of the Scheme by ensuring a timely response to eligible survivors of institutional child sexual abuse. The Scheme has been developed with a trauma-informed approach so that judicial review processes will not be required. Judicial review may cause undue administrative delays under the Scheme.

The threshold of ‘reasonable likelihood’ means that it is more likely that a person who has experienced institutional child sexual abuse will have access to redress under the Scheme. Accordingly, the protections provided by the Administrative Decisions Judicial Review Act are unlikely to be required.

Further, where an applicant is dissatisfied with a decision in relation to their eligibility under the Scheme or the redress that is available to them, the applicant is able to apply for an internal review of the decision (clause 73 of the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018*). Clause 75 provides that the internal review of a decision is to be undertaken by the Operator or independent decision-maker delegated with that power. To ensure full independence, neither the Operator nor independent decision-maker is permitted to have been involved in the making of the decision under review.

This alternate review mechanism ensures that an independent and unbiased review of a decision is available at no cost to the applicant. The internal review process is intended to prevent re-traumatising the applicant through having to re-tell their story of past institutional child sexual abuse in an action under the Administrative Decisions Judicial Review Act. Re-traumatisation of an applicant is counter to the objects of the Scheme which seeks to recognise and alleviate the impact of past institutional child sexual abuse.

Schedule 4 — Disclosure and protection of information under the national redress scheme

Freedom of Information Act 1982

Item 1 inserts a new item into Schedule 3 of the Freedom of Information Act, which sets out a list of secrecy provisions from various enactments. This amendment means that ‘protected information’, as provided for in subclauses 96(6), 99(1), 100(1), 101(1), 101(2) and clause 104, would not be required to be disclosed under the Freedom of Information Act.

This exemption supports the trauma informed approach of the Scheme, ensuring that survivors’ information is adequately protected. It also protects institutions’ information against fraudulent applications made to the Scheme. The exemption protects the integrity of the operation of the Scheme, removes any uncertainty about the operation of the information publication scheme regarding the assessment policy guidelines, and makes it transparent that protected information under the Scheme is exempt under the Freedom of Information Act.

Social Security (Administration) Act 1999

Item 2 inserts a new paragraph (h) into subsection 202(1) of the *Social Security (Administration) Act 1999*. This paragraph provides that a person may obtain protected information if the information is obtained for the purposes of the Scheme.

Item 3 inserts a new paragraph (de) into subsection 202(2) of the *Social Security (Administration) Act 1999*. This paragraph provides that a person may make a record of, disclosure or otherwise use such protected information if it is done so for the purposes of the Scheme.

Schedule 5 — Only adults can apply under the national redress scheme

Age Discrimination Act 2004

Item 1 inserts new table item 32B into Schedule 1 of the *Age Discrimination Act 2004*, which sets out a list of enactments and instruments to which an exemption for unlawful age discrimination apply. This amendment allows the exclusion of children applying to the Scheme if they will not turn 18 during the life of the Scheme to be exempted from unlawful age discrimination.

Applying an age limit to the Scheme addresses the risk of children signing away their future civil rights when they may have limited capacity to understand the implications, and when the impact of the abuse may not fully be realised, and reduces the risk of monetary payments to minors being misused. The Scheme’s support services will be available to child survivors who must wait until they turn 18 years to receive redress under the Scheme.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE BILL 2018

NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE (CONSEQUENTIAL AMENDMENTS) BILL 2018

These Bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bills

In 2015, The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) released its *Redress and Civil Litigation Report*, which recommended the establishment of a national redress scheme for survivors of institutional child sexual abuse. These Bills give effect to the commitment of the Government by establishing the foundations for such a scheme.

The *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018* (the National Bill) and the *National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018* (the Consequential Amendments Bill) will provide redress to eligible survivors of institutional child sexual abuse. The National Redress Scheme for Institutional Child Sexual Abuse (the Scheme) will recognise and alleviate the impact of past child sexual abuse that has occurred in an institutional context by providing three components of redress, including:

- a monetary payment of up to \$150,000 as a tangible means of recognising the wrong survivors have suffered. The amount of monetary redress will account for any prior payments that have been made by a participating institution in relation to the abuse for which they are responsible
- access to counselling and psychological services, either through a lump sum payment or state or territory based services, depending on the residence of the survivor
- a direct personal response to survivors from the responsible participating institution(s), should the survivor request one.

The Commonwealth, with the assistance of New South Wales, Victoria and the Australian Capital Territory, is showing national leadership by establishing the Scheme to take responsibility for providing redress to its survivors. Other state and territory governments and non-government institutions are invited to opt-in to the Scheme to provide redress for the survivors that they are responsible for on the basis of the principle of 'responsible entity pays'. The Scheme will be able to provide redress on behalf of:

- a **state government's institutions** where, for the purposes of paragraph 51(xxxvii) of the Constitution, the state has either referred or adopted the Commonwealth law and the Minister declares in writing that those institutions are participating; and
- a **territory government's institutions** where the Minister declares in writing that those institutions are participating; and
- a **non-government institution** where they have agreed to being a part of the Scheme and the Minister declares in writing that it has opted in.

A person is eligible for redress under the Scheme if they are 18 years of age or older, were sexually abused, and that abuse is within the scope of the Scheme. Sexual abuse is within scope of the Scheme if it occurred when the person was a child, took place before the cut-off day of 1 July 2018 (the date of the Scheme's commencement), and a Commonwealth institution or a participating institution is responsible. While redress is for both the sexual and related non-sexual abuse of a person within the scope of the Scheme, to be eligible for redress child sexual abuse must have occurred.

To access redress, a person must apply to the Scheme, and the Scheme Operator (the Secretary of the Department of Social Services, or their delegate) must consider there is a reasonable likelihood that the person is eligible for redress. The Scheme Operator will make an offer of redress to a person where they consider a person is eligible.

To receive redress, a person must accept their offer, and in doing so, release the responsible participating institution(s), and its associates and officials, from any liability for sexual abuse and related non-sexual abuse, of the person within the scope of the Scheme.

Without limiting the circumstances that might be relevant in determining whether a participating institution is responsible for the abuse of a person, it is relevant:

- whether the abuse occurred on the premises of the institution, where activities of the institution took place, or in connection with the activities of the institution
- whether the abuser was an official of the institution when the abuse occurred
- whether the institution was responsible for the day-to-day care or custody of the person when the abuse occurred
- whether the institution was the legal guardian of the person when the abuse occurred
- whether the institution was responsible for placing the person into the institution in which the abuse occurred.

An institution will be primarily responsible for the abuse of a person if the institution is solely or primarily responsible for the abuser having contact with the person. An institution will be equally responsible for the abuse of a person if the institution and

one or more other institutions are approximately equally responsible for the abuser having contact with the person.

The Commonwealth or a participating state or territory government may be determined as the funder of last resort (FOLR) where the government is equally responsible with a defunct institution (therefore paying the defunct institution's share of redress). A defunct institution is a non-government institution that no longer exists.

The Consequential Amendments Bill will exempt payments made under the Scheme from income tests for other Commonwealth payments, exclude payments made under the Scheme from the divisible property of a bankrupt and exempt Scheme decisions from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. The Consequential Amendments Bill will also allow the Scheme to access social security system information for ease of administration, and make protected information exempt from the *Freedom of Information Act 1982*. In addition, it will exempt the Bill from the *Age Discrimination Act 2004* under Schedule 1 of that Act (as a result of the policy for child applicants, as discussed below).

The design and implementation of the Scheme has been undertaken in collaboration with stakeholders including the Independent Advisory Council on redress, state and territory governments, other Commonwealth departments, and non-government institutions.

Consideration by the Parliamentary Joint Committee on Human Rights

The Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the Commonwealth Redress Bills), were introduced in the House of Representatives on 26 October 2017. Those Bills supported the establishment of a Commonwealth Redress Scheme (absent a referral of power from a state to establish a National Redress Scheme).

Those Bills were considered by the Parliamentary Joint Committee on Human Rights, who concluded their consideration of the Bills in their Report 2 of 2018, after requesting a response from the Minister on a number of matters in their Report 13 of 2017 (the Minister's response was received on 20 December 2017). The Committee's responses on a number of issues are detailed below.

Human rights implications

This Bill engages the following human rights:

- the right to state-supported recovery for child victims of abuse – article 39 of the Convention on the Rights of the Child (the CRC)
- the right to protection from sexual abuse – article 19 and article 34 of the CRC
- the freedom from discrimination in upholding the rights of the child – article 2 of the CRC
- the right to social security – article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR)

- the right to maternity leave with adequate social security benefits – article 10 of the ICESCR
- the right to health – article 12 of the ICESCR
- the right to effective remedy – article 3 of the International Covenant on Civil and Political Rights (the ICCPR)
- the freedom from unlawful attack on honour and reputation – article 17 of the ICCPR
- the right to freedom of expression – article 19 of the ICCPR
- the right to protection against arbitrary or unlawful interferences with privacy – article 17 of the ICCPR
- the right to a fair hearing – article 14 of the ICCPR.

The right to state-supported recovery for child victims of abuse

Article 39 of the CRC guarantees the right to state-supported recovery for child victims of neglect, exploitation and abuse.

The National Bill promotes this right by establishing the Scheme. The Scheme will support the recovery of survivors of institutional child sexual abuse that occurred prior to the cut-off day (the date of the Scheme's commencement) in Commonwealth institutional settings, and in other institutions that are participating in the Scheme.

The Scheme will directly assist in survivors' recovery by providing access to counselling or psychological services, either through a lump sum payment or state or territory based services, depending on where the survivor lives.

Survivors' recovery may also be aided by the recognition of harm done which is built into several other aspects of the Scheme. A monetary payment will be offered to eligible survivors recognising that the abuse should never have occurred. Survivors will also be able to choose to receive a direct personal response from the responsible institution which may include an opportunity for the survivor to tell their story to a senior representative, receive an apology from the institution and an explanation of what measures have been taken to prevent child sexual abuse from occurring in the future.

Additionally, the Commonwealth will be funding community-based Redress Support Services to assist survivors applying for the Scheme. These services will refocus the support available to survivors engaging with the Royal Commission, to assist them through the process of applying and receiving redress. They will be located in each state and Territory and there will be dedicated services for Aboriginal and Torres Strait Islander people.

Beyond the redress and supports that individual survivors will receive, the establishment of the Scheme will afford a high public profile to the issue of

institutional child sexual abuse. For survivors who have felt that they have been ignored, this recognition may be a crucial part of their recovery.

The National Bill will not promote or limit the right to state-supported recovery for survivors of child sexual abuse that occurred outside of participating institutional settings, or after the cut-off day for the Scheme. For those survivors who will not be eligible for the Scheme, existing community supports and civil litigation processes remain available.

The right to protection from sexual abuse

Articles 19 and 34 of the CRC guarantee the right of every child to protection from all forms of physical or mental violence, injury or abuse, including sexual exploitation and abuse.

The National Bill seeks to recognise and alleviate the impact of historical failures of the Commonwealth and other government and non-government organisations to uphold this right, by establishing the Scheme to provide redress to survivors as described above.

The freedom from discrimination in upholding the rights of the child

Article 2 of the CRC guarantees the right of children to freedom from discrimination in the upholding of their other rights in the Convention.

Citizenship and permanent residency status

To be eligible for redress under the Scheme, a survivor must be an Australian citizen or permanent resident at the time they apply for redress. However, it will be possible to deem additional classes of people eligible for redress to recognise particular circumstances consistent with the intent of redress.

Non-citizens and non-permanent residents will be ineligible to ensure the integrity of the Scheme. Verification of identity documents for non-citizens and non-permanent residents would be very difficult. Opening the Scheme to all people overseas could result in organised overseas groups lodging false claims in attempts to defraud the Scheme, which could overwhelm the Scheme's resources and delay the processing of legitimate applications. Past examples of fraud highlight this as a key concern; for example, flood relief payments after the 2011 Queensland floods identified a number of fraudulent applications. These restrictions on eligibility for the Scheme are necessary to achieving the legitimate aims of ensuring the Scheme receives public support and protecting against large scale fraud.

Whilst administrative considerations are generally insufficient for the permissible limitation of human rights, it is relevant in the context of this particular Scheme, as the nature of the survivor cohort is such that timeliness in processing Scheme applications is critical. Over half of the survivors anticipated to apply to the Scheme are over 50 years of age, and so significant delays to the processing of applications may result in survivors passing away before they have the opportunity to accept redress. It is also widely recognised survivors of child sexual abuse also experience poorer health and social outcomes, amplifying the need for timely decision-making

and for promoting the rights of survivors. Timeliness in the processing of applications is also critical to providing closure to survivors, and prolonging the processing of applications is likely to re-traumatise those survivors.

Furthermore, using the aforementioned rule-making power is also necessary to ensure that the Scheme can be appropriately flexible. There may be classes of survivors that the Scheme has not, or could not, envisage to include in the Bill, who could be accommodated via this rulemaking power.

The Parliamentary Joint Committee on Human Rights' report on the Commonwealth Redress Bills concluded:

"...there are concerns that the breadth of the restriction on the eligibility of all non-citizens and non-permanent residents may not be proportionate. However, setting out further classes of persons who may be eligible in the proposed redress scheme rules, including those who would otherwise be excluded due to not being citizens or permanent residents, may be capable of addressing these concerns."

Survivors with serious criminal convictions

Whilst the Bill has a special assessment process for applicants with serious criminal convictions, the CRC does not explicitly exclude different processes on the basis of criminal history.

Applicants will not be entitled to redress if they have been convicted of an offence which received a custodial sentence of five or more years. However, the Operator may determine that the person is entitled to redress if providing redress to the person would not bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme. When making this determination, the Operator must take into account any advice given by relevant Attorneys-General, the nature of the offence, the length of the sentence of imprisonment, the length of time since the person committed the offence, any rehabilitation of the person, and any other matter that the Operator considers is relevant. The view of the relevant Attorney-General where the abuse occurred is weighted more heavily than other matters.

Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system, and are sentenced to custody at a higher rate than non-Indigenous defendants. This aspect of the Bill may therefore impact on Aboriginal and Torres Strait Islander peoples, and could be perceived as indirectly discriminating on the basis of race.

However, restricting eligibility on the basis of criminal history is necessary to achieve the legitimate aim of the Scheme aligning with community expectations around who should receive redress payments from Government, with flexibility to make relevant persons entitled to redress on a case-by-case basis, where appropriate to do so. There is a risk the public would not support a Scheme that paid redress to perpetrators of serious crimes. In particular, victims of those crimes may strongly object to redress payments being made to people who have committed serious crimes against them.

Furthermore, the restriction on survivors with serious criminal convictions was developed in consultation with State and Territory Attorneys-General, who were almost unanimous that reasonable limitations on applications is necessary to uphold public faith and confidence in the Scheme, and a necessary part of the framework for the states to opt-in to the Scheme (ensuring nationwide access to redress).

This issue has also been previously addressed in the context of the Defence Abuse Response Taskforce (the DART). To ensure the DART remained in step with community expectations, the rules were changed to render persons convicted of serious crimes ineligible.

The Parliamentary Joint Committee on Human Rights' report on the Commonwealth Redress Bills concluded:

“...there are concerns in relation to the proposed exclusion of persons with certain criminal convictions from being eligible for the scheme. However, the discretion of the scheme operator to determine eligibility of survivors if they are otherwise ineligible may be capable of addressing some of these concerns.”

The Committee also noted the Minister's intention to include any limitation on eligibility for persons with criminal convictions in the primary legislation of the National Bill (rather than in subordinate legislation), which is now the case.

Incarcerated survivors

Whilst the Bill sets out different operational processes for incarcerated survivors, the CRC does not explicitly exclude different processes on the basis of incarceration.

The Bill specifies that a person cannot make an application for redress if the person is in gaol (within the meaning of subsection 23(5) of the *Social Security Act 1991*). This includes persons who are being lawfully detained (in prison or elsewhere) while under sentence for conviction of an offence and not on release on parole or licence, or persons who are undergoing a period of custody pending trial or sentencing for an offence. The person will therefore be able to make an application for redress if they are not in gaol at some point during the 10 years of the Scheme. This restriction can be overridden if the Operator determines that there are circumstances justifying their application being made, for example because they will be in gaol during the last two years of the Scheme, or they are terminally ill.

This restriction is necessary as the Scheme will be unable to deliver appropriate Redress Support Services to incarcerated survivors, which may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. As the Scheme will run for 10 years, survivors who are incarcerated for a short period of time will be able to apply when they are no longer incarcerated. In a closed institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality.

Additionally, survivors who are incarcerated for longer periods of time (i.e. five or more years) may not be entitled to redress as a result of their custodial sentence (detailed above) in the first instance.

Child applicants

Whilst the Bill sets out different operational processes for child applicants, the CRC does not explicitly exclude different processes on the basis of age.

The Bill specifies that a person cannot make an application for redress under the Scheme if the person is a child who will not turn 18 years of age before the Scheme sunset day. This will mean that children aged under eight when the Scheme commences will not be able to receive redress, but will still have the right to pursue civil litigation if they choose.

The Bill also sets out that if a child who will turn 18 years of age before the Scheme sunset day makes an application for redress, the Operator must deal with the application in accordance with any requirements prescribed by the Rules. The Rules will set out that the Operator must not make a determination to approve or not approve the application until the person is 18 years, and once they turn 18, the Operator will make a determination (taking into account any new information provided by the survivor), allowing the survivor to accept or decline an offer. If the offer is accepted, the survivor will be provided with redress.

Notably, of the more than 8,000 survivors who attended private sessions with the Royal Commission, only around 50 survivors were aged 0 to under 8 years (the majority were aged over 50 years). Additionally, in their Redress and Civil Litigation Report, the Royal Commission noted that while it was possible that some individuals will wish to seek redress while they are still a minor, it is not expected that many minors will apply as it will almost always be within the time limitations to commence proceedings through civil litigation. This is because an individual would be more likely to receive larger payment either through settlement or civil litigation than they might through the Scheme. It is therefore assumed that only a small number of survivors will be unable to make an application for redress due to this age limitation.

The restriction on some children applying for redress, and the special process for how children's applications are treated, is necessary to protect those children's interests. As a requirement of the Scheme is to release responsible participating institutions from any liability for sexual abuse and related non-sexual abuse within the scope of the Scheme (restricting their right to later pursue civil litigation), it is necessary to ensure that the effect of the release is fully understood. Survivors who are children are unlikely to be able to fully comprehend the implications of such a decision, especially when the impact of their abuse may not have been fully realised yet.

Furthermore, a component of the application process is for survivors to articulate the impact that the relevant abuse has had on them. As the impact of child abuse in a person's early years may not be realised until later in the person's life, an application submitted as a child may not contain the relevant detail. Similarly, a child survivor's ability to articulate their experience would likely increase with age. While children who will turn 18 years of age before the Scheme sunset day are able to make an

application for redress as a child, it is important that they are able to provide the Operator with updated information once they are an adult, which the special process will allow.

Whilst other avenues to include children, such as requiring them to have a nominee arrangement were considered, numerous stakeholders raised concerns about nominees not making decisions in the best interests of the survivor, or not using redress payments for the benefit of the survivor. Additionally, even if the Scheme were to require that payments go into a trust account, the necessary interaction with the minor's parent or guardian would present complexities. Some minors who have been sexually abused in an institutional setting may have fractured relationships with their parents or guardians, and may remain in out of home care. Due to these relationships, the minor may not trust that their parent or guardian will make choices in their best interest.

The special process described strikes the right balance between safeguarding the interests of children whilst allowing them to have some indication of their likely redress entitlement. This will allow these children to pursue a range of different options. Some survivors may wait until they turn 18 in order to access redress, whilst others (supported by their parent/ or guardian/s) may choose to pursue civil litigation.

There is precedent to excluding children from redress schemes for the reasons outlined above. Several state-based redress schemes have excluded children from applying, including the Western Australian Scheme and South Australia's ex-gratia scheme. In addition, under Tasmania's and Queensland's schemes, only people who were aged 18 and over at scheme commencement were able to apply.

Child survivors and their families, including both those who are unable to access redress under the Scheme and those who have to wait until they are 18 to receive a redress determination, will be able to access the Scheme's community support services, as well as legal support services to receive advice about available options outside of the Scheme.

This policy has been developed in discussions between state and territory redress ministers, and will be reviewed during the Scheme's review points. The policy will also be carefully communicated to the survivor cohort.

On the basis of above, the Consequential Amendments Bill will exempt the Bill from the *Age Discrimination Act 2004* under Schedule 1 of that Act.

Survivors with a security notice in force

Whilst the Bill prohibits applications from people who have a security notice in force, it is unlikely that the CRC was intended to cover discrimination on this basis. In any case, this limitation is reasonable. The Bill specifies that persons are not entitled to redress while a security notice is in force in relation to the person. A person's security notice must be reviewed annually, and can be revoked. Once revoked, the person can apply for redress under the Scheme. This limitation is necessary to ensure that redress funds are not given to persons who may prejudice Australia's national security interests, or may use those funds for purposes against Australia's

national security interests. This restriction is consistent with broader Commonwealth policy.

Counselling and psychological services

Whilst Bill sets out different methods of delivering counselling and psychological depending on the residence of a survivor, the CRC does not explicitly exclude different delivery models on the basis of a person's residence.

The Bill specifies that depending on their current residence (not the jurisdiction in which they were abused), survivors will receive either a lump sum payment (to access counselling and psychological services privately), or will be given access to state or territory based services. States and territories, upon opting-in to the Scheme, will elect for survivors residing in their jurisdiction to either receive the lump sum payment (the amount of which will be linked to the severity of abuse experienced by the survivor), or whether they will deliver counselling and psychological services to those survivors. Survivors residing outside Australia will receive the lump sum payment. Responsible participating institutions will be liable for the same amount to support the delivery of counselling and psychological survivors; this will either be paid directly to the survivor or to the applicable jurisdiction delivering services to survivors.

This model of delivering counselling and psychological services recognises that not all states and territories are capable of delivering the same services to survivors, due to a number of constraints including geography (i.e. rural, regional and remote areas) and their existing services. This model allows jurisdictions that are capable of delivering services directly to survivors, and can meet National Service Standards, to do so. Where this is not possible, or where a survivor resides outside of Australia, they will be given a lump sum payment whereby they can access counselling and psychological services privately. In either form of delivery, survivors will still be accessing the benefit of counselling and psychological services, and those services will be comparable.

The right to effective remedy

Article 3 of the ICCPR guarantees the right to effective remedy for those whose rights outlined in the ICCPR are violated. Article 24 of the ICCPR guarantees the right of every child to protection by society.

The Bill limits the right to remedy for survivors who accept redress under the Scheme by requiring them to release all institutions providing them with redress, as well as 'associates' of the institution(s), from any liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. This would have the effect of barring the survivor from civil litigation against the responsible participating institution(s) and their associates and officials for all sexual and non-sexual abuse within the scope of the Scheme.

Due to its non-legalistic nature, redress through the Scheme will be a more accessible remedy for eligible survivors than civil litigation. Entitlement to redress is determined based on a standard of 'reasonable likelihood', which is lower than the standard for determining the outcome of civil litigation, which is the balance of

probabilities. The availability of redress is dependent on the extent to which institutions opt-in to the Scheme. Consultation has shown that institutions are not likely to opt-in to the Scheme if they remained exposed to paying compensation through civil litigation in addition to paying monetary redress. Attaching the release to entitlement to all elements of redress is necessary to encourage institutions to opt-in and to make redress available to the maximum number of survivors.

Furthermore, organisations comprising multiple institutions are likely to opt-in to the Scheme as one, forming a ‘participating group’ (institutions are then known as ‘associates’ of one another). In order to form a participating group, institutions must be sufficiently connected and appoint a representative for the group. That representative will then be jointly and severally liable with each associate for funding contributions. Attaching the release to all associates of responsible participating institution(s) for sexual abuse and related non-sexual abuse within the scope of the Scheme is therefore reflective of their joint financial liability, and is a necessary component of ensuring that institutions will opt-in to the Scheme together, therefore ensuring maximum coverage for survivors.

To acknowledge the extent that this Bill may limit this right, the Scheme will deliver free, trauma informed, culturally appropriate and expert Legal Support Services. These services will be available to survivors for the lifetime of the Scheme at four key stages of the application process: prior to application so survivors understand eligibility requirements and the application process, during the completion of a survivor’s application, after a survivor has received an offer of redress and elects to seek an internal review, and on the effect of accepting an offer, including its impact on the prospect of future litigation. This means that survivors will be able to make an informed choice as to whether they wish to accept their offer and in doing so release the institution(s) and their associates and officials (excluding the perpetrator) from civil liability for abuse within the scope of the Scheme, or seek remedy through other avenues. Survivors will be strongly encouraged to utilise this legal advice. Broader Scheme communications (including the Scheme website) will also ensure that survivors are well informed.

The Parliamentary Joint Committee on Human Rights’ report on the Commonwealth Redress Bills concluded:

“The bar on future civil liability of participating institutions may engage and limit the right to an effective remedy. However, the proposed rules governing the provision of legal services under the redress scheme may operate as a sufficient safeguard so as to support the human rights compatibility of the measure.”

The freedom from unlawful attack on honour and reputation

Article 17 of the ICCPR guarantees the right of everyone to freedom from unlawful attacks on their honour and reputation.

Key survivor details, including details of alleged perpetrators will be provided, with the survivor’s consent, to institutions identified in their application. Participating institutions will be required to provide specific relevant information to the Scheme. All information under the Scheme will be subject to confidentiality. However, there is a risk that unlawful disclosure of information about an abuser by a participating

institution irrevocably damages the reputation of an abuser in circumstances where proof to a criminal or even a civil standard is not required.

Supplying details of abusers is necessary to allow participating institutions to provide the relevant information and records that verify 'reasonable likelihood', which underpins eligibility assessments made for the Scheme. The risk of unlawful disclosure by participating institutions is necessarily a part of making redress available for survivors through the Scheme. In order to mitigate this risk there are strict limits and offence provisions relating to access, use and disclosure of Scheme information. Any unlawful attack on honour or reputation will be the result of individuals breaching the provisions of the Bill, rather than resulting from the Bill itself.

The right to protection against arbitrary or unlawful interferences with privacy

Article 17 of the ICCPR guarantees the right of everyone to protection from arbitrary or unlawful interference with privacy. Collection, use and disclosure of personal information under the Scheme will engage Article 17 of the ICCPR.

To establish eligibility, survivors will be required to supply the Scheme with personal information including highly sensitive information about the child sexual abuse that they experienced. To progress the application to assessment, limited survivor and alleged perpetrator details will be provided, with the survivor's consent, to the participating institution(s) identified in their application. Participating institution(s) will be able to use this information in a limited way to facilitate making insurance claims and to institute internal disciplinary procedures where an alleged perpetrator or person with knowledge of abuse is still associated with the institution. Participating institutions will be required to provide the Scheme with specific information pertaining to survivors and alleged perpetrators, including the survivor's and alleged perpetrator's involvement with the institution, any related complaints of abuse made to the institution and details of any prior payments made to the survivor.

This collection and exchange of information is necessary for the eligibility assessment process and information under the Scheme will be subject to confidentiality. Outside of Scheme representatives, only survivors and those they nominate will have access to records relating to their application. Strict offence provisions will be put in place to mitigate risks of unlawful access, disclosure, recording, use, soliciting or offering to supply Scheme information.

The Bill also includes provisions for the Operator to disclose allegations of child sexual abuse to child protection authorities and police in certain circumstances, and allows institutions to comply with their existing mandatory reporting obligations under state and territory laws (imposing offences for the misuse of protected information). This will be communicated to survivors prior to them submitting their application. The Scheme, in very limited circumstances, will also be required to refer some matters to police without the survivor's consent in cases of serious risk to life. Additionally, some non-identifying information collected by the Scheme will be used to report on performance of the Scheme.

The information sharing provisions of the Bill are necessary to achieve the legitimate aims of assessing eligibility under the Scheme and protecting children from abuse,

and are appropriately limited to ensure they are a proportionate means to achieve those aims.

The Parliamentary Joint Committee on Human Rights' report on the Commonwealth Redress Bills concluded:

“The committee notes that disclosure in such circumstances may be sufficiently circumscribed such that the measure would be a proportionate limitation on the right to privacy. The committee recommends that the Scheme Operator's disclosure power be monitored by government to ensure that any limitation on the right to privacy be no more extensive than what is strictly necessary.”

The Government intends to monitor the Operator's disclosure power, including through broader reviews of the Scheme's implementation. General information relevant to disclosure may also be detailed in the Scheme's annual report to the Minister (for presentation to the Parliament) and also has the capacity to be scrutinised through the Scheme's governance arrangements.

The Committee also noted that the (former) Minister has indicated he will consider including a positive requirement that the Operator must have regard to the impact the disclosure may have on a person to whom the information relates in any future legislation developed for a National Redress Scheme. This has now been reflected in the Bill.

The right to freedom of expression

Article 19 of the ICCPR requires that everyone shall have the right to freedom of expression, which includes the freedom to seek, receive and impart information. Article 19(3) provides that this right may be subject to restrictions provided by law, where it is necessary for respect of the rights of others. The Bill sets out a number of restrictions on the use and disclosure of protection information in the Scheme.

The Scheme will utilise a number of different types of information which will be protected. This includes information provided by applicants and institutions, and other materials such as the assessment framework policy guidelines. There are a number of limited authorisations for the disclosure of this information (as described in relation to privacy), with strict offences for unauthorised access, recording, disclosure, soliciting, offering and use of protected information (depending on the circumstances).

These restrictions are reasonably necessary for respect of the rights of others. These restrictions predominantly serve to protect the privacy of persons engaging with the Scheme, including survivors (noting that the right to protection against arbitrary or unlawful interferences with privacy, as detailed above, would necessarily be infringed without reasonable limitations around disclosure). This is particularly important as survivors of institutional child sexual abuse are a vulnerable cohort, and the release of their private information is likely to be extremely distressing and re-traumatising.

Restrictions on the use and disclosure of protection information is also necessary for the broader operation of the Scheme. For example, participating institutions expect that the information they supply will be kept secure, and to not have appropriate safeguards would jeopardise their participation in the Scheme.

The right to social security and the right to maternity leave with adequate social security benefits

Article 9 of the ICESCR guarantees the right of everyone to social security. Article 10 of the ICESCR guarantees the right of mothers to maternity leave with adequate social security benefits. The Consequential Amendments Bill will uphold these rights by making monetary payments made under the Scheme exempt from income tests for other government payments.

The right to health

Article 12 of the ICESCR guarantees the right of everyone to the highest attainable standard of physical and mental health. The Bill promotes survivors' right to health by providing access to counselling and psychological services to survivors who seek it as one of the three elements of redress, maximising survivors' access to health services. Counselling and psychological services will be delivered either through a lump sum payment or state or territory based services, depending on where the survivor lives at the time of their application.

The right to a fair hearing

Article 14 of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A determination of a person's entitlement to redress as a result of sexual abuse, and a finding of responsibility on the part of institutions for such abuse, involves the determination of rights and obligations and therefore is likely to constitute a suit at law. There could be a perception that the Bill limits this entitlement by excluding external merits review and review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* from the Scheme.

The decision to limit external merits review rights from the Scheme, including review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, was made following consultation with institutions, survivors and the Independent Advisory Council on Redress following the Royal Commission's recommendation. This is consistent with the non-legalistic nature of redress schemes. The Scheme provides survivors with access to an internal review process, but no rights to external merits review, as this would be overly legalistic, time consuming, expensive (adding considerable costs to administration) and would risk further harm to survivors. Furthermore, if these avenues were available, many survivors may have unrealistic expectations of what could be achieved given the low evidentiary barrier to entry to the Scheme. Survivors also retain the right to pursue civil litigation until they accept an offer of redress.

The Scheme will appoint appropriately qualified, independent assessors, known as Independent Decision Makers, who will make all decisions on applications made to

the Scheme. Independent Decision Makers will not report or be answerable to Government. These Independent Decision Makers will be able to provide survivors with access to independent and impartial internal review without subjecting them to potential re-traumatisation.

Furthermore, members of the Administrative Appeals Tribunal are appointed based on their judicial experience, not recruited for the skillset and understanding of the survivor cohort that will be required of Independent Decision Makers. The Administrative Appeals Tribunal must make a legally correct or preferable decision, while Independent Decision Makers will make decisions on applications with highly variable levels of detail and without strict legislative guidance on what weight should be applied to the information they do receive. Without an understanding of past decisions under the Scheme, the Tribunal may reach decisions that are inconsistent with past decisions made by Independent Decision Makers. Utilising the Administrative Appeals Tribunal for merits review under the Scheme risks inappropriately imposing a legalistic lens on a non-legalistic decision making process.

The Parliamentary Joint Committee on Human Rights' report on the Commonwealth Redress Bills concluded:

“Having regard to this information and the particular context in which the review scheme operates, the internal review mechanism may be capable of ensuring that survivors have adequate opportunities to have their rights and obligations determined in a manner that is compatible with the right to a fair hearing. However, the committee recommends that the operation of the internal review mechanism be monitored to ensure that survivors have sufficient opportunities to have their rights and obligations determined by an independent and impartial tribunal.”

The Government intends to monitor the Scheme's internal review mechanism, including through broader reviews of the Scheme's implementation. General information relevant to internal review may also be detailed in the Scheme's annual report to the Minister (for presentation to the Parliament) and also has the capacity to be scrutinised through the Scheme's governance arrangements.

Conclusion

The Bill and Consequential Amendments Bill are compatible with human rights because they promotes the protection of human rights and to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to ensuring the Scheme's integrity and proper functioning.

**[Circulated by the authority of the Minister for Social Services,
the Hon Dan Tehan MP]**