

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018

Summary

The *National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018* (the instrument) is made by the Minister for Social Services under section 55 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act). Section 55 of the Act provides the Minister may declare, in writing, guidelines about how direct personal responses (DPRs) are to be provided under the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme) established by the Act. Subsection 55(2) of the Act provides that declaration is the direct personal response framework (the Framework).

The purpose of the Framework established by the instrument is to set out the arrangements under which a participating institution (Commonwealth, State, Territory and non-government institutions) must engage in a DPR to a survivor under the Scheme. A survivor will have the option to request a DPR from the participating institution upon signing an Acceptance of Offer for redress under the Act. Should a survivor request a DPR, the participating institution must take reasonable steps to engage in a DPR with the survivor. In addition:

- where a survivor is found to have suffered abuse in more than one institutional setting, they will be able to request a DPR from each participating institution; and
- a survivor may delay or withdraw from the DPR at any time.

The Framework outlines the obligations of participating institutions in engaging in DPR, including that they seek to avoid further harming the survivor when participating in DPR. The Framework establishes rules relating to when a DPR is not required as well as review and reporting obligations of participating institutions.

Background

Subsection 54(2) of the Act provides that a DPR from a participating institution to a survivor is any one or more of the following:

- an apology or a statement of acknowledgement or regret; and/or
- an acknowledgement of the impact of the abuse on the survivor; and/or
- an assurance as to the steps the institution has taken, or will take, to prevent abuse occurring again; and/or
- the opportunity to meet with a senior official of the institution.

The purpose of the Framework established by the instrument is to set out the arrangements under which a participating institution must engage in a DPR with a

survivor under the Scheme. Under the Framework, a DPR can be given through different mechanisms that may include one or more of the following:

- a face-to-face meeting, in which a survivor meets with a senior official of the participating institution, and is able to recount their experience;
- written engagement with the survivor, where this is preferred by the survivor;
- multiple survivors of the same institution meeting with a senior official of the participating institution, in a group setting subject to the survivor's wishes;
- any other mode of DPR a participating institution might offer, subject to the survivor agreeing to receive a DPR in this manner.

Through these mechanisms, a survivor is able to have their experience heard and acknowledged by a representative of the institution and receive an apology for the harm to assist them to achieve a sense of justice. A participating institution can develop an understanding of what happened to the survivor and the harm that was caused, and enable the participating institution to learn what else might be done to prevent such abuse and harm in the future.

Under the Framework in conjunction with the Act, participating institutions are responsible for:

- engaging in a DPR with survivors that request it, except where to do so would cause further harm;
- providing transparency to survivors and the Scheme about what the institution offers by way of DPR, what the process involves and ensuring it is able to engage in the kind of DPR it offers;
- protecting the privacy and confidentiality of survivors;
- ensuring a survivor's needs and interests are at the forefront, this includes the survivor's:
 - o suitability or readiness to participate in a DPR;
 - o motivation for participation, and expectations;
 - o individual needs, including support needs; and
 - o opportunity to choose how they will participate in the process offered;
- ensuring institutional representatives who provide a DPR on behalf of the institution are appropriately:
 - o trained in culturally-sensitive trauma-informed care and understand the nature and impact of child sexual abuse;
 - o selected for participation, taking into account factors such as seniority, role in the institution, ability to demonstrate empathy, engagement skills, relevant skills and experience in delivering an effective DPR;
 - o authorised to participate on behalf of the participating institution, and to acknowledge and take responsibility for the abuse on behalf of the institution;
- giving survivors a choice of institutional representatives to engage in a DPR on behalf of the institution, such as male and female representation and diverse cultural backgrounds where possible;
- reporting to the Scheme (as outlined below); and
- receiving and managing any complaints from survivors about the DPR offered or engaged in by the participating institution.

If a participating government institution is providing redress as funder of last resort for a non-participating defunct non-government institution, the participating institution

is under no obligation to engage in a DPR on behalf of the defunct non-government institution. If a participating institution is acting as funder of last resort for a now defunct institution and has been identified as equally responsible, it will be required to offer DPR on behalf of itself only.

Where an identified institution is now defunct, it will not be required or able to engage in a DPR. However, if a representative exists for a defunct institution, the defunct institution will be considered a participating institution and as such, if that institution is identified as the responsible institution, the representative will be required to take all responsibility for redress, including providing a survivor the option to access a DPR.

Each participating institution is responsible for complying with the Framework and will provide reporting to the Scheme Operator annually on the number of survivors accessing DPR from that institution under the Scheme, including the number and type of DPRs requested and finalised and the time between a DPR request and its completion. Institutions must offer survivors the opportunity to provide feedback on their experience with DPR and consider and be responsive to survivor feedback.

The Scheme Operator is responsible for the administration of the Scheme. Under the Framework, this includes providing the survivor with a written notice including contact details for the relevant participating institution to commence arrangements for a DPR, if the survivor has requested a DPR.

A direct personal response (DPR) is one of the three elements of redress available under the Scheme for people who have experienced institutional child sexual abuse, as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). A DPR is a formal opportunity to acknowledge the abuse the survivor suffered while under the “care” of an institution, and for a survivor to have their story of abuse and its impacts heard by the institution in a safe and supportive space.

The Royal Commission’s Redress and Civil Litigation report outlines the importance of DPR for survivors. Many survivors told the Royal Commission how important it is for their sense of achieving justice that the institution makes a genuine apology to them, acknowledges the abuse and its impacts and gives a clear account of how the institution is preventing abuse occurring again.

An important secondary objective of the DPR process is to enable institutions to develop insight into the implications of sexual abuse for survivors and the institution, to inform how the institution may prevent future abuse and respond appropriately to any abuse occurring in the future.

The DPR Framework provides the parameters for a participating institution when engaging in DPR under the Scheme. This provides clarity for participating institutions and survivors to ensure all understand the scope of the process and the obligations of participants. The principles underpinning DPR are outlined in the Act and noted in the Framework to guide engagement in DPR within a restorative justice approach.

Consultation

The Department of Social Services consulted Commonwealth agencies, state and territory governments and non-government institutions to develop this Framework, circulating drafting instructions for comment to inform further refinement.

Regulatory Impact Analysis

This Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Explanation of the provisions

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018*.

Section 2 – Commencement

This section provides a table setting out the commencement of the instrument, being the later of the commencement of the Act and the start of the day after this instrument is registered. As the Act commences on 1 July 2018, the instrument will accordingly commence the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under section 55 of the Act.

Section 4 – Definitions

Section 4 defines the term **Act** as above. The **note** to section 4 informs the reader that words and phrases used by the Framework are defined in the Act and therefore have the same meaning given by the Act.

Part 2 – Direct personal responses

Section 5 – Requesting a direct personal response

Section 5 sets out requirements in instances where a person requests a DPR. In particular, if an acceptance document specifies a participating institution as a responsible institution that a person (the **survivor**) wishes to receive a DPR from, the Operator must give the survivor a written notice:

- setting out the contact details for the responsible institution (paragraph 5(a)); and
- explaining that the survivor must contact the institution to commence the DPR process (paragraph 5(b)).

The **note** to section 5 brings the reader's attention to the fact that paragraph 42(2)(g) of the Act provides that a person accepting an offer of redress who wishes to receive a DPR must specify, in the person's acceptance document, the participating institutions that the person wishes to receive a DPR from.

Section 6 – Arranging a direct personal response

Section 6 sets out rules for arranging a DPR once one has been requested as provided in section 5.

Subsection 6(1) provides that if the survivor requests a DPR, the responsible institution must give the DPR as soon as practicable, taking into account the survivor's suitability and readiness for engagement in the DPR.

Subsection 6(2) states that the DPR must be:

- of a kind, or kinds, agreed with the survivor (paragraph 6(2)(a)); and
- engaged in by the method, or methods, agreed with the survivor (paragraph 6(2)(b)).

The **note** to subsection 6(2) brings the reader's attention to the fact that subsection 54(2) of the Act provides that a DPR from a participating institution, to a person, is any one or more of the following;

- (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.

Section 7 – Methods of engaging in direct personal response

Section 7 sets out the methods by which a DPR must be given.

Section 7 provides that the DPR must be given by one or more of the following methods:

- a face-to-face meeting, in which the survivor meets with a senior official of the responsible institution (paragraph 7(a));
- written engagement with the survivor (paragraph 7(b));
- any other method agreed with the survivor (paragraph 7(c)).

The **note** to section 7 clarifies that the responsible institution must let the survivor know which methods the institution is able to use to engage in direct personal responses and directs the reader to subparagraph 11(1)(a)(ii) of the Framework.

Section 8 – Face-to-face meetings

Section 8 sets out the requirements for responsible institutions that engage in a face-to-face meeting as part of the DPR and the associated requirement for including additional survivors in a face-to-face meeting.

Subsection 8(1) provides that if the survivor requests the DPR to be given through a face-to-face meeting, the responsible institution must use its best efforts to give the DPR:

- at a time and place agreed with the survivor (paragraph 8(1)(a)); and
- if unforeseen circumstances prevent the DPR being given at that time and place - as soon as practicable afterwards as agreed with the survivor (paragraph 8(1)(b)).

Subsection 8(2) states that a face-to-face meeting may, include other survivors for whose abuse the Operator has determined the institution to be responsible, if:

- each survivor wishes the other survivors to be included (paragraph 8(2)(a)); and
- the institution agrees to the other survivors being included (paragraph 8(2)(b)).

Section 9 – Confirming arrangements

Section 9 provides that the responsible institution must, as soon as practicable after agreeing on arrangements for the DPR, confirm those arrangements in writing given to the survivor.

Section 10 – Direct personal response given by representative

Section 10 deals with a DPR given by a representative of a responsible institution.

Subsection 10(1) provides that if the survivor agrees to a representative of the responsible institution giving the DPR in a face-to-face meeting on behalf of the institution, the institution must allow, where possible, the survivor to choose from representatives of different genders and cultural backgrounds, and who are differentiated by other relevant characteristics.

Subsection 10(2) provides that when considering a person as a possible representative, the institution must take into account each of the following:

- the person's position and seniority in the institution (paragraph 10(2)(a));
- whether the person has demonstrated empathy and engagement (paragraph 10(2)(b));
- whether the person has other traits and skills relevant to giving the DPR (paragraph 10(2)(c)).

The **note** to subsection 10(2) serves as a reminder to the reader that section 56 of the Act sets out general principles guiding the provision of DPRs, including the requirement that DPRs be delivered by people who have received training about the nature and impact of child sexual abuse and the needs of survivors, including cultural awareness and sensitivity training where relevant.

Section 11 – Obligations of responsible institution

Section 11 sets out a range of obligations that apply to responsible institutions when preparing and giving a DPR, including confidentiality.

Subsection 11(1) provides that in preparing for and giving the DPR, the responsible institution is obliged to:

- provide clear and consistent information to the survivor about each of the institution's process for arranging DPRs (subparagraph 11(1)(a)(i)) and the methods the institution is able to use to engage in DPRs (subparagraph 11(1)(a)(ii));
- ensure the institution is able to engage successfully in each DPR given by the institution (paragraph 11(1)(b));
- ensure the survivor's needs, expectations and preferences dictate the way the DPR is given (paragraph 11(1)(c));
- to pay the costs associated with engaging in the DPR (paragraph 11(1)(d));
- seek to avoid, further harming the survivor (paragraph 11(1)(e));
- protect the confidentiality of all information relating to the DPR to the extent that disclosure is not required by a law of the Commonwealth, a State or Territory (paragraph 11(1)(f)). This obligation is subject to subsection 11(2), about the confidentiality of the DPR (see below);
- demonstrate that the survivor's testimony has been listened to or heeded (paragraph 11(1)(g));
- not question the survivor's testimony (paragraph 11(1)(h)).

Subsection 11(2) provides that every aspect of the DPR is confidential unless:

- all participants agree otherwise (paragraph 11(2)(a)); or
- an actual or potential threat to human life, health or safety is revealed in the course of giving the DPR (paragraph 11(2)(b)).

Subsection 11(3) provides that if either of the exceptions to confidentiality in paragraph 9(2)(a) or (b) apply then the institution must ensure that any disclosure of information relating to the DPR is within the limits agreed by the participants, or proportionate to the threat, as the case requires.

Section 12 – Delaying or ceasing direct personal response

Section 12 deals with delaying or ceasing a DPR.

Subsection 12(1) provides that participation in a DPR is voluntary for the survivor.

Subsection 12(2) provides the survivor may delay or withdraw from a DPR at any time.

Subsection 12(3) provides that any person involved in the DPR process may delay or cease the process at any time, if the person reasonably believes that continuing the process would jeopardise the health or safety of the survivor and/or the representative of the institution who is giving, or who is to give a DPR in a face-to-face meeting.

Subsection 12(4) provides if the survivor delays or withdraws from a DPR, or fails to attend a DPR or related meeting, the responsible institution must attempt to reschedule or renegotiate arrangements for a DPR for the survivor as often as is reasonable.

Subsection 12(5) provides that if the DPR process is delayed or ceased by another person, the responsible institution must offer to resume the DPR process or seek to provide an alternative kind or method of DPR for the survivor, if the institution reasonably believes that it can do so without jeopardising the health or safety of the survivor.

Part 3 – When direct personal response is not required

Section 13 – Direct personal response not required in certain circumstances.

Section 13 sets out the circumstances when a participating institution is not required to give a DPR.

Subsection 13(1) provides a participating institution is not required to give a DPR if:

- the survivor does not indicate their wish to engage in a DPR with the institution in their acceptance document (paragraph 13(1)(a));
- the survivor does not contact the institution to request the DPR before the scheme sunset day (paragraph 13(1)(b));
- the survivor has not, before the scheme sunset day, responded to reasonable attempts to arrange a DPR (paragraph 13(1)(c));
- the survivor, after requesting a DPR, notifies the institution that the survivor wishes to withdraw from the DPR (paragraph 13(1)(d)); or
- the survivor has already received a DPR from the institution under the scheme (paragraph 13(1)(e)).

The **note** to subsection 13(1) is intended to bring the reader's attention to subsection 193(1) of the Act which provides the ***scheme sunset day*** is the tenth

anniversary of the scheme, or any day before that anniversary prescribed by the rules.

Subsection 13(2) provides that subsection 13(1) does not prevent the institution from giving a DPR.

The **note** to subsection 13(2) clarifies that DPR under the Scheme is only available to a person whose application for redress has been approved, and alerts the reader to Part 2-3 of the Act.

Section 14 – Special rules for defunct institutions

Section 14 provides for special rules in relation to defunct institutions.

Subsection 14(1) provides that a participating government institution that is providing redress as the funder of last resort for a non-participating defunct non-government institution is not required to provide a DPR on behalf of that defunct institution.

Subsection 14(2) provides that if a participating institution is acting as the funder of last resort for a defunct institution and has been identified as equally responsible, it will only be required to offer a DPR on its own behalf.

Subsection 14(3) provides that if a participating defunct institution has a representative, the representative must engage in any requested DPR for the institution on behalf of the institution.

The **note** to subsection 14(3) clarifies that where a defunct institution does not have a representative, it will not be participating in the scheme.

Part 4 – Review and reporting obligations of participating institutions

Section 15 – Review obligations

Section 15 sets out review obligations applying to participating institutions.

Subsection 15(1) provides that responsible institutions must ask the survivor for feedback on the DPR and give them details of avenues available for providing feedback, after giving a DPR.

Subsection 15(2) provides the survivor is not obliged to give feedback on the DPR.

Subsection 15(3) provides the institution must make reasonable efforts to consider, and be responsive to, feedback given.

Section 16 – Complaints

Section 16 provides a requirement for participating institutions to have a process for managing complaints and rules relating to complaints handling.

Subsection 16(1) provides that a participating institution must have a process for managing complaints relating to DPRs.

Subsection 16(2) states that the process for managing such complaints:

- must be communicated to survivors who have requested a DPR from the institution (paragraph 16(2)(a)); and
- be available to survivors, including after any initial feedback is provided on the DPR (paragraph 16(2)(b)).

Subsection 16(3) states the institution must make reasonable efforts to consider, and be responsive to, complaints.

Section 17 – Reporting obligations

Section 17 provides that, as soon as practicable after the end of each financial year, each participating institution must give the Operator, in the approved form, the following information:

- the number of requests for DPRs made to the institution during the year (paragraph 17(a));
- the number of DPRs given by the institution during the year (paragraph 17(b));
- the types of DPRs requested of the institution during the year (paragraph 17(c));
- the types of DPRs given by the institution during the year (paragraph 17(d));
- the time between each request made to the institution for a DPR and the giving of the DPR (paragraph 17(e)).

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 Direct Personal Response Framework 2018

This legislative instrument (the Framework) is 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 Framework

The Framework prescribes matters for the purposes of engagement in direct personal responses under the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme) established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act).

The Scheme will provide three elements of redress to people that have experienced institutional child sexual abuse: a monetary payment of up to \$150,000 may be provided as tangible recognition of the wrong survivors have suffered, survivors will receive access to counselling and psychological services and the Scheme will facilitate a direct personal response from responsible institutions at the request of a survivor. The Scheme will commence on 1 July 2018 and will operate for a period of 10 years.

Section 55 of the Act provides the Minister with the power to declare, in writing, guidelines about how direct personal responses are to be provided under the Scheme. When making the declaration, the Minister must have regard to the principles in section 56. The declaration is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to it.

The Framework prescribes, among other things, how DPRs are to be requested, arranged and given and the participating institutions' obligations in engaging and reporting upon DPRs.

In particular the Framework provides:

- should a survivor request a DPR, the participating institution must take reasonable steps to provide the survivor with a DPR;
- where a survivor is found to have suffered abuse in more than one institutional setting, they will be able to request a DPR from each participating institution; and
- a survivor may decline the option for a DPR at any time.

The Framework also seeks to assist a participating institution to avoid further harming a survivor when engaging in DPR. In addition, the Framework establishes rules relating to when a DPR is not required as well as review and reporting obligations of participating institutions.

Statement of Compatibility with Human Rights

Human rights implications

The Framework 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 self-determination and freedom to pursue social development – article 1 of the International Covenant on Civil and Political Rights (the ICESCR)
- the right to health – article 12 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR).

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 Framework promotes this right by providing the detailed requirements necessary to support and implement the direct personal response, one of the three core elements of the Scheme.

The Scheme will support the recovery of people that have experienced 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 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 Framework promotes this right through providing the detailed requirements necessary to support and implement the direct personal response element of the Scheme.

The Scheme seeks to recognise and alleviate the impact of historical failures of the Commonwealth and other government and non-government organisations to uphold this right.

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.

The Framework sets out the minimum requirements for engagement in a direct personal response to ensure that all who receive redress have equal opportunity

to access a direct personal response that is meaningful and appropriate for their circumstances.

Section 8 of the Framework specifies that participating institutions must allow, where possible, the survivor to choose from representatives of different genders and cultural backgrounds, and who are differentiated by other characteristics. This seeks to ensure that direct personal response can be given in a way that accommodates diversity.

The right to self-determination and freedom to pursue social development

Article 1 of the CDESCR guarantees the right of individuals to self-determination and, by virtue of that right, the freedom to pursue their economic, cultural and social development.

The Framework sets out the detailed requirements for implementation of the direct personal response element of the Scheme that ensure survivors' preferences are respected and accommodated throughout their engagement in the direct personal response process. Under the Framework, survivors determine when the direct personal response process will commence and agree the timing, kind and method of the direct personal response. The survivor can delay or withdraw from the process at any time.

The right to health

Article 12 of the ICDESCR guarantees the right of everyone to the highest attainable standard of physical and mental health.

The Framework promotes this right through providing the detailed requirements necessary to support the implementation of the direct personal response element of the Scheme in a manner that promotes the health and wellbeing of the survivor. This includes provisions for delaying, ceasing or altering the kind or method of the direct personal response where a person involved in the process reasonably believes there is a risk to the health or safety of the survivor and/or representative of the institution.

Conclusion

The Framework is compatible with human rights because it promotes the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to ensuring the Scheme's integrity and proper functioning.

The Hon Dan Tehan MP, Minister for Social Services