

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

National Redress Scheme for Institutional Child Sexual Abuse Act 2018

National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020

Purpose

The *National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 1) Rules 2020* (the **Instrument**) amends the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (the **Rules**) to clarify that three New South Wales independent schools do not fall within the definition of 'State institution' in section 111 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the **Act**).

The effect of excluding these schools from the definition of 'State institution' is that they can only participate in the National Redress Scheme for Institutional Child Sexual Abuse (the **Scheme**) if they join the Scheme as non-government institutions. These schools operate independently of government control, but fell within the definition of 'State institution' due to being established under State legislation. It is therefore appropriate that if these schools choose to participate in the Scheme, they do so in their own right, rather than as State institutions.

Background

Section 179 of the Act provides the Minister with the power to make rules prescribing matters required or permitted by the Act to be made, or that are necessary or convenient to be made for carrying out or giving effect to this Act.

State institution amendments

Subsection 111(1) of the Act sets out when an institution is a 'State institution':

(1) *An institution is a **State institution** if:*

- (a) *it is or was part of a State; or*
- (b) *it is or was a body (whether or not incorporated) established for a public purpose by or under a law of a State; or*
- (c) *the rules prescribe that it is a State institution.*

Subsection 111(2) of the Act provides:

(2) *However, an institution is not a **State institution** if the rules prescribe that it is not a State institution.*

The power to prescribe that an institution is not a State institution under section 111 of the Act allows the Scheme to deal with instances where it is more appropriate for an institution to pay redress for a person, rather than the State, such as in the case of the three New South Wales schools named in this Instrument.

This Instrument prescribes three New South Wales independent schools for the purposes of this subsection. Historically, these schools were incorporated under State legislation to advance public purposes such as religious education, but they were never controlled by the New South Wales state government. As a result of the amendments, the three New South Wales schools named in this Instrument will need to separately agree to participate in the Scheme as non-government institutions, which will provide opportunities for any people who have experienced institutional child sexual abuse in these institutions to seek an effective remedy through the Scheme.

This beneficial amendment puts the schools named in this Instrument in a position to fully participate in the Scheme. Previous to these amendments being made, any applications naming these schools would not have been able to progress as the institution was not participating in its own right and the New South Wales state government did not intend for the schools to be State institutions for the purposes of the Act.

Commencement

This Instrument commences the day after this Instrument is registered on the Federal Register of Legislation.

Consultation

The New South Wales government requested this amendment to the Rules. The three New South Wales independent schools named in this Instrument were not consulted prior to the amendment being made as the amendment removes a technical impediment to the schools participating in the Scheme as non-government institutions, given the New South Wales government is not willing for the institutions to participate in the Scheme as state institutions. Potential applicants were not consulted in the making of this Instrument because they could not be identified as the Scheme has not received any applications relating to any of the three schools.

Regulation Impact Statement (RIS)

A regulatory impact statement was not required (OBPR reference number is 25968).

Explanation of the provisions

Section 1

This section provides that the name of this Instrument is the *National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2020*.

Section 2

This section provides that the Instrument commences the day after it is registered.

Section 3

This section provides that the authority for making the Instrument is section 179 of the Act.

Section 4

This section provides that each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to the instrument has effect according to its terms.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Schedule 1

Schedule 1, item 1

This item inserts new subsection (2) at section 54B (table).

New subsection 54B(2) provides that the institutions specified in the table at the end of section 54 are prescribed for the purposes of subsection 111(2) of the Act as institutions that are not State institutions. The table in section 54B names three New South Wales independent schools and the boards of trustees for each of these schools.

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 Amendment (2020 Measures No. 1) Rules 2020

Overview

The purpose of this instrument is give the ability to three New South Wales independent schools to participate in the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme), in their own right, as a non-government institutions.

Human rights implications

The proposed amendments to the Rules engage the following rights:

- Convention on the Rights of Persons with Disabilities (CRPD)
 - article 3 general principles
 - article 6 violence against women
 - article 7 violence against children
 - article 16(5) freedom from exploitation
- Convention on the Rights of the Child (CRC)
 - article 16 arbitrary and unlawful interference
 - article 19 protecting children from abuse

General principles

The Scheme was established to provide redress to those who have experienced institutional child sexual abuse; including those with disabilities who are more likely to experience violence due to their perceived vulnerabilities. Redress includes a monetary payment, a direct personal response from the responsible institution(s) and access to counselling services.

While the ICCPR applies to everyone; the CRPD recognises the barriers that persons with disabilities may face in realising their rights, and the CRC recognises the barriers that children face in realising their rights.

The preamble of the CRPD and the General Principles set out in Article 3 reflect the need for respect for the inherent dignity, individual autonomy, the need to be able to participate fully and effectively and be included in society. As well as the need for respecting differences and acceptance of persons with disabilities as part of human diversity and providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The preamble of the CRC sets out that children are in a known category of persons that are entitled to special care and assistance.

The *National Redress Scheme for Institutional Child Sexual Abuse Act* (the Act) recognises that children in institutional settings are especially vulnerable to sexual abuse and did not necessarily have the ability to report or gather evidence about the abuse. The Scheme aims to provide an alternative to civil litigation for those who have experienced institutional sexual abuse to access justice.

The Scheme is premised on the basis that the institutions which are responsible for the abuse provide redress. The Act does not compel institutions to join and access to redress for survivors who experienced abuse in state, territory or non-government institutions is reliant on the responsible institution having voluntarily joined the Scheme. Excluding these three New South Wales independent schools from the definition of 'State institution' will allow them to join the Scheme independently from the New South Wales Government. New South Wales independent schools being able to join the Scheme provides greater potential institutional coverage, potentially making redress available to more survivors.

Equal access to justice

Article 19 of the CRC is about protecting children against abuse, providing social programs to support children. Where abuse has already occurred to report, refer and investigate the abuse.

Articles 6 and 7 of the CRPD are about recognising that females and children with disabilities are at greater risk of discrimination. Article 16 of the CRPD includes that legislation and policies should address that violence against those with disabilities be investigated and if appropriate, prosecuted.

Amending the Rules to allow three New South Wales independent schools to participate in the Scheme will potentially provide greater access to redress through the Scheme. This is important as redress can only be provided where there is a participating institution found to be responsible for the abuse.

Conclusion

Allowing these three New South Wales independent schools to participate in the Scheme as non-government institutions is compatible with human rights. It allows for greater inclusion in the Scheme by allowing these schools to participate. To the extent that these amendments limit human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.