

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing**

*Australian Charities and Not-for-profits Commission Act 2012*

*Australian Charities and Not-for-profits Commission Amendment (2021 Measures  
No. 1) Regulations 2021*

The *Australian Charities and Not-for-profits Commission Act 2012* (the Act) provides for the registration and regulation of charities by the Australian Charities and Not-for-profits Commission (ACNC).

Section 200-5 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) is to ensure registered entities are governed in a way that enables them to be accountable for past institutional child sexual abuse. This will help maintain and enhance public trust and confidence in the Australian charity sector.

To achieve this, the Regulations prescribe a new governance standard for the purposes of subsection 45-10(1) of the Act, which requires registered entities to take reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme) if the entity is, or is likely to be, identified as being involved in the sexual abuse of an applicant for redress under the Redress Scheme.

The Redress Scheme was established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* on 1 July 2018 in response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse. Under the Redress Scheme, survivors of institutional child sexual abuse may receive redress in the form of a redress payment of up to \$150,000, counselling and psychological care, and an optional direct personal response from the responsible participating institution.

The Redress Scheme operates on an opt-in basis, where responsible participating institutions are liable to pay their share of the costs of redress payments and counselling and psychological care. Survivors of past institutional child sexual abuse cannot obtain redress under the Redress Scheme if none of the institutions responsible for their abuse have joined the Redress Scheme. If there are multiple responsible institutions involved and only some of those institutions have joined the Redress Scheme, the survivor may not be able to obtain the maximum amount of redress that would otherwise be available if all of the responsible institutions had joined the Redress Scheme.

The issue of institutions failing to join the Redress Scheme was recognised in a report by the Joint Select Committee overseeing the implementation of redress related

recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, *Getting the National Redress Scheme right: An overdue step towards justice*, tabled in Parliament on 2 April 2019. Recommendation 3 of that report recommends the Government consider mechanisms and their efficacy, including those available under the *Charities Act 2013*, to penalise all relevant institutions that fail to join the Redress Scheme.

On 22 October 2020, the Prime Minister announced that the Government was finalising sanctions for institutions that continue to refuse to join the Redress Scheme, including the withdrawal of their charitable status.

The Regulations form part of the Government's response to this issue, as a failure to comply with the new governance standard could result in the ACNC Commissioner revoking the entity's registration (that is, the entity's charitable status), which could cause the entity to lose access to certain government funding, exemptions, concessions and benefits.

The Regulations build on amendments made to the Act by the *Treasury Laws Amendment (2020 Measures No. 6) Act 2020*. Those amendments incentivise basic religious charities (which are not subject to the governance standards) to join the Redress Scheme if they have been identified in relation to an application for redress.

Consultation was held on an exposure draft instrument and explanatory materials from 7 December 2020 to 8 January 2021. During this period, discussions were held with survivor advocacy groups, charity sector peak bodies, charity law specialists and academics, and officials from the Department of the Treasury, the ACNC and the Department of Social Services.

Twelve written submissions were received in response to the consultation. There was broad support for the proposed governance standard, however, a number of submissions sought clarification on certain aspects of the governance standard. As a result, the explanatory statement was revised to provide additional information about when an entity may be likely to be identified as being involved in the sexual abuse of an applicant, and what may be recognised as taking reasonable steps to join the Redress Scheme. All public submissions will be available on the Treasury website.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after the earlier of:

- the day both Houses of Parliament pass a resolution approving the standard; or
- the last day on which the standard could be disallowed in either House of Parliament.

A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulation Impact Statement is at [Attachment C](#).

**Details of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021***

Section 1 – Name

The name of the instrument is the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations).

Section 2 – Commencement

The Regulations commence on the day for commencement specified in section 45-20 of the *Australian Charities and Not-for-profits Commission Act 2012*. That is, the day after the earlier of:

- the day both Houses of the Parliament pass a resolution approving the standard; or
- the last day on which the standard could be disallowed in either House of the Parliament, unless the Regulations are disallowed or either House passes a resolution disapproving the Regulations before that day.

Section 3 – Authority

The Regulations are made under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Item 1 adds new definitions of terms that are used in the new governance standard. This includes the definition of ***participating non-government institution*** and ***sexual abuse***. These definitions have the same meaning as in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Redress Act).

Item 2 inserts section 45.30 in the *Australian Charities and Not-for-profits Commission Regulation 2013*. Section 45.30 sets out new governance standard 6.

***The object***

The object of the new governance standard is to maintain and enhance public trust and confidence in the Australian charity sector by ensuring that a registered entity's governance enables it to be accountable for its past conduct relating to institutional child sexual abuse. This is linked to the objects of the Act and the matters the Australian Charities and Not-for-profits Commission (ACNC) Commissioner must consider in exercising their powers under the Act.

In particular, the object of the governance standard promotes the objects of the Act by giving the public confidence that registered entities manage their affairs accountably and transparently, use their resources effectively and efficiently, and pursue their charitable purposes.

Additionally, the governance standard takes into account the unique nature and diversity of charitable entities and the distinctive role they play in Australia. As these entities are given funding, exemptions, concessions and benefits from governments and donations from members of the public, it is appropriate that they have some level of accountability to the public about their actions and meet community expectations in relation to their governance. This includes community expectations about how these entities are accountable for their past involvement in institutional child sexual abuse.

### ***The standard***

Governance standard 6 only applies to a registered entity that is, or is likely to be, identified in relation to an application under the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme).

This includes registered entities that are identified in an application for redress (made under section 19 of the Redress Act), or in further information given to the Operator of the Redress Scheme (under section 24 or 25 of the Redress Act).

It also includes registered entities that are *likely* to be identified in relation to an application under the Redress Scheme. This may capture entities that:

- are named in a report of the Royal Commission into Institutional Responses to Child Sexual Abuse;
- have been involved in litigation relating to past institutional child sexual abuse;
- have been notified that a person intends to lodge an application under the Redress Scheme which names the entity as being involved in sexual abuse; or
- otherwise hold or have been made aware of credible information about their involvement in past institutional child sexual abuse.

The new governance standard requires these registered entities to take reasonable steps to join the Redress Scheme as participating non-government institutions.

In practice, officers of the Redress Scheme will notify registered entities that are not participating institutions that the entity has been identified in relation to an application. Officers of the Redress Scheme may also notify registered entities that the entity is likely to be identified in relation to an application. This will allow the entity to start taking steps to comply with the new governance standard. Such a notice would be given as soon as practicable after the entity is identified.

The ACNC may also advise relevant affected entities of the need to engage with officers of the Redress Scheme to ensure these entities can comply with the new governance standard.

### *Registered entities that have been identified in relation to an application*

Officers of the Redress Scheme primarily obtain information about whether an entity may be responsible for abuse of an applicant under the Redress Scheme through an application for redress (made under section 19 of the Redress Act).

The relevant application for redress does not need to be valid under subsection 19(2) of the Redress Act for the purposes of the new governance standard. For example, if the application does not specify where the applicant lives, but identifies a registered entity as being involved in the sexual abuse of the applicant, that entity would need to take reasonable steps to join the Redress Scheme to comply with the new governance standard. This ensures that registered entities cannot rely on a minor issue with the relevant redress application to avoid being subject to the new governance standard.

Registered entities can also be identified in relation to an application through subsequent information given in response to a request by the Operator of the Redress Scheme (under section 24 or 25 of the Redress Act).

The application form for redress currently requests that applicants provide as much identifying information as possible about each institution that is responsible for bringing the applicant in contact with the person or people who sexually abused them. However, there may be circumstances where an application does not provide sufficient information to identify an entity. In those circumstances, the Operator of the Redress Scheme may request that the applicant provide further information under section 24 of the Redress Act. In responding to that request, the applicant may provide sufficient information to identify an entity as being involved in their abuse. Information that is provided in this way is captured by this governance standard.

Similarly, information provided by an entity that has already joined the Redress Scheme (that is, a participating institution in the Redress Scheme) that identifies another entity as being involved in abuse of the applicant is within the scope of the governance standard if that information is provided in response to a request by the Operator under section 25 of the Redress Act. This could occur where an applicant mistakenly identifies a participating institution as being involved in the abuse, the Operator requests information from the participating institution as required under section 25 of the Redress Act, and the participating institution provides information that helps to identify the entity that was involved in the sexual abuse of the person.

### *Registered entities that are likely to be identified in relation to an application*

A registered entity will be captured by the new governance standard if it is *likely* to be identified as being involved in the sexual abuse of an applicant for redress under the Redress Scheme. This is consistent with the existing governance standards and best practice governance, as entities need to plan, prepare and govern themselves not only on what has happened or is currently happening, but also on what is reasonably foreseeable. This approach will also ensure that survivors who make future applications naming these institutions will not face uncertainty and unnecessary delays in having their applications assessed.

Registered entities that are likely to be identified in relation to an application include those that were named in a report of the Royal Commission into Institutional Responses to Child Sexual Abuse but have not been identified so far in an application for redress. One reason this could occur is because survivors are waiting for these institutions to join the Redress Scheme before making an application.

A registered entity may also be captured if it is informed directly by a survivor (or their representative) that they intend to make an application for redress naming the entity, if it has been involved in litigation regarding past institutional child sexual abuse, or if it otherwise holds or has been made aware of credible information about its past involvement in institutional child sexual abuse.

Under the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018*, if a registered entity has been ordered by a court to pay compensation or damages for the abuse of a person, the entity (once participating in the Redress Scheme) is not responsible for the person's abuse under the Redress Scheme. The new governance standard does not affect this rule.

Whether a registered entity is likely to be identified as being involved in the sexual abuse of an applicant for redress will depend on the facts and information available to the entity. In other words, an entity that is not reasonably aware that it may be responsible for past abuse that is within the scope of the Redress Scheme would not be captured by the governance standard.

#### *Taking reasonable steps to become a participating non-government institution*

As with the existing governance standards, the steps that are reasonable to comply with the new governance standard are to be determined objectively and will depend on the specific circumstances of the registered entity.

However, in most cases, it requires affected entities to become participating non-government institutions in the Redress Scheme within a reasonable time. There may be some limited exceptions, such as where the entity does not meet the legislative requirements to join the Redress Scheme (such as the financial requirements) and provides information to that effect to officers of the Redress Scheme.

Generally, the key milestones for an entity to join the Redress Scheme include:

- indicating an intention to participate in the Redress Scheme;
- developing an institutional list;
- participating in a financial viability assessment; and
- agreeing to participate in the Redress Scheme (for the purposes of paragraph 115(3)(c) of the Redress Act).

Working constructively with officers of the Redress Scheme to action these steps without undue delay would generally demonstrate that a registered entity is taking reasonable steps to joining the Redress Scheme. However, the size of the entity and other relevant factors may mean that different timeframes for taking these steps may be reasonable.

### ***Failure to comply with the governance standard***

Officers of the Redress Scheme and the ACNC will share information to ensure the ACNC Commissioner can effectively administer the new governance standard. Consistent with current practice, the ACNC will provide guidance and education to affected entities to help them understand and comply with their legislative obligations. This may involve the ACNC advising relevant affected entities of the need to engage with officers of the Redress Scheme about taking steps to join the Redress Scheme.

Consistent with existing governance standards in the *Australian Charities and Not-for-profits Commission Regulation 2013*, failure to comply with the new governance standard means that the entity is not entitled to be registered under the Act. This enlivens the ACNC Commissioner's power to consider revocation of the entity's registration. If the ACNC Commissioner exercises this power, the entity would no longer be eligible for certain government funding, exemptions, concessions and benefits.

Alternatively, if the entity is a federally regulated entity, a failure to comply with the new governance standard may result in enforcement action being taken by the ACNC Commissioner under Chapter 4 of the Act. This could include for example, issuing formal warnings and giving directions relating to actions required to comply with the governance standard.

Additionally, a failure to comply with the new governance standard may be a significant matter that must be reported to the ACNC Commissioner under section 65-5 of the Act. An administrative penalty applies for failing to give the ACNC Commissioner such a notice within the required time.

Before enforcement action is taken by the ACNC Commissioner, registered entities will have the opportunity to present their case, consistent with the rules of procedural fairness and current practice.

These options give the ACNC Commissioner flexibility to pursue the most appropriate action in each case, depending on their assessment of various considerations, including the severity and nature of the failure. These options are also consistent with the options that apply for a failure to comply with the existing governance standards.

### ***Application***

These amendments apply in relation to applications for redress made under the Redress Act before, on or after the day the amendments commence. This means the new governance standard will apply to registered entities irrespective of when the relevant application for redress is made.

This ensures that the amendments apply to as many registered charities that may be responsible for past institutional child sexual abuse as possible.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021*

This Legislative Instrument 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 Legislative Instrument**

The *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) ensure registered entities are governed in a way that enables them to be accountable for past institutional child sexual abuse.

To achieve this, the Regulations prescribe a new governance standard which requires registered entities to take reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme) if the entity is, or is likely to be, identified as being involved in the sexual abuse of an applicant for redress under the Redress Scheme.

### **Human rights implications**

The Regulations engage the following human rights and freedoms:

- the right to state-supported recovery for child victims of abuse under Article 39 of the Convention on the Rights of the Child; and
- the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the International Covenant on Civil and Political Rights.

#### *Right to state-supported recovery for child victims of abuse*

The amendments in the Regulations promote the right to state-supported recovery for child victims of neglect, exploitation and abuse under Article 39 of the Convention on the Rights of the Child by requiring registered entities to take reasonable steps to join the Redress Scheme if the entity may be responsible for the sexual abuse of an applicant for redress.

The Redress Scheme supports people who have experienced institutional child sexual abuse by enabling recognition of past abuse and providing access to redress, including counselling and psychological care services.

To receive redress under the Redress Scheme, the institution responsible for the person's abuse must be participating in the Redress Scheme. Since the commencement of the Redress Scheme on 1 July 2018, the Australian Government



has focused on ensuring that every institution with a history of working with young people joins the Redress Scheme so that all survivors who may apply can access redress. Incentivising additional entities to join the Redress Scheme will result in more people being able to access redress under the Redress Scheme.

#### *Right to protection from arbitrary or unlawful interference with privacy*

The amendments in the Regulations engage the right to protection from arbitrary or unlawful interference with privacy in Article 17 of the International Covenant on Civil and Political Rights as:

- officers of the Redress Scheme will need to contact registered entities that have not joined the Redress Scheme to advise that an application for redress has been received in relation to the entity, to allow the entity to comply with the new governance standard;
- officers of the Redress Scheme will need to provide information to the Commissioner for the Australian Charities and Not-for-profits Commission (ACNC) to allow the Commissioner to effectively administer the new governance standard; and
- the ACNC may need to liaise with a registered entity about whether the entity is complying with the new governance standard to ensure any action it takes is appropriate in the circumstances.

These exchanges of information may involve personal information within the meaning of the *Privacy Act 1988*. The purpose of these exchanges of information is to allow the new provisions to operate effectively. For example, the disclosure of information from officers of the Redress Scheme to the ACNC Commissioner ensures the ACNC Commissioner can assess whether a registered entity is meeting the new governance standard.

The protected information framework in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* and the *Australian Charities and Not-for-profits Commission Act 2012* would apply to the use and disclosure of much of this information. Additionally, the obligations under the *Privacy Act 1988* relating to the collection, use and integrity of personal information applies to officers of the Redress Scheme, the ACNC, and a number of affected registered entities.

To the extent the amendments in the Regulations interfere with privacy, that interference is reasonable and proportionate to the legitimate objective of encouraging registered entities that may be responsible for past institutional child sexual abuse to join the Redress Scheme.

#### **Conclusion**

The Regulations are compatible with human rights because it promotes the protection of human rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the legitimate objective of encouraging relevant registered to join the Redress Scheme.

## **Regulation Impact Statement**

*National Redress Scheme for Institutional Child Sexual Abuse – New governance standard for registered charities*

### **Introduction**

This Regulation Impact Statement (RIS) examines the case for action by the Australian Government to strengthen the incentives faced by Non-Government Institutions (NGIs) to participate in the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme), applying the principles of Australia's regulatory impact analysis framework as outlined in the Australian Government Guide to Regulatory Impact Analysis<sup>1</sup>.

Importantly, this RIS is about the case for stronger incentives for NGIs to join the Scheme, not about whether Australia should have a Scheme. Introduction of the Scheme was recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) (box 1), was agreed by the Australian Government shortly after, and was established in 2018 (box 2).

#### **Box 1: Royal Commission into Institutional Responses to Child Sexual Abuse**

In January 2013, the Australian Government established the Royal Commission in response to allegations of sexual abuse of children in institutional contexts that had been emerging in Australia for many years. Over a five-year period, the Royal Commission inquired into how institutions with a responsibility for children managed and responded to allegations and instances of child sexual abuse and investigated where systems failed to protect children.

The Royal Commission found that the trauma of institutional child sexual abuse can have profound, long-lasting and cumulative impacts on survivors. The most common impact was on the survivors' mental health, including depression, anxiety, post-traumatic stress disorder, sleeping difficulties and nightmares, as well as feelings of guilt, shame and low self-esteem. Additionally, the Royal Commission found survivors had difficulties with trust and intimacy, parenting and relationship problems, and often developed addictions after using alcohol or other drugs to manage the psychological trauma. Child sexual abuse can have ripple effects that reach beyond the abused child and affect future generations.

The Australian Government recognises the long-term impacts child sexual abuse can have on the health and wellbeing of people. The Royal Commission was an important first step towards acknowledging the suffering of people and finding ways to move forward. Its final report can be found at:

<https://www.childabuseroyalcommission.gov.au/final-report>.

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<sup>1</sup> Available at: <https://www.pmc.gov.au/sites/default/files/publications/australian-government-guide-to-regulatory-impact-analysis.pdf>

## **Box 2: The National Redress Scheme for Institutional Child Sexual Abuse**

The Scheme was established in 2018 in response to recommendations made by the Royal Commission. It is established under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act).

The Scheme aims to recognise and alleviate the impact of past child sexual abuse that occurred in an institutional context, providing people a simple, trauma-informed way to access redress. The Scheme provides three elements of redress to eligible applicants:

- a monetary payment of up to \$150,000;
- access to counselling and psychological services; and
- the option to receive a direct personal response from a responsible institution(s).

The Act sets out who is eligible to apply for redress, the objectives and principles under which the Scheme operates, and the requirements on institutions participating in the Scheme.

An applicant can only make one application for redress through the Scheme, although their application can include multiple claims of abuse. A person who accepts an offer of redress is required to release the responsible participating institution/s from liability for sexual abuse and related non-sexual abuse that is within scope of the Scheme. This means that an applicant cannot pursue an institution for compensation through the civil legal system for the abuse that they received redress for under the Scheme, providing legal certainty for NGIs that participate in the Scheme.

The Scheme holds institutions accountable for past sexual abuse, requiring a responsible institution to pay for compensation. NGIs are liable for abuse regardless of the Scheme's existence; joining the Scheme does not create liability for past wrongdoing, and NGIs can still be pursued through civil litigation.

Among other recommendations, the Royal Commission suggested that the Scheme should be survivor focused, that the responsible institution should fund the cost of redress, and that a 'reasonable likelihood' be the standard of proof for determining applications.

This enables equal access to redress and justice, which can be difficult for some survivors to pursue under existing mechanisms. Individuals may be unable to pursue redress through civil litigation, due to the requirement for individuals to fund private civil litigation, legal issues such as a lack of evidence for a balance of probability threshold, or unwillingness to be exposed to an adversarial process given the attendant personal trauma and uncertainty such litigation entails.

Numerous case studies in the Royal Commission final report detailed the inadequacy of civil litigation and previous redress attempts at providing a sense of justice and compensation to victims of child sexual abuse in an institutional context.

## 1. The problem

As it currently stands, the extensive communitywide benefits from the Scheme are not being realised due to the less than maximum participation in the Scheme.

Under the operating rules of the Scheme, survivors cannot access redress unless at least one of the institutions responsible for their abuse is participating in the Scheme. If a person names more than one institution in their application, and they choose to proceed without all the relevant institutions having joined, their redress payment may be reduced. An applicant has no ability to require participation in the Scheme by an institution.

The Australian Government cannot mandate that NGIs join the voluntary Scheme. Under legislation, for a NGI to join the Scheme it must be declared, by notifiable instrument, to be a participating institution. The Minister for Families and Social Services cannot make a declaration unless the NGI has agreed to participate in the Scheme.

Because participation in the Scheme is voluntary, it is reasonable to assume individual NGIs have made, and will continue to make, their own calculations about the costs and benefits to them of joining the Scheme. Factors likely to be relevant to NGIs in making such decisions will include any reputational effects they will suffer from non-participation, the risks of financial costs to them of participating weighed up against the risk of financial costs of non-participation, and any other relevant factors.

Improving communitywide outcomes require the costs and benefits on all parties to be considered, something that individual NGIs will not necessarily take account of in making their own personal decision to join the Scheme. Given this mismatch between NGIs' private incentive to join, which may currently be minimal, and the community's expectation that they sign up to participate, less-than-maximum participation by NGIs on an ongoing basis should be expected. This results in a commensurate reduction in communitywide benefits for survivors, NGIs, governments, and the community at large.

Given the benefits of the Scheme – to survivors of institutional child sexual abuse, NGIs, and the community at large - the Australian governments and the community expect all institutions named in applications to the Scheme, or in materials published by the Royal Commission, to join the Scheme as soon as possible in order for survivors to access the redress they deserve in the most trauma informed and efficient manner achievable.

The Scheme will continue to receive applications over the next seven years, some of which may name NGIs that have not previously been named in applications. Some of the newly named NGIs may be reluctant to join the Scheme and there are currently no consequences of not participating, beyond being publicly named on the Scheme's website as refusing to join. Some NGIs yet to join the Scheme may never do so unless further incentives are applied. While larger and/or more motivated NGIs have already joined, stronger levers are needed to influence the remaining NGIs to join.

## 2. Why is Government action needed?

Government action is needed to further incentivise NGIs making individual decisions to join the Scheme, to align with the community's interest in maximising participation.

As noted, some NGIs yet to join the Scheme may never do so unless further levers are applied. Unless their participation in the Scheme can be incentivised, including through Government intervention, some survivors of institutional child sexual abuse will not be able to access redress. The Royal Commission identified the extensive costs survivors face in both trying to pursue redress through private litigation, and the costs of not being able to pursue redress at all.

The Australian Government administers the Scheme and has the ability to control a number of levers that can strongly influence NGIs to join the Scheme. Government action is needed to ensure NGIs are incentivised to join, with the application of financial consequences if they do not join, which will help influence their decisions about whether to participate or not, with NGI incentives more closely aligned to the community benefits and expectations as a whole.

Only Government action can create a clear imperative for an institution to join the Scheme by shifting the incentives they face to join.

## 3. What policy options are you considering?

This RIS considers two policy changes for incentivising charitable NGI participation in the Scheme, and compares them to the current situation. This RIS discusses options to encourage relevant non-participating NGIs who are registered charities to join the Scheme.

### Option 1 – Maintain the status quo

Maintain the status quo, whereby registered charities continue to face no financial consequences for a failure to participate in the Scheme. Existing measures, including working with relevant registered charities to encourage their participation, and naming relevant non-participating registered charities on the Scheme website, would continue.

### Option 2 – A new governance standard that applies to registered charities named in a claim for redress, and registered charities *likely* to be named in a claim for redress

This option involves the introduction of a new Australian Charities and Not-for-profits Commission (ACNC) governance standard to require a registered charity to take reasonable steps<sup>2</sup> to participate in the Scheme if the entity, has been named in a

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<sup>2</sup> Whether a registered charity is taking reasonable steps at a given point in time is contingent on the particular facts and circumstances and needs to be assessed on a case by case basis. The Department of Social Services, as the administrator of the Scheme, will share information with the ACNC to inform its assessment of whether entities are taking reasonable steps to join the Scheme.

claim for redress *or is likely to be*<sup>3</sup> identified as being involved in the abuse of an applicant for redress under the Scheme.

This approach is broadly consistent with the existing ACNC governance standards and best practice corporate governance, which require charities to plan, prepare and govern themselves not simply based on what has happened or is currently happening, but also on what is reasonably foreseeable.

### **Option 3 – A new governance standard that applies only to registered charities named in a claim for redress**

This option involves the introduction of a new ACNC governance standard to require a registered charity named in a claim for redress to take reasonable steps to participate in the Scheme.

Restricting the application of the governance standard to registered charities that have been named in a claim for redress may not capture instances where survivors are waiting for charities named in the Royal Commission to join the Scheme prior to making a claim for redress. However if a survivor were to identify a charity in a claim for redress, the charity would be subject to the new governance standard.

#### *Common to both options 2 and 3*

Registered charities, with the exception of basic religious charities (BRCs), are required to comply with ACNC governance standards in order to maintain their charity status. To address this potential gap, in addition to the measures discussed in this document, the Government is amending the eligibility criteria for BRCs in the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) so that BRCs who have a claim against them under the Scheme must join the Scheme in order to retain their BRC status. Relevant BRCs who fail to join the Scheme will no longer be eligible for BRC status and therefore must comply with all governance standards<sup>4</sup>. Where charities have lost their BRC status, the impacts they face will be consistent with those faced by all non-BRC charities, as discussed below.

Consistent with the administration of the Scheme, registered charities who are unable to join despite best efforts (for example not being sufficiently financially viable) will not be subject to ACNC compliance action.

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<sup>3</sup> Guidance will be developed regarding entities who may be *likely* to be identified in a claim. This may capture entities that: are named in a report of the Royal Commission; have been involved in litigation regarding past institutional child sexual abuse; or have been notified that a person intends to lodge an application under the Scheme which names the entity as being involved in past child sexual abuse.

<sup>4</sup> There are currently five ACNC governance standards that are a set of core, minimum standards that deal with how charities are run (including their processes, activities and relationships). The standards require charities to remain charitable, operate lawfully, and be run in an accountable and responsible way. Proposals discussed in this document would add a sixth governance standard. More information on governance standards is available on the ACNC website : <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards>

## **Additional levers beyond the scope of this RIS**

It is important to note a variety of levers exist, including those targeting financial consequences, to incentivise NGIs to join the Scheme. This RIS examines options related to removal of charity registration and the subsequent loss of tax concessions, but a multifaceted approach is needed to maximise institutional participation. A particular cohort of NGIs not influenced by one lever may be influenced by a different set of incentives.

NGIs not influenced by this policy may be influenced by other complementary levers. As noted above, the Australian Government is also publicly naming NGIs that do not commit to joining the Scheme and is progressing changes that will remove an NGI's access to future Government grant funding, in parallel to this work.

### **4. What is the likely net benefit of each option?**

***Option One – Maintain the status quo, current Government policy applies and relevant charities who do not join the Scheme continue to be eligible for charity registration.***

In the absence of a change in Australian Government policy to incentivise registered charities to participate in the Scheme, the full benefits of the Scheme to the community are unlikely to be realised, resulting in unnecessary costs to survivors and the wider community.

Survivors that have a potential claim against a registered charity that has refused to participate in the Scheme will not be able to access the three elements of redress and the community as a whole will continue to face the extensive costs of the system that existed prior to the Scheme being established.

#### Impact on survivors

Where a registered charity named in an application to the Scheme does not join, survivors would not be able to access appropriate redress through the Scheme in relation to that registered charity.

The current situation negatively impacts on individual survivors as (discussed above) they must fund the private litigation costs of pursuing registered charities in court, with the attendant evidentiary challenges and personal trauma that system entails, or alternatively they may not be able to access any form of redress. This could arise where the applicant's health or financial situation affects their capacity to pursue civil action (which operates on a higher standard of proof). Potential future applicants may also lose confidence in the Scheme, not believing it to be an effective way of seeking redress.

#### Impact on institutions

Under the Scheme's design and legislative framework, institutions initially had until 30 June 2020 to join the Scheme. This deadline to join was later extended to 31 December 2020, with identified NGIs given until this date to complete the joining

process; those that did not join by that date have been publicly named on the Scheme's websites and may be subject to consequences.

The majority of identified non-participating charities are in the process of joining. However one registered charity has expressly refused to join the Scheme, and given the voluntary nature of participation no consequences exist beyond being publicly named on the Scheme's website as having refused to join.

Under the status quo, relevant registered charities would face the same situation as before the Scheme was enacted, including facing potential litigation from survivors, or alternatively not being held liable for the redress expected of them by survivors and the community.

The relevant registered charities would also continue to be eligible for the benefits of charity registration, although they will be ineligible for future Commonwealth grant funding, which may shift the incentives for some NGIs to join the Scheme.

### Impact on the community and Government

A failure to maximise participation in the Scheme will continue to see the Australian community fail to benefit from the extensive work of the Royal Commission, and put right the historic wrongs of institutional child sexual abuse. It is the Australian community's expectation that survivors have access to efficient and effective redress, a situation undermined by a failure of registered charities to participate. The financial, legal and health costs to survivors and related costs to registered charities of not addressing historic abuse is not acceptable to the community.

The Government's inability to process all applications made to the Scheme due to the non-participation of some registered charities risks survivors, the community and other stakeholders losing faith in the Scheme.

This option, and lack of action, creates significant negative impacts for survivors and the community as a whole. As there would be no additional consequences for registered charities if they choose not to join, maintaining the status quo puts at risk the significant benefits the Scheme was designed to offer to all.

### **Option 2 – A new governance standard that applies to charities named in a claim for redress, and charities *likely* to be named in a claim for redress**

This approach provides a strong incentive for charitable NGIs to participate in the Scheme (thereby maximising survivor access to redress) because refusal to join will result in an NGI's charity registration being revoked and the loss of charitable tax concessions. While this approach does not guarantee all registered charities that have been named in a claim, or are *likely* to be named in a claim, will join the Scheme, it would create an incentive that would otherwise not exist.

### Impact on survivors

The benefit of this approach would be to increase the likelihood that relevant registered charities join the Scheme, thereby maximising survivor access to redress. While it is difficult to quantify the extent to which relevant non-participating registered charities will join the Scheme following introduction of a new governance



standard, less than maximum participation reduces the extensive benefits to survivors of the Scheme, so any increase in institutional participation is of benefit to survivors.

It would also provide reassurance to survivors that relevant registered charities named in applications or in materials published by the Royal Commission that do not join the Scheme will not be able to continue benefiting from charity registration, including charitable tax concessions.

In extending the application beyond charities who have a claim against them to include charities where a claim is likely to be made against them, this option maximises participation of relevant charities in the Scheme and thereby maximises survivor access to redress. The approach covers situations where survivors may be waiting for charities named in the Royal Commission to opt-in to the Scheme prior to making a claim for redress

### Impact on registered charities

Under this proposal, registered charities named in an application for redress, or who are likely to be named in a claim, would have their registration revoked and lose access to a range of tax concessions if the entity does not take reasonable steps to join the Scheme<sup>5</sup>. The lack of access to charity tax concessions may have negative financial impacts on some registered charities that have not joined the Scheme, acting as an incentive for them to join.

While the number of charities expected to be impacted under option 2 is expected to be very low, the financial impact is unquantifiable as the value of the tax benefit forgone is dependent on a range of factors (further details are outlined below). The number of claims made in the future is uncertain, however, given the long duration and comprehensive nature of the Royal Commission into Child Sexual Abuse, we do not expect a significant number of additional charities to be named in claims in the future.

- *Income tax exemption:* Registered charities can be endorsed by the ATO to be exempt from income tax. This would benefit those charities that have a positive taxable income. The scale of benefits received from this tax concession would increase as taxable income increases. This concession would be of limited benefit to those charities with low or no positive taxable income.
- *Fringe Benefit Tax concessions:* Certain registered charities are eligible for Fringe Benefit Tax concessions. These concessions would benefit charities with paid workforces. This concession would be of limited benefit to those charities who rely predominantly on volunteers with few or no paid employees.

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<sup>5</sup> The ACNC is the national regulator of charities. Consistent with current practice, the ACNC will provide guidance and education to affected entities to help them understand and comply with their legislative obligations. Before compliance action is taken by the ACNC Commissioner, registered entities will have the opportunity to present their case, consistent with the rules of procedural fairness. More information on the ACNC's regulatory approach can be found on their website at : <https://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement>

- *GST concessions*: Registered charities are eligible for a number of GST concessions. For example, not being liable for GST on raffles, bingo events, and non-commercial transactions, transfers between certain religious groups, and for accommodation and food in retirement villages. Charities may also claim input tax credits and fundraising events and for the reimbursement of volunteer expenses.
- *Franking credit refunds*: Registered charities who satisfy residency requirements and are endorsed for income tax exemptions from the ATO are eligible for franking credits. This concession would benefit charities who receive income from shares, with benefit increasing as the value of income derived from shares increases.
- *Deductible gift recipient (DGR) status*: Where entities are endorsed as DGRs, donors are able to claim a deduction on donations of \$2 or more. Legislative amendments to require non-Government DGRs to be registered as charities are currently being prepared.<sup>6</sup> Once legislated, loss of charity registration would also mean a loss of DGR status for those institutions who are endorsed DGRs. This could reduce their attractiveness to donors and thus reduce their financial support base.

There may also be some reputational costs associated with losing charity status. However, the Government could name entities who fail to take reasonable steps to join the Scheme after six months. As such, the additional reputational costs of losing charity registration may be marginal to the reputational costs of being publicly named as failing to take reasonable steps to join the Scheme.

While all registered charities, with the exception of Basic Religious Charities, are subject to ACNC governance standards, the governance standard introduced under this option would not be relevant or require any action or risk any penalty for the vast majority of charities who either have no exposure to child sexual abuse claims arising from the Royal Commission, or do have exposure to child sexual abuse claims arising from the Royal Commission and are taking reasonable steps to join the Scheme, or have already joined.

On balance, this option, combined with other options being considered by the Australian Government is intended to strongly influence relevant registered charities to decide to participate in the Scheme, rather than to not be a participant. Participation in the Scheme is the most efficient and effective and trauma informed way to meet the needs of survivors and the community as a whole, even at a cost to registered charities responsible for past child sexual abuse.

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<sup>6</sup> The proposed amendments will require all non-Government Item 1 DGRs (except specific listings) to maintain ACNC charity registration in order to maintain their eligibility for DGR endorsement. Item 2 DGRs (ancillary funds) and specifically listed Item 1 DGRs will be encouraged but not required to maintain charity registration. DGRs operated by Commonwealth or State government agencies are unable to be registered as charities with the ACNC. The amendments are one element of a broader package of DGR reforms designed to enhance the administration and oversight of entities with DGR status, by strengthening governance arrangements and reducing administrative complexity.

## Impact on Government

This option would help maximise the success of the Scheme. It aligns with the Government's commitment to action and to revoking the charitable status of those charities who have been identified in a claim for redress and do not join the Scheme, with the ultimate aim of increasing institutional participation in the Scheme and access to redress for survivors. Further, consistent with community expectations, charities who refuse to join the Scheme would no longer enjoy charity tax concessions. It aligns with the Government's commitment to action and would apply the policy strongly and consistently across Government.

## Costs

### *Government agencies*

There is likely to be a minor administrative cost to the ACNC. The ACNC intends to commence investigations of charities that do not meet the new governance standard, consistent with their usual compliance activities. Based on currently available information, the costs to the ACNC of these investigations over a 12 month period is estimated to be equivalent to 1 Full Time Equivalent employee. Further agency impacts are likely depending on the course of investigations but cannot be quantified at this time.

### *Charitable NGIs – costs of joining the Scheme*

Participation in the Scheme imposes regulatory costs on NGIs. These costs differ depending on the size, age, and historical structure of the charity.

To date only one charitable NGI has refused to join the Scheme and therefore would be impacted by the new governance standard. The below estimate of administrative costs has been calculated based on the experience of Scheme officers assisting institutions of a similar size and structure as this one entity.

From an institutional perspective, there are four stages of becoming a participating NGI. These are:

1. Outreach – responding to an approach by the Department of Social Services, developing a basic understanding of the Scheme, and facilitating an organisational decision of intent to join;
2. On boarding – understanding the Scheme, attendance at training (3 days, 2 people), research and provision of an institutional list (sites, branches, parishes, chapters), and participation in the Financial Viability Assessment, which includes an estimate of liability;
3. Joining – consideration of the Agreement to Participate (akin to an MOU), organising system access to the Scheme's Institution portal; and
4. Participating – responding to Requests for Information in relation to applications, payment of invoices, consideration of financial and other reports from the department.

Reimbursement of redress payments to applicants and on-costs (contribution to Scheme costs) are not included in this estimate. Given the Scheme only has seven

years to run from 1 July 2021, the costs have been annualised over seven years. Labour costs are calculated at \$73.05 per hour, consistent with the Regulatory Burden Measurement Framework.

The total administrative cost of participating in the Scheme over seven years is estimated to be \$46,058 for a larger entity. This figure comprises \$7,707 of fixed administrative costs associated with joining the Scheme (the four stages listed above). In addition, a participating NGI will incur incremental administrative costs associated with processing redress claims. The costing is based on an estimate of 35 claims (5 per year) requiring 15 processing hours each. This results in an estimated additional annual administrative cost of participation of \$5479 (\$38,351 over seven years). Annualised over seven years, the total annual administrative costs is estimated to be \$6580.

Where a smaller entity may become subject to the new governance standard, the total annual administrative costs annualised over seven years is estimated to be \$1044, due to their typically less complex nature and fewer claims. See [Attachment A](#) for a more detailed breakdown of estimated administrative costs for both larger and smaller NGIs.

As aforementioned, the number of claims made in the future is uncertain, however, given the long duration and comprehensive nature of the Royal Commission into Child Sexual Abuse, we do not expect a significant number of additional charities to be named in claims in the future.

Given community expectations that relevant NGIs should participate in the Scheme, we consider the costs to charitable NGIs of participating in the Scheme are offset by the benefit to applicants, who are survivors of institutional child sexual abuse. They are also offset by an avoidance of damage to organisational reputation for the participating NGI. It is worth noting that over 400 NGIs have joined the Scheme without additional incentives such as those proposed in this document.

### **Option 3 – A new governance standard that applies only to registered charities named in a claim for redress**

While this option would only extend to registered charities that have a claim against them (and not those *likely* to have a claim against them), similar to option 2, this option would align with the Government's policy objective of revoking a registered charity status where it does not opt-in to the Scheme, with the intent of encouraging the registered charities' participation in the Scheme. The approach does not guarantee that all registered charities with a claim against them will join the Scheme, however it creates an incentive for them to do so that otherwise would not exist.

While the impact on survivors, registered charities and government is similar to that of option 2, this option does not maximize the potential benefits for survivors and is therefore less consistent with the policy intent.

## 5. Who did you consult and how will you consult with them?

The consultation strategy for the new governance standard was developed and implemented consistent with the requirements for changes to governance standards stipulated in the *Australian Charities and Not-for-profits Commission Act 2012*.

The Treasury released a draft governance standard and explanatory statement for public consultation on the Treasury website and received 12 written submissions. In addition, the Treasury also invited key Government and non-government stakeholders to attend two targeted consultation sessions. The following stakeholders engaged in the consultation process:

- Survivor advocate groups;
- Charity sector peak bodies;
- Charity law specialists and academics; and
- Commonwealth Government agencies.

A summary of the feedback from stakeholders is as follows:

- Survivor advocate groups strongly supported a new governance standard consistent with option 2.
- Charity sector peak bodies broadly supported the introduction of a new governance standard. Some indicated they had encouraged their membership to join the Scheme on the basis of the likelihood of a claim being made in the future, and as such were supportive of option 2. However, others expressed concern over the uncertainty introduced by option 2 extending to charities *likely* to be identified in a claim in the future.
- Charity law specialists had mixed responses. Some noted their support for option 2 but considered better guidance was needed to explain which charities would be considered *likely* to be identified in a claim in the future. Some objected to the narrow focus of the proposed governance standard suggesting instead it should have a broader application requiring all charities to take reasonable steps to be accountable for wrongs against vulnerable people for both past and future events. Others echoed concerns about the uncertainty around the application of *likely* to be identified, noting this may impose costs on charities who may be unsure if the new governance standard under option 2 requires them to take reasonable steps to join the Scheme.
- Relevant Australian Government agencies consider option 2 is administrable. It is also consistent with existing ACNC governance standards and best practice corporate governance, which require charities to plan, prepare and govern themselves not simply based on what has happened or is currently happening, but also on what is reasonably foreseeable. The ACNC will develop guidance to clarify the application of *likely* to be identified in a claim to minimise any undue confusion.

## **6. What is the best option from those you have considered?**

Treasury considers option 2 best meets the Government's objective of imposing strong incentives for NGIs to join the Scheme. Treasury's view is that concerns raised by stakeholders regarding uncertainty around which charities may be considered to be *likely* to be identified in a claim can be managed through improved information being provided in explanatory materials, and through ACNC guidance and standard compliance education processes. Such materials could reflect scenarios such as those described below.

Registered entities *likely* to be identified in a claim will include registered entities that were named in the Royal Commission into Institutional Responses to Child Sexual Abuse but have not been identified so far in an application for redress. This could occur because survivors are waiting for institutions to join the Redress Scheme before making an application.

In addition, a registered entity may also be *likely* to be identified as being involved in the abuse of an applicant for redress if it has been notified that a person intends to lodge an application under the Redress Scheme which names the entity as being involved in sexual abuse, or it has been involved in litigation regarding past institutional child sexual abuse.<sup>7</sup>

Whether a registered entity is *likely* to be identified as being involved in the abuse of an applicant for redress will depend on the facts and information available to the entity. In other words, an institution that is not reasonably aware that it may be responsible for past abuse under the Redress Scheme would not be captured.

Relevant Ministers previously supported development of option 2 prior to this RIS being prepared, noting public consultation with the sector was required in order to seek the views of relevant stakeholders. Consultation was undertaken as described above, with stakeholders submitting written submissions and participating in targeted consultation sessions. The feedback received from stakeholders further informed development of the options, and guided the preparation of further advice to Ministers, prior to final decision.

## **7. How will you implement and evaluate your chosen option?**

The ACNC and DSS will work together on the implementation of option 2. DSS will assist the ACNC in its compliance role by properly identifying non-participant registered charities of concern. The ACNC will engage with DSS in the course of any investigation into a breach of the new governance standard to determine whether a charity is taking reasonable steps to join the Scheme for its given circumstances.

Once the ACNC has been informed about charities of concern, consistent with their usual compliance processes, the ACNC will work with those charities to ensure they

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<sup>7</sup> Where a registered entity has been ordered by a court to pay compensation or damages for the abuse of a person, the entity, once participating in the Scheme, will not be liable for a redress payment for that person's abuse for which damages have been paid.

understand their obligations under the governance standard, and provide them with the opportunity to meet the requirements of the governance standard before further compliance action is taken.

Treasury and DSS will monitor the number of relevant non-participating registered charities who continue to fail to join the Scheme following implementation of option 2, and whether their charity registration is revoked and they ultimately lose access to charitable concessions.

**Attachment A to the Regulation Impact Statement**

**Estimated administrative costs of joining the Scheme for larger and smaller Non-Government Institutions (NGIs)**

Prepared in consultation with the Department of Social Services

<b>ITEM</b>	<b>Estimated time taken for Larger NGIs (hours)</b>	<b>Cost at hourly rate of \$73.05</b>	<b>Estimated time taken for Smaller NGIs (hours)</b>	<b>Cost at hourly rate of \$73.05</b>
<b><u>FIXED ADMINISTRATIVE COST OF JOINING THE SCHEME</u></b>				
<b>Outreach</b>	<b>6</b>	438.3	<b>6</b>	438.3
Responding to DSS once notified, Intent (decision)	6		6	
<b>On- boarding</b>	<b>74.5</b>	5442.23	<b>36.5</b>	2666.325
Understand NRS, Board meeting	10		5	
Document review, training	45		22.5	
Confirm structure, develop institutional list	12		4	
Participate in financial assessment process, provide financial statements	7.5		5	
<b>Joining</b>	<b>25</b>	1826.25	<b>12.5</b>	913.125
Facilitate agreement to participate, MOU.	25		12.5	
A) Total fixed cost	105.5	\$7,706.78	55	\$4,017.75
<b><u>INCREMENTAL ADMINISTRATIVE COSTS (DEPENDENT ON CLAIMS)</u></b>				
Single claim	15	1095.75	15	1095.75
Claims per year (5 per year for larger NGIs, 3 overall for smaller NGIs)	75	5478.75		469.61
B) Total over seven years	525	\$38,351.25	45	\$3,287.25
<b><u>C) TOTAL OVER SEVEN YEARS (fixed plus incremental costs, A+B=C)</u></b>	<b>630.5</b>	<b>\$46,058.03</b>	<b>100</b>	<b>\$7,305.00</b>
<b>Annualised over seven years</b>		<b>\$6,579.72</b>		<b>\$1,043.5</b>



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