

SUBMISSION

National Redress Scheme

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To: Joint Select Committee on Implementation of the National Redress Scheme
From: Professor Kathleen Daly and Research Fellow Juliet Davis, Griffith University,
[REDACTED]

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Re: Second Interim Report of the Joint Select Committee

via the Joint Select Committee email address: redress@aph.gov.au

1. Summary

Daly is Director, and Davis is Research Fellow of the International Redress Project, funded by the ARC (2017-2021). Daly is a member of the Commonwealth Independent Advisory Council on Redress. A leading authority in the field, she authored the prize-winning book, *Redress for Institutional Abuse of Children* (2014), which analysed 19 case studies of responses to institutional abuse and redress schemes in Australia and Canada.

Our submission addresses four of the Committee's priority focus areas by:

- drawing on our knowledge of Scotland's Advance Payment Scheme (APS) to make recommendations on early payments in the National Redress Scheme (NRS);
- expanding our previous recommendations for countering lawyer misconduct in the NRS;
- re-emphasising points made in past submissions on the assessment framework matrix, indexation, and funder of last resort provisions.

2. Early payments to priority claimants

The Committee seeks submissions on the appropriateness of early payments to NRS priority claimants. Scotland's APS has been given as an example of early payments for high priority survivors. We discussed the APS with the Scottish Government official who led its development, and share their insights in our submission.

We recognise that the proposed early payments are likely to elicit considerable discussion and there may be several ways to approach these matters. Our submission examines what might be considered 'sticky' policy questions to guide the Committee in its deliberations.

We consider (1) the rationale for early payments to priority claimants (2) key elements of Scotland's APS and (3) how early payments could be part of the NRS.

Rationale for early payments to priority claimants

The NRS, claimants, and the public need to understand the purpose of early payments. What are they intended to achieve? In our view, receiving at least a partial payment would help to give elderly or terminally ill claimants some sense of justice before they die or lose their mental capacity. This process needs to be carried out expeditiously and with little additional burden on survivors. While we see the merit of early payments, they should not slow down

the assessment of priority applications overall. Thus, it may be prudent to impose assessment deadlines.

We envision two groups obtaining early payments: (1) claimants who have already applied to the NRS and whose claims are pending and (2) claimants who are yet to make an application. There will be significant variation within these groups, and of course, we cannot anticipate claimants' individual circumstances. But we have aimed this submission with the first group in mind.

The early payment should build on the NRS priority process, which attempts to respond to applications of elderly or terminally ill claimants within a shorter timeframe. However, core elements of the priority process need to be strengthened and made clear. What constitutes a priority application is not defined by the NRS, and there are no public data on the number of applications and outcomes of priority claimants. The NRS could not provide us the data, when we sought it. *The NRS should be called upon to produce all the relevant data required to fashion evidence-based recommendations/policy on early payments.*

With the inability of the NRS to define key terms or provide data, we have relied on knowmore. knowmore gives a claimant priority status when 'they are of advanced age, and/or have identified immediate and serious health concerns such as a diagnosis of terminal cancer or other life-threatening illnesses'.¹ Between 1 July 2018 and 30 September 2020, knowmore allocated 23 percent (about 1,640) of its 7,131 clients to priority status (knowmore, 2020).

Key elements of Scotland's APS

Scotland's legislated redress scheme is expected to begin in 2021. It is intended to be a share model between the Scottish Government and non-government organisations. In anticipation of this, Scotland's APS opened in April 2019. Scottish Government data show that in its first year, 417 payments were made (no figure is given for the number of applications). The timeframe from an application's receipt to payment is 32 working days (22 days for approval, 10 days for payment).

The payment is a flat amount of £10,000 (AU\$18,300). It will be deducted from future redress payments and will not be indexed. All advance payments are funded by the Scottish Government.

To be eligible, a claimant must satisfy three elements:

- (1) they were in care as a child in Scotland,
- (2) they experienced abuse in care in Scotland before December 2004, and
- (3a) have a terminal illness *or* (3b) are 68 or over (initially 70 years, but lowered in December 2019).

For each element, a claimant provides:

- (1) supporting documents to show they were in care in Scotland, e.g., formal documents (such as care records and education and social work files), letters sent to the claimant while in care, and photographs taken while in care.
- (2) a declaration that they were abused before December 2004 as a child in care in Scotland (no requirement to describe the abuse or provide evidence of it).

¹ We do not know how the definition used by knowmore and the NRS differ.

(3a) details on their healthcare professional, who will be contacted (with the claimant's consent) to confirm their condition; *or* (3b) proof of birth date.

The Scottish Government official we spoke to relayed the following about what was learned in implementing the APS:

- During its first year, survivors highly praised their treatment by APS staff.
- About 8% of applications were rejected on the basis of scheme criteria. No applications were rejected on the basis of evidence because APS staff take a flexible approach to what is considered supporting documentation. Staff then verify the document's authenticity with the institution that provided it to the claimant.
- The criterion 'terminal illness' was superior to 'serious illness' because it places decision-making in the hands of medical practitioners, rather than assessors without medical training. However, defining a 'terminal illness' can be difficult. The decision was taken by the APS to use a robust definition of terminal illness already in use by the Government's social services system and in consultation with doctors' unions.

The learnings from Scotland have been structured into our submission.

Proposed early payment for the NRS

On careful reflection, we make two sets of recommendations: one on payment structure and eligibility, and the second on funding the early payment.

Payment structure and eligibility

Recommendation 1: An early payment should be a flat payment.

Recommendation 2: We do not have a firm view on the payment amount: it can be set any number of ways. One is to examine the distribution of payments already made by the NRS to see what percent fell at or below a certain amount. For example, data² provided to this Committee on notice, 7 Feb 2020, shows:

- 19 rec'd \$10,000 or less (1.7%)
- 24 rec'd \$15,000 or less (2.1%)
- 45 rec'd \$20,000 or less (3.9%)
- 64 rec'd \$25,000 or less (5.6%)

Based on this information, we may say, for example, that a flat payment of \$20,000 is reasonable because to date, 4% of claims have been paid \$20,000 or less. By pegging an early payment amount to what has already been paid to claimants, we create a good nexus between

² In calculating the percents, we interpreted 'less than 10' as 5. The total N of payments counted is 1,149. The DSS needs to run updated distributions on the latest set of payments to determine accurate information. They need to show actual N and not 'less than 10'. To provide evidence to inform the Committee, DSS needs to do a careful analysis of the number of applications already determined to be priority (and by what definition), how long they have been in the application process, and how long they take to assess, as compared to those in the non-priority group. They may not have detailed data, but presumably there is aspirational data on speed of processing for priority cases.

a chosen amount for the early payment and NRS outcomes. This is preferable to picking an amount out of the air without any nexus.

Another way is to determine what a reasonable amount would be to cover living expenses for a set length of time. Whatever the amount decided, it should have face validity as reasonable and meaningful as an early (or partial) payment.

Recommendation 3: A claimant should be eligible for an early payment if:

- they experienced child sexual abuse before 1 July 2018,
- they are an Australian citizen or permanent resident,
- they are aged over 18 or will turn 18 before the end of the scheme,
- they meet a specific age or have a terminal illness, and
- their claims relates to an institution that has joined, *or has indicated its intention to join*, the NRS.

Dot points 1 to 3 are current NRS eligibility criteria; dot points 4 and 5 (age or illness, and the relevant institution's status within the NRS) are new.

For age, this should be the same as that for priority claimants, with a lower age available for Aboriginal and Torres Strait Islander claimants.

For eligibility on health grounds, this requires a terminal illness, as diagnosed by medical professionals using a recognised medical definition.

For institution status, it should be extended to any institution that has *indicated its intention to join the scheme*. A look at the NRS website shows that this would add 164 institutions.

Recommendation 4: The NRS should take a pragmatic approach to evidential requirements. Survivors should be able to prove institutional child sexual abuse by a declaration and some form of supporting documentation. They should not be required to describe or provide evidence of the abuse. We know that this evidential requirement is lower than that used by the NRS. However, it has proved to be successful in Scotland.

The NRS is unique in the world of government redress because it includes care leavers and non-care leavers. Thus, the NRS needs to be flexible in allowable documentation that can show connection with an institution, e.g., care records, school attendance records, parish records, membership records, Royal Commission private sessions testimony, or photographs.

Claimants seeking an early payment on health grounds should be asked to provide contact details of a healthcare worker who can confirm their diagnosis. This avoids the need for claimants to provide medical records and keeps medical decisions in the hands of medical experts.

Payment funding

Consideration must be given to the different circumstances of applicants (those who have already applied and those who are yet to apply). The following recommendations reflect our view that for early payments the NRS should move away from the 'responsible entity pays' principle. Early payments should be paid by the government of the state or territory where the applicant claims the abuse took place.

Recommendation 5: If an applicant only seeks an early payment (and does not submit an application for individual assessment), the government should seek a *voluntary* contribution from the institution in which the abuse was claimed to have occurred.

Recommendation 6: If an applicant receives an early payment and goes on to have their claim individually assessed, the responsible organisation (if not a state or territory government) should pay the claim and repay the relevant state and territory government the early payment amount.

Recommendation 7: If there is a short-fall between the individually-assessed claim and the early payment, it should be covered by the state or territory government where the abuse took place. It should not be sought from the claimant.

The intent of these recommendations is two-fold: to bypass the need for the NRS to conduct negotiations with non-government institutions and to accelerate implementation of the early payment process. We recognise that the introduction of an early payment is a major design change that is likely to require a unanimous vote by the Ministers' Redress Scheme Governance Board. However, it is not likely to increase parties' costs significantly.

Recommendation 8: If a claimant receives an early payment and goes on to apply for an individually-assessed claim, which is not validated, the early payment amount should not be clawed-back from the claimant unless there is clear evidence that the claim is false.

Scheme integrity is essential and needs to be addressed squarely. On this, we make three points. First, there is a low likelihood of false claims. We say this because no such problems have emerged from Scotland's APS. Second, our proposed eligibility and documentation requirements will likely deter ineligible people. Third, as an added safeguard, the application form could include a statement confirming that the applicant is eligible and the supporting documentation is genuine. This would allow the overturning of any application later found to be false.

Implementation

Recommendation 9: A dedicated early payment team should be set up to handle early payment queries and claims. For those who have already applied, the team should go through priority claims to determine eligibility for an early payment and make an offer. For those who have not yet applied, a new form should be created.

3. Legal advice and private law firms

In our 2018 submission to the former Joint Select Committee (*Submission 49.1*), we called for increased oversight and a complaints mechanism for lawyers and ‘form fillers’ working in redress. We gave examples of lawyer misconduct in Ireland’s Residential Institutions Redress Board (*RIRB*) and Canada’s Indian Residential School Independent Assessment Process (*IRS -IAP*) and anticipated similar problems occurring in the NRS.

Since our submission, legal misconduct in the NRS and the exploitation of survivors have been the subject of media reports (see Story Carter, 2020) and submissions to this Committee by survivors, service providers, and advocates. Such practices include: an individual charging claimants a ‘success fee’ after offering to assist them with their claim; a private law firm charging contingency fees based on the quantum of redress payment; and private firms charging excessive fees, giving poor quality service, and breaching client confidentiality.

We propose three activities to counter such practices:

- closing the information gap on obtaining legal advice,
- clarifying expectations for practice, and
- centralising the response to legal misconduct in the NRS.

Closing the information gap on obtaining legal advice

There is an information gap when it comes to obtaining legal assistance. The NRS needs to take active steps to reduce opportunities for lawyers to take advantage of claimants. This can be done by:

- increasing knowmore’s visibility and accessibility, and
- educating potential claimants about hiring and working with lawyers.

Recommendation 10: knowmore’s free legal services need to be publicised widely by the NRS. knowmore needs to be well funded to handle the volume of requests.

Many survivors are not aware that knowmore provides free and independent legal services to NRS claimants. Currently, the NRS website fails to adequately mention knowmore and its services. knowmore is not mentioned at all in the pages ‘Thinking about applying’ or ‘Start or continue an application’ even though these are most likely to be read by potential applicants. The ‘Support Services’ page does not refer to knowmore by name, but instead requires the user to click on another link titled ‘Independent Legal Support’ before information about knowmore is displayed. Clearly this needs to be rectified, with clear information made readily available to claimants. In addition, all NRS material to claimants should mention knowmore.

Recommendation 11: A fact sheet should be produced on what claimants should look for when hiring a lawyer (e.g. *Fact Sheet 15: Hiring a lawyer* by the NSW Office of the Legal Commissioner and *Working with a lawyer* by the Indian Residential Schools Adjudication Secretariat). The fact sheet should give information on how to complain about legal services. The fact sheet should be prominently displayed on the NRS website and hyperlinked to the application form. Lawyers should be required to provide it to those seeking legal advice.

Clarifying expectations for legal practice

Recommendation 12: The NRS should publish guidelines for expected legal practice in the NRS.

As we outlined in *Submission 49.1*, the Chief Adjudicator of the Indian Residential Schools Independent Assessment Process published the *Expectations of Legal Practice in the IAP* in 2012 in response to poor standards of legal service and the exploitation of survivors by their legal counsel (Ish, 2012).

Here we quote directly from some examples relevant to the NRS:

- Lawyers must restrict their [redress scheme] practice to the number of cases they can competently and responsibly take on at any one time.
- Lawyers should not initiate contact with individual survivors to solicit them as clients or inquire about whether they were sexually assaulted.
- Upon initial contact with the claimant, lawyers must ensure that advertising is respectful, and is not false or misleading; and unconscionable or exploitative means are not used in offering legal services to vulnerable persons, or persons who have suffered a traumatic experience and may not yet have had a chance to recover.
- Lawyers must ensure that all fees and disbursements are clearly communicated to the claimant in a way that is understandable.
- Lawyers should routinely inform clients, consult with them, obtain instructions, and give them as much control as possible on the direction of their case. When working with claimants, lawyers should: explain the process to the claimant in a way that is understandable; ... provide realistic expectations of the length of time required to resolve the claim; avoid unnecessary delay, particularly for ill or aging claimants; recognize claimants' special communication needs, including language barriers, cultural expectations, and limited access to telephone and internet services' (Indian Residential Schools Adjudication Secretariat, accessed 20 October 2020).

These standards would be one task, among others, that form part of recommendation 13.

Centralising the response to legal misconduct in the NRS

Recommendation 13: A national regulatory framework must be created to deter illegal activity and breaches of legal misconduct with respect to the NRS. A central deliberative body should be established to capture complaints and swiftly resolve them.

Currently, the regulation of legal practice sits at the state and territory level and is highly fragmented (see *Submission 49.1* for an example from Queensland). It involves multiple professional and statutory bodies and is not consumer-focused. Instead, it aims to identify wrongful conduct by individual lawyers.

We believe that the NRS should expect good lawyering and regulate accordingly. Our proposed regulatory body would have a different role than that which currently exists. It would set expectations and regulate to *improve legal practice*, rather than identify and discipline wrong-doers. In developing practice standards, the regulatory body should build upon current complaints received about poor legal services in the NRS.

4. Operation of the National Redress Scheme

Daly's *Submission 49* to the former Joint Select Committee drew from research on redress schemes to critique particular elements of the NRS. Here we reiterate its recommendations with respect to the assessment framework matrix and the indexation of past payments.

Assessment Framework Matrix

Recommendation 14: The NRS should revise the assessment framework to make it more sensitive, appropriate, and relevant to the range of abuses experienced by a diverse group of survivors.

The NRS assessment framework is not in line with other schemes in Australia or other countries with respect to publicly available information on individualised assessments of abuse. It restricts decision-makers to three types of sexual abuse, from which all subsequent determinations flow. This does not accord with the Royal Commission's conclusion that 'many complex and interconnected factors' affect victims, including how an institution responded.

The assessment framework poorly communicates to survivors how the monetary payment will 'provide a tangible recognition of the seriousness of the hurt and injury suffered by a survivor' (Royal Commission redress recommendation 15).

We support the former Joint Select Committee's recommendations that:

- 'Commonwealth, state and territory governments work together to develop and implement a new Assessment Framework which more closely reflects the assessment matrix recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse and which acknowledges that the type or severity of abuse does not determine the impact of sexual abuse for the individual' (recommendation 9).
- '[A]pplicants who were assessed using the current framework are re-assessed using the new framework [and when] re-determining the redress payment under the new framework, offers of redress must not be lower than the original offer' (recommendation 10).

Indexation

Recommendation 15: Indexation should be removed as a matter of urgency.

The indexation of past payments has been consistently criticised by advocates and survivor support services (see for example Victorian Aboriginal Child Care Agency, 2018, Care Leavers Australasia Network, Submission 17, p. 3.) It has also been a concern of members of parliament (see Macklin, Second Reading Speech, 24 May 2018) and both the former and current Joint Select Committees. The former Joint Select Committee recommended that the practice of indexing past payments be re-visited (recommendation 5). This Committee recommended in its first interim report (2020) that indexation of past payments should be removed, and as an interim measure, that indexation cease once an application is submitted (recommendation 5).

We believe that action needs to be taken to implement final and meaningful change, rather than interim measures.

5. Funder of last resort

Recommendation 16: The scope of the funder of last resort provisions should be expanded to cover all claims against defunct institutions, regardless of whether the government was responsible for the abuse.

We support the expanded scope of the funder of last resort provisions recommended by the Committee in its first interim report (2020, recommendation 12) and by the former Joint Select Committee (2019, recommendation 4).

The narrow scope of the current funder of last resort provisions has compromised equitable access to the NRS for those claimants abused in a defunct institution. The Committee's recommendation is a welcome return to the Royal Commission's view of the broader role of government in providing redress beyond a 'responsible entity pays' principle.

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