

SUBMISSION

Oversight of Legal Practitioners and Form Fillers

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To: Chair and members of the Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse – Oversight of Redress Related Recommendations

From: Professor Kathleen Daly and Research Fellow Juliet Davis, Griffith University,

Date: 30 November 2018

Re: Oversight of Legal Practitioners and Form Fillers
(Addendum to K. Daly Submission, 21 November 2018)

via Committee Secretariat email address: institutionalresponsestoabuse.sen@aph.gov.au

Summary

Although most legal practitioners will assist institutional abuse survivors in a highly professional and ethical manner, some will not. We anticipate problems of legal misconduct in the NRS and civil litigation associated with institutional abuse of children, drawing from what occurred in two redress schemes: Ireland's Residential Institutions Redress Board (*RIRB*) and Canada's Indian Residential School Independent Assessment Process (*IRS-IAP*). Compared to all other schemes, these two have the highest maxima. They also required lawyers to assist survivors in completing forms and gathering required documents.

We call upon the committee to consult with knowmore and other relevant legal practitioners, along with survivor groups, to shape an appropriate framework and complaints mechanism for legal practitioners and 'form fillers'. (The latter are in a grey area of oversight because they are not legal practitioners and not employed by a law practice.) This submission is intended to provide relevant material for creating such a framework. We are concerned with appropriate oversight of legal practices for redress processes generally, that is, both the NRS and civil litigation in respect of institutional abuse of children. However, we recognise that some activities are more appropriately centred on the NRS.

Oversight of legal practitioners and form fillers

In the *Redress and Civil Litigation Report*, the Royal Commission (2015) referred to the 'extensive involvement' of lawyers in the *RIRB* and noted that a 'number of participants' in the Commission's consultations opposed the 'legalism' of the scheme (Appendix N: 580). The Royal Commission found that it did not 'have sufficient grounds to recommend capped fees or to recommend that private sector lawyers be included or excluded from the scheme... If survivors wish to retain private sector lawyers, this should be their decision and it should occur at their own expense' (Royal Commission 2015: 362). It preferred that the scheme fund 'advocacy and support services' to assist survivors in making their claims for redress (p. 362).

However, as witnesses in previous hearings of the committee have said, the application form is lengthy and may pose problems for applicants, some of whom may be particularly vulnerable due to health or educational difficulties. These procedural problems may be

greater for those with criminal histories, who are currently required to undergo a ‘special assessment process’ to be regarded as eligible.

Applicants may wish to access legal assistance at several points in the redress process: when deciding whether they should apply to the NRS (rather than pursuing civil litigation), and when taking part in the NRS. While free legal assistance is available through knowmore, some applicants may wish to seek private legal assistance for several reasons, among them: a desire to retain a legal advisor who is not associated with the NRS, and a desire that their application is not delayed because of knowmore’s heavy workload.

The entry of private lawyers into redress processes for institutional abuse (both the NRS and civil litigation) raises the potential for legal misconduct and exploitation of vulnerable survivors, as occurred in the *RIRB* and *IRS-IAP*. The complexity of the application form may also lead to the rise of a second group of people who require oversight and regulation: ‘form fillers’, i.e., non-lawyers who assist the claimant in completing the application form. Form fillers took part in the *IRS-IAP*, and some were found to have acted inappropriately (*Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 [41]).¹

The regulation of the legal profession in Australia is conducted at the state/territory level, and as a consequence, it is highly fragmented. Currently, there is no entity that we are aware of that has oversight of the legal profession’s conduct nationally. This means that regulators dealing with similar complaints against legal practitioners may be working in silos, and the widespread nature of these harmful practices may be missed as a result. This may delay actions taken by the scheme Operator or regulators of the legal profession to stop unprofessional conduct.

Importantly, legislation governing the legal profession is unlikely to cover the practices of form fillers. The NRS application form anticipates that claimants may receive help in completing their application form (NRS Application Form, Question 59). Some claimants may be able to receive free assistance from family members or community groups, and others may be assisted by legal practitioners. However, some claimants may contract non-legal form fillers to help them complete their applications. When form fillers are neither legal practitioners nor employed by a law practice, they fall into a grey area. It is unclear how a claimant can be protected from, or hope to resolve, problems arising from a contract with a form filler, such as when a claimant is charged an unfair amount, is required to pay contingency fees on their redress payment, or has their application completed in a sloppy or dishonest manner. As such, it is necessary that protections are put in place to ensure that form fillers are adequately regulated and that claimants are aware of the complaint mechanisms available.

The *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (NRS Act), s. 18 limits applicants to a single application. This restriction may pose problems when the outcome of an applicant’s claim has been affected by the unprofessional or dishonest conduct of their legal advisor or a form filler.

¹ Rather than charging a flat fee for their services, some form fillers charged claimants a contingency fee, that is, a percentage of their redress settlement. Form filler contingency fees were later declared to be void on a number of grounds, including public interest (*Fontaine et al. v. Canada (Attorney General) et al.* 2014 MBQB 113). A form filling organisation was also found to have completed claimants’ forms inaccurately in order to increase the size of their claims, which were then signed off by an associated law firm (*Fontaine v. Canada (Attorney General)*, 2012 BCSC 839).

Recommendation 1: The Operator should publish a document which outlines the appropriate practice standards that it expects from the legal profession with respect to the NRS and redress processes more generally. Law societies in all Australian states and territories should advertise and reinforce these norms among their members. An example is *Expectations of legal practice in the IAP (Independent Assessment Process)* by the Indian Residential Schools Adjudication Secretariat.

Recommendation 2: The Operator should provide a notice to potential applicants that advises them about things to think about when hiring a lawyer. Examples are *Fact Sheet 15: Hiring a lawyer* by the Office of the Legal Commissioner (NSW) and *Working with a lawyer* by the Indian Residential Schools Adjudication Secretariat. This notice should also advise applicants about how to bring complaints against legal practitioners as well as form fillers.

Recommendation 3: The Operator should establish a national complaints mechanism through which applicants can lodge a complaint about ‘unsatisfactory professional conduct’ or ‘professional misconduct’ by a lawyer or form filler. These complaints could relate to either the NRS or civil litigation claims in respect of institutional abuse.

Recommendation 4: If a legal advisor or form filler is found to have engaged in ‘unsatisfactory professional conduct’ or ‘professional misconduct’, the applicant should be permitted to re-file their application as an exception to s.18 NRS Act.

Recommendation 5: The Operator should harvest material from state and territory ‘discipline registers’ with the aim of consolidating a list of disciplinary actions taken against lawyers across Australia. This consolidated list should only contain the details of lawyers who were found to have engaged in ‘professional misconduct’ in their dealings with applicants to the NRS.² This consolidated list should be posted on the NRS website and updated on a rolling basis.

Appendix 1 provides information on current professional standards and complaint mechanisms under the NRS, regulation of the legal profession in Australia, and potential handling of form fillers. Appendix 2 gives examples of lessons learned from Ireland’s *RIRB* and Canada’s *IRS-IAP*.

References (includes those in Appendices 1 and 2)

Farrow, Trevor. (2014). Residential schools litigation and the legal profession. *University of Toronto Law Journal*, 64(4), 596-619.

Fontaine v. Canada (Attorney General), 2012 BCSC 839.

Fontaine et al. v. Canada (Attorney General) et al. 2014 MBQB 113.

Fontaine v. Canada (Attorney General) (23 June 2014), L051875 (BCSC).

Galloway, Gloria (2017). Lawyers accused of ‘greed’ in taking fees from residential-school survivors. *The Globe and Mail*, 23 October 2017.

² It would be optimal for the list to also contain details of lawyers engaging in ‘professional misconduct’ in the litigation of institutional abuse; however, we recognise that it may be difficult for the Operator to accurately identify and harvest these cases from the state/territory discipline registers.

Indian Residential Schools Adjudication Secretariat. *Expectations of legal practice in the IAP (Independent Assessment Process)*. Available at <<http://www.iap-pei.ca/expectations-eng.php>> (accessed 26 November 2018).

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Law Council of Australia. Regulation of the profession and ethics. Available at <<https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>> (accessed 22 November 2018).

Law Society of Ireland. Check a solicitor's record. Available at <https://www.lawsociety.ie/Public/disciplinarysearch/?filters=s_Buggy> (accessed 21 November 2018).

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Legal Services Commission. Queensland Civil and Administrative Tribunal. Available at <<https://www.lsc.qld.gov.au/discipline/the-queensland-disciplinary-bodies/qcat>> (accessed 23 November 2018).

Legal Services Commission. Our role. Available at <<https://www.lsc.qld.gov.au/about-us/our-role>> (accessed 23 November 2018).

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McDonald, Dearbhail (2006). Solicitor fined over double bill. *Irish Independent*, 7 September 2006. National Redress Scheme. Contact us. Available at <<https://www.nationalredress.gov.au/about/contact-us>> (accessed 27 November 2018).

Office of the Legal Commissioner. *Fact sheet 15: Hiring a lawyer*. Available at <<http://www.olsc.nsw.gov.au/Documents/Fact%20Sheet%2015%20Hiring%20Lawyer%20July2015%20AC.pdf>> (accessed 26 November 2018).

Residential Institutions Redress Board. (18 October 2005). Letter issued to the Law Society of Ireland. Available at <http://www.rirb.ie/updates_article.asp?NID=74> (accessed 21 November 2018).

Royal Commission into Institutional Responses to Child Sexual Abuse (2015). *Redress and Civil Litigation Report*. Sydney: Commonwealth of Australia.

Appendix 1

1. Current professional standards and complaint mechanisms under the NRS

Some professional standards and complaint mechanisms are contained in the NRS; however, none directly relate to the provision of legal services to applicants under the scheme.

Professional standards

Professional standards have been established with respect to the provision of counselling and psychological care (CPC) services by participating jurisdictions. CPC services provided by participating jurisdictions under the scheme must comply with the *National Service Standards for the Provision of State and/or Territory Based Counselling and Psychological Care*, outlined in Schedule C of the Intergovernmental Agreement on the National Redress Scheme for Institutional Child Sexual Abuse (COAG 2018).

Complaint mechanisms

General complaints about the scheme can be made to DSS. A written response to the complainant will be issued within 28 days. If the complainant is not satisfied with the response, they can complain to the Commonwealth Ombudsman (National Redress Scheme, accessed 27 November 2018).

Section 16 of the *Direct Personal Response Framework 2018* requires that participating institutions have a mechanism in place for considering and responding to complaints about direct personal responses.

2. Regulation of the Legal Profession in Australia

National regulation

Since 2011, there has been a set of what could be considered national conduct rules for solicitors (the Australian Solicitors' Conduct Rules). However, these are not administered by a national body and have been adopted only in Queensland, Victoria, New South Wales, South Australia, and the ACT (Law Council of Australia, accessed 22 November 2018).

State/Territory regulation

The majority of rules governing solicitors' legal practice have been developed at the state/territory level. In addition, the regulation of legal practitioners occurs at a state/territory level, conducted by the following bodies:

- ACT Law Society
- Office of the Legal Services Commissioner (NSW)
- Law Society NT
- Legal Services Commission (Qld)
- Legal Profession Conduct Commission (South Australia)
- Legal Profession Board of Tasmania
- Victorian Legal Services Board & Commissioner
- Legal Practice Board of Western Australia

Each state and territory regulator has a 'discipline register' that records the name and details of legal professionals who have been found guilty of professional misconduct.

Queensland example

The *Legal Professional Act 2007* (Qld) governs the performance of legal practice in Queensland. Under the Act, the Legal Services Commissioner is authorised to ‘receive and deal with complaints about lawyers, law practice employees and unlawful operators’ (Legal Services Commission, Complaints, accessed 29 November 2018). The Commission can refer and oversee investigations to the Queensland Law Society and Bar Association of Queensland. It can also initiate and conduct an investigation on its own initiative.

Once the investigation is completed, the Commissioner may begin disciplinary proceedings in either the Legal Practice Committee (LPC) or the Queensland Civil and Administrative Tribunal (QCAT) (Legal Services Commission, Our role, accessed 23 November 2018). The LPC can impose penalties on lawyers for ‘unsatisfactory professional conduct’ while QCAT can find lawyers guilty of both ‘unsatisfactory professional conduct’ and ‘professional misconduct’ (which is a more serious finding) (Legal Services Commission, Legal Practice Committee, accessed 23 November 2018). Penalties may include: striking the lawyer’s name from the role, suspending the lawyer from practice, a fine of up to \$100,000, and a public or private reprimand (Legal Services Commission, Queensland Civil and Administrative Tribunal, accessed 23 November 2018).

The Legal Services Commission is required under the *Legal Profession Act 2007* to keep a ‘discipline register’ of every court or disciplinary body decision in which a lawyer is found guilty of professional misconduct (Legal Service Commission, The Queensland discipline register, accessed 23 November 2018).

3. Form fillers

Form fillers who are employees of a law practice will generally be governed by the relevant professional legislation (e.g. *Legal Professional Act 2007* (Qld)). However, if they are not employees of a firm, and not claiming to be a lawyer or conducting legal work, they will not be covered by the Act.

Their services may be covered by the *Australian Consumer Law*, which does not allow misleading claims or unfair terms in contracts for services. Complaints can be made nationally to the Australian Competition and Consumer Commission; however, this body does not deal with individual complaints. This is left up to state and territory consumer protection agencies such as the Office of Fair Trading Queensland.

The same problems regarding the fragmented regulation of the legal profession also apply to responses to unscrupulous form fillers. Thus, we recommend that the NRS publish details about the complaint mechanisms available to NRS applicants for form fillers and lawyers.

Questions 59 and 60 of the NRS application form ask the applicant to provide details about any support person who provided them with assistance in completing their application. Although privacy is of paramount concern, it may be possible for the NRS to use this information in a way that is beneficial to the applicant if their form filler is found to be unscrupulous or predatory.

Appendix 2. Lessons from redress schemes with a substantial level of legal involvement

The Irish *RIRB* and Canadian *IRS-IAP*

- provide examples of the types of misconduct by legal practitioners in redress schemes and
- demonstrate steps that have been taken by the scheme operators to discourage inappropriate behaviours.

***RIRB* (Ireland)**

Lawyer misconduct

There was public outcry in Ireland in October 2005 when complaints emerged that survivors had been overcharged for legal services in relation to the *RIRB* (McDonald, *Irish Independent* 2006).

Twelve firms were referred to the Solicitors Disciplinary Tribunal, a legal body that is independent of the Law Society and appointed by the High Court (McDonald, *Irish Independent* 2006). As of 7 September 2006, the Tribunal was investigating 22 complaints regarding overcharging (McDonald, *Irish Independent* 2006). However, a search of the Law Society of Ireland's discipline registry from 2005-2018 located only one solicitor, Michael Buggy, whose disciplinary record referred to misconduct with respect to the *RIRB*. On 13 June 2006, the Tribunal found that he had:

- Charged his client for legal services, but could not show any evidence of such work.
- Settled his client's costs with the *RIRB* without informing his client or obtaining his instructions.
- Deducted his fees from his client's award without his client's written authority.
- Failed to provide his client with a bill of costs.

Buggy was censured and required to pay a fine of €5,000 (Law Society of Ireland, accessed 21 November 2018).

Scheme actions to discourage misconduct

On 18 October 2005, the *RIRB* publicly issued a letter to the Law Society of Ireland in which it rebuked the Law Society for not taking a proactive approach to dealing with complaints against solicitors, such as writing a general warning about the inappropriateness of certain acts (*RIRB*, accessed 21 November 2018).

***IRS-IAP* (Canada)**

Lawyer misconduct

The *IAP* involved many instances of misconduct by legal professionals. According to Farrow (2014: 609-10), they included:

IAP claimants who were caught up in schemes which their counsel purported to provide them with loans, often with criminally high interest rates, that were never received by the borrowing clients. Other cases involved questionable, insensitive, and at times misleading approaches to client solicitation by plaintiff-side counsel; inappropriate disclosure of confidential claimant information to consulting non-lawyers; exaggerated promises of success with respect to certain claims; failure

adequately to meet with and prepare clients; conduct amounting to the unauthorized practice of law; unacceptable termination letters and arrangements that did not adequately protect the interests of former clients; conflicts of interest; a disregard for important terms of the alternative dispute-resolution settlement process; and incorrect, misleading, and falsely signed and completed IAP forms, which – at least in one case – were completed by a lawyer who was ‘actively engaged in manipulating application forms for the IAP.’ Further, in one case, a firm had failed to file 1,159 completed IAP applications, notwithstanding pending and past filing deadlines, as well as unfiled claims on behalf of deceased victims.

Farrow concluded that ‘there [were] enough examples of complaints to warrant significant concern on the part of anyone who cares about how these cases proceed...’ (Farrow 2014: 611).

In one egregious example, the British Columbia Supreme Court terminated the Blott & Company law firm’s involvement in the IAP and arranged for the transfer of at least 1,500 claimants to other lawyers due to gross misconduct (*Fontaine v. Canada (Attorney General)*, 2012 BCSC 839).

Doug Racine of the Aboriginal Law Group wrote to the Law Society of Saskatchewan on 1 September 2017 expressing his concerns about ‘unethical practices or greed’ of some lawyers dealing with claims under the IAP (Galloway, *The Globe and Mail* 2017). Racine claimed that the worst instances of lawyers unfairly taking money from survivors’ IAP claims occurred between 2007 and 2012, when adjudicators started to crack down on excess fees. He claimed that ‘lawyers regularly asked for and received [an] additional 15 per cent’ on top of the 15 per cent paid by the government, which would be deducted from the client’s compensation payment. He said that this practice was ‘particularly commonplace’ in Manitoba, Alberta, and Saskatchewan. Drawing on his experience representing scheme applicants, he believed that ‘the 15 per cent paid by the government was more than adequate compensation and that taking the extra 15 per cent was “nothing short of gouging”’ (Galloway, *The Globe and Mail* 2017).

Scheme actions to discourage misconduct

On 30 August 2012, the Chief Adjudicator published the *Expectations of Legal Practice in the IAP* in response to ‘situations where the level of service leaves something to be desired, and in a small number of well-publicized cases, vulnerable claimants have been exploited by their legal counsel, the very people they are most entitled to rely upon to act in their best interests’. These Expectations set out ‘appropriate norms of practice’ and supplemented Law Society rules, Canadian Bar Association guidelines, and IAP rules and guidelines. They were revised in October 2013.

Some Expectations that may be relevant to the Australian national redress scheme include:

- ‘Lawyers must restrict their IAP 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’
- ‘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 26 November 2018).

Complaints mechanism

In 2014, the IRS-IAP appointed an Independent Special Advisor (ISA) to the Court Monitor to review claimants’ complaints about their lawyer or representatives. The complaints process was set out in the *Administrative Protocol for addressing complaints related to the integrity of the Independent Assessment Process (IAP)*, which was in Schedule A of *Fontaine v. Canada (Attorney General)* (23 June 2014), L051875 (BCSC).

The Administrative Protocol recognised that the ‘integrity of the IAP’ could be threatened by fraudulent or exploitative conduct by lawyers or representatives (p. 1-2). Under the Administrative Protocol, anyone is able to make a complaint to the Chief Adjudicator or Court Monitor, who would then relay it to the ISA (p. 2). The ISA would determine how the complaint should be dealt with, including an internal response to the complaint or an external measure such as referral to a law society or ‘law enforcement agency’. The ISA can also ‘recommend that the Court Monitor bring a Request for Direction before the Supervising Courts, seeking a more complete investigation and/or other interim or permanent remedial measures’ (p. 3). The Court Monitor is required to provide quarterly reports to the Court Counsel and the Supervising Judges on complaints and ISA actions (p. 3).