

## SUBMISSION

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: 8 February 2019

Re: Analysis of National Redress Scheme changes to and departures from the Royal Commission’s recommendations and principles of redress

Addendum to K. Daly Submission, 21 November 2018; and K. Daly and J. Davis Submission, 30 November 2018

Via email to Committee Secretariat: [institutionalresponsestoabuse.sen@aph.gov.au](mailto:institutionalresponsestoabuse.sen@aph.gov.au)

### Summary

Our submission analyses 17 key matters of contention in the National Redress Scheme (NRS) and the ways in which they were dealt with in the NRS bill and delegated legislation.

Our findings are:

1. Five matters received significant attention from politicians, survivors, advocates, and commentators (the *headliners*); however, there were 12 others that received less attention but have important implications for survivors.
2. Of 17 matters, 14 saw change, often significant, in the NRS compared to what the Royal Commission (RC) recommended.
3. Change in the NRS can be explained by three pressure points: economics, politics, and operator convenience.
4. Change in the NRS generally did not adhere to the RC’s principles of redress.

This submission draws from a more detailed paper that tracks the evolution of the NRS, from the tabling of the RC’s *Redress and Civil Litigation Report* in September 2015 to December 2018, 6 months after parliament voted on the bill.<sup>1</sup> It considers four questions.

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<sup>1</sup> We extended the review time period by 6 months because (1) delegated legislation tabled in August 2018 was not known to legislators when the NRS bill was passed; and (2) we wanted to analyse the submissions to and hearings held by the Joint Select Committee (JSC) on the relationship of the RC’s recommendations to the NRS bill.

## **Q1: What were matters of contention in Australia's redress scheme?**

*Background.* Many matters of contention were raised by politicians, parliament committees, survivors, survivor advocates, and members of the general public about the Commonwealth Redress Scheme (CRS) and the NRS. We identified 17 key matters by reviewing parliamentary materials<sup>2</sup> and media reports. These matters directly or indirectly reflect the content of 64% of the RC's 75 recommendations. We believe that they cover all the relevant matters.<sup>3</sup>

*Finding 1a.* The 17 matters and relevant RC recommendations are shown in Table 1 (columns 1 and 2). Shown in bold in column 1 are the headliners: matters brought forward by large numbers of people and with considerable media attention. The five headliners were:

- Reduced monetary payment cap (from \$200,000 recommended by the RC to \$150,000 announced by the government on 4 November 2016).
- Reduced counselling and psychological support (from life-time availability recommended by the RC to amounts pegged to type of abuse, ranging from \$5,000 for penetrative abuse, to \$1,250 for exposure abuse).
- Exclusions to eligibility based on applicants' criminal histories (from no mention by the RC to significant exclusions).
- Significant modification of the assessment framework (from a RC-recommended matrix with three areas of consideration, to an NRS framework with a fixed hierarchy of abuse privileging penetrative abuse). Concerns were also raised about the lack of information regarding the assessment framework.
- The ongoing limitation of eligible abuse to sexual abuse only. This has been a significant source of concern, particularly among care leaver advocacy groups.

We would argue that the reduction in the monetary payment cap is less significant than the other headliners (Daly, Submission to JSC, 21 November 2018). The assessment framework, counselling support, and exclusions based on criminal history are strongly out of line with good practice, when compared to other world redress schemes for institutional abuse of children.

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<sup>2</sup> Early reports by scrutiny committees (December 2017 and February 2018), the Senate Community Affairs Legislation Committee (Senate Committee) hearings (February-March 2018) and report (March 2018) on the CRS, the Senate Committee report (June 2018), and submissions to and hearings held by the JSC.

<sup>3</sup> The 17 matters encompass 48 of 75 RC recommendations on redress (directly or indirectly). The reasons that 27 recommendations were not included were as follows: they dealt with matters external to the redress scheme itself (establishing the scheme, conducting outreach, and external sanctions [20 recommendations]); they were about non-controversial definitions (3 recommendations); or they concerned operational requirements for individual assessments (4 recommendations). The specific recommendations not included were as follows: the hypothetical situation in which a single national redress scheme was not announced (recs. 27 and 30); general scheme funding (recs. 34, 35, 38-42); certain eligibility criteria (recs. 44-46); the publicising of the scheme (recs. 49 and 50); the funding and selection of support services (recs. 3, 52, 53); evidential support for applications (recs. 54-57); and the redress scheme's interactions with alleged abusers and the police (recs. 70-75).

*Finding 1b.* Twelve other matters received less attention than the headliners, but are important to survivors. The most striking is the Direct Personal Response (DPR). It was the first of three redress elements discussed in the RC's *Report*, but it is now relegated to third place and largely overlooked. Other important matters that have received less attention include (1) the interrelated matters of one application per applicant, the timeframe for institutions to opt-in, and the reduced coverage afforded by the 'funder of last resort'; and (2) an expansion of parties covered by the deed of release.

## **Q2: Was there change, and to what degree, in the NRS from what the RC had recommended?**

*Finding 2.* Table 1 (columns 3 and 4) shows that for 14 of 17 matters (82%), there was moderate or significant change between what the RC recommended and what is in the NRS.<sup>4</sup>

Of the 14 matters, there was significant change for 8 (57%):

- the reduced provision of counselling and the reduced responsibilities of institutions to engage in a DPR;
- restrictions on who could apply (criminal history exclusions, application from gaol, citizenship and residency requirements, those unable to apply if an institution no longer existed or was insolvent);
- method of calculating the monetary payment (the assessment framework); and
- conditions of the deed of release.

## **Q3: What caused change in the NRS from the RC's recommendations for redress?**

*Background.* Without access to cabinet discussions or relevant information on negotiations among the key parties, we can only infer the causes for the shift from a good practice redress scheme that was recommended by the RC to the NRS.

During parliamentary deliberations on the NRS bill, many legislators said it was 'imperfect', but they would vote to pass it because too much time had already elapsed and survivors were dying. Legislators also knew that the federal/state inter-governmental agreement would make it difficult to amend the bill because it would require recommencing negotiations with the states.

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<sup>4</sup> Our determination of the degree of change (significant or not) is necessarily subjective, and some may dispute our categorisation. For example, the shift from a \$200,000 to \$150,000 maximum payment may be a significant change to many, and certainly it has symbolic significance. We also know that the 2-year opt-in period for institutions, when coupled with the requirement that each survivor could only submit a single application, has had a significant effect on survivors applying to the scheme. Many are awaiting greater clarity before they apply. Thus, if we have erred, it is in a conservative direction.

*Finding 3.* We identified three reasons for change in the NRS from the RC's recommendations: economics, politics, and convenience of the operator. Table 1 (column 5) shows the pressure points for each matter of contention. Of 14 matters with change, 7 (50%) can be attributed to economics; 3 (21.5%) to politics; and 4 (28.5%) to the convenience of the operator.<sup>5</sup>

By *economics*, we mean any monetary costs of the scheme for government and non-government institutions. A Finity Consulting Report (July 2015: 64) estimated that the total cost of the scheme, if governments were funders of last resort would be roughly similar for government (47%) and non-government (53%) institutions. We do not know what role non-government organisations played in negotiating the economic costs for the scheme, but because their contributions were estimated by Finity to be substantial, the economics at play were (and are) not just a matter for governments.

By *politics* we mean any political costs of the scheme to governments (such as loss of votes or public support) caused by 'bad press' or a perceived failure to pass the 'pub test'.<sup>6</sup> There may have been political costs to non-government institutions, but if there were, it was not apparent in remarks made by government officials.

By *operator convenience*, we mean any perceived administrative costs to implementing the scheme.

#### **Q4: Did change in the NRS adhere to the RC's principles for redress?**

*Background.* The RC (2015: 9-10) identified four general principles that should guide the provision of redress: (1) it 'should be survivor-focused'; (2) 'there should be "no wrong door" for survivors [to gain] access to redress'; (3) 'all redress should [have] appropriate regard to what is known about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular, and to the cultural needs of survivors'; and (4) 'all redress should [have] appropriate regard to the needs of particularly vulnerable survivors'.<sup>7</sup>

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<sup>5</sup> Again, our categories may be challenged, particularly for economics. For example, we cannot be sure why the DPR underwent significant change in the NRS: might this have been caused by institutions that did not wish to engage directly with survivors, as much as by economics? Likewise, we cannot be sure why the NRS restricted the age eligibility of applicants: might this have been caused more by politics than by economics?

<sup>6</sup> For instance, if a well-known person who was imprisoned for committing criminal acts, including sexual crime, applied to the scheme; or if Australian non-residents or non-citizens could apply for monetary payments.

<sup>7</sup> The 'no wrong door' principle was difficult to relate to each matter because it called for a flexible approach to assist survivors to understand and access the redress scheme. Thus, we dropped it from the analysis. The item for 'regard to the nature and impact of child sexual abuse' was also difficult to code because some matters may have an indirect relationship, but we coded for those that had a clear direct relationship, based on the research literature.

*Finding 4.* Table 2 lists each matter of contention, and asks whether change in the NRS adhered to three of the RC's principles for redress.<sup>8</sup> Of the 14 matters that saw change, the change:

- *did not adhere to being survivor-focused for 14 (100%) (column 2); rather, the aim was to reduce the economic and political costs to government and non-government institutions, or to increase operator convenience;*
- *did not adhere to having regard to the nature and impact of child sexual abuse for 6 (43%) (column 3); and*
- *did not adhere to having regard to the needs of vulnerable survivors for 9 (64%) (column 4).*

Our analysis of change in the NRS indicates a retreat from the goal of providing justice to survivors in favour of protecting the interests of participating institutions and the scheme operator. Nearly half of the changes are contrary to the RC's findings regarding the nature and impact of child sexual abuse, including the life-long, intermittent, and varied impacts of abuse, as well as links between child sexual abuse and future criminal offending. Additionally, more than half of the changes can be expected to disadvantage vulnerable survivors, including care leavers, those in in prison, Aboriginal and Torres Strait Islanders, non-citizens, children and young people, and the elderly.

## References

Daly, Kathleen. Submission to Joint Select Committee on the Royal Commission into Institutional Responses to Child Sexual Abuse – Oversight of Redress Related Recommendations, 21 November 2018.

Finity Consulting Pty Limited (July 2015). *National Redress Scheme Participant and Cost Estimates*. Sydney.

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

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<sup>8</sup> Here too, our assessment may be challenged because NRS departures from the RC's redress principles may lightly touch upon a number of them. For example, the erosion of the apology element in the DPR may be seen as failing to have regard to the needs of particularly vulnerable survivors (Table 2, column 4) because an 'apology' versus a 'statement of regret' is sensitive to many survivors, including Aboriginal and Torres Strait Islanders. Again, in making these assessments, we have erred in a conservative direction.

**Table 1. Redress scheme provisions: change and degree of change from the RC’s recommendations to the NRS**

<b>Matters of contention (N=17)</b> <b>(1)</b>	<b>The RC’s recommendations</b> <b>(2)</b>	<b>Change from RC recs to NRS?</b> <b>(3)</b>	<b>Type of change</b> <b>(4)</b>	<b>Pressure point for change</b> <b>(5)</b>
<i>Content: What are the elements of redress and amount of monetary payment?</i>				
<b>Monetary payment cap</b>	\$200,000 maximum.	yes	reduced to \$150,000	economics
<b>Counselling and psychological support</b>	Counselling available for the life of the survivor, with no fixed limits. Counselling available to family members.	yes	significant reduction in amount and eligibility	economics
Direct personal response	Three minimum elements: apology, a meeting with a senior institutional representative, a statement as to steps to prevent further abuse.	yes	significant reduction in responsibilities of institutions	economics
<b>Assessment framework</b>	Matrix measuring ‘severity of abuse’ (40 points), ‘impact of abuse’ (40 points), and ‘additional elements’ (20 points).	yes	significant modification	economics
Indexation	Previous monetary payments should be indexed and taken into account.	no	NA	NA
<i>Eligibility: Who is eligible (or not) to apply?</i>				
<b>Criminal history exclusion</b>	RC did not discuss or specify.	yes	significant restriction in eligibility	politics
No application from gaol	RC did not discuss or specify.	yes	significant restriction in eligibility	politics
Citizenship/residency	RC had no citizenship or residency requirements.	yes	significant restriction in eligibility	politics
Age limit at application	RC had no restriction on children applying.	yes	some restriction in eligibility	economics
Funders of last resort	Commonwealth and state/territory governments to be ‘funders of last resort’ to cover any funding shortfall.	yes	significant reduction in government role	economics
<b>Eligible abuse</b>	Limited to sexual abuse.	no	NA	NA

<i>Accessibility: What are the parameters of application and acceptance?</i>				
Single application	RC did not discuss or specify.	yes	some restriction of survivors' strengthening of claims with new information	operations
Acceptance period	One year for survivor to accept (or not) offer of redress.	yes	some reduction to 6 months	operations
Deed of release	Applicant to release the scheme and institution from liability as a condition of receiving monetary payment.	yes	significant expansion of released parties	economics
Timeframe for institutions to opt-in	RC did not discuss or specify. <sup>9</sup>	yes	some expansion of institutions' timing flexibility	operations
Scheme reporting	Annual publication of data about applications made, institutions identified, abuse periods, finalisation of applications, and applications for review.	yes	some reduction in information to be reported by Operator	operations
Lack of external review	No external review.	no	NA	NA

<sup>9</sup> Although the RC did not specify a date by which institutions were required to opt-in, rec. 31 states that 'Whether there is a single national redress scheme or separate state and territory redress schemes, the scheme or schemes should be established and ready to begin inviting and accepting applications from survivors by no later than 1 July 2017'. This may be construed as intending that all participating institutions would be expected to join the redress scheme by its commencement date, and not permitting an additional 2 years to do so.

**Table 2. Did change in the NRS adhere to the RC’s principles for redress?**

Note: When there is a blank in Table 2, it means there is no clear relationship in the research literature between the matter and the RC redress principle. NA is used when a matter has not changed from the RC recommendations to the NRS.

<b>Matters of contention (N=17)</b>  <b>(1)</b>	<b>Survivor-focused</b>  <b>(2)</b>	<b>Regard to the nature and impact of child sexual abuse</b>  <b>(3)</b>	<b>Regard to the needs of particularly vulnerable survivors</b>  <b>(4)</b>
<b>Monetary payment cap</b>	no		
<b>Counselling and psychological support</b>	no	no	no
Direct personal response	no		
<b>Assessment framework</b>	no	no	no
Indexation (no change)	NA	NA	NA
<b>Criminal history exclusion</b>	no	no	no
No application from gaol	no	no	no
Citizenship/residency	no		no
Age limit at application	no		no
Funders of last resort	no		
<b>Eligible abuse</b> (no change)	NA	NA	NA
Single application	no	no	no
Acceptance period	no	no	no
Deed of release	no		
Timeframe for institutions to opt-in	no		no
Scheme reporting	no		
Lack of external review (no change)	NA	NA	NA