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## **Office of the Public Advocate South Australia**

# **Submission to the Joint Standing Committee on Implementation of the National Redress Scheme Inquiry into the operation of the National Redress Scheme**

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## **Inquiry into the operation of the National Redress Scheme**

### **1. Terms of Reference (ToR)**

That pursuant to Paragraph 1(a) of the Committee's resolution of appointment, the Committee inquire into and report upon:

1. Applications for redress from:
  - a. Persons with disability
  - b. First Nations people
2. Availability of data and information relating to applicants listed in Paragraph (1) above, including:
  - a. Total applications received compared to the number of applications expected when the Scheme commenced.
  - b. Possible reasons why current application trends could vary from expectations.
  - c. Time taken to process applications and pay compensation to applicants.
  - d. Whether applicants with disability had a disability at the time of their abuse or whether it was acquired later in life.
  - e. Other relevant trends and data.
3. Strategies that could assist applicants listed in Paragraph (1) to access the Scheme.
4. Availability of legal advice for survivors and their advocates and, in addition:
  - a. Quality of legal advice.
  - b. Opportunities for Scheme applicants to consider available legal options and to exercise their own choices.
  - c. Strategies to minimise instances of alleged claim farming or excessive fees.
5. The performance and effectiveness of support services for Scheme applicants, including:
  - a. Accessibility.
  - b. Resourcing and funding levels.
6. Whether 'Part 4-3 – Protecting information under the scheme' in the National Redress Scheme for Child Sexual Abuse Act 2018 (Cth) enables the Scheme to operate to its greatest potential.
7. Any other relevant matters.

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## 2. Glossary

Acronym	Full title
DCP	Department for Child Protection
GAA	<i>Guardianship and Administration Act 1993 (SA)</i>
IDM	Independent Decision Maker
IPP	Information Privacy Principles
ISG	Information Sharing Guidelines
NRS	National Redress Scheme
OPA	Office of the Public Advocate
PA	Public Advocate
PT	Public Trustee
PWDA	People with Disability Australia
RFI	Request for Information
SACAT	South Australian Civil an Administrative Tribunal
SACID	South Australian Council for Intellectual Disability
SRRU	State Redress Response Unit

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### 3. Introduction

The Public Advocate (PA) welcomes the opportunity to provide a submission to the *Joint Standing Committee on Implementation of the National Redress Scheme, Inquiry into the operation of the National Redress Scheme*. The PA attends the *National Redress Scheme – South Australian Steering Committee* meetings and is willing to support applicants in their interaction with the scheme. The PA or the Office of the Public Advocate (OPA) is not subject to claims under the NRS as the PA is only appointed as guardian for adults over the age of 18 years.

In this submission the PA provides comment on matters relating to ToR 1(a) - applications for redress from people with disability and ToR 3 - strategies that could assist these applicants to access the Scheme.

To date, the OPA has not been involved in any applications via the NRS, so we cannot comment on the other points in the Terms of Reference. We are concerned that OPA clients may well be eligible for the NRS but, because of their cognitive disabilities, no pathway has been found for their claims to be made or recognised. This submission speaks to the challenges in progressing claims through the NRS for people under public guardianship in South Australia and makes recommendations about support that could be provided for this process.

It should be noted that a significant number of OPA clients also have administration orders via the South Australian Civil and Administrative Tribunal (SACAT) appointing the Public Trustee as their financial administrator. The Public Trustee manages the financial affairs of these people and would have an interest where a person is in receipt of a payment through the NRS.

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### 4. The Public Advocate

The South Australian PA promotes the rights and interests of people with impaired decision-making capacity. The PA is supported by the OPA to provide guardianship, investigation, advocacy, dispute resolution, and information to support people who need assistance with decision making.

The PA is a statutory officer who advocates for and on behalf of adults with impaired decision-making capacity and their families, carers, and supporters. In particular, the PA administers South Australian laws that relate to guardianship for adults who are unable to make decisions for themselves, who are at risk of abuse or neglect and may require assistance with decision making.

The PA undertakes systemic advocacy to protect and promote the rights and safety of South Australians with impaired decision-making capacity. The PA writes submissions, prepares consultation papers which are presented to Ministers and senior government officials.

The PA can be appointed by SACAT as a guardian of last resort if a person has impaired decision-making capacity, there is a lifestyle, accommodation, and/or health decision to be made and there is no other appropriate person to be appointed.

What this means in practice is that the PA will only be appointed if there is no one else in a person's life able or willing to make necessary decisions, or if there is family conflict meaning that agreement on decisions is difficult or not possible.

Consequently, the PA often must make decisions for people who have complex needs or experience complex situations and who are often without support networks. A person generally has impaired decision-making capacity due to disability such as intellectual or cognitive disability.

The PA is the guardian for 1773 clients. Of these 187 identify as Aboriginal. The PA is keen to advocate for the rights of these, and other South Australians who have impaired decision-making capacity and disability.

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### 5. Discussion

The PA is guardian for some of South Australia's most disadvantaged and vulnerable citizens with disability. Many of whom have had interactions with other state government or non-government agencies throughout their childhood such as Department of Human Services (Youth Justice), the Department for Child Protection (DCP) and SA Health (Mental Health Services).

Even when OPA clients have been provided services as children by government and non-government agencies, there are challenges in determining if they are survivors of past institutional abuse, violence or childhood trauma.

The following section identifies the challenges and acknowledges that many issues have been identified in the *Final Report of the Second Year Review of the National Redress Scheme*<sup>1</sup>, the interim response from the Australian Government to the Final Report<sup>2</sup> and through the *Service Charter for your National Redress Scheme*<sup>3</sup>.

### 6. Issues/ Challenges

#### 1) Lack of evidence available to OPA to support an application for a Request For Information (RFI)

The PA is appointed as guardian of last resort for adults with impaired decision-making capacity by the SACAT. At the time of the appointment the OPA is provided with limited information about the person. This information is primarily related to the reason for the guardianship appointment. It is uncommon for a person to come under guardianship with a full case history or story of their life. The OPA is appointed to address specific decisions that need to be made at that point in time.

The PA is often appointed as the guardian for young people as they turn 18 and who are exiting guardianship of the Chief Executive in the Department for Child Protection. South Australian government departments (and agencies funded by the state) have provisions for sharing information under the Information Sharing Guidelines (ISG)<sup>4</sup>. There is still a matter of professional judgment about what information will be shared with the PA. The PA endeavours to obtain further information under the ISG in relation to the protected person needed to promote the safety and wellbeing of children, young people, vulnerable people and their families<sup>5</sup>. This is a challenge that the PA continues to work through with other departments.

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<sup>1</sup> [Final report of the second year review of the National Redress Scheme | National Redress Scheme](#) accessed 4/1/2023

<sup>2</sup> [Interim Australian Government response to the final report of the second year review of the National Redress Scheme | National Redress Scheme](#) accessed 4/1/2023

<sup>3</sup> [Service Charter for your National Redress Scheme | National Redress Scheme](#) accessed 4/1/2023

<sup>4</sup> Ibid

<sup>5</sup> [About the Information Sharing Guidelines | Department of the Premier and Cabinet \(dpc.sa.gov.au\)](#) accessed 4/1/2023

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**Recommendation 1:** That the National Redress Scheme recognise the additional barriers faced by adults under public guardianship and seek to address these within the scheme.

### 2) People under guardianship and their history

As noted by the Disability Royal Commission, in cases of child sexual abuse, much of the hard evidence, such as institutional records, has been lost. Further, survivors of abuse may have incomplete memories: the impact of trauma on memory was noted by the Blue Knot Foundation in its submission: Fragmentation and lack of chronology, the passage of time, many people having vague recollections without being able to name the detail or even the actuality of the abuse at times.<sup>6</sup>

For people under guardianship who have impaired decision-making capacity and disability there are additional factors which also impact on recall. For people who have resided in institutional settings as children or young people, concepts and orientation to time, place and date can be impaired by mental illness or, potentially, by medications that the person was prescribed. This can present barriers to being able to accurately recount specific details<sup>7</sup>.

People with disability often rely on others such as family members to record and keep track of milestones in their lives. For many of the clients of the OPA they do not have family to rely on. Therefore, information from other departments and institutions that they have previously been involved with, is critical to support any application to the NRS.

Noting the concerns for clients of PA, the use of 'reasonable likelihood' as the standard of proof and additional considerations outlined in the National Redress Guide is important. In particular:

*In determining reasonable likelihood, the Operator must also consider that the Scheme was established in recognition that some people:*

- a. Have never disclosed their abuse and disclosure to the Scheme may be the first time they have done so.*
- b. Would be unable to establish their presence at the institution at the relevant time (the institution's records may have been destroyed, record keeping practices may have been poor, or the person may have attended institutional events where no attendance record would have been taken)<sup>8</sup>.*
- c. Do not have corroborating evidence of the abuse they suffered.*

**Recommendation 2:** That the NRS review policy guidelines and training material for Independent Decision Makers (IDM) as proposed by the Second Year Review to improve this process.

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<sup>6</sup> [d21-508932-final-report-second-year-review-national-redress-scheme.pdf \(nationalredress.gov.au\)](#) accessed 4/1/2023

<sup>7</sup> [Orientation to Time Place and Person - Intellectual Functioning \(guwsmedical.info\)](#) accessed 4/1/2023.

<sup>8</sup> [3.2.1 What does 'reasonable likelihood' mean? | National Redress Guide \(dss.gov.au\)](#) accessed 5/1/2022



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### 3) Complex communication issues

The Second Year Review notes that information should be provided about alternative communication methods available for people with complex communication challenges to give them an opportunity to identify their support needs and request assistance from specialist disability redress support services<sup>9</sup>. This is a positive step to making the scheme more accessible.

For people with communication challenges (either expressive or receptive) due to disability, engaging with the redress process is more difficult. Some people under guardianship use alternative and augmented communication. It is important that the person has access to appropriate supporters, communication partners<sup>10</sup>, and communication devices and, most importantly, are given sufficient time to communicate what they want to say.

**Recommendation 3:** That the NRS consider a program like the communication partners program to support people with communication needs through the redress process.

### 4) Literacy and access to the internet

Some people with disability are unable to read and write or access a computer. It is noted that the *Service Charter for your National Redress Scheme*<sup>11</sup> aims to make application forms and processes accessible by providing different ways to apply. The examples given are online and through a paper form.

It is noted that recommendation 3.8 from the Second-Year Review of the NRS was that the Australian Government explore, alternative mechanisms to facilitate access to the Scheme for individuals who would otherwise find accessing the scheme a great challenge - Aboriginal and Torres Strait Islander people, Culturally and Linguistically Diverse people and applicants with disability. This includes, but is not limited to, face-to-face application assistance. The Australian Government supports this recommendation and will explore alternative mechanisms to increase access to the Scheme for under-represented groups including the ability to rely on evidence given to other forums and oral applications. It is also noted that videos about different aspects of the scheme are now available on the NRS website<sup>12</sup>. This is a welcome step towards making the process more accessible for everyone but there will always be people who do not have access to the internet and providing them with information will always remain a challenge.

**Recommendation 4:** That the NRS explore and employ avenues to reach and communicate with people who do not have access to the internet, are illiterate or not computer literate.

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<sup>9</sup> [d21-508932-final-report-second-year-review-national-redress-scheme.pdf \(nationalredress.gov.au\)](#) accessed 5/1/2023

<sup>10</sup> [Guide-for-communication-partners.pdf \(www.sa.gov.au\)](#) accessed 4/1/2023

<sup>11</sup> [nrs-charter-pdf-v10-sept-22.pdf \(nationalredress.gov.au\)](#) accessed 4/1/2023

<sup>12</sup> [National Redress Scheme videos | National Redress Scheme](#) accessed 4/1/2023

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### 5) Disclosure

People under guardianship may be less likely to disclose a history of abuse to the delegates of the PA. A history of involvement with multiple systems can impact on the person's ability to establish trusting relationships. Public guardianship differs from private guardianship or having an informal decision maker in your life as there is more likely to be an ongoing trusting relationship with the guardian/supporter. The role of the PA is limited to the powers detailed in the guardianship order. The role is not case management where there may be the opportunity to establish a trusting relationship. At times, the PA can be appointed against the wishes of the person which may set the tone of the ongoing relationship. This lack of a close trusting relationship can impact on a person disclosing a history of abuse. People under guardianship do not have other suitable people in their lives to assist them with decisions (hence OPA's appointment). As a result they are more likely to miss out on opportunities for redress. Noting this issue, every effort should be made to determine people under public guardianship's eligibility for the scheme.

**Recommendation 5:** That people under public guardianship are considered a priority cohort for the National Redress Scheme.

### 6) Guardianship under the GAA S5 Principles to be observed.

The PA is appointed as the guardian via the *Guardianship and Administration Act 1993* (GAA) (SA). Under the Act the PA delegates certain powers to staff of the OPA to assist her in performing her function as guardian. In performing these functions, the Section 5 Principles to be observed' guide OPA staff on how they should make decisions for the person under guardianship:

*(a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and*

*(b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and*

*(c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and*

*(d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.<sup>13</sup>*

The OPA staff need to consider whether progressing an application to the NRS would be the wish of the client.

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<sup>13</sup> [Guardianship and Administration Act 1993 \(legislation.sa.gov.au\)](https://legislation.sa.gov.au) accessed 4/1/2023

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### 7) Identification of abuse, neglect and exploitation

For many people with disability, recognising that what they are experiencing is violence and that this is a problem, or a crime is a significant issue. This can be made worse by limited access to quality information and support. They may also lack the confidence to seek help or be unaware of the services available to support them<sup>14</sup>.

People with profound intellectual, cognitive and communication disabilities are at even greater disadvantage. Childhood abuse and neglect may have occurred, but they lacked the capacity to understand that what happened was abuse and wrong. Even if the abuse was witnessed it may not have been reported. If the person with disability does understand, they may not be able to articulate what has happened. Often changes in a person's behaviour can indicate something is not right but people supporting the person with the profound disability need to know the person well to detect these changes and indicators. Changes in behaviour would not be considered enough evidence for redress.

There is a need for education around people's rights and what is abuse, which may assist people in identifying that they have been subject to childhood institutional abuse so that they may seek redress. This is an area not addressed by the NRS and it is an issue broader than the NRS itself.

**Recommendation 6:** That education is provided to people with disability about their rights to safety and about what is neglect abuse and exploitation more broadly.

**Recommendation 7:** That education about human rights, identifying and reporting abuse, neglect and harm is provided to all staff in human services industries.

### 8) Supporting people with disability and the National Redress Scheme

It is noted that People with Disability Australia (PWDA) provides support for people with disability who are considering applying for the National Redress Scheme. This service is only available face-to-face in New South Wales and Queensland. All other support through this service is via phone.

The South Australian Council for Intellectual Disability (SACID) has recently commenced support services for people with intellectual disability. They provide support to applicants before during and after they apply to the NRS. This is a welcome support for people with intellectual disability and their families.

There are complexities in relation to capacity, guardianship and administration orders and informal support. When a person applying for redress requires support (due to intellectual disability or impaired decision-making capacity) they need to appoint a Nominee via the Redress Nominee Form<sup>15</sup> There are two types of redress

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<sup>14</sup> [Domestic, family and sexual violence experienced by people with disability | 1800RESPECT](#) accessed 4/1/2023

<sup>15</sup> [https://www.nationalredress.gov.au/sites/default/files/documents/2021-03/nrs0032103\\_0\\_0.pdf](https://www.nationalredress.gov.au/sites/default/files/documents/2021-03/nrs0032103_0_0.pdf) accessed 9/1/2023

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nominees that can be appointed, they are the Assistance Nominee and the Legal Nominee. An Assistance Nominee cannot apply for redress and cannot accept or decline an offer of redress on the persons behalf. The Legal Nominee can do this but for the scheme to appoint a Legal Nominee there must be a current legal arrangement in place such as a Power of Attorney, Guardianship or Financial Management Order. Informal support arrangements are not recognised by the scheme. This results in guardianship or administration orders being put in place when informal arrangements could be sufficient. Many adults with an intellectual disability have lived successfully with informal arrangements in place with parents or family supporting them for many years. The need for current formal legal arrangements to be in place before a legal nominee can be appointed creates yet another barrier for people with intellectual disability accessing redress.

**Recommendation 8:** That the NRS review current Legal Nominee requirements so as to recognise informal arrangements when considering appointing a Legal Nominee through the scheme.

## 9) Conclusion

The NRS is a welcome response for survivors of institutional childhood sexual abuse. There are additional challenges for people with disability under public guardianship accessing redress through the scheme. Reaching these groups is not straightforward and requires multiple approaches. Some of these approaches have been identified in the Second Year Review of the NRS and the Commonwealth Government has made some commitments in their response to this review. The *Service Charter for your National Redress Scheme* provides a high-level commitment to survivors and their families. There is a commitment to ongoing review of the Charter but as to how its success is measured is unclear.

The introduction of the support services through SACID is a welcome introduction but there are still many challenges for people accessing the scheme and further improvements to assist people with disability, in particular those under public guardianship as they are some of the most vulnerable and disadvantaged people.

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## 10) Recommendations

**Recommendation 1:** That the National Redress Scheme recognise the additional barriers faced by adults under public guardianship and seek to address these within the scheme.

**Recommendation 2:** That the NRS review policy guidelines and training material for Independent Decision Makers (IDM) as proposed by the Second Year Review to improve this process.

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**Recommendation 8:** That the NRS review current Legal Nominee requirements so as to recognise informal arrangements when considering appointing a Legal Nominee through the scheme.

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