



Supplementary submission to the Joint Select Committee on Implementation of the National Redress Scheme

Exploitative practices of some law
firms and 'survivor advocacy'
businesses

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About knowmore

Our service

knowmore legal service (knowmore) is a nation-wide, free and independent community legal centre providing legal information, advice, representation and referrals, education and systemic advocacy for victims and survivors of child abuse. Our vision is a community that is accountable to survivors and free of child abuse. Our mission is to facilitate access to justice for victims and survivors of child abuse and to work with survivors and their supporters to stop child abuse.

Our service was established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). knowmore was established by and operates as a program of Community Legal Centres Australia, with funding from the Australian Government, represented by the Attorney-General's Department and the Department of Social Services. knowmore also receives some funding from the Financial Counselling Foundation.

From 1 July 2018, Community Legal Centres Australia has been funded to operate knowmore to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme.

knowmore uses a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne, Brisbane and Perth. Our service model brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

Our clients

In our Royal Commission-related work, from July 2013 to the end of March 2018, knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. Almost a quarter (24%) of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018, to 31 March 2020 knowmore has received 29,888 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 6,107 clients. More than a quarter (26%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. More than a quarter (27%) of clients are also classified as priority clients due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.

knowmore's submission

As we noted in our submission to the Joint Select Committee on Implementation of the National Redress Scheme (the Committee) dated 28 April 2020, knowmore is becoming increasingly concerned about some law firms and emerging 'survivor advocacy' businesses engaging in practices that exploit survivors trying to access redress through the National Redress Scheme (NRS). In particular, we are hearing a growing number of concerns — raised directly by survivors but also by other support services and stakeholders, including the NRS itself — about law firms charging survivors high and arguably excessive fees for services that survivors could obtain for no cost from knowmore or other funded redress support services. At times, such conduct has been accompanied by the provision of services that are not of a reasonable, professional standard, leading inevitably to further and unnecessary traumatising of the survivor.

We note that similar concerns were raised recently with the Committee by Beyond Brave.¹

In this supplementary submission, we provide more detailed information about these matters based on the experiences of knowmore and our clients. We also make a number of recommendations for improvement for the Committee's consideration.

Overview of the problem

We preface the following comments with the clear statement that knowmore obviously supports survivors being able to decide who they turn to for legal assistance and other support, including using paid services. Many private law firms deliver high quality and trauma-informed services to survivors, charging only reasonable fees and at times reducing those fees to ensure the client's interests are placed above the firm's commercial considerations.

However, the foundational principles of trauma-informed practice — of empowerment and choice — are important in survivors arriving at an informed position of understanding what supports are available to them, and what the implications of engaging with those supports are, particularly in terms of fees charged.

Many survivors are in circumstances of vulnerability, including through advanced age, isolation, ill health, low literacy levels, financial disadvantage and incarceration. These circumstances, often occurring in combination, may impact upon their capacity to fully understand the implications of engaging with particular service providers, leaving survivors susceptible to exploitation. There is also a clear public policy interest in survivors maximising the benefit of any redress payment received through the NRS, particularly where a range of support services, now with considerable experience of the Scheme, are available to provide survivors with free and trauma-informed support.

As we noted in our earlier submission, knowmore is aware of some firms charging up to \$15,000 plus GST to act for survivors in NRS applications, with fees contingent upon the quantum of the redress payment the survivor receives. Such reports have been received in relation to a small number of law firms, some of which are alleged to be targeting particular groups of clients, including Aboriginal survivors. These problems are highlighted in the case studies below.

1 Joint Select Committee on Implementation of the NRS, *Proof Committee Hansard — Monday, 6 April 2020*, Evidence of Mrs S Galdamez, National Manager of Advocacy and Support Services, Beyond Brave (Bravehearts Foundation), p. 26.

A client facing a \$16,500 fee under a costs agreement with a private law firm

A client came to know more after hearing about our free service from another survivor. The client had previously worked with a law firm that had completed his NRS application. That law firm did not make the client aware of know more's free service, and had the client sign a costs agreement with fees to be calculated on a sliding scale, dependent on the quantum of their redress payment. As such, were the client to receive a maximum redress payment of \$150,000 (as is likely), the legal costs would be \$15,000 plus GST (\$16,500).

The law firm representing this client also took the following steps:

- Provided the law firm's trust account details in the 'Bank account details' section of the Application for Redress (Question 30).
- Had the client sign a Redress Nominee Form nominating the firm as their Legal Nominee.
- Had the client sign a Power of Attorney appointing the firm, for the client's case.
- Had the client execute an Authority, directed to the NRS, to pay the firm the redress payment.

An elderly Aboriginal client who unknowingly entered into a costs agreement with a private law firm

An elderly Aboriginal client with a debilitating health condition suffered significant sexual abuse as a child. The client had received advice from a private law firm and was working with a support service. The client believed that either the support service or the Aboriginal Legal Service may have lodged their NRS application for them, but they were not sure. It became apparent that the client may have been assisted by a local law firm, as that law firm attended the support service to provide legal advice.

The client vaguely recalled the name of the law firm and that they might have signed a piece of paper, although they were not sure what it was. The client believed the law firm was not assisting them because they had not supplied the law firm with details of the abuse and had not heard from the law firm again after an initial meeting.

With the client's consent, know more made contact with the law firm and was told that the firm was working on the NRS application but that it had not yet been submitted. A copy of the costs agreement was requested and forwarded. The agreement showed the client was being charged for this work. The client was effectively unaware that they had engaged a private lawyer to do this work.

The costs agreement showed that the estimated legal costs to prepare the redress application were \$3,500 to \$5,000. The costs agreement was close to eight months old. The client instructed know more that they had not heard from the law firm during that time. The client did not have a copy of the client agreement and was not aware they were being charged for this work.

On the client's instructions, know more contacted the law firm to advise the client agreement had been terminated and raising a concern as to the client's capacity to have signed the agreement. A response has not been received.

Given the client's age and ill health, know more worked to complete a new NRS application, obtaining records and visiting the client to complete the application. The application was completed and submitted to the NRS within three months of the client contacting know more.

As illustrated in the second case study, concerns about excessive fees are not uncommonly coupled with reported poor levels of service. That is, survivors impacted by the practices of these law firms are paying large amounts of money for service that is not up to standard, not trauma-informed and not culturally safe.

In recent months, reports have also been received about emerging 'survivor advocacy' businesses, which have the stated aim of helping survivors, for a fee, with civil and/or redress claims. Some of these businesses publish information to the effect that they have been founded by a survivor/survivors of child sexual abuse and will provide services from the perspective of someone who has been through the prospective client's experience and, therefore, understands them and 'the system'. We have received information that in some instances there are associations between these survivor advocacy businesses and private law firms working in abuse cases, which may extend to the provision of funding and financial payment for preliminary work done on client matters referred to a firm. We are not aware of whether such links are disclosed to clients of these organisations when any referrals to law firms are made.

knowmore has received complaints from survivors about the practices of one such advocacy business in particular. The conduct alleged in these complaints relates to practices that do not reflect a client-centred or trauma-informed approach to survivors — for example, unsolicited receipt of correspondence about services offered, attaching a form of client agreement; and breaching confidentiality. In one instance that was the subject of complaint to knowmore, this included breaching a survivor's confidentiality by disclosing their status to family members who, until then, were not aware of the survivor's experience of childhood sexual abuse. Information provided by survivors indicates that survivors currently in prison are a particular target group for this business.

It is clear that many survivors engaging with private law firms and businesses are not being advised about the availability of free services. This approach may extend to survivors being openly dissuaded from seeking help from such sources. For example, one private law firm states on its website that: *"The free lawyers are not experts in child sexual abuse. They may miss something a specialist would pick up."*

Another approach we have seen firms adopt is to use paid advertising/ranking on Google to have the firm's advertisement appear as the first search result when key search terms such as "National Redress Scheme" or "knowmore" are entered.

The concerning practices that have been raised with knowmore mirror instances of unprofessional and unethical conduct by lawyers in institutional redress schemes in Ireland and Canada. The potential for these problems to arise in the NRS was raised with the former Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the former JSC) by Professor Kathleen Daly and Ms Juliet Davis:

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).²

In both cases, the overcharging of survivors for legal services was a significant problem.³ In Canada, the Chief Adjudicator of the IRS-IAP further noted:

...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.⁴

2 K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, Submission 40 — Supplementary Submission 1 to the Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission, 2018, p. 1, <www.aph.gov.au/DocumentStore.ashx?id=248d99ab-b807-4e8a-9ad9-162bdf2eb0bc&subId=666563>.

3 K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*.

In responding to these problems, the Canadian scheme not only recognised the serious adverse impacts for survivors, but also recognised that the integrity of the scheme itself “could be threatened by fraudulent or exploitative conduct by lawyers or representatives”.^{5,6} The NRS arguably faces the same risks if the kinds of practices being reported to knowmore go unchecked.

Recommendations for improvement

In knowmore’s view, mechanisms must be put in place to protect survivors from being targeted by law firms and survivor advocacy businesses engaged in exploitative practices. We note that regulation through existing bodies such as the state and territory law societies and legal services commissions has a number of limitations, including that the jurisdictional nature of regulation is unlikely to provide a consistent and effective national response to the problem,⁷ and that legal regulatory bodies have limited scope to deal with the conduct of survivor advocacy businesses, save for very limited forms of conduct. Our view is that new, specific measures are therefore required.

Drawing in particular on experiences overseas and the recommendations of Professor Daly and Ms Davis to the former JSC, knowmore makes the following recommendations:

1. The NRS legislative framework should be amended to cap the fees that lawyers can charge for services delivered with respect to the NRS. This is consistent with the approach adopted for the IRS-IAP in Canada,⁸ where caps on legal fees are supported by a mechanism by which applicants can seek to have their legal fees reviewed by the scheme to ensure that what they are being charged is fair and reasonable.⁹ It is also consistent with the approaches of some Australian jurisdictions in other contexts. For example, in Western Australia, lawyers representing clients in child sexual abuse actions cannot charge any fee above what is allowed under any applicable costs determination made by the Legal Costs Committee.¹⁰ Similarly in New South Wales, albeit in a different context, the maximum amount a lawyer is entitled to charge for various legal services provided with respect to a compulsory third party (CTP) claim is prescribed by regulation.¹¹ We make further observations below about how the regulatory practices applied to prevent ‘claim farming’ practices in CTP matters may be a useful model to adopt to address the conduct we have outlined.
2. The NRS should publish a set of expected practice standards for lawyers and survivor advocates providing services to survivors seeking redress.¹² The Expectations of Legal Practice in the IAP published by the Indian Residential Schools Adjudication Secretariat provides an example of what this might look

4 Letter from D Ish QC, Chief Adjudicator of the Indian Residential Schools Independent Assessment Process, 30 August 2012, <www.lawsociety.sk.ca/media/43984/iapsept2012en.pdf>.

5 K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, p. 9.

6 Relevantly, we note that one of the general principles guiding actions of officers under the Scheme is that “redress should be assessed, offered and provided in a way that protects the integrity of the scheme” [section 10(5), *National Redress Scheme for Institutional Child Abuse Act 2018* (Cth)].

7 See similar comments in K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, p. 2.

8 In the IRS-IAP, the maximum lawyers can charge is 30 per cent of the applicant’s compensation award. The Government of Canada will pay legal fees up to the value of 15 per cent of the award, with any fees above this to be paid by the applicant (Indian Residential Schools Adjudication Secretariat website, ‘Working with a lawyer’, <www.iap-pei.ca/lawyer-avocat-eng.php>).

9 Indian Residential Schools Adjudication Secretariat website, ‘Working with a lawyer’, <www.iap-pei.ca/lawyer-avocat-eng.php>.

10 Section 15L, *Civil Liability Act 2002* (WA).

11 Schedule 1, *Motor Accident Injuries Regulation 2017* (NSW).

12 See also K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, Recommendation 1, p. 3.

like.¹³ knowmore particularly supports the following principles from that document being adapted to the NRS context:

- “Lawyers should not initiate contact with individual survivors to solicit them as clients or inquire about whether they were sexually assaulted.” (Expectation 3a)
- “Lawyers must ensure that... advertising is respectful, and is not false or misleading.” (Expectation 3b)
- “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:
 - a. explain the process to the claimant in a way that is understandable...;
 - b. provide realistic expectations of the length of time required to resolve the claim;
 - c. avoid unnecessary delay, particularly for ill or aging claimants;
 - d. recognize claimants’ special communication needs, including language barriers, cultural expectations, and limited access to telephone and internet services...” (Expectation 6)

knowmore considers that the practice standards should also require lawyers to advise a potential client of the availability of free services before executing a costs agreement.

3. For a more robust approach, which would also address the issues noted above in Recommendations 1 and 2, participating States and the Commonwealth should adopt a model based on the legislative response recently enacted in Queensland to combat the problem of ‘claim farming’ in respect of motor vehicle accident/CTP claims.¹⁴ In response to widespread concerns about the predatory practices of various marketing syndicates, in which unsolicited contact was made with members of the public, harassing them to pursue compensation claims against CTP insurers, legislative change was enacted to make such claim farming an offence, and to introduce a range of other measures to eradicate such practices. The syndicates engaging in this conduct often sought to pressure members of the public into pursuing claims through asserting a connection with insurers, to create an impression of authenticity, then on-selling the person’s information to lawyers or other claims managers.

Other aspects of this response include a prohibition upon the giving or receiving of financial incentives for the referral of potential claimants, and a requirement that lawyers acting on behalf of a person in a CTP claim complete a ‘Law Practice Certificate’ to certify that neither they, nor their firm, have engaged in claim farming activities in relation to the claim. Also, if the claim is a speculative claim (also known as ‘no win, no fee’), lawyers are required to certify that the costs agreement complies with the relevant legislation and the ‘50/50 rule’ under section 347 of the *Legal Profession Act 2007* (Qld). As noted above, we favour the introduction of a legislative cap on fees charged to survivors in relation to NRS applications.

The legislation also equips the relevant regulatory body (the Motor Accident Insurance Commission) with functions and powers to investigate and prosecute claim farming conduct. This includes the power to issue claims management standards. We have set out in Recommendation 2 some of the areas that should be addressed in such standards in relation to the NRS.

4. The NRS should provide potential applicants with information relevant to their decision to hire a lawyer or survivor advocate, including key factors they may wish to consider, any caps on fees, and how they can make a complaint if they have concerns about the conduct of a lawyer or survivor advocate (see below).¹⁵ As noted by Professor Daly and Ms Davis, the guidance on working with a lawyer provided by

13 Indian Residential Schools Adjudication Secretariat website, ‘Expectations of legal practice in the IAP’, revised 3 October 2013, <www.iap-pei.ca/expectations-eng.php>.

14 Through the enactment of the *Motor Accident Insurance and Other Legislation Amendment Act 2019* (Qld).

15 See also K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, Recommendation 2, p. 3.

the IRS Adjudication Secretariat¹⁶ and *Fact Sheet 15: Hiring a Lawyer* from the New South Wales Office of the Legal Commissioner are useful examples.¹⁷

5. The NRS should establish a complaints process to deal with concerns about the conduct of lawyers and representatives from survivor advocacy businesses.¹⁸ Again, the approach taken in Canada with respect to the IRS-IAP provides one model for consideration. Key elements of that model include:
- Any person being entitled to make a complaint about the conduct of lawyers or representatives to the Chief Adjudicator or Court Monitor.
 - The appointment of an Independent Special Advisor to the Court Monitor to review complaints and determine how they should be dealt with.
 - The power of the Independent Special Advisor to deal with complaints internally or externally, for example by referring the conduct to a law society or law enforcement agency for action.¹⁹

16 Indian Residential Schools Adjudication Secretariat website, 'Working with a lawyer', <www.iap-pei.ca/lawyer-avocat-eng.php>.

17 Office of the Legal Services Commissioner, *Fact Sheet 15: Hiring A Lawyer*, OLSC, Sydney, 2015, <www.olsc.nsw.gov.au/Documents/Fact%20Sheet%2015%20Hiring%20Lawyer%20July2015%20AC.pdf>.

18 See also K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, Recommendation 3, p. 3.

19 Administrative Protocol for Addressing Complaints Related to the Integrity of the Independent Assessment Process, cited in K Daly and J Davis, *Submission: Oversight of Legal Practitioners and Form Fillers*, p. 9.

Conclusion

Reports from survivors and other stakeholders that some law firms and survivor advocacy businesses are engaging in practices that exploit survivors wishing to investigate their redress options, including through the NRS, are of great concern to knowmore. We are aware that some firms are charging survivors high and arguably excessive fees for services that they could obtain for no cost from knowmore or other funded redress support services, and are often providing services that are not trauma-informed, not culturally safe and objectively not of an appropriate professional standard. This will lead inevitably to further and unnecessary traumatisation of survivors, including Aboriginal survivors, who some firms are allegedly targeting. These practices not only have serious adverse impacts for survivors, but they may also threaten the integrity of the NRS itself.

In our view, specific mechanisms must be put in place to protect survivors trying to access redress under the NRS from being targeted by businesses engaged in exploitative practices. Drawing in particular on experiences overseas and recommendations made to the former JSC by Professor Kathleen Daly and Ms Juliet Davis, we recommend that:

1. The NRS legislative framework be amended to cap the fees that lawyers can charge for services delivered with respect to the NRS.
2. The NRS publish a set of expected practice standards for lawyers and survivor advocates providing services to survivors seeking redress.
3. Participating States and the Commonwealth enact a similar legislative scheme to that adopted in Queensland to address the problem of claim farming for CTP claims.
4. The NRS provide potential applicants with information relevant to their decision to hire a lawyer or survivor advocate, including key factors they may wish to consider, any caps on fees, and how they can make a complaint if they have concerns about the conduct of a lawyer or survivor advocate.
5. The NRS establish a complaints process to deal with concerns about the conduct of lawyers and representatives from survivor advocacy businesses.

These mechanisms will assist in addressing the concerns raised about the conduct of lawyers and survivor advocates and, importantly, will empower survivors to make informed decisions about the legal and other assistance they access during the NRS process. In turn, these mechanisms will help to curb exploitative practices and protect the integrity of the Scheme, while protecting survivors from further harm and assisting them to maximise the benefit of any redress payment they receive through the NRS.

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Community Legal Centres Australia acknowledges the traditional
owners of the lands across Australia upon which we live and work.
We pay deep respect to Elders past and present.