

20 February 2023

Senator Catryna Bilyk
Senator for Tasmania
Chair
Joint Standing Committee on the
Implementation of the National Redress Scheme

BY EMAIL : redress@aph.gov.au

Dear Senator Bilyk,

**SUBMISSION TO THE JOINT STANDING COMMITTEE ON
IMPLEMENTATION OF THE NATIONAL REDRESS SCHEME: INQUIRY INTO
THE OPERATION OF THE NATIONAL REDRESS SCHEME**

Kelso Lawyers welcomes the opportunity to respond to the Committee's inquiry into the operation of the National Redress Scheme ('NRS'). Kelso Lawyers is a private law firm who represents victims of historical child sexual abuse through civil and redress avenues. We make submissions to the Committee with regard to the terms of reference as follows:

Applications for redress from (a) persons with disability and (b) first nations people and strategies that could help these applicants access the Scheme.

Kelso Lawyers has extensive experience in representing applicants with disability and/or who identify as first nations people through the redress process. We recognise and applaud the Scheme's processes in relation to terminally ill applicants, which we believe greatly assists in access to the scheme, particularly due to the age of applicants.

Further, Kelso Lawyers welcomes the introduction of the advance payment in September 2021, particularly for vulnerable first nations people. However, in relation to applicants with disabilities, it appears that advance payments are only available to applicants with physical disabilities where those disabilities are categorised as "terminal illness". It is argued that the NRS should recognise a broader spectrum of applicants with disabilities to be eligible for an advance payment. As per the *Disability Discrimination Act 1992* (Cth), a disability is legally recognised to include both physical and psychiatric impairments. We would argue that the criteria for advance payments be updated to reflect the debilitating impact of psychiatric disabilities, particularly as a result of historic child sexual abuse. Kelso Lawyers submits that by widening the eligibility for advance payment, would ensure applicants with psychiatric disabilities are provided with better access to the Scheme.

*Availability of legal advice for survivors and their advocates and, in addition:
Opportunities for Scheme applicants to consider available legal options and to exercise their own choices.*

The purpose of support services, including legal nominees and advocates, is to ensure that the Scheme is accessible, inclusive, and that through applying to the Scheme the applicant's needs and best interests are met.

Applicants to the Scheme, as survivors of childhood abuse, form part of a particularly vulnerable cohort of the community, the longstanding effects of which arguably permeate throughout their life and can impact their ability to both access the Scheme and complete an application. To that end, support services, such as legal nominees, play a crucial role in facilitating fair access to redress with a view to minimising trauma and assisting survivors to obtain better outcomes.

Kelso Lawyers has had the opportunity to act for many applicants since the Scheme's inception and has found it to be beneficial to achieving positive outcomes and facilitating a safe environment for survivors to engage with the Scheme; it is a role that we take incredibly seriously and with deep understanding as to the importance of our involvement. Applicants can come from a wide spectrum of backgrounds, and can include people with disabilities, especially intellectual disabilities, people with low literacy or varying linguistic abilities, former Child Migrants, and former State Wards. By acting as legal nominee for applicants, it allows us to establish and build a relationship with the applicant, garnering trust with the individual and their unique circumstances, and ultimately enabling us to advance their best interests.

As per the Final Report¹ and the subsequent interim response published by the Australian Government in 2021², recommendations were set out and supported that ultimately centred around *'enhancing the survivor experience with the Scheme'* and adopting a more proactive attitude to availing survivors to appropriate support mechanisms, such as legal nominees. As one example in support of that, a simplified application pack was developed, including the nominee form should the applicant require it, as it was acknowledged how crucial a role nominees can play in the redress process.

Acting as legal nominee, private law firms including Kelso Lawyers are granted the authority to:

- Help a person complete their application for redress,
- Receive copies of all letters,
- Ask questions about a person's application for redress,
- Receive phone calls about a person's application for redress,
- Provide information,
- Ask for an offer of redress to be reviewed,
- apply for redress, or
- accept or decline an offer on a person's behalf.

Despite the above, we cite the below examples from our experience where the Scheme has failed to respect the role of the legal nominee, ultimately causing further harm to the survivor. These include:

¹ Final report of the second year review of the National Redress Scheme | National Redress Scheme accessed 14/02/23.

² Interim Australian Government response to the final report of the second year review of the National Redress Scheme | National Redress Scheme accessed 14/02/23.

- Survivors being asked to confirm their preference to have a nominee throughout the claim process subsequent to submitting documentation to that effect and/or in later stages of the application process where the nominee has already been effectively established. This challenge to the relationship undermines the very basis of allowing nominees to act for survivors; they require someone to advocate on their behalf, so they do not need to confront the difficulties associated with the application process.
- Survivors are being asked complex questions with little to no supporting information or explanation. For example, they are being prompted to answer questions relating to their criminal history with a view to confirming whether they should be assessed under the Serious Criminal Conviction Pathway. As the Scheme sets out the precise circumstances under which an applicant should be assessed under the Pathway, the nuance of this is better handled by the legal nominee. We have witnessed applicants become confused and anxious in response to these types of questions.
- In tandem with the aforementioned point, survivors are being asked questions that have already been answered and are contained within the application. The purpose of having a legal nominee in place is to facilitate the delivery of key information to the Scheme and asking the applicant to go field those questions effectively undermines the very foundation of the relationship.
- Survivors are being contacted independently by the Scheme and without support from their nominee. This can prove to be quite detrimental to the applicant if they are given important or complex information without any support or guidance. In some circumstances this has occurred when the Scheme has conveyed an offer of redress to the applicant, a significant and sometimes devastating breach of the nominee arrangement in place.
- Persistent reference to free legal assistance services that they can or should approach, despite having a legal nominee already in place. This has occurred when applicants have been availed with a redress offer and the Scheme has suggested they have the acceptance documents explained to them by services such as Knowmore. We have witnessed survivors become confused and upset at the suggestion they should be seeking other services and forcing us to interject on their behalf to affirm our role. We would assert that the paramount concern for the Scheme should be creating a non-combative environment for the application process and by advancing these suggestions, it has the opposite effect, which the applicant should not be subject to.

The above examples illustrate the Scheme's clear departure from respecting the sanctity of the relationship between the survivor and the legal nominee. Furthermore, the majority, if not all, of the above comments or questions should be directed to the legal nominee first, as advocate for the survivor.

As legal advocates, we have the unique ability to distil complex information into something more easily understood, a tool which is especially helpful to such a vulnerable group of people as those represented by the applicants of the Scheme. It is important that the Scheme allows us the opportunity to do so.

Kelso Lawyers are aware that the Committee has concerns regarding the behaviour of some private law firms, in particular, and as noted in the *Inquiry Discussion paper*, that they are not acting in the best interests of the applicant. We would argue that it is a fundamental exercise of our role, both inherent in legal practice and generally as advocates, that we act in the best interest of the applicant,

and to that end, Kelso Lawyers has not wavered in that duty as we appreciate the importance of our role to survivors.

Legal support services, including private legal firms, play an integral role for applicants to the Scheme in managing their expectations regarding outcomes available under the Scheme, the process of what the Scheme entails, the best way to secure the most favourable outcome, and the implications to accepting any payments offered under the Scheme. In a wider context, legal services are more uniquely placed to assess the varied sources of redress that an individual may be eligible for, while factoring the Scheme in.

We are aware that the Committee has concerns that some applicants may feel “*pressured to make a civil claim*”. We find this point in itself to be rather concerning. Kelso Lawyers certainly do not pressure any survivor of childhood abuse into making any pursuit for compensation, whether that be a civil claim or an NRS application. However, we do consider it is imperative that all persons with eligibility to apply to the Scheme are advised and well informed of all options available to them and the steps involved, as the financial and legal consequences of accepting either payment can be significant.

The undeniable fact remains that civil claims are not capped at a maximum payment of \$150,000 as is the NRS, and in our experience many claims can be resolved from anywhere between \$50,000 to well over \$1million. Kelso Lawyers have resolved a number of civil claims for people eligible for the scheme between \$600,000-\$1.25million.

Kelso Lawyers assesses each person that approaches our firm and the circumstances of their abuse on a case-by-case basis and determines the best avenue for them. Many survivors are not aware they are, at a minimum, even entitled to redress, let alone the varied options available. Advising survivors of all of the options available to them better places them to make informed decisions, rather than minimising the information or centering it around the Scheme alone.

It is also important to raise that Applicants can only make one application to the Scheme, and if accepted by the Applicant, they are required to waive their civil right forevermore to pursue compensation against the Institution for the abuse suffered. It has unfortunately been our experience that people have enquired with our firm seeking a second opinion as to their legal options after having already accepted a redress payment without knowing the implications of doing so, a tragic set of circumstances. We are of the opinion that survivors should be able to exhaust all their available legal options, before signing away their legal rights.

This further highlights the importance of independent legal advice. We acknowledge the free legal service that runs in connection with the Scheme, Knowmore. We have recently spoken to a number of clients who have contacted Knowmore and been told that there was no availability to speak with a solicitor and that they would need to be put on a waiting list until a spot became available. At Kelso Lawyers, we attempt to have a potential client in contact with a solicitor within a few days of enquiring, as we appreciate the emotional courage it takes to come forward, and the associating stressors that may arise after doing so without support. We have otherwise found that survivors, especially those who are former State Wards, have a preference to deal with private law firms as opposed to government entities, understandably given their past relationship with government bodies. This is a right that applicants should have, and should be supported by the Scheme.

With reference to the above points, we note the following statistics:

Kelso Lawyers Statistics:

During the period 1 July 2021 to 30 June 2022:

- We have submitted 48 applications to the Scheme
- Of those 48, the redress offers ranged between \$15,000 and \$150,000, with an average amount of redress awarded being \$97,263.32

National Redress Scheme Statistics

During the period 1 July 2021 to 30 June 2022:³

- There were 5,987 applications to the Scheme, of which 3,133 determinations were made on the applications
- Of those applications, 3,043 applications were eligible for redress, and 90 applications were deemed ineligible
- Of those eligible applicants, 2,970 applications were finalised, including 2,675 redress payments ranging from less than \$10,000 to \$150,000, with an average payment of \$90,809

The above statistics raise some interesting points with regard to the value other legal services, including private legal firms, can provide to applicants. Firstly, approximately 52% of applications were still yet to be determined, despite waiting at least 11 months. Furthermore, of the applications submitted to the Scheme, approximately 3% were ineligible for redress, making up 90 applications in total who, after enduring the significant wait period, were offered nothing. Additionally, 36 applicants who were offered redress declined to accept the offer, arguably as they did not feel it to be an accurate reflection of their pain and suffering. While we cannot speak to the circumstances that prevented those applicants from being eligible, or from being awarded appropriate compensation, it is nevertheless evident that if they had been availed to legal services, they could have been properly advised as to their likelihood of being offered redress, and how their circumstances would have been assessed under the Scheme, effectively minimising any further re-traumatisation accompanied with the application process.

Also, with regard to the 36 applicants who ultimately declined their offer of redress, it raises significant concerns as to the options remaining available to them. Declining an offer of redress from the Scheme effectively pressures them into pursuing a civil claim if they still wish for their abuse to be acknowledged by the institution. In the event that they are unsuccessful in a civil claim, they likely have exhausted all avenues of legal recourse available to them, as declining an offer forfeits their right to re-submit an application to the Scheme forevermore, the effect of which can be devastating to survivors of childhood abuse. This further highlights the importance of legal representation and survivors being fully informed of all available options and consequences before choosing the path that is most suitable for them and their circumstances.

³ Department of Social Services, Annual Report 2021-22, *Part 3 – National Redress Scheme* p. 144.

Further to the above, of the 2,675 applicants who accepted redress payments, the average amount awarded was \$90,809 whereas Kelso Lawyers has successfully been able to secure an average payment amount of \$97, 263.32. While the monetary value of compensation may not speak to the overall healing process applicants go through when their abuse is acknowledged, the approximately \$6,400 difference can be deeply significant to someone and their ongoing quality life.

The Performance and effectiveness of support services for Scheme Applicants, including:

- a. *Accessibility*
- b. *Resourcing and funding levels*

We submit that the accessibility, resourcing and funding levels of support services for National Redress Scheme applicants requires additional attention, despite recent improvements being made.

Direct Personal Response (DPR)

We are of the view that the number of applicants making contact to undertake the direct personal response (DPR) upon finalisation of an application is undeniably low. During the reporting period between 1 July 2021 to 30 June 2022, of the 1,870 people that accepted the offer of a direct personal response from a participating institution.⁴ Of those 1,870 applicants, only 187 completed their direct personal response, while 290 made contact to begin the process of receiving their direct personal response.⁵

We believe this reflects the view that applicants are currently bearing the burden of contacting the relevant institution to access their DPR, which is proving extremely difficult for applicants, noting the sensitive nature of each application. Although we welcome the commencement of the DPR team in recent months, we urge more staff and resources to be allocated to this team. This will ensure that each applicant who seeks a DPR is either followed up or reminded of their right to access a DPR from their responsible institution via telephone, email or post, rather than being discouraged simply because of the burden placed upon them.

Researching Historical Records

Kelso Lawyers appreciates that the scheme assesses applications which are in major part, of a historical nature. This presents challenges with respect to locating and accessing records relating to an application. In some cases, even when the appropriate records are located, they are mostly unreadable which further adds to the difficulty the scheme faces.

We submit that the requirement for applicants to provide further information who do not have legal representation nor access to a computer, or the internet are particularly disadvantaged in this respect.

Furthermore, providing documentary evidence is also significantly burdensome for the applicants we represent. For example, one of our applicants was asked to provide further information about his offender and the relevant institution, as it was likely his application was going to be deemed unfavourable as they had been unable to obtain any records pertaining to

⁴ Department of Social Services, Annual Report 2021-22, *Part 3 – National Redress Scheme* p. 144.

⁵ Ibid.

our client's offender. Within a matter of days, we were able to locate a Scouts honour board confirming the name of his offender online via a simple google search. This also reiterates the abovementioned value of employing a private law firm to assist applicants in cases where additional research is required, and the positive impact this may have on a victim's application both emotionally and financially.

Noting the above challenges, we would welcome further funding of resources and employment of appropriately qualified research staff to assist with locating historical records. We believe this would limit the number of insufficient searches for records and remove the burden on applicants to provide further information with respect to their application.

Availability of Financial Education & Referral Services

Kelso Lawyers also submits that the lack of financial literacy among applicants has not been appropriately addressed by the scheme. We note that applicants are some of our most vulnerable in society.

From our perspective, we are assisting applicants who are being awarded a significant amount of money through redress for their pain and suffering, without the financial tools to ensure that they can financially progress, whether that be as an individual or as a family.

We recommend at a minimum a financial fact sheet, similar to the counselling and DPR fact sheet be provided with an applicant's acceptance documents. This would include contact details for free financial counselling, managing finances, reducing previous debts, as well as planning for the future. As a starting point, the Federal government's moneysmart.gov.au website could be used to facilitate this recommendation.

In addition to the financial fact sheet, we submit that a Financial Counselling team, similar to the DPR team should be created within the scheme to ensure that applicants upon receiving their redress payments are fully informed of the benefits/risks of their current and future financial decisions. This would be beneficial for all parties, ensuring that applicants are catered for beyond the finalisation of their application, noting that the financial impact for a majority of applicants has been lifelong.

Deceased Applicants

Sadly, Kelso Lawyers has had several applicants die prior to or during the outcome stage.

Pursuant to the National Redress Guide, specifically paragraph 4.12 it is confirmed that *"in general, if a person makes an application for redress, but dies before the application has been determined, the application for redress is determined as if the person has not died. If a person dies, the person (or their estate) will not be entitled to redress (which includes access to counselling and psychological care and a direct personal response), but a redress payment may still be payable"*.

We have been advised in these matters that a death certificate and confirmation of the applicant's next of kin is required in order to continue to progress the application. We note on two particular occasions we have provided these documents to the scheme as advised; however, the scheme is yet to finalise these applications despite us being advised in February and October 2022 that both of these applications were at the outcome stage. Each time we have sought an update, the Scheme has been unable to provide further information as abovementioned applications are being processed through the deceased estates team.

We recommend that the scheme advise applicants, legal representatives and the relevant support services of their specific process for finalising deceased applications, including the documents required (if in addition to the death certificate and will), as well as the expected timeframe and relevant contact to ensure regular updates are provided to the next of kin of the deceased applicant.

Other issues

Serious criminal conviction

In 2015, The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that when developing a redress scheme, a person should be eligible to apply for redress “*if he or she was sexually abused as a child in an institutional context and the sexual abuse occurred... before the cut-off date*”.

We make reference to the special assessment process for applicants who have received a serious criminal conviction.⁶ As seen in the above recommendation; the Royal Commission did not recommend placing any stipulations on applying for redress. We would argue that this provision stops applicants who have suffered child sexual abuse from applying for the Scheme and accessing redress they would otherwise be eligible for. In our experience, it is a relatively common experience for victims of historic child abuse to have a criminal record, particularly in the immediate aftermath of the abuse. We would argue removing this caveat from the application process, in order to ensure that eligibility for redress is equally assessed for each applicant.

Of further relevance, we note a recent experience with the special assessment process that was distressing for our client. A recent applicant, despite not meeting the criteria for the special assessment process was forced to proceed through the pathway as the NRS had “information” that he had been sentenced to more than 5 years in prison for a single sentence. We informed the NRS this information was not correct and provided the applicant’s criminal history. This was disregarded, and the applicant was forced to complete the special assessment process in order to proceed with his application. The information provided to the NRS was eventually proven to be incorrect as the applicant and criminal history had initially indicated. We note that this process was very confusing and distressing for the applicant and caused unnecessary delay in his application. It is fortunate in this circumstance that the applicant had a legal nominee to help navigate this process with him and advocate on his behalf.

If the special assessment process was to remain, we submit the NRS should publish a detailed guide as to the assessment process and provide information about the estimated timeline for the special assessment process and any options for review of special assessment decisions, including relevant timeframes.

Refusal to Make Payment into Private Solicitors’ Trust Accounts

⁶ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)*, Division 2.

From our experience, private law firms through their solicitors have been advocating for the best interests of the applicants they represent since the scheme's inception. This has been facilitated by an applicant signing the relevant nominee form, thus nominating a private law firm such as Kelso Lawyers to act on their behalf throughout the process. This allows the scheme to contact Kelso Lawyers on behalf of the client rather than the client themselves, to provide updates.

This has ensured that the applicant's wellbeing is accounted for noting the trauma associated with an application, while also ensuring that they are provided with full and frank legal advice so that they can make an informed decision about the outcome of their application. We would like to raise that despite Kelso Lawyers and other private law firms advocating for the applicants and providing additional support as their nominee, as well as having an authority to receive monies on the applicant's behalf, the scheme does not have a facility to deposit redress payments into private Solicitors' trust accounts.

We are of the view that this conflicts with our role and purpose as the applicant's nominee; noting that once a redress payment is made to the applicant, they then have to transfer the amount owing to our firm from their redress payment. We believe without this facility it undermines the importance of private legal advocates in this sphere, as the burden is then placed on the applicant to transfer the amount owing for their legal fees to us.

As such, we recommend a facility should be provided for an applicant's redress payment to be paid into private solicitors' trust accounts to ensure no further burden is placed on the applicant into trying to settle the balance of their legal fees.

We trust that these recommendations assist.

Yours faithfully,

Peter Kelso
Director
KELSO LAWYERS