Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

Submission by Kelso Lawyers

Introduction

Our Mission for Survivors of Abuse

Kelso Lawyers ('Kelsos') welcomes the opportunity to provide this submission to the Joint Select Committee. We have a long and proud history of fighting for the rights of survivors of childhood and domestic abuse. Our focus on abuse law has come from the harsh experiences of our founder and director, Peter Kelso; who suffered 13 years of physical abuse as a NSW State ward in foster care.

Purpose of these Submissions

Our aim in these submissions is to provide the Committee with practical insights and recommendations based on our extensive experience in representing survivors of institutional and domestic abuse.

Our Experience Fighting for Survivors of Abuse

Our experience in abuse claims has included civil litigation in the Local, District, and Supreme Court of NSW; a high volume of negotiated settlements; Victims Compensation Schemes in New South Wales, Queensland, Tasmania, and Western Australia - including the review of determinations by the NSW Civil & Administrative Tribunal, the NSW District Court and the NSW Supreme Court; representing survivors at the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission'); assisting Australian Defence Force personnel with their applications to the Ombudsman; Advising children in NSW State care on their legal rights, and preparing their claims; the preparation of law reform submissions for the Royal Commission and NSW State government; and now providing advice and representation to survivors applying to the National Redress Scheme ('NRS').

Recommendations

1. Foster Care Abuse	
1.1	Insert an amendment into the NRS Act[1] or NRS Rules[2] to expressly state that an institution is responsible for abuse by the relatives, neighbours and acquaintances of the foster parents where the institution has arranged or consented to the foster placement. This is to prevent the erosion of 'beneficial' interpretations that are common over the life of statutory compensation schemes.
2. Accountability for the National Redress Scheme	
2.1	Allow survivors to apply as of right to the Administrative Appeals Tribunal for a full merits review.
2.2	Allow additional submissions and evidence to be filed at both the internal review stage and on review by the AAT.
2.3	Allow Judicial Review under the AD(JR) Act by the Federal Circuit Court.
2.4	Allow survivors who are successful before the AAT or FCC to have their legal costs covered, so that their redress is not reduced by the cost of correcting a mistake by the NRS Operator.
3. Correcting Unfair and Inappropriate Elements of the National Redress Scheme	
3.1	Apply the maximum redress cap on a per 'set of abuse' basis, rather than a per person basis.
3.2	Increase the maximum redress per claim to at least $200,000 (as recommended by the Royal Commission), and allow it to be increased annually via the NRS regulations.
3.3	Simplify the Assessment Framework (see below 'Fixing the Assessment Framework' for our proposed approach) so that it can be easily administered and explained.
3.4	Allow survivors to claim for physical abuse, regardless of whether sexual abuse also occurred.
3.5	Remove the deemed rejection deadline. If the Scheme needs to clear its books each financial year, the better solution is to pay the award to a trustee (either one that the survivor nominates, or which is set up for this purpose) if it is not accepted or rejected within 12 months. Then, when the survivor feels able to re-engage with the NRS, the money can be paid out if the offer is accepted, or paid back if it is not.
3.6	Remove the restriction on persons applying who have been, or who currently are,

[1] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth).*
[2] *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (Cth).*

	incarcerated.
4. Improving the Accessibility of the National Redress Scheme	
4.1	Ensure that the NRS website is user friendly, optimised for mobile devices, and that the search functionality of the site can accommodate misspellings.
4.2	NRS paperwork needs to be concise and easy to understand. Compound questions should be avoided, and closed questions should be kept to a minimum (survivors often find closed questions stressful as they are prevented from putting their answer in context).
4.3	Advertise the NRS on social media, in doctors' surgeries, Centrelink & Medicare Service Centres, and public transport.
4.4	Make full use of SMS notifications when communicating with survivors. This reduces the risk of losing contact due to change of address, lost mail, and survivors screening their calls for numbers they don't recognise.

Reasons for Recommendations

1. Foster Care Abuse

We commend the drafters for including abuse in foster care within the scope of the scheme.[3] This brings the NRS in line with international developments in comparable legal systems, such as the United Kingdom and New Zealand.[4]

In our experience, cases of foster care abuse can be some of the most horrific and brutal. While foster care offers the possibility of a more natural home environment, it also increases the risk of abuse by significantly reducing an institution's ability to supervise the child's day-to-day wellbeing. Historically, supervision visits by Welfare officers would be conducted with the child in front of their foster parents, which made it particularly dangerous for children to make disclosures of abuse. Visits were also conducted infrequently, and with notice, which allowed much more time for abuse to escalate, and made it easier for foster parents to conceal it.

We submit that the phrase in section 15 of the NRS Act "responsible for the abuser having contact with the person" should be given a very broad interpretation so as to include abuse by relatives and acquaintances of foster parents. We have seen heartbreaking stories of survivors who were denied compensation because the abuse was perpetrated by a neighbour or family

[3] Application for Redress form (downloaded 30 July 2018), questions 31, 36, 41, 47; *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)*, s15.
[4] See *Armes v Nottinghamshire County Council* [2017] UKSC 60; *S v Attorney General* [2003] NZCA 149.

member such as an uncle or cousin. Placing a child in foster care prevents the institution from controlling who has access to the child. We submit that by imposing that risk on the child, it should be the institution that wears the financial consequences of it, not the child.

On this issue, it is also important for the Committee to be aware that abuse of children in foster care is often committed by other children; either biological children of the foster parents, or other foster children in the same placement.

In our experience, the interpretation of statutory compensation schemes by decision-makers tends to become less and less beneficial over time. With time, financial pressures and minimal external review of decisions starts to produce increasingly convoluted and harsh interpretations of the entitlements of applicants. Furthermore, this scheme has the added pressure of wanting to keep institutions participating, which will create pressure to start awarding the bare minimum redress that can be justified on the most strict 'black letter' interpretation of the NRS Act. Preventing this will be greatly assisted by expressly proscribing in the Act or the Rules the more broad and beneficial interpretation.

Recommendation

1.1. Insert an amendment into the NRS Act or NRS Rules to expressly state that an institution is responsible for abuse by the relatives, neighbours and acquaintances of the foster parents where the institution has arranged or consented to the foster placement.[5]

2. Accountability for the National Redress Scheme

In our decades of experience representing survivors of abuse in statutory compensation schemes we have seen some very unjust and illogical determinations from government assessors. The ready availability of external merits review of determinations is crucial. It has been the recurrent theme of the Royal Commission that effective accountability systems are critical to keeping institutions honest and just in their behaviour - the conduct of the National Redress Scheme should be no exception.

It is therefore very disappointing that the NRS Act has not allowed for external merits review via the Administrative Appeals Tribunal. It has also not provided for Judicial Review by the Federal Circuit Court or Federal Court.

While internal review of determinations is provided for, experience has taught us that the effectiveness of this mechanism degrades rapidly over time where assessors consider the likelihood of external review and correction unlikely. Further injustice is caused by s75(3) of the NRS Act which prevents an applicant providing additional evidence or submissions to

[5] While this abuse is arguably already within the scope of the NRS, experience has taught us that as time wears on, the interpretations applied by decision-makers in statutory schemes tend to become more and more narrow.

correct a misunderstanding of the original decision-maker. This feature demonstrates an ignorance of the complex lives that many survivors have led. The result is that the internal review mechanism is almost completely ineffective, and in essence a mere formality.

Constitutionally, the only option for survivors to challenge unsatisfactory internal review decisions will be to apply to the High Court for Judicial Review (far more narrow and technical than merits review). This option is also open for institutions who consider a redress decision to be flawed.

In our experience, the ready availability of external merits review is not abused by applicants to statutory schemes. Instead, this option is generally used intermittently to maintain the effectiveness of internal reviews. The result is a just, quick, and cheap system for ensuring correct and preferable decision-making.

Unfortunately, the review mechanisms for this scheme demonstrate either an ignorance of statutory compensation schemes, or an intention to allow the NRS to operate largely as a law unto itself - with only the most onerous, intimidating, and expensive external review mechanism in our legal system available to correct injustice (and judicial review will generally only correct gross injustice and incompetence).

Recommendations:

2.1. Allow survivors to apply as of right to the Administrative Appeals Tribunal for a full merits review.

2.2. Allow additional submissions and evidence to be filed at both the internal review stage and on review by the AAT.

2.3. Allow Judicial Review under the ADJR Act by the Federal Circuit Court.

2.4. Allow survivors who are successful before the AAT or FCC to have their legal costs covered, so that their redress is not reduced by the cost of correcting a mistake by the NRS Operator.

3. Correcting Unfair Aspects of the Scheme

Increase the cap on Redress, and make it apply per 'set of abuse' rather than per person

It is inappropriate that redress is capped at $150,000. It is also inappropriate that survivors can only make one application for all their abuse, as opposed to one application per 'set of abuse'.[6] This has a number of undesirable effects in the operation of the scheme and its attitude towards survivors:

[6] See section 20 of NRS Rules.

1. It has the absurd result of treating people as if they have a 'saturation point' of $150,000 beyond which they can't absorb any more harm from being sexually assaulted.

2. It has the effect of turning the NRS into a mechanism by which all the responsible participating institutions can cap the cost and split the bill for purchasing the survivor's cause of action against each of them. In fact, the more responsible institutions involved in the abuse (whether they are all participating institutions or not), the cheaper it is for each participating institution.

3. The limitation of $150,000 regardless of the number of sets of abuse has produced an exceptionally complex mathematical procedure in Part 6, Division 2 of the NRS Rules for calculating each institution's share.[7] The method contains such crimes against the English language as s25(1) "Use the following formula to work out the key institution's portion of the set of abuse share of maximum amount for each set of abuse of the person for which the key institution is responsible". This complexity is the result of the unfair decision to cap redress on a per person rather than per 'set of abuse' basis. The harder the Scheme is to explain, the more likely it is to be perceived as unfair, and the greater the scope for errors in calculating redress.

4. The calculation of redress is more focused on the institutions' share of the cost of redress than on the survivors' need for that redress. For example, in general, if two institutions are equally responsible for the abuse, but only one is a participating institution, then the maximum redress available to the survivor is reduced by half; this is not a survivor-focused approach. Whereas if the claim were made under the common law, the survivor could sue one institution for the whole amount and leave the institution to recover from the other responsible institution or from the abuser.[8]

Ultimately, the $150,000 cap is disrespectful to survivors; and this is aggravated by applying it per person rather than per 'set of abuse'. Furthermore, by applying this cap on a per person basis this introduces a high level of complexity to the apportionment and calculation of Redress which is apt to produce error in Redress determinations, and confusion amongst survivors.

Recommendations:

3.1. Apply the maximum redress on a per 'set of abuse' basis rather than per person basis.

[7] It was necessary for us to program an Excel sheet step by step with the calculations and steps prescribed by the NRS Act and NRS Rules in order to clarify their correct interpretation. These calculations are not something that can be competently performed by hand, let alone explained in plain English.

[8] See for example: *State of New South Wales v Taylor* [2017] NSWSC 1794.

3.2. Increase the maximum redress per claim to at least $200,000 (as recommended by the Royal Commission), and allow it to be increased annually via the regulations.[9]

Fixing the Assessment Framework

The NRS Assessment Framework[10] is poorly drafted. It does not reflect well on the NRS that far greater precision is exercised in apportioning the Redress liability between the institutions (see NRS Rules), than is applied to the calculation of the "Maximum Amount" of Redress for survivors.

The poor drafting of the Assessment Framework is both in the amounts attributed to each element of the abuse, and the overlapping manner in which elements are defined. For example, the definitional overlap between 'extreme circumstances', 'institutionally vulnerable' and 'non-sexual abuse' will cause confusion:[11]

> **extreme circumstances**: sexual abuse of a person occurred in extreme circumstances if:
>
> (a) the abuse was **penetrative abuse**; and
>
> (b) taking into account:
>
> (i) whether the person was **institutionally vulnerable**; and
>
> (ii) whether there was related **non□sexual abuse** of the person;
>
> it would be reasonable to conclude that the sexual abuse was so egregious, long□term or disabling to the person as to be particularly severe.

Will there be situations where a person was 'institutionally vulnerable' and suffered 'non-sexual abuse' but is not considered to have suffered sexual abuse in 'extreme circumstances'?

It is also not appropriate that child physical abuse does not qualify without related sexual abuse, and that it is only allocated $5,000 regardless of its severity. We have represented countless survivors who have suffered through brutal physical abuse and humiliation (including broken bones, burns, inmate beatings sanctioned by institution staff, and the use of cages and metal objects). Child physical abuse can result in lifelong physical disabilities, disfigurement, and serious psychiatric injuries. $5,000 is not an appropriate sum to allow for physical abuse.

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[9] This is only fair as the value of any deduction that an institution gets for a past settlement with the survivor increases each year (see NRS Act, s30(2), step 4 of the 'method statement') but the Maximum Redress does not.

[10] *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 (Cth).*

[11] *National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 (Cth),* s4.

Recommendations:

3.3. We recommend simplifying the Assessment Framework to something that is more easily explainable and less open to confusing interpretations. For example:

Sexual Abuse		Physical Abuse	Aggravating Factors
Penetrative	**Non-Penetrative**		
$100,000	$50,000	$50,000	$50,000

3.3.1. Penetrative sexual abuse should be defined to include the performance of oral sex on the survivor.

3.3.2. Aggravating Factors should take into account anything in the offender's conduct (including psychological abuse and threats) or position, or the circumstances, or the manner in which the abuse was inflicted, that increased the survivor's trauma from the physical or sexual abuse (similar to the considerations relevant to aggravated damages at common law), or the duration of the abuse.

3.4. Allow survivors to claim for physical abuse, regardless of whether sexual abuse also occurred.

Remove the 6 Month Deemed Rejection Deadline

"Deeming" rejection of a redress offer after 6 months is highly unfair. Survivors are only allowed to make one application, so if they are deemed to have rejected one, they may be excluded from the scheme entirely.

A survivor-focused scheme must accommodate the effects that child sexual abuse has on many survivors. In our experience, it is not uncommon to have difficulty getting in contact with survivors from time to time. This can arise from a variety of factors caused by their childhood abuse, such as: homelessness, flair-ups in mental health, family conflict, regular changing of address, and the tendency to retreat from society for many months at a time. It is also not uncommon for survivors of historical abuse in State institutions to have difficulties with literacy, and many - in our experience - find government forms and letters extremely stressful and hard to understand.

Accepting an offer is an extremely important decision to make, and survivors should be given adequate time to reflect on their decision, consult with their support systems, and seek legal advice.

Recommendation

3.5. Remove the deemed rejection deadline. If the Scheme needs to clear its books each financial year, the better solution is to pay the award to a trustee (either one that the survivor nominates, or which is set up for this purpose) if it is not accepted or rejected within 12 months. Then, when the survivor feels able to re-engage with the NRS, the money can be paid out if the offer is accepted, or paid back if it is not.

Do Not Exclude Applicants on the Ground of Current or Past Incarceration

This is another element of the NRS which demonstrates inexperience with the world of institutional child abuse; particularly abuse of State wards. Our firm has represented quite a number of survivors with extensive criminal histories.[12] Time served should be punishment enough, survivors should not be punished again, by exclusion from this scheme, for the desperation that their abuse forced them into.

The reality is that it was not uncommon for the abuse in these institutions to so severely affect people that it effectively excluded them from mainstream society. Many were inflicted with serious mental health problems and discharged onto the street with no money, no education, no support network, and blacklisted from employment and relationships by the stigma of the institution they were committed to. Histories of using drugs and alcohol to block out the traumatic memories are not uncommon, and with that occasionally comes a history of incarcerations for related crimes.

This scheme is no place for political ideologies and delicate sensibilities. The scheme must operate to help survivors, not exclude them.

Recommendation:

3.6. Remove the restriction on persons applying who have been, or who currently are, incarcerated.

4. Improving Accessibility of the National Redress Scheme

In our experience, the effects of child sexual abuse often cause varying degrees of life-long disengagement with mainstream society. We note that it has been the experience of other institutional abuse redress schemes in the past that many survivors did not hear about the redress schemes until very late, or not till after the schemes had ceased accepting applications.

[12] The find and connect page for Tamworth Boys Home provides some additional examples: https://www.findandconnect.gov.au/guide/nsw/NE00412

Recommendations

4.1. Ensure that the NRS website is user friendly, optimised for mobile devices, and that the search functionality of the site can accommodate misspellings.

4.2. NRS paperwork needs to be concise and easy to understand. Compound questions should be avoided, and closed questions should be kept to a minimum (survivors often find closed questions stressful as they are prevented from putting their answer in context).

4.3. Advertise the NRS on social media, in doctor surgeries, Centrelink & Medicare Service Centres, and public transport.

4.4. Make full use of SMS notifications when communicating with survivors. This reduces the risk of losing contact due to change of address, lost mail, and survivors screening their calls for numbers they don't recognise.

Conclusion

We thank the Committee for inviting Kelso Lawyers to provide these submissions. We trust that the above recommendations and discussion will be of practical assistance to the Committee. We have endeavoured to keep these submissions brief and to the point. We would be pleased to attend a hearing of the Committee and provide further assistance.

KELSO LAWYERS

Peter Kelso, Director