

Senator Dean Smith
Chair
Joint Select Committee on Implementation of the National Redress Scheme

By email

NATIONAL REDRESS SCHEME: LEGISLATED DENIAL OF HUMAN RIGHTS

Dear Senator Smith

I am writing to express my disquiet at the implicit and explicit human rights discrimination against victims of institutional sexual abuse legislated in the National Redress Scheme (NRS).

The Parliamentary Joint Committee on Human Rights (JPCHR) was established to examine all bills and legislative instruments for compatibility with human rights and report to both houses of parliament. However the statement of compatibility, or lack of it, it does not affect the validity, operation or enforcement of the instrument or any other provision of a law of the Commonwealth.

As currently legislated the NRS denies the human rights of applicants as I have listed below. If the JPCHR has issued a statement of compatibility it brings the work of the committee, and the parliament, into disrepute.

At 10:12, Thursday, 10 June 2021, I rang the advice line of the Australian Human Rights Commission (AHRC) to enquire about the procedure to make a complaint relating to the denial of my human rights by the NRS. I was very succinctly advised as my rights had been legislatively denied the AHRC had no role to play. It was suggested my only option was to contact my local MP to lobby on my behalf to have the legislation amended to restore those rights.

Below I outline the relevant treaties, advice from the Attorney General's Department to the APS relating to treaty obligations, and advice on Procedural Fairness from the Victorian and Commonwealth governments.

Following this I provide the rationale for my views contrasting the NRS against treaty obligations.

There are seven Human Rights treaties to which Australia is a party. Three of these are of particular relevance to the National Redress Scheme, the:

1. International Covenant on Civil and Political Rights (ICCPR);
2. Convention on the Rights of Persons with Disabilities (CRDP); and
3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

I am basing my proposition, partly, on the publication of the Parliamentary Joint Committee on Human Rights [**Attachment 1 – Guide to Human Rights.pdf**]

International Covenant on Civil and Political Rights (ICCPR)

Right to a fair hearing

Source: article 14(1) of the ICCPR (fair hearing)

The right to a fair hearing is a fundamental part of the rule of law and the proper administration of justice. The essential right to a fair hearing provides that all persons are:

- equal before courts and tribunals; and,
- entitled to a fair and public hearing before an independent and impartial court or tribunal as established by law.

The right to a fair hearing applies in both criminal and civil proceedings.

Equality before the courts and access to justice

All parties before a court or tribunal are to have the same basic procedural rights, including both sides having a reasonable opportunity to present their case. For example, both sides are to have the same rights to present and contest evidence, examine witnesses or appeal a decision.

All people are to have equal access to the courts, regardless of citizenship or any other status. This requires that no one is to be barred from accessing courts or tribunals ... in order to be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

Independent and impartial courts and tribunals

The right to a fair hearing includes the right to an independent, impartial and competent court or tribunal. This relates to the separation of powers between the judiciary and the executive, and the requirement that judges do not have, and are not seen to have, any conflicts of interest.

Convention on the Rights of Persons with Disabilities (CRDP)

Right to equality and non-discrimination

Source: articles 2, 3 and 26 of the ICCPR, articles 2 and 3 of the ICESCR, ICERD, CEDAW, CRPD, and, and article 2 of the CRC.

The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights.

The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

The right to equality and non-discrimination requires that the State:

- ensure all laws are non-discriminatory and enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (with equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights.

The Human Rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind. All people are equal before the law and are therefore entitled to the equal and non-discriminatory protection of the law.

The right to equality and non-discrimination requires that the State:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

ATTORNEY GENERAL'S DEPARTMENT ADVICE

[Attachment 2: AGD.pdf]

This advice covers:

1. Fair trial and fair hearing rights;
2. Right to an effective remedy; and
3. Rights of people with disability.

PROCEDURAL FAIRNESS ADVICE

[Attachment 3 – Procedural Fairness – The Hearing Rule]

[Attachment 4 – What is Procedural Fairness – Merit Protection Commission]

NATIONAL REDRESS SCHEME: HUMAN RIGHTS VIOLATIONS

International Covenant on Civil and Political Rights (ICCPR)

A. MERIT REVIEW

On receiving an offer of Redress, I am able to ask for a review if I am unhappy with the offer made. An independent decision maker from within the secretariat will then make a new decision. No further information to support my case will be considered.

I am not able to view information provided by the offending institution: it is regarded as protected disclosure.

This is a serious breach of natural justice.

The new offer may be less, or more, or may result in a different decision about my eligibility. When a new offer is made the previous is automatically withdrawn.

There is no external merit review. Again, a flouting of natural justice owed to victims of abuse.

Recently, Professor Anne Twomey, Professor of Constitutional Law at the University of Sydney, defined Natural Justice as **the right to be heard**.

This right has been legislated away deliberately by the government which is shameful and a further denigration of the rights of victims in applying for Redress.

In her letter of response to a Representation on my behalf to the Minister for Families and Social Services from Kevin Hogan, Member for Page, the Secretary of the Department of Social Services wrote (during Caretaker Mode), **'The decision to limit external merits and judicial reviews was informed by concerns that these processes would be overly legalistic; time consuming, expensive and would risk further harm to survivors.'**

To advocate for a just settlement of redress, when it is denied, is a basic human right; it is not for others to posit such reasons, as given, for the denial of such a right which is mandated under the ICCPR.

The legal principle of **Procedural fairness** is also required in assessing claims for Redress, and decisions need to be consistent with the principles of procedural fairness, the:

1. **bias rule**— free from bias or apprehension of bias by the decision-maker;
2. **evidence rule**—rational or based on evidence that is logically capable of supporting the facts; and
3. **hearing rule**—providing people likely to be adversely affected by decisions an opportunity to: (a) present their case, and (b) have their response taken into consideration **before** the decision is made.

The *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* does not allow for an external review to be conducted by either an agency or a tribunal. The Commonwealth Ombudsman cannot conduct a merit review, nor does the Act provide for a merit review at the Administrative Appeals Tribunal, or judicial review by the Federal Circuit Court or Federal Court.

The only recourse available to challenge a decision is to apply to the High Court, which is provided under Section 75 (iii) of the Australian Constitution: a financial impossibility for victims of abuse.

Section 75 (iii) appeal to the High Court of Australia

In their paper, *Litigants and Legal Representation: A Study of Special Leave Applications – the High Court of Australia*, Pam Stewart & Anita Stuhmcke, 2019, outline the difficulties faced by self-represented litigants, and the disproportionate success rates of the most 'capable' litigants who are seasoned players with significant resources; as well as other matters.

Of the successful applications by reference to legal counsel the following is noted:

1. No barrister – 0%
2. Non silk – 8.76%
3. QC/SC – 91.25%

With a daily rate of \$10,000 for a QC/SC, it is highly unlikely those seeking Redress through the NRS would have access to \$50,000 - \$80,000 to seek Special Leave to challenge a NRS decision.

The legislation preventing victims of institutional sex abuse from access to judicial review is an explicit breach of their human rights, needs to be addressed and resolved in victims' favour.

[Attachment 5 – A study of Special Leave Applicants]

Legislated independent Review of the NRS

The following accepted definitions are therefore relevant. Both are sourced from The Oxford English Dictionary.

Independent: free from outside control; not subject to another's authority

Draft: preliminary version of a piece of writing

The NRS legislation mandates a 2-year Independent review of the NRS, currently underway.

Considering the documented flaws in the NRS by the Joint Committees of the 45th and 46th parliaments - including considerable comment from legal and medical groups highlighting their concerns about the need for reforms, as well as a number of other institutions - **an independent review is essential.**

I believe the Minister for Families and Social Services, and the Secretary of the Department of Social Services and legislated Operator of the NRS should have appointed:

1. A retired senior justice of either the Federal Court or the High Court; and
 - a. The position to be situated within, and staffed by, either the Australian Human Rights Commission, or the Commonwealth Ombudsman, as independent statutory authorities.

This is the only way a forensic and independent review of the NRS could be undertaken and accepted by survivors of institutional child sex abuse, and, I believe, by the public.

In its place, the Minister and Secretary have chosen:

1. to appoint, Ms Robyn Kruk OA, a retired Secretary of NSW and Commonwealth departments as the "Independent" Reviewer;
2. to make all publicly accessible information on the review only to be found on the NRS website (the organisation under review);
3. to make the contact email address for submissions: redressreview@dss.gov.au (the organisation under review). DSS provides the Independent Reviewer and staff with IT access, highlighting obvious privacy concerns;
4. to staff the office of the Independent Reviewer by NRS and DSS officers (the organisation under review). Privacy breaches therefore require investigation;
5. to exclude a contact telephone number. Instructions are given to email a request with a note that someone will return the "call";

6. not to acknowledge all submissions: whether each is brought to the attention of the Independent Reviewer or discarded is unknown. Assessments as to their status are made by NRS/DSS staff before being forwarded to said Reviewer;
7. to ask NRS applicants to take part in a voluntary Feedback Study relating to their NRS experiences conducted by the Social Policy Research Centre, UNSW, Sydney: Professor Ilan Katz. The report was to assist the Independent Reviewer in developing a position on applicants' experiences of the NRS.

In response to an email, on 6 January 2021, Professor Katz wrote: The report has not yet been published. We submitted a **draft report** to DSS in December 2020. The **final report** will be given to Robyn Kruk who is reviewing the Redress Scheme. (my highlights)

There are serious privacy issues around this document.

Most seriously, will the final document have been nuanced or parts redacted and, if so, what is the effect this may have on the "review"?

The Minister for Families and Social Services and the Secretary of the Department, and legislated Operator of the NRS, are in breach of the ICCPR. They deny the breach of human rights of victims of institutional child abuse and refuse to remediate harm, citing the necessity of waiting for the completion of the 2-year Review.

This is factually incorrect: the breaches could have been resolved prior to this: these had been forensically brought to their attention by Joint Committees of the 45th and 46th parliaments. They are in further breach in the handling and management of the Review.

The High Court has said, where administrative proceedings are held in private, the apprehended bias test is better formulated 'by reference to a fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to the apprehension of bias'.

Using the High Court's dicta there is a clear case to be made for apprehended bias in both the administration of the NRS and in the Independent Review it is undertaking.

Convention on the Rights of Persons with Disabilities (CRDP)

An issue needing to be brought forward is mental illness. I believe it to be true that the overwhelming majority of victims of institutional sex abuse are suffering mental illness in some form - some manage through resilience or through medical interventions; those living in remote areas, especially those of indigenous background, struggle with shame and despair leading to co-morbidities, drug addiction and self-medication often leading to homelessness and death.

The NRS needs to adhere to the CRDP; which it is ignoring.

[Attachment 6 – Access to Justice: United Nations Human Rights Special Procedures]

This document outlines the **International Principles and Guidelines on Access to Justice for Persons with Disabilities**ⁱ

Principle 1

All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability.

Principle 2

Facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities.

Principle 3

Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations.

Principle 4

Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others.

Principle 5

Persons with disabilities are entitled to all substantive and procedural safeguards recognized in international law on an equal basis with others, and States must provide the necessary accommodations to guarantee due process.

Principle 6

Persons with disabilities have the right to free or affordable legal assistance.

Principle 7

Persons with disabilities have the right to participate in the administration of justice on an equal basis with others.

Principle 8

Persons with disabilities have the rights to report complaints and initiate legal proceedings concerning human rights violations and crimes, have their complaints investigated and be afforded effective remedies.

Principle 9

Effective and robust monitoring mechanisms play a critical role in supporting access to justice for persons with disabilities.

Principle 10

All those working in the justice system must be provided with awareness-raising and training programmes addressing the rights of persons with disabilities, in particular in the context of access to justice.

A clear example of the NRS discriminating against people with a disability is the legislated Matrix which does not reflect the medical/psychological evidence which empirically proves the type, or severity, of abuse does not determine the impact of sexual abuse on the individual.

Therefore, someone who had suffered contact abuse and is being treated for PTSD, and other serious psychologically related conditions, could only receive a maximum of \$50,000 under the legislated matrix. Under the Royal Commission's matrix, the redress payment could be \$110,000.

This is ethically and intellectually grotesque: it publicly displays a complete lack of empathy and administrative competence and a preference on the part of government to protect the powerful vested interests of offending institutions.

The government is explicitly discriminating against those with psychological disability - who are powerless to defend themselves - by constructing this matrix which protects the financial interests of offending institutions.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

There is an astonishing lack of culturally appropriate support for Aboriginal and Torres Strait Islanders in the National Redress Scheme. This includes a lack of life-long access to counselling and psychological care, despite recommendations by the Royal Commission.

The government legislated a \$5,000 cap per individual: long-term health care for victims of child sexual abuse is not therefore a real priority, and there is a lack of understanding by governments about the needs and priorities for those who are unable to advocate for themselves.

The Joint Select Committee on Implementation of the National Redress Scheme has released an interim reply and is currently working on its Second Interim Report.

In **Recommendation 7** of its First Interim Report:

The Committee recommends that the second anniversary review examine the following areas for reform as a high priority:

- increasing access to counselling and psychological care services - including specialist financial counselling - for survivors who intend to apply for the scheme, and throughout the application process;
- expanding the provision of out-of-hours support and counselling services;
- expanding the provision of culturally sensitive services with a particular emphasis on the needs of First Nation's people; and
- removing any caps or limits on counselling and psychological care services for survivors.

Those of Aboriginal and Torres Strait Islander descent need strong advocacy to ensure culturally appropriate - and needed - critical health care is **mandated**.

IN CONCLUSION:

The NRS, as currently structured, denies fundamental human rights to victims of institutional sex abuse according to the:

1. International Covenant on Civil and Political Rights (ICCPR);
2. Convention on the Rights of Persons with Disabilities (CRDP); and
3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

HUMAN RIGHTS COUNCIL – COMPLAINT PROCEDURE UNIT

Should the Independent Review not result in the government legislating to reform the current identified inequities in the NRS, and my application for redress is not adequately addressed according to the ICCPR, to which Australia is a party, the only option left open to me is to lodge a complaint as an individual to the:

Office of the United Nations High Commissioner for Human Rights
Human Rights Council Branch - Complaint Procedure Unit
OHCHR – Palais Wilson
United Nations Office at Geneva
CH – 1211 Geneva 10
Switzerland
F: (41 22) 917 90 11
E: cp@ohchr.org

[Attachment 7 – Human Rights Council: Complaint Procedure Form]

Senator Smith, I am happy for this document, and attachments, to be forwarded to Committee members.

With best wishes

Yours sincerely


