

6 March 2015

The Hon Justice Peter McClellan AM
Chair of the Royal Commission
into Institutional Responses to
Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

redress@childabuseroyalcommission.gov.au

Dear Justice McClellan

**Re: Consultation Paper Redress and civil litigation
Royal Commission into institutional responses to child sexual abuse**

About NLA

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Response to the Consultation Paper

Equality and Justice

NLA supports the approach by the Royal Commission to equality and justice for survivors of abuse, by determining that redress shall not be dependent on factors

such as the State or Territory in which the abuse occurred, given that abuse could have occurred in a number of jurisdictions.

Where there may have been multiple tortfeasors, we consider that it is important to avoid overlaying a redress scheme with the usual principles that apply when common law damages are assessed, as this unnecessarily adds an additional layer of complexity to a redress scheme.

By allowing general amounts of redress which are assessed on a more global basis it does away with trying to ascribe certain impacts to institutional and non-institutional abuse. It is recommended that a robust and broad brush approach be taken to the assessment of an appropriate amount of redress.

In this regard, NLA supports the adoption of a matrix similar to the matrix outlined in Table ES1¹. Experience from our work in criminal injuries compensation matters shows that the survivor may suffer tremendous mental shock or emotional trauma as a result of offences considered by the criminal justice system as relatively minor offending behaviour (at least on a scale of seriousness of matters before the criminal courts).

Again, to avoid the application of usual common law principles to the assessment of compensation or damages, such as causation, NLA supports the use of a matrix which acknowledges the impact on the survivor of conduct which may not necessarily be “compensable”, that is, in cases where the survivor suffers from the effects of abuse of various kinds: sexual, physical, mental, neglect (parental or institutional) and forced labour.

NLA supports the principle that the availability and type, or amount of redress available, will not depend on factors such as whether the abuse occurred in a government or non-government institution, however an issue arises where some States and Territories have already made redress payments to survivors of abuse (in instances where a child was in State care).

It will therefore be necessary to carefully resolve this issue with the States and Territories, and address the real or perceived notion of ‘double-dipping’. In this regard it is critical to ensure that the parameters of a redress scheme are clear to applicants at the outset.

The same may be said where a person has also received a criminal injuries compensation payment or obtained common law damages. However, the method of assessment of prior redress payments, criminal injuries compensation payments and common law damages may not be reflective or the same as the method of assessment for redress payments pursuant to a new scheme.

¹ Consultation Paper pg. 18

The basis for calculating awards or payments under existing State and Territory legislation can be quite prescriptive.

Commissions have experience of settling claims for common law damages arising out of the negligence of the State, where the plaintiff suffered sexual abuse and was at the time in the care of the State. In some instances, the person had also received criminal injuries compensation. We have successfully advocated on behalf of the person that full repayment of the criminal injuries compensation was not required, because the basis of the payment of the compensation and the settlement of common law damages was in relation to different conduct or abuse.

NLA does not support an automatic reduction in redress payments or denial of access to a new redress scheme, simply because the person has already received common law damages, a State based redress payment or criminal injuries compensation.

Counselling and psychological care

NLA supports access to a wide range of therapeutic services that suit the particular needs of the survivor, especially if a component of redress is to include the financial cost of counselling or therapy, rather than or in addition to a lump sum payment of money. In our experience, some survivors have expressed an interest or desire in accessing non-traditional or alternative forms of healing and therapy, such as art therapy or music therapy. To allow this access does, to a degree, provide more choice to survivors, and reflects the philosophy underpinning the National Disability Insurance Scheme: recognition of the need for individualised support and understanding that survivors have different needs, preferences and aspirations.

It is also desirable to provide access to financial assistance for as long a period of time as possible, as there may be times when a life event triggers the need for therapeutic intervention at a much later stage.

For some survivors they may have already undertaken extensive counselling or therapy and may feel that they no longer wish to engage in counselling or therapy. For others it may be re-traumatising to go through counselling or therapy and they will (justifiably) express a strong desire to not engage with counselling services, psychologists or psychiatrists.

In our experience there are considerable gaps in the availability of services which provide assistance to male survivors of childhood sexual abuse.

Monetary payments

NLA supports the availability of a lump sum payment of redress given the significant effects of sexual abuse on survivors.

Some survivors may feel that a lump sum payment could best be used as a deposit for the purchase of a new home or to pay off an existing mortgage. In other instances survivors express a desire to go on a holiday, buy a car, pay everyday bills

or be able to afford respite. The point is that choice and freedom in how a lump sum payment is spent by the survivor should be respected and not enforced.

The traumatic effects of childhood sexual abuse may often result in the inability of the survivor to achieve a satisfactory education and therefore to gain long term or secure employment. A lump sum payment is some recompense for the loss of enjoyment of life, loss of education and loss of earning capacity.

NLA prefers that choice be a significant factor in how redress is provided, however there will be some cases where there is a legitimate concern that a lump sum payment of money might be used to fund drug, alcohol or gambling addiction. It could also be considered that some survivors are particularly vulnerable such as people with an intellectual disability, physical disability or other capacity issue. In some cases it may therefore be considered appropriate that redress payments are held on behalf of the person by an agency such as the Public Trustee.

This may also be a consideration in cases where there is a possibility that a lump sum payment could be used up by family members and friends of survivors, especially where there is some power or influence exerted by family and friends of the recipient of large sums of money.

This ought to be carefully balanced against the aspiration of a redress scheme giving survivors the opportunity to exercise control over how they wish to spend the redress payment without any judgment being made by society or government regarding the appropriate expenditure of this money.

Payment of redress funds to the Public Trustee will of course vary throughout the States and Territories. Legal Aid Commissions are aware of some complaints made by those who have their funds managed by the Public Trustee, regarding fees charged by the Public Trustee (which can in some cases significantly erode the funds held on trust), and/or the loss of control that people have in relation to accessing their money. On the other hand, clients sometimes tell us that they appreciate their money being held in trust by the Public Trustee because it allows them to tell other family members that they don't have control over the funds and therefore they are unable to give money to family or friends, when it is requested or demanded of them.

In relation to children and young people, it is our experience that the full impact of abuse is not always known or manifest until the child goes through puberty; has their first serious sexual relationship or first marriage like relationship. In addition the time of having a first baby is also a marker of when the full gravity of childhood sexual abuse can be experienced.

This is a relevant consideration for assessing access to the scheme by children and their guardians.

It may not be appropriate for a child's parent or guardian to carry the responsibility of making application to a redress scheme on behalf of a child. They may not be aware of the scheme or lack the ability to act in the child's best interests. These factors also support the view that the scheme should not have a fixed closing date.

NLA suggests that further consideration be given to considering whether people other than the "primary victim" may have access to a scheme. The concept of "secondary victim" is explored in State based victims of crime legislation. It is well recognised that family members of the survivors of childhood sexual abuse, like parents, also suffer emotional and psychological trauma because of the abuse suffered by the "primary victim".

NLA recommends that further consideration be given to access to a redress scheme by family members of a person who suffered abuse, but dies before the scheme commences, or dies after making an application to the scheme.

Redress scheme processes

NLA supports the view that there should not be a fixed closing date for applications to the scheme. There will be some very difficult to access communities like prisoners and Aboriginal communities, especially in remote areas.

There are some limitations on prisoners holding large sums of money in their account so they may need to have accounts outside prison should a lump sum redress payment be made.

For remote aboriginal communities it will be necessary to consider ways of engaging with the communities and raising awareness of the availability of redress. Vital research into the unmet legal need in civil and family law, and the associated need for community legal education, has recently been undertaken in Western Australia. Findings and recommendations may be found in the Indigenous Legal Needs Project – WA. Similar projects have been completed for Victoria, Northern Territory, and Queensland. Some years ago this research was also conducted in New South Wales. For the most recent findings and recommendations in Western Australia, see: <http://www.jcu.edu.au/ilnp/resources/ilnpreports/index.htm>

The experience of some State based redress schemes has been that survivors have not had a long enough period of time to become aware of the scheme, and to receive necessary and appropriate assistance to access the scheme before it was closed.

NLA supports a simple and clear application process. In our experience, some victims of crime may not be able to produce evidence of expenses which they have incurred in the past as a result of a crime or abuse. This is because of the trauma and severe disruption to the person's life, or because the expense was incurred many years ago. We submit that this factor should be taken into account when determining the validity of claims.

The application form needs to be clear and as concise as possible. Re-traumatisation occurs when a survivor is required to recount the timeline (if abuse occurred over a period of time) or to recount specific incidents.

As mentioned above, it will need to be determined whether redress is linked to particular types of offences, the nature of the abuse or whether it is linked to the actual impacts of the abuse (or a combination of these factors).

A difficulty may arise when the person is required to submit an application form which details the impacts of the abuse. Will it be necessary for a report to be obtained from a doctor, counsellor, psychologist, social worker or psychiatrist, to substantiate the impacts of the abuse? All have varying qualifications and abilities to comment on the effects of the abuse. Obtaining reports also comes at an emotional cost to the survivor and a financial cost to the scheme.

Providing assistance

Legal Aid Commissions have experience in assisting vulnerable and disadvantaged people, especially through the delivery of civil law programs throughout Australia. Some Legal Aid Commissions have provided very extensive assistance to victims of crime to access compensation, or achieved settlements for clients in the form of common law damages where the client was abused whilst in State care. In addition, some legal aid commissions have also assisted clients to access State based redress schemes and have provided community legal education about these schemes.

There is a vast network of Legal Aid offices throughout the States and Territories, and access to rural, regional and remote areas is achieved by Legal Aid Commissions through extensive circuit work. This is especially important when service delivery is required to assist people living in remote areas.

NLA supports the provision of assistance to survivors in making application to a redress scheme. Some survivors may lack the educational skills and ability to navigate such a scheme, or to appreciate the intricacies of the scheme. Some survivors will experience re-traumatisation as a result of applying to the scheme, therefore proper support will be essential.

NLA supports the proposition that legal advice and assistance should be made available to survivors to make an application for redress, and in addition to support survivors to consider and accept (or reject) an offer, and to advise on the effect of entering into a deed of release, especially as it relates to confidentiality and the preservation (or otherwise) of common law rights.

It must be made clear in policy or legislation that payments made by a redress scheme do not impact on a person's eligibility for social security; that statutory refunds will not be required to Medicare and that a redress payment is not considered taxable income pursuant to taxation law.

Conclusion

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely,

George Turnbull
Chair