RYAN CARLISLE THOMAS LAWYERS

Ms Robyn Kruk AO
Independent Reviewer
National Redress Scheme

your ref:
our ref: PSA: 2082551

25 September 2020

By Email: redressreviewsubmissions@dss.gov.au

Dear Ms Kruk,

Submission regarding second year review into how the National Redress Scheme is working for survivors and other stakeholders

We refer to the above matter and advise that we wish to make a submission regarding the operation of the National Redress Scheme ("the NRS") for survivors of institutional child sexual abuse two years into its operation.

Introduction

Ryan Carlisle Thomas (RCT) is Victoria's largest law firm representing survivors of institutional abuse. Since the late 1980s we have secured compensation for more than 3,500 survivors of abuse in government, non-government and religious institutions. Over thirty years later we are still fierce advocates for the rights of those abused as children. We have also acted for clients who appeared at public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse ("The Royal Commission").

1. Physical and Other Abuse

Ryan Carlisle Thomas remains opposed to the exclusion of abuse survivors who have suffered non-sexual abuse such as physical abuse, psychological abuse and neglect. Whilst we note the NRS can currently consider related non-sexual abuse, we consider the definition of abuse should be broader and encompass all forms of institutional child abuse.

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Many of our clients have suffered horrific physical abuse in institutional care, the emotional and physical scars of which often remain with them for life. Although the Royal Commission's terms of reference did not extend to such abuse, we see no reason why the proposed scheme should not extend to include physical abuse, psychological abuse and neglect, even in the absence of child sexual abuse.

2. Serious Criminal Convictions

We note that under the NRS, those who have suffered abuse, but who have served more than 5 years or longer in prison for a single offence, will not be entitled to redress unless the NRS Operator makes a determination that providing redress in the circumstances would not bring the Scheme into disrepute or adversely affect public confidence in, or support for, the Scheme.

The Royal Commission had conducted private sessions with 6,875 survivors as at 31 May 2017. Of those survivors, the Commission reported that 10.4 per cent were in prison at the time of their private sessions. Assuming that these survivors were serving prison sentences of 5 years or more, this would mean that on the basis of those who spoke with the Royal Commission alone, 715 of those who attended private sessions may be excluded from the NRS on the basis of their convictions.

A significant proportion of our institutional abuse clients have criminal records, especially those who were abused as wards of the states or in the juvenile justice system. Many of our clients with criminal records stopped offending years ago. It is well documented that one of the effects of child sexual abuse can include imprisonment.[1] Longitudinal studies have also shown that childhood abuse can considerably enhance the risk of survivors resorting to crime and violence later in life, although such criminal involvement tends to decline as they approach early adulthood.[2]

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, Interim Report Volume 1, 2014, p. 117

[2] http://insight.vcoss.org.au/the-role-of-out-of-home-care-in-criminal-justice-outcomes

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Previous research by the Australian Institute of Criminology in 2012 has found that childhood sexual abuse survivors were almost five times more likely than their peers to be charged with an offence.[3] That study did not focus on survivors of institutional child abuse, but research conducted in Victoria in 2007 found that, of a sample of children aged over 10 years old and living in out-of-home care, 21 per cent had experienced police contact in the previous six months, including having been charged with a criminal offence or being cautioned or warned by the police.[4]

From the testimonies we have received from our clients, it is certainly not unusual for people with significant levels of abuse to "go off the rails". Many abuse survivors tell us they turned to drugs to self-medicate, developing a drug habit for which they were then compelled to offend; others tell us they offended after becoming antisocial and resenting authority as a result of the abuse. In many instances the abuse they suffered has often had a major bearing on their criminal offending, with survivors often lamenting that it was behaviour and responses they learnt in order to survive in the institutions that have caused them to be convicted of crimes or to continue offending in their adult life. Further, it is arguable that many would not have "done the time" in the first place had they not been abused. Such abuse survivors have already been punished, first by institutions where they suffered abuse, then by institutions of incarceration. While not condoning or excusing the crimes they have committed, we consider it is necessary to recognise that many of the crimes stem from psychological injury, antisocial behavior and drug addiction caused by the abuse they suffered in the institutions.

We remain concerned by the additional hoops required to be jumped through by survivors of child sexual abuse with serious criminal convictions. We consider that abuse survivors with criminal records should have their applications determined in the same manner as other abuse survivors from the outset, with every application to the NRS assessed on its own merits. The current hurdles can effectively lead to the NRS punishing them again for crimes

[3] http://www.sciencedirect.com/science/article/pii/S0145213417300066
[4] S Wise & S Egger, The Looking After Children Outcomes Data Project: Final Report, Australian Institute of Family Studies, prepared for the Department of Human Services Victoria, 2007, p. 15.

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for which they have already served the time. Such abuse survivors have already been punished, first by institutions where they suffered abuse, then by institutions of incarceration.

3. Legal Advice and Private Law Firms

There have been reports in the media of "a circling pack of law firms" seeking to profit from NRS applications by charging abuse survivors for work for which they're entitled to receive for free via the Knowmore Community Legal Centre.[5]

At RCT Law, when abuse survivors approach us for advice, we consider and discuss all legal options available with them, including the NRS, civil litigation and out of court settlements. Where we recommend the NRS as their best option, we strongly encourage survivors to approach Knowmore Legal Service.

RCT Law wholeheartedly endorses the valuable work performed by Knowmore, both during the life of the Royal Commission into Institutional Responses to Child Sexual Abuse, and in representing survivors to help them navigate the NRS.

In all but the most exceptional circumstances, we do not assist survivors with NRS applications. We have assisted a very small number of clients with NRS claims at their insistence due to exceptional circumstances, despite having first advised them of the free Knowmore alternative, and have also assisted a survivor with issues arising from a finalised NRS application on a pro bono basis on referral from Knowmore.

RCT Law is proud to be part of a panel of trauma-informed specialist law firms to whom Knowmore refers abuse survivors for legal advice regarding their civil options to consider as an alternative to pursuing a NRS application.

[5] See eg https://www.abc.net.au/news/2020-06-19/lawyers-target-redress-abuse-clients-in-new-cottage-industry/12006878?nw=0

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RCT Law is opposed in principle to those abuse survivors seeing redress through the NRS being legally represented by private law firms seeking to profiteer from work to which they are entitled to receive for free through Knowmore Legal Service. We consider that any private law firm acting on behalf of abuse survivors in a NRS application should be required to first inform their prospective clients in writing of the free alternative available via Knowmore so abuse survivors can make an informed choice as to whether they nevertheless wish to instruct private lawyers to represent them.

4. Extreme Circumstances

We are concerned by the lack of transparency in both the *National Redress Scheme for Institutional Child Sexual Abuse Act* 2018 (Cth) ("NRA") and the *National Redress Scheme for Institutional Child Abuse Assessment Framework 2018* ("NRF") surrounding when the $50,000.00 "extreme circumstances" payment will be made in claims involving penetrative abuse. If survivors fail to qualify for extreme circumstances compensation, contained as a factor for consideration in the assessment matrix/table contained in 5.1 of the National Redress Guide ("NRG"), the maximum redress payment they can obtain for penetrative abuse is only $100,000.

We consider that in the interests of justice, the criteria used in assessing entitlements under the NRS should be made public, including in relation to when extreme circumstances will be recognised. The policy guidelines are currently subject to interpretation by those administering the NRS, which can lead to inconsistency and uncertainty.

Section 4 of the NRF defines extreme circumstances as being sexual abuse of a person 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."

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The NRF at section 4 states that a person is "institutionally vulnerable" if:

> "…having regard to the following matters relating to the responsible institution for the abuse and the time of the abuse, it would be reasonable to conclude that the person's living arrangements at the time increased the risk of sexual abuse of the person occurring:
> (a) whether the person lived in accommodation provided by the institution;
> (b) whether the institution was responsible for the day-to-day care or custody of the person;
> (c) whether the person had access to relatives or friends who were not in the day-to-day care or custody of the institution;
> (d) whether the person was reasonably able to leave the day-to-day care or custody of the institution
> (e) whether the person was reasonably able to leave the place where the activities of the institution took place."

However, while the guidelines set out factors against which "extreme circumstances" will be assessed, they do not go so far as to stipulate that, if all factors are present, the maximum compensation will be paid. This leads to the unsatisfactory situation where there is still discretion for abuse survivors to be denied extreme circumstances payment by those administering the NRS.

Further, the requirement of "related non-sexual abuse" seems superfluous considering the definitions in the NRA and NRF.

The NRA defines "non-sexual abuse" as including "physical abuse, psychological abuse and neglect". In order to amount to related non-sexual abuse, the participating institution must be responsible for both the sexual abuse and the non-sexual abuse of the survivor.

In our experience with survivors, sexual abuse is inevitably accompanied by psychological abuse and the institution is almost always responsible for both. Considering this, it would be reasonable to conclude that the related non-sexual abuse factors are almost always fulfilled in cases of child sexual abuse.

Child sexual abuse, whether it includes penetrative abuse or whether there is related non-sexual abuse, invariably results in long-term disabling effects for abuse survivors. We

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consider that the common definition of “egregious”, namely “outstandingly bad or shocking”, applies to all circumstances of child sexual abuse.

The failure to adequately communicate when the $50,0000 extreme circumstances payment will be made has led to significant uncertainty for survivors to date.

RCT Law has attempted to seek clarification from those responsible for managing the NRS regarding under what circumstances extreme circumstances payments will be made. We submitted questions to the Independent Decision Maker (‘IDM’) of the NRS. We attempted to clarify whether it is a prerequisite for obtaining extreme circumstances compensation that a person be institutionally vulnerable and have suffered related non-sexual abuse, or whether there are circumstances where a person may not be *both* institutionally vulnerable and have suffered related non-sexual abuse, but the abuse still be deemed “egregious”.

The response we received was unclear. It suggested that the IDM has discretion in applying the definition of “extreme circumstances”, and that, while the IDM may take into account the factors listed in the NRF, they will also consider survivors’ overall experiences and whether different institutions are responsible for the abuse.

It is clear from our communications with IDM delegates that there are additional criteria or factors which the IDMs may take into account in assessing extreme circumstances and that are not available either to the public or to survivors applying under the NRS. This potentially undermines the purposes of the NRS, which was to create a transparent, simple and consistent process for survivors to access redress.
Making the criteria used to assess extreme circumstances publicly available would increase transparency and confidence in the NRS.

5. *Increasing and indexing the maximum redress amount and removing indexing of past NRS payments*

The NRS is currently expected to run for 10 years from its 1 July 2018 inception.

We note that the current maximum payment available under the NRS is $150,000, which is available only in cases of penetrative abuse where extreme circumstances are also held to apply.

We consider that the maximum NRS payment should be increased and indexed annually in accordance with inflation.

There have been a number of judicial decisions in both Victoria and interstate in recent time where plaintiffs have been awarded significant damages, some in excess of a million dollars, by way of compensation for institutional child abuse[6].

Whilst the NRS was always envisaged as an alternative to civil litigation, with a lower standard of proof and lower payments available generally on this basis, we consider that, in order to remain relevant, redress payment caps should be increased for each category of abuse (currently exposure, contact and penetrative abuse).

We further consider that the payment caps for each category of abuse should be increased annually for the life of the scheme to take into account inflation.

Earlier relevant prior payments that have been received by abuse survivors are currently adjusted for inflation using an annual inflation rate of 1.019, with the adjusted amount being deducted from the payment in accordance with section 30 of the NRA.

We consider that the rate of inflation should be removed altogether. Many abuse survivors settled their claims prior to the implementation of the NRS when there were numerous legal defences available to institutions to resist claims. As a result, many abuse survivors settled

[6] See eg *Erlich v Leifer & Anor* [2015] VSC 499; *Hand v Morris & Anor* [2017] VSC 437; *Waks v Cyprys & Ors* [2020] VSC 44; *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27

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their claims for what would now be regarded as a pittance due to legislative reforms and judicial determinations that have been made since this time.

Only “relevant prior payments” made by/on behalf of an institution that are related to the abuse in the NRS application are deducted from the NRS payment according to 5.1 of the NRG, with prior payments capable of being broken down into separate amounts that cover different purposes being broken down in this manner and only the amounts paid in recognition of the abuse or harm caused being treated as relevant prior payments. However, we note that in some past settlements, legal expenses may not be capable of being reasonably attributed, and may still be considered a relevant prior payment if this is the case.

We consider that in the interests of fairness to those survivors who settled claims prior to the introduction of numerous reforms to the area of institutional child abuse, past payments should not be indexed for inflation.

6. Expedited Claims and general timeframes

In our limited direct experience with the NRS, and based on instructions from some of our clients who have pursued the NRS option, we consider that the NRS process for expedited claims should be improved.

For example, we acted for a terminally ill abuse survivor whose NRS application took in excess of five months to result in an offer. We received a verbal decision at time, after significant correspondence with the NRS chasing a decision. Although the abuse survivor considered requesting a review of the decision, they ultimately accepted the NRS offer because of their concern that the review would involve further waiting, and time they did not potentially have on their side.

Many terminally ill abuse survivors, or abuse survivors in chronic poor health, do not have the luxury of time on their side to await an outcome under the NRS. We consider that the

Scheme could be significantly improved in terms of turnaround time for such survivors, to ensure they receive an offer of redress while still alive.

The NRS has also attracted significant criticism in terms of delays in processing applications generally. Whilst some delays were inevitably due to allowing time for some institutions to opt into the NRS, we consider that general turnaround times for processing applications under the NRS could also be improved.

7. Timeframe to Accept NRS Offers

We note that pursuance to section 34 of the NRA, survivors have a 6-month period from the date of offer by which to accept a written offer of redress.

We consider that the period by which to accept an offer of redress under the NRS should be extended to 18 months in order to afford abuse survivors sufficient time to make an informed decision as to whether to accept or reject a NRS offer. Making such a decision often requires advice as to alternatives to the NRS, primarily civil litigation.

In order to adequately advise abuse survivors about a potential civil litigation pathway, lawyers usually need to request institutional records and take detailed instructions regarding the abuse. In addition, lawyers need to establish that an injury has occurred as a result of the abuse, which often requires medico-legal assessment where abuse survivors have not sought relevant treatment over the years.

Given the above process can take some months, we consider that extending the timeframe by which to accept a NRS offer to 18 months would assist in taking some of the pressure off abuse survivors in making that decision, and allow them to make a fully informed decision about whether the NRS is their best option.

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Conclusion

We thank you for the opportunity to provide our feedback and welcome the opportunity to discuss any aspect of this submission.

Yours sincerely,

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