

THE NATIONAL REDRESS SCHEME

Professor Robert Guthrie
John Curtin Institute of Public Policy

Introduction

- The Royal Commission estimated about 60,000 people were sexually abused as children in Australian Institutions.
- The Commission recommended inter-alia a National Redress Scheme (NRS)
- The elements of 'appropriate redress' are a 'direct personal response', 'counselling and psychological care' and 'monetary payments'
- Monetary payments to be assessed by a matrix
- NRS generally adopts the Commission recommendations – with some modifications

Introduction

- In Western Australia it is estimated there are about 5700 survivors of institutional sexual abuse who may be able to access the NRS.
- About half of these survivors were abused in WA Government institutions,
- Approximately 1000 in mixed government and other institutional care and the balance in non-government institutions.
- Half of the survivors identify as indigenous Australians.
- About one quarter of the survivors reside in rural and remote regions
- Western Australia has already established the Country Schools Hostel Redress Scheme and the Redress WA.
- Payments under previous WA schemes and any payments for like abuse made under the *Criminal Injuries Compensation Act 2003* are to be taken into account under the NRS

General Principles

- The objects of the Act are to recognise and alleviate the impact of past institutional sexual abuse and related abuse and to provide justice for the survivors of that abuse.
- Provide redress in the form of monetary payments up to \$150,000.00 counselling and psychological services up to \$5000.00, and a direct personal response to survivors by participating institutions.
- Redress is available to a person who was child when abused and the abuse occurred prior to 1 July 2018. The abuse must occurred inside a participating State or Territory.
- Person must be an Australian citizen or permanent resident of Australia and make an application to establish they have been sexually abused within the scope of the NRS by one or more of the participating institutions (PI) responsible for abuse. A PI is responsible for abuse if the abuse occurred in circumstances where the PI is primarily or equally responsible for the abuser *having contact with* the person/survivor.
- The institution responsible for the abuse suffered by a victim is responsible for the redress.
- Institutions are only able to participate in the Scheme if the states in which they operate also opt in. Where an institution no longer exists or is otherwise unable to pay either the Commonwealth or the relevant State or Territory will act as a 'funder of last resort'.

Constitutional Basis for NRS

- NRS Act is dependent on a state or territory participating in the Scheme.
- State and Territories seeking to participate in the scheme must refer relevant powers to the Commonwealth.
- In other words the NRS is a Commonwealth scheme administered by the Commonwealth with powers referred by the States.
- In Western Australia the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 was introduced in August 2018

The Operator

- The Principal Act will be administered by The Operator.
- Where the Operator considers there is a reasonable likelihood that the person is eligible for redress the Operator must approve the application and make an offer of redress to the person.
- If the offer is accepted the person is entitled to redress under the NRS and the PI and its officials are released from all civil liability for the abuse. The abuser is not released from liability.
- The Operator may enter into, vary and administer a contract agreement, deed or understanding relating to the provisions of support or assistance under the NRS.
- The Operator is responsible for ensuring the NRS is *survivor focused* and that it avoids further harm or re-traumatisation to the person/survivor. Redress should be assessed, offered and provided with appropriate regard to the nature and impact of the child sexual abuse and in particular institutional abuse. The cultural needs of survivors and in particular vulnerable survivors should be taken into account.
- The Operator is also responsible for determining which PI is responsible for the abuse of a person and for recovering the costs of redress provided to the person/survivor as well as recovering the costs of administering the NRS from PIs.

Key Terms

- Section 5 of the NRS Act defines key terms in the Act.
- *Reasonable likelihood* which is the standard of proof under the Act and therefore the NRS is referred to as *the chance of a person being eligible is real, is not fanciful or remote and is more than merely plausible.*
- The NRS provides redress for sexual abuse and related sexual abuse. Section 5 refers to non-sexual abuse being related to sexual abuse where the PI is responsible for both sexual abuse and non-sexual abuse of the person. Sexual abuse is defined as *any act which exposes the person to or involves the person in sexual processes beyond the person's understanding or contrary to accepted community standards.*
- Importantly, rule 6 of the NRS Rules refers to child-on-child sexual abuse and in that context sexual abuse of a person *is not within the scope of the NRS if the abuse did not involve physical contact with or penetration of the person.* It follows that child-on-child abuse involving contact and penetrative sexual abuse is within the scope of the Act but child-on-child exposure abuse is not.
- Survivor is defined as a person who has suffered sexual abuse that is within the scope of the NRS. Abuser is defined circuitously as a person who has abused another person.

Redress Monetary Component

Kind of sexual abuse of a person	Recognition of sexual abuse	Recognition of impact of sexual abuse	Recognition of related non-sexual abuse	Recognition of person institutionally vulnerable	Recognition of extreme circumstances of sexual abuse
1. Penetrative abuse	\$70,000	\$20,000	\$5000	\$5000	\$50,000
2. Contact abuse	\$30,000	\$20,000	\$5000	\$5000	Nil
3. Exposure abuse	\$5000	\$5000	\$5000	\$5000	Nil

Counselling

Kind of sexual abuse	Amount of the component
1. Penetrative abuse	\$5000
2. Contact abuse	\$2500
3. Exposure abuse	\$1250

Institutional Responsibility

- section 15(4) of the NRS Act sets out the circumstances which might be relevant in determining primary and equal responsibility. None of these matters on their own are determinative. They include whether
- the institution was responsible for the day to day care or custody of the abused person,
- the institution was the legal guardian of the abused person
- the institution was responsible for placing the person into the institution in which the abuse occurred
- the abuser was an official of the institution
- the abuse occurred on the premises, or where activities took place or in connection of the institution
- any other circumstance as prescribed by rules

The Application

- A person seeking redress must make an application in the approved format providing details of their address and information required by the Operator which is verified by a statutory declaration.
- An application cannot be made if a person has already made application for redress and is subject to different considerations if a person is in gaol or is subject to a security notice or has not turned 18 years before the NRS sunset day.
- Only one application can be made under the NRS even if the application is unsuccessful. The expectation is that application will take between 3 and 12 months to process.
- The Operator must also give written notice to the PIs of the determination. If the application has been approved the Operator must make an offer to the person. The Operator may revoke by notice in writing any determination but only where an offer of redress has not been accepted. If the determination is revoked then any offer made is revoked and any review application is also withdrawn.
- The Operator may than make further requests for information. NRS Rule 17 provides that the Operator can revoke a determination when the Operator becomes aware the person has received a payment from an institution in relation to the abuse outside of the NRS.
- Information provided in the application form will be shared with the PI nominated in the application. This information will include the applicants name and date of birth and details of the sexual abuse and impact of that abuse on the applicant. Some information in relation to the sexual abuse may also be disclosed to police or child protection authorities. Section 19

Requests for Information

- The Operator may, upon reasonable grounds for believing a person has information, request in writing information from the person making application.
- If the matter is urgent the production period is within 4 weeks and if not urgent then within 8 weeks.
- The Operator may direct a written notice for information to a PI where they have reasonable grounds for believing that the PI may be responsible for abuse of the person.
- If a person fails to provide information within the notice period then the application will not be determined until it is provided. If the PI fails to provide information within the notice period then the Operator may determine the application on the information available.
- Civil penalties of 60 penalty units apply to a person who provides information to the Operator which is false or misleading in a material particular.

Quantum of Redress Monetary Payments

- Section 30(2) of the NRS Act sets out the method to be applied by the Operator to work out the amount each responsible institution must pay as a share of the costs of the redress payment.
- This involves in part taking into account any prior payments made by the institution to the person.
- Section 30(3) of the NRS Act sets out the method of calculating the amount of redress payment for the person. To determine the amount of counselling and psychological assistance payment the Operator must take into account the assessment framework prescribed by regulations. The assessment framework regulations may be supplemented by assessment guidelines which may be applied to work out the redress payable.
- The Minister may make guidelines for the purposes of applying the assessment framework. The information in the policy guidelines is not publically available.
- The Operator must also provide a written notice to the responsible institution setting out whether or not the application has been approved and if so amount of the redress payment to the person and the institution's share of costs of those payments.
- The Operator must give reasons for any of these determinations.
- Unless related to judicial review or proceedings arising out of false and misleading statements the documents created solely for the purposes of a redress application are not admissible in evidence in civil proceedings.

Interaction with the *Criminal Injuries Compensation Act 2003 (WA)*

- Sections 21 and 42 relevant – BUT now subject to the referral legislation
- National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 – may have some effect on claims to the Office of CIC –
- Note the Bill has not been passed
- The effect of *Baker and Cooper* – even without the Bill mean NRS payments likely to be taken into account if CIC applications made

Direct Personal Responses

- An apology or a statement of acknowledgement of regret;
- An acknowledgement of the impact of the abuse
- An assurance as to the steps taken or that will be taken by the institution to prevent abuse occurring again
- An opportunity for the person to meet with a senior official of the institution
- DPR Framework requires the PI to provide a DPR in a manner and at a time requested by the survivor

Exclusions

A person who has been sentenced to a term of imprisonment of 5 years or longer, before or after making application for redress may not be entitled to redress. The Operator will notify the Attorneys General and seek advice from the specified adviser. In making a determination the Operator must take into account

- Any advice from the special advisor
- The nature of the offence
- The length of the sentence of imprisonment
- The length of time since the person committed the offence
- Any rehabilitation of the person
- Any other matter considered relevant by the Operator
- The Operator must give greater weight to the advice of the specified advisor.

NRS Rule 37 prescribes that if the Operator decides not to make a determination that the person is not prevented from being entitled to redress then the Operator must give notice to the person and the participating institutions.

Rights of Review

- A person may seek a review of a determination of the Operator either as to the quantum of redress or a determination not to grant redress.
- This process requires the determination to be referred to an independent decision maker who may reconsider the determination and affirm, vary or set aside and substitute a new determination.
- The independent decision maker may only have regard to the information and documents that were available to the person who made the original determination.
- A notice must be given to person notifying them of the outcome of the determination and stating the reasons for it. If the determination is varied or set aside a fresh offer must be given to the person. If the determination is affirmed the Operator must extend the time for acceptance of any offer by a further 2 months. Notice of the review must also be sent to the PI.

Conclusions

- The NRS Scheme is a significant political and legislative achievement given that it is the Commonwealth's first national compensation/redress scheme and has involved not only the co-operation of all States and Territories but also responsible institutions.
- The model adopted bears little relationship to State and Territory models though there is some precedent from previous Western Australian systems of redress.
- The legislative framework is extensive and complex and involves a network of legislation, guidelines, rules and frameworks, some of which are not publically available.
- The introduction of statutory apologies in the form of direct personal responses is novel and comprehensive and will require extensive training for responsible institutions.