

The National Redress Scheme for Institutional Child Sexual Abuse – the Western Australian Response

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Introduction

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) estimated about 60,000 people were sexually abused as children in Australian Institutions during the period it examined.¹ The Royal Commission recommended, ‘The Australian Government should establish a single national redress scheme’ (National Redress Scheme- NRS).² The NRS reflects a number of the recommendations made by the Royal Commission, including the implementation of the three elements of redress,³ the use of a matrix to determine monetary payments,⁴ and the provision of an internal review scheme.⁵ The elements of ‘appropriate redress’ identified by the Royal Commission are a ‘direct personal response’, ‘counselling and psychological care’ and ‘monetary payments’.⁶ The recommended matrix takes into account the severity and impact of abuse, while also taking ‘additional elements’ into account to a slightly lesser extent.⁷ The NRS matrix whilst similar to the matrix recommended by the Royal Commission differs in some important respects discussed below.

The Scheme does not reflect all recommendations made by the Royal Commission. For example, the maximum amount of monetary payment under the Scheme has been capped at \$150,000,⁸ whereas

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¹ Some commentators assert that the NRS will be the largest redress scheme yet established. See Skye Rose and Andrew Brooks Child Safety; *What to consider before jumping into the National Redress* at <https://www.moores.com.au/news/child-safety-what-to-consider-before-jumping-into-the-national-redress-scheme> accessed 26 October 2018. For a survey of international redress schemes see Kathleen Daly (2014) *Conceptualising Responses to Institutional Abuse of Children* (26)1 *Current Issues in Criminal Justice* online at https://www.griffith.edu.au/_data/assets/pdf_file/0018/223317/2014-Daly-Conceptualising-Responses-to-Inst.-Abuse-of-Chldrn-PUBversion.pdf accessed 26 September 2018

² ‘26. In order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.’ – Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 79

³ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 73

⁴ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 77

⁵ ‘61. A redress scheme should offer an internal review process.’ – Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 84

⁶ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 73

⁷ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 77

⁸ Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) cl 18(1)(a)

the Royal Commission recommended the cap be set at \$200,000.⁹ The Scheme may also exclude specific classes of people, such as people with criminal convictions which the Royal Commission did not seek to exclude.

The purpose of this paper is to survey the currently available information in relation to the NRS the establishment of which was one of the most significant recommendations of the Royal Commission report. 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.¹⁰ It is estimated about half of the survivors identify as indigenous Australians. About one quarter of the survivors reside in rural and remote regions presenting particular challenges for Western Australian service providers.¹¹ Importantly, Western Australia has already established the Country Schools Hostel Redress Scheme and the Redress WA. The latter was established by the WA Government to acknowledge and apologise to adults who, as children, were abused and/or neglected while they were in the care of the State. It was open from 2008 until 31 December 2011. About \$114 million was paid under this scheme by 5325 payment offers. The former acknowledged the abuse of children who were abused whilst in boarding services provided by the WA Government from the 1960s specifically St Andrews Hostel, Katanning and St Christopher's Hostel in Northam.¹² That scheme ended in 2013 with approximately \$6 million in redress payments made.¹³ Payments under those schemes and any payments for like abuse made under the *Criminal Injuries Compensation Act 2003* are to be taken into account under the National Redress Scheme as discussed below.

General Principles and Objects of the Principal Act

The National Redress for Institutional Child Sexual Abuse Act 2018 No 45, 2018 (the NRS Act) commenced on 1 July 2018. 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.¹⁴ Section 179 of the NRS Act allows for the Minister to make rules (the NRS Rules) to give effect to the NRS Act. In addition section 32 of the NRS Act provides for a framework to be established for the assessment of redress (the NRS Framework). To achieve the objects of the NRS Act the NRS is established to provide redress in the form of monetary payments up to \$150,000.00 counselling and psychological services up to \$5000.00¹⁵, and a direct personal response to survivors by participating institutions.¹⁶ The NRS will also enable institutions responsible for abuse of survivors to participate in

⁹ 'The appropriate level of monetary payments under redress should be ... a maximum payment of \$200,000 for the most severe case.' - Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 78

¹⁰ This data obtained via the Officer of Commissioner for Victims of Crime WA

¹¹ Tara Cassidy ABC Tropical North 12 June 2018 *National redress scheme for sex abuse survivors 'out of touch' in regions* at <https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Royal-Commission/Documents/RC-SOI-FINAL-151217.pdf> accessed 26 September 2018

¹² Hon Peter Blaxell, Special Inquirer, August 2012 *St Andrew's Hostel Katanning: How the system and society failed our children*.

¹³ Royal Commission into Institutional Responses to Child Sexual Abuse – Statement of Intent by Minister MCGurk on behalf of the Government of Western Australia December 2017 at <https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Royal-Commission/Documents/RC-SOI-FINAL-151217.pdf>

¹⁴ Section 3(1)

¹⁵ Section 4

¹⁶ Section 3(2)(a) and (b) and section 16

the NRS.¹⁷ Redress is available to a person who was a child when abused and the abuse occurred prior to 1 July 2018. The abuse must have occurred inside a participating State or Territory.

To be entitled to redress a 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.¹⁸ PIs include all Commonwealth institutions, State and Territory institutions declared to be PIs and any non-government institution declared to be a PI.

The intended operation of the Scheme is for the institution responsible for the abuse suffered by a victim to pay for the redress. This is known as the 'responsible entity-pays basis'.¹⁹ However, 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 for a victim's redress, either the Commonwealth or the relevant State or Territory will act as a 'funder of last resort'.²⁰ As of 18 June 2018 all states have announced that they will participate in the Scheme. Western Australia was the last state to commit to the Scheme on 13 June 2018.²¹ A number of high profile institutions have also announced they will be opting in to the Scheme. The Catholic Church was the first non-government organisation to join the Scheme,²² followed by the Anglican Church, Salvation Army, Uniting Church and several others.²³

The removal of common law limitation periods in several states, including Western Australia, may have encouraged participation in the Scheme. Western Australia previously had a six-year limitation period for victims of child sexual abuse to take civil action.²⁴ However, legislation was passed in April 2018 to remove this limitation period.²⁵ This legislation was influenced by the findings of the Royal

¹⁷ Section 3(2)(c)

¹⁸ Section 4

¹⁹ 'The scheme is based on the critical principle of 'responsible entity pays', which was a key recommendation of the royal commission. A participating responsible institution will be expected to pay for redress for their survivors, along with a proportionate share of the administrative costs.' – Christian Porter, MP. (26 October 2017). Second Reading Speech, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth),12131

²⁰ '...where an institution no longer exists, the Commonwealth and, more often, the States, will have to step in and foot the bill as a funder of last resort.' – Samantha Donovan, 'A national compensation scheme for abuse victims was supposed to be up and running by now. Why isn't it?' *ABC News* (online), 15 December 2017, <http://www.abc.net.au/news/2017-12-15/States-reluctant-to-sign-up-to-national-redress-scheme/9259032>

²¹ AAP, 'WA the final State to commit to the \$3.8b national redress scheme.' *WA Today* (online), 13 June 2018, <https://www.watoday.com.au/national/western-australia/wa-the-final-State-to-commit-to-the-3-8b-national-redress-scheme-20180613-p4zI5v.html>

²² Prime Minister, Minister for Social Services, 'Catholic Church Commits to National Redress Scheme' (Media Release, 30 May 2018) <https://www.pm.gov.au/media/catholic-church-commits-national-redress-scheme>

²³ Ministers for Department of Social Services, 'Uniting Church Opts in to National Redress Scheme' (Media Release, 4 June 2018) <https://ministers.dss.gov.au/media-releases/3186>

²⁴ AAP, 'Sex abuse legal action limit removed in WA', *WA Today* (online), 10 April 2018 <https://www.watoday.com.au/politics/western-australia/sex-abuse-legal-action-limit-removed-in-wa-20180410-p4z8v1.html>

²⁵ 'The six-year time limit on child sex abuse survivors to take legal action has been lifted in Western Australia. A bill removing the constraint on civil action passed State parliament on Tuesday.' AAP, 'Sex abuse legal action

Commission, which stated ‘...the average time for a survivor to disclose child sexual abuse was 22 years’.²⁶ Similar legislation was introduced in Queensland, New South Wales and Victoria in 2015 and 2016. These changes arguably create an incentive for institutions to join the Scheme because upon acceptance of a redress offer requires victims to release the relevant institution from all civil liability for the abuse claimed.²⁷ Queensland introduced the Limitations of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016,²⁸ which removed the limitation period of ‘three years from the time they turn 18’ for victims to initiate civil action against the perpetrator.²⁹ New South Wales also introduced legislation to this effect in 2016,³⁰ while Victoria did so in 2015.³¹ All of these states and their institutions now face potential civil action for historic offences, therefore encouraging participation in the Scheme. One of the less expected outcomes of the removal of the common law limitation periods may be the increase in civil actions against institutions.³²

The commitment of all states to the Scheme is significant, as the Commonwealth does not have the constitutional power to legislate for a national scheme unless there is a referral of power by the states under section 51(xxxvii) of the Constitution.³³ The creation of a national scheme was a key recommendation of the Royal Commission,³⁴ in order to ensure fairness and uniformity for all victims

limit removed in WA’, *WA Today* (online), 10 April 2018 <https://www.watoday.com.au/politics/western-australia/sex-abuse-legal-action-limit-removed-in-wa-20180410-p4z8v1.html>

²⁶ ‘The Royal Commission into Institutional Responses to Child Sexual Abuse found that the average time for a survivor to disclose child sexual abuse was 22 years.’ Quigley, J. quoted in AAP, ‘Sex abuse legal action limit removed in WA’, *WA Today* (online), 10 April 2018 <https://www.watoday.com.au/politics/western-australia/sex-abuse-legal-action-limit-removed-in-wa-20180410-p4z8v1.html>

²⁷ Department of Social Services, *What Happens Next?* National Redress Scheme <<https://www.nationalredress.gov.au/applying/what-happens-next>

²⁸ Gail Burke, ‘Child Sexual Abuse Statutory Time Limits Removed for Queensland Victims After New Laws Pass’, 9 November 2016 <http://www.abc.net.au/news/2016-11-09/statutory-time-limits-removed-for-victims-child-sex-abuse-qld/8007836>

²⁹ ‘Under the previous laws, child victims had three years from the time they turned 18 to start civil action.’ Gail Burke, ‘Child Sexual Abuse Statutory Time Limits Removed for Queensland Victims After New Laws Pass’, 9 November 2016 <http://www.abc.net.au/news/2016-11-09/statutory-time-limits-removed-for-victims-child-sex-abuse-qld/8007836>

³⁰ Ryding, Amanda and Reisz, Laura, *Statutory Limitation Periods in Child Abuse Cases Removed In NSW* (21 April 2016) Collins, Biggers & Paisley Lawyers <https://www.cbp.com.au/insights/insights/2016/april/statutory-limitation-periods-in-child-abuse-cases>

³¹ Ryding, Amanda and Reisz, Laura, *Statutory Limitation Periods in Child Abuse Cases Removed In NSW* (21 April 2016) Collins, Biggers & Paisley Lawyers <https://www.cbp.com.au/insights/insights/2016/april/statutory-limitation-periods-in-child-abuse-cases>

³² There are indications that this is the case in WA with an increase in FOI requests to government departments and lodgement of approximately 100 writs at the time of writing.

³³ ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States...’ – Commonwealth of Australia Constitution Act, s 51(xxxvii)

³⁴ ‘26. In order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.’ – Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Recommendations* (2017) 79

of institutional child sexual abuse. Section 51(xxxvii) of the Constitution allows states to refer either a matter or the substance of a bill to the Commonwealth.³⁵ However, if any of the states had decided not to opt in to the Scheme, they could have instead 'adopted' the law enacted by the Commonwealth, which would allow power to remain with the state.³⁶

Constitutional Basis for the Legislation

As noted above the 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. The Commonwealth only has power to provide redress where a Commonwealth institution is involved and can only provide redress to applicants who have nominated State and Territory institutions where a referral of powers has been made. 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 to address the issues relating to the referral of powers the interrelationship between the NRS Act and the *Criminal Injuries Compensation Act WA* (2003). At the time of writing the Bill has not been passed and is subject to ongoing scrutiny so some caution must be applied with the commentary below.³⁷ The information in relation to the Bill is taken from the Explanatory Memorandum. The key provisions in relation to referral are contained in Part 2 of the Bill under clauses 4-12. Those sections provide for the adoption of the Commonwealth's National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (the National Redress Act and the period of time for which the adoption has effect.³⁸ Clause 5 provides for the referral of the amendment reference to the Commonwealth Parliament to provide for express amendments to the National Redress Act including the extent and period of time to which the amendment reference has effect. Clause 6 provides detail regarding the manner in which the National Redress Act can be amended, namely when the National Redress Act may amended or affected by Commonwealth Acts or instruments but which does not include certain matters relating to State redress mechanisms being a scheme, program or arrangement established by State Parliament, State government or other government or non-government institution.³⁹ Clause 8 provides that the amendment reference does not include the matter of making a law to the extent that that law would substantively remove or override a provision of the National Redress Act that requires the agreement of the State. A matter requiring the agreement of the State could include, for example, declaring a State institution to be a participating institution. Clause 9 provides the Governor may, at any time, by proclamation, fix a day as the day on which the adoption or the amendment reference or both are to terminate. The termination of the amendment reference does not affect laws made under that

³⁵ Samantha Donovan, 'A national compensation scheme for abuse victims was supposed to be up and running by now. Why isn't it?' *ABC News* (online), 15 December 2017, <http://www.abc.net.au/news/2017-12-15/States-reluctant-to-sign-up-to-national-redress-scheme/9259032>

³⁶ Samantha Donovan, 'A national compensation scheme for abuse victims was supposed to be up and running by now. Why isn't it?' *ABC News* (online), 15 December 2017, <http://www.abc.net.au/news/2017-12-15/States-reluctant-to-sign-up-to-national-redress-scheme/9259032>

³⁷ The Bill is currently before the Uniform Legislation and Statutes Review Committee which has raised some parliamentary sovereignty. [http://parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/2E13303F1C67427E4825830800011ACC?opendocument](http://parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/2E13303F1C67427E4825830800011ACC?opendocument) Two letters from the Attorney to the Committee are noted.

³⁸ Clause 4

³⁹ Clause 7

reference before termination (whether or not they have come into operation before termination).⁴⁰ Clause 11 authorises the regulations or the Minister to give directions as to how the agreement of the State is to be given or withdrawn or may be evidenced for the purposes of, and consistently with, the National Redress Act and the National Scheme. Clause 12 provides that a State PI may give information to the Operator under the National Redress Scheme in response to a relevant request of the Operator; and a State agency may provide information to another State agency for the purpose of assisting any participating State institution to comply with such a request. The information may be provided despite any law of the State unless the law is prescribed by the regulations. The Operator of the National Redress Scheme is the Secretary of the Commonwealth Department of Social Services. Although Western Australia has not yet passed the relevant legislation applications can be made to the Commonwealth pending the implementation of the legislation. Applications lodged by Western Australian applicants will be placed in a holding position until the legislation is passed.

The Operator

The Principal Act will be administered by The Operator.⁴¹ 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. That offer may be accepted or declined. 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. Notably if the person declines the offer then no redress is provided and no release to the PI or its officials is required. This in effect allows an applicant for redress to test the waters in relation to proceed with any civil action. 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.⁴² 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. Most of the key terms are self-evident or make reference to key provisions in the Act. Some key terms should be noted. The term *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*.⁴³ 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*

⁴⁰ Clause 10

⁴¹ See sections 9 and 10

⁴² Section 10(3)

⁴³ From Broadbent, A., & Bentley, R. (1997). Child abuse and neglect Australia 1995-96 (Child Welfare Series No. 17). Canberra: Australian Institute of Health and Welfare, page 14, adopted by the Royal Commission.

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.

Entitlement to Redress

Sections 12-14 of the NRS Act set out when a person becomes entitled to redress by meeting the eligibility criteria noted above and The Operator makes an offer which is accepted by the person. Importantly the Operator must determine if the PI is primarily responsible or equally responsible for the abuse. A PI is responsible for abuse if it primarily or equally responsible for that abuse. Primarily responsible means the PI is solely responsible for the abuser having contact with the person, and equally responsible means the PI and one or more institutions are approximately equally responsible for the abuser having contact with the person and no institution is primarily (solely) responsible for that abuse.⁴⁴ Importantly, 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

- a) the institution was responsible for the day to day care or custody of the abused person,
- b) the institution was the legal guardian of the abused person
- c) the institution was responsible for placing the person into the institution in which the abuse occurred
- d) the abuser was an official of the institution
- e) the abuse occurred on the premises, or where activities took place or in connection of the institution
- f) any other circumstance as prescribed by rules

The rules may also prescribe which institutions will be primarily or equally responsible or alternatively will not be primarily or equally responsible.

The NRS Framework is important because it provides a table/matrix by which applications will be assessed. Clause 6 of the NRS Framework sets out the following table.

Column 1 Kind of sexual abuse of a person	Column 2 Recognition of sexual abuse	Column 3 Recognition of impact of sexual abuse	Column 4 Recognition of related non-sexual abuse	Column 5 Recognition of person institutionally Vulnerable	Column 6 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

Each of the terms used in the table in Clause 6 are defined in Clause 4 which provides;

⁴⁴ Section 15(1), 15(2) and 15(3)

abuse: relevant sexual abuse of a person is **contact abuse** if:

- (a) any of that abuse involved physical contact with the person by someone else or by an object used by someone else (even if the rest of that abuse did not); and
- (b) none of that abuse involved penetration of the person.

exposure abuse: relevant sexual abuse of a person is **exposure abuse** if none of that abuse involved physical contact with the person (whether involving penetration of the person or not) by someone else or an object used by someone else.

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.

institutionally vulnerable: a person who suffered sexual abuse was **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.

penetrative abuse: relevant sexual abuse of a person is **penetrative abuse** if any of that abuse involved penetration of the person (even if the rest of that abuse did not).

relevant sexual abuse of a person means all of the sexual abuse of the person within the scope of the scheme for which one or more participating institutions are responsible (even if one or more participating institutions are responsible for some of that abuse and one or more other participating institutions are responsible for the rest of the abuse).

Clause 5 prescribes the manner in which these forms of abuse are taken into account to arrive at a total sum for redress. Clause 6 prescribes the maximum amounts payable for counselling according to the form of sexual abuse, as follows;

Column 1 kind of sexual abuse	Column 2 amount of the component
1. Penetrative abuse	\$5000
2. Contact abuse	\$2500
3. Exposure abuse	\$1250

It can be observed that redress and counselling is calculated primarily according to the form of abuse with only column 3 of Clause 4 explicitly referring to the impact of the abuse on the survivor.⁴⁵ Section 102 of the NRS Act refers to Assessment Framework Policy Guidelines which are to be used in conjunction with the Abuse Assessment Framework.⁴⁶ The information in the policy guidelines is not publically available and it is an offence under section 104 of the NRS Act to disclose the guidelines to an unauthorized person. The guidelines cannot be disclosed to a court or tribunal unless the purpose of disclosure is to give effect to the NRS Act.⁴⁷ It is also noteworthy that only those persons who have been subjected to penetrative sexual abuse will be entitled to access *extreme circumstances* payments.

Primary Responsibility

The NRS may find a participating institution is primarily responsible if the institution is solely, or primarily responsible for the abuser having contact with the person in which case that institution will be responsible for providing a *direct personal response* to the person and paying 100% of the funding contribution to provide redress to the person for the sexual abuse. Special Rules apply under the NRS Rules in relation to the Commonwealth's responsibility for abuse of persons in cadet forces⁴⁸ and for abuse of child migrants from the United Kingdom and Malta.⁴⁹ In the latter case Rule 10 makes the Commonwealth and the States and Territories equally responsible.

Equal Responsibility

The Operator may find a participating institution equally responsible if that institution and one or more institutions are approximately equally responsible for the abuser having contact with the person. When a participating institution is determined to be equally responsible for an instance of abuse, then that institution will be responsible for providing a direct personal response to that person and paying an equal share of the funding contribution to provide redress to the person for that instance of abuse. The NRS Rules also affect the determination of responsibility because Rule 8 provides for the circumstances in which a participating government institution and a non-government institution will be equally responsible. This will occur when the government institution had parental responsibility for the child under an order of the court or the child was a ward of the jurisdictions and

⁴⁵ There has been some criticism of this approach. See for example J Courtin and C Atmore 'The redress scheme for child sex abuse is unjust and damaging.' The Guardian 3 September 2018 at <https://www.theguardian.com/commentisfree/2018/sep/03/the-redress-scheme-for-child-sex-abuse-victims-is-unjust-and-damaging>

⁴⁶ Airlie Ward ABC News 16 September 2018 *Anglican Church horrified over how redress scheme calculates payments to victims* at <http://www.abc.net.au/news/2018-09-16/anglican-church-horrified-over-national-redress-calculations/10236812> accessed 26 September 2018

⁴⁷ Section 105

⁴⁸ Rule 9

⁴⁹ Rule 10

the government institution made an arrangements for the non-government institution to have the day to day care of the child and the abuse occurred in the care of the non-government institution and not in the care of another institution.

Institutions not responsible

A participating institution is not responsible where there is not a *reasonable likelihood* the institution had responsibility for an abuser coming into contact with the person and in such cases no direct personal response of redress is required from this institution.⁵⁰ Rule 12 prescribes the circumstances in which a participating government institution will not be responsible, namely where the only connection between the government institution and the participating institution is that the government regulated or funded or established in the institution under a law. In the case of an institution it may not be responsible where the abuse occurred whilst another institution had the day to day care or custody of the person or was the legal guardian and the abuse was carried out by an official of the other institution on the premises of the other institutions or where activities of the other institution took place.

The Application Process

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.⁵¹ The application can be done in paper form or online. The application form requires demographic information as well as particulars in relation to when the abuse took place, the institution involved, whether the applicant is a citizen, is in jail, or a visa holder and whether the applicant is over 18 years. A number of questions in the application relate to identifying the institution and the capacity in which the child was resident or connected with the institution. There are specific questions in relation to the frequency of abuse, details of the abuser and their role in the institution. The application form directs the applicant to be specific about the abuse and should be read with the NRS Assessment Framework. The applicant is required to provide particulars of any payments previously received and details of the form of abuse for which payment was made. This requirement has prompted applicants for redress to seek information from various sources as to past payments. In Western Australia this has meant requests for information have been made to the departments responsible for the Country Schools Hostel Redress Scheme and Redress WA. Requests have also recently been made to the Office of Criminal Injuries Compensation for details of past awards of compensation. Once these particulars are given the form directs the application to detail the impact of the abuse upon them with prompts given in relation to specific aspects of their life. Documents, statements or photographs can be attached to the application. Importantly the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 makes provision for information sharing between the Operator and PI's and State Agencies.

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.⁵² If a child makes an application it must be dealt with in accordance with prescribed rules.⁵³ In such cases the child applicant is provided with a 'preliminary assessment' and also provided with information to allow that child to obtain legal advice. When the persons turns 18 the original application will be assessed and an offer made. When this is lodged the Operator can request the person and the PI to provided additional information to determine the application. Only

⁵⁰ Rule 11

⁵¹ Section 19

⁵² Section 20 and section 193 being the tenth anniversary of the scheme

⁵³ Section 21

one application can be made under the NRS even if the application is unsuccessful. However an application which is withdrawn before the Operator makes a determination is treated as having not been made and notice of the withdrawal will be given to the PI.⁵⁴ The application has to be determined as soon as practicable. The expectation is that application will take between 3 and 12 months to process. The Operator must determine which PIs are responsible, the amount of redress, counselling and psychological services.⁵⁵ The determination must be made in writing together with reasons for the determination and advice as to rights of review. 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.⁵⁶ If the determination is revoked then any offer made is revoked and any review application is also withdrawn. The Operator may then make further requests for information.⁵⁷ 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.

Requests for information

The Operator may, upon reasonable grounds for believing a person has information, request in writing information from the person making application. The notice must specify the nature of the information, how the information can be given and the period within which the information is to be given. If the matter is urgent the production period is within 4 weeks and if not urgent then within 8 weeks. A person may request an extension of the period for production of information before the expiry of the period and comply with any requirements in the rules. The Operator may also grant an extension of time upon their own initiative.⁵⁸ 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. Similar time frames for production of information and extension of time will apply to the PI.⁵⁹ 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.⁶⁰ 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.⁶¹

Working out the amount of Redress payment and sharing of costs

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

⁵⁴ Sections 22 and 23

⁵⁵ Section 29-31

⁵⁶ Section 30(4) and (5)

⁵⁷ Section 30(6) and (7)

⁵⁸ Section 24

⁵⁹ Section 25

⁶⁰ Section 26

⁶¹ Section 27

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.⁶² 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.⁶³ As noted above the information in the policy guidelines is not publically available. Once the amount has been worked out and the Operator makes a determination the person is to be notified in writing of the determination with reasons for the determination and advice as to the review process.⁶⁴ 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. In addition the Operator must determine if the institution is an associate of a responsible institution, or if it is not responsible for the abuse or if it is a funder of last resort for a defunct institution. The Operator must give reasons for any of these determinations.⁶⁵ A determination that the institution is or is not a responsible institution or is or is not liable is not a finding of law or fact by a court, but may result in liability under the NRS.⁶⁶ 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.⁶⁷

Offers and Acceptance of Redress

A person who has received an offer of redress who wishes to accept that offer must notify the Operator of acceptance in the prescribed manner within the acceptance period. If the offer is accepted redress is provided and the person releases all PIs from any civil liability, though the abuser is not likewise released. The acceptance of the offer does not release another institution not named in the offer from liability. An institution named in the offer is also released from any liability in an action for damages if an unnamed institution is found liable for damages.⁶⁸ If the offer is accepted the Operator will notify the PIs. If the offer is declined no redress is provided and the PIs are not released from civil liability.

The offer must specify⁶⁹

- a) the three components of redress and amounts payable in each case
- b) which institutions are responsible and whether those institutions are defunct, associate institutions and in each case who is liable for providing redress
- c) any institution which is not responsible
- d) any institution which is a funder of last resort
- e) If the institution is defunct and explanation that direct personal response is not available to the person
- f) information about access to legal advice and other services
- g) how to accept or decline the offer and information about when the offer expires and that failure to respond with result in the offer being taken as declined

⁶² Section 31 and 32

⁶³ Section 33

⁶⁴ Section 34

⁶⁵ Section 35

⁶⁶ Section 36 – this section appears to address the estoppel issues

⁶⁷ Section 37

⁶⁸ Section 43

⁶⁹ Section 39

- h) that no further applications for redress can be made
- i) an extension of time to consider the offer and how to do this
- j) the release of civil liability
- k) any other matters prescribed by regulations

NRS Rule 31 sets out the requirements of a notice of offer. The Operator must allow at least 6 months as the acceptance period for an offer of redress, which may be extended on the Operators initiative or by application of the person provided the request is made in accordance with the rules.⁷⁰ Notice must also be sent to the PI giving details of the offer.⁷¹ A person may accept the offer by completing the approved form, which includes a statement to the effect the person accepts the offer and releases the responsible institutions from civil liability. The approved form will also require the person to nominate which components of redress they wish to receive and if they require a direct personal response.⁷² Notice of acceptance of the offer is then to be given to the PIs.⁷³ A person may decline an offer in the prescribed form and notice and the PIs will be notified accordingly.⁷⁴

Where the offer of redress has been accepted the Operator must pay the redress payment and provided access to counselling and psychological services if required. The Operator must refer the person to services and pay for services rendered as soon as practicable.⁷⁵ A payment of redress or counselling services is not regarded as compensation for the purposes of the *Social Security Act 1991* or the *Veterans' Entitlements Act 1986*, or any other legislation of the Commonwealth, a State or Territory although it may be treated as compensation or damages in relation to any contract of insurance.⁷⁶ The redress and counselling payments are also not subject to garnishee.⁷⁷ Responsible institutions must take reasonable steps to provide the person with a direct personal response.

Interaction with the Criminal Injuries Compensation Act 2003 (WA)

As noted above the NRS is a Commonwealth scheme however some issues arise in relation to the interaction with the Criminal Injuries Compensation Act 2003 (CICA). Without the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (the Bill) applicants would be affected by the operation of section 21 and section 42 of CICA which give the Assessor discretion to direct an applicant to seek payments from elsewhere and in the event that payments are received from another source to take those payments into account.

Section 21(1)(a) of CICA provides that if a victim 'has reasonable grounds for taking proceedings independently of this Act to obtain compensation or damages' then the Assessor may defer the application.⁷⁸ Therefore, without consideration of the Bill eligible victims of institutional child sexual abuse may be required to first seek compensation through the NRS before lodging an application under the Act. Clause 14 of the Bill provides that a person is not entitled to receive an award of compensation under the CICA in relation to an offence if the offence is or involves abuse and the person has accepted the redress payment component of a Scheme offer in relation to the abuse.

⁷⁰ Section 40

⁷¹ Section 41

⁷² Section 42

⁷³ Section 44

⁷⁴ Section 45 and 46

⁷⁵ Section 51

⁷⁶ Section 48, 49 and 52

⁷⁷ Sections 50 and 53

⁷⁸ Section 21 CICA

Clause 15 of the Bill mirrors section 21 of the CICA and provides that a criminal injuries compensation assessor must defer an application by a person for criminal injuries compensation if:

- (a) a person has made a compensation application in relation to an offence; and
- (b) the offence for which the compensation application is made is or involves abuse; and
- (c) the person has not made a Scheme application; and
- (d) the assessor dealing with the compensation application by or on behalf of a person is of the opinion that there is a likelihood that the person is eligible for a redress payment under the Scheme.

Effectively the criminal injuries compensation application must be deferred pending the making of a NRS application. Clause 16 of the Bill provides criminal injuries compensation assessor must defer consideration of a criminal injuries compensation application in either of the following circumstances:

Where a person has made application to the NRS and subsequently makes a criminal injuries compensation application in relation to an offence, and:

- (a) the offence in relation to which the person makes the criminal injuries compensation application is or involves abuse; and
- (b) the Scheme application has not yet been determined.

Where a person has made a criminal injuries compensation application in relation to an offence and subsequently makes a NRS application, and:

- (a) the offence in relation to which the person made the criminal injuries compensation application is or involves abuse; and
- (b) the criminal injuries compensation application has not yet been determined, the criminal injuries compensation assessor dealing with the compensation application must defer the application pending the outcome of the NRS application.

Clause 16(3) of the Bill provides that if the person accepts the redress payment component of a Scheme offer, the criminal injuries compensation application is taken to be refused. If the person is found not to be eligible or entitled to a payment under the NRS or the person declines the redress payment component of a redress offer, then the criminal injuries compensation application would proceed and be dealt with in the usual way.

Without clause 16(3) of the Bill the decision in *Baker*⁷⁹ would take effect, that is, an Assessor must deduct 'any amount that the victim has received by way of compensation or damages' from the compensation award. In *Baker* the workers' compensation payments exceeded the statutory maximum under the Act and as a consequence the Assessor had no jurisdiction to make any further award under the Act.⁸⁰ *Baker* also confirmed that 'any amount' under section 42(3) included compensation, damages and insurance the applicant may be entitled to receive.⁸¹ But for clause 16 of

⁷⁹ [2015] WASCA 56

⁸⁰ [2015] WASCA 56

⁸¹ *Ibid.*

the Bill the NRS is likely to fall within this definition as it is a form of compensation, and so any payment made would be deducted from a subsequent award made under the Act. Given the historic nature of most claims for abuse under the NRS the statutory maximum under the CICA would generally have been below any offer under the NRS so that the Assessor would not have jurisdiction to make an award in any event. The question also arises as to the effect if any of section 49 of the NRS which provides that a NRS payment shall not be considered as compensation under State law. Given the constitutional limitations on the Commonwealth the question arise whether this section would override the effect of the decision in *Cooper v Smith*⁸². Again it should be noted that at the time of writing the Bill is subject to ongoing scrutiny and some of the above clauses are under consideration.⁸³

Direct Personal Responses

Provided that it is made in accordance with the direct personal response framework, a direct personal response includes one or more of the following

- a) An apology or a statement of acknowledgement of regret;
- b) An acknowledgement of the impact of the abuse
- c) An assurance as to the steps taken or that will be taken by the institution to prevent abuse occurring again
- d) An opportunity for the person to meet with a senior official of the institution⁸⁴

The Minister may declare in writing guidelines for a direct personal response.⁸⁵ There are guiding principles for a direct personal response set out under section 56 of the NRS Act which should be provided on request from a survivor including;

- a) Meaningful recognition of the institutions responsibility by way of an apology, acknowledgement or statement of regret
- b) An assurance of steps taken to protect against further abuse
- c) A willingness by institutions to offer and provide a direct personal response which is responsive to the survivors needs and which are delivered by people trained about the nature of child sexual abuse and the needs of survivors
- d) A willingness to accept feedback

Clause 6 of the NRS Direct Personal Response Framework provides that if requested by a survivor the responsible institution must give the direct personal response as soon as practicable and must be of a kind or kinds and the method as agreed with the survivor. Clause 7 of the NRS Direct Response Framework specifies that the direct personal response may be a face to face meeting with a senior official of the responsible institution, a written engagement or any other method agreed with the survivor. Clauses 8 and 9 require that face to face meetings be at a place and time agreed with the survivor and can include other survivors being present. The responsible institution must confirm the arrangements as soon as practicable. If a face to face meeting is agreed upon the survivor must be given the opportunity to choose from representatives of different genders, cultural backgrounds or

⁸² [2017] WADC 82 Derrick J at 60 said the word 'compensation' as it appears in s 42(3) (CICA) as meaning to make up for, or to offset, or to make amends for a debt or a loss.

⁸³ See Parliamentary Debates Legislative Assembly 30 October 2018 Attorney General Mr J Quigley p 13 at 834 and Parliamentary Debates Legislative Council Hon Nick Gorian 31 October 2018 p 50

⁸⁴ Section 54 of NRS Act. See also Carroll, Robyn, When 'Sorry' is the Hardest Word to Say, How Might Apology Legislation Assist? (2014). (2014) 44(2) Hong Kong Law Journal 491; UWA Faculty of Law Research Paper 2014-43. Available at SSRN: <https://ssrn.com/abstract=2512657>

⁸⁵ Section 55 of NRS Act

who are differentiated by other relevant characteristics. Detailed obligations for the responsible institutions are set out in clause 11 – which inter alia require clear and consistent information being provided to the survivor and ensuring that no further harm is done to the survivor. The survivor may delay or withdraw from the process but the responsible institution must attempt to reschedule or renegotiate arrangements. A direct personal response is not required if the survivor does not require it or does not contact the institution before the cessation of the NRS. Clause 14 of the NRS Direct Personal Response Framework provides a government institution as funder of last resort for a defunct institution does not have to provide a direct personal response unless it is equally responsible for the abuse. A representative of a defunct institution must provide the direct personal response. Responsible institutions may ask for feedback and have a process of reviewing complaints in relation to direct personal responses. Records of the direct personal responses must be kept in order to fulfil the reporting requirements set out under clause 17 of the NRS Direct Response Framework.

Exceptional cases

A claim for redress is not payable to the estate of a deceased person where the redress has not been accepted, declined or withdrawn prior to death, however the Operator may make a payment to another person having regard to the persons will and any law relating to the disposition of the property of the deceased person.⁸⁶ A payment of redress can be made to a person who is not eligible by reason of the sexual abuse occurring in a non-participating State provided that a Commonwealth or a participating Territory institution is primarily responsible for the abuse.⁸⁷ The NRS Rules also apply in the case of exceptional circumstances.⁸⁸

Exclusions to entitlement to redress

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.⁸⁹ In the event of such an application

⁸⁶ Sections 59 and 60 and NRS Rules 33 -35

⁸⁷ Section 61

⁸⁸ Rule 14 and 15

⁸⁹ These exclusions have been the subject of considerable negotiation between the participating States and the Commonwealth government and the legislated provisions have departed from a blanket exclusion of persons in jail as first proposed and which provoked some criticism. See *ABC Ballarat* Charlotte King 22 June 2018 *National Redress law amount to 'prejudiced exclusion 'against communities, legal groups say* at <http://www.abc.net.au/news/2018-06-21/aboriginal-redress-laws-prejudiced-against-community-lawyers-say/9890858> and SBS News 24 June 2018 *Groups don't want criminal redress limits* at <https://www.sbs.com.au/news/groups-don-t-want-criminal-redress-limits> accessed 26 September 2018. Melissa Davey, 'Plea for criminal who were victims of child sexual abuse to access redress scheme', *The Guardian* (online), 1 February 2018 <https://www.theguardian.com/australia-news/2018/jan/31/plea-for-criminals-who-were-victims-of-child-sexual-abuse-to-access-redress-scheme>. Some researchers in the USA have asserted that provisions which prohibit claims based on the applicant's history have a racially discriminatory effect. See *The Marshall Project* Feature filed 13 September 2018 <https://thecrimereport.org/2018/09/14/blacks-suffer-when-crime-victim-aid-is-denied-to-convicts/> accessed 21 September 2018. Research studies on this topic often refer to a 'cycle of violence' when discussing the link between victims of child sexual abuse and adults convicted of criminal offences. This phrase refers to the pattern of behaviour that occurs when victims of childhood abuse then perpetrate violence against others later in 'the life cycle'. The 'cycle of violence' model was been considered in a number of studies. One study stated, 'those who are sexually abused as children may learn corresponding criminal attitudes and behaviours'. This claim is supported by the National Institute of Justice, which identifies the promotion of 'antisocial behaviours during childhood'⁸⁹ as a contributing factor of this cycle of violence. The link between victims of child sexual abuse and criminal behaviour in adulthood is also supported by empirical

the Operator will notify the Attorneys General of the relevant State, Territory or Commonwealth (referred to in this role as the specified adviser) and seek advice from the specified adviser as to whether the Operator should determine the person is not prevented from being entitled to redress by reason of the NRS being brought into disrepute or adversely affecting public confidence or support for the NRS.⁹⁰ In making a determination the Operator must take into account⁹¹

- a) Any advice from the special advisor
- b) The nature of the offence
- c) The length of the sentence of imprisonment
- d) The length of time since the person committed the offence
- e) Any rehabilitation of the person
- f) Any other matter considered relevant by the Operator

The Operator must give greater weight to the advice of the specified adviser.⁹² 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.

Section 39 of the CICA provides that an award will not be made to a person injured when ‘committing a separate offence.’⁹³ This provision only operates when the applicant is committing an offence when they are injured and does not apply so as to exclude an applicant who subsequently commits an offence.⁹⁴ A person is not excluded under the CICA for having a previous criminal conviction. Therefore, victims who are excluded from the NRS for having a relevant criminal conviction may be able to seek compensation under the CICA. However, legislation in other jurisdictions, such as Queensland and Victoria, excludes some applicants for past criminal behaviour in certain circumstances. The *Victims of Crime Assistance Act 2009* (Qld) provides that an award of compensation cannot be made if the applicant had previous involvement in the criminal activity.⁹⁵

data. Despite varying in aims and methods, many studies produce similar results. One study found that 75% of sexual abusers were sexually abused themselves as children, while another concluded that victims of child sexual abuse were more likely to be arrested for violent crimes. See Shelly McGrath et al., ‘Sexual Victimization in Childhood and the Propensity for Juvenile Delinquency and Adult Criminal Behaviour: A Systematic Review’ (2011) *Aggression and Violent Behavior* 16, 488. National Institute of Justice, *Pathways Between Child Maltreatment and Adult Criminal Involvement* (12 October 2017) National Institute of Justice <https://nij.gov/topics/crime/children-exposed-to-violence/Pages/pathways-between-child-maltreatment-and-adult-criminal-involvement.aspx>. Elisa Romano and Rayleen De Luca, ‘Exploring the Relationship Between Childhood Sexual Abuse and Adult Sexual Perpetration’ (1997) *Journal of Family Violence* 12(1), 85-98. Jane Siegel and Linda Williams, ‘The Relationship Between Child Sexual Abuse and Female Delinquency and Crime: A Prospective Study’ (2003) *Journal of Research in Crime and Delinquency* 40(1), 85.

⁹⁰ Section 63(4) and (5)

⁹¹ Section 63(6)

⁹² Section 63(7)

⁹³ ‘If an assessor is satisfied ... that the injury was suffered when the person was committing a separate offence, the assessor must not make a compensation award in favour of the person.’ – *Criminal Injuries Compensation Act 2003* (WA) s 39(1)(b)

⁹⁴ *Criminal Injuries Compensation Act 2003* (WA) s 35(3)

⁹⁵ ‘The government assessor cannot grant assistance to a primary victim of an act of violence if the government assessor is satisfied, on the balance of probabilities, the only reason, or the main reason, the act of violence was committed against the primary victim was ... because of the victim’s previous involvement in a criminal activity, whether or not the victim is currently involved in the criminal study.’ – s 80(1)(b)

This section appears to link the criminal activity of the applicant with the activity for which the claim is made, so that this is not a blanket exclusion. The *Victims of Crime Assistance Act 1996 (Vic)*, on the other hand, states that consideration must be given to 'past criminal activity and the number and nature of any findings of guilt or convictions'.⁹⁶ This allows some discretion but still grants the power to deny an award of compensation based on an applicant's past criminal convictions.

As a result, victims of institutional child sexual abuse in Victoria or Queensland may be unable to seek redress through either the NRS or their relevant state mechanism if they have a criminal history which is relevant to the Assessor's considerations. Additionally, although victims in Western Australia are not subject to such exclusions under the CICA the maximum award for historic offences is significantly less than the average amount to be awarded by the NRS.⁹⁷

A person is not entitled to redress if they are subject to a security notice issued by either the Home Affairs Minister or the Foreign Affairs Minister.⁹⁸ A notice issued by either Minister must be given to the Operator. The notice may be reviewed and revoked.⁹⁹ If the notice is issued after an application has been made and before a determination or offer has been made the application is taken to be withdrawn.¹⁰⁰ NRS Rule 39 applies to determinations made under these provisions.

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. The process of review is set out in sections 73- 79 of the NRS Act, which 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 is a person with experience in social welfare, case manage or law. 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.

Nominees

The Operator may, with the consent of the person, appoint either a legal nominee or assistance nominee to assist the person in making an application for redress and act in the best interests of the person.¹⁰¹ The appointment of a nominee can be suspended or revoked.¹⁰² Only a legal nominee may

⁹⁶ 'In determining whether or not to make an award of assistance or the amount of assistance to award, the Tribunal must have regard to ... the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence...' – s 54(a)

⁹⁷ *Criminal Injuries Compensation Act 2003 (WA)* s 31

⁹⁸ Section 66 and 67

⁹⁹ Sections 68-70

¹⁰⁰ Section 71

¹⁰¹ Sections 81 and 83

¹⁰² Section 82

make application for redress and accept or decline an offer of redress.¹⁰³ The nominee must inform the Operator of any circumstance which may affect the ability of the nominee to act for the person.¹⁰⁴

Protected information

Protected information (or the fact of lack of information) is information given by a person or PI for the purpose of the NRS.¹⁰⁵ A person may obtain, record, disclose or use protected information for the purposes of the NRS or if it is necessary to prevent or lessen a serious threat to an individual's life or safety or where the information is aggregated in such a way so as not to disclose the identity of the person or institution.¹⁰⁶ The Operator may disclose protected information to a nominee.¹⁰⁷ The Operator may also disclose protected information to Centrelink, Medicare or it is in the public interest to do so.¹⁰⁸ The Operator may, subject to any conditions, also disclose protected information to the relevant government institution where it is for the purpose of enforcement of the criminal law or for the safety or wellbeing of children, provided the Operator takes into account the impact of such disclosure on the person seeking redress. NRS Rules 41-54 require the Operator to have regard to the public interest and the impact that any disclosure may have on a person and whether disclosure has any effect on a range of matters including public revenue, matters pertaining to Commonwealth, State and Territory employees and property, proceeds of crime, Ministerial briefings and research issues.

Institutions

A person must show that at least one participating institution is primarily or equally responsible for the abuser having contact with the person leading to their sexual abuse (and if applicable, related non-sexual abuse). There are 4 types of institutions under the NRS:

1. Commonwealth institutions (such as Commonwealth departments and bodies established under Commonwealth law, for example, the Department of Defense, Qantas Airlines before privatisation)
2. State institutions (such as state departments and certain bodies established under individual state laws)
3. Territory institutions (such as territory departments and certain bodies established under individual territory laws)
4. Non-government institutions (such as churches, sporting groups and charities).

All Commonwealth institutions are participating institutions however State, Territory and non-government institutions are only participating in the NRS if they agree to join the NRS and the Minister for Social Services has declared that they are a participating institution.¹⁰⁹ Participating institutions are included in the NRS Abuse Declaration 2018.

Institutions that participate in the NRS may also join as part of a group and appoint a representative institution to interact with the NRS on its behalf. For groups of participating non-government institutions, the Minister must be satisfied of the connections between each institution in the group

¹⁰³ Section 84 and 85

¹⁰⁴ Sections 86 and 87

¹⁰⁵ Section 92

¹⁰⁶ Section 93

¹⁰⁷ Section 94

¹⁰⁸ Section 95

¹⁰⁹ Section 108 and 109

before declaring the group and then the representative institution (which may or may not be an institution participating in the NRS).

If an institution has not joined the NRS they are not a participating institution. A person applying for redress from a non-participating cannot be assessed until the relevant institution/s has joined the NRS. The NRS will contact the person to inform them of their options to either withdraw or hold their application.

Institutions are able to join the NRS up until 30 June 2020 (the second anniversary date) although this period may be extended by the Minister for Social Services. The Minister may make a declaration in relation to a defunct institution after the second anniversary.¹¹⁰

Institutions that no longer exist (defunct) are also included under the NRS where a person has declared they will be the representative for the former institution.¹¹¹ If an institution is defunct then the NRS may:

- a) undertake research on the named institution, and
- b) investigate if another participating institution will agree to be its representative, or
- c) provide advice that a Commonwealth, state or territory government is jointly responsible and therefore is able to provide redress as the funder of last resort on behalf of the institution.

To join the NRS, the Minister must be satisfied the institution agrees to join the NRS and is able to meet its liabilities and obligations required by the NRS. The Minister must then declare in writing that the institution is a participating institution.¹¹² The Ministers declarations cannot be disallowed by Parliament. NRS Rules 56- 65 relate to the notice requirements to participating institutions.

Requirements to join the NRS

Each State, Territory or non-government institution must agree in writing that they will join the NRS, and provide assurance to the Commonwealth that they can meet their liabilities and direct personal response obligations as required by the NRS and be able to do so for the period of the NRS.

Non-government institutions that are also forming a participating group when joining the NRS, all proposed members of a participating group, and the proposed representative for the group, must agree to the group arrangement in writing. A defunct institution cannot be declared a representative institution of a participating group.

A participating institution may exit the NRS by writing to the Minister requesting in writing that the declaration to participate in the NRS is revoked.¹¹³ As soon as practicable, the Minister must revoke the declaration, by notifiable instrument. Revocations made by the Minister are not subject to disallowance and therefore cannot be overturned through a motion moved in the Australian Parliament.

When a revocation is made by the Minister for an institution, the institution will continue to be a participating institution for the purpose of any applications in progress before the declaration came into effect. This means that people applying for redress who are found eligible under the NRS can access redress and the institution is still liable for the funding of redress and to provide a direct personal response if requested.¹¹⁴

¹¹⁰ Section 115(4)

¹¹¹ Section 118 and 119

¹¹² Section 115

¹¹³ Section 116

¹¹⁴ Section 116(7)

A participating institution that is a member of a participating group is an associate of each other participating institution in the group and are identified in a person's offer of redress. When a person accepts an offer they release the responsible institution/s and each associate in their participating group including officials (other than an official who is an abuser of the person) from any civil claim for any abuse within the scope of the NRS. A group representative must receive all notices in relation to the NRS on behalf of the institutions it represents. To become a participating group of non-government institutions, institutions must agree to: form a group, to be in the group with the other members, and to have a representative. The representative must also agree to the arrangement in writing.¹¹⁵

Participating institutions cover the costs of redress but to facilitate timely provision of redress and services the Commonwealth will bear the initial costs and then seek funding contributions on a quarterly basis from the institutions. Penalties apply to late payments. In the case of participating government institutions as funder of last resort of defunct institution that government institution will pay the defunct institutions share of costs.¹¹⁶ NRS Rules Part 6 apply to the sharing of cost of the redress components setting out the means for calculating those costs. NRS rules 67 and 68 relate to requirements in relation to the calculation of funding costs and the agreement by States to be a funder of last resort.

Review of the scheme

By reason of section 192 of the NRS Act the Minister for Social Services must commence a review of the Scheme as soon as possible after the second anniversary of the Scheme start day, and the eighth anniversary of the scheme start day which must include all of the following matters:

- a) the extent to which the states, participating Territories and non-government institutions have opted into the scheme, including key facilitators and barriers to opting in
- b) the extent to which survivors who are eligible for redress under the scheme have applied for redress
- c) the extent to which redress has been provided to survivors who are entitled to redress under the scheme
- d) the application, assessment and decision-making process, including user experiences of the process
- e) redress payments
- f) access to counselling and psychological services under the scheme
- g) the extent to which survivors access direct personal responses under the scheme, including factors influencing the uptake and experiences with the direct personal response process
- h) the availability of, and access to, support services under the scheme
- i) the implications of the scheme's design for survivors (including Indigenous and child migrant survivors as well as survivors who are still children or who have a criminal conviction)
- j) the operation of the scheme's funding arrangements (including a review of the scheme administration component of funding contribution for participating institutions' share of the costs of the administration of the scheme)
- k) the operation of the funder of last resort provisions
- l) the extent to which the scheme has been implemented as proposed in the National Redress Scheme Agreement

¹¹⁵ Section 133 and 134

¹¹⁶ Section 149 to 165

- m) the views of key stakeholders on the scheme (including representatives from survivor groups, non-government institutions, advocacy groups, support services provider groups, the Independent Advisory Council, the Commonwealth, the states and the territories)
- n) the administration of this Act and the scheme
- o) any other matter relevant to the operation of this Act or the Scheme
- p) the results of any other review or evaluation conducted in relation to the operation of the Scheme.

The scope of the statutory review suggests considerable data collection, but also suggests that there will be significant research opportunities. In particular the average redress payment made will need to be reconciled against the average which figure has already been nominated.¹¹⁷ The uptake of direct personal responses will be of interest given the novel nature of this remedy. The views of the stakeholders will involve extensive consultation.

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 abut also responsible institutions. The Commonwealth has not previously legislated in the area of victims of crime compensation/redress and 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.

¹¹⁷ Samantha Donovan *The World Today* ABC New 27 April 2018 Institutional child sex abuse survivors might get less money under national redress scheme available at <https://www.abc.net.au/news/2018-04-27/child-sex-abuse-survivors-less-money-redress-scheme/9704148> accessed 5 November 2018

References

National Redress Scheme for Institutional Child Sexual Abuse Act 2018

National Redress Scheme for Institutional Child Sexual Abuse Rules 2018
National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Act 2018

National Redress Scheme Assessment Framework 2018

National Redress Scheme for Institutional Child Sexual Abuse Direct Personal Response Framework 2018

National Redress Scheme for Institutional Child Sexual Abuse Declaration 2018

A guide to the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* can be found at <http://guides.dss.gov.au/national-redress-guide>

Western Australia's National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018:

<http://www.parliament.wa.gov.au/parliament/Bills.nsf/BillProgressPopup?openForm&ParentUNID=9CBB266AB9CFC73B482582F0001CBE92>

Locating institutions <https://www.findandconnect.gov.au/guide/wa>

The Australian Parliament currently has a Committee looking at the Commonwealth Government's implementation of the Royal Commission's recommendations relating to redress. The Committee held hearings on 8 and 10 October. It is due to report at the end of November.

- The background to the Committee can be found here: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse
- The submissions to the Committee are here: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Submissions
- The program and transcripts of the hearings, which were held with survivors, advocates, legal services, redress support services and the Commonwealth Government, can be found here: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Public_Hearings

The WA Parliament's Uniform Legislation and Statutes Review Committee is examining the WA redress legislation. Information about the Committee's Inquiry, including advice provided to the Committee to date, can be found here:

[http://parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/2E13303F1C67427E482583080011ACC?opendocument](http://parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/2E13303F1C67427E482583080011ACC?opendocument)