WOMEN'S LEGAL SERVICE NSW

30 September 2020

Ms Robyn Kruk AO
Independent Reviewer
Second Anniversary Review of the National Redress Scheme

By email: redressreviewsubmissions@dss.gov.au

Dear Ms Kruk,

Response to National Redress Scheme second anniversary review

1. Women's Legal Service NSW (**WLS NSW**) thanks the National Redress Scheme (**the Scheme**) for the opportunity to provide feedback on the operation of the Scheme.

About Women's Legal Service NSW

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

3. Since 1995, WLS NSW has provided a state-wide First Nations Women's Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. We provide a First Nations legal advice line, casework services including a specialised family law service to assist First Nations women access the family law courts, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for First Nations women.

4. An Aboriginal Women's Consultation Network guides the FNWLP. It meets quarterly to ensure that we deliver a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.

5. WLS NSW has provided legal advice and support to victim-survivors of child abuse over several decades. We advise and represent victim-survivors in accessing Victims Support in NSW (and previously, Victims Compensation) and have also advised and represented women who have been subjected to child abuse and child sexual assault in various institutions. This includes representing survivors of child sexual assault in civil litigation against the State of New South Wales, a case which was the subject of the Royal Commission Case Study 19 into Bethcar Children's Home, and

representing clients in other claims against the State and in applications to the National Redress Scheme.

6. Our limited resources mean we are not in a position to provide a detailed response to this review. However, we have had the opportunity to read the submission to this review made by community legal centre knowmore and we endorse their recommendations.

7. WLS NSW was, and remains, strongly in support of the establishment of an independent national redress scheme. We welcomed the introduction of the Scheme as a valuable and important alternative to civil litigation for victim-survivors of child sexual abuse in institutional settings to access justice and to hold institutions to account.

8. However, our experiences representing victim-survivors in their applications to the Scheme have been cause for concern in that the Scheme:

   8.1 is not as trauma-informed and victim-survivor focussed as it should be; and

   8.2 that the Scheme is failing to meet its responsibilities to provide equal access to justice for all survivors of institutional sexual abuse and equal and fair treatment of survivors throughout the redress process while avoiding further harm or traumatising victim-survivors.

9. We echo the words of knowmore at the April 2020 public hearing of the Joint Select Committee on the Implementation of the National Redress Scheme Committee (**JSC**):

   > *The reality is that we have a scheme that's fundamentally different to what the Royal Commission envisaged and recommended. Those departures in the design and implementation of the Scheme continue to have an adverse impact upon survivors.*[1]

10. A redress scheme should be underpinned by the following principles[2]:

    a. *Redress should be survivor focused;*

    b. *There should be a 'no wrong door' approach for survivors in gaining access to redress;*

    c. *All redress should be offered, assessed and provided with appropriate regard to what is known about the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and to the cultural needs of survivors; and*

    d. *All redress should be offered, assessed and provided with appropriate regard to the needs of particularly vulnerable survivors.*

WLS NSW is concerned that the Scheme is not currently meeting all of its obligations in this regard.

[1] Joint Select Committee on the Implementation of the NRS, *Proof Committee Hansard – Monday 6 April 2020*, Evidence of Mr W Strange, p. 32 accessed at: https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/b09efaf9-cb03-48ac-a10a-c85599257bd3/toc_pdf/Joint%20Select%20Committee%20on%20Implementation%20of%20the%20National%20Redress%20Scheme_2020_04_06_7661.pdf;fileType=application%2Fpdf#search=%22committees/commsen/b09efaf9-cb03-48ac-a10a-c85599257bd3/0001%22

[2] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, Recommendation 4.

11. In writing this submission, we draw from the experiences of both our clients as they engage with the Scheme and its process and also our experiences as legal practitioners and First Nations community access workers at WLS NSW as we engage with the Scheme on behalf of our clients. While our practice in representing clients in claims to the Scheme is very small compared to services such as knowmore, the experiences of our clients and ours as a legal service, have shown clear trends or patterns and this, combined with working alongside our colleagues in knowmore and hearing their similar experiences and concerns and having the opportunity to read through knowmore's submission to this review, mean we are confident that the experiences are not one off or confined to the experiences of our group of clients but rather, reflective of systemic failings on the part of the Scheme.

12. Our response to this review will focus on these key issues:

    1. Lack of cultural safety and cultural competency
    2. Excessive delays
    3. Poor communication with victim-survivor applicants and/or their nominees
    4. Lack of transparency, procedural fairness and natural justice
    5. Blunt assessment and application of relevant prior payments
    6. Indexation is unfair
    7. Compensation cap is too low
    8. Release is manifestly unfair
    9. Counselling and direct personal response are not sufficiently trauma informed and victim-survivor focussed

Lack of cultural safety and cultural competency

13. According to the Royal Commission, "*Aboriginal and Torres Strait Islander children are significantly over-represented in some high-risk institutional contexts due to a range of historical, social and economic factors, including colonisation*."[3]

14. The Royal Commission reported that 14.3 percent of all victim-survivors who attended a private session identified as Aboriginal and/or Torres Strait Islander, despite accounting for approximately 3 percent of the Australian population and stated further that this figure was likely under-reported due to fear, shame, a lack of cultural safety, language barriers and/or systemic racism and discrimination.[4]

15. The Royal Commission recommended four general principles for redress, including:

> *"All redress should be offered, assessed and provided having appropriate regard to what is known about the nature and impact of child sexual abuse, and institutional child sexual abuse in particular, and to the cultural needs of survivors. All of those involved in redress, particularly those who might*

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 2, Nature and Cause*, 2017 p 17
[4] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 2, Nature and Cause*, 2017, pp 89-90

interact with survivors or make decisions affecting survivors, should have a proper understanding of these issues and any necessary training."[5]

16. In addition, the Royal Commission recommended the Scheme develop a communication strategy for communicating with Aboriginal and Torres Strait Islander communities and that the direct personal response and counselling components of redress be delivered in a culturally sensitive and appropriate manner.[6]

17. It is imperative that the Scheme does not expose First Nations people to further trauma and harm as a result of its processes.

18. We are very concerned about the capacity of the Scheme to provide culturally safe services to First Nations victim-survivors. Our concerns include:

    18.1 An apparent failure on the part of the Scheme to appoint sufficient numbers of First Nations staff, particularly in key decision making and management positions in the Scheme and to appoint First Nations independent decision makers;

    18.2 An apparent failure to employ or appoint First Nations Scheme staff to deliver decisions to First Nations victim-survivors;

    18.3 An apparent failure to employ or appoint First Nations Scheme staff to assist those delivering the decisions to do so in a way that is culturally safe and appropriate;

    18.4 Determinations being delivered - both orally and in writing – in a manner which is overly scripted and legalistic, rather than in plain language, leaving victim-survivors unable to understand the decision which has just been delivered to them;

    18.5 An apparent lack of understanding of gratuitous concurrence whereby even when asked whether they understand the decision and next steps, a First Nations person is more likely to agree rather than say they don't understand;

    18.6 A lack of culturally safe counsellors for First Nations victim-survivors; and

    18.7 A lack of counsellors in rural, regional and remote areas;

19. We have raised our concerns with the Scheme, but we are not confident that our feedback has translated into more culturally safe and sensitive communications and processes for First Nations people.

20. We are pleased that the Scheme has engaged with knowmore to provide cultural awareness training to its staff and we strongly support further and ongoing engagement with knowmore to ensure that the Scheme is culturally safe for First Nations victim-survivors and First Nations workers supporting victim-survivors as they navigate and access redress.

21. In the event that training by knowmore has not yet been provided to independent decision makers, we urge that such training be provided urgently to ensure that decision makers are appropriately trained

[5] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, Recommendation 4, p 10

[6] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, Recommendations 5 and 14, pp 12 and 19

to provide culturally sensitive decisions which recognise and respond to the unique experiences of First Nations peoples and the manner in which inter-generational trauma and abuse and the deep impacts of shame can impact on a First Nations victim-survivor ability to disclose all aspects of the abuse and its effects. It is imperative that independent decision makers are aware of these impacts to ensure against an unjust and unfair outcome.

22. We recommend the Scheme urgently take steps to ensure it is meeting its obligations to ensure that the Scheme delivers its services to First Nations people in accordance with the principles recommended by the Royal Commission.

Excessive delays

23. Our clients have experienced lengthy delays in receiving initial determinations in their applications for redress. Their claims were lodged soon after the Scheme opened, and it has only been in recent months that they have received determinations including those claims lodged as and accepted by the Scheme as being priority claims.

24. The stress and anxiety caused by the extensive delays were compounded by the failure (by way of inability or refusal) on the part of the Scheme to provide updated and concrete timeframes for decision, despite repeated requests. This lack of transparency as to determination timeframes is particularly problematic. An integral part of a trauma-informed practice and process is to clearly communicate timeframes, progress and processes because it promotes transparency and manages expectations and anxiety.

25. The delays caused our clients significant anxiety, frustration, distress and anger. Understandably, at times this emotion was directed at us as legal providers even though the determination timeframe was completely out of our control. This in turn caused some of our clients to express a loss of faith in us as legal service providers because it was perceived the delays were at our hand and / or something we could resolve with the Scheme.

26. Our clients' anxieties and frustrations were further exacerbated by the failure of the Scheme to bundle together the applications lodged by our clients who were abused in the same institution and in very similar fact scenarios so that all of those applications could be determined and delivered in the same short time period. Rather, determinations were delivered over many, many months and in no particular order, including by failing to prioritise those applications that had been earmarked as priority claims. Our clients talk with each other and were particularly frustrated when they heard of another person's claim being determined when theirs had not. Where the circumstances or facts of these applications were largely the same, it was difficult for both our clients, and our service, to understand the inexplicable ordering and delays to the determinations.

27. Delays of this length are unacceptable and are inconsistent with a trauma focussed and victim-survivor centred process.

28. We recommend the Scheme put sufficient resources in place to ensure that applications are dealt with in an efficient manner and within a reasonable timeframe.

29. We further recommend that the Scheme proactively communicate with applicants and their nominees at regular intervals as to the progress of an application and its expected timeframe for determination.

Poor communication on the part of the Scheme with victim-survivor applicants and/or their nominees

Failure to communicate about progress of applications

30. Our experience overall has been that the Scheme is poor at communicating with victim-survivor applicants and their nominees. This includes communication over the phone and in writing.

31. In our experience, the Scheme has failed to proactively communicate with a victim-survivor or their nominee regarding the progress of an application. This leaves the onus on an applicant to contact the Scheme.

32. Repeated requests in writing and over the phone regarding the status of an application and requests for determination timeframes have either been completely ignored or have taken months to be responded to. Where we have received a response, the information received has been so vague as to be of no assistance in providing any concrete information about the expected timeframe. The lack of communication from the Scheme regarding the progress of a complaint, particularly where there are such excessive delays, is extremely disappointing and again, symbolic of a service which is failing in its obligations and responsibilities to ensure it is trauma informed and responsive.

33. As stated above, we recommend that the Scheme proactively communicate with applicants and their nominees at regular intervals as to the progress of an application and its expected timeframe for determination.

Failure to provide a consistent contact / case co-ordinator

34. At one time, we were pleased to be advised that our clients' applications had been handed to one case co-ordinator, meaning that one person was aware of the status of all of the applications lodged by WLS NSW and would be a central contact for us as nominees. Sadly however, this arrangement was short lived and without any communication from the Scheme about the change, the case-co-ordinator was moved to another part of the Scheme and no new case co-ordinator appointed.

Failure to communicate with appointed nominee

35. Our clients frequently reported that despite appointing WLS NSW as their nominees, the Scheme contacted them directly to ask for further information or evidence. Our clients reported this caused them extreme distress and triggered their trauma because they were being asked information about the abuse and / or to provide information or evidence about their harm. It was inappropriate that any of these contacts took place, particularly in circumstances where each of our clients had appointed WLS NSW as their nominee.

36. Disturbingly, in two cases, the Scheme contacted our clients directly to deliver an (adverse) decision. When we asked the Scheme why they did so in circumstances where both of our clients, First Nations women, had appointed a nominee and where the Scheme would have been or should have been aware the decision would be distressing to the victim-survivor, there was no explanation offered despite an acknowledgement that this was not the usual process and it was reasonable to expect that the Scheme should contact us as legal nominee to discuss the delivery of a decision to the applicant first.

37. In both of the above matters, our clients reported feeling incredibly distressed at not only the decision but also not having WLS NSW in the conversation with them to provide support and explanation. They

also reported that they didn't know it was an option and / or did not feel they could ask the Scheme to arrange for us to be present when the decision was delivered to them.

38. We recommend the Scheme takes immediate action to ensure that where a victim-survivor applicant has appointed a nominee, that all communication from the Scheme is via the nominee.

Failure to deliver decisions in a trauma informed manner

39. We have been alarmed at the manner in which Scheme staff have delivered the oral decisions to our clients. Overwhelmingly, they have not been delivered in a manner which is consistent with being trauma informed and victim-survivor centred. Our experiences have included the following:

    39.1 In at least half of the oral deliveries of determinations to our clients, the Scheme has failed to acknowledge that the Scheme and the independent decision maker believed the victim-survivor's history of abuse. In circumstances where the Scheme declines to pay compensation, even in circumstances where it is because prior payments are taken into account, it is vitally important that a victim-survivor is told they are believed and that a decision not to pay compensation is not a reflection of a lack of belief in their experiences.

    39.2 The people delivering the decision have generally read out the determination, which means it is stilted, scripted, full of jargon and legalistic. Requests by us as legal practitioners to explain the decision in plain language have largely not been met, or very poorly done, leaving us to explain the decisions in plain language instead.

    39.3 Where victim-survivors have expressed anger at the outcome, it has appeared that the Scheme staff have not felt equipped to respond appropriately to anger and frustration and unsure how to respond appropriately and effectively within a trauma framework.

    39.4 In a number of circumstances, the Scheme failed to call at the appointed time to deliver the decisions, at times making our clients (and us) wait for up to 20 minutes for the call, usually without acknowledgement or apology for the lateness. In one instance, arrangements were made to deliver a decision, only to be told by the Scheme that the decision was no longer able to be delivered as planned, with no explanation provided as to what had led to the decision to recall the decision or the likely timeframe expected until it could be delivered.

40. We also have concerns about the written determinations. The determinations can best be described as formal, complex, long and overly legalistic form letters which fail to provide detail about the particularities of the application, the evidence relied upon and the reasoning by which the independent decision maker came to their decision.

41. The decisions, whether delivered orally or in writing, are very difficult for victim-survivors to understand without assistance. While we accept there is certain important information which must be provided to a victim-survivor with their decision, this information can still be provided in a plain language, trauma informed and victim-survivor focussed manner and we do not believe that the current wording of the determinations is this.

42. We have raised our complaints above with the Scheme, but without a clear complaints and accountability process, we are not sure whether our feedback has been taken into account in further training for and feedback to Scheme staff.

43. We recommend that urgent work is undertaken by the Scheme to ensure the written and oral determinations are in plain language.

44. We further recommend that where an offer is made, that the Scheme clearly and unequivocally communicate in writing and orally, that the Scheme and independent decision maker acknowledges and believes the account of abuse given by the victim-survivor.

Lack of transparency, procedural fairness and natural justice

45. We are extremely concerned about a number of areas in which there is a lack of transparency on the part of the Scheme, and the consequent failure to afford natural justice and procedural fairness to victim-survivor applicants. In particular, we are concerned about the secrecy around the Assessment Framework, the failure to provide adequate reasons for determinations and the review process.

46. The Royal Commission recognised that transparency and fairness are essential to reducing the risk of re-traumatisation and maximising the benefits of redress for survivors.[7] The Royal Commission noted further that applications should be *"assessed in accordance with transparent and consistent criteria and the applicant will be given sufficient information to understand how their eligibility and the amount of any monetary payment were determined."* [8] In our experience, the Scheme is failing in this regard.

Lack of transparency in the Assessment Framework Policy Guidelines

47. There is a distinct lack of transparency around the Assessment Framework Policy Guidelines.

48. The National Redress Scheme Act (**the Act**) prohibits a person from obtaining, recording, disclosing or using the Assessment Framework Guidelines,[9] with only very limited exceptions.

49. The secrecy surrounding these Guidelines not only means there is a lack of transparency around the decision making framework applied to applications, but it introduces an element of distrust and suspicion amongst victim-survivor applicants due to the seeming refusal of the Scheme to make clear the details of the criteria against which applications will be assessed and determined. Secrecy around how an application will be assessed is at odds with a Scheme which purports to be victim-survivor focussed and trauma informed.

50. The lack of transparency also impacts an applicant's capacity to understand how a decision was reached, whether the decision is fair and reasonable based on the assessment criteria, framework and evidence and whether it is consistent with the legislation. This is particularly highlighted where the Scheme declines a claim or where there is an unexpected adverse decision on a claim.

51. We note that the former JSC raised strong concerns in 2019 about the secret nature of the Assessment Framework Policy Guidelines and did not agree with the principal justification given for their secrecy,

[7] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, p 269
[8] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, p 43
[9] Part 4-3, Division 3, *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth)

that is, to avoid fraudulent applications, arguing that was not a sufficient reason to keep the Guidelines secret.[10]

52. We note and agree with the benefits of releasing the Guidelines as listed by knowmore in their submission:[11]

- *assisting survivors, legal advisers and support services to better understand the decision-making process and the Scheme's approach to key terms in the Assessment Framework;*
- *assisting with the timely resolution of applications, as survivors will be better able to understand what information is relevant to the assessment of their application and provide this information up front, therefore reducing the risk of re-traumatisation in the application process and reducing the need for the Scheme to seek clarification from survivors;*
- *assisting legal advisers and support services to better manage expectations about the likely outcome of a redress application, therefore increasing certainty for survivors;*
- *supporting and promoting consistency in decision-making;*
- *enhancing the ability of survivors and those supporting them to understand how and why a redress decision has been made; and*
- *assisting legal advisers and support services to provide advice to survivors about the reasonableness and lawfulness of the original decision and the likely outcome of an internal review, therefore enhancing the ability of survivors to make an informed choice about whether to exercise their right to seek an internal review.*

53. In this regard, we support recommendation 11 of knowmore's submission to this review which calls for the urgent introduction of amendments to the Act to permit the publication of the Assessment Framework Policy Guidelines and the publication of the Guidelines.

Failure to provide adequate reasons

54. The provision of detailed written reasons is essential to the transparency, accountability and procedural fairness of the determinations.

55. Section 34(1)(b) of the Act requires the Scheme to provide written reasons for determinations.

56. The lack of transparency around the decision-making framework is compounded by what has been our experience of determinations which either fail to provide any reasons at all or, where reasons are provided, they are inadequate because they are brief and vague.

57. Reasons should:

57.1 refer to, and ideally summarise, the information and evidence the independent decision maker had available to them, considered and relied upon;

[10] Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission, *Getting the National Redress Scheme Right: An Overdue Step Towards Justice*, paragraph 8.79

[11] Knowmore, Submission in response to the Second Anniversary Review of the National Redress Scheme, 2020, p 23.

57.2 clearly articulate the findings based upon the available evidence;

57.3 identify any gaps in the evidence;

57.4 clearly set out how these findings fit within the Assessment Framework; and

57.5 where relevant, clearly articulate how and why decisions have been made with respect to prior payments.

58. A failure to provide adequate reasons inevitably causes further distress and harm to a victim-survivor, especially in circumstances where there is an adverse decision.

59. A failure to provide full and transparent reasons also leaves the victim-survivor unclear about what information has been relied upon, what weight has been placed on particular evidence and what evidence may have been over-looked and/or dismissed. This is highlighted where there is inconsistency in decision making amongst groups of victim-survivors who were abused at the same institution and who had very similar experiences. Inconsistent decisions combined with a failure to explain the reasoning behind these decisions is incredibly distressing, divisive and damaging for victim-survivors who are left feeling that their experiences have been invalidated and that they are not believed. This, in turn, leads to disastrous consequences.

60. The failure to provide full and transparent reasons also raises questions as to whether the correct test of "reasonable likelihood" is being applied to the determination of applications and how "extreme circumstances" is being interpreted by decision makers.

61. The failure to provide detailed reasons significantly impacts on the victim-survivor's ability to fully consider and assess their review options and the likely merits of seeking a review.

62. We recommend the provision of detailed reasons in each and every determination.

Prohibition on providing new evidence on review

63. We are concerned that section 75(3) of the Act prohibits the provision of new information on internal review and we urgently call for amendment of the Act to remove this provision.

64. We are further concerned at the lack of clarity on whether or not independent decision makers consider legal submissions made on review. In our opinion, legal submissions should not be considered "new information" however in our experience to date, decision makers on review have made no reference at all to the legal submissions provided, leading to our belief that they are being treated on review as "new information" and therefore not considered.

65. We recommend the prohibition of the provision of new information on review be over-turned.

66. We further recommend that an urgent direction is given to direct that decision makers are to consider any legal submissions made on review and decisions should acknowledge and make reference to those submissions.

Failure to afford procedural fairness and natural justice

67. In addition to the failure to provide adequate reasons and its relationship to natural justice and procedural fairness, we are also concerned by the failure of the independent decision makers to

provide victim-survivors with the opportunity to address or respond to issues which ultimately lead to an adverse determination prior to the determination being made.

68. In our view, the principles of natural justice and procedural fairness make it incumbent on the independent decision maker to provide the victim-survivor with information about evidence (or lack thereof) which the independent decision maker believes is adverse to their claim and an opportunity to address it prior to the decision being made.

69. A failure to afford natural justice and procedural fairness to an applicant is inimical to a Scheme which is trauma informed and victim-survivor focussed. It is also at odds with the principles of administrative decision making which are underpinned by the principles of procedural fairness and natural justice.

70. We recommend that where an adverse decision is likely to be made on available evidence because the available evidence may not clearly match the information in the application form, the independent decision maker affords a victim-survivor the opportunity to provide further evidence or information to clarify as issue in question before making a decision.

71. As stated above, where an adverse decision is made, an applicant should be afforded the opportunity to provide further evidence on review to address the issue or gap in the evidence which led to the adverse decision.

Risk of monetary payments being reduced on review

72. We are concerned that seeking a review of a decision opens the victim-survivor up to the risk that on review, the decision maker can decide to reduce a payment. This acts as a deterrent to victim-survivors seeking a review and is inconsistent with a trauma-informed and victim-survivor focussed scheme.

73. Our clients have noted that they see this as a threat on the part of the Scheme, causing great distress to our clients because they see it as yet another barrier in the path to seeking access to justice.

74. We recommend an amendment to the Act that prohibits a reduction of an offer on review, meaning that the independent decision maker can only increase an offer or affirm the original decision.

Impact of lack of transparency, natural justice and procedural fairness on victim-survivors

75. A lack of clear information about how an application will be assessed, what information has been taken into consideration in reaching a determination, and clear reasons for the determination undermine a victim-survivor's trust and confidence in the system because it is impossible to understand how a decision has been made and to determine whether or not it appears to be fair and reasonable.

76. Our clients have consistently expressed to us that they have no faith in the Scheme and its processes and that they believe that it is the State taking another opportunity to silence them and exclude them. It reinforces the power imbalances that exist between victim-survivors and their perpetrators and typically between victim-survivors and the State.

77. In order for the Scheme to provide services which do no further harm to victim-survivors who engage in the Scheme, it is imperative that the Scheme urgently takes all necessary steps to address the current lack of transparency in decision making and information and ensure that all victim-survivors are afforded procedural fairness and natural justice in all aspects of their dealings with the Scheme.

Blunt and unfair assessment and application of relevant prior payments

78. We are very concerned about the lack of transparency and unfairness in the assessment of relevant prior payments.

79. In our experience, the Scheme has taken a blunt rather than nuanced approach to the determination of the question of relevant prior payments. For example, damages in civil claims paid in relation to breaches of duty of care on the part of the State as opposed to damages for the actual abuse have been deemed relevant prior payments under the Scheme. In our opinion, this is an incorrect application of the principle and at odds with the purpose of the provision to avoid "double-dipping".

80. Where a victim-survivor has also received a prior payment of victims compensation or victims support with respect to the abuse, this, in combination with the (incorrectly applied) civil damages payment, all indexed, has meant that in almost all circumstances, our clients have received no monetary payment at all.

81. This blunt and unfair approach to the determination of relevant prior payments has a disproportionate impact on First Nations people who were removed and placed in institutions under racist and draconian policies and may therefore have had successful civil claims with respect to the removal and effects of the removal, as opposed to the abuse itself.

82. In a similar vein to the failure to provide detailed reasons for a determination discussed above, it has been our experience that the independent decision makers have also entirely failed to provide reasons as to how they reached the decision that the civil damages were relevant and failed to acknowledge or address and respond to the detailed submissions WLS NSW has made in each of the applications as to why we do not believe the payments should be regarded as relevant prior payments. In the absence of reasons, it is not clear the basis upon which the independent decision makers have come to a different viewpoint, which in turns makes it challenging to know how to address the issue on internal review.

83. The approach to the assessment of relevant prior payments means that victim-survivors are denied access to justice by way of a payment of compensation in recognition of the abuse perpetrated against them and the harm suffered and reinforces the power imbalance between the victim-survivor and the Scheme, echoing the power imbalance between the victim-survivor and the Institution. It also fails to hold the Institution to account.

84. We recommend the provision of detailed reasons on the issue of assessment of relevant prior payments in determinations.

85. We further recommend that a nuanced approach is taken to the assessment of whether or not a prior payment is in fact relevant. Transparency around the guidelines for the decision-making framework on what is and is not deemed to be relevant when it comes to prior payments including examples would assist in this regard.

Indexation is unfair

86. Indexation of relevant prior payments is unfair.

87. Consistent with the JSC recommendation of May 2020, we recommend that prior relevant payments are no longer indexed.[12]

Compensation cap is too low

88. The compensation cap of $150,000 is too low.

89. The effect of the low compensation amounts is exacerbated by indexing prior payments because they further reduce the overall available payments.

90. We recommend the compensation cap is increased to $200,000 as recommended by the Royal Commission.

Release is manifestly unfair

91. The requirement that a victim-survivor sign a release which waives their right to pursue future legal action against the institution should they choose to accept an offer of redress is manifestly unfair. A trauma-informed victim-centred approach should allow a victim-survivor to make the choice to accept or decline an offer of redress based only on the merits of the offer itself, free from needing to consider the legal implications for future or potential future causes of action.

92. The release forces a victim-survivor to weigh up and choose between accepting redress and foregoing a future cause of action that may arise with respect to their experience of institutional abuse. This detracts from or is a distraction from the offer of redress.

93. In NSW, consideration is currently being given to whether legislation should be introduced to allow a court to set aside a settlement agreement for past child abuse claims. If such legislation was introduced, a victim-survivor who has accepted any offer of redress, even if it were only counselling or a direct personal response rather than a monetary payment, will be prevented from pursuing this legal option. For victim-survivors who were abused in an institution in NSW and who have had previous settlements in civil claims, this is a relevant and important consideration they are forced to weigh up in deciding whether or not to accept an offer of redress. Forcing a victim-survivor to do this is unfair and unreasonable.

94. For many of our clients, they are unfairly forced to choose between accepting an offer of a direct personal response and counselling or declining the offer so as to preserve the option to pursue a potential future cause of action. Placing victim-survivors in this unfair, distressing and frustrating position runs counter to the purpose of a redress scheme because it detracts from any acknowledgement of abuse and harm and offer of healing and instead, is seen as another attempt by the Scheme and the institution to dodge accountability.

[12] Joint Select Committee on Implementation of the National Redress Scheme, *First Interim Report of the Joint Select Committee on Implementation of the National Redress Scheme April 2020*, (May 2020) Recommendation 5 at p xvii

95. Further, the legal consequences of the release and the written explanation of the effects of the release in the letters of offer from the Scheme are very complex and difficult to understand without the benefit of legal advice and plain language translation.

96. It is our position that the current broad release is unnecessary. The receipt of a monetary payment and any other offer from the Scheme could be considered in any future successful cause of action, in the same vein as prior payments are considered by the Scheme. This would remove the current barrier caused by the requirement to sign such a broad release.

97. We recommend the requirement to sign a broad release upon accepting an offer is removed.

Counselling and direct personal response are not sufficiently trauma informed and victim-survivor focussed

98. We are concerned that there is little over-sight into ensuring that all counsellors are sufficiently qualified and trained to ensure victim-survivors receive a high quality trauma-informed, victim-survivor focussed and culturally safe service.

99. We note that in regional, rural and remote areas and even areas in the outskirts of greater Sydney, the numbers of available counsellors drop markedly, limiting access to appropriate and trauma informed counselling services. This leaves victim-survivors with having to choose between a long wait list for an appointment to visit with a counsellor situated close to where they live or needing to travel some distances to see a counsellor, a cost which is prohibitive to some or impossible where public transport options are difficult or non-existent. For some victim-survivors, the only choice may be to travel great distances to meet face to face with a counsellor because there are no counsellors in the vicinity of where they live.

100. We are further concerned at the lack of culturally safe counsellors for First Nations survivors and at the lack of counsellors in rural, regional and remote areas, which is more likely to adversely impact First Nations people. Offering counselling via phone or video is not the full answer as many First Nations people express a preference for face-to-face contact. Further telephone reception and limited data may particularly impact access in regional, rural and remote areas.

101. We are also concerned that a victim-survivor who accepts the offer of a direct personal response is left to directly engage with the institution regarding the nature of that response. A trauma-informed approach would have the Scheme provide a support person to facilitate these discussions and to ensure that victim-survivors are able to successfully navigate this process and negotiate a response that is best suited to their needs and desires. The obvious power imbalances bring a very real risk that the victim-survivor will find it too difficult to articulate and / or negotiate their needs without support and will not end up pursuing this option or will end up with a direct person response which is not suited to their needs and not what they were really hoping for and seeking.

102. We recommend that the Scheme ensures there are sufficient counsellors available to victim-survivors who accept an offer of counselling. We further recommend that the Scheme ensures that all approved counsellors have sufficient and ongoing training to ensure they provide services which are consistent with the principles of being trauma-informed and victim-survivor focussed.

103. We recommend the Scheme ensures there are sufficient Indigenous counsellors available to First Nations victim-survivors. We further recommend all counsellors, Indigenous as well as non-

Indigenous, are appropriately qualified and able to ensure they provide counselling services that are culturally safe and culturally sensitive.

104. We recommend the Scheme provide support persons to assist victim-survivors to navigate the selection of a counsellor and to negotiate the direct personal response with the institution.

In closing

105. The introduction of the National Redress Scheme was a great step forward by the Australian Government in sending a clear message to victim-survivors of child abuse in institutions that such abuse is not condoned and of a strong commitment to providing redress and healing. However, in order to provide a scheme which is truly trauma informed and victim-survivor focussed, efficient, effective, fair and accessible, and culturally safe for First Nations victim-survivors, reform is imperative, urgent and overdue.

106. We urge the Government and the Scheme to implement the recommendations in this submission, in knowmore's submission and in the April 2020 First Interim Report of the Joint Select Committee to ensure that the Scheme meets the needs of the very victim-survivors it was set up for.

107. If you would like to discuss any aspect of this submission, please contact Philippa Davis, Principal Solicitor, Gail Thorne, Community Access Worker or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Service NSW

Philippa Davis
Principal Solicitor

Gail Thorne
First Nations Women's Legal Program
Community Access Worker