



# Précis Paper

## The National Redress Scheme

A discussion on the recent establishment of the National Redress Scheme and what it means for institutional child sexual abuse claims.

### Discussion Includes

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- The process for making an application
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# Précis Paper

## The National Redress Scheme

1. In this edition of BenchTV, Angela Sdrinis (Director – Angela Sdrinis Legal, Victoria) and Dr Hadeel Al-Alosi (Lecturer– Western Sydney University, Sydney) discuss the recent establishment of the National Redress Scheme and what it means for institutional child sexual abuse claims.

### What is the National Redress Scheme?

2. The Royal Commission into Child Abuse made a number of recommendations relating to both criminal and civil issues in regard to child abuse.
3. In recognition of the difficulties faced by survivors in accessing justice, one of the major recommendations was that a National Redress Scheme ("the Scheme") be established to compensate survivors of historical child sexual abuse.
4. The Scheme started on 1 July 2018 after the Commonwealth passed the *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018* (Cth) in June 2018.
5. To give effect to the Scheme as a national scheme, the various States of Australia have needed to pass legislation referring powers to the Commonwealth.
6. Only NSW, with the passing of the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018* (NSW), and Victoria, with the passing of the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018* (Vic), have done so at present.
7. As a result, the Scheme currently only applies to survivors of abuse which occurred in a Commonwealth institutional setting, or in Victoria, or in NSW.
8. Nevertheless, all States in Australia have agreed that they will pass legislation to opt in to the Scheme.
9. Under the Scheme, not only do survivors have to be a survivor of the Commonwealth, Victoria or NSW, but also the relevant institution under whose care they were abused must have opted in to the Scheme.

### The process for making an application

10. To initiate the process, a survivor must complete a lengthy application form, a Statutory Declaration, and provide any further information they deem appropriate relating to the abuse.
11. The Standard of Proof in the Scheme is 'reasonable likelihood', which is a lower standard than in both the civil and criminal courts.
12. Claims officers process the claim and may ask both the survivor and the institution for any additional information and material they deem relevant.
13. An assessment officer will then determine the claim based on an assessment framework.

14. The assessment framework provides for varying degrees of severity of abuse together with corresponding compensation amounts, counselling provisions, and a requirement that institutions provide a personal response should the survivor require that.
15. Thus, there are three components to the Scheme:
  - i. the monetary component;
  - ii. the psychological component; and
  - iii. the personal response component.
16. The Scheme will only be in operation for 10 years.
17. The range of compensation available under the Scheme is \$10,000–\$150,000.
18. For the counselling component to the Scheme, the operator of the Scheme will provide access to counselling for the survivor if they are in one of the jurisdictions which have opted into the Scheme.
19. It is also possible for the operator to award an amount of up to \$5,000 for counselling in addition to the monetary compensation if the claimant lives in a jurisdiction where the state government has not opted in.

#### Reasons why institutions opt into the Scheme

20. An institution might opt into the Scheme for moral, political and branding purposes.
21. Large religious institutions were under a lot of pressure to opt in to the Scheme.
22. Opting into the Scheme is also a way for institutions to limit liability and their exposure to risk.
23. This is because in conjunction with the Scheme, Australian States have passed, or have committed to passing, legislation abolishing limitation periods in child abuse claims.
24. In Victoria, legislation has been passed which compels organisations to nominate an entity which can be sued in child abuse cases.
25. In Queensland and Western Australia, legislation has passed whereby previous deeds in child abuse cases can be set aside.
26. Therefore, survivors who were settling claims for very little money in the past now have access to the courts in ways not seen before.
27. There is also a huge difference in terms of monetary compensation in what a successful applicant can get under Redress (up to \$150,000), and what one can get in the civil courts (no limit imposed) if one has a viable cause of action.

#### The National Redress Scheme and civil proceedings

28. The Scheme will require successful applicants to sign a Deed of Release so that those people who accept a payment of up to \$150,000 cannot subsequently sue the institutions in the civil court.
29. Nevertheless, whilst they cannot sue the institution, they may still sue the individual perpetrator.

30. It is imperative that before a survivor of institutional abuse makes a decision to go to Redress, they should seek legal advice about their right to make a claim in the civil court.
31. This is because people who may not have had a viable cause of action in the past might have today.
32. Redress is a good option for survivors who would otherwise have trouble proving their case in a court of law.
33. In all States, except for Queensland and Western Australia which have passed legislation to set aside Deeds, it is very difficult to get a Deed of Release set aside.
34. People who have only received modest amounts in the past in the civil system, may be able to get a 'top up' of compensation under the Scheme.
35. Prior settlements will be indexed for inflation under the Scheme.
36. Whilst the maximum amount of monetary compensation available under the Scheme is \$150,000, the Minister has said that the average payment will only be \$76,000.

### Limitations

37. Legal barriers such as limitation periods, the Ellis defence, and the difficulty of proving events that occurred a long time ago, have in the past meant that very few cases have made it to court, and of those that have, only a handful have been successful.
38. The 'Ellis defence' is a defence used by the Catholic Church (and other churches), who have claimed that there is no legal entity which can be sued in historical child abuse claims. This is due to the way in which the Catholic Church and some other churches are organised, by virtue of a property trust incorporated but no other legal entity.
39. Therefore, whilst victims could sue the property trust, the Catholic Church argued that because the property trust had nothing to do with the supervision of priests (or other perpetrators), it could not be held liable for the child sexual abuse.
40. The courts essentially agreed with this.
41. Further, a fair proportion of survivors of child sex abuse struggle in life and institutions were taking advantage of these struggles by offering modest amounts of money to settle matters before even going to court.

### Reception by the public

42. For many survivors, the Scheme has been triggering and often traumatic, despite the fact that one of the objects of the Act is to minimise trauma.
43. One of the reasons for this is that the Scheme was rushed through as the Government had committed to the Scheme starting on 1 July 2018. As it does not affect all Australian jurisdictions (and not all institutions will opt in), it is hardly a *National* Redress Scheme at this time.

44. The complexity of the objectives of the Scheme together with the fact that it was rushed through, have meant that there has not been a lot of time for survivors to absorb and relay feedback.
45. Further, the way the Scheme has been set up has been quite discouraging of private lawyers becoming involved.
46. Fortunately, however, the Government has provided funding to the Knowmore Legal Service, which was established to assist the Royal Commission, and to support survivors in making their Redress claims.
47. The Scheme provides no provision for legal costs for survivors who wish to elicit private lawyers to assist in their application.
48. It is also important that people obtain advice from the start of their matter, particularly as to whether redress is the best option, or whether there is a viable common law claim.
49. Survivors who do not access legal advice may find that they have given away their common law rights for relatively little money by going through redress.
50. Free advice is available from the Knowmore service.

#### Concerns regarding the Scheme

51. The 10 year limit may be a barrier for many survivors.
52. This is because it may take many years for survivors to come forward and the 10 year limitation of the Scheme will mean that some people will be locked out because they are not prepared to make a claim yet.
53. Further, survivors who are in jail are ineligible to apply under the scheme (there are some exemptions such as if the claimant has limited life expectancy).
54. Also, survivors who have been convicted of a serious crime with a jail term of 5 or more years will be required to apply for exemptions to be eligible. There is not a lot of guidance as to what the basis of any exemption should be.
55. It may be arguable that these people have already been punished for their crime through sentencing. It is not the Scheme's role to punish survivors by rendering them ineligible to apply on account of conduct later in life.
56. Child sex abuse can result in quite significant behavioural responses which can spiral into criminal offending.
57. Another concern relating to the Scheme is that it appears that the legislation is drafted in such a way so that a survivor who is not offered any monetary compensation, but accesses counselling or the direct personal response, will still have to sign a release from making a civil claim.
58. As a result, there might be survivors who are signing away their common law rights for no actual monetary compensation and just for the cost of counselling and/or an apology.
59. Only citizens or permanent residents may apply, which locks out the majority of people who have been abused in our detention centres.

### Takeaways for Practitioners

- 60. More information about the Scheme can be found at <https://www.nationalredress.gov.au/>.
- 61. This is an area of law where practitioners will be increasingly approached by clients for advice, and it is a very specialised and complex area.
- 62. It would be unwise to advise clients to go straight to the Scheme without advising them of their common law rights as well.
- 63. Therefore, if a client seeks advice regarding a Deed of Release, a practitioner should not just give advice regarding the terms of the Deed, but should also give advice on the broader issues and the option to sue in the courts.
- 64. If a practitioner does not feel they can give appropriate advice, they should refer the person to the Knowmore legal service or to a specialist in the area.

## **BIOGRAPHY**

### Angela Sdrinis

Director – Angela Sdrinis Legal, Victoria

Angela is a Personal Injuries Accredited Specialist and leading expert in Sexual and Institutional Abuse and is the Director of Angela Sdrinis Legal, a law firm which specialises in abuse claims. Angela has been a passionate advocate for the rights of children abused in care, and has been instrumental in developing a settlement protocol in claims involving the State of Victoria and other non-government organisations. Angela has represented clients at a number of Royal Commission case studies and participated in Royal Commission round table discussions. Angela has also been called to give evidence on child abuse matters before federal and state parliamentary committees and has written numerous submissions and articles and speaks regularly on abuse issues. Angela is a member of the NACLAC/Knowmore Legal Service Sub-Committee.

### Dr Hadeel Al-Alosi

Lecturer- Western Sydney University, Sydney

Dr Hadeel Al-Alosi is a lecturer in the School of Law at Western Sydney University. Hadeel has conducted extensive socio-legal research on Australia's child abuse material. She also has a strong interest in the work of community legal centres and addressing access to justice issues for vulnerable groups, in particular children and women experiencing domestic violence.

## **BIBLIOGRAPHY**

### Legislation

*National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Cth)*

*National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (NSW)*

*National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Vic)*

*National Redress Scheme for Institutional Child Sexual Abuse Act 2018*

### Related Acts and Instruments

*National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018*

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

*National Redress Scheme for Institutional Child Sexual Abuse Rules 2018*

*National Redress Scheme for Institutional Child Sexual Abuse Declaration 2018*