

The Redress Law Reform/Policy project

The Kimberley Community Legal Service Redress project looked back at the experience of people and communities in the East Kimberley the Redress WA scheme.

The Project was led by Judy Harrison and Bev Russ. Judy is a senior solicitor volunteer with Kimberley Community Legal Service. Bev is a local Aboriginal woman who was the KCLS Indigenous Women's Programme Worker until December 2011

Both before and during the Project KCLS had contact more than 200 Redress WA claimants or potential claimants.

About Redress WA

Redress WA was a State Government Scheme which accepted applications between 1 May 2008 and 30 April 2009 from people who were *abused or neglected in State care in WA* before 1 March 2006. Applicants had to be over 18 and applications could not be lodged in relation to deceased people. The Redress scheme involved:

- Acknowledgment of the abuse or neglect by the WA Government.
- An apology by the WA Government
- The possibility, for some, of some counselling, and
- An ex-gratia payment, which was originally a maximum of \$80,000 but was reduced by the government, after applications closed but before offers began to be made, to a maximum of \$45,000.

The Scheme originally required that applicants be willing to give up their rights to seek further compensation but this requirement was removed some months *after* the closing date and no one who received a Redress payment has given up their rights.

Under the Scheme, the first ex gratia payments began to be made in February 2010 and the Redress WA office in the Department of Communities closed in about August 2011.

The [Departments of Communities Annual Report 2011 – 2012](#)

Lists "WA Redress Scheme Major achievements for 2011-12 as:

- Completed 5,325 payments made to eligible Redress applicants across the life of the program. These payments totalled \$117.7 million.
- Completed the distribution of 1,575 apologies signed by the Premier and The Minister for Community Services, bringing the total number of apology letters to 4,013
- Completed 20 reviews of claims at the request of applicants of which 5 were upheld and 20 dismissed. This brought the total number of reviews requested for the entire project to 89 with 70 dismissed and 19 upheld"

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(<http://www.communities.wa.gov.au/AboutUs/AnnualReports/Pages/default.aspx>)

Why did KCLS review the experience in with the Redress Scheme?

1. No evaluation of the experience with the Scheme has been conducted and in February 2012, the Department of Communities has advised that the Government did not intend to evaluate the implementation or effects of the Scheme.
2. Although the Scheme closed on 30 April 2009, KCLS continued to receive inquiries during the rest of 2009, 2010, 2011 and continuing in 2012. All of these inquiries were by Indigenous people most of whom did not lodge their claim before the closing date and consequently missed out. KCLS assisted with claims and undertook follow up for two years, concluding in November 2011, when Redress assessments and payments finished (KCLS, 2011).
3. KCLS assisted some people, at different times after the closing date, to seek permission from Redress to make a late application. These were all Indigenous people and their circumstances, which KCLS put forward, included (KCLS, 2012b):
 - i. the person had not heard about Redress before the closing date;
 - ii. the person was old and frail and no one had helped them;
 - iii. the person lived in the bush, had low literacy, low English comprehension and they did not receive any information about Redress;
 - iv. the person was in hospital or in prison and there was no one to help them; and
 - v. the person had been unwell with a physical, psychological or psychiatric condition

Redress declined these requests on the basis that the Scheme was well advertised, help was widely available, the person should have known about the Scheme and should have applied before the closing date.

4. Most Indigenous people in the East Kimberley did not receive emotional support at any stage in the Redress process. Similarly few of the successful claimants received assistance to prepare about how they would use their Redress money.
5. Among successful claimants, some were touched by the Premier's written apology, some were angry about it because they did not think it was genuine and many did not remember receiving it.

6. The Scheme as it was designed and administered is a direct abuse of the human rights of Indigenous people.

Developing the KCLS 2012 Redress Project

In June and July 2011 KCLS collated and logged its internal Redress records and then asked the Redress office in writing for details about the status of applications and outcomes for all individuals who KCLS had assisted. During this time the Redress office was winding down and moving towards closing and by the Redress office advised that the information was not readily available on their data base, many of their files had already been archived and they were not willing to provide the information requested.

Consequently the Project was confirmed at the end of November as a constructive step to understand more about client and community experiences regarding the implementation of Redress WA in the region.

The project sampled a broad range of views about the experience with the Redress Scheme and thinking about what if anything should happen next.

February 2012 – June 2012

Where it was reasonable and appropriate to do so, KCLS staff discussed Redress WA with new or continuing clients.

Redress was not discussed with clients where there was insufficient time or it was inappropriate because of other factors, for example, where it would have been insensitive to raise it because of the nature of the contact with the client.

This resulted in conversations with **a few hundred people** between February 2012 and May 2012 and June 2012 about Redress. This process also boiled the questions down to three points, which we elaborate upon when appropriate in all relevant contacts i.e.

- Did you know about the Redress WA Scheme?
- What was your experience of the Scheme / what are your views about the Scheme?
- What if anything do you think should happen next about the Redress Scheme?

KCLS focussed on Kununurra, Wyndham, Halls Creek, Balgo, Warmun and Kalumburu in the East Kimberley. Connections were made with Broome and Derby (by phone).

No one affected by the Scheme expressed concern that we were discussing it. This includes people who have positive views about the Scheme and those who had negative or mixed views. No one has expressed that it is a bad thing or a hurtful thing to look at how the Redress Scheme operated. To the contrary, we found that people have something to say and they want to say it.

Project findings

So many people missed out

The key findings of the review was that a large number of Indigenous people in the East Kimberley missed out on Redress because they did not lodge an application by the closing date. Additionally, that it is likely that many Indigenous people in the East Kimberley who were successful in their Redress claim received less than they should have received because the full details of their experiences and the impacts were not put forward.

One organisation referred to about 100 Indigenous people coming in since Redress closed, all of whom had missed out. Most Indigenous organisations had had contact with Indigenous people who missed out and most believed that this was the 'tip of the iceberg'.

Services often talked about an upsurge of inquiries about Redress when some claimants began to receive their Redress ex gratia payment, which, as noted above was at least a year up to two years, after the Scheme closed. Receipt of Redress payments made Redress a topic of conversation among many Indigenous people once payments began to be received. Although the ability of Indigenous people to inform each other was clearly demonstrated by this process, this came too late because the Scheme was closed.

Many thought that if Redress payments had started to be made while the Scheme had been open, that this would have facilitated information flow within remote Indigenous networks. As well, that this is an example of what should have been built into the Scheme through broad based Indigenous input at the planning and implementation stage.

Based on the various forms of input during the Project, there is a strong impression that several hundred Indigenous people in the East Kimberley, who would have been eligible for Redress missed out.

Apology, counselling and support

Those who received an ex gratia Redress payment often did not remember receiving a letter of apology from the Premier and Minister for Community Services. The Redress procedure was that a letter of apology would be sent to each successful claimant shortly after their financial payment was made.

For those who received the letter, many were not literate. While some had the letter read to them, many only had parts read out or it was not read at all. In one community, the letter was read out to people in groups and this resulted in mixed reactions. Many who understood the apology did not feel it was genuine. For many, the apology was diminished by the process, which was poorly

understood and by the time which people had to wait for a response to their application and for their payment.

Access to counselling and personal support services did not increase appreciably in the East Kimberley while the Redress Scheme was operating. There was strong input that long term, local, culturally and appropriate support is required.

Most people did not know about the memorial in Northbridge in Perth and they did not relate to this as something which was useful for them.

It appears that the apology was largely unsuccessful in the East Kimberley. This is because the process was not negotiated in advance and it was not tailored to the needs and circumstances of local Indigenous people.

The Failure of the WA Redress Scheme

The extent of the failure of the Redress WA Scheme in the East Kimberley is a case study about the difficulties which arise when Indigenous people are not fully involved from the outset. The fact that this scheme began without negotiation with Indigenous representatives, about terms of settlement or reparation is symptomatic of the overall policy failure based on the apologisers dictating terms rather than enabling Indigenous people to negotiate in their rightful place, as those to whom satisfactory reparations are due.

The failure is also a further case study about the validity of repeated recommendations by Senate Committees that areas such as these require a national approach. Finally, it is a case study about the agony to which members of the Stolen Generations are being subjected by the failure of the Commonwealth Government to establish a federal reparations process.

The project concluded that the WA Redress Scheme should be re-opened for Indigenous people. Further, that the extent of the problems with the previous Scheme indicates that genuine consideration, particularly by Indigenous people should occur.

Similar schemes in Queensland and Tasmania did re-open for further applications by Indigenous people due to the number of people who originally missed out (Parliament of Australia, 2008, Parliament of Australia, 2010)

The Project found that a more adequate process for Redress WA in the East Kimberley would have involved many aspects, including:

- Public input by Indigenous people into the design of the Scheme

- More preparation before the Scheme began including resources and training for Indigenous organisations in remote communities for local support and assistance,
- More culturally and linguistically appropriate awareness raising before the Scheme started and while it was underway,
- Adequate assistance to people to complete the Redress application, including providing evidence, in addition to the person's personal statement, about the effects of the abuse or neglect which they suffered,
- Resources for trained interpreters relative to demographics,
- Resources for remote communities to purchase services to assist with Redress applications or for contracted services to spend sufficient time in remote communities to accord dignity, time, privacy and clear communication,
- Resources for culturally appropriate support and healing, before, during and after applications were prepared, while applicants were waiting to hear from Redress and after they received the outcome of their application, and
- A far longer application period than the 12 months which applied.

The Human Rights Principles

The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law **Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005** are the internationally regarded standard for effective reparations. Article 18 provides that reparations should include 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'. Restitution may require aspects such as the restoration of human rights (Article 19), and Article 20 provides that compensation 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case'. Article 22(3)(e) provides that 'satisfaction' includes: 'Public apology, including acknowledgement of the facts and acceptance of responsibility'.

These spirit and intent of these Principles require a process of interaction with the victim/s to establish their needs and requirements. Initiatives in which the violator purports to determine what should be satisfactory to and for the victim, fail the test of mutuality which is at the heart of the reparation process. Provision of reparations which are not acceptable to the victim, is not likely to achieve the objective of healing and amends which the process aims to facilitate. This includes failing to provide the combination of reparations required or failing through the processes by which reparations are delivered. The processes are a powerful vehicle which support or contaminate initiatives.

In this case the Western Australian Government emphasised that the Redress WA Scheme was not a 'compensation' scheme and the Premier and Minister for Community Services stated on numerous occasions that nothing could compensate those abused or neglected in State care)

Statements that 'nothing can compensate' take on different meanings when expressed by a victim or a perpetrator. When an intending reparation provider uses these words to validate a reparation package, which they know to be unacceptable to the victims, the perpetrator uses the consequences of the original wrongdoing to justify their own position, thereby dismissing mutuality and underlining who holds the power.

The Human Rights and Equal Opportunity Commission, Indigenous people and many others contend that reparations for the Stolen Generations must include a range of measures which include healing, link-up, apology as well as compensation.

The National Stolen Generations Alliance applies three basic principles as the foundation for its work: These are:

- 'Truth - Telling the true stories, educating, learning and understanding;
- Justice - Righting wrongs through reparations, redress and compensation;
- Healing - Reconnecting and restoring identity, acceptance and belonging'.(National Stolen Generations Alliance, 2011b)

These principles resonate with notions of the 'actual', 'real' and 'true' which are also embedded in the concept of 'substantive equality'. The Western Australian Equal Opportunity Commission describes 'substantive equality' and 'systemic racism' as follows in a publication to assist Western Australian public servants and program managers improve their practices:

Substantive Equality: Substantive equality recognizes that policies and practices which on their face maybe non-discriminatory can result in inequalities that can be unlawful. When all people have access to a public service that best meets the different needs of WA"s diverse community, then Substantive Equality in the public service can be achieved.

Systemic Racism: Race discrimination in an organisation's policies, procedures and practices. Policies, practices or procedures that have, whether by design or impact, the effect of limiting an individual's or a group's right to the services generally available. If the barrier is affecting some groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. (WA Equal Opportunity Commission, 2011 p.2)

The principles arise from human rights frameworks which treat human rights as cogent, relevant and subtle necessitating broad input from diverse stakeholders and effective participation by those who may be affected, when taking actions

The arguments in favour of monetary compensation rely on the general nature of reparations and the interdependent nature of the relevant elements. Also that monetary compensation is a norm, its absence resonates as defiance and impunity and this flavours and undermines all other components in a reparations scheme

Indeed, it can be argued that lack of adequate reparations or redress in relevant contexts, affects the fabric of justice, and this applies whether justice, is seen as a continuum, a starting point, an end point or all three, because reparations or redress tackle impunity.

Moola Bulla Case Study

Moola Bulla, a pastoral station run by the WA Department of Native Welfare between 1908 and 1954 near Halls Creek has been 'influential in moulding the character of the people of the East Kimberley' (Kimberley Language Resource Centre, 1996 p.xi). Moola Bulla features in the history of segregationist, assimilationist and integrationalist policies towards Indigenous people in Western Australia (Bateman, 1948, Ross and Drakakis-Smith, 1983, Rumley and Toussaint, 1990, Kimberley Language Resource Centre, 1996, Haebich, 2000). Indigenous people were rounded up and taken to Moola Bulla, many children from the wider region were removed from their families and taken to Moola Bulla, and Moola Bulla was a ration depot, where people were encouraged to stay. In 1955, after Moola Bulla was sold, the new owner had Indigenous people at Moola Bulla trucked out, without any warning. Some were taken into Halls Creek and some were taken to Fitzroy Crossing (ibid).

In late March 2012 KCLS has had contact with, or became aware of, over 15 Indigenous people who lived at Moola Bulla before it was sold, who were likely to be eligible under the WA Stolen Wages Reparation Scheme and who missed out on Redress because they did not know about it or they were not ready to tell their story.

Kimberley Community Legal Service Review of REDRESS WA

Nothing is ever perfect. It is about doing the best we can when the situation is so limited. The government decided. Then it was just about making the best of it. What should we have done? Just walked away? Nothing can be done now. The government won't listen. Why should it. No one really listens. (Community Service Worker, East Kimberley, February 2012)

Saying sorry is not the same as being sorry. They [WA Government] weren't sorry. They didn't do it like they were sorry. They aren't sorry now about how it was done. They don't care. (Community Service Worker, West Kimberley, February 2012)

I was taken. I wasn't given up. I was stolen. I was taken from my family, my language, my culture, my people, my history. Redress wasn't about any of that. Redress wanted to know what happened to me where they put me. They didn't care about me being taken. They can't change that or say sorry for that by talking about something else. (Member of the Stolen Generations, East Kimberley, February 2012)

My name was on the list. I gave my name for the list. When will I hear? When is my turn? Those young girls I looked after - some of them got their money. We are all old ones now. I am the same as them. (Indigenous women, East Kimberley, April 2012)

What's them 'Redress'? I never know that one. What's him about? I never have that one. I was there [name of] Mission. I was thrashed. I want that one Redress. I tell my story. You filler up form for Redress'. (Indigenous man, East Kimberley, May 2012)

I felt awful. We all felt awful. It wasn't dignified. It wasn't right. It was about getting forms in. (Community Service Worker, East Kimberley, April 2012)

It wasn't justice. Aboriginal people don't get justice. There has never been justice. (Community Sector Worker, East Kimberley, April 2012)

Yes, we all know people missed out. They come in, we say no, no, too late. Different ones ask and I hear things around. A lot of people missed out. (Community Service Worker, West Kimberley, February)

WA Stolen Wages Reparation Scheme

The WA Stolen Wages Reparation Scheme began with no prior notice to community agencies or networks in Western Australia on 6 March 2012 (DIA, 2012, Western Australia, 2012b, Western Australia, 2012a). This Scheme is providing a maximum ex-gratia payment of \$2,000 to Indigenous people born before 1958 (54 years or older in 2012) who had their income managed and not fully repaid by the WA Government, referable to time when the person was at least 14 years old and resident at a Government Native Welfare Settlement in Western Australia (DIA, 2012). The Stolen Wages Scheme is open for six months, until 6 September 2012 and was announced by the WA Minister for Indigenous Affairs on the day it commenced (ibid). At the same time the Minister released the report of the 2008 WA Stolen Wages Taskforce for the first time (Western Australian Stolen Wages Task Force, 2008). This Task Force exercise, which included public consultations in some communities in the East Kimberley in October and December 2007 (ibid. pp.90-91), did not recommend the Scheme which the WA Government announced (Koehler, 2012).

The WA Government did not provide the opportunity for public comment on the Task Force Report or release a draft of the Government's proposed Stolen Wages Reparation Scheme for input. The two part reparation package recommended by the Task Force consisted of reparations for individuals and 'common experience' reparations regarding the common experiences of Indigenous people were both implicitly rejected. The Government has not responded to the many other recommendations in the Task Force Report including the recommendation for an apology. The WA Government response also falls far short of the recommendations made by the Senate Community Affairs Committee when it reviewed the stolen wages issue in 2006 from a national perspective (Parliament of Australia, 2006).

That Redress WA was a current topic within KCLS when the Stolen Wages Reparation Scheme began, contributed to KCLS becoming proactive in developing and circulating information about the Stolen Wages Scheme which in turn contributed to extremely high client response. While other services, particularly the state wide WA Aboriginal Legal Service, were working on their response plan, KCLS was experienced large a numbers of drop ins and referrals especially in Halls Creek and Kununurra. On effect was that the KCLS Redress Project had to adapt, and the possibility of the Project placing direct emphasis on follow up with the original Redress clients, was deferred.

However, KCLS Redress records, and experience with Stolen Wages matters since March 2012, indicate a significant cross over among Indigenous people who would had been

eligible for Redress WA and those who are likely to be eligible under WA Stolen Wages. This is because of:

- The age profile of the KCLS Redress clients, and
- The degree of overlap between the definition of 'Government Native Welfare Settlement', relevant to the WA Stolen Wages Scheme, and the list of State institutions, which includes former Indigenous missions, specified by the Redress WA Scheme (WA State Solicitor's Office, 2005, Government of Western Australia, 2010, DIA, 2012).

The response to the Stolen Wages Scheme provided an urgent, important and concrete way for KCLS to practice learnings around the Redress experience and the Redress Project. KCLS was the first service in Western Australia to develop processes for Stolen Wages client assistance, including endorsing, supporting and assisting Indigenous people and others to voice their reactions and strong objections to the scheme (KCLS, 2012a).

KCLS also saw that some of the contacts with services, networks, groups and individuals about the Stolen Wages Scheme may be opportunities for discussion of experiences regarding Redress, and vice versa. At the same time it continued to be important to avoid confusion, avoid raising expectations or causing distress around the issue of the Redress Scheme. Exploration with services, networks and individuals between March and May confirmed substantial synergies, to the point that exploring issues about Redress may generate unexpected benefits from the abysmal Stolen Wages WA Reparation Scheme.

Redressing the WA Redress Scheme for Aboriginal people

The WA Government Redress Scheme was an administrative scheme which was open for applications for 12 months from 1 May 2008. The Scheme included the components of an ex-gratia payment, counselling and an apology. People aged 18 or over who were abused or neglected in State care in WA before March 2006 were eligible to apply. The potential applicants were non-Aboriginal people, including former British child migrants brought to Australia during WWII, and Aboriginal people.

Research undertaken by the Kimberley Community Legal Service (KCLS) in 2012 revealed the extent of the failure of the WA Redress Scheme for Aboriginal people in the East Kimberley, and that these failures are echoed across the State. Several hundred Aboriginal people in the East Kimberley missed out on applying for the Scheme, often because they didn't know about it. The WA Government's response to this has been that they should have known. Additionally, many Aboriginal people who received an ex-gratia payment received less money than they would have, had there been more time, emotional support and help to complete applications properly.

Aboriginal people in the East Kimberley, like other Aboriginal people across the State, had no voice or representation in the development and implementation of the Scheme. The Scheme was consequently not tailored for Aboriginal people, particularly those with low literacy and limited access to information and assistance, which is common in remote areas. The Scheme appears to have been most effective for the more capable applicants and least effective for the most vulnerable. In general terms, the Scheme seems to have been more effective in urban areas than in regional and remote areas and more effective for non-Aboriginal people than Aboriginal people.

The WA Government has not evaluated the implementation, outcomes or impacts of the Scheme for Aboriginal people and has indicated that it does not intend to do so. This continues and compounds the lack of focus on substantive equality which also explains the failure of the Scheme. The Government's refusal to evaluate also flies in the face of the experience with the WA Stolen Wages Reparation Scheme, which is resulting in far broader awareness about how many Aboriginal people could have applied for Redress. This is because every Aboriginal person who was eligible for Stolen Wages, should have received information about Redress before the Redress Scheme closed, but many did not.

KCLS research in the East Kimberley indicates that the majority of Aboriginal people affected by the WA Redress Scheme have strong views about what went wrong. These people, many who were not aware of the Scheme when it was open, overwhelmingly want their experiences to be taken into account in designing a new Scheme specifically for Aboriginal people. This contradicts arguments that asking people to look back at the WA Redress Scheme and talk about it would be distressing because people have moved on. In fact, many people have views they want to express because they find their treatment, both when they were in care and how this was approached by the Redress Scheme, distressing.

KCLS has identified ways forward which accord with the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations*

of *International Humanitarian Law* being the internationally regarded standard for effective reparations (HREOC, 1997, Shelton, 2005 pp.11-34, UN General Assembly, 2005, Lawry, 2010).

This should start with Aboriginal people being enabled to determine and express their requirements for the new Scheme. Then, there should be a process of negotiation whereby, in the spirit of these Basic Principles and Guidelines, the WA Government would develop the terms for reparations with Aboriginal people. The terms would relate to the Scheme, including implementation processes. This would address the requirement that reparations represent a settlement, not something unilaterally determined and imposed by those seeking to make reparations.

KCLS research indicates that the aspects about which Aboriginal people are likely to wish to negotiate relate to how Aboriginal people can be empowered during and through the reparation process. This includes:

1. Whether there should be any time limit for applications.
2. How the Scheme should be administered, monitored and progressively evaluated including how Aboriginal people, families and communities affected could be involved to ensure accountability to Aboriginal people and the broader community.
3. The other elements of the Scheme:
 - o The form and processes of the apology;
 - o Better ways to avoid recurrence;
 - o Ways of recognising and honouring those who have passed away;
 - o Emotional support for individuals, families and communities;
 - o Forms of assistance for individuals who may wish to apply or reapply; and
 - o The amount payable, options for payment in-kind or more options than one cash payment.
4. Whether the four aspects which are currently treated as separate issues in Government responses to Aboriginal people, should be approached together in some ways. That is:
 - o Redress Scheme - abuse and neglect of Aboriginal people in State care;
 - o Stolen Generations - the taking away, treatment and effects;
 - o Stolen Wages - withholding income from Aboriginal people when in institutions, on stations and in other contexts; and,
 - o Forced Adoption – removal of babies and children from Aboriginal mothers and families without consent.

References

- HREOC 1997. Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families Human Rights and Equal Opportunity Commission, Sydney, viewed 17 October 2012, <http://www.humanrights.gov.au/social_justice/bth_report/index.html>.
- Lawry, C. 2010. Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations. *Australian Indigenous Law Review*. University of New South Wales, Indigenous Law Centre, Sydney, Vol 14, Issue 2, pp. 83-99.
- Shelton, D. 2005. The United Nations Principles and Guidelines on Reparations: Context and Principles. In: Feyter, K., Parmentier, S., Bossuyt, M. & Lemmens, P. (eds.) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. Intersentia, Antwerp and Oxford, pp. 11 -34.
- UN General Assembly 2005. The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law United Nations, New York, Resolution 60/167, UN Doc A/Res/60/147, viewed 17 October 2012, <<http://www2.ohchr.org/english/law/remedy.htm>>.