



Royal Commission into Institutional Responses to Child Sexual Abuse
Consultation Paper: Redress and Civil Litigation (January 2015)

Written submissions by the Kimberley Community Legal Services Inc.

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The Kimberley Community Legal Services Inc. (KCLS) welcomes the opportunity to make written submissions (**submissions**) to the Royal Commission into Institutional Responses to Child Sexual Abuse on the Consultation Paper: Redress and Civil Litigation (January 2015).

These submissions reflect the views and experiences of KCLS and the experiences of many clients in the Kimberley in relation to past redress, reparations and compensation schemes.

1. Our Service

KCLS is a generalist civil law Community Legal Centre, which operates across the Kimberley and into the Great Sandy Desert and the Tanami Desert. Approximately 95% of KCLS' clients are Indigenous men and women whose lives, opportunities and social, economic and political position is affected by historical and continuing injustices. Many clients speak English as a second or subsequent language and are members of the Stolen Generations. Some do not speak out against historic wrongs for many reasons including sadness, tiredness, a sense of defeat, lack of hope or fear of retribution. Many however are determined to bring governments and other institutions to account.

KCLS has offices in Kununurra and Broome. We provide outreach services to Wyndham, Derby, Halls Creek and Warmun and we undertake extended visits to remote communities. This includes: Kalumburu; Billiluna; Mulan; Balgo; Yiyili; Ngallagunda (Gibb River Station); Imintji; Kupungari (Mt Barnett) and Kundat Djaru (Ringer Soak).

A key aspect of KCLS' service delivery and law reform work is enabling Aboriginal clients who have experienced historical or continuing injustices to advocate and seek redress, including reparations. KCLS continues to work for and with Aboriginal people relating to Redress WA, the WA Stolen Wages Reparations Scheme and Stolen Generations. Some of our clients have sought redress through Towards Healing. KCLS acts for many clients in relation to Criminal Injuries Compensation applications.

KCLS has helped many clients raise their concerns about reparations schemes in the media, through petitioning the Western Australian Parliament¹ and in public essay². Many KCLS clients have raised their concerns directly with members of both houses of the Western Australian Parliament, with relevant Ministers, with the opposition and other parties. However, the current WA Government has been consistently unreceptive about the gross deficiencies and failures of these schemes for Aboriginal people.

The previous written submissions by KCLS to the Royal Commission, relating to the Redress Schemes Issues Paper, was reflective of these experiences.³ We also acknowledge the many submissions to the Royal Commission about the issue of redress made by other groups and individuals seeking redress. A common theme of these submissions is that much learning is possible from the failings and limitations of previous schemes.

We acknowledge the time taken by the Royal Commission to reflect on all submissions, as evidenced in the extensive Consultation Paper.

¹[http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/%28\\$all%29/2060724E3EBF97EA48257D51002B65A8/\\$file/ev.040.140908.let.001.pc.pdf](http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/%28$all%29/2060724E3EBF97EA48257D51002B65A8/$file/ev.040.140908.let.001.pc.pdf)

² Steve Kinnane, Judy Harrison and Isabelle Reinecke, 'Finger Money: The black and white of stolen wages', (2015) 47 *Griffith Review* 49.

³ <http://childabuseroyalcommission.gov.au/getattachment/11dfe294-030d-4517-b173-9105f71a6e7d/79-Kimberley-Community-Legal-Services>

2. Terms of Reference

Our submissions presented here relate to matters in the Consultation Paper on which the Royal Commission has specifically sought input and to paragraph (d) of the Commission's Terms of Reference:

*what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.*⁴

3. Human rights principles regarding redress

Our Submissions acknowledge and draw upon human rights principles concerning reparations, as recognised by Australia and other members of the international community.

In this respect we refer to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

Our submissions also draw upon the findings in Part 4, and the citation of human rights principles in Appendix 8, of the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (*Bringing them Home Report*).

⁴ As reproduced in Commonwealth, Royal Commission into Institutional Responses to Child Sex Abuse, *Consultation Paper: Redress and Civil Litigation* (2015) 7.

4. General Observations

We make the following general observations on the Consultation Paper:

Fairness

The Consultation Paper recognises the importance of the concept of ‘fairness’ for survivors of abuse when seeking redress. KCLS supports this framework and submits any future redress scheme will not be seen as serving justice for or by survivors without substantive (actual) equality of access and fair treatment, in substantive terms, for all survivors. This includes recognising the different experiences among survivors, the experiences among particular groups of survivors such as Indigenous people, and the different ways survivors may access a redress scheme, including Indigenous survivors.

Elements

KCLS generally supports the three general elements of redress stated in the Consultation Paper. Namely, survivors may engage in or receive:

- A direct personal response by the Institution, including an apology, the opportunity for the survivor to meet with a senior representative and an assurance as to the steps that the institution has taken/will take to prevent further abuse;
- Access to counselling and psychological care as needed, throughout the survivor’s life - this includes the supplementation of existing services to ensure access; and
- Monetary payments as a tangible means of recognising the suffering of all survivors.

General Principles

KCLS agrees with the general principles for providing redress as outlined in the Consultation Paper. Additionally, we submit that the following principles should also be adopted to ensure that the principles of fairness and equality are achieved:

- Impartiality throughout the process;
- Transparency of the process including that: the guidelines / criteria must be publicly available from the outset; any changes to these must be clearly documented and notified;
- The processes for assessment should be fully and clearly described; survivors should receive updates about the processing of their application; and
- Substantive decisions should be capable of being reviewed on the merits; overall progress should be reported on publicly.

We strongly agree with the need for appropriate and effective assistance for survivors who are particularly vulnerable. We consider many survivors may need assistance with their claims in order to be empowered by the claims process. This includes navigating the process using support or assistance of their choice.

We strongly recommend a scheme which allows for survivors to be assisted by a lawyer, or specialist advocate, if the survivor so chooses. In the case of vulnerable survivors (including those with poor literacy, those who are socially marginalised and who face major obstacles due to lack of resources, remoteness or other factors) we submit that it should be presumed that legal assistance will be

required unless the survivor gives their free, prior and informed consent to proceed without legal assistance.

Based on our experience, the absence of legal assistance in these cases will place the implementation, credibility and success of the scheme at risk. Legal assistance accords survivors their rights and creates accountable, ethical and efficient routines for claims to be prepared, lodged and processed.

We have no doubt that if vulnerable claimants in the Kimberley lack access to culturally appropriate, accessible, and sustained legal assistance, reparative failure will result. Any pejorative views about lawyers making claims processes legalistic or drawn out completely miss the point that without locally acceptable legal assistance accessible to claimants in their locations throughout the process, the most vulnerable will be effectively prevented from participating.

5. Chapter 2 – Structural Issues

We welcome submissions that discuss the issues raised in Chapter 2.

In particular:

- we seek the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternative approach***
- we welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse.***

KCLS strongly supports the implementation of a legislated national redress scheme (**national scheme**).

A national scheme will:

- Be better placed to influence key Commonwealth agencies, including Medicare and various peak health and medical associations, to ensure the adequate funding of survivors' life-long care needs;
- Be better placed to obtain financial commitments from government and non-government institutions to properly fund and facilitate a redress scheme;
- As a result, be more likely to be adequately resourced to make meaningful financial and non-financial reparations to survivors of abuse by or within institutions;
- Be best placed to ensure human rights guarantees are incorporated into a redress scheme;
- Be more accessible for survivors through a single application process, consistent promotional material, consistent criteria, consistent standards of proof and consistent review mechanisms;
- Be easier for survivors to navigate, especially for survivors who move between jurisdictions or who suffered abuse in multiple locations or in multiple institutions (we note many of KCLS' clients move between the East Kimberley / Northern Territory);
- Be adequately resourced to commission specialist services, including promotional material and culturally appropriate engagement including for Indigenous survivors;
- Ensure consistency in the approach to individual survivors who have already obtained redress (with any future redress to be offset against reparations already received);
- Help promote consistency in the approach to survivors' who seek common law compensation;
- Make a clear national statement of commitment to righting historical wrongs;
- Circumvent shifting responsibility between jurisdictions for making reparations;
- Avoid potential conflict of interest for some State Governments which may otherwise seek to shape the reparation response to avoid criticism of their previous highly deficient efforts; and
- Capitalise on the apparent bipartisan support for the Royal Commission's work.

In the case of survivors of abuse which occurred in Western Australia, and for survivors of abuse living in Western Australia, KCLS does not consider a state based Scheme operated by the Western Australian Government to be suitable. The reasons for this include:

- The failure of the WA Redress Scheme – there were numerous serious problems with this Scheme, none of which have been alluded to in the submission by the WA Government.⁵

⁵ Government of Western Australia Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Issues Paper 6 – Redress Schemes, 2014, online at:

For example, the WA Government is aware that hundreds of Aboriginal people missed out because the Scheme wasn't open for long enough and the arrangements for late applications were totally inadequate. Insufficient assistance was available for Aboriginal people who applied, resulting in grossly inadequate payments. The WA Government has refused to conduct a public evaluation of implementation, adequacy and effects of the Scheme. This track record indicates that a scheme administered by the WA Government is likely to have a high risk of failure;

- The failure of the WA Stolen Wages Scheme – with this Scheme the WA Government failed to treat Aboriginal people with dignity and respect. The lead up to the establishment of this Scheme included withholding critical information, including actuarial modelling, from Aboriginal people, failing for four years to make the report of the Stolen Wages Taskforce public, failing to allow any opportunity for public input in relation to the contents of that report and failing to negotiate with Aboriginal people. The Scheme established by the Government had secret guidelines, it lacked transparency and credibility and the Scheme caused insult and uproar; and
- Country High Schools Hostels Ex Gratia Scheme – this is the most recent relevant Scheme. The guidelines were secret. The Scheme was targeted primarily to Western Australia's major population centre in the South West of Western Australia, effectively discriminating against those abused or neglected in other institutions elsewhere in the State.

For all of the above reasons, we submit the key principles of fairness and equality are more likely to be met with a consistent, transparent, arm's length, National Scheme.

6. Chapter 4 – Direct personal response

We welcome submissions that discuss the issues raised in Chapter 4, including the principles for an effective direct personal response and the interaction between a redress scheme and direct personal response.

We submit that providing survivors with an option for a direct personal response from an institution is an essential component of a redress scheme. Such non-financial actions are likely to have significant therapeutic benefit for many of KCLS' clients who suffered childhood abuse.

In its simplest form this could be a direct personal apology. However there should be a range of apology options from which each survivor could choose. Public apologies, published apologies, community apologies and apologies of a nature negotiated by individual survivors or groups of survivors should be offered.

We consider the following elements of a direct personal response should also be available to individual survivors:

- Access to full personal records, including:
 - Native Welfare files;
 - Institutional files and records relating to them;
 - Commonwealth pension and entitlement information;
 - Historical family data; and
 - Genealogical material.
- Expert legal assistance, at no cost to the survivor, to evaluate the strength of civil claims;
- Assistance to survivors to be able to fully participate in discussions surrounding loss and healing relating to the abuse;
- Assistance to link up with other survivors regionally and nationally; and
- Provision of culturally appropriate counselling and healing services.

Collective redress

We also submit the Royal Commission is correct to identify collective redress for Aboriginal and Torres Strait Islanders as a necessary element of any future redress scheme.

We say this for the following reasons:

- Some survivors and their communities have strong and intertwined relationships with institutions in which abuse occurred. Church run missions are the main example;
- Consequently, some clients wish to repair relationships with these institutions and end unresolved trauma and grief;
- That is, some clients seek to draw spiritual strength from the same church which perpetrated the abuse;
- A significant barrier to meaningful change and reconciliation is the shame felt by individuals when coming forward in isolation and fear of retribution or alienation from tight communities; and
- These historical and cultural realities require a different mechanism to avoid stigmatising individuals and allow the benefit of an apology to be maximised and risks minimised.

The availability of collective redress therefore allows Indigenous survivors meaningful access to the benefits of non-financial responses as it draws distinction between the existence of the right to an

apology and the method of how it may be delivered. The default *one-size-fits-all* approach is unlikely to be taken up in the Kimberley and is likely to cause more harm than healing or amends.

7. Chapter 5 – Counselling and psychological care

We welcome submissions that discuss the issues raised in Chapter 5, including the principles for counselling and psychological care, existing services and service gaps and the principles for supporting counselling and psychological care through redress.

In particular:

- we seek the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors***
- we welcome submissions on the relative effectiveness and efficiency of the options in meeting survivors' needs.***

KCLS supports ongoing counselling and psychological care being an integral element of any future redress scheme. We also support the many elements of lifelong care in Chapter 5 of the Consultation Paper including recognition of episodic use of counselling and the need for its flexible delivery.

We submit the availability of quality, culturally, linguistically and locationally appropriate ongoing care is likely to help some survivors work on the effects of the abuse. Many of KCLS' clients experience multiple forms of disadvantage linked to institutionalised abuse and trauma, including that which occurred in institutional settings. Issues such as chronic poverty, social exclusion, being a victim and/or perpetrator of family or interpersonal violence, substance abuse, cognitive and physical impairment and other multiple chronic health conditions may be related in direct and indirect ways to experiences of abuse by and within institutions.

We strongly submit that existing services with local knowledge are best placed to deliver assistance and services to our clients and that this is essential for quality, access and sustainability.

To be effective for our clients, any counselling or psychological care component must overcome the:

- Limited number of existing mental health and support services across the Kimberley;
- Absence of psychologists and psychiatrists permanently based in the East Kimberley;
- Limited staffing and resources of many community health clinics in remote communities;
- Difficulties for remote communities with no permanent health clinics, relying on access outreach medical service or traveling hundreds of kilometres to access larger centres;
- Increasing demand and how remote services will manage it;
- Quality issues arising from limited access to training and qualifications for workers attempting to respond to the complex effects of sexual assault and trauma; and
- Tendency to overlook, or underestimate, the alternative strengths and capacities of existing services, especially Aboriginal controlled medical services, which are often best placed to identify strategies to work with local people and communities.

To date our clients' experiences in obtaining culturally appropriate and accessible mental health / support services is limited. Contact with visiting services is also sporadic and expensive. Many clients lack access to basic phone services which limits access to and by care providers and impacts on the client's ability to acquire information or to seek or receive assistance.

Regarding gaps in current services, we agree the current Mental Health Treatment Plan is an example of a system that struggles to meet our clients' needs. This is due to the difficulty of obtaining a GP referral before being able to access mental health care services, a focus on short-

term interventions and the limited number of sessions included for those seeking assistance. Most critically, patients have few services to access and fewer based permanently in the Kimberley.

It is not clear how expanding Medicare funded services would resolve these issues. The direct funding of social work and counselling positions within existing services, preferably within Indigenous run services, is more likely to meet existing gaps.

8. Chapter 6 – Monetary payments

We welcome submissions that discuss issues raised in Chapter 6, including the purpose of monetary payments.

In particular, we welcome submissions on:

- the assessment of monetary payments, including possible tables or matrices, factors and values***
- the average and maximum monetary payments that should be available through redress***
- whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme***
- the treatment of past monetary payments under a new redress scheme.***

Assessment of Monetary Payments – Matrices

We submit clear and transparent guidelines to assess monetary payments are necessary for any future redress scheme. These guidelines will help accord survivors their human rights and provide credibility to the totality of the reparations package offered to survivors of childhood abuse.

In this respect we note the matrix on page 147 of the Consultation Paper aligns with such principles. Guidelines are likely to provide a transparent set of principles against which claims may be properly prepared and subsequently assessed, however some discretion will also be required to avoid some situations resulting in injustice.

Average and Maximum Monetary Payments

We note the many considerations and complex factors to be weighted by the Commission to determine the recommended amount of monetary payments. However, we submit that as a priority the Commission's terms of reference require recommendations for:

ensuring justice for victims through the provision of redress by institutions

Having regard to human rights principles, the overall response, including the amount of monetary payments, should take into account the elements of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. We submit that the amount of the monetary payment accorded to each applicant survivor should be such as to be considered full and ample by the survivor in the circumstances. The aspect of the compounding effects of abuse should be given full weight.

We therefore submit that for the Royal Commission to fulfil its terms of reference, recommendations regarding the maximum payment should be far higher than the maximum currently contained in the Consultation Paper (\$200,000.00). This is a particularly sensitive point because the Commission's aim is to remain focused on the survivors, rather than engage in unnecessary compromise.

Additionally, we submit there is a strong case for a higher common experience or baseline payment than what is outlined in the Consultation Paper to more accurately reflect both the experiences and reasonable expectations of our clients and other survivors.

Our clients' experiences of childhood abuse are felt both individually and collectively, and the impacts are pervasive. A significant common experience payment would ensure clients who underreport abuse, or who are traumatised by abuse experienced by others as well as themselves, receive recognition of the collective *and* the individual nature of traumatic events. This reflects our

experience working with Redress WA where clients frequently received less than they were entitled to because they were reluctant to fully divulge past abuse.

For former residents of missions and government run dormitories and the Stolen Generations, trauma from abuse is often felt not only by the individuals who directly experienced the abuse, but by whole communities. Consequently, payments based only on a fixed scale may not reflect the expectations of individual claimants or the aspects of shared experiences. We acknowledge flexibility is less desirable in this part of a redress scheme, however the tension we see may largely be resolved by a higher baseline payment, higher maximum payments and raising average amounts. The provision of general discretionary powers under a redress scheme would also temper perverse outcomes from a more rigid approach.

Instalments

We consider there should be flexibility in how survivors may exercise their right to compensation, and the possibility for clients to choose within the redress process.

This stems from the capacity of clients and the impact a large payment may have on individuals, groups or communities. While KCLS does not support a scheme which limits the participation of survivors or their ability to receive a payment in any way, we consider a need for an initial assessment or conversation to be had with potential recipients of such a payment, to avoid any further injury or harm to individuals or communities involved. The choice of receiving either a lump-sum payment or several payments by instalments is a choice which should be exercised by those involved.

9. Chapter 7 – Redress scheme processes

We welcome submissions that discuss the issues raised in Chapter 7, including any aspects of redress scheme processes.

In particular, we welcome submissions on:

- eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included***
- the appropriate standard of proof***
- whether or not deeds of release should be required.***

KCLS strongly agrees with opinions already put forward by other services as to the need for a human rights based approach when establishing policies and procedures. For example, in their joint submission on Issues Paper 5: Civil Litigation, the Victorian Aboriginal Legal Service (VALS) and the Human Rights Law Centre (HRLC) recognised the important role that the Commission plays in recognising and respecting the human rights of all Australians, and affirmed that the implementation of a human rights framework can enhance transparency, increase empowerment, and lead to better outcomes.⁶

We also note the principles outlined in the *Bringing Them Home Report* regarding the reparation process,⁷ and strongly agree that the assessment of individual claims to redress be guided by the following principles:

- Widest possible publicity regarding the scheme and the process, in clear and accessible language;
- Strong emphasis on claimants receiving free legal advice and representation in support of their claim, unless they choose otherwise;
- No limitation period for making a claim;
- Independent decision making on claims, and the inclusion of Indigenous people in the decision-making process;
- A minimum level of formality throughout the process, including an appropriate standard of proof for claims; and
- A focus on cultural appropriateness throughout the process.

Other factors that we believe would strongly enhance the effectiveness of the scheme in the Kimberley include:

- Encouraging and assisting vulnerable claimants to obtain legal assistance in relation to their claim;
- Respecting the right of claimants to choose to be legally represented at any and all stages of the process;
- No deed of release;
- Survivorship of claim, allowing the entitlement to pass on to the family of deceased survivors; and
- Clear review and appeal mechanisms, with information about these processes to be provided to communities in a language and method that is clear, easy to understand and culturally appropriate.

⁶ Victorian Aboriginal Legal Service and Human Rights Law Centre, *Submission on Civil Litigation*, Royal Commission into Institutional Responses to Child Sex Abuse, 17 March 2014.

⁷ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home* (1997) Chapter 14.

10. Chapter 9 – Interim redress

We welcome submissions that discuss the issues raised in Chapter 9, including the additional principles for interim arrangements and possible structures.

In particular, we seek the views of survivors, survivor advocacy and support groups and institutions on whether there are other issues on which direction or guidance might be required for interim arrangements.

Regarding interim arrangements for potential claims and claimants, we believe a future redress scheme which allows for early access to monetary compensation payments in cases of hardship will be more effective for our client base.

For example, situations in which claimants are suffering from a terminal illness and will not be able to claim in the future would justify an early release.

We support a scheme that allows for survivorship of claims, to ensure families of deceased survivors can also access much-needed support through the redress process.

11. Chapter 10 – Civil litigation

We welcome submissions that discuss the issues raised in Chapter 10.

In particular, we welcome submissions on:

- the options for reforming limitation periods and whether any changes should apply retrospectively***
- the options for reforming the duty of institutions and whether any changes should apply retrospectively***
- how to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts***

KCLS strongly advocates for no limitation date or closing date for survivors who wish to make a claim. In making this submission, KCLS supports the Commission's recognition in the Consultation Paper that limitations on claim periods '*are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation*', and are often '*clearly inadequate for survivors... [of child sex abuse]*'.⁸

Furthermore, we draw upon the experience of our clients regarding the WA Redress Scheme to stress the importance of a flexible, open-ended closing date. Many of our clients were simply not aware of the WA Redress Scheme until it was too late for them to lodge an application and to have their claim considered. It was not until about eight (8) months after the Scheme closed when some community members started receiving payments and/or apologies from the government that the broader community became aware of the Scheme.

This experience demonstrates that the imposition of a rigid limitation date will negatively impact our client base, allowing very few community members to participate and thus severely restricting the effectiveness of the scheme.

⁸ Commonwealth, Royal Commission into Institutional Responses to Child Sex Abuse, *Consultation Paper: Redress and Civil Litigation* (2015) 32.