



Joint Select Committee
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email and post: redress@aph.gov.au

Dear Chair,

17 April 2020

**RE: Submission to the Joint Select Committee on Implementation of the National Redress Scheme
Inquiry into 'Establishment and operation of the Commonwealth Redress Scheme'**

1. Saines Lucas Solicitors is a firm based in Ballarat and Western Victoria and is over 80 years old. Saines Lucas Solicitors specialises in all areas of personal injury law and we act for a number of survivors of institutional childhood sexual abuse.
2. Thank you for asking our Ms. Bianca Anstis to provide submissions in relation to case law in respect of the quantum of damages that survivors can expect to receive and in relation to the current definition of penetration in the Section 5 of the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 ("the Framework").

Quantum of Damages in Sexual Abuse Cases

3. It is important to note that each and every case is determined by its own facts. This summary is merely to provide some insight into recent awards of damages in civil actions for childhood sexual abuse. It should also be noted that this sample is only reflective of matters that have been tried as a cause (i.e. by a judge alone), and do not include the awards of damages from jury trials or from the vast number of matters that settle by way of negotiation, without proceeding to judgment. The following cases indicate that a survivor can expect to receive a greater amount of compensation, particularly where they have sustained economic loss, if they are successful in bringing civil proceedings against the perpetrator or the institution, than if they receive payment through the National Redress Scheme. It is respectfully submitted the maximum payment available to

survivors under the National Redress Scheme should be increased to \$200,000, in line with the Royal Commission's recommendation¹ and that of the Joint Committee.²

4. In *Erlich v Leifer*³ Justice Rush of the Victorian Supreme Court awarded the Plaintiff damages in the sum of \$1,124,428. In this matter, the Plaintiff was sexually abused over a three-year period by the Defendant, who was the Headmistress at Adass Israel School. The abuse occurred over a three-year period and included digital penetration, touching of the outside of the Plaintiff's vagina and the Defendant sucking on the Plaintiff's breast. The Plaintiff suffered from psychiatric injuries including severe depression, post-traumatic stress disorder ("PTSD"), borderline personality disorder, and the Plaintiff had also self-harmed. The damages awarded included:
 - a. General damages (being compensation for the Plaintiff's pain and suffering) - \$300,000
 - b. Future economic loss including superannuation - \$501,422
 - c. Past medical expenses - \$156,007
 - d. Future medical expenses - \$16,641
 - e. Exemplary damages - \$100,000.
5. In *Hand v Morris*⁴ Justice Zammit of the Victorian Supreme Court awarded the Plaintiff \$717,000 in damages. The Plaintiff was a primary school student who was sexually abused in 1974, when the Defendant compelled the Plaintiff to touch the Defendant's penis in front of another student in a classroom. The Plaintiff was diagnosed with generalised anxiety disorder. The damages awarded included:
 - a. General damages - \$260,000
 - b. Past economic loss (being the loss of the ability to receive promotions, due to the Plaintiff's lack of confidence) - \$100,000
 - c. Future economic loss including superannuation - \$320,000.

¹ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, 2015) recommendation 19

² Joint Select Committee on oversight of the implementation of the Royal Commission into Institutional Responses to Child Sexual Abuse (Getting the National Redress Scheme right: An overdue step towards justice, April 2019) recommendation 15.

³ *Erlich v Leifer* [2015] VSC 49.

⁴ *Hand v Morris & Anor* [2017] VSC 437.

6. In *Dryden v Jones*⁵ Judge Haesler SC DCJ of the New South Wales District Court awarded the Plaintiff \$421,017 in damages. The Plaintiff was abused by his father's friend between 1989 – 1991 including oral sex and attempted anal sex. The Plaintiff was diagnosed with major depressive disorder, PTSD, generalised anxiety disorder, alcohol abuse disorder and polysubstance abuse utilisation. Judge Haesler also made this statement in relation to calculation of damages:

Care must be taken. Exact comparisons cannot be made. Each assessment involved a number of different and individual considerations. My focus must be on the harm occasioned to the plaintiff in 1990 and 1991, his subsequent psychological reaction to it and consequent and continuing impairments. These impairments have impacted negatively on most aspects of the plaintiff's life over three decades. They will continue indefinitely.”⁶

The damages awarded consisted of:

- a. General damages - \$230,000
 - b. Past economic loss (the Plaintiff only occasionally had time off work) - \$16,065
 - c. Future economic loss - \$50,000
 - d. Aggravated damages - \$20,000.
7. In *P v D*⁷ Judge Russell SC DCJ of the New South Wales District Court awarded the Plaintiff \$472,742.04. The Plaintiff had been abused multiple times over a six – nine-month period, although the claim was limited to the three counts of sexual assault of which the Defendant had been convicted. The Plaintiff also suffered concurrent abuse from a teacher (unrelated to the abuse by the Defendant and not subject to this proceeding), including oral sex and penile penetration. The Plaintiff suffered from major depression and had been in receipt of the Disability Support Pension and had not worked since 2004. The damages awarded included:
- a. General damages (this was apportioned due to the concurrent abuse. Had there only have been one offender, the Court indicated it would have awarded \$360,000) - \$120,000
 - b. Interest on general damages - \$79,200
 - c. Past medical expenses (apportioned) - \$4,216.25
 - d. Future medical treatment - 27,325.79
 - e. Past economic loss - \$150,000
 - f. Future economic loss - \$100,000
 - g. Less \$8,000 already paid to the Plaintiff pursuant to a restitution order.

⁵ *Dryden v Jones* [2018] NSWDC 223.

⁶ *Dryden v Jones* [2018] NSWDC 223 [20].

⁷ *P v D* [2018] NSWDC 277.

8. In *A B v Australian Capital Territory*⁸ Judge Elkaim of the Australian Capital Territory Supreme Court awarded the Plaintiff \$267,662.83. The Plaintiff had attended a hospital due to suspected salmonella, and a drunk patient sexually assaulted the Plaintiff. The Plaintiff had mild pre-existing anxiety and was subsequently diagnosed with PTSD. The Plaintiff sought that \$300,000 be awarded for general damages. However, the Court made the following award:
 - a. General damages - \$90,000
 - b. Interest on general damages - \$2,478
 - c. Past medical expenses - \$2,600.83
 - d. Future medical expenses - \$37,500
 - e. Past economic loss - \$40,000
 - f. Interest on past economic loss - \$7,434
 - g. Past superannuation - \$4,400
 - h. Future economic loss - \$75,000
 - i. Future superannuation - \$8,250.
9. In *P2 v D2*⁹ Judge Russell SC DCJ of the New South Wales District Court awarded the Plaintiff \$650,670 in damages. The Plaintiff was sexually abused by the Defendant, his foster father, when he was aged between 12 and 16 years of age. The Plaintiff had lived with 26 different foster parents when he was 6 years old, before residing with the Defendant and his foster mother from age 7 – 18. His foster parents were physically abusive towards the Plaintiff, and the Defendant was also convicted of 5 counts of sexual assault including oral sex and digital and penile penetration. The Plaintiff had been diagnosed with PTSD, generalised anxiety, social anxiety disorder and moderate depression. There was no claim for economic loss, because the Plaintiff ceased work due to a work-related injury. The damages awarded included:
 - a. General damages - \$300,000
 - b. Interest on general damages - \$200,000
 - c. Future medical expenses - \$105,950
 - d. Aggravated damages - \$50,000
 - e. Exemplary damages - \$25,000
 - f. Less \$30,250 victim support payment.
10. In *MC v Morris*¹⁰ Judge Fagan of the New South Wales Supreme Court awarded the Plaintiff \$3,510,513 in damages. The Plaintiff was sexually assaulted between the ages of 13 – 15 by his neighbour in 1996 – 1998. There were a number of sexual assaults, but the proceeding only related to those which the Plaintiff could describe in sufficient detail, including four counts of oral sex. The Plaintiff had been diagnosed with PTSD, major depressive disorder, he had made three or

⁸ *A B v Australian Capital Territory* [2018] ACTSC 16

⁹ *P2 v D2* [2019] NSWDC 84.

¹⁰ *MC v Morris* [2019] NSWSC 135.

four suicide attempts and had spent three months in a psychiatric facility. The damages awarded included:

- a. General damages - \$400,000
- b. Interest on general damages - \$115,000
- c. Past economic loss - \$840,000
- d. Past superannuation - \$92,400
- e. Interest on past economic loss - \$676,363
- f. Future economic loss - \$1,079,483
- g. Future superannuation - \$152,963
- h. Future medical expenses - \$20,000
- i. Future domestic care - \$134,304.

11. In *Waks v Cyprys & Ors*¹¹ Justice Forbes of the Victorian Supreme Court awarded the Plaintiff \$804,170. The Plaintiff was a 13-year-old student when he was sexually abused by the First Defendant. The First Defendant pinched the Plaintiff's buttocks in a karate class and touched the Plaintiff's penis inside and outside his clothing on various occasions. The Plaintiff was also subjected to similar sexual abuse, as well as oral sex from another individual, over a six-month period, ceasing approximately six months before the First Defendant abused the Plaintiff. The Plaintiff was diagnosed with chronic PTSD, adjustment disorder with depressed mood, major depression and polysubstance abuse/dependency. The following damages were awarded:

- a. General damages - \$200,000
- b. Past medical and other expenses - \$37,348
- c. Future medical expenses - \$25,000
- d. Past and future loss of earning capacity, including superannuation - \$541,822.

12. In *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers*¹² Judge Herron DCJ of the Western Australia District Court awarded the Plaintiff \$1,329,500 damages. The Plaintiff was sexually abused at the boy's home for a period of eight years until he was 16 years old by six perpetrators. The abuse included digital and penile rape, two counts of oral sex, ongoing fondling and other physical abuse and neglect. The Plaintiff was diagnosed with complex PTSD, major depressive disorder and alcohol abuse disorder. The damages awarded included:

- a. General damages - \$400,000
- b. Past loss of earning capacity - \$620,000
- c. Interest on past loss of earning capacity - \$400,000
- d. Future medical expenses - \$6,000
- e. Past gratuitous care (including interest) - \$5,000
- f. Past special damages (including interest) - \$7,500

¹¹ *Waks v Cyprys & Ors* [2020] VSC 44.

¹² *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27.

- g. Past travel expenses - \$2,000
- h. Less \$111,000 deduction for past compensation received.

Penetration & Redress Payments

13. Redress payments under the National Redress Scheme are linked to whether the sexual abuse included penetration. Survivors who have sustained penetrative abuse are entitled to a maximum of \$70,000 in recognition of the sexual abuse, compared to \$30,000 for survivors of contact and exposure abuse. Survivors of penetrative abuse are also entitled to \$20,000 in recognition of the impact of the sexual abuse, in contrast to those who suffered contact abuse (\$10,000) and exposure abuse (\$5,000). It is noted that survivors of related non - sexual abuse and those who were institutionally vulnerable are all entitled to \$5,000 in relation to each of these categories. Finally, survivors of penetrative abuse are entitled to \$50,000 where there were extreme circumstances of sexual abuse.¹³
14. The Framework defines penetration as “relevant sexual abuse of a person is *penetrative abuse* if any of that abuse involved penetration of the person (even if the rest of that abuse did not)”.¹⁴ This definition is unclear, as it does not indicate whether penetrative abuse extends to digital and oral penetration (as does other legislative definitions, for example *The Crimes Act 1958* (Vic) s 35A(1)).
15. Further, the redress payment that a survivor is entitled to receive should not be linked to whether or not penetration occurred. As the above case law demonstrates, survivors can have different psychological reactions and different consequences to sexual abuse. The redress payment needs to be flexible, to reflect that sometimes survivors who suffer from objectively more severe abuse, may in some circumstances, make better recoveries and have less of an impact on their lifelong earning capacity, than some survivors who may have suffered objectively less serious abuse. It is noted that survivors can suffer from equally horrific abuse without penetration being involved, and redress payments should focus on the consequences of the abuse, similarly to the common law, instead of the type of abuse (i.e. penetrative, contact or exposure). Accordingly, it is submitted that the Government should adopt the Joint Select Committee’s recommendation to cease linking the type of abuse to the amount of compensation¹⁵.

¹³ National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 s 5.

¹⁴ National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018 s 4.

¹⁵ Joint Select Committee on oversight of the implementation of the Royal Commission into Institutional Responses to Child Sexual Abuse (Getting the National Redress Scheme right: An overdue step towards justice, April 2019) recommendation 9.

Financial Implications

16. In response to the Joint Select Committee's recommendation to increase the maximum amount of redress payments to \$200,000, the Government responded that:

"The Government will consult with jurisdictions and will further consider this recommendation through the legislated second anniversary review of the Scheme. Consideration will also need to be given to the financial implications and any potential unintended impact on financial viability and the ability of NGIs to participate in the Scheme."¹⁶

17. It is noted that the purpose of the scheme is not to replace civil litigation. However, if survivors do not have access to a greater redress payment, more survivors may feel pressured to pursue civil claims against institutions, given a much greater amount of compensation is potentially available to survivors through civil litigation. This may lead to even greater costs to NGIs and to governments, especially given the legal fees associated with litigation, in addition to any awards of compensation.

Conclusion

18. It is clear that the National Redress Scheme should be changed to provide a greater amount of compensation to survivors of institutional childhood sexual abuse, and to provide greater flexibility, consistent with the common law, by assessing survivors on an individual basis, according the severity of the consequences of the abuse, and not arbitrarily by the category of the abuse.

Yours faithfully,

SAINES LUCAS SOLICITORS

Per:

Bianca Anstis
Solicitor.

¹⁶ Australian Government response to the Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse report: *Getting the National Redress Scheme right: An overdue step towards justice* (February 2020) pg 7.