

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 24/2018

Authorised	Sharon Stuart, Branch Manager, Redress Policy and Legislation
Date:	19/12/2018 (updated 3 June 2021 – MOG)

Reference or Topic

1. Treatment of legal costs when working out prior payments
2. Section 26 of the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* provides for payments that are not relevant prior payments reducing institution's share of costs of redress payments.
3. Subsection 26(4) of the Rules states that a payment is not a relevant prior payment to the extent that it is:
 - not in recognition of the abuse or the harm caused by the abuse, or
 - it is reasonably attributable to expenses of medical, dental or other treatment, or any other expenses (e.g. legal fees or living expenses).

Issue

4. Out of court settlements, ex-gratia payments, and compensation payments have often been paid in an 'all-in' manner, where the payment is not broken into various subcomponents (including legal costs).
5. Many people receiving 'all-in' payments have paid associated legal costs after the institution has made the payment (or the institution made the payment directly to lawyers, who deducted legal costs before distributing the remainder of the payment to the person).

Advice

1. Where a payment cannot be clearly broken into parts, and there is no indication that part of that payment was made in recognition of abuse or harm caused by the abuse, none of the payment will be considered a relevant prior payment.
2. Where a payment cannot be broken into parts, and it is likely that at least part of the payment was made in recognition of abuse or harm caused by the abuse, all of the payment will be considered a relevant prior payment.
3. The Scheme Operator has discretion to separate a prior payment into subcomponents where there is information available to support the separation. This power is delegated to Independent Decision Makers, and needs to be considered when making their determination.
4. Independent Decision Makers may deduct legal costs from a prior payment amount (i.e. determine legal costs to not be a relevant prior payment) where an applicant or

institution provides appropriate documentation.

5. Services Australia will need to consider all information provided to determine the amount that is a relevant prior payment. An Independent Decision Maker will assess each payment on a case-by-case basis, and will have discretion to separate a payment into subcomponents where there is enough information available to support the separation.
6. Given the low evidentiary threshold of the National Redress Scheme, it is not necessary to obtain formal written evidence to verify each prior payment. However, for the Operator to be satisfied of a prior payment amount, or the purpose for which the payment was made, it is recommended that the information would need to be verified in some way, either by a statement from the institution or documentation indicating the payment or purpose.
7. Examples of suitable documentation may include an invoice for the legal services, a bank statement showing the final amount received by the applicant, a letter from the legal service detailing the costs for legal services, or a receipt of payment for legal fees.
8. A statement from the institution providing a breakdown of the payment, including an estimation of legal or other costs can be considered sufficient information where there is no other supporting information. This will facilitate non-relevant aspects being deducted from prior payments and could lead to more beneficial outcomes for survivors.
9. Further documentation demonstrating the final amount received by a person, or the cost of the legal services, may be considered by an Independent Decision Maker when determining relevant prior payments.
10. A written statement or declaration by the survivor, in the application or otherwise, is not sufficient documentation to deduct legal fees from a prior payment.
11. Consistent with procedural fairness principles, where an institution provides information about a prior payment that the applicant has not, the Scheme will need to contact the applicant to provide them with an opportunity to provide additional information on the payment. Similarly, where an applicant has provided information about a prior payment that the institution has not, the Scheme must contact the institution to provide them with an opportunity to provide additional information on the payment (this will typically occur through the RFI or revocation process).

Background

12. The approach to consider documentation provided by either institutions or applicants when determining relevant prior payments was agreed at the Ministers' Redress Scheme Governance Board on 10 December 2018.
13. The Interjurisdictional Committee agreed that changes to the 'Application for Redress' would assist applicants in providing further information on prior payments and legal fees, and could lead to outcomes that are more beneficial for survivors.
14. The Scheme will undertake further work to update the relevant questions in the 'Application for Redress'.¹

¹ The Scheme published the approved Application for Redress form (released on 27 March 2021) that includes amendments for prior payments.

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 4/2019

Authorised	Sharon Stuart
Date:	23 January 2019

Reference or Topic

1. Application of indexation to prior payment when reviewing original determination
2. Sections 29, 30, 39, 40, 75 and 78 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act)

Issue

3. How are prior payments treated where an original determination is under review, particularly
 - Is the calculation to adjust relevant prior payments conducted again at the time when the review decision is made? This amount might increase the amount deducted from the Redress payment if the whole year period (n) for indexing has increased since the original determination was made due to a new determination date compared to the initial determination date.
 - Would there be a different treatment of the prior payment adjustment calculation if the review decision is the same as the initial IDM determination verses if the review decision is different to the initial IDM determination?

Advice

4. Depending on the circumstances for review, the calculation for relevant prior payments may or may not need to be undertaken at the time of review.
5. However, if the calculation is undertaken, the adjusted amount of a relevant prior payment should be based on the date of the original determination.
6. That is, if the review determination is made in a year subsequent to when the original determination was made, the indexation calculation should not be affected (unless there was an error made in the original calculation).

Discussion

7. Section 75(2) of the Act requires a person reviewing an original determination to reconsider the original determination and make a determination (a review determination) that either:
 - affirms the original determination;
 - varies the original determination; or
 - sets aside the original determination and substitutes a new determination.

8. Affirming the original determination

- An original determination can be affirmed on review if the Operator or IDM conducting the review agrees with the original determination.
- If the original determination is affirmed on review, and the person has been given an offer of redress that approves the application for Redress, then section 78(4) of the Act requires that the acceptance period under subsection 40(2) of the Act be extended for an additional two months.
- As the original determination is maintained, there should not be a reassessment of the payment and the indexation of the prior payment will not be changed regardless of the date the review determination is made.

9. Varying or setting aside the original determination

- An original determination can be varied or set aside (and substituted with a new determination) on review if the Operator or IDM conducting the review disagrees with the original determination.
- If this occurs, and the varied or substituted determination approves the application for redress, the varied or substituted determination may require a new amount of the redress payment to be worked out according to Section 30 of the Act.
- Step 4 of the Method Statement in Section 30 requires any relevant prior payment to be indexed by multiplying the amount by 1.019^n , where “n” is the number of whole years since the relevant prior payment was paid to the person.
- In these circumstances, where the original determination is varied or set aside, the review determination will specify the date that the varied or substituted determination takes effect.
- The date of effect of the varied or substituted determination should be the date of the original determination, as made by the Operator under section 29.
- Therefore, the new determination should calculate the amount of payment, including the relevant prior payment, based on the date of the original determination.
- Unless an error was made in the indexation calculation of the original determination, or the review determination changed the date of the prior payment, the number of whole years since the relevant prior payment was paid (n) in the calculation in Step 4 of the Method Statement in Section 30 of the Act should not change.
- In these circumstances, section 78(3) of the Act requires the Operator to withdraw the original offer and notify the person in writing of the withdrawal. If the varied or substituted determination approves the application for redress, section 78(3)(b) required the Operator to give the person a new written offer of redress in accordance with section 39.
- Section 39(j) requires the offer to state the date of the offer. This date should be the date that the new offer reflecting the varied or substituted determination is made which will be different from the date of effect of the review determination discussed above.
- Section 39(k) requires the offer to state the acceptance period for the offer. Section 40 states that the acceptance period must be at least 6 months, starting on the date of the offer.
- Therefore, while the date of effect of the review determination will be the same date as the original determination, the date of offer will be the date of the new offer, and the acceptance period will be a period of at least 6 months from the date of the new offer.

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 8/2019

Authorised	Sharon Stuart
Date:	29/05/2019

Reference or Topic

1. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act) Section 30
2. Apportionment of relevant prior payment paid by multiple institutions for abuse both in and out of scope of the Scheme.

Issue

3. The *National Redress Scheme for Institutional Child Sexual Abuse Act* (the Act) and the *National Redress Scheme for Institutional Child Sexual Abuse Rules* (the Rules) do not provide any guidance on apportioning a prior payment when the payment includes non-relevant prior payments and was paid by multiple institutions and at least one of those institutions is not participating.
4. In situations where a prior payment is made by multiple institutions, but not all institutions are participating, the formula at s26(6) of the rules does not apply. This is because the formula at s26(6) of the rules only applies where all institutions are participating within the scheme, and when the amount paid by the institutions is unknown.

Analysis / Discussion

5. The Act allows the Operator discretion to work out the amount of any payment that was paid to the person by, or on behalf of, the responsible institutions in Step 3 of the *method statement* at s30(2) of the Act.
6. As the present issue is not provided for in the legislation, this policy advice has been developed to enable the Operator to work out the amount of a payment.
7. The first step in working out the amount of any payment made by the responsible institution is to work out the amount of the entire payment that was made. Then work out how much of that prior payment was made by each institution that contributed to the payment.
8. From this amount, deduct all payments prescribed by the rules as not being a relevant prior payment (eg: medical expenses). The remaining amount represents the relevant prior payment.
9. Use Formula A provided at the end of this policy advice where you know the amount the participating institution contributed to the overall payment. This requires you to divide the contribution amount of the individual participating institution by the total amount of the prior payment. Then multiply this number by the relevant prior payment. This differs from the formula at s26(6) of the rules as outlined above.
10. This ensures that the portion of the payment made by the participating institution is the same as their proportion to the entire relevant prior payment.
11. Adjust this amount for inflation in line with step 4 of the *method statement*.

12. This is best understood through the example provided below:

- A relevant prior payment of \$100,000 was made to a person four years ago, with the s 38 contributing \$80,000 and XY Orphanage contributing \$20,000. s 38 are a participating institution. XY Orphanage is not a participating institution.
- Legal costs of \$25,000 were paid and \$473 of Medicare repayments were made.
- Deduct the legal costs (\$25,000) and Medicare repayment (\$473) from the entire prior payment amount of \$100,000. This results in a payment of \$74,527.
- Work out the apportionment of the prior payment in line with the contribution of \$80,000 made by s 38 using the formula provided in this policy advice.

$$\left(\frac{\$80,000}{\$100,000} \right) \times \$74,527 = \$59,621.60$$

- This results in a prior payment amount of \$59,621.60. This represents the relevant prior payment amount made by s 38 and ensures that s 38 portion of the whole payment is the same as their portion of the relevant prior payment.
- Move onto step 4 of the *method statement* and adjust the payment for inflation by $\$59,621.60 \times (1.019^4) = 64,283.63$
- The relevant prior payment paid by s 38 to be deducted from their gross liability amount is \$64,283.63.

Advice

13. When a prior payment is paid by multiple institutions that includes non-relevant prior payments and was made by institutions not participating in the Scheme or responsible for the abuse in the application, use **Formula A** provided below to work out the relevant prior payment attributable to the participating responsible institution. This will ensure that the prior payment is apportioned in line with the policy intent of the Scheme. Formula A can only be used when the responsible institutions contribution to the entire payment is known.
14. In situations where the responsible institutions contribution to the entire payment is not known, the same process as outlined above should occur (to deduct non-relevant aspects of the prior payment) and then the payment should be apportioned equally between the institutions using **Formula B** provided below.

Formula

Formula A

Apportionment of a prior payment made by participating and non-participating institutions with relevant and non-relevant aspects

$$\left(\frac{\text{Responsible institutions contribution to the entire prior payment}}{\text{The total amount of the prior payment}} \right) \times \text{Relevant prior payment}$$

Formula B

$$\left(\frac{1}{\text{Number of institutions (participating and non participating) by, or on behalf of, which the payment was paid}} \right) \times \text{Relevant prior payment}$$

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 19/2019

Authorised	Sharon Stuart, Branch Manager
Date:	29/05/2019

Reference or Topic

1. Subsection 30(2) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act)
2. Section 26 of the *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (the Rules)

Issue

3. As raised in Helpdesk 360, further clarification is required regarding whether payments made for 'pastoral care' or 'pastoral assistance' are considered relevant for the purposes of the National Redress Scheme for people who experienced institutional child sexual abuse (the Scheme).

Advice

4. Payments that a made for 'pastoral care' or 'pastoral assistance' are not relevant prior payments under the Scheme.
5. Pastoral care/assistance payments are not made in recognition of the abuse or the harm caused by the abuse. These payments were often made as part of the s 38 and the s 38.
6. 'Towards Healing: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia' procedures document defines pastoral care as "the provision of spiritual advice and support, education, counselling, medical care, and assistance in times of need."
7. Pastoral care/assistance payments are reasonably attributable to counselling treatment or any other expense, and is therefore not a relevant prior payment as outlined in s26(4)(b) of the Rules (see Analysis/Discussion).

Analysis / Discussion

8. All prior payments need to be considered in line with the legislative requirements.
9. Subsection 30(2) of the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (the Act) outlines that a prior payment is "any payment that was paid to the person by, or on behalf of, the responsible institution in relation to abuse for which the institution is responsible."
10. Section 26 of the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (the Rules) outlines payments that are not relevant prior payments under the Scheme. Of particular relevance to these payments are s26(4) and (5) of the Rules.

- (4) A payment is not a relevant prior payment to the extent that:
- a) it is not in recognition of:
 - i) the abuse; or
 - ii) harm caused by the abuse; or
 - b) it is reasonably attributable to:
 - i) expenses of medical, dental, or other treatment; or
 - ii) any other expenses.
- (5) A payment to the person in relation to non-sexual abuse for which the responsible institution is responsible is not a relevant prior payment (to any extent) if the non-sexual abuse is not covered by a set of abuse that also covers sexual abuse of the person.

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 1/2020

Authorised	Sharon Stuart, Branch Manager, Redress Policy and Legislation Branch
Date:	10/02/2020

Reference or Topic

1. Step 3 of the method statement under subsection 30(2) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*
2. Subsection 26(4) of the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018.

Issue

3. How should Independent Decision Makers (IDMs) consider portions of prior payments that were set aside for Medicare Compensation Recovery under the *Health and Other Services (Compensation) Act 1995*?
4. Should IDMs or redress officers seek further information from applicants to determine whether the Commonwealth has reimbursed to the applicant any amount quarantined under the Medicare Compensation Recovery in regards to a prior payment/settlement?

Advice

5. Where an applicant or an institution provides information that a portion of a prior payment has been paid to Medicare, then that portion is **not** a prior payment as stipulated by subparagraph 26(4)(b)(i) of the Rules. That is, the portion of the prior payment was reasonably attributable to expenses of medical, dental or other treatment and was not a payment in recognition of the abuse or the harm cause by the abuse.
6. Where documentation states that Medicare has refunded this payment back to the applicant, then the payment would no longer be attributable to medical expenses and should be classified as a relevant prior payment.
 - a. Documentation may be a letter from a lawyer or Medicare stating that Medicare has reimbursed the amount into the applicant's account.
 - b. A letter from a lawyer stating that Medicare *may* reimburse the payment amount is not sufficient.
7. In absence of any documentation showing that Medicare has refunded the payment to the applicant, IDMs may consider the payment reasonably attributable to medical expenses and not the abuse or the harm caused by the abuse.
8. It is likely that in the majority of cases it will be very difficult to ascertain whether the Medicare Compensation Recovery amount has been reimbursed to the applicant or not. This may be due to:
 - a. the lack of records or awareness of the reimbursement as it is an automatic process,
 - b. the delay in the reimbursement in relation to the original settlement amount,
 - c. the historical nature of the reimbursement, or
 - d. the difficulty in accessing records from a bank, Medicare or law firm.
9. In addition, it may be difficult and traumatic to seek this information from applicants.

10. Due to these factors and taking into account the general principles of the Scheme set out in section 10 of the Act, IDMs may determine, without requesting further information from the applicant, whether it is reasonable that the portion was for medical expenses (and therefore not a relevant prior payment) or not.

Analysis / Discussion

11. Section 8 of the *Health and Other Services (Compensation) Act 1995* requires that if:
 - a. a person has received an amount of compensation under a judgement or settlement in respect of an injury, and
 - b. a Medicare benefit has already been paid in respect of a professional service rendered to that person in the course of treatment of, or as a result of, the injury then the amount of the benefit is owed to the Commonwealth.
12. Many judgements and settlements quarantine a portion of the compensation amount to be used to pay back any outstanding amounts owed to Medicare (usually 10 per cent of the total compensation amount).
13. After a specified period (typically 21 days), if the applicant has no money owing to Medicare, the withheld amount is paid to the person.
14. Section 10 of the Act sets out general principles that should guide the actions of officers of the Scheme.
15. Considering these general principles, it is likely to be traumatising for applicants if IDMs or redress officers were to request further information from applicants regarding these potentially small portions of prior payments.
16. In addition, it is unlikely that not seeking confirmation from the applicant would damage the integrity of the Scheme, as a request for further information is unlikely to provide additional information in the majority of cases.

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 5/2019

Authorised	s 22 (updated version cleared by s 22)
Date:	Updated April 2020 (original January 2019)

Reference or Topic

1. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (the Act)* – Section 30
2. Apportionment of prior payment made by the same legal entity for multiple responsible institutions.

Issue

3. The legislation does not provide clear guidance on how to apportion a prior payment that a participating jurisdiction made to cover abuse that occurred in multiple institutions that are part of the same legal entity.
4. This is most likely to occur in a situation where a participating jurisdiction makes a relevant prior payment to a person for abuse that occurred in multiple state-run and controlled institutions, such as public schools, hospitals and state-run orphanages.
5. Step 3 of the Method Statement under section 30(2) of the Act requires the Scheme Operator to “*work out the amount of any payment*” and to not include any payment that is prescribed by the rules as not being a relevant prior payment. As the present issue is not provided for in the legislation, a policy advice has been developed to enable the Operator to work out the amount of a payment.

Advice

6. When a participating jurisdiction has made a relevant prior payment for abuse experienced in institutions which form part of the state, territory or Commonwealth, the payment may be considered as being made by the responsible institutions that are part of the legal entity that is the state, territory or Commonwealth.
7. In these circumstances, the amount of the payment will then be apportioned between these institutions by splitting the prior payment proportionately across the responsible institutions that are part of the **same legal entity**.
8. For this policy advice to apply, the responsible institutions must be part of the **same legal entity**. It is not sufficient for the connection to merely be that both institutions are government institutions within the same jurisdiction, such as the below two examples:
 - a. Many states have legislation that specifies that local councils are separate legal entities from the State, however still form part of the overall government.
 - b. s 38 is a corporate Commonwealth entity that is a body corporate with a separate legal identity from the Commonwealth however is still part of the overall Australian Government.
9. This must be determined on a case-by-case basis using all available information and legislation to satisfy the requirements and will require analysis by an IDM of the legal

structure of the participating jurisdiction and its relationship with the state institution. The Redress Policy and Evaluation team is able to assist an IDM with this research and analysis if required.

10. When determining a legal entity the following sources of information should be consulted, noting this list is not exhaustive:
 - c. Any information gathered in the RFI, and
 - d. Any state, territory or Commonwealth legislation that establishes the legal structure of the institutions.
11. Following the Method Statement at s30(2) of the Act, the assessment framework must be applied to work out the amount of redress payment and the responsible institutions share of that amount.
12. The responsible institutions share of that maximum amount is what will be used to apportion the institutions share of the prior payment amount.

Advice Summary

13. When a participating jurisdiction makes a relevant prior payment for multiple institutions that are part of the same legal entity, the prior payment will be apportioned in line with the proportion of responsibility determined under the Act.

Formula

Apportionment of a relevant prior payment made by multiple responsible institutions that are part of the same legal entity

$$\begin{array}{l}
 \textit{Proportion of prior} \\
 \textit{payment (as a fraction)}
 \end{array}
 =
 \frac{\begin{array}{l}
 \textit{The institution's gross liability amount worked out} \\
 \textit{under step 2 of the} \\
 \textit{redress payment method statement}
 \end{array}}{\begin{array}{l}
 \textit{Total of gross liability amounts of all responsible institutions, to which} \\
 \textit{the prior payment relates, that are part of the} \\
 \textit{the same legal entity worked out under step 2} \\
 \textit{of the redress payment method statement}
 \end{array}}$$

Example of when a payment WOULD be split and how it is apportioned

Payment: The s 38 provides an out of court settlement to a person of \$80,000 in recognition of the abuse that occurred in three responsible institutions.

Finding of responsibility: The s 38 is equally responsible with XY Primary School for set one of the abuse. s 38 is equally responsible with AB Hospital for set two of the abuse.

Determining legal status: All three responsible institutions are part of the same legal entity (the State of New South Wales).

Apportioning the payment:

- The Assessment Framework is applied to the application and determines that the person will get a \$100,000 redress payment. This is split between the responsible institutions in the following manner:
 - o s 38 is responsible for \$50,000.
 - o XY Primary School is responsible for \$25,000.
 - o AB Hospital is responsible for \$25,000.
- The \$80,000 prior payment is a relevant prior payment for each institution and must be apportioned between them. This apportionment is done using the same proportions of the

payment that occurred when establishing the gross liability amount (eg as s 38 was responsible for half of the \$100,000 monetary redress payment, they will be found responsible for half of the \$80,000 prior payment. This results in:

- s 38 - \$40,000 prior payment.
 - XY Primary School - \$20,000 prior payment.
 - AB Hospital - \$20,000 prior payment.
- These amounts are then adjusted for inflation using step 4 of the Method Statement as per the requirements of s30(2) of the Act.
 - This process ensures that the whole \$80,000 prior payment is deducted from the gross liability amount as intended.

Example of when a payment would NOT be split amongst institutions

Payment: A prior payment was made by the State of s 38 for abuse that is within the scope of the Scheme. An IDM finds that both the State and a **local council** were responsible for the abuse.

Determining legal status: Determine the legal structure for local councils in s 38 to establish if a local council is a separate legal entity from the State.

- Section 5 of the s 38 defines a local council as a body corporate with perpetual succession and can sue or be sued in its corporate name.
- This means that local councils within Victoria (as at 25 February 2020) are separate legal entities to the State.

Proceed to apply the Assessment Framework and Method Statement as per usual and do not apportion the payment between the State and local council.

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 7/2020

Authorised	Sharon Stuart, Branch Manager, Redress Policy, Strategy and Design
Date:	August 2020

Reference

1. Section 30 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act).

Issue

2. Whether Step 3 of the method statement (contained in section 30 of the Act) would capture payments that have not yet been paid to an applicant, but are scheduled to be paid at a future date (i.e. where a payment or part of a payment may be pending).
3. It has become apparent that there may be some instance where it was agreed in an out of court settlement for an institution to pay a person by way of instalments, rather than as a lump sum payment. This has raised the question of how the Scheme legislation should interpret these kinds of payments when assessing if any relevant prior payments exist.

Advice

4. Only instalments that **have been paid** to a person by an institution at the time of the Independent Decision Maker (IDM) making their determination can be considered as 'relevant prior payments' for the purposes of calculating a person's redress payment amount under step 3 of section 30 of the Act.
5. If there is evidence that an applicant will receive a payment after submitting their application and before an IDM makes their final determination, the Scheme should contact the applicant to confirm that this payment was made before including in the information provided to the IDM.
6. Any agreed future payments yet to be paid to the person (for example under an agreement to settle litigation out-of-court) should not be considered when calculating 'relevant prior payments' for the purposes of the Scheme.
7. When completing step 4 of section 30 of the Act, each instalment is to be individually adjusted using the formula $(1.019)^n$ as this represents the most accurate inflation of the prior payment instalments and ensures only the true amount is deducted from a person's redress payment.

Analysis / Discussion

8. If all instalments were added together and adjusted using the date from the first instalment, this would result in a larger amount being deducted from a person's redress payment, compared to each individual instalment being treated as a separate prior payment. This would be beneficial to an institution but not to an applicant.

9. Another example is if all instalments were added together and adjusted using the date of the final instalment received, this would result in a smaller amount being deduced from the institutions prior payment and would be beneficial to an applicant and not to an institution.
10. Neither of these methods would represent a true adjustment of the prior payment.
11. Calculating prior payments in the way outlined at points 5 and 6 ensures that the beneficial nature of the legislation is upheld and the applicant's redress payment is a true reflection of inflation.

National Redress Scheme

For people who have experienced institutional child sexual abuse

Policy Advice No. 16/2020

Authorised	Sharon Stuart
Date:	August 2020

Reference or Topic

- *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act) – section 30 (the Method Statement)
- National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (the Rules) – section 26 provides for payments that are not relevant prior payments reducing institution’s share of costs of redress payments.
- Note this replaces policy advice 15/2019.

Issue

Whether a payment, or part of a payment, made in relation to loss of identity, denial of Aboriginality and family and related stolen generation policy and practices are considered relevant prior payments.

Analysis

Defining a relevant prior payment

1. The purpose of the National Redress Scheme (the Scheme), as set out in Section 3 of the Act, is to recognise and alleviate the impact of institutional child sexual abuse and related abuse. The Scheme is not designed as a payment to compensate for loss of identity or denial of Aboriginality and family and the impact of the Stolen Generation policy and practices.
2. Subsection 30(2) of the Act outlines that a prior payment is “any payment that was paid to the person by, or on behalf of, the responsible institution in relation to abuse for which the institution is responsible.” A relevant prior payment may include a prior redress payment, ex gratia payment or out-of-court settlement payment.
3. A prior payment made to compensate for the impacts of the Stolen Generation policy will only be a relevant prior payment under the Scheme, if the payment satisfies the requirements in section 26 of the Rules.
4. Section 26 of the Rules defines a ‘relevant prior payment’ as any payment that was made by, or on behalf of the institution responsible for sexual abuse or related non-sexual abuse. Non-sexual abuse includes physical abuse, psychological abuse and neglect, where the abuse was related to sexual abuse.
5. Section 26 defines two types of payments that will not be relevant prior payments:
 - where a payment is not in recognition of the abuse, or the harm caused by the abuse (Rule 26(4)(a)), or
 - where the payment was attributable to expenses, for example legal costs, medical or dental expenses, or other expenses (such as counselling) (Rule 26(4)(b)).
6. A relevant prior payment must therefore be directly related to the institutional sexual abuse or related non-sexual abuse.

Advice

7. If information provided to the Scheme indicates that the prior payment was paid in relation to sexual abuse then it will be considered a relevant prior payment and it will be adjusted for inflation and deducted from any amount of redress payable under the Scheme.
8. The Scheme can only include or exclude a payment, or part of a payment, as a relevant prior payment for the purpose of a redress payment calculation on the grounds set out in the Scheme's legislation (as above) and where it has information confirming what the payment was made for.

Application to Stolen Generation or related payments

9. Where a prior payment was made in recognition of the person's removal from culture, community or family, it was made in recognition that the stolen generation policy at the time was wrong, rather than as recognition of any child sexual abuse or the harm caused by abuse for which an institution is responsible.
 - This means that the **payment would not be treated as a relevant prior payment**.
10. Where a prior payment made in recognition of the person's removal from culture, community or family also included recognition of sexual abuse, or harm caused by the abuse, the payment would be considered a relevant prior payment under the Scheme.
 - Where there is no supporting information to break down the portion of the payment made in recognition of the sexual abuse, or harm caused by the abuse, then the **entire payment would be treated as a relevant prior payment**.
 - Where there is supporting information that breaks down the prior payment and shows the portion made in recognition of the sexual abuse, or harm caused by the abuse, then **only that portion of the payment would be treated as a relevant prior payment**.
11. For the payment to be classified as a relevant prior payment under the Scheme, the applicant or the institution would need to clearly identify that the payment, or part of the payment, was made for a specific identifiable instance or circumstance of sexual abuse or related non-sexual abuse.

Separating a prior payment into sub-components

12. A prior payment that included amounts paid for different purposes may be separated into different sub-components. For a sub-component to be considered a relevant prior payment, it must have been made in recognition of sexual abuse or related non-sexual abuse (as outlined above).
13. The Scheme will have discretion to include or exclude sub-components of a payment where there is enough information available to support the separation of components within a payment and for section 26 of the Rules to be considered against each sub-component.
14. Information about a prior payment can be obtained through a person's application or an institution's response to an RFI or RFFI. An institution should provide as much information as possible about a prior payment in an RFI or RFFI.
15. Given the low evidentiary threshold of the Scheme, it is not necessary to obtain formal written evidence to verify each prior payment. However, for the Scheme to be satisfied of a prior payment amount, and the purpose for which the payment was made, information would need to be verified in some way, either in a statement from the institution or documentation indicating the payment or purpose.
16. Examples of suitable documentation may include an invoice or receipt, a letter from a legal service detailing the cost for legal services, or a statement from an institution. A statement from an institution can include a breakdown of the payment into sub-components and the purposes for which they were made.
17. Legal costs, medical or dental expenses and other expenses, such as counselling may be deducted from a prior payment amount where an applicant or institution provides appropriate documentation. A statement from the institution providing a breakdown of the payment, including an estimation of legal or

other costs, can be considered sufficient information where there is no other supporting information. (See Policy Advice No. 24/2018).

18. A written statement or declaration by the survivor, in the application or otherwise, is not sufficient documentation to indicate the purpose for which a payment was made and enable the payment to be divided into subcomponents.
19. Consistent with procedural fairness principles, where an institution provides information about a prior payment that the applicant has not, the Scheme will need to contact the applicant to provide them with an opportunity to provide additional information on the payment. Similarly, where an applicant has provided information about a prior payment that the institution has not, the Scheme should contact the institution to provide them with an opportunity to provide additional information on the payment (this will typically occur through the RFFI process).
20. The following table can be used by institutions to breakdown the prior payment into sub-components:

The total amount of the prior payment	\$[XXXX]
Of the total amount how much (if anything) was attributed to or paid in recognition of sexual abuse and related non-sexual abuse	\$ [this amount would be considered a relevant prior payment]
Of the total amount how much (if anything) was attributed to or paid for medical costs, legal costs or other expenses	\$ [this amount would NOT be considered a relevant prior payment]
Of the total amount how much (if anything) was attributed to or paid in recognition of other harms (for example removal from family, culture, being a member of the Stolen Generations etc).	\$ [this amount would NOT be considered a relevant prior payment]