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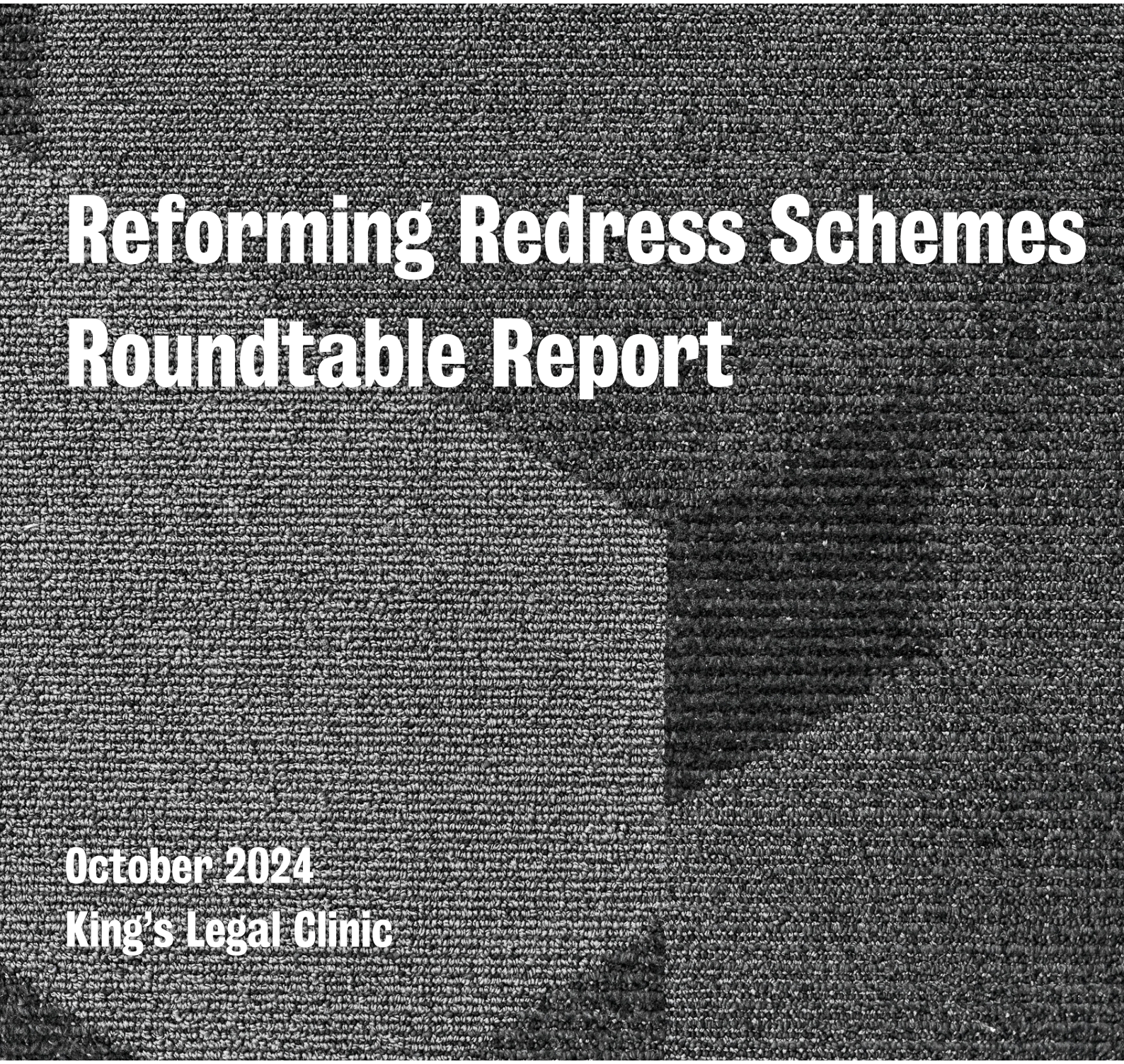
KING'S College LONDON



Reforming Redress Schemes Roundtable Report

October 2024

King's Legal Clinic

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1. Executive Summary

A significant number of Redress schemes have been set up over the years to compensate citizens for harms caused by failures by public bodies[1]. Recent King's research[2] evaluated the structure and performance of the Windrush Compensation Scheme (**WCS**) to the Horizon Shortfall Scheme (**HSS**), Lambeth's Children's Home Redress Scheme (**Lambeth Scheme**) and the Infected Blood Compensation Scheme. King's research found weaknesses in all Redress schemes and concluded that there were significant structural failings present in the WCS which required urgent reform.[3] Wider systemic issues in the administration and regulation of Redress Schemes had been identified earlier by the APPG for Fair Business Banking[4], and there have been calls for reform in the House of Lords and House of Commons.

On 20 June 2024, King's Legal Clinic (**KLC**) convened a Roundtable made up of a range of stakeholders including victim advocates, experienced lawyers and researchers primarily with expertise relating to the WCS, HSS, the Lambeth Scheme, the Infected Blood Compensation Scheme and Financial Services Redress Schemes. The aim of the roundtable was to identify whether reform was needed in the operation of Redress schemes relating to harm perpetrated by the state[5]. The discussion focused on exploring critical problems, what had been effective and what structural reform was needed. The Roundtable was conducted under Chatham House rules; KLC is grateful for the time and thoughtful contributions of all Participants.

Overall, the resounding view of many of the Participants was a feeling of being let down and that many of the schemes were not fit for purpose, they did not achieve their aims in important respects and the schemes exacerbated the harm already suffered by the individuals who were the intended beneficiaries. Generally, the redress offered both financial and otherwise, what was considered inadequate. Redress schemes universally

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[1] More widely, in the case of financial services many redress schemes have been set up to compensate for failures by companies (of which some have significant public ownership).

[2] Pal, Shaila and Nowell, Elly, The Windrush Compensation Scheme: A Comparative Analysis (9 February 2024). Available at SSRN: https://ssrn.com/abstract=4721713

[3] Research reveals structural weaknesses in Windrush Compensation Scheme remain as legal challenge of the refusal to provide legal aid to victims is to be heard, KCL (13 February 2024)
Available at:
https://www.kcl.ac.uk/news/research-reveals-structural-weaknesses-in-windrush-compensation-scheme-remain-as-legal-challenge-of-refusal-to-provide-legal-aid-to-victims-is-to-be-heard

[4] Building a Framework for Compensation and Redress' (February 2023) APPG for Fair Business Banking (since the opening of Parliament in July 2024, this APPG has been renamed the All-Party Parliamentary Group on Fair Banking):
Available at:
https://www.appgbanking.org.uk/news/redress-report-launch

[5] The roundtable was aided by wider discussions on the similar challenges and systemic issues found in the financial services redress scheme context.

suffered from delays in their establishment and operation, with each scheme having to invent itself from the ground up. Additionally, with no framework for how schemes should be run, they are highly inconsistent in their adherence to principles around fairness and accessibility. Concerns were raised around the consistency and transparency of decision making. The Infected Blood Compensation Scheme, whilst still to be implemented, provided a valuable potential best practice framework for the design and core principles which should underpin a redress scheme.

Following the Roundtable, the National Audit Office published its report on Government Compensation Schemes finding:

'*There is no central coordinated approach when government sets up new compensation schemes resulting in a relatively slow, ad-hoc approach. Setting-up and administering a compensation scheme is a complex task, and challenging for officials who may have never done it before. This has led to mistakes and inefficiencies in the design of schemes, and delays in getting money to claimants. Claimant and stakeholder confidence can be further undermined where the design and operation of the scheme is not seen as being independent from those who have caused them harm*.'[6]

In light of the Roundtable discussions and the report by the National Audit Office, KLC's key recommendations for reform are:

- Create compulsory guidance with common principles[7] for the setting up and operation of redress schemes.
- The establishment of a standing public body to act as a compensation authority and administer redress schemes relating to harm perpetrated by the state, to enable fair and independent outcomes.

2. Views of the Roundtable

Victims' Voice

A number of Participants noted that the relative success and failure of the schemes correlated with the extent to which those designing and implementing the scheme meaningfully committed to the active participation of Victims' Advocacy Groups. For both the Lambeth Scheme and the Infected Blood Compensation Scheme, Victims' Advocacy Groups were provided with some legal costs to enable engagement in the design of the scheme, though Participants noted that in the case of the Lambeth Scheme, this came after some protestation. The superior model of the Infected Blood Compensation Scheme (which is in its implementation phase) was attributed significantly to the approach of those involved in the Infected Blood Inquiry, in particular Sir Robert Francis KC and

[6] National Audit Office, Lessons learned: Government compensation schemes (July 2024), Session 2024-25 HC 121
[7] Please see pages 5-6 of this report for suggested common principles.

Sir Brian Langstaff who as well consulting Victims' Advocacy Groups, broadly adopted many of the proposals made. It is worth noting however that even in these schemes where some positive comment was made, it was preceded by decades of cover ups which only came to light due to the tenacity and fortitude of Victims' Advocacy Groups. In contrast, a number of Participants felt the WCS failed to meaningfully and adequately consult Victims' Advocacy Groups and stakeholders on the design and implementation of the scheme. In part, these failures were attributed to a desire to implement a scheme quickly and an entrenched institutional view of the limited value of the voice of migrant communities. Some felt promises were made during this period and then later told that they would not be implemented, which served as another blow to victims. Similar dissatisfaction was expressed by the Participants in respect of all the Post Office Schemes, which have been developed and implemented in a fragmented way arising in part from litigation.

Victims are often not at the centre of the mission of restorative justice in the establishment of compensation schemes, their experience is often marginalised, and their voices are not adequately heard in the set-up of the schemes. A particularly acute problem which significantly damaged trust in redress schemes was that many were set up by the same institution that perpetrated the harm and in some instances lawyers who were previously defending the institution were involved in the running of the redress scheme.

Awards

There was a divergence of views on how loss should be calculated. Some favoured a tariff system which they felt allowed some clarity on what could be claimed and therefore arguably more straightforward to manage administratively. Whereas others felt awards should be more individualised reflecting the specific circumstances of the victims which, whilst likely to take longer and be most costly, would deliver 'justice' to victims. Most schemes explored in fact operated on a tariff basis with some having mixed models. Problems were identified in the ability to claim and the assessment of consequential loss, in particular the long-term earning potential of both individuals and business.

The use of interim awards was highlighted as being essential to mitigate waiting periods whilst full awards are being calculated, though it was noted that the introduction of interim awards in the Post Office, Infected Blood Compensation Scheme and the WCS came after either significant public outcry or criticism by stakeholder forums.

Many of the Participants considered non-financial redress equally important as financial redress and were dissatisfied with what was available in the various schemes, which either did not offer an effective or genuine apology. Participants agreed that an apology needed to be timely, meaningful, personal and not couched in the language of lawyers.

Application process and evidential burden

Participants from the WCS and HSS schemes reported exasperation at the application process and the amount of evidence expected, which was felt to be excessive and inconsistent with the stipulated standard of proof. It was also broadly agreed that schemes should tailor evidential requirements to the context of the compensation scheme and the decision maker should support the gathering of evidence. Where the wrongs are of a historical nature, difficult to evidence, or where the body responsible for the harm played an active role in the destruction or obfuscating of evidence, evidential requirements should be relaxed to take this into account. For example, the claimant's witness statement should be believed unless there is compelling evidence to the contrary. This is the intended approach in the Infected Blood Compensation Scheme and can be found in a more diluted form in the guidance for other schemes, though Participants felt this was not applied in practice. Participants also felt schemes should be transparent and consistent about the weight they give evidence.

Participants reported that the WCS, Lambeth Scheme and HSS schemes delivered slow and inconsistent outcomes. Some felt that the decision maker was trying to get away with not paying or paying as little as possible or 'low balling'. The majority felt the schemes were generally adversarial in their approach and this was in part attributed to the culture of the decision maker, who was also the perpetrator of the harm in all the schemes bar the Infected Blood Compensation Scheme. Some Participants found that the involvement of external specialist lawyers supporting the decision-making process assisted the resolution of the claim. Though criticisms were also made by Participants of the high costs (which in some cases exceeded the total costs of compensation paid) of using external lawyers in the HSS, and the operating costs by non-specialist caseworkers in the WCS. Participants from the Infected Blood Compensation Scheme noted that, in developing their compensation framework with Sir Robert Francis, they were acutely aware of the failings of the other schemes, in particular the WCS, and this was reflected in core design elements including: (i) having an arms-length body as a decision maker, (ii) evidential standards, (iii) the awards framework, and (iv) the wider support framework.

Many Participants felt the process of applying for compensation itself traumatising, and many of the schemes lacked appropriate support for victims. It was widely agreed that a holistic, tailored approach is needed; one which considers not only the original harm done but also how to minimise and alleviate any further harm done through an accessible and compassionate redress scheme.

Provision of legal advice

Participants all agreed that accessible, good quality, funded legal advice was necessary to enable victims to make claims due to the fear and distrust felt towards the state and the

need for lawyers to act as buffer and support victims to make objective decisions in emotionally charged circumstances. The lack of any funded advice in the WCS was highlighted in the wider context of a very high refusal rate for the scheme compared to the HSS and Lambeth Scheme which provided some level of funded advice. Some Victims' Advocates raised concerns about the involvement of lawyers due to a belief that some lawyers are 'just after the money,' though they felt this could be addressed with proper vetting of lawyers or specialist panels. Notably, some victims preferred to manage information and direct the process entirely to retain ownership and as a form of empowerment to reflect their deep understanding of the harm suffered.

The Financial Services Redress scheme context was explored and provided valuable insights into the accessibility issues victims faced where schemes are asserted to be accessible without the need for legal representation, which was not funded. Whereas in fact banks who operate the schemes took extensive legal advice which meant victims were at a disadvantage.

Transparency and accountability

Issues around transparency were also raised about all schemes, in particular the WCS and the HSS. In respect of the HSS, it was felt there were inconsistencies as to the amount of awards, lack of transparency with what claim handlers were doing including the level of involvement of the Post Office in the decision making and review process. For both the HSS and the WCS it was felt that there was a lack of transparency on the statistical data produced for the schemes.[8]

3. Key recommendations

The Participants all agreed that each scheme involved different issues and the design and implementation of a scheme should be adjusted to the reflect the issues and the harm experienced by victims. It was agreed that were many instances of commonality and that certain structural elements and underpinning principles should be present in a redress scheme.

KLC recommendations for reform[9] are:

[8] A similar lack of transparency of process, information and outcomes was also noted in Financial Services Redress schemes.

[9] These recommendations are supported by Jason Evans (Factor 8), Glenda Caeser (Windrush Lives), Malcolm Johnson (Lime Solicitors), Van Fergusson and Sharon Anthony-Tewkesbury (Southwark Law Centre), Grace Brown (Barrister at Garden Court Chambers), Rachel Hire and Julie Taberer (Collins Solicitors), Emma Jones (Leigh Day), Ned Beale (Hausfeld & Co LLP), David Enright and Ross Smith (Howe+Co Solicitors) and Clara Gisoldo (Senior Researcher, APPG on Fair Business Banking and APPG on Anti-Corruption & Responsible Tax).

Recommendation 1: Create compulsory guidance with common principles for the setting up and operation of Redress schemes. The principles should include:

I. **Justice delayed is justice denied.** This is of heightened relevance in claims relating to historic harm perpetrated by the state. The set up of redress schemes should be commenced without delay, though balanced with the need to consult with stakeholders and allow for an appropriate framework to be devised.

II. **Schemes should be designed, implemented and adapted utilising a collaborative and victim centred approach**. A range of stakeholders, including victims and their representatives should design, implement, and monitor, the scheme. Funding should be made available to enable equitable participation. Recommendations from victims and their representatives should carry significant weight, and where these are departed from in the final scheme, justification should be provided.

III. **A Redress scheme must be administered by a body separate and independent from the perpetrator of the original harm**. The public body should ensure the make- up of the advisory board contains relevant independent experts, victims and/or victims' representatives. A robust 'conflict of interests' assessment must be carried out in respect of any advisory board member to ensure independence is both real and perceived to be real. Victims and their representatives should be given a right to object, and where they are overridden, clear justification should be provided.

IV. **Schemes must be designed which minimise any re-traumatising effects and are accessible.** Application processes should be straightforward, trauma informed, and compassionate. Funded legal advice and support services should be made available from the outset of a claim to safeguard victims.

V. **Eligibility criteria for compensation should be framed broadly to reflect the harm suffered** and proper regard must be had to the harm suffered by dependents and families of victims. Schemes should proactively identify eligible victims rather than trying to minimise compensation.

VI. **Awards should reflect the range of harms suffered and include both financial and non-financial awards.**

VII. **Heads of loss should be devised to reflect the harm suffered having regard to existing legal principles on loss, but not constrained by them.** Schemes must not be adversarial. A lowered standard of proof should be applied, particularly in cases of historic state harm, with the benefit of the doubt applied in favour of victims.

VIII. **Those administering Redress Schemes should facilitate the gathering of relevant evidence**, taking steps themselves or through third parties where appropriate. This should include provision for psychiatric reports and forensic accountants where needed.

IX. **Schemes must be set so up that are able to deliver compensation, in a fair, effective, timely, transparent and proportionate manner.** Applications and claims should be

processed swiftly. Minimum processing times should be set and published and enforcement mechanism for delays must be implemented. It should be borne in mind that victims who are in a difficult financial position will often take whatever first figure they are offered. Interim payments should be made available to mitigate the impact of delay on victims.

X. **Schemes should have a simple and clear independent appeal mechanism.**

Recommendation 2: The establishment of a new standing public body to act as a compensating authority and administer redress schemes to enable fair and independent outcomes.

In the interim, whilst steps are taken to set up a public body, we agree with the recommendation of the NAO that the Cabinet Office set up a 'a *centre of expertise to provide guidance, expertise or a framework for public bodies seeking to set up a compensation scheme*'.

4. Roundtable Participants

Sharon Anthony-Tewkesbury (Southwark Law Centre)
Ned Beale (Hausfeld & Co LLP)
Grace Brown (Barrister at Garden Court Chambers)
Glenda Caeser (Windrush Lives)
Hannah Camplin (King's College London)
David Enright (Howe+Co Solicitors)
Jason Evans (Factor 8)
Van Ferguson (Southwark Law Centre)
Clara Gisoldo (Senior Researcher, APPG on Fair Banking & APPG on Anti-Corruption & Responsible Tax)
Jeremy Gostick (National Audit Office)
Lucia Hinton (Shirley Oaks Survivors Association)
Rachel Hire (Collins Solicitors)
Malcolm Johnson (Lime Solicitors)
Emma Jones (Leigh Day)
Elly Nowell (King's College London)
Shaila Pal (King's College London)
Simon Reason (National Audit Office)
Ross Smith (Howe+Co Solicitors)
Raymond Stevenson (Shirley Oaks Survivors Association)
Julie Taberer (Collins Solicitors)

King's Legal Clinic (KLC) aims to enhance the education of law students at The Dickson Poon School of Law and promote social justice. We aim to improve access to justice through a range of activities, including: providing free legal advice to members of the public through our Legal Advice Clinic and working with local and international organisations on research and justice projects. KLC works in partnership with Southwark Law Centre on the Windrush Justice Clinic. The Windrush Justice Clinic provides pro bono legal support to claimants seeking compensation and conducts research on the accessibility and fairness of the Windrush Compensation Scheme.

This report was prepared by Shaila Pal (Director, Supervising Solicitor & Senior Lecturer at King's Legal Clinic) with assistance from Elly Nowell (Research Assistant) and support from King's Law students Wendy Agutu, Brightney Opara, and Hanane Zidani.

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