

***Comments on Issues Paper 7 – Statutory victims of crime compensation scheme***

**for the**

**Royal Commission into Institutional Responses to Child Sexual Abuse**

- 1. What are the advantages and disadvantages of statutory victims of crime compensation schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts?**

*Advantages*

Due to the nature of child sexual abuse, particularly historical child sexual abuse, it is unlikely that a victim in an institutional setting would be able to access compensation from the perpetrator or institution in a timely or beneficial manner. Providing compensation through a statutory scheme would recognise the harm caused without requiring a victim to engage legal representation to pursue private claims in the civil courts for damages. Pursuing civil claims can be costly and re-traumatising for victims of crime.

Civil action is not available to every victim of crime due to a range of reasons, namely cost, the difficulty in locating perpetrators, evidence that may or may not have been collected at the time of offences and whether perpetrators have any assets to pursue.

Victims of childhood institutional sexual abuse are likely to have suffered financial stress as a result of the abuse. State funded compensation schemes would go some way to recoup some of the costs associated with a victim's recovery.

Statutory compensation is also a way of recognising the harm suffered by people who have experienced childhood institutional sexual abuse. This type of offending often results in victims not being believed when they report such offences to authorities and institutions who too often support the perpetrators denial.

A compensation scheme would be an advantage for victims who feel they have not had any other benefits from the criminal justice system.

*Disadvantages*

Compensation schemes must be designed and administered in a beneficial manner to reduce potential further harm to applicants. Statutory schemes run the risk of placing onerous obligations upon victims to prove their eligibility. This can be a significant barrier to applicants and often causes further harm.

Victims of childhood institutional sexual abuse may not find a government funded compensation scheme appropriate for their personal value system. Victims sometimes prefer that any compensation payable to them is taken from the perpetrator or institution itself, rather than from community funds.

Delays in making applications for victims of crime financial assistance, or compensation schemes, creates barriers and contributes to difficulties in accessing existing schemes. Many victims of sexual assault find it difficult to manage day to day responsibilities. It takes great energy and commitment for sexual assault victims to disclose sexual abuse, particularly historical abuse. It is not surprising therefore that victims of sexual assault are still the least likely of all victims of crime to report to police and the most likely to delay reporting to police.

Child sex abuse victims may either repress their memories of the offence, are afraid to talk about it, or do not understand until adulthood that the behaviour was unlawful. They are also hold legitimate concerns that disclosing abuse within their family structure will result in them ostracised from their family.

In submissions to the Australian and NSW Law Reform Commissions Report Family Violence – A National Legal Response the Commissions heard that delay (in reporting a sexual offence) is the norm rather than the exception. The Commissions recognised that delay in complaint is a typical feature of reporting sexual assault and that the mere passage of time ought not to ‘count against’ a complainant in sexual offence proceedings, and recommended that federal, state and territory legislation make certain provisions to take account of delays in reporting sexual offences.<sup>1</sup>

Tasmania’s Law Reform Institute heard submissions that delays in reporting sexual offences may occur for a number reasons. These reasons include:

- Shame and/or embarrassment
- Not wanting family or others to know
- Fear of reprisal by assailant
- Self blame or blamed by others for the attack
- Fear of not being believed
- Fear of being treated hostilely by police or other parts of the justice system
- Lack of proof that the incident happened
- Not knowing how to report the incident (particularly in the case of victims with cognitive impairment).<sup>2</sup>

In the case of child victims of sexual assault substantial delays in reporting may, and often do, occur. The Report of the Task Force on Sexual Assault and Rape in Tasmania noted that in child sexual assault cases the child is often the victim of abuse by a family member and it is hard for them to ‘tell on’ a trusted adult on whom they may be dependent:<sup>3</sup>

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<sup>1</sup> ALRC, Volume 2, p1324, para 28.57, Recommendation 28-4

<sup>2</sup> Tasmania Law Reform Institute. Issues Paper No. 8, 2005 Warnings in sexual offences cases relating to delay in complaint, p2

<sup>3</sup> Tasmania. Task Force on Sexual Assault and Rape in Tasmania, p.35

The Tasmanian Ombudsman investigated large scale delayed reporting of sexual assault crimes, which resulted in the report titled: *Review of claims of abuse from adults in state care as children, 2004*. This report revealed 192 allegations of sexual assault, 24% of the total of claims. The Ombudsman noted that in most cases it is recorded that no charges were laid as a result of the complaints at the time they were initially reported. At the time of the review, eight cases, previously reported and dismissed, had been referred to police for prosecution.

In her forward the Ombudsman made the following statement:

*I knew that it would be a difficult and daunting task. I had no idea how difficult and complex it would be, nor how long it would take. We learnt very quickly that uncovering people's lives to expose secret, painful memories that had lain hidden for 30, 40 and 50 years was not a task that could be rushed. Many of the adults who came forward confessed that they had never told anyone of their childhood experiences. Others who had told someone in authority are still bitter that they were not listened to, or were not believed. This is a clear, and rather tragic, example that substantial delays in reporting sexual assault may occur for a number of legitimate reasons.*

Statutory compensation schemes generally impose time limits for applications. Some have statutory limitation periods for eligibility. These restrictions do not sit well with the common theme of delayed reporting for sexual assault victims.

Western Australia's Standing Committee on Constitutional Affairs and Statutes Revision, in relation to a petition seeking legislation on various aspects of substantive law and procedural law relating to sex offences against children, noted that the imposition of a statute of limitations would mean that victims would have no avenue of recourse open to them and no way of legitimising empowerment, which legal proceedings can offer.

Delay in reporting sexual offences creates access and eligibility issues for those wishing to apply for compensation schemes. For example;

- Time limits on making an application – in the ACT a victim is expected to make an application within 12 months of the crime occurring. An out of time extension is possible but this must be decided in court after an application by a victim of crime and the delay in reporting the crime explained and justified.
- Jurisdictional schemes require a high amount of evidence to provide that the crime occurred. For historical sexual offences, this can be difficult for a range of reasons.
- While the conviction of the perpetrator is not necessarily required, those that do have a conviction of the offender find applying for and receiving financial assistance a much easier process. Victims of childhood institutional sexual abuse rarely see the offender convicted.
- Victims with physical injuries and medical reports find accessing existing schemes easier than those with psychological injuries due to the nature of their supporting documentation and evidence. Victims of childhood institutional sexual abuse are more likely to suffer psychological injuries than physical and this type of injury is often more difficult to measure than physical injuries.

## **2. What features are important for making statutory victims of crime compensation schemes effective for claimants?**

The scheme should be beneficial and accessible. The application process should be easy to follow without requiring legal representation. Applicants should be case managed through the process. Case management can help overcome barriers to access for marginalised groups. For example, victims with intellectual disabilities or dyslexia find it difficult to understand and complete the paperwork required of the ACT scheme.

It should be an administrative scheme rather than a court based one. Court based schemes can be adversarial in nature. Expecting a person to appear in court, navigate and complete legal documents, such as statutory declarations, and provide a suitable amount of evidence leads people to believe they must seek legal representation.

Where people do feel they require legal representation they are often either unable to afford this representation.

**3. Are there elements of statutory victims of crime compensation schemes, as they currently operate, that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts? For example:**

- a. some schemes have time limits and discretionary provisions to extend the time limits to make claims;**

See earlier comment. The ACT has a 12 month time limit for making an application for financial assistance. Where an applicant is applying after the 12 months, they must appear in court and apply for an 'out of time' exception to be granted. These are usually granted in the ACT.

- b. all schemes have caps on payments;**

Victims' statutory compensation schemes are a form of recognition for the harm suffered. They are not designed or funded to fully compensate victims for the harm that has been done. The cap on payments to victims of sexual offences in the ACT is currently \$50,000 for the 'compensation' component which is relatively generous compared to other jurisdictions.

- c. some schemes have lower caps on payments for offences committed earlier in time and one scheme does not apply to offences committed before 1971;**

The ACT does not have lower caps on payments for offences, however the scheme came in to effect on 1 July 1983 and victims of offences occurring before this time are not eligible for financial assistance at all.

- d. some schemes require that the act of violence or offence be reported to the police, or require an explanation if not reported to police; and**

In the ACT the crime must have been reported to police. There is no exception. At times this has created a difficulty for those who have delayed reporting offences. Due to the passage of time and lack of evidence, police sometimes do not pursue the gathering of evidence after such a report is made. For example, where the offender is deceased, police are reluctant to take a report due to an inability to investigate the matter.

While it would be beneficial for all applicants under the financial assistance scheme to have made a report to the police, there are certain circumstances where this is either not possible, or where there may be a reasonable reason for not doing so. An example of such a

circumstance would be a victim of an historical sexual assault where the police will not take a report because the offender is deceased.

These circumstances could be taken into account by adopting similar legislation to that in QLD. Under section 81 of the QLD Victims of Crime Assistance Act 2009 all victims must have reported the crime to police with the exception of what is called a 'special primary victim'. Special primary victims includes primary victims of an act of violence involving a sexual offence, committed by a person who was in a position of power, influence or trust; or a primary victim of an act of violence who was a child when the act was committed, has an impaired capacity, and who is being threatened or intimidated by the person who committed the act, or by someone else. In these circumstances, a special primary victim must either report the crime to a counsellor, psychologist or doctor as a pre-requisite for a financial assistance application.

- e. most schemes require repayment of victims' compensation if the recipient later receives compensation from another source (e.g. via damages or settlement in civil litigation).**

The ACT scheme is a scheme of last resort. When applying for financial assistance, a victim has to declare whether or not they have taken, or will take, legal action for damages against the offender, have received damages from a court, have or intend to make a workers compensation claim, have or will receive an insurance payment, or have received money under another law. Where money has been received from any of these sources, the amount will likely be deducted from the ACT scheme's payment to the victim, if any payment is made.

- 4. What changes should be made to address the elements of statutory victims of crime compensation schemes that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts?**

The evidence required needs to be achievable, there should be no time limits on making an application, and there should be little to no emphasis on needing a conviction.

- 5. What forms of redress, including services and payments, should be offered through statutory victims of crime compensation schemes?**

Victims in the ACT are eligible for 8 hours of service with the possibility of a further 12 hours of service. People are encouraged to use up these hours before applying for more assistance through the victims of crime financial assistance scheme. Any compensation scheme should allow for psychological assistance.

Victims of crime in the ACT are provided unlimited advocacy through Victim Support ACT. This agency also offers services including psychological, remedial, tutoring, and other services that will assist in the recovery of a victim.

In a scheme addressing childhood institutional sexual abuse, lump sum payments are more likely to assist victims by allowing the flexibility to respond to their unique needs.

- 6. To what extent, if any, should those who suffer child sexual abuse in institutional contexts be eligible for additional or different compensation and services, compared to victims of other crimes? Why?**

The financial compensation that may be available should be more focused on lump sum payments due to a likely lack of receipts and evidence compared to other assistance that would be required for other victims.

**7. Are the levels of verification or proof required under statutory victims of crime compensation schemes appropriate for claims by those who suffer child sexual abuse in institutional contexts?**

The level of verification or proof required under some schemes is not appropriate for claims by those who suffer child sexual abuse in institutional contexts. It is difficult to provide appropriate evidence for an offence that occurred in a historical context due to a lack of witnesses and a lack of supporting documentation and records.

The legislated level of proof in the ACT for victims of crime financial assistance applications is on the 'balance of probabilities'. However victims of crime sometimes express the view that their application was assessed under a higher threshold of proof, particularly in instances when matters are committed to trial in the Supreme Court and the outcome of those proceedings are waited upon before determining their eligibility for compensation.

It is critical that any victims' compensation scheme is very clearly administered in a beneficial manner at all times. The aim of any such scheme should be to do no more harm. Case management of applicants would help prevent further harm from occurring as applicants would be assisted to access their entitlements. Without case management, victims very easily gain an impression that they are challenged to prove things that they may not be able to prove. For example, it is always difficult to provide appropriate evidence for an offence that occurred in a historical context due to a lack of witnesses and a lack of supporting documentation and records. Therapeutic case management of applicants may well help resolve these difficulties.

To receive financial assistance in the ACT a victim has to prove not only that the crime occurred, but also provide evidence as to their level of injury. This is very difficult when the injury is psychological as psychological injuries can be difficult to identify, diagnose and provide evidence for their existence.



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