

# SUBMISSION – ISSUES PAPER 7:

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Statutory Victims of Crime Compensation Schemes

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## Royal Commission into Institutional Responses to Child Sexual Abuse

June 2014

*Centre for Excellence*  
in Child and Family Welfare Inc.



100 Years  
1912–2012

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## Summary of recommendations

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The Centre for Excellence in Child and Family Welfare makes the following recommendations:

**Recommendation 1:** That any specific statutory compensation scheme for victims of child sexual abuse should formally involve the relevant institution or institutions.

**Recommendation 2:** That any statutory compensation scheme for victims of child sexual abuse should be developed in consultation with victims and their advocates to determine the appropriate format for proceedings.

**Recommendation 3:** That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require that an application be commenced within a timeframe.

**Recommendation 4:** That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require a report to be made to police within a timeframe.

**Recommendation 5:** That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require a victim's own criminal record to be considered.

**Recommendation 6:** That financial assistance structures that are more appropriate to the needs of victims of child sexual abuse in institutions be developed and included in any statutory victims of crime compensation scheme.

**Recommendation 7:** That caps on assistance should be significantly raised in compensation cases for victims of child sexual abuse in institutions.

**Recommendation 8:** That provision be made for victims of child sexual abuse in institutions to receive ongoing payments from the relevant statutory compensation scheme

**Recommendation 9:** That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require a victim to prove that he or she has suffered a definable injury beyond the fact of the sexual abuse itself.

## Introduction

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### *The Centre for Excellence in Child and Family Welfare*

The Centre for Excellence in Child and Family Welfare ('the Centre') is the peak body for child and family welfare in Victoria, providing independent analysis, dialogue and cross-sectoral engagement to address factors that perpetuate disadvantage and vulnerability. Working alongside our 96 member organisations, the role of the Centre is to build capacity through research, evidence and innovation to influence change. The Centre and its member organisations collectively represent a range of early childhood, child, youth and family support services, and out of home care services, including kinship care, foster care and residential care.

The objects of the Centre include:

- To contribute to the wellbeing of children and young people and the support and strengthening of family life particularly where there is poverty and disadvantage.
- To promote leadership and excellence in child, youth and family services.
- To actively represent the interests of members to government and to the community, and to influence community expectations of support available to children and families.
- To develop and influence policies in child, youth and family welfare, including providing policy advice to government in respect of child, youth and family welfare.
- To promote ongoing research and evaluation in child, youth and family welfare.

### *Approach taken in this submission*

The Centre takes the view that an effective redress scheme for victims of child sexual abuse in institutions must meet the standards captured by the van Boven principles.<sup>1</sup> This is supported by the Human Rights and Equal Opportunity Commission inquiry into the forced separation of Aboriginal and Torres Strait Islander children from their families and the Senate Community Affairs References Committee report into Australians who experienced institutional out of home care as children.<sup>2 3</sup> According to these principles, a human rights compatible redress scheme must include:

1. Acknowledgment and apology;
2. Guarantees against repetition;
3. Measures of restitution;
4. Measures of rehabilitation; and
5. Monetary compensation.

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<sup>1</sup> van Boven, Theo, (2005) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations Audio-visual Library of International Law, 16 December 2005.

<sup>2</sup> Commonwealth of Australia, (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.

<sup>3</sup> The Senate, Community Affairs Reference Committee, *Forgotten Australians: a report on Australians who experienced institutional out of home care as children*, August 2004, P215-216.

The ability of statutory victims of crime schemes to provide redress for victims of child sexual abuse in institutions should be measured by their ability to deliver each form of redress outlined above.

The Centre has long advocated the establishment of a redress scheme for people who have suffered abuse in residential care and supports the establishment of a national redress scheme.<sup>4 5</sup>

This submission will examine the aspects of statutory crime compensations schemes particularly the current Victorian statutory victims of crime compensation scheme in order to propose changes that would need to occur for schemes to be able to deliver effective redress for victims of child sexual abuse in institutions. The Centre notes the recommendation of the Parliament of Victoria's Family and Community Development Committee in its 2013 report *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations* that the Victorian Government review the functions of VOCAT to consider its capacity to administer a specific scheme for victims of criminal child abuse.<sup>6</sup>

The distinct experience of Aboriginal and Torres Strait Islanders who have been victims of child sexual abuse in institutions is particularly important to consider in the context of a Victoria-specific compensation scheme, given the high numbers of Aboriginal children removed into institutions and foster homes in this state. A recent Victorian Government report made the finding that 'a higher proportion of Aboriginal people in Victoria have been directly affected by the Stolen Generations than any other state or territory'.<sup>7</sup> Many experienced sexual abuse whilst institutionalised.<sup>8</sup>

### Terminology

Some people who have experienced sexual violence prefer the term 'survivor' over the term 'victim', as the former better conveys their strength and agency. The Centre acknowledges the resilience of those who have suffered child sexual abuse in institutional contexts. For the purposes of clarity and consistency, this submission uses the term 'victim', given that the discussion focuses on a framework known as a 'victims of crime' compensation scheme.

For the purposes of this submission the Centre applies the broad definition of 'institution' as employed in the Letters Patent of this Royal Commission.<sup>9</sup> At the same time we acknowledge and refer to the particular circumstances of those who have suffered child sexual abuse in the institutional care settings of child and family service providers.

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<sup>4</sup> Centre for Excellence in Child and Family Welfare, (2008) *It's Not Too Late to Care: Report on the research into life outcomes for people brought up in institutional care in Victoria*, Monograph Number 17, Centre For Excellence in Child and Family Welfare, Melbourne.

<sup>5</sup> Centre for Excellence in Child and Family Welfare, *Submission Issues Paper 6, Royal Commission into Institutional Responses to Child Sexual Abuse, June 2013*, p5.

<sup>6</sup> Family and Community Development Committee, Parliament of Victoria, (2013), *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, Parliament House, Melbourne, p574.

<sup>7</sup> Victorian Government, (2014), *Victorian Aboriginal Affairs Framework 2013-2018: Building for the Future: A Plan for 'Closing the Gap' in Victoria by 2013*, p7.

<sup>8</sup> Commonwealth of Australia, above n 1, 141-2.

<sup>9</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Letters Patent*, accessed on 11 July 2014 at <http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>.

## Context

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### Statutory Victims of Crime Compensation Schemes and Victims of Child Sexual Abuse

In Australia, each state or territory has a distinct statutory scheme to compensate victims of crime.<sup>10</sup> Each scheme involves different mechanisms for determining assistance for victims. From the perspective of the need to provide a nationally consistent approach to redress for victims of child sexual abuse in institutions, this variance between the state victims of crime compensation schemes is problematic.<sup>11 12 13</sup> A national scheme or harmonisation of state schemes is required. However, for the purpose of discussing Australian victims of crime compensation schemes' ability to meet the needs of victims of child sexual abuse in institutions, it is possible to identify commonalities across the different schemes. Christine Forster and Patrick Parkinson, in the context of child sexual abuse in general, which includes but is not specific to child sexual abuse in institutional contexts, found that none of the Australian statutory victims of crime compensation schemes has a framework that satisfactorily accommodates applications from victims of child sexual abuse. This is because child sexual abuse is different from the other crimes that are contemplated by the various statutory frameworks. According to Forster and Parkinson, all the schemes assume that: The offence has been reported to police soon after it occurred; the victim has made an application for compensation soon after the crime occurred; and a specific injury has resulted from the crime.<sup>14</sup> However, in child sexual abuse cases, the victim is likely to report years after the abuse (if at all) and is likely to have suffered significant harm as a result of the abuse, but this harm may not fit a medical or psychiatric definition.<sup>15</sup> A further issue common to the schemes is that they provide for assistance to be granted where an 'act of violence', understood as a single act involving physical force, has occurred. The reality of child sexual abuse is that whilst this can be accompanied by acts of physical violence, this is not always the case. For many of these victims, harm is suffered in the context of an ongoing and destructive relationship with the perpetrator.<sup>16</sup>

### The Victorian Scheme: The Victims of Crime Assistance Tribunal (VOCAT)

The Victorian statutory victims of crime scheme suffers from some of the above shortcomings in terms of providing compensation for victims of child sexual abuse. Its ability to meet the redress needs of victims of child sexual abuse in the specific context of institutional abuse will be examined in detail. It is hoped that the observations and recommendations that will be made with reference

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<sup>10</sup> Family and Community Development Committee, p560.

<sup>11</sup> Care Leavers Australia Network (2010) *Submission to Senate Legal and Constitutional Committee Affairs References Committee on Review of Government Compensation Payments*.

<sup>12</sup> Association of Children's Welfare Agencies, (2014) *Response to Issues Paper 7: Statutory Victims of Crime Compensation Schemes* (submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2014, p5.

<sup>13</sup> Family and Community Development Committee, above.

<sup>14</sup> Christine Forster and Patrick Parkinson, 'Compensating Child Sexual Assault Victims within Statutory Schemes: Imagining a More Effective Framework' (2000) 23 *University of New South Wales Law Journal* 172, 173.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 188-9.

to the Victorian scheme will have broader relevance. These will be made with the aim of advancing the understanding, at the national level, of the utility of victims of crime compensation schemes in meeting the redress needs of victims of child sexual abuse in institutions.

In Victoria, awards of assistance under the statutory crimes compensation scheme are governed by the *Victims of Crime Assistance Act 1996 (Vic)* ('the Act') and are determined by the VOCAT. VOCAT commenced in June 2007, replacing the Crimes Compensation Tribunal, which started in March 1973.<sup>17</sup> Since 2006, there has been a Koori VOCAT list, which seeks to be responsive to the particular circumstances of Koori applicants and to create a culturally safe environment for Koori Victims of crime.<sup>18</sup> At VOCAT, decisions are made by Tribunal members, who are also magistrates. VOCAT operates at each of the 54 venues of the Magistrates' Court of Victoria across the state.<sup>19</sup> The scheme is publicly funded, with the costs of administering VOCAT and the awards of assistance made to victims paid from the consolidated revenue fund.<sup>20</sup>

### Process

An applicant to VOCAT may elect either to attend a hearing, or to have his or her application decided 'on the papers', meaning that the Tribunal member will make a decision based on the written application, without a hearing being conducted. However, in applications with complex issues the Tribunal member will usually require a hearing to be held. For an application to succeed, it is not necessary that the perpetrator of the crime has been found guilty of the offence, or even that charges have been laid. Rather, the applicant must establish that a criminal act of violence has occurred. The Tribunal must be satisfied of this on the balance of probabilities, a lesser standard or proof than that which applies in criminal proceedings. However, the act of violence must have been reported to police within a reasonable time unless special circumstances meant that this did not occur.<sup>21</sup> Applications must be made within two years of act of violence occurring, although there is provision for the Tribunal to grant an extension of time on a case by case basis<sup>22</sup> (see the section 'Time limits' below for more detail on these provisions). The applicant also needs to demonstrate that he or she has suffered injury as a result of the act of violence, which must fall into one or more of the following categories: actual physical bodily harm; mental illness or disorder; an exacerbation of a mental illness or disorder; pregnancy. When making a decision, the Tribunal member must consider the character and behaviour of the applicant.<sup>23</sup> In doing so, he or she will take into account any criminal convictions an applicant may have. This may result in the application being refused, or the amount of assistance being reduced. The Tribunal must also take into account any other entitlements the applicant may have to obtain financial assistance in relation to the act of violence. This means that if the applicant successfully sues the perpetrator, or is able to access funds through other statutory schemes such as TAC or WorkCover, or through insurance or superannuation, the Tribunal may reduce the amount of assistance awarded.<sup>24</sup>

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<sup>17</sup> Victims of Crime Assistance Tribunal, *2012-2013 Annual Report* (2013) 3.

<sup>18</sup> *Ibid*, 10.

<sup>19</sup> *Ibid*, 4.

<sup>20</sup> *Victims of Crime Assistance Act 1996 (Vic)* s 69.

<sup>21</sup> *Victims of Crime Assistance Act 1996 (Vic)* s 52.

<sup>22</sup> *Victims of Crime Assistance Act 1996 (Vic)* s 29.

<sup>23</sup> *Victims of Crime Assistance Act 1996 (Vic)* s 54(a).

<sup>24</sup> *Victims of Crime Assistance Act 1996 (Vic)* s 16.

## Time limits

The Victorian scheme imposes two time limits relevant to victims of child sexual abuse:

1. applications must be made within 2 years from the act of violence having occurred, and
2. the act of violence must be reported to police within a 'reasonable time'.

The Tribunal may grant exceptions to each of these rules. In doing so, they take into account factors such as the age of the applicant at the time of the act of violence,<sup>25</sup> and whether the person who committed the act of violence was in a position of power, influence or trust in relation to the applicant.<sup>26</sup> Where the applicant was a child at the time of the act of violence, the Tribunal member must consider whether the application is being made within a 'reasonable time' after he or she has reached the age of 18. The requirement for the act of violence to be reported to police within a 'reasonable time' may be waived if the Tribunal member finds that special circumstances brought about the delay. A victim's genuine fear of the perpetrator, and the fact that the perpetrator held a position of power over the victim have been held to constitute 'special circumstances' in the case of a rape reported to police over thirty years after it occurred.<sup>27</sup>

## Forms of assistance

The Act defines different categories of victim who are eligible for assistance. Different forms and amounts of assistance apply depending on these categories. Under the Act, 'primary victim' includes someone who is injured or dies as a direct result of an act of violence committed against him or her.<sup>28</sup> A 'secondary victim' is someone who is present at the scene of an act of violence<sup>29</sup>, or someone who is a parent or guardian of a primary victim who was under the age of 18 at the time of the act of violence was committed.<sup>30</sup> A 'related' victim is a close family member, dependent of, or someone who had an intimate personal relationship with a primary victim who died as a direct result of that act.<sup>31</sup>

### *Assistance for primary victims*

Primary victims may be awarded up to \$60,000 to cover the following items<sup>32</sup>:

- Counselling<sup>33</sup>
- Medical expenses<sup>34</sup>
- Loss of earnings as a direct result of act of violence, for a period of up to two years after the act of violence (up to \$20,000)<sup>35</sup>
- Loss of or damage to clothing worn at the time of the commission of the act of violence<sup>36</sup>
- Safety related expenses.<sup>37</sup>

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<sup>25</sup> *Victims of Crime Assistance Act 1996* (Vic) s 29(1)(a).

<sup>26</sup> *Victims of Crime Assistance Act 1996* (Vic) s 29(1)(c).

<sup>27</sup> *Frost v VOCAT* [2002] VCAT 1390 (31 October 2002).

<sup>28</sup> *Victims of Crime Assistance Act 1996* (Vic) s 7.

<sup>29</sup> *Victims of Crime Assistance Act 1996* (Vic) s 9(a).

<sup>30</sup> *Victims of Crime Assistance Act 1996* (Vic) s 9(b).

<sup>31</sup> *Victims of Crime Assistance Act 1996* (Vic) s 11.

<sup>32</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8.

<sup>33</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8(2)(a).

<sup>34</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8(2)(b).

<sup>35</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8(2)(c).

<sup>36</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8(2)(d).

In exceptional circumstances, primary victims may be awarded financial assistance to cover other expenses that will help him or her to recover from the act of violence.<sup>38</sup>

What constitutes 'exceptional circumstances' is something that the Tribunal member will determine according to the circumstances of the particular case.<sup>39</sup> Examples of awards for expenses to assist recovery that the Tribunal has made include removal expenses, computer equipment, remedial tutoring and self-defence classes.<sup>40</sup>

### *Special financial assistance*

Primary victims who have suffered what the Act calls a 'significant adverse effect' - being grief, distress, trauma or injury<sup>41</sup> - as a direct result of the act of violence may also seek 'special financial assistance'.<sup>42</sup> Different amounts are available depending on the type of criminal offence the act of violence corresponds to and the severity of harm caused to the victim. The maximum amount of special financial assistance available is \$10 000. This is additional to, or on top of, any assistance granted under the categories of financial assistance outlined above, which is capped at \$60 000. It should be noted that in general special financial assistance only applies to acts of violence committed on or after 1 July 2000. Although there are some limited exceptions for victims of child sexual abuse, even these victims will generally not be able to claim special financial assistance if the act of violence occurred before 1 July 1997.

### *Assistance for secondary victims*

Secondary victims may be awarded up to \$50,000 to cover the following:<sup>43</sup>

- medical expenses;
- counselling;
- loss of earnings as a direct result of act of violence, for a period of up to two years after the act of violence (up to \$20,000) in exceptional circumstances;
- in exceptional circumstances, expenses to assist the recovery of a parent or guardian of a child victim.

### *Assistance for related victims*

A related victim may be awarded up to \$50,000 (s 13(1)), to cover the following:<sup>44</sup>

- counselling;
- medical expenses or funeral expenses resulting from the death of the primary victim;
- assistance for distress experienced as a result of the death of the primary victim;
- compensation for loss of money that, but for the death of the primary victim, the related victim would have been likely to receive from the primary victim during a period of up to 2 years after that death;
- other expenses incurred as a direct result of the death of the primary victim.

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<sup>37</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8 (2)(e).

<sup>38</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8(3).

<sup>39</sup> *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651, para 30.

<sup>40</sup> Fitzroy Legal Service, *The Law Handbook*, 7 July 2014 <http://www.lawhandbook.org.au/>

<sup>41</sup> *Victims of Crime Assistance Act 1996* (Vic) s 3.

<sup>42</sup> *Victims of Crime Assistance Act 1996* (Vic) s 8A.

<sup>43</sup> *Victims of Crime Assistance Act 1996* (Vic) s 10.

<sup>44</sup> *Victims of Crime Assistance Act 1996* (Vic) s 13.

## Positive aspects of VOCAT for victims of child sexual abuse in institutions

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### 1. Independence

Victims of abuse do not necessarily feel comfortable or able to approach the organization responsible for the abuse. The ability to make an application to an independent body is therefore likely to be a positive factor for some victims. Also, the fact that the decision is made by a magistrate, a person of authority, can help victims feel that their experience has been validated.

### 2. Less formal and less adversarial compared to other types of legal action

VOCAT is an administrative tribunal and is designed to be more flexible and informal than a court.<sup>45</sup> It is generally seen as a less stressful experience for victims compared to civil litigation or criminal trials. It is rare that a victim will have to give formal evidence at a hearing and rare that a victim will be cross examined.

### 3. Publicly funded

As VOCAT is publicly funded, a victim's ability to access financial assistance is not limited by the financial position of the offender.

### 4. Therapeutic potential

VOCAT has strong links to community victim support services, who are able to assist victims as they go through the process of making an application to VOCAT.<sup>46</sup> In terms of the VOCAT process, the fact that victims may state a preference to attend a hearing or to have the application determined by a Tribunal member in chambers allows victims some choice in determining the kind of legal response that best meets their therapeutic needs. Where hearings do take place, they are designed to function in a way that is therapeutic to victims. This may involve the magistrate sitting at the table with the victim, engaging them directly and encouraging them to speak about their experience.<sup>47</sup> Victims are able to bring support people of their choosing, and hearings can be closed to the public. At hearings, VOCAT aims to provide a 'sympathetic and compassionate forum for applicants to relate their experiences as victims of crime. The hearing process can assist in restoring an individual victim's sense of dignity'.<sup>48</sup>

Should a separate VOCAT list dealing with child sexual abuse in institutions be developed, the expertise of the Magistrates' Court of Victoria in establishing and operating specialist jurisdictions speaks well of its potential to accommodate such a scheme. The Magistrates' Court currently offers a number of specialist courts, designed to be 'less formal and more flexible than a traditional Magistrates' Court, and are designed to make the participants more comfortable...A Specialist Court attempts to take a more individualised and service-focussed approach...in contrast to the often dispassionate

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<sup>45</sup> Victims of Crime Assistance Tribunal, above n 8, 4.

<sup>46</sup> Ibid, 6.

<sup>47</sup> Ibid, 8.

<sup>48</sup> Ibid, 8.

approach of a traditional Magistrates' Court.<sup>49</sup> These specialist courts may be viewed as being shaped by principles grounded in therapeutic jurisprudence. Therapeutic jurisprudence involves a critical perspective towards the law that recognises how the legal system may detrimentally affect the wellbeing of individuals engaging with it. However, under this approach, the legal system is also understood as a potential site of positive therapeutic intervention. Proponents of therapeutic justice, including a number of Victorian magistrates who are strong advocates of this philosophy,<sup>50</sup> seek to develop alternative legal models that enhance the wellbeing of those affected encountering them.<sup>51</sup> A court process designed along these lines may be a good fit for victims of child sexual abuse in institutions, as it would have the potential to address the emotional and rehabilitative needs as well as the legal needs of these victims.

## 5. Legal fees are usually covered

Under the VOCAT provisions, an amount separate to the financial assistance made to a victim is available to pay for legal fees. The effect of this provision is that victims are usually legally represented.<sup>52</sup>

## Limitations of VOCAT for victims of child sexual abuse in institutions

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### 1. Lack of involvement of institutions in the process

The key limitation of VOCAT in providing redress for victims of child sexual abuse in institutions is the fact that the institutions involved do not play a role in the process. Financial compensation is just one aspect of true redress. For many victims, it is crucially important that the institutions responsible be brought to account. Whilst VOCAT may involve acknowledgment from a Magistrate on behalf of the state, many victims seek an acknowledgment of and an apology for what they have suffered from the specific institution responsible. Further, of central importance is that the victim is able to receive satisfactory assurances from the institution that steps are being taken to ensure the abuse does not happen again to other children. Thus, VOCAT currently has a severely limited ability to deliver the first two aspects of redress according to the van Boven principles:

1. Acknowledgment and apology
2. Guarantees against repetition.

**Recommendation 1: That any victims of child sexual abuse specific statutory compensation schemes should formally involve the relevant institution or institutions in applications involving child sexual abuse in institutions**

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<sup>49</sup> Magistrates' Court of Victoria, *Specialist Jurisdictions*, 11 July 2014, <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdiction>

<sup>50</sup> See for example: Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2003) 20 *Law in Context* 121.

<sup>51</sup> David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125

<sup>52</sup> Victims of Crime Assistance Tribunal, above n 8, 7.

## 2. Formality of the process

Whilst VOCAT is intended to be less formal than a court, it is nonetheless a formal legal process. The fact that VOCAT operates from Magistrates' Courts reinforces this aspect of its nature. Not all victims will feel comfortable in this setting. Specifically, victims who have experienced the criminal justice system may be reluctant to engage with the legal system. This factor and other cultural barriers in accessing the legal system are of particular relevance for Aboriginal and Torres Strait Islander victims. However, it is noted that the Koori VOCAT list was established in order to address this issue.

**Recommendation 2: That any victims of child sexual abuse specific statutory compensation scheme should be developed in consultation with victims and their advocates to determine the appropriate format for proceedings.**

## 3. Time limits

Victims of child sexual abuse in institutions face significant barriers to disclosing the abuse. Many victims take years to do so, and some are never able to. There are two significant time limits imposed by the Victorian scheme:

1. applications must be made within 2 years from the act of violence having occurred, and
2. the act of violence must be reported to police within a 'reasonable time'.

As outlined in the *Context* section above, there are exceptions to these rules that victims of child sexual abuse in institutions may be able to rely on. However, not all victims may be successful in doing so.

Further, the rules, even with their exceptions, have the effect of requiring a victim to justify his or her behaviour in failing to disclose the abuse at an earlier time. This does not appropriately recognize the significant difficulties victims face in disclosing the abuse, as children and later in their adult lives.

### *Barriers to disclosing at the time of the abuse*

- Victims were too young at the time to understand that what had happened to them was a criminal offence.
- Perpetrators used their positions of high social esteem to ensure that victims did not report the abuse.<sup>53</sup>
- Where the child was living in an out of home care facility or boarding school, there was often no adult available to whom the child felt comfortable in disclosing the abuse.<sup>54</sup>
- Some children attempted to disclose the abuse but were not believed.
- Some children had negative interactions with police. This includes children who were in residential institutions and ran away due to the abuse have reported that police apprehended

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<sup>53</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non Government Organisations* (2013) 50.

<sup>54</sup> Ibid.

them, heard their disclosures of abuse but did not believe them, and returned them to the respective institutions responsible for the abuse.<sup>55</sup>

#### *Barriers to disclosing as an adult*

- Victims may suffer from ongoing feelings of shame that make it difficult to disclose the abuse.
- Previous experiences of not having been believed make it harder to disclose or report as an adult.
- Previous negative experiences of interactions with police can operate as barriers to victims reporting the abuse. This issue is particularly relevant to Aboriginal and Torres Strait Islander victims, where poor relationships between a victim's community and police can deter victims from making a report.<sup>56</sup>

Given the past negative experiences with police common to many victims of child sexual abuse in institutions, the recommendation of the Association of Children's Welfare Agencies that reports to other services such as welfare, health and counseling should be accepted as satisfying the requirement to make a report is noted with approval.<sup>57</sup>

Where a victim has found the courage to disclose the abuse and has come forward to make an application to VOCAT, the first issue the Tribunal will look at is that of time frames. This does not set a therapeutic or understanding tone for the process and is likely to be counter-therapeutic for victims of child sexual abuse in institutions. Victims may feel that they are being told that they have done something wrong by not having come forward earlier. This is likely to exacerbate the sense of self-blame and shame many victims struggle with. The operation of these provisions does not support VOCAT's stated aim of providing a 'sympathetic and compassionate forum for applicants to relate their experiences as victims of crime'.<sup>58</sup>

A victim-centered redress scheme should not require victims of sexual abuse in institutions to explain the length of time it has taken them to either report the abuse, or to take action in respect of compensation for the abuse. A victim who has summoned the courage to speak about child sexual abuse, no matter how long ago the abuse occurred, should not have to justify whether or not they have done so within a 'reasonable' time. Rather, the significant barriers they have overcome to report at all should be recognized. For this reason, the Centre endorses the *Betrayal of Trust* Recommendation that the Victims of Crime Assistance Act 1996 (Vic) be amended to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings.

**Recommendation 3: That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require that an application be commenced within a timeframe.**

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<sup>55</sup> Ibid, 165.

<sup>56</sup> M. Schwartz, F. Allison and C. Cunneen, *The Civil and Family Law Needs of Indigenous People in Victoria* (2013) 165.

<sup>57</sup> Association of Children's Welfare Agencies, above n 4.

<sup>58</sup> Victims of Crime Assistance Tribunal, above n 8, 8.

**Recommendation 4: That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require a report to be made to police within a timeframe.**

#### 4. Mandatory consideration of the criminal record of the victim

According to the Act, the Tribunal must have regard to ‘the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence.’<sup>59</sup> It is important to state that most victims of child sexual abuse do not go on to commit criminal offences. However, research establishes that an increased risk of criminal offending is associated with the experience of child sexual abuse. Sometimes there is a clear connection between the abuse and subsequent criminal offending by the victim of that abuse. For example, a victim may have run away from the facility at which the abuse was perpetrated, and gone on to commit survival crimes whilst homeless, such as begging and shop theft of basic items. Sometimes the connection between the abuse and the victim’s offending may be less readily apparent. For example, people who have experienced child sex abuse have an increased risk of drug and alcohol addiction.<sup>60</sup> These issues may lead them to commit drug offences, or various other offences as a consequence of their addiction. Even in these cases, where the link is less clear, sexual abuse is still a driving factor in the subsequent criminal offending. Given that subsequent criminal offending is likely be at least in part a product of the negative and diffuse impact the sexual abuse has had on an applicant, it is not appropriate that he or she be viewed as a less deserving victim. This is particularly relevant to Koori victims, given the over-representation of Kooris in the criminal justice system and therefore the likelihood that a Koori person appearing before VOCAT will have a criminal history. The interrelationship between child sexual abuse and subsequent criminal offending by the victim is illustrated by the following statement by Alister McKeich, who spoke to the *Betrayal of Trust* inquiry on behalf of Uncle Howard Edward, who at 10 years old was described as being,

the best scholar, the best sportsman, the most popular boy in grade 4 and the natural choice as leader of his class.’ However, by 16 years of age Howard was in and out of Turana youth centre and not long after spent time in Pentridge prison. It is not difficult to see how the effects of abuse while institutionalised greatly contributed to Howard’s transition from a boy of such great potential to someone who, as an adult, would remain in and out of prison and suffer from alcohol and drug related issues for many years.

If a person has a history of criminal offending, he or she has already been dealt with by the criminal justice system in respect of that offending. When appearing as a victim, and a victim of the very serious crime of child sexual abuse, which has life-long impacts, that person’s criminal history should not be taken into account as a matter of course.

<sup>59</sup> *Victims of Crime Assistance Act 1996* (Vic) s 54(a).

<sup>60</sup> Judy Cashmore and Rita Shackel, *The long-term effects of child sexual abuse* (2013) Australian Institute of Family Studies, 8.

**Recommendation 5: That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require a victim's own criminal record to be considered.**

## 5. Inappropriate structure of financial assistance

Many of the types of financial assistance available through VOCAT will not be available to victims of child sexual abuse in institutions. For example, assistance for clothing damaged at the time of the act of violence, or to cover loss of earnings for two years after the act of violence is simply not relevant to the experience of these victims. Further, many victims of child sexual abuse in institutions will be prevented from accessing special financial assistance, as the abuse they suffered occurred prior to 1997.

**Recommendation 6: That financial assistance structures that are more appropriate to the needs of victims of child sexual abuse in institutions be developed in any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions.**

## 6. Caps on financial assistance

VOCAT offers symbolic compensation on behalf of the state to victims of crime, in line with the understanding that it is the state's role to protect its citizens from crime, and that it owes a responsibility to victims when criminal harm has been done to them. VOCAT does not provide a victim with damages in the same sense as can be achieved through civil litigation, where a successful claim by a victim results in a payment that purports to return the victim to his or her pre-crime position. This is consistent with all compensation schemes in Australian states and territories, where awards are 'not intended to reflect the level of compensation to which victims of acts of violence may be entitled at common law or otherwise'.<sup>61</sup> At VOCAT the amounts available are significantly lower than what would be available through successful litigation. In its submission to the Betrayal of Trust Inquiry, the Law Institute of Victoria noted:

A victim applying to VOCAT with the strongest possible claim might be awarded up to \$70,000 (that is, the maximum \$60,000 award plus \$10,000 in special financial assistance). If the same person were to succeed in a civil claim for the same abuse if they suffered a substantial loss of earnings or significant pain and suffering, our members report that the damages could exceed \$200,000.<sup>62</sup>

Further, although the maximum available through VOCAT is \$70,000, it should be noted that the average amount of financial assistance awarded by VOCAT for 2011-2013 was \$7,763.<sup>63</sup> If victims of

<sup>61</sup> Australian Law Reform Commission, *Family Violence - A National Legal Response* (ALRC Report 114, November 2010) para 4.112.

<sup>62</sup> Family and Community Development Committee, above n 44, 557-8.

<sup>63</sup> Victims of Crime Assistance Tribunal, *2012-2013 Annual Report* (2013), 13.

crime compensation schemes are to be a viable alternative to litigation for victims of child sexual abuse in institutions, the amounts available must be commensurable.

**Recommendation 7: That caps on assistance not apply, or at least be significantly raised, in compensation cases for victims of child sexual abuse in institutions**

Sexual abuse in institutional contexts affects victims' lives in multiple and profound ways. As the *Betrayal of Trust Report* found,

Children subjected to criminal abuse in organisations often experience lifelong impacts that include mental health problems, addiction issues, relationship difficulties, issues with anger and difficulties with life skills, education and employment.<sup>64</sup>

Victims of child sexual abuse in institutions are likely to have ongoing financial needs. Unlike other statutory compensation frameworks such as TAC or WorkCover, VOCAT does not offer ongoing financial assistance for victims, a significant drawback.

**Recommendation 8: That provision be made for victims of child sexual abuse in institutions to receive ongoing payments from the relevant victims of crime statutory compensation scheme.**

## 7. Requirement to prove injury

As noted in the *Betrayal of Trust* report, 'there is no single experience of the damage resulting from criminal child abuse...not everyone is affected in the same way or to the same degree'.<sup>65</sup> Whilst research shows a clear link between child sexual abuse and adverse mental health effects for victims,<sup>66</sup> not all victims go on to experience mental illness as adults. However, to qualify for an award of assistance at VOCAT, a victim must prove that he or she has suffered 'injury', which given the context of the acts of violence in question, would need to fall into the category provided by the Act of 'mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock'.<sup>67</sup> This provision has the effect of requiring victims to prove that they have a psychiatrically recognised illness, which may not be the case. A preferable alternative would be for VOCAT to award assistance based on the recognition of the inherent harm caused by the fact of the abuse.

**Recommendation 9: That any statutory victims of crime compensation scheme designed to provide redress specifically for victims of child sexual abuse in institutions should not require a victim to prove that he or she has suffered a definable injury beyond the fact of the sexual abuse itself.**

<sup>64</sup> Family and Community Development Committee, above n 44, 66.

<sup>65</sup> Ibid, 64.

<sup>66</sup> Judy Cashmore and Rita Shackel, above n 51, 8.

<sup>67</sup> *Victims of Crime Assistance Act 1996* (Vic) s 3.

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