



16 June 2014

Royal Commission into Institutional Responses  
to Child Sexual Abuse  
GPO Box 5283  
Sydney 2001

By email: [solicitor@childabuseroyalcommission.gov.au](mailto:solicitor@childabuseroyalcommission.gov.au)

Dear Commissioners,

### **Royal Commission Issues Paper 6: Redress Schemes**

1. Women's Legal Services NSW (WLS NSW) thanks the Royal Commission into Institutional Responses to Child Sexual Abuse for the opportunity to provide comment on the Royal Commission's Issues Paper 6: Redress Schemes.
2. We have organised our submission around a number of issues WLS NSW has identified as of primary importance, as well as briefly answering key questions identified by the Royal Commission.
3. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

### **Funding independent legal representation for victims as a matter of right**

4. As noted in the Issues Paper, redress schemes have 'had quite varied rules, including about coverage, eligibility, validation procedures and payment calculation and scales'. A detailed understanding of the operation of a redress scheme will often only be gained through extensive involvement in it as a participant, making preliminary engagement with redress schemes an emotional hurdle, and an access to justice issue, for all victims of crime.
5. Victims of child sexual assault are likely to experience particular barriers to engagement with redress schemes. These may include: unfamiliarity with processes; uncertainty as to what a redress scheme can offer in terms of outcomes; unwillingness to confront either the

perpetrator of crimes or members of the accountable Institution; fear of being discredited or not being believed, particularly due to the passage of time; the possibility of receiving compensation that is incommensurate with the crimes committed.

6. WLS NSW submits that redress schemes should provide funds for legal advice and representation for victims engaging with the schemes, as a matter of right. A legal advocate can mitigate many of the barriers listed above, and act to prevent unnecessary re-traumatisation of victims. The provision of legal advice is also consistent with the *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*,<sup>1</sup> the primary international legal instrument governing redress and reparation schemes.
7. For victims to have confidence that the legal advice and assistance they are afforded is impartial, victims should be able to select and retain the legal practitioner of their choosing. Prior to the changes introduced by the *Victims Rights and Support Act 2013* (NSW) a system of legal disbursements was in place to support the provision of legal representation in engaging with the statutory victims compensation scheme. Similarly, we understand that where an applicant is legally represented in a Victims of Crime matter in Victoria, the Victims of Crime Assistance Tribunal will ordinarily pay legal costs reasonably incurred by the applicant directly to their legal representative.

### **Recommendation**

That any institutional redress schemes should fund independent legal advice and representation for victims as a matter of right.

### **Compensation must reflect the seriousness of the damage done to victims**

8. WLS NSW is deeply concerned by the diminishing level of support offered to victims of violence by some redress schemes. For example, the reduction in the quantum of damages to victims of domestic violence and sexual assault in NSW by changes to the Victims Compensation Scheme under the *Victims Rights and Support Act 2013* (NSW) sends a troubling message about the relative importance to the State of the healing and recovery of victims of crime.
9. WLS NSW recognises that to some extent, reparations payments may be conceptualised as symbolic recognition of damage done, rather than a payment of restitution to the victim. Inherent in this conception of the purpose of reparations is the notion that no amount of money may adequately compensate for the harms perpetrated by crimes such as child sexual abuse.
10. Nevertheless, WLS NSW believes that it is not appropriate that the quantum of damages available through redress schemes be significantly less than the compensation available to victims through civil litigation.

<sup>1</sup> UN Doc. A 60/509/Add.1, adopted by the General Assembly 1 December 2005. Although the *Basic Principles* primarily apply to State actors, principle 15 provides that where another entity is responsible for the violation 'such party should provide reparation to the victim' while principle 3(c) specifically provides that a component of reparations is equal and effective access to justice 'irrespective of who may ultimately be the bearer of responsibility for the violation'.

11. A primary motivating factor in establishing redress schemes may be to avoid the costs involved for all parties in civil litigation. While it is highly appropriate for both the State and other Institutions to take such considerations into account in establishing Redress Schemes, it is not acceptable to establish schemes that make awards of compensation significantly less than those available under the common law. For these reasons, WLS NSW's position is that where child sexual assault is made out, the minimum 'base' level of compensation in all redress schemes should be no less than \$100,000.

### **Recommendation**

Where child sexual assault or abuse is made out, the minimum 'base' level of compensation in all redress schemes should be no less than \$100,000.

## **Redress schemes should recognise that injury is inherent in a sexual assault**

12. A central component of many of the statutory compensation schemes for victims of crime in Australia is a requirement that a claimant prove that both an act of violence was perpetrated against them, and that they occasioned a recognised injury.<sup>2</sup>
13. WLS NSW submits that sexual assault always causes actual physical harm and psychological harm to the victim in ways that are more than minor, transient or trifling. This is particularly evident when the victim is a child.
14. Child sexual assault may be distinguished from other crimes in a number of important ways. It is highly typical for victims not to report or identify sexual assaults against them for many years after events have taken place.<sup>3</sup> A result of this effluxion of time it may be that establishing an injury by way of documentary evidence may be far more difficult than for a crime reported contemporaneously.
15. For these reasons, WLS NSW advocates that any redress scheme dealing with compensation or reparations for sexual assault should have as part of its rubric, a form of reparations for which there are no evidentiary requirements that require victims to prove a discrete physical or psychological injury arising from the sexual assault/s. As well as going against the well-established evidence of the egregious effect that sexual assault has on children,<sup>4</sup> it is also WLS NSW's experience that placing unnecessary evidentiary burdens on victims to establish injuries, through processes such as statutory declarations or reports to counsellors, may result in further harm to them.

### **Recommendation**

All Redress Schemes should recognise that injury is inherent in sexual assault and sexual abuse. Redress Schemes should not have a separate requirement that an injury be made out before compensation is awarded.

<sup>2</sup> See, for example, *Victims Rights and Support Act 2013* (NSW) ss 18-19. See also, Christine Forster (2013) 'Victims of Crime Compensation Schemes: Compensating Victims of Family Violence' 116 *Precedent* 42.

<sup>3</sup> Christine Forster and Patrick Parkinson (2000) 'Compensating Child Sexual Assault Victims' 23(2) *UNSW Law Journal* 175.

<sup>4</sup> Christine Forster and Vedna Jivan (2005) 'Opportunity Lost: In search of justice for victims of sexual assault' 28(3) *UNSW Law Journal* 759.

## Base rates of compensation should be used to prevent victims from having to meet onerous evidentiary burdens

16. Taking note of the way in which onerous evidentiary requirements in Redress Schemes may re-traumatise victims, WLS NSW suggests that a two-tiered system of compensation may be appropriate. To be eligible for a 'base' compensatory payment of sexual assault, all that a victim should need to establish is that a sexual assault(s) occurred. If a victim is able and willing to engage in further evidence gathering to establish that the assault(s) was of a particularly aggravated nature, or that it caused particularly aggravated forms of harm, victims should be able to elect to engage in a 'supplementary' process in which the gravity of harm could be quantified to make a victim eligible for further compensatory payments.
17. As well as being sensitive to the possibility of re-traumatising victims, a two-tiered system of compensation may also better meet the needs of victims who want the aggravated nature of their sexual assault to be recognised. In WLS NSW's experience, for some victims, putting evidence of their experience before a body designed to provide redress and compensation, and having that experience appropriately acknowledged and compensated, may be an important part of their healing process.
18. As discussed above, WLS believes that in order for such a system to fairly recognise the harm and injury that is occasioned through all sexual assaults, it would be appropriate for all 'base' compensatory payments to be no less than \$100,000. Furthermore, additional 'supplementary' payments must adequately recognise the considerable harm that has been occasioned by the particular circumstances of victims' experiences.

### Recommendation

Institutions administering Redress Schemes should implement a two-tiered system of compensation as an appropriate way to prevent re-traumatisation of victims, while recognising the serious nature of child sexual abuse.

## Responses to Questions posed by the Issues Paper

### Question 1

19. Civil litigation can be beyond the reach of many people, especially those who do not have the financial and or personal resources to undertake what can be lengthy legal processes in which lawyers need to be engaged; there is the risk of adverse costs; and the prospect of having to give evidence in court and be cross examined. Legal aid is not easily obtainable for such litigation and such litigation is usually beyond the capacity of other legal assistance providers such as community legal centres.
20. Advantages of a redress scheme include the capacity to make procedures which are: more straightforward; tailored to suit the specialised nature of the proceedings; conducted in a way that recognises the impact of trauma; determined on the papers; and usually proceed in a more timely way.

### Question 4, 5, 6, 8

21. Further work would need to be undertaken to fully assess the benefits of establishing a national scheme, however WLS NSW anticipates that there are likely to be more benefits than not, for victims, in establishing a national redress scheme. A consistent approach nationally

could provide fairness and consistency. It should not matter whether the abuse occurred in one state or another (where compensation laws may differ); nor should it matter whether an institution responsible for abuse has resources with which to pay compensation; nor should it matter that the structure of an institution is technically difficult to sue, which has been the experience with the Catholic Church.

22. WLS NSW submits that it should be mandatory for institutions to be subject to a national redress scheme. All decision-making should be independent of the institution. An oversight function to monitor systemic issues should also be part of a national scheme.
23. Our preliminary view is that the State should provide and fund a national redress scheme, as is required by *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*,<sup>5</sup> and devise a mechanism for seeking contributions from all relevant institutions, perhaps as part of a national accreditation / standards setting function.

#### Question 7

24. Our preliminary view is that seeking redress or compensation through a redress scheme should be optional for claimants ie claimants should retain the ability to pursue civil litigation if they wish. It is difficult to support closing off a civil litigation right given that over a long period of time, there is a risk that a redress scheme may not survive in the form in which it is established, or at all.
25. If you would like to discuss any aspect of this submission, please contact me on 02 8745 6900.

Yours faithfully,  
**Women's Legal Services NSW**

Janet Loughman  
Principal Solicitor

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<sup>5</sup> UN Doc. A 60/509/Add.1, adopted by the General Assembly 1 December 2005.