



1 July 2014

Royal Commission into Institutional Responses
to Child Sexual Abuse
GPO Box 5283
Sydney 2001
By email: solicitor@childabuseroyalcommission.gov.au

Dear Commissioners,

Issues Paper 7: Statutory Victims of Crime Compensation 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 7: Statutory Victims of Crime Compensation Schemes.
2. 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.
3. Victims compensation has been a particularly significant area of our casework practice over many years. We have experienced various changes to the scheme in NSW, the most significant of which occurred in 2013 with the introduction of the *Victims Rights and Support Act 2013* (NSW) ("VRSA").

Human rights and due diligence obligations

4. The abuse of children is a violation of human rights. It involves a grave abuse of power and should also be understood within the continuum of violence against women. Child sexual abuse is a violation of the rights:
 - a. To be free from torture or cruel, inhuman or degrading treatment or punishment;¹
 - b. To the enjoyment of the highest attainable standard of physical and mental health;²

¹ International Covenant on Civil and Political Rights (ICCPR) ratified by Australia on 13 August 1980, Article 7; Convention on the Rights of the Child, (CROC) ratified by Australia on 17 December 1990, Article 37; CEDAW General Comment 19: Violence against Women, as contained in UN Doc A/47/38 (1992) at paragraph 7.

² CROC, Article 6; International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Australia on 10 December 1975, Article 12.

- c. The right to life;³
- d. The right to equality and non-discrimination.⁴
- 5. Under international human rights instruments, States are required to act with due diligence to prevent, punish, investigate and redress harm as a result of acts of violence.⁵
- 6. Significantly, States may be held responsible for private acts if they fail to act with due diligence to prevent, investigate or punish acts of violence.⁶
- 7. We submit that the state provision of compensation to victims of crime should be placed in a human rights framework including the due diligence obligations imposed under international law.

Advantages of statutory victims of crime compensation schemes

- 8. In our experience, statutory victims of crime compensation schemes are a good alternative to civil litigation for victims of institutional child sexual abuse seeking redress for the abuse they experienced.
- 9. Victims of crime compensation schemes can be a cheaper and quicker alternative to civil litigation. There is no fee for applying for financial support from NSW Victims Services and applications are determined in a relatively timely manner compared to civil litigation.
- 10. Victims of crime compensation schemes often have broader time limits than those in civil litigation, recognising that it can take victims of child abuse, in particular, a very long time to seek advice about the abuse they experienced. Under the current NSW VRSA scheme, there is no time limit for victims of child sexual abuse to apply for financial support for justice-related and out-of-pocket expenses and a recognition payment (however claimants only have 2 years after they turn 18 years old to claim economic loss or medical and dental expenses).
- 11. Applications for financial support for victims of crime in NSW are determined 'on the papers'. Victims of child sexual abuse are not required to give oral evidence and cross-examined in a formal setting, which in our experience can be re-traumatising for victims.
- 12. For many victims, having access to a statutory scheme is the first time their experience has been believed by an authority and this of itself can be a powerful contributor to healing.

Disadvantages of statutory victims of crime compensation schemes

- 13. Disadvantages of statutory schemes include that the perpetrator, or the relevant institution if there is one, which could be argued owed a duty of care, are not directly brought to account. Further, compensation amounts are usually less than could be awarded in civil litigation. Apologies are not formally part of their function.
- 14. Particular schemes can also present particular problems or disadvantages. For example, WLS NSW believes there are significant problems with the current NSW VRSA, which unfairly

³ CROC, Article 6.

⁴ CEDAW, Article 3.

⁵ Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33. A right to reparations is also found at CROC, Article 39; UN Committee on the Rights of the Child, *General Comment No. 13* CRC/C/GC/13, para 41(f); CAT Article 14; ICCPR, Article 2.

⁶ CEDAW *General Comment 19: Violence against Women*, as contained in UN Doc A/47/38 (1992) at paragraph 9.

disadvantage victims of institutional child sexual abuse seeking redress for the harm they have suffered, which include:

- limited compensation;
- a requirement to prove injury;
- onerous evidentiary requirements;
- onerous reporting requirements;
- risk of restitution;
- no funded legal services to assist victims apply for financial assistance;
- limited counselling;
- restrictive time limits for aspects of entitlements.

15. We have included in this submission, aspects of our critique of the current NSW VRSA as it relates to child sexual abuse to provide concrete examples of current problems with the statutory victims of crime scheme currently operating in NSW. We submit that the NSW Scheme needs reform to improve access to the Scheme and benefits under the Scheme for victims of institutional child sexual abuse.

Compensation must reflect the seriousness of the damage done to victims

16. WLS NSW is deeply concerned by the diminishing level of support offered to victims of violence. 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 VRSA in 2013 sends a troubling message about the relative importance to the State of the healing and recovery of victims of crime. The maximum amount of compensation / recognition payment for harm was reduced from \$50,000 to \$15,000. While financial assistance is available for immediate needs and economic loss there are significant barriers to victims of child sexual assault accessing these, including the time limits discussed above. Further, the amount of \$50,000 available under the NSW scheme prior to 2013, was set in 1987 when the statutory scheme was first introduced⁷ and this amount failed to keep pace with inflation.
17. 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.
18. Nevertheless, WLS NSW believes that it is not appropriate that the quantum of damages available through statutory victims of crime compensation schemes be significantly less than the compensation available to victims through civil litigation. For these reasons, we suggest that where child sexual abuse is made out, the minimum 'base' level of compensation in all statutory victims of crime schemes should be no less than \$100,000.

Recommendation

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

⁷ Section 16 Victims Compensation Act (NSW) 1987

19. Further, statutory victims compensation schemes vary across jurisdictions, offering different forms of redress and different compensatory amounts to survivors of institutional child sexual abuse. For example, in NSW survivors of child sexual abuse may be eligible for up to \$5,000 for immediate needs, \$30,000 for economic loss and \$10,000 recognition payment.⁸ In Victoria primary victims are eligible for up to \$60,000, plus \$10,000 special financial assistance.⁹ In Queensland and Western Australia primary victims are eligible for up to \$75,000.¹⁰ In South Australia primary victims are eligible for up to \$50,000 and in the UK primary victims are eligible for up to £250,000.¹¹
20. A further failure of the NSW scheme to reflect the seriousness of the damage caused by child sexual abuse is the extent to which the scheme can become the captive of political and administrative “imperatives” such as budget shortfalls or law and order agendas.
21. A particularly heinous example of this was the retrospective application of the 2013 changes brought in under the VRSA in NSW, which compounded the significant reduction in maximum available awards. The new scheme applied retrospectively to all claims lodged under the old Victims Compensation Scheme, but not yet determined. Many victims of child sexual abuse were eligible for up to \$50,000 for the severe psychological injuries they suffered due to the abuse. These victims, many of whom had been waiting several years for their applications to be determined due to administrative delays, found it very difficult to comprehend they would only be eligible for up to \$15,000 (\$10,000 for category B recognition payment and \$5,000 special transitional payment payable to victims of child sexual abuse who lodged their claim within 2 years of the sexual assault) under the new scheme. Many clients of WLS NSW were not eligible for the \$5,000 transitional payment because they did not lodge their claim within time, despite their claims being accepted out-of-time under the old Scheme.
22. We suggest that there be a nationally consistent scheme across Australia and that a mechanism be established to frame compensation amounts based on criteria that recognise the seriousness of the damage caused by child sexual assault that is independent of the vagaries of political and budget priority influences and subject to indexation.

Recommendation

That there be a nationally consistent scheme across Australia that is subject to indexation and that an independent mechanism be established to frame compensation amounts based on criteria that recognise the seriousness of the damage caused by child sexual assault.

The Scheme should recognise that injury is inherent in a sexual assault

23. 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.¹²
24. 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.

⁸ *Victims Rights and Support Regulations 2013* (NSW) r 8 and r 12 and *Victims Rights and Support Act 2013* (NSW) s 35.

⁹ NSW Department of Attorney General and Justice and PriceWaterhouseCoopers *Review of Victims Compensation Fund* (12 July 2012) p 101.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² 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.

25. Child sexual abuse 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.¹³ A result of this effluxion of time may be that establishing an injury by way of documentary evidence may be far more difficult than for a crime reported contemporaneously.
26. For these reasons, WLS NSW advocates that any scheme dealing with compensation or reparations for sexual assault should have as part of its rubric, a form of compensation 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,¹⁴ it is also our 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

Statutory victims of crime compensation schemes should recognise that injury is inherent in sexual assault and sexual abuse. Statutory victims of crime compensation schemes should have as an option, a base level claim that does not have a separate requirement that an injury be made out before compensation is awarded.

27. Taking note of the way in which onerous evidentiary requirements in statutory victims of crime compensation 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.
28. 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.
29. As discussed above, WLS NSW 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.

¹³ Christine Forster and Patrick Parkinson (2000) 'Compensating Child Sexual Assault Victims' 23(2) *UNSW Law Journal* 175.

¹⁴ Christine Forster and Vedna Jivan (2005) 'Opportunity Lost: In search of justice for victims of sexual assault' 28(3) *UNSW Law Journal* 759.

Recommendation

Statutory victims of crime compensation schemes could better reflect the needs of claimants by offering a two-tiered system of compensation as an appropriate way to prevent re-traumatisation of victims.

Reporting requirements

30. In NSW under the current VRSA, while victims can rely solely on documentary evidence to support their application for financial support and recognition payments, the type of documentary evidence required is unduly onerous on victims of institutional child sexual abuse. An application for financial assistance for economic loss and/or a recognition payment must include 'a police report or report of a Government agency and a medical, dental or counselling report verifying that the applicant ... has actually been injured as a result of an act of violence'.¹⁵
31. Victims of institutional child sexual abuse, particularly those who identify as Aboriginal and Torres Strait Islander or are from culturally and linguistically diverse backgrounds, can find it very difficult to report the abuse to Police or a Government agency, particularly where the sexual abuse may have occurred in an institution managed by a government agency. Many victims are reluctant to disclose historical sexual abuse to Police or a Government agency because of their prior experience of abuse in institutional contexts have led them to fear and distrust Police and the Government. In our experience, many victims disclose their experiences to non-government organisations.

Recommendation

If a person is able to establish an act of violence and, where relevant, an injury on the balance of probabilities, the form of evidence should not be prescribed.

Restitution

32. NSW Victims Services can seek to recover financial support paid and recognition payments made under the Scheme from persons found guilty of the crimes giving rise to the payments.¹⁶ While this is discretionary, many victims are reluctant to apply for support under the Scheme, fearing that their abusers will re-enter their lives and have access to their personal information for the purpose of responding to a provisional order for restitution.
33. The PricewaterhouseCoopers report on the former Victims Compensation Scheme recognised restitution as a significant barrier to victims of domestic violence, sexual assault, child sexual abuse and child abuse exercising their right to claim compensation and recommended that 'victims have the ability to opt out of the restitution process in circumstances where they can demonstrate a safety concern as a result of restitution being pursued'.¹⁷

Recommendation

Victims of child sexual abuse must be able to elect whether or not restitution is pursued.

¹⁵ Victims Rights and Support Act 2013 s 39(2).

¹⁶ *Victims Rights and Support Act 2013* s 59.

¹⁷ PricewaterhouseCoopers, NSW Department of Attorney General and Justice *Review of the Victims Compensation Scheme* 13 July 2012 p 42.

Funding independent legal representation for victims as a matter of right

34. A detailed understanding of the operation of a statutory victim of crime compensation scheme will often only be gained through extensive involvement in it as a participant, making preliminary engagement with victims of crime compensation schemes an emotional hurdle, and an access to justice issue, for all victims of crime. Victims of child sexual assault may also find it difficult to make complex arguments required under the Scheme such as to why the acts of violence were unrelated, applying the provisions of the Act and case law.
35. WLS NSW submits that the NSW Victims Support Scheme and any other statutory victims of crime compensation 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*,¹⁸ the primary international legal instrument governing redress and reparation schemes.
36. 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 statutory victims of crime compensation schemes should fund independent legal advice and representation for victims as a matter of right.

Counselling

37. Victims of violence can apply for free counselling under the NSW VRSA Scheme. While we support the availability of free counselling for victims of violence, in our experience some victims have been asked by their Victims Services Approved Counsellors to limit discussing matters directly related to the act of violence only.
38. We are also concerned that counselling hours can be capped at 22 hours under the NSW VRSA Scheme. Victims of institutional sex child sexual abuse have suffered significant harm and often need more than 22 hours counselling to work through complex psychological issues.

¹⁸ 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'.

Recommendation

Victims who have experienced complex trauma, particularly victims of child sexual abuse, should not be restricted on the amount of counselling hours and the issues they can discuss in approved therapeutic counselling sessions.

Time limits

39. In NSW victims of child sexual abuse only have until they turn 20 years old to apply for financial support for medical and dental expenses and economic loss incurred as a direct result of the abuse.¹⁹ In our experience, and well documented in the literature, there are many reasons why victims of child sexual abuse would not report or disclose abuse before they were 20 years old, for example, shame, an inability to recognise the abuse was a crime and a lack of access to therapeutic services to help them emotionally prepare themselves to seek redress. The Royal Commission *Interim Report* concludes that disclosure often takes more than 20 years.²⁰

Recommendation

Time limits should not apply for statutory compensation schemes for victims of child sexual abuse.

40. 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

¹⁹ *Victims Rights and Support Act 2013* s 40(1).

²⁰ p158 Commonwealth of Australia. Royal Commission into Institutional Responses to Child Sexual Assault. *Interim Report Volume 1* 30 June 2014.