



WIRRINGA BAIYA

ABORIGINAL WOMEN'S LEGAL CENTRE INC.

Wurringga Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or have been victims of violence.

27 June 2014

Royal Commission into

Institutional Responses to Child Sexual Abuse

By email: solicitor@childabuseroyalcommission.gov.au

Dear Commissioners,

RE: ISSUES PAPER 7 – STATUTORY VICTIMS OF CRIME COMPENSATION SCHEMES

We refer to the above Issues Paper.

Our service

Wurringga Baiya Aboriginal Women's Legal Centre (Wurringga Baiya) is a New South Wales state-wide community legal centre for Aboriginal women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault

Although our service is available to both Aboriginal and Torres Strait Islander women, children and young people close to 99% of our clients are Aboriginal. For this reason throughout this submission we will refer to the issues and needs of Aboriginal women and their communities.

Please note that we have a great deal of experience working with victims of child sexual assault but the large majority of our clients were abused by family members and friends, and thus not in an institutional context. Our experience is mostly with assisting women and children bringing an application for victims compensation through the NSW statutory compensation scheme, called the Victims Support Scheme (previously the Victims Compensation scheme), as discussed further below.

We would also like to note that the recommendations made by the Commission and the suggestions contained within this submission are *not* directed towards to rights and interests of people sexually abused in familial settings. We would like to see justice for all survivors of child sexual abuse and to see the community achieve this through proper focus on survivors and a mindfulness of their rights.

Statutory Victims Compensation Schemes generally

In late 2011 the NSW Government announced that it would hold a review of the NSW Victims Compensation Scheme. This review was to be conducted by the international firm PricewaterhouseCoopers (PwC). In response to that review our Centre made a substantial and comprehensive written submission to PwC in which we analysed all victims compensation schemes across the country. We also focused on the benefits and disadvantages of the NSW scheme as it was then.

We have attached our submission to PwC for the Commission to consider. Of course that submission did not exclusively focus on child sexual assault, let alone child sexual assault in an institutional context. However, we stand by our submissions in relation to the many elements of a statutory victims compensation scheme that we think are necessary to make it effective.

The importance of Statutory Victims Compensation Schemes

We repeat here what we submitted to the PwC review about the importance of statutory victims compensation schemes¹:

State provisions of compensation to victims of violent crime can, provided it is done adequately and with sensitivity, help the mental and physical recovery of a highly marginalized cross-section of our community. Numerous rationales exist as to why the state should provide such compensation. These rationales apply not only to compensation for economic loss resulting from violent crime, but also to accompanying pain and suffering victims may experience. They can be broadly divided into three categories, with some overlap: first, compensation can be of great symbolic value to victims; second, it can be of great practical value in ameliorating the impact of violent crime on victims' lives; finally, it involves victims in the criminal justice system, where they are often otherwise excluded.

a. State compensation is of great symbolic value for victims of violent crime

Victims of violent crime are very frequently damaged by their experiences. Many victims feel a sense of alienation and despair, and a loss of confidence in the ability of the state to protect them; violent crime undermines an individual's public trust. The provision of compensation by the state can play a significant role in regaining both the individual and the community's trust in public institutions². The therapeutic value of receiving compensation is well-recognised. Given that money is a symbol of value and importance, the provision of compensation sends the message that the community, and the state, recognises the impact of crime on the victim, and cares about those

¹ "Wurringa Baiya Aboriginal Women's Legal Centre Submission Regarding the NSW Victims Compensation Scheme", 18 April 2012, pages 9-11

² F. Megret, 'Justifying Compensation by the ICC's Victims Trust Fund: Lessons from Domestic Compensation Schemes' (2010-2011) 36 *Brooklyn Journal of International Law* 123, 160.

generally who have been harmed by crime³. One study focusing on sexual-assault victims showed that, where victims received compensation they felt the state and community acknowledged their experiences, and that their stories had finally been believed⁴. Another similar study found that compensation was of great therapeutic benefit to victims⁵. While these studies did not look at victims of violent crime more generally, it can be supposed that these benefits could well apply to victims broadly. Without this support, trauma experienced by victims could be expressed as anger, withdrawal, and other disrupting behaviours⁶.

b. State compensation can have important practical effects on the lives of victims of violent crime

Where compensation is adequate, it can have a great impact on the ability of victims to recover from their experiences and improve their lives. It can enable financial access to health services and encourage people to obtain the health services they will inevitably need following their victimization⁷. Provided compensation is not limited to actual economic loss, it can also address the long-term practical impacts of violent crime; frequently victims have, throughout their lives, lost opportunities for further education, reasonable living conditions, the ability for form long-term, beneficial relationships and the pursuit of employment and travel⁸. Such a list can only begin to imagine the consequences of victimization beyond actual, direct economic loss, and compensation can have a great practical effect in ameliorating this impact.

c. Including victims in the criminal justice system

The modern criminal justice system, whereby offenders are charged by the state and all fines are paid to the state, largely excludes the victims of crime. The criminal trial offers no possibility of restitution to the victim in question, who must turn, at their own cost to the (frequently inaccessible) civil law to receive any reparations. Compensation schemes aim to address this exclusion.⁹ An application for compensation involves gathering information, having a victim's story heard at a Tribunal and receiving counseling, as well as the compensation itself, a process that can be highly therapeutic for a victim that would otherwise have little role in the criminal justice system.¹⁰ A

³ I. Barrett-Meyering, 'Victim Compensation and Domestic Violence: A National Overview' (2010) *Australian Domestic & Family Violence Clearing House*, 3; I. Freckelton, 'Criminal Injuries Compensation: Law, Practice and Policy' (2001) *LBC Information Services*, 97.

⁴ Barrett-Meyering, 'Victim Compensation and Domestic Violence: A National Overview', 3.

⁵ Ibid.

⁶ M. O'Connell, 'Criminal Injuries Compensation: Revisiting the Rationale for State Funded Compensation for Crimes Victims', Paper prepared at 'Promising Practices for Victims and Witnesses in the Criminal Justice System – a National Conference, (2003), 17.

⁷ Freckelton, I. 'Criminal Injuries Compensation: A Cost of Public Health' (1999) 7(2) *Journal of Law and Medicine* 193, 203.

⁸ Ibid; Barrett-Meyering, 'Victim Compensation and Domestic Violence: A National Overview', 3.

⁹ Megret, 'Justifying Compensation by the ICC's Victims Trust Fund: Lessons from Domestic Compensation Schemes', 125.

¹⁰ Freckelton, 'Criminal Injuries Compensation: A Cost of Public Health', 196.

key tenant of the compensation process, is that, unlike the trial, it is victim-centered, examining exclusively what is best for the victim and giving the victim an opportunity to have their story heard.¹¹ This focus, rarely experienced otherwise by a victim in relation to the crime committed against them, fosters a worthwhile sense of victim agency and empowerment. (Waterhouse, 2009, 257-259).

d. Compensation is well established in domestic legislation and international instruments.

Compensation schemes are established in all Australian jurisdictions and are also established as part of best practice for state parties to the United Nations.

The United Nations *Declaration of Basic Principles of Justice for Victims of Crime, Abuse and Power* establishes that states should:

"...endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes"

as well as:

*"...the family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimisation."*¹²

The declaration also states that *"the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged."*

Australia is a signatory to United National Declaration and we note that in a country such as this, that has access to relative wealth and economic stability, there is a moral and ethical imperative (as well as a legal obligation) to enable victims of violence to have access to compensation schemes.

Furthermore, Australia has taken a number of steps to recognise victims rights and enshrine these rights in domestic legislation and other instruments.

Our domestic legislation also provides a rights framework for victims to access compensation and the *Charter of Victims Rights* (pursuant to section 6 of the Victims Rights Act 1996) provides that:

Section 6.17 Compensation for victims of personal violence

¹¹ Barrett-Meyering, 'Victim Compensation and Domestic Violence: A National Overview', 3; M Dawson and J Zada, 'Victims of crime: the therapeutic benefit of receiving compensation', paper presented to *Australian and New Zealand Association of Psychiatry, Psychology and Law Annual Congress* (1999), 3.

¹² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGA, 29th November 1985.

A victim of a crime involving sexual or other serious personal violence is entitled to make a claim under a statutory scheme for victims compensation.

We note these legal instruments and affirm our positions that all victims of violence in NSW and in particular, victims of domestic violence and sexual assault should have access to these rights and should not face additional barriers to justice or in accessing compensation, counseling and rehabilitation services.

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

In addition to the above we submit there are the following advantages with a statutory victims compensation scheme:

- It does not subject the victim to the stress of litigation and the rigours of cross-examination.
- It does not involve the expense of civil litigation including legal fees, subpoena fees and expert fees (as paid by the victim client).
- It does not require legal representation to the extent and cost required by a civil claim (for example: it does not require counsel).

Disadvantages

In addition to, what we have discussed in our attached submission to PwC we submit the following:

- As the compensation monies comes from a statutory fund the money is limited and often capped to token, very small amounts.
- Inconsistent laws and schemes across the states.
- No acknowledgement by the institution that they failed to protect the victim.
- No apology from the institution.
- No public exposure or shaming of the institution, and its' failures to protect the victim.

What features are important for making statutory victims of crime compensation schemes effective for claimants?

- Access to support and counselling throughout the process and beyond
- Respectful of and sensitive to cultural differences and how it impacts on the experiences of the victim
- Offers levels of compensation for pain and suffering that are respectful, adequate and not tokenistic.

- Discretion to award levels of compensation based on a case-by-case basis with consideration to the levels of pain and suffering.
- Focus on pain and suffering and loss of economic opportunity and capacity rather than actual economic loss. This is particularly relevant for victims who were abused as children, as abuse in childhood and adolescence compromises every aspect of their development.
- Provides for legal fees to be paid by the Scheme.

The current NSW statutory victims compensation scheme

In June 2013 the NSW Government passed the *Victims Rights and Support Act 2013* which dramatically changed the NSW statutory victims compensation scheme. The NSW Government largely adopted the majority of the recommendations made by PwC in its' report¹³. The most significant negative changes can be summarised as follows:

- Significant reductions in the amount of compensation paid to victims for pain and suffering, which are now called 'recognition payments'
- Changes to time limits with no discretion to allow late claims
- Requiring the act of violence to be reported to a government agency for the main types of financial assistance
- No provision for legal fees to be paid by the scheme if a victim chooses or needs to be legally represented
- Retrospective application of the new recognition payments to claims lodged under the repealed legislation that had not been determined at the date the legislation was introduced into Parliament (these claims are referred to as "transitional" matters).

What the new NSW scheme means for victims of child sexual assault

Time Limits

Initially, the Bill that was introduced into the NSW Parliament stated the time limit for child sexual assault applications were to be made within 10 years from when the victim turned 18 years of age. However, after much advocacy from a number of community legal centres, such as ours, the Bill was amended at the last minute to remove a time limit for child sexual assault victims to make a claim for recognition payments.

Compensation for pain, suffering and trauma

Payments for pain, suffering and trauma for sexual violence have been reduced as follows:

Type of sexual abuse	Amount under Old	Amount under New
----------------------	------------------	------------------

¹³

http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report_pwc-vcf-review.pdf

	Scheme	Scheme
Ongoing or pattern of sexual abuse	\$25,000 to \$50,000	\$10,000
Single sexual assault (ie sexual intercourse as defined by section 61H of the <i>Crimes Act 1900 (NSW)</i>)	\$10,00 to \$25,000	\$5,000
A single incident of attempted sexual assault or indecent assault	\$7,500 to \$10,000	\$1,500

It is submitted that the significant reductions in the amount of compensation paid to victims for pain and suffering are not only highly inadequate, but reflect an inherent gender and cultural bias as statistically there are more females than males that apply for statutory compensation. A quick glance of past reports of the Chairperson of the NSW Victims Compensation Tribunal shows females are overwhelming victims of domestic and sexual violence, which are the top categories that people seek compensation for under the NSW statutory scheme. Our clients are doubly disadvantaged because numerous crime statistics reports show that Aboriginal women and children are over represented as victims of violence compared to their non-Aboriginal counterparts.

Evidence Requirements

The new scheme requires a victim to report the violence they experienced to a government agency if they want to claim for:

- Economic loss; and/or
- A recognition payment.

This requirement is particularly problematic for Aboriginal people who often have a deep mistrust of government agencies, especially Police.

Historically there have been many reasons to fear and avoid the Police and the Department of Family and Community Services at all cost, those reasons included the forced removal of children and deaths in custody.

That legacy remains with many communities and sadly a number of our clients still report racism by police officers and other government workers. In some cases, what we see is the opposite problem when Aboriginal women wanting to report find it difficult to report violence because police are indifferent or dismissive of their allegations of violence.

We also note that there is huge community pressure about remaining silent about abuse, especially domestic violence and sexual assault and many women and children remain fearful of reporting violence to the police.

Aboriginal people, when seeking support or assistance, tend to access Aboriginal specific services, which are more likely to be independent non-government agencies.

In some rural and remote communities the only service that is available is a non-government service, such as an Aboriginal Medical Service.

For victims of child sexual assault while in the care of an institution, the failure of the institution to protect them often creates a huge distrust of all institutions including government agencies.

Other concerns with the new NSW scheme

Community legal centres have raised a number of concerns with the new statutory victims scheme, and more recently have written to the NSW Attorney-General and the NSW Commissioner for Victims Rights about those concerns. Attached to this submission is a copy of this letter dated, 16 June 2014.

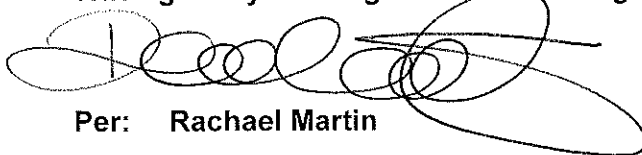
Conclusion

Unfortunately at the timing of this Discussion Paper, our Centre staff are extremely busy trying to finalise dozens of statutory victims compensation matters and regrettably have not been able to make a comprehensive submission to this Discussion Paper. NSW Victims Services is listing all of the transitional matters in order for them to be finalised by the end of June 2015. We understand that this has come at the direction of NSW Treasury. At the time the 2013 legislation was introduced there were approximately 23,000 transitional matters waiting for assessment. As our Centre carries a number of transitional matters we are now focused on putting the best cases forward for our clients, whom will receive much less than they would have received under the old statutory victims compensation scheme.

If, at a later point, the Commission would like more information, or further submissions about statutory victims compensation schemes, please do not hesitate to contact the Centre by email to Rachael.Martin@clc.net.au or calling 02-9569 3847.

Yours faithfully,

Wirringa Baiya Aboriginal Women's Legal Centre

A handwritten signature in black ink, appearing to read 'Rachael Martin', with a large, stylized flourish extending from the end of the signature.

Per: Rachael Martin

Principal Solicitor