



WIRRINGA BAIYA ABORIGINAL WOMEN'S LEGAL CENTRE

SUBMISSION REGARDING THE NSW VICTIMS COMPENSATION SCHEME

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13 April 2012

Review of the NSW Victims Compensation Scheme
GPO Box 2650
SYDNEY
NSW 1171

Dear Sir/Madam,

Review of the NSW Victims Compensation Scheme

We welcome the opportunity to make submissions to this review regarding amendments to the victims compensation scheme in NSW which we anticipate will result in a revision of the *Victims Support and Rehabilitation Act 1996 (NSW)* (hereafter referred to as the *VSRA*).

Wirringa Baiya Aboriginal Women's Legal Centre was established to work primarily with victims of violence, and the core of our casework is victims compensation. This is obviously an extremely important review for us and the issues of victims rights, access to compensation and counseling affect our clients acutely.

We note that such a review has been the topic of discussion for some time, including in the closing comments contained in the Victims Compensation Tribunal Victims Services Chairperson's Annual Reports 2009/2010 and 2010/2011 (hereafter referred to as the *Chairperson's Report - date*). In anticipation of this review, our service has spent a considerable amount of time reviewing the schemes in other states and territories and as such, we are able to draw on the experiences of other schemes in our analysis. The submission that we had prepared, had been done in advance of receiving the Issues Paper and a number of the issues raised in this paper, have already been addressed in our submissions. Where we have not addressed a specific issue, we will address this at the conclusion of our submissions.

Would like to make some general comments about the manner in which this review has been undertaken:

Inadequate information about the review

In spite of our requests for information about the review, there has not been any information released on the Victims Services website, nor on the PriceWaterhouse Coopers (PwC) website. Aside from a single press release published at the end of 2011 just prior to Christmas, no announcements have been made and the information has been piecemeal and provided only through meetings such as the Victims Interagency.

Given that these changes are likely to affect thousands of vulnerable victims of violence, and the service providers who work in frontline support roles, we feel that more information should have been provided and at an earlier date to enable services to consider the issues and be involved in the consultation or make submissions.

The time frame for consultation has been too short

We note that the PwC report is due to be delivered to the Government on 30 June 2012 and we appreciate that this was part of the tender guidelines and as such, outside the control of PwC. However, the community has been given only five (5) weeks in which to read, understand and respond to the issues paper and this timeframe coincides with state school holidays and ANZAC Day.

We note that very many non-profit, community based organisations provide front-line services to victims of violence and there has simply not been enough information provided or time for many of these services to contribute to this review.

To overcome these shortfalls, we make the following recommendations:

- For the PwC Issues Paper and subsequent Report to be made public. This could be published on the Victims Services website and on the PwC website. We note that the Issues Paper has been distributed discreetly and that a proper consultation should involve many more stakeholders, including representatives from frontline support services like women's refuges, the Rape Crisis Centre and other similar services.
- For the Government to release an exposure draft Bill for comment and to promote this Bill widely.

Wirringa Baiya Aboriginal Women's Legal Centre

Wirringa Baiya Aboriginal Women's Legal Centre is a New South Wales statewide 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 and our casework assist clients apply for victim's compensation.

Over the fifteen (15) years of our operation we have given advice and support to many hundreds of women and children who have been victims of violence. We have assisted many women and children access victims compensation and counseling and have spoken to hundreds more who, for whatever reason are unwilling or unable to go ahead with victims compensation claims. We have seen the benefits that compensation provides for women who have often endured many years of physical violence and sexual abuse.

In addition to our day-to-day advice and casework services, we also provide legal advice clinics in several outreach locations including in women's correctional centres and community centres. We also provide support to women through our involvement with the Women's Domestic Violence Court Advocacy Service (WDVCAS) at the Downing Centre and Waverly Court and have some exposure in this capacity to the

process of obtaining and enforcing ADVOs. We have provided numerous community legal education workshops to community members in New South Wales, in both regional and metropolitan locations and some of these workshops are to raise awareness around victims rights and give women the skills and means to access their rights.

As such, our experiences are informed by the women we work with and the clients we support and where relevant, we have used case studies in this submission to illustrate our points.

Terminology

In our submissions we have referred to 'domestic violence' although it is more common practice to use the terms 'domestic violence' and 'family violence' interchangeably. Wirringa Baiya's position is that the dynamic of intimate partner violence should be distinguished from violence or abuse that occurs in other family relationships or in the Aboriginal community, between members of the same kin.

We prefer to use Aboriginal rather than Indigenous. However, we note that a number of reports use the term Indigenous and where we refer to those reports in our submissions we will use the term Indigenous if that is the term used in the relevant report. By using the noun "Aboriginal" we intend to refer to Aboriginal and Torres Strait Islander people.

The victimisation and over-representation of Aboriginal women and children as victims of violence

A recent NSW Bureau of Crime and Statistics (NSW BOCSAR) analysis of domestic violence trends and patterns in the last ten years showed that Aboriginal women in NSW continue to be dramatically over-represented as victims of violence¹. The rate of domestic violence for Aboriginal women is six times more likely than that for non-Aboriginal women.

It has also been found that nationally, Indigenous women are 31 times more likely than other Australian women and men to be hospitalized for family violence related assaults².

Numerous reports have highlighted the problem of child sexual assault particularly in Aboriginal communities and NSWBOCSAR data shows that Aboriginal girls are sexually assaulted at 2.2 times the rate of non-Aboriginal girls.

As such, the victimization that our clients have experienced is extreme and many of our clients present with a trifecta of long-term victimization such as child sexual

¹ Katrina Grech and Melissa Burgess, 'Trends and Patterns in domestic violence assaults: 2001 to 2010' (Issue paper No 61, NSW Bureau of Crime, Statistics and Research, May 2011), 8.

² Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Productivity Commission, (2011), 23.

assault, adult sexual assault and relationships of domestic violence. Many clients have also experienced high levels of child hood neglect and have witnessed domestic violence during childhood, which of course, are now considered child protection issues.

We note that in 2009/2010 there were 14,667 children in out of home care and that Aboriginal children make up over 30% of these children³ which is again a gross over-representation and is indicative of families and communities in crisis. We have acted for many children who have been removed from their families, and placed in out of home care only to have been abused while in care. Removing children from families has not always ensured their safety and protection from violence and sexual abuse.

In our view, the cycle of violence and neglect in Aboriginal communities needs to be broken with culturally appropriate counseling, strategic and targeted support, therapeutic interventions and local solutions to local problems. In our view, victims compensation and counseling can be an important part of this process and we have seen how victims benefit from having the serious wrongs they have suffered properly acknowledged and compensated, which has helped them to heal and move forward. It is with this in mind that we turn to our submissions in relation to the Victims Compensation Scheme in NSW and the Issues Paper.

³ Department of Family and Community Services Annual Report 2010-11.

General comments on the Issues Paper

Projected cost of the scheme and ‘unsustainability’ of the Victims Compensation Fund

We note that the Issues Paper (at page 2) makes a number of key points including the ongoing cost of providing compensation for victims of crime. We note that the Chairperson’s Report 2010/2011⁴ is referenced as a source of information for these projected costs and that the points drawn from that report are that:

- There are around 21, 610 pending claims as of 31 December 2011
- The value of the pending claims is projected at \$239.2 million

We are not accountants, however we feel that it is important to question these figures and we make the following observations in relation to the outstanding, undetermined and unpaid claims:

A substantial number of these claims will be dismissed

We note that the 2010/2011 Chairpersons Report states that 40% of received claims are dismissed, some because they are without merit and some, because they relate to ‘unrelated acts of violence’ and are in fact, multiple claims made by single applicants. It would be logical to assume that a similar proportion of the 21,610 claims pending would also be dismissed on similar grounds. As such, not all of these claims will be awarded compensation.

The average claim in the period 2010/2011 was \$11, 375.00.

It appears that the Chairperson’s figures are based on a raw multiplication of the number of claims x the average (or close to) amount awarded. This is not a logical nor accurate way to predict the future expense of the scheme and the proportion of expected dismissed claims should also be figured into this matrix.

We also note that in the 2010/2011 year, fewer claims were submitted than the 2009/2010 period, due in part (we assume) to the restrictions introduced by the 1 January 2011 changes (limiting the number of old claims through the application Section 23 (A)). Should that trend continue, we would expect to see a further reduction in the annual numbers of claims lodged and the number of successful claims awarded compensation, not an increase.

We disagree with the statement that “Clearly the fund is unsustainable.” (page 6 Issues Paper) and we note the following:

The maximum amounts of compensation for each injury on the Schedule of Injuries have **not** been increased since the Schedule’s inception in 1996. Using the Reserve

Bank of Australia online inflation calculator tool (see <http://www.rba.gov.au/calculator/annualDecimal.html>), we note the following:

Dollar value in 1996	Value in 2011
\$7,500.00	\$11,171.74
\$10,000.00	\$14,895.66
\$30,000.00	\$37,239.15
\$50,000.00	74,478.30

This indicates a 2.7% annual increase, which accumulates to a 49% increase over the fifteen (15) years of the scheme. By contrast, the amounts paid for all injuries awarded under the Schedule of Injuries have remained unchanged during this period and we refer to our submissions below in relation to our recommendations for injuries, especially in relation to the injury of domestic violence.

Additionally, the overall amount paid out by the Fund for awards of “pain and suffering” has actually decreased in the 15-year period 1996/1997 – 2010/2011. In 1996/1997 the Fund paid out \$65.75 million in awards for pain and suffering⁵. By contrast, in 2010/2011, some 16 years later, the total paid for compensation awards, legal costs and disbursements and approved counseling was \$63.2 million (see page 8 of the Chairperson’s Report 2010/2011).

We make these observations in order to clarify some of the projected figures and note that contrary to the assertion that the Fund is unsustainable or the costs are blowing out, the amount paid in compensation has not had CPI indexation increases and additionally, the total cost paid in pain and suffering and legal costs and disbursements and approved counseling in 2012 is actually less than 15 years ago.

We seek clarification on the issue of the figures used to substantiate the claim that the Fund is unsustainable.

⁵ Joint Select Committee on Victims Compensation, *Second Interim Report: The Long Term Viability of the Victims Compensation Fund* (1999), 37.

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1. The rationale for the provision of compensation to victims of violence

We submit that the objectives of the VSRA are appropriate. We are strongly of the view that support and rehabilitation must include compensation, support and counselling. It is our view that any amendment to the scheme must continue to include compensation, counselling and support.

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 institutions⁶. 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 generally who have been harmed by crime⁷. 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 believed⁸. Another similar study found that compensation was of great therapeutic benefit to victims⁹. 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.

⁶ 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.

⁷ 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.

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

⁹ *Ibid.*

Without this support, trauma experienced by victims could be expressed as anger, withdrawal, and other disrupting behaviours¹⁰.

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 victimization¹¹. 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 travel¹². 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.¹³ 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.¹⁴ A 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.¹⁵ 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).

¹⁰ 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.

¹¹ Freckelton, I. 'Criminal Injuries Compensation: A Cost of Public Health' (1999) 7(2) *Journal of Law and Medicine* 193, 203.

¹² Ibid; Barrett-Meyering, 'Victim Compensation and Domestic Violence: A National Overview', 3.

¹³ Megret, 'Justifying Compensation by the ICC's Victims Trust Fund: Lessons from Domestic Compensation Schemes', 125.

¹⁴ Freckelton, 'Criminal Injuries Compensation: A Cost of Public Health', 196.

¹⁵ 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.

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.”¹⁶

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

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.

¹⁶ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGA, 29th November 1985.

2. Elements of victims compensation in New South Wales

In NSW in order to be successful a victim must be able to establish on the balance of probabilities that they were:

1. a victim of a violent crime; and
2. as a result of that violent crime have suffered an injury.

Violent crime

What is an act of violence is defined by section 5 of the *VSRA*, which essentially involves the commission of an offence involving violent conduct resulting in injury or death. Section 24 of the *VSRA* excludes certain persons from being eligible compensation. It is our view that all acts of violence should be covered by the scheme, with the exceptions presently covered in section 24 of the *VSRA*.

Compensation for Injury

Compensation for violent crimes across the jurisdictions in Australia, including NSW, is made up of the following:

Economic loss

- primarily for medical and counselling expenses.
- damage to clothes or items worn at the time of the incident
- loss of actual wages.
- some states also compensate for expenses such as security upgrades

Non-economic loss

- compensation for pain and suffering.

It is our view that compensation should be paid by the victims compensation scheme for:

- pain and suffering (see below for further discussion)
- economic loss (including loss of wages and out of pocket medical expenses)

It is also our view that counselling and rehabilitation should be provided separately and not figured into any maximum amount that is allocated for an act of violence. Access to appropriate medical care and support whether it be for a physical or mental health problem should be a matter of right regardless of whether it was caused by an act of violence or not.

3. The importance of compensating victims of domestic violence and sexual assault for pain and suffering

We submit that the recognition of pain and suffering for victims of domestic violence and sexual assault is of critical importance. The payment of pain and suffering serves as an important symbolic gesture by the State to recognise the harm a victim has suffered. In the 1999 report of the Joint Select Committee on Victims Compensation it quoted the Combined Group of Community Legal Centres NSW (now known as Community Legal Centres NSW Inc.) to sum up the policy behind the provision of payment for pain and suffering:

“The rationale of statutory victims compensation schemes is to provide a forum where victims of crime can obtain some redress by way of recognition and validation of their experiences as victims of crime, to provide some acknowledgement by the state that the person has suffered harm, and through monetary compensation, to provide a tangible expression of the community’s regret”¹⁷.

Crime statistics and victims surveys overwhelmingly show that victims of domestic violence and sexual assault are women and children. As discussed above, statistics show that Aboriginal women and children are over-represented as victims of domestic violence and sexual assault, compared to their non-Aboriginal counterparts. Thus their very vulnerability and disadvantage makes Aboriginal women more likely to be victims of violence.

The crimes of domestic violence and sexual assault are rarely one-off single incidents of violence. These types of crimes are perpetrated by people close to their victims. They are forms of violence used to control and dominate the victims. They are crimes that are often of a long duration, which may involve a pattern or cycle of abuse. They are crimes that involve abuse that can literally go on for years and years.

For the large majority of our clients who experience domestic violence, the violence often has begun for them when they were teenagers or young adults. Thus it has occurred while they were still at school or having just finished school. Also most of our clients had children with their violent partners and generally became a parent young, either in their late teens or early twenties. This in effect means that the large majority of our clients never begun, or had the opportunity to have, paid work and therefore any career or income of their own.

Child sexual abuse by its very nature is a crime against children, from as young as infants to late teenage years. We have had clients who have experienced sexual assault from pre-school ages through to 18 years (and in some cases into adulthood by the same perpetrator). The abuse results in serious disruption to their emotional and cognitive development and thus their schooling, adversely affecting their ability to seek or acquire paid work.

¹⁷ Joint Select Committee on Victims Compensation, *Second Interim Report: The Long Term Viability of the Victims Compensation Fund* (1999), 38.

Thus our clients rarely claim for loss of wages because they were unable to ever seek paid work as a result of their injuries, or are overwhelmingly stay-at-home, single mothers raising their children in difficult circumstances. In relation to our clients it would be meaningless and discriminatory to amend the current scheme to primarily focuses on economic loss, such as loss of wages.

The main injury that results from domestic violence and sexual assault is profound psychological trauma. Certainly many victims of domestic violence will suffer physical injuries ranging from broken burns, scarring to soft-tissue injuries but all of our clients who have suffered domestic violence have been psychologically affected. Our clients who have suffered domestic violence, sexual assault, or in some cases both, typically are diagnosed with:

- Severe depression
- Severe anxiety
- Post-traumatic stress disorder.

In summary, our clients, as a result of the prolonged violence suffer profound pain and suffering which in turn affects their ability to parent, contribute to community and society and their capacity to earn an income.

It is our strong view that victims of domestic violence and sexual assault should be compensated for pain and suffering together with any economic loss they may have suffered.

It is our view that payments for pain and suffering should be lump sum payments. It is our view that our clients are best placed to decide what to use that lump sum payment for. It is paternalistic and offensive to suggest that the State would know better unless a victim has a significant disability that would require the victim to have a guardian and/or financial manager. Some victims may want some financial counselling about how to manage their compensation sum but this should be entirely voluntary. It would be useful for the scheme to provide financial counselling for this purpose.

4. Positive features of the current scheme in NSW

Recognition of pain and suffering

From our Centre's perspective, a very positive feature of the current scheme in NSW is that it recognises the pain and suffering of victims of violence. The 'compensable injuries' on the "Schedule of Injuries" (Schedule 1 to the *VSRA*, hereafter referred to as the *Schedule*) are generally amounts of compensation for the pain and suffering attributed to particular injuries.

We submit that the government should maintain the schedule of injuries with some improvements as discussed below.

In relation to the Schedule it is often difficult to prove particular physical or psychological injuries for victims of domestic violence and sexual assault. In our experience there are rarely physical injuries as a result of sexual assault. In many cases for victims of domestic violence the main physical injuries are soft tissue injuries such as bruising to the body or black eyes, which are not recognised as injuries on the schedule. The specific psychological injury of "Category 2: chronic psychological or psychiatric disorder that is severely disabling" has proven very difficult to establish for many of our clients who have experienced domestic violence or sexual assault.

Fortunately the Schedule has included the offence -based injuries of "Domestic Violence" and the three categories of "Sexual Assault". For all of these injuries a victim needs to only establish physical or psychological harm, which thus recognises and compensates the frequent bruising and black eyes and the psychological disorders not considered to be severe enough. We submit these injuries of domestic violence and sexual assault are important positive features of the current scheme which must be retained, although we submit that the amount of compensation awarded for the domestic violence is inadequate, as further discussed below.

It also should be said that the Schedule of Injuries does not comprehensively compensate victims for all that they suffered. Back in 1997 the Joint Select Committee on Victims Compensation noted:

"This Schedule is not considered to be an accurate compensatory measure of what a victim has suffered, in that it does not attempt to place the victim back into the position he/she was in before the incident.

In fact, it largely does not even provide for differing degrees of physical impairment.

What it is designed to do is to recognise that the victim has suffered as a result of a crime by the provision of a token financial gesture. How large that token

gesture should be without insulting the victim is a matter of opinion.”¹⁸

We also note that the maximum amounts of compensation for each injury on the Schedule of Injuries have **not** been increased since the Schedule’s inception in 1996. We also point out that the Joint Select Committee on Victims Compensation in its report stated that in 1996-97 the Victims Compensation Tribunal paid out \$65.75m in awards for pain and suffering¹⁹. However, in 2010/2011, some 16 years later, the total paid for compensation awards, legal costs and disbursements and approved counseling was \$63.2 million²⁰.

We do not think that only permanent injuries be compensated. There are many injuries that can take many months or years to recover from thus ultimately not permanent but have nonetheless caused significant pain and suffering. Certainly psychological injuries such as severe depression and severe anxiety caused by long term violence can last for many months if not years.

As stated above, the ‘Schedule of Injuries’ in no way compensates a victim to the extent of placing the victim back in the position they were prior to the violence, as would be the case if seeking damages in a personal injury claim at common law. What is an appropriate amount of compensation for the State scheme to award for pain and suffering, depends on the nature of the act of violence, the duration of the violence and the nature and extent of the injury.

Maximum and minimum amounts of compensation

It is difficult to quantify the amount of suffering victims of sexual assault and domestic violence endures, as the harm, especially the psychological harm, is so profound. Having said that, we think that the amount of compensation for pain and suffering paid to victims of domestic violence and sexual assault in other schemes such as Queensland and Victoria is highly inadequate and insulting (see below for our summaries of these two schemes).

The current minimum for the compensable injury of domestic violence, and the lowest category of the sexual assault injury, is \$7,500.00. It is our view that the maximum of \$50,000.00 should be increased and adjusted to the CPI as calculated from 1996, which according to the Reserve Bank is \$74, 478.30 (so say \$74, 500.00).

We would submit that a reduction in the amount of compensation awarded for the compensable injuries of domestic violence and sexual assault (as opposed to an over-all minimum amount, which would include economic loss such as loss of wages) should *only* be contemplated if there is an increase in the maximum that could be

¹⁸ Ibid.

¹⁹ Joint Select Committee on Victims Compensation, *Second Interim Report: The Long Term Viability of the Victims Compensation Fund* (1999), 37.

²⁰ See page 8 of the *Chairperson’s Report 2010/2011*.

awarded for those injuries. Having said that, we submit that the minimum for both compensable injuries of domestic violence and sexual assault should not be any lower than \$5,000.00 to be of any meaningful benefit to the recipient.

We would be happy to be party to any other consultations on this issues. See below for a further discussion of an alternative scheme for payment of pain and suffering.

Reporting to police requirements

We also acknowledge the importance of the current scheme recognising that many victims of domestic violence and sexual assault find it very difficult to report violence for a range of complex, legitimate psychological reasons including retaliation by the offender. The current law does not require the victim to report the violence to police to be compensated having taken into account the nature of the relationship between the victim and the offender, fear of retaliation (see section 30(2) of *VSRA*) and the fact that she may very well have reported it to a health practitioner (see section 30 (1)(b1) of *VSRA*). We note that Queensland and Victoria are also more progressive in their reporting requirements.

Reporting to police is an especially complex issue for Aboriginal women and children. Historically there have be many reasons to fear and avoid the police 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. 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. As most violence occurs within families and perpetrators are more likely to be close family members, we wish to reiterate that shame and pressure on victims to remain silent occurs for a number of reasons.

We have many clients who are too scared to report violence because of repercussions from family members and the wider community. These women and children have limited options or ability to report.

This is the case in urban, rural and remote communities and we note that the very low level of conviction rate for sexual assault also poses a barrier for women and children wishing to report as they feel that they may not be believed or may cause more trouble within their own families and community.

Recommendation

We submit that the matters that are considered by an Assessor when determining whether an act of violence was reported to the police, as provided in section 30 (2) of *VSRA*, should be retained.

Time limits and leave being granted in domestic violence, child abuse and sexual assault claims

We also commend the provision that enables victims of domestic violence, child abuse and sexual assault to apply outside the two (2) year time limit. This is a clear acknowledgement that the significant trauma victims suffer impedes their ability to bring claims within the required time limits. Certainly many of our clients struggled with the consequences of the violence for many years before reaching a point where they could seek compensation. Some of our clients self-medicated with alcohol or drugs for years, some became so dysfunctional that they committed crimes to support their habits and found themselves in gaol. Others describe a life of half living, feeling numb and distant from their children and friends, or highly anxious and phobic and housebound.

Recommendation

We repeat the point made above that there are extensive community pressures and often negative outcomes for our clients who speak out violence and it may take two five or ten years to leave a community and set up a new life that is safe and away from the perpetrator and the community where the abuse occurred. Two years is not an appropriate time frame for victims of domestic violence or sexual abuse to apply for compensation and we are firmly of the view that discretion should be maintained to allow late claims for victims of domestic violence and sexual assault.

Although all of our clients find the victims compensation process emotionally exhausting and gruelling, almost all found it as an cathartic and validating experience that helped to bring some closure to the violence they had experienced.

We note that the Chairperson in the two previous annual reports highlighted the issue of applications being made outside the two-year time limit. The outgoing Chairperson Mr Cec Brahe the *Chairperson's Report 2007/2008* also flagged the limitation period as an issue for law reform but did not make any particular recommendation²¹.

The current Chairperson of the Victims Compensation Tribunal has recommended that the time limit for claims outside two years be capped at 20 years from the date of the violence or 20 years from when the victims turns 18 in the case of child victims²². We do not support this recommendation. This recommendation would disproportionately affect Aboriginal women and children.

Research by the NSWBOCSAR consistently shows that Aboriginal women and children are over-represented as reported victims of sexual assault and child sexual assault. Of course the true extent of sexual assault and child sexual assault in Aboriginal communities is unknown. The report²³ of the Aboriginal Child Sexual Assault

²¹ *Chairperson's Report 2007/2008*, at page 28.

²² *Chairperson's Report 2010/2011*, page 33.

²³ Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future* (2006), 48 ('*Breaking the Silence Report*').

Taskforce commissioned by the NSW Attorney-General's Department, reported that child sexual assault was considered to be a 'huge issue' in every community consultation.

It is well known that child sexual assault and sexual assault by their very nature are hidden and secret crimes. These crimes are rarely disclosed until many years later after they occurred. The *Breaking the Silence Report* made a number of findings about the significant barriers to disclosure by Aboriginal victims of child sexual assault. These barriers include the following:

- Child sexual assault was not well understood in Aboriginal communities²⁴
- Child sexual assault was inter-generational and in some communities normalized²⁵
- Child sexual assault was seldom reported by Aboriginal victims due to many factors including: fear, shame and guilt; lack of understanding about what is sexual assault; threats from the perpetrator; pressure from their family; confusion about their relationship with the perpetrator; fear of not being believed; actual experiences of not being believed and disclosures not being acted upon; having no-one to tell; and/or not knowing who to tell²⁶
- The devastating effects of sexual abuse which led to severe depression, self-harm, substance abuse and suicide attempts²⁷

It is noted that this report was released in 2006 and therefore shows the contemporary picture of the significant barriers to disclosure. We submit that that these barriers were even greater and even more pronounced thirty and forty years ago when there was systemic racism towards the Aboriginal community, paternalism and the forced removal of Aboriginal children.

Furthermore, the *Breaking the Silence Report* also highlighted a profound lack of knowledge about Victims Services and victim's compensation within the Aboriginal community²⁸. This report also noted that Victims Services' own review of service delivery to the Aboriginal community for 2001 to 2003 showed that although Aboriginal people are 2-6 times more likely to become victims of crime, they are five times less likely than a non-Aboriginal victim of crime to lodge a victims compensation claim²⁹. Although in recent years the number of Aboriginal applicants has increased in the last financial year only 8% of the total number of claims received were Aboriginal.

It is only now that many older Aboriginal women have the courage, knowledge and psychological well being to come forward to disclose sexual abuse. We submit that it would be demoralising, unjust and tragic if older Aboriginal women were unable to

²⁴ *Breaking the Silence Report*, 51.

²⁵ *Breaking the Silence Report*, 50 – 51, 61.

²⁶ *Breaking the Silence Report*, 52.

²⁷ *Breaking the Silence Report*, 56.

²⁸ *Breaking the Silence Report*, 216-217.

²⁹ *Breaking the Silence Report*, 213.

make an application for victims compensation for the sexual abuse they experienced as children or young women. Many of our clients tell us of the critical role the compensation process played to assist them to heal. Many of our clients have cried with the news of the decision that the Victims Compensation Tribunal believed that they were sexually abused many years ago and acknowledged the harm it caused.

The Chairperson's Report 2010/2011 states that 398 claims were lodged where the victim was 18 years or younger at the time the alleged sexual assault offence was committed but where the victim was aged between 41 and 90 at the time of lodgement³⁰. However, we would argue that this is a very small percentage of the claims lodged for that year being 8,854. What is not made clear is if in fact a number of those claims were by the same victim for acts of violence, which would make them subject to section 5(3) of the *VSRA* and thus found as related by the Tribunal resulting in the 'dismissal' of the other related claims. The Chairperson estimates that more than half of these claims are unsuccessful but offers no view as to why they are unsuccessful³¹. We have ran a number of claims for sexual assault victims who experienced violence more than 20 years ago and our clients have largely been successful. The Chairperson also stated that these claims are time consuming, which we find surprising given that most of these claims rely on evidence provided by Statutory Declaration only. The Chairperson does not explain why this is this the case³².

The same Chairperson's Report refers to domestic violence victims being successful for acts that occurred more than 20 years ago. The Chairperson states that these claims will often be successful and states that it is his view that "*they certainly do not represent the best use of the sparse resources of the Fund*"³³. It is our submission that victims of domestic violence who have been living with the trauma of violence more than 20 years ago, but are still affected, are equally deserving of compensation as a victim whose violence only ceased say one year ago. If anything, the trauma suffered by those victims who endured violence many years ago is more profound because there was less support and assistance to both end the violence and deal with the impact.

It is not clear from the Chairperson's Report 2010/2011 how much compensation is in fact paid to victims of violence who were victims of violence more than 20 years ago. However, it is our submission that victims of domestic violence and sexual assault should be prioritised by the scheme.

Recommendation

It is our submission that the current provisions in relation to leave should be retained. It is our view that it is entirely appropriate that victims of domestic violence, sexual assault and child abuse should be given leave unless there is a good reason not to, as per section 26(3) of the *Act*.

³⁰ *Chairperson's Report 2010/2011* at page 13 and 33.

³¹ *Ibid*, 33.

³² *Ibid*.

³³ *Ibid*.

We oppose the recommendation by the current Chairperson that the time limit for claims outside two years be capped at 20 years from the date of the violence or 20 years from when the victims turns 18 in the case of child victims. If the government is seriously considering legislating a final limitation date on all claims we strongly argue that 20 years after the act of violence is far too short a period and should not be considered as appropriate.

5. How the current scheme can be improved

Domestic Violence Injury

As discussed above there is an injury available to victims of domestic violence called 'Domestic Violence'. While we think it is a positive feature, it is our view that the amount for this injury is highly inadequate. The range of compensation for this injury is between \$7,500.00 and \$10,000.00. This means that a victim of five or twenty years of ongoing physical violence could at most only be awarded \$10,000.00 minus \$750.00 (section 19A(1) of *VSRA* deduction) unless she can establish:

- Category 2, chronic psychological or psychiatric disorder that is severely disabling; or
- successfully make claims for unrelated acts of domestic violence (which is increasingly difficult in light of the Court of Appeal decision *VCF v JM [2011] NSWCA 890*).

A sexual assault victim who, having established a pattern of sexual abuse, can be awarded between \$25,000 and \$50,000. Compare this to a victim of a single violent assault by a stranger, which resulted in a fractured kneecap with full recovery who can be awarded \$18,000 (minus \$750 for the section 19A (1) deduction).

The 'domestic violence' injury was introduced following the removal of the injury of 'shock' which had a number of categories based on the duration of the injury. This was the recommendation of the Joint Select Committee on Victims Compensation in 1999.

It is our submission that the inequity of the compensation amount for domestic violence needs to be addressed as a matter of priority.

We suggest that the range of compensation for the injury of domestic violence be between \$7,500 and the maximum allowed by the *VSRA* (which is currently \$50,000) to give an Assessor more discretion to award higher awards for victims who have established a significant pattern of abuse, or who have established significant physical and/or psychological harm. We have considered suggesting different categories for domestic violence but there are some difficulties in defining what are the circumstances or elements that define a category that is worth more than another category, in terms of quantum.

Recognising pregnancy and loss of foetus as types of injury

We think that the definition of an injury should include pregnancy and the loss of a foetus as injuries that can be sustained by a female. This is an important acknowledgement of the damage caused by unwanted pregnancies that can result from sexual assault and violent relationships and the miscarriages that also occur when women are assaulted while pregnant. This would in effect mean creating a separate compensable injury for both injuries, or, if our recommendation is accepted to increase the amount of compensation for the injury of 'domestic violence',

recognising these injuries as serious harm to warrant a greater amount of compensation. Alternatively, if a scheme is adopted similar to the ACT, recognition of these injuries in any assessment of pain and suffering.

6. Some ideas for change

Payments of pain and suffering: prioritising victims of domestic violence, sexual assault and homicide

It is our submission that victims of domestic violence, sexual assault and family members of homicide victims should be given the highest priority of any victims compensation scheme. As stated above, the nature of domestic violence and sexual assault is such that they are crimes of long duration resulting in significant trauma.

The profound trauma of losing a family member to homicide is obvious.

We submit that **if** any removal of injuries from the Schedule of Injuries, or reduction in the amount of awards for compensable injuries were to be contemplated, compensation for the injuries of domestic violence and sexual assault be quarantined from those cuts. We would add that, if anything, the compensation amounts for those injuries should in fact be increased.

We note that in the Australian Capital Territory payments for pain and suffering is called 'Special Assistance' (see section 10 of *Victims of Crime (Financial Assistance Act) 1983 (ACT)*) and is only available to:

- victims of sexual offences (up to \$50,000)
- a police officer, ambulance officer or firefighter, who sustained a criminal injury in the course of the exercise of his or her functions as a police officer, ambulance officer or firefighter (up to \$50,000)
- victims of an "extremely serious injury", which is defined in section 11 of the ACT legislation and largely focuses on permanent impairment, disfigurement or disorders (up to \$30,000.00)
- related victims (as defined) of a homicide victim (up to \$30,000 to be shared by all related victims in amounts considered appropriate by the Court)

We think that the ACT scheme is highly inequitable for domestic violence victims who would have to establish an extremely serious injury, compared to sexual assault victims who only need to establish 'pain and suffering'. We also question that one of the priorities of the special assistance is for emergency services personnel.

Nonetheless, we think it is an interesting to approach to make compensation for pain and suffering payments only available to certain types of victims, **if** the government was contemplating any changes to the schedule of injuries.

If the government were to consider the ACT scheme we strongly argue that victims of domestic violence and sexual assault should only need to establish physical or psychological harm to be awarded for pain and suffering.

It is our view that the maximum amount of compensation for pain and suffering paid to victims of domestic violence and sexual assault should be greater than the current maximum of \$50,000.00. At the very least we submit that the maximum should be \$74, 478.30.00 (being \$50,000.00 adjusted to CPI increases from 1996). To offset this

increase the minimum amount could be reduced, but to no lower than \$5,000.00. This would give more discretion to compensate according to the seriousness of the offence/s, the duration of the violence and the seriousness of the injury.

We note that nearly a third of the claims lodged in NSW in 2010/2011 were for assaults other than sexual assault and domestic violence³⁴ While it is not clear how many of those claims were successful it would seem that 43% of awards made were for injuries other than the compensable injuries of domestic violence and sexual assault (see page 20 of the 2010/2011 Chairperson's Annual Report).

If the government were to consider making pain and suffering payments only available to sexual assault victims, domestic violence victims, family member of homicide victims and other victims who have suffered an extremely serious injury, then there should be a significant increase in the maximum payment allowed for the Victims Assistance Scheme. This would be particularly important for victims of crime who suffer injuries that are not covered by Medicare, namely dental work, the cost of which is too expensive for many people. We would also advocate that the minimum for the VAS be lowered. There are some costs, such as a new lock for a door, that may be below \$200.00 but still too expensive for victims of crime on a Centrelink benefit or very low income.

Family members of homicide victims

While we think family members of homicide victims should be a priority for the scheme we think there should be a focus on paying awards of pain and suffering to children under 18 of the homicide victim and adult dependents of the homicide victim.

The family members of a homicide victim who can apply are defined by section 9(3) of the *VSRA*. In determining who should be compensated if there are two or more family victims dependent family members take precedent over non-dependent family members. However, the challenge sometimes lies in proving dependency.

We acted for two young children whose father was murdered. The children's parents had separated due to severe domestic violence inflicted by the father on their mother. The father took little responsibility for the children and was unreliable in his contact with his children and paid no child support. When he died four other members of his family made claims for compensation as family victims. The mother of the children made claims on the behalf of her two children. As the homicide victim was a largely irresponsible parent who contributed little to the care and financial support of his two children we were not able to convince the Tribunal that the children were dependent on their father at the time of his death. This meant the award of \$50,000 minus the cost of a funeral, which somehow came to just over \$12,000, had to split between six family members. We submit the law is unjust in this respect. We submit that children of a homicide victim under the age of 18 years of age should not be required to prove dependency. They should be prioritised as a matter of right.

³⁴ *Chairperson's Annual Report 2010/2011*, Figure 5a on page 18.

Recommendation

We recommend that the law be changed so that only:

- children under the age of 18 of the homicide victim (including step children, children of whom the victim is a guardian and unborn children of the victim); and
- family members who were dependent on the homicide victim

should be able to claim compensation for pain and suffering. This of course does not exclude other family members from seeking counselling from Victims Services.

Secondary victims

It is our view that it is very difficult for a secondary victim to be awarded compensation for pain and suffering. The only injury available to secondary victims is Category 2: chronic psychological disorder that is severely disabling, which is difficult to establish for primary victims let alone secondary victims. What is more, a secondary victim can only be awarded compensation if there are any funds left over from the pool of money allocated to the act violence (see section 19 (2) of the *VSRA*).

The Annual Reports of the Chairperson of the VCT do not state how many secondary award claims were successful and how much compensation was awarded for those claims, but we suspect it is very small. We question why this category even exists if it is so difficult to establish.

In particular, we are concerned that children who have witnessed long-term domestic violence can only claim as a secondary victim with the only real option to claim for the injury of Category 2: chronic psychological disorder that is severely disabling.

We submit that children who have witnessed domestic violence and/or sexual assaults of other family members should not be limited to only being able to claim the compensable injury of Category 2: chronic psychological disorder that is severely disabling. We submit that they should be entitled to claim the injury of 'domestic violence' or the appropriate 'sexual assault' categories.

Making institutions more accountable for compensating victims who were abused while in care

We do not know how many applications for compensation relate to victims who were abused in care ran by religious institution and the state. Nonetheless, we advocate that those institutions and the state need to recognise the responsibility for that harm caused and appropriately and adequately fund reparation schemes for those victims (see the submissions on this below).

We note the considerable difficulties that victims of sexual abuse by Catholic clergy face when seeking appropriate compensation from the Catholic Church. This is an

issue that has been identified by the Upper House Greens Member, David Shoebridge, who is advocating for law reform on this issue.³⁵

While we do not claim to have any expertise in suing religious institutions for the sexual abuse of people in their care, we submit that the government needs to do all that it should to remove any legal blocks that impede that remedy.

³⁵ 'Roman Catholic Property Church Trust – Property Amendment (Justice for Victims) Bill 2011: Consultation Paper', David Shoebridge, Member of the NSW Legislative Council (2011).

7. Benefits and disadvantages of the schemes in other states and territories

In considering this review we have undertaken a review of the victims compensation schemes in other Australian states and territories. We have noted some of these provisions throughout our submission however, by way of summary, we have highlighted the benefits and disadvantages as we see them, of the alternative schemes that we understand will be considered by the review.

a. Australian Capital Territory: *Victims of Crime (Financial Assistance) Act 1989*

Advantages of the scheme

- In terms of eligibility the ACT scheme, in addition to primary victims and family member victims (referred to as 'related victims') is also available to a person responsible for the care of a primary victim who suffered a 'criminal injury' (see section 10(3)). This recognizes that other family members or partners will suffer a loss when caring for a primary victim who has been the victim of a violent crime.
- The definition of the related victim refers to defined family members who "had a genuine personal relationship with the victim at the time of the victim's death" (see section 16). We think this is a good thing as currently in NSW family members (as defined) could be completely alienated from the homicide victim at the time of death and still make an application for compensation and be successful.
- The definition of injury includes pregnancy, which is not available in NSW. It also includes mental shock or nervous shock (see the 'Dictionary' at the end of the *Act*)
- Victims of sexual assault can be compensated for pain and suffering up to the amount of \$50,000.00 (see section 10(1)(f). Victims need to only establish pain and suffering.

Disadvantages of the ACT scheme

- Victims of domestic violence can only be compensated for pain and suffering if the injury is an "extremely serious injury" and the victim has obtained the assistance from the victims services scheme that is reasonably available, unless the person is physically incapable of benefiting from the scheme. The maximum is only \$30,000.00 compared to \$50,000.00 for the other primary victims who can seek awards of pain and suffering.
- The definition of an "extremely serious injury" is very much focused on permanent impairment, whether it be the impairment of a bodily function, disfigurement, loss of foetus, or mental disturbance or disorder (see section 11). It would seem quite difficult to establish, as the impairment is only considered to be extremely serious if:

“it results in a great and permanent reduction in the injured person’s quality of life; and

it is otherwise extremely serious.

(3) An impairment, loss, disfigurement, disturbance or disorder is not to be taken to be extremely serious, if the injured person were to undergo suitable medical or other treatment at any time—

(a) it would cease to be extremely serious because of an alleviation of the reduction in the injured person’s quality of life occasioned by the injury; or

(b) it would otherwise cease to be extremely serious.” (Section 11)

- Legislation only covers crimes that occurred after 30 June 1983.
- An award of compensation cannot be made if the violent crime was not reported to the police (see section 12). There does not seem to be any exceptions to this requirement.
- Compensation can be reduced if the victim (except for sexual assault victims) was intoxicated at the time the injury was sustained (see section 31(1)- (3)). This is very concerning for domestic violence victims, as we fail to see the relevance of whether a woman was intoxicated or not at the time she was assaulted by the offender.
- Legal costs are charged to client and not reimbursed by the scheme. But fees are set by regulation. At the moment maximum that can be charged is \$650 (cl 3A of Regulation 1998).
- The time limit is only 12 months after the day of injury or property damage. We note that Court can extend period “If the court considers it just to do so” but there are no specific provisions for leave for victims of domestic violence and sexual assault.
- The Magistrates Court assess applications and the ACT government, as represented by the Australian Government Solicitors, can join the proceedings. If the ACT government does not join proceedings the application is decided on the papers. If, however, it opposes the application will got to a hearing for the Magistrate to decide.

Other observations of the ACT scheme

- The definition of primary victims who can seek payment for pain and suffering also includes emergency services personnel such as police officer, ambulance officer or firefighter who in course of job criminal injury suffered can claim ‘special assistance’ of up to \$50,000.00 for “pain and suffering” (But such a victim needs to have exhausted workers compensation remedies first)

- The ACT scheme also has a category of victim called an “eligible property owner” whose property is damaged while assisting a police officer in the course of preventing a crime, arresting and offender or rescuing a victim.

b. Northern Territory: *Victims of Crime Assistance Act and Regulations (Northern Territory)*

Benefits of the NT Scheme

- Increase in financial assistance (compensation) in situations where the applicant has received an award. (An example would be where an applicant was entitled to make a claim for financial losses and was not aware until after the award was made).
- Non-core expenses (security upgrade, home relocation) can be claimed where ‘exceptional circumstances’ and necessary to victim’s recovery.
- Applicants in domestic violence claims have the option of not submitting evidence of injury and still be entitled to receive compensation in the lower range (currently \$7,500).
- Usually takes 12 months for a complex claim to be assessed and 2 to 7 months for a simple claim.
- Compensable injuries include:
 - Pregnancy (\$40,000)
 - Female genital mutilation (\$10,000 - \$25,000)
- Costs in appeal matters- 80% of the costs allowable as per Supreme Court Rules.

Disadvantages of the NT scheme

- Compensation for psychological or psychiatric disorder is relatively low considering the chronic injury- (\$7,500 - \$10,000)
- Costs not payable other than solicitor’s reasonable disbursements (does not include counsel’s fees. s54(3))
- Restitution procedures don’t require the offender to be convicted.

c. Queensland: *Victims of Crime Assistance Act 2009 (Queensland)*

Benefits of the Queensland scheme

- The scheme is an administrative scheme with applications being assessed by government assessors, which as is in the case New South Wales, does not require a court hearing and complex litigation.
- The maximum amount of assistance a primary victim can seek is \$75,000.00. However, the amount of pain and suffering that can be awarded is highly inadequate, as discussed further below.
- We understand that in most cases applications are assessed within a matter of 6 months.

- The maximum amount available to family victims of a homicide (referred to as 'related victims') is \$100,000 if there is more than one related victim.
- A related victim can also seek assistance for the loss of the primary victim's economic support:
 - “an amount of up to \$20000 that, but for the death of the primary victim of the act of violence, the related victim would have been reasonably likely to receive from the primary victim, during a period of up to 2 years after the primary victim's death” (section 49(e)).
- The definition of injury includes pregnancy (section 27(d)). This is an important acknowledgement of the damage caused by unwanted pregnancies that can result from sexual assault and violent relationships.
- The definition of injury includes a sophisticated understanding of the impact of sexual assault:
 - “(f) for a sexual offence, the totality of the following adverse impacts of the sexual offence suffered by a person—
 - (i) sense of violation;
 - (ii) reduced self worth or perception;
 - (iii) lost or reduced physical immunity;
 - (iv) lost or reduced physical capacity (including the capacity to have children), whether temporary or permanent;
 - (v) increased fear or increased feelings of insecurity;
 - (vi) adverse effect of others reacting adversely to the person;
 - (vii) adverse impact on lawful sexual relations;
 - (viii) adverse impact on feelings; or
 - (g) a combination of matters mentioned in paragraphs (a) to (f).” (Section 27(f) of the *Act*)
- In the complex formula for payments of special assistance to primary victims (as discussed below) the circumstances of the offence is to be considered when establishing which category an offence falls into. One the circumstances considered is any 'serious bodily injury' suffered by the primary victim, which includes the loss of a foetus or the reduction in the ability to have children. We think the loss of foetus as bodily injury to the woman is an important injury to acknowledge for domestic violence victims, as we have had a number of clients over the years who have been assaulted while pregnant and resulted in the loss of that foetus. (see section 3 of Schedule 2 to the *Act*)
- Time limit for child victims does not run until victim turns 18 years of age.
- The legislation has good leave provisions, as is in the case in NSW. Time limits in Queensland can be extended with consideration of the person's age at the time of the offence and the alleged offender's position of power, influence or trust in relation to the victim. Examples given by the legislation include a person's parent, carer or spouse. These are important considerations for victims of child sexual assault, sexual assault and domestic violence.

Disadvantages of the Queensland scheme

- The focus of the scheme referred to as ‘financial assistance’ is very much economic loss. For all categories of victims compensation is paid for:
 - Reasonable counseling expenses
 - Reasonable medical expenses
 - Loss of wages (the amount available varies)
- The maximum award for pain and suffering is \$10,000.
- Compensation for pain and suffering is only paid to primary victims (referred to as ‘special assistance’ and family victims of a homicide (referred to as ‘distress assistance’). While we have no objections to the focus on primary victims and family victims of a homicide, the amount of compensation paid for pain and suffering is highly inadequate and we suggest insulting to victims of horrific crimes such as domestic violence and sexual assault.
- Special Assistance for primary victims is largely offence- based with a sliding scale depending on the seriousness of the act of violence and the resulting injury. The awards for each offence is summarised in the table below (see Schedule 2 of the *Act*).

Special Assistance category and quantum for award	Relevant offences
Category A act of violence \$5000 to \$10000	<ul style="list-style-type: none"> • Attempted murder • Rape • Incest with child under 16 or person with impaired capacity • Maintaining a sexual relationship with person under 16
Category B act of violence \$1301 to \$3500	<ul style="list-style-type: none"> • attempted Category A offence • a sexual offence (anything other than Category A sexual offences) • grievous bodily harm • offence defined by Criminal Code section 317 (e.g.: robbery whilst armed or burglary with violence, torture or kidnapping)
Category C act of violence \$651 to \$1300	<ul style="list-style-type: none"> • an attempt to commit Category B offence • serious assault as described in the Criminal Code, section 340; • robbery • unlawful wounding; • assault occasioning bodily harm, including whilst armed or in company
Category D act of violence \$130 to \$650	<ul style="list-style-type: none"> • an attempt to commit a category C act of violence; and • an act of violence involving an assault, stalking or deprivation of liberty

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NB: We note that consideration is also given to the “circumstances” of the offence. So the category of the offence may be lower in the hierarchy but the circumstances make it more serious. If the circumstances do make it more serious it is deemed a higher category.

- A primary victim, as is the case in NSW, need to establish that they have been the victim of an act of violence that has resulted in injury. The definition of injury includes a good definition of the impact of sexual assault but a domestic violence victim would have to establish: bodily injury, mental illness or disorder, intellectual impairment; pregnancy; or disease (section 27 of the Act). This in effect means that it is much more difficult for a domestic violence victim to establish injury than a sexual assault victim. Queensland needs to create a more appropriate injury for domestic violence.
- An applicant can have a legal representative assist them with the application, but legal fees will only be paid up to the amount of \$500.00.

d. South Australia: *Victims of Crime Act 2001 (South Australia)*

Benefits of the scheme

- If the offender is prosecuted, the sentencing court can order the offender to pay compensation to the victim. The court collects this money. It is important to let the prosecutor know if you want to ask for this compensation, as the request is dealt with when the offender is sentenced.
- Funeral expenses up to \$7,000.00
- Applications must be made by a victim - 3 years after the commission of the offence; and for an application for the death of a victim - 12 months after the date of death.
- For children the time limit runs from the date on which the child turned 18 years old.
- In South Australia there is a Commissioner for Victims’ Rights who can:
 - Makes recommendations to the AG on how to use Government resources to effectively and efficiently help victims of crime
 - Make recommendations to the AG on matters arising from the performance of these resources
 - Monitor compliance with the Declaration of Principles Governing Treatment of Victims in the Criminal Justice System
 - Consults with the DPP in the interests of victims and in specific cases about matters such as victim impact statements and charge bargains
 - Consults with the judiciary about court practices and procedures and the effect of these on victim
 - Monitor the effectiveness of laws regarding victims and victims families
 - Undertakes tasks that have been assigned by the AG, which are consistent with the *Victims Crime Act 2001*

Disadvantages of the scheme

- Maximum cap on old applications based on when the scheme was introduced in 1969.

Date of offence?	\$ Maximum
Post 1 September 1990	50,000
Between 1 Aug 1987 – 1 September 1990	20,000
Between 1978 – 1 August 1987	10,000
Between 1975 - 1977	2,000
Between 1969 - 1974	1,000

- Making multiple claims for separate acts of violence is very hard – and most do not succeed.
- Compensation is only available if an *offence* can be proved *beyond reasonable doubt*. If the *offender* was successfully prosecuted, there will be no difficulty in proving the offence.
- It can happen that no offender is caught, or that someone is charged but the *prosecution* does not go ahead, or it goes ahead but fails. In those cases, a claim can still succeed if there is enough evidence that the victim's injuries resulted from a crime. Independent evidence corroborating the crime may be needed. This can take many forms and is not limited to eyewitness evidence. For some cases where the offence cannot be proved, a grace payment may be available.
- If successful, then the costs are worn by the Crown, but if the claim is unsuccessful, some solicitors may charge clients for the cost of preparing the application (set by regulations).

e. Tasmania's scheme: *Victims of Crime Assistance Act 1976 (Tasmania)*

Benefits of the scheme

- Victims Support Services part of the Department of Justice since July 2001, responsible for:
 - the administration of the Victims Register and the provision of information to victims from that Register
 - liaison between the victim and other divisions of the Department of Justice
 - operation and management of the Victims of Crime Service
 - provision of information to victims regarding court processes
 - the provision of the Court Support and Liaison Service for victims of family violence (as part of the 'Safe at Home' project)
 - co-ordination of Victim/Offender Mediation in a limited number of appropriate cases
 - administration of Victims of Crime Assistance (financial assistance for victims of crime) and the provision of assistance to the Criminal Injuries Compensation Commissioners.
- Administrative scheme not a court based scheme therefore uses Government appointed assessors or commissioners

- Option to attend private oral hearing to “tell their story” however not talk about amount of award
- 3 year limitation period with extension where special circumstances justify it
- 3 categories of payment to solicitor depending upon complexity of application
- Includes pregnancy as an injury
- Perpetrators specifically excluded from attending hearings with the Commissioner
- Can make interim awards s5(6)
- Can get leave from Commissioner if refused an award or got an award to make a further application for an award based on the same offences if because of the circumstances it is just to do so for example more information has been obtained s5(5)

Disadvantages

- Wide discretion of commissioner to make awards of compensation to have regard to any circumstances they think are relevant, they may call the applicant to appear before them and if they don't not make an award
- Emphasis on reporting matters to the police
- Psychological injuries weighted less than physical injuries
- Awards small maximum \$30,000 single offence
- Difficulty in getting up multiple applications, however where there related acts or more than 1 offence compensation can go up to \$50,000
- Can't make an application for violence that happened before 21 June 1976
- Availability of scheme not widely known
- Can't get an award unless commissioner believes that you have exhausted the opportunity for civil award s5(4)
- S10 Decision of Commissioner final no appeal from it

Neutral Aspects of the scheme

- Criminal Injuries Compensation Commissioners must be solicitors – S2A
- An application for compensation must be made within 3 years of lodging application s 7(8)
- Restitution s 7A

Legal test

- Subject to section 6, compensation may be awarded under this Act where a person is killed or suffers **injury** –
 - (a) as a result of the act of another person that constitutes an **offence** or would have constituted an offence, but for the fact that that other person had not attained a specified age, or was insane, or had other grounds of excuse or justification at law for his or her act; or
 - (b) in assisting a police officer in the exercise of the power to arrest a person or to take action to prevent the commission of a crime by a person.

2 (2) For the purposes of this Act, references to an injury shall be construed as including references to any impairment of bodily or mental health, and also to becoming pregnant.

f. Victoria's scheme: *Victims of Crime Assistance Act 1996 (Victoria)*

Benefits of the scheme

- For family members of homicide victims, you need to *show* a **genuine personal relationship** with the victim at the time of the victim's death **and** dependency and the applicant is
 - the spouse of the victim
 - a parent, guardian or step-parent of the victim
 - child or step-child of the victim or some other child of victim
 - a brother, sister, step-brother or step-sister of the victim
- injury includes pregnancy
- funeral costs can be paid
- interim financial assistance can be paid, for example for urgent medical or other costs
- fees are paid by a schedule

	Preparation fees	Appearance fees
Directions hearing		290 – 455
Application of modest complexity	755 - 870	630 – 735
Application of greater complexity	8700 - 1100	745 – 975
Multiple claims	Primary application: 750 – 1100 Second and subsequent applications: 30% to 50% of the principal application fee	Primary application \$630 to \$975 Second and subsequent applications: 30% to 50% of the principal application fee.
Related victim applications	(a) Lead Application: \$750 to \$1100 (b) Associated Applications: 30% to 50% of lead application fee	a) Lead Application: \$630 to \$975 (b) Associated Applications: 30% to 50% of lead application fee

Disadvantages of the scheme

- focus on counseling/therapeutic costs, comp for pain and suffering only paid in 'exceptional circumstances' by applying for special financial assistance (SFA) (Primary Victims only) for victims who suffer a "significant adverse effect"
- mandatory refusal of SFA unless the act of violence is reported to the Police
- old claims (pre 1997) are very hard to bring due to the strict reporting requirements

- The maximum for pain and suffering (SFA) is \$10,000 for penetrative sexual assault see below:

	Minimum	Maximum	Minimum	Maximum
	For violence pre 01/07/07		For violence post 01/07/07	
Category A	3,500	7,500	4,667	10,000
Category B	1000	2500	1,300	3,250
Category C	500	1000	650	1,300
Category D	100	500	130	650

- Related acts include similar acts by MULTIPLE offenders. For example, a gang rape with ten offenders is one act of violence.
- Any person considered to have a legitimate interest in the application, including the offender, may be notified of and is entitled to be present at the hearing (Section 34 (2); Section 35). But only after the Tribunal has given the applicant an opportunity to be heard on the issue of whether or not notice should be given to the offender (Section 34 (3)).

Neutral aspects of the scheme

- can be a oral hearing or on the papers

g. Western Australia's scheme: Criminal Injuries Compensation Act 2003 (WA)

Benefits of the Western Australian (WA) Scheme

- There is no minimum threshold.
- The maximum amount that an assessor may award is \$75,000, this may include injury and/or loss and/or expenses.
- It takes on average 6 months for claims to be assessed.
- Limitation period is 3 years.
- The injury of 'mental shock or nervous shock' does not require the applicant to have a 'disorder' or 'mental illness'.

Disadvantages of the Western Australian scheme

- No compensation available to secondary victims.
- Maximum amounts vary according to the period when the offence took place (\$300 maximum for claims arising between 1971-1976 to recent offences \$75,000).
- Compensation amounts for injuries are discretionary as there is no schedule of injuries.
- Compensation not available for any offence committed before 22 January 1971.
- An applicant is precluded from making a claim where the alleged offender is acquitted of the offence, the assessor can only grant compensation if it is satisfied that the offence was committed by another person (s13).

- The WA scheme has a relationship clause directing the assessors not to award compensation where there is a relationship or connection between the offender and the victim, or close relative and any money paid is likely to benefit the offender (s36). (Family violence victims are disadvantaged by the fact that they are related and connected).
- An assessor has no power to award costs

8. Counseling and the Victims Compensation Fund

Background

In 2010/11 there was 6717 applications for initial counseling received and an eventual 3811 people who received counseling through the approved scheme. The Fund paid \$3.42 million to approved counselors who are private practitioners.

Our concern with this payment is that a large amount of money is being given directly to private practitioners, and that this may not be the most effective use of such a large amount of resources.

Submissions

In NSW and most Australian states and territories, reasonable counseling expenses that have been incurred for the treatment of trauma (or ongoing mental health conditions) will be covered or paid by the Victims Compensation Fund (the Fund) or equivalent. In some states, past and future costs can be paid, on the condition that a receipt or invoice (for future treatment) can be produced. These services are provided by either:

- Private “approved” counselors (in NSW for example), or
- Private practitioners providing mental health or therapeutic counseling services to victims of the crime.

The system in NSW and all other states and territories is such, that funding for mental health and counseling services is paid by the Fund directly to private practitioners, which means that consumers are forced to access particular practitioners and the money that is allocated to private practitioners directly.

Of course, some victims of violence/crime may choose or seek to access mental health and therapeutic services from public health providers and these costs are usually borne by the health service directly or recouped through Medicare.

Access to properly and appropriately provided mental health services through the public system is an issue of equity of access for people across NSW. It is a bedrock of our public policy framework that adequate health services should be at a basic level, free or affordable, accessible and properly designed and provided for all people and for those affected by trauma and loss, these services should be responsive, culturally and socially appropriate and committed to addressing the complex needs of all Australians. There are many gaps in service provision for mental health and therapeutic services in NSW and we note that this is especially so for victims living in rural and regional environments. We note that there is a lack of culturally appropriate services for Aboriginal women and children and that there is especially a lack of services for childhood sexual abuse.

Whilst some organisations and services in Australia acknowledge and address trauma in the work they do, the Mental Health Coordinating Council together with collaborating partners ASCA (Adults Surviving Child Abuse), ECAV (Education Centre

against Violence) and PMHCCN Private Mental Health Consumer Carer Network Australia have been advocating for a cultural and philosophical shift to promote 'Trauma informed Care and Practice' be adopted broadly across a range of service systems in Australia. NSW Health and Community Health Services including the Aboriginal Medical Services, already provide a wide range of mental health services including trauma counseling, psychiatric and psychological services, recovery services although, as we know, mental health services remain under-funded and struggle to meet the demand presented by many people suffering mental health and other post-trauma conditions including people diagnosed with post traumatic stress disorder.

Nonetheless, these services are well placed within public health and community settings to respond to the complex and high level needs of their consumers including making appropriate referrals to other services such as the range of medical and GP services on offer, local referrals for crisis accommodation and housing support, provisions of caseworkers and social workers to provide intensive case-management to individuals or families at risk, legal services to address ongoing safety and other needs as well as to encouraging consumer participation in groups, courses and therapy to address their ongoing and developing complex needs.

Recommendation

We feel that many victims of violence would benefit from being linked into public health services rather than having to access counseling services from private counselors.

Disconnection from health and other services

Through the years of their abuse, many of our clients have become disconnected from mainstream health and other services and lack the support networks around them to properly identify their mental health and other needs. We have given advice to women who have not accessed medical services for many years for their own personal health, aside from hospitalisation, which has occurred as a result of the violence. For women living in rural and remote communities, many have access issues already to mental health and general health services and for various reasons, face a range of disadvantages, which has limited their ability to attend to their own needs. Furthermore, many women are unaware that the anxiety or depression they are suffering can be aided through counseling and psychological services. When women start accessing victim's compensation and the associated counseling services, many are relieved that counseling is provided. However, we also have the experience particularly in rural and remote communities where there has not been an approved counselor who is a woman (important for our clients who have all been domestic violence or sexual assault victims, or both) or with appropriate cultural awareness training, or have had sufficient experience of working with clients with complex and multiple health and other needs. As such, some of our clients are unable to access the counseling services provided by Victim's Services Approved counselors.

Recommendation

We are of the view that the public health system including community health and women's health services are better placed to identify and respond to the needs of victims of violence who may have complex needs and years of untreated trauma to work through.

We acknowledge however, that this would put an additional strain on the already under-funded public mental health system and associated services and as such, we suggest that some if not all of the counseling budget of the Fund is re-directed into specially funded "trauma" specialist positions that could be co-located in public and community health services. We envisage that this scheme would improve client access to a variety of other co-located services and amenities and reconnect severely disadvantaged victims with a range of services and programs and link them to other practitioners who may be able to address their other needs.

Recommendation

We note that the Fund currently contributes \$3.42 million to private counselor fees each year and we suggest as outlined that all or some of this money would be better invested and better spent through diversion into the public health systems.

We note that some people may still chose to access private practitioners, especially if they have developed a comfortable and effective therapeutic relationship with their therapist. We do not recommend cutting this contact, but would support a transition into the public system. Importantly and finally, this role would properly recognise the high levels of trauma suffered by many people in the community and would improve the equity and access issues that we noted above. These practitioners could be co-located in community mental health, women's health and Aboriginal medical services and be better able to identify, address and respond to complex need clients in a system that better ensures equity of access and proper redistribution of the Fund's budget for the greater good of more consumers.

Strengthening Aboriginal communities and culturally appropriate services

We have made several references to the high levels of lateral violence in Aboriginal communities, where Aboriginal women and children are often victims of very long-term and systemic sexual abuse and violence.

We would like to make three comments in relation to this:

1. Not enough Authorised Counsellors have experience of working with Aboriginal women and children; and
2. Aboriginal counselors should be supported, trained and encouraged to become Authorised Counsellors.
3. Build the capacity of the Aboriginal community by investing in the training and development of Aboriginal people as counsellors in general.

Authorised Counsellors experience of working with Aboriginal women and children

Our clients have experienced a range of disadvantage in their lives and notably, in relation to their victimisation, they face issues in accessing legal remedies and access to culturally appropriate services. We are aware that many of the Authorised Counselors do not have experience of working with Aboriginal women or communities and are not aware of the complexities of domestic violence and sexual assault within Aboriginal communities. We are aware that Victims Services encourages Approved Counsellors to undertake training in relation to Aboriginal cultural awareness, but that this is not compulsory. We would suggest that this should be made mandatory for all counselors and Authorised Report Writers. We are of the view that this should occur in line with the mandatory cultural awareness that all new employees of Government departments and agencies undertake.

Aboriginal counselors should be supported, trained and encouraged to become Authorised Counsellors.

While we are not suggesting that all Aboriginal victims of violence want access to Aboriginal counselors, we do think that Victims Services should encourage Aboriginal counselors to join the Approved Counseling scheme and could engage better with Aboriginal communities by doing so. Many of our clients who have experienced violence go on to work in crisis support roles and as with many victims of violence, their experience enables them to have better understanding of the challenges and obstacles faced by victims in reporting violence and moving on from their trauma.

We feel that by recruiting more Aboriginal staff in all roles and especially in therapeutic roles, would strengthen Aboriginal women and communities to speak up about violence and to seek support and rehabilitation services to address their trauma.

We would be happy to discuss these proposals with Victims Services in more detail.

Issues raised in the Issues Paper

In response to the specific questions under the heading, Questions on Services, we feel that question 26 – 29, 31 and 35 have been answered by our response above. In relation to the other questions, we think:

30) We think that the VAL is a useful service and should continue. However, we note that the “Aboriginal Access Line” should be staffed by Aboriginal workers. It would be the expectation of someone calling this number that the person answering the phone is an Aboriginal person and not simply someone with cultural awareness training.

32) We are not aware of the current role of case managers and what the job description is for these roles. We are also unaware of how these staff view their role. We don't rely on these case managers at all and have little knowledge of their role.

However, as a state-wide service we appreciate the difficulties in providing comprehensive referral services to our clients from all corners of NSW and we rely heavily of strong local referral support networks, the reliability of which vary from area to area.

By using Human Services Network (a Government referral database), local knowledge, local networks and linked up service provision we hope that some of these barriers are starting to be overcome but we know from experience that one of the most efficient ways of finding out about local services and programs is to visit those areas in person. We suggest that case managers could travel to regional areas every year in order to establish strong local networks and links with other services.

33) Witness assistance is required for victims and we note that the Witness Assistance Service through the Director of Public Prosecutions provides this statutory function already. We would have no objection to reasonable travel costs being paid for the cost of a victim's personal support person to travel to and from court to support them.

34) We don't understand this question.

36) The current system for advance payments is already highly discretionary and we are of the view that it should remain so and be determined on a case-by-case basis depending on the circumstances. We would be concerned about a situation where there was an advance payment made in instances where the Applicant would be unlikely to receive an award of compensation. We are unsure whether this has ever happened. However, this could be overcome by requiring some basic level of substantiation about the nature of the claim and an interim determination about the degree of compensation likely to be awarded.

37) As per the legislation and objectives of Victims Services, there are a great many services that are offered and likewise, some services that shouldn't be provided including financial counseling (although access to financial counselors should be offered when an award of compensation is made), housing, health, legal or any other professional advice. We are unsure of the intention of this question and what answer the question seeks to elicit. The question seems to assume that there may be services provided by Victim's Services at the moment that are unnecessary – we are not aware what these services might be and cannot comment further.

38) We refer to our submissions in relation to increasing the amount of compensation for victims of domestic violence and our comprehensive submissions made on the issue of amending the scheme for pain and suffering and other expenses as outlined above.

8. Professional Costs

We note that Wirringa Baiya provides free legal services to our clients and receives funding from the NSW Department of Justice and Attorney General and as such, does not rely on the professional fees paid for work done on victim's compensation applications to fund our service. Nonetheless, the payment of professional costs does assist us to service more clients and broadens our capacity to provide other services like community education in rural and remote communities.

We also note that most of our matters take many hours of legal work and effort to complete and that because our clients present with complex matters, it is common to spend anywhere up to 100 hours on our victim's compensation matters. While we do not infer that this is the same for all solicitors, we make the general point that (in our experience) the solicitors who take on victim's compensation matters for domestic violence and sexual assault victims recognize the very real effect of trauma on their clients and have a social justice focus in the services that they provide. We lastly comment that the current fees paid (\$958.00) do not reflect an adequate payment for the time taken to prepare complex and involved matters, which in our experience takes no less than 100 hours of professional legal work.

The effect of 1 January 2011 reforms

We note that the most recent changes to the victim's compensation scheme, which came into effect on 1 January 2011, amended the manner in which costs are awarded. Shortly after the changes, we wrote to the Attorney General and raised our concerns that:

- the amendment to section 35(1), will mean more solicitors will be awarded less than the prescribed amount; and
- because the amended section 36(1)(A) will remove the right to appeal a determination in relation to costs.

We predicted at that time that many private solicitors will cease to assist clients in victim's compensation applications and we note that Artemis Lawyers (which had a large victims compensation practice) have ceased acting for clients in victim's compensation applications. As a direct result, many community legal centres have experienced an increase in client referrals and inquiries in relation to the victim's compensation claims.

Already our Centre, together with many other community legal centres, cannot assist the many clients with complex needs that require assistance with their numerous and complicated victims compensation applications.

The need for solicitors in victim's compensation applications

We note that there has been a move in NSW in recent years (and occurs in, for example the Northern Territory) for applicants to be assisted by internal Victims Services case managers. We concede that for “straight-forward” or simple applications, that this makes a lot of sense and that some applicants can be assisted in this manner, thus avoiding the need for the payment of professional costs. However, our service rarely advises clients with “simple” matters, all of our current clients are Aboriginal women with complex histories, multiple acts of violence and complex needs such as homelessness, histories of their own incarceration, drug and alcohol dependency or mental health conditions. These clients are highly unsuitable to be case managed by Victims Services as they need intensive support.

As such, there will continue to be a role for clients to access solicitors, be they private, pro bono or at community legal services and there are good arguments for why the Victims Compensation Fund should continue to provide remuneration for professional costs as outlined above and because of the complex and sensitive nature of the work.

Discretion in awarding professional costs

We concede there is some need for some discretion when awarding costs and we acknowledge that in the past, some legal firms have been able to recoup considerable professional costs by assisting clients with victims compensation applications. However, we are of the view that most solicitors, even private and pro bono practices take on victim’s compensation matters for altruistic purposes and that the fees paid for a highly complex matter are not a reflection of the hours of work done.

We also note that if costs are removed entirely, community legal centres who are in the main, committed to providing services to clients with complex needs and to assisting with victims compensation, will not have the capacity to assist all needy victims of complex trauma.

Recommendation

We support the current position that costs are awarded on a discretionary basis.

Our suggestions for costs

In contemplating how to approach this issue of professional costs, we have undertaken a review of how costs are dealt with in other states and territories.

Some states provide a schedule of professional costs and Tasmania has a simple and logical method for awarding costs. Costs are awarded on the basis of the complexity of the matter for example:

- simple matters - \$550
- standard matters - \$770 and
- complex matters - \$1100

By contrast, in South Australia, costs are awarded only if the claim is successful and if the matter is unsuccessful the solicitor has the right to charge the client for the work done, again this is set by a schedule. It is the same in the ACT where the client always bear the cost and solicitors can charge up to \$650 only.

We are of the view that most solicitors approach victim's compensation applications by balancing the best interests of clients with the prospects of success and we presume that the majority of matters which are dismissed each year are for acts of violence deemed by the Tribunal to be 'related' rather than being frivolous or baseless. As such it would be unconscionable to enable a solicitor to charge costs to a client on a legal technicality especially when the concept of 'related acts' is open to interpretation by the Assessor.

While we note that the South Australian model may have the result of dissuading potential applicants (and their solicitors) from lodging multiple claims, and thereby reducing the cost of the scheme overall, we would not support any proposal for clients to be liable for costs. This is contrary to the philosophical rationale for the payment of compensation as outlined above, and would further disadvantage many victims of violence.

Many victims of violence are already economically and socially disadvantaged and among our clients, this is often because of financial abuse during their domestic violence relationships or because of a lack of earning capacity due to incomplete schooling (due to childhood abuse for example).

Recommendation

We support the introduction of a schedule of professional fees and we support the current position that costs are awarded on a discretionary basis.

Other issues raised in Issues Paper

We have answered many of the issues raised about legal practitioners outlined in the Issues Paper, however, we would like to respond to the specific question:

45) What role should legal providers play within the Fund, in the process of making an application, seeking a review, or appealing a decision?

We have noted above the important role a that legal practitioners can have in assisting traumatised victims with highly complex matters apply for compensation. We have also noted that for complex matters the current scheduled payment of \$958.00 does not adequately reflect the amount of work done by a legal professional. As such, we recommend the schedule of fees to be raised and lowered in accordance with the complexity of the matter and the amount of work done.

We would like to reiterate that some clients with particular needs, or complex matters will not be suitable for internal Victims Services case management due to the nature

of their matter and the complex support and other needs that community legal centres (and other legal services) are best placed to provide.

However, we do not think that ALL applicants necessarily require access to solicitors for help preparing their matters and there may be some more straightforward claims (for example where there are Police records, a successful prosecution and ample medical records) where the Applicant may be able to apply for compensation themselves, or with the guidance of a case manager. We note that in some regions (Northern Territory) this is common practice.

In such instances, we would recommend that an independent solicitor is made available (through for example, the Law Society Pro Bono scheme, or through the Legal Aid Commission) to give an Applicant, advice about possible appeal rights.

We have concerns about especially vulnerable, unrepresented Applicants being properly supported and advised and are of the view that if case managers are going to be increasingly relied upon to provide this service, we would recommend they undertake:

- mental health awareness training
- Aboriginal cultural awareness training and
- comprehensive training about power and control and abusive relationships
- comprehensive training around trauma.

We note that the Education Centre Against Violence could provide some of this training, as could the Mental Health Coordinating Council, which is currently advocating for a “trauma informed health care” approach for all public service employees when having contact with the public.

Issues raised by the Issues Paper, not otherwise addressed

5) Is it appropriate to impose a levy on convicted offenders?

Yes and we note that this already occurs in NSW. We would support maintaining the current regime in relation to the imposed levy system.

6) Is it appropriate to require convicted offenders to pay compensation to any victim of the crime?

We assume that this question relates to payments for secondary victims. Please see our submissions in relation to payments to secondary victims. We think that if the current eligibility criteria remains and secondary victims are able to claim money for pain and suffering then, yes, offenders should be required to contribute to this. We note that many secondary victim claims are unsuccessful due to the injury that needs to be proven (Psychological injury category Two) however, we are of the view that if compensation can be claimed by a secondary victim, there is no good reason why an offender shouldn't pay. This properly acknowledges that violence affects more people in the community than just the victim directly and we believe that this is the right message to send to offenders and the community more broadly.

In relation to restitution more broadly, we do not act for perpetrators and have limited knowledge of how these proceedings work, but we feel that the current system which enables a right of review and the offender to respond, is a good system and should be preserved.

7) If the scheme is changed, what should the continuation of rights be under the existing scheme?

We assume that this is a typographical error and the question should read "under the new scheme".

As can be seen throughout our submission, we are advocating for keeping much of the current scheme in tact. Importantly, we draw your attention to our discussion of the rationale for compensation and the various international instruments that support the payment of compensation to victims of violence. As a minimum, we would support:

- Financial compensation for pain and suffering
- Counseling and
- That the rights under the Charter of Victims Rights are preserved.

For a longer discussion, feel that we have answered this question comprehensively in our submissions.

39) What are the acceptable waiting times for access to compensation benefits.

We think this depends on the matter and the circumstances of each claim and the needs of the victim. However, for some matters that are straightforward and the evidence is readily available, we would suggest that 12 -18 months might be a reasonable amount of time.

In relation to times for completion of matters, we would also like to comment that the comments made by the Chairperson in relation to the length of time it takes for a determination to be made and we note that this needs to be understood with the benefit of information from the practitioners, such as our service, that regularly do victim's compensation work. Most of our matters take at least two (2) years for a determination. The reasons for this are complex and the time taken for completion is influenced by factors such as:

- gathering evidence, appealing freedom of information requests, reviewing evidence
- taking instructions from traumatised clients
- framing the applications
- drafting and finalising Statutory Declarations
- preparing submissions addressing out of time considerations (many of our client's claims relate to domestic violence and sexual assaults that happened more than two years ago)
- waiting for determinations from the Victims Compensation Tribunal about out of time submissions
- assisting arranging counseling and other mental health services
- assisting our client with non-VCT civil legal problems (family law, housing, debt, discrimination, ongoing violence)
- preparing our client to see the Authorised Report Writer (this can take our clients many months and sometimes years)
- arranging travel for our clients from rural locations to the ARW appointment
- waiting for the ARW report
- drafting final submissions

We provide this summarized overview to give an example of a complex matter and to highlight that time between lodging the application (the form) and getting an outcome from the Assessor is not necessarily indicative of administrative problems with Victims Services. It has been said that many victims want access to compensation quickly and that the time taken for completion of a matter is distressing for victims. In our experience, most of our clients need at least two years to come to terms with the application and prepare themselves for the steps needed to access compensation.

For some of our clients it can take many conversations before they feel comfortable enough to speak about the violence they experienced in any detail. In addition our timelines for completion are delayed because as clients build rapport and trust, they disclose other violence that they may wish to claim for. Child sexual assault is often the most difficult issue our clients struggle to discuss, the other is sexual assault within a relationship. These conversations happen over many months and sometimes years and for a woman who has often lost all trust in systems and services, it is

important for us to have this time with our clients in order to gain their trust and for us to help them have their story told.

Section 23A of the *VSRA* now means that all potential claims need to be lodged before any final determination, thus as additional claims are filed the possible assessment date for the other claims is pushed back. If our matters were being listed for determination within shorter periods (for example, between 6 – 12 months) we would be likely to request an adjournment.

We are not aware of the situation for “straight forward” matters where there has been a single discrete assault, a conviction and ample evidence. But that is often NOT the case for our clients. We prioritise taking on more complex matters and for these matters, we would be concerned about the process being sped up.

Generally speaking most of our clients do not complain about how long it takes for a decision. As discussed above it can take many months for us to prepare an application. This is in part due to challenges locating and receiving relevant evidence, as well as difficulties obtaining instructions from our client who are too traumatised to talk to us, or have other health problems or family problems that take priority.

Our clients are also so used to having so little that they will bear the delay in a decision if it means in the end that they will receive the best decision possible.

We accept that there is a backlog of matters and that the actual time taken from the lodgment of final submissions to determination is currently quite slow. For example, we are aware that the Victims Compensation Tribunal is currently assessing October 2011 matters which is a delay of 6 months. Nonetheless, it is erroneous to suggest that all victims want and need access to compensation quickly as many of our clients do not and need the time to enable them to confront their trauma, access counseling and move forward.

42) – 44) Under what circumstances should disputes be allowed under the Fund? What dispute process should be followed and should there be different levels of dispute resolution and what principles should guide this.

We assume that this question relates to the appeals process. We are not aware of other “disputes” may arise in a victims compensation application although perhaps this question relates to disputes about other issues such as reasonable victims expenses or disputes about other out of pocket expenses.

In relation to appeals, we feel that the current timeframe (3 months) is appropriate and we note that many of our clients need this amount of time to get advice about and appeal, consider their legal options and give us proper instructions.

The current regime allows for appeals pursuant to section 38 and 39 of the *VSRA*.

Section 38 (3) provides that:

“An appeal from a determination of a compensation assessor is to be determined on the evidence and material provided to the compensation assessor. However, the Tribunal may, by leave, receive further evidence and material if it considers that special grounds exist or if the evidence or material concerns matters occurring after the determination appealed against.”

We note that although this section allows for further evidence to be requested by the Tribunal, but we have not heard of this occurring and these appeals are usually de novo hearings only. We note that appeals to the District Court can be made on a question of law only.

We note that “error of law” is interpreted narrowly and section 39 (3) provides:

For the purposes of this section, the following matters are not questions of law:

(a) a determination of whether an injury for which compensation has been claimed is an injury specified in the schedule of compensable injuries or whether it is a compensable injury of a particular description specified in that schedule,

(b) a determination of whether a series of acts are related and constitute a single act of violence.”

We are of the view that there should be greater scrutiny of decisions made by the Tribunal and that Section 39 should be amended not to limit what constitutes an “error of law”.

We also feel that consideration should also be given for the proposal for the District Court to hear matters based on all the evidence, and not simply on an error of law. Consideration should also be given to the District Court’s ability to make judgments and determinations of compensation as was the case prior to 1996. We note that the Victims Compensation Tribunal is likely to want to retain control of decision-making processes (and considerations of costs) however, should the system go back to the previous procedure, submissions could still be made by the Victims Compensation Tribunal to the District Court on the award of compensation if the amount was likely to be revised and increased.

Lastly, we would like to reiterate a point that community legal centres have made many times before, that is that there should be greater transparency of Victims Compensation Tribunal decisions and it would be helpful for clients and practitioners to have access to published decisions from the Tribunal (deidentified where necessary). We note that other Tribunals such as the Administrative Appeals Tribunal makes judgments and decisions available through their website. We note also that states such as Victoria publish regular guidelines and also judgments on a wide range of specific issues³⁶. We recommend the NSW scheme introducing a similar service to

³⁶ Available at: <http://www.vocat.vic.gov.au/publications/relevant-review-cases>.

assist practitioners and to improve the transparency and accessibility of victim's compensation.

We note also that guidelines and consistency in decision-making by Victims Services Assessors would be a cost saving exercise for the Fund. By publishing this information and directing Assessors to follow previous judgments and the amount of compensation awarded, the Fund would have a more accurate and reliable record and estimate of the money being paid out for certain injuries and types of matters. We see great benefit in this approach for victims, advocates, offenders and ultimately the Fund and suggest that you take this consideration on board for these reasons.

46) What other potential funding sources should be considered?

We do not feel we are in a position to comment on this completely however we note that Hon Pru Goward has previously raised the possibility of establishing a redress fund that the Catholic Church and other religious organisations contribute to and the establishment of a redress scheme for victims abused in care by these organisations. We note that Western Australia previously had a redress scheme and that some of the claimants for victim's compensation would be otherwise entitled to sue organisations such as the Catholic Church but for civil time limitations on this action and other restrictions which impede actions against the religious institutions as discussed above.

We also note that some of our clients and understand that many clients of legal centres that work more closely with young people exiting care, have been victims of violence prior to coming into the care or while in care. Children abused in care would potential claim against FACS for negligence.

These children often choose to claim under the Victims Compensation Fund, rather than pursue lengthy and costly personal injury claims against Community Services results in legal and compensation costs being effectively saved by one Government Department, and spent by another. The liability for these claims likewise is the responsibility of Community Services, whereas the Victims Compensation Fund bears the cost of these claims. These types of claims put a huge drain (or potential drain) on Victims Services and we suggest that Community Services should be approached to contribute to the Fund.

We note that as of 2009/2010 there was 14,667 children in out of home care placements, and Aboriginal children made up 31.2% of these children and we would expect that being victims of violence and/or witnessing serious violence is common to many of these children.

47) What support should be available for convicted inmates who are victims of violent crime?

Through an outreach program Wirringa Baiya provides, as well as our analysis of self-

reporting and other surveys, we have become aware of the very high levels of victimization of people in prison. In 2010/2011 30% of women in NSW prisons are Aboriginal and over half the children in juvenile detention centres are Aboriginal. The reasons for the high numbers of Aboriginal people in custody are complex and the fact remains that Aboriginal people are incarcerated at 13 times the rate of non-Aboriginal people³⁷ and Aboriginal women are the fastest growing group in NSW prisons. While not wishing to overload these submissions with statistics, we feel that it is important to draw attention to some of the very high rates of Aboriginal incarceration and the very high levels of victimization that these women and children have experienced prior to entering the criminal justice system:

- Between 1998 – 2009 the number of Aboriginal women in prison increased from 91 – 236, an increase of 230%
- Aboriginal women account for 27.6% of the full time female prison population
- Aboriginal girls are 8 ½ times more likely to appear in a criminal court than non-Aboriginal girls and
- Almost half (48%) of children in juvenile detention centres are Aboriginal.

It would be simplistic and inaccurate to conclude that Aboriginal people commit more offences to account for these rates, the reality is that that Aboriginal incarceration is a social and political issue influenced by many factors, including those outlined above and indicative of their responses to, and sometimes lack of options in coping with, the very high levels of victimisation that Aboriginal women and children face in the general community.

Aboriginal women in prison and children in juvenile detention centres have experienced high levels of victimization throughout their lives, often commencing through witnessing domestic violence and abuse in the home and then going on to experience child sexual abuse and relationships of domestic violence. This information is drawn from self-reporting surveys such as the Young People in Custody Health Survey, Inmate Health Surveys and the Inmate Census as well as the 2002 report *“Speak Out Speak Strong”*³⁸ and our own experiences of working directly with women in prison.

These sources of information tell us that:

- 69% of all women and 81% of Aboriginal women report at least one relationship of domestic violence³⁹
- 44% of Aboriginal women report victimhood of adult sexual assault⁴⁰, and
- 70% of Aboriginal women report victimhood of child sexual assault
- 81% of girls in juvenile detention centres report at least one form of child abuse

³⁷ Corrective Services NSW, *Statistical Profile of Offenders*, (2009).

³⁸ R. Lawrie and Aboriginal Justice Advisory Council *“Speak Out, Speak Strong”* (2002).

³⁹ Corrective Services NSW, *Inmate Health Survey 2001* (2003) [*Inmate Health Survey*].

⁴⁰ Ibid.

or neglect⁴¹

Only a third (or 29%) of women the subject of the “*Speak Out Speak Strong*” study said that they had previously disclosed their childhood sexual abuse and the overwhelming majority (68%) of these women said that they would like counseling to help address their trauma and abuse. In relation to mental health, people in prison have schizophrenia at 3 -5 times the rate of the general population⁴² and Aboriginal girls in in juvenile justice centres have on average 4.8 separate mental health diagnoses⁴³

Very often, women and children who have been victims of violence have self-medicated their mental health and trauma with drugs and alcohol which inevitably results in adding to the chaos of their lives and increases their contact with the criminal justice system.

These figures are indicative of communities in crisis and exemplify to policy makers the very real need for better culturally appropriate early intervention to identify child sexual abuse and violence more broadly when it occurs and to respond with appropriate counseling, support and referral services, especially for communities in rural, regional and remote parts of NSW.

Many of the women we speak to have not previously been able to access counseling and mental health services, due in part to the chaos of their lifestyles and due also to lack of availability of services and services that are culturally appropriate or accessible for Aboriginal women and children. We are mindful that these issues are known to Victims Services and we commend the initiative taken by Correctives Services and Victims Services to provide a victims counseling trial in two women’s prisons. This is not enough. Access to mental health services in prison is scant and hard to access. Psychologists are provided by Corrective Services within the prison setting and these workers are over-loaded and stretched. In the community, we note that Corrective Services is seeking to employ more psychologists to access clients on community service orders or otherwise under the order of Corrective Services.

However this is an issue of equity of access and as can be seen in our lengthy submissions about counseling above – our view is that trauma informed health care is a public health issue which needs to be acknowledged and addressed with appropriate interventions starting in childhood for victims of violence.

People in prison should have access to a suite of mental health and support services and this is consistent with their human right to access counseling and rehabilitation services. We note that provision of such services is likely to be controversial, however, we are of the view (and we have clients who tell us) that unless people can get help

⁴¹ D. Indig, C. Vecchiato, L. Haysom, J. Carter, U. Champion, C. Gaskin, e. Heller, S. Kumar, N. Mamone, P. Muir, P. van den Dolder and G. Whitton, *2009 Young People in Custody Health Survey: Full Report*, Justice Health and Juvenile Justice, Sydney (2011).

⁴² *Inmate Health Survey*.

⁴³ *Ibid*.

with their trauma, their offending behavior is likely to continue (such as drug use) and the cycle goes on. We would recommend expanding the Victims Counseling trial into every women's prison and if other services are going to be developed, we would recommend prioritizing these services for the most vulnerable in the community and in prison – women and children.

48) To what extent should benefits and compensation be adjusted for contributory negligence?

The current Victims Compensation scheme already provides for considerations for the deduction of compensation pursuant to Section 30 of the VSRA. We are strongly opposed to any other move towards a contributory negligence scheme - this proposal is unconscionable. We note above, that the ACT allows for deductions to compensation for contributory negligence such as intoxication. We cannot comprehend any situation in which a victim of violence could be found to contribute to the act of violence nor to their injuries. We note that almost all of our clients are victims of domestic violence and sexual assault and we find the suggestion that an intoxicated woman may have somehow encouraged or provoked an act of violence to be unjustifiable and an appalling proposal.

49) Are there other funding models that should be considered?

In preparation for this Issues Paper, we have undertaken a comprehensive review of the schemes in all Australian states and territories. We refer to these submissions and to our comments above in relation to alternative sources of funding. We have made comments about eligibility, compensation and counseling below.

We have also addressed the rationale for the provision of financial compensation and we argue strongly that any changes to the current scheme should preserve the principle of financial compensation for pain and suffering for victims of violence. We draw your attention to a number of international instruments, which provide for this including:

- European Convention on the Compensation of Victims of Violent Crimes, 1983 and
- United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

We note that Australia is a part to the United Nations Declaration and that these principles have currently been enshrined in domestic legislation including the Victims Rights Act 1996 (NSW) and the Victims Support and Rehabilitation Act 1996 (NSW) (the VSRA). We note that there is also a Charter of Victims Rights in NSW pursuant to the Victims Rights Act 1996 and that a statutory victims compensation scheme has been operating in NSW since 1968.

50) How should the scheme link with the broader service system?

We don't understand this question.

Conclusion

Thank you for taking the time to consider this submission.

If you require any further information about our Centre, or have any questions about our submission, please do not hesitate to contact Rachael Martin of this office on 02 9569 3847 or rachael.martin@clc.net.au

Yours faithfully,

Wirringa Baiya Aboriginal Women's Legal Centre

Per Thea Deakin-Greenwood
Solicitor

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