



**Government  
of South Australia**

**Commissioner for  
Victims' Rights**

45 Pirie Street  
Adelaide SA 5000

GPO Box 464  
Adelaide SA 5001  
DX 336

Tel 08 8204 9635  
Fax 08 8207 2504

If calling please ask for  
**Michael O'Connell or Sarah Fletcher**

Telephone  
**8204 9635**

Email  
voc@agd.sa.gov.au

Reference  
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Royal Commission into Institutional Responses to Child Sexual Abuse  
GPO Box 5283  
SYDNEY NSW 2001  
solicitor@childabuseroyalcommission.gov.au

Dear Commissioners

**Re Redress Schemes**

Thank you for your invitation to make a submission and comment on the Issues Paper developed as part of the Royal Commission into Institutional Responses to Child Sexual Abuse.

By way of brief introduction, his Excellency the Governor for South Australia appointed me as Commissioner for Victims' Rights. My role is likened to a crime victim ombudsman, although my functions are broader than traditionally associated with an ombudsman. I make this submission as an independent statutory officer who is tasked with monitoring and reviewing the effect of the law on victims and with a keen interest in preventing victimisation and re-victimisation.

My views as expressed below should not be taken to represent those of the Government of South Australia.

Over the last three decades we have seen an expanding evidence base that reveals the extent of childhood sexual abuse and, in some cases, its devastating, lifelong effects. In the last two decades it has come to light that many children were subjected to childhood sexual abuse whilst in the care and protection of state run institutions and religious organisations, among others.

There have been various approaches to redressing the harm these individuals suffered including a number of state-based inquiries. In South Australia victims were given the opportunity to tell their story to the Children in State Care Commission of Inquiry, which commenced in November 2004. In many instances it was the first time victims had disclosed the sexual abuse that continued to affect them as adults (Children in State Care Commission of Inquiry, 2004).

The Commission recommended that the government 'acknowledge and apologise for the pain and hurt' endured by those who were sexually abused whilst in state care. On 17 June, 2008 the then Premier Mike Rann, apologised on behalf of the current and past parliaments.

He said “there is nothing to change the fact that people stood by and failed to act to prevent these tragedies from happening, but to say to the survivors of sexual abuse in state care that we believe you, that we understand the hurt done to you, that we accept our past failings and that we are sorry is a powerful step forward” (2008, p3703). Furthermore, he argued that the importance of an apology to survivors of abuse in state care cannot be over-stated (Rann 2008).

In responding to and supporting adult victims of childhood sexual abuse whilst in state-care the Children in State Care Commission of Inquiry also recommended the establishment of a government funded free specialist service to adult victims of child sexual abuse whilst in state care and examination of various redress schemes operating in other jurisdictions. South Australia subsequently established a redress scheme similar to those operating in Tasmania, Queensland and Western Australia whereby victims could apply for an *ex gratia* payment. The maximum redress available differed across the jurisdictions from \$30,000 to \$80,000<sup>1</sup>. The maximum in South Australia was set at \$50,000 on the basis of equity with the maximum payable to victims of crime under who receive state-funded compensation

The South Australia redress scheme applies to victim-survivors of child sexual abuse in state-care. and is underpinned by the law that authorises the Attorney-General to make *ex gratia* payments from the Victims of Crime Fund. Unlike the approach taken to state-funded compensation including *ex gratia* payments under section 27(4) *Victims of Crime Act 2001*, the State neither pays solicitors’ fees to assist victim-survivors lodge their applications or for reasonable costs and disbursements. Instead, the State pays a set solicitor fee so those victims who receive an offer of a redress payment can seek legal advice on both the adequacy of the sum and the implications of signing the notice of discharge.

**1. What are the advantages and disadvantages of redress schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts, particularly in comparison to claims for damages made in civil litigation systems?**

Please note that my response to this question relates to redress in the form of financial payments. It must be noted however, that financial payments are only one component of comprehensive reparation schemes. Reparations comprise acts or processes of making amends for crimes; and, effective reparations contain five core elements: restitution, compensation, rehabilitation, satisfaction (with process or access, for instance) and non-repetition (Principles 19-23, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005).

It is widely acknowledged that financial payments on their own do not ameliorate the impact associated with past injustices and that financial payments alone are unlikely to be an adequate remedy for the pain and suffering they endured.

Schemes have been established however, on the basis that they would provide acknowledgment of the past abuse and offer some sense of justice, particularly where no other means of justice is accessible or feasible (Senate Inquiry on Forgotten Australians 2004, p.226). Hence, redress schemes are considered to offer symbolic significance through opportunities for people to be acknowledged and, if a payment is made their pain and suffering validated.

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<sup>1</sup> The \$80,000 was replaced by a maximum of \$45,000 after a change of government in WA

Regarding state-funded compensation in general Feldthusen Hankivsky & Greaves (2000) state that victims expect the process to attain compensation will enhance the recovery of their emotional well-being. Indeed Valente (1996, p. 287) states that financial compensation can assist victims to free themselves from their abusive past. In a Dutch study (Mulder, 2013) examining crime victim's perspective to compensation (not victims of abuse in state-care), most respondents stated that they viewed the payment as a form of recognition and as an act of justice that helped them to cope with the aftermath of the crime.

Lump sum payments to victims of crime have, however been criticised on the basis that they often fail to mitigate victim's psychological injury and/or social isolation (Cook, David & Grant 1999, p.67; Wade, 1996).

Daly (2013) identified this as the 'money paradox' stating that despite the obvious inadequacies of financial payments, victims and victim advocacy groups almost universally call for 'compensation'. To date, however, there is little empirically sound evidence as to how redress in Australia has been received by victims of abuse in state care and whether their expectations are fulfilled.

Anecdotal evidence known to me as Commissioner suggests varying levels of satisfaction among victims who receive financial payments. Some accept these payments as acknowledgment for the harm done to them while others are grateful that the payment will alleviate their financial stress to some degree. Conversely, the very offer of money is viewed by some, as an attempt to buy their silence. A victim with whom I spoke stated that the offer of a financial payment by a religious organisation angered him and made him feel like a whore. I surmise from interviewing this victim that his feeling was exacerbated by the genuine belief that he was not listened to and truly acknowledged. Another victim complained that having been sexually abused by different people in different places that the offer of a single payment of approximately half the maximum payable was outrageous and offensive.

Redress in the form of financial payments can also present problems as claimants, on occasion, view the quantum as representative of their individual worth or of the degree of harm done to them. Hence claimants are often dissatisfied with the amount offered to them and view such as an insult. Indeed the difficulty with any form of redress is accommodating the diverse range of needs and expectations amongst claimants.

At the National Victims of Crime Conference in Adelaide, October 2013, Daly presented preliminary findings from her research into redressing victimisation in total institutions. She highlighted a number of concerns expressed by victims including; misunderstandings as to how quantum is determined, the vast difference between quantum in civil settlements and ex-gratia payments and the time and energy expended by the applicant in attaining redress. Daly concluded that it is important to explain and give meaning to 'compensation' or redress. It would therefore seem imperative that claimants are in a sense inducted into redress schemes whereby the purpose of the scheme and the processes, are comprehensively explained at the outset so as to avoid any unrealistic expectations or misunderstandings.

Regardless of the issues highlighted, the merits and deficits of redress schemes must also be viewed in relation to the alternative of civil litigation.

There are many reasons why a victim might pursue justice through a civil prosecution. For some victims it may be the only means by which to seek to hold offenders accountable and/or third parties whose negligence contributed to the crime. The lower

standard of proof required means that a finding of civil liability is achieved despite insufficient evidence to prove guilt beyond reasonable doubt in a criminal court. Thus for some victims achieve a sense of justice, validation and public recognition through civil litigation. Where there is no opportunity for a criminal prosecution, civil litigation fulfils some victims' desire to "have their day in court". For some, this process also provides victims with opportunity to "obtain more information about the crime through discovery" (Herman, 2010, p.92). For some victims civil litigation is simply a means by which to recover damages.

While civil litigation has advantages for some victims it is important to note that these cases tend to be defended vigorously resulting in protracted proceedings and extensive legal costs which may ultimately be borne by the victim/claimant. Consistent with this I have received several complaints from victims who have pursued civil litigation and either pre-proceedings or post-proceedings have been confronted with demands for payment of considerable sums. For example, a victim lodged a folio of documents with a law firm that advertised no win no fee for the purpose of ascertaining whether they had grounds to pursue civil litigation. That victim later complained of being charged some thousands of dollars for reading the folio. Another victim on receiving an offer to settle was distraught on learning that almost half the settlement would be retained by the law firm to cover solicitor's fees and other costs. That victim felt duped. In these cases and others a common demand from victims is for honest dealings and accurate estimates on likely expenses.

Furthermore, a claimant may be subjected to rigorous and uncompromising scrutiny which may result in a secondary injury commonly referred to as a secondary victimisation.

Another disincentive for victims, based on my experiences, arises when a defendant engages in acts or omissions to delay proceedings but at the same time the costs to the victims multiplies. In a case that comes to mind ultimately the victims were confronted by their own legal expenses, the possibility that if they withdrew their claim the defendant would seek reimbursement of his costs, and the likely eventuality that when the proceedings ended the defendant would no longer have sufficient means to pay damages if awarded.

In contrast, state redress schemes seek to alleviate the burden on victims with the state acting as a model litigant. Indeed in South Australia the Attorney-General emphasised the 'benevolent' nature of the scheme, although feedback from aggrieved victims suggest that they found the process less than benevolent. Redress schemes like civil litigation tend to have a lower burden of proof than the criminal court. In South Australia the Attorney-General may make an ex gratia payment when satisfied criminal conduct has happened.

The application process is intended to be more expedient than civil litigation and at no cost to the claimant. While this is the intent I have no statistics on the average length of time taken to resolve claims under the South Australian redress scheme and whether these time frames are considered acceptable to victims. The quantum under state redress is however, generally significantly lower than civil damages and there is no formal appeal of sums offered.

It must also be acknowledged that many offenders cannot be successfully sued and hence these victims would, without a state redress scheme, be left without recognition, enduring the harm done and bearing the losses.

**2. What features are important for making redress schemes effective for claimants and institutions? What features make redress schemes less effective or more difficult for claimants and institutions?**

As previously stated redress, including financial payments and support services, is of importance to many victims as they seek to address the harm done to them. Regardless of the type of scheme, victims must first be aware of the availability of redress. Thus it is vital that any information about redress schemes be disseminated widely through mainstream media and not limited to criminal justice agencies and/or victim support services. It is important to remember that many victims may never have reported the abuse nor sought help to deal with the effects. An effective scheme is therefore both available and accessible.

Redress schemes must be clearly explained to potential claimants in order to establish and maintain realistic expectations. This includes outlining the purpose of redress, the application process, victim/claimant's rights and responsibilities and how to access any assistance throughout the redress process. With this knowledge victims can make informed choices as to whether they wish to pursue redress or not. Unfortunately some of the victims whom I have encountered have poor or low literacy levels as well as low self-esteem and find the information on the South Australian redress scheme daunting and incomprehensible.

Effective redress schemes ensure processes are fair and respectful of victims and are not just outcome oriented. Mulder (2013) when examining victims' views on compensation concluded that "satisfaction appeared to be more dependent on the perceived quality of the procedure than on the amounts". This is a view echoed by a number of victims with whom I have spoken who have sought redress from the State or religious institutions. Some victims become angry when they feel the process is tedious others are angered if the process appears to be insincere and simply concerned with "cleaning up a mess" (Pers.comm, 2013). Ideally there should exist a parallel process that provides victim-applicants with opportunities to talk about their experiences, to discuss their needs and in which their suffering is acknowledged (Herman, 2010). One victim stated that "it is the symbolism of the acknowledgement of suffering that is the healing element" despite the relatively small financial payment offered to her. A victim however, who felt rushed viewed the process as "offensive".

Victims must have access to free, specialised counselling from the time an enquiry about redress is first made. Many of the victims I assisted to submit applications for redress had never before disclosed, to family, friends or professionals, the abuse they suffered. Thus they found themselves confronted with traumatic memories which had suppressed for years and years. The sister of one such victim/applicant stated that simply completing the most basic parts of the application form caused her sister "great distress" such that she now held fears for her wellbeing. Hence I reiterate that redress should extend beyond financial payments and address victims' complex needs.

A new scheme in Ireland has been established to address the complex needs of those who were abused in residential institutions as they now approach old age. The scheme acknowledges that many people who spent time in residential institutions "were neglected, were badly nourished, were poorly educated and as a result of that, they have spent a life of severe disadvantage" which continues to impact on their health and wellbeing. It is intended that victims be provided with a service that is "dedicated to them and to meeting their needs as they are now" regardless of any monies they have received through redress or the courts (<http://www.rte.ie/news/2014/0117/498433-redress-abuse>).

Victims should also have access to funded independent legal advice from the time they commence the claim so that victims are properly informed of their entitlement to apply and assisted as appropriate. As well victims should have access to independent legal advice on whether the sum offered by the state or responsible institution is fair and reasonable.

From a victims' rights as human rights perspective, the core principles for redress schemes are consistent with the principles for state-funded crime victim compensation, as follows:

- All victims of violent crime (such as child sex abuse) should be eligible for compensation unless implicated in the crime.
- Redress schemes should recognise both economic and non-economic losses for the primary and secondary victims of violent crime.
- Redress (including financial assistance) schemes should recognise victims' on-going losses, such as future medical expenses and treatment costs.
- All victims of violent crimes should be informed of their right to compensation, including how to apply, and if necessary, assisted to apply.
- The law and procedure governing state-funded compensation should be fair, and the application process should be respectful and timely, as well as both available and accessible.
- Where compensation payments are determined by administrative decision, there should be an independent authority of review (such as a Court), and victims should be informed on how to have decisions reviewed.
- To ensure the financial security of the compensation scheme, the funding base should be broader than appropriation from consolidated revenue.
- State-funded victim compensation should be an element of a broader needs-based system of victim assistance to support primary and secondary victims.

**3. What forms of redress should be offered through redress schemes? Should there be group benefits available to, say, all former residents of a residential institution where abuse was widespread? What should be the balance between individual and group redress?**

The South Australian redress scheme, like most others has limited financial redress to victims of sexual abuse that happened whilst in state care. While this assists to demonstrate the serious nature of the offending and acknowledges the lifelong impacts of such victimisation it has the potential to create a fragmented system that values some victims more than others. Many victims who were not sexually abused suffered physical, psychological and emotional abuse and neglect whilst in institutions. Furthermore, some of these victims may have witnessed the sexual abuse of others and/or lived in fear that they would be sexually abused.

There is a case to argue for group benefits for all former residents of an institution where abuse was known to be widespread. While this approach may be ideal Governments may argue that it is not economically feasible. It can be argued that the

sexual abuse of children is so serious and devastating that these victims should be given preferential treatment.

Furthermore if a limited sum was available to a larger group of people resulting in lesser sums being paid than is happening under the existing scheme it is probable more victims will feel aggrieved and experience a secondary injury. My experience as Commissioner for Victims' Rights dealing with victims of conventional crime in general and victims of abuse in state-care in particular suggests that when reasonable sums of money are on offer individual wants and needs overshadow collective needs.

The restitution of victims of abuse in state-care as with victims of the stolen generation often generates debate about the extent to which current taxpayers should be held to account for the wrongdoings of previous generations. It must be remembered that victims of abuse in state-care have suffered a double betrayal of trust, firstly by the perpetrator of the abuse and secondly by the state who failed to protect him or her. While the victimisation and failure of the state may have been perpetrated by previous generations the impact of the victimisation continues and in some circumstances will affect the next generation. Victimisation must be acknowledged and redressed in order to minimise the impact and associated disadvantage.

Where financial redress is limited by offence type, broader redress such as counselling and support services should be available to victims of all abuse, including physical, sexual and psychological abuse, in state-care.

**4. What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims? If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?**

Variation exists across the redress schemes operating throughout Australia. Despite some commonalities, there is a lack of uniformity in process and awards across the jurisdictions. Freckleton (1994, p.245) when examining the lack of uniformity across state-funded victim compensation schemes asserted that it is "fundamentally unfair upon the victim of a crime of violence that she or he receive different entitlements" depending on the state in which the crime occurs. Mindful of such inequity, Garkawe and O'Connell (2007) have argued the need for a federal, Australia-wide approach to issues concerning victims of crime. In this context, the need to ensure consistent service provision to all victims of crime irrespective of where the crime occurred or where they may reside is acknowledged.

Towards this end the Commonwealth, state and territory governments have worked collaboratively to develop the National Framework on Victims' Rights and Victim Assistance (the Framework). It aims to improve coordination of services to victims of crime against the person to assist their recovery from the impact of crime and minimise re-victimisation in navigating the criminal justice system. In April 2013 the Standing Council on Law and Justice endorsed the Framework and tasked a National Working Group on Victims of Crime to develop an implementation plan and monitor the operation of the Framework and plan, which is happening. The Framework does not, however, address the inequities across Australia. The Table appended, reveals the commonalities and variations. For example, all schemes cover victims of violent crime; some schemes emphasise financial assistance for practical needs whereas others emphasise compensation for personal injury. The maximum payable varies as does the means to determine the sums payable. Such is a by-product of Australia's

constitutional arrangement that leaves responsibility for criminal law, victims' rights and victim services largely in the political powers of States and Territories.

A national redress scheme would ensure greater equity for victims of crime. If this is not practical then perhaps lessons can be learnt from the European approach to harmonising state-funded victim compensation schemes, which entails setting minimum standards and entitlements then by either Recommendation and/or Convention providing a legislative framework within which each nation operates its victim assistance programmes, including compensation.

The Rome Statute that established and governs the International Criminal Court also created the Trust Fund for Victims to help victims. The Fund is intended to help victim-survivors "recover their dignity, rebuild their families and communities, and regain their place as fully contributing members of their societies." The Fund provides reparations for physical rehabilitation, psychological rehabilitation and material rehabilitation. Its revenue is from government and non-government sources; although it is under-funded. A board comprising various interests administers the Fund. It therefore offers an important example for debate on the potential for a national Victims of Crime Fund to which government institutions and non-government institutions might contribute.

**5. If institutions have established internal redress schemes, should all or any part of the decision-making of the scheme be independent of the institution? Should the schemes be subject to any external oversight? If so, what?**

If a victim-survivor wants the offer reviewed, he or she can ask me, as Commissioner for Victims' Rights, for help. On behalf of the victim-survivor, I request the Crown conduct an internal review, which has happened several times. Some victim-survivors have written direct to the Crown with their requests for review. There is no provision for conciliation or arbitration by an independent authority, or for judicial review. It is assumed that the Attorney-General's discretion is absolute and not subject to challenge in court.

In state-funded compensation schemes, it is common to have an appeal process for victims who are dissatisfied with a decision that affects them, whether it be about eligibility for compensation or the sum of compensation. As some jurisdictions have moved away from compensation schemes towards financial assistance schemes, appeal process have narrowed – if exist at all.

Good practice in governance requires the process and procedure by transparent and open to review. Such review should be conducted by someone truly independent of the offender or offending organisation. One objective should be to provide a means of formally scrutinising compliance with the standards and norms that are articulated in law, procedure or whatever is applicable to the redress programme. Such scrutiny could happen by establishing a special expert Committee to oversee the implementation initially and decisions thereafter. A further objective should be to minimise the need for litigious processes; thus minimise the risk of secondary victimisation.

Expert committees are common elements of human rights instruments in international law. In early discussion on possibilities and practicalities of a redress scheme in South Australia, a proposal was mooted to establish a committee comprising three members – lawyer, victim advocate and psychologist – to either assess all applications or to review contested decisions. The expressed preference was for all committee members to be independent of the state (that is the Crown as administrator of the scheme and

adviser to the Attorney-General). The proposal, as evident from the existing redress scheme, was not taken up; but the Premier and the Attorney-General announced that the Crown would act as 'model litigant' in all dealings with victims of sexual abuse in state-care. Whether victims agree that has happened, or is happening, is unknown because there has been no independent review of the scheme.

**6. Should establishing or participating in redress schemes be optional or mandatory for institutions?**

Should redress be a demonstration of genuine regret and acknowledgment for the harm done, it would be better if reparations, such as redress, are 'volunteered'; however, I suspect given victims' grievances and critiques of redress schemes that a level of compulsion will be necessary. The level of compulsion might be considered in light of the transparency of decision-making and the grievance process, see answer to question 5, for instance.

**7. Should seeking redress or compensation through a redress scheme be optional for claimants? Should claimants retain the ability to pursue civil litigation if they wish?**

The sexual abuse of a child is, amongst other things, an abuse of power and control. It stands to reason therefore that victim empowerment is a key component when seeking to assist and support a victim of child sexual abuse. Victim empowerment is the process of allowing victims to have or take control, to express their needs, to be recognised and respected as an individual and to have opportunities to make choices for themselves, thus making the transition from victim to survivor.

It is therefore vital that victims choose whether or not they seek redress. There should be information and support available to victims when considering their options but the decision should rest with the victim. If redress is automatic it may be viewed with disdain by the very victims it is intended to assist as being another system of control imposed upon them.

I believe victims who receive redress should retain the ability to pursue civil litigation as they do under South Australia's state-funded victim compensation scheme. In fact some victims receive state-funded compensation then use the monies to pursue civil litigation. I do not however, advocate that victims be compensated for the same injury twice. Therefore, if a victim received civil damages subsequent to a redress payment the victim should be required to return the redress sum.

**8. How should fairness be determined in redress schemes when some institutions have more assets than others? How should fairness and consistency between survivors be achieved in these circumstances? what should be the position if the institution has ceased to operate and has no clear successor institution?**

Offender-made restitution and offender-paid compensation is one way to hold offenders accountable for their crimes and the harm caused to victims. There are different approaches to restitution or compensation. Regarding much crime, many victims are not in a financial position to sue. To alleviate the burden on victims and possibly to reduce demand on state-funded compensation (see below) in some jurisdictions, prosecutors are obligated to apply for restitution or compensation during the sentencing phase of criminal proceedings. In other places, victims can be represented during sentencing and in a few places the state funds lawyers to help victims apply for compensation. Courts can also be obligated to consider applications

and even give priority to compensation over, for instance, imposing fines. In reality, most offenders are not in the financial position to pay compensation. Similar impediments exist with respect to victims suing offenders, so civil suits are rarely worthwhile.

The United Nations (1985) has determined that when violent offenders cannot pay compensation, the state should do so. State-funded compensation for victims of crime is, as said above, an element of reparations. It is also a relatively recent public policy phenomenon. The first such scheme was introduced in 1963 in New Zealand; followed by Great Britain in 1964. Schemes now exist in the United States, Canada, Japan and many other countries, as well as throughout Australia. The introduction of state compensation for victims in common law countries has tended to be associated with the commission of serious violent crime resulting in a public campaign (Karmen 1996: 325; Elias 1983: 27-29).

The state mostly has no obligation to compensate victims of crime; yet various rationales have been put forward for such. These include: a belief that the state should compensate victims because it has failed to protect them (Schafer 1960; Karmen 1996; Miers 1997); a belief that the state owes a moral obligation to assist citizens in distress (Maggadino 1976; Mieners 1978; for see also Inbau 1959; and, for a contrary view: Childres 1964; Elias 1983); to help ease the financial burden resulting from crime; and, to provide for treatment to help victims deal with the effects of crime (O'Connell & Fletcher in press). Polish (1973) and Burns (1992) described state-funded compensation as 'state charity', which Burns (1992) added is "designed to soothe the public". In Australia such compensation has been called an "Act of Grace" (Office of Crime Statistics (South Australia) 1989). As stated by Justice Jacobs (Kingston-Lee v Hunt and Others and the State (1986) 42 SASR 136), state-funded victim compensation: "... is essentially humanitarian in motive; it recognises that many criminal offenders are without means and accordingly imposes the primary burden of compensation upon the State; but because the State has no liability in law to the victim, apart from the statute, compensation is in the nature of an ex gratia payment."

A similar approach should be taken to victims of child sexual abuse that happened or happens in institutions. The law should provide for offender-paid compensation and prosecutors should be obligated to make victims aware of their right to apply for compensation and also to make such applications when victims request. Alternatively, consistent with the United Nations Guidelines and Principles on Legal Aid, the state should pay lawyers to assist victims to make applications for compensation.

Institutions, like the state, have a moral and should have a legal obligation to pay compensation whenever liable or whenever the actual offender is unable. An institution or the state should carry the financial burden and seek recovery from offenders, rather than have victims waiting years, even decades for offenders to finalise compensation payments.

A proper legal regime could alleviate some of the inequities, but not all. The state should provide statutory compensation in those cases where, although not legally liable, the victim has exhausted other avenues. Of course, a state institution is legally liable, then it should have the same obligations as other institutions.

- 9. What are the advantages and disadvantages of offering compensation through a redress scheme which is calculated on the same basis that damages are awarded by courts in civil litigation systems? Should affordability for institutions be taken into account? If so, how?**

Equity and fairness are important advantages. Alternatively, requiring a victim to produce the same standard of evidence to attain redress as they would be required to mount a civil prosecution undermines the concept of 'redress' being both a moral obligation and benevolent or charitable.

Questions on affordability shift the focus towards the offender's personal circumstances rather than the harm done and the victim's needs. Perhaps a national Fund as mentioned above could help to ensure victims are not disadvantaged.

**10. Given that the sexual abuse of children mostly occurs where there are no witnesses, what level of verification or proof should be required under a redress scheme to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation?**

The burden should be variable. If the victim seeks restitution as a criminal sanction, then the burden of proof for the crime itself should be beyond reasonable doubt; however, once so proven the grounds for a restitution order should be proven only to the civil test – balance of probabilities. There should be provision to allow the Court to draw an inference from accused persons' silence; and, disclosure law and practice should be reformed to put an onus on accused to produce certain evidence.

In civil proceedings the balance of probabilities test should prevail, although the legal process could be facilitated and the burden eased on victims if an onus existed to disclose all applicable evidence by the parties to the proceedings.

For redress schemes that require victims to compromise on the sums awarded for the harm done to them, the burden should be less than either criminal or civil. Certainly, the process should not be such that victims suffer secondary victimisation.

That said, the process should have safeguards to prevent fraud – especially as fraud demeans valid victims. Furthermore, fraudulent claims, if exposed, jeopardise public empathy for victims. As Commissioner for Victims' Rights, I was confronted by a most upset victim because she had recently been informed that a person known to her was likely to be paid a monetary sum as a victim of abuse in state care. The female-victim complained to me that she was present and the abuse did not happen as alleged. When she challenged the applicant and his/her supporters she was bullied, harassed and threatened if she went public. She added in forthright terms that there were too many genuine cases, so she did not want to publicly undermine their right to just recompense. I hasten to add that in all my dealings with victims of abuse in state-care this is one of two statements to me that suggest impropriety by individuals. Just as 'we' are prepared to let ten guilty people go free, rather than one innocent person be convicted, so too should 'we' be prepared to pay one fraudulent claim in order to avoid ten deserving victims from receiving compensation.

Unfortunately, there is a paucity of research on what works and for who; see below and in particular the concluding comment.

**11. What sort of support should be available for claimants when participating in a redress scheme? Should counselling and legal advice be provided by any redress scheme? If so, should there be any limits on such services?**

Simply giving money as compensation to victims is not the answer, and it is not what all victims are asking for.

Research on restorative justice provides lessons to inform reform debate on redress schemes. Koss and Achilles (2008), for example, have summarised their views on the application of restorative justice to sex offences. They wrote,

“A consensus of published studies is that survivor / victims need to tell their stories about their experiences, obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, receive support that counteracts isolation and self-blame, and above all have choice and input into the resolution of their violation. Victim-sensitive justice capable of responding to these needs would involve processes that respect survivor / victims as autonomous persons, individualise both their needs and the appropriate community responses including avenues for offender accountability, censure, and material reparation, if desired, protect physical safety, reduce potential re-abuse, and maximise offender fulfilment of commitments.”

This quote comprises important pointers and highlights key issues central to a victim-oriented process in which redress is an element.

Victims should be provided with support throughout the redress process and, if necessary, thereafter. As previously stated victims should have access to funded independent legal advice from the time they commence the claim so that victims are properly informed of their entitlement to apply and assisted as appropriate. As well victims should have access to independent legal advice on whether the sum offered by the state or responsible institution is fair and reasonable.

Victim/claimants should also have access to free counselling throughout the entire reparation including throughout the application process for financial redress. Many victims report to me that during the application process they are bombarded with extremely painful memories. For some victims it is the first time they have talked about their experiences or disclosed their victimisation to close family and friends let alone complete strangers. Free counselling should be readily accessible to all victims of abuse in state-care regardless of whether they are able or intend to seek financial redress.

**12. If a claimant has already received some financial compensation for the abuse through one or more existing schemes or other processes, should the financial compensation already received be taken into account in any new scheme?**

Yes, in order to maintain the integrity of all schemes and processes. Receiving payment from more than one source or scheme for the same injury is a matter that has been, and continues to be, debated by the National Victims of Crime Work Group. For those operating redress schemes, there should be protocols to facilitate information exchange. For victims there should be an obligation to disclose as exists in state-funded victim compensation schemes.

Victims should be treated with respect and dignity, and be given assistance appropriate to their needs. They should have a right to seek reparations but that does not entitle them to profit from the crimes perpetrated against them.

Conversely, it would be abhorrent to any sense of justice to disentitle victims who have suffered intense and long-term from redress simply because they have been paid some monetary sum by another institution or under another scheme.

## Concluding comment

Since World War II, Holocaust survivors have often been told: “to let it go”, and “it’s time to get on with their lives”. These survivors often suffered profoundly due to the indifference and inappropriate responses of those who should have helped and others who looked on. We should avoid repeating history – although I fear it has already been repeated time and time again.

Although many victims and some victim-advocates express on-going support for lump-sum monetary victim compensation, others argued there is a paucity of evidence to demonstrate that such payments achieve desired outcomes for either victims or the state. O’Connell and Fletcher (in press) reviewed the international and local literature then found little empirical research that substantiates the various rationales for state-funded victim compensation. Indeed, there has been little advance in knowledge since Holder (1999) observed “It is very unsatisfactory that there should be no research anywhere that actually asks crime victims whether the pain and suffering component of compensation actually alleviated their trauma” (p13). She also concluded that “A narrow focus on ‘financial compensation’ for an individual’s injury without consideration of the rehabilitative effect of such awards nor of the totality of victims’ needs is seriously flawed” (p15). Yet, Fletcher and O’Connell (in press) observed that many victims perceive compensation as a right or fundamental entitlement and a means to hold offenders accountable for the harm done. They also point out that the limited Australian victim-survey data suggests victims of crime in South Australia, Victoria and New South Wales were not alienated by the process to attain state-funded compensation and many were appreciative of the payment as recognition of by the state of their injuries. I suspect that some victims will hold similar views about the redress schemes, while other will be strongly critical of the process, the sums paid or both.

Further, regarding victim assistance many victims believe the state (and I would add other institutions) should provide both counselling, practical help or other support and compensation (see also Victorian Community Council against Violence 1994; Joint Select Committee on Victims Compensation 1997a, 1997b, 1997c; Justice Strategy Unit 2000b).

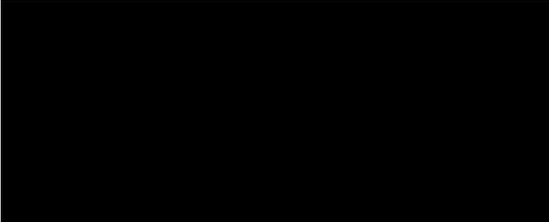
The debate on state-funded victim compensation, however, is an example of a broader debate on ‘what’ to provide victims and ‘how’ to provide for victims’ needs (ACT Victims Referral Project 2013). Victims have not always been the beneficiary of the debate; indeed, it has helped fuel “a backlash” against the expenditure involved in state funding of criminal injuries compensation schemes (Freckelton 2003).

It seems to me that there should be a place for victim-survivors to come forward and tell their story in pursuit of truth and acknowledgement, as well as reparation. To paraphrase Danieli (2005):

1. victims want re-establishment of their esteem, dignity and equality of power and value as people.
2. victims want relief from the effects and from the stigmatisation, as well as acknowledgement.
3. victims want equal rights under law and the provision of justice; and prevention of further victimisation.
4. victims want to combat impunity and provide and maintain equal justice and reasonable redress.

All victims I have helped want vindication by acknowledgment of the crime committed against them and validation by acknowledgment of the harm done to them. Redress is but one element to achieve these outcomes. Redress is desired by many victims, but that is not all they desire. It is not desired by some victims, who instead want other forms of assistance.

Yours faithfully,



Michael O'Connell | Commissioner  
Commissioner for Victims' Rights