

The inadequacy of state-based compensation schemes for survivors of abuse

Submission to the Royal Commission on Institutional Responses to Child
Sexual Abuse: Issues Paper 7

30 June 2014

CONTENTS

Who we are	2
Introduction.....	3
Widely divergent schemes.....	3
The inadequacy of benefits paid.....	4
Limitation periods	4
Inadequate support provided for legal assistance.....	4
Schemes are vulnerable to government commitment	5
Justice.....	6
A national compensation fund is inappropriate	6
The importance of the common law.....	6
Recommendations for reform	7
Bridging the information and referral gap.....	9
Conclusion.....	10
Annexure A: Summary of statutory schemes.....	11

WHO WE ARE

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The Australian Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The Australian Lawyers Alliance is represented in every state and territory in Australia. More information about us is available on our website.¹



INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Royal Commission on Institutional Responses to Child Sexual Abuse regarding *Issues Paper 7: Statutory Victims of Crime Compensation Schemes*.

In essence, we submit that statutory victims compensation schemes are inadequate and inappropriate mechanisms to compensate survivors of institutional abuse.

This inadequacy is reflected in:

- Widely divergent schemes
- Inadequate benefits;
- Limitation periods;
- Inadequate support provided for legal assistance;
- Vulnerability in respect of the adequacy of government commitment to fund such schemes;
- Perceptions of justice and accountability.

We also submit that a national compensation fund is not the answer for survivors of institutional abuse, and that many of the failures of statutory schemes would be likely to be repeated in any national scheme.

We advocate that it is more appropriate that survivors of abuse should be able to sue relevant institutions at common law.

We submit that current barriers to accessing the common law, including limitation periods and the legal status of such institutions and their assets, can and should be overcome via legislative reform.

WIDELY DIVERGENT SCHEMES

Statutory victims of crime compensation schemes are, in and of themselves, inappropriate to provide redress to survivors of institutional abuse.

State and territory based victims' compensation schemes are widely divergent nationwide.

The schemes are fragmented and piecemeal across Australia, with each scheme providing different benefits and having different legal hoops that individuals must jump through.

This lack of commonality nationwide means that survivors of abuse attempting to gain redress under the schemes, even if they have been abused by the same individual (albeit in different states) will have different access to the types of benefits available, limitation periods, delays, reviews, assistance provided and government commitment to the scheme's sustainability.

THE INADEQUACY OF BENEFITS PAID

We note that the benefits that may be accessed under the relevant victims of crime compensation schemes are low, especially when compared with judgments under the common law for injury.

At Annexure A, we provide a brief round-up of the legislation and benefits regarding victims of crime nationwide.

Given the incredibly low benefits available and the strict time limits, the vast majority of people that have experienced institutional abuse do not seek support under statutory schemes.

LIMITATION PERIODS

We note also, that strict limitation periods bar individuals from accessing statutory victims of crime compensation schemes. In some jurisdictions, these limitation periods require victims to apply for assistance under the scheme within two or three years of the abuse occurring, or within two to three years of turning 18 years of age.

Even where, as in NSW, the period is longer, it is still less than half the average time from abuse to reporting.²

INADEQUATE SUPPORT PROVIDED FOR LEGAL ASSISTANCE

Under most statutory compensation schemes for victims of crime, support provided for legal assistance is nominal.

Individuals wishing to access statutory schemes largely gain support from community legal centres, advocacy services or via private lawyers who are likely to receive inadequate remuneration for their work.

Any compensation scheme should be subject to proper legal representation and adequate rights of review.

SCHEMES ARE VULNERABLE TO GOVERNMENT COMMITMENT

One of the key problems with statutory victims compensation schemes is their dependency upon government support for their ongoing sustainability and financial position.

In 2013, the NSW victims' compensation scheme was subjected to radical reductions, with the introduction of the *Victims Rights and Support Bill 2013* (NSW).

Case study: NSW Victims Compensation Scheme

The NSW government announced in 2011 that the victims compensation scheme was to be reviewed, with a view of 'to deliver faster and more effective financial support to victims of violent crime'. PriceWaterhouseCoopers were appointed to undertake the review and released an Issues Paper in March 2012. Six weeks were provided to contribute public submissions, closing in May 2012. PriceWaterhouseCoopers presented its report to the NSW government in July 2012.

The Bill radically reduced benefits available to individuals under the scheme, including reducing the maximum lump sum benefit from \$50,000 to a 'recognition payment' of \$15,000. The changes were also retrospective, affecting individuals whose claims were lodged but still pending.

The scheme already had extensive delays: as at September 2012, the average waiting time for the determination of a victims' compensation claim was 25 months.³

On 17 May 2013, Community Legal Centres NSW drafted an urgent complaint to the UN Special Rapporteur on violence against women, requesting that the Special Rapporteur send an urgent appeal to the New South Wales government to withdraw the Bill and engage in a proper consultation with those who will be impacted by the changes.⁴

The Bill was passed by the NSW Legislative Council on 30 May and assented to on 3 June 2013.¹

¹ See Parliament of NSW, 'Victims Rights and Support Bill 2013,' <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/E7E0C8BFEE233CE4CA257B64001CA285>

JUSTICE

We note that statutory victims compensation schemes do not deliver what many survivors of abuse are seeking: justice, and that those who failed to act appropriately will be held accountable.

Payment from victims compensation schemes is funded by the taxpayer, and not from the institution that has allowed gross and indecent events to occur, and in some cases, continued to occur with the knowledge of the institution.

Statutory victims' compensation schemes do not hold institutions accountable and do not act as a sufficient deterrent or agent for systemic change.

A NATIONAL COMPENSATION FUND IS INAPPROPRIATE

We note that previously, there have been proposals for a national compensation fund, to be funded by institutions responsible and by government. The likelihood of adequate government funding in respect of those in its care is to be seen in the very low amounts available for victims compensation.

Our suspicion is that church and other bodies which support a national scheme hope that any restrictions on government payouts will apply to them.

We believe that many of the failures of statutory schemes in their provision for victims of crime will be replicated within any national compensation fund.

We submit that any proposed national compensation fund will inevitably become an undercompensation fund, and therefore inadequate. Under such a fund, individuals will never receive the form of support, legal assistance, independence, justice or compensation that they would have received under the common law.

Furthermore, any private compensation schemes, such as those provided by the Roman Catholic Church, Anglican Church and Salvation Army, are only likely to provide any real justice if the victim has a right to pursue full common law compensation in the courts if not satisfied with either the process or the amount offered.

THE IMPORTANCE OF THE COMMON LAW

Ultimately, we believe that the common law provides a fairer, more just and more appropriate option for survivors of institutional abuse.

This was also acknowledged by the Victorian Family and Development Committee,



in its inquiry into the handling of child abuse by religious and non-government organisations, 'Betrayal of Trust':

'For many victims of criminal child abuse, the option of pursuing a claim through civil litigation is central to their desire for justice. Many told the Inquiry that civil litigation is not only an avenue to seek compensation, but also a form of acknowledgement and accountability for the harm they have suffered.

The Committee is firmly of the view that victims have a fundamental right to sue non-government organisations for damage they have suffered at the hands of representatives of that organisation. Court judgements provide a valuable and practically available form of public condemnation for criminal child abuse, and create a powerful incentive for organisations to change their practices to prevent such abuse.

No civil claims of criminal child abuse made against religious organisations have been decided by the Victorian courts. Civil litigation in these cases is generally resolved through private settlements.¹⁵

Any payouts by way of the church or government should, of course, be offset against the entitlement to common law damages.

As previously submitted, it is accepted that litigation in courts can be expensive and stressful. However, the overwhelming majority of cases settle and only those where the parties are clearly at odds need to be litigated. If there is no right to litigate, then the victim has no effective means of putting pressure on the body responsible for the abuse to provide adequate compensation.

As we have previously submitted to the Royal Commission, in order for survivors to access the common law, reforms are required:

- Incorporation of relevant institutions so that they exist as legal entities suable at law;
- Making churches vicariously liable for their personnel; and
- Full waiver of limitation periods for survivors of institutional abuse.

RECOMMENDATIONS FOR REFORM

Incorporation of relevant institutions

The Catholic Church's trust assets are legislated separately in every state and



territory. Therefore, legislative reform to ensure the legal incorporation of the Catholic Church would be required in each state and territory regarding its legal status and the availability of its assets.

We submit that such changes are also necessary to ensure liability in future cases beyond institutional abuse. For example, Roman Catholic parochial schools have their property held by trustees which can't be sued and the Catholic Education Office, which employs most teachers, is not a legal entity. It depends upon the bishop in each diocese whether the *Ellis* defence is taken.

An example of such legislative reform has been introduced by David Shoebridge MLC into the NSW Parliament, in the form of the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)*.

We believe that this Bill provides the first steps towards the type of legislative reform that should be introduced in every state and territory across Australia.

However, we emphasise that the Bill does not resolve the question of limitation periods.

Vicarious liability

Case law throughout the common law world, including England, Canada, Ireland and also in the United States, has established countless cases wherein the Roman Catholic Church has accepted or been held liable through its trustees for the criminal misconduct of priests or teachers.

Australia alone has the contrary view taken in the *Ellis* decision.

The Victorian Family and Development Committee recommended that 'the Victorian Government undertake a review of the *Wrongs Act 1958 (Vic)* to identify amendments that would ensure organisations are held accountable for their legal duty to protect children from criminal abuse.'⁶

We submit that legislative review of all relevant civil liability legislation should be relevantly undertaken in every state and territory in Australia.

Full waiver of limitation periods

We note that while the *Justice for Victims Bill 2014 NSW* provides an excellent example regarding incorporation, the Bill does not go far enough to remedy the issue of limitation periods.

An Anglican church survey revealed that the average time from experience of

abuse until complaint is 23 years.⁷

We affirm the recommendations of the Victorian Family and Development Committee, who recommended that:

‘Statutes of limitations disadvantage victims of child sexual abuse because they typically take decades to act on the understanding of the harm arising from their abuse and to issue proceedings. The Committee therefore determined that it is necessary to amend the Limitation of Actions Act 1958 (Vic) to allow victims sufficient time to initiate civil legal action. It recommends that the Victorian Government consider amending the Act to exclude criminal child abuse from the operation of the limitations periods.’⁸

BRIDGING THE INFORMATION AND REFERRAL GAP

We submit that there is also a need for publicity for survivors of institutional abuse about the options open to them to seek justice.

We note that if access to common law compensation was to be opened, via legislative amendments as we have suggested, restrictions currently exist in NSW on legal advertising, meaning that individuals can struggle to find a lawyer that will be able to represent them in these matters.

Yet the reality is that there are competent solicitors prepared to act for victims on a no win, no fee basis, and this is, for most victims, the only available form of legal aid in this country.

We note that the victims’ compensation tribunal is unable to refer individuals to private law firms to seek assistance.

We also note that there do not appear to be any pre-established links between private law firms and community legal centres.

The ‘referral roundabout’ is a common experience for any client seeking legal assistance, especially when seeking assistance via government funded services.

We are concerned that individuals who are making, or will make, first report of abuse suffered within an institution, need ready access to information regarding where they can seek a lawyer to assist with their claim.

Trauma that people have experienced should not be perpetuated via further obstacles in their search for justice.

Communicating about abuse that has occurred is a courageous step for many



survivors of abuse. People need to be informed about what the next step is, and how to take it.

In this respect, there may be a role for the KnowMore service to be expanded into a legal referral service or a centralised location for knowledge and contact details regarding solicitor firms that provide advice in this area.

CONCLUSION

In essence, we submit that statutory victims compensation schemes are inadequate and inappropriate mechanisms to compensate survivors of institutional abuse. We submit that it is more appropriate that survivors of abuse should be able to sue relevant institutions at common law.

Current barriers to accessing the common law, including limitation periods, vicarious liability and the legal status of such institutions and their assets, can and should be overcome via legislative reform.

ANNEXURE A: SUMMARY OF STATUTORY SCHEMES

Summary: Limitation of time

- NSW: Victims Compensation Scheme under the *Victims Rights and Support Act 2013*.
 - An application for financial support must be duly made within 2 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 2 years after the day on which the child concerned turns 18 years of age **(s40 (1))**.
 - An application for a recognition payment must be duly made within 2 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 2 years after the day on which the child concerned turns 18 years of age **(s40 (4))**.
 - An application for a recognition payment in respect of an act of violence involving domestic violence, child abuse, or sexual assault, must be duly made within 10 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 10 years after the day on which the child concerned turns 18 years of age **(s40 (5))**.
- Victoria: Victims of Crime Assistance Tribunal (VOCAT) under the *Victims of Crime Assistance Act 1996*.
 - An application must be made within 2 years after the occurrence of the act of violence **(s29 (1))**.
 - The Tribunal may extend the time limit if it considers it appropriate to do so, taking into account age **(s29 (3)(a))**, intellectual disability **(s29 (3)(b))**, or mental illness **(s29 (3)(b))**, whether the perpetrator was in a position of power, influence, or trust in relation to the applicant **(s29 (3)(c))**, the physical or psychological effect of the act of violence on the applicant **(s29 (3)(d))**, whether the delay threatens the capacity of the Tribunal to make a fair decision **(s29 (3)(e))**, whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18 **(s29 (3)(f))**, and all other circumstances it considers relevant **(s29 (3)(g))**.
- QLD: Victim Assist Queensland under the *Victims of Crime Assistance Act 2009*.

- An Application for victim assistance for an act of violence must be made within 3 years after the act of violence happens (**s54 (1)(a)**), or, for a victim who is a child, the day the child turns 18 (**s54 (1)(c)**).
 - The scheme manager may, on application by a person, extend the time for the person making an application or victim assistance if the scheme manager considers it would be appropriate and desirable to do so, having regard to age (**s54 (2)(a)**), impaired capacity (**s54 (2)(a)**), whether the person who allegedly committed the act of violence was in a position of power, influence, or trust, in relation to the person (**s54 (2)(c)**), the physical or psychological effect of the act of violence on the person (**s54 (2)(d)**), whether the delay undermines the possibility of a fair decision (**s54 (2)(a)**), and any other matter the scheme manager considers relevant (**s54 (2)(f)**).
- WA: Criminal Injuries Compensation Scheme under the *Criminal Injuries Compensation Act 2003*.
 - A compensation application must be made within 3 years after the date on which the offence to which it relates was committed (**s9 (1)(a)**), or if it relates to more than one offence, the last of them was committed (**s9 (1)(b)**).
 - An assessor may allow a compensation application to be made after the 3 years if he or she thinks it is just to do so and may do so on any conditions that he or she thinks it is just to impose (**s9 (2)**).
- SA: Victims of Crime Compensation (VOCC) under the *Victims of Crime Act 2001*.
 - The initial application period is, for an application by a victim, 3 years after the commission of the offence (**s18 (2)(a)**).
 - The court may, for any proper reason, extend a period of limitation fixed by this section (**s18 (7)**).
- Tasmania: *Victims of Crime Assistance Act 1976*.
 - An application for an award is to be made within 3 years after the date of the relevant offence (**s7 (1A)**).
 - If a primary victim, secondary victim, or related victim is less than 18 years old at the time of the relevant offence, his or her application for an award must be made no later than 3 years after he or she turns 18 (**s7 (1B)**).
 - The Commissioner may extend the 3-year period if satisfied that there are special circumstances which justify the extension (**s7 (1C)**).

- ACT: *Victims of Crime (Financial Assistance) Act 1983*.
 - Applications for financial assistance must be filed within 12 months after the day when the relevant injury was sustained (**s27 (2)**).
 - The magistrates Court may, on application made at any time, extend the time of the filing of an application if the court considers it just to do so (**s27 (3)**).
- NT: *Victims of Crime Assistance Act*.
 - An application for an award must be made for an application relating to a compensable violent act, within 2 years after the occurrence of the violent act (**s31 (1)(a)**), or, for another application, within 2 years after the occurrence of the injury or death to which the application relates (**s31 (1)(b)**).
 - The Director may accept a late application, if the Director considers the circumstances justify it, having regard to whether the death or injury occurred as a result of sexual assault, domestic violence, or child abuse (**s31 (3)(a)**), age (**s31 (3)(b)**), whether the offender was in a position of power, influence, or trust in relation to the applicant (**s31 (3)(c)**), mental incapacity (**s31 (3)(d)**), whether the delay will affect the assessor's ability to make a proper decision (**s31 (3)(e)**), whether the violent act was reported to a police officer within a reasonable time after it occurred or at any time before the application is made (**s31 (3)(f)**).

Summary: Access to compensation

- NSW: Victims Compensation Scheme under the *Victims Rights and Support Act 2013*.
 - Recognition payments are significantly lower than that offered under the scheme prior to legislative change (**s36**);
 - Consideration of reduction to recognition payments (**s44**).
- Victoria: Victims of Crime Assistance Tribunal (VOCAT) under the *Victims of Crime Assistance Act 1996*.
 - A primary victim may be awarded by the Tribunal assistance of up to \$60,000, plus any special financial assistance awarded in accordance with section 8A (**s8 (1)**).
- QLD: Victim Assist Queensland under the *Victims of Crime Assistance Act 2009*.
 - A primary victim of an act of violence may be granted assistance of up to \$75,000 (**s38 (1)**).
 - Also, in addition to the assistance mentioned in subsection (1), the

primary victim may be granted assistance of up to \$500 for legal costs incurred by the victim in applying for assistance under this Act **(s38 (2))**.

- WA: Criminal Injuries Compensation Scheme under the *Criminal Injuries Compensation Act 2003*.
 - Subject to sections 32, 33 and 34, the maximum amount that may be awarded in aggregate under sections 30(1) and (3) in favour of one person for a single offence committed on a date in a period set out in the Table to this subsection is set out in the Table opposite that period **(s31 (1))**.

Table

Item	Period (all dates inclusive)	Maximum amount
1.	22 January 1971 to 17 October 1976	For an indictable offence: \$2, 000 For a simple offence: \$300
2.	18 October 1976 to 31 December 1982	\$7, 500
3.	1 January 1983 to 31 December 1985	\$15, 000
4.	1 January 1986 to 30 June 1991	\$20, 000
5.	1 July 1991 to the day before the day on which this Act comes into operation	\$50, 000
6.	On or after the day on which this Act comes into operation	\$75, 000

- SA: Victims of Crime Compensation (VOCC) under the *Victims of Crime Act 2001*.
 - In awarding statutory compensation, the court must observe the following rules **(s20 (3))**:
 - In any case – where an amount arrived at to compensate financial loss, or the aggregate of amounts arrived at to compensate financial loss and non-financial loss, would, but for this subparagraph, exceed \$50, 000, the amount awarded will be \$50, 000 **(s20 (3)(a)(iii))**.

² See Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, May 2009.

³ See Community Legal Centres NSW, 'Open Letter to the Attorney-General, Victims Compensation: Vital for Victims, 25 September 2012. A copy of the letter is accessible at <http://www.lawyersalliance.com.au/documents/item/65>

⁴ A copy of this letter can be accessed at <http://www.lawyersalliance.com.au/documents/item/123>

⁵ Parliament of Victoria, Family and Development Committee, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and non-government organisations*, November 2013, at xxxix. Accessible at http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Preliminaries.pdf

⁶ *Ibid* xl.

⁷ Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, May 2009. Accessed at <http://www.anglican.org.au/governance/commissions/documents/professional-standards/study%20of%20reported%20child%20sexual%20abuse%20in%20the%20anglican%20church%20may%202009%20full%20report.pdf>

⁸ Parliament of Victoria, above n 5, at xl.

⁹ See

<http://www.legalaid.tas.gov.au/factsheets/PDF/Criminal%20Injuries%20Compensation.pdf>