



## **Joint Response to the Royal Commission's Issues Paper no. 7: Statutory Victims of Crime Compensation Schemes**

**30 June 2014**

### **Introduction**

As legal aid and community legal services providing legal advice and representation to a diverse client base across Central Australia, we are unfortunately too familiar with the devastating impact that sexual and other forms of violence, including child sexual abuse, has on individuals, their families and their communities. Whilst we cannot measure or quantify the pain and harm suffered by those who have experienced child sexual abuse in an institutional context, we consider that it is critical that the legal system provides accessible and appropriate avenues for the recognition of this pain and harm.

Accordingly, we thank the Royal Commission for the opportunity to discuss the operation of the Northern Territory's (NT) victims of crime compensation scheme. We hope that our comments may assist in improving the NT victims of crime compensation scheme's responsiveness to the needs of people who have suffered child sexual abuse in an institutional context.

### **About us**

Founded in 1973, the **Central Australian Aboriginal Legal Aid Service (CAALAS)** provides high quality, culturally appropriate legal advice, representation, education and advocacy in criminal, civil and family law to Aboriginal and Torres Strait Islander people living in Central Australia. CAALAS lawyers and Aboriginal Legal Support Officers regularly attend bush court sittings and run clinics and workshops in remote communities across Central Australia.

CAALAS regularly provides legal advice and assistance in relation victims of crime compensation applications. Whilst the provision of legal assistance to victims of crime constitutes a large part of our civil team's practice, requests for legal assistance from clients who have suffered child sexual abuse are uncommon.

The **Central Australian Women's Legal Service (CAWLS)** is a not for profit organisation funded by the Commonwealth Attorney-General's Department and the Northern Territory Government. CAWLS provides free legal advice and assistance to all Central Australian women in the areas of domestic and family violence, family Law and children, family Law and property, discrimination, victims of crime, child protection and housing.

Although child sexual abuse claims are also relatively uncommon for our service, CAWLS provides assistance to a significant number of clients seeking to make compensation applications in relation to a range of crimes.

The **Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (CAAFLUAC)** is a Family Violence Prevention Legal Service which is funded by the Commonwealth Department of Prime Minister and Cabinet. CAAFLUAC provides legal assistance, casework, counselling, court support and referrals to Aboriginal adults and children who are victims/survivors of family and domestic violence, including sexual assault, in Alice Springs, Yuendumu, Papunya, Hermannsburg, Tennant Creek and Elliott. This includes providing assistance to clients who seek to make applications under the victims of crime compensation scheme. CAAFLUAC also conducts community legal education and early intervention and prevention activities around domestic and family violence issues.

## **Submission**

### **1. What are the advantages and disadvantages of statutory victims of crime compensation schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts?**

Some of the intended advantages of statutory victims of crime compensation schemes are that they are supposed to be quicker, cheaper, simpler, more certain, significantly less onerous and generally less traumatic for victims than pursuing compensation through the court system

One of barriers is the level of evidence required to establish eligibility. It can be difficult to establish a crime has been committed against the application, or that harm has been suffered, in the absence of police and medical reports. In CAAFLU's experience, for instance, applicants' Statutory Declarations are not given much weight as evidence.

Another disadvantage of the scheme for survivors of child sexual abuse is that the scheme is quite rigid about what types of offences and injuries are compensable. Therefore, where the abuse suffered by an applicant does not fall within the Category 1, 2 or 3 offences listed in the Regulations or the applicant has not suffered an injury or injuries listed in Schedule 3 of the Regulations which meet the minimum threshold, then they will be found to be not entitled to compensation.<sup>1</sup>

Changes to the scheme in terms of the types of evidence allowable and the types of offences and injuries that are compensable may help in improving the response to applications made by victims who have suffered child sexual abuse, including in an institutional context.

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<sup>1</sup> Regulation 16(2) states that injuries similar to those in Schedule 3 or injuries which cause symptoms for at least six weeks can also be compensable.

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

We consider the following features to be important:

- An easily accessible scheme that is transparent and fair and is applied in a consistent manner;
- Mechanisms within the scheme that reflect the particularly sensitive and difficult nature of child sexual abuse, such as exceptions to the requirements that victims report matters to police, assist in police investigation and prosecution of matters and that applications are filed within a two year time limit;
- A scheme that is underpinned by trauma-informed principles that guide the scheme's aims, objectives and operation, including the mode of assessment of pain and injury;
- Proper, evidence-based recognition of the significant and varying pain and injury that those who have suffered child sexual abuse may experience;
- Access to counselling as a standard aspect of making an application; and
- Access to legal advice and representation to help vulnerable applicants complete the process.

**3. Are there elements of statutory victims of crime compensation schemes that are effective or ineffective for claimants? For example:**

*a. Discretionary provisions to extend the time limits;*

Section 31(2) confers discretion on the Director of the existing VOCC scheme to accept an application after the expiry of the two year time limit. Section 31(3)(a) recognises, to an extent, that it is unfair to require victims of child abuse to bring an application within the two year statutory time frame. Section 31(3) explicitly provides that, in determining whether to exercise the discretion to accept an out of time application, the Director must have regard to, among other things, whether the injury or death occurred as a result of child abuse, the age of the applicant at the time of the violent act, whether the offender was in a position of power, influence or trust in relation to the applicant and, whether the delay will affect the assessor's ability to make a proper decision. In practice, we find that it is this last consideration which is the most critical factor in whether or not an application will be accepted out of time.

Whilst this discretion has been exercised quite fairly in the Northern Territory to date, it would be beneficial to include further safeguards for victims of child sexual abuse. We recommend that the scheme incorporates a provision providing that the Director must allow an out of time application in cases of child sexual abuse, unless there is an exceptional reason to refuse to allow the application to be made. By removing the onus on the applicant to make their case for acceptance of their application beyond the statutory time limit, the scheme may be less intimidating for victims of child sexual abuse. Further, it would offer an acknowledgement of the vast number of reasons as to why many victims of child abuse do not report, or not until significant time has passed since the offences.

b. *Caps on payments;*

The NT VOCC scheme currently has both a minimum threshold of \$7,500 and a maximum cap of \$40,000 on payments.

The NT has the second lowest cap in Australia. The highest cap for a VOCC scheme is \$75,000 in QLD and WA. Given the significant harm and suffering caused by child sexual abuse in an institutional context, and the historically widespread nature of this abuse within the NT, we recommend that the cap be increased to be comparable with that in QLD and WA, at a minimum.

c. *Requirements to report the act of violence or offences to the police and to assist police investigations and prosecution*

Whilst there is some discretion to award compensation in circumstances in which the applicant has not reported the act of violence or offences to the police or has not assisted the police in the investigation or prosecution of the crime, this discretion should be broadened to better meet the needs of applicants who have experienced child sexual abuse, and in particular, abuse within an institutional context.

Section 43 of the *Victims of Crime Assistance Act (NT)* sets out the circumstances in which financial assistance must not be awarded. Most of the grounds relate to a failure to report the matter to police. Section 43 provides:

**“When financial assistance must not be awarded**

The assessor must not award financial assistance to the applicant if any of the following circumstances apply:

- (a) the assessor is satisfied the applicant is not entitled to an award;
- (b) the violent act was not reported to a police officer within a reasonable time after its occurrence, unless the assessor is satisfied circumstances prevented the report being made;
- (c) the violent act was not reported to a police officer before the date the assessor decides the application, unless the assessor is satisfied circumstances prevented the report being made;
- (d) the applicant failed, without reasonable excuse, to assist police officers in a material way in the investigation or prosecution of the violent act, including by failing to make a formal complaint or statement;
- (e) the assessor is satisfied the applicant made the application in collusion with the offender;
- (f) the injury or death occurred during the commission of a crime by the applicant.”

There are important and very valid reasons why many victims of child sexual abuse in an institutional context may not have made a report to the police or may have decided not to make a formal complaint or statement. The relationships of power and authority that may be present between a child victim and accused, particularly when these dynamics are entrenched over an extended period of time, may prevent

a victim of child sexual abuse from feeling safe to report the abuse. Further, abuse against children often exhibits special features that are designed to exploit a child's particular vulnerability, including manipulation, instillation of fear and threats.

Whilst assessors have the discretion to award financial assistance in circumstances where offences were not reported on the basis that he or she is satisfied that circumstance prevented a report from being made or the victim had a reasonable excuse for failing to assist the police, this discretion can be exercised arbitrarily. It would be preferable to include a stated exception to sections 43(b), (c) and (d) where abusers held positions of power and control over their victims, such as with victims of domestic violence and child sexual abuse.

It is critical that there be a presumption in favour of awarding assistance to victims of child sexual abuse, notwithstanding that an applicant has not reported the relevant crime to the police or formally assisted the police with the investigation or prosecution of the violent act.

**d. Other issues**

*(i) Calculation of the award*

The manner in which an award of financial assistance is calculated under the scheme is convoluted and arbitrary, and in our view, fails to appropriately recognise the degree and types of harm suffered by victims of sexual abuse, including victims of child sexual abuse in an institutional context.

The NT's VOCC compensation scheme allows applicants to either claim a single total amount for a Category 1, 2 or 3 violent act, listed in Schedule 1 of the Regulations, without having to prove any injuries, or they may make a claim for compensable injuries, listed in Schedule 3 of the Regulations (noting that they will be entitled to 100% of the standard amount for the most serious injury, 30% of the standard amount for the second most serious injury and 15% of the standard amount for the third most serious injury up to a total of \$40,000).<sup>2</sup>

For example, if an applicant's claim relates to the commission of acts of gross indecency on a child under the age of 16, or an attempted rape of a person under 16, the applicant could claim \$7,500 - \$10,000 for a 'category 1 compensable violent act' or, if the applicant can establish that the offence involved a pattern of abuse<sup>3</sup>, \$25,000 - \$40,000. Even if this amount does not meet the maximum available claim, the applicant is precluded from also claiming psychological harm. However, psychological harm may be considered by an assessor when determining where in a stated range an applicant's award should fall.

In the alternative, the applicant could claim for each separate injury suffered. Should the applicant wish to instead claim for each separate injury suffered, the types of injuries that

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<sup>2</sup> Section 18 of the *Victims of Crime Assistance Regulations*.

<sup>3</sup> The statutory term 'pattern of abuse' is defined by cl. 6 of the *Victims of Crime Assistance Regulations* as a violent act is "(b) the violent act is a series of 3 or more related criminal acts that occur over a period of time; and (b) the acts are committed against the same victim by the same offender". By cl. 4 of the *Regulations*, 'violent acts' are deemed to include sexual offences listed in the schedules to the *Regulations*.

can be claimed, and the amount for each injury, is set out in Schedule 3 to the Regulations. Most of the injuries that may be claimed are physical injuries, which are often not applicable to child sexual abuse victims. The forms of physical harm suffered by a victim of child sexual abuse victim may also be difficult to prove at a later date.

The calculation of psychological injury is particularly problematic within the current NT VOCC scheme. Psychological harm is listed as a type of injury that may be claimed, if applicant has a 'chronic and moderately disabling' recognised psychological or psychiatric disorder that relates to certain (somewhat arbitrarily identified) offences. If the abuse does not relate to one of these identified offences, then the applicant will only be able to claim psychological harm if he or she suffers from a 'severely disabling and chronic; recognisable psychological or psychiatric disorder'.<sup>4</sup> This is a very high threshold which can be extremely difficult to meet. For example, a person who suffered a form of child abuse that does not come within the list of identified offences, and as a result of the abuse is suffering from Post Traumatic Stress Disorder that is moderately disabling and chronic, would not be eligible for compensation under the NT VOCC scheme. We note that the scheme's classification of a psychological disorder as moderate or severe does not seem to be linked to any medical criteria.

Further, the scheme fails to recognise that psychological harm or injuries as a result of child sexual abuse may manifest in ways that significantly impact upon the life of the victim, but fall short of classification as a recognisable psychological or psychiatric disorder. We note also that it can be very difficult to assess historic psychological injuries where the victim has made a full or partial recovery.

In our view, the scheme does not adequately recognise the pain and suffering victims of sexual abuse may have experienced at the time of the abuse and may continue to experience. It means that a potentially large number of people who have suffered sexual abuse receive no recognition of the trauma they have experienced. Categorising trauma and determining the levels of psychiatric harm by offence type means that the scheme is ill-equipped to respond to the particular circumstances of the applicant, and may not appropriately recognise the type and degree of harm the applicant has suffered. Assessing the psychological impact of child sexual abuse requires a sensitive, trauma-informed approach and the legislation should reflect the range of presentations this kind of injury may take.

***(i) Recovery action against the offender***

The Northern Territory has the power, under s. 56 of the *Victims of Crime Assistance Act* (the Act), to commence proceedings against the offender for the recovery of some or all of the money granted to the victim. This power may be exercised even without a finding of guilt. We are concerned that this broad power may deter some applicants from making an application, and that the exercise of the recovery power could potentially re-victimise applicants who have suffered child sexual abuse.

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<sup>4</sup> Victims of Crime Assistance Regulations, cl. 15.

Recovery action against an offender may create a range of issues for a victim. A victim may feel their safety is threatened by the fact that the offender is now being made financially liable for offences committed. Further, this may encourage offenders to pursue litigation to contest the recovery action, and in turn, put the victim at risk of re-victimisation by the offender, and re-traumatisation through court proceedings.

On the other hand, we recognise that the applicant may wish the offender to personally pay for the harm suffered. It is also important to have regard to the victim's wishes and to pursue a recovery action against the offender without the victim's consent could be incredibly disempowering or intimidating. Because this is a sensitive, and in some cases, potentially harmful issue, we consider that in case of child sexual abuse in an institutional context, the offender should not be pursued unless the applicant has provided his or her consent for this to occur.

Whilst the NT government currently do seek the opinion of the victims before commencing recovery proceedings against offenders, they require there to be an objective risk to the victim's safety before they will agree not to pursue recovery. In our view this requirement is inappropriate; even if a victim's fear is not based on an objective risk to their safety, it does not mean that their fear is not real. To pursue recovery against an offender in light of a victim's very real, but ultimately subjective, fear risks re-traumatising victims and may even discourage victims from making compensation applications. .

Accordingly, we believe that there should not be recovery in matters of domestic violence and sexual assault unless the victim instructs that he or she wishes recovery action to be taken.

#### **4. What changes should be made to address the elements of statutory victims of crime compensation schemes that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts?**

We have made a number of suggestions above in relation to changes which could be made to address the elements of the NT VOCC scheme which raise particular difficulties for people who suffer child sexual abuse in institutional contexts.

In addition to the significant issues raised above, there are a number of practical barriers that victims face in making an application under the existing VOCC scheme. The process of making an application in and of itself can be a tedious, protracted, traumatising and potentially expensive process for victims.

For example, under the current legislation, it is not clear whether travel and meal expenses incurred as a result of obtaining a medical examination under s. 35(1) are covered by s. 35(3) of the Act. Currently, the Crime Victims Services Unit pays travel expenses for remote clients, but there is no allowance for meals. Most of the clients of our legal services have very little, if any, discretionary income. Most receive Centrelink payments, and many are subject to income management, which leaves little money to pay for incidental expenses of medical examinations and appointments carried out in towns and cities away from home. It is therefore important that all expenses are covered and paid for in advance, if possible. Further, applicants should have access to counselling and some form of case-management throughout the process of making a

claim, to ensure that their injuries are appropriately assessed and that they are afforded tailored assistance to make a claim, including the use of an interpreter.

**5. What forms of redress, including services and payments, should be offered through statutory victims of crime compensation schemes?**

Access to counselling is vital and should be offered to all applicants at the time of an applicant makes an application. Under the NT's current VOCC scheme, applicants may apply for counselling under a Victims Counselling Scheme established under the Act.

In recognition that the process of making an application can lead to re-traumatisation of a victim, counselling should be offered, rather than applied for, and should be delivered by experienced practitioners, who have a strong understanding of cross-cultural communication. Unfortunately, it is still very difficult for victims from remote communities in the NT to access counselling services, and there is a dearth of culturally appropriate counselling and mental health services more generally.

***(ii) Should those who suffer child sexual abuse in institutional contexts be eligible for additional or different compensations and services, compared to victims of other crimes?***

It is important that any VOCC scheme that aims to provide redress to victims of child sexual abuse in institutional contexts adequately recognises the significant psychological harm that child sexual abuse victims may suffer. As discussed above, the scheme as it currently stands is ill-equipped to do this. In the instance that the current VOCC scheme is strengthened to better provide for victims of this nature, then additional compensation schemes are unlikely to be required.