



**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES  
TO CHILD SEXUAL ABUSE  
AT SYDNEY**

ISSUES PAPER 7

**STATUTORY VICTIMS OF CRIME COMPENSATION SCHEMES**

RELEASED 29 MAY 2014

**SUBMISSIONS IN RESPONSE**

**Newcastle Office**

Lifestyle House  
671-677 Hunter Street  
NEWCASTLE WEST NSW 2302  
**T:** (02) 4907 4200 **F:** (02) 4929 1188

**Sydney Office**

Governor Phillip Tower  
Level 36, 1 Farrer Place  
SYDNEY NSW 2000  
**T:** (02) 8823 3300 **F:** (02) 8823 3788

PO Box 2293 DANGAR NSW 2309

**Email:** [pkelso@kelsos.com.au](mailto:pkelso@kelsos.com.au) **Websites:** [www.kelsos.com.au](http://www.kelsos.com.au) [www.royalcommission.com.au](http://www.royalcommission.com.au)

## Executive Summary

Kelso's The Law Firm is in an excellent position to voice an opinion on the effectiveness of statutory victims of crime compensation schemes ('SVCCS'). Kelso's works directly with survivors of sexual abuse and other victims of crime, and has done so in NSW since the Victims Compensation Tribunal commenced operation in February 1988. The firm's Director, Mr Peter Kelso, has completed over 10,000 applications in NSW. He has also been a highly active external audit practitioner for the NSW Department of Family and Community Services for the last three years. Mr. Kelso has also completed hundreds of applications for statutory compensation in Tasmania and as many as 50 applications in Western Australia. These submissions will, however, focus on the current scheme in NSW.

In answering Question 1, we survey the advantages and disadvantages of SVCCS. Their advantages include the avoidance of litigation, monetary reward, the rules of evidence do not apply, that the age of the offender does not deny a person access to an award, and the speed and control of the claim. Their disadvantages are that the schemes are not uniform across the country and poor legislative drafting makes achieving the desired outcomes difficult and often frustrating. There is also a failure to recognise the unique category of claimant that has suffered institutional child sexual abuse when they are not provided meaningful redress. Limitation periods and failures to report within a reasonable period often prevent a claim being made or severely reduce its chance of succeeding. Proving harm forces the victim to retell their experiences; this is problematic when the courts have recognised the obvious psychiatric harm of child sexual abuse. The capped and categorised payments create absurd outcomes for those abused for long periods. The compensation provided is often not meaningful when it is paid for by the taxpayer and not by the institution responsible.

Our answer to Question 2 details the important elements of a scheme which benefit claimants or at least aim to benefit claimants.

Our answer to Question 3 analyses the difficulties that the *Victims Rights and Support Act 2013* ('VRSA') pose to claimants. This includes poor legislative drafting that can be arbitrarily used to award claims in a lower category or combine various claims to unfairly deprive a person of greater compensation. The absurd outcomes created can confuse and upset claimants. The VRSA also removed the provision of legal costs resulting in victims going without legal representation and dealing solely with Victims Services staff. Staff at Victims Services prepares applications for victims under a conflict of interest, particularly when attempting to advise victims on their full entitlements and their prospects of appealing an unfavourable decision or dismissal. A victim's access to compensation is decreased and the burden to obtain and sort through relevant evidence is placed back on the victim. Inefficient processing of claims by Victims Services also leads to delays and inconsistent advice. This creates further barriers in obtaining justice.

Our answer to Question 4 provides our recommendations for fixing some of the immediate problems facing the VRSA scheme. These are consistent with our recommendation for a Commonwealth agency to handle redress schemes as proposed in Issues Paper 6.

Our answers to Questions 5 & 6 explain additional services that should be offered to institutional child sexual abuse victims. Their vulnerability in society showcases why additional services need to be provided to sufficiently recognise and compensate victims of institutional abuse. In summary, we recommend meaningful monetary compensation, unlimited counselling, a Gold Card, a funeral fund and an effective apology.

Our answers to Question 7 relate to the difficulties faced by victims of institutional child sexual abuse in obtaining the necessary evidence to sufficiently provide their claim under the VRSA. The Commission is aware that numerous allegations of institutional child sexual abuse remained undisclosed for many years and even once they were reported, many were not acted upon by the institution involved. Even fewer reports were passed on to police for investigation. The fact that the VRSA allows the value of claims to be reduced on the basis that disclosures were not made to the relevant authorities, were not reported within a reasonable period or that the victim failed to assist police does not recognise the particular problems that institutional child sexual abuse claimants have when making a claim.

We hope our submissions are of assistance to the Commission.

## Contents

Executive Summary.....	2
1. Introduction .....	6
2. Question 1A: Advantages of Statutory Victims of Crime Compensation Schemes .....	8
Avoidance of Litigation.....	8
Monetary Payments.....	9
Rules of Evidence .....	10
Criminal Liability of Offenders.....	11
Equal Access to Funds.....	11
Speed of Claim.....	12
Flexibility .....	12
3. Question 1B: Disadvantages of Statutory Victims of Crime Compensation Schemes .....	13
Non-Uniformity Amongst States.....	13
Poor Legislative Drafting .....	13
Failure to Recognise the Unique Category of Claimant.....	14
<i>Failure to report within a reasonable period</i> .....	14
<i>Proving harm</i> .....	14
<i>Capped and categorised payments</i> .....	15
<i>Limitation periods</i> .....	15
<i>Source of award money</i> .....	15
<i>Failure to provide meaningful redress</i> .....	16
4. Question 2: Important Features of an Effective Statutory Victims of Crime Compensation Scheme .....	16
Payment of Legal Fees .....	16
Flexibility .....	17
Payment of Disbursements .....	17
Unlimited Counselling.....	17
Efficient Processing and Regular Reviews .....	18
Notices of Decision .....	18
Internal Appeals.....	18
Support to Secondary Victims and Carers .....	19
Unambiguous Legislation .....	19
Meaningful Compensation .....	19

5. Question 3: Elements of the VRSA Which Raise Particular Difficulties for Claims by Victims of Child Sexual Abuse in Institutional Contexts .....	19
Legislative Issues .....	19
<i>Series of related acts</i> .....	20
<i>Serious bodily injury and grievous bodily harm</i> .....	21
<i>Physical injuries</i> .....	23
<i>Neglect</i> .....	24
<i>The impact of inconsistent and absurd outcomes</i> .....	25
Reasons for Not Awarding Victims Compensation .....	26
Evidentiary Burden .....	27
Processing of Claims .....	27
Absence of Legal Representation .....	28
<i>Psychological health of victims</i> .....	28
<i>Education level of victims</i> .....	28
<i>Victims' apprehension surrounding state agents</i> .....	29
<i>Requirement for specified legal skills</i> .....	29
<i>Evidentiary complexities</i> .....	29
<i>Complete independence of representation</i> .....	30
<i>Victims currently in state care</i> .....	30
<i>Executive supervision of judiciary decisions</i> .....	31
Inadequate Compensation.....	32
<i>Economic loss</i> .....	32
<i>Inadequate compensation</i> .....	32
<i>Wide scope to reduce awards</i> .....	33
<i>Awards based on conduct rather than harm</i> .....	33
Death of a Claimant .....	34
6. Question 4: Recommended Changes to the VRSA to Address These Issues .....	34
Legislative Reform .....	34
Reasons for Not Awarding Victims Compensation .....	36
Evidentiary Burden .....	36
Efficient Processing of Claims.....	37
Legal Representation.....	37
Meaningful Compensation .....	38
Death of a Claimant .....	38

<b>7. Question 5 &amp; 6: Forms of Compensation and Services That Should be Offered to Victims of Child Sexual Abuse in Institutional Contexts .....</b>	<b>38</b>
Vulnerability.....	38
Monetary Compensation.....	40
Additional or Different Compensation or Services.....	41
<b>8. Question 7: The Levels of Proof Required Under SVCCS and Their Appropriateness for Victims of Child Sexual Abuse in Institutional Contexts .....</b>	<b>42</b>
No Report to Police.....	42
Blaming the Victim .....	44
The Requirement of Documentary Evidence .....	44
Delays and Limitation Periods.....	44
Criminal Law Concepts.....	45
<b>Acknowledgments: .....</b>	<b>46</b>

## 1. Introduction

1. It is with great pleasure that Kelso's The Law Firm provides a submission in response to Issues Paper 7 on Statutory Victims of Crime Compensation Schemes.
2. The Director of Kelso's The Law Firm, Mr Peter Kelso, was admitted to practice in 1984. Mr Peter Kelso founded Kelso's the Law Firm in Newcastle in 1986.
3. Mr Kelso has extensive experience in victims of crime work. He conducts the largest victims of crime practice in NSW specialising in statutory compensation for victims since the Victims Compensation Tribunal commenced operation in February in 1988. Mr Kelso has also represented hundreds of victims of crime in Tasmania and an estimated 50 victims in Western Australia. Mr Kelso also practices extensively in the area of compensation for victims of clergy and institutional abuse.
4. Mr Kelso is in frequent contact with victims of clergy and institutional child abuse through the internet. He runs Australia's largest and most frequently visited Facebook page specifically designed to update victims with news on the Royal Commission. His Facebook page is a popular way for victims to voice their opinions and vent their frustrations by commenting on Mr Kelso's almost daily newsfeeds. Mr Kelso has an excellent appreciation of the concerns of victims at a national level. A measure of Mr Kelso's influence with victims can be evidenced by the number of times he is quoted in the media.
5. Peter Kelso has been a prominent member of the External Legal Practitioners audit panel for Family and Community Services ('FACS') for three years. His firm has completed hundreds of audits of Departmental files of children in the care of the Minister. Mr Kelso's firm advises the Minister on a weekly basis on the eligibility of children in care for compensation under the NSW statutory scheme. His firm has

lodged hundreds of claims for compensation for children in care. For example, between April 2012 and April 2014 Mr Kelso's firm won over \$4.6 million in compensation for children in the care of the Minister in NSW, effectively setting up trust funds for them, which they are able to access when they turn 18 years of age.

6. Mr Kelso is himself a 'Forgotten Australian' having grown up in institutional care in NSW from 1962 to 1974. His passion for victims of childhood abuse is a product of the way he was treated in foster care and the way his life has unfolded positively since those early days. He is, today, a lively and inspirational speaker.
7. The Royal Commission presides over a seminal and transitional moment in Australian legal history. The Royal Commission has already received evidence during earlier case studies of the prevalence of institutional child abuse in State-run institutions. The Commission has also heard from victims who have sought compensation under SVCCS. The Commission is faced with the task of assessing and evaluating the broad issue of the prevalence of child sexual abuse in institutions, and in disentangling distorting factors such as delays in reporting abuse and access to appropriate redress for victims.

## **2. Question 1A: Advantages of Statutory Victims of Crime Compensation Schemes**

8. SVCCS can offer some advantages to victims of child sexual abuse in an institutional context when seeking to obtain compensation.
9. Other avenues for obtaining justice are often times not available. Many institutions do not have independent redress schemes established for victims of abuse and civil proceedings may not be a viable or appropriate option for various reasons.

### Avoidance of Litigation

10. The avoidance of litigation is a high priority for many victims and for the courts in general. Court proceedings are notoriously lengthy, expensive and uncertain. They are adversarial in nature, they are less flexible and can be very traumatic and humiliating to victims who are required to undertake various assessments and endure cross examination.<sup>1</sup>
11. SVCCS may have the potential to compensate victims whose claims fall outside the limitations period or are unlikely to succeed due to a lack of contemporaneous or corroborative evidence. About half of child sexual abuse victims never report the abuse and many do not disclose until well into adulthood.<sup>2</sup> The Queensland Crime and Misconduct Commission found in 2003 that only 28% of victims of sexual abuse reported to authorities. This therefore increases the likelihood of a victim's claims being time-barred or lacking contemporaneous evidence to support their claims.

### Monetary Payments

12. Money is one of the most commonly sought forms of redress and is the main form of compensation provided under SVCCS. A monetary award can provide some measure of economic freedom, the means to access counselling and other rehabilitative services, to have a holiday or pay off outstanding bills. It can facilitate a move to a different city or provide the opportunity to purchase a new car or to renovate a house.<sup>3</sup> An award may even provide a substantial deposit on a new house. As the Commission has heard from countless witnesses, many victims have

---

<sup>1</sup> K Braun, 'Legal Representation for Sexual Assault Victims — Possibilities for Law Reform?'(2014) 25(3) *Current Issues in Criminal Justice* 819, 821.

<sup>2</sup> *Queensland Crime Commission & Queensland Police Service (2000) Project Axis: Volume 1*. Brisbane: Queensland Crime Commission.

<sup>3</sup> C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32(2) *University of Western Australia Law Review* 264, 270.

no substantial savings and no assets. It is this firm's experience that a monetary award can even give a victim a sense of dignity, pride and security in knowing that they can leave their children an inheritance.

13. The long-term therapeutic effect of a monetary award is contingent on how meaningful that award is to the victim. From this firm's experience, the meaningfulness of an award is very personal and subjective to the individual.

#### Rules of Evidence

14. SVCCS do not strictly apply rules of evidence. This provides an advantage to many victims when their claims are lacking in formal reports to government agencies and are reliant on corroboration through hearsay evidence.
15. As the Commission would be aware, the rules of evidence do not apply to claims made through Victims Services under the VRSA. This presents great opportunity for efficiencies in fact-finding with respect to establishing claims by victims. For example, Victims Services is not subject to 'judicial notice' constraints and is in fact empowered to require, of its own volition, the production of records by any person or government agency.<sup>4</sup>
16. Victims Services is also not restrained from engaging in the use of evidence for coincidence or tendency reasoning to establish a claim. Together this provides the opportunity of keeping a database that could be used to help establish subsequent claims relating to the same offenders or institutions; thus relieving some of the evidentiary burden on claimants. This is a potential advantage for victims over the court process.
17. More generally, as Victims Services is not required to apply the various common law and statutory iterations of the 'best evidence rule', victims and their witnesses

---

<sup>4</sup> *Victims Rights and Support Act 2013* (NSW) ss 11-12.

are able to give their evidence in written form. This is of assistance in obtaining the evidence as many victims and their witnesses have an understandable apprehension about the prospect of being required to give their evidence orally or in a public court room. We have observed this apprehension to derive in part from a concern that in seeking assistance, or helping someone obtain assistance, their privacy be maintained and that their relationships with members of their community – particularly where the abuse was committed by a former member of their community – not be subject to complications.

### Criminal Liability of Offenders

18. Many children in institutional or foster care are at risk of sexual abuse by other children.<sup>5</sup> Due to the age of the offender they are unlikely to be considered liable for their offensive conduct due to the rebuttable presumption of *doli incapax*. A child, when between the ages of 10 and 14, must be proven to know what they were doing was wrong, not just that it was mere naughtiness or childish mischief.<sup>6</sup> Courts may also consider any mental impairment of the offender to further remove liability.
19. For a victim to obtain compensation civilly in such a situation can be difficult. The offender, being a minor, will have no assets, and imputing civil liability to the offender's legal guardians or the relevant supervising institution can be problematic.<sup>7</sup> Some current SVCCS allow for an act of violence to be established even where the offender may not be considered criminally responsible due to age or mental impairment.<sup>8</sup>

---

<sup>5</sup> The subject of questioning by Mr Benson of Counsel of Ms Alexander on 3 March 2014 (Case Study 7), T5216:33-47, T5217:1-11.

<sup>6</sup> See *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *RH v DPP (NSW)* [2013] NSWSC 520 [12]-[19].

<sup>7</sup> *Oyston v St Patrick's College (No 2)* [2013] NSWCA 310; *State of New South Wales v Mikhael* [2012] NSWCA 338.

<sup>8</sup> *Victims Rights and Support Act 2013* (NSW) s 19(2).

### Equal Access to Funds

20. Another potential advantage of SVCCS is that compensation awards are paid from a single pool of money. This means that awards are not influenced or determined by the depths of the defendant's pockets. Award categories and thresholds can give a sense of fairness amongst victims because the breach of a victim's rights is not valued differently according to the value of the offender's assets.
21. The success of a claim is also not affected by the strength or experience of the defendant in legal matters. Victims are also spared the task of having to enforce a judgement debt against an uncooperative defendant.

### Speed of Claim

22. In theory, SVCCS should provide a faster and more efficient process for determining these kinds of claims. A matter can be determined by an assessor or Tribunal Member, without the need for an oral hearing. Appeals can be lodged internally which simplifies and accelerates the process. Appeals can also be on merit, rather than on points of law.

### Flexibility

23. Claims which are dealt with under a SVCCS can be processed with greater flexibility than the courts allow, enabling consideration to be made for the individual needs of the victim. Depending on the particular scheme, claims may be withdrawn, expedited or adjourned. This gives a victim greater control over their claim and allows for the vicissitudes of life. This firm has seen that it is extremely beneficial for a victim suffering financial hardship or a serious medical problem to have the option of fast-tracking their claim or applying for an interim award.
24. It is also advantageous if a victim can put their claim on hold if they are unable to remain engaged with the matter due to their mental health or other impacting

issues. It is also not uncommon for a victim to make amendments to their claims after the claim has been lodged. The ability to amend various facts about their claim without reducing the validity of their allegations is very important. The ability to adjourn or amend a claim without the risk of adverse costs orders is a further advantage of SVCCS.

### **3. Question 1B: Disadvantages of Statutory Victims of Crime Compensation**

#### **Schemes**

25. A SVCCS is only as good as the legislation which creates it and the body which is established to implement it. There are several key issues that arise with SVCCS which create enormous disadvantages to all applicants, but particularly to victims of child sexual abuse in institutions.

#### Non-Uniformity Amongst States

26. The current SVCCS established to compensate victims of crime differ from state to state. A lack of legislative uniformity creates considerable confusion and legal obstacles for victims. It also creates the unfair reality that compensation is determined by the location in which abuse occurred rather than focusing solely on the wrong that was committed and how it has negatively impacted on the victim involved.

#### Poor Legislative Drafting

27. Further disadvantages are created at the legislative level in terms of drafting and statutory interpretation. Poorly drafted legislation can turn a well-meaning provision into a confusing and complicated minefield for victims, legal representatives and assessors to interpret and apply to the case at hand. Specific examples will be

discussed in greater detail in question 3. Oversights at this level lead to inconsistent and often absurd decisions on claims. It creates high levels of uncertainty, disappointment for victims and increases the need for appeals.

#### Failure to Recognise the Unique Category of Claimant

28. SVCCS fail to recognise child victims of sexual abuse in institutions as a unique category of claimant. As it stands in New South Wales, victims of childhood sexual abuse occurring in institutions have their claims determined under the same scheme that was established to compensate victims of family violence, assaults and robberies. This is not suitable for several reasons.

#### *Failure to report within a reasonable period*

a. Under SVCCS a failure to report an act of violence within a reasonable period of time or to cooperate with police is reason to cast a negative presumption on a victim's claim.<sup>9</sup> It can lead to reductions to a victim's award or a complete dismissal based on the assessor's discretion. Due to the nature of child sexual abuse alone, this is completely inappropriate.

#### *Proving harm*

b. The requirement for victims of child sexual abuse to prove harm is also very burdensome and unnecessary, particularly when New South Wales courts are accepting that psychological harm is an inevitable consequence of child sexual abuse.<sup>10</sup> Many victims spend their whole lives attempting to repress or overcome the trauma of childhood abuse.<sup>11</sup> Requiring a victim to attend a psychological assessment to prove that they suffered harm for the purposes of obtaining

---

<sup>9</sup> *Victims Rights and Support Act 2013* (NSW), s 44.

<sup>10</sup> *R v Gavel* [2014] NSWCCA 56 [110] (Leeming JA, Johnson and Hall JJ).

<sup>11</sup> C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32(2) *University of Western Australia Law Review* 264, 269.

compensation appears entirely redundant, particular when there is sufficient evidence to establish on the balance of probabilities that the abuse was committed. The requirement for reports also creates an unnecessary cost to tax payers in reimbursing victims for the cost of these reports.

*Capped and categorised payments*

- c. Compensation awards paid to victims of sexual abuse under SVCCS are usually capped based on the category of abuse that they best fit into.<sup>12</sup> Whilst this simplifies claims and creates some certainty for victims as to the expected outcome this can also lead to absurdities and unfair results for victims. Based on this structure in the VRSA, a victim of two or more indecent assaults can be awarded the same amount as a victim of ten years of the worst sexual abuse imaginable.<sup>13</sup> SVCCS also fail to recognise the full extent of the psychological harm that sexual abuse has on a victim's life. Therefore, SVCCS do not come close to adequately compensating victims of child sexual abuse.

*Limitation periods*

- d. Varying limitation periods are still enforced under SVCCS, often without discretion to apply for leave. This disadvantages victims who have been unable to disclose any or all of their abuse for many decades. Victims may be time barred from lodging applications for compensation or they may be forced to apply for compensation before they are ready to cope emotionally with the application process.

---

<sup>12</sup> *Victims Rights and Support Act 2013* (NSW) s 35.

<sup>13</sup> *Victims Rights and Support Act 2013* (NSW) s 35(2)(b).

*Source of award money*

- e. The opportunity for victims to feel as though justice has been delivered is often missed when compensation is paid from taxpayer's money, rather than by the institution seen to be responsible for the abuse. This is a clear disadvantage of SVCCS over a National Redress Scheme as proposed by this firm in our submissions for 'Issues Paper 6 – Redress Schemes' dated 2 June 2014.

*Failure to provide meaningful redress*

- f. The actual monetary awards paid to victims of child sexual abuse under SVCCS fall far below what might be considered meaningful redress. Awards are significantly less than those which can be awarded in civil proceedings and fail to properly recognise the damage that was done.
- g. Payments also fail to recognise the far higher degree of control and responsibility that an institution has over children who were abused whilst in its care, as opposed to children abused in the general population. The failure of SVCCS to provide meaningful redress will be discussed in greater detail in question 3.

#### **4. Question 2: Important Features of an Effective Statutory Victims of Crime Compensation Scheme**

Payment of Legal Fees

- 29. The provision of legal fees under a statutory scheme is a very important feature. It recognises the importance of separate legal representation for the victim. A skilled lawyer is crucial to allow the victim to have access to their maximum entitlements under the scheme and to be properly advised on prospects of appeal. State governments who are looking to wind down the commitment to SVCCS typically

repeal or amend legislation and cease the payment of legal fees. This move has a powerful impact on the number of victims coming forward to access the scheme and diminishes the number of claims made each year. Whilst this results in financial savings for the state government, it prevents the proper number of deserving applicants coming forward to make a legitimate claim. A fair scheme must give victims the options of obtaining separate legal representation with legal fees awarded separate to lump sum compensation.

### Flexibility

30. A statutory scheme must be flexible. This means giving victims the opportunity to withdraw claims, amend their statement of claim, put their claim on hold or expedite a claim due to financial hardship or exceptional circumstances. This firm has also seen time and time again, the importance of interim payments. A victim should have the option of applying for a part payment of their award before the finalisation of their claim due to exceptional circumstances if an assessor can be satisfied on the evidence available that their claim will be successful.

### Payment of Disbursements

31. A capped allowance for disbursements on a claim is also important. The cost of medical or specialist reports can be extremely burdensome for victims and often times victims are simply not able to pay them. It is not uncommon for psychiatric assessments to cost well over \$1,000. Most health professionals will not be willing to wait for payment for reports until a claim is determined, particularly if claims take years to finalise or if that particular professional provides reports for many victims' claims. For this reason, an effective statutory scheme should have the ability to pay the cost of a report once an invoice has been filed.

### Unlimited Counselling

32. Counselling is a particularly important feature in any effective SVCCS. A counsellor can have a very important and close role in the claiming process. It has been this firm's experience that victims require varying levels of emotional support throughout their claim. This is best provided by a counsellor who has special experience working with victims of crime. An effective scheme must have the resources to refer a victim to an appropriate counsellor as soon as a claim is lodged. Counselling should be free and unlimited and should be offered to both primary and secondary victims.

### Efficient Processing and Regular Reviews

33. Claims should be processed quickly and efficiently. Delays due to administrative and budget-driven issues at a Tribunal can cause a debilitating level of stress to a victim. In fact, many victims affected by delays report feeling re-traumatised. It is very important that a state government gives the SVCCS the financial and staffing resources necessary to cope with the number of claims lodged. For that reason it is necessary that schemes are reviewed regularly to ensure that they are meeting this need.

### Notices of Decision

34. When a claim is determined, whether it is successful or dismissed, a Notice of Decision provided by an assessor which outlines the reasoning behind the decision is important, both to the victim and to the legal representative. Victims should be entitled to an explanation regarding the outcome of their claim. Notices of Decision are also an invaluable resource for legal representatives who specialise in this field.

### Internal Appeals

35. The option to appeal a decision internally is another important aspect for an effective SVCCS. Internal appeals provide a fast and efficient means of reviewing an assessor's decision. A SVCCS should provide payment of legal fees for appeals lodged by a legal representative. This will encourage greater advocacy and increase access to justice for victims. This firm has also seen the importance of internal appeals to senior assessors as a means of seeking guidance on ambiguous provisions in the VRSA.

### Support to Secondary Victims and Carers

36. An effective SVCCS should provide assistance and support to secondary victims and carers of primary victims. This should be in the form of counselling. Secondary victims of crime who have been seriously impacted due to vicarious trauma should also be entitled to some form of monetary compensation.

### Unambiguous Legislation

37. As discussed in further detail in question 3, problems in the legislation will greatly impact on the effectiveness of a scheme. Legislation must be drafted using plain language and provide clear and unambiguous definitions and thresholds.

### Meaningful Compensation

38. Compensation must be meaningful to the victim. An award should be tailored to the specific needs of the victim. Examples of the current scheme's failure to provide meaningful redress will be discussed further in question 3.

## 5. Question 3: Elements of the VRSA Which Raise Particular Difficulties for Claims by Victims of Child Sexual Abuse in Institutional Contexts

### Legislative Issues

39. In the VRSA, the legislature has attempted to simplify the determination of awards by categorising acts of violence and allocating a recognition payment to each category.<sup>14</sup> However, the Act refers to various words and expressions which are either undefined or not clearly defined in both the statute and common law. Whilst, the interpretation and application of other terms are left - substantially without guidance - to the free discretion of assessors. The Honourable MacFarlan JA commented in *Victims Compensation Fund Corporation v JM* [2011] NSWCA 89 at [6] that this lack of guidance in the statute exacerbates an applicant's difficulty in challenging the Tribunal's decision.

### *Series of related acts*

- a. The majority of victims who were sexually abused as children in an institutional setting will have claims which come under Category B as defined under section 35(2)(b) of the VRSA. A recognition payment of \$10,000 is paid for 'a sexual assault, indecent assault or attempted sexual assault involving violence that is one of a **series of related acts.**'
- b. Section 19(4) of the VRSA states that two or more acts are related because: (a) they were committed against the same person, and (b) in the opinion of the Tribunal or Commissioner: (i) they were committed at approximately the same time, or (ii) they were committed over a period of time by the same person or group of persons, or (iii) they were, for any other reason, related to each other.

---

<sup>14</sup> *Victims Rights and Support Act 2013* (NSW) s 35; *Victims Rights and Support Regulation 2013* (NSW) cl 12.

Section 19(5) then provides that an act is *not* related to another act if, in the opinion of the Tribunal or the Commissioner, having regard to the particular circumstances of those acts, they ought not to be treated as related acts.

- c. The above sections give an assessor complete discretion over whether or not to consider acts related. Unlike the repealed *Victims Support and Rehabilitation Act 1996* (NSW), there is no separate category for sexual abuse which may be described as a ‘pattern’ of sexual abuse. This means that a victim who was, for example, indecently assaulted two times in the one day, can receive the same award as a victim who was subjected to sexual abuse over many years. This clearly produces a very unfair and absurd result for some victims.
- d. The VRSA maintains the same definition of ‘series of related acts’ as used in the *Victims Support and Rehabilitation Act 1996*.<sup>15</sup> In *Victims Compensation Fund Corporation v JM* [2011] NSWCA 89 at [30], Young JA commenting on the ‘series of related acts’ provisions in the *Victims Support and Rehabilitation Act 1996* (NSW), observed: “with respect, the present Act is not well drafted to deal with fact situations which can vary immeasurably, one from the other.”

*Serious bodily injury and grievous bodily harm*

- e. The legislation uses thresholds such as ‘a sexual assault resulting in **serious bodily injury**’<sup>16</sup> and ‘an assault resulting in **grievous bodily harm**’<sup>17</sup> (‘GBH’) to categorise and provide thresholds for recognition payments. The use of such terms causes confusion when neither term is defined in the Act. The common law provides little assistance as it also omits to clearly define these terms. It might be deduced that because GBH is often described in the common law as “really

---

<sup>15</sup> *Victims Support and Rehabilitation Act 1996* (NSW) s 5(3).

<sup>16</sup> *Victims Rights and Support Act 2013* (NSW) s 35(2)(a).

<sup>17</sup> *Victims Rights and Support Act 2013* (NSW) s 35(c).

serious harm”,<sup>18</sup> that ‘serious bodily injury’ is something similar to actual bodily harm (‘ABH’), although this is mere conjecture.

- f. Another ambiguity arises in the use of the word ‘bodily.’ It has been clear to date that assessors are not willing to accept that the term ‘bodily’ extends to psychiatric injury. This approach appears out of step with the common law. In *R v Aubrey*<sup>19</sup>, Macfarlan JA (Johnson and Davies JJ concurring) approved the House of Lords decision of *R v Ireland*<sup>20</sup> which addressed the issue of whether the term ‘grievous bodily harm’ included a recognized psychiatric illness. In *R v Ireland*, Steyn LJ stated “I would hold that “bodily harm” in sections 18, 20 and 47 [of the *Offences Against the Person Act 1861* (UK)] must be interpreted so as to include recognizable psychiatric illness.”
- g. Another ambiguity arises with respect to the term ‘bodily’ in the Act. Despite the approval of *R v Ireland*<sup>21</sup> and *R v Dica*<sup>22</sup> in *R v Aubrey*<sup>23</sup>, assessors have not been willing to treat even severe psychiatric injuries as grievous bodily harm for the purposes of the Act. The result is that a person who is crippled by a serious psychiatric injury from many years of the worst kind of domestic violence receives the same recognition payment as a person who, for example, is punched once in the arm and receives some minor bruising. This is an unfair result given that this is a beneficial piece of legislation<sup>24</sup> and in view of the comments in *R v Dica*, cited in *R v Aubrey*, that “the charge is not answered simply because the grievous bodily harm suffered by the victim did not result from direct or indirect physical violence. Whether the consequences suffered by the victim are physical

---

<sup>18</sup> *DPP v Smith* [1961] AC 209, [34] (Viscount Kilmuir LC).

<sup>19</sup> [2012] NSWCCA 254 at [59]-[62].

<sup>20</sup> [1998] AC 147.

<sup>21</sup> [1998] AC 147

<sup>22</sup> [2004] EWCA Crim 1103; QB 1257

<sup>23</sup> [2012] NSWCCA 254 at [59]-[62].

<sup>24</sup> *IW v City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J, 39 per Gummow J; [1997] HCA 30, referring to *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333.

injuries or psychiatric injuries, or a combination of the two, the ingredients of the offence ... are identical.”

- h. The VRSA completely fails to recognise the severity of psychological harm. This firm has seen GBH extended to a minor cut on a cheek, but not extended to victims who have multiple serious diagnosed psychiatric disorders originating from abuse. If a recognition payment truly intends to recognise the harm suffered by a victim, the decision not to recognise the seriousness of psychiatric injuries does not align itself with this intent.
- i. The use of criminal offences, such as GBH and ABH as injury thresholds for recognition payments simply confuses the process and creates huge uncertainty for victims, particularly in a scheme which has attempted to remove the need for legal representation. Thresholds for these offences are not well established in law and are often used as plea bargains in criminal cases. Drawing on the criminal law for the purpose of determining the size of the recognition payment directs the focus to the seriousness of the offender’s conduct rather than the seriousness of the harm to the victim, and further invites the application of principles for interpreting criminal liability into the interpretation of remedial legislation.

*Physical injuries*

- j. Although the purpose of this paper is to specifically address child sexual abuse in institutions, a large proportion of victims who were sexually abused in institutions also suffered some form of physical abuse.<sup>25</sup> The VRSA provides two categories for physical abuse claims. These categories are Category C which covers both ‘an assault resulting in GBH’ and the ‘physical assault of a child that is one of a series of related acts’ and Category D for ‘an assault (not resulting in

---

<sup>25</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [1.55].

GBH).’ Category C awards \$5,000 and Category D awards \$1,500. As we are focusing on child victims of abuse, most would fit into Category C as long as they can establish that the physical abuse was part of a series of related acts.

- k. The absurdity arises when victims are subjected to extreme forms of physical abuse or suffer a particularly serious injury. As the scheme currently is, a child who suffered a brain injury will be awarded \$5,000, no matter how catastrophic the injury. Sadly, this firm commonly sees determinations on claims for child victims who suffered years of extreme domestic violence or catastrophic injuries (e.g. Shaken Baby Syndrome) awarded a mere \$5,000. This same award is paid to child victims of relatively minor physical assaults. Whilst we do not intend to diminish the negative impact which any level of physical violence has on a child, it is important for an award to properly recognise the extent and severity of a victim’s injuries.

#### *Neglect*

- l. Many victims of abuse within an institutional setting also allege that they were victims of neglect during their time in care. To establish an act of violence, the VRSA requires ‘violent conduct’ to have occurred.<sup>26</sup> Section 19(3) provides that ‘violent conduct extends to sexual assault and domestic violence.’ Section 19(8)(f) states that domestic violence is ‘any act resulting in injury that occurred in the commission of a personal violence offence [within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)] against [among others] (vi) ‘a person who, at the time of the offence, had a relationship involving his or her dependence on the ongoing paid or unpaid care of the person who committed the offence’ or (viii) ‘a person who is or has been a child or step-child of the

---

<sup>26</sup> *Victims Rights and Support Act 2013* (NSW) s 19(1)(b).

person who committed the offence, or some other child of whom the person is the guardian.’

- m. The list of *Crimes Act 1900* (NSW) (‘CA’) offences which are considered personal violence offences are outlined in section 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (‘CDPVA’). This includes s 44 - ‘Failure of persons to provide necessities of life.’ Section 44 has since been divided into s 44 and s 43A (Failure of persons with parental responsibility to care for child’). In what appears to be a legislative oversight, the CDPVA was not changed to include s 43A as a personal violence offence.
- n. It is also interesting to add that, under s 279(1)(d)(ii) of the *Criminal Procedure Act 1986* (NSW), s 44 of the CA is listed as a “child assault offence”. There is no mention of s 43A.
- o. We are left with the absurd inference that denying the necessities of life to an adult is defined as ‘violent conduct’ yet the same behaviour towards a vulnerable child is not. Assessors have used this argument to deny child victims of neglect a recognition payment under the VRSA, no matter how serious or harmful the neglect.
- p. While there does appear to be scope to remedy this absurdity via the law on statutory interpretation,<sup>27</sup> Victims Services has confirmed in writing that they will continue to hold that the express mention of s 44, but not s 43A, demonstrates the parliament’s intention that child neglect not be considered to be ‘violent conduct’. We would submit that Lopes LJ’s comments could not be more applicable than in the present situation: “[such an approach] is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the

---

<sup>27</sup> *Albury City Council v North Albury Shopping Centre Pty Ltd* (1985) 1 NSWLR 220.

maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice".<sup>28</sup>

*The impact of inconsistent and absurd outcomes*

- q. The experience of this firm since the enactment of the VRSA is that decisions on claims are very inconsistent. This has led to high levels of uncertainty for both victims and legal representatives. Dismissals are very upsetting and distressing to victims. Inconsistent decisions also increase the burden of work for lawyers who are left with the task of appealing a decision at the firm's expense. If a victim is not legally represented or if their lawyer declines to lodge an appeal without payment of legal fees, this burden of appealing falls on the victim. The finalisation of a claim is also further delayed and victims are left without a sense of closure on a matter.
- r. For victims who are not legally represented, determinations can be very confusing. Lodging an appeal on a matter of legislative interpretation is a task for a lawyer and it is erroneous to expect a victim to do this themselves. Victims without legal representation are forced to seek advice direct from Victims Services on their claims. It is important to observe that support staff at Victims Services are not legally trained and are, in fact, in a position of a conflict of interest with victims. Accordingly, they should not properly be put in the position of advising the victims on the prospects of seeking an internal review or appeal to NCAT.

Reasons for Not Awarding Victims Compensation

- 40. The VRSA provides several reasons why compensation may not be paid even when an act of violence has been sufficiently established. These reasons are outlined in

---

<sup>28</sup> *Colquhoun v Brooks* (1888) 21 QBD 52, 65.

section 44 and include contributory behaviour, a failure to report the offence to police within a reasonable time, a failure to report the offence to a health practitioner or relevant agency, failing to assist police and failure to mitigate the extent of the injury suffered. This section also grants an assessor the discretion to refuse or reduce an award for 'such other matters as the Commissioner considers relevant.'<sup>29</sup>

### Evidentiary Burden

41. Under section 39(2)(b) of the VRSA, victims are required to provide a police report or report of a Government agency and a medical, dental or counselling report confirming injury to support any claim for victims compensation.
42. The nature of child sexual abuse is characterised by its element of secrecy. Abuse usually occurs in private and can therefore not be corroborated by witnesses or with medical or other forms of physical evidence. In most cases, the victim's allegations constitute the only evidentiary basis that the alleged abuse took place.<sup>30</sup> Child victims are also often dependant on third parties to make formal reports of any allegations to police or other agencies, therefore it is unfair to penalise a victim for the failures of others.

### Processing of Claims

43. Under the scheme created by the recently repealed *Victims Support and Rehabilitation Act 1996*, claims were taking upwards of three years to be finalised by the Victims Compensation Tribunal and Victims Services. Delays were experienced at every stage of the claiming process - leave applications, registration of claims, approval for psychological assessments, listing of claims and determination.

---

<sup>29</sup> *Victims Rights and Support Act 2013* (NSW) s 44(1)(g).

<sup>30</sup> R Shackel, *The Dynamics of Disclosure of Child Sexual Abuse* (14 August 2012), Right Now – Human Rights in Australia, <<http://rightnow.org.au/topics/children-and-youth/the-dynamics-of-disclosure-of-child-sexual-victimisation-implications-for-investigation-and-prosecution/>>.

44. Correspondence with staff at Victims Services has continued to provide difficulties when attempting to process claims under the current VRSA. There appears to be a high turnover of staff, resulting in inconsistent and conflicting advice being provided to victims and legal representatives. This is particularly worrisome with a scheme which attempts to remove the need for legal representation for claimants.
45. The current framework at Victims Services intends to provide one-on-one case management to claimants, yet recent feedback from claimants suggests that this is not the case. Claimants report receiving correspondence from multiple staff members regarding their claims causing confusion and stress.

#### Absence of Legal Representation

46. A major issue faced by any applicant for Victims Support under the VRSA is the absence of legal representation. This is particularly so in the case of victims of sexual abuse, and even more so for victims of institutional child sexual abuse. The need for victims of institutional child sexual abuse to be represented derives from a number of factors:

#### *Psychological health of victims*

- a. Child sexual abuse is well recognised in the literature<sup>31</sup> and by the courts<sup>32</sup> to seriously affect the psychological health and development of victims. The review of the previous Victims Compensation Scheme undertaken by PriceWaterhouseCoopers recognised that the psychological impact of violent crime in general on most victims left them in need of assistance when

---

<sup>31</sup> Australian Institute of Family Studies, *The impact of child sexual abuse on mental health* (2013) <http://www.aifs.gov.au/cfca/pubs/papers/a143161/05.html>.

<sup>32</sup> *R v Gavel* [2014] NSWCCA 56, [110]; *Shu Qiang LI v R* [2005] NSWCCA 442, [44].

progressing their applications.<sup>33</sup> For the reasons that follow we submit that this is even more so the case for victims of institutional child sexual abuse.

*Education level of victims*

- b. The education levels of many victims of institutional child sexual abuse leaves them at a significant disadvantage in navigating the application process. It is well recognised that persons who spent their childhood in the care of State institutions received a very poor level of education; to quote the Forde Inquiry: “One of the strongest impressions left on the Inquiry was the poor quality of education received by many of the witnesses. A number were illiterate, or close to it, despite having spent their childhoods in the care of the State.”<sup>34</sup>

*Victims’ apprehension surrounding state agents*

- c. Understandably, persons who have been abused by agents of the State will be apprehensive about placing the fate of their applications in the hands of another agent of the State, such as a support staff at Victims Services. Research on the experiences of sexual assault victims in the criminal law system has found that “a significant relationship exists between being legally represented by a lawyer and a victim’s level of confidence when giving evidence.”<sup>35</sup> While the Victims Services process is not an adversarial one, the experience for a victim of recounting their childhood sexual abuse in vivid detail will nevertheless be a vulnerable and traumatic experience.

---

<sup>33</sup> NSW Department of Attorney-General and Justice, PriceWaterhouseCoopers, *Review of the Victims Compensation Fund* (2012) 69. This report can be accessed at

[http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report\\_pwc-vcf-review.pdf](http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report_pwc-vcf-review.pdf).

<sup>34</sup> Queensland, Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) vi.

<sup>35</sup> K Braun, 'Legal Representation for Sexual Assault Victims — Possibilities for Law Reform?'(2014) 25(3) *Current Issues in Criminal Justice* 819, 822.

*Requirement for specified legal skills*

- d. Victims Services support staff are not lawyers and therefore do not have the required skillset to obtain the best outcome, particularly within the linguistically ambiguous framework of the VRSA, and even more so where the act of violence does not fit neatly into one of the s 35 categories.

*Evidentiary complexities*

- e. Applications for victims of institutional child sexual abuse often involve a significant degree of evidentiary complexity (whereas a typical claim for common assault reported to the police will generally be a simple matter of obtaining the police report and a letter from a doctor). This arises from the concealed circumstances, long reporting times, and resulting psychological injuries that are usual in cases of institutional child sexual abuse. This will generally require a lawyer's eye for detail, and a lawyer's skill, to know how best to untangle the factual matrix and present the claim to the greatest effect. Without legal representation there is the significant risk of complex claims falling victim to cognitive biases and being dismissed or unfavourably determined.<sup>36</sup>

*Complete independence of representation*

- f. Victims Services support staff are in a more difficult position than a private lawyer in progressing the applications of victims. This is because a private lawyer's primary concern is to advance the interests of his or her client and, in doing so, give full weight to the client's wishes. Staff at Victims Services on the other hand must operate under direction of their department when progressing a victim's application, and must give full weight to the department's policies. Independent legal representation gives victims a sense of control and mitigated

---

<sup>36</sup> A Tversky and D Kahneman, 'Judgement Under Uncertainty: Heuristics and Biases' (1974) 185(4155) *Science* 1124

vulnerability with respect to their applications<sup>37</sup> and it is to the detriment of the Victims Services process that this not provided for.

*Victims currently in state care*

- g. A major hurdle is created by the removal of legal representation for victims who are currently in the care of the Minister or who suffer from a significant cognitive impairment. Many of these victims must rely on the Department of Family and Community Services ('FACS') or the New South Wales Trustee and Guardian ('TAG') to act on their behalf in legal matters. Under the repealed *Victims Support and Rehabilitation Act 1996* (NSW), it was common for FACS and TAG to instruct private solicitors to legally represent these victims in claims for victims compensation. This was a viable option when legal fees were paid by the State Government. Caseworkers and Legal Officers at FACS and TAG do not have the time or resources to lodge thousands of claims for victims of crime. As a result, victims compensation is now far less available to our most vulnerable victims.

*Executive supervision of judiciary decisions*

- h. Finally, and this is a particularly important issue for problematic statutes like the VRSA, the absence of legal representation has the practical effect of removing the executive from the supervision of the judiciary. Victims seldom have the means (and even if they did the size of the awards make it unviable) to appeal a determination of a Victims Services assessor to a tribunal or a court. The practical effect of this is that Victims Services becomes the tribunal of fact and of law – a judge in its own case. Victims are also deprived of the benefit of having a court determine the proper interpretation of some of the more ambiguous

---

<sup>37</sup> K Braun, 'Legal Representation for Sexual Assault Victims — Possibilities for Law Reform?'(2014) 25(3) *Current Issues in Criminal Justice* 819, 824.

provisions of the Act. To quote Justice Neaves: “Clearly, it is not for the Court to dictate to the Parliament or the Executive what resources are to be made available in order properly to carry out administrative functions under legislative provisions. Equally clearly, however, the situation cannot be accepted in which the existence of a right created by the Parliament is negated, or its value set at nought, by a failure to provide the resources necessary to make the right effective.”<sup>38</sup>

### Inadequate Compensation

47. The Victims Support package provided under the VRSA is, we submit, properly to be viewed as providing an efficient scheme for victims of short-lived abuse with non-permanent injuries. It is therefore ill-adapted to victims of institutional child sexual abuse. This may be illustrated by the following:

#### *Economic loss*

- a. The Act does not provide for economic loss from the reduced earning capacity caused by the injuries.<sup>39</sup> Cases like *XY v Featherstone* [2010] NSWSC 1366<sup>40</sup> are illustrative of the great void that exists between the awards that victims of State-institutions can receive from the State via the courts and under the VRSA; yet in both instances the State was the party with the care and control of the victim when the abuse was committed while only the abuser was sued. While the VRSA does provide for ‘actual’ lost income, this is of no benefit to victims of institutional child sexual abuse as they were not engaged in paid employment at the time of their abuse.

---

<sup>38</sup> *Wei v Minister for Immigration, Local Government & Ethnic Affairs* [1991] FCA 268 [55].

<sup>39</sup> *Victims Rights and Support Act 2013* (NSW) s 26; *Victims Rights and Support Regulation 2013* (NSW) cl 7.

<sup>40</sup> See paragraph 3 of that judgement.

*Inadequate compensation*

- b. The best outcome that victims of institutional child sexual abuse can achieve through Victims Services is a \$10,000 ‘recognition payment’ and 10 hours of counselling through a counsellor approved by Victims Services; though they may apply for in excess of 22 hours of counselling if they can show ‘exceptional circumstances’.<sup>41</sup>
- c. Recognition payments do not reflect payments which are available to victims who are eligible to seek compensation through litigated or non-litigated settlements. This firm had a client who was successful in obtaining \$150,000 in damages as a victim of child sexual abuse from the institution involved through a non-litigated settlement. Prior to this settlement, a claim for Victims Support was lodged for the same act of violence on behalf of this victim. This claim was recently determined under the VRSA and the client was awarded a recognition payment of \$1,500. An award 100 times higher was available in a non-litigated settlement. However, as previously discussed in these submissions, this type of settlement is not always available to victims.

*Wide scope to reduce awards*

- d. The VRSA also contains wide scope for assessors to cut down the size of a claim by merging them. For example, the amount of the recognition payment may also be cut down if the assessor decides that sexual abuse by multiple offenders in the one institution should be regarded as really ‘a series of related acts’ constituting one ‘act of violence’ and therefore only one claim;<sup>42</sup> and there are instances of this happening to our clients.

---

<sup>41</sup> *Victims Rights and Support Regulation 2013* (NSW) cl 5.

<sup>42</sup> *Victims Rights and Support Act 2013* (NSW) s 19.

- e. The potential size of awards available to victims of institutional child sexual abuse is further reduced by ambiguities in the Act that have consistently been resolved against them.

*Awards based on conduct rather than harm*

- f. Recognition payments are determined substantially by the seriousness of the offender's actions, not the degree of harm caused to the victim. That the award received lack a rational connection to the harm caused is a source of perceived unfairness to victims. To illustrate, an applicant who is assaulted and caused a permanent brain injury will get the same award (\$5000) as an applicant who sustains a broken finger from an assault. Similarly, a person who is indecently assaulted twice will receive the same award as a person who is effectively kept as a sex-slave by their carer for 10 years.

Death of a Claimant

- 48. Death of the person claiming compensation means that their potential monetary entitlement dies with them. Their potential compensation cannot be inherited under their will or the laws of intestacy. Section 24 of VRSA makes this clear. Family victims may apply for compensation if the death of the primary victim was the result of a homicide, but not otherwise. This position is unlike what usually occurs under the general law when the action can be taken by family members when the person has died.<sup>43</sup>

---

<sup>43</sup> *Compensation to Relatives Act 1897* (NSW) ss 3-4; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2.

## 6. Question 4: Recommended Changes to the VRSA to Address These Issues

### Legislative Reform

49. The legislation should focus on the injury itself and not the application of a category of criminal law. To do so, would still impose a system where the objective classification of injury applies rather than its effect on the claimant. The Schedule of Injuries under the scheme used in the *Victims Support and Rehabilitation Act 1996* (NSW) provided more categories with payments that could be made if that classification was met.
50. A range should be used which better recognises the seriousness of harm and provides discretion on the part of assessors to award over the threshold if it is necessary. As the Honourable Sackville AJA stated in *Victims Compensation Fund Corporation v JM* [2011] NSWCA 89 at [65], ‘the difficulty facing policy makers, within a framework in which the resources available to compensate victims of crime are limited, is to ensure that curing one anomaly or injustice does not create worse anomalies or injustices’.
51. The use of criminal law terms needs to be avoided in SVCCS. Using terms like grievous bodily harm is applying jurisprudence from the criminal context onto what should be remedial legislation, muddying the purpose of SVCCS. It can lead to assessors forcing a higher threshold than statutory interpretation would allow.<sup>44</sup> Terms with no discernible meaning within the statute and the general law should be avoided, such as the use of ‘serious bodily injury’. Classification, as stated above, should be based on the impact of the injury rather than whatever criminal charge it most resembles. The uncertainty and confusion that a lawyer experiences when deciphering these provisions is magnified for those without legal training.

---

<sup>44</sup> *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9 [35]-[40].

52. Provisions that effectively allow acts of violence to be conflated into ‘a series of related acts’ need to be avoided. If abuse can be categorised as either a single act or a series of related acts, victims of long periods of abuse (including child sexual abuse) are left behind. An additional category that recognises a pattern of abuse would be recommended to address this problem, which provides a corresponding higher payment. A pattern of abuse would be applicable to long-term or chronic abuse.
53. Psychiatric harm needs to be better recognised. The current scheme under the VRSA does not properly recognise the psychiatric harm that can occur from offences. It merely treats it as proof of injury. It does not place a claim into a higher category of injury as it is not recognised as ‘bodily harm.’ Psychiatric harm could be based on an objective scale, like an assessment on the Global Assessment of Functioning (GAF) scale, to ensure that compensation reflects the level of psychiatric harm.
54. To ensure victims of child neglect can obtain compensation, section 4 of the CDPVA should be amended to include s 43A of CA as a personal violence offence.
55. The inconsistency of the legislation needs to be addressed head-on. Interpreting compensation legislation may lead to harsh or anomalous results on a plain reading of the statutory text.<sup>45</sup> However, the discovery of statutory meaning can be a ‘sympathetic and imaginative’ process for the assessors applying it.<sup>46</sup> The guiding principles of the legislation should be made clear and obvious, and interpreted to benefit the claimant instead of ensuring that Victims Services can arbitrarily reduce the availability of payment. An outcome should make sense to the person claiming compensation. Any inconsistency should be resolved in favour of the claimant.

---

<sup>45</sup> *Victims Compensation Fund Corporation v Brown* [2003] HCA 54 [29].

<sup>46</sup> *Thiess v Collector of Customs* [2014] HCA 12 [23]

### Reasons for Not Awarding Victims Compensation

56. Section 44 issues should not be applied to reduce the award because they do not reflect why claims may not be reported. While a claimant should not be able to profit from wrongdoing, they should not have their claims reduced because they did not act in a manner to which an assessor deems to be the conduct of reasonable people.

### Evidentiary Burden

57. Psychiatric harm should be assumed for victims of sexual abuse, especially child sexual abuse. They should not be forced to provide medical evidence to prove that they suffered harm. The courts will already assume psychological harm in most cases. This reduces the need for victims to recount the details, minimising the risk of re-traumatisation. A victim's claim should also not be penalised for lack of a police report.

### Efficient Processing of Claims

58. Sufficient funding to ensure that a Tribunal is properly equipped to process and determine claims will help to ensure that claims are determined without unnecessary delay. Legal representation for applicants will also free up staff at Victims Services and ensure that claims are prepared correctly and efficiently.
59. Soft law in the form of policies and guidelines should ensure consistency of advice and service at Victims Services.

### Legal Representation

60. Payment of legal fees to legal representatives will ensure that victims have the greatest possible access to justice. This will particularly benefit child victims and victims with a disability who cannot be expected to approach Victims Services

themselves. The provision of legal fees will also allow government departments, such as FACS and TAG to refer victim's matters to external legal practitioners.

61. A legal representative is in a better position to provide one-on-one support and guidance to a victim. Rather than dealing with multiple staff members at a Tribunal, a victim can have their claim managed by a solicitor who works on their claim from start to finish.
62. As previously discussed, legal representatives are in the best position to advise a victim of whether to appeal a decision.
63. Payment of legal fees for initial claims and associated appeals should not be paid out of a victim's award. Potential claimants may avoid pursuing claims if they do not have a lawyer to navigate them through what can be a labyrinthine process.

#### Meaningful Compensation

64. Compensation should more adequately reflect the damage suffered by the individual. Our suggestions regarding classifications based on injuries as opposed to crimes and adding a category of 'pattern', should help remedy some of the problems with inadequate compensation that tend to conflate claims.
65. The National Redress Scheme is the best approach to provide victims of institutional child abuse with meaningful compensation.

#### Death of a Claimant

66. A SVCCS should follow the general law's approach to when a claimant dies.<sup>47</sup> There should be the option for a family member to take over a claim if the claimant dies prior to determination. It should be noted that the deceased's family has endured the effects of institutional child sexual abuse indirectly through the effects of it on the

---

<sup>47</sup> *Compensation to Relatives Act 1897* (NSW) ss 3-4; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2.

deceased's ability to obtain employment as well as parenting skills.<sup>48</sup> This approach also recognises that many victims of child sexual abuse in institutions are getting older and experience poorer health than the general population.

## **7. Question 5 & 6: Forms of Compensation and Services That Should be Offered to Victims of Child Sexual Abuse in Institutional Contexts**

### Vulnerability

67. Those sexually abused in institutions are a vulnerable group in society. This includes the Forgotten Australians and those abused more recently in state care. It is important to note that they were already at risk before they were put into state care due to many being previously abused and neglected, making them more susceptible to the effects of institutional child sexual abuse.<sup>49</sup> It has been estimated that there are over 500,000 Forgotten Australians from over the past century, with a possible 100,000 from NSW.<sup>50</sup> They should be awarded more than those who have not suffered from institutional child sexual abuse. In cases where the abuse occurred in State-run institutions, the State has a greater level of responsibility to those victims.
68. Institutional child sexual abuse does not merely cause psychological harm. Due to their abuse, institutional child sexual abuse victims were not given a proper education, severely disadvantaging their opportunities of gaining suitable or higher employment.<sup>51</sup> This means that the Forgotten Australians are more likely to be of lower socio-economic status. They are at a higher risk of having mental health and

---

<sup>48</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [6.14]-[6.16]-[6.19], [6.37]-6.42].

<sup>49</sup> SH Thoresen and M Liddiard, 'Failure of care in state care: In-care abuse and postcare homelessness' (2011) 36(1) *Children Australia* 4, 6.

<sup>50</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [5.35].

<sup>51</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [4.62]-[4.65], [6.37]-[6.42], [6.46]-[6.48].

drug addiction issues as well as difficulty trusting authority after a childhood of sexual abuse.<sup>52</sup> Their inability to adjust made them more likely to engage in anti-social or criminal activity, including prostitution.<sup>53</sup> Those abused more recently in state care also often have poor future employment and education prospects.<sup>54</sup> They deserve additional or different compensation and services on the basis of their abuse.

69. Sexual abuse can lead to a person experiencing Post-Traumatic Stress Disorder, depression, drug abuse and sexualised behaviour.<sup>55</sup> Sexual abuse and neglect in childhood has a catastrophic impact on the victim's entire life,<sup>56</sup> therefore monetary payouts should be higher to better reflect this.

#### Monetary Compensation

70. Meaningful monetary compensation is required to recognise the harm done to the particular claimant who has experienced institutional child sexual abuse. Of course, what is meaningful to one person may not be meaningful to another. Compensation cannot remedy the pain from which they suffer.<sup>57</sup> But it can allow economic freedom and play a role in recovery.<sup>58</sup> The review of the previous Victims Compensation Scheme undertaken by PriceWaterhouseCoopers recognised that

---

<sup>52</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [6.20]-[6.36]; Australian Institute of Family Studies, *The impact of child sexual abuse on mental health* (2013) <http://www.aifs.gov.au/cfca/pubs/papers/a143161/05.html>.

<sup>53</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [6.20]-[6.49]-[6.52].

<sup>54</sup> SH Thoresen and M Liddiard, 'Failure of care in state care: In-care abuse and postcare homelessness' (2011) 36(1) *Children Australia* 4, 8.

<sup>55</sup> W O'Donoghue, LT Benuto and O Cirlugea, 'Analyzing child sexual abuse allegations' (2013) 13(4) *Journal of Forensic Psychology Practice* 296, 298.

<sup>56</sup> Australian Institute of Family Studies, *The impact of child sexual abuse on mental health* (2013) <http://www.aifs.gov.au/cfca/pubs/papers/a143161/05.html>; Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [6.1]-[6.65].

<sup>57</sup> C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32(2) *University of Western Australia Law Review* 264, 270-271.

<sup>58</sup> C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32(2) *University of Western Australia Law Review* 264, 270-271.

using the word ‘compensation’ may set ‘unrealistic expectations as to the quantum and purpose of the benefits available’.<sup>59</sup> The review indicated that the cost of violent crime cannot be completely quantified due to its physical, psychological and emotional effects and that it is not possible for a state to financially compensate such victims to the fullest extent.<sup>60</sup> However, monetary compensation would still provide a form of recognition of their institutional child sexual abuse.

#### Additional or Different Compensation or Services

71. Counselling should be provided on an unlimited basis to institutional child sexual abuse because their harm will last the rest of their lives. Such costs should be paid by the private institution wherever possible, rather than by the taxpayer.
72. A funeral fund is appropriate due to the fact that most will likely have little to no savings, have poor health and a lower life expectancy. This provides assistance to family members who have often been carers to victims.
73. A Gold Card would recognise the multifaceted needs of victims requiring assistance and support from a vast range of health professionals.
74. Effective apologies are often said to include offers of compensation, expressions of empathy and acknowledgements of violated rights or social standards.<sup>61</sup> It must acknowledge and pay respect to the Forgotten Australians and other institutional child sexual abuse victims who still experience the fallout from the abuse, often by taking responsibility and expressing regret for the abuse they have suffered.<sup>62</sup>

---

<sup>59</sup> NSW Department of Attorney-General and Justice, PriceWaterhouseCoopers, *Review of the Victims Compensation Fund* (2012) 50. This report can be accessed at [http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report\\_pwc-vcf-review.pdf](http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report_pwc-vcf-review.pdf).

<sup>60</sup> NSW Department of Attorney-General and Justice, PricewaterhouseCoopers, *Review of the Victims Compensation Fund* (2012) 50. This report can be accessed at [http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report\\_pwc-vcf-review.pdf](http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/vss/documents/pdf/report_pwc-vcf-review.pdf).

<sup>61</sup> R Fehr and MJ Gelfand, ‘When apologies work: How matching apology components to victims’ self-construals facilitates forgiveness’ (2010) 113 *Organizational Behavior and Human Decision Processes* 37–50.

<sup>62</sup> M Murphy, ‘Apology, recognition, and reconciliation’ (2011) 12 *Human Rights Review* 47, 54; DP Boyd, ‘Art and artifice in public apologies’ (2011) 104 *Journal of Business Ethics* 299, 300; E Walton, ‘Therapeutic forgiveness: developing a model for empowering victims of sexual abuse’ (2005) 33(2) *Clinical Social Work Journal* 193, 196-197.

Apologies are often pointless if it is not followed up by an offer of compensation or another meaningful form of redress.<sup>63</sup>

75. An apology is important when the failure to protect the victim was by either a powerful private or a State-run institution that often has a high level of authority, trust and responsibility regarding the children. Many victims have experienced years of abuse, shame, embarrassment, cover-ups, rejection and disbelief of their allegations. The systematic failure to hold their abusers accountable would mean that a full and complete apology is required where the institution accepts responsibility and its liability. This meaningful apology would recognise the high levels of hurt experienced by Forgotten Australians and other institutional child sexual abuse victims. Not to do so would create a further injustice to be suffered by this very vulnerable group in society.<sup>64</sup> An apology should not re-traumatise the Forgotten Australians and other institutional child sexual abuse victims.

## **8. Question 7: The Levels of Proof Required Under SVCCS and Their Appropriateness for Victims of Child Sexual Abuse in Institutional Contexts**

### No Report to Police

76. It is unfair to make the absence of a police report a grounds for a negative inference as to the truth of a claim. Criminal convictions should not be required to prove sexual abuse took place, particularly when it is up to the police's discretion whether to continue investigating a claim.<sup>65</sup> This assumes that a person abused in an institution would even trust the police enough to report their allegations to them. It

---

<sup>63</sup> DP Boyd, 'Art and artifice in public apologies' (2011) 104 *Journal of Business Ethics* 299, 305.

<sup>64</sup> M Murphy, 'Apology, recognition, and reconciliation' (2011) 12 *Human Rights Review* 47, 57-58.

<sup>65</sup> C Forster, 'Good law or bad lore? The efficacy of criminal injuries compensation schemes for victims of sexual abuse: a new model of sexual assault provisions' (2005) 32 *University of Western Australia Law Review* 264, 278-284.

is important to note that police act on behalf of the State just like their abuser in the State-run institution. The sooner an allegation is reported, the more likely it is that police will charge and initiate prosecution against the offender.<sup>66</sup> Institutional child sexual abuse victims are disadvantaged as a result when there may be a significant amount of time before they disclose, assuming they disclose at all. Delay in reporting is especially an issue when the later a report is made; the less likely is to be believed by the police.<sup>67</sup>

77. The availability of corroborative evidence is another crucial consideration to the police's decision to lay charges.<sup>68</sup> Victims of sexual abuse may have low reporting rates due to the shame and guilt they feel.<sup>69</sup> Whether an allegation is pursued by police may be based on how blameworthy, however unjustifiably so, that the victim is perceived to be by virtue of their perceived poor character or immorality.<sup>70</sup> Child sexual abuse allegations may not be believed by forensic psychologists or child welfare case workers, depending on what child interviewing techniques they use to draw out the relevant information and how they use them.<sup>71</sup> This is particularly true when children are more likely to give inconsistent information regarding their abuse by, for example, recounting the abuse in different ways.<sup>72</sup>
78. Section 44 of the VRSA allows an award to be reduced on the basis that a claim was not reported to police, and, if it is reported, whether reasonable assistance was

---

<sup>66</sup> SD Muldoon, SC Taylor and C Norma, 'Patterned characteristics of continued and discontinued sexual assault complaints in the criminal justice process' (2014) 24(3) *Current Issues in Criminal Justice* 395, 400.

<sup>67</sup> SD Muldoon, SC Taylor and C Norma, 'Patterned characteristics of continued and discontinued sexual assault complaints in the criminal justice process' (2014) 24(3) *Current Issues in Criminal Justice* 395, 400.

<sup>68</sup> SD Muldoon, SC Taylor and C Norma, 'Patterned characteristics of continued and discontinued sexual assault complaints in the criminal justice process' (2014) 24(3) *Current Issues in Criminal Justice* 395, 412-413.

<sup>69</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [4.4]-[4.5].

<sup>70</sup> SD Muldoon, SC Taylor and C Norma, 'Patterned characteristics of continued and discontinued sexual assault complaints in the criminal justice process' (2014) 24(3) *Current Issues in Criminal Justice* 395, 398, 404-405, 410-411.

<sup>71</sup> W O'Donoghue, LT Benuto and O Cirlugea, 'Analyzing child sexual abuse allegations' (2013) 13(4) *Journal of Forensic Psychology Practice* 296, 299-300, 306-310.

<sup>72</sup> W O'Donoghue, LT Benuto and O Cirlugea, 'Analyzing child sexual abuse allegations' (2013) 13(4) *Journal of Forensic Psychology Practice* 296, 299-300, 306-310.

provided. This ability is unfair based on the many reasons a person may have for not contacting the police. Forgotten Australians and other institutional child sexual abuse victims may have been too frightened or ashamed to complain, especially when it would not be clear there was a person who they could trust enough to disclose to without fear of retribution. Currently, even when child sexual abuse allegations have been made to Community Services, case workers have failed to report it to police if it did not meet the sufficient grounds to go to the Joint Investigation Response Team.<sup>73</sup> Fortunately, in terms of s 44 issues, reports to government agencies or health professionals may be sufficient when there have been no reports of the allegations to police.

#### Blaming the Victim

79. Section 44 also allows payments to be reduced if the claimant's behaviour (including past criminal activity), condition, attitude or disposition contributed directly or indirectly to the sexual abuse. This is particularly an issue when both the claimant and offender are children at the time of the abuse. This may be particularly relevant when children are abused by other children when they were under State care.<sup>74</sup>

#### The Requirement of Documentary Evidence

80. Section 39 of the VRSA requires documentary police and medical evidence of harm. So, while this section could foreseeably be applied to refuse a claim for not having these sources of evidence, Victims Services assessors have thus far not applied it in this manner. Under the VRSA, victims of child sexual abuses are still required to prove psychiatric harm where there is no proof of direct physical

---

<sup>73</sup> NSW Ombudsman, *Review of the NSW Child Protection System: Are things improving?* (2014) 17.

<sup>74</sup> Senate References Committee on Community Affairs, Parliament of Australia, *Forgotten Australians* (2004) [4.47].

injuries in order to be compensated.<sup>75</sup> Assessors applying the VRSA are not willing to assume psychological harm for victims of child sexual abuse and insist on some form of actual evidence.

#### Delays and Limitation Periods

81. When the abuse has been of a historical nature, claims have been dismissed because they lack contemporaneous evidence. The nature and reputation of the institution involved should have great weight when determining validity of a claim that is lacking in contemporaneous evidence. This would be akin to a form of evidence proving the tendency on the part of the institution to have perpetrators of child sexual abuse. It would also recognise the long periods of time that it takes for applications or complaints to be made.
82. Ultimately, s 40 of the VRSA allows an assessor to dismiss an historical child sexual abuse claim for being out of time. However, s 40(7) states that if the claimant was under 18 at the time of the sexual offence, there is no time limit in which to make their claim under the VRSA.

#### Criminal Law Concepts

83. The categories from which recognition payments are made should not be based on criminal culpability or abuse that can be categorised as a crime.<sup>76</sup> By using definitions under the CA and criminal law, it unduly affects the threshold for accepting claims, primarily because it risks inviting the use of statutory interpretation principles in beneficial legislation that are only appropriate for criminal legislation. A scheme should be based more upon the effect of the injury

---

<sup>75</sup> C Forster, 'Good law or bad lore? The efficacy of criminal injuries compensation schemes for victims of sexual abuse: a new model of sexual assault provisions' (2005) 32 *University of Western Australia Law Review* 264, 287.

<sup>76</sup> C Forster, 'Good law or bad lore? The efficacy of criminal injuries compensation schemes for victims of sexual abuse: a new model of sexual assault provisions' (2005) 32 *University of Western Australia Law Review* 264, 276-277, 284, 296.

upon the victim.<sup>77</sup> Prosecutors of criminal offences do not represent the interests of the State, nor the victim.<sup>78</sup> The prosecutor's role has no connection to awards of compensation to institutional child sexual abuse victims.

Peter Kelso  
Solicitor

30 June 2014

**Acknowledgments:**

Tom Baker, Supervising Solicitor; Tyler J. Fox, Solicitor; Ashley Kelso, Solicitor; Lydia Kelso, Law Student.

---

<sup>77</sup> C Forster, 'Good law or bad lore? The efficacy of criminal injuries compensation schemes for victims of sexual abuse: a new model of sexual assault provisions' (2005) 32 *University of Western Australia Law Review* 264, 276-277, 284, 296.

<sup>78</sup> K Braun, 'Legal representation for sexual assault victims – possibilities for law reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819, 824.