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# Royal Commission into Institutional Responses to Child Sexual Abuse

## Issues Paper 7: Victims of Crime Compensation Schemes

Submission of the Victorian Aboriginal Legal Service

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## About the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (**VALS**) provides advice and representation to thousands of Aboriginal Victorians each year by:

- Providing legal advice, assistance and representation in areas of criminal, civil and family law
- Providing community legal education to increase the communities' knowledge of their rights and obligations before the law
- Promoting law reform to address the disadvantage suffered by the Aboriginal people and communities within the legal and justice systems
- Providing policy analysis and advice on measures to improve justice outcomes, including reducing the rate of imprisonment of Aboriginal people
- Advocating for the rights of Aboriginal people in contact with the justice system
- Building public awareness and understanding of issues confronting Aboriginal people and communities within the legal and justice system.

VALS is the only Victorian Organisation funded by the Australian Government under the Aboriginal and Torres Strait Islander Legal Services Program.

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## Foreword

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On behalf of the Victorian Aboriginal Legal Service I am pleased to submit our latest contribution to the Royal Commission into Institutional Responses to Child Sexual Abuse. Issues Paper 7 examines barriers to justice and other outcomes within Victims of Crime Compensation Schemes.

The Aboriginal community in Victoria has far higher contact with the justice system than the non-Aboriginal community. This is across a broad range of issues, but also in areas of sexual abuse. Our community has a history of institutionalisation, and with that, a range of abuses within that context.

One of the outcomes of such experiences is that our children and grandchildren also experience out-of-home care, including foster and kinship care, and at times, are victims of sexual abuse in these, and other, settings.

It is important that our community understands its legal rights. Community legal education is paramount in ensuring that Aboriginal people have access to avenues of justice such as victims of crime compensation schemes. Furthermore, a culturally appropriate system, and culturally relevant supports, such as counseling, should be made available.

Within this debate lies the matter of victim underreporting. The evidence available to the Victorian Aboriginal Legal Service demonstrates that sexual abuse is underreported due to a number of reasons, including family and community considerations, feelings of ‘shame’ and a reluctance to approach the police or other services to report the abuse due to a range of historic factors such as negative contact with a number of these agencies.

With the correct considerations granted towards barriers to justice that are explicit to the Aboriginal community, we can ensure that victims – of any kind of abuse – can be awarded appropriate compensation to assist in their journey of healing, both for the individual, the family and the community.

It is with this in mind that the Victorian Aboriginal Legal Service has prepared this submission.

**Wayne Muir**  
**Chief Executive Officer**  
**Victorian Aboriginal Legal Service**

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**1. Executive Summary**

1. The Victorian Aboriginal Legal Service has prepared this submission to represent the views of the Victorian Aboriginal community concerning Victims of Crime Compensation Schemes. This submission should be read in conjunction with Issues Papers 5 and 6, which concern Civil Litigation and Redress Schemes, respectively.
2. As such, much of the information contained in this submission highlights the issues raise more extensively in the previous Issues Papers, particularly concerning access to justice, community legal education initiatives and redress.
3. However, in light of the topic of Issues Paper 7 being Victims of Crime Compensation Schemes, the Victorian Aboriginal Legal Service has prepared recommendations specific to the VOCAT process in Victoria, in particular around barriers to reporting instances of sexual abuse, and certain limitations the VOCAT process creates for Aboriginal and Torres Strait Islander persons seeking justice through this avenue.

## **2. Summary of Recommendations**

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### **2.1 Recommendations concerning the advantages and disadvantages of statutory victims of crime compensation schemes for Aboriginal claimants in institutional contexts:**

- That increased financial assistance be made available to victims in order to be able to claim
- That there be an increase in funding to culturally appropriate counselling for Aboriginal and Torres Strait Islander victims of sexual abuse
- There be an increase in funding for legal education around rights of Aboriginal and Torres Strait Islander legal services to assist victims
- That the Victims of Crime schemes take into consideration Aboriginal community and family factors as outlined above when assessing and addressing claims.

### **2.2 Recommendations concerning features of effective statutory victims of crime compensation schemes:**

- That the time limitations be extended for victims to apply
- That cultural support be offered to Aboriginal and Torres Strait Islander claimants

### **2.3 Recommendations concerning time limitations:**

- Given that the two year time limitation creates a barrier to victims accessing justice, the Victorian Aboriginal Legal Service strongly recommends that this time period be reviewed.
- The time limitation creates a barrier given that many victims, due to circumstances such as homelessness, may not even have knowledge of the scheme. It is recommended that funding for community legal education programs be increased in order to advise the Aboriginal community in Victoria of compensation schemes.

### **2.4 Recommendations concerning caps on payments:**

- The Victorian Aboriginal Legal Service strongly advocates that counselling, legal and financial advice expenses be kept separate from compensatory payments.

- That culturally appropriate counselling services be better funded to ensure access to affordable counselling.
- That the current \$10 000 cap on ‘special financial assistance’ be reviewed and increased.

### **2.5 Recommendations concerning ‘special financial assistance’:**

- Given that many instances of sexual abuse in institutionalised settings occurred well before 2007, that ‘special financial assistance’ be granted in special circumstances where institutional child sexual abuse occurred.

### **2.6 Recommendations concerning victim underreporting:**

- That historically poor relationships between police and the Aboriginal community be taken into consideration when assessing reasons for underreporting of sexual abuse.
- That the difficulties in accessing proof via Freedom of Information be taken into consideration when assessing claims for compensation.
- Given the majority of instances of institutional child sexual abuse were not reported, that this be taken into account when assessing claims for compensation.

### **2.7 Recommendations concerning access to justice:**

- That increased assistance be made available to access records
- That the burden of proof be lowered
- That there be increased culturally appropriate support available for Aboriginal and Torres Strait Islander people giving evidence
- That there be an increased cap on payments

### **2.8 Recommendations concerning offense based awards systems:**

- Introduce an offense based awards system, as seen in New South Wales, thereby cutting out burdensome procedural matters.

**2.9 Recommendations concerning additional compensation schemes for Aboriginal and Torres Strait Islander people who have suffered abuse in institutional contexts:**

- The Victorian Aboriginal Legal Service strongly recommends that a redress scheme be introduced in Victoria applicable to all formerly institutionalised survivors of sexual, physical, emotional and cultural abuse.
- That any redress scheme introduced at either a state or federal level be made accessible for those formerly institutionalised persons who suffered sexual, physical and emotional abuse, and in the case of Aboriginal and Torres Strait Islander persons, cultural abuse.

**2.10 Recommendations concerning verification of proof for claimants:**

- Given that the rates of abuse were so prevalent in institutionalised settings, that any redress scheme introduced at either a state or federal level consider the burden of proof to simply be proof of institutionalisation.

### 3. Responses to Issues Paper 7 – Statutory Victims of Crime Compensation Schemes

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3.1 *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?*

In practice it appears that there are common barriers which prevent victims from successfully pursuing statutory victim compensation schemes in the context of sexual abuse. For Aboriginal people within the Victorian community, these barriers include:

- Lack of financial means: The process of obtaining the requisite supporting document may necessitate time off work which could be difficult if the claimant is only on minimum or low wages, or if they are the sole income earner. Aboriginal community members who are most at risk to sexual abuse within institutions, have often had poor outcomes in education and employment due to their experiences. As such, those most in need to access justice at least able to do so.
- Lack of emotional resources: Culturally appropriate counselling is underfunded and as such, Aboriginal community members struggle to source the appropriate supports to assist them through the process of victims of crime compensation. This is of course in particular for sexual abuse cases in which the possibility of triggering trauma is most high.
- Practical considerations: Often, a lack of legal education around victims of crime compensation schemes will have implications such as a delay in making an application. This is also due to the fact that victims will need to see medical practitioners to obtain the necessary supporting documents, which can be a confronting experience as it forces the victim to speak about the acts and how they have affected their life. This is in and of itself off putting for many victims.
- Community and Family considerations, such as the presence of the perpetrator: Based on evidence as ascertained through the Victorian Aboriginal Legal Service, the perpetrator is most likely to be a family member. This is also complicated given the Aboriginal Child Placement Principle by which Aboriginal children are often placed in the care of family or kin under a court

order. As such, the lines between ‘familial abuse’ and ‘institutional abuse’ become blurred.

Under the *Victims of Crime Assistance Act 1996*, any person considered to have a legitimate interest in the application, including the offender, may be notified of and is entitled to be present at a compensation hearing.

Whilst the victims are entitled to make use of special protections during the hearing (for example, closed circuit television and screens), they remain a source of considerable concern, particularly given that Aboriginal families are often tight knit units.

- Shame: Feelings of ‘shame’ are also present in cases such as these. ‘Shame’ can be a culturally prevalent emotion within Aboriginal communities which is far more deep-seated than non-Aboriginal conceptions of the term. This includes revealing personal information to strangers (such as a lawyer, doctor or police) and in this context, revealing instances of sexual abuse can be regarded as causing shame to the individual, family or community. This has been regarded as a result of colonisation in which Aboriginal people are regarded as a minority within a dominant culture.
- If the perpetrator is a member of the community the victim often feels to access the scheme would cause trouble as it would bring it all back up and could fracture the family. In such instances, the victim may need to use mainstream services to avoid any conflict which then creates issues if the service chosen is not culturally appropriate. The lack of Aboriginal counselors/psychologists makes it difficult to find an appropriate person that the victim will feel comfortable with.

#### **Recommendations:**

- That increased financial assistance be made available to victims in order to be able to claim
- That there be an increase in funding to culturally appropriate counseling for Aboriginal and Torres Strait Islander victims of sexual abuse
- There be an increase in funding for legal education around rights of Aboriginal and Torres Strait Islander legal services to assist victims
- That the Victims of Crime schemes take into consideration Aboriginal community and family factors as outlined above when assessing and addressing claims.

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

1. The following features would enhance the effectiveness of the scheme:
  - Extending the period of time to make an application: Given the reasons as cited above, the Victorian Aboriginal Legal Service strongly advises that the time limitations in which victims can make a claim be considerably extended.
  - Consideration of the cultural factors that often bar a client from making an application: This could include access to appropriate counselling and legal support, including the consideration of whether to employ a ‘cultural advocate’ would could be present at the deliberations to provide an insight into the cultural issues relevant to the victim and emphasis the role that family and community takes in the healing process.

**Recommendations:**

- That the time limitations be extended for victims to apply
- That cultural support be offered to Aboriginal and Torres Strait Islander claimants

3.3 *Are there elements of statutory victims of crime compensation schemes, as they currently operate, that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts? For example:*

- a. *Some schemes have time limits and discretionary provisions to extend the time limits to make claims;*

Victims have only two years from the date of the act of violence to apply pursuant to section 29 of the *Victims of Crime Assistance Act 1996*. If an application is made out of the time, the Tribunal can have regard to the following factors:

- the age of the applicant at the time;
- whether the applicant is intellectually disabled within the meaning of the *Disability Act 2006* or mentally ill within the meaning of the *Mental Health Act 1986*;

- whether the person who committed, or is alleged by the applicant to have committed, the act of violence was in a position of power, influence or trust in relation to the applicant;
- the physical or psychological effect of the act of violence on the applicant;
- whether the delay in making the application threatens the capacity of the Tribunal to make a fair decision;
- whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18;
- all other circumstances that is considers relevant.

However, victims who are unaware of the Act are unable to use this as a reason as to why they did not make an application within time. In practice it does not appear as though many victims are aware of the scheme and they are often surprised that it exists and the compensatory awards available to them.

#### **Recommendations:**

- Given that the two year time limitation creates a barrier to victims accessing justice, the Victorian Aboriginal Legal Service strongly recommends that this time period be reviewed.
- The time limitation creates a barrier given that many victims, due to circumstances such as homelessness, may not even have knowledge of the scheme. It is recommended that funding for community legal education programs be increased in order to advise the Aboriginal community in Victoria of compensation schemes.

*b. All schemes have caps on payments;*

Primary Victims - types of assistance available to all:

- Reasonable counselling expenses
- Reasonable medical expenses
- Loss of earnings up to \$20,000

- Expenses for loss or damage to clothing
- “In exceptional circumstances” an amount to help recover from the act of violence – section 8(3)
- There is a cap of \$60,000 on all awards made under section 8.

#### Primary Victims -“Special Financial Assistance”

- There is additional “special financial assistance” available to Primary Victims (amount is awarded in addition to award under section 8).
- In order for Primary Victim to be eligible for “special financial assistance” applicant needs to show:
  - He/she suffered significant adverse effect as a direct result of the act of violence, and
  - That the act of violence falls into categories A – D for the purposes of section 8A. Regulations to the Act specify an act of violence as a category A – D act of violence.
    - Category A: actual physical bodily harm; or
    - Category B: mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock; or
    - Category C: pregnancy; or
    - Category D any combination of matters referred to in s (a), (b) and (c) arising from the act of violence.
  - The maximum amount in relation to a category A act of violence (\$10,000) is prescribed as the maximum amount in relation to a category B, C or D act of violence where as a direct result of the act of violence the victim has—
    - suffered a very serious physical injury;
    - been infected with a very serious disease; or
    - been the victim of a series of related criminal acts being acts of indecent assault or sexual penetration.

**Recommendations:**

- The Victorian Aboriginal Legal Service strongly advocates that counselling, legal and financial advice expenses be kept separate from compensatory payments.
- That culturally appropriate counselling services be better funded to ensure access to affordable counselling.
- That the current \$10 000 cap on ‘special financial assistance’ be reviewed and increased.

*c. Some schemes have lower caps on payments for offences committed earlier in time and one scheme does not apply to offences committed before 1971;*

The current legislation covers all acts of violence committed on or after 1 July 2000. The current legislation may cover acts of violence committed before 1 July 2000 in certain circumstances – see Transitional provisions in ss. 77-79 of Victims of Crime Assistance Act 1996.

Primary victims who have suffered significant adverse effects from an act of violence and who wish to make an application for “special financial assistance” may only do so if the act of violence occurred on or after 1 July 2007

**Recommendations:**

- Given that many instances of sexual abuse in institutionalised settings occurred well before 2007, that ‘special financial assistance’ be granted in special circumstances where institutional child sexual abuse occurred.

*d. Some schemes require that the act of violence or offence be reported to the police, or require an explanation if not reported to police; and*

The underreporting or delayed reporting of institutionalised child sexual abuse, combined with the difficulty of securing a conviction, poses a major obstacle to compensation claims by victims. The *Victims of Crime Assistance Act 1996* goes some way towards recognising the factors which prevent victims from

immediately reporting child sexual abuse to police, by directing the Tribunal to consider whether the offender was in a position of power, influence or trust in relation to the victim, whether the victim was threatened or intimidated by the offender, and the nature of the injury alleged to have been suffered by the victim. The current provisions could be further strengthened by removing the requirement for victims to report the violence act to police, if they have already reported it to a counsellor, social worker, psychologist or doctor.

#### **Recommendations:**

- That historically poor relationships between police and the Aboriginal community be taken into consideration when assessing reasons for underreporting of sexual abuse.
- That the difficulties in accessing proof via Freedom of Information be taken into consideration when assessing claims for compensation.
- Given the majority of instances of institutional child sexual abuse were not reported, that this be taken into account when assessing claims for compensation.

*3.4 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?*

- Greater access to records: It can be with great difficulty and expense that community members find a barrier to accessing the records required to make a claim. This is pertinent in cases of removal and repeated institutionalisation under various ‘care’ arrangements, often of which records were not kept at all, or are missing vital information. Similarly, perpetrator details may not be known and given the complexity around people’s upbringings (eg. Repeated foster placements) the specific location of instances of sexual abuse may not be known.
- Improving the process of giving evidence and being subject to examination and cross examination: Cross examination causes personal stress and in the area of child sexual assault, the level of stress is intensified due to the relationship and power differentiation between the victim and the perpetrator or the institution where it occurred. It also requires the victim to discuss the personal impact it has had upon them which is private information that the victim may not want to

discuss in front of the perpetrator, if present, or in front of any other person given the level of shame often attached to the act itself which is then reflected in the victims own view of themselves.

- Increased cap on payments: The effects of institutionalised child sexual abuse often take years to address and require more intensive psychological assistance. As such, payment caps must be increased to ensure greater access to justice for victims of sexual abuse.

#### **Recommendations:**

- That increased assistance be made available to access records
- That the burden of proof be lowered
- That there be increased culturally appropriate support available for Aboriginal and Torres Strait Islander people giving evidence
- That there be an increased cap on payments

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

- Removing the need to prove the victim has suffered an injury

The Victorian system could explore the option of introducing an offence based awards system in Victoria, as this would remove the onus on child sexual assault victims having to provide they have suffered an injury. Such schemes already exist in New South Wales and Northern Territory.

A key advantage of an offence based award is that it would spare the victim from the need to provide medical or psychological evidence of their injury, which would minimise the potential for re-traumatisation. It would be beneficial if either victims would only need to submit evidence of injury but would not need to go through any extensive psychiatric assessment. The difficulty would then be defining what would fit within evidence of injury for institutionalised victims whose records are often missing or have not reported the act of violence previously to any person.

**Recommendations:**

- Introduce an offense based awards system, as seen in New South Wales, thereby cutting out burdensome procedural matters which can be re-traumatising.

*3.6 To what extent, if any, should those who suffer child sexual abuse in institutional contexts be eligible for additional or different compensation and services, compared to victims of other crimes? Why?*

It is the view of the Victorian Aboriginal Legal Service that a redress scheme be made available for all Aboriginal and Torres Strait Islander people who were formerly removed from their family, land, language and culture and placed in an institutional setting. This includes foster care, church run homes, ‘orphanages’, state care, and family group homes.

The evidence demonstrates that formerly institutionalised persons have had low outcomes across all social indicators, including health and well being, employment and education, literacy and numeracy, and that all experienced some form of cultural, physical, emotional and/ or sexual abuse.

Given the weight of evidence demonstrating the rates of abuse and subsequent poor life outcomes, such a redress scheme should be dependent solely on the evidence that the person were placed in state care to avoid the traumatisation of revisiting stories via cross examination in a court of law, and medical and psychological assessments, as seen in current civil litigation processes.

**Recommendations:**

- The Victorian Aboriginal Legal Service strongly recommends that a redress scheme be introduced in Victoria applicable to all formerly institutionalised survivors of sexual, physical, emotional and cultural abuse.
- That any redress scheme introduced at either a state or federal level be made accessible for those formerly institutionalised persons who suffered sexual, physical and emotional abuse, and in the case of Aboriginal and Torres Strait Islander persons, cultural abuse.

3.7 *Are the levels of verification or proof required under statutory victims of crime compensation schemes appropriate for claims by those who suffer child sexual abuse in institutional contexts?*

- Evidence of the “act of violence”:
  - Claim can still proceed if there has been no conviction in relation to the act of violence.
  - Registrar will make enquiries with police as to history of the act of violence.
  - If there is no conviction then charges, a police report, or even a statement to police (if given soon after occurrence of alleged act of violence) may be sufficient evidence – when in conjunction with applicant’s evidence.
- Evidence – Injuries:
  - Physical injuries - Medical reports and hospital files or records
  - Psychological injuries - Psychological/psychiatric reports, either by applicant’s treating psychologist/psychiatrist or subsequent to a fresh assessment, must be in accordance with Practice
- Evidence of expenses claimed:
  - For medical or counseling expenses - invoices / receipts/ quotes
- For “Exceptional Circumstances” expenses:
  - for items to help in recovery from the act of violence) - invoices / receipts/ quotes
  - For loss of earnings claims – pay slips and other evidence of loss of earnings.

**Recommendations:**

- That any redress scheme introduced at either a state or federal level be made accessible for those formerly institutionalised persons who suffered sexual, physical and emotional abuse, and in the case of Aboriginal and Torres Strait Islander persons, cultural abuse.
- Given that the rates of abuse were so prevalent in institutionalised settings, any redress scheme introduced at either a state or federal level must consider whether the burden of proof could be simply evidence of having been subject to institutionalisation.