

AUSTRALIAN LAW REFORM COMMISSION

JUSTICE RESPONSES TO SEXUAL VIOLENCE

ISSUES PAPER 49 (APRIL 2024)

SUBMISSION BY THE CLAYTON UTZ PRO BONO PRACTICE

Introduction

We thank the Australian Law Reform Commission for the opportunity to make a submission on the Justice Responses to Sexual Violence: Issues Paper 49 (April 2024) (**Issues Paper**).

Our relevant experience is in acting for sexual assault and sexual abuse victim survivors in criminal injury and other compensation schemes across Australia (**compensation schemes**). This submission addresses Questions 52 and 53 of the Issues Paper.

Every year the Clayton Utz Pro Bono practice¹ advises and represents around 70 victim survivors of sexual violence including child sexual assault (and around a further 130 victim survivors of family violence) to access a statutory compensation scheme in the Australian Capital Territory, New South Wales, Queensland, Victoria and Western Australia.²

Our clients are overwhelmingly women and children. They are of all ages, and include:

- First Nations clients;
- clients from culturally and linguistically diverse backgrounds;
- LGBTI clients;
- clients in regional and metropolitan settings; and
- clients who have been convicted of criminal offences and are incarcerated.

Our clients are referred to us for pro bono assistance by the legal assistance sector - Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services - due to that sector's lack of funding to meet the overwhelming demand for this work.

If this were a different Inquiry, we would have much more to say about some specific challenges of each of the compensation schemes, which differ markedly in each State and Territory. However, for the purposes of the Issues Paper (and specifically Questions 52 and 53), we focus our observations on examples from our over two decades of working with victim survivors of sexual violence.

Finally, we note that the names of people included in the case studies in this submission have been changed, along with other identifying information.

¹ See 'Pro bono at Clayton Utz', *Clayton Utz* (Web Page) <<https://www.claytonutz.com/about/pro-bono-practice/pro-bono-at-clayton-utz>>.

² *Victims of Crime Act 1994* (ACT); *Victims Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA).

Submission

The importance and purpose of compensation schemes

1. Compensation schemes are important, particularly in instances of sexual violence. For the overwhelming majority of victim survivors of sexual violence, these schemes are their only prospect of receiving any compensation or financial support.
2. We know from the rates of attrition of reported sexual assault cases,³ that compensation schemes may be the only time a victim survivor of sexual violence receives an official acknowledgement that the violence they experienced happened (and that they are believed).
3. The compensation schemes were intended to offer victim survivors an alternative to a further traumatising civil court experience, where they would have to confront (and possibly be cross-examined by) their assailant, with no certainty that the person they were suing had the financial means to meet any judgment.
4. Put simply, to quote the parliamentary debates over the first compensation scheme bill in Australia, the schemes are intended to give "justice where justice would otherwise be denied".⁴ We further note that as beneficial schemes they are intended to be construed and interpreted beneficially.⁵ We submit that unfortunately, in our experience, this not always the case in practice.

"Compensation" is a misnomer

5. We note that despite the general characterisation of compensation schemes, not all schemes which provide a financial award to victims of crime provide adequate "compensation" to a person who has been sexually assaulted. Instead, many of the compensation schemes offer other assistance to support victim survivors in their recovery and some form of "official" recognition that the acts of violence occurred. The only compensation scheme which explicitly states that its purpose is compensation is the *Criminal Injuries Compensation Act 2003* (WA), which is also the most generous in the country.⁶
6. As reflected by their varied objects, there is a vast inconsistency between the awards available between compensation schemes, the effect of which is that a victim survivor who experiences

³ See, eg, Bridgett Gilbert, NSW Bureau of Crime Statistics and Research, *Attrition of sexual assaults from the New South Wales criminal justice system* (Bureau Brief No. 170, May 2024).

⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 March 1967, 3915 (William Francis Sheahan, MP).

⁵ *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Act* (2016) 260 CLR 232.

⁶ Victims of Crime Act 1994 (ACT) s 3AA; Victims Rights and Support Act 2013 (NSW) s 17; Victims of Crime Assistance Act 2009 (Qld) s 3; Victims of Crime Assistance Act 1996 (Vic) s 1.

an act of violence in NSW will receive far less than someone who experiences the same act in WA or the ACT.

7. By way of illustration, we have set out a brief example below.

Enormous disparity between compensation schemes	
The jurisdiction in which the violence occurred makes an enormous difference to the maximum amount of compensation available. An identical act of violence will see a vastly different outcome, depending on which compensation scheme an applicant can access.	
What happened to Michelle was less important than where it happened	
Consider the situation of Michelle. She is a woman in her thirties who is the victim survivor of historical child sexual assaults, which occurred when she was 13, 14 and 15 years old.	
The geographic location of the violence makes a huge difference as to how much she may expect from a compensation scheme. Whether she was within an institution when she was sexually assaulted will also make a huge difference as to how much she may expect to recover from a compensation scheme.	
The maximum recognition or compensation payment which Michelle is eligible to receive under the following compensation schemes is:	
NSW \$10,000	Victoria \$10,000
Queensland \$15,000	Australian Capital Territory \$50,000
Western Australia \$150,000	National Redress Scheme (if the sexual assaults occurred in an Institution) \$150,000

8. It is perverse that Australians who have experienced similar acts of violence are disadvantaged by the location of the violence.
9. The disparity between compensation schemes is not justified by the argument that some schemes claim to offer "holistic support" to victim survivors beyond compensation. In our experience, an adult victim survivor of a historic child sexual assault will have little opportunity to access, for example, additional supports available under the NSW Victims Support Scheme.

Payments have not kept pace

10. Looking to New South Wales, as one example:

- (a) Since 1900, the *Crimes Act 1900* (NSW), granted power to the courts to order that a sum be paid out of the property of a convicted offender as compensation to any "aggrieved person" sustaining loss or injury by reason of the commission of an offence. Since 1900, and until the first compensation scheme in NSW was established in 1967, the sum awarded by a superior court did not exceed \$2,000;⁷
 - (b) In 1986, the Task Force reviewing services for victims of crime in NSW described the then maximum award of \$20,000 as "inadequate";⁸
 - (c) In 1993, a review of NSW victims compensation claims showed that primary victims of sexual assaults of a child received on average \$15,618.⁹ Accounting for inflation, this would be \$34,012.68 today;¹⁰
 - (d) The maximum recognition payment available in NSW since 2013 to a victim survivor of multiple acts of child sexual assault is \$10,000. We further note that payments in the NSW Scheme have not been indexed annually since their introduction in 2013, and are now worth considerably less by comparison to 11 years ago.
11. We echo the acknowledgment by Robyn Kruk AO in the Second Year Review of the National Redress Scheme of the inherent trauma involved for victim survivors in making an application to a compensation scheme.¹¹
 12. There are always constraints on funding compensation schemes, but awards should not be so small as to diminish the stated purposes of the compensation schemes. While it is powerful for victim survivors to receive recognition of the violence committed against them, when that recognition is accompanied by a paltry sum, the effect of "recognition" is diminished considerably.

⁷ Duncan Chappell, 'The Criminal Injuries Compensation Act, 1967 (N.S.W.)'(1968) 2(3) *The Australian Bar Gazette* 7, 7.

⁸ Pia Salmelainen New South Wales Bureau of Crime Statistics and Research, *Criminal Victim Compensation: A Profile of Claims, Claimants and Awards* (Report, 1993) 1.

⁹ *Ibid*, 26.

¹⁰ See 'Inflation Calculator', *Reserve Bank of Australia* (Web Page) <<https://www.rba.gov.au/calculator/financialYearDecimal.html>>.

¹¹ Robyn Kruk AO, *Final Report: Second Year Review of the National Redress Scheme* (Report, 26 March 2021) 9.

Legal assistance can be essential for many applicants

13. While compensation schemes are marketed as self-represented processes, policy makers should stop pretending that for many applicants, these schemes can be navigated adequately without access to legal assistance.
14. We set out some views on this below but would like to note that the process of applying for the schemes requires victim survivors to revisit extremely difficult periods of their lives which is, in and of itself, traumatic. This is compounded when schemes are complicated by unnecessary bureaucracy including seeking records from a number of services, different packages of assistance and often having to advocate when financial assistance is refused.

A confusing process for victim survivors

Kayla lodged an application for victims support without legal help.

Her account of the violence by one assailant included multiple sexual assaults as well as acts of domestic violence including physical assaults, stalking and harassment.

The assessor decided there had been multiple acts of violence, and that the sexual violence was not related to the domestic violence. Kayla was approved a recognition payment of \$10,000 for the sexual violence and was recommended to lodge a second application for the acts of domestic violence.

When Kayla lodged her second application (as recommended), the second assessor dismissed the application on the grounds that it has already been lodged and decided. This devastated Kayla and further resulted in her being ineligible for further financial supports in respect of the domestic violence. Kayla had difficulty in accessing legal support and was referred to us after the time in which she could seek a review had expired.

Ideally, the first assessor should have decided that two unrelated acts of violence had occurred and provided the appropriate support without requiring Kayla to make a second application.

These examples occur, in our experience, far too often.

15. While all schemes outside the National Redress Scheme are intended to be self-represented, applicants face many complexities including:
 - (a) myths around eligibility - many eligible victim survivors are unaware that they can apply to a compensation scheme and often assume that nothing may be lodged without first securing a criminal conviction;
 - (b) different forms of financial support are tied to statutory interpretation;

- (c) accessing records often require record searches such as GIPA applications and requests for medical and counselling reports which can be expensive, complex and time consuming; and
 - (d) the process for applying for compensation can be traumatic for victim survivors, for example, by having to recount their experiences multiple times or by reviewing records which may be contemporaneous and contain distressing material.
16. The reality remains that under the current compensation schemes a sexual assault victim survivor is much more likely to achieve a better outcome with legal representation. This is due to the complexity of application forms, the required evidence, specific statutory interpretation, and an assessment approach which too often dismisses applications at first instance (which are ultimately successful upon internal review).
17. Many victim survivors are unaware of how to access records nor have the funds to do so. The more vulnerable the victim survivor, the truer this is and is particularly relevant for those who have experienced child sexual abuse. We spend considerable time making applications and reviewing records, and absorb the cost of those applications for many clients. Not only is it unlikely that many of our clients could afford the upfront cost of such applications or know how to seek a waiver for those fees, but the records also contain distressing contemporaneous records of their experiences and first responder assessments of them and those experiences. In our experience, for most of our clients they do not wish to see these records and, if forced to do so, find the process distressing.
18. Once an application is decided, in many instances, we consider the decision to be inconsistent with the governing legislation. Although we are comfortable pursuing internal reviews on our clients' behalf, for nearly of all our clients, they would either not proceed to an internal review if compensation was low or refused, or they would not be able to complete an internal review application on their own. Yet internal reviews are extremely important in an area where we would respectfully submit there is a relatively high rate of incorrect decisions at first instance.¹²
19. There is not enough government funded (or pro bono) legal advice and representation available to ensure that victim survivors can understand and exercise their options for compensation in an informed way.¹³ In 2022-2023, the community legal sector and Legal Aid

¹² See Department of Communities and Justice, *2022-23 Annual Report* (Volume 1, 2023) 119. This Report provided that for the 2208 requests for internal review determined, 1,088 requests were approved for a higher amount in 2023-23 (49%) and of the 65 applications for external review by NCAT finalised in the same year, 27 settled prior to hearing and 10 set aside the Commissioner's decision (57%).

¹³ Pro bono work is not the solution. The Clayton Utz Pro Bono Practice may be the largest provider of Compensation Scheme pro bono assistance in Australia, and we can provide representation to only around 200 victim survivors of violence each year.

provided just over 5,000 instances of assistance (inclusive of one-off advice and tasks) for victims compensation.¹⁴ The scheme in New South Wales alone received 57,586 applications.

20. We suggest best practice would be for each of the schemes or a National Scheme to be supported by a funded legal service. A good example of this is 'knowmore' and associated community services under the National Redress Scheme (which also faces challenges with respect to demand and supply). We further submit that funded legal assistance may reduce administrative costs within the schemes themselves as applicants would be able to prepare applications more efficiently.

Trauma-informed schemes

21. We acknowledge no scheme is perfect and all schemes are managing the tension between resourcing and dealing with incredibly high levels of demand. However, it is our experience that there is not always a beneficial approach being taken to statutory interpretation and application, resulting in a poor applicant experience that is far removed from a trauma-informed approach.

¹⁴, 'Legal Assistance Services, 2022-23 financial year', *Australian Bureau of Statistics* (Web Page, 9 May 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/legal-assistance-services/latest-release>>.

A terrible experience far removed from a trauma-informed approach

Samantha survived extremely serious sexual violence perpetrated by her ex-partner. At the time we met Samantha, her ex-partner had been charged with almost 100 offences against her. She had suffered extensive physical and psychological injuries.

Samantha received an insignificant "compensation" payment for the related acts of sexual violence but sought further financial support for her medical expenses. Her doctors had recommended multiple surgeries and treatments to address her injuries.

The first decision maker refused her application, discounting specific medical evidence from her doctors and instead preferring a general speculation that it was not possible to be certain that all her injuries were directly caused by the violence. This was extremely distressing for Samantha, and she had no choice but to use her "compensation" payment to proceed with her scheduled surgery.

On internal review, months later, Samantha's medical expenses were approved (though there were further administrative delays and difficulties in accessing payment for her upcoming surgeries).

At a time when Samantha was navigating the criminal justice system as a witness and was advised that she may need to enter witness protection, the process with accessing compensation and support was extremely stressful and almost impossible to navigate without legal help. While ultimately resolved, it was a far cry from a beneficial, victim survivor focused approach.

22. We share the following high-level observations about best practice that we believe would reflect a greater understanding of the experience of trauma faced by our clients.
23. Schemes should always have discretion to accept claims outside of statutory time limitations. Time limitations are a significant barrier for accessing compensation schemes as they disproportionately impact the most vulnerable. At present, New South Wales is the only scheme that does not allow this discretion. This fails to recognise how difficult it can be for victim survivors to report sexual harm and is inconsistent with widely accepted research about how victim survivors process and recover from sexual harm.¹⁵
24. In schemes where the "compensation" payment does not relate to any assessment of the type of or severity of harm, and instead is an offence-based scheme (such as in New South Wales or Queensland), we recommend removing the redundant (yet traumatic) requirement for victims of sexual violence to establish harm. If all that needs to be established is that some

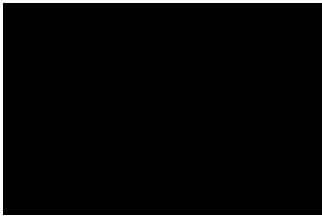
¹⁵ 'Child Sexual Abuse', *Australian Institute of Health and Welfare* (Web Page, 12 April 2024) <<https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/child-sexual-abuse>>.

level of harm occurred, it should be self-evident that an act of sexual abuse is inherently harmful - to suggest otherwise is both offensive to victim survivors and out of step with community standards. This is particularly true in instances of childhood sexual abuse.

25. We strongly recommend schemes reconsider the current approach to restitution. It is our experience that the process of restitution places victim survivors at risk. Many of our clients live in ongoing fear of partners who have committed extreme sexual and family violence against them. For some of our clients, the mere risk that restitution may occur is sufficient for them to either decide not to make an application or repay compensation paid to them. We know restitution results in a relatively small amount of funds recovered, but disproportionately impacts victim survivors of sexual and domestic violence, two of the largest groups that the schemes were intended for. We recognise that to ensure sustainability of the schemes and in line with community expectations, there may be some role for restitution to play. However, we recommend that there be a presumption against restitution in circumstances where the act of violence includes sexual violence or domestic/family violence.
26. We submit a possible alternative to restitution would be to impose a criminal levy or standard fine at the time of conviction. This would remove the risk of a future triggering event and make it clear that the State is seeking the funds and not the victim survivor.
27. We recommend the acceptance of a wide variety of records of reports that reflect how difficult it is to report sexual violence, this can include reporting support services such as counsellors, medical practitioners, social workers and other support workers.
28. While all schemes provide funding for counselling, some force victim survivors to work solely with selected or approved counsellors. We note that for victim survivors with pre-existing relationships with non-approved counsellors, this can be limiting as it forces them to develop a new therapeutic relationship which would require them disclose their experiences yet again (should they want to access financial assistance for that counselling).
29. We recommend that front line providers receive more training on the schemes and how to best support victim survivors to access them. We refer to the development of Health-Justice Partnerships in Australia which are founded on the understanding that front line workers have greater access to those with legal issues than lawyers in many circumstances. We also note that under some schemes a report from a counsellor or doctor would be all that is required for a victim survivor to access the scheme as it could constitute both a report of an act and proof of harm. As such, it would seem sensible for support workers in health settings or indeed police to raise the possibility of a compensation scheme at the time sexual violence is reported or disclosed. This is particularly important in circumstances where financial assistance may be needed to assist the victim survivor to leave the violent situation.
30. Finally, we would implore policy makers to work alongside support services in developing schemes that are trauma informed and be guided by victim survivors. We note the innovative

approach taken in Victoria where victim survivors can access payment for expenses outside of prescribed categories if a counsellor can explain that the expense will assist in the recovery of the victim survivor. We don't believe this should replace the need for increased compensation payments to provide autonomy for victim survivors but we commend the Victorian Scheme for listening to victim survivors (and their support providers) as to what will assist in their recoveries.

Should you wish to discuss any of the matters raised in this submission, please do not hesitate to contact us.



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