

Please reply to the: Brisbane Office
Our Reference: AG:

9 December 2014

Victims of Crime Assistance Act Review
Department of Justice & Attorney-General
GPO Box 149
BRISBANE QLD 4001

By email: VOCAAReview@justice.qld.gov.au

Dear Sir/Madam

RE: RESPONSE TO THE REVIEW OF THE VICTIMS OF CRIME ASSISTANCE ACT 2009 (VOCAA)
CONSULTATION PAPER

We refer to the Consultation Paper issued in relation to the VOCAA review. Thank you for the opportunity to contribute a submission to this review.

INTRODUCTION

knowmore is a free legal service established to assist people engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). We were established by the National Association of Community Legal Centres, with funding from the Australian Government through the Attorney-General's Department. Advice is provided through a national telephone service and at face-to-face meetings, including at outreach locations. We have offices in Sydney, Brisbane, Melbourne and Perth.

Our service was launched in July 2013 in Sydney and since that time we have provided over 4,700 client advices to over 1,800 clients. To date, around 20% of our clients have identified as being Aboriginal or Torres Strait Islanders.¹ Many of the clients that we have assisted have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to childhood sexual abuse they

¹ The Consultation Paper notes the overrepresentation of Aboriginal and Torres Strait Islander people as victims of crime

suffered in an institutional context. Many of our clients have had direct experience with statutory victims' compensation schemes across the country. As can be seen from the data outlined in the **attached** infographic, the majority of these clients are aged over 45 years and therefore will fall outside the time limitation periods for claims, arising from crimes committed against them as children, under existing litigation systems or statutory victims' compensation schemes.

Statutory compensation schemes form part of the suite of compensatory options potentially available at present to survivors of institutional child sexual abuse, along with institutional redress schemes and civil claims. However, these schemes are often the least attractive option for survivors because of the very limited financial and other awards which are available.

Our response to this Consultation Paper is largely based on our submission to the Royal Commission's Issues Paper 7: Statutory Victims of Crime Compensation Schemes. A copy of this submission, together with our related submissions to the Royal Commission's Issues Paper 6: *Redress Schemes* and Issues Paper 5: *Civil Litigation*, are available on the Policy and Redress tab of the Royal Commission's website: www.childabuseroyalcommission.gov.au. Our submission is grounded in our work with survivors of child sexual abuse, and on hearing of their collective experience as to the problems inherent in the current systems, and what they need by way of options for pursuing redress and justice. As such, the views articulated in this submission derive from the collective experiences of those who have survived childhood sexual abuse in institutional contexts. However, many of the comments made below are not solely applicable to claims arising from childhood sexual abuse in institutional contexts, but are highly relevant to all survivors of childhood abuse (sexual, physical, emotional and neglect) and also survivors of adult sexual abuse and other victims of crime.

We consider that if a suitable and effective national redress scheme is implemented as recommended in our submission to Issues Paper 6: *Redress Schemes*, survivors of institutional childhood sexual abuse would have no need to access statutory victims' schemes in future. It is difficult to envisage any circumstances in which such survivors would need or wish to access such schemes as an alternative to an effective national redress scheme, and/or exercising their common law rights, if those avenues were available.

However, it is unlikely that survivors of sexual abuse in contexts other than institutional settings would be within the scope of any national redress scheme adopted as a result of any recommendations of the Royal Commission. Moreover, there is currently no suitable and effective national redress scheme and unlikely to be one for some time, given the complex implementation issues involved.² As VOCAA now stands, the majority of our clients are excluded from obtaining any special financial assistance under the current scheme because of issues such as time limits; lack of understanding and transparency around the exercise of discretion under s. 54 (2) and absence of police complaints and criminal convictions. The Consultation Paper does not address any of those issues in detail.

² In this context, we note that the Royal Commission has advised of its intention to issue a consultation paper in January 2015, on the general subject of 'Redress' for survivors of institutional child sexual abuse; see <http://www.childabuseroyalcommission.gov.au/policy-and-research/redress>

For these reasons, we recommend reforms to the current scheme that recognise and accommodate the unique features for survivors of crimes involving child sexual abuse such as: delayed complaint-making and non-reporting of complaints; difficulty in obtaining historical records; their over-representation in the criminal justice, health and child protection systems; and issues with police undertaking historical investigations. We also recommend the establishment of specialist assessors who operate within a trauma-informed framework.

SPECIFIC QUESTIONS

1. *How could the application process be streamlined so it is less onerous for victims while at the same time ensuring that Government has the appropriate checks and balances in place to make an assessment for a claim?*

Many of our clients have issues with literacy and report that their education was disrupted either as part of the abuse they suffered, or as a result of it. They are often overwhelmed by forms and requirements to produce various documents. Even the process of obtaining and/or producing certified identification can be beyond some of our clients, particularly those who live in regional and remote areas and have limited access to support agencies. Similarly, many of our clients are unable to themselves meet the costs of obtaining much of the documentation that may be required to help establish a claim. Any steps to further simplify the application process should be encouraged.

For reasons detailed under the heading of *'Time Limits'* in the *'Other Issues'* section of this submission, proof of the offending can be problematic, especially in historical cases of child sexual abuse. Even if a person did report the offence to the police or other authority, there are often difficulties in now locating any historical police, medical or other records that may assist claims. Even records to establish the fact that a child lived at a certain institution at the relevant time often cannot be found. Where an institution's records are in existence, they are unlikely to document the making of allegations or the occurrence of sexual abuse.

We would support the measures outlined on page 14 of the Consultation Paper such as the removal of requirements that a medical certificate to be attached to the application and of having to provide a Statutory Declaration. More flexible ways to provide the required supporting documentation/information required will benefit survivors of child sexual abuse.

Recommendation 1. That greater flexibility be included in the application process to ensure that eligible applicants can access available assistance.

2. *Should pools of assistance be removed from the Act to streamline processes and ensure victims receive assistance at the earliest possible opportunity?*

The fact that it is rare that entire pools of assistance are exhausted, is quite surprising. It would be interesting to know why – particularly in light of the figures set out in paragraphs 3.3 and 3.5 of the Consultation Paper which seem to indicate that the amounts now paid out under this scheme are substantially less than under the old scheme, even at last decade's figures. It would have been helpful for

the Consultation Paper to have set out total expenditure to victims under both the current scheme set up by VOCAA and the previous scheme under the Compensation of Victims (CoV) Act.

VOCAA states that grants of assistance are not intended to reflect the level of compensation payable by civil litigation proceedings and also states that the purpose of the scheme is in addition to other services for victims. There are often no other services for our clients. Although there are sometimes redress claims against specific schemes set up by some institutions, very rarely is there any insurance scheme to obtain assistance from, as envisaged in paragraph 3.1 of the Consultation Paper.

3. *Should the Act be changed so victims receive a set amount of special assistance within each of the categories for this assistance?*

Many survivors of institutional childhood sexual abuse have suffered debilitating and life-long trauma as a consequence of the crimes committed against them. For these survivors, adequate financial compensation is important; as recognition of the wrongdoing that occurred; and as a means to enable them to pursue their recovery. The importance of awards that allow survivors to do something significant, such as buy a house or to access education or to provide for their own children, cannot be underestimated. The fact that VOCAA recognises that the wrong doing which occurred is only worth such a small financial payment is perceived by some survivors as a message that the crimes committed against them, and the devastating impacts of those crimes, are not regarded by the law and our society as being significant.

The devastating effect of institutional childhood sexual abuse is well catalogued. This impact is usually overlaid with the impact of institutionalisation and loss of family, along with, in many cases, physical and emotional abuse. Many survivors, and particularly Indigenous Australians and those brought to Australia under former Child Migration schemes, also suffer a loss of culture as well. The cumulative impact of this complex trauma is significant, life-long and usually devastating.

In this context, we acknowledge that the payments under VOCAA are not truly compensatory in nature. However it must be asked whether the current maximum awards available under the existing scheme appropriately reflect community standards in relation of offences of sexual violence against children. To illustrate this point, we note that on 30 July 2014 the Queensland Law Society advised its members³ of a recent Federal Court decision relating to the awarding of general damages in cases of sexual harassment, providing the following commentary:

An appeal to the Federal Court of Appeal has set a strong precedent, with general damages for sexual harassment increased from \$18,000 to \$100,000. Anne Andersen of the Anti-Discrimination Commission Queensland has advised that, in *Richardson v Oracle Corporation Australia Pty Limited* [2013], FCAFC82, 15/7/14, the traditional level of damages in cases of sexual harassment was found to be “manifestly inadequate” to compensate victims.

Under the *Queensland Anti-Discrimination Act 1991*, there is no monetary limit in compensation for loss or damage (see section 209 (1)(b)), so this case will also apply in Queensland. The same principles should also apply across the board for all discrimination-type matters, as the case shows that the damages should properly reflect the level of harm done as assessed by today’s community standards.

³ ‘QLS Update’ email to members of 30 July 2014

Without in any way seeking to diminish the harm that arises to victims of sexual harassment or other forms of discrimination, and the need to recognise and compensate that wrongdoing in a way reflective of community standards, the decision stands as an obvious point of comparison highlighting the inadequate level of financial awards that are currently available under COVAA for victims of criminal offences of sexual violence.

An inevitable consequence of the reality of grossly inadequate awards is that a survivor who wishes to obtain meaningful financial compensation is forced into exploring or engaging in multiple legal actions, each inherently re-traumatising.

The proposal in the consultation paper to set specific amounts for special assistance payments does give more certainty to applicants; however for those who would be eligible under the existing process for an 'uplift' to a more serious category of violence, this would mean that they would miss out on this extra sum.

The fact a discretion exists for assessors is not in itself a bad thing, especially if there are clear guidelines and transparency as to its exercise. We note the comments in the Consultation Paper about inconsistencies across decisions. However, given the small amounts of financial assistance available under COVAA it is difficult to see how properly trained assessors might differ widely in their assessment of comparable cases.

If a move to set specific amounts is implemented as a result of this review, we would query why such a payment should be predicated on the act of violence/a specific crime, rather than on the effect the act/crime has had on the victim.

4. Is the current maximum payment of \$6,000 for funeral assistance sufficient?

As with everything else, the \$6,000 maximum payment for funeral assistance would have been of more value five years ago. One of the reasons for a five yearly statutory review of VOCAA is presumably to ensure that amounts set in the legislation are still appropriate. We would support an increase reflecting any general increased costs.

It is not clear why this is the only category of assistance covered in this section of the Consultation Paper. All the amounts as set out in the Paper's Appendix titled '*Table of financial assistance*' are subject to the same argument and should be similarly canvassed in this review.

5. Should victims who are eligible to claim assistance through CTP Insurance be required to do this first rather than applying for assistance through the victims of crime financial assistance scheme?

We have no specific submissions on this point, which does not arise in the context of our client work.

6. Should VAQ be given more powers to obtain confidential information about victims to assist them to determine applications for assistance?

Providing there is consent on the part of the applicant (as part of their initial application) and it is clear what information may be sought and how it may be used, it is not unreasonable that VAQ should be able to obtain otherwise confidential information.

7. *Should there be an appropriate transitional period for people to finalise their current criminal compensation applications so that only one system of financial assistance for victims of crime is in place in Queensland?*

It is not possible to ascertain the extent of the current problem of what might be termed 'legacy' applications from the Consultation Paper. Presumably there are adequate measures available to parties under the *Uniform Civil Procedure Rules* to deal with the first group who have taken no further action in their claim under the repealed COV Act since 2012. As for the second group who are awaiting an ex-gratia payment, we agree that it would certainly be more streamlined and efficient for it to be decided pursuant to the COVA principles by the VAQ Scheme Manager, rather than the Attorney-General. Presumably the same parameters would apply to the decision.

8. *Should the fundamental principles of justice be strengthened to ensure victims' interests are promoted and their rights exercised?*
9. *Are there any other principles of justice that should be included in the Act to improve the treatment of Victims?*

The Consultation Paper mentions that the purposes of declaring the principles of justice is to advance the interests of victims, and to inform victims of the way they should expect to be treated by Government agencies. Most of the listed principles of justice deal with the second of those two purposes.

The principles of justice should require that this review also considers any matters that reduce victims' access to the services provided by VAQ, or operate to the clear detriment of a large cohort of crime victims, such as survivors of sexual abuse. We suggest that the issue of time limits falls within this category. We refer the review to **knowmore's** abovementioned submissions to the Royal Commission, and also to the recent steps taken in Victoria to remove limitation periods in relation to civil claims arising from the criminal abuse of children, for material elaborating upon how limitation periods operate unfairly to disadvantage survivors of childhood sexual abuse from obtaining justice.

Recommendation 2: That the VOCAA review examine the issue of time limits applying to the bringing of claims.

The estimate on page 13 of the Consultation Paper that only 5% of victims who report a crime to police⁴ go on to make a claim under COVAA should be a cause of serious concern. There is no analysis in the Consultation Paper of why only a small number of victims are accessing the scheme, beyond listing a number of possible reasons. In addition to those reasons, we would again note the issue of arbitrary time limits and additionally, the focus on the types and perpetrators of crimes and their passage through the criminal justice system, rather than on the effect of that crime of the victims.

⁴ In this context, it must be recognised that many crimes, particularly sexual offences, are never reported to police

More generally, an enhanced understanding of why victims do not pursue their rights to seek assistance under COVAA would presumably assist in the development of strategies and reforms to better meet the stated commitment of delivering timely assistance to victims of crime. This is an area that would lend itself to further targeted research in an endeavor to produce some evidence that helps policy-makers understand the reasons underlying the current, poor take-up rates.

Possible mechanisms to improve accessibility might include:

- publishing materials in a wider range of languages
- ensuring published material is available in a range of user-friendly forms
- establishing and refining partnerships with relevant agencies who may provide services to victims and who may operate as relevant referral points

Recommendation 3: That the Victims Services Coordinator review the accessibility of the scheme with a view to increasing accessibility, and with a particular emphasis on less visible groups of victims who may experience barriers in accessing the scheme.

Given the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, it is likely that the 12% of victims who have obtained compensation is still a gross under-representation of the number of Aboriginal and Torres Strait Islander people who would be entitled to receive compensation. Particular strategies designed to improve access to the scheme, and the delivery of services recognised as culturally appropriate and safe for Indigenous people, should be considered.

Recommendation 4: That there be increased assistance and a focus on community initiatives to promote and facilitate access to compensation under COVAA, with particular strategies for engagement with members of Aboriginal and Torres Strait Islander communities.

The Consultation Paper notes that the second limb of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* talks about victims suffering hardship when assisting with the prosecution of offenders. There is a wealth of research on the effect of court processes on the victims of crime; many of our clients have talked about the traumatising effect that their participation in the criminal justice system has had on them.

Recommendation 5: That all people involved with victims of child sexual abuse in the QPS, ODPP, QCS and Victims Assist adopt a trauma informed framework for the delivery of services. The commitment to operate within a trauma-informed framework should also be spelled out in the articulation of the principles of justice in the Act.

10. Should non-government organisations, which are funded to provide victim support services, be required to apply the fundamental principles of justice?

It seems reasonable to require that all funded services apply the principles of justice. We recommend that all services who support victims of childhood abuse also adopt a trauma informed model for the delivery of services.

11. *Should the Victim Services Coordinator have an oversight role in relation to the implementation of justice principles to better support the rights and interests of victims?*
12. *Should the Victim Services Coordinator be given more powers to access information about complaints and be involved in complaints processes where necessary for the timely resolution of a complaint?*

If the functions of the Victim Services Coordinator as set out in Chapter 4 of the Act are to be properly fulfilled, the issues raised on page 22 of the consultation paper need to be addressed. The proposal for an independent Victims of Crime Commissioner with investigative powers is one option, as the Consultation Paper explains. Alternatively, the duties of the Victims Services Coordinator could be retained, with strengthened powers, and the need for some independent oversight could be fulfilled through an expansion of the jurisdiction of the Ombudsman's Office. There is nothing in the Consultation Paper to indicate that there are any issues with the current external review process to the Queensland Civil and Administrative Tribunal.

We support the streamlining of the complaints process and empowering the Victims Services Coordinator to intervene in the resolution of complaints to other agencies to assist victims and to also be informed of all complaints made, to ensure all the functions of that role are able to be fulfilled.

OTHER ISSUES

Terms of Reference

The first Term of Reference states that the review is to consider:

- whether the financial assistance scheme achieves its goal to assist victims to recover from acts of violence;
- whether the levels of financial assistance provided are appropriate and sustainable; and
- the interaction between the financial assistance scheme and other compensation schemes.

However, as noted, the Consultation Paper does not discuss the issues arising in relation to the time limits set by COVAA and the only levels of financial assistance discussed in detail are those in relation to funeral benefits; the question dealing with the pool of money available for secondary and related victims; and fixing the amount of special assistance available. There is no detailed discussion of the appropriateness of the special assistance available under COVAA, or the fact it may not reflect the effect of the crime on the victim. We would urge the review to examine the levels of financial assistance available under COVAA in further detail.

In relation to the third dot point, there are some comments in the Consultation Paper about some victims having access to possible assistance through other services such as insurance, Workers' Compensation and Medicare, but no analysis of the interaction between them. There is no discussion about options of civil litigation, nor of government or institutional redress schemes. Given the extent of the offending against children exposed by the current Royal Commission, and the detailed work it has undertaken in respect of

what survivors of child sexual abuse require to obtain proper justice, we would suggest that the review might usefully draw on some of the lessons learned in this context, in evaluating VOCAA (in the context of this term of reference) and identifying necessary reforms.

The second Term of Reference is that the review should examine the effectiveness of the State in recovering grants of assistance from convicted offenders and the consideration of alternate models. None of the questions or any of the commentary in the Consultation Paper address this term of reference. See also see our comments under the heading '*Responsibility*' below.

Recommendation 6: That a supplementary consultation paper be prepared dealing with the first two terms of reference be prepared and included in this statutory review of the operation of VOCAA.
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As the new scheme introduced in 2009 was such a paradigm shift from the old criminal compensation approach, it would be good to include the results any evaluation that has been done of the current scheme and an analysis as to which approach best satisfies the principles of justice enunciated in VOCAA.

The other matters that might usefully be canvassed in any supplementary consultation paper addressing the second term of reference are:

- the role of the State Penalty Enforcement Registry (SPER) and the relationship between SPER and VAQ; and
- whether there could or should ever be the option of recovery action taken against institutions where crimes took place.

Time Limits

As **knowmore's** earlier submissions to the Royal Commission demonstrate, time limits need to be positioned in a complex trauma framework. Current time limitations do not take into consideration the common experience of survivors' memories of abuse being outside of their awareness for many years. Dissociating or 'splitting off' traumatic material is well understood as one of the brain's coping/survival strategies. Trauma is a state of high arousal that impairs integration across many domains of learning and memory. In many cases, memories may suddenly emerge many years later following a seemingly unrelated triggering event – often, though not always, either witnessing or experiencing another traumatic incident.

Limitation periods also do not take into account the staged nature of recovery from complex trauma – safety, remembering and mourning and reconnection. For many survivors of child sexual abuse, becoming physically and psychologically safe takes many years. If this first stage of recovery is not firmly in place, speaking about trauma in the way necessary for engaging in a legal process such as any type of compensation claim, poses significant risks to wellbeing.

Survivors of child sexual abuse commonly experience complex, long-term psycho-social impacts which can impair their capacity to engage with a variety of systems. These include economic disadvantage, unstable employment, housing issues, physical health problems, relationship difficulties and mental health issues, as well as barriers to accessing support for these problems. They are also over-represented in the criminal justice and child protection systems.

When a survivor is dealing with chronic homelessness, complex family and relationship issues, flashbacks, panic attacks, depression, insomnia, dissociative episodes, addictions, eating disorders and/or ongoing emotional dysregulation (just some of the ongoing consequences of childhood trauma), it is extremely difficult for them to consider pursuing legal action and to take the necessary steps to prioritise any such action within a set timeframe.

Section 54 in chapter 3 of VOCAA sets out that claims must be made within three years of the act of violence or, for a child, within three years of turning 18. Section 54(2) grants the scheme manager a discretion to extend that time period in certain circumstances. There is nothing in the Consultation Paper or in any material published by VAQ that we have seen, that gives any indication as to how that discretion is exercised.

Recommendation 7: That time limits for claims by survivors of childhood abuse be abolished.

Definition of *related victim*

The definition of “related victim” under section 26(5) of the Act limits compensation, to close family members and dependents, to those circumstances where there has been a death as a result of the act of violence. This would, for example, preclude a claim for counselling for children who are traumatised by the impact of an act of violence on a parent even though they have not witnessed the act of violence.

Recommendation 8: That consideration be given to extending the definition of related victim by removing the requirement that a death result from the act of violence.

Responsibility

In the context of crimes of violence against children, despite the existence of recovery provisions relating to individual offenders, to an extent State and Territory funded schemes remove the responsibility of the offending from relevant institutions. This is a disincentive to institutions from building systems, policies and procedures that protect vulnerable children; awards under the schemes have little specific or general deterrent effect on offenders and particularly upon institutions.

Some outcomes many survivors see as necessary for them to obtain ‘justice’, include non-monetary outcomes such as acknowledgment, system reform and deterrence. The lack of a link between the responsibility for meeting awards under the existing scheme and relevant institutions can even operate as a disincentive for survivors to pursue claims against the scheme.

Trauma-informed service delivery

As already discussed, the scheme should operate within a trauma-informed framework and decision-makers and staff should be trained in the impact of child sexual abuse and in complex trauma. While proceedings are relatively short and informal compared to many other forms of legal proceedings, they still have the potential to re-traumatise survivors.

While we make this recommendation, we must also note that it is our experience, and that of many of our clients, that the staff of Victims Assist are extremely helpful and their overall approach to customer service is superb.

Thank you for considering our submission and its accompanying recommendations. Should you wish to discuss our submission further, please contact in the first instance Ann Gummow, the Senior Lawyer in our Brisbane office, on (07) 3218 4500.

Yours faithfully,

per 

WARREN STRANGE
Acting Executive Officer

ENCL. *knowmore* Infographic