

4 July 2014



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Royal Commission into Institutional Responses to Child Sexual Abuse
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By email: solicitor@childabuseroyalcommission.gov.au

Dear Mr Best

Victims of Crime Compensation Schemes: Issues Paper 7

Attached is the Law Council of Australia's submission relating to the Victims of Crime Compensation Schemes Issues Paper 7 for your consideration.

The Law Council thanks the Royal Commission for the opportunity to make this submission.

Yours faithfully

A handwritten signature in black ink, appearing to read "M Hagan".

MARTYN HAGAN
Secretary-General

Victims of Crime Compensation Schemes: Issues Paper 7

Royal Commission into Institutional Responses to Child Sexual Abuse

4 July 2014

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Introduction

1. The Law Council is pleased to provide this submission to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) regarding its *Issues Paper 7: Statutory Victims Compensation Schemes* (the Issues Paper).
2. The Law Council has previously made submissions regarding:
 - (a) The Royal Commission's *Issues Paper 5: Civil Litigation Schemes* on 25 March 2014;¹
 - (b) the Royal Commission's *Issues Paper 2: Towards Healing* on 13 September 2013 (the Towards Healing Submission);²
 - (c) the Royal Commission's *Issues Paper 1: Working with Children Checks* on 12 August 2013;³
 - (d) the Royal Commission's Draft Practice Guidelines on 19 April 2013;⁴
 - (e) the Australian Government's consultation regarding the Royal Commission's establishment on 28 November 2012.⁵
3. This submission highlights the need to address a number of key issues in respect of compensation schemes for victims of institutional child sexual abuse, including the need to:
 - (a) Address the time limits (or limitation periods) which preclude applications from being made;
 - (b) Ensure that victims can access fair and equitable compensation, regardless of the time period or jurisdiction in which the abuse occurred;
 - (c) Address the situation in which victims may be unable to pursue compensation claims due to particularly high standards of proof in one jurisdiction;
 - (d) Ensure that any obligations to report to police do not apply to certain types of vulnerable victims;

¹ Law Council of Australia, *Civil Litigation: Issues Paper 5 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 25 March 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2802_-_Civil_Litigation_Issues_Paper_5.pdf (LCA Issues Paper 5 Submission).

² Law Council of Australia, *Towards Healing: Issues Paper 2 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 13 September 2013, available at: <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/12.-Law-Council-of-Australia1.pdf>.

³ Law Council of Australia, *Working With Children Checks: Issues Paper 1 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 12 August 2013, available at: <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/09/66.-Law-Council-of-Australia.pdf>.

⁴ Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission regarding Draft Practice Guidelines*, 19 April 2013, available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2713%20-%20Draft%20Practice%20Guidelines.pdf>.

⁵ Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse*, 28 November 2012, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2664%20-%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20Consultation%20Paper.pdf>.

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- (e) Review key definitions - such as psychological harm;
 - (f) Review procedures to overcome evidentiary issues such as a lack of documentation; and
 - (g) Ensure that the law in all jurisdictions reflects that a convicted perpetrator cannot access a victim's psychological records.
4. Although they fall outside the Royal Commission's terms of reference, this submission further highlights the need to consider a number of these issues in relation to broader groups of victims.

Comments

5. The following comments reflect the Law Council's past advocacy in this area, as well as specific feedback received by the Law Institute of Victoria, Law Society of Western Australia and the Law Society of South Australia. The Law Council also makes particular reference to the New South Wales, in light of the recent changes to its statutory victims of crime compensation scheme, with the assistance of the Law Society of New South Wales.

Overarching comments

6. Statutory victims of crime compensation schemes exist in all states and territories in Australia. As there are substantial barriers to successfully pursuing civil litigation claims (as discussed in the Law Council's previous submission on this issue), victims compensation schemes will be the most relevant and/or preferred course of action for many victims of institutional child sexual abuse. Several of the advantages of such schemes are discussed below.
7. In commenting on these schemes, the Law Council emphasises that the Royal Commission's focus on victims of crime compensation schemes, including the establishment of any new statutory compensation scheme for victims of institutional child sexual abuse, should not limit individuals' rights to recover compensation from perpetrators or institutions at common law, where it is possible to do so.
8. While the Law Council has not conducted an exhaustive review of the differences between State and Territory statutory victims of crime compensation schemes, it is aware that these vary considerably. They include differences in eligibility requirements, time limits in which to make claims, caps on compensation amounts, determination processes, burdens of proof, and key definitions. The Law Council refers to the recent National Framework of Rights and Services for Victims of Crime 2013-2016, published by the former Standing Council on Law and Justice (the Framework),⁶ which provides an overview of the key features, and differences, between State and Territory victims compensation schemes. However, it notes that since the Framework was published, key changes were implemented in relation to the

⁶ Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime 2013-2016* (2013) (Standing Council on Law and Justice).

New South Wales scheme during 2013,⁷ and a new victims of crime compensation model has also been proposed in the Australian Capital Territory.⁸

9. The differences between State and Territory schemes give rise to the potential for different outcomes for victims of abuse which is of a largely similar nature, depending on the jurisdiction in which the abuse occurred. In some cases, as discussed below, the differences in outcomes will be stark.
10. Such varying outcomes will not only be experienced by victims of institutional child sexual abuse, but also victims of other kinds of crimes, including victims of child abuse in private settings. While the experiences of these other victims are beyond the Royal Commission's terms of reference, many of the issues which are highlighted in this context may benefit from broader consideration. In this regard, the Law Council is aware of previous commentary which suggests that "in light of extraordinary variation in crimes compensation schemes, a reference should be given to the Australian Law Reform Commission [(ALRC)] to assess the various models which exist around Australia, and to draft a model code of criminal injuries compensation for submission to the Standing Council of Attorneys-General".⁹

Specific questions

The advantages and disadvantages of statutory victims of crime compensation schemes

11. Some advantages of statutory victims compensation schemes, compared to civil litigation, are discussed as follows:
 - (a) As they are generally funded from a victims compensation fund (and usually government-funded),¹⁰ certain issues which arise in the context of civil claims, such as impecunious defendants, deceased defendants, defendants who are not incorporated bodies or no longer exist, and barriers to the establishment of liability, do not arise in such schemes.
 - (b) The Victorian Parliament Family and Community Development Committee (the Victorian Committee)'s *Inquiry into the handling of child abuse by religious and other organisations*¹¹ has observed that in Victoria, the statutory victims of crime compensation scheme provides a "viable alternative to civil litigation for victims because of its ability to provide an independent acknowledgement of

⁷ *Victims Rights and Support Act 2013* (NSW). The Law Council is aware that the changes to the New South Wales scheme have been highly controversial, particularly with respect to their application to victims who have suffered child abuse. These changes are discussed further below.

⁸ Australian Capital Territory Justice and Community Safety Directorate, *The ACT Victims of Crime Financial Assistance Scheme: Proposed Model* (April 2014). The South Australian Government has also announced changes to its victims of crime compensation scheme. Initiatives include that the maximum amount payable to victims will increase from \$50,000 to \$100,000 and that maximum compensation payments for funerals and grief will also be doubled: Tom Koutsantonis, Treasurer of South Australia, 'State Budget 2014-15 – Victims of crime compensation to increase' (News Release, 19 June 2014).

⁹ Ian Freckelton, "Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed" (undated), article available on the Australian Institute of Criminology website at: http://www.aic.gov.au/media_library/publications/proceedings/27/freckelton.pdf. Note that the Standing Council has been renamed the Standing Council on Law, Crime and Community Safety.

¹⁰ The Law Council recognises that as well as being funded from state revenue, victims compensation schemes may include, for example, funding from the proceeds of crime, while in some jurisdictions, sums paid to victims can be recovered from convicted offenders.

¹¹ Parliament of Victoria, Family and Community Development Committee, *Inquiry into the handling of child abuse by religious and other organisations*, referred 17 April 2012, information, including the Final Report, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788> (Victorian Committee Report).

harm”.¹² For example, the Victorian scheme provides an avenue for victims to tell their story to a tribunal member or have the matter dealt with administratively without having to attend a hearing.

- (c) The Victorian Committee has also noted the Victorian compensation scheme is a less “legalistic” and adversarial process (noting that the applicant is rarely required to give evidence or be cross-examined), includes the provision of victims support services, and provides for legal representation.¹³ It also noted that victims can receive financial assistance through the scheme even if the offender has not been identified or charged, and regardless of whether the perpetrator has been convicted.

12. Statutory victims of crime compensation schemes are also viewed as more “user-friendly” and time-efficient than alternative means of redress. For example, the Law Society of Western Australia has commented that in Western Australia, the scheme involves relatively simple application forms, and that assessors are helpful with obtaining necessary documents.

13. The Law Institute of Victoria has further contrasted statutory victims of crime compensation schemes with reparations orders, noting that they constitute a “substantially less burdensome process”.¹⁴ For example:

- (a) Reparation orders may only be made if an offender is convicted and they are, therefore, subject to the criminal standard of proof. They require the accused to still be alive, and the victim’s story to be corroborated sufficiently to satisfy this higher standard, which becomes less likely as time passes after the abuse occurs. In contrast, victims of crime compensation schemes generally involve a lower standard of proof,¹⁵ such as the balance of probabilities, which is easier to satisfy.
- (b) Compared to reparations orders, claims to victims compensation schemes are also able to proceed even if no one has been charged with, or found guilty of, a crime.
- (c) The effectiveness of reparations orders is also dependent upon the perpetrator’s ability to pay, whereas statutory schemes offer a more reliable means of compensation.

14. Victims compensation schemes also focus primarily on investigating the victim’s circumstances and injury, rather than the actions and conduct of the accused. They have been described as more “victim-centred”, compared to criminal proceedings, which are concerned with the conduct of the offender. As such, it has been observed that they may “help to restore the victim’s sense of control, and validate their experiences of trauma”.¹⁶

¹² Ibid viii.

¹³ Ibid 517.

¹⁴ See, for example, s 85B of the *Sentencing Act 1991* (Vic). Under this section, if a court has found a person guilty of an offence, the victim can apply for an order that the guilty party pay her or him compensation for medical and other expenses reasonably incurred (or reasonably likely to be incurred) as a direct result of the offence.

¹⁵ However, the Law Council notes the exception under the South Australian victims of crime compensation scheme, which relies that the relevant offence relies upon a higher standard of proof – see further discussion below.

¹⁶ I. Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper 8, January 2010, 3 (Meyering).

Disadvantages

15. One key disadvantage of statutory victims of crime compensation schemes is that the compensation which can be awarded is substantially lower than the amounts that could be awarded in a successful civil claim. In this context, the Law Institute of Victoria has noted that under the Victorian victims of crime compensation scheme, a victim with the strongest possible claim might be awarded up to \$70,000 (that is, the maximum \$60,000 award plus \$10,000 in special financial assistance). If the same person were to succeed in a civil claim for the same abuse, if they suffered a substantial loss of earnings or significant pain and suffering, its members report that the damages could exceed \$200,000.¹⁷
16. The Law Society of Western Australia agrees with this limitation of victims compensation schemes, noting that the maximum compensation available under the Western Australian scheme (\$75,000 for victims where the offence has been committed since 1 January 2004)¹⁸ is unlikely to be sufficient to compensate the victim in more serious abuse cases. In this respect, the Law Council notes that in other jurisdictions, such as New South Wales, the maximum amounts available to victims are much lower than in Western Australia or Victoria, as discussed below.
17. The Victorian Committee also agreed, stating that a further limitation of the Victorian scheme is its inability to assist victims who suffer ongoing or permanent injury, and noting the lifelong psychological harm suffered by many victims of criminal child abuse. The Victorian Committee contrasted this position with the “safety net” of ongoing support provided under other compensation models, such as the Department of Veterans’ Affairs and the Victorian Transport Accident Commission.
18. Further key disadvantages which are discussed below include:
 - (a) The disadvantage posed by the maximum compensation amounts is compounded by the fact that they may be very low (or unavailable), depending upon the date of the abuse;
 - (b) The limitation periods which are attached to victims compensation schemes; and
 - (c) The Law Society of South Australia has raised the standards of proof contained in the South Australian victims compensation legislation as a particular problem within that jurisdiction.

¹⁷ In its submission to the Victorian Inquiry, the Law Institute of Victoria has noted this figure to be consistent with reported awards: see e.g. *GGG v YYY*[2011] VSC 429, a civil case concerning sexual abuse by an uncle in which the abused plaintiff was awarded \$267,000 (comprising general damages of \$200,000, aggravated damages of \$20,000, exemplary damages \$30,000 and special damages of \$17,000) with subsequent submissions invited on interest (over 33 years) and costs. See also *SB v State of NSW* [2004] VSC 514, a civil case concerning sexual abuse in and related to foster care arrangements, in which the plaintiff was awarded damages in the sum of \$281,461.00 (comprising general damages of \$195,000, past loss of earnings of \$26,461 and future loss of earning capacity of \$60,000) – see: Law Institute of Victoria, *Submission to the Parliament of Victoria, Family and Community Development Committee regarding its Inquiry into the Processes by which Religious and other Non-Government Organisations Respond to the Criminal Abuse of Children by Personnel within their Organisations*, 21 September 2012, available at: <http://www.parliament.vic.gov.au/fcdc/article/1789> (LIV submission).

¹⁸ These maximum amounts are much lower in Western Australia, where the offence occurred prior to 2004, as discussed below. The Law Council notes that even if there are multiple offences that happened after 1 January 2004, if they are “multiple related offences”, the victim can only claim a maximum of \$75,000; but, if they are “multiple unrelated offences”, the victim may claim up to \$150,000 (i.e. the victim can only claim for two incidents): subsections 33 and 34 of the *Criminal Injuries Compensation Act 2003* (WA).

19. Another issue is that it is generally the State or Territory, rather than the perpetrators or the institutions in which the abuse occurred, which funds statutory victims of crime compensation schemes.¹⁹ While this helps to ensure that a victim who may otherwise miss out receives compensation, for many of the victims involved, it is also likely to result in questions about the extent to which justice has been done in respect of the abuse. This is a factor which has led to the Victorian Committee's recommendations that an independent alternative justice avenue for criminal child abuse victims be considered, which would include as a key feature that non-government organisations are responsible for the funding of compensation needs and other supports agreed through the process.²⁰

Important features for effective statutory victims of crime compensation schemes

20. One feature which is important to ensuring that victims of crime compensation schemes work effectively for claimants is access to, and adequate funding of, legal representation. In this context, the Law Council notes the Framework summary which indicates that in some jurisdictions such as Victoria, solicitors' fees are usually paid by the Tribunal (rather than the applicant) according to a scale of costs, and a solicitor is recommended, while not required in Victoria.²¹ In contrast, in Western Australia, if a victim engages a solicitor to prepare and lodge the application, he or she cannot claim for legal fees.²² A member of the Law Society of South Australia has noted that in South Australia, key disadvantages include:

- (a) The lack of legal aid assistance for the purposes of presenting such claims;²³ and
- (b) The impoverished scale fees for the presentation of such claims.²⁴

21. Under the new NSW scheme which regrettably is retrospective, solicitors are no longer paid by Victims Services (unlike the old scheme, under which state funding was available). Victims of crime are instead allocated a Victims Services support coordinator to assist with a claim, and are advised that they do not require a solicitor.²⁵ Victims Services staff are unable to provide legal advice nor are they able to write

¹⁹ The National Framework of Rights and Services for Victims of Crime 2013-2016 describes how the schemes are funded in each jurisdiction – see: Standing Council on Law and Justice.

²⁰ Victorian Committee Report, xlv-xlvi.

²¹ Standing Council on Law and Justice, 43

²² Legal aid is available for criminal injuries compensation claims in Western Australia only in limited circumstances, such as where the victim is a child, or has an intellectual disability or is "otherwise disadvantaged in making the application themselves" – see: Legal Aid Western Australia, *Chapter 6B: State Eligibility Guidelines* (1 July 2006), 16-17.

²³ The Legal Aid Commission of SA eligibility guidelines note that legal aid is not normally provided for compensation claims, including criminal injuries compensation (see:

http://www.lsc.sa.gov.au/cb_pages/practitioners_eligibility.php#specificguidelines). Further, the SA Governments *Information for Victims of Crime* booklet notes that legal aid is not available for victims compensation applications (page 61), available at:

<http://www.voc.sa.gov.au/Publications/Booklet/Victims%20of%20Crime%20book%20web2.pdf>.

²⁴ Under subsection 25(1) (b) of the *Victims of Crime Act 2001* (SA), a legal practitioner must neither charge nor seek to recover in respect of proceedings under this Act an amount by way of costs in excess of the amount allowable under the prescribed scale. Scale fees may be prescribed by regulation, under subsection 25(2). They are set out in Schedule 2 of the *Victims of Crime (Statutory Compensation) Regulations 2004* (SA). For example, a solicitor may charge: a fee of \$500 for a limited claim where the identity of the offender is known and compensation is agreed (a solicitor is not entitled to a fee in respect of a limited claim for compensation where the identity of the offender is unknown and compensation is agreed); a fee of \$1 000 for any other claim that is not a related claim; if the claim is a related claim—a fee of \$1 000 for the first claim and, for each of the other related claims, a fee of \$800.

²⁵ New South Wales Attorney-General and Justice Department, *The New Victims Support Scheme: a Detailed Guide* (2013), 12 (Attorney-General and Justice Department).

submissions for a victim. The Law Council is concerned that there may be an opportunity for a conflict of interest to arise in circumstances where the staff from Victims Services (which ultimately determines whether or not victims support is awarded) assists a victim in making a claim for victims support. While the process is intended to be more straightforward for victims, the Law Council notes that the assessment of an individual's eligibility may nevertheless be complex under the new legislation and it is also concerned that victims of crime are actively dissuaded from seeking independent legal advice.

22. The Law Council considers that sufficient State funding should be provided to ensure that independent, skilled, experienced and dedicated legal representatives are available to assist victims of crime in the processing of their claims.
23. More broadly, as previously highlighted, the Law Council considers that access to legal representation is important to ensure that a victim is in the best position to pursue the most appropriate redress option in light of his or her circumstances. In this context, it notes that claimants may be obliged to refund the amount of assistance provided through victims of crime compensation schemes if they subsequently receive damages.²⁶ In this regard, it refers to its previous recommendations that consideration should be given to how victims of institutional child sexual abuse can be supported to access legal advice and representation in the longer term, beyond the term of the Royal Commission itself.²⁷
24. More generally, principles which may assist in making victims compensation schemes effective include:
 - (a) Assisting the victim with the process of recovery – this includes a focus on psychological harm and counselling, treatment and therapeutic needs, as well as support to victims during the application process;
 - (b) Avoiding causing further harm to the victim – for example, because the process is overly adversarial;
 - (c) Ensuring adequate levels of compensation, rather than arbitrary caps;
 - (d) Ensuring that the scheme is accessible – for example, the Law Society of Western Australia has identified online applications as one user-friendly feature; and
 - (e) Providing adequate funding to victims of crimes agencies, so that they can ensure that victims can present their claims without procedural or other impediments, and that prompt resolution of claims can be achieved. Time frames for the assessment of processing of claims should be reviewed so that delays are avoided; noting that early resolution of claims is advantageous to the victim's recovery.
25. The Law Society of Western Australia has also noted that in Western Australia, the broad discretion which is provided to the Assessor to take individual circumstances into account and analyse the issues on a case-by-case basis is an effective feature of the Western Australian victims of crime compensation scheme.

²⁶ For example, as required under section 62 of the *Victims of Crime Assistance Act 1996* (Vic).

²⁷ Law Council of Australia, *Civil Litigation: Issues Paper 5 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 25 March 2014, 30, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2802_-_Civil_Litigation_Issues_Paper_5.pdf.

Difficulties faced under statutory victims of crime compensation schemes by people who suffer child sexual abuse in institutional contexts

Time limits and discretionary provisions

26. The time within which a compensation claim may be lodged varies across jurisdictions, but in all jurisdictions, is calculated from the date at which the injury/ act/ offence occurred.²⁸ In the Australian Capital Territory, the primary victim has 12 months within which to lodge a claim.²⁹ In South Australia, Queensland, Western Australia and Tasmania, victims generally have 3 years in which to lodge a claim.³⁰ Victorian victims of crime legislation provides that victims must generally lodge a claim for compensation within 2 years of the date of the crime,³¹ as is the case in the Northern Territory.³²

27. The situation in New South Wales has recently changed, such that:

- (a) Generally, payments for financial support and recognition payments have a limit of 2 years from the incident for claiming, or 2 years after a child turns 18,³³
- (b) Where the act is an act of violence involving domestic violence, child abuse or sexual assault,³⁴ there is a limit of 10 years from the incident for claiming a recognition payment, or where the act was carried out on a child, a limit of 10 years after the child turns 18.³⁵
- (c) However, where the victim is a primary victim of a sexual offence as a child (as opposed to being a victim of sexual assault) there is no time limit on the claim in respect of:
 - (i) Financial support, being for financial assistance of a kind specified in clause 8(2)(b) or (d) of the *Victims Rights and Support Regulations 2013* (NSW) – respectively, this refers to up to \$5,000 for certain out-of-pocket expenses³⁶ or \$5,000 for expenses associated with relevant criminal or coronial proceedings;³⁷ or
 - (ii) A recognition payment.³⁸

28. According to the Framework, the possibility generally exists across Australian jurisdictions of an extension of time.³⁹ The Law Society of Western Australia has

²⁸ There are slight variations across jurisdictions. For example, in Western Australia, the time is calculated from the last of the offences where more than one offence was committed: s 9 of the *Criminal Injuries Compensation Act 2003* (WA).

²⁹ *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 27.

³⁰ See: s 18 of the *Victims of Crime Act 2001* (SA); s 54 of the *Victims of Crime Assistance Act 2009* (Qld); s 9 of the *Criminal Injuries Compensation Act 2003* (WA); and s 7 of the *Victims of Crime Assistance Act 1976* (Tas).

³¹ See s 29 of the *Victims of Crime Assistance Act 1996* (Vic).

³² *Victims of Crime Assistance Act 2006* (NT) s 31.

³³ Subsections 40(1) and 40(4) of the *Victims Rights and Support Act 2013* (NSW).

³⁴ *Ibid* s 19(8).

³⁵ *Ibid* sub-s 40(5).

³⁶ Clause 8(2)(b) of the *Victims Rights and Support Regulations 2013* (NSW) refers to up to \$5,000 for out-of-pocket expenses if the victim cannot demonstrate loss of actual earnings.

³⁷ *Ibid*. Clause 8(2)(d) refers to \$5,000 for expenses associated with relevant criminal or coronial proceedings relating to the act of violence, making statements to police, preparing victim impact statements and similar justice related expenses.

³⁸ Subsection 40(7) of the *Victims Rights and Support Act 2013* (NSW).

commented that in Western Australia, although it is a disadvantage that there is a time limit on claiming statutory compensation, assessors have generally exercised discretion in favour of victim.

29. However, in its submission to the Victorian Committee regarding the Victorian scheme, the Law Institute of Victoria stated that:

[t]he requirement to bring claims to [the Victims of Crime Assistance Tribunal (VOCAT)] within two years is, however, problematic in cases of sexual abuse of children who might not seek assistance until some time after the events when they are adults.⁴⁰

30. Where the alleged abuse had reportedly occurred more than two years previously, the Law Institute of Victoria noted that it was possible to apply to VOCAT to request an extension, providing the victim meets the relevant criteria.⁴¹ It stated that factors that which were required to be considered by VOCAT in making a determination as to an extension of time included:

- (a) The age of the applicant at the time of the act of violence;
- (b) Whether the applicant suffers from an intellectual disability or mental illness;
- (c) Whether the accused perpetrator was in a position of power or influence in relation to the applicant at the time of the act of violence;
- (d) The physical or psychological effect of the act of violence on the applicant;
- (e) Whether any delay in commencing an application threatens the Tribunal's capacity to make a fair decision;
- (f) Whether the applicant was a child at the time of the act of violence, and whether an application to the Tribunal was made within a reasonable time of them turning 18; and
- (g) All other circumstances that the Tribunal considers relevant.

31. The Law Institute of Victoria noted that many of these factors were particularly relevant in cases of abuse of minors by personnel of religious organisations and that there had been some reported cases in which time was extended for applicants who suffered sexual abuse as minors.⁴²

32. On that basis, the Law Institute of Victoria recommended that the Committee:

- (a) Seek information on the extent to which the requirement to bring claims to VOCAT within two years of a criminal act occurring is having a significant impact in terms of excluding claims from victims of criminal abuse where abuse occurred as a child and they report it as adults; and

³⁹ Standing Council on Law and Justice, 35. The discretion to extend time limits does not appear to exist under the new NSW scheme.

⁴⁰ LIV submission, 22

⁴¹ Ibid, citing sub-ss 29(3)(a)–(g) of the *Victims of Crime Assistance Act 1996* (Vic).

⁴² Ibid 22-3, citing: *CS v Victims of Crimes Assistance Tribunal* [2006] VCAT 1061, at [26]-[31]; *Frost v Victims of Crimes Assistance Tribunal* [2002] VCAT 1390, at [20]-[25]; *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 at [24].

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- (b) Consider any possible amendments to the factors to be considered in providing an extension of the two-year requirement under section 29(3) of the *Victims of Crime Assistance Act 1996* (Vic) (the Victorian Act) to provide expressly for the circumstances of victims of criminal abuse where abuse occurred as a child and they report it as adults.⁴³

33. The Report of the Victorian Committee was tabled in Parliament on 13 November 2013.⁴⁴ On the issue of time limits, the Victorian Committee recommended that the Victorian Government consider amending the Victorian Act to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings.⁴⁵

34. The Law Society of Western Australia agrees that there is a need to remove time limits for victims of crime compensation claims for victims of child sexual abuse within institutions. It notes that this type of abuse is extremely traumatic for children and dramatically shapes the adult he or she will ultimately become, stating that:

The sequelae of abuse cannot be identified within three years, and sometimes not within six years. Some children are extremely reluctant to confide in the fact that sexual abuse impacts them. They may try to avoid acknowledging the incident(s) and at some point the issues will resurface and manifest in some way. As a result, they should not be barred from bringing a claim.

35. While there may be flexibility within different Australian jurisdictions to extend time limits to victims of child sexual abuse, the Law Council notes that any application to extend the time limits poses an additional hurdle which a victim must overcome.

36. In its civil litigation barriers submission, the Law Council included a discussion of the limitation periods which apply in Australian jurisdictions in respect of personal injury actions. This included references to its *A Model Limitation Period for Personal Injury Actions Position Paper* (the Position Paper).⁴⁶

37. As noted in its last submission, the Law Council noted that it had adopted the position that child sexual abuse cases form a special category of intentional tort, where policy considerations strongly favour allowing proceedings to continue where there is a possibility of a fair trial. It further referred to the Position Paper view that:

*...ordinary standards of "reasonableness" are often not appropriate in relation to persons whose psychological injuries may be profound and continue long after the physical symptoms of abuse have resolved. A person subject to abuse over an extended period may take an extended period of time to connect the abuse with their psychological injuries or to engage in any process which requires them to recollect their abuse.*⁴⁷

⁴³ Ibid 23.

⁴⁴ Victorian Committee Report. The Victorian Committee looked into: the practices, policies and protocols in religious and other non-government organisations for the handling of allegations of criminal abuse of children; whether there are systemic practices in such organisations that preclude or discourage the reporting of such allegations; and whether changes to law or practices, policies and protocols in such organisations are required to help prevent abuse, and to deal with allegations of abuse.

⁴⁵ Ibid. Recommendation 27.1, Part H.

⁴⁶ Law Council of Australia, *A Model Limitation Period for Personal Injury Actions: Position Paper* (June 2011), copy available from the Law Council on request.

⁴⁷ Dr B Matthews (2003) "Limitation periods and child sexual abuse cases: law, psychology, time and justice" *Torts Law Journal* 11(3), 218, 3.

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38. The Position Paper also refers to a number of arguments against applying the ordinary limitation period to civil actions arising out of criminal enterprise, including that:
- (a) There is no limitation on when the State may commence criminal proceedings against a person for more serious crimes, such as sexual abuse. Accordingly, there appears to be little justification for protecting perpetrators from civil consequences for their actions through application of a limitation period; and
 - (b) While there is a public interest in ensuring civil proceedings are brought quickly and without unnecessary delay, there is a greater public interest in allowing a person, who has suffered horrifically due to the callousness of another person, as much time as is necessary.
39. The Law Council concluded in its previous submission that a different approach was required in relation to limitation periods in respect of child sexual abuse victims, given the particular trauma involved, the likely delays in pursuing claims, the fact that victims were children at the time of the abuse, and the public interest in justice being done.
40. For similar reasons to those set out in its previous submission, it considers that a different approach to time limits is also warranted in the case of victims of crime compensation scheme time limits. Such a different approach could involve: establishing a special statutory period for childhood abuse claims; a date of discoverability approach with special provisions for child abuse claims (see discussion below); or, removing time limits altogether for child victims of institutional abuse (as recommended by the Victorian Inquiry).

Discoverability

41. As noted above, the time within which a compensation claim may be lodged varies across jurisdictions, but in all jurisdictions, is calculated from the date at which the injury/ act/ offence occurred.
42. However, this differs from an approach which focuses on the “date of discoverability” – i.e. the date on which the plaintiff has actual or constructive knowledge of the decisive facts giving rise to the claim, including that an injury has occurred.
43. As noted in the Position Paper, limitation laws for personal injuries actions in NSW, Victoria, Tasmania and the UK require commencement of the limitation period from the “date of discoverability”.
44. The potential for unfairness to arise in instances in which plaintiffs were unaware that an injury had occurred – for example, in latent injuries which do not begin to manifest until many years after the cause has been identified – has led to particular Law Council’s recommendations in relation to limitation periods for personal injuries actions, including that:
- (a) Limitation periods should be dated from the “date of discoverability”; and
 - (b) The test for discoverability should be subjective, having regard to the personal antecedents of the plaintiff.⁴⁸

⁴⁸ As stated in the Position Paper, the test for constructive knowledge should be subjective, so that consideration is given to what the plaintiff him/herself knew or ought to have known or discovered through reasonable inquiry. The Law Council has further recommended in the Position Paper that: the general limitation period should be three years; there should be general judicial discretion to extend the limitation

45. While the Position Paper is concerned with limitation laws for personal injuries actions, the Law Council considers that these recommendations for dating limitation periods from the date of discoverability are also relevant to statutory victims of crime compensation schemes – particularly with respect to victims who may experience “latent” injuries, including victims of institutional child sexual abuse. It considers that the least desirable outcome for such victims is a strict time limit being imposed from the date the injury or damage was sustained, as opposed to the date on which the injury was discoverable by the claimant.

Caps on payments

46. As with limitation periods, the caps for compensation that are available under statutory victims of crime compensation schemes vary across jurisdictions.

47. In New South Wales, under the new victims of crime compensation scheme recently commenced, the total maximum payable to a claimant for an act of violence has changed from \$50,000 under the old scheme⁴⁹ to:

- (a) Up to \$15,000 for recognition payments;⁵⁰
- (b) Up to \$30,000 for financial assistance for economic loss;⁵¹ and
- (c) Up to \$5,000 for financial assistance for immediate needs.⁵²

48. Secondary victims are only eligible for counselling services in New South Wales.⁵³

49. The Law Council is aware that the introduction of the new scheme in New South Wales has been controversial, with many in the community legal sector raising concerns in relation to its application to victims of sexual assault, including child

period; there should be a special limitation period for child sexual abuse victims; time should not commence running against a minor or those under a disability until they reach 18 years or cease to be under a disability; and there should be no “long stop” provisions.

⁴⁹ *Victims Support and Rehabilitation Act 1996* (NSW) s 19 (repealed). The section provided that the maximum amount of statutory compensation payable to a single person in respect of an act of violence was \$50,000; or \$50,000 in total for the primary victim, secondary victims claiming through the primary victim and/or family victims claiming through the primary victim.

⁵⁰ Clause 12 of the *Victims Rights and Support Regulation 2013* (NSW) prescribes the amounts payable for Category A, B, C and D recognition payments pursuant to s 36 of the *Victims Rights and Support Act 2013* (NSW) to a maximum of \$15,000. It is also possible that a person who has sustained injury through or by reason of an offence (where the offender has been convicted or sentenced), including an immediate family member of a deceased person may receive a sum, not exceeding \$50,000, from the offender as compensation for injury (ss 93 and 94 of the *Victims Rights and Support Act 2013* (NSW)). However, a direction for compensation for injury must not be given on the conviction of any other person for the offence, or, for the offender or any other person for a related offence, if that sum were to exceed \$50,000 (s 95(1)).

⁵¹ Financial assistance for economic loss is available to primary victims, and certain benefits may also be available to parents of a child victim and family members of a homicide victim. The benefits available under “economic loss” include: reasonable travel expenses; medical and dental expenses; assistance with cost of living and other expenses including rent assistance, furniture, child care and household bills capped at \$5,000 for those victims who were not employed at the time of the crime; expenses associated with damage to personal effects capped at \$1,500; justice related expenses capped at \$5,000; and loss of actual earnings capped at \$20,000: Eligibility is not guaranteed. See: Attorney-General and Justice Department 5.

⁵² Clause 8 of the *Victims Rights and Support Regulation 2013* (NSW) provides for a maximum of \$5,000 immediate financial assistance to the primary victim pursuant to s 26(1) of the *Victims Rights and Support Act 2013* (NSW).

⁵³ Section 28 of the *Victims Rights and Support Act 2013* (NSW) provides that secondary victims are eligible for approved counselling services.

victims. This includes concerns that the amounts paid to victims of child sexual abuse (or of domestic violence) have been substantially reduced under the new scheme.⁵⁴

50. Further, the claims by victims of historical child sexual abuse are now constrained by the specific time limits which operate under section 40 of the *Victims Rights and Support Act 2013* (NSW). As discussed above, beyond the standard time frames of two years after the relevant act of violence (or two years after the child turns 18), the person will be reliant on either subsections 40(5) or (7) of that Act which provide for the following exceptions in respect of time limits:

- (a) If the person relies upon subsection 40(5) (where the act is an act of violence involving domestic violence, child abuse or sexual assault), the person will be able to seek a recognition payment only (maximum \$15,000);⁵⁵ or
- (b) If the person relies upon subsection 40(7) (primary victim of a sexual offence as a child),⁵⁶ the person will be able seek only a recognition payment (maximum \$15,000) or certain financial support totalling \$10,000.⁵⁷

51. The statutory victims of crime compensation schemes in other jurisdictions differ from that in New South Wales. Indeed, some also apply to secondary victims. In Tasmania, the maximum amount of compensation available to primary victims is \$30,000⁵⁸ and provision is made for compensation to secondary victims.⁵⁹ In the Northern Territory, the maximum amount of compensation available to primary victims is only \$40,000,⁶⁰ but compensation is also available to secondary victims.⁶¹ In Victoria, primary victims of crime can receive up to \$60,000, plus \$10,000 in special assistance.⁶² Secondary victims of crime can receive up to \$50,000 in compensation.⁶³ In Queensland, primary victims of crime can receive up to \$75,000 in compensation⁶⁴ and compensation is also available to secondary victims.⁶⁵

52. Other jurisdictions do not provide compensation for secondary victims, but nevertheless have victims of crime compensation schemes for primary victims. In South Australia, the maximum amount of compensation available to a primary victim of crime is \$50,000.⁶⁶ On 19 June 2014, the South Australian Government announced that this would increase to \$100,000 from 2015-16, that being one of a suite of new measures to “improve support for victims and make the justice system more accessible.”⁶⁷ In the Australian Capital Territory, the maximum amount of

⁵⁴ Anna Patty and Harriet Alexander “No time limit for child abuse claims, but payout cap stays”, *Sydney Morning Herald*, 30 May 2013; and, ABC Radio National, “Lawyers alarmed by victim compensation changes”, *PM*, 8 May 2013 (Miriam Hall).

⁵⁵ Subsection 40(5), *Victims Rights and Support Act 2013* (NSW) contains a time limit of 10 years for claiming a recognition payment, or where the act was carried out on a child, a limit of 10 years after the child turns 18

⁵⁶ Under subsection 40(5), *Victims Rights and Support Act 2013* (NSW), no time limits apply

⁵⁷ Subsection 40(7) of the *Victims Rights and Support Act 2013* (NSW) refers to financial support under clause 8(2)(b) or (d) of the *Victims Rights and Support Regulations 2013* (NSW) – respectively, this refers to up to \$5,000 for certain out-of-pocket expenses if the victim cannot demonstrate loss of actual earnings, or \$5,000 for expenses associated with relevant criminal or coronial proceedings.

⁵⁸ See reg 4 of the *Victims of Crime Assistance Regulations 2010* (Tas).

⁵⁹ Section 2(1) of the *Victims of Crime Assistance Act 1976* (Tas).

⁶⁰ Schedule 3 of the *Victims of Crime Assistance Regulations 2006* (NT).

⁶¹ Section s 11-2 of the *Victims of Crime Assistance Act 2006* (NT).

⁶² Sections 8 and 8A of the *Victims of Crime Assistance Act 1996* (Vic).

⁶³ *Ibid* s 10.

⁶⁴ Section 38 of the *Victims of Crime Assistance Act 2009* (Qld).

⁶⁵ *Ibid* s 26.

⁶⁶ Section 20 of the *Victims of Crime Act 2001* (SA).

⁶⁷ Tom Koutsantonis, Treasurer of South Australia, ‘State Budget 2014-15 – Victims of crime compensation to increase’ (News Release, 19 June 2014).

compensation available to a primary victim of crime is \$50,000,⁶⁸ and financial assistance is also available to relatives of the victim.⁶⁹ Primary victims of crime in Western Australia can receive up to \$75,000 in compensation,⁷⁰ and compensation is also available to close relatives.⁷¹

53. The Law Council considers that the very different compensation outcomes which may be obtained by a victim who has experienced child sexual abuse, depending upon the jurisdiction in which the abuse occurred, may be viewed as arbitrary and unjust. The current disparity of awards between jurisdictions lends weight to the view that there should be national consistency on this issue, as with time limits on compensation claims. Further, the compensation offered under such schemes should reflect the degree of harm suffered by the victim, which the Law Council suggests is not reflected in the majority of existing schemes.
54. An additional issue is the treatment of multiple offences. In discussing the maximum caps in this section, the Law Council has generally referred to the maximum amount of compensation available in respect of a single offence. It recognises, however, that there may be different approaches to the treatment of multiple offences, including by a single offender, between jurisdictions.
- (a) For example, in Western Australia, if such offences are considered to be “multiple related offences” then the maximum compensation must not exceed the maximum amount that may be awarded for the last one of the offences to be committed, pursuant to subsection 33(1) of the *Criminal Injuries Compensation Act 2003* (WA). That is, if the last offence was committed after 1 January 2004, the victim can claim a maximum of \$75,000. However, if they are considered to be “multiple unrelated offences” by one offender, the amounts awarded must not in aggregate exceed twice the maximum amount that may be awarded for the last one of the offences to be committed: so, if the last offence occurred after 1 January 2004, the victim may claim up to \$150,000, pursuant to subsection 34(2).
- (b) Meanwhile, in New South Wales, an “act of violence” means an act or series of related acts, whether committed by one or more persons.⁷² Only one recognition payment is payable to a single victim in respect of a series of related acts of violence against the victim.⁷³
55. While the Law Council has not investigated the treatment of multiple offences for the purposes of compensation caps more fully across different jurisdictions, it recognises that this issue is highly relevant in assessing the situation of victims of institutional

⁶⁸ Section 14 of the *Victims of Crime (Financial Assistance) Act 1983* (ACT). Changes have however been proposed to the ACT victims compensation scheme as discussed earlier in this submission.

⁶⁹ *Ibid* s 17.

⁷⁰ Section 31 of the *Criminal Injuries Compensation Act 2003* (WA). This maximum applies to a single offence and also in the case of multiple related offences, while in the case of multiple unrelated offences, the maximum amount is \$150,000 - see further comments above.

⁷¹ *Ibid* s 30.

⁷² Subsections 19(1), *Victims Rights and Support Act 2013* (NSW).

⁷³ Subsection 36(2), *Victims Rights and Support Act 2013* (NSW). A “series of related acts” is two or more acts that are related because a) they were committed against the same person, and b) in the opinion of the Tribunal or Commissioner, they were i) 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 (subsection 19(4)). However, 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.

child sexual abuse, many of whom are likely to have been abused on more than one occasion by one or more perpetrators.

Lower caps for historical offences

56. The Law Council has not conducted a thorough investigation into the current position in every jurisdiction on this issue. However, it notes that in Western Australia, for example, the maximum award available for a single offence depends on the date that the offence occurred, as follows:⁷⁴

22 January 1971 - 17 October 1976	\$2,000
18 October 1976 - 31 December 1982	\$7,500
1 January 1983 - 31 December 1985	\$15,000
1 January 1986 - 30 June 1991	\$20,000
1 July 1991 - 31 December 2003	\$50,000
1 January 2004 – present	\$75,000

57. The arbitrary way in which amounts payable are attached to the date of abuse – which is highly relevant in the context of institutional child sexual abuse, given the historical nature of many of these cases – can be illustrated by the Western Australian approach. For a person abused between 1971 and 1976, the victim may only be able to receive a maximum of \$2,000 for a single offence or multiple related offences.⁷⁵ These maximum amounts that are available for historical child sexual abuse are so low as to render the overall utility of the scheme highly questionable, given that the process of seeking compensation may involve significant trauma.

58. Meanwhile, in South Australia, maximum payments also depend upon the date in which the offence occurred according to the following schedule (under respective legislation):⁷⁶

22 January 1970 to 10 April 1974	\$1 000.00
11 April 1974 to 30 June 1978	\$2 000.00
1 July 1978 to 30 July 1987	\$10 000.00
1 August 1987 to 31 August 1990	\$20 000.00

⁷⁴ Section 31 of the *Criminal Injuries Compensation Act 2003 (WA)* regarding the maximum amount of compensation payable for a single offence. See also: Department of the Attorney-General, *Courts and Tribunal Services*, available at: <http://www.courts.dotag.wa.gov.au/C/compensation.aspx?uid=1894-2822-6966-4703>.

⁷⁵ For a single offence and multiple related offences. This amount would be \$4,000 where multiple unrelated offences by the same offender occur: ss 33 and 34 of the *Criminal Injuries Compensation Act 2003 (WA)*. A member of the Law Society of Western Australia has commented that prior to the enactment of the Act, the same caps did not apply in respect of multiple offences, so that if, for example, a victim suffered 20 incidents of sexual assault in 1972 and made a claim prior to this legislation being enacted, the victim would be entitled to make a claim for \$40,000. However, if a claim were to be made now, the victim would be entitled to make a claim for up to \$4,000 if those incidents were treated as “multiple unrelated offences” by the same offender, or \$2,000, if the incidents were treated as “multiple related offences”.

⁷⁶ Legal Services Commission of South Australia, *Law Handbook*, available at: <http://www.lawhandbook.sa.gov.au/ch35s02s03.php>.

Since 1 September 1990

\$50 000.00

59. Based on these examples, it appears that in in two jurisdictions at least, the more historical the claim, the more limited the potential outcome for the victim under statutory compensation schemes. Clearly, referencing compensation amounts to the date of injury is arbitrary and unfair to those who may have suffered over the longest period, with serious demonstrable and life-long consequences.

Reporting to police

60. The Law Council considers that the lack of reporting of a crime by a victim of institutional child sexual abuse should not affect his or her entitlement to a statutory compensation payment.

61. The Law Council notes that in the Australian Capital Territory, victims are currently unable to claim compensation if they fail to report the crime to the police.⁷⁷

62. The ACT Justice and Community Safety Directorate, which has proposed a new ACT Victims of Crime Financial Assistance Scheme, has recommended that this requirement should generally be retained.⁷⁸ However, it has further recommended that an exception be included for specific primary victims, who are highly vulnerable and known to be unlikely to report to the crime to the police.⁷⁹ This group is proposed to include:

- (a) Primary victims of sexual offences;
- (b) Primary victims of offences committed by a person who was in a position of power, influence or trust in relation to the primary victim when the violent crime was committed;
- (c) A primary victim who was a child when the act was committed;
- (d) A primary victim who has an impaired capacity; and
- (e) A primary victim who is being threatened or intimidated by the person who committed the violent crime or by someone else.⁸⁰

63. For this group, the Directorate recommends that if the exception applies and the decision maker is satisfied that there was a reasonable excuse for a report not being made to a police officer, the applicant may provide other evidence that the violent crime occurred.⁸¹

64. The Law Council considers that there would be value in ensuring that across all jurisdictions in which an obligation of reporting to police exists, specific exceptions are provided in relation to highly vulnerable victims such as the groups proposed in the Australian Capital Territory, in relation to whom the barriers to reporting are well recognised. Otherwise, there is a risk of jeopardising these victims' ability to claim

⁷⁷ Subsection 12(1)(c) of the *Victims of Crime (Financial Assistance) Act 1983* (ACT).

⁷⁸ Justice and Community Safety Directorate, *The ACT Victims of Crime Financial Assistance Scheme: Proposed Model* (April 2014) 14-5.

⁷⁹ *Ibid* 14.

⁸⁰ *Ibid* 15.

⁸¹ *Ibid*. This may include an appropriate report from a government agency, and a report from the victim's counsellor, psychologist or doctor. The Directorate notes that this approach is generally in line with that taken in New South Wales or Queensland. It further proposes that reports may be recognised from appropriate non-government agencies, such as rape crisis centres.

compensation, even if there is scope for explanations to be provided as to a lack of reporting.

Repayment

65. The Law Council considers that any compensation scheme should not derogate from existing rights to recover compensation from perpetrators or institutions liable for damages. It recognises, however, the rationale in seeking repayment of victims' compensation if damages or a settlement is later obtained. There is a reasonable argument that statutory compensation schemes need to be sustainable and prioritise benefits to those who are unable to make a civil law claim. It therefore follows that those who can claim at common law should be required to repay into the scheme, to ensure the availability of funds for those who cannot claim.
66. Nevertheless, as noted above, the Law Council considers that the obligation upon claimants to refund the amount of assistance provided through a victims of crime compensation scheme if damages are later received reinforces the need for access to legal representation at the outset of the process. This will help to ensure that a victim is in the best position to pursue the most appropriate redress option in light of his or her circumstances, and help to avoid duplication of effort and potential further harm which may be caused by going through several processes.
67. The Law Society of Western Australia notes that in Western Australia, the Assessor will defer an application if there is a common law matter on foot awaiting the finalisation of the common law matter. In this light, the Law Council considers that repayment of statutory compensation obtained is preferable to deferral of payment, noting that the civil litigation process may be protracted.

Other issues

Definitions

68. The Law Council notes that victims of crime compensation schemes at the State and Territory level are further complicated by different definitions of certain terms depending on the jurisdiction where the compensation claim is being made.⁸² For instance, in Victoria, Queensland and the Northern Territory, "injury" is defined as a "mental illness or disorder,"⁸³ or a "recognisable psychological or psychiatric disorder."⁸⁴ This differs from victims of crime compensation legislation in other States and Territories that extend the definition of injury to "mental or nervous shock",⁸⁵ or "psychological or psychiatric harm."⁸⁶
69. It has been noted by some commentators that the use of more "restrictive" definitions (such as that used in the Northern Territory for "mental injury"), could make victims ineligible for compensation if they are unable to demonstrate that they have a recognisable psychiatric disorder or do not want to undergo a formal psychiatric assessment.⁸⁷ The Law Council notes that regulations under the *Migration Act*

⁸² Meyering, 5.

⁸³ Section 27(1)(b), *Victims of Crime Assistance Act 2009* (Qld); s. 3(1), *Victims of Crime Assistance Act 1996* (Vic).

⁸⁴ Section 6(b), *Victims of Crime Assistance Act 2006* (NT).

⁸⁵ Dictionary in *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims of Crime Act 2001* (SA) s 4; *Criminal Injuries Compensation Act 2003* (WA) s 3.

⁸⁶ *Victims Rights and Support Act 2013* (NSW) ss 5 and 18.

⁸⁷ Meyering, 5.

1958 (Cth) allow victims of family violence to establish its occurrence and effects by means other than psychological assessment.⁸⁸

Convicted perpetrator's access to psychological records

70. The Law Society of Western Australia has further referred to a particular difficulty which arises when a convicted perpetrator requests the victim's records. It notes that:

- (a) Where the perpetrator of the abuse is convicted, the Assessor can make an award that the convicted individual repays the State. The perpetrator may attempt to avoid reimbursement to the State by alleging that the victim was psychologically damaged prior to coming into the perpetrator's care. As a result, the Assessor as a matter of procedural fairness has the power to provide to the perpetrator the victim's psychological reports submitted in support of the application for compensation.
- (b) The release of these reports can lead to further psychological harm to the victim. A decision may have to be made to withdraw the claim for compensation as the psychological harm to the victim would outweigh the benefits of receiving the award.
- (c) Changes are desirable to ameliorate further psychological harm to the victim. The Law Society of Western Australia suggests that there are two possible ways that this could be achieved:
 - (i) Prior to the Assessor releasing the report, the victim should be evaluated by a psychologist to determine whether there would be any psychological harm caused to the victim if his or her reports are released. If the psychologist reports that the client would suffer further psychological harm as a result of the release of the reports, the Assessor should have a discretion to withhold the records; or
 - (ii) The Assessor should have a discretion to appoint an independent psychologist/ psychiatrist to review the psychological records and any other records that the Assessor or the perpetrator consider appropriate (such as information held by the State or an education facility) and provide a report to the Assessor about whether there is any evidence to support the perpetrator's claim.

The Law Society of Western Australia states that given that this is a medical question only, the Assessor would in any event be reliant upon such an evaluation. There could be a panel of such psychologists and psychiatrists.

The Law Society of Western Australia further comments that while the perpetrator would receive the report (or a redacted copy), the victim's privacy would be largely maintained and it would be less likely that he or she would feel violated as the report is from someone independent.

Proposed changes

71. The issues discussed in this submission would suggest that as a priority, the following issues should be considered:

⁸⁸ Department of Immigration and Border Protection, *Fact Sheet 38 – Family Violence Provisions* (February 2014) available at: <http://www.immi.gov.au/media/fact-sheets/38domestic.htm>.

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- (a) Addressing the time limits within victims compensation schemes for victims of institutional child sexual abuse, given the trauma involved and the subsequent delays in reporting such abuse;
 - (b) Ensuring that victims can access fair and equitable compensation, regardless of the period or the jurisdiction in which the abuse occurred;
 - (c) Ensuring that victims who may be unable to pursue compensation claims due to particularly high standards of proof – such as in South Australia – have access to compensation which provides some level of acknowledgement and satisfaction; and
 - (d) Ensuring that sufficient State and Territory funding is provided to enable independent, skilled, experienced and dedicated legal representatives are available to assist victims of crime in the processing of their claims, as well as in determining the most appropriate redress option in light of his or her circumstances.

72. Further, this submission suggests that the relevant definitions of psychological harm could be reviewed, and that changes be considered in relation to:

- (a) Access by the convicted perpetrator to the victim's psychological records;
- (b) Ensuring that any obligations to report to police do not apply to particularly vulnerable victims; and
- (c) Reviewing procedures to help overcome issues such as a lack of documentation.

73. A member of the Law Society of South Australia has suggested that a further feature which may increase schemes' effectiveness is through requiring convicted offenders to be liable for the compensation so as to not erode any statutory fund. In this context, he notes that often the Crown does not seek to pursue recovery because the perpetrator may be indigent – however, longer term recovery mechanisms such as those to be found in respect of social security reparation orders for recovery of overpaid social security payments could be employed.

Other redress offered through statutory victims of crime compensation schemes

74. The Law Council has not considered this question in detail. However, the Law Society of Western Australia suggests that the forms of redress which should be considered include discretionary general damages payments, medical treatment, vocational retraining and educational assistance. Counselling should also be made available, including during the application process.

75. The Law Council also suggests that the Royal Commission should consult carefully with particular groups about the specific needs for redress that they may require through statutory victims of crime compensation schemes. For example, the Law Council believes that it would be beneficial for the Royal Commission to consult with Aboriginal and Torres Strait Islander organisations about whether they consider that particular services are required to address the needs of Aboriginal and Torres Strait Islanders. In a similar vein, the Law Council considers that it may be beneficial for the Royal Commission to consult with the National Children's Commissioner and children's advocacy groups about the specific needs of children, including in relation to trust fund arrangements.

Eligibility for additional or different compensation and services

76. The Law Society of Western Australia has noted that children in care as victims present a special category of victim, given that this kind of abuse is extremely traumatic for children and may dramatically shape their development and quality of life in adulthood. It notes that these victims generally lack support other than services from the Department of Child Protection, which can sometimes be part of the problem.
77. However, the Law Society of South Australia has stated that from the perspective of the victim, there may not be clear grounds to distinguish between, for example, abuse in the home and abuse in an institution, noting that both are criminal offences. Further, it is acknowledged that adult victims of crime, including kidnapping, wrongful imprisonment, torture, sexual and other serious assault may suffer very high levels of immediate and ongoing trauma, which is not substantially different to child victims of sexual assault and violence
78. The case for a separate category of redress schemes in the case of abuse which occurs in an institutional context is the arguable culpability of the organisation or institution in failing to protect the victims of abuse, the degree of vulnerability of the victims and the community's expectation that organisations charged with the fiduciary, moral and ethical obligation to care and provide a safe environment for children uphold those duties to the highest extent possible. In relation to the latter, it is suggested that this could only be achieved by requiring those organisations to contribute to a redress scheme or statutory compensation scheme, or be subject to civil and/or criminal sanctions for their breach of duty of care.
79. That said, as the Law Council has previously noted, while many of the issues highlighted above carry particular relevance in relation to victims of institutional child abuse, they are also relevant to groups of victims beyond the terms of reference of the Royal Commission, particularly victims who have suffered sexual and other abuse as children (outside the institutional context). Consideration should therefore be given to how these issues could be addressed more comprehensively – for example, by the ALRC carrying out a more comprehensive review of statutory victims of crime compensation schemes, and drafting a model victims' compensation scheme.

Levels of verification or proof

Standards of proof

80. According to the Framework document, in most States and Territories the civil standard of proof applies under statutory victims compensation schemes – i.e. on the “balance of probabilities”, or that it is “more likely than not” that a crime took place. The Law Society of Western Australia has commented that the standard in Western Australia is generally appropriate, provided that some level of documentation is available as to what transpired (see further discussion below).
81. However, in South Australia, for compensation to be paid, an offence generally needs to be demonstrated beyond reasonable doubt. Subsection 22(2) of the *Victims of Crime Act 2001* (SA), which sets out the relevant standards of proof, states that no order for statutory compensation may be made (except by consent of the Crown) unless:
- (a) The commission of the offence to which the application relates:
 - (i) Has been admitted, or proved beyond reasonable doubt, in proceedings before a court; or

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- (ii) Has been admitted in statutory proceedings related to the offence or can be reasonably inferred from admissions made in any such proceedings; and
 - (b) The other facts on which the application is based have been proved on the balance of probabilities.

82. While this standard of proof is not problematic if the perpetrator has been found guilty of the offence, in other cases, as the Law Society of South Australia states, this creates a greater hurdle, at least in some cases, in obtaining compensation for historical sex crimes. One of its members notes the difficulties inherent in this standard of proof as follows:

The statutory compensation scheme should not necessarily rely upon proof of convictions because that in turn relies upon the administration of justice through the agencies of police and prosecution authorities who each in turn have resource, discretionary and other exigencies which may mean a victim is not able to pursue such a claim.

83. For victims who cannot meet the above threshold of proof in South Australia, there is the possibility that the Attorney-General may exercise his or her discretion to make an ex gratia payment. For example, such a payment may be granted if:

- (a) It appears to the Attorney-General that, because of lack of evidence, absence of capacity to incur criminal responsibility or other matters personal to the perpetrator, or for any other reason that does not reflect adversely on the victim, an offence has not been, or cannot be, established;⁸⁹ or
- (b) The Attorney-General considers necessary, and consistent with the objects and policy of this Act, to compensate harm resulting from criminal conduct or conduct of the kind described above.⁹⁰

84. In this way, the Attorney-General can compensate people who have suffered harm as a result of criminal conduct, even if a conviction is not obtained.⁹¹ However, as noted by the Legal Services Commission of South Australia, there is no legal entitlement to these payments. It is up to the Attorney-General to decide whether any payment should be made, and if so, how much.⁹²

85. The Law Council considers that the approach to standards of proof in South Australia is out of keeping with that across other Australian jurisdictions.

Lack of documentation

86. The lack of documentation was raised as a key evidential barrier to successful civil claims in the Law Council's submission on this issue.

87. In the current context, the Law Society of Western Australia has also noted as a particular barrier the lack of available documentation to support victims' compensation

⁸⁹ Subsection 27(4)(c), *Victims of Crime Act 2001* (SA).

⁹⁰ Subsection 27(4)(e), *Victims of Crime Act 2001* (SA).

⁹¹ In this light, the Law Council notes that the South Australian Government has set up a special ex gratia payments scheme for former residents in state care who experienced sexual abuse as children.

⁹² Legal Services Commission of South Australia *Law Handbook*, <http://www.lawhandbook.sa.gov.au/ch35s02s09.php>.

claims in situations of institutional child sexual abuse. This issue has also been raised by a Law Society of South Australia member, who states that verification or proof that a crime has been committed is difficult where offending has occurred many years ago. Records that may have been made about the report may be lost or destroyed. He suggests that the processes by which the authorities require proof should be reviewed, with a view to achieving reductions in procedural or administrative burden. Finally, he notes that other models exist which are more favourable to the assessment of such claims – for example, in the Commonwealth sphere for the assessment of entitlements to compensation through the Administrative Appeals process.

Conclusion

88. The Law Council considers that, while there are advantages to seeking redress under statutory victims of crime compensation schemes, there are several issues that need to be addressed to improve these schemes for victims of institutional child sexual abuse, and other victims of crime.
89. The Law Council considers that the overarching issue is that victims of crime compensation schemes vary significantly across jurisdictions, resulting in entrenched inequalities between victims depending on the State or Territory in which the crime has taken place and the application for compensation lodged. The maximum compensation amounts payable highlight the arbitrary outcomes involved. Other key issues which are likely affect victims to a greater or lesser extent, depending on the relevant jurisdiction, include: time limits on bringing a claim; standards of proof; reporting obligations; narrow definitions of harm; and access to psychological records of victims by convicted perpetrators.
90. The Law Council suggests that the Royal Commission should consider recommending reforms in relation to these key issues in order to enable victims of institutional child sexual abuse to have equal access to fair and equitable statutory victims of crime compensation schemes. The Law Council also suggests that the Royal Commission consider making recommendations over an inquiry into a more comprehensive review of victims of crime compensation schemes, including drafting a model scheme.
91. The Law Council looks forward to continued engagement with the Royal Commission.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executives members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors. Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.