

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)



**SUBMISSION TO THE
ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD
SEXUAL ABUSE IN RESPONSE TO ISSUES PAPER 7**

14 JULY 2014

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA ('ALSWA')

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the Indigenous people of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

Due to resource limitations and the need to prioritise the allocation of its legal resources, ALSWA provides legal advice and representation for victims in relation to criminal injuries compensation claims on a case-by-case basis. Most frequently, clients are referred to private lawyers with experience in criminal injuries compensation.

INTRODUCTION

The Royal Commission's Issues Paper No 7 (released on 29 May 2014) deals with statutory compensation schemes for victims of crime. The paper highlights that these schemes are not uniform across Australian jurisdictions and it refers to a number of specific areas of concern. The Royal Commission seeks submissions on the effectiveness of statutory victims of crime compensation schemes in 'delivering redress for those who suffer institutional child sexual abuse' and poses a number of questions for consideration.

In this submission, ALSWA addresses particular issues concerning the Western Australian criminal injuries compensation scheme that may impact on Aboriginal people who have suffered institutional child sexual abuse. This submission does not address every question raised in the Issues Paper but

instead highlights, for the Royal Commission's consideration, particular aspects of the criminal injuries compensation scheme that are of most concern to ALSWA.

Overview of the Criminal Injuries Compensation Act 2003 (WA)

The *Criminal Injuries Compensation Act 2003 (WA)* ('the Act'), which commenced on 1 January 2004, governs the victims of crime compensation scheme in Western Australia. The Act does not apply to an offence that was committed before 22 January 1971.¹ The maximum amount of compensation payable under the scheme is \$75,000. However, there are different caps stipulated for historical offences. Compensation awards are available in limited circumstances even where a person has not been convicted of the offence; however, the provisions of the Act operate in such a way that it is invariably necessary for the victim to have, at the very least, reported the offence to police.

Section 18 of the Act requires an assessor to 'determine compensation applications expeditiously and informally'. The assessor is not bound by the rules of evidence and 'may inform himself or herself in any manner he or she thinks fit'. In determining an application for compensation under the Act, the assessor has discretion to conduct a hearing. However, generally, applications are determined on the papers. The Chief Assessor observed, soon after the Act came into operation, that the new scheme was a significant improvement for victims of sexual assault because under the previous regime hearings had been compulsory. She further commented that some sexual assault victims had been discouraged from proceeding with an application for compensation because of the trauma of giving evidence at a hearing.² One clear advantage of the current Western Australian scheme is that the victim generally avoids the trauma associated with giving oral evidence in court and/or having to face the perpetrator in open court. However, there are a number of potential barriers to a successful claim for compensation for historical child sexual abuse. These are discussed below.

PARTICULAR AREAS OF CONCERN

Offences committed before 1971 and payment caps for historical offences

Any person who has been a victim of child sexual abuse committed before 22 January 1971 (ie, over 43 years ago) does not have a right to apply for compensation under the Act. For some Aboriginal people who have been victims of child abuse in institutional settings, this restriction will preclude access to compensation under the scheme. In addition, the Act specifies maximum amounts payable for a single offence (or for multiple related offences) depending on when the offence was committed.³ These payment caps are set out in the table below.

Date of offence	Maximum amount payable
22 January 1971 to 17 October 1976	\$ 2,000
18 October 1976 to 31 December 1982	\$ 7,500
1 January 1983 to 31 December 1985	\$15,000
1 January 1986 to 30 June 1991	\$ 20,000

1 *Criminal Injuries Compensation Act 2003 (WA)* s 8.

2 Porter H, 'Criminal Injuries Compensation' (Paper presented to the Western Australian Federation of Sexual Assault Services (WAFSAS) Forum, 4 October 2005, Perth) 2.

3 *Criminal Injuries Compensation Act 2003 (WA)* s 31.

1 July 1991 to 31 December 2003	\$ 50,000
1 January 2004 to present	\$ 75,000

Clearly, the lower limits applicable to historical offences are likely to disproportionately impact victims of child sexual abuse because of the typical delay in disclosing these types of crimes. In other words, in real terms, a compensation award of \$2000 made today for an offence that occurred in 1975 is unlikely to provide sufficient redress for the harm suffered. These relatively low amounts for historical offences may discourage victims from seeking compensation in the first place. The ALSWA does not believe that the lower payments for historical offences adequately reflect the ongoing harm suffered by victims of institutional child sexual abuse.

No compensation payable if person acquitted of the offence

Compensation payments may be made to a victim of a proved offence.⁴ In addition, in some circumstances, compensation may also be available to a victim of an 'alleged offence'. For example, under s 13(2) of the Act a person may apply for compensation for an alleged offence if the person is claiming that the alleged offence was committed by a person other than an acquitted person. Section 13(4) provides that an 'assessor must not make a compensation award in respect of a compensation application made under this section unless satisfied that the alleged offence was committed but by a person other than the acquitted person'. However, if the assessor is satisfied that the person who committed the relevant act was not criminally responsible for it, the alleged offence is taken not to have been committed (unless the person was not criminally responsible for it on account of unsoundness of mind).⁵

This means that if a person is charged with the offence and found not guilty and the victim maintains that person is the perpetrator, no compensation can be awarded. This is somewhat contradictory given that compensation is generally payable upon proof of the relevant matters on the balance of probabilities. An acquittal simply means that the offence could not be proved beyond reasonable doubt. This does not necessarily mean that there is not sufficient evidence to establish the commission of the offence on the balance of probabilities. In regard to this provision, the Chief Assessor has observed that:

The uncomfortable fact is that it is likely that on what the police may have perceived to be a 'stronger' case, and therefore decided to prosecute, the applicant is vulnerable, in terms of an application for compensation, to the likelihood of an acquittal. Had the case appeared to the investigating officers to be 'weaker' and a decision made not to prosecute, this may well have preserve the applicant's entitlement to compensation.⁶

Historical child sexual offences may be difficult to successfully prosecute. Significant delay in reporting the offence will result in a lack of forensic evidence and fading memories may impact upon the likelihood of conviction. It has been observed that for child sexual offence cases in New South Wales between 1995 and 2004 'fewer than 16% of the cases reported to the police resulted in proven charges'. In addition, it was commented that this 'was more pronounced in cases involving adult

⁴ A proved offence means an offence for which a person has been convicted. Section 5 sets out the particular circumstances that are included within the meaning of 'conviction' such as a spent conviction order or a referral to a juvenile justice team under the *Young Offenders Act 1994 (WA)*.

⁵ Or by reason of ss 27, 31 & 34 of the *Criminal Investigation (Covert Powers) Act 2012 (WA): Criminal Injuries Compensation Act 2003 (WA)* s 13(5).

⁶ Porter H, 'Criminal Injuries Compensation' (Paper presented to the Western Australian Federation of Sexual Assault Services (WAFSAS) Forum, 4 October 2005, Perth) 9.

complainants'.⁷ The difficulty in successfully prosecuting historical child sexual offences may have the result that victims of institutional child sexual abuse may fail to receive compensation because the alleged perpetrator has been acquitted.

Proof of injury or loss as a consequence of the offence

Compensation is only payable for injuries and loss suffered as a consequence of the 'proved' or 'alleged' offence. For example, the applicable section dealing with a 'proved offence' states that an assessor must not make a compensation award unless satisfied (on the balance of probabilities) that 'the claimed injury and any claimed loss has occurred and *did so as a consequence of the commission of a proved offence*'.⁸ In *Re Jackamara*⁹ it was observed that there must be a causal link between the mental health injury for which the applicant was seeking compensation and the assaults which he alleged took place many years earlier in juvenile detention centres. It was stated that the 'assaults do not have to be the sole cause of the mental health injury, but must have contributed materially to that injury'.¹⁰ It was further observed that:

The available medical reports appear to indicate that [the applicant] is suffering from a panic disorder and post-traumatic stress disorder which can be traced back to significant childhood trauma and abuse. Unfortunately there is no indication that his mental health issues have arisen from the specific alleged assaults suffered by [the applicant] while kept in juvenile detention centres.¹¹

The extent of trauma and abuse experience by some Aboriginal people (both within and outside institutional settings) may have an impact on the identification of a causal link between mental health injuries and a historical offence of institutional child abuse. As just one example, a report on the *Profile of Women in Prison in 2008 in Western Australia* revealed that 94% of Aboriginal female prisoners had experienced some form of abuse (physical or sexual) during their lives and 52% of these women had experienced *both childhood and adult abuse*.¹² If an Aboriginal victim of institutional child sexual abuse is seeking compensation many years after the event, any prior or intervening trauma or harm suffered is likely to impact on the assessment of any causal link between current mental injury and the specific incident.

Limitation periods

An application for criminal injuries compensation must be made within three years of the commission of the offence. However, s 9 (2) of the Act provides that an assessor 'may allow a compensation application to be made after the 3 years if he or she thinks it is just to do so and may do so on any conditions that he or she thinks it is just to impose'. The general time limit of three years potentially imposes a significant barrier to claims by victims of child sexual abuse in institutional settings because it is well understood that victims of child sexual abuse may take many years to disclose the abuse. In this regard, the Royal Commission's Interim Report states that the analysis of information obtained by the Commission in private sessions shows that 'on average it took victims 22 years to disclose the abuse, men longer than women'.¹³ It has been observed that criminal injuries compensation schemes which require that an application must be lodged within a set period of time 'do not accommodate

7 Quadara A, 'Prosecuting child sexual abuse: The role of social science evidence' in Hayes A & Higgins D (Eds) (2014) *Family Policy and the Law: Selected essays on contemporary issues for Australia* (Melbourne, Australian Institute of Family Studies) 261, 262.

8 *Criminal Injuries Compensation Act 2003* (WA) s 12(3).

9 [2014] WADC 9

10 *Ibid* [103].

11 *Ibid* [108].

12 Department of Corrective Services, *Profile of Women in Prison 2008* (2009) 74–76.

13 Royal Commission into Institutional Responses to Child Sexual Abuse, Interim Report Vol 1 (2014) 6.

sexual abuse victims who often do not connect their injuries with the abuse they have experienced until many years after the event'.¹⁴

A recent case in Western Australia demonstrates some of the difficulties associated with delayed applications in relation to historical child abuse. In *Re Jackamara*¹⁵ the applicant sought compensation for 12 physical assaults allegedly committed against him by seven group carers at juvenile detention facilities, the last having been said to have occurred in 1984. He also claimed that he had been subject to an offence of a sexual nature, namely that he was held naked in a punishment cell on numerous occasions while staff and inmates 'peered at him lying naked in his cell'.¹⁶ He did not lodge an application for criminal injuries compensation for 21 years (ie, 2005). In addition to the application for criminal injuries compensation, the applicant made an application to Redress WA alleging that he had been 'repeatedly physically abused by his foster parents, his mother and siblings and at each of the juvenile detention and other State facilities where he had been placed while in the care of the Department of Community Welfare'. His application was successful on the 'basis that he had suffered abuse and neglect whilst in State care. The injury, harm or loss suffered by him was assessed as having been severe and he received an ex gratia payment of \$28,000' from Redress WA.¹⁷

The assessor had granted an extension of time but had refused to make an award of compensation on the basis that she was not satisfied that the alleged offences had occurred. On appeal (by way of rehearing) the District Court reconsidered the issue of granting an extension and noted that taking into account the three-year-period allowed, the application was 18 years out of time. The reasons provided by the applicant to the assessor to explain this delay included that 'as a juvenile victim he did not understand that the assaults on him involved criminal conduct nor did he know that he might be entitled to claim compensation under the Criminal Injuries Compensation Scheme'.¹⁸ The applicant explained that he was not aware of the possibility of applying for compensation until July 2005 when he was informed by the acting director of the Department for Community Services. However, the District Court stated that ignorance of 'the availability of criminal injuries compensation is not an excuse, particularly not where this has stretched over a period of 21 years'.¹⁹ It was observed that the 'delay in this case was extraordinary'.²⁰ The court also observed that because the applicant had received an ex gratia payment from Redress WA in relation to all of the abuse he suffered in state care, he would not be without any redress for the alleged offences in the juvenile detention centres. Further, it was held that the prospect of a successful application is also relevant in determining whether an extension should be granted. It was stated that, although the alleged assaults had been reported to the police and investigated, it is significant that the police 'came to the conclusion that there was insufficient evidence to justify a prosecution'.²¹ The only evidence that the alleged assaults took place was contained in the statement of the applicant and the court observed that there are difficulties in making a determination that an offence occurred on 'limited materials and evidence and in respect of incidents that are said to have occurred almost 30 years ago'.²² The court held that it was not just in this case to grant an extension of time.

ALSWA acknowledges that there are policy reasons for imposing time limits on applications for criminal injuries compensation and highlights that the relevant provisions under the Western

14 Forster C, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A new model of sexual assault provisions' (2005) 32 *University of Western Australia Law Review* 264, 265.

15 [2014] WADC 9

16 *Ibid* [7].

17 *Ibid* [6].

18 *Ibid* [26].

19 *Ibid* [9].

20 *Ibid* [35].

21 *Ibid* [51].

22 *Ibid* [100].

Australian scheme provide some degree of discretion to the assessor to grant an extension of time in appropriate cases. In the past, extensions of time have been granted for applications lodged years after the alleged criminal behaviour.²³ In *NMB*²⁴ the applicant lodged her application for criminal injuries compensation for sexual offences approximately 10 years out of time. She had reported the offences to the police a few years after the incident and the perpetrator was convicted some five years prior to her application for compensation. The Chief Assessor held that:

Taking account of the fact the offender had been found guilty of the offence and that the applicant was a child when the offence was committed, and accepting that the psychological consequences of such conduct had made it difficult for the applicant to take the steps necessary to complete an application for compensation, I considered it just to allow an extension of time within which the applicant could commence her application.²⁵

The case of *Jackamarra* (discussed above) is very recent and it is yet to be seen whether this decision will have any major impact on future cases involving a significant delay in instituting an application for criminal injuries compensation. It is clear, however, that a delay in reporting the offence and instituting an application for criminal injuries compensation is likely to be problematic because of the practical difficulties in establishing the commission of an offence years after the alleged incident.

At a minimum, ALSWA is of the view that for victims of child sexual abuse the applicable time limit should not begin to run until the child has reached the age of 18 years. A reform of this nature may go some way towards alleviating any potential injustice that may result for child victims who are unable to disclose the abuse or institute proceedings until reaching adulthood.

Requirement to assist in the identification, apprehension and prosecution of the person who committed the offence

Section 38 of the Act provides that:

An assessor must not make a compensation award in favour of a victim, or a close relative of a deceased victim, if the assessor is of the opinion that the victim or close relative did not do any act or thing which he or she ought reasonably to have done to assist in the identification, apprehension or prosecution of the person who committed the offence.

The Chief Assessor has observed that the 'decision whether or not to report a sexual assault to the police has important consequences to entitlement to criminal injuries compensation'. In regard to s 38, 'reporting the offence is only the beginning of the obligation, which falls upon the victim of the offence, to support the criminal justice system in its response to that report'.²⁶

Where there has been delay, but ultimately a prosecution, the delay will be irrelevant to the application. However, where delay has occurred and no prosecution has been undertaken, it will be necessary for the assessor to consider the reasonableness of the applicant's conduct, taking into account for instance whether the delay might be seen as having prevented the police from identifying or apprehending the offender. Even if the delay has had that outcome objectively, it is still open to an assessor to be satisfied that the applicant's reasons for the delay were reasonable, for that person, and in the circumstances which prevailed.²⁷

Failure to report an offence committed against the applicant when the applicant was a child will often be regarded by an assessor as reasonable in the circumstances. In some cases the

23 For example, in *Hinchcliffe v Hinchcliffe* [2010] WADC 78 an extension of time was granted after a nine year delay.

24 [2014] WACIC 7.

25 *Ibid* [5].

26 Porter H, 'Criminal Injuries Compensation' (Paper presented to the Western Australian Federation of Sexual Assault Services (WAFSAS) Forum, 4 October 2005, Perth) 4.

27 Porter H, 'Criminal Injuries Compensation' (Paper presented to the Western Australian Federation of Sexual Assault Services (WAFSAS) Forum, 4 October 2005, Perth) 5.

applicant may determine to take the matter to the police once he or she has reached adulthood, but this will not always be the case. Reasons such as the family relationships around a child, the wish not to upset a parent, grandparent or sibling and ongoing fear of the alleged offender who remains part of the family, are often advanced by applicants to explain a decision not to report offences to the police. In addition it may be the case that the child told an adult who took no further action. Clearly the child's actions are the ones upon which the Act focuses, not the actions or failure to act of those responsible for care of the child.²⁸

For victims of child abuse in institutional settings who may not disclose the abuse for many years and who may not have reported the offence to police or any other person in authority, this provision may preclude a favourable outcome. Furthermore, a victim of institutional child sexual abuse may not proceed with an application for compensation because the trauma associated with reporting the offence to police and the resulting criminal justice process may outweigh any perceived benefits of compensation (especially where the maximum amount payable under the scheme is relatively small). It is highlighted that for many Aboriginal victims, there are additional barriers to reporting a child sexual offence that occurred in an institutional setting including historical mistrust of authorities, shame and lack of access to culturally appropriate support services.

Awareness of right to claim compensation

In its recent reference on family and domestic violence, the Law Reform Commission of Western Australia (LRCWA) observed that there is a need for greater awareness of the right to claim criminal injuries compensation, in particular to avoid any problems with lodging applications out of time.²⁹ The LRCWA recommended that the websites of the Office of Criminal Injuries Compensation and Victims of Crime should be 'augmented with more detailed information about the requirements and processes for applications for criminal injuries compensation' and that a broader review of the criminal injuries compensation be undertaken.³⁰ Some general observations were made by the LRCWA in regard to the provision of relevant information by police at the time of reporting an offence and it was noted that this may potentially prejudice subsequent criminal proceedings if police were seen to have encouraged the victim to seek compensation.

More generally, it has been observed that one of the practical barriers to victims of crime compensation schemes is lack of awareness. It has been suggested that:

One potential way to raise awareness of victim schemes could be to place the phone number of its assistance lines and/or other advocacy groups at the end of newspaper articles relating to victims of violent crime, similar to the media suicide reporting guidelines which requires phone numbers of support services (such as Lifeline and Kids Helpline) to be provided at the end of suicide related articles.³¹

In addition to improving publicly available information generally, the ALSWA is of the view that victims of crime should be provided with appropriate information and referral to relevant agencies in regard to their right to claim compensation as soon as a person has been convicted of the offence. The ALSWA believes that this now occurs in the metropolitan area because of the work of Victim Support Services and the Child Witness Service. However, in remote or regional locations where victim support workers may not always be available or stationed, victims may not be provided with appropriate information about their right to apply for compensation.

28 Porter H, 'Criminal Injuries Compensation' (Paper presented to the Western Australian Federation of Sexual Assault Services (WAFSAS) Forum, 4 October 2005, Perth) 7.

29 Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper (2013) 156.

30 Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Final Report (2014) Recommendations 67 & 69.

31 Chan B et al, 'Support and Compensation – Lessons from Victims of Crime' (paper presented to the Actuaries Institute, Injuries Schemes Seminar, Gold Coast, 10-12 November 2013) 26.

Practical issues

In addition to a lack of awareness about the right to claim criminal injuries compensation, Aboriginal people from remote and regional areas are at a further disadvantage because of the shortage of medical professionals. For example, ALSWA represented a regional client in one matter and was unable to obtain a report from a child psychologist. Due to the unavailability of child psychologist in the area, the cost of obtaining such a report from an expert in Perth was prohibitive. Aboriginal Medical Services are under resourced and overstretched and, therefore, they are generally unable or unwilling to provide medical reports for the purposes of criminal injuries compensation claims.

Further, the application form for criminal injuries compensation requires a police incident report or offence report number to be provided.³² If these details (and other details in relation to the offence) are unknown, an application to the Western Australia Police for a 'Permissible Information Report' is required. A fee of \$37.40 accompanies this application. The ALSWA does not consider that it is appropriate for a victim of institutional child sexual abuse to be required to pay money to the state to obtain records of a reported crime to facilitate an application for compensation and submits that this fee should be waived.

32 See http://www.courts.dotag.wa.gov.au/files/criminal_injuries_compensation_help.pdf.