

MEETING THE NEEDS OF VICTIMS OF CRIME CONFERENCE

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CONCURRENT SESSION 5B – VICTIMS' NEEDS

Title: Compensating domestic violence victims: how do the states and territories compare?

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Slide 1

This conference is a welcome opportunity to reflect on how well we are meeting the needs of victims of crime in Australia. A fundamental test of a victim support system is whether or not it responds to the needs of the most vulnerable – one such group is women who have experienced domestic violence.

While there are a range of ways in which victim support systems can assist women affected by domestic violence – for example, through access to counselling and to court assistance – today I want to focus on just one component: statutory compensation.

My interest in victim compensation stems from the ongoing work of the Clearinghouse around the financial impacts of domestic violence.

In a report published earlier this year, we examined the wide-ranging consequences of domestic violence for women's economic wellbeing and the strategies which improved their financial security. The report showed that many of the forms of financial support currently available to women are for small amounts. Often they can only be used towards a narrow range of goods and services – for example, vouchers for food or medical services. Financial assistance is often means tested or based on selection criteria which women may not meet.

Victim compensation is quite unique in this respect as it is one of the few instances in which women may be able to access a lump sum payment which

they can use as they see fit. It is also one of the few forms of financial support available towards some major expenses, such as dental care.

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The importance of victim compensation to domestic violence victims is borne out in the findings of the Clearinghouse's recent study. While very few of the 57 women we spoke to in 2009 had accessed compensation, those who had done so were clear about its benefits.

As one woman explained:

[The victim support service] paid for my teeth, \$16 500. My mouth was all smashed so that was enough evidence... They [also] organised counselling for the children because one of my kids is very suicidal... That was one good thing that came out of the bad. – Service 7, Client focus group 2

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A staff member at the same service spoke of another client's positive experience of applying for compensation:

One woman I worked with ... had her house burnt down. She was badly burned, 75% of her body. She went into a refuge and the [victim support service] paid for her medical treatment, her taxi because she couldn't be in the sunlight to get from the refuge to the hospital, the counselling and they put in a compensation application for her... In that sense they were brilliant, nothing was too much trouble. – Service 7, Staff focus group

Women and service workers in our study indicated that victim compensation was a critical avenue for getting justice and increasing women's financial stability after a violent relationship. Their stories prompted some further research into the operation of schemes around Australia and at the beginning of 2010, the Clearinghouse released this Stakeholder Paper titled *Victim*

compensation and domestic violence: a national overview. In January this year, the NSW Government introduced a number of controversial changes to its system of victim compensation which affect some of the findings in that paper – and I want to come back to those changes later in this presentation – but to the best of my knowledge, the paper is otherwise up to date. [You are welcome to pick up a copy of the paper at the entrance to the room, if you haven't already.]

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Today I want to talk in more general terms about some of the issues raised in this Clearinghouse paper and give you a sense of how the eight states and territories compare. I expect that some of you will have a lot more on the ground experience of the victim compensation scheme in your jurisdiction than me – but hopefully having a better understanding of the national picture will help you to advocate more strongly for victims' rights in your state or territory.

There are five questions which I think we should be asking about our victim compensation schemes:

- How many domestic violence victims are accessing compensation?
- How much compensation do domestic violence victims typically receive?
- Who is missing out?
- What are some of the good things that different states and territories are doing to improve access to compensation?
- What should we be concerned about?

The first two questions are actually quite difficult to answer. Unfortunately, there is no public record of which victims of crime are receiving compensation in most states and territories. Currently, only the ACT and NSW provide this data in their annual reports.

For that reason, I'm going to focus on these two jurisdictions today but I want to emphasise that the issues raised are relevant across the board.

I'm going to give you an overview of the data for both domestic violence and sexual assault victims, as clearly some women who experience domestic violence will be making claims as a result of being sexually abused by a partner and the provisions around domestic violence and sexual assault sometimes differ.

It's also important to acknowledge that the ACT and NSW schemes are structured quite different, which in turn affects the outcomes for domestic violence victims. In particular:

- One component of the ACT scheme is a flat award of special assistance of \$30 000 for victims who sustain an 'extremely severe injury'. A higher award of up to \$50 000 is available in cases of sexual assault but no special provisions apply to domestic violence victims. When reporting data on domestic violence compensation claims in their annual report, the ACT refers only to intimate partner violence.
- By contrast, as part of its tariff system of awarding compensation, the NSW scheme provides offence based awards for domestic violence of \$7500-\$10 000 and for sexual assault (depending on the category) of \$7500-\$50 000. The definition of domestic violence used is a broad one, which includes not only intimate partners but also immediate family members, household members, fellow residents and caregivers.

Slide 5

So, to begin with: How many domestic violence victims are accessing victim compensation?

As you can see from this slide, in the last financial year, 2009-10:

- There was only one compensation award made for a domestic violence incident in the ACT; however,
- There were also 20 awards for sexual assault, of which at least two were perpetrated by an intimate partner.

Obviously, 58 awards is only a small number of awards so we might expect to see some significant variations in the make-up of awards over the years. But, if

we look back at the reports of the three previous years, in fact there has been quite limited variation in the proportion of domestic violence awards each year. They comprised:

- 4.8% of total awards in 2008-09
- 2.4% in 2007-08
- 3.8% in 2006-07.

There has been greater variation in the percentage of sexual assault awards made from as low as 9.6% of total awards in 2008-09, to up to 30.2% in 2006-07.

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The figures from NSW are quite different. In the financial year 2009-2010, there were:

- 911 awards for domestic violence
- 691 awards for sexual assault.

Together they account for over 50% of total awards, a figure which has remained consistent over the past few years.

The number of awards to domestic violence victims has gradually increased in NSW over the past few years, with 750 awards in 2007-08 (28% of total awards) and 874 awards in 2008-09 (29% of total). The number of awards to sexual assault victims has varied slightly, with 722 awards in 2007-08 (27% of total awards) and 917 claims in 2008-09 (31% of total).

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But the number of domestic violence victims accessing compensation is only part of the story. The next question we need to ask about our schemes is how much compensation domestic violence victims typically receive when they apply.

Again we only have the data in NSW and ACT to go off.

Because of the small number of awards made in the ACT, it's hard to draw any definitive conclusions – but certainly on these 2009-10 figures, sexual assault and domestic violence victims appear to be receiving awards significantly above the average.

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The picture in NSW is quite different:

- The average award for all crimes in 2009-10 was \$12 300.
- We don't know exactly what the average award was for each type of crime; but we do know how awards for domestic violence and sexual assault victims were spread across a range of award categories.

As you can see on this slide, in the case of domestic violence awards:

- The vast majority, just under 87%, came under the category of a domestic violence injury, which can lead to an award of \$7500-\$10 000
- Only a small number of awards were made for injuries which attract more substantial awards.

By comparison, in the case of sexual assault, the majority came into the highest award category, with an award of \$30 000-\$50 000.

These figures tell us quite a complex story of who is potentially missing out on compensation.

In the case of the ACT:

- The system appears to be working quite well for sexual assault victims because of the special provisions that have been introduced – the availability of a higher award of special assistance has probably made it more attractive to go through what can be a complex application process
- However, clearly domestic violence victims are not accessing the scheme.

In the case of NSW:

- Both domestic violence and sexual assault victims are accessing compensation in large numbers – although this may change as a result of the recent changes to the legislation
- However, domestic violence victims who choose to use the special provisions are potentially missing out in terms of the size of awards they are receiving. The evidence of harm required to apply for an award under the domestic violence provision is lower than applying under the other categories – but in the process, women are receiving below average awards, creating an inequitable situation.

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Another issue I want to quickly raise today is children's access to compensation. While the main focus of my own work has been on women claiming compensation as victims of domestic violence, one group of victims who are also potentially missing out in this context are children who witness their mothers being abused or who are themselves victims of child abuse.

This issue was raised in NSW last year when the NSW Ombudsman released this report investigating the role of Community Services in lodging compensation claims on behalf of children in out-of-home care. The report found that only 368 applications had been lodged by Community Services over the four year period 2005-2009. By contrast, the Ombudsman told the *Sydney Morning Herald* that up to 4000 children currently in care would be eligible for compensation.

One of the case examples given in the report was of a young person who had witnessed assaults against his mother and been subjected to physical abuse. According to the Ombudsman's report, Community Services staff appeared to have formed a view that he was not eligible for compensation because his injuries were 'too minor'. The report concluded that they had 'overlooked' or were 'unaware' of his psychological trauma and injuries.

While the Ombudsman's report focused on children in state care, we should be asking how well each of our state and territory compensation schemes is meeting the needs of all children.

Slide 10

Many of the issues I'm raising today are not new – and there are some good changes which states and territories have made in the last decade in recognition of some of the barriers faced by domestic violence victims.

The first way in which some states and territories have improved access to compensation is by extending the range of expenses that can be claimed to include items which domestic violence victims frequently incur. A good example is home security expenses, such as change of locks and installation of security alarms, or relocation costs. In the past, many schemes did not cover these costs or only covered them if the victim could show they have 'special circumstances'.

Victoria is one of the most recent states to expand its scheme to include 'safety-related expenses, as of July 2010, allowing it to respond quickly and effectively to the needs of family violence victims. The New South Wales and Tasmania schemes also cover safety-related expenses.

Another way in which states and territories have improved access to compensation is through administrative changes to their schemes, including by introducing compensation applications in specialist court proceedings. Five years ago, Victoria incorporated applications for compensation into the work of the Family Violence Court Division of the Victorian Magistrates Court at Heidelberg and Ballarat, leading to an immediate increase in applications the following year.

The most important way in which states and territories have improved access to compensation is by introducing a range of new provisions around eligibility. Some of these provisions apply specifically to domestic violence and/or sexual assault victims, while others apply to all victims of crime but are of particular benefit to domestic violence victims.

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I discuss these special provisions and the history behind them in detail the Clearinghouse paper but this table gives an overall picture of which

jurisdictions have implemented special provisions and the areas they apply to. The table is a simplification but conveys one key issue – the ad hoc and patchy nature of the provisions and the significant gaps that remain in the system.

I won't go into detail about how each of these provisions work but I do want to quickly explain how I have classified the provisions.

Five states and territories have introduced offence based awards – what I mean by that is awards which are based not only on the victim's ability to show that they have experienced physical or psychological harm as a result of the violent crime, but also the severity of the offence committed against them.

The rationale behind offence based provisions is that the very fact that an offence has been committed should be considered 'proof' of harm. In fact, in some, though not all, jurisdictions, these provisions allow victims to claim compensation without providing any additional evidence of physical or psychological harm, thus potentially reducing the burden of retelling their story or undergoing intrusive medical and psychiatric assessments.

[The ACT is somewhat of an anomaly in that what I have categorised here loosely as an 'offence based award' is actually the higher rate of special assistance available to sexual assault victims who sustain an 'extremely severe injury'. However, I think it still belongs in this category in the sense that the higher rate has been designated in recognition of the especially traumatic impact of sexual assault.]

In addition to introducing offence based awards, four of the states and territories have developed provisions that give greater guidance to assessors when dealing with matters involving domestic violence. The main innovations in this area have been around the reporting requirements, contributory conduct clauses and the process for requesting time extensions. The importance of these measures is that they remove some – although not all – of the discretion in assessing compensation claims and ensure that the process is better informed about the dynamics of domestic violence.

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Unfortunately, while there is some good work being done to improve access to compensation around Australia, there are still many issues that we should be concerned about.

Restrictive eligibility requirements continue to cause problems for victims of domestic violence in all states and territories. The controversial changes to the NSW compensation scheme illustrate well the disproportionate impact of strict eligibility criteria on domestic violence and sexual assault victims.

The amendments, which came into effect in January this year, have widened the definition of 'related acts' to include not only acts committed at approximately the same time but also acts committed over a period of time by the same person or groups of persons. The widening of the definition of related acts in NSW is contrary to the recommendations of the Australian and New South Wales Law Reform Commissions' 2010 Family Violence Inquiry:

- that acts should not be considered 'related' 'merely because they are committed by the same offender'; and
- that 'victims should have the opportunity to object if claims are to be treated as related' (Recommendation 29–5).

The amended NSW legislation also removes the ability to lodge claims for violence pre-dating the determination of a successful compensation claim, unless the applicant can demonstrate they have exceptional circumstances. As Community Legal Centres NSW has also argued, one of the groups most likely to be affected by this change is victims of child sexual abuse who subsequently experience domestic violence. If they have already received an award for compensation for a later act of violence, they will become ineligible for compensation for the abuse experienced in their childhood. To the best of my knowledge, NSW is the only jurisdiction in Australia with a requirement of this nature.

Another barrier to accessing compensation for domestic violence victims is lack of legal advice. This is another issue that has been raised in the context of the NSW changes, which have resulted in a reduction in the legal fees payable to solicitors assisting in compensation matters, particularly with appeals. It is my

understanding that many private solicitors have now said that they will no longer take on compensation matters, increasing the demands on community legal centres.

The changes in NSW are especially disappointing given it has previously been one of the leaders in making compensation more accessible to domestic violence victims. I've focused on them today because they are a timely reminder of the barriers faced by domestic violence victims – but I want to make it clear that these issues are not unique to New South Wales.

The other area of policy which is of concern to me is debt recovery. Over the last decade, there has been a push to reduce the amount of government spending on compensation claims by raising debts against perpetrators. While attractive in the first instance as a way of increasing perpetrator accountability, there are a number of problems with this approach.

As a general principle, debt recovery is problematic because the basic premise behind statutory compensation is that it is a payment by the state in recognition of the government's responsibility to protect citizens from violent crime. It is also problematic because it can lead to increased involvement of perpetrators in compensation proceedings, thereby undermining what is meant to be a 'victim-centred' process.

Debt recovery is even more problematic in the context of domestic violence because of the nature of the relationship between the victim and the perpetrator and the increased risk of retaliation through a range of means, including through physical violence, property damage, the refusal to pay child support, and demands for child custody.

The trend towards debt recovery requires more public debate, particularly where it is motivated primarily motivated by cost cutting rather than improving outcomes for victims.

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Given some of the problems that I have outlined today, I think there is an urgent need to review how well our compensation schemes are meeting the needs of domestic violence victims.

As a minimum, states and territories need to address the lack of public information which is available about the number of compensation awards made each year. All states and territories should be reporting annually on the breakdown of claims and awards so that we know whether certain victims of crime are experiencing difficulties accessing the schemes.

There is a very clear need for legislative change, and this was also highlighted by the Australian and New South Wales Law Reform Commissions in their Family Violence Inquiry last year. Legislation change may come in a variety of forms, including:

- The adoption, extension and standardisation of special provisions for domestic violence and sexual assault victims
- The immediate removal of discriminatory clauses, such as those recently introduced in NSW.

Furthermore, debt recovery processes need to be reviewed. My view is that victim compensation schemes are simply not the place for pursuing perpetrator accountability for the financial impacts of domestic violence. Instead states and territories should consider other avenues for increasing accountability, such as criminal justice proceedings – for example, by making compensation orders a standard part of sentencing or introducing or increasing levies paid by those convicted of a criminal offence. We should also be looking at their place within restorative justice processes.

Finally, to ensure that women find out about and can easily apply for compensation in the first place, governments must provide adequate funding for legal assistance.

Statutory compensation is often the only form of financial redress available to women affected by domestic violence. Meeting their needs should be a priority of our victim compensation schemes.