

COMPENSATING CHILD SEXUAL ASSAULT VICTIMS WITHIN STATUTORY SCHEMES: IMAGINING A MORE EFFECTIVE COMPENSATORY FRAMEWORK

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I. INTRODUCTION

In most Australian jurisdictions, and also in New Zealand, attention has been paid in recent years to the reform of victims' compensation schemes. In New South Wales, the issue has been the subject of several parliamentary reports, following the last major revision of the legislation in 1996.¹ A major concern of such inquiries has been how to reduce the costs to the taxpayer of such schemes and also how to deal with applications for compensation which parliamentarians have deemed unmeritorious.

Such inquiries and investigations have already led to statutory reforms in many jurisdictions, and it is likely that they will continue to do so.² A recurring theme in such inquiries is concern that those for whom the scheme was never

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1 Joint Select Committee on Victims Compensation, *First Interim Report: Alternative Methods for Providing for the Needs of Victims of Crime*, May 1997, which recommended a greater emphasis on counselling and rehabilitation rather than monetary compensation. This was followed by the Joint Select Committee on Victims Compensation, *Second Interim Report: The Long Term Financial Viability of the Victims Compensation Fund*, December 1997, which recommended some specific changes to address escalating costs and to make the scheme more responsive to victims. In response to this Report the scheme was amended by the *Victims Compensation Amendment Act 1998* (NSW). Recently a third Report, Joint Select Committee on Victims Compensation, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme*, February 2000, has further consolidated the view that the schemes should primarily focus on rehabilitation.

2 *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ); *Criminal Offence Victims Act 1995* (Qld); *Victims of Crime Assistance Act 1996* (Vic).

originally intended have exploited that scheme which was established to provide some measure of compensation for victims of violent crime.³

It has never been suggested that victims of child sexual assault fall into this category of undeserving claimants. Nonetheless, there is a danger that in the move to reform such schemes for other reasons, the particular situation of child sexual assault victims will not be adequately considered in the statutory framework that is adopted. Furthermore, in any reform of victims' compensation schemes, consideration needs to be given as to how compensation should be awarded for child sexual assault. It is different in many respects from all other crimes of violence that come within the contemplation of the statute. Generally, such schemes assume that the offence has been reported reasonably soon after it has occurred,⁴ that the person seeks compensation from the statutory scheme within a reasonable period⁵ and that a definable injury has resulted.⁶ None of these may be true of victims of child sexual assault who may well report the offences many years after they first occurred, and for whom the issue of defining injury in conventional medical or psychiatric terms is problematic. As will be seen, there are also other ways in which child sexual abuse does not fit neatly into the conceptual framework of statutory compensation schemes.

This article will examine two questions. First, how have reforms to statutory compensation schemes affected the entitlement of child sexual assault victims to claim compensation? Secondly, how should statutory compensation schemes assess the level of compensation that should be paid to victims of child sexual assault? In particular, when schemes award compensation by payment of a lump sum rather than by reimbursement of counselling costs or other expenses, how should assessors determine the level of compensation and discriminate between applicants on the basis of relative seriousness or need?

3 See, for example, Joint Select Committee on Victims Compensation, *Report: Inquiry into Psychological Injury – Shock*, December 1998 at 11, which concluded that the category of nervous shock was being misused by victims who would not normally receive compensation. See also the Joint Select Committee on Victims Compensation, *Second Interim Report*, note 1 *supra* at 39, which raised the issue of the misuse of the shock category.

4 See *Criminal Offence Victims Act* 1995 (Qld), s 11; *Criminal Injuries Compensation Act* 1978 (SA), s 7(9)(a); *Victims of Crime Assistance Act* 1996 (Vic), s 29; *Crimes (Victims Assistance) Act* 1996 (NT), s 12(b) which all require the event to be reported within a "reasonable" time.

5 Three schemes require claims to be brought within three years after either a conviction or injury: *Criminal Offence Victims Act* 1995 (Qld), s 40(1); *Criminal Injuries Compensation Act* 1978 (SA), s 7; *Criminal Injuries Compensation Act* 1985 (WA), s 17(1). Two schemes require claims within two years: *Victims of Crime Assistance Act* 1996 (Vic), s 29; *Victims Compensation Act* 1996 (NSW), s 26(1), although there is special provision for extension in instances of sexual assault, s 26(3)(b). And, two schemes require claims within 12 months: *Criminal Injuries Compensation Act* 1983 (ACT), s 10(2); *Crimes (Victims Assistance) Act* 1996 (NT), s 5(1).

6 D Miers, "Compensation and Conceptions of Victims of Crime" (1983) 8 *Victimology* 204.

II. THE THEORETICAL BASIS BEHIND THE INTRODUCTION OF CRIMINAL INJURIES COMPENSATION SCHEMES

Statutory schemes to compensate victims of crime emerged in many Western jurisdictions in the 1960's.⁷ In Australia, spurred on by the developments elsewhere, the first criminal compensation scheme was introduced in New South Wales in 1967, and within nine years all of the states and territories had enacted similar legislation.⁸ No Federal statute has been enacted, although a Criminal Compensation Bill was passed by the House of Representatives in 1974, only to be defeated in the Senate.⁹ The schemes were intended to complement the civil system so as to provide a more effective mechanism of compensation for victims who suffered personal injury as a result of criminal activity. They reflected a general belief that it is socially and morally desirable for society to accept a communal responsibility for criminal activity and to provide resources to those left in need as a result.¹⁰

The theoretical basis behind the compensation schemes at their initial inception appears to combine solatium principles with the restitutionary purposes of the common law.¹¹ Solatium refers to a form of 'token' payment that marks the community's concern but does not attempt to restore the injured person to the position he or she enjoyed before the injury. By contrast, the restitutionary principles that underscore the tort system aim, as far as money can, to fully compensate the victim. Implicitly, because the schemes have fixed

7 New Zealand was the first in 1963 (*Criminal Injuries Compensation Act 1963 (NZ)*), followed by England in 1964 which introduced a non-statutory scheme administered by a Criminal Injuries Compensation Board. The United States passed legislation in 29 jurisdictions between 1965 and 1977, followed by Canada and some European countries: D Carrow, *Crime Victim Compensation*, Government Printing Office (1980); D Miers, "The Provision of Compensation for Victims of Violent Crime in Europe" (1985) 10 *Victimology* 662.

8 *Criminal Injuries Compensation Act 1967 (NSW)*; *Criminal Code Amendment Act 1968 (Qld)*; *Criminal Injuries Compensation Act 1969 (SA)*; *Criminal Injuries Compensation Act 1970 (WA)*; *Criminal Injuries Compensation Act 1972 (Vic)*; *Criminal Injuries Compensation Act 1976 (Tas)*; *Criminal Injuries Compensation Act 1983 (ACT)*.

9 See I Davies, "Compensation for Criminal Injuries in Australia: A Proposal for Change in Queensland" (1991) 3 *Bond Law Review* 2.

10 See P Duff, "Criminal Injuries Compensation: The Symbolic Dimension" (1995) 1 *Juridical Review* 102.

11 Atiyah suggests that there are three possible principles underlying the notion of compensation: it may be restitutionary and attempt to restore to the victim what has been lost, it may be a substitute or solace for what has been lost, or it may be a form of equalisation offering the victim what they have never had in comparison to others in a similar situation. See P Atiyah, *Accidents, Compensation and the Law*, Butterworths (1993).

maximum awards,¹² their primary purpose is to provide merely a solatium to those members of the community who have suffered personal injuries through the criminal transgressions of other members. For some victims of child sexual abuse no amount of compensation can ever return them to the position they enjoyed prior to the assaults. In this sense, compensation for such claims will always be providing a solatium. Nevertheless, the structure of the schemes suggests, initially anyway, an underlying restitutionary purpose that attempts to match the severity of the harm with the level of award. To the extent of the various monetary limits of each statute, the schemes were intended to mirror common law principles providing victims (although not to the extent of the common law) with compensation in accordance with the actual harm suffered.¹³ Thus, Parliamentary Reports and debates at the time of the implementation of the schemes illustrate ideas of "real compensation"¹⁴ alongside principles of sympathy and solatium.¹⁵ Generally this reflected an ethos of community responsibility concomitant with comprehensive entitlement in line with the values and policies of a welfare state.

III. TYPICAL LEGAL MODELS OF AWARDING COMPENSATION: THE DISCRETIONARY AND TARIFF-BASED MODELS

The various statutory schemes to compensate victims of crime in Australia and other Western jurisdictions differ from one another in numerous ways. This article particularly focuses on the typical forms of compensation, and the differing means by which they are awarded. As in the common law, compensation is divided into two categories consisting of pecuniary loss and non-pecuniary loss. Pecuniary loss is typically encapsulated in the statutory schemes in a category defined as 'loss' that usually includes actual expenses, medical and counselling costs, loss of personal effects and loss of earnings. Non-

12 Queensland has the highest maximum award of \$75 000: *Criminal Offence Victims Act 1995* (Qld), s 25(2). The maximum award is \$60 000 in Victoria: *Victims of Crime Assistance Act 1996* (Vic), s 8; \$50 000 in ACT, NSW and SA: *Criminal Injuries Compensation Act 1983* (ACT), s 7(1); *Criminal Injuries Compensation Act 1978* (SA), s 7; *Victims Compensation Act 1996* (NSW), s 19(1); \$25 000 in the NT: *Crimes (Victims Assistance) Act* (NT), s 13; and \$10 000 in Tasmania: *Criminal Injuries Compensation Act 1976* (Tas), s 6(10).

13 Courts in all Australian State jurisdictions have held that common law principles of assessment apply. If compensation, once assessed, exceeds the statutory maximum then the maximum amount should be awarded. See *Rigby v Solicitor for the Northern Territory* (1991) 105 FLR 48; *In re Poore* (1973) 6 SASR 308; *Re Criminal Injuries Compensation Ordinance 1983* (1984) 58 ACTR 17; *R v Fraser* (1975) 2 NSWLR 521.

14 See the *Second Reading Speech*, Criminal Injuries Compensation Bill (NSW) where the statutory limit of \$2000 is challenged on the basis that it cannot provide real compensation for victims: New South Wales, Legislative Council, 1966-67, Debates, vol 66, pp 4405-19. These ideas were also fundamental to the implementation in 1972 of the comprehensive Accident Compensation Scheme in New Zealand that replaced civil claims for compensation. See Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand*, 1967.

15 See New South Wales, Legislative Assembly February 1967, Debates, vol 65, pp 3615-8.

pecuniary loss is typically encapsulated within the term 'injury' that is defined as bodily injury or nervous and mental shock or both.

The mode of awarding non-pecuniary compensation primarily takes two forms: the discretionary model and the tariff based model. The discretionary model is the most common, probably because non-pecuniary loss is perceived as indeterminate, and therefore a flexible case by case approach is preferred. It was initially adopted in all Australian jurisdictions with the exception of Queensland.¹⁶ The unifying feature of this model of awarding compensation is that the level of award is left completely to the discretion of the magistrate within the fixed limits specified for each scheme. In Australia, the awards under the discretionary model range from a maximum of \$10 000 in Tasmania to \$75 000 in Queensland.¹⁷ Some schemes exclude trivial claims that do not justify a specified minimum amount of compensation.¹⁸

The second form of awarding non-pecuniary compensation is to include a table, usually in the form of an attached schedule, which lists in full the range of compensable harms and stipulates a particular amount for each harm.¹⁹ Typically, the tables list a range of body parts and particular harms to those body parts specifying an amount for each depending on their perceived seriousness.²⁰ Psychiatric and psychological injuries are usually encapsulated in the table within a single category of nervous and mental shock.²¹ This approach, in contrast to the first, leaves magistrates with minimal discretion. Although this model has been adopted in a range of other Australian compensatory frameworks,²² only Queensland adopted it when the criminal injuries schemes initially emerged in Australia. Initially, the Queensland model²³ incorporated the table of injuries attached to the *Workers Compensation Act 1916 (Qld)*,²⁴ that specified a limited number of injuries with a fixed amount for each. If the injury suffered was not one specified in the Schedule of that Act, the award was to be calculated in relation to and by comparison with those injuries that were specified.²⁵ This model was substantially adopted in separate statutory form in the *Criminal Offence Victims Act 1995 (Qld)*, that repealed and replaced the previous relevant compensatory provisions in the Criminal Code.²⁶ In the new Act, an attached schedule lists 36 compensable injuries each with a range of award based on a percentage of the maximum award of \$75 000. There are three levels of nervous shock replacing the previous single category, including "minor,

16 Queensland adopted a tariff-based model, discussed further below.

17 See note 12 *supra*.

18 See *Criminal Injuries Compensation Act 1983 (ACT)*, s 9(2); *Crimes (Victims Offences Act) 1996 (NT)*, s 13, which excludes claims less than \$100; and *Victims Compensation Act 1996 (NSW)*, s 20(1)(9), which excludes claims less than \$2400.

19 See *Victims Compensation Act 1996 (NSW)*, Schedule 1; *Criminal Offence Victims Act 1995 (Qld)*.

20 *Ibid.*

21 See *Victims Compensation Act 1996 (NSW)*, (5) Schedule 1.

22 Most Workers Compensation schemes use this model. See also *Sporting Injuries Insurance Act 1978 (NSW)*.

23 *Criminal Code Amendment Act 1984 (Qld)*, s 663A.

24 *Workers Compensation Act 1916*, s 14(1)(C), later *Workers Compensation Act 1990 (Qld)*, s 8.6.

25 *Criminal Code Amendment Act 1984 (Qld)*, s 663BA.

26 See *Criminal Offence Victims Act 1995 (Qld)*, s 46.

moderate or severe" injuries, with respective award ranges of 2 per cent to 10 per cent, 10 per cent to 20 per cent, and 20 per cent to 30 per cent of the maximum awardable amount. The magistrates therefore have a discretion but one which is limited to the specified award range for each injury.

IV. LEGISLATIVE RESPONSE TO THE 'BLOW OUT' COSTS OF THE SCHEMES

In the 1990s, the focus of the schemes began to shift as costs escalated and tested government commitment to the principles that had generated their initial implementation. A philosophical shift from ideas of community responsibility towards those of individual responsibility was accompanied by significant alterations to the non-pecuniary component of some schemes, typically incorporating a move away from the full discretionary model. Two types of changes were made: The first approach, adopted in New Zealand²⁷ and in Victoria,²⁸ was to remove or reduce the non-pecuniary loss component of the schemes. The second approach, utilised in both England²⁹ and New South Wales³⁰, was to adopt the tariff based model of awarding compensation. In most situations, this eliminated the discretion of the magistrate (or other assessor) in relation to the assessment of compensation.

A. Removing Non-Pecuniary Loss as a Form of Compensation in the Statutory Schemes

In 1972, New Zealand, forging a new approach to compensation law, introduced a comprehensive no fault statutory scheme to compensate all accidents causing personal injury and, at the same time, removed any civil right to sue other than for exemplary damages.³¹ No particular provision was made for victims of crime. They were implicitly incorporated within the broad structure of the scheme. The initial Act provided compensation for pecuniary loss up to 80 per cent of pre-accident earnings. The non-pecuniary component of the scheme was provided for in two provisions incorporating both the discretionary and tariff based modes of awarding compensation. The first provision was for permanent loss of bodily functions to be determined in reference to a Schedule of disabilities.³² If the injury did not appear on the Schedule, then, with reference to a medical assessment, the extent of the injury was calculated as a percentage of disability that was then applied to the maximum award.³³ The second category

27 *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ), which reduced the non pecuniary component of the scheme.

28 *Victims of Crime Assistance Act 1996* (Vic), which completely removed the non-pecuniary component of the scheme.

29 *Criminal Injuries Compensation Act 1995* (UK).

30 *Victims Compensation Act 1996* (NSW).

31 *Accident Compensation Act 1972* (NZ).

32 *Ibid*, s 119 (later *Accident Compensation Amendment Act 1982* (NZ), s 78) initially provided a maximum of NZ\$5000 that was gradually raised until it reached the maximum of NZ\$17 000 in 1982.

33 *Ibid*, s 119(4).

was for loss of enjoyment of life, disfigurement and pain and mental suffering, including nervous shock and neurosis.³⁴ The maximum of \$7500³⁵ was to be awarded on a purely discretionary basis, although the legislature pinpointed a number of factors that a magistrate should consider in determining the amount of award. An extra provision, also discretionary, allowed a further amount to be awarded up to the maximum of the combined total of ss 119 and 120 if there were “special circumstances” relating to the facts of the case.³⁶ This provision was removed in 1982.³⁷

In 1992, after a series of reports emphasising escalating costs,³⁸ the scheme was radically overhauled. The changes reflecting a sharp swing away from principles of community responsibility toward principles of individual responsibility. This was effectuated by the introduction of insurance and employer based premiums.³⁹ Non-pecuniary compensation was drastically reduced with the abolition of the pain and suffering provision. Lump sum compensation for permanent disability was replaced with an independent allowance of up to \$40 per week for a disability of 100 per cent to be scaled down in accordance with the degree of disability.⁴⁰ Mental injury, as a category of compensable harm, was removed from the scope of the Act unless suffered as a consequence of physical injury.⁴¹

In 1996, Victoria followed and dramatically extended the New Zealand example by completely abolishing non-pecuniary compensation in any form.⁴² The Parliamentary discourse surrounding the measure, like in New Zealand, emphasised a shift in principle from compensation to rehabilitation. As the Attorney-General commented during the second reading of the Bill: “The government wishes to change the focus of criminal injuries compensation in Victoria by developing a scheme which is far more responsive to the needs of victims.”⁴³ Accordingly, alongside the implementation of the Act, the Victims Referral and Assistance Service was established to centralise referrals of crime victims to appropriate counsellors or government and community based networks and agencies or both. Nevertheless, as in New Zealand, although much of the rhetoric accompanying the changes was of rehabilitation rather than

34 *Ibid*, s 120 (later *Accident Compensation Amendment Act 1982 (NZ)*, s 79).

35 Raised to \$10 000 in 1974.

36 *Accident Compensation Act 1972 (NZ)*, s 120(6).

37 *Accident Compensation Amendment Act 1982 (NZ)*.

38 See Law Reform Commission Report No 4, *Personal Injury and Prevention and Recovery*, 1988; W Birch, *Accident Compensation – A Fairer Scheme*, GP Publications (1991).

39 See R Millar, “An Analysis and Critique of the 1992 Changes to New Zealand’s Accident Compensation Scheme” (1992) 5 *Canterbury Law Review* 2.

40 *Accident Rehabilitation and Compensation Insurance Act 1992 (NZ)*, s 54. The allowance was raised to NZ\$60 per week from 1 July 1997. *Accident Rehabilitation and Compensation Insurance Amendment Act 1996 (NZ)*.

41 *Accident Rehabilitation and Compensation Insurance Amendment Act 1996 (NZ)*, s 4 (1).

42 *Victims of Crime Assistance Act 1996 (Vic)*.

43 Victoria, Assembly, Spring Session 1996, Debates, vol 432, p 1023.

financial savings, rationalisation and cost cutting appear to be a driving force behind the changes.⁴⁴

B. The Introduction of Tariff Based Models to Replace the Discretionary Model

New South Wales and England have also moved to reduce costs in their criminal injuries compensation schemes.⁴⁵ Rather than removing the non-pecuniary component of the schemes, these two jurisdictions have recently replaced the discretionary modes of awarding compensation with a tariff based approach.⁴⁶ Interestingly, both jurisdictions have also adopted special provisions designed to meet the special need of sexual abuse victims.⁴⁷

In 1995, England adopted a tariff-based model in statutory form to replace the previous discretionary approach to awarding compensation. Since 1964, the scheme had operated on a non-statutory model with claims assessed on the basis of common-law damages administered by a Board. In response to the perceived 'blow out' in the costs of the scheme,⁴⁸ the new Act appended a schedule with 25 levels of compensation ranging from £1000 at level one to £250 000 at level 25. The tariff of injuries is comprehensive, extensively detailing injuries to each part of the body. Uniquely, alongside the tariff for particular physical injuries, the English scheme provides an additional dimension with the inclusion of separate categories for physical and sexual abuse. Although the intention of the scheme was to avoid an "offence based" approach,⁴⁹ nevertheless the categories of harm appear to correlate with typical criminal offences. There are six categories of

44 See C Corns, "Victims of Crime Assistance Act", *Victims of Crime Assistance* (1997) at [2.2], who argues cost cutting was the major motivation behind the Victorian amendments.

45 See C Colby, "Financial Compensation for Victims of Abuse" (1998) 20(3) *Journal of Social Welfare and Family Law* 221 at 225.

46 *Victims Compensation Act* 1996 (NSW); *Criminal Injuries Compensation Act* 1995 (UK).

47 See *Victims Compensation Act* 1996 (NSW), (6) Schedule 1; *Criminal Injuries Compensation Act* 1995 (UK), Schedule 1.

48 Parliamentary discussions prior to the enactment of the new Bill emphasised the unsustainable costs of the scheme. The Home Secretary told the House of Commons that a tariff based scheme would enable costs "to be more easily controlled and predicted": United Kingdom, House of Commons May 1995, vol HC 260, Official Report (6th Series) p 735.

49 The Minister of State described the tariff as "avoiding specific reference to offences". Rather, the tariff seeks to describe injury "in terms of the harm done": United Kingdom, House of Commons October 1995, vol HC 566, Official Report (6th Series).

harm for child sexual abuse.⁵⁰ Further to these categories are four levels of shock or mental disorder including a £1000 award for temporary mental anxiety, if medically verified.

In New South Wales, a tariff based approach to awarding non-pecuniary compensation was adopted in 1996, replacing the previous discretionary approach.⁵¹ Within the table of compensable harms the new Act included three categories of harm specifically to facilitate compensation for sexual assault victims. The three levels of compensation are tied to specific sexual offences ordered according to the criminal seriousness of each.⁵² Although clearly modelled on the English version, the New South Wales approach is much less complex than its English counterpart. Unlike that model, there is no differentiation between child sexual assault and adult sexual assault. Each level of award roughly equates to two separate levels of award identified in the English model. Within each award range, the magistrate has discretion to choose the particular amount but is initially directed to a range of award determined by the nature of the incident that caused the injury.

The changes in New South Wales and England do not however signal a wholesale move to a principle of solatium despite the clear intent to contain costs. The table type formula illustrates an attempt to maintain a restitutionary harm based approach with compensation levels tied to the perceived seriousness of the injury. The legislature appears to be pursuing a policy that compensation

50 *Criminal Injuries Compensation Act (1995) (UK)*, Schedule 1. Minor isolated harm involving non-penetrative indecent acts will result in an award of £1000; a pattern of serious abuse including repetitive, frequent non-penetrative indecent acts will result in an award of £2000; a pattern of severe abuse involving digital or non-penile penetration or oral genital contact or both will result in an award of £3000; a pattern of severe abuse over a period exceeding 3 years will result in an award of £6000; repeated non-consensual vaginal or anal intercourse or both over a period of up to 3 years will result in an award of £10 000 and a similar pattern which exceeds 3 years will result in an award of £17 500. A separate scale of award is included for victims of sexual assault of any age including six levels of award with the same monetary limits as for child sexual assault. The categories are minor indecent assault which is defined as a non-penetrative physical act over clothing; serious indecent assault which is a non-penetrative indecent act under clothing, severe indecent assault which involves digital or non-penile penetration or oral genital contact or both; non-consensual vaginal or anal intercourse or both; non-consensual vaginal or anal intercourse or both by two or more attackers and finally non-consensual vaginal or anal intercourse or both with other serious bodily injuries.

51 *Victims Compensation Act 1996 (NSW)*. In New South Wales much of the parliamentary discussion leading up to the introduction of the new Act emphasises rehabilitation as a primary goal. See New South Wales, Legislative Council May 1996, Debates, vol LC250, p 975. See also Joint Select Committee on Victims Compensation, *First Interim Report*, note 1 *supra*. The passing of the *Victims Rights Act 1996 (NSW)*, establishing a Victims of Crime Bureau to provide support for victims of crime further illustrates the shift in philosophy from compensation to rehabilitation.

52 *Victims Compensation Act 1996 (NSW)*, Schedule 1. Category One includes indecent assault or assault with violence in the course of attempted unlawful sexual intercourse. The award range is \$2400 to \$10 000. The second category includes unlawful sexual intercourse or the infliction of serious bodily injury in the course of attempted unlawful intercourse. The award range is \$10 000 to \$25 000. The third category includes a pattern of abuse involving category one or two sexual assault; unlawful sexual intercourse in which serious bodily injury is inflicted; unlawful sexual intercourse in which two or more offenders are involved; or unlawful sexual intercourse in which the offender uses an offensive weapon. The award range is \$25 000 to \$50 000.

should, as much as possible, attempt to equate the level of harm with the amount of the award and not merely to fulfil a solatium function.

IV. VICTIMS OF CHILD SEXUAL ASSAULT: CRITIQUING CURRENT MODELS OF AWARDING COMPENSATION

Victims of child sexual assault have encountered a number of particular problems when they have sought to obtain compensatory redress within the legal framework of the existing schemes. Neither the injuries that child sexual assault victims typically experience nor the nature of the events that have caused them harm fit smoothly into the organisation of the various statutory schemes.

Each of the models of awarding non-pecuniary compensation currently used in the Australian and New Zealand jurisdictions presents particular, but differing problems for victims of child sexual assault. For sexual abuse victims in Victoria and New Zealand, where non-pecuniary loss has been reduced or removed as a form of compensation, the ramifications are enormous as in other jurisdictions this component often forms the most significant part of victims' awards.⁵³ Although the associated implementation of substantial rehabilitative support facilitates healing and reintegration into society, this does not provide the financial base which can, for many, significantly improve quality of life. Furthermore, this model is clearly antithetical to any policy or principle of 'true compensation' for sexual assault victims and deprives them of any right to compensation for their loss of enjoyment of life, loss of amenities and past and continuing pain and suffering. In particular, the New Zealand example results in a prejudicial outcome for sexual abuse victims in light of the continuing ban on civil litigation for personal injury except in respect of exemplary damages.⁵⁴

A. The Discretionary and Standard Tariff Based Models

There are problems in the application of both the discretionary approach and the tariff based approach to awarding compensation. Research has recently explored the effectiveness of the discretionary approach for victims of child sexual assault by examining a selection of cases heard under the now amended

53 CASA House, *Just Tokens? A Report on the Experience of Victim Survivors of Sexual Assault when Making Applications for Crimes Compensation* (1997). The Report found in a survey in Victoria of 163 sexual abuse applicants that 85 per cent did not receive any pecuniary award. For the ramifications in the New Zealand context see R MacKenzie, "Lump Sums or Litigation? Compensation for Sexual Abuse - The Case for Reinstatement of a Compensation for Criminal Injuries Scheme" (1993) 15 *New Zealand Universities Law Review* 367.

54 A 1998 Court of Appeal decision, *Queenstown Lakes District Council v Palmer* [1991] 1 NZLR 549, held that civil litigation could proceed in respect of a nervous shock claim that did not involve any physical injury. Owing to the fact that such claims are no longer covered by the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ), the court held it would be anomalous to prevent such claimants from civil action as this would effectively leave them without remedy. Due to the fact that sexual abuse victims are specifically included in the Act (see Schedule 1) this decision will not clear the way for such victims to seek redress in the civil courts despite the fact they are likely to receive little compensation under the new legislation.

Victims Compensation Act 1987 (NSW).⁵⁵ The records of the Victims' Compensation Tribunal were searched for applications for compensation by 183 sexually abused children who were presented to the Child Protection Units of Sydney metropolitan hospitals in 1988-90. One group of these young people was followed up at 18 months and again at five years after the study intake with an assessment of psychological and behavioural outcomes. Another group was followed up after nine years and similar assessments were made.

The researchers found that applications for compensation were made by only 38 out of the 183 children in the study. Relationships between the size of the award and characteristics of the index sexual abuse were explored, as well as procedural and evidentiary aspects of the claims. The researchers also examined the relationship, if any, between the size of the award and the behavioural and psychological outcomes for the children over the follow-up period.

The researchers could find no objective explanation for the size of the awards in the cases examined. The awards did not appear to be related to any aspects of the index event such as the seriousness of the offence in legal terms; the frequency, duration or severity of the abuse; or the use of violence or threats. Nor was there any statistical correlation with any relevant characteristics of the victim such as age, gender and relationship to the offender. Whether there was a diagnosis of psychiatric injury also had no bearing on the result, nor whether there was corroborative medical evidence of abuse. Other intake factors such as the severity of children's symptoms of harm also bore no correlation to the size of the award. Furthermore, the size of the award was not significantly related to any of the 18 month or nine year follow-up variables. Of the five year follow-up variables, the size of the award was inversely related to sadness and depression scores and anxiety. That is, the greater the degree of sadness and depression five years after the abuse, the lower the award was likely to have been. While individual magistrates who assessed such applications may have had a consistent rationale for making greater or lesser awards, no consistency generally could be found in the awards among different magistrates. From the empirical analysis, decision-making appeared to be random. This research suggests that an entirely discretionary system is not appropriate for cases of child sexual assault, since it affords no measure of certainty or consistency in terms of the likely outcome.

While the tariff based approach may therefore be a preferable approach, it also has difficulty accommodating the particular circumstances of sexual assault claims and the kinds of harm that result. In some schemes, such as in Queensland, the particular forms of harm are narrowly defined and force sexual assault victims into categories of harm that often may not accord with the actual harm they are suffering. Indeed the way that injury is defined in both the discretionary and the tariff based models creates difficulties for victims of sexual assault.

55 H Swanston, P Parkinson, S Shrimpton, B O'Toole and K Oates, "Statutory Compensation for Victims of Child Sexual Assault: Examining the Efficacy of a Discretionary System" (2000) 8 *International Review of Victimology* 37.

B. The Statutory Definition of Injury: The Need for Proof of Psychological Harm

Both forms of statutory scheme define injury in more narrow terms than is used in the common law.⁵⁶ Injury is defined in the discretionary schemes as bodily injury or mental and nervous shock or in similar terms.⁵⁷ Although the two categories are intended to cover the spectrum of non-pecuniary loss, including physical injury to the body and psychological injury to the mind, the definition highlights the limitations of the statutory framework which forces the judiciary to group and classify the injuries of claimants in one form or another. Similarly the tariff based model, by listing various physical injuries and separately specifying a category of nervous or mental shock perpetuates a similar scenario. Neither categorisation system is particularly apt for victims of sexual assault.

For sexual abuse victims the harm may not be evidenced in ostensible damage and therefore may not fit readily into the category of bodily injury. At the same time the category of nervous and mental shock may also be inappropriate for a variety of reasons. Indeed the use of the term nervous shock, taken from the common law, has led to confusion in the courts of all jurisdictions. Some magistrates have characterised sexual abuse claims as nervous shock claims even relying on classic common law nervous shock cases as precedent.⁵⁸ This is an inappropriate category to describe and classify the injuries of sexual assault victims for several reasons: Nervous shock is a legal term adopted in the late nineteenth century when it emerged to denote a particular classification of injury for the purposes of the law of negligence. It drew upon the burgeoning discourse of psychiatry. The term has never had an agreed medical meaning and although it is now usually defined in legal texts as a “recognisable psychiatric illness”,⁵⁹ the term nervous shock persists as part of legal doctrine. It generally denotes the

56 See *Criminal Injuries Compensation Act 1983 (ACT)*, s 2(1); *Criminal Injuries Compensation Act 1985 (WA)*, s 3; *Victims of Crime Assistance Act 1996 (Vic)*, s 3; *Criminal Offence Victims Act 1996 (Qld)*, s 20; *Victims Compensation Act 1996 (NSW)*, Schedule 1; *Criminal Injuries Compensation Act 1976 (SA)*, s4; *Crimes (Victims Assistance) Act 1996 (NT)*, s 4.

57 *Ibid.*

58 See for example, *Behrans v Bertram Mills Circus Ltd* [1957] 2 QB 1, in which the victim suffered nervous shock when confronted with a rapidly approaching elephant, was compared to the shock of a victim abducted and raped in *The Applicant v Larkin*; *Withnall v Wilkinson* [1976] WAR 199. In *R v Fraser*, note 13 *supra*, the magistrate relied on *Dilieu v White* [1901] 2 KB 669 in which a woman gave premature birth to a child after suffering a near miss when a van drove into a building in which she was present to substantiate a finding of nervous shock to a victim abducted and repeatedly raped. In *F v H* (Unreported, Supreme Court of Western Australia, Nicholson J, September 1992) the judge relied on *Mt Isa Mines Ltd v Pusey* (1970) 45 ALJR, where an employee suffered nervous shock after witnessing two fellow employees burn to death to substantiate a finding of nervous shock for a claimant sexually abused by her mother's boyfriend over a period of six years. By contrast in *Re Gage & Bird* (1978) 19 SASR 239, the magistrate specifically rejected the use of *Battista v Cooper* (1976) 14 SASR 225, a case involving a witness to a murder, in a rape case on the basis that the rules surrounding nervous shock actions were irrelevant.

59 See N Mullany and P Handford, *Tort Liability for Psychiatric Damage*, Law Book Company (1993) p 14; H Luntz and D Hamby, *Torts. Cases and Commentary*, Butterworths (4th ed, 1995) p 488; H Luntz, *Assessment of Damages*, Butterworths (3rd ed, 1990) p 135.

harm that results from a “sudden sensory perception” usually after witnessing a traumatic event.⁶⁰

The concept of shock seems inappropriate for child sexual assault victims who rarely experience a “sudden sensory perception” as is classically required in nervous shock actions. Instead their experiences often involve behaviour by the perpetrator over a long period of time, involving various forms of coercion or manipulation. Furthermore, child sexual abuse victims are neither *witnesses* to a traumatic event, nor secondary victims in any sense, nor is their injury the result of negligent behaviour. Instead they are victims of intentional direct harm which in the common law would be characterised as battery from which the ordinary rules of damages would flow. Indeed in Canada, where civil litigation by sexual abuse victims is an increasing trend,⁶¹ the usual cause of action is battery and compensation is typically awarded for pain and suffering and loss of enjoyment of life, without any necessity for proof of a psychiatric injury.

Furthermore, many of both the short and long term effects experienced by victims of child sexual assault do not fit readily into psychiatric classifications. Indeed the process of ‘medicalising’ the injuries of victims into psychiatric classifications when the various sequelae, although often devastating, do not form aspects of recognised psychiatric disorders is artificial. In the New South Wales study of claims in the Victims Compensation Tribunal, it was found that most successful claimants did not have any recognised psychiatric disorder.⁶² While it did not appear that a medical diagnosis of a psychiatric injury was insisted upon by the Tribunal, the legal requirement to demonstrate such a disorder did have an influence on the processing of applications. In two cases, a ‘diagnosis’ of post-traumatic stress disorder (“PTSD”) appears to have been made by staff in the registry office of the Tribunal without any evidence to this effect from therapists. This may have been because the staff of the Tribunal were seeking to assist the applicants to present their cases in a manner which met the legal requirements of the Act. In other cases, the diagnosis was made by counsellors who were not qualified as clinical psychologists or psychiatrists. By contrast, in Victoria, it has been reported that there is an increasing trend to interpret injury that results from sexual assault according to the Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”).⁶³

The reality is that it is difficult to classify the effects of sexual abuse in terms of recognised categories of psychiatric disorder. Certainly, there are some cases

60 See *Jaensch v Coffey* (1984) 155 CLR 549.

61 See B Feldthusen, “Discriminatory Damage Quantification in Civil Actions for Sexual Battery” (1994) 44 *University of Toronto Law Journal* 133; “Therapeutic Jurisprudence?” (1993) 25 *Ottawa Law Review* 206; “The Canadian Experiment with the Civil Action for Sexual Battery” in N Mullany (ed), *Torts in the Nineties*, The Law Book Company (1997) 274.

62 H Swanston, P Parkinson, S Shrimpton, B O’Toole and K Oates, note 55 *supra*. In only four out of the 32 successful claims was a diagnosis offered by a clinical psychologist or psychiatrist. In all cases the diagnosis was of PTSD. There were five other diagnoses of PTSD offered by persons unqualified to make this diagnosis. It is unclear whether in all cases this labelling influenced the determination of the Tribunal.

63 S Jarvis and F McIlwaine, “‘Telling the Whole Story.’ Reports To the Crime Compensation Tribunal” (1996) 7 *Australian Feminist Law Journal* 145.

in which victims may demonstrate symptoms of PTSD.⁶⁴ This is most likely where the child has been the victim of a forcible sexual assault or sadistic abuse. PTSD is typically suffered after a sudden traumatic event in which a person perceives his or her life to be in danger.⁶⁵ However, where child sexual assault does not involve a personal attack or other traumatic event, the conditions in which PTSD occurs are less likely to be present. Other psychiatric diagnoses might be made since child sexual assault is associated with a range of sequelae which may be classified in terms of psychiatric 'injury' such as depression,⁶⁶ anxiety disorders⁶⁷ and eating disorders.⁶⁸ However, these may not emerge for some considerable period of time and may not be causally related solely to the abuse. A range of other factors may, in combination, lead to adolescent or adult psychopathology. It follows that the test of mental injury is inappropriate as a means of testing whether there has been harm to a child as a consequence of child sexual assault.

Another problem is that for most children the harm which flows from sexual abuse is multi-faceted. Consider the harm which flows from the sexual abuse of a child by her father and which results in his imprisonment. The harm to such a child cannot be seen only in terms of the damaging effects of an identified number of acts of violation. The sexual abuse reflects a profound distortion in the entire parent-child relationship. Cathy Anne Matthews refers to the abused child as having "a different basic reference point of defective nurture".⁶⁹ The effects of such abuse may be profound. The child may have to cope with the grief of not having the kinds of healthy interaction with her father which other children have; the difficulty of having to go through the criminal justice process; the stress of coping with the level of family disruption that the disclosure of the abuse causes; the sense of responsibility, if not guilt, when the father is

64 Sec D Wolfe, L Sas and C Werkerle, "Factors Associated with the Development of Post-traumatic Stress Disorder Among Child Victims of Sexual Abuse" (1994) 18 *Child Abuse and Neglect* 37; L Briggs and P Joyce, "What Determines Post-traumatic Stress Disorder Symptomatology for Survivors of Childhood Sexual Abuse?" (1997) 21 *Child Abuse and Neglect* 575.

65 The traumatic stress arises from the inability of the person to protect herself or himself by the normal mechanisms of fighting or flight. In J Herman, *Trauma and Recovery*, Harper Collins (1992) p 34, the author describes what happens when these ordinary adaptations to threat are rendered useless:

Traumatic reactions occur when action is of no avail. When neither resistance nor escape is possible, the human system of self-defense becomes overwhelmed and disorganized. Each component of the ordinary response to danger, having lost its utility, tends to persist in an altered and exaggerated state long after the actual danger is over...Traumatic symptoms have a tendency to become disconnected from their source and to take on a life of their own.

66 S Nagy, R DiClemente and A Adcock, "Adverse Factors Associated with Forced Sex Among Southern Adolescent Girls" (1995) 96 *Pediatrics* 944; A Silverman, H Reinherz and R Giaconia, "The Long-term Sequelae of Child and Adolescent Abuse: a Longitudinal Community Study" (1996) 20 *Child Abuse & Neglect* 709.

67 M Lynskey and D Fergusson, "Factors Protecting Against the Development of Adjustment Difficulties in Young Adults Exposed to Childhood Sexual Abuse" (1997) 21 *Child Abuse & Neglect* 1177.

68 D Moyer, L DiPietro, R Berkowitz and J Stunkard, "Childhood Sexual Abuse and Precursors of Binge Eating in an Adolescent Female Population" (1997) 21 *International Journal of Eating Disorders* 23; S Wonderlich, R Wilsnack, S Wilsnack and T Harris, "Childhood Sexual Abuse and Bulimic Behavior in a Nationally Representative Sample" (1996) 86 *American Journal of Public Health* 1082.

69 C Matthews, *Breaking Through*, Albatross (1990) p 114.

sentenced; and the further losses involved in growing up with perhaps only one income earner in the household. On top of this there may be other effects associated with the trauma of the abuse itself such as the sense of violation, which are experienced by victims of abuse in extrafamilial situations.

A final complicating factor in insisting on proof of psychological injury, understood in conventional terms, is that some victims show no demonstrable long term effects at all.⁷⁰ Children vary in their resilience to harmful behaviour and in the level of family support which may help them to deal with their feelings about the abuse.⁷¹ However, even if there are no discernible long term effects, victims may well suffer a variety of short term effects, for example the stress of police interviews and perhaps court proceedings; the difficulties experienced in family relationships if the perpetrator was a member of the household, a relative or a trusted friend; and the pain and suffering from such an unpleasant experience. We do not compensate adult victims of crime only if the crime has long term effects. As Browne and Finkelhor put it:

Effects seem to be considered less serious if the impact is transient and disappears in the course of development. However, this tendency to assess everything in terms of its long-term effects betrays an 'adultocentric' bias. Adult traumas such as rape are not assessed ultimately in terms of whether or not they will have an impact on old age; they are acknowledged to be painful and alarming events whether their impact lasts for one year or ten. Similarly, childhood traumas should not be dismissed because no 'long-term effects' can be demonstrated.⁷²

The Queensland model particularly highlights the problematic nature of the prescribed statutory definitions of injury for sexual assault victims. The demarcation in that jurisdiction between bodily injury and nervous shock with a different maximum amount for each has created a considerable compensatory barrier for victims of sexual abuse.⁷³ In all seven of the cases involving sexual abuse that have reached the District Court on appeal between 1988 and 1997, the magistrates took the view that the claimants were limited by the nervous shock maximum of \$20 000.⁷⁴ Bodily injury, with a much more generous maximum

70 K Kendall-Tackett, L Williams and D Finkelhor, "Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies" (1993) 113 *Psychological Bulletin* 164 at 173.

71 M Lynskey and D Fergusson, note 67 *supra*.

72 A Browne and D Finkelhor, "Initial and Long-term Effects: A Review of the Research" in D Finkelhor (ed), *A Sourcebook on Child Sexual Abuse* (1986) 143.

73 Prior to 1995, the *Criminal Code* 1899 (Qld) specified any bodily injury not listed in the Schedule of the *Workers Compensation Act* 1916 (Qld) was to be calculated by comparison to those that were. In *Castle and Hughes; ex parte Hansen* [1990] 1 Qd R 560, it was held that there was no limit to the amount of award that could be awarded for such unspecified bodily injuries. In 1995, the relevant provisions of the *Criminal Code* 1899 (Qld) were replaced with the *Criminal Offence Victims Act* 1995 (Qld), which closed the door to unlimited awards but retained the principle that bodily injuries not listed in the schedule could attract awards up to the maximum of the scheme.

74 *R v Bridge & Maddams; ex parte Larkin* (1989) 1 Qld R 554; *West v Morrison* (Unreported, Supreme Court of Queensland, Macrossan J, September 1996); *R v GL Harrison* (Unreported, Supreme Court of Queensland, Ambrose J, April 1993); *Tiernan v Tiernan* (Unreported, Supreme Court of Queensland, Byron J, April 1993); *In the Matter of R v Thomas Richard Tiltman*; and *In the Matter of the Application for Compensation by Michael John Dawe (Also Known as Michael John Sullivan. By his Next Friend Lynette Mary Sullivan)* (Unreported, Supreme Court of Queensland, Lee J, April 1995); *Ozcan as Next Friend of Tamcelik v Tamcelik* [1998] 1 Qld R 330.

award⁷⁵ was not considered to encompass the forms of injury typically suffered by sexual abuse victims and therefore the awards were confined to the nervous shock maximum regardless of the extent of the claimant's injuries. In one case, a claimant who was abducted and raped in terrifying circumstances successfully argued that she had suffered a significant loss of earnings but this did not add to her award as the judge had already awarded the maximum \$20 000 for nervous shock.⁷⁶ In 1996, an applicant argued that her injuries consisted of both bodily injury and nervous shock. She suffered from

fatigue, breathlessness and hyperaesthesia, lack of self worth, repeated drug overdoses, self inflicted injuries, recurrent nightmares and flashbacks, incapacitating fear involving locking herself indoors for long periods of time, panic, periods of disassociation and numerous suicide attempts.

The majority held that these harms did not constitute bodily harm and therefore the claimant was limited by the \$20 000 maximum for nervous shock. The limitations of the statutory definitions are starkly portrayed in this instance, which frustrates any principle to equate the level of harm with the level of compensation. In the end, many of the effects of sexual abuse might be more appropriately classified as behavioural or social, such as a tendency toward addiction,⁷⁸ suicidal ideation,⁷⁹ and low self esteem.⁸⁰ As such they do not easily sit within either the category of bodily injury, nor that of mental and nervous shock, yet none would deny the level of harm that some victims experience.

C. Injury as a Single Event: The Continuous Nature of Sexual Abuse

Another inadequacy within the existing models is that the law inevitably ends up treating sexual abuse, as with all personal injuries, as a single event, assuming that the victim has experienced a particular injury as the result of one particular incident. This follows the criminal law's conceptualisation of offences. The criminal law constructs offences as incidents or events, because each incident forms the basis of a separate criminal charge which must be proven beyond reasonable doubt. Understood in this way, each act of violation of a child is a separate event just as each burglary or bag snatching incident is a separate event.

This conceptualisation of child sexual abuse as isolated incidents rather than continuous experiences within the context of an ongoing relationship has caused difficulty in the application of victims' compensation statutes to child sexual abuse cases. Courts have had to determine whether each act of abuse represents a compensable claim. In fact, child sexual abuse is frequently part of a pattern of continuing behaviour, which often spans many years. To attempt to fit this into

75 The maximum award under the current Act is \$75 000 but if the injury occurred prior to 18 December 1995 the provisions under Ch 65A of the *Criminal Code* 1899 (Qld) continue to apply.

76 *R v Bridge & Maddams*, note 74 *supra*.

77 *West v Morrison*, note 74 *supra*.

78 L Johnsen and L Harlow, "Childhood Sexual Abuse Linked with Adult Substance Use, Victimization and AIDS-risk" (1996) 8 *AIDS Education and Prevention* 44.

79 S Riggs, A Alario and C McHorney, "Health Risk Behaviours and Attempted Suicide in Adolescents who Report Prior Maltreatment" (1990) 116 *Journal of Paediatrics* 815.

80 R Oates, B O'Toole, D Lynch, A Stern and G Cooney, "Stability and Change in Outcomes for Sexually Abused Children" (1994) 33 *Journal American Academy of Child Adolescent Psychiatry* 945.

the statutory definition of injury involves artificially condensing many incidents that may have resulted in the gradual worsening of injury into a single compensatory timeframe or event. Furthermore, if magistrates insist on this, it places an unreasonable onus on victims to name particular dates and times when the abuse occurred and to recall the exact nature of each particular incident. As claims are often made many years after the abuse, owing to the secrecy and shame that surrounds it, and as some memory loss is not uncommon,⁸¹ the legal requirements appear unnecessarily problematic.

In both New Zealand and many Australian State jurisdictions, victims have attempted to claim for multiple incidents of abuse sometimes in an attempt to receive compensation more commensurate with their actual harm. In New Zealand, multiple incidents of abuse were eventually accepted in some circumstances and compensated separately so long as they were not considered part of a continuous pattern of abuse.⁸² By contrast, all of the Australian State jurisdictions have introduced specific provisions which fictionalise multiple incidents of abuse into a single "act of violence" if they can be shown to be related.⁸³ In the end the provisions do not attempt to equate the level of harm with the amount of compensation but merely to limit victims in situations of multiple ongoing abuse to a single maximum amount.

D. Injury as an 'Act of Violence'

In each of the existing schemes, injury must result from an 'act of violence' usually in the commission of an offence. Although child sexual assault can occur in a climate of aggressive physical force, more often it is the result of more subtle pressure and psychological manipulation. The process by which offenders gain the acquiescence of their victims in sexually abusive behaviours is known as grooming.⁸⁴ Research with both victims and offenders has demonstrated that the process of victimisation is often a carefully planned one in which the offender gradually creates the conditions in which the abuse can occur without a grave risk that the child will tell.⁸⁵ Grooming may involve many different

81 See M Harvey and J Herman, "Amnesia, Partial Amnesia and Delayed Recall Among Adult Survivors of Childhood Trauma" (1994) 3 *Consciousness and Cognition* 295; L Meyer Williams, "Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse" (1994) 62 *Journal of Consulting and Clinical Psychology* 1167; B VanderVolk and R Fisler, "Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study" (1995) 8(4) *Journal of Traumatic Stress* 505.

82 See R MacKenzie, note 53 *supra* at 369.

83 See *Criminal Injuries Compensation Act* 1985 (WA), s 20(2); *Victims of Crime Assistance Act* 1996 (Vic), s 4; *Victims Compensation Act* 1996 (NSW), s 5(1); *Criminal Injuries Compensation Act* 1976 (Tas), s 6(2); *Criminal Injuries Compensation Act* 1983 (ACT), s 7(20); *Crimes (Victims Assistance) Act* 1996 (NT), s 14; *Criminal Injuries Compensation Act* 1978 (SA), s 9.

84 J Christiansen and R Blake, "The Grooming Process in Father-Daughter Incest" in A Horton, B Johnson, L Roundy and D Williams (eds), *The Incest Perpetrator* (1990) 88.

85 See, for example, M Elliot, K Browne and J Kilcoyne, "Child Abuse Prevention: What Offenders Tell Us" (1995) 19 *Child Abuse and Neglect* 579; L Berliner and J Conte, "The Process of Victimisation: The Victims' Perspective" (1990) 14 *Child Abuse and Neglect* 29; P Phelan, "Incest and Its Meaning: The Perspectives of Fathers and Daughters" (1995) 19 *Child Abuse and Neglect* 7.

techniques.⁸⁶ One is showing special attention to a particular child, and isolating the child from the mother and siblings in various ways.⁸⁷ In one study of offenders, both intrafamilial and extrafamilial offenders indicated that the main way in which they won the child's trust was by being a friend.⁸⁸

Another way of grooming is by the gradual sexualisation of the relationship. The offender increasingly brings up sexual matters or introduces the child to sexual materials, perhaps first by 'accidentally' leaving them around. Typically, this also involves a gradual and subtle increase in sexual contact.⁸⁹ The process of sexualisation is one in which slowly but surely the boundaries between right and wrong, and between appropriate and inappropriate affection, are blurred in the child's mind. The gradual process of introducing sexual activity may also trap the child in a belief that having acquiesced in some sexualised play, he or she is no longer in a position to say 'no' to more invasive forms of sexual contact.

Although sexual abuse is always an invasion of personal integrity it is often a liberal interpretation of the statutory provision to characterise the abuse as an act of violence. Whilst the various tribunals and courts typically recognise child sexual assault as coming within the scope of the legislative provisions, the inappropriateness of the current terminology is again illustrated.

E. The Problem of Future Prediction: The Sleeper Effect of Childhood Abuse

Initially, it is difficult to anticipate the level of injury and suffering which a child victim will suffer in the future. While future assessment is often speculative for personal injury claimants, it is particularly problematic in terms of child sexual assault victims. In particular, recent research shows that a variety of factors may intervene to either exacerbate or partially cause the effects suffered by a typical abuse victim.⁹⁰ It is extremely difficult to separate out those effects that are predicated directly on the sexual abuse and all the other factors such as poor family functioning,⁹¹ domestic violence,⁹² physical abuse,⁹³ the quality of peer and family relationships,⁹⁴ and psycho-social factors before the

86 J Conte, S Wolf and T Smith, "What Sexual Offenders Tell Us About Prevention Strategies" (1989) 13 *Child Abuse and Neglect* 293; L Budin and C Johnson, "Sex Abuse Prevention Programs: Offenders' Attitudes About Their Efficacy" (1989) 13 *Child Abuse and Neglect* 77.

87 L Laing and A Kamsler, "Putting an End to Secrecy: Therapy with Mothers and Children Following Disclosure of Child Sexual Assault" in M Durrant and C White (eds), *Ideas for Therapy with Sexual Abuse* (1990) 159.

88 L Budin and C Johnson, note 89 *supra* at 81.

89 M Elliot, K Browne and J Kilcoyne, note 88 *supra* at 585-6; J Conte, S Wolf and T Smith, note 89 *supra* at 77.

90 R Goldney, "Victims of Crime. A Psychiatric Perspective" (1998) 5.1 *Psychiatry, Psychology and Law* 153.

91 Note 72 *supra*.

92 P Mullen, J Martin, J Anderson, S Romans and G Herbison, "Childhood Sexual Abuse and Mental Health in Adult Life" (1993) 163 *British Journal of Psychiatry* 721.

93 J Fleming, P Mullen and G Bammer, "A Study of Potential Risk Factors for Sexual Abuse in Childhood" (1997) 21(1) *Child Abuse and Neglect* 49.

94 M Lynskey and D Fergusson, note 67 *supra*.

abuse occurred, all of which may impact upon the long term outcome for the child.⁹⁵ Furthermore, the harm suffered by child sexual abuse victims may not manifest itself until many years after the abuse.

F. Recent Attempts to Address the Needs of Sexual Abuse Victims: The English and New South Wales Models

The recent move to a table of offences approach to sexual assault by the New South Wales Parliament avoids some of the problems faced by victims which have been detailed previously in this article. Magistrates are left with a partial discretion that allows some scope for a case by case approach and yet are constrained by the specified limits. It avoids the problematic definitions of 'injury' which have forced sexual abuse victims into categories of mental and nervous shock and removes the opportunity for multiple claims by creating a particular category for which the criterion is ongoing abuse.

The model is likely therefore to provide a greater degree of consistency and certainty than the former approach. Nevertheless, within each award range, magistrates are left with no guiding principle from which to determine the amount of award other than the seriousness of the offence in terms of legal categorisation. Although it may be assumed that the seriousness of the criminal offence will correlate with the degree of harm to the victim,⁹⁶ this is not necessarily the case, as a range of factors affect long term outcomes, including such issues as the degree of parental support for the child.⁹⁷

The English approach is more comprehensive in that it differentiates child sexual abuse from adult sexual abuse and provides six levels of harm for each. However, like the New South Wales model, it still attempts to equate the criminal seriousness of the offence to the level of harm suffered, by defining the level of awards in terms of the incidents of abuse, rather than its effects. A recent Report on the Scheme,⁹⁸ although supporting in principle an increase in the level of tariff for child sexual abuse, does not address or recommend any changes to the form of the categories.

95 J Paradise, L Rose, L Sleeper, and M Nathanson, "Behavior, Family Function, School Performance, and Predictors of Persistent Disturbance in Sexually Abused Children" (1994) 93 *Pediatrics* 452.

96 Parliamentary discussion indicates an assumption that legal seriousness will provide an accurate depiction of the level of harm. See for example the Second Reading of the NSW Bill, note 14 *supra* at 976.

97 H Swanston, J Tebbutt, B O'Toole and K Oates, "Sexually Abused Children 5 Years After Presentation: A Case-Control Study" (1997) 100 *Pediatrics* 600; J Tebbutt, H Swanston, K Oates, and B O'Toole, "5 Years After Child Sexual Abuse: Persisting Dysfunction and Problems of Prediction" (1997) 36 *Journal of the American Academy of Child and Adolescent Psychiatry* 330.

98 Home Office, *Compensation for Victims of Violent Crime. Possible Changes to the Criminal Injuries Scheme*, 25 March 1999 at 9.

VI. IMAGINING NEW LEGAL FRAMEWORKS: A DIFFERENT COMPENSATORY MODEL

The problematic nature of the preceding models for child sexual abuse victims highlights the need for a model that recognises the special circumstances of such claimants and which is more receptive to the actual loss suffered by victims. The increasing awareness of the levels of sexual abuse within our society makes it timely to explore more appropriate responses within the law to the various needs of victims. Furthermore, it benefits society collectively to provide appropriate means of rehabilitation and restoration for those whose lives have been fragmented by their experiences. The statutory compensatory framework is not premised only on principles of solatium, nor should it be, as the level of loss should dictate as far as possible the amount of compensation required to assist victims in dealing with their victimisation. At the same time, state run schemes can never aspire to be fully restitutionary. Thus, any new proposal must attempt to consolidate principles of solatium and restitution but so as to provide a more accurate means of compensating sexual assault victims for their actual loss.

How can this be done? A starting point is to suggest that there is no point in trying to accommodate compensation for child sexual abuse into the general statutory framework of victims' compensation schemes, for the reasons given. First, while few people doubt that great harm is caused by childhood sexual abuse, the nature of the offence and the variety of its sequelae makes it difficult to fit this crime within the framework of statutory schemes which are predicated on acts of violence. The operating factor which makes child sexual assault such a serious offence is that the child does not have the capacity to consent to sexual activity, and such sexual activity, outside the context of innocent peer exploration, usually harms the child's psycho-social development. Sexual abuse is therefore a violation of the bodily integrity of the child by whatever means that violation is achieved. Force is only one means by which offenders secure the child's acquiescence.

Secondly, child sexual assault cannot be accommodated in a conceptual framework which requires a recognisable injury as defined in medical terms. The harm which flows from sexual abuse may take a great variety of forms, and that harm may emerge immediately or at a later time, or in different ways in different times. Sometimes, an adolescent or adult may have a recognisable psychiatric disorder, such as an eating disorder, and a clinician may be able to attribute causation in some measure to a previous experience of sexual victimisation. However, the constellation of symptoms which a victim of child abuse presents to a clinician may not be classifiable in terms of a conventional psychiatric disorder. This does not mean that no harm has resulted from the offence.

Thirdly, crimes of child sexual assault cannot be readily fitted into a conceptual framework which understands the offence in terms of incidents, rather than in the context of an ongoing relationship with the perpetrator in which multiple offences are likely to be the norm. Freed from the constraints of the laws of evidence in criminal proceedings, compensation tribunals need to evaluate the totality of the child's experience of abuse. Within the totality of that

experience, children may be able to remember some incidents more clearly than others, and provide more consistent accounts of some incidents than others. As long as the court is satisfied of the substantial truth of the applicant's claim of victimisation, it is the whole experience of abuse which needs to be evaluated for the purposes of compensation.

Fourthly, compensation for child sexual assault cannot be conceptualised in terms which draw upon the tabular approach adopted in assessing damages in workers' compensation schemes. This is the weakness of the tariff system in which compensation is assessed on the basis of a table of harms which places a certain value upon the loss of limbs or bodily function. The harms which result from sexual abuse cannot be tabulated in a simple form in the way that one might assess other forms of loss for compensation purposes.

Fifthly, a compensation scheme for child sexual assault should not require the victim to lodge an application within so many months or years of the offence as applies to other offences. A tribunal needs sufficient evidence of the abuse, and the further from the event, the more difficult it may be to substantiate a claim. Nonetheless, compassion demands that lawmakers take account of the secrecy which usually surrounds the crime of child sexual assault and the difficulties which are often involved in disclosure. Time limits which apply to other forms of crime and other types of claim cannot readily be applied in child sexual assault cases.⁹⁹

It follows from these five points that no scheme of compensation for child sexual assault will be entirely consistent with the rationales that apply in relation to other kinds of violent crime. In terms of the principles that need to apply to the award of compensation, child sexual assault is necessarily *sui generis*.

To answer the question of how to assess compensation for child sexual abuse, it is first important to identify the purpose of providing compensation. Peter Duff argues that the role of victims' compensation is symbolic, not restitutionary.¹⁰⁰ If this is the case, it may not be important to try to accurately assess the extent of harm flowing from the abuse, and the extent to which there is a causal relationship between the offence and either present or potential adult psychopathology. The important feature is that an offence of personal violation has been committed which is associated with many adverse outcomes in later life.

The degree of compensation ought to reflect in some way the seriousness of the offence since the compensation is an expression of community sympathy and concern. An offence of grievous bodily harm is treated as more serious than a minor assault, and therefore requires a greater expression of solatium from the community. In the same way, a compensation scheme needs to recognise that there are different levels of seriousness in terms of child sexual assault.

99 The issue concerning time limitations in victims' compensation statutes is part of a broader problem with limitation periods in relation to compensation for child sexual abuse. For an extensive discussion of *Limitations Acts* in relation to common law claims by such claimants, see A Marfording, "Access to Justice for Survivors of Sexual Abuse" (1997) 5 *Torts Law Journal* 221.

100 P Duff, note 10 *supra*, argues that the schemes were created to express a public statement of sympathy.

On this view, it is justifiable to adopt a tariff system which is based on the seriousness of the offence (or offences), as long as that tariff system properly differentiates between different levels of seriousness. It is doubtful whether a tariff which has been devised by reference to the seriousness of offences according to a Crimes Act will meet this need for sensitive differentiation. A Crimes Act tariff adopts an events based approach to the compensation of abuse, with all the problems of isolating discrete occurrences of abuse which this entails.

It is better to look at the whole history of abuse and to assess seriousness in terms of categories which reflect the degree of trauma which the child is likely to have experienced, whether or not there are likely to be long term effects. Avoiding an 'adultocentric' bias, compensation needs to be commensurate with the level of the child's current distress as measured objectively by an assessment of the degree of trauma which is likely to be associated with this degree and frequency of criminal behaviour.

It is evident from the research that the presence of physical force is a significant factor in determining the seriousness of child sexual assault.¹⁰¹ The relationship with the perpetrator is also a significant factor. Abuse by a parent or step-parent is especially serious because of the betrayal of trust implicit in the disruption of such a primary relationship.¹⁰² The duration and frequency of the abuse is also important, given the developmental consequences which may result from a distortion of normal psychosexual development over a significant length of time.

These factors suggest that it is necessary to differentiate between the sexual abuse of children and sexual assault of adults. This, the current law in New South Wales fails to do. In differentiating between different levels of offence, the offence of rape is the paradigm, and isolated events are clearly in contemplation. The lowest category is indecent assault or assault with violence in the course of attempted sexual intercourse. The second category includes completed sexual intercourse or attempted intercourse resulting in injury. The highest award goes to situations in which there are various aggravating factors.¹⁰³

For children, the degree of seriousness of an offence cannot be judged merely by whether there has been vaginal or anal penetration or any other form of sexual contact that falls within the definition of intercourse. The harm of child sexual abuse does not exist only in the extent of physical violation. The current law is not only 'adultocentric' but also event focused. Drafting new laws on victims' compensation will require lawmakers to understand the trauma of sexual abuse through the eyes of a child, and to take account of the betrayal of trust involved in the abuse of positions of power as parents, teachers and others in positions of authority.

101 J Liem, J James, J O'Toole and A Boudewyn, "Assessing Resilience in Adults with Histories of Childhood Sexual Abuse" (1997) 67 *American Journal of Orthopsychiatry* 594.

102 J Freyd, *Betrayal Trauma: The Logic of Forgetting Child Abuse*, Harvard University Press (1996) pp 9-10.

103 Note 50 *supra*.

The first element, then, of a new approach to compensating child sexual assault is a tariff based approach which takes account of the differing degrees of seriousness involved in different offences depending upon the degree of coercion involved in the abuse, its relational context and its duration. A second element ought to be generous provision for counselling costs.

Paying counselling costs for victims of child sexual assault and other violent crime ought to be understood as an aspect of the public health budget rather than *ex gratia* compensation for certain victims of crime. The paucity of public resources which are provided for the counselling of sexual assault victims, together with the lack of availability of Medicare rebates for consultations with clinical psychologists, combine to make compelling the argument that the government should make generous provision for counselling costs through the victims' compensation scheme as a means of targeting public health resources to victims of abuse who are in need of such assistance. Given the limitations on Medicare funding for victims of abuse,¹⁰⁴ there is a strong moral case for Federal funding to assist States in meeting the counselling costs of victims of abuse.

In summary, a new approach to compensation for the victims of child sexual abuse ought to have the following features:

- a) Applications should be accepted from victims of child sexual abuse at any time before the age of 18 or within two years of turning 18, with a discretion for the Tribunal to accept applications outside of these time limits.
- b) Proof of a medical condition attributable to the victimisation should not be a necessary element.
- c) Compensation should not depend on whether the sexual abuse can be classified as a crime of violence.
- d) Generous counselling costs should be made available to victims of child sexual abuse on the basis of need as long as the therapist certifies that in his or her view, the problems being addressed in therapy are causally connected in some way to the person's childhood victimisation. Provision of up to \$20 000 for counselling on an invoice or receipt basis would be appropriate, and it would also be appropriate for rebates to be made on a standard fee scale similar to the Medicare system. The level of counselling costs made available should not vary in accordance with the perceived degree of seriousness of the offence. Demonstrated need should be the criterion.
- e) Beyond the provision of counselling costs, solatium payments should be made to victims of child sexual abuse on a tariff basis. At one end of the scale ought to be single, non-penetrative acts of sexual abuse which are not aggravated by violence or the threat of violence to overcome resistance. Higher up the scale would be cases of sexual abuse by a parent, relative or other person in a relationship of trust such as a

104 The Medicare scheme provides rebates for consultations with psychiatrists, within certain annual limits. This leads some victims of abuse to seek psychiatric assistance even in the absence of a diagnosed psychiatric disorder.

teacher, and sexual abuse involving violence or the threat of it. The highest awards ought to be for sexual abuse which occurs over a period of time, especially where the perpetrator is a parent, step-parent or other person in a position of trust.

Imagining a new compensatory framework for victims of child sexual abuse involves rethinking the basis for awarding compensation under statutory schemes and reconceptualising traditional legal concepts about the nature of child sexual abuse offences. To do so may require new thinking, but it will lead to more consistent and principled decision making, together with better targeting of public resources. The effort of imagining will have real benefits for many victims of abuse.