




# Compensation for victims and survivors of sexual assault in Western Australia

Assessor Robert Guthrie



## Introduction – three forms of compensation

- *Criminal Injuries Compensation Act 2003 WA*
- Commonwealth Redress Scheme
- Common law remedies for sexual assault/abuse



# Terminology

- ▶ Victim or Survivor?
- ▶ Proved and alleged offences – section 12-17
- ▶ Single and multiple (unrelated offences)- section 34
- ▶ Multiple related offences – section 33
- ▶ Sexual abuse and sexual assault
- ▶ Compensation and financial assistance schemes
- ▶ Statutory and Common law compensation



# *Criminal Injuries Compensation Act* 2003

- Compensation for victims of crime in Western Australia – commenced January 1971
- *Victims* compensated where they suffer injury as a consequence of the commission of an offence, whether proved by conviction or by offences alleged by the applicant/victim established on balance of probabilities
- Compensation calculated having regard to the date of the offence
- Offence occurring in WA- though applicant does not have to be resident/citizen

# Maximum Statutory Compensation awarded according to offence date

Years of operation	Single offence	Multiple unrelated offences - by operation of section 34 of the Act
22 January 1971 - 17 October 1976	For an indictable offence - \$2000 For a simple offence \$300	\$2000
18 October 1976 to 31 December 1982	\$7500	\$15,000
1 January 1983 to 31 December 1985	\$15,000	\$30,000
1 January 1986 to 30 June 1991	\$20,000	\$40,000
1 July to 1 January 2004	\$50,000	\$100,000
1 January 2004 ongoing	\$75,000	\$150,000



# Sexual abuse and Sexual assault

- ▶ Sexual abuse denotes a continuum of behaviours
- ▶ Sexual assault denotes a specific event or incident
- ▶ Usually sexual abuse will trigger section 34 because although the offences are related due to the offences being committed by the same person they are **unrelated in time, place, and circumstances** (although often common forms of abuse)
- ▶ Most sexual abuse and sexual assault cases are crimes indictable in the District Court – prosecuted by the Director of Public Prosecutions
- ▶ Indecent Assault usually dealt with in the Magistrates Court



# Time Limitations

- ▶ If the incident occurred prior to January 1971 – then Assessors have no jurisdiction to make an award – as the legislation was not in operation prior to this time
- ▶ Applications to be lodged within 3 years of the offence occurring BUT
- ▶ Section 9(2) of the Act allows Assessors to extend this time limit indefinitely –
- ▶ Important because :
  - a) Now well established that reporting of sexual offences is significantly delayed
  - b) Many victims are children who would normally be allowed some leeway in bringing legal actions



# Assessment of Criminal Injuries Claims in Western Australia

- By Judicially Appointed – Assessors – with power to subpoena and compel witnesses
- Subject to appeal to the District Court
- Assessment based on principles of common law tort – with consideration of
  - a) Past present and future pain and suffering
  - b) Past present and future loss of earnings/reduction in scope of employment
  - c) Treatment expenses – past and future
  - d) Other specified losses – such as personal items of clothing damaged/lost
  - e) Funeral expenses and claims for dependency





# National Redress Scheme for Institutional Child Sexual (Cth Powers) Act 2018 WA

- ▶ Sections 13 -15 – (NRS Act WA) Assessor required to defer applications that should be made to Redress
- ▶ Section 21 of the CIC Act – defer for other remedies
- ▶ Section 42 of the CIC Act – Baker and Cooper Decisions
- ▶ Section 68 of the CIC Act - relationship with s15k of the Civil Liability Act



# Commonwealth Redress

A person can apply under the Commonwealth Redress Scheme if they:

- experienced **institutional child sexual abuse** before 1 July 2018, and
- are aged over 18 or will turn 18 before 30 June 2028, and
- are an Australian citizen or permanent resident.



# Commonwealth Redress

Under the Scheme, an offer of redress consists of three components:

- a counselling and psychological component
- a redress payment (compensation?)
- a **direct personal response** from each participating institution responsible for the abuse (apology)



# National Redress Data 2019-2020

In the second year of operation (1 July 2019 to 30 June 2020):

- 3,127 people applied in that year
- 929 institutions were found to have been responsible across the individual cases of abuse
- average payment of \$81,876
- \$205,016,984 paid out
- 1,736 people requested counselling
- 1,345 people requested a direct personal response from an institution
- 78.7 per cent of applications name more than one institution in their application and 33.7 per cent of applications name four or more institutions



# Commonwealth Redress

- Large financial scheme – about three times the size of the current WA system
- Planned duration 10 years
- Complexity relates to the overlapping liability of institutions
- Speed of finalisation of claims – there are over 50 independent decision makers
- Limited powers to obtain information from institutions
- 1 July 2019 to 30 June 2020, the Scheme finalised a total of 2,510 applications, giving an average of 209 per month over the period.

# Commonwealth Redress for Institutional Sexual Abuse

Column 1 Kind of sexual abuse of a person	Column 2 Recognition of sexual abuse	Column 3 Recognition of impact of sexual abuse	Column 4 Recognition of related non-sexual abuse	Column 5 Recognition of person institutionally Vulnerable	Column 6 Recognition of extreme circumstances of sexual abuse
1 Penetrative abuse	\$70,000	\$20,000	\$5000	\$5000	\$50,000
2 Contact abuse	\$30,000	\$20,000	\$5000	\$5000	Nil
3 Exposure abuse	\$5000	\$5000	\$5000	\$5000	Nil



# Forms of abuse

- **contact abuse** - physical contact with the person by someone else or by an object used by someone else and does not involve penetration
  - **exposure abuse**: none of that abuse involved physical contact
  - **extreme circumstances**
    - (a) the abuse was penetrative abuse; and
    - (b) taking into account:
      - (i) whether the person was institutionally vulnerable; and
      - (ii) whether there was related non-sexual abuse of the person;
- it would be reasonable to conclude that the sexual abuse was so egregious, long-term or disabling to the person as to be particularly severe.



# Institutionally Vulnerable applicant

- ▶ ***institutionally vulnerable***: where person's living arrangements at the time increased the risk of sexual abuse of the person occurring:
- ▶ (a) whether the person lived in accommodation provided by the institution;
- ▶ (b) whether the institution was responsible for the day-to-day care or custody of the person;
- ▶ (c) whether the person had access to relatives or friends who were not in the day-to-day care or custody of the institution;
- ▶ (d) whether the person was reasonably able to leave the day-to-day care or custody of the institution;
- ▶ (e) whether the person was reasonably able to leave the place where the activities of the institution took place.





# Funds for Counselling

Column 1 kind of sexual abuse	Column 2 amount of the component
1. Penetrative abuse	\$5000
1. Contact abuse	\$2500
1. Exposure abuse	\$1250



# Direct Personal Responses (Apology)

- **Direct Personal Responses**
- Provided it is made in accordance with the direct personal response framework, a direct personal response includes one or more of the following
  - An apology or a statement of acknowledgement of regret;
  - An acknowledgement of the impact of the abuse
  - An assurance as to the steps taken or will be taken by the institution to prevent abuse occurring again
  - An opportunity for the person to meet with a senior official of the institution



# Framework for Apology


- ▶ The Minister may declare in writing guidelines for a direct personal response.
- ▶ Meaningful recognition of the institutions responsibility by way of an apology, acknowledgement or statement of regret
- ▶ An assurance of steps taken to protect against further abuse
- ▶ A willingness by institutions to offer and provide a direct personal response which is responsive to the survivors needs and which are delivered by people trained about the nature of child sexual abuse and the needs of survivors
- ▶ A willingness to accept feedback



# Exclusions


- ▶ **Exclusions to entitlement to redress**
- ▶ A person who has been sentenced to a term of imprisonment of 5 years or longer. If a person makes an application the Operator will seek advice from the specified adviser as to whether the Operator should determine Redress will be brought into disrepute or adversely affecting public confidence or support for Redress. In making a determination the Operator must take into account
  - ▶ Any advice from the special advisor
  - ▶ The nature of the offence
  - ▶ The length of the sentence of imprisonment
  - ▶ The length of time since the person committed the offence
  - ▶ Any rehabilitation of the person
  - ▶ Any other matter considered relevant by the Operator

The Operator must give greater weight to the advice of the specified advisor




# Summary - Redress

- No time limitations – designed for historic claims
- Determined by IDM's
- Based on matrix – determined by the nature of the offence
- Limited regard for the impact on the applicant
- Level of consistency/certainty
- Requires similar 'paperwork to OCIC claims but determination is not based in common law tort system
- Administrative system with no right of appeal – though limited rights of review
- Novel approach in relation to direct personal responses



# Common Law – Tort claims for sexual assault and sexual abuse


- Plaintiff can sue individual for abuses or assault – usually this will be pleaded as Assault/trespass of the person/deprivation of liberty
- Suing an individual will raise issues of the individual defendants;
  1. capacity to pay/assets – often the offender has no capacity to pay
  2. Whether they are deceased – in many cases of historical abuse the primary offender is dead



# Common Law – Tort claims for sexual assault and sexual abuse

- ▶ Alternatively in the case of sexual abuse/assault where the offender is employed/engaged by an institution (eg a Church or government department) the plaintiff may sue the institution
- ▶ Suing the institution raises issues of;
  1. Identity of the institution
  2. Evidence of the institution having knowledge of the abuse – whether they ought to have known of the abuse and whether it was foreseeable that the offender would have abused the plaintiff

In the past all these things have been difficult due to time limits and technical issues in relation to suing some religious institutions



# Civil Liability Act – amendments in relation to child abuse

- *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA)* came into effect on 1 July 2018.
- The limitation period for child sexual abuse claims has been removed retrospectively and prospectively,
- Unless there has been a previous settlement, a writ can be issued regardless of when child sexual abuse occurred.





# WPM -v- TRUSTEES OF THE CHRISTIAN BROTHERS [2020] WADC 112 (19 August 2020)

- ▶ In 2018 amendments were made to the [Limitation Act 2005](#) and the [Civil Liability Act 2002](#) (WA) by the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) to enable claims for damages for historical sexual abuse to proceed.
- ▶ Relevantly, [s 92](#) of the [Limitation Act 2005](#) states that a court may, if satisfied that it is just and reasonable to do so, set aside a settlement agreement in relation to a previously settled cause of action.
- ▶ The plaintiff, WPM, seeks leave pursuant to [s 92](#) of the [Limitation Act 2005](#) (WA) to commence an action for damages for sexual, physical and mental abuse and to set aside settlement agreements entered into in relation to the alleged abuse.
- ▶ The settlement in 2009 was for \$40,000.00 and the settlement in 2014 was for \$250,000.00



# WPM -v- TRUSTEES OF THE CHRISTIAN BROTHERS [2020] WADC 112 (19 August 2020)

- ▶ The abuse is alleged to have occurred between 1954 and 1961 whilst the plaintiff was living at the Bindoon Farm School and under the care of the first defendant, the Trustees of the Christian Brothers. The perpetrators of the abuse are alleged to include a number of Christian Brothers and other residents at the Farm.
- ▶ The third defendant's liability is said to arise pursuant to [s 15B](#) of the [Civil Liability Act 2002](#) (WA) on the basis that he is the holder of an office of authority in the Roman Catholic Order of the Congregation of Christian Brothers, for the purpose of the operation of Homes and Orphanages by the Christian Brothers in Western Australia.
- ▶ The plaintiff's proposed causes of action became time barred many years ago. In 2009 and 2014 he entered into settlement agreements evidenced by deed (2009 Deed and 2014 Deed) relating to claims for damages for abuse.




# **WPM -v- TRUSTEES OF THE CHRISTIAN BROTHERS [2020] WADC 112 (19 August 2020)**

per - Stevrianou DCJ

The sexual abuse of children is one of the most abhorrent crimes imaginable and the fact these crimes may have happened many years ago should not be a barrier to being able to seek justice and compensation in our civil courts.

In WPM settlements of \$40,000 and \$250,000 were set aside because they were not 'just' settlements – the institution took advantage of the inability of the plaintiff to establish liability AND because the amounts paid were inadequate



## **LAWRENCE -v- PROVINCE LEADER OF THE OCEANIA PROVINCE OF THE CONGREGATION OF THE CHRISTIAN BROTHERS [2020] WADC 27 (21 May 2020)**

- ▶ From 1952 onwards between the age of 8 and 16 years whilst Mr Lawrence was under the care of the Christian Brothers he was repeatedly subjected to sexual abuse, physical abuse, cruelty, intimidation, humiliation, degradation and neglect by Brothers and teaching staff.
- ▶ He was able to sue the institution because of the amendments to the Civil Liability Act
- ▶ He alleged psychiatric harm impacting upon all aspect of his life
- ▶ On the first day of trial liability was admitted
- ▶ He was awarded \$400,000 for general damages, \$620,000 for past economic loss, \$400,000 for interest on past economic loss, \$5,000 for future medical expenses and \$14,500 for past special damages less \$111,000 pursuant to s15K of the CLA, being a total award of \$1,329,500.



# Section 15K of the Civil Liability Act – taking account of prior compensation

## **15K . Prior compensation payments taken into account**

(1) In this section —

***compensation payment*** , made in respect of a person —

(a) means a payment made in respect of the person by way of compensation or redress (including an ex gratia payment) for child sexual abuse of the person; but

(b) does not include an amount paid under a judgment in or settlement of a child sexual abuse action.



# Section 15 K

- (2) A court, in making an award of damages in a child sexual abuse action in respect of a person, must deduct an amount equal to the amount of any compensation payment made in respect of the person for the child sexual abuse the subject of the action.
- (3) The court must do so only to the extent to which the compensation payment is for that child sexual abuse.
- (4) If the court is not satisfied as to the extent to which the compensation payment is for that child sexual abuse, the court must deduct an amount equal to 50% of the payment.
- (5) This section does not limit a court's power, in making an award of damages in a child sexual abuse action in respect of a person, to take into account an amount paid under a judgment in or settlement of a previous child sexual abuse action in respect of the person.




# Physical and sexual abuse

*Christian Brothers* argued additional physical and emotional abuse suffered by Mr Lawrence while under their care was unrelated to the sexual abuse and therefore should reduce his damages as some of his injuries related to physical abuse – this is referred to as the ‘salt in the wounds’ defence

Herron DCJ however said

*“In this case, as I shall explain, the evidence demonstrates that the sexual abuse of Mr Lawrence was **bound up with physical and emotional abuse** in the context of a pervasive atmosphere created by the Christian Brothers of violence, fear and terror.... that maltreatment and any consequent harm are **so entwined with the child sexual abuse** and the harm which was caused by that abuse, that the causes and the harm cannot be disentangled.”*



1.	General damages	\$400,000
2.	Loss of earnings (including loss of superannuation benefits)	\$620,000
3.	Interest on past loss ( <u>s 32</u> of the <u>Supreme Court Act</u> )	\$400,000
4.	Future medical expenses	\$5,000
5.	Future medication expenses	\$1,000
6.	Special damages (as agreed):	
	Past gratuitous care and assistance	\$5,000 (including interest)
	Past special damages	\$7,500 (including interest)
	Past travel	\$2,000 (including interest)
	<b>Sub-total:</b>	\$1,440,500
	Less \$111,000 (agreed deduction pursuant to s 15K of the CLA)	
	<b>Total:</b>	<b>\$1,329,500</b>





# Exemplary and Aggravated Damages

As to Exemplary Damages Herron DCJ said [at 1050]

As I have noted, exemplary damages are awarded rarely. In my view, particularly because of the historical nature of the allegations and the time which has long since passed, and all of the steps the Christian Brothers have taken in recent times to acknowledge their appalling behaviour, and also having regard to the fact that the Christian Brothers no longer exist as an institution having the care of children, I am not of the view that this is one of those rare cases which justify an award of exemplary damages. Accordingly I decline to award exemplary damages.

And in relation to aggravated damages at [1053]:

In awarding Mr Lawrence's general damages for pain and suffering and loss of amenities I have taken into account the insult and humiliation and the degrading nature of the abuse suffered by Mr Lawrence, particularly when he was sexually abused by Brother Murphy. I therefore consider the purpose of aggravated damages satisfactorily addressed in the award of general damages and it is not appropriate to make any specific award for aggravated damages.

# Paul Bradshaw Settlement - 2018

A Perth man who has been awarded a record \$1 million compensation payout for abuse suffered at the hands of Christian

Brothers says he would have been happy simply with an apology.

Paul Bradshaw took legal action over sexual abuse he suffered in the 1950s and 60s.

Under the terms of the settlement he will be awarded \$1 million and will also have his costs paid by the trustees of the Christian Brothers.

It is believed to be the highest single payment awarded in Australia as a result of legal action against the Christian Brothers.

Outside the court Mr Bradshaw, who only has six months to live, said money was not what had motivated his fight.

"I wasn't going for the money. I was just going for justice," he said.

"It's all I wanted was justice, nothing else.

"I didn't want any money. I just wanted an apology off the Christian Brothers — I would've been happy with that.

# Summary of compensation/damages

	<b>Criminal Injuries Compensation</b>	<b>Redress</b>	<b>Common Law Damages</b>
<b>amount</b>	\$150,000 – based on time of offence – take account of compensation received from other sources	\$150,000 – but subject to matrix depending on nature of the offence – take account of compensation received from other sources	No limit save some statutory restrictions -take account of compensation received from other sources
<b>Time limits</b>	Three years	No time limits - save cut off point for recent abuse- though system designed to run for 10 years	Normally 3 years but does not apply now in relation to child sexual abuse
<b>Extension of time</b>	Yes indefinite subject to it being just	Not required	Yes subject to leave being granted
<b>Decision makers</b>	Assessors – Legal Qualified	Independent Decision Makers – range of backgrounds	District Court Judge – Legally Qualified

# Other comparisons

	OCIC	Redress	Common Law
Principles of assessment	Tort affected by statutory cap	Redress matrix based on nature of the offence	Tort principles with statutory modifications
Conduct of applicant	Relevant if committing an offence at the time or behaviour contributes to injuries - usually has no application in relation to child sexual abuse	Past criminal behaviour can affect entitlements	Contributory negligence in theory but not usually applicable
Source of funding	State government	Responsible institutions State and Cth government	Responsible offenders and institutions