

**STANDING COMMITTEE ON FOREIGN  
AFFAIRS, DEFENCE & TRADE**

**ENQUIRY INTO DLA PIPER'S REPORT OF THE REVIEW OF  
ALLEGATIONS OF SEXUAL AND OTHER ABUSE IN DEFENCE, AND  
THE GOVERNMENT'S RESPONSE TO THE REPORT.**

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## **Introduction**

### **About Shine Lawyers**

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 550 people spread throughout 37 offices in the country.

Shine Lawyers has specialised inter alia, in sexual abuse litigation for more than 13 years.

During this time the firm has conducted many individual and group actions in processing and negotiating compensation arrangements for victims of sexual abuse.

Significant litigation that the firm has successfully concluded includes:

**1. Neerkol Group Litigation**

The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, conducted by the Sisters of Mercy. An innovative and new methodology of concluding claims for sexual abuse litigation was developed during this claim (see details below).

**2. Nudgee Orphanage Group Litigation**

This claim involved the successful resolution of claims of circa 30 victims of sexual abuse, again in an orphanage run by the Sisters of Mercy.

**3. Brisbane Grammar Sexual Abuse Litigation**

This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse. These claims were litigated in the Supreme Court but ultimately resolved by way of group negotiation. A two tiered model of resolution was first introduced during this litigation (see details below).

**4. St Paul's Sexual Abuse Group Litigation**

The claim involved some 25 former students of St Paul's College in Brisbane who were subjected to sexual abuse during their school years.

The claim was commenced in the Supreme Court of Queensland and successfully resolved using the methodology adopted in the Brisbane Grammar Group litigation claim.

**5. Scriven v Toowoomba Preparatory School**

This was a single claimant piece of litigation which advanced to trial by jury. It resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

## **Terms of Reference**

Shine Lawyers will limit its submissions to one of the terms of reference namely:

“(b) Whether an alternative expedited and streamlined system for the resolution of disputes relating to the support, rehabilitation, treatment and compensation of victims in Defence be considered and established, and the constitutionality of such an alternative system.”

## **The History of Compensation – Frameworks for Victims of Sexual Abuse in Australia**

In our experience, of the many State and Commonwealth frameworks for compensation frameworks in existence, some types of claims are well suited to existing compensation frameworks whilst others simply are not.

By way of example workers compensation, which is among the most mature of compensation frameworks in Australia having been developed since the early 1900s, is well suited to statutory frameworks currently in existence at both the State and Commonwealth levels. Most compensation structures for workers compensation involve hybrids of statutory and common law methodologies to enable the appropriate resolution of claims. Sexual abuse claims, put simply, are not well suited to any existing statutory compensation frameworks. It is the experience of this firm that the peculiar features of resolving compensation arrangements for victims of sexual abuse requires a most agile and flexible structure to bring about appropriate and speedy outcomes for victims of sexual abuse.

### **Traditional Statutory Frameworks**

Most compensation schemes in Australia involve a statutory framework that encompasses the processing of a claim using the following principles:

#### **1. Eligibility Criteria**

Most legislation involves the setting of definition parameters for access to the statutory scheme.

#### **2. Lodgement**

Most schemes involve lodgement of prescribed forms with information required to meet the eligibility and assessment criteria.

#### **3. Payment Structures**

Most schemes will involve a suite of payment structures including compensation for pecuniary loss via a weekly payment, compensation for non-pecuniary loss including medical hospital rehabilitation and other expenses. In some cases, assessment of permanent impairment and lump sum payment methodology to accompany same, exists.

In schemes that offer access to common law, historically claims were pursued through court processes. In more recent times, many scheme structures have introduced a pre-court procedure mechanism designed to resolve common law claims in a faster and more cost efficient methodology. By way of example the Queensland Workers' Compensation Scheme

until the mid-1990s involved the pursuit of common law rights via traditional methods of court commenced claims. Following reforms to that scheme, a pre-court process was introduced whereby prior to a claimant being able to issue court proceedings, a process was to be completed through the pre-court structure. This involved the following steps:

1. Notice of Claim

Lodgement of a document with an insurer providing all of the key information necessary for an insurer to investigate and assess the elements of the common law claim.

2. Discovery

A refined and simpler discovery process to enable the exchange of documentation by the parties without the volume and complexity of traditional discovery structures.

3. Independent Medical Examination

A vehicle for both parties to seek and obtain independent medical evidence in support of positions on compensation claims.

4. Resolution Notice

A requirement that an insurer document the findings of both the investigation and assessment including the making of an offer to settle claims.

5. Compulsory Conference

A conference of the parties, sometimes mediated, to resolve claims informally prior to court proceedings being commenced.

6. Exchange of Mandatory Offers

A requirement that parties exchange offers with statutory cost consequences following the trial of any litigated claim.

The introduction of the pre-court process in Queensland was enormously successful with the conversion rates in the process ranging between 70% and 80%. This had the effect of reducing dramatically the time for claims to be conducted and reducing cost accordingly.

## **Why won't traditional compensation structures work for sexual abuse claims?**

Although as lawyers we are in no position to make professional assessments regarding the health impacts of victims of sexual abuse, we can offer the following observations having litigated for more than a decade in this area.

- 1. Nature of the claims**

By definition, the impact on individuals having been subjected to sexual abuse is significant and (while not detracting from the impact on other types of claimants seeking compensation), there is a peculiarity involving the victims of sexual abuse.

In these cases, claimants have had their trust taken from them through the traumatic ordeals that they were subjected to and consequently rigid structures which by

definition involve significant disputation, simply don't work as a methodology to bring closure to claims.

## **2. Time impacts**

Given that a common feature of sexual abuse claims is that events can have occurred up to several decades earlier, the ability to both recall information and accurately answer to the rigid requirements of statutory compensation frameworks becomes most difficult.

It is also not uncommon that victims have suppressed the events for obviously understandable reasons and therefore what is required to enable both the presentation of key information and the assessment of claims is a very agile and flexible structure.

## **3. Closure**

Many compensation frameworks in Australia are designed as long tail structures. By way of example the Comcare Scheme existing for the benefit of commonwealth employees, is traditionally known as a long tail scheme. Long tail compensation schemes, sometimes referred to as pension schemes, by definition involve claimants being in a compensation system for an extended period of time. The schemes are usually known as weekly payment schemes as opposed to lump sum schemes which involve claimants being paid an amount of compensation periodically subject to the meeting the eligibility criteria through the scheme. It is our experience that a key feature of long tail schemes is that they involve heightened levels of disputation as both stakeholders to the scheme, being the insurer and the claimant can adopt different positions in relation to eligibility.

Although long tail schemes have a place in compensation frameworks in Australia, we would respectfully suggest that in our experience of acting for many victims of sexual abuse, a short tail, agile and flexible structure is a more appropriate one for victims of abuse.

A theme that we observe in conducting these claims historically is that victims are generally most reluctant to have to relive the effects of the trauma associated with the underlying event and in general want closure as quickly as possible so that they can attempt to move on with their lives. A short tail flexible model would be well suited to this.

## **4. Assessment of Compensation**

In compensation claims for physiological injuries, assessment is a reasonably standard process whether it be via a statutory framework or a common law framework.

In the case of sexual abuse claims, we would suggest that the same standardization simply does not exist given the nature of the claims.

It has been our experience that in the area of assessment, flexibility and agility is indeed the most significant criteria required in a compensation framework of this type.

## **How might a compensation structure look?**

Drawing on our experience of the past decade in sexual abuse litigation and having conducted several differently type structured claims, at both individual and group levels, we would make the following recommendations for an appropriate structure for compensating victims of abuse. The structure could operate as follows:

### **1. Independent representation of claimants**

Given the trust issues raised earlier in this submission, it is critical that claimants be given access to advisors of their own choice. This is commonly available in all existing compensation frameworks. It is of significant importance in the case of abuse claimants to enable the best pathway to resolution of claims.

### **2. A simple lodgement process**

In one of the cases we referred to earlier in this summary, claims were traditionally commenced by writ in the Supreme Court, as was the tradition.

It became apparent to the parties that a simpler framework was required in order to address the claims.

As a consequence of the meeting of stakeholders, it was agreed that a lodgement process be altered to simplify the transaction for the benefit of the victims. In this case, submissions were lodged with the defendant addressing key issues of liability, causation and damages, providing an informal but easy framework for the defendant to commence the investigation and assessment process. This bypassed the traditional models of pleadings and discovery, which proved cost effective and eliminated significant delay. We would recommend the design of a very simple but sufficient framework to address the key areas of liability, causation and damages in this case.

### **3. Medical Examinations**

Traditional examinations in the existing compensation frameworks can be lengthy and costly. In most compensation schemes both parties have an entitlement to their own independent medical examinations which can occur several times through the life of the compensation framework.

In several of the claims in which Shine has acted (refer to above) we have by agreement with the stakeholders produced a panel of medical experts settled on by all stakeholders from which a claimant can select one expert in the panel for the purpose of examination and report.

This has the effect of eliminating significant cost and delay in achieving medical evidence necessary for the compensation assessment process. It avoids the claimant having to relive the effects of the abuse on multiple occasions and assists in resolving trust issues in that the claimant has exercised control over the selection of the appropriate expert.

We would submit that a panel structure by agreement being between the stakeholders with a single medical expert for assessment of the claim, would be a most suitable methodology in this case.

#### **4. Negotiation Process**

Most compensation disputes are resolved either by negotiation between the parties or by decision of an appropriate authority, being either a statutory body with appropriate powers or a court of law.

An analysis of existing compensation frameworks in Australia will see a mix of structures to achieve this purpose.

Given the sensitivities of abuse claims, we strongly recommend a process that allows negotiated outcomes rather than arbitrary decisions to bring about the conclusion of claims. Obviously, the latter is required in any framework in the event that the parties cannot resolve the claims by agreement and the same applies here.

What we have learnt in conducting many claims is that a negotiated framework needs customization when dealing with abuse claims.

During one of the claims conducted by this firm, we developed in consultation with the defendant, a two tiered system for negotiating outcomes. Traditionally, compensation claims that are settled by negotiation involve addressing the legal issues surround the claim including aspects of liability, causation and damages and if attached to a statutory framework, eligibility and other criteria. What we learnt through experience in acting for many claimants was that in addition to any compensation outcome, claimants (as part of the process of seeking closure to the traumatic events), sought an opportunity to engage in dialogue with those ultimately responsible for the conduct of others inflicting abuse on claimants to address not only the impacts of the abuse but to seek an apology for the conduct involved.

As a consequence, we developed the two-tiered model whereby we agreed a formal structure for the processing of the legal claim and negotiation thereof, and in tandem developed a structure whereby claimants could engage in dialogue with responsible parties to address the issues outlined above. In one of the claims referred to above, this was trialed for the first time and in our assessment proved a very successful methodology for claimants.

It was not a compulsory part of the process in that not every claimant had to pursue this second element, but indeed most did.

Our observations at the conclusion of this claim were that claimants were most appreciative of the opportunity firstly to be able to speak in a private but protected environment with those responsible for the conduct and to receive a private and genuine apology in that process proved most powerful.

We can recall observing the relief on the part of many claimants who up to that point had had no contact with those responsible and simply wanted to express their views regarding those matters being heard, listened to and responded to. We believe a dual structure for these claims would prove a most effective methodology to bringing not only compensation and legal closure, but practical closure for those who have been subjected to horrific events.



In the event that claims would not be successfully negotiated, then a structured agreed determination body would then make appropriate determination of claims.

## **5. Constitutionality**

The existing statutory frameworks included in the *Military Rehabilitation and Compensation Act 2004*, are limited in their scope to allow for a flexible model as referred to above.

Alternatives available to government would be amendment of existing legislation to provide appropriate statutory power to develop such structures, or alternatively to call on ministerial powers to effect ex gratia payments to claimants with appropriate processing models to be determined thereafter.

## **Conclusion**

One thing is clear from 13 years of experience acting for significant numbers of victims of sexual abuse; existing statutory frameworks for compensation payments simply do not work.

We urge upon the Committee to consider seriously the development of a suitably structured framework involving key elements of:

1. Flexibility
2. Agility
3. Ability to bring about closure in the best possible way for victims of abuse.

We are most happy to provide the committee with further information regarding any of the frameworks that have been developed referred to above.