

## OPPORTUNITY LOST: IN SEARCH OF JUSTICE FOR VICTIMS OF SEXUAL ASSAULT

### A NOTE ON *VICTIMS COMPENSATION FUND CORPORATION V GM*

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#### I INTRODUCTION

Five children, sexually abused by a perpetrator known to them, were recently denied compensatory redress under the *Victims Support and Rehabilitation Act 1996* (NSW) ('*VSRA*').<sup>1</sup> The children were unsuccessful because the NSW Court of Appeal held they had not provided evidence of their injuries. The case arose out of the introduction of 'offence-based' sexual assault provisions into the New South Wales criminal injuries compensation scheme.

The term 'offence-based' refers to an approach that primarily assesses the amount of compensation on the basis of the criminal seriousness of the perpetrator's conduct rather than the severity of the victim's injuries.<sup>2</sup> The purpose of introducing an offence-based approach for this group of victims, this note argues, was to reduce the arduous nature of the application process, thereby signalling a timely recognition of the historical discrimination faced by victims of sexual abuse in accessing the scheme. The inadequate drafting of the provisions had however led to uncertainty amongst practitioners and academics alike regarding the requirement to provide proof of injury.<sup>3</sup>

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1 *Victims Compensation Fund Corporation v GM* [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004).

2 Peter Duff, 'The Measure of Criminal Injuries Compensation: Political Pragmatism or Dogs Dinner?' (1998) 18 *Oxford Journal of Legal Studies* 105, 133.

3 See Christine Forster, 'Stolen Generations and the Victim's Compensation Tribunal: The Writing in of Aboriginality to "Write Out" a Right to Compensatory Redress for Sexual Assault' (2002) 25(1) *University of New South Wales Law Journal* 185; see also New South Wales Combined Community Legal Centres, *Submission to the Attorney General's Review of the VSRA 1996 and Victims Rights Act*; NSW Attorney-General's Department, *Review of the Victims Support and Rehabilitation Act 1996 and the Victims Rights Act 1996* (2004) 42.

The case of *Victims Compensation Fund Corporation v GM<sup>A</sup>* ('GM') provided the opportunity for the NSW Court of Appeal to resolve that uncertainty. This note argues that while it was open for the Court of Appeal to concur with the District Court that proof of injury had been removed by the new offence-based provisions, the Court of Appeal did not. Instead, eschewing context and the 'social, economic and legal inequalities'<sup>5</sup> that had led to the introduction of the sexual assault provisions, the Court of Appeal adopted a conservative approach to their implementation. The Court could have considered, on the one hand, relevant key Joint Select Committee Reports, basic tort law principles, and international conventions to which Australia is a signatory. On the other, it could have considered a plethora of research revealing the devastating harm victims of sexual abuse typically suffer<sup>6</sup> and the substantial body of literature highlighting the historical and ongoing discrimination faced by victims of sexual abuse in both the criminal justice system and the civil system.<sup>7</sup> However, preferring an emphasis on statutory interpretation, the Court of Appeal held that the requirement to provide proof of injury had not been removed by the offence-based provisions. The Court of Appeal's decision, this note suggests, perpetuated and enlarged the gap between the law and the realities and experiences of victims of sexual abuse.

4 [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004).

5 See Diana Majury, 'Equality and Discrimination According to the Supreme Court of Canada' (1991) 4 *Canadian Journal of Women and the Law* 407, 417 who argues that it is crucial to consider context when interpreting any legal measure aimed at addressing inequality. See also Jenny Morgan, 'Equality Rights in the Australian Context: A Feminist Assessment' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994), who similarly advocates a 'contextual' approach in the application of equality measures.

6 See generally Liz Tong, Kim Oates, Michael McDowell, 'Personality Development Following Sexual Abuse' (1987) 11 *Child Abuse and Neglect* 371; Judith Cohen and Anthony Mannarino, 'Psychological Symptoms in Sexually Abused Girls' (1988) 12 *Child Abuse and Neglect* 571; David Finkelhor et al, 'Sexual Abuse and its Relationship to Later Sexual Satisfaction, Marital Status, Religion and Attitudes' (1989) 4 *Journal of Interpersonal Violence* 379; A J Einbender and William Friedrich, 'Psychological Functioning and Behaviour of Sexually Abused Girls' (1989) 57 *Journal of Consulting and Clinical Psychology* 155; Judith Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (1992); Paul Mullen et al, 'The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life' (1994) 165 *British Journal of Psychiatry* 35; Mark Chaffin, John Wherry and Roscoe Dykman, 'School Age Children's Coping with Sexual Abuse: Abuses, Stresses, and Symptoms Associated with Four Coping Strategies' (1997) 21(2) *Child Abuse and Neglect* 227; Paul Mullen and Jillian Fleming, 'Long Term Effects of Child Sexual Abuse' (1998) 9 *Issues in Child Abuse Prevention* <<http://www.aifs.gov.au/nch/issues9.html>> at 6 November 2005; Jillian Fleming et al, 'The Long-Term Impact of Childhood Sexual Abuse in Australian Women' (1999) 23 (2) *Child Abuse and Neglect* 145.

7 See Reg Graycar and Jenny Morgan, 'Disabling Citizenship: Civil Death for Women in the 1990s' (1995) 17 *Adelaide Law Review* 49; Luan Danaan, 'Justice Meets Mnemosyne: The Law and Women's Memories of Child Sexual Assault' (1996) 7 *Australian Feminist Law Journal* 151; Sue Jarvis and Fiona McIlwaine, 'Telling the Whole Story: Reports to the Crimes Compensation Tribunal' (1996) 7 *Australian Feminist Law Journal* 145; Luan Danaan, 'Just Tokens? A Report on the Experience of Victim/Survivors of Sexual Assault when Making Application for Crimes Compensation' (1997) 9 *Australian Feminist Law Journal* 143; Ian Freckelton, 'Compensating the Sexually Abused' in Patricia Easteal (ed) *Balancing the Scales. Rape, Law Reform and Australian Culture* (1998) 19; Nick Mullany, 'Civil Actions for Childhood Abuse in Australia' (1999) 115 *The Law Quarterly Review* 565; Nathalie Des Rosiers, 'Childhood Sexual Abuse and the Civil Courts' (1999) *Tort Law Review* 201; Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) *Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW* <<http://www.agd.nsw.gov.au/cpd.nsf/>> at 6 November 2005.

Part II provides an overview of the facts and procedural history of *GM*. Part III maps the historical emergence of criminal injuries compensation schemes in New South Wales. Part IV introduces the sexual assault provisions, the focus of this paper. Part V examines the judicial interpretation of the *VSR*A by the District Court and the Court of Appeal. Part VI critiques the Court of Appeal's decision and considers alternate sources of interpretation including tort law and international law. Finally, Part VII considers the implications of the Court of Appeal's findings both for the five applicants and for other victims of sexual assault.

## II *GM*: FACTS AND PROCEDURAL HISTORY

Five siblings were sexually abused by a family friend on numerous occasions. The children were aged six, seven, seven, nine and ten at the time of the disclosure of the offences. The perpetrator was initially charged with 11 'representative' counts of aggravated indecent assault, one count of aggravated sexual assault, one count of aggravated indecency involving a victim under 16 under the authority of the perpetrator, and one count of common assault. The perpetrator pleaded guilty to three counts of aggravated indecent assault in exchange for full discharge of the other charges. Subsequently, the parents of the children lodged applications for compensation in the NSW Victims Compensation Tribunal ('the Tribunal') on their behalf. To avoid retraumatising the children, the parents chose not to subject them to psychiatric assessment and did not submit medical evidence in support of the claims. The children's lawyers argued that the *VSR*A provides that compensation for offences that fall within the sexual assault provisions can be awarded without requiring medical or testimonial evidence of injury. The Tribunal, in response, advised the children's lawyers that proof of injury was required and requested medical evidence. Subsequently, in the absence of medical evidence, the Tribunal refused all five applications. An appeal to the Tribunal Member failed and the case proceeded on appeal to the District Court.<sup>8</sup> The successful outcome in the District Court was appealed by the Tribunal to the New South Wales Court of Appeal.<sup>9</sup>

## III A QUICK HISTORY OF CRIMINAL INJURIES COMPENSATION SCHEMES IN NEW SOUTH WALES

Statute has provided victims of crime with an avenue of compensatory redress in New South Wales since the beginning of the century. The history of statutory compensation for victims of crime in New South Wales can loosely be grouped into three main phases. In the first, the New South Wales *Crimes Act 1900* (NSW) ('*Crimes Act*') made provision for judges to award compensation to

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<sup>8</sup> *GM v Victims Compensation Fund* (Unreported, Sidis J, 18 June 2003).

<sup>9</sup> *GM* [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004).

victims of crime which was paid out of the property of the convicted offender.<sup>10</sup> The rationale underpinning this phase of compensation was that offenders should be responsible for recompensing victims for the injuries they have suffered.<sup>11</sup> However, this vehicle was unsatisfactory, in part, because the amounts that could be awarded under the *Crimes Act* were modest and secondly because offenders were often impecunious.<sup>12</sup>

The second phase, beginning in 1967 saw the introduction of a state-funded statutory scheme in New South Wales to compensate victims of crime.<sup>13</sup> This phase marked a significant shift away from placing total responsibility on the perpetrator towards placing responsibility on the State for the injuries suffered by victims of crime.<sup>14</sup> It enabled victims to apply for an ex-gratia payment from Consolidated Revenue if the perpetrator was impecunious or unable to be identified.<sup>15</sup> This development in the New South Wales jurisdiction followed a wave of similar schemes that had been introduced in other countries.<sup>16</sup> It also accompanied the creation of a number of other restorative schemes such as social welfare benefits for single parents, the unemployed, the sick and the less-abled.<sup>17</sup> The change to a state-funded scheme can be situated within the emergence of the welfare state<sup>18</sup> and the accompanying shift of the political ideology of the state towards a collective commitment to the caring for the well-being of citizens and the collective good.<sup>19</sup>

The third phase of statutory compensation for victims of crime in New South Wales began in 1993, after the Brahe Report<sup>20</sup> was tabled in the New South Wales Parliament detailing the shortfalls of the existing scheme. It suggested the scheme be improved to ensure that claims for compensation are determined 'efficiently and with sensitivity' and made a number of recommendations.<sup>21</sup> In response to the Brahe Report, the New South Wales scheme underwent significant changes. The primary change was the shift to a tariff approach of

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10 *Crimes Act 1900* (NSW) s 437(1).

11 Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (2001) 32.

12 See Paul Fairall, 'Criminal Compensation Under the *Crimes Act 1900* (NSW)' (1985) 9 *Criminal Law Journal* 98, 99.

13 *Criminal Injuries Compensation Act 1967* (NSW).

14 See Freckelton, above n 11, 32.

15 See Fairall, above n 12, 98.

16 New Zealand was the first in 1963: *Criminal Injuries Compensation Act 1963* (NZ) followed by the United Kingdom: *Criminal Injuries Compensation Act 1963* (UK). The United States passed legislation in 29 jurisdictions between 1965 and 1977 followed by Canada and some European countries: Deborah Carrow, *Crime Victim Compensation* (1980); David Miers, 'The Provision of Compensation for Victims of Violent Crime in Europe' (1985) 10 *Victimology* 662.

17 Margaret Thornton, 'Neo-liberalism, Discrimination and the Politics of "Ressentiment"' (2000) 17(2) *Law in Context* 8, 11.

18 See Duff, 'The Measure of Criminal Injuries Compensation' above n 2, 106.

19 See Thornton, above n 17, 10.

20 Cec Brahe, *Review of the Victims Compensation Act* (1993).

21 *Ibid* 15.

awarding compensation for injury,<sup>22</sup> replacing the previous discretionary approach.<sup>23</sup> The new scheme appended a schedule listing a range of body parts and particular harms to those body parts, specifying amounts for each injury depending on their perceived seriousness.<sup>24</sup> The revamped scheme also introduced an approved counselling scheme providing 20 hours of free counselling to victims.<sup>25</sup> The changes manifest in the *VSRA* demonstrated a shift away from collective responsibility and the provision of compensation towards a philosophy of individual responsibility and the rehabilitation of victims.<sup>26</sup> The changes were also driven by a desire to reduce the costs of the schemes<sup>27</sup> although not at the expense of 'deserving' victims. One group of victims that was placed in this category of deserving victims was sexual assault victims.<sup>28</sup>

#### IV THE INTRODUCTION OF SEXUAL ASSAULT PROVISIONS

Successive chairpersons of the New South Wales Victims Compensation Tribunal recommended that specific sexual assault provisions be included in the new scheme to address the particular needs of sexual assault victims.<sup>29</sup> The call was heeded and in 1996, the New South Wales scheme, the first to do so in Australia, was expanded to include sexual assault provisions. It did so with the incorporation of three levels of award in the schedule of injuries.

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- 22 A tariff approach guides the judiciary in their calculation of an award for non-pecuniary loss with a table of amounts to be awarded for particular specified injuries. Most workers compensation schemes use a tariff model of awarding compensation. See also *Sporting Injuries Insurance Act 1978* (NSW), which adopts a tariff model. However, in criminal injuries compensation schemes in Australia only Queensland and New South Wales have adopted a tariff approach.
- 23 A discretionary approach leaves the assessor to determine the amount of non-pecuniary award up to the statutory maximum of the particular scheme. All criminal injuries compensations schemes in Australia, other than New South Wales and Queensland, have adopted this model.
- 24 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1.
- 25 In 1998 the *Victims Compensation Amendment Act 1998* (NSW) widened the counselling provisions so that victims who had suffered an injury within the meaning of s 5 but not a 'compensable injury' within the meaning of s 7 could still access counselling services.
- 26 See New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 1996, 974 (Jeff Shaw, Attorney-General). The Attorney-General identified the principal aims of the new scheme as follows:  
to place greater emphasis upon the rehabilitation of victims of violent crime, through the provision of appropriate counselling; to ensure that awards of compensation are directed toward those victims suffering the most serious injuries; and to address the escalating costs of the scheme such that the genuine needs of victims are met at a reasonable cost to the community.  
In 2000, the *Victims Compensation Amendment Act 2000* (NSW) was passed changing the name of the New South Wales Act to the *Victims Support and Rehabilitation Act 2000* (NSW) (removing the term 'compensation' and replacing it with 'support and rehabilitation').
- 27 New South Wales Joint Select Committee on Victims Compensation, *First Interim Report: Alternative Means of Providing for the Needs of Victims of Crime* (1997) 9.
- 28 See the statements in New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 1996, 976, 977 (Jeff Shaw, Attorney-General).
- 29 New South Wales Joint Select Committee on Victims Compensation, *Report: Inquiry into Psychological Shock* (1999) 16.

Category One	Indecent assault or assault with violence in the course of attempted unlawful sexual intercourse.	\$7500 to \$10 000 <sup>30</sup>
Category Two	Unlawful sexual intercourse or the infliction of serious bodily injury in the course of attempted unlawful intercourse.	\$10 000 to \$25 000
Category Three	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.	\$25 000 to \$50 000

The provisions changed the way the New South Wales scheme compensates victims of sexual abuse. The previous scheme had used a victim-centred approach to awarding compensation. The term 'victim-centred' refers to an approach that assesses compensation on the basis of the severity of the injuries suffered by the victim.<sup>31</sup> Victims had typically submitted reports from medical experts documenting the injuries they had suffered and compensation was awarded according to the level of harm to the individual, determined by an assessor on a discretionary basis up to a maximum of \$50 000. The new scheme however adopted an offence-based approach to compensating victims of sexual abuse. This approach assessed the amount of compensation on the basis of the criminal seriousness of the perpetrator's conduct, rather than on the severity of individual victim's injuries.<sup>32</sup> Thus, each of the three levels of award in the *VSRA* accord with similar categories present in the criminal law, and the award range increases in line with the perceived increase in criminal seriousness. A victim of an indecent assault, for example, using the sexual assault provisions can only receive compensation in the \$7500–\$10 000 range regardless of the severity of the injuries because indecent assault is considered less 'criminally' serious than unlawful sexual intercourse, which is a Category Two offence. This approach means that sexual assault victims are treated differently than they were under the previous scheme and differently from other victims of crime who are still assessed using a victim-centred approach. Sexual assault victims (and domestic violence victims) are the only categories of victims in the new scheme to which an offence-based formula is applied to calculate the amount of award.

The introduction of the sexual assault provisions in the New South Wales scheme in 1996 created uncertainty and confusion on several fronts amongst

30 Note that the range in Category One was initially \$2500–\$10 000 but the threshold was raised in 2000 to \$7500: *Victims Compensation Amendment (Compensable Injuries) Regulation 2000* (NSW) sch 1.

31 See Duff, above n 2, 133 who uses the terms victim-centred and offence-based to describe similar approaches to awarding compensation in the English jurisdiction.

32 Ibid.

practitioners, academics and tribunal assessors alike.<sup>33</sup> Three main concerns arose; first, did the introduction of an offence-based approach and the categorisation of sexual assault as a ‘compensable injury’ in the schedule of injuries remove the requirement to provide proof of injury? Second, once the relevant ‘sexual assault’ band range is selected, the assessor has discretion to determine the precise figure to award within that band. No guidance was provided however on how the assessor should determine the amount within the prescribed range. Two possibilities appeared viable: the assessor could either equate the amount of award with the severity of ‘harm’ flowing from the relevant offences; or determine the amount of award based on the perceived ‘criminal seriousness’ of the sexual offences leading to the claim. Finally, if there was a requirement to provide proof of injury, could injury be inferred from the inherent invasive nature of sexual offences without the need for medical evidence? The opportunity to resolve these issues and provide clarity of process for victims of sexual assault presented itself in the case of *GM*.

## V HOW THE SEXUAL ASSAULT PROVISIONS WERE INTERPRETED

In the District Court proceedings of *GM Sidis J* articulated two central legal issues that required resolution. Does the new scheme require victims of sexual assault to provide proof of injury? And, if proof of injury is required, can it be satisfied with proof of the offences themselves on the basis that the nature of the offence creates a presumption of injury? The following two sections overview the reasoning in both the District Court and the Court of Appeal in relation to these two issues.

### A Is Proof of Injury Required?

#### 1 Key Statutory Requirements

The outcome in both the District Court and the Court of Appeal in relation to whether sexual assault victims must provide proof of injury, hinged on the interpretation of ss 5, 6 and 7 of the *VSRA*, and their relationship to the sexual assault provisions contained in the appended schedule of injuries. The three sections set out the initial criteria for determining whether an applicant is eligible for compensation and an appended schedule contains the list of injuries that are compensable under the scheme. Section 6 provides that a primary victim of an act of violence is eligible for statutory compensation.

Sections 5 and 7 provide definitions of a primary victim and an act of violence. An act of violence is defined in s 5 as an act, or series of related acts:

- (a) that has apparently occurred in the course of the commission of an offence, and
- (b) that has involved violent conduct against one or more persons, and

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<sup>33</sup> See Forster, above n 3; New South Wales Combined Community Legal Centres, above n 3.

(c) that has resulted in injury or death to one or more of those persons.

A primary victim of an act of violence is defined in s 7 as a person who receives a compensable injury or dies, as a direct result of that act. A primary victim of sexual assault must therefore have received an *injury* to satisfy the requirement for an act of violence in s 5 as well as a *compensable injury* to satisfy s 7.

Injury is defined in the dictionary section as ‘actual physical bodily harm’ or ‘psychological or psychiatric injury’. Compensable injury is defined in the dictionary section as those injuries contained in the appended schedule of injuries. Sexual assault is listed in the schedule of injuries (alongside other injuries such as bone fractures and loss of hearing) and is specifically defined as ‘the compensable injury of sexual assault’. The key issue therefore in determining the initial eligibility of the five children was whether proof of sexual assault, defined as a compensable injury in the schedule and therefore satisfying s 7, also satisfied the requirement for an injury in s 5 in the absence of medical evidence.

## 2 Reasoning of the District Court

The District Court found in favour of the five child applicants. Judge Sidis concluded that victims of sexual assault are required to provide proof of one of the sexual offences listed in the scheme but are *not* required to provide proof of injury. Judge Sidis held that the term ‘injury’ in s 5 and the term ‘compensable injury’ in s 7 are interchangeable and since sexual assault is characterised as a ‘compensable injury’ in the schedule, the requirement for an ‘injury’ in s 5 is satisfied by the proof of a sexual assault.

In arriving at her conclusion, Sidis J made the following points. She acknowledged that the guidelines on the *VSR*A issued by the Tribunal did not accord with her own findings since they state that proof of injury is required in instances of sexual assault. However, she found that the guidelines must be consistent with the Act and that the guidelines do not in themselves define or determine the meaning of the Act. In support of her proposition she further stated that there were several indications in the *VSR*A that sexual assault victims were to be dealt with differently to other victims of crime. She suggested that the reason the legislature had removed the requirement for sexual assault victims to provide proof of injury was either because sexual assaults ‘are so abhorrent that victims of those offences should be eligible for compensation as a matter of right’ or alternatively, ‘that victims of such crimes are presumed to have suffered injury by reason of the experiences to which they have been exposed’.<sup>34</sup>

## 3 Reasoning of the Appeal Court

The Court of Appeal adopted a very different approach. In contrast to Sidis J the judges concluded that sexual assault victims *are* required to provide proof of injury. They held that ‘injury’ in s 5 and ‘compensable injury’ in s 7 are not

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34 *GM v Victims Compensation Fund* (Unreported, Sidis J, 18 June 2003) 9.

interchangeable terms. The judges held that the meanings and purposes of the two terms are different and explained the difference in the following terms: the requirement in s 5 for an injury is a threshold test, which all victims of crime, including sexual assault victims, must satisfy. To satisfy the s 5 test, all victims must provide proof of an injury as it is defined in the dictionary section (actual physical harm or psychological injury). Once the s 5 test for injury is satisfied, the assessor must then turn to the schedule of compensable injuries to see if the injury is serious enough to warrant compensation. The court concluded that the 'compensable injuries' listed in the schedule are the kind of 'serious' injuries which result in compensation and not all injuries that meet the s 5 test will meet the more onerous requirements of the schedule.

Further, although sexual assault is explicitly termed a 'compensable injury' in the schedule, the judges did not agree that this meant that proof of a sexual assault established a compensable injury unless there was medical proof of a consequential injury. Instead, the judges characterised the words in the schedule as 'infelicitly expressed'<sup>35</sup> and surmised that what the legislature had intended was to provide a single award for one or more offences and their consequential injuries, rather than a series of different amounts for different injuries. The judges contended that if the act of sexual assault is itself considered an injury then any victim would be automatically entitled to the initial amount of the relevant award range (which they implied would be unworkable) and the assessor would be left without a formula to calculate the amount of award in the range. While the plaintiffs argued that assessors could ascertain the amount to be awarded with reference to the nature of the offence; the judges however remained unconvinced and held that this would be inconsistent with the purpose of the Act.

The Court of Appeal primarily relied on two key factors in reaching its conclusion. First, statutory provision of compensation for victims of crime, which dates back to the *Crimes Act 1900* (NSW), has always required proof of injury. Second, the *VSRA* was passed in a climate of cut-backs and was intended as limiting legislation. This is clearly evidenced, they maintained, by parliamentary discussion in *Hansard* prior to the introduction of the Act and key Joint Select Committee Reports published after the introduction of the Act. Both sources, the judges held, emphasise the cost-cutting intent of the legislature. Further, both points, the judges suggest, lead to the conclusion that the removal of the requirement to provide proof of injury was not the intent of the legislature.

### **B Does the Nature of Sexual Assault in itself Prove Injury?**

The second issue before the two courts was whether, if proof of injury is required by the *VSRA*, what constitutes proof of injury in instances of sexual assault? Judge Sidis held that even if proof of injury is required by the Act, the five applicants had satisfied that requirement on the basis that the nature of the assaults they had each suffered provided evidence of proof of injury. Judge Sidis

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35 *GM* [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004) [115].

stated: 'what was done to these children involved actual physical contact amounting to harm or injury which was more than merely transient or trifling'.<sup>36</sup>

The Court of Appeal found, in contrast to Sidis J, that proof of injury had not been established by the five applicants. The judges held that Sidis J had assumed that physical contact in the course of a sexual assault 'amounted to harm or injury that was more than trifling'.<sup>37</sup> This conclusion they claimed was 'manifestly wrong' and an 'erroneous application of the authorities'.<sup>38</sup> Instead, physical contact must result in hurt or injury calculated to interfere with the health and comfort of the victim and this must be established with the provision of evidence. Although Sidis J had concluded that proof of the offences themselves sufficed to prove that injury or hurt had occurred, the Court of Appeal concluded that, in the absence of medical evidence, this was not established by the applicants.

## VI CRITIQUING THE COURT OF APPEAL'S DECISION AND ALTERNATE APPROACHES

### A Reasoning of the Court of Appeal: A Critique

The Court of Appeal held that not every injury that satisfies the requirement in s 5 for an injury will result in compensation. Indeed, the court concluded that only more serious and persistent injuries are listed in the schedule and are compensable. Although the judges did not provide an explanation for why an injury might satisfy s 5 but not be included in the schedule of compensable injuries it is likely, as the Court of Appeal suggests, that this *is* the intent of the legislature and that 'injury' and 'compensable injury' are not interchangeable terms. This is due to the new scheme providing counselling, but not compensation, for injured victims who have not suffered a 'serious' compensable injury. Such a concession in the new scheme is in line with its 'rehabilitation' ethos.<sup>39</sup> For example, a victim of an assault who receives minor bruising and temporary shock would be entitled to free counselling but not a compensatory award since the injuries suffered do not equate to any of the serious injuries listed in the schedule.

However, although the legislature may have intended that satisfaction of the s 5 meaning of 'injury' will not equate to the satisfaction of the requirement for a 'compensable injury' as specified in s 7 (and therefore result in a compensation award) an injury listed as a 'compensable injury' in the schedule would surely satisfy the requirement for an injury in s 5, since in the judges own words, the schedule of compensable injuries represents the 'most serious injuries for which the state considers compensation should be paid'.<sup>40</sup> The reasoning hinges therefore on whether the terminology used in the schedule which defines sexual

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36 *GM v Victims Compensation Fund* (Unreported, Sidis J, 18 June 2003) 11.

37 *GM* [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004) [135].

38 *Ibid* [137].

39 See discussion in above n 25.

40 *GM* [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004) [120].

assault as a 'compensable injury' means that proof of a sexual assault itself without further proof of injury satisfies the requirement in s 7 for a compensable injury. The judges held that it does not.

It is illustrative to follow the reasoning of the Court of Appeal through to the resulting outcomes. If s 5 requires proof of an injury (actual bodily harm and/or psychological injury) consequential on a sexual assault, what degree of severity of injury is required? If the victim of a sexual assault has suffered minor bruising, cuts or anxiety and provided medical evidence, would this be sufficient to satisfy the requirement for an injury under s 5? If so when such a victim proceeds to the sexual assault provisions and is placed in the relevant category of award based on the nature of the offence they have experienced, would they automatically receive the base amount? That line of reasoning would mean that whilst the 5 children in the case at hand remain uncompensated because they have provided no medical evidence, any person who provided evidence of any minor injury such as bruising, cuts or anxiety, provided the injury was not 'not trifling and transient', would receive compensation at the level of the relevant award range, based on the criminal seriousness of the sexual offence. This does not appear to accord with a 'common-sense' outcome.

Alternatively, the judicial reasoning might suggest that, having satisfied s 5, the sexual assault provisions can only be accessed upon proof of one of the other compensable injuries in the schedule. However, the offence-based category would then amount to an extra hurdle not faced by other victims of crime (narrowing the range of sexual offences that can constitute an act of violence and restricting the amount of award based on the criminal seriousness of the offence rather than the severity of injury). This would not amount to a benefit for victims and it is unlikely that this was the intent of the legislature. Further, in situations where the award amount of the injury suffered by the victim in the schedule is less than the base amount of the relevant category of sexual assault, the applicant can elect to receive the increased amount and in that way 'benefit' from the sexual assault provisions. This approach however seems to suggest that the injuries of sexual assault victims are worth more than the same injuries suffered by victims of other crimes. The reasoning of the Court of Appeal therefore, when scrutinised, fails to resolve the uncertainties that have plagued the sexual assault provisions since their inception.

### **B Statutory Interpretation, Extrinsic Sources and the Context of Sexual Abuse**

The schedule of the *VSR*A expressly states that sexual assault is a compensable injury. Despite this, the Court of Appeal concluded that the phrase 'the compensable injury of sexual assault' does not mean that sexual assault is a compensable injury. The Court held that to qualify as a compensable injury, sexual assault must be accompanied by consequential injury that is proven with medical evidence. This interpretation of the *VSR*A calls for further analysis. The standard approach to statutory interpretation in New South Wales is the

purposive approach.<sup>41</sup> As Parkinson puts it, the ordinary meaning of the words of an Act should be 'discerned from its context in the Act as a whole and in light of the purposes that the Act was designed to achieve'.<sup>42</sup> Extrinsic materials (*Hansard*, law reform reports, other committee reports, and explanatory memoranda), if published prior to the enactment of the Act in question,<sup>43</sup> may be used to 'confirm the ordinary meaning of a legislative provision or to determine the meaning where the provision is ambiguous or obscure'.<sup>44</sup>

In determining whether sexual assault is a compensable injury, the Court of Appeal sought to ascertain if the legislative intent differed from the 'ordinary' meaning of the words in the statute. It did this by examining selected extrinsic and other sources. The judges considered statements recorded in *Hansard* and a report from the NSW Joint Select Committee on Criminal Injuries Compensation<sup>45</sup> to determine the purpose of the legislation. They concluded after consideration of these sources that the *VSR*A was limiting legislation designed to curtail state liability to victims of crime generally. The judges used this position to support a number of their findings and to favour an interpretation of the provisions that results in 'limiting' claims by victims of sexual abuse.

Parliamentary discussion in *Hansard* and statements in the NSW Joint Select Committee Reports do support the judges' conclusion that the Act was intended to limit claims by victims of crime. However, the debates in *Hansard* also support the proposition that the sexual assault provisions were intended to ease access to compensatory redress for victims and to overcome some of the historical and contextual difficulties faced by these 'deserving' victims.<sup>46</sup> Further, the Joint Select Committee Reports support the contention that the sexual assault provisions were intended to remove the requirement to provide proof of injury as illustrated in the following instances. The Committee stated in December 1997 (after the changes were introduced), that 'sexual assault is divided into three categories and an award range is provided for victims, which is determined according to the nature and pattern of offence. There is no requirement to provide proof of a certain level of psychological injury'.<sup>47</sup> In a subsequent Report in

41 *Interpretation Act 1987* (NSW) s 33.

42 Patrick Parkinson, *Tradition and Change in Australian Law* (2<sup>nd</sup> ed, 2001) 209.

43 *Interpretation Act 1987* (NSW) s 34(2)(e).

44 See Parkinson, above n 42, 210.

45 The Joint Select Committee on Victims Compensation was established after the introduction of the *VSR*A to review the changes that had been made to criminal injuries compensation. The three publications that ensued from the Committee and referred to by the Court of Appeal are *not* extrinsic sources within the meaning of the *Interpretation Act 1987* (NSW) since they were published after the passing of the *VSR*A. Nevertheless one of the Reports was utilised by the NSW Court of Appeal in their reasoning. Joint Select Committee on Victims Compensation, *Second Interim Report: The Long Term Financial Viability of the Victims Compensation Fund* (1997). Joint Select Committee on Victims Compensation, *Report: Inquiry into Psychological Shock*, above n 29; Joint Select Committee on Victims Compensation, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme* (2000).

46 When the Bill was presented to parliament for its final reading, Jeff Shaw stated that 'the categories of sexual assault in the schedule have been introduced to recognise the particular needs of this group of victims': New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 1996, 976 (Jeff Shaw, Attorney-General). See also Brahe, above n 20, 18, 21, 41.

47 See Joint Select Committee on Victims Compensation, *Second Interim Report*, above n 45, 44.

1998, the Select Committee stated that victims of sexual assault are not required 'to prove that they have a psychological injury in terms of nervous shock or mental illness'.<sup>48</sup> Finally in February 2000, the Joint Select Committee made its most compelling statement to date with an express assertion that proof of injury is no longer required:

There were also two 'protected' categories introduced into the scheme: homicide and sexual assault. Victims who fall within either of these categories are no longer required to provide proof of injury. ... Victims of sexual assault are paid according to the severity of crime perpetrated against them. The major purpose of introducing these categories was to alleviate the pressure on victims who had suffered a very serious injury to prepare forms and present medical certificates. The fact that victims have ... suffered a sexual assault is seen as proof enough of the right of compensation. Further, by waiving the requirement to show proof of injury claims should be expedited through the administrative process, therefore not unnecessarily prolonging victims suffering.<sup>49</sup>

In addition, a statement by Dr Elms (former Chairman of the NSW Victims Compensation Tribunal) prior to the introduction of the *VSRA* lends weight to the views expressed by the Joint Select Committee. Dr Elms stated that the legislation (as it then operated) inappropriately forced victims of sexual assault 'to prove that something is wrong with them ... To my mind this is a classic case where compensation should be awarded for the traumatic experience itself rather than having to prove to a difficult standard the results of that experience'.<sup>50</sup>

The statements by the Joint Select Committee and Dr Elms, whilst not extrinsic sources within the meaning of the *Interpretation Act 1987* (NSW), provide compelling evidence of the policy position of the NSW legislature. The statements clearly support the conclusion that the intent of the legislature was to improve access to compensation for victims of sexual assault and to remove some of the historical and contextual disadvantage faced by victims in meeting the requirements of the scheme. Where provisions have been introduced to redress historical disadvantages faced by a marginalised group, the court should in interpreting those provisions consider the 'context of the history of oppression experienced by the group to which the person before the court belongs'.<sup>51</sup> As the Canadian academic Majury explains, 'the social, economic and legal inequalities currently faced by the group are additional and important pieces of the general context'.<sup>52</sup> The 'context' of historical and ongoing disadvantage experienced by victims of sexual abuse in Australia, particularly in their interactions with the legal system, includes the following.

Research indicates that sexual abuse is prevalent in Australian society across all ages, cultures and socio-economic classes, predominantly experienced by

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48 See Joint Select Committee on Victims Compensation, above n 29, 8.

49 Joint Select Committee on Victims Compensation, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme* (2000) 9.

50 Dr E Elms (Seminar on Criminal Compensation Claims, 1992), cited in Joint Select Committee on Victims Compensation, above n 29, 16.

51 See Majury, above n 5, 417. See also Morgan, above n 5.

52 See Majury, above n 5, 417.

women and children and primarily perpetrated by men.<sup>53</sup> Victims have historically encountered difficulty in accessing both the criminal and the civil system, as illustrated by the low conviction rates in the criminal justice system<sup>54</sup> and by a dearth of successful cases in the common law tort system.<sup>55</sup> In particular, research has indicated that criminal injuries compensation schemes have historically disadvantaged sexual abuse victims because: the secrecy and shame, generated in part by societal and police attitudes, that continues to surround sexual abuse hinders victims from reporting the abuse and lodging claims,<sup>56</sup> because many victims are unaware that the injuries they suffer have resulted from the abuse<sup>57</sup> and because the process of verifying both the sexual assault and the injuries that result can be traumatic and often involves reliving and re-experiencing the abuse.<sup>58</sup>

In addition to suggesting that the provisions were introduced to address historical disadvantages faced by victims of sexual abuse in accessing the scheme, the Reports expressly posit that the means adopted by the legislature to redress those disadvantages was the removal of the requirement to provide proof of injury. The Court of Appeal in its decision implied that the removal of the requirement to provide proof of injury would lead to an increase in unsubstantiated claims. However, research suggests that removing the requirement to provide proof of injury would do little to affect the legitimacy of claims since sexual abuse *typically* causes devastating harm. As Millhouse J puts it succinctly: 'Almost every rape ... is harmful and dreadful; that is in the nature of the crime although the circumstances of some are worse than others'.<sup>59</sup> Typical effects in both adult and child victims include low self-esteem, feelings of isolation and alienation, major depression, inability to relate to others, or to trust

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53 The Australian Bureau of Statistics recorded that, on a national level, 15 630 sexual assaults were reported to authorities in 2000. They also recorded that 79% of the victims who reported a sexual assault were female and that 99 per cent of the offenders were male: Australian Bureau of Statistics, *Recorded Crime* (2000). The Report covered the period from 1 January 2000 to 31 December 2000.

54 See Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) *Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW* <<http://www.agd.nsw.gov.au/cpd.nsf/>> at 6 November 2005.

55 There has not been in Australia the surge of litigation in the tort of battery seen in the Canadian jurisdiction: see Bruce Feldthusen, 'The Canadian Experiment with the Civil Action for Sexual Battery' in Nick Mullany (ed) *Torts in the Nineties* (1997) 274. However see also the successful case of *Ward W; R and G (by their next friend P) (Intervener)* (1994) 17 FLR 751, in which two girls successfully sued their stepfather in battery for sexual abuse and received \$97 000 and \$80 000 respectively for pain and suffering, emotional shock, post traumatic stress disorder, anxiety and depression. See also *Paten v Bale* [1999] QSC 317 (Unreported, Wilson J, 19 October 1999) where the plaintiff successfully sued a neighbour in battery for sexual abuse over a two year period between the ages of seven and nine. She suffered chronic post traumatic stress disorder, chronic depressive disorder, sexual aversion disorder and an unspecified personality disorder and was awarded a total of \$183 282 including \$120 000 for future economic loss.

56 Christine Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10(2) *Torts Law Journal* 143, 150.

57 See Julia Cabassi and Amanda George, 'Remembering Childhood: Time Limitations the Hurdle for Childhood Sexual Assault Survivors Seeking Compensation' (1993) 18(6) *Alternative Law Journal* 286, 288.

58 See Jarvis and McIlwaine, above n 7.

59 See *P v South Australia* (1992) 60 A Crim R 286, 290.

others particularly persons in authority,<sup>60</sup> difficulties with interpersonal and sexual relationships<sup>61</sup> guilt, self-hatred, denial, repression, disassociation and amnesia,<sup>62</sup> drug addictions, suicidal behaviour, and eating disorders<sup>63</sup> and vocational and educational setbacks.<sup>64</sup> Although not affecting the legitimacy of claims, the removal of the requirement to provide proof of injury would however provide considerable relief for victims from the potentially traumatic process of psychiatric assessment (which may involve re-living the experience and the shame that victims typically experience); it would enable claims to proceed more efficiently through the system reducing the potential damage caused by delay; and it would provide access to the scheme for larger numbers of injured victims who are deterred from lodging claims because of the requirement for medical or psychological assessment.

In confining their analysis to the narrow parameters of statutory interpretation, the judges failed to consider key statements in the Joint Select Committee Reports, the literature that documents the history of disadvantage faced by victims of sexual abuse, and the literature that documents the harms typically experienced by victims of sexual abuse. Reference to those sources could have provided an understanding of the historical and ongoing discrimination that had prompted the introduction of the sexual assault provisions which were being interpreted. It could also have revealed the unnecessary nature of a requirement to provide medical evidence of injury. Despite this and the statements in the Reports, the Court of Appeal persisted in its conclusion that the legislature did not intend to remove proof of injury for sexual assault victims.

### C Considering Tort Law

In determining firstly the meaning of ss 5, 6 and 7 and secondly their relationship with the sexual assault provisions, the Court of Appeal relied on two key propositions. First, the judges looked to the history of the schemes to assert that criminal injuries compensation schemes in New South Wales have always required proof of injury and concluded that it was unlikely that the legislature intended to change the status quo. Second, the judges stated that if the requirement to provide proof of injury was removed, there would be no clear formula for assessors to determine the precise amount in the award range. However, when situated within the broader context of tort law, where criminal injuries compensation schemes had their genesis, both propositions have the potential to produce different outcomes to those arrived at by the judges.

Since their inception, criminal injuries compensation schemes in New South Wales have required applicants to provide proof of injury before a successful

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60 See Judith Cohen and Anthony Mannarino, above n 6; Einbender and Friedrich, above n 6.

61 See Paul Mullen and Jillian Fleming, 'Long Term Effects of Child Sexual Abuse' (1998) 9 *Issues in Child Abuse Prevention* <<http://www.aifs.gov.au/nch/issues9.html>> at 6 November 2005; Finkelhor et al, above n 6.

62 See Judith Herman, *Father, Daughter Incest* (1981).

63 S E Romans et al, 'Sexual Abuse in Childhood and Deliberate Self-Harm' (1995) 152 *American Journal of Psychiatry* 1336.

64 Chaffin, Wherry and Dykman, above n 6.

claim can ensue. The Court of Appeal contended that since the legislation was intended to be limiting, it was unlikely that the legislature would have removed the requirement which, the judges argued, had the potential to lead to more claims rather than less. They further asserted that to remove the requirement to provide proof of injury would have been an unusual and extraordinary move 'inimical to the concept of a compensation scheme'.<sup>65</sup> It is not however an extraordinary or unusual premise in the broader context of tort law, where proof of injury has never been a requirement in the tort of battery, the primary action for a direct physical invasion to person or property. The rationale underscoring battery and the other trespass torts is that the invasion of personal integrity is a wrong in itself that should be recognised by an award of damages.<sup>66</sup> Although an award in such circumstances is nominal (a token award not intended to compensate the victim for their actual injuries)<sup>67</sup> and whilst it could be argued that the base amounts in the three award bands are more substantial than a 'token' award, the amounts are nevertheless small in comparison to the devastating harms that sexual assault typically causes. Indeed, some have argued that the amounts provided by criminal injuries compensation schemes are merely a 'solatium' primarily aimed at providing an acknowledgement by the state of the wrong. It is therefore not an 'unprincipled' or 'unprecedented' step, out of line with the basic tenets of compensation law, for the legislature to take the view that compensation should be awarded to victims in recognition of the 'abhorrent' wrong and the invasion of personal integrity inherent in a sexual assault, without the need to provide medical evidence of injury.

The second rationale offered by the judges in support of their position is posed in the question: if historically the severity of an injury has determined the amount of compensation awarded, and if proof of injury is no longer required, how would assessors determine the appropriate amount in the award range? That question is easily answered with reference to tort law. To receive an amount of compensation for the invasion of personal integrity in any of the trespass torts, a plaintiff does not have to provide proof of injury. To be eligible for an amount that compensates for the full extent of the injuries suffered by the plaintiff, he or she must provide proof of those injuries. There appears to be no plausible reason why the *VSR*A could not operate in a similar manner. To receive the base amount of compensation a plaintiff would have to provide proof of the invasion of personal integrity, which would require proof of one of the sexual offences listed in the dictionary section of the *VSR*A (and the plaintiff would not have to provide proof of injury). To receive more than the base amount, the plaintiff would have to provide proof of injury, as well as proof of a sexual offence, and compensation would be awarded on a restitutionary basis to the maximum of the scheme. Based on this reasoning, each of the five children in *GM* would have been entitled to the base amount in the award range, in line with the nature of the offences they had experienced. Three of the five child plaintiffs who were subjected to a 'pattern of

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65 *GM* [2004] NSWCA 185 (Unreported, Mason P, Ipp JA, McColl JA, 16 June 2004) [126].

66 See Harold Luntz and David Hamby, *Tort Cases and Commentary* (5th ed, 2002) 87.

67 See Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999) 23.

abuse' would have qualified for a Category Three award and received the base amount of \$25 000. In the absence of any proof of injury no further award would have been made.

#### D Looking to International Law

Two international conventions to which Australia is a signatory, the *Convention on the Elimination of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CROC') could have assisted the judges in an interpretation of the *VSRA* that aligns with Australia's international obligations. Although Australia is not bound by international conventions unless they have been incorporated into domestic law, where a statute is capable of two interpretations the courts should presume that parliament intended to legislate consistently with any relevant international covenant to which it is a signatory.<sup>68</sup>

CEDAW, known as the International Bill of Rights for Women,<sup>69</sup> and ratified by Australia in 1980, obligates members to protect the sexual integrity of women. General Recommendation 19 specifically deals with sexual violence against women and obligates member states to 'ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respects their integrity and dignity'. Recommendation 19 also obligates members to provide appropriate protective and support services for victims particularly penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including sexual assault. CEDAW does not merely mandate a formal approach to equality<sup>70</sup> but rather compels member states to undertake measures designed to achieve substantive equality.<sup>71</sup> It does this by obligating member states to ensure equality of opportunity, equality of access to those opportunities (sometimes in the form of affirmative action measures) and, crucially, equality of results.<sup>72</sup>

In the same way that CEDAW protects the sexual integrity of women, CROC, ratified by Australia in 1990, protects the sexual integrity of children and recommends the 'best interests' of the child as the paramount consideration in all matters concerning children. Article 3 states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions,

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68 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) 66; See also Martin Dixon, *Textbook on International Law* (2001) 98.

69 UN Division for the Advancement of Women <[http://www/un.org/womenwatch/daw/cedaw](http://www.un.org/womenwatch/daw/cedaw)> at 6 November 2005.

70 Formal equality is the requirement that legal rules should apply in the same way to all members of the community regardless of sex, race, sexuality or any other characteristic. See Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 (1994) [3.8]. Research has illustrated the limitations of formal equality to achieve actual equality for women.

71 Substantive equality refers to 'actual' equality: see Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996) 176.

72 See Rea Abuda Chongsun 'Non Discrimination and Gender Equality' (Presentation on behalf of International Women's Rights Action Watch Asia Pacific (IWRAP-AP), given at the Regional Consultations on the Interlinkages between Violence Against Women and Women's Right to Adequate Housing, in Co-Operation with the UN Special Rapporteur on Adequate Housing, New Delhi, India, 28-31 October 2003).

courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' and Article 34 obligates State parties to 'protect children from all forms of sexual exploitation and sexual abuse'.

The inclusion of sexual assault provisions by the New South Wales legislature in the *VSR*A heralded a long awaited recognition of the historical disadvantages faced by victims in accessing the scheme, particularly child victims. An interpretation of the provisions to mean either that proof of injury is not required or alternatively that sexual assault itself presumes the infliction of injury would accord with the substantive 'equality of results' approach mandated by CEDAW. It would achieve this by expressly acknowledging that victims of sexual assault face burdens not experienced by victims of other crimes and it would also legitimate an alternate application process that recognises those burdens and eases access to compensation.

The removal of the requirement to provide proof of injury is also a measure in the 'best interests' of child victims of sexual abuse, and therefore in line with Australia's obligations under CROC, since it removes the risks of retraumatisation associated with psychiatric and psychological assessment and minimises the risk that delay will 'draw out' the trauma and further damage the child victim.

Thus, the initial introduction of the sexual assault provisions was a move in accord with Australia's international obligations, as it appeared firstly to recognise and address the particular discrimination faced by victims of sexual abuse and secondly, to fulfil the obligation to act in the best interests of child victims. The decision of the Court of Appeal detracts from that interpretation and entrenches the discrimination victims face.

## VII THE IMPACT AND IMPLICATIONS OF COURT OF APPEAL'S FINDINGS

The decision of the Court of Appeal in *GM* will have far-reaching impacts legally, economically and socially for victims of sexual abuse. These impacts are not confined to victims of sexual abuse but will extend to their families and the wider community.

First, although the intent of parliament was to create a more 'benevolent' framework for victims of sexual abuse, and although the Court of Appeal claims its decision leaves that benevolent framework in place, in effect the potential of the provisions to provide easier access to compensation has not been realised. Second, the decision sends a symbolic message to the wider community that sexual abuse is not seriously regarded by the state. Third, the potential of the provisions to provide economic and therapeutic benefits to victims of sexual abuse has been significantly frustrated. Finally, victims who choose to proceed with an application risk retraumatisation whilst those who are deterred from applying remain uncompensated. These impacts are discussed in detail below.

### A The *VSRA*: Benevolent or Benign

The Court of Appeal concluded that, despite their findings, the *VSRA* is 'benevolent' to victims of sexual assault. It is benevolent, according to the judges, in two ways. First, the Act has extended the meaning of 'violent' conduct to include instances of abuse which do not fall within an 'ordinary' meaning of what constitutes violence. For example, under the new sexual assault provisions, the definition of what constitutes sexual assault has been 'expanded' to include events such as intercourse with consent obtained by means of a non-violent threat. According to the Court of Appeal this means, that in instances where the victim is induced into sexual acts by coercive means, such situations will still fall within the meaning of an act of violence despite the absence of physical force. In implying that this is a 'benevolent' development, the judges display a fundamental misunderstanding of the inherent 'violence' of all sexual abuse regardless of the circumstances. Further, courts in New South Wales and other Australian jurisdictions have always adopted a broad interpretation of the concept of 'violence' in sexual abuse cases heard under criminal injuries compensation schemes and have not denied claims on the basis that the abuse resulted from a process of 'grooming' and coercion rather than through physical force.<sup>73</sup> The sexual assault provisions therefore have not been benevolent in extending this long established understanding of sexual violence, they have merely confined it to the specific and limited categories contained in the dictionary section of the *VSRA*.

Second, the judges claim that the *VSRA* gives victims of sexual assault the 'beneficial' choice of either lodging a claim using the sexual assault provisions or the option of using the same victim-centred mode accessed by all other victims of crime. However, the Court of Appeal's interpretation has not rendered the sexual assault provisions an easier route for victims, but rather has imposed extra hurdles. The scheme now requires the satisfaction of both an offence-based component (where the applicant must fit within one of the three categories of offences specified in the schedule and the award is constrained by that categorisation) and a victim-centered component (proving to a medical standard the presence of an injury). In sum, the decision in *GM* requires victims of sexual assault to satisfy the same victim-centered criteria that other victims of crime

73 See, eg, *C v BC*; *D v BC* (Unreported, Supreme Court of Western Australia, Murray J, 5 June 1997); *R v C* [1982] 2 NSWLR 674; *C v C* (1993) 111 FLR 467; *KAB v DJB* [2000] Q SC 498 (Unreported, Atkinson J, 22 December 2000); *R v Tamcelik; Ex Parte Ozcan* [1998] 1 Qld R 330; '*H*', '*B*', '*E*' v *Crimes Compensation Tribunal* [1997] 1 VR 608; '*E*' v '*P*'; '*T*' v '*P*' (Unreported, Supreme Court of Western Australia, McKechnie J, 10 December 2001); '*F*' v '*H*' (Unreported, Supreme Court of Western Australia, Nicholson J, 27 August 1992); '*J*' v *Peterson* (Unreported, Supreme Court of Western Australia, Scott J, 20 September 1994); *Komon v Podirsky and the Undersecretary for Law* (Unreported, Supreme Court of Western Australia, Rowland J, 12 June 1991); '*L*' v '*L*' [1999] WA SC 262 (Unreported, McKechnie J, 1 November 1999); '*L*' v '*W*' (Unreported, Supreme Court of Western Australia, Murray J, 22 April 1993); '*M*' v '*J*'; '*J*' v '*J*' (Unreported, Supreme Court of Western Australia, Scott J, 4 November 1992); *M v Hoogwerf* [1998] WA SC 380 (Unreported, Miller J, 14 December 1998); '*McD*' v *Edwards* (Unreported, Supreme Court of Western Australia, Heenan J, 10 October 1997); '*O*' v '*J*' (Unreported, Supreme Court of Western Australia, Wallwork J, 13 February 1992); '*V*' v '*W*'; '*A*' v '*W*' (Unreported, Supreme Court of Western Australia, Walsh J, 23 March 1993); '*X*' v '*Y*' (Unreported, Supreme Court of Western Australia, Parker J, 13 September 1996).

must satisfy, *in addition* to the extra requirements imposed by the offence-based categories.

### B The Symbolic Implications of Denying Compensation

The denial of compensation to the five child plaintiffs and the finding that future applicants must provide, to a medical standard, proof that an injury has occurred has significant symbolic implications. As the Brahe Report stated 'compensation is both an important formal acknowledgment on behalf of the community that the injury and suffering were unjustly inflicted' and 'an expression of support and concern by the community and government authorities'.<sup>74</sup> An effective system of state-funded compensation for victims of sexual abuse provides a clear statement of the unacceptability of sexual abuse in the community.<sup>75</sup> Conversely, a system that is ineffective at compensating victims sends a range of negative symbolic messages. These include the message that sexual abuse is not regarded seriously by the state; that the wrongs that sexual abuse victims experience are not injurious; and finally that sexual abuse is not in itself an abhorrent harm that the state considers worthy of compensation.

### C Retraumatizing Victims

The five child applicants in *GM* did not lodge medical evidence of their injuries. Evidence was not provided because their parents did not want them to be subjected to retraumatisation through the process of psychiatric or psychological assessment. The concerns of the parents are supported by research which suggests that the process of psychiatric or psychological assessment may retraumatise victims of sexual assault and worsen the injuries they suffer.

Psychological counselling, which has therapeutic goals, and psychological assessment, which is a non-therapeutic tool aimed solely at assessing the level of injury, are vastly different in their impact. A psychological assessment for the purpose of producing evidence for court proceedings involves a victim re-telling their story and thereby reliving the trauma, shame and humiliation that is typically experienced in instances of sexual abuse. The purpose of assessment is not therapeutic and usually involves only one evaluation session without the trust, relationship building, and long-term objective setting that characterises therapeutic counselling. As Jarvis and McIlwaine explain: 'often assessment and diagnosis occurs outside of any therapeutic process. This is problematic because women often report an escalation of distress and feelings of being unsafe, as a result of retelling the abuse. This can represent yet another experience of trauma'.<sup>76</sup> The end result of this process can be the worsening of the level of injury and trauma, particularly in child victims.

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74 See Brahe, above n 20, 13.

75 See Nora West, 'Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis' (1988) 50(1) *Toronto Faculty of Law Review* 96, 98. See also Jennifer Temkin, *Rape and the Legal Process* (2nd ed, 2002) 347.

76 See Jarvis and McIlwaine, above n 7, 148.

The decision of the Court of Appeal has established that this potentially harmful process is now integral to an application for criminal injuries compensation by sexual assault victims. The implications of this are two-fold: some victims may be subjected to assessment despite the risks of retraumatisation and worsening of injury, whilst others may be deterred from lodging claims. Those that are deterred will remain uncompensated and the wrong they have suffered will remain unacknowledged. Both outcomes are the antithesis of the expressly stated purpose of the new legislation 'to provide support and rehabilitation for victims of crimes and violence'.<sup>77</sup>

#### D Lost Economic and Therapeutic Benefits

The therapeutic and economic benefits that potentially flow from a compensatory award to victims of sexual abuse are considerable. In *GM* the five child applicants were denied the economic and therapeutic benefits an award of compensation would have afforded.

Economic benefits include the means to obtain counselling (the 5 applicants will not be entitled to the free counselling under the Act since s 5, according to the judges has not been satisfied), the possibility of future studies to address the loss of educational and consequential career opportunities the children are likely to experience, and the opportunity to make positive life changes such as moving away from the place of abuse.<sup>78</sup> Further, the five children may have received therapeutic benefits as a result of the public acknowledgment of the abuse by the state. As Dr Sandra Hacker puts it: 'The symbolic recognition of the validity of the victim's experience provides reassurance to victims that the legal system and the community cares about their pain. This reassurance and recognition assists in the patient's recovery'.<sup>79</sup> For a victim of sexual abuse, an acknowledgment that what happened is not her or his fault and that someone in authority is prepared to believe her or him can offer an important new perspective and can facilitate closure for the victim. As Herman puts it:

Restoration of the breach between the traumatized person and the community depends, first, upon public acknowledgement of the traumatic event and, second, upon some form of community action. Once it is publicly recognized that a person has been harmed, the community must take action to assign responsibility for the harm and to repair the injury. These two responses – recognition and restitution – are necessary to rebuild the survivor's sense of order and justice.<sup>80</sup>

### VIII CONCLUSION

The sexual assault provisions in the *VSRA*, introduced in the context of conflicting policy objectives, sought on the one hand to limit claims by victims

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77 See *Victims Support and Rehabilitation Act 1996* (NSW) s 3(a) ('Objects of the Act').

78 See Freckelton, 'Compensating the Sexually Abused', above n 7, 196.

79 Quoted in Victoria, *Parliamentary Debates*, Legislative Assembly, 21 November 1996, 1454 (John Thwaites).

80 Judith Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (1992) 70.

of crime whilst on the other hand easing access to compensatory redress for victims of sexual assault. The predominant means of achieving a more accessible scheme for victims of sexual assault was through the introduction of a discrete set of offence-based provisions, which, this note has argued, removed the requirement to provide proof of injury. The removal of the requirement to provide proof of injury would have reduced the arduous nature of the application process and would have reduced the potential for the retraumatisation of victims by removing the need for psychiatric assessment. It would also have facilitated the expeditious processing of claims thereby avoiding 'drawing out' the trauma of victims. Central to the objectives of providing an efficient, effective and sensitive means of compensating victims of sexual assault was a recognition of the 'inherent' harm of sexual abuse. As Sidis J puts it, it is an inherent harm because of its 'abhorrent nature' and also because of the long-term devastating impact that research suggests victims of sexual abuse typically suffer. Inadequate drafting however coupled with a conservative approach by the Court of Appeal frustrated those objectives.

The decision of the New South Wales Court of Appeal in *GM* therefore is an opportunity lost. On the one hand, an opportunity lost to realise the potential of the sexual assault provisions in providing an efficient, effective and therapeutic model of compensation for victims of sexual abuse. On the other hand, it is an opportunity lost by the State of New South Wales to lead by example and provide a symbolic message to other jurisdictions of the seriousness with which it regards sexual abuse. Sexual abuse victims and their advocates are left with little choice but to rally yet again for the gains they had already made, but have now lost.

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