



Royal Commission into Aboriginal Deaths in Custody Recommendation

4. Claims for compensation based on findings of Commissioners

That if and where claims are made in respect of the deaths based on the findings of Commissioners:

- a. Governments should not, in all the circumstances, take the point that a claim is out of time as prescribed by the relevant Statute of Limitations; and*
- b. Governments should, whenever appropriate, make the effort to settle claims by negotiation so as to avoid further distress to families by litigation.¹*

Background²	<p>The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) emphasised the need for a sensitive and nuanced approach towards addressing claims related to individual deaths in custody. The Commission re-examined the circumstances of ninety-nine deaths in custody. Several of these had occurred years prior to its establishment and had not been thoroughly investigated until brought to the attention of Commissioners.</p> <p>The RCIADIC uncovered a disturbing number of instances where systemic failures had either caused or contributed to these deaths and discussed avenues via which families might wish to explore the option of seeking compensation. Acknowledging the diverse attitudes and needs among family members might require different approaches, the Final Report recommended that Aboriginal families resolve these matters with the help of their legal advisers, enabling them to determine the best course of action.</p> <p>Two significant concerns were raised by the Commission for consideration by governments. Firstly, the potential for the time that had elapsed between a death in custody and the findings of the Commissioners to impact options for families and their legal representatives to make claims. Secondly, the need to minimise the emotional strain on families and proceed via negotiation wherever possible to avoid further distress of court-based hearings.</p>
Intent	Ensure that state and territory governments promptly address compensation claims and negotiate settlements where possible to minimise additional distress to affected families.
Responsibility	All state and territory governments.
Key contacts	Victorian Government Solicitor's Office; Victorian Aboriginal Legal Service (VALS).
Key action taken	
2005 Review³	The State Coroner advised that Recommendation 4 was relevant to civil law processes but not to coronial practice and legislation.

¹ *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991) vol 1, 99-100 ('RCIADIC').

² *Ibid* vol 1, 99-100 [3.3.93].

³ Aboriginal Justice Forum (Vic), Department of Justice (Vic), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (Review Report, October 2005) vol 1, 462 ('2005 Review').

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2018 Review⁴	Deloitte concluded that Recommendation 4 had been fully implemented in Victoria. This assessment was largely based on statements in the Victorian Government's 1993 Implementation Report, that the Statute of Limitations should not be invoked to prevent the hearing of claims for compensation cases where the hearing of such claims had been delayed by the length of the RCIADIC, and that it was in the interests of all litigants for claims to be settled by negotiation whenever possible.
Since then	<p>In Victoria, pursuing compensation after coronial inquests typically requires civil litigation under the <i>Wrongs Act 1958</i> (Vic). Claimants in wrongful death cases must demonstrate significant personal injury and may rely on evidence from coronial findings. The Victorian Aboriginal Legal Service (VALS) noted that compensation is challenging to obtain due to the strict psychiatric assessment requirements under this Act.</p> <p>In rare instances, compensation claims related to deaths in custody have become public. For example, Percy Lovett, long-term partner of Veronica Nelson, initiated a wrongful death lawsuit against the state of Victoria and four other entities.⁵ However, in most cases such claims are settled privately through confidential agreements. While this may spare the family further harm or trauma from prolonged litigation, as suggested by the RCIADIC, the confidentiality of these settlements means there is limited public information on the extent to which the Victorian Government has been involved and/or made payments in relation to compensation claims arising from deaths in custody.</p> <p>The Aboriginal Justice Caucus (AJC) and VALS advocate for more proactive efforts by the Victorian Government to settle claims arising from deaths in custody in good faith, including making ex-gratia payments.</p> <p>In other jurisdictions, ex-gratia payments have been made by governments in the wake of Aboriginal deaths in custody. An ex-gratia, or act of grace payment, is a discretionary payment made by the government when an individual suffers financial loss or harm due to government actions. This type of payment may be provided when the issue cannot be resolved or compensated through legal means, or when legal action is impractical. There are examples of ex-gratia payments being made in other jurisdictions⁶ in relation to Aboriginal deaths in custody, but similar examples were not found for Victoria.</p>

⁴ Deloitte Access Economics, Department of Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) 19-20 ('2018 Review').

⁵ Australian Associated Press, 'Veronica Nelson's partner launches lawsuit against Victorian government over death in custody', *The Guardian* (Web page, 9 January 2023) <<https://www.theguardian.com/australia-news/2023/jan/09/veronica-nelsons-partner-launches-lawsuit-against-victorian-government-over-death-in-custody>> ('Veronica Nelson's partner launches lawsuit against Victorian government over death in custody').

⁶ Jacob Kagi, 'Ms Dhu's Family Gets \$1.1m Ex-gratia Payment, State Apology for Death in Custody 'Tragedy'', *Indigenous Australians, ABC News* <<https://www.abc.net.au/news/2017-09-20/family-of-ms-dhu-handed-apology-million-dollar-ex-gratia-payment/8963980>>.

4. Claims for compensation based on findings of Commissioners

Evidence of impact

Authorising documents

Wrongs Act 1958 (Vic)⁷

This Act governs claims for damages for personal injury and death resulting from negligence or fault. Section 16 outlines liability for death caused wrongfully:

Whensoever the death of a person is caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

Limitation of Actions Act 1958 (Vic)⁸

Statute of limitations refers to legally set time limits within which a person can bring a lawsuit or begin legal proceedings against another party. Section 27H of this Act outlines that the time limit for taking legal action about a wrongful act or neglect causing death begins from the date of death.

For the purposes of the application of this Part to a cause of action that arises under Part III of the Wrongs Act 1958, the long-stop limitation period is deemed to run from the date of death of the deceased.

The Act defines the 'long-stop limitation period' in this case as 12 years.

Outputs

Due to the confidential nature of settlements, there is limited information regarding compensation paid in relation to Aboriginal deaths in custody examined by the RCIADIC, and those that have occurred since.

Outcomes

Despite the 2005 Review recommending that relevant compensation claims be reported to the Aboriginal Justice Forum, no records of such reports could be found.

Compensation claims following deaths in custody can be pursued through civil litigation under the *Wrongs Act 1958 (Vic)*, with the limitation being that legal action must be initiated within 12 years of a death. These court-based processes can be complex and may contribute to the distress and trauma experienced by families whose loved ones have passed in custody. While some claims become publicly known, many are settled privately, which conceals the extent of the Victorian Government's involvement in and/or payment of claims for wrongful acts or neglect contributing to deaths in custody.

Community views

Victorian Aboriginal Legal Service⁹

Through Wirraway, VALS offer culturally safe legal support and representation to families, particularly for deaths in custody. VALS has represented several Aboriginal families in coronial

⁷ *Wrongs Act 1958 (Vic)* ('*Wrongs Act*').

⁸ *Limitation of Actions Act 1958 (Vic)* ('*Limitation of Actions Act*').

⁹ Victorian Aboriginal Legal Service, 'One Year After Inquest Findings, More Must Be Done to Honour Veronica Nelson' 30 January 2024) <<https://www.vals.org.au/one-year-after-inquest-findings-more-must-be-done-to-honour-veronica-nelson/>>.

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inquests for deaths in custody, and continues to raise concerns about the time families must wait for answers:

Families often have to wait years to find out crucial information about how their loved ones have died. This is cruel and exacerbates a family's grief and trauma.

Lack of accountability for failures contributing to deaths in custody, means civil processes are often the last available option for families seeking justice:

So far, no individual or organisation has faced any disciplinary action or criminal prosecution for their involvement in Veronica's passing.

Related recommendations

2005 Review¹⁰

Recommendation 75

That the State Coroner and Department of Justice (Court Services) provide a report to the Aboriginal Justice Forum on whether any claims have been made and the Victorian Government's policy on this issue.

Assessment summary¹¹

The intent of Recommendation 4 was to ensure families could seek compensation in relation to deaths in custody without being hindered by the Statute of Limitations. It also encouraged governments to settle claims through negotiation to avoid the additional distress of litigation for bereaved families.

While civil processes exist for families seeking to make compensation claims, there is limited information on their accessibility, use or outcomes for Aboriginal families:

It would be advantageous to know what that data says regarding claims that were made...to be able to know if people have been able to navigate that system or how difficult it was. Families may not be aware that they can pursue these options. (Lawrence Moser, Chairperson, Eastern Metropolitan Regional Aboriginal Justice Advisory Committee (EM RAJAC)).

While we know of some families who sought compensation in relation to deaths in custody, the confidential nature of settlements and lack of publicly available information, limited the available evidence.

Aboriginal families need to be well-informed about options for seeking compensation. The Victorian Government should make ex-gratia payments to avoid further distress and trauma associated with litigation.

It's important our people are well informed in regard to whether they can or cannot make claims for compensation or pursue ex-gratia payments. (Bobby Nicholls, Chairperson, Hume RAJAC)

Funding agreements need to be amended, particularly with private prison providers so that there are financial consequences when a death in custody occurs, and funds can be made available to families.

In the funding agreements, procurement...going forward there must be a component in there around this particular issue and around the resourcing. (Lawrence Moser, Chairperson, EM RAJAC).

¹⁰ 2005 Review, 496.

¹¹ Meeting with Aboriginal Justice Caucus Working Group (Project Team, In Person 28 August 2024) ('Working Group Meeting (28 August 2024)'); Meeting with Aboriginal Justice Caucus (Project Team, In person, 23 October 2024) ('Aboriginal Justice Caucus (23 October 2024)').

Assessment of Recommendation 4

Is the intent of the recommendation accurately described?

Yes No

Does the action taken align with the intent of the recommendation?

0 – No action taken

1 – Action taken is of little relevance to the intent of the recommendation

2 – Action taken partially aligns with the intent of the recommendation

3 – Action taken fully aligns with the intent of the recommendation

1

(Score out of 3)

Is there evidence of the desired impact or outcome/s?

0 – No evidence

1 – Evidence of output rather than outcome

2 – Some evidence action contributed to outcome/s

3 – Clear link between action and impact or outcome/s

0

(Score out of 3)

How relevant is the recommendation in the current context?

0 – No relevance – refers to practices, agencies or laws that no longer exist

1 – Low – some relevance, but most aspects of the recommendation no longer apply

2 – Moderate – remains relevant, but some aspects of recommendation no longer apply

3 – High – entirely relevant to current context

3

(Score out of 3)

Does full implementation have the potential to reduce incarceration, increase safety in custody and/or progress Aboriginal self-determination?

0 – No potential to improve Aboriginal justice outcomes

1 – Low – potential to improve Aboriginal justice outcomes, but none of the three identified

2 – Moderate – potential to progress one or two of the outcomes identified

3 – High – potential to reduce incarceration AND increase safety in custody AND self-determination

1

(Score out of 3)

Potential actions for further work

Inform families about options for pursuing compensation for deaths in custody

Ensure families are well-informed about their options for pursuing civil compensation claims and/or ex gratia payments; avenues for accessing legal and other support to pursue these; and their rights to pursue additional claims if new information arises.

Advocate for the Victorian Government to provide ex-gratia payments

Encourage the Victorian Government to offer ex gratia payments to avoid additional distress of litigation.

Include financial consequences for deaths in custody in private prison contracts

Include financial consequences for deaths in custody in contracts/funding agreements for private providers of prison and/or custodial health services.

Immediate financial support for families after a death in custody

Provide families with a financial support payment to cover funeral expenses, travel, counselling and other assistance immediately after a person has died in custody (like payments made to families when a child passes in the care of the State). Agencies with custodial responsibilities must contribute to this fund.

Moderate priority for further work

Relevance and potential impact

		Low (0-2)	Moderate (3-4)	High (5-6)
Extent of action taken and evidence of outcomes	High (5-6)			
	Moderate (3-4)			
	Low (0-2)		Rec 4	

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