

29 July 2016

Director, Civil Law
NSW Department of Justice
By email: policy@justice.nsw.gov.au

Dear Director,

Review of the Victims Rights and Support Act

1. Community Legal Centres NSW (CLCNSW) thanks the NSW Department of Justice for the opportunity to respond to the review of the Victims Rights and Support Act 2013 ('the Act').

About CLCNSW

2. CLCNSW represents the network of 37 community legal centres (CLCs) throughout NSW. Victims support matters (particularly complex matters) make up a significant part of the work of many CLCs. Our members include:
 - 2.1 Wirringa Baiya Aboriginal Women's Legal Centre, a NSW state-wide service for Aboriginal women, children and youth, with a focus on assisting victims of crime;
 - 2.2 Women's Legal Service NSW, a state-wide service with a focus on domestic and family violence, sexual assault, family law, care and protection, victims support, discrimination and access to justice; and
 - 2.3 Many generalist (geographically-based) community legal centres that advise and represent clients in victims support matters.
3. Clients assisted by CLCs in NSW with victims support matters are predominantly victims/survivors of domestic violence and/or sexual assault including childhood sexual abuse as well as child abuse. As a result of many years experience in this area, some of our member CLCs have developed specialist knowledge in relation to assisting victims of sexual assault and domestic violence.
4. The majority of clients assisted by CLCs in relation to victims support matters are high needs clients: many have been very seriously affected by their experience of violence. As a result a significant number of CLCs' victims support clients are affected by a mental illness, drug and alcohol dependence, chronic unemployment, loss of their children to the child protection system, or other serious impact.
5. Approximately 20 CLCs in NSW participate in the CLCNSW Domestic Violence and

Victims Compensation Sub-Committee. CLCNSW, through its Victims Compensation Sub-Committee, has been actively involved in responding to various reviews of and amendments to the victims compensation and support legislation since its inception. We are well placed to assess the impact of the current Victims Support Scheme on vulnerable applicants and to provide insight and feedback to the NSW Government.

Use of language

6. Domestic and/or family violence occurs when one person tries to coerce or control another person in a range of 'domestic relationships' as outlined in section 5 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW). Family violence is the preferred term to encompass the complex interaction of kinship structures and extended family relationships in Aboriginal and Torres Strait Islander communities. When we use the term 'domestic violence' in this submission it is intended to also include family violence.
7. We note that some people who have been subjected to violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission we use the term 'victim' which is intended to be inclusive of both victims and survivors.

Feedback following first 12 months operation of the scheme

8. Following the first 12 months operation of the Act CLCNSW wrote to then Attorney General the Hon Brad Hazzard MP on 16 June 2014. The purpose of the letter was to raise concerns about aspects of the scheme and to make recommendations intended to improve the scheme, particularly for victims of domestic violence, sexual assault and child abuse.
9. Many of the issues raised in that letter continue to be issues of concern today. We attach a copy of that letter as part of our submission to this review. Many of the recommendations included below were included in that letter dated 16 June 2014. We have revised some of the recommendations. The issues we raise in this submission are intended to supplement our letter dated 16 June 2014.

Current review

10. At the outset we would like to acknowledge the importance of a victim support scheme. Consistent with human rights obligations it is vital that victims can access counselling and financial support and that the harm they have suffered as a result of one or more acts of violence is recognised.
11. We also acknowledge the work of Victims Services in supporting victims/survivors of violence. CLCs tend to see clients when things are not working well. For this reason this submission primarily focuses on suggestions for improvement of the current scheme. This is not to say that there isn't also exemplary work by Victims Services.
12. We further acknowledge that the NSW Government has since addressed the retrospective nature of the legislation by providing those who had lodged a victims compensation application which had not been finally determined before the 7 May 2013 with the opportunity to apply for reassessment of their matter under the old scheme. We commend the NSW Government for taking action on this issue. We

also make recommendations for improvements to the reassessment process in the final section of this submission.

Summary of recommendations

13. In summary we recommend:

- 13.1 If a person is able to establish an act of violence and injury occurred to the standard of proof of “reasonable likelihood” that should be sufficient. The form of evidence should not be prescribed.
- 13.2 In the alternative to non-prescription of documentary evidence, extend the documentary evidence allowed to include documentation from NGOs.
- 13.3 Remove the requirement to prove injury in cases of sexual assault, including child sexual abuse, domestic violence and child abuse, except when necessary to establish aggravating circumstances for a higher category of recognition payment, that is, “serious bodily injury”, “offensive weapon”, “carried out by 2 or more persons”, “one of a series of related acts”, or “grievous bodily harm”.
- 13.4 NSW Police receive training such that they include a list of injuries in addition to the act of violence in their reports.
- 13.5 Consideration of a new category of recognition payment that recognises multiple injuries as a result of multiple acts of violence that could be described as a global injury.
- 13.6 Removing upper time limits on recognition payments for victims of domestic violence, sexual assault and child abuse.
- 13.7 Removing the 2-year time limit for financial assistance for victims of domestic violence, sexual assault, child sexual abuse and child abuse including for loss of actual earnings and medical and dental expenses.
- 13.8 Choking, suffocation, strangulation or attempts to choke, suffocate or strangle should be specifically included at a minimum as a Category C recognition payment.
- 13.9 Better recognition of physical and psychological forms of domestic violence through higher recognition payments.
- 13.10 Category B recognition payments should be expanded to include domestic violence involving violence that is one of a series of related acts.
- 13.11 Acts of violence currently resulting in a Category B recognition payment should be elevated to Category A (\$15,000).
- 13.12 Amending the Act so that children of primary victims, who are under 18 at the time of their parent’s/carer’s death, should automatically qualify for a Category A payment.
- 13.13 Amending the Act so that spouses and de facto partners of primary victims of homicide automatically qualify for a Category B payment.

- 13.14 Victim Services actively supports victims to evidence claims of economic loss or provide appropriate referrals when they are unable to do so.
- 13.15 Improving access to economic loss payments for victims engaged in casual work.
- 13.16 Clarification and simplification of the calculation of loss of actual earnings and that the method of calculation is embedded in the victims support legislation.
- 13.17 Amending the Act to allow an application for internal review to be lodged outside the 28 day time limit where there are exceptional circumstances.
- 13.18 Amending the Act to ensure external review is available for all claims for financial assistance, including immediate needs and economic loss.
- 13.19 The addition of a new victims support payment called a Disability and Domestic and Family Violence Crisis payment.
- 13.20 Greater transparency in the Victims Services data published relating to the new scheme including the publishing of data as outlined in paragraph 117 below.
- 13.21 Victims Services requests all records relating to a client's contact with a service rather than narrowing by date.
- 13.22 A question be added to the Victims Support application form to the effect of "If you are unable to identify the medical services you have used but believe Medicare may have a record tick the box and someone from Victims Services can contact you to discuss."
- 13.23 If the requirement to report to a government agency continues Victims Services should consider improving pathways to all federal agencies, including Centrelink.
- 13.24 Victims Services obtains records of all police evidence held in relation to the application for support.
- 13.25 Victim Services provides listing dates in all matters and clearer communication about delays
- 13.26 The publishing of case studies on decisions by Victims Services on their website.
- 13.27 Clarification about the circumstances in which a support coordinator will be appointed to an applicant.
- 13.28 Providing victims with access to funded legal assistance for their claims, particularly victims of domestic violence, sexual assault, child sexual abuse and child abuse.
- 13.29 Amending the legislation so that Victims Services can pay for medical expenses and freedom of information expenses separate to financial assistance.

13.30 Victims of domestic violence, sexual assault, child sexual abuse or child abuse must be able to elect whether or not restitution is pursued.

13.31 With respect to reassessment of transitional matters the government:

13.31.1 extend the deadline for making an application to 1 September 2020;

13.31.2 provide discretion to extend the time limits on responding to requests for evidence; and

13.31.3 continue work on a widespread communications strategy that encompasses a broad range of services and includes culturally appropriate media.

13.32 The Commissioner of Victims Rights should be established as independent to government.

Documentary evidence, inadequate recognition of domestic violence and time limits

14. The case study below highlights some of the issues applicants commonly face under the Act. We believe it evidences the need for reforms to the Act.

Case Study 1

Bridget (not her real name) is an Aboriginal woman. Bridget had been in a violent relationship on and off for many years and had several children to the alleged perpetrator. Bridget left NSW to escape the alleged perpetrator but he got details about where they were living from conversations with the children and followed them. When she returned to the area police assisted Bridget to obtain an apprehended domestic violence order (ADVO) but the alleged perpetrator was very good at evading service. Finally he was served with the ADVO but the violence and harassment only really stopped when he re-partnered.

Most of Bridget's economic loss happened more than 2 years ago when she left the area to escape the alleged perpetrator so these amounts could not be recovered due to the 2-year time limit. During much of the violence Bridget had young children in her care so did not attend hospital for her injuries and as such she did not have medical evidence of physical injuries. Nor had Bridget discussed the violence with her GP or a counsellor.

Bridget saw a Victims Services approved counsellor for two sessions to obtain evidence of psychological injury for her Application but did not want to continue with the sessions. A community legal centre assisted Bridget to make two Applications for periods when Bridget was in a relationship and separated. Bridget was awarded two recognition payments of \$1,500 each.

Standard of proof and documentary evidence

15. This case study highlights the challenges in obtaining the necessary documentary evidence for financial assistance for economic loss or a recognition payment. This is particularly an issue in trying to establish an assault resulting in grievous bodily

harm. More detailed information about these issues is contained in our letter dated 16 June 2014.

16. The Royal Commission into Institutional Responses to Child Sexual Abuse recommends that a standard of proof of “reasonable likelihood” should be adopted for a redress scheme that would provide higher financial payments (up to \$200,000) than those that are available under the *Act*.¹ The Royal Commission describes this standard as “higher than plausibility but lower than the balance of probabilities”.
17. The Royal Commission considered a number of options for standard of proof for the redress scheme, including balance of probability and plausibility, but did not recommend a standard of proof of balance of probabilities because the redress scheme it recommended for victims of child sexual abuse would not be compensating victims according to common law principles.² Similarly, a recognition payment that is available under the *Act* is not compensation assessed according to common law principles. Rather, as the name indicates it is intended to be a recognition of the harm caused by the act of violence.
18. As noted by the Royal Commission, the Senate Community Affairs References Committee also recommended a standard of proof of “reasonable likelihood” when it recommended a national reparations fund for victims of abuse in institutions and out of home care.³
19. Given the extensive inquiry undertaken by the Royal Commission and the fact that similar recommendations are being called for in other inquiries, we recommend the standard of proof be “reasonable likelihood”.
20. We refer to the Victims Services data profiles for recognition applications. In 2013-14 there were 5,580 applications for recognition payments, 1,551 claims were determined and 278 claims were dismissed.⁴ We presume this refers to 278 recognition payments. 30.9% (86) of the claims that were dismissed were due to finding no act of violence.
21. In 2014-15, there were 7,439 applications for recognition payments, 5,490 claims were determined and 728 claims were dismissed. Again we presume this refers to 728 recognition payments. Of these 58% (422) were dismissed due to a finding of no act of violence.
22. We acknowledge that the rates of dismissal under the new scheme are lower than under the old scheme.
23. However, we posit that the strict documentary requirements may be a contributing factor to not establishing an act of violence.
24. It would be useful to include a break down of reasons why an act of violence is not established in the data profiles, including documentary requirements.

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, Recommendation 57.

² *Ibid* at 367-376.

³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper into Redress and Civil Litigation*, 2015, at 171.

⁴ We note the transitional claims are not included in this number.

25. It would also be useful for Victims Services to keep statistics on the number of people they talk to regarding documentary evidence requirements and time limits and the number of people who say they do not have the necessary documentary evidence or are outside the time limit. It would be useful to break these into categories, including domestic violence, sexual assault, child sexual abuse and child abuse and include as a number and percentage.
26. If a person is able to establish an act of violence and injury occurred to the standard of proof of “reasonable likelihood” that should be sufficient. The form of evidence should not be prescribed.
27. In the alternative to non-prescription of documentary evidence, extend the documentary evidence allowed to include documentation from NGOs.

Inadequate recognition of domestic violence and sexual assault

28. CLCNSW is strongly of the view that none of the current recognition payment categories adequately acknowledge the harm caused as a result of sexual assault, including child sexual abuse, domestic violence and child abuse.
29. While we acknowledge that the recognition payment is intended to be symbolic and that no amount of money may adequately compensate for the harms perpetrated by crimes, in our experience the small sums awarded as a recognition payment for sexual assault, including child sexual abuse, domestic violence and child abuse sends a message to victims of violence that their experiences are insignificant and of little consequence.
30. We are particularly concerned that domestic violence and sexual assault are inadequately recognised.
31. Working within the existing categories, we recommend that acts of violence currently resulting in a Category B recognition payment should be elevated to Category A.
32. We are also concerned that many victims of domestic violence are only eligible for a Category D payment of \$1,500.
33. This is reflected in the statistics included in the Australian Government’s response to the United Nations Joint Communication from Special Procedures dated 17 February 2015. Of the 360 recognition payments received by victims of domestic violence in 2013-14, 64% were Category D and 36% Category C.⁵
34. On 1 September 2015 a regulation commenced enabling claimants who had lodged their application but not had it finally determined before 7 May 2013 to apply for reassessment under the old scheme.
35. CLCs are starting to receive decisions in reassessment matters. The contrast in payment for injuries as a result of domestic violence, sexual assault and child sexual abuse under the old scheme compared to the new scheme is significant.

⁵ Australian Government’s response to the United Nations Joint Communication from Special Procedures, 17 February 2015 at paragraph 1.22 accessed on 18 July at: [https://spdb.ohchr.org/hrdb/29th/Australia_17.02.15_\(6.2014\).pdf](https://spdb.ohchr.org/hrdb/29th/Australia_17.02.15_(6.2014).pdf)

36. For example, in one matter involving repeated sexual assaults in the context of a long history of domestic violence which also included physical and psychological abuse, an applicant received a Category B payment of \$10,000. As she applied more than 2 years after the act of violence she was ineligible for the special grant payment. Upon reassessment under the old scheme the applicant received a determination of \$45,000.
37. In a matter where the applicant was sexually assaulted, she was awarded a Category C recognition payment of \$5,000 and as she applied within 2 years of the act of violence a \$5,000 special payment. Upon reassessment under the old scheme the applicant received a determination of \$18,000.
38. Several applicants who were awarded \$1,500 recognition payment for domestic violence and were ineligible for the special grant due to the time limit have been awarded \$10,000 upon reassessment.
39. A victim of repeated child sexual abuse was awarded a Category B recognition payment of \$10,000 and was ineligible for the special payment due to the time limits. Upon reassessment she was awarded over \$42,000.

Removal of injury requirement in sexual assault, domestic violence and child abuse

40. We submit that sexual assault, including child sexual abuse, domestic violence and child abuse, by their very nature result in an injury.
41. Therefore, we recommend removing the requirement to prove injury in cases of sexual assault, including child sexual abuse, domestic violence and child abuse, except when necessary to establish aggravating circumstances for a higher category of recognition payment, that is, “serious bodily injury”, “offensive weapon”, “carried out by 2 or more persons”, “one of a series of related acts”, or “grievous bodily harm”.
42. We acknowledge that injury is specifically mentioned in some aggravating factors such as “serious bodily injury” and “grievous bodily harm” which if proved would result in a higher recognition payment. We recommend that in cases of sexual assault and/or domestic violence proof of injury should be limited to such aggravating factors only.
43. We further acknowledge this will require an amendment to the definition of act of violence in s 19, to remove the reference to injury.
44. We are concerned that both physical and psychological forms of domestic violence are inadequately recognised and that this needs to be addressed in this review.
45. There also seems to be an anomaly where the Act rightfully recognises the impact of ongoing sexual assault and makes a higher payment for this, being a Category B recognition payment (which we recommend becomes a Category A recognition payment), but fails to recognise the impact of ongoing and prolonged domestic violence. Mirroring the sexual assault provisions we recommend Category B recognition payments should be expanded to include domestic violence involving violence that is one of a series of related acts.

Time limits

46. As the case study above highlights the time limits for economic loss are also too restrictive.
47. Similarly, the 2-year time limit (or 2 years after the day of turning 18 years) for financial support for medical and dental expenses is too restrictive. While there are exceptions to the time limits for victims of child sexual abuse with respect to some forms of financial assistance - such as out-of-pocket expenses and expenses associated with criminal or coronial proceedings - significantly, these do not include medical and dental expenses.
48. In the second reading speech Minister Hazzard on behalf of the then Attorney General states *"Victims need to be supported while they recover and come to terms with what has happened."*
49. Minister Hazzard also states the new scheme is an *"infinitely better response to victims"* because it

provides a package of practical and financial support that is tailored to victims' individual needs and provided to victims at the time they need it.
50. CLCNSW agrees that victims need to be supported while they recover but submits the recovery does not always happen within the first two years of the relevant act of violence. To be truly *"tailored"* and responsive to the *"victims' individual needs"* financial assistance, particularly for victims of domestic violence, sexual assault, child sexual abuse and child abuse needs to be expanded beyond 2 years.
51. The 2013-14 Victims Services data profiles regarding financial support applications show that 7.4% (206) of applicants applied for financial support outside the two-year time limit. The 2014-15 data profiles show 11.1% (431) applicants applied for financial support outside the two-year time limit.
52. We recommend the removal of the 2-year time limit for financial assistance for victims of domestic violence, sexual assault, child sexual abuse and child abuse, including loss of actual earnings and medical and dental expenses.
53. There are a range of well documented reasons, including those outlined in our letter dated 16 June 2014, as to why victims of domestic violence, sexual assault, including child sexual abuse, and child abuse may delay reporting the violence and seeking assistance. Victims' access to medical and dental services should not be limited because of a delay in reporting.
54. Further, according to the *Victims Compensation Review Report*, the Government commissioned report into the old victims compensations scheme, the victims compensation schemes in other jurisdictions reviewed within Australia and the United Kingdom include exceptions to time limits.⁶
55. Additionally, clients seeking assistance from CLCs are finding they are excluded from accessing justice due to the 10-year upper time limit (or 10 years after the day

⁶ PricewaterhouseCoopers, *NSW Department of Attorney General and Justice Review of the Victims Compensation Fund*, 12 July 2012 at 98.

of turning 18 years if the act of violence happened as a child) for victims of domestic violence, sexual assault and child abuse in accessing recognition payments.

Case Study 2

Yvonne (not her real name) was the victim of serious and ongoing child abuse by her father. Abuse included attempted strangulation and assaults with a weapon. When she was in her forties Yvonne approached a legal centre for advice about seeking victims support for the abuse only to be told that she was outside the time limit for any type of support other than counselling.

56. Time limits acting as a barrier to accessing justice is also borne out in the data profiles provided on the Victims Services website. In 2013-14, 11.4% (636) of recognition payment applications were lodged more than 10 years from the act of violence. In 2014-15, 13.7% (1019) were lodged more than 10 years after the act of violence.
57. It would be useful to publish the break down by category, including domestic violence, sexual assault, child sexual abuse and child abuse. While there is no time limit to apply for a recognition payment relating to child sexual abuse we anticipate the number of people applying for a recognition payment after 10 years would include more categories than child sexual assault alone.
58. We recommend the removal of time limits for recognition payments for victims of domestic violence, sexual assault and child abuse.

New category for global injury

59. CLCs have been seeing clients who due to the trauma of being subjected to multiple acts of violence by multiple perpetrators over an extended period of time are often not able to recall the details required to support a single or multiple victims support claims, such as lining up dates of acts of violence with the relevant perpetrator. We include below a case scenario of how such victims often present.

Case scenario

Victims are often aged between 40 – 60 years.

They have often been victims of child sexual abuse which has not been reported. Therefore, there is no or little evidence to support a claim for child sexual abuse.

They have often been in a series of domestic violence relationships for which there may be evidence but they are generally ineligible for financial support or a recognition payment due to the time limits.

Where domestic violence and sexual assaults have occurred within the last 10 years they may not have the necessary evidence – for example, due to the impact of trauma they are not able to line up dates of acts of violence with a relevant perpetrator.

They often become fixated on the fact that their injuries and the impact their injuries have had on their lives is not recognised, for example, through a recognition payment. This causes them distress and compounds their trauma. They tell us this makes them

feel like no one cares.

They find it difficult to engage with support services in a meaningful way, for example, they may not be able to mitigate their injuries by regularly attending counselling.

60. What is very clear from the victims who present as outlined in the case scenario above is that they have suffered significant injuries as a result of the multiple acts of violence.
61. Given the intended beneficial nature of the victims support scheme we seek ways to improve access to justice, particularly for those who have experienced a life time of trauma. It is important to ensure all victims receive the support they need.
62. We submit that a trauma informed response should meet such victims where they are at and recognise the harm they have endured. We believe such recognition is important in the rehabilitation and recovery process which is the goal of the victims support scheme.
63. One way to achieve this is through the consideration of a new category of recognition payment that recognises the enormous impact of multiple acts of violence that could be described as a global injury. We recommend this be a Category B recognition payment and that there be a different threshold of evidence that does not require dates being matched to perpetrators and injuries.
64. If a global injury category is introduced and a victim is awarded such a recognition payment consideration would need to be made about how this could affect their right to make an individual claim for victims support against one of the perpetrators – it may be that they are ineligible to make such a claim or that the claim is offset against the individual claim.

Loss of earnings

65. Establishing loss of earnings is particularly difficult for unrepresented applicants.
66. As outlined in the victims support application form establishing loss of earnings generally requires collection of evidence from the victim's employer, including a letter that outlines not only the time taken off work without pay but the reason why leave is taken.
67. Some victims of violence, particularly victims of domestic violence and sexual assault may be reluctant to claim for economic loss for many reasons, including fear, shame and embarrassment about telling their employer their absence from work is due to such violence. This is a further barrier to claiming loss of earnings. CLCNSW recommends victims be informed by Victim Services and assisted to obtain alternative forms of evidence or referred to appropriate services if Victim Services is unable to assist. The application form should also be amended to indicate alternative forms of evidence can be accepted.
68. For those engaged in casual work if they refuse work, for example because they are in hospital or attending court, they are not eligible to claim this as loss of earnings. This should be reconsidered.

Case Study 3

Susan (not her real name) was a victim of sexual assault. She was a casual worker and experienced a significant drop in her income in the year following the sexual assault due to a number of factors that were directly connected to the harm caused by the sexual assault.

Susan worked three jobs on a casual or sessional basis. While she was recovering from the sexual assault she accepted fewer casual work opportunities. She also had to move because the assault occurred in a very small community. She could not provide a letter from an employer saying she was absent from work on particular dates.

Susan was not awarded any assistance for loss of income even though the records for her taxable income indicated that the drop in her income was connected to the sexual assault and she could provide evidence that she had in fact refused offers of work more often following the sexual assault. This did not satisfy the requirements in section 39(4)(b) of the Act.

Calculation of “actual loss of earnings”

69. A further issue relates to the way actual loss of earnings is calculated. The process of calculating loss of earnings is complex and convoluted and is not likely something which could be navigated by the ordinary person.
70. Further, we understand that Victims Services reads the provisions relating to the weekly loss of earnings as being a static rate, capped at the *Workers Compensation Act* rate as at 30 September 2012 rather than an indexed rate. We do not believe it was the intention of the drafters that a static rate be applied to the calculation of loss of actual loss of earnings.
71. We recommend clarification and simplification of the calculation of loss of actual earnings and that the method of calculation is embedded in the victims support legislation and indexed.
72. We recommend further consultation on this issue.

Counselling

73. The increased access to counselling in regional, rural and remote areas is a positive aspect of the new Victims Support scheme. However, some CLCs report continuing challenges in this area.
74. Where a victim is already engaged in counselling with someone who is not a Victims Services Approved Counsellor and does not meet all the criteria to become an Approved Counsellor and there is a benefit to the client in continuing the counselling with the existing counsellor, for example, so as to avoid disrupting the counselling relationship and having to establish trust with another counsellor whom they might only be able to access, for example, by telephone or skype, we suggest consideration of special arrangements. For example, there could be discretion for this counsellor to receive payment for services from Victims Services, including to prepare the required report where the counsellor is supervised by someone with the

requisite experience and the client is informed of this.

75. Another way to further improve access to Approved Counsellors for victims in regional, rural and remote areas is to provide access to courses in these areas for counsellors that are free of charge or at a subsidised rate.
76. We welcome the opportunity for qualified counsellors who might not be Victims Services Approved Counsellors to apply to be an Approved Counsellor for the sole purpose of continuing counselling with an existing client and providing relevant medical evidence to Victims Services.
77. It is important that Approved Counsellors are culturally competent. We have received feedback that suggests this is an area for continued improvement.

Review mechanisms

78. Under the old Victims Compensation scheme, applicants could appeal to the Victims Compensation Tribunal or the District Court on a question of law within 3 months after the day on which the relevant notice of determination had been served, with the possibility of further time in “exceptional circumstances”.⁷
79. Under the new scheme, applications for internal review and for external review to the NSW Civil and Administrative Tribunal (‘the Tribunal’) must be filed within 28 days from receiving the Notice of Decision. Given the new scheme does not require legal representation and given the particular vulnerabilities of many victims of violence this timeframe does not provide applicants with sufficient time to access a lawyer to obtain legal advice and to consider the decision and review options.
80. CLCNSW recommends introducing a discretion to allow an extension of time for an internal review as applies to the external review. The current lack of discretion is at odds with the intended beneficial nature of the legislation for victims and is an unusual practice.
81. We are also concerned about the limited external review options for claims for financial assistance; applications for review to the Tribunal are limited only to recognition payments.
82. We recommend external review be available for all claims for financial assistance, including immediate needs and economic loss.

Disability and Domestic and Family Violence Crisis payment

83. We note that People with Disability Australia has raised the important issue of the need for the NSW victims support scheme to be more responsive to the needs of victims of violence with a disability.
84. Disability support, for example, for attendant care in a refuge or for an Auslan or sign interpreter, is very expensive. The cost of such support may be a barrier to leaving situations of domestic violence.
85. Victims of violence with a disability may currently be able to claim such expenses as

⁷ *Victims and Support Rehabilitation Act 1996* s 36(3) and s39(2)

immediate needs. However, this means they would likely have to choose between these expenses and for example, clothing and furniture.

86. People with Disability Australia (PWDA) proposes the addition of a new victims support payment called a Disability and Domestic and Family Violence Crisis payment.
87. They propose this payment should be modelled on the Victorian Family and Domestic Violence Crisis Response Initiative, which is:
 - 87.1 A maximum of \$9000 over 12 weeks;
 - 87.2 Available for women with disability and/or women whose child/ren have disability (however, this should be guided by self-identification of disability in collaboration with a domestic and family violence service provider, in line with World Health Organisation definition);⁸ (though PWDA recommends this should extend to all victims of domestic violence with disability where act of violence took place in NSW)
 - 87.3 Covers the standard array of disability supports, including: personal care, Auslan or sign language interpretation, assistance providing care for children, assistance with meal preparation, shopping, etc
88. Given the National Disability Insurance Scheme (NDIS) does not provide a crisis response service the need for a Disability and Domestic and Family Violence Crisis payment is all the more important.
89. If the NDIS is unable to provide the required assistance before the end of the 3-month period, the Disability and Domestic and Family Violence Crisis payment should be available for up to an additional 3 months.
90. This payment should be a separate payment and not included in the \$5,000 maximum amount for immediate needs, \$30,000 maximum amount for economic loss or in the recognition payment. Victims of crime with a disability should not be required to choose between needs. Rather their varying needs should be adequately met.
91. CLCNSW endorses this recommendation. CLCNSW understands the need for support has particularly been identified with respect to women with disability seeking access to emergency accommodation, given the gendered nature of such violence. We support all victims of domestic violence in NSW with disability being able to access this payment.
92. Implementation of this recommendation would be consistent with the objects of the *Victims Rights and Support Act*⁹ and the NSW Domestic and Family Violence Justice Strategy to ensure the justice response is “an accessible system” including for people with disability.¹⁰

⁸ World Health Organisation, Definition of disabilities accessed on 13 July 2016 at: <http://www.who.int/topics/disabilities/en/>

⁹ *Victims Rights And Support Act 2013*, section 2 and section 17

¹⁰ Department of Justice, *NSW Domestic and Family Violence Justice Strategy* at 12 and 20.

Gendered impact of changes to victims support

93. At the time the Victims Rights and Support Bill was introduced CLCs and many other community, women's and human rights organisations expressed concern that the new scheme would provide less support particularly for victims of domestic violence, sexual assault, child sexual abuse and child abuse.¹¹
94. Given the gendered nature of domestic violence and sexual assault it was feared the changes would disproportionately impact on and discriminate against women.
95. It was anticipated that documentary evidence requirements – to report to the police or a government agency in addition to a medical report for financial assistance for economic loss and recognition payments - short time limits and inadequate recognition payments, particularly relating to domestic violence and sexual assault, would be particular barriers to accessing the scheme.
96. Furthermore, where victims have sustained a serious psychological injury, for example, through domestic violence or sexual assault, their capacity to work may have been diminished so they are less likely to be employed full-time, if at all which would impact upon access to the \$20,000 for loss of actual earnings of the \$30,000 for economic loss.
97. Additionally there was concern expressed that even those victims of domestic violence, child abuse and sexual assault who were not otherwise excluded from these payments due to time limits may not have the necessary receipts or documentation to substantiate their claim, leaving them with only a modest recognition payment.¹²
98. In the second reading speech Minister Hazzard said:

While those amounts [recognition payments] are less than the maximum amounts of compensation available under the Victims Compensation Scheme, they are in addition to financial assistance available for immediate needs and longer-term expenses.
99. CLCNSW believes the Australian Government's response to the United Nations Joint Communication from Special Procedures about the Victims Rights and Support Act 2013 supports the view that victims of domestic violence and sexual assault are disproportionately impacted by the changes to victims support.
100. In 2013-14 there were 3,363 applications from victims of domestic violence for counselling, yet only 310 awards of immediate needs for victims of domestic violence, 91 victims of domestic violence claimed for economic loss¹³ and 360 victims of domestic violence received a recognition payment.¹⁴

¹¹ Urgent appeal to the United Nations Special Rapporteur on Violence against Women on the introduction of the Victims Rights and Support Bill 2013 NSW Australia, 17 May 2013.

¹² This may be due to the passage of time, or because of the nature of the injury may make it especially difficult to collect and keep such documentation.

¹³ The number of claims awarded is not provided.

¹⁴ Australian Government's response to the United Nations Joint Communication from Special Procedures, 17 February 2015 at paragraphs 1.19 – 1.22.

101. Similarly, in 2013-14 there were 1,732 applications from victims of sexual assault for counselling yet only 51 awards for immediate needs, 44 payments for economic loss and 187 recognition payments.¹⁵
102. This means of the number who applied for counselling only 11% of domestic violence and sexual assault victims received a recognition payment, only 3% of domestic violence victims applied for and only 3% of sexual assault victims were awarded financial assistance for economic loss and only 3% of sexual assault victims and 9% of domestic violence victims were awarded immediate needs payments.
103. In contrast, in 2012-13 under the old scheme, 5,723 applications for counselling were made and 6,660 applications for compensation were received, that is applications for compensation exceeded applications for counselling.¹⁶
104. While noting the importance of counselling, financial support and recognition payments are also important.
105. An analysis of the data provided in the Victims Services data profiles for 2013-14 shows very different figures to those provided to the Special Rapporteur for the same time period. The figures provided by the Australian Government to the Special Rapporteur are provided below in parenthesis.
106. Based on the percentages provided in the Victims Services data profiles for 2013-14 a similar number of victims of domestic violence applied for counselling, that is, 3329 people (compared to 3,363).
107. The breakdown for financial support into immediate needs and economic loss is not provided in the Victims Services data profiles, but 829 domestic violence victims claimed for financial support (compared to 310 awards for immediate needs and 91 claims for economic loss).
108. According to the Victims Services data profiles 1696 victims of domestic violence *claimed* for recognition payments (compared to 360 being awarded recognition payments).
109. Similarly, Victims Services data profiles for 2013-14 show 1729 applications by sexual assault victims for counselling (compared to 1,732); 348 *claims* for financial support (compared to 95 awards for immediate needs and economic loss); and 1244 *claims* for recognition payments (compared to 187 victims of sexual assault being awarded a recognition payment).
110. Despite the difference in language between “claims” in the Victims Services data profiles and “awards” in the figures provided to the Special Rapporteur, the higher figures in the Victims Services data profiles still confirm that the majority of victims of domestic violence and sexual assault are not claiming for financial support.
111. In 2013-14 only 25% of victims of domestic violence who applied for counselling also applied for financial support. Similarly, only 20% of sexual assault victims who applied for counselling also applied for financial support.

¹⁵ Ibid.

¹⁶ *Victims Compensation Tribunal Chairperson's Report 2012-13* at 10-11.

112. In the 2014-15 Victims Services data profiles only 35% of victims of domestic violence who applied for counselling also applied for financial support. Similarly, only 25% of sexual assault victims who applied for counselling also applied for financial support.
113. We submit that while the new scheme provides financial support to some victims of domestic violence and sexual assault, given the high number of such victims who are not accessing this support the scheme is not working as the government intended.
114. The government should look closely at the reasons why so few victims of domestic violence and sexual assault are accessing financial support. We submit many of those reasons have been outlined above. The government should take the opportunity of this legislative review of the Act to remove any barriers so victims can access the support they need.

Need for transparency

115. The difference in the figures provided to the Special Rapporteur compared to the Victims Services data profiles highlights the need for greater transparency in reporting data under the new scheme.
116. Comprehensive data about the old scheme was provided in the annual Victims Compensation Tribunal Chairperson's report. Data included:
- Number of applications received over a 5 year period
 - Number of applications received by gender, age, type of offence
 - Number of applications from primary victims by gender and age
 - Number of applications pending
 - Number of awards
 - Average payment
 - Percentage of offences claimed in compensation claims
 - Percentage of claims awarded by amount
 - Number of awards made in each of the sexual assault categories, psychological or psychiatric disorder categories and domestic violence categories
 - Number of dismissals over a 5 year period and reasons for dismissal by percentage
 - Number of applications lodged out of time, including by category
 - Number of applicants who were legally represented
 - Number of appeals lodged, determined and pending and grounds for appeal
 - Number of appeals from the Tribunal to the District Court
 - Status of appeals to the Supreme Court and Court of Appeal
 - Number of counselling applications received over a 5 year period
 - Number of counselling applications received by gender and age

- Percentage of offences claimed in counselling claims
- Number of responses to the client satisfaction survey and responses
- Amount recovered through restitution
- Number of restitution hearings
- Number of claims received by Aboriginal and/or Torres Strait Islander people over the last 5 years
- Summary of offence claimed by Aboriginal and/or Torres Strait Islander people
- Number of applications from family members and number of claims awarded, refused and dismissed

117. At a minimum the following data should be published annually

- Number of applications received, awarded, pending and dismissed for every year of the new scheme until it reaches 5 years and then include the last 5 years for:
 - counselling,
 - financial assistance – immediate needs
 - financial support – economic loss
 - recognition payments
 - received – this should cover a period of 5 years
- The data above by gender and age for the last 12 months
- Average payment for immediate needs, economic loss, recognition payments
- Number and percentage of applications for counselling, financial assistance for immediate needs, financial support for economic loss – including a breakdown of actual loss of wages - recognition payments that were received, awarded, pending and dismissed as a result of domestic violence and sexual assault, including a breakdown (number and percentage) of recognition payment categories as was provided in the Australian Government's response to the Special Rapporteurs.
- Number and percentage of assaults resulting in grievous bodily harm (GBH) claims where the GBH is a psychological injury have been awarded? Of these the number and percentage assisted by Victims Services alone in each financial year since the commencement of the new scheme? Where the client has been assisted by an advocate? Where the client has been legally represented?
- Average payments for immediate needs, economic loss and recognition payments as a result of domestic violence and/or sexual assault.
- Number and percentage of claims involving domestic violence and/or sexual assault which were refused or assistance was reduced due to s44 factors with a breakdown by number and percentage of each of the s44 factors.
- Number of applications lodged out of time and the number and percentage of these relating to domestic violence and/or sexual assault.

- Shortest, longest and average time to determine applications for financial assistance for immediate needs, financial support for economic loss, recognition payment and counselling.
- Number of applicants who are legally represented.
- Dismissal rates for represented and unrepresented claimants for financial assistance for immediate needs, financial support for economic loss and recognition payments by number and percentage.
- Number of internal and external reviews lodged, determined, pending and settled before a decision is made and the grounds for appeal.
- Status of appeals to the Supreme Court and Court of Appeal.
- Number of responses to the client satisfaction survey and a summary of responses.
- Once matters are finalised
 - Amount recovered through restitution
 - Number of restitution hearings
- Number of claims received by Aboriginal and/or Torres Strait Islander people over the last 5 years, including by gender and age.
- Summary of offence claimed by Aboriginal and/or Torres Strait Islander people.
- Number of applications from family members and number of claims awarded, refused and dismissed.
- Number and percentage of unsuccessful claimants who sought internal review, the number and percentage who were legally represented in this process and the number and percentage of both represented and unrepresented claimants who were successful in their review.

Practice issues

Application form

118. CLCNSW notes some people have difficulties in opening the victims support application form. There needs to be greater accessibility for mac users. On occasions there are also system failures when pressing the submit button does not result in the provision of a receipt number.
119. There should be separate sections for immediate needs and economic loss, particularly as there are different evidentiary requirements.
120. We note there is very useful information in the help section of each question. We recommend that when a person clicks on an aspect of their claim that the information available through the help button is automatically made visible. People might not otherwise see this useful information.
121. The items listed as examples of financial assistance are mostly medical items. Security is also listed. We recommended adding relocation costs, furniture, housing expenses and child care.

Collection of evidence

122. Several CLCs have expressed concerns about the approach of some Victims Services staff to evidence collection.
123. For example, an application for medical evidence by Victims Services may provide dates that are too narrow, such as the date of the assault. Such a practice fails to recognise that relevant disclosures of violence or injury are not always made in proximity to the date of the act of violence. This may result in a claim failing due to insufficient evidence.
124. Some CLC solicitors when inspecting files have seen correspondence responding to Victims Services requests for medical evidence stating that while they had records for a client they did not provide them as they did not fall within the dates stipulated by Victims Services.
125. CLCNSW recommends that Victims Services request all records relating to a client's contact with a service rather than limiting by date.
126. Concern has also been expressed that when CLC solicitors provide a long list of possible sources of medical evidence, Victims Services do not follow up the full list. Once some evidence is found this seems to be considered sufficient.
127. The concern with this is that without considering all the evidence the client may have their claim refused or only be awarded a Category D recognition payment when in fact they may be eligible for a higher recognition payment. Significantly, considering all the evidence may reveal additional claims.
128. If an applicant is unable to identify the medical services with whom they have engaged a Medicare Claims History form could be completed to identify such services.
129. CLCNSW recommends a question be added to the Victims Support application form to the effect of "If you are unable to identify the medical services you have used but believe Medicare may have a record tick the box and someone from Victims Services can contact you to discuss."
130. If the requirement to report to a government agency continues Victims Services should consider improving pathways to all federal agencies, including Centrelink.
131. Some CLCs have raised concerns about collection of police evidence by Victims Services. The most common form of police evidence relied upon by Victims Services is the CoPS entry. However, more detailed evidence of the assault, a history of violence and injury is usually detailed in police statements, photos and briefs of evidence. In our experience, it is highly unusual for Victims Services to obtain this evidence on behalf of a victim. The new scheme does not make provision for repayment of disbursements meaning that if applicants want this evidence, they need to pay for it out of their own pocket.
132. We recommend Victims Services obtain records of all police evidence held in relation to the application for support.

Listing of matters

133. Several CLCs have raised that matters are being determined without first providing the legal representative with a listing date.
134. This is occurring in relation to reassessment matters as well as new matters.
135. Additionally, where clients were directly contacted by Victims Services to inform them of the reassessment process and a CLC has since written to Victims Services to advise they are representing the client, correspondence continues to be sent directly to the client.
136. Clients are reporting being distressed by the continuing correspondence from Victims Services when they are legally represented. This administrative glitch needs to be addressed.
137. While Victims Services may have some evidence before it on which to base a decision, if they do not have all the relevant information it may affect the claim. For example, a claim or element of the claim could be dismissed, or a Category D recognition payment awarded when a Category C payment should instead have been made.
138. If legal representatives and unrepresented applicants are provided with a listing date they know by when they must submit all relevant evidence.
139. CLCNSW recommends Victim Services provides listing dates in all matters.
140. We also recommend improved communication from Victims Services regarding delays. In our experiences clients report distress in not having a clear timeframe of when to expect a decision.

Responses to requests and correspondence

141. A number of CLCs have commented on delays on the part of Victims Services to respond to requests and correspondence, for example, for information, for confirmation of an adjournment, or to inspect a file.
142. Some CLCs report they have not received a response to their request in over 6 weeks despite following up by phone and in writing.
143. CLCs in regional, rural and remote ('RRR') areas are reporting delays in accessing medical evidence from Victims Services. As distance significantly limits opportunities for RRR community lawyers to inspect files at Victims Services, such CLCs are reliant upon Victims Services providing them copies of medical evidence from the files.¹⁷ This is an important service that Victims Services provides to promote access to justice in RRR areas. Victims Services should be adequately supported to ensure this can happen in a timely manner.

¹⁷ We acknowledge that Victims Services is not always at liberty to provide copies of all medical evidence and our comment does not pertain to these circumstances.

Removal of evidence

144. CLCs also express concern about the failure by Victims Services to include all evidence from an applicant's file in the bundle filed in the Tribunal upon an application for review. A full and proper review of an application for victims support depends on Victims Services providing all evidence on the file.

Publishing of case studies

145. We welcome the publishing of victims support decisions determined by the Tribunal on the NSW caselaw website.
146. The Australian Human Rights Commission publishes summaries of decisions relating to resolved complaints in the Conciliation Register. Similarly, the NSW Anti-Discrimination Board provides case studies in its e-newsletter and provides a summary of all legal cases reported in the e-newsletter by category in a section on their website called "Legal cases".
147. We recommend the publishing of case studies on decisions by Victims Services on their website. Case studies of decisions on financial assistance would be of particular assistance to applicants because it would set out the range of options available. Where decisions are subsequently successfully reviewed, these case studies should be updated.

Appointment of support coordinators and legal representation

148. The government describes support co-ordinators as *"conduct[ing] a comprehensive assessment of each situation"*. They *"develop a tailored plan and guide victims through the criminal justice and human services systems. Assistance is not limited to legal assistance.... The support coordinator develops a package of care."*¹⁸
149. It remains unclear how and when support co-ordinators are allocated to applicants and experiences with support coordinators are varied.
150. One CLC reports one of their clients having a positive experience with a support co-ordinator. The support co-ordinator gathered relevant evidence and identified other claims. However, the CLC was not contacted by the support co-ordinator until almost a year after the CLC had lodged the client's application form and so was unaware the client was receiving this support. It is unclear why the CLC and the support coordinator appeared to be doing the same work.
151. Some CLCs report being contacted by support coordinators to inquire if the CLC will be lodging further claims based on the evidence on the Victims Services file. Similarly some assessors in their determinations refer to potential further claims and identify the evidence to support such claims. We commend these practices.
152. Another CLC asked Victims Services when a support co-ordinator would be appointed. The CLC was informed that there is no case management of files unless there are safety concerns.

¹⁸ Australian Government's response to the United Nations Joint Communication from Special Procedures, 17 February 2015 accessed on 15 July 2016 at: [https://spdb.ohchr.org/hrdb/29th/Australia_17.02.15_\(6.2014\).pdf](https://spdb.ohchr.org/hrdb/29th/Australia_17.02.15_(6.2014).pdf)

153. CLCNSW seeks clarification about the circumstances in which a support coordinator will be appointed to an applicant.
154. It was said at the time of the introduction of the Act that there would no longer be a need for legal representation as the new scheme “*will be so much simpler and more straightforward than the Victims Compensation Scheme*”¹⁹ and victims of violence would be “*allocated a support coordinator*” [at Victims Services].²⁰
155. It has been the experience of several CLCs that they have intervened to assist clients as the clients were not getting the help they needed, for example, with evidence collection from Victims Services.
156. Despite the reference above to Victims Services providing “legal assistance” they are unable to provide legal advice including on whether an applicant should have been eligible for a higher category of injury and should therefore consider seeking a review. Nor can they write submissions, for example, addressing s44 factors which may otherwise result in a refusal or reduction of financial support.
157. As we raised in our letter dated 16 June 2014 there is also a conflict of interest in the staff from the agency that ultimately determines whether or not victims support is awarded also assisting victims to make an application.
158. The role for legal representation has also been highlighted in the reassessment of transitional matters. For example, applicants without legal representation may be unaware that they could elect to change the category of injury for which they were claiming, for example, from domestic violence to psychological or psychiatric disorder category 2 and that this will usually require submissions in support of that category and about quantum.
159. We repeat our recommendation from our letter dated 16 June 2014 that victims, particularly victims of domestic violence, sexual assault, child sexual abuse and child abuse should be provided access to funded legal assistance for their claims.

Payment to counsellor/doctor for medical report

160. We note there was an allocation of funds for reimbursement under the old scheme. The introduction of support coordinators to gather evidence was intended to replace this. This submission has raised some short comings regarding evidence collection by Victims Services.
161. In our experience often the medical evidence upon which Victims Services relies to support a claim is the approved counselling report. In cases, particularly of domestic violence which includes sexual assault, the victim may have been reluctant to discuss the sexual assault with this counsellor. If the client has reported the sexual assault to another health professional, this health professional may be unwilling to write a report without payment.
162. Victims Services needs to do more work to ensure counsellors and doctors provide brief but useful evidence to support a victims support claim.
163. The government needs to acknowledge that payment is required for such reports

¹⁹ Victims Rights and Support Bill, Second Reading Speech, 7 May 2013

²⁰ *Victims Compensation Tribunal Chairperson's Report 2012-13* at 7.

and should enable this to happen.

164. These expenses should not be incurred by the victim.
165. Furthermore, where an applicant is asked by Victims Services to provide evidence CLCNSW recommends that Victims Services pays this expense.
166. CLCs have seen instances where the cost of a report requested by Victims Services has been paid out of financial assistance for immediate needs. While it is positive that the applicant has not had to wear the cost themselves, in such circumstances, this raises two issues. Firstly, given it is often in cases of domestic violence and sexual assault that such further evidence is required and that there are often delays in reporting such violence, the victims may have applied outside the 2 year time limit from the act of violence and so not be eligible for payment through financial assistance for immediate needs. Secondly, if they are within time, but have other competing immediate needs they should not have to incur the cost of evidence to support their claim.
167. CLCNSW therefore recommends a legislative amendment that enables Victims Services to pay for medical expenses and freedom of information expenses separate to financial assistance.

Immediate needs

168. Some clients report excellent assistance from Victims Services in accessing immediate needs, but have contacted CLCs as they needed assistance with other aspects of their claim.
169. It is useful to list examples of types of expenses that fall within financial support as Victims Services currently does in the data profiles they publish on their website.
170. It would also be useful to expand the list on the application form as outlined above at paragraph 121.
171. It is not clear why travel is included in the data profiles for 2013-14 but not 2014-15. It would be useful to further explain what may fall within "FV immediate needs" listed as a type of expense in the 2014-15 data profiles.
172. There seems to be an anomaly where security upgrades can be awarded as an immediate need for a victim wishing to remain in their home or relocation costs where a victim chooses to leave their home, but where the perpetrator who contributed to the rent or other household expenses leaves the home and the victim is left to wear the costs alone the victim is unable to access immediate needs to assist with meeting these expenses in the short-term.

Reassessment of transitional matters

173. As mentioned above we commend the government for addressing the retrospective nature of the legislation by providing those who had lodged a victims compensation application which had not been finally determined before 7 May 2013 with the opportunity to apply for reassessment of their matter under the old scheme.

174. Applications for reassessment are open for 12 months, closing on 31 August 2016.
175. However, we are concerned that 12 months is too short a timeframe for accepting applications for re-assessment. We feel it is vital that the system that is designed to support victims of violence operates from a trauma-informed basis which includes providing an adequate period of time to respond.
176. CLCs have been making best efforts to contact previous clients to inform them about the opportunity to apply for reassessment. Some CLCs have still been unable to contact some clients.
177. We understand that Victims Services has advertised the reassessment scheme in local and metropolitan papers since the introduction of the scheme.
178. CLCs are reporting that some service providers have not been aware of the reassessment scheme to inform their clients.
179. Further promotion of the reassessment scheme is required, including throughout NSW prisons, as well as a longer period of time to apply.
180. It has been the experience of one of our members that several transitional matters were dismissed seemingly on the basis of not meeting the particular documentary evidentiary requirements of the *Victims Rights and Support Act* to report to police or a government agency. Those who had their transitional matters dismissed are ineligible to apply for reassessment. If transitional matters were dismissed due to failure to meet the particular documentary evidentiary requirements of the new Act this requires a remedy.
181. In particular, we recommend the NSW Government:
- 181.1 extend the deadline for making an application to 1 September 2020;
 - 181.2 provide discretion to extend the time limits on responding to requests for evidence; and
 - 181.3 continue work on a widespread communications strategy that encompasses a broad range of services and includes culturally appropriate media.

Should you have any questions please contact Liz Snell, CLCNSW Domestic Violence and Victims Compensation Subcommittee Co-convenor on ph 8745 6900.

Yours faithfully

Polly Porteous
Interim Executive Director

Encl: Letter to the Hon Brad Hazzard MP re first 12 months of the *Victims Rights Support Act*

16 June 2014

The Hon. Brad Hazzard MP
Attorney General of NSW
Level 31, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Via email: office@hazzard.minister.nsw.gov.au

Dear Attorney General,

First 12 months of Victims Rights and Support Act 2013

We write to you as we approach the end of the first 12 months of the *Victims Rights and Support Act 2013*. We understand that Victims Services has initiated a review of the first 12 months of this legislation.

Please accept this letter as a submission to this 12 month legislative review.

About Community Legal Centres NSW

Community Legal Centres NSW (CLCNSW) represents the network of 38 community legal centres (CLCs) throughout NSW. Victims support matters (particularly complex matters) make up a significant part of the work of many CLCs. Our members include:

- Warringa Baiya Aboriginal Women's Legal Centre, a NSW state-wide service for Aboriginal women, children and youth, with a focus on assisting victims of crime;
- Women's Legal Services NSW, a state-wide service with a focus on domestic and family violence, sexual assault, family law, care and protection, victims support, discrimination and access to justice; and
- Many generalist (geographically-based) community legal centres that advise and represent clients in victims support matters.

Clients assisted by CLCs in NSW with victims support matters are predominantly victims of domestic violence and / or sexual assault including childhood sexual abuse. As a result of many years experience in this area, some of our member CLCs have developed specialist knowledge in relation to assisting victims of sexual assault and domestic violence.

It is also worth noting that clients assisted by CLCs in relation to victims support matters are generally high-needs clients: many have been very seriously affected by their experience of violence. As a result a significant number of CLCs' victims support clients are affected by a mental illness, drug and alcohol dependence chronic unemployment, loss of their children to the child protection system, or other serious impact. It is CLCs' experience that many of their victims support clients experience post traumatic stress disorder, significant anxiety or major / clinical depression. The trauma our clients have experienced often significantly limits their capacity to work.

Approximately 20 CLCs in NSW participate in the CLCNSW Domestic Violence and Victims Compensation Sub-Committee. CLCNSW, through this Sub-Committee, has been actively involved in responding to various reviews of, and amendments to, the victims compensation and support legislation since its inception. We are well placed to assess the impact of the current Victims Support Scheme on vulnerable applicants and to provide insight and feedback to the NSW Government.

Comments on new Victims Support Scheme

1. Documentary Evidence

The experience of Community Legal Centres in NSW in handling victims compensation claims, led us to raise concerns about the documentary evidence requirements in the *Victims Rights and Support Act 2013*.

In an application for financial assistance for immediate needs documentary evidence 'such as a medical report or police report' is required 'to support, on the balance of probability, the applicant's claim to be a victim of an act of violence'.¹

In an application for financial assistance for economic loss or for a recognition payment, the documentary evidence required includes 'a police report or report of a Government agency and a medical, dental or counselling report verifying that the applicant or child who is the primary victim concerned has actually been injured as a result of the act of violence'.²

It has been well established by decades of research that there are significant barriers to reporting domestic violence, child sexual abuse and sexual assault. Some victims also fear reporting to police or other government agencies particularly Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities. Our experience with victims led us to understand that when victims report such crimes, many will report the crime they experience to a non-government organisation rather than a government agency. This is especially the case in smaller communities in rural and remote areas where victims may have relationships with staff in a variety of government agencies or where there may be no government health services, only non-

¹ *Victims Rights and Support Act 2013 (VRSA)*, Section 39(2)(a)

² *VRSA*, Section 39(2)(b)

government health services. The documentary evidence requirement that reports must be made to police or a government agency has been a problem for victims support claims that CLCs have assisted with since the introduction of the *Victims Rights and Support Act 2013*. While acknowledging the need for some form of documentary evidence, to only allow limited forms of evidence disproportionately impacts on victims of domestic violence, sexual assault and child sexual abuse, the majority of whom are women.

Case study one

Lisa* has been receiving counselling through the approved counselling scheme. She recently decided she was ready to apply for compensation in relation to a complex history of emotional and sexual abuse as a child. Throughout her childhood she was exposed to domestic violence and as a child she was sexually abused by a male family friend. Lisa suffers from post-traumatic stress disorder, severe anxiety and due to the trauma she has experienced has been unable to work.

Lisa has never reported the child sexual abuse to police or any other government agency because as a child she learnt to fear the police and government. She does not want to report to the police or a government agency now, many decades after the event. Under the previous scheme, the Community Legal Centre she contacted may have been able to prove the acts of violence on the basis of statutory declarations and psychological evidence.

Without the stipulated documentary evidence, Lisa is denied access to financial assistance for economic loss and a recognition payment.

* Not her real name.

Case study two

Susan* was a victim of extensive child sexual abuse by several family members. As these family members threatened to kill her if she ever told anyone, Susan never reported to police. She fell pregnant when she was 15 years, but lost the foetus. She did not seek medical assistance when this happened.

It is only in recent years, many decades after the abuse, that Susan first disclosed the acts of violence to a counsellor.

Under the current scheme Susan does not meet the documentary evidence requirements for a recognition payment, up to \$5,000 for out-of-pocket expenses or up to \$5000 for justice-related expenses.

* Not her real name.

Our experience leads Community Legal Centres in NSW to recognise that this requirement is too restrictive and we recommend that documentary evidence requirements for recognition payments be extended. If a person is able to establish an act of violence and an injury on the civil standard of proof, that should be sufficient. The form of evidence should not be prescribed.

This change would align the *Victims Rights and Support Act 2013* with the Charter of Victims Rights, particularly regarding treating a victim with cultural sensitivity and ensuring access to services.

If this is not implemented, in the alternative, documentation from non-government organisations that establish act of violence and injury should be sufficient.

It has also been noted that where victims do make a report to police, while the act of violence is generally included, often a list of injuries is not included in the report. We further recommend NSW Police receive training such that they include a list of injuries in their report. Where victims of violence are able to report to police, if both the act of violence and the injury is recorded in a police report there should be no need for a medical report.

2. Restitution

Lawyers in Community Legal Centres in NSW have found that many victims of domestic violence and sexual assault are not keen to pursue recognition payments if the perpetrators are going to be pursued to pay restitution. Many victims have informed CLCs that they fear for their safety, believe the perpetrator would try to seek retribution and would try to re-enter their lives and so recommence the cycle of violence if restitution was pursued. While the Commissioner of Victims Rights has discretion about whether or not restitution is pursued, discretion does not provide victims of violence with certainty before they start the victims support process.

These victims then miss out on immediate financial assistance and recognition payments that could help them to rebuild their lives. This is contrary to the United Nations principles of protecting victims from intimidation and retaliation.³

Case study three

Mary* contacted a Community Legal Centre about an application for victims support. Her ex-partner Jason* had a long history of violence against her which included several convictions for assault and several apprehended violence orders. The description of her injuries would likely warrant a Category C recognition payment of \$5000.

³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985, Article 6(d)

Mary remains fearful of Jason and has gone into hiding. However, Jason knows where her family lives.

Once Mary was advised about restitution she adamantly stated she could never apply. She feared if her ex-partner found out he and his family would harm her and/or her family.

* Not their real names.

The PricewaterhouseCoopers report on the old NSW Victims Compensation Scheme recognised restitution as a significant barrier to victims of domestic violence, sexual assault, child sexual abuse and child abuse exercising their right to claim compensation. They therefore recommended that 'victims have the ability to opt out of the restitution process in circumstances where they can demonstrate a safety concern as a result of restitution being pursued.' PricewaterhouseCoopers made this recommendation as 'whilst the principle of restitution is important, the safety of the primary, secondary and family victims should take precedence'.⁴

There are some circumstances in which victims of domestic violence, sexual assault, child sexual abuse or child abuse are willing to claim compensation in the knowledge that restitution may be pursued as they feel the perpetrator should be held accountable.

Community Legal Centres NSW therefore recommends that victims of domestic violence, sexual assault, child sexual abuse and child abuse should be able to elect whether or not restitution is pursued. Such a provision is both empowering for victims, as well as responsive to victims safety concerns.

We have informally heard that it has been proposed to institute a threshold amount of money to be reached before restitution is pursued. If such a threshold is introduced we argue it is still necessary for victims of violence to be able to elect that restitution not be pursued. This provides certainty for victims of violence.

3. Legal assistance

The report of the Chairperson of the Victims Compensation Tribunal for 2012-2013 indicated that 70% of victims were legally represented at the Tribunal prior to the end of the Victims Compensation Scheme. Community Legal Centres NSW understands from an Information Session provided by Victims Services that under the new Victims Support Scheme approximately 5% of victims have legal representation. Community Legal Centres in NSW have found that under the new Victims Support Scheme, we have been required to assist a number of victims with lodging their victims support claims.

⁴ PricewaterhouseCoopers, NSW Department of Attorney General and Justice *Review of the Victims Compensation Scheme*, 13 July 2012 at 42.

It was said at the time of the introduction of the NSW Victims Support Scheme that there would be no need for legal representation as victims of violence would be assisted by support co-ordinators and case managers at Victims Services. Staff at Victims Services, however, are unable to provide legal advice. Nor are they able to write submissions for a victim, for example, addressing s 44 factors which may otherwise result in a refusal or reduction of financial support.

There have also been instances where support co-ordinators have provide incorrect information about some of the more technical aspects of the legislation, such as, the ability to withdraw an application under the old scheme and apply under the new scheme.

Additionally, we submit it is a conflict of interest for staff from the agency that ultimately determines whether or not victims support is awarded to assist a victim in making such an application.

Many CLCs have had transitional matters that were refused or only partially successful at first instance, that were successful following an Internal Review. Some of these have been due to an oversight rather than a mistake in the application of the law. While victims of violence may receive correspondence from Victims Services informing them of a right to appeal, without legal representation, clients will not know on what grounds to base the appeal, particularly given the technical nature of some matters. See the case studies below.

Case study four

Kylie* was physically and sexually assaulted by a stranger in a public park. She reported the incident to the police, and had medical evidence taken at a sexual assault service. Kylie incurred a number of medical fees, and commenced seeing a private counsellor to assist her in working through her trauma.

Kylie filed a claim for Victims Compensation. After the legislative changes, she decided to withdraw her application and re-lodge her claim to take advantage of immediate needs payments. Kylie re-lodged her claim and sent in medical bills from her doctors and counsellors.

Since that time, Kylie has called Victims Services many times to ask why no immediate needs payments have yet been made. Client Officers at Victims Services have told her that there is not enough evidence on her file, and that they are not ready to make the decision yet. This is despite Victims Services at information sessions indicating they aim to determine immediate needs payments in 15 working days.

Nearly one year after filing for immediate needs payments, Kylie has still received nothing from Victims Services. Kylie is thousands of dollars out of pocket, and sought assistance from a Community Legal Centre because she said she had no understanding of the scheme, or what Victims Services wanted her to do.

* Not her real name.

Case study five

Maria* lodged an application for compensation under the old scheme for domestic violence that occurred during her marriage of many years.

Maria's application was accepted by the Victims Compensation Tribunal as an application for compensation that was filed within the prescribed 2-year timeframe under the previous Act.

Maria was awarded a 'Category D' recognition payment but refused a 'special grant' under clause 5, schedule 2 of the Act on the basis that her application fell outside the prescribed time period because there was no 'violent conduct' in the two year period before she filed.

The Community Legal Centre representing Maria filed a Request for an Internal Review, in which they pointed out that Maria's application had been accepted as duly lodged within the prescribed time period at the time of filing. Furthermore, Maria's report to the police of a breach of the apprehended violence order less than 2 years before she lodged her victims compensation claim was an act of violence within the meaning of s 19 of the Act.

This Internal Review required Maria's legal representative to make technical arguments about how the assessor had erred in determining that a breach of an AVO did not constitute violent conduct.

As a result of the review Maria was successful in also receiving a special grant.

* Not her real name.

Case study six

Tyronne* was repeatedly kicked and bashed by a stranger in 2008. Tyronne suffered serious injuries including five broken teeth, a fractured jaw, dislocated fingers, chipped elbows and significant psychological injuries. The perpetrator was charged by the Director of Public Prosecutions and the police with assault causing grievous bodily harm with the intent to cause grievous bodily harm, however he was eventually convicted of assault occasioning actual bodily harm.

Tyronne became aware of the victims compensation scheme in 2012 and lodged an application. Under the old scheme Tyronne would have been eligible for over \$9,600. His application was determined under the new scheme and was awarded with \$1500 for assault not occasioning grievous bodily harm.

A Community Legal Centre assisted Tyronne lodge an internal review and made submissions regarding relevant case law about what constitutes assault occasioning grievous bodily harm. Tyronne's appeal was successful and he was awarded \$5,000 for assault occasioning grievous bodily harm. It was clear in the assessor's reasons why the decision was amended. Tyronne was not eligible for the special transitional payment of \$5,000 because he did not lodge his application for victim's compensation within 2 years of assault.

*Not his real name

Case study seven

Aashish* is a disability pensioner. He has multiple sclerosis and a brain injury and lives in a Housing NSW unit. Aashish was assaulted in his unit by a neighbour with a mental illness, and in the course of the assault his screen door (installed at his own expense) and his mobile phone were damaged. Aashish reported the assault to the police and sought medical attention at a local hospital. He also obtained an Apprehended Violence Order against his neighbour.

Aashish lodged an application under the Victims Support Scheme for financial assistance to cover the expense of replacing his screen door and his phone. After receiving police material the Commissioner of Victims Services requested that Aashish make submissions on the application of s44(1)(e) of the *Victims Rights and Support Act 2013*.

Aashish has limited literacy skills, and could not afford to pay a lawyer to draft the submissions for him. Legal Aid is not available for this kind of legal work. Since the new scheme for victims support started the Community Legal Centre Aashish contacted can no longer refer clients on low incomes to private lawyers for assistance as legal costs are no longer covered by the scheme. The Community Legal Centre provided some advice to Aashish using a volunteer lawyer at an evening advice service but was not able to prepare the submissions for Aashish. (The Community Legal Centre restricts its casework in Victims Support matters to cases of sexual assault and domestic violence because of resource constraints.) Aashish's application for financial assistance was ultimately rejected.

*Not his real name.

We are also concerned that under the new scheme, legal representatives are able to charge clients for their work. If such clients are successful in their claims, this may result in clients receiving very little of their payment as they have to pay legal fees.

The clients assisted by Community Legal Centres in relation to victims support matters are generally high-needs clients. We recommend victims of violence, particularly victims of domestic violence, sexual assault, child sexual abuse and child abuse are able to access funded legal assistance to progress their claims. Such funding could take the form it did under the old Victims Compensation Scheme.

4. Counselling

Community Legal Centres in NSW have been assisting victims who have developed a therapeutic relationship with a counsellor who is not part of the Victims Services Approved Counselling Service. The counsellor does not always want to apply to be part of the Victims Services Approved Counselling Service. The victims do not want to have to develop another therapeutic relationship with a counsellor who is part of the Victims Services Approved Counselling Service. Additionally, some CLCs report that clients who have experienced multiple traumas in their life have been asked by their Victims Services Approved Counsellor to limit their counselling sessions to matters directly relating to the act of violence for which they are seeking victims support and not to any other issues.

For this reason we recommend that a system be developed to enable counsellors in the Victims Services Approved Counselling Service to do assessments only, as used to occur with Authorised Report Writers, rather than be required to develop a therapeutic relationship. The report only needs to be brief and should include what happened, the injury and the impact. Separate to this, victims of violence should be able to access free therapeutic counselling. Furthermore, victims who have experienced complex trauma should not be restricted on the issues they can discuss in approved therapeutic counselling sessions.

5. Domestic violence, sexual assault, child sexual abuse and child abuse

The Victims Support Scheme imposes upper time limits which were not present in the old Victims Compensation Scheme.⁵

While there are no time limits for victims of child sexual abuse for recognition payments, up to \$5000 out-of-pocket expenses and up to \$5000 for expenses associated with criminal or coronial proceedings, if they apply outside the 2-year time limit, they are unable to access financial assistance for economic loss (up to \$20,000) nor medical and dental expenses.

Different time limits apply where the primary victim dies 2 years after the act of violence which is found to have directly resulted in the death.

⁵ Section 40(1) *Victims Rights Support Act* imposes a general time limit of 2-years from the act of violence or if the victim was a child at the time of the act of violence, within 2-years after the day the child turns 18 years for making a claim for financial support or a recognition payment. Sections 40(5) and 40(1) provide that for victims of domestic violence and/or sexual assault or child abuse, the 2-year time limit applies for financial support, but they have a 10-year time limit for a recognition payment or if the act of violence occurred when they were a child, within 10 years after the day the child turns 18 years.

Based on our experience of working with victims of domestic violence, sexual assault and child sexual abuse, and research in the area,⁶ there are many reasons why victims delay reporting the violence.

These include:

- Given such crimes are an abuse of power and trust, often form a cycle of abuse, and perpetrators of such crimes frequently blame their victims, it can take some time for a victim to identify that what has happened to them is a crime;
- Stigma, feelings of shame and loss of trust associated with such violent acts and that this takes time to overcome;
- It is often through counselling that additional acts of violence are identified and/or the true extent of injuries is realised and this also takes time – often there are long histories of violence involving different types of abuse (for example, the one victim may have experienced domestic violence and sexual assault) sometimes involving multiple offenders;
- Victims need to emotionally prepare themselves to access the Victims Support Scheme. This may include disclosing to police, health professionals, family and/or friends and having the support of a counsellor;
- Women victims who are also primary care-givers for family often leave self care until last and this may mean that are only in a position to deal with acts of violence they experienced when they were children when their own families have grown up.
- Women may be reluctant to seek help due to social pressures, isolation from social support, economic dependence on the perpetrator and the threat of future attacks;
- For women from culturally and linguistically diverse backgrounds there are additional cultural and community barriers to disclosing such acts of violence; and
- Fear of police.

The arbitrary imposition of a time limit denies equal access to justice for victims of domestic violence, sexual assault and child sexual abuse by comparison with victims of other crimes.

Case study eight

Susan* was a victim of extensive child sexual abuse by several family members. As a direct result of the psychological injuries she sustained due to the child sexual abuse, there have been extended periods of time when Susan has been unable to work.

The exception from the time limits for victims of childhood sexual assault enables Susan to apply for a recognition payment, should she have the necessary

⁶ Lievore, D Non-reporting and hidden recording of sexual assault: an international literature review <http://www.aic.gov.au/publications/previous%20series/other/41-60/non-reporting%20and%20hidden%20recording%20of%20sexual%20assault.html>

documentary evidence. The economic loss she can claim pursuant to s 40(7) is limited to \$5,000 for out-of-pocket expenses (she has no relevant justice-related expenses).

If Susan was able to claim the other types of economic loss available to primary victims she may be able to substantiate much more significant losses, including loss of actual earnings—up to \$20,000, and medical expenses.

*Not her real name.

Case study nine

Veronica* was a victim of domestic violence throughout her marriage of 10 years. She has three children. There have been no further acts of violence since Veronica separated from her husband four years ago. Veronica only recently learnt about the Victims Support Scheme and recently made an application.

Veronica tried to start up a newsagency business five years ago. She had many challenges getting it up and running due to the ongoing abuse of her husband. While she was trying to set up the business, she and her children were forced to flee to a refuge. After moving into the refuge, Veronica found the impact of the trauma meant she could no longer work and she was forced to shut down her business. She lost a great deal of money and is still unable to work due to the trauma.

Due to the time limits, Veronica is not able to receive financial assistance for loss of actual earnings. Even if Veronica did apply in time, it is unclear whether her loss constitutes 'economic loss suffered by the primary victim as a direct result of th[e] act of violence'.

*Not her real name.

We recommend:

- the removal of upper time limits for recognition payments for victims of domestic violence, sexual assault and child abuse;
- the removal of the 2-year time limit for financial assistance for victims of domestic violence, sexual assault, child sexual abuse and child abuse including loss of actual earnings and medical and dental expenses.

6. Psychological injury

The NSW Government has recognised that domestic violence is more than physical violence, in the objects of th *Crimes (Domestic and Personal Violence) Act*. Domestic violence also includes emotional abuse: through repeated derogatory taunts; stalking; withholding financial support; and isolating victims from their family, friends and culture. This is also recognised in recent amendments to the *Family Law Act*. In contrast, the recognition payments in the Victims Support Scheme primarily focus on physical injuries – the only

acknowledgment of psychological harm is if it meets the criteria of 'assault' then a recognition payment of \$1500 will be awarded.

The injuries victims of domestic violence experience are often repeatedly sustained over an extended period of many years; often involve a pattern or cycle of abuse; are often perpetrated by someone the victim knows; and are a means of coercion, control and dominance of the victim.

The NSW government asserts that the Victims Rights and Support Act 2013 is consistent with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles). The Basic Principles recommend financial compensation for victims who have 'sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes' (emphasis added). We do not believe \$1,500 is adequate recognition of the psychological harm many victims have suffered.

We further note and welcome the introduction of the Crimes Amendment (Strangulation) Bill 2014 into NSW Parliament on 7 May 2014. This Bill proposes choking, suffocation and strangulation be recognised as separate and specific offences. Additionally, the Bill proposes provisions regarding attempts to choke, suffocate and strangle be strengthened.

In your second reading speech, you acknowledge the prevalence of strangulation in domestic violence incidents. You also recognised the potential lethality of strangulation 'which causes significant physical and psychological trauma to victims'.

In acknowledging the difficulty in establishing grievous bodily harm as it 'rel[ies] on proof of particular bodily harm', you noted

many people who survive strangulation have minimal visible external injuries, despite the seriousness of the offence. An insidious aspect of strangulation incidents is the significant fear and psychological damage that can be inflicted on a victim without any physical injuries being apparent.

We share your concerns about the difficulty victims of domestic violence have in establishing grievous bodily harm and therefore recommend choking, suffocation, strangulation or attempts to choke, suffocate or strangle should be specifically included at a minimum as a Category C recognition payment.

In addition to this, we submit there should be better recognition of a psychological injury. We recommend a victim of a domestic violence offence resulting in a psychological injury should be eligible for a Category C recognition payment. A victim of a domestic violence offence resulting in a serious psychological injury should be eligible for a Category B recognition payment.

Case study ten

Ava* was in a relationship with Sen. Sen was incredibly psychologically abusive to Ava during their relationship. He also sexually assaulted Ava in 2005. Ava was too scared to report this abuse to the police. Sen was eventually sentenced to serve time in gaol for assaulting another person.

Ava came to a Community Legal Centre for advice about applying for victim's compensation in June 2013. The Community Legal Centre advised her that she was required under the new scheme to report the violence to a government authority. Since then Ava has been trying to report the violence to the police, however they have told her they need the 'full story' before they will take her statement. Ava has been trying to write down what happened to her however, she's finding this very difficult to do. Sen has also recently been released from gaol and Ava believes Sen knows where she lives and is stealing her mail. Ava is so scared of what Sen might do to her that she's not leaving her home and does not answer her phone.

The Community Legal Centre is concerned that she has only a short time left to lodge her application for victim's compensation in relation to the sexual assault in 2005. The Community Legal Centre is also concerned that Ava cannot seek a recognition payment in relation to the long history and ongoing effects of the psychological abuse on her by Sen.

* Not her real name.

Case study eleven

Yvonne* was sexually assaulted by her uncle 14 times between the ages of 9 and 10, including digital and penile penetration in her vagina and anus. Yvonne was reminded on each occasion of being sexually assaulted by him that it was their 'little secret' and warned her not to tell anyone. Yvonne has since been diagnosed with post-traumatic stress disorder and suffers from renal problems.

Yvonne did not want to deal with the traumatic memories of the sexual assaults for many years. She only sought advice from a Community Legal Centre about the sexual assaults in 2012 when she was 27 years old. The Community Legal Centre assisted Yvonne make an application for victim's compensation under the old scheme. The Community Legal Centre initially advised Yvonne that she was eligible for up to \$50,000 because she was suffering severe psychological injuries as a result of the sexual assaults.

Yvonne's application was recently determined under the new scheme. All the acts of violence were determined to form a single series of acts and she was awarded \$10,000. Yvonne was not eligible for the transitional payment of \$5,000 under the new scheme because she did not lodge her application within two years of turning 18.

*Not her real name.

7. Ongoing domestic violence

It is not clear to us why the *Act* rightfully recognises the impact of ongoing sexual abuse and makes a higher payment for this, being a Category B payment (see section 35 (2) (b)), but does not recognise the impact of ongoing and prolonged domestic violence. Even though an applicant could technically make a number of different applications for different periods or clusters of domestic violence by the same offender, it is our experience that Victims Services rarely finds such applications as ‘unrelated’ pursuant to section 19 (4) and (5) of the *Act*.

We also submit that the Category B recognition payment should be expanded to include ongoing acts of domestic violence.

8. Retrospectivity

At the time of the introduction of the Victims Support Scheme, Community Legal Centres in NSW were assisting over 1500 victims with their claims under the old victims compensation scheme. The decision to make the *Victims Rights and Support Act 2013* retrospective denied these victims the rights they were entitled to at the time of the offence. Furthermore, the review commissioned by the Government recognised that it would be ‘unfair to change these goalposts mid-way’.⁷

We recommend that the retrospective nature of the *Victims Rights and Support Act 2013* be reversed so that victims with claims lodged under the old victims compensation scheme can have their claims dealt with under the scheme that was in place at the time of the offence.

In the alternative, all claims that were accepted under the old Victims Compensation Scheme, including claims that had been accepted out-of-time, should be eligible for the \$5,000 special payment. As evident in the *2012-13 Victims Compensation Tribunal Chairperson’s Report*, the majority of out-of-time claims relate to domestic violence and sexual assault. It is unjust and we believe discriminatory against women given the gendered nature of this violence that such victims do not receive the special payment because they did not lodge within 2 years of the act of violence.

Case study twelve

Margaret* was physically and sexually assaulted on numerous occasions by her first husband, Tommy*, for 5 years. Following the breakdown of that relationship, Margaret was the victim of violence in a second relationship, with Jim*. When she first saw a Community Legal Centre in 2005, Margaret disclosed

⁷ PricewaterhouseCoopers, *Review of the Victims Compensation Scheme*, Note 4 at 51.

both acts of violence, but said that “she didn’t have enough energy” to relive both experiences at the same time, and so decided to proceed only against Jim. Margaret was successful in this initial claim, and was awarded \$50 000.

Well before the abolishing of the old NSW Victims Compensation Scheme, Margaret got back in contact with her Community Legal Centre and said that she was ready to file against Tommy. The Community Legal Centre filed for Margaret under the categories of sexual assault (category 3) and psychological injury (category 2). Margaret was advised that a successful determination in either category could result in a payment of up to \$50,000. Leave to apply out of time was sought and granted before the new Victims Support scheme was introduced.

When her matter was determined under the new system, the Assessor found that a Category C recognition payment of \$5000 was warranted, on the basis that at least one sexual assault had been established in Margaret’s relationship with Jim. Margaret was deeply disappointed that she was only awarded one-tenth of the money that she might have otherwise been eligible for had she pursued her claim earlier. Under the new time limits, Margaret was also ineligible to receive the \$5000 transitional payment on the basis that she had not filed within 2 years of the sexual assaults having taken place.

* Not their real names.

9. Family Victims

We are also concerned about the recognition payment for family victims. We note that parents, step-parents or guardians of a primary victim of a homicide automatically qualify for a recognition payment of \$7,500.00.⁸ However, a child of the primary victim has to prove financial dependence on the primary victim at the time of their death in order to qualify for a recognition payment.⁹ We submit that this is unfair and an unnecessary burden for children of homicide victims, especially children under the age of 18. We submit that the *Act* should be amended such that children of primary victims, who are under 18 at the time of their parent’s/carer’s death, should automatically qualify for a Category A, Regulation 12 (a), recognition payment of \$15,000, and not be required to prove financial dependence.

Equally, we think it is unfair that spouses or de facto partners of a primary victim of a homicide are required to establish financial dependence in order to qualify for a recognition payment. It is submitted that spouses and de facto partners should be given the same recognition as parents/step-parents and guardians under section 36(b) of the *Act*, and automatically qualify for a Category A, Regulation 12 (b) payment of \$7,500.00, with the availability of proving financial dependence and seeking a higher payment of \$15,000.00.

⁸ section 36 (1)(b) of the *Victims Rights and Support Act 2013* and Regulation 12 (b) of the *Victims Rights and Support Regulation 2013*

⁹ section 36(1)(a) of the *Victims Rights and Support Act 2013*

10. Secondary victims

It is well recognised that witnessing violence can have a severe and long term effect on a person. Witnessing family violence can lead to intergenerational problems of child sexual abuse and family and domestic violence. Children who grew up in institutions who witnessed widespread abuse of their peers can suffer significant psychological harm as a result.

Family law recognises that children who are exposed to domestic and family violence are at risk of harm.¹⁰ The *Victims Rights and Support Act 2013* also recognised the harm that can be caused to those who witness violence allowing them to seek compensation for the injuries they suffered.¹¹

The current *Victims Rights and Support Act 2013* fails to adequately recognise the significant harm caused to those who witness violence. While we support secondary victims having the right to free counselling, we also believe that secondary victims who suffer a psychological injury as a result of witnessing violence should also be able to apply for compensation.

We therefore recommend that a secondary victim who suffers resulting in a psychological injury should be eligible for a Category C recognition payment and a secondary victim who suffers a serious psychological injury should be eligible for a Category B recognition payment.

Case study thirteen

Susana* and Marcus* were in a relationship and had a young daughter, Alice. Marcus was psychological and physically abusive to Susana, however none of the physical abuse caused grievous bodily harm. Susana's daughter witnessed a lot of this abuse and suffered psychological injuries as a result.

A Community Legal Centre assisted Susana and Alice lodge applications for victim's compensation under the old scheme. Both Susana and Alice would have been eligible for up to \$50,000 each. Both applications were determined under the new scheme. Susana was awarded \$6,500 for assault and the special transitional payment. Alice's application was dismissed because secondary victims are not eligible for compensation under the new scheme.

*Not their real names.

11. Appeals

The new *Act* has created a two tiered appeal process, being firstly an internal review and then, secondly, an appeal to the NSW Civil and Administrative Tribunal (with respect to recognition payments only). The time frame for an

¹⁰ Family Law Act s 60CC

¹¹ Section 15 *Victims Rights and Support Act 2013*

internal review is strictly 28 days after which the applicant was given notice of the original decision.¹² There is no provision in the *Act* for an applicant to apply for further time to seek an internal review. We note that the repealed legislation provided for a three month time limit to lodge an appeal, to the then Victims Compensation Tribunal, and gave the Tribunal the discretion to give further time to an appellant in “exceptional circumstances.”¹³

It is submitted that 28 days is not sufficient time for an applicant to seek independent advice about the merits of applying for an internal review, and then preparing a document, which sets out the grounds for the appeal.

It may be that the applicant does not in fact see the decision of the initial Assessor until after the 28 days have past, nor has the capacity to prepare an internal review application. This could be for a variety of reasons including: ill-health caused by trauma, loss of family members and sorry business for Aboriginal people, or issues of personal safety that has meant that the victims applicant has had to move house quickly to escape their perpetrator. Such a short time frame for an appeal is inconsistent with the beneficial intent of the legislation and fails to acknowledge the impact of trauma on a victim’s capacity to complete complex administrative and legal tasks.

Case study fourteen

Anoush* is an elderly Arabic speaking man. He needed urgent dental work done after he was assaulted. In November 2013 a Community Legal Centre assisted Anoush lodge an application to Victims Services, seeking financial assistance for immediate needs and a recognition payment for Anoush. All the necessary evidence and invoices were attached to the original application.

In December 2013 Victims Service had not yet registered Anoush’s claim. In January 2014 Victims Services said they had received the application, but no supporting evidence. The Community Legal Centre sent the evidence supporting Anoush’s claim to Victims Service again. In February 2014 Victim Services said they had not received any evidence supporting Anoush’s claim, however shortly after they confirmed they had received the evidence and that the application would be determined within a fortnight. In March 2014 the application had not been determined.

In April 2014 Anoush’s application for immediate needs was determined. The Community Legal Centre asked Victim Services to pay Anoush’s dentist directly. Anoush had the necessary dental work done. In May 2014 Anoush called and said his dentist had not been paid. Anoush is still waiting for his application for a recognition payment to be determined.

¹² See section 49(1) of the *Victims Rights and Support Act 2013*

¹³ See section 36 (3)(a) and (b) of the *Victims Support and Rehabilitation Act 1996*

*Not his real name.

We therefore recommend that the *Act* be amended to increase the time period for an application for internal review to three (3) months after which the applicant was given notice, and to give the Commissioner discretion to allow an application for internal review to be lodged outside the three month time limit, where there are exceptional circumstances.

12. Independent Commissioner of Victims Rights

We welcome the appointment of a Commissioner of Victims Rights but are disappointed that this role is not independent from government.

Given that complaints under the Charter of Victims Rights are overwhelmingly likely to be in relation to government agencies it would seem obvious that independence from government is necessary to ensure, not only that complaints are dealt with appropriately, but are seen to be made independently and without bias. We note also that Victims Services is itself an agency that could be the subject of a complaint under the Charter, which leads to a clear conflict of interest.

Additionally, it seems highly inappropriate that the Commissioner of Victims Rights, who is tasked with handling complaints under the Charter, is also responsible for determining victims support applications and reviews. One can easily imagine a situation where a victim of crime felt that their interactions with Victims Services staff failed to comply with the Charter, but felt reluctant to make a complaint to the Commissioner for fear it would affect any payment they might receive.

The role of an oversight body is different from that of an internal complaints process. It is important that such bodies are seen to be independent of government.

Our recommendations

We submit the following recommendations to the 12 month review of the *Victims Rights and Support Act 2013*.

1. If a person is able to establish an act of violence and an injury on the civil standard of proof, that should be sufficient. The form of evidence should not be prescribed.
2. In the alternative to non-prescription of documentary evidence, extend the documentary evidence allowed to include documentation from NGOs.
3. NSW Police receive training such that they include a list of injuries in addition to the act of violence in their reports.
4. Victims of domestic violence, sexual assault, child sexual abuse or child abuse must be able to elect whether or not restitution is pursued.

5. Provide victims, particularly victims of domestic violence, sexual assault, child sexual abuse and child abuse, with access to funded legal assistance for their claims.
6. That a system be developed to enable counsellors to do assessments only for the purpose of a Victims Support claim.
7. Victims who have experienced complex trauma should not be restricted on issues they can discuss in approved therapeutic counselling sessions.
8. Remove upper time limits on recognition payments for victims of domestic violence, sexual assault and child abuse.
9. Remove the 2-year time limit for financial assistance for victims of domestic violence, sexual assault, child sexual abuse and child abuse including for loss of actual earnings and medical and dental expenses.
10. Choking, suffocation, strangulation or attempts to choke, suffocate or strangle should be specifically included at a minimum as a Category C recognition payment.
11. A victim of a domestic violence offence resulting in a psychological injury should be eligible for a Category C recognition payment.
12. A victim of a domestic violence offence resulting in a serious psychological injury should be eligible for a Category B recognition payment.
13. Category B recognition payments should be expanded to include ongoing acts of domestic violence.
14. Amend the *Victims Rights and Support Act 2013* so that children of primary victims, who are under 18 at the time of their parent's/carer's death, should automatically qualify for a Category A recognition payment of \$15,000.00.
15. Amend the *Victims Rights and Support Act 2013* so that spouses and de facto partners of primary victims of homicide automatically qualify for a Category A recognition payment of \$7,500.00.
16. Amend the *Victims Rights and Support Act 2013* to require an application for internal review to be lodged within three (3) months after receiving notice of the decision, and to allow for appeals outside three (3) months where there are exceptional circumstances.
17. Reverse the retrospective nature of the legislation.
18. If retrospectivity is not reversed, in the alternative, award the \$5,00 special grant to all applications under the old scheme.
19. The Commissioner of Victims Rights should be established as a position that is independent from government.

If you would like to discuss this further please contact Rachael Martin, Principal Solicitor, Wirringa Baiya Aboriginal Women's Legal Centre on 02-9569 3847.

Yours faithfully,

Alastair McEwin
Director
Community Legal Centres NSW

CC: Mahashini Krishna, Acting Victims of Crime Commissioner