

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 12month 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:

- 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;
- 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 \$5,000 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.

Mary remains fearful of Jason and has gone into hiding. However, Jason knows

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)

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 provided 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 the 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 the *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 only has 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 inflicted 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 with 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 assault 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 acts of violence as 'not related' 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 psychologically 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 60 CC

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. ¹²There 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 Services 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 Services again. In February 2014 Victims 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 Victims 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 \$5,000 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

