



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/ICC/JJ/HRC:GUml1186156

3 August 2016

Director, Civil Law
NSW Department of Justice
Locked Bag 5111
PARRAMATTA NSW 2146

By email: policy@justice.nsw.gov.au

Dear Director,

Statutory review of the *Victims Rights and Support Act 2013*

Thank you for the opportunity to provide a submission to the review of the *Victims Rights and Support Act 2013* (NSW) ("Act").

The Act establishes the Charter of Victims Rights and the Victims Support Scheme. The two most important objects of the Act in the Law Society's view are:

- to recognise and promote the rights of victims of crime; and
- to establish a scheme for the provision of support for victims of acts of violence.

The Law Society has previously provided a submission to the Attorney General, which outlined a number of the provisions of the Act that we considered were particularly problematic and required review. This submission is attached.

The Law Society remains concerned about those aspects of the Act identified in its earlier submission which require urgent review. We provide the following additional comments on the review of the Act.

1. Level of support

The Law Society notes that the support that can be provided under the Act includes:

- approved counselling services;
- financial assistance for intermediate needs;
- financial assistance for economic loss; and
- recognition payments.

The Law Society believes that the level of support provided by the Act is inadequate.

The low level of the recognition payments is of particular concern to the Law Society. We note:

- Category A recognition payments for a family victim of a homicide who is financially dependent on the victim are limited to \$15,000;
- Category B recognition payments for people who are the subject of a very serious sexual assault are limited to \$10,000;
- Category C recognition payments for acts involving, amongst other things, sexual assault resulting in serious bodily injury are limited to \$5,000; and
- Category D recognition payments for acts involving, amongst other things, a robbery involving violence or indecent assault are limited to \$1,500.¹

Insofar as the goal of the Act is to establish a scheme for the provision of support for victims of acts of violence, the Law Society queries whether this level of support is adequate. We recognise that there is a need for all schemes of support to be financially affordable. However, providing effective support for victims of crime is one of the key responsibilities of the Government, on behalf of the community.

2. Access to legal advice and representation

The Act provides for a relatively complicated mechanism for lodging applications for assistance, and in relation to the criteria to be applied. For example, s 44 of the Act allows the Commissioner to refuse a claim or reduce the financial support or recognition payment in certain circumstances. These circumstances include if the crime was not reported to the police within a reasonable time or if the victim did not cooperate with the police.

Similarly, the requirements outlined in s 39 of the Act dealing with documentary evidence to support applications for victims support are complicated. For example, for a case of actual loss of earnings, material needs to be obtained from the employer detailing the absence from work and "a statement from the employer substantiating those particulars".²

In the Law Society's view, the material that is required to support a well-drafted application cannot be easily prepared by most people without legal advice. We believe that legal representation should be both encouraged and paid for under the scheme.

As noted in our previous submission, at the time the Act was introduced, it was suggested there was no need for legal representation because applicants would be assisted by Victim Services support coordinators and case managers. We note that such personnel at Victim Services are not permitted to provide legal advice to victims on interpretation of the legislation, nor can they assist the victims in drafting a complex submission.

As noted in our previous submission, Legal Aid is not available for this type of legal work, and many Community Legal Centres would be unable to assist many victims of crime due to resource constraints. Legal practitioners are able to charge a fee to assist a client under the new scheme, but many applicants are socially disadvantaged and unable to afford costs. We reiterate our view that, given the very low level of payments under the Act, it is not fair for victims to have to bear their own legal costs under the scheme (where these arise).

We reiterate that, as a consequence of this change, many victims of crime may not be receiving their proper entitlements because they may not understand their entitlements and

¹ Section 36(1), *Victims Rights and Support Act 2013* (NSW) ("Act"); r 12, *Victims Rights and Support Regulation 2013* (NSW) ("Regulation").

² Section 39(4)(b), Act.

cannot afford legal representation or advice. We remain concerned that access to justice in this regard is being compromised.

In particular, we note the disproportionate impact that this has on Aboriginal and Torres Strait Islander people who may be seeking redress under the Act. We note that Aboriginal women are one of the largest cohorts of victims of domestic and family violence. However, the number of Aboriginal women who have used the Act for redress is historically very low. We also note that this is particularly problematic in remote Aboriginal communities. We believe that much more needs to be done to make the scheme and redress under the Act more accessible for Aboriginal people. This should involve proactively reaching out into communities, and funding organisations, including public legal assistance organisations such as Community Legal Centres, Legal Aid NSW and the Aboriginal Legal Service, to undertake outreach into communities to assist people with their applications.

We maintain, as per our previous recommendation, that sufficient State funding should be allocated to ensure that independent, skilled, experienced and dedicated legal representatives are available to assist victims of crime in processing their claims.

3. Time delays

The Law Society notes that a person whose application for statutory compensation was lodged, but not finally determined, under the old Act is eligible to make an application for reassessment of that application.³ We are aware of cases where applications for reassessment have been submitted and are still not being dealt with after some months. For example, an application for reassessment was submitted in September 2015 and has still not been dealt with some 10 months later.

We recommend that adequate resources be provided to the Commissioner of Victims Rights to enable applications to be dealt with promptly.

4. Victims support levy

A victims support levy ("VSL") is automatically imposed on all persons found guilty of crimes, and applies to all offences (with certain exceptions)⁴ that are dealt with by the Children's Court.⁵ However, a person under the age of 18 years is not liable to pay the VSL if the court by which the person is convicted directs that they are exempt from liability to pay it.⁶

In the experience of our members, dedicated Children's Court magistrates waive the VSL for children almost as a matter of course in practice. However, it is the experience of our regional members that this does not occur with the same regularity in regional courts sitting as Children's Courts.

The Law Society submits that the VSL should not be imposed on persons under the age of 18 years. Children generally lack economic independence and are rarely employed. The vast majority have no income at all. The imposition of the VSL on children is unreasonable given their lack of means to pay it. Additionally, the VSL applies per charge, so where there are multiple charges there can be very large levies imposed on children.

³ Regulation 19, Regulation.

⁴ See s 105(2), Act.

⁵ Section 105(1)(g), Act.

⁶ Section 106(3), Act.

We recommend that the Act be amended so that the VSL does not apply in the Children's Court. Alternatively, we recommend that the Act be amended so that the VSL does not apply to children unless the magistrate orders otherwise.

5. Restitution orders

Part 5, Division 2 of the Act provides for the financial support paid, and recognition payments made, under the scheme to be recovered from persons found guilty of the crimes giving rise to the payments.

In the experience of our members, young people have had restitution orders made against them when they turn 18 years for offences committed when they were a child. Often these notices of restitution orders are received by young people, including those who have been or are still in custody, some time after they committed their offence. Because a long time has passed, the young person often does not consider bringing the matter to the previous solicitor who represented them in the criminal matter. Furthermore, the restitution order is a civil matter for which it is much more difficult to receive a grant of legal aid.

Failure to lodge a written objection to a notice of a restitution order within 28 days after the notice was served may result in confirmation of the order, upon which the amount payable under the order may be recovered by the Commissioner of Victims Rights.⁷ These restitution orders can impose debts of many thousands of dollars on young people, and may result in court proceedings being brought against them. The Law Society believes that the making of these restitution orders against young people for offences committed when they were a child is inconsistent with the principles of youth rehabilitation.

We recommend that the Act be amended so that restitution orders cannot be made against persons for offences committed when they were under the age of 18 years.

Conclusion

Providing effective support for victims of crime is one of the key objectives of the Act. The Law Society submits that the scheme under the Act provides inadequate support for victims of acts of violence. Recognition payments should be substantially increased, and legal advice should be permitted, and paid for, under the scheme.

Should you have any questions or require further information, please contact Meagan Lee, Policy Lawyer on (02) 9926 0214 or email Meagan.Lee@lawsociety.com.au.

Yours faithfully,



Gary Ulman
President

⁷ Section 63, Act.



THE LAW SOCIETY
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Our ref: Injury:RElw876920

15 July 2014

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

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

Dear Attorney General,

Victims Rights and Support Act 2013

I understand that a review of the operation of the first twelve months of the *Victims Rights and Support Act 2013* ("the Act") is underway. I am writing to you on behalf of the Law Society's Injury Compensation Committee ("ICC") and Indigenous Issues Committee ("IIC") (referred to together as the "Committees") to voice the Committee's concerns about a number of discrete provisions of the Act that have been identified as particularly problematic and requiring review.

1. Time limits

Strict upper time limits apply to applications under the Act which were not present under the *Victims Support and Rehabilitation Act 1996* ("the old Act"). There is now no provision for leave to be granted for an application outside the time limits, which was a positive feature of the previous scheme.

Generally for victims there is a limit of two years from the incident (or two years after a child turns 18) to claim for financial assistance for economic loss¹ and a limit of two years from the incident (or two years after a child turns 18) to claim for recognition payments.²

Applications for recognition payments for victims of domestic violence, child abuse or adult sexual assault must be made within 10 years of the act of violence (or for a child victim within 10 years of the child turning 18).³ However, the two year time limit applies to these victims in making a claim for financial support.

There are no time limits for victims of child sexual abuse applying for recognition payments; applying for out-of-pocket expenses up to a maximum of \$5,000 and applying for expenses associated with relevant criminal or coronial proceedings (justice related expenses) up to a maximum of \$5,000. However, if victims of child sexual assault apply outside the two year

¹ Section 40(1) *Victims Rights and Support Act 2013*

² Section 40(4) *Victims Rights and Support Act 2013*

³ Section 40(5) *Victims Rights and Support Act 2013*

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limit of turning 18 they are unable to access financial assistance for loss of actual earnings (capped at \$20,000) or medical and dental expenses.

There are many well documented and legitimate reasons why there is often delay by victims in reporting domestic violence, sexual assault and child sexual abuse. The imposition of arbitrary time limits effectively denies such victims equal access to justice when compared with victims of other crimes.

Recommendations

- Removal of the two 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.
- Removal of upper time limits for recognition payments for victims of domestic violence, sexual assault and child abuse.

2. Domestic violence and sexual assault

The IIC considers that the 2013 amendments will have had a disproportionate effect on Aboriginal people. The figures suggest that Aboriginal people are overrepresented as victims of crime. From 2008 – 2012, Aboriginal people made up between 8 to 12% of all applicants.⁴ Of those applications, 76% were for domestic violence or sexual assault.

In respect of domestic violence, the categories of recognition payments in the Act focus on victims who have suffered physical injuries.⁵ Under the old scheme, the Schedule of Injuries included a domestic violence injury and psychological or psychiatric injury. It is now the case that a victim who suffered years of domestic violence in the form of emotional abuse, which does not become grievous bodily harm, would at best be able to recover \$1,500 as a Category D recognition payment if it was accepted that there was an assault.⁶ The Committees are of the view that this sum of \$1,500 is inadequate recognition of the devastating psychological damage that is often a major injury resulting from such domestic violence, and which continues for many years. The effects of psychological damage can include severe depression, anxiety or Post Traumatic Stress Disorder.

The Act recognises the impact of repeated ongoing sexual assault and this is reflected in the fact that such assaults attract a higher payment in the form of a Category B payment.⁷ However by contrast, the Act does not recognise the effect of repeated and ongoing domestic violence.

In respect of sexual assault, the new scheme offers a maximum lump sum payment of \$10,000. For an applicant to receive a Category B payment of \$10,000 they must be a victim of the most serious kind of sexual assault; that is, involving serious injury, the use of a weapon or multiple offenders, or a series of related acts involving sexual assault, indecent assault or attempted sexual assault involving violence.⁸ Under the old scheme, victims of the most serious kind of sexual assault (one involving a pattern of abuse, two or more offenders,

⁴ Department of Attorney General & Justice "Victims Compensation Tribunal – Chairperson's Report" 2012/2013 at p31, available online http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7/wr/assets/vss/m75425218/chairpersons_2012-13.pdf (accessed 8 July 2014)

⁵ Section 35 *Victims Rights and Support Act 2013*

⁶ Section 35(4)(d) *Victims Rights and Support Act 2013*

⁷ Section 35(2)(b) *Victims Rights and Support Act 2013*

⁸ Section 35(2), *Victims Rights and Support Act 2013*

an offensive weapon or the infliction of serious bodily harm) came within Category 3 and were entitled to an amount between \$25,000 - \$50,000.⁹

For all other sexual assaults under the new scheme, the applicant will only be entitled to receive a Category C recognition payment of \$5,000.¹⁰ Under the old scheme, victims of a sexual assault which was not part of a pattern of behaviour and did not result in serious bodily harm came within Category 2 and were entitled to an amount between \$10,000 - \$25,000.¹¹ Victims of an indecent assault or an assault with violence in the course of attempted sexual assault came within Category 1 and were entitled to an amount between \$7,500 - \$10,000.¹²

The IIC submits that these amounts are manifestly inadequate and recommends that the quantum of compensation available in relation to sexual assault be reassessed.

Recommendations

- A victim of domestic violence offence resulting in a serious psychological injury should be eligible for a Category B recognition payment.
- A victim of a domestic violence offence resulting in a psychological injury should be eligible for a Category C recognition payment.
- A victim of ongoing acts of domestic violence should be eligible for a Category B recognition payment.
- The quantum of compensation available in relation to sexual assault be re-assessed.

3. Family Victims

The Committees take the view that the recognition payments for family victims should include the children of a primary victim of a homicide regardless of their age or whether or not they were financially dependent on the primary victim. Currently parents, step parents or guardians of a primary victim of a homicide automatically qualify for a recognition payment of \$7,500¹³. 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 qualify¹⁴.

Likewise, 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 also 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 payment of \$7,500.

Recommendations

- Section 36 of the Act should be amended so that children of primary victims automatically qualify for a recognition payment of \$7,500 regardless of age.

⁹ Schedule 1, Cl 6, *Victims Support and Rehabilitation Act 1996*.

¹⁰ Section 35(3) *Victims Rights and Support Act 2013*

¹¹ Schedule 1, Cl 6, *Victims Support and Rehabilitation Act 1996*

¹² Schedule 1, Cl 6, *Victims Support and Rehabilitation Act 1996*

¹³ Section 36(1)(b) *Victims Rights and Support Act 2013*

¹⁴ Section 36(1)(a) *Victims Rights and Support Act 2013*

- Section 36 of the Act should be amended so that spouses or de facto partners automatically qualify for a recognition payment of \$7,500.

4. Access to legal advice

Unlike the old scheme, the victims' legal fees under the new scheme are not paid by the Commissioner, and in fact victims are discouraged from seeking independent legal advice. It was said last year, at the time of the introduction of the Act, that victims of violence would have no need for legal representation because they would be assisted by Victims Services support co-ordinators and case managers¹⁵. However such personnel at Victims Services are not permitted to provide legal advice to victims on the interpretation of the more technical aspects of the legislation. Nor are they able to assist a victim draft complex submissions; for example, in support of a claim for financial assistance for economic loss. Section 44 factors must be adequately and comprehensively addressed by the victim of crime when duly making a claim, or the claim may be refused, or entitlements reduced.

The application of the legislation is complex in itself but even more so to a lay victim who has very little or no capacity to understand the more technical aspects of the legislation such as the need to address the section 44 factors. The lay victim is not able to receive legal advice from staff at Victims Services to assist in duly making a detailed and comprehensive application for support to ensure receipt of proper entitlements.

Legal Aid is not available for this kind of legal work. Community Legal Centres have significant resource constraints and are unable to assist many victims of crime with their applications. Legal practitioners are able to charge a fee to prepare a claim for a client under the new scheme but the reality is that victims on low incomes will not be able to afford to pay a lawyer to assist. As the payments now recoverable under the Act are extremely modest, it is rarely going to be financially viable to instruct a private lawyer in these matters. The ICC has received feedback from its members and other solicitors that very few solicitors now act for clients in victims' compensation applications.

It should be noted that even under the old scheme the fees payable to solicitors for this work were extremely modest and did not reflect a fair or adequate payment for the time required to prepare often complex matters. Many of the solicitors previously engaged in victims' compensation matters did so for reasons of social justice rather than the miniscule costs that might be awarded.

As a consequence of these legislative changes, many victims may not be receiving their proper entitlements or none at all, because they do not understand their entitlements and cannot afford access to legal representation or advice. The Committees are concerned that access to justice has been denied to many victims.

The ICC also takes the view that a clear conflict of interest arises in a situation where the staff from Victims Services, (which ultimately determines whether or not victims support is awarded) also assists a victim in making a claim.

¹⁵ Second Reading Speech, Victims Rights and Support Bill 2013, Hansard, *Legislative Assembly*, 21 May 2013 at p 20527 (Mr Chris Patterson, MP)

Recommendations

- Sufficient State funding should be provided to ensure that independent, skilled, experienced and dedicated legal representatives are available to assist victims of crime in the processing of their claims.
- The Act be amended to include a power to award costs to a victim in similar terms to section 35 of the old Act.

5. Appeals

A victim dissatisfied with the amount awarded by the administrative decision maker at Victims Services, may first request an internal review by lodging an application in writing within 28 days of receipt of the determination. This is a particularly short timeframe in which to receive the decision of the Victims Services and then consider the merits of applying for an internal review. The staff at Victims Services are not permitted to provide legal advice by drafting grounds for an internal review.

If the victim is dissatisfied with the outcome of the administrative internal review, he or she may appeal to the NSW Civil and Administrative Tribunal; but only with respect to recognition payments. This time limit is strict and there is no provision for an applicant to apply for further time to seek an internal review. The old scheme provided for a three month time limit to lodge an appeal to the Victims Compensation Tribunal which had discretion to extend further time. It is submitted that 28 days is a wholly inadequate time frame.

Recommendation

- Amend the Act to require an application for internal review to be lodged within three months after receiving notice of the decision, and to allow for the appeal period to be extended where there are exceptional circumstances.

6. Retrospectivity

The retrospectivity of the legislation is particularly objectionable to the Committees. Any applications filed under the old scheme, which were not finally determined by 7 May 2013, are now dealt with under the new scheme. This has meant that many claimants who had been waiting for determination of their existing claim for well over two years were then informed that they failed to meet the new criteria, or that the payments they were expecting were now vastly reduced. The Committees believe that victims are entitled to have their claims dealt with under the scheme that was in place at the time of the offence.

Recommendation

- All claims that were accepted under the old Act, including claims that had been accepted as out of time, should be eligible for the \$5,000 special payment.

7. Quantum

Finally the Committees would like to record the dismay of their members and similar feedback from legal practitioners in NSW with respect to the quantum of payments generally now available to victims of crime under the Act. Victim compensation schemes are supposed to provide the community's acknowledgement of a public wrong and presumably assist victims reclaim their lives. It is submitted that the limited sums now payable do neither.

The changes will have a particularly harsh impact on the victims of domestic violence and victims of historic child sexual abuse. Currently, the victims from NSW giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse would be limited to a recognition payment of \$10,000 under this scheme.

Should your officers have any queries arising from this letter, please contact Leonora Wilson on leonora.wilson@lawsociety.com.au or (02) 9926 0323.

Yours sincerely,

A handwritten signature in black ink that reads "Ros Everett". The signature is written in a cursive, flowing style.

Ros Everett
President