



THE LAW SOCIETY  
OF NEW SOUTH WALES

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](mailto: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 loss<sup>1</sup> and a limit of two years from the incident (or two years after a child turns 18) to claim for recognition payments.<sup>2</sup>

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).<sup>3</sup> 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

<sup>1</sup> Section 40(1) *Victims Rights and Support Act 2013*

<sup>2</sup> Section 40(4) *Victims Rights and Support Act 2013*

<sup>3</sup> Section 40(5) *Victims Rights and Support Act 2013*

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney  
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809  
[www.lawsociety.com.au](http://www.lawsociety.com.au)



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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> Under the old scheme, victims of the most serious kind of sexual assault (one involving a pattern of abuse, two or more offenders,

<sup>4</sup> Department of Attorney General & Justice "Victims Compensation Tribunal – Chairperson's Report" 2012/2013 at p31, available online [http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/assets/vss/m75425218/chairpersons\\_2012-13.pdf](http://www.victimsservices.lawlink.nsw.gov.au/agdbasev7wr/assets/vss/m75425218/chairpersons_2012-13.pdf) (accessed 8 July 2014)

<sup>5</sup> Section 35 *Victims Rights and Support Act 2013*

<sup>6</sup> Section 35(4)(d) *Victims Rights and Support Act 2013*

<sup>7</sup> Section 35(2)(b) *Victims Rights and Support Act 2013*

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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 \$7,500<sup>13</sup>. 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<sup>14</sup>.

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.

<sup>9</sup> Schedule 1, Cl 6, *Victims Support and Rehabilitation Act 1996*.

<sup>10</sup> Section 35(3) *Victims Rights and Support Act 2013*

<sup>11</sup> Schedule 1, Cl 6, *Victims Support and Rehabilitation Act 1996*

<sup>12</sup> Schedule 1, Cl 6, *Victims Support and Rehabilitation Act 1996*

<sup>13</sup> Section 36(1)(b) *Victims Rights and Support Act 2013*

<sup>14</sup> 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 managers<sup>15</sup>. 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.

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<sup>15</sup> 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](mailto: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 style with a long, sweeping underline.

Ros Everett  
**President**