

The Shopfront

YOUTH LEGAL CENTRE

The Director,
Civil Law NSW
Department of Justice
GPO Box 31
SYDNEY NSW 2001

22 June 2016

Dear Sir/Madam

Statutory Review of Victims Rights and Support Act 2013 (Victims Act): Submission from the Shopfront Youth Legal Centre

1 Introduction

We are writing to you in response to the review of the Victims Act. We note that you are assessing whether the policy objectives of the Victims Act remain valid and whether the terms of the Victims Act remain appropriate for securing those objectives.

We note that one of those objectives is to "*recognise and promote the rights of victims of crime*". In our view the opportunity to fully participate in the scheme established by the Victims Act (**Victims Support Scheme**), regardless of disadvantaged background, intellectual disability or youth is one of those rights of victims of crime.

2 About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront has been operating since 1993 and is a joint project of the law firm Herbert Smith Freehills, Mission Australia and The Salvation Army.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. This leaves them extremely vulnerable and traumatised and unable to protect themselves.

Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem. These young people have difficulty successfully navigating the different bureaucracies related to housing, health care and income support, in addition to managing their legal issues.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. Most of the young people we assist as criminal defendants are also victims of abuse with unresolved trauma.

We have assisted numerous clients to pursue victims' compensation claims, in particular claims for domestic violence and sexual assault, which in the main relate to their history of child abuse.

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3 General comments on the Victims Support Scheme

Although we understand that certain categories of victims have expressed satisfaction with the Victims Support Scheme we are writing these submissions on behalf of our client group, ie homeless and disadvantaged young people. For this client group, participation in the Victims Support Scheme without legal assistance is still a difficult and daunting process.

Also, since most of our clients' claims relate to historical child abuse or domestic violence, they are not in a position to take advantage of the financial assistance packages as there are specific time limits (2 years from the act of violence or 2 years from the victim's 18th birthday) and almost all of the financial assistance packages relate to expenses incurred or lost wages, which are not applicable to victims of historical child abuse nor in the most part to homeless young people. They are therefore completely reliant upon the Recognition Payments to compensate them for the trauma they have suffered. These Recognition Payments are substantially less than the amounts awarded for equivalent claims under the Old Act.

We also note that one of the main justifications for the establishment of the Victims Support Scheme and consequent reduction in these compensation payments was that it would allow faster processing of claims. Although this was the case initially, in our experience, especially in the past 12 months, the delays between lodgement of an application and receiving a determination have now stretched out to approximately 12 months or longer, particularly if the claim relates to childhood abuse and is reliant upon police or FACS files.

4 Specific comments

4.1 Reduced payments for trauma suffered by victims of sexual assault and domestic violence

One of our primary concerns is the significantly reduced payments for domestic violence and sexual assault victims, including victims of child sexual assault. For the reasons stated above, our client group are mostly not in a position to take advantage of the financial assistance packages and are therefore completely reliant upon the Recognition Payments for compensation for the trauma and injury they have suffered.

In our submission, these reductions ignore and undervalue the trauma suffered by these victims. This is particularly the case for victims of prolonged child sexual assault, who would have suffered multiple counts of abuse during a critical period in their lives.

Compensation payment for pain suffered is a symbolic recognition of a public wrong and an important part of addressing violent crime in our society. The huge reduction in payments for victims of these forms of violence has detrimental effects on a victim's ability to reclaim their life, but more importantly, in contrast to the current level of community and media concern about domestic violence, also sends a clear message that this is not important to us as a society.

We do note that the removal of the concept of compensable injury and the related Schedule of Injuries and threshold requirements has benefitted the victims of one-off violent assaults by strangers or unrelated perpetrators. However, a victim of domestic violence who is over the age of 18 years can only receive a recognition payment of \$1500, unless he/she can prove they suffered grievous bodily harm. This produces some anomalous results. For example, a young woman who is beaten every day by her partner, suffering bruises, lacerations and psychological trauma is seen as less worthy of a higher recognition payment than someone who was in a brawl and was punched in the jaw.

We find it difficult to understand how, after working so hard to recognise that domestic violence is a serious issue and to implement significant strategies such as the NSW Domestic Violence Justice Strategy and the recent amendments to the *Crimes (Domestic and Personal Violence) Act*, the government now appears to be giving greater recognition to "public" acts of violence.

4.2 Failure to recognise psychological trauma, particularly in victims of domestic violence coupled with the requirement to show grievous bodily harm in order to receive the higher recognition payment

The requirement that a victim of domestic violence must prove that they have suffered grievous bodily harm (GBH) in order to receive the higher payment, coupled with the refusal to recognise severe psychological trauma as a form of GBH is producing some patently unjust results.

As described above, a young woman can be beaten every day for years and suffer extensive bruising and lacerations and severe psychological trauma and be awarded \$1,500, whilst someone who is hit once in the jaw and goes to hospital receives more than 3 times that amount.

We note that many of our client group who are claiming for domestic violence, in particular past domestic violence, do not qualify for the financial assistance packages, ironically due to their circumstances of homelessness and disadvantage.

Case Study

When she was only 22 years old, Nancy was in a violent relationship with the father of her young child. After months of beatings, including one hospital attendance with a suspected broken collar bone, she left him.

He then asked to meet with her to discuss some financial issues. Nancy didn't want him to know where she lived so she agreed to meet him at a friend's house. He parked outside the house and she got into the car to talk to him. He then drove her to a waterfront location. He kept drinking alcohol while they spoke. He became angered and demanded that they resume their relationship. He threatened to punch her in the head if she opened the door.

He then drove his car erratically, at speed. He went through a red light and he drove on the wrong side of the road, forcing other cars off the road. He said that he and Nancy were going to die. He bashed her head against the dashboard repeatedly. She tried to call Police and he took her mobile phone and threw it from the car.

At one point Nancy took an opportunity to pull on the handbrake. The car spun around. When it stopped she jumped from the car. She landed awkwardly and hurt her ankle. She flagged down an oncoming car and it started to drive her to the Police Station. The ex-partner followed that car and bashed into it from behind with his car while it drove.

He was eventually charged and convicted of kidnapping and other offences. Despite the months of beatings and her traumatic ordeal in the car, Nancy received a mere \$1,500 recognition payment.

We consider that there is a simple solution which could resolve this situation of manifest injustice. Section 35(3) of the Victims Act could be amended to add an additional act of violence to the category C Recognition Payment which would provide for "domestic violence". We note that there is already a definition of "domestic violence" in s19(8) of the Victims Act.

4.3 Restricted time limits for claims

Our experience in the past 3 years has been that the imposition of 10-year time limits for victims' claims for recognition payments for domestic violence, sexual assault and child abuse (not including child sexual assault) is negatively affecting our clients.

Many of our clients are young people who are currently dealing with the results of a childhood and early adulthood consisting of physical abuse, substance abuse, homelessness and mental health issues. It is unfortunate but very common for many of them to find themselves in domestic relationships with violent partners.

Also, we are finding that these homeless and disadvantaged young adults (ie those over 18 years old) are often victims of sexual assaults. They spend their twenties and thirties

trying to repair and rehabilitate their lives, before being able to deal with the trauma of their late adolescence and early twenties.

Also, there is no clear definition of 'child abuse' in the Victims Act, unlike sexual assault and domestic violence. In our experience, it seems to be an arbitrary decision made by officers at Victims Services whether an incident is classified as child abuse or not and therefore whether it is accepted as being within time.

Case Study

Alex is a young Aboriginal woman who suffered child abuse and neglect as a young girl. She is currently 23 years old and suffering from mental health issues and homelessness. Although she is aware that victims support exists she has instructed us that it is too traumatic for her and she is not able to deal with her childhood at the moment. She does not know when she will be physically and mentally in a position to do so, but it is concerning that once she reaches 28 years old (ie in 5 years' time) she will lose her rights to claim compensation.

We submit that a simple amendment to section s40(7) of the Victims Act so that domestic violence, sexual assault and child abuse are included in the list of acts of violence for which there are no time limits. Alternatively, instead of just an open-ended application period, the Victims Act could provide for a similar procedure to that found in the Old Act, ie the imposition of a time limit but an ability to apply for leave to file an application out of time in certain circumstances and a presumption that such leave should be granted.

4.4 Requirement to report act of violence to police or government agency

We note that this requirement has a particular impact on our client group and can result in quite distressing results.

Many of our clients have had negative experiences with police and government agencies and therefore instead report their crime to support services, many of which are non-government agencies. It is our experience that many of our clients, particularly those who were victims of child abuse, have been told all of their lives that they will not be believed. Therefore it takes a relationship of great trust before a victim is able to have the confidence to disclose what happened to them.

In these circumstances, many young people disclose their experiences of sexual abuse or domestic violence to counsellors, psychologists, refuge workers, social workers, employers and family members, none of which are acceptable to the Commissioner. We find ourselves advising young people who have made numerous contemporaneous disclosures that they do not have a claim for compensation whilst a person who was lucky enough to have a sympathetic public school teacher or DOCS worker can make a single disclosure and lodge a claim.

We consider that the documentary requirements should be expanded in order to encompass reports or records, at the very least, from organisations that receive some form of government funding, but preferably to all documents that evidence an act of violence and injury that meet the civil standard of proof.

Case Study

Karen is only 19 years old. Since she can remember, Karen's mother has been extremely violent towards Karen. As a result of the mother's behaviour, the family was evicted from their home and moved in with the grandfather. The family was again made homeless because of the mother's substance abuse and violence and they moved around a lot. Karen does not remember any DOCS or police involvement with the family. Karen has disclosed the abuse to her psychologist, her case worker at Weave Youth, Family and Community, her GP and workers at the Glebe Pathways Day Program.

Karen told her psychologist that she recalled daily physical abuse by her mother which was so severe she was unsure whether she would survive. When her injuries were severe enough to warrant medical attention, Karen's mother refused to let her go to hospital, or on the very few occasions that she went, she was too scared to tell anyone.

Despite making repeated disclosures of the abuse to different reputable professionals, Karen does not have a report from police or a Government Agency as defined in the Victims Act and is therefore unable to lodge a claim.

4.5 Legal assistance

In the document titled "The Victims Support Scheme: a detailed guide" produced by Victims Services (www.victimsservices.justice.nsw.gov.au/Documents/bk19_vss-guide-details.pdf) applicants are told that they do not need lawyers and that "You will be allocated a support coordinator to assist with your claim and get evidence"

As discussed above, many of our clients suffer from intellectual disabilities, mental health issues and very low levels of literacy. All of them are 25 years old or under. It is virtually impossible for them to navigate the Victims Support Scheme by themselves, in particular in relation to the factors described in s44 of the Victims Act. A failure to properly address these factors could result in a reduction or refusal of the claim. This would be manifestly unjust.

Case Study

Marvin is a homeless young man who suffers from schizophrenia. He made a claim for victims compensation for severe injuries suffered as a result of an altercation at a party. He didn't report the assault until 2 days afterwards, due to having been detained at a medical centre and at the hospital for over 18 hours (he did not realise that delay was an issue, nor did he have the capacity to explain this delay in his application for compensation). He also didn't attend any follow-up appointments with police to make his statement or to provide assistance in the investigation of the assault. He was therefore at risk of losing some or all of his recognition payment under s 44 of the Victims Act.

Marvin's lawyer carried out an investigation into his medical history and obtained a psychiatric report which described some of Marvin's symptoms and also his circumstances at that time (ie homelessness). Detailed submissions were prepared which explained that any of Marvin's failures were due to his homelessness and his mental health problems. The Assessor accepted these submissions and awarded Marvin the entire recognition payment.

There are other areas where our client's lack of literacy and sophistication, combined with (in our experience) the lack of knowledge of the support co-ordinator at Victims Services, can lead to an injustice. We set out some examples below:

- (a) **Claims rejected as out of time:** The online application form does not contain an option to describe a claim as 'child abuse'. The only option if the perpetrator was not in a domestic relationship with the child such as a teacher, counsellor or even a stranger, is 'assault'. We note that several clients have received letters telling them that their claims were rejected as being out of time. In response, we have sent detailed submissions proving that the assault/s should be classified as child abuse and the claim/s has then been accepted. Clients tell us that had they received the letter of rejection of a claim on this basis (without having access to legal advice), it would not only be very distressing but that they would not necessarily have the requisite knowledge nor feel capable of challenging this decision.
- (b) **Internal Reviews:** Our clients have received a large number of Notices of Decision either rejecting that client's application for a recognition payment or awarding a client with a lower recognition payment than their claim deserves. Also we have received decisions where a recognition payment has been reduced due to s 44 considerations. In each of these situations we have advised the client to seek an internal review and we have provided submissions to the reviewing Assessor on issues of fact and law that the previous Assessor may have missed. We have been successful in all of our requests for Internal Reviews on behalf of our clients.

However, some of the issues are quite complex and require an understanding of the relevant law in order to even recognise that one has a right of review. The letter that Victims Services sends out with successful and unsuccessful claims contains one sentence on Internal Reviews; *"If you would like this decision to be reviewed, you must apply to us in writing within 28 days of this letter being sent"*. There is no suggestion to seek legal advice or otherwise and most people, but particularly our client group, are not in a position to make that assessment themselves. Nor are they necessarily capable of fulfilling the requirements of s49 (3) of the Victims Act which provides that *"An application for an internal review must be in writing and state fully the grounds of the application"* particularly within the statutory time limit of 28 days.

We have made enquiries to the support co-ordinators at Victims Services and been informed that if a client calls up asking for advice about a decision, that client is referred to the Review team (who are not lawyers) and given information on the steps to take to seek an internal review. There is no advice given on the merits of the decision and in fact we have been told that no case support officer is in a position nor qualified to question an Assessor's decision nor explain to a vulnerable young person the reasoning behind the decision.

Given the time limit of 28 days with no option to apply for leave to extend that time, vulnerable people are placed at a significant disadvantage when attempting to properly access their entitlements for support. This is particularly true for people in custody or with mental health issues or other circumstances of disadvantage.

Case Study

Jack was a young Aboriginal man with a long history of physical and sexual abuse. He was severely traumatised and had made several applications for victims support. One of his applications related to years of sexual abuse by a well-known paedophile ring when he was a teenage boy.

Despite accepting without objection that Jack was sexually assaulted by older men at a very young age and that he had suffered psychological harm as a result of these sexual assaults, the Assessor rejected the application stating that there was not sufficient evidence to prove that it is more likely than not that the acts of violence occurred. The Assessor went on to say that even if he/she found that Jack was entitled to a recognition payment, the Assessor would decide that "taking into account the provision of section 44(1)(a) of the Act that an award should not be made." This decision was apparently based upon "the applicant's behaviour during the subject period directly or indirectly contributed to the injury he sustained." i.e. he wasn't able to escape the paedophile ring and kept returning. This decision was not only wrong and victim-blaming but it was extremely distressing for Jack.

Jack was in custody during the relevant time and was not in a position to assess whether this decision was legally correct or not, certainly not within 28 days. Fortunately he had access to legal assistance from the Shopfront. We advised him to seek an internal review of this decision and that we would prepare detailed submissions on his behalf within the relevant time period. He instructed us to do so and ultimately received a recognition payment of \$10,000.

We submit that for vulnerable and traumatised young people, with a background of significant disadvantage and homelessness, it is just not possible for them to understand and analyse their decision and to successfully argue in support of their entitlements.

In addition the inflexibility of the 28 days to lodge a request for an internal review unfairly impacts on people who are homeless or in custody as the current phrase in s 49(2) of the Victims Act that the 28 days runs from the day on which the applicant is *"given notice"* rather than the day on which the

applicant received notice of the decision, means that many people are unaware of their rights to an internal review until after the time has expired.

The time limit restriction could be resolved by a simple amendment to section s49 (2) of the Victims Act so that the 28 days commences from the day on which the applicant **received** [our emphasis] the notice of the decision.

Alternatively, instead of a completely inflexible time period, the Victims Act could provide for a similar procedure to that found in the Victims Support and Rehabilitation Act 1996 (**Old Act**), ie the imposition of a time limit but an ability to apply for leave to file a request for an internal review out of time in certain circumstances and a presumption that such leave should be granted.

As stated above, in our opinion, based on our lengthy experience working with vulnerable young people, the deliberate omission of any system to provide for and pay for legal advice and assistance for this vulnerable group has severely disadvantaged them and unfairly impacted on their ability to access their full entitlements for Victims Support.

4.6 Domestic violence victims afraid of retribution

We refer to the Commissioner's discretion to make a provisional order for restitution against convicted perpetrators under section 59 of the *Victims Rights and Support Act 2013* (NSW). Section 59(1) relevantly provides:

"If the Commissioner is of the opinion that, before or after an approval for the giving of financial support or making of a recognition payment is given, a person has been convicted of a relevant offence, the Commissioner may make a provisional order for restitution against the person. "

In our experience, particularly with vulnerable victims of domestic violence either by ex-partners or family members, the first question they ask is "will the perpetrator find out about any claims for compensation?"

One answer is that they will, if the perpetrator has been convicted of an offence relating to the act of violence being claimed. They will be issued with a provisional order of restitution which amongst other things, includes the **name of their victim** and **how much they have been awarded**.

The fact that a violent offender will learn that his/her victim has received money is terrifying to most victims of domestic violence. For many of them, particularly those who due to circumstances such as having children in common or family members, it is an insurmountable obstacle to making or progressing a claim.

What makes this circumstance even more galling is that these victims, unlike many instances of domestic violence, have made the courageous step of reporting the violence against the perpetrator to the Police, and in many cases given evidence, which has therefore made a conviction possible. We submit that it is simply against the interests of justice for domestic violence victims to be effectively denied their opportunity for compensation under the Victims Support Scheme because they have reported crimes to the Police and convictions have been successfully made against their offenders.

We note that it is possible to provide submissions together with evidence to the Commissioner seeking an assurance that restitution claims will not be made. We have done this successfully on behalf of several clients. However, as discussed above, many victims, on the advice of Victims Services, do not seek legal advice.

Our understanding from talks given by the Commissioner is that collection of monies through the Restitution process accounts for only a small percentage of funding for the Victims Support Scheme. In these circumstances, perhaps this injustice can be resolved by a simple amendment either allowing the victim to be consulted on whether restitution should be made or at the very least be able to tick a box requesting that their details remain anonymous. This may not assist in all cases but it may provide comfort to some vulnerable people.

4.7 Restitution

As a legal service for young people we also provide advice on restitution debts. The imposition of a restitution debt on a young person, particularly when they are starting to find employment or to rehabilitate themselves can be a financial disaster for that young person. In our experience, the offence behind the restitution debt usually relates to a time when the young person was a child and was homeless or otherwise extremely vulnerable.

The Victims Act is different to its predecessor in that it does not provide a right of appeal against a final order for restitution, unless a written notice of objection has been lodged within 28 days of the notice being served. Service can be personally or by post.

Since most of our clients are homeless or transient, they rarely receive the original notice of the provisional order and hence are not in a position to serve a notice of objection within the relevant time period. Any appeals to the NCAT are also limited to matters where a notice of objection has been lodged. Thus a young homeless person is unfairly disadvantaged and has all of their rights to object and to appeal to higher authorities removed based on their unfortunate circumstances. Under the previous scheme, there was a section allowing a final order for restitution to be set aside in certain circumstances.

Again, it is our submission that this anomaly could be corrected by adding a clause in similar terms to s56 of the Old Act.

5 Conclusion

A strong victims' compensation scheme that is equally accessible to every member of society, is important in empowering victims, recognising their pain and suffering and for recognition that there has been a public wrong. Victims' compensation is important not just to victims but also for a fair and just society.

The issues raised and the proposals outlined in this letter would, in our submission, assist towards achieving this goal.

We therefore urge you to carefully undertake the review of the current scheme taking into account the suggestions contained in this submission.

Yours faithfully



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