



WIRRINGA BAIYA

ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

18 July 2022

Director, Civil Law
NSW Department of Justice

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

Dear Director,

STATUTORY REVIEW: *VICTIMS RIGHT AND SUPPORT ACT 2013 (the VRSA)*

We refer to the above and welcome the opportunity to make a submission.

Wurringa Baiya's work

Wurringa Baiya Aboriginal Women's Legal Centre is a state-wide community legal centre for Aboriginal women, children and youth who have experienced domestic violence, sexual assault and child sexual assault. We have assisted many of our clients with applications for Victims Support under the VRSA.

Wurringa Baiya's clients

As Aboriginal women, our clients have particular vulnerabilities that exist at the intersection of racial, gender and economic disadvantage. We acknowledge the strength and resilience of our clients, most of whom are the primary caregivers and breadwinners for multiple generations in their family and kinship networks.

Most of our clients have trauma histories which begun when they were children. Many of our clients have been exposed in childhood to domestic and sexual violence from adults they should have been able to trust. Sexual assault and domestic violence for our clients exist as acts of violence within a cycle of abuse that can last for years. They have spent their lives developing strategies to keep themselves safe.

Our clients commonly endure violence alone and do not report it to police or seek medical help for their injuries. Shame, a well-founded mistrust of white authorities and a fear of community retribution are all factors which inhibit disclosure. Often, when clients engage with Wurringa Baiya, it is the first time they have spoken about what they have experienced. It is often the first time that they are believed.

Our clients live across New South Wales and their access to mobile phone credit, email and computers varies depending on their age, level of literacy, financial situation and whether they are incarcerated. Internet connection or coverage depends on where they live. Some clients do not have access to the internet or cannot use email. We communicate via letters which we read to

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Wurringa Baiya is a non-profit organisation managed by Aboriginal women.

ABN: 60 382 206 441

them over the phone. Some clients do not have mobile credit to call our service and rely on Wirringa Baiya to call them.

Clients in custody

The vulnerabilities listed above are compounded for our clients in custody. We note that domestic violence is recognised as a key underlying driver of Aboriginal and Torres Strait Islander women's offending.¹ Women in custody have extensive histories of victimisation, which includes sexual abuse and sustained violence from intimate partners and carers.

There has been research to profile the experiences of Aboriginal women in custody. We refer to the findings of the Inspector of Custodial Services "Women on Remand" reported prepared in February 2020 and the Australian Law Reform Commission's 'Pathways to Justice – An inquiry into the Incarcerations Rate of Aboriginal and Torres Strait Islander Peoples' report, published in 2017. Both of these reports provide useful information about the needs, profiles and pathways for Aboriginal women into the Criminal Justice system. Despite being less than 3% of the NSW population, Aboriginal women make up 32.71% of the female inmate population in NSW.²

The Australian Law Reform Commission Final Report into Pathways to Justice reported that Aboriginal women are generally incarcerated for short periods, cycling in and out of custody.³ They experience multiple disadvantages.⁴ A NSW study in 2003 showed that for Aboriginal women in custody at that time, 70% experienced child sexual assault, 44% experienced sexual abuse as adults and 78% experience violence as adults.⁵ They experience high levels of homelessness before and after incarceration, have low levels of education and literacy.⁶

Why Victims Services is so important for our clients

Victims Services is often the only form of financial assistance and recognition that our clients will receive for the violence they experience. It is the backbone of the supports available in New South Wales. Without it, a client is left to navigate to a patchwork of slow and locally administered programs. The assistance our clients receive under the Scheme can make the difference between whether they leave violence or remains trapped and exposed to risk.

The Background Paper circulated as part of this Statutory Review states that 58% of all applications received by Victims Services relate to acts of domestic violence, 16% relate to child sexual assault and 6% relate to sexual assault. The majority our clients' applications are for acts of violence which include domestic violence, sexual violence and child sexual assault.

¹ Australia's National Research Organisation for Women's Safety, 'Women's imprisonment and domestic, family and sexual violence' (Research Synthesis, 16 July 2020) 10.

² NSW Bureau of Crime Statistics and Research (2020) *NSW Custody Statistics Quarterly Update December 2020*, https://www.bocsar.nsw.gov.au/Publications/custody/NSW_Custody_Statistics_Dec2020.pdf p25.

³ Australian Law Reform Commission. (2017). *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), 351.

⁴ *Ibid.*

⁵ Aboriginal Justice Advisory Council. (2003). *Speak Out Speak Strong Aboriginal Women in Custody Research Project*. www.lawlink.nsw.gov.au/ajac.

⁶ *Ibid.*

Domestic violence

The Background Paper lists the supports available in New South Wales for survivors of domestic violence: *Staying Home Leaving Violence* program, Link2home, the NSW Domestic Violence Line, Safer Pathway. In our experience, these programs are of limited practical use for our clients, especially for clients trying to escape violence when compared to the immediacy of support received under the Victims Support Scheme.

Immediate Needs Support Payment (INSP)

Separation is a risk factor for severe, life-threatening or lethal violence for a person leaving a domestic violence relationship.⁷ Clients leaving violence need urgent practical support to relocate or install security measures. The Immediate Needs Support Package is, in our experience, the most effective form of financial assistance available to keep our clients safe. It is the most accessible and has the quickest processing times.

The Escaping Violence program, in our experience, takes far too long to administer. The Centrelink Crisis Payment is only available to existing Centrelink recipients who contact Centrelink within 7 days of leaving violence and it is only equal to a week's Centrelink income.⁸ Our clients, in the trauma and confusion of this time, often miss this window to apply. Other localized programs are often at capacity and cannot assist our clients, who live across New South Wales. The Victims Support Scheme is a critical safety net for our clients leaving violence.

Recognition Payment

Recognition payments awarded under the Victims Support Scheme are often the only way our clients will receive any acknowledgement of their trauma. They cannot afford to seek remedies via civil litigation and the perpetrators of their abuse rarely have any assets even if they could.

Sexual Violence

The Background Paper lists supports available to survivors of sexual violence, such as the Witness Assistance Service and the Child Sexual Offence Evidence Program. As described above, many of our clients' experiences of sexual abuse are unreported. These programs are of little to no use for our clients, who are unwilling to be retraumatized, do not trust police to handle their complaints and do not want to participate in court. The Victims Support Scheme is the most effective way of securing assistance and recognition for our clients who have experienced sexual violence.

For many of our clients, their experiences as survivors of adult or child sexual assault have impacted their whole lives – they might be unable to work, suffer mental health problems, self-medicate with alcohol or drugs. Their capacity to participate in their community and maintain a

⁷ Australasian Institute of Judicial Administration, National Domestic and Family Violence Bench Book, 2021, 4.2.

⁸ For further context, the weekly jobseeker payment for a single woman with dependent children is \$345. <https://www.servicesaustralia.gov.au/how-much-jobseeker-payment-you-can-get?context=51411>

job is severely reduced. A recognition payment is the most accessible way to recognise their trauma and the impact it has had on their life.

Victims Support Scheme for women in custody

The money received under the Victims Support Scheme is critically important for our clients in custody. If a client receives financial assistance or a recognition payment while she is in custody, she can use it to assist her to secure safe housing upon release.

Without secure and stable accommodation, our clients are more likely to return to violent situations, either with ex-partners or new perpetrators. Returning to violence impacts whether a woman will have access to her children, the likelihood of her relapsing if she uses drugs or alcohol and her ability to break a cycle of violence.

The money clients in custody receive under the Victims Support Scheme helps them to find safety and independence upon release and is, in our experience, the most practical support available.

Our clients need legal assistance to access the Victims Support Scheme

The racial, gendered and economic vulnerabilities of our clients mean that Victims Support Scheme is not something they have capacity to navigate alone. Our clients need assistance accessing and filling out Victims Services forms, arranging counselling, accessing their records, understanding legislated time limits, making internal reviews, understanding the merits of their claim. Taneka's case study below speaks to the difficulties our clients experience when applying for Victims Support without legal assistance.

This Statutory Review addresses whether the terms of the VRSA remain appropriate to meet the policy objectives, which include 'recognising and promoting the rights of victims of crime', as contained in Division 2 of the VRSA. We submit that our client's rights as victim/survivors, if they were to apply without legal representation, would not be adequately recognised or promoted. Many of our clients are excluded from accessing the Scheme and its ancillary services due to the same traumas that warrant recognition under the Scheme.

Previous submissions made by Wurringa Baiya

We refer to:

1. Our letter to the NSW Department of Justice dated 16 July 2016; and
2. Our letter to the Commissioner of Victims Rights dated 26 February 2021.

Many of the issues in our previous submissions relate to trauma-informed practice and procedural fairness and we note that they remain significant concerns.

The below recommendations highlight issues of particular concern to Wurringa Baiya.

Time limits

We have significant concerns about the strict time limit for victim/survivors of domestic violence, adult sexual assault and child abuse imposed under s 40. It is our strong submission that under s 40(5), ten years for an application for a recognition payment is not sufficient time for these groups of victim/survivors.

Many of our clients struggled with the consequences of the violence for many years before reaching a point where they could seek compensation and counselling. Some describe a life of half living, feeling numb and distant from their children and friends, or highly anxious, phobic and housebound; unable to talk about the terrible trauma they endured. Other clients self-medicated with alcohol or drugs for years to block out the memories of their abuse.

The report commissioned by your department, and produced by PricewaterhouseCoopers, *NSW Attorney General and Justice: Review of the Victims Compensation Fund, 2012* (the PwC report), stated the following:

We recognise that any change in eligibility requirements would have a significant impact on victims. In particular, **imposing stricter time limitations would have a significant impact on victims of violence which occurred many years ago, in particular those related to child sexual assault and domestic violence.** We acknowledge that as the societal attitude to violence has changed and victims of historical claims have had time to reflect and come to terms with their past trauma, and feel more supported by changing cultural attitudes, they have started to come forward in increasing numbers and report these acts of violence

It has taken a long time for many Aboriginal victim/survivors to feel safe and secure to talk about their experiences of sexual and domestic violence, given the well-documented and tragic history of forced removals of children and deaths in custody.

It is not clear from the PwC report why a cap of ten years was considered appropriate, despite acknowledging that the last Chairperson of the now redundant Victims Compensation Tribunal had recommended 20 years. We understand that no other state has such an absolute cap on out of time applications, and most have provisions with discretion to grant leave.

Equally we submit that the two year time limit for financial assistance for loss of earnings and medical and dental expenses is too restrictive. This time limit applies to all victim/survivors of violence, including child sexual assault (the two exceptions being judicial and out of pocket expenses for victim/survivors of child sexual assault). For the same reasons stated above, many victim/survivors take years to come forward and access the Victims Support Scheme.

Recommendations – Time Limits

1. Amend s 40(5) to remove upper time limits on recognition payments for victim/survivors of domestic violence, sexual assault and child abuse.
2. Amend s 40(1) to remove the 2-year time limit for financial assistance for victim/survivors of domestic violence, sexual assault, child sexual abuse and child abuse including for loss of actual earnings and medical and dental expenses.

S 35 Recognition Payment

Domestic violence

The categories of recognition payments are particularly insulting to domestic violence victims and fails to properly recognise the long-term harm and trauma caused by the violence and the unique context in which domestic violence occurs.

Include domestic violence offences under s 35(3) at a minimum

Domestic violence offences should be classified, at a minimum, in Category C. The nature of offending that leads to domestic violence is different from other acts of violence. An assault committed in an intimate partner relationship is different from an assault committed by a stranger. In her Second Reading speech of the *Crimes (Domestic and Personal Violence) Act 2007*, Tanya Gadiel noted that the Act addressed the 'aggravated nature of an offence that is committed in the context of a domestic violence relationship.'⁹ This is not currently recognised for the purposes of a recognition payment under the VRSA.

Include ongoing domestic violence as a stand-alone category under s 35(2)

Many of our clients have endured years of domestic violence, which has included physical assaults, sexual violence, threats, intimidation, coercive control and harassment. Except being awarded separate payments for separate assaults (which has been difficult to achieve under both the repealed legislation and the VSRA), a victim of 15 years of domestic violence could at most only be awarded \$5,000 as a recognition payment *but only if* one of those assaults resulted in grievous bodily harm. Success arguing psychological grievous bodily harm on the first instance in our experience has been limited and unpredictable.

Include acts of strangulation, choking and suffocation under s 35(3), at a minimum

Acts of strangulation, choking and suffocation need to be separately recognised under s 35(3) for three reasons. First, they are critically different to other acts of violence and warrant their own category of recognition payment. Second, establishing grievous bodily injury based on medical records is extremely difficult because the minimal physical effects of strangulation belie the seriousness of the offence. Third, Victims Services assessors in our experience are often unwilling to accept psychological injury amounts to grievous bodily harm. Without inclusion under s 35(3), survivors of strangulation offences are unlikely to receive a recognition payment

⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4327 (Tanya Gadiel).

that reflects the severity of the violence they experienced and in many cases were lucky to survive.

Acts of strangulation, choking and suffocation as a 'red flag indicator'

Acts of strangulation, choking and suffocation are a risk factor for a domestic violence homicide.¹⁰ They are a red flag indicator of an escalation in the severity of violence in intimate partner relationships.¹¹ The *Crimes Amendment (Strangulation) Bill 2014* (NSW) created a separate offence for choking, suffocating or strangulation in recognition of the unique severity of this type of offending.¹² The VRSA should be amended to reflect how Acts of strangulation, choking and suffocation are treated in companion pieces of legislation like the *Crimes Act*. Under the *Crimes Act*, grievous bodily harm with intent carries the same maximum penalty as a choking, suffocating or strangulation offence. The *Crimes Act* recognises that that by their nature, acts of strangulation, choking or suffocation cause grievous bodily harm.

Under the VSRA, acts of strangulation, choking or suffocation are not recognised as a Category C payment unless applicants can establish injury to the standard of grievous bodily harm.

Establishing injury

Applicants applying for an act of strangulation, choking or suffocation are often unable to establish to the requisite level of injury for a grievous bodily harm recognition because, despite the seriousness of the act survivors of strangulation often have minimal immediately evident physical injuries.¹³

Injuries caused by strangulation are often not visible, contributing to the minimisation of physical injury by victims, police and medical responders alike.¹⁴ Strangulation symptoms include confusion and slurred speech which can be mistaken by medical staff as other drug or mental health issues. It is unlikely that medical records from the initial presentation will reflect a physical injury to the level of 'grievous bodily harm'. Without a separate category of recognition payment, acts of strangulation, choking and suffocation are not adequately recognised under the VRSA.

Strangulation offences are critically different types of domestic violence offences and warrant a separate category of recognition payment.

Case study

Jen (not her real name)

Jen experienced a very violent 12-month period with her then boyfriend. The police were called regularly throughout the year. The reports from the police indicated that the violence was

¹⁰ NSW Parliamentary Research Service, 'NSW strangulation offence: Time for further reform?' (Issues Backgrounder Number 3/September 2018, Parliamentary Library, Parliament of New South Wales, 2018) 6.

¹¹ Ibid 3.

¹² Ibid 6.

¹³ Ibid.

¹⁴ Ibid 3.

escalating. The violence reached the point of choking Jen until she blacked out. We assisted Jen to apply for a category C payment for the strangulation.

She had been to the hospital and while she recalled having 'bulging eyes' from the strangulation, the Assessor determined that her injury did not reach the threshold of grievous bodily harm. The Assessor wanted further medical evidence of any damage to her eyes. There was no further evidence from the time of the strangulation and so she received only \$1500.

Use s 19(5) to recognise strangulation offences as an unrelated act of violence

S 19(5) should be enlivened where an act of violence includes a strangulation offence. In our experience, Victims Services assessors are unwilling to accept a strangulation offence as a separate act of violence, if it occurs as part of an assault or ongoing violence. Strangulation offences are critically different types of domestic violence offences and should be included under s 35(3) as a distinct category of recognition payment.

Increase recognition payment categories for sexual assaults

Sexual assaults recognised under s 35(3) should be included under s 35(2), and sexual assaults under s 35(2) should be recognised under s 35(1).

Consider the nature of an act of violence as relevant to s 19(5)

Assessors need to use s 19(5) to recognise that there are many factors that mean that acts of violence ought not be treated as related. Our clients experience sexual violence, strangulation, threats and intimidation, AVO breaches and physical assaults over the course of a relationship. We see many of Victims Support decisions which justify treating a decade of violence as "a series of related acts" because it involves the same perpetrator. This is a one-dimensional understanding of abuse and is not trauma-informed.

Victims Services assessors need to consider the nature of the acts of violence that perpetrators commit during a domestic violence relationship and invoke s 19(5) when the nature of the offending is critically different. Coercive control, for example, is a pattern of abuse designed to deprive a person of autonomy and selfhood,¹⁵ whereas strangulation is a red flag indicator for intimate partner homicide.¹⁶ The nature of the offending is radically different and should be recognised as such under the VRSA. Perpetrators are prosecuted under the *Crimes Act* for separate offences however compensation for the same acts of violence under the VRSA does not make the same distinction.

Case study
Amy (not her real name)

Amy applied for two separate recognition payments for domestic violence, because there was a period of more than four years between the acts of violence, during which time the perpetrator

¹⁵ Government of New South Wales, *Coercive Control Discussion Paper*, Discussion Paper, 2020 7.

¹⁶ Above n 4.

was in prison. The violence occurred in two different towns in NSW, the nature of their relationship had changed and there were quite different modes of violence during each period.

The initial assessor found that the violence formed a series of related acts because the violence was perpetrated by the same offender over a specific period of time over the course of their relationship, and because the harm caused was an accumulation of the domestic violence perpetrated rather than resulting from specific acts of violence.

Wirringa Baiya was successful at internal review arguing that the violence should be separated into the two separate periods. Without legal representation, Amy would not have received the full extent of compensation to which she was eligible under the Scheme.

Positive duty

We submit that there should be a positive duty under s 19 on the decision-makers to consider different acts of violence where it is apparent in the records, and invite an additional application for those separate acts of violence or, where the evidence exists, award a separate recognition payment.

The beneficial intent of the VRSA means that clients should not need legal representation to be able to access the maximum amount they are eligible for under the Scheme.

Case Study

Taneka (not her real name)

We assisted Taneka to apply for a recognition payment for ongoing child sexual abuse. In their decision, a Victims Services assessor noted that there was one occasion which involved a separate act of violence however they did not award a separate recognition payment. The onus was on the Applicant to re-apply, with the same evidence, for the separate act of violence.

Taneka's vulnerabilities as a survivor of sustained child sexual abuse meant that without Wirringa Baiya's assistance, she would not have made another application because the process was retraumatizing. The award was worth a significant amount to a client like Taneka. If she didn't have legal representation, Taneka would have missed an opportunity to have some of her trauma recognised.

Taneka's story is continued in a later case study.

Recommendations – Recognition Payments

1. Amend s 35(3) to include, at a minimum, domestic violence offences
2. Amend s 35(2) to include ongoing domestic violence as a stand-alone category
3. Amend s 35(3) to include, at a minimum, acts of strangulation, choking and suffocation
4. Amend s 35(2) to include, at a minimum, sexual assaults
5. Amend s 19(5) to provide that an act of strangulation, choking and suffocation are not related to other different acts of violence
6. Amend s 35(2) to include domestic violence involving violence that is one of a series of related acts
7. Assessors to use s 19(5) as a means of upholding the beneficial nature of the VRSA
8. Acts of violence currently resulting in a Category B recognition payment should be elevated to Category A
9. Index payments annually
10. Expand s 19(8)(f) to mirror the definition of a 'domestic relationship' in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
11. Create a positive duty under s 19 to invite applications for separate acts of violence

S 39 requirement to separately prove injury

Sexual assault – adult and child

We submit that survivors of sexual assault should not need to separately prove injury in their Victims Services applications. Sexual assault by its nature is a crime that involves serious harm in the most intimately invasive way. Sex offences under the *Crimes Act 1900* (NSW) ('the *Crimes Act*') attract some of the most serious penalties, which reflects the severity of the offending.

By requiring a victim to provide evidence of injury, the VRSA assumes it is possible to be sexually assaulted without suffering harm. This is particularly offensive to victims of child sexual assault.

We have clients who have strong evidence to establish that they survived a sexual assault, including child sexual assault. In many cases, these clients have never sought counselling for a range of reasons including a lack of culturally appropriate counselling services and a desire to avoid retraumatisation. To apply for a recognition payment, these clients have been forced to seek counselling to obtain a counselling report satisfy the legislative requirement for proof of harm.

We submit that requiring proof of harm in circumstances where the nature of the offence makes harm self-evident undermines a survivor's agency and the strategies they have developed to keep themselves safe. The proof of harm requirement in these circumstances is in conflict with s 6.1 of the Charter of Victims Right, which demands 'respect for the victim's rights and dignity'.

We note that the National Redress Scheme for Institutional Child Sexual Abuse (National Redress Scheme) does not require evidence of harm and submit that the VRSA should adopt a similar trauma-informed approach in cases of adult and child sexual assault.

Domestic violence

By the same reasoning, we submit that victims of domestic violence should not need to prove harm for the purposes of s 39(2) unless they seek to prove severe harm to establish a higher recognition payment for serious physical injury or serious psychological harm. We see many cases where injury can be established from police records or a conviction.

In these cases, s 39(2) requires applicants to search for medical records or obtain counselling to prove what is already established on the papers. This process can be retraumatizing for our clients. Applicants who have survived domestic violence can struggle to remember what, if any, services they accessed. Many clients never reported their injuries at the time they were experiencing the cycle of violence and are compelled to seek counselling, the difficulties of which are described below, to satisfy s 39(2). Many Aboriginal women are not comfortable or familiar with the Western World's version of counselling, therefore this in itself can create additional anxiety for our clients.

Case study

Alena (not her real name)

Alena applied for a recognition payment for domestic violence. NSW Police records include contemporaneous notes of Alena's injuries and photos of the injuries Alena suffered, including cuts to her throat and face. The offender was convicted for multiple assaults, which Wirringa Baiya argued established that Alena was injured as a result of the acts of violence.

Victims Services did not accept these records of proof of injury. Alena did not want to attend counselling but had to engage to obtain a Certificate of Injury. The process of separately proving harm was retraumatizing and disempowering for Alena.

Case study

Taneka (not her real name)

As stated above, Taneka survived ongoing child sexual abuse. As is common in cases of child sexual assault, she did not have any medical records to prove injury. Taneka did not want to attend counselling and re-live the trauma but she had to engage to receive a Certificate of Injury. Taneka's dignity and autonomy as a survivor was not recognised throughout this process.

Recommendation – Proving Injury

1. Remove the requirement under s 39(2) to separately prove injury for survivors of domestic violence, adult sexual assault and child sexual assault

Evidence

Evidence gathering is disproportionately difficult for vulnerable clients

Gathering evidence for their Victims Services applications is disproportionately burdensome for vulnerable clients. Our clients are Aboriginal women, many of whom struggle with literacy, do not have reliable access to the internet, do not use email, do not have a computer and have no credit to make phone calls. Many do not have the confidence, or the understanding how to navigate the Victims Services website, nor the knowledge to understand what is expected from them. These participation barriers are significantly increased for our incarcerated clients.

We note that there is no opportunity for the Commissioner to exercise powers granted under s 12 to compel production of information. Applicants should be able to request the Commissioner to obtain medical evidence on their behalf, particularly when they are in custody, have literacy issues or are homeless.

Specific barriers for women in custody

Women in custody cannot call around various medical providers to get records. They have no means of getting the phone number for a particular medical service. If they were able to get the number, to request the records, they would have to put that on their call sheet and pay for the call from a meagre wage, to ask how to request records. They don't have a way of making an external call to the medical service to pay for records. If they were able to get records, they are unable to receive the records confidentially as all incoming mail is screened by officers. This is grossly inappropriate particularly as the records can relate to child and adult sexual assault, as well as other medical records.

We submit that it is contrary to the purpose of the VSRA to retraumatise clients by requiring them to gather evidence themselves.

Evidence gathering

One of the reasons Victims Services gave for no longer obtaining medical records was that it was too time-consuming.

We submit that Victims Services is best placed to gather evidence on behalf of applicants. It is no faster for our Centre to obtain evidence. In many cases, working against Victims Services deadlines to gather evidence distracts from core advocacy work. If Victims Services managed the evidence gathering process, either themselves or through a specially funded service, they could assess an application when they see the necessary evidence has been collected.

S 6.3 of the Charter of Victims Rights says that 'a victim will have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs'. Services should be specifically funded to provide Victims Services assistance to uphold the Charter.

Applying for Victims Support would reduce retraumatisation to applicants and remove many of the administrative barriers that inhibit our clients from accessing the Scheme.

Difficulties obtaining evidence within 12 months of lodging an application

The difficulties of evidence-gathering are compounded by Victims Services' 12-month deadline to submit evidence after lodging an application for a recognition payment. Clients often have multiple admissions to medical services, long histories of interactions with police and trauma histories which severely reduce their ability to remember when and where violence occurred. It is difficult for clients to identify what services would hold their records.

Many of our clients do not have access to a computer or a printer, cannot sign documents on their phone and live in regional NSW. Our Centre posts authorities to clients for them to sign. Simply receiving a signed authority to access records can take weeks. It can then take months for services to produce records. If the records do not contain relevant information, we have to work with the client further to try and isolate which service would hold their records.

While there is discretion available to the Commissioner under s 41(1)(c) to extend, we are not seeing this provision being used.

We submit that this period be extended in recognition of the barriers to access that vulnerable applicants face.

Case study

Chrystelle (not her real name)

Chrystelle survived ongoing domestic violence which included multiple head traumas just under 10 years ago. To preserve the time limit, we applied for a recognition payment and have begun gathering evidence. Chrystelle's injuries have impaired her memory. She has also lived a transient lifestyle. She cannot remember which medical services have her records for what act of violence. It is unlikely that we will be able to obtain Chrystelle's medical records within the 12-month deadline and her application risks being lapsed.

Chrystelle's vulnerabilities

Chrystelle has limited credit for phone calls and struggles to use email and the internet. She cannot look for her records without assistance from a service like Wirringa Baiya.

Recommendations - Evidence

1. Victims Services to obtain evidence, or specifically fund a service to perform this role and uphold s 6.3 of the Charter of Victims Rights
2. Create a legislative presumption that applicants who request more time to provide evidence are granted more time

Counselling

Victims Services-approved counsellors need to provide a flexible and culturally safe service for Aboriginal women. We have experienced disgruntled counsellors who resent when clients ask

for a Certificate of Injury. We submit this attitude does not recognise or respect the diverse strategies our clients have employed their whole lives to live with their traumas.

Case study

Deborah (not her real name)

We assisted Deborah, an older Aboriginal woman, to apply for a recognition payment for an historic sexual assault. Deborah contacted a Victims Services counsellor who also worked with Deborah on a separate domestic violence matter. Deborah chose this counsellor because she listed her experience on the Victims Services website as including adult sexual assault.

The counsellor eventually engaged with Deborah about her sexual assault. The Centre and Deborah separately requested a Certificate of Injury. The counsellor refused until we advised that they were required to under the Victims Services guidelines.

When the counsellor finally provided the Certificate of Injury, they made comments that Deborah's story was improbable due to the length of time she had taken to report it. The comments demonstrated an alarming lack of understanding about the factors that may impede disclosure of sexual assault for Aboriginal women: shame, a mistrust of police, a lack of cultural safety in the criminal justice system.

Deborah's experience with this Victims Services was not safe for her as a survivor of a sexual assault and as an Aboriginal woman. It also is in complete contradiction to the current messaging of many sexual assault campaigns to believe the victim/survivor.

It is essential that these counsellors have appropriate experience working with Aboriginal people and people who have experienced multiple traumas including domestic violence and sexual assault.

Access to counselling for women in custody

There are an insufficient number of Victims Services counsellors available to women in custody, despite the high levels of need.

Wirringa Baiya's work with women in custody supports the assumption that every Aboriginal woman in custody has experienced trauma.

Recommendations - Counselling

1. Ensure that Victims Services-approved counsellors are culturally safe and trauma-informed
2. Improve access to counselling for women in custody by:
 - a. Providing regular counsellors based in each of the correctional centres
 - b. Asking counsellors who sign up as Victims Services-approved counsellors if they will provide counselling to women in custody and making this a searchable option on the list of counsellors
3. Expand s 31 to include power for Commissioner to require a counsellor to complete a certificate of injury

Procedural fairness

Applicants need access to all evidence that Victims Services relies upon to make a decision

Our clients have long histories of trauma which impacts on their ability to remember events and chronologies. They have survived ongoing domestic violence, sexual assault and/or child sexual abuse. Often, our clients have long histories of interactions with police and cannot recall specific years or months when incidents occurred. Given the impact of trauma on memory, our clients can fail to include key information that is available to Victims Services in their applications for support.

Applicants and their advocates need access to the information that Victims Services uses to make a decision. Procedural fairness requires that information relevant to critical issues be given to a person about whom a decision is being made.¹⁷ We submit that Victims Services should provide this information before a decision is made, so applicants can make their best case at the first instance.

Lina

Lina (not her real name)

We assisted Lina to apply for a recognition payment for domestic violence. In their decision, a Victims Services Assessor quoted police material that had been redacted from our GIPA request. The Assessor should have known the information would be redacted and provided it to Lina's representatives so that we could make her best case at the first instance.

Earliest return date for a decision

As a matter of procedural fairness, applicants and their advocates need to be advised in writing of the earliest date by which a matter will be determined so that they can prepare their evidence. The right to a fair hearing includes a reasonable opportunity to present a case. We

¹⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms -Encroachments by Commonwealth Laws*, Report 129 (2016) 14.22.

submit that 'presenting a case' includes presenting all the evidence that an applicant wants to put forward. It is necessary to advise applicants of the earliest date by which they need their evidence.

We have experienced situations where Victims Services have been put on notice that an applicant's evidence is not complete and Victims Services have prematurely assessed a claim. We then waste our internal review opportunity getting an application assessed once our evidence is complete.

Case study

Regan (not her real name)

Regan's ex-partner was serving a custodial sentence for violence against her and was imminently due for release. Regan was extremely concerned about the safety of herself and her children and we urgently filed an INSP application, without having time to have requested any police or court records.

We only became aware of the extent and severity of the offences after the Assessor made a decision using police records. The Assessor simultaneously decided Regan's INSP application and her recognition payment application. This was unusual and, in our experience, not in accordance with the usual procedure used by Victims Services.

Our Centre was not given notice that the recognition payment would be decided so soon. No opportunity was given to provide further evidence of injury or make submissions. In addition, our Centre was not provided by Victims Services with a copy of the police records which the Assessor relied on prior to the decision being made. Our client was denied procedural fairness, unable to put forward her best evidence or have access to information relied upon by Victims Services to make their decision.

Include discretion to apply out of time under s 40

The same factors that lead to the victimisation of our clients also inhibit their access to the Victims Support Scheme. These factors include: trauma histories, mistrust of police and other white authorities, ongoing domestic violence, childhood sexual abuse. Many clients do not know that the Scheme exists, and by the time they come to us for assistance, we discover that they are out of time to apply for past acts of violence.

Each of our clients manages the effects of the violence they have experienced at their own pace. We submit that there should be discretion under s 40 to apply out of time for all aspects of the VRSA as a matter of trauma-informed practice. Victim/survivors should not be excluded from accessing support under the VRSA because the way they manage their trauma does not fit into the Scheme's narrow time-limits.

Allow applications to be re-opened under s 41A

We submit that s 41A should allow applications to be reopened in order to preserve time limits if the applicant provides a valid reason for failing to provide evidence within the 12-month deadline.

Many of our clients are navigating destabilising life events such as homelessness, incarceration and hospitalisation. They can be uncontactable for many months, and we are unable take instructions. S 41A should include a power to reopen applications where applicants provide a valid reason for missing the evidence deadline. This is critical in cases where an applicant is vulnerable to missing a time limit if their application is lapsed under s 41A.

Narrow the scope of s 44(1)(a)

S 44(1)(a) includes any behaviour, attitude or disposition of a victim that *indirectly* contributed to their injury as a reason for reducing or not approving financial support or a recognition payment. Many of our clients are misidentified as primary aggressors – they act in self-defence in response to violence from a perpetrator. Under s 44(1)(a), these clients could be seen as indirectly contributing to their injuries. We submit that the idea of indirect contribution, in the context of domestic violence, fails to understand the dynamics of abusive and violent relationships.

Expand s 44(3) to include s 44(1)(f) and s 44(1)(e)

S 44(3) requires the Commissioner to consider the dynamics of domestic and sexual violence when making a determination under s 44(1)(f): whether a victim failed to take reasonable steps to mitigate the extent of an injury as soon as practicable after the act of violence. S 44(3) recognises the myriad of reasons that victims of domestic violence do not report or delay reporting their injuries.

We submit that s 44(3) should be expanded to include s 44(1)(e): whether a victim failed to provide assistance to any person investigating the act of violence or in the arrest or prosecution of the person alleged to have committed the violence.

Only 40% of domestic violence is currently reported in NSW.¹⁸ There are a number of reasons why women trapped in a cycle of violence do not want to assist in the investigation, arrest and prosecution of their perpetrator. These include shame, fear of retribution and the complicated dynamics of a violent relationship that lead women to feel a need to ‘protect’ their perpetrator.

For our clients as Aboriginal women, police are not an organisation they feel safe engaging with. Often, police fail our clients by misidentifying them as the primary aggressor when they are called to domestic violence incidents. More importantly, our clients engage with police against a cultural background of Aboriginal deaths in custody and the Stolen Generations. For our clients, the police as an institution have proven themselves to be unsafe. We submit that our clients’

¹⁸ Equity Economics, *The Social Sector in NSW: Capitalising on the potential for growth* (Report prepared for the New South Wales Council of Social Service, March 2021) 22.

reluctance to engage with police is born of intergenerational trauma and colonial violence and s 44(1)(e) should be included within s 44(3) to reflect this.

We further submit that the Commissioner must have regard to a person's Aboriginality as a relevant factor when considering if s 44(1)(e) or (f) applies.

S 45 set-off amounts

S 45 should include a provision whereby the Commissioner must consider whether a restitution debt was awarded under the old Victims Services scheme and make reductions accordingly. We submit that the set-off amount should not apply where the restitution debt was incurred when the applicant was under 18.

Case study Mel (not her real name)

We recently had a client who had a restitution debt against her from when she was under 18 for an act of her violence she committed. She owed VS \$7250 because her victim was awarded under the old scheme. VS refused to waive or reduce the debt. Around the same time while she was still under 18, she experienced DV by her then boyfriend. She lodged under the new scheme. For similar types of violence and injuries as her victim she was awarded \$1500. Which has all been offset against her restitution debt. The same client also applied for INSP for very serious domestic violence she have recently experienced. The Assessor awarded her the INSP packages, but noted that it was open to them to set that award off against her debt.

She currently has an application awaiting decision with VS for a sexual assault as well which will be partially or wholly off-set against that her restitution debt (depending on whether they accept that the sexual assault caused her serious bodily injury or not).

Expand s 51 to include INSP and economic loss

We submit that there is no reason why decisions made about economic loss and INSP applications are not externally reviewable under s 51. In many cases, economic loss and INSP payments are worth more than what our clients receive as a recognition payment. The financial support under the Scheme is critically important for our vulnerable clients.

Reasons for decisions

We submit that there should be a statutory obligation for Victims Services assessors to provide reasons for their decisions. Not only do reasons enhance transparency and accountability, they enable applicants to determine whether a decision was made lawfully and whether their interests were adequately considered.¹⁹ Reasons for decisions are an integral aspect of procedural fairness – they allow an applicant to assess whether they have received a fair hearing.

¹⁹ Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis, 5th ed, 2019) at 1200-1202

Wirringa Baiya has received Victims Services decisions which do not appear to have considered the applicant's evidence and do not give reasons for the decision. We are finding that Victims Services assessors are not properly considering the submissions we do make. Reference to submissions appears to come from a template which notes that the Assessor considered the submissions and thanks the legal representative for making them.

Without reasons, we are unable to determine if we need to submit further evidence, or simply request that the existing evidence be considered. Applicants then must take decisions to internal review, which takes up valuable Centre resources and inhibits us from taking on new matters to assist more clients. Applicants are unable to make their best case on internal review if they are not aware of the reasons for a decision.

We note that external review is not available for economic loss or INSP decisions: it is imperative that good decisions are made at first instance which consider all the evidence and state the grounds for the decision.

Victims Services forms

Victims Services forms need to include more space for applicants to state the grounds for their application. INSP applicants in particular are in a state of crisis – they do not have time to attach various submissions which elaborate upon their situation. Many clients do not know that attaching submissions is possible. For clients who can access the forms, they are limited to four to five sentences to make their claim.

Recommendations – Procedural Fairness

1. Provide applicants with all evidence Victims Services relies upon to make a decision
2. Advise applicants and their advocates in writing of the earliest return date for a decision
3. Amend s 40 to include a discretion to apply out of time
4. Amend s 41A to allow applications to be re-opened
5. Amend s 44(1)(a) to include only direct contributions by a victim/survivor to their injury
6. Amend s 44(3) to apply to s 44(1)(e)
7. Commissioner must have regard to a person's Aboriginality as a relevant factor when considering if s 44(1)(e) or (f) applies
8. Amend s 45 to require the Commissioner consider whether a restitution debt was awarded under the old Victims Support Scheme and make adjustments accordingly
9. Payments should not be set-off against a debt that was incurred when the applicant was under 18.
10. In no circumstances should INSP payment be set-off against any debts
11. Amend s 51 to allow external review for INSP and economic loss decisions
12. Legislate a requirement to provide reasons for decisions
13. Victims Services forms provide more room for a client to comprehensively state the grounds for their application.

Trauma-informed administration of INSP

Victims Services have begun auditing our clients on a random basis, and requiring receipts before issuing further INSP payments. By its nature, INSP is a crisis payment. Women leaving violence are at a higher risk of intimate partner homicide.²⁰ This is a time of confusion and risk. Requiring women to keep track of exactly how they used INSP to keep themselves and their families safe is not trauma informed, especially when the auditing is initiated without cause for suspicion.

Case study

Melanie (not her real name)

Melanie and her son escaped her violent ex-partner in 2020 and was provided with an INSP package. The perpetrator followed Melanie and her son, who again needed to relocate. Victims Services would not assess her application until she provided receipts for how she spent the initial INSP package. Melanie could not relocate until she received the INSP package. The delay in assessing her application placed her and her son at risk.

Recommendation – Administering INSP

1. Victims Services adopts a trauma-informed approach to auditing INSP – ending random audits, providing other options to explain how applicants spent INSP

Transparency

Wiringa Baiya manages Victims Services matters based on what we estimate to be Victims Services' policies and guidelines. The below example illustrates the practice management and case strategy issues that arise out of Victims Services' opaque decision-making processes.

Case study

Assessment queue

Victims Services does not publish information about when an application is placed in the queue for assessment. Clients commonly instruct that they want their matter assessed as quickly as possible. This has led Wiringa Baiya to make applications for Victims Support prior to gathering evidence, on the assumption that applications are assessed when the Primary Victims form is submitted. We are then working against a 12-month deadline to gather evidence, the difficulties of which are outlined throughout this submission.

Wiringa Baiya has recently been informed that Victims Services places applications in the queue for assessment when all evidence is submitted. This entirely changes how the Centre should manage Victims Support applications.

²⁰ Above n 2.

Our Centre cannot make practice management decisions in the best interests of our clients without access to guidelines and policies that Victims Services rely upon to make decisions.

Recommendations - Transparency

1. Victims Services publishes policies and guidelines they rely on to make decisions
2. Victims Services publishes comprehensive data annually

Standard of proof

We submit that the standard of proof under the VRSA should be consistent with similar types of victim compensation schemes, like the National Redress Scheme which is designed to be more accessible than civil litigation.²¹ The standard of proof under the National Redress Scheme of 'reasonable likelihood' is lower than the civil standard which is the balance of probabilities.

We submit that the Victims Support Scheme is similarly designed as an alternative to civil litigation. The financial remedies under the VRSA are lower than what is available under civil litigation. The standard of proof should reflect this, and be 'reasonable likelihood'.

Recommendation – Standard Of Proof

1. Legislate the standard of proof under the VRSA as "reasonable likelihood"

Introduce Immediate Needs Support Package for sexual violence

We note with approval the efficacy of Immediate Needs Support Packages for victims of domestic violence. Survivors of sexual violence can similarly have immediate safety concerns and we submit that INSP should be extended to survivors of sexual violence.

Case study

Janelle (not her real name)

Janelle is a teenage girl who was in violent relationship with a boy about 7 years older than her. The offender served a custodial sentence for offences against her. Close to his release date, he spread the word that he would seek revenge when released from prison.

Janelle and her mother fled their house and couch-surfed until they were housed at a refuge. The client's mother came to the Centre for help to apply for a recognition payment but the Centre also helped her to apply for essential furniture. When they fled their home, they only left with their clothes. The client and her mother were re-housed and fortunately we were successful with an INSP for most of the furniture the client asked for.

Recommendation – Sexual Violence INSP

1. Introduce an Immediate Needs Support Package for survivors of sexual violence

²¹ Explanatory Memorandum, National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 122.

Restitution

S 59 must not be applied where the applicant has notified the Commissioner of safety concerns should the order be made. Many of our clients instruct that they do not want to apply for a recognition payment when they are told about Victims Services' restitution process.

Pursuing restitution from domestic violence offenders puts our clients at risk. It can cause a perpetrator to re-engage with our client, seek retaliation and create community backlash. In these circumstances, obtaining a recognition payment creates a safety risk for our clients. They must choose between their safety and receiving financial recognition for the violence committed against them. Such a choice penalises the victim and undermines the therapeutic purpose of the Victims Support Scheme.

In recognition of the dignity of victim/survivors, and as part of a trauma informed practice which respects their agency, victims/survivors should be able to elect whether or not restitution is pursued.

Recommendation - Restitution

1. Amend s 59 to legislate a presumption under s 59 not to pursue restitution in circumstances of sexual, domestic or family violence, unless victim/survivor elects for this to occur

Victims Support Scheme - people who are incarcerated

S 25(4) disproportionately burdens Aboriginal and Torres Strait Islander women, who are 20 times more likely to be incarcerated than non-Aboriginal or Torres Strait Islander woman.²²

Moreover, the s 25(4) ignores the drivers of incarceration for Aboriginal women that locate them as both victims and offenders within the criminal justice system. Aboriginal women in prison in NSW are likely to be survivors of child sexual abuse, adult sexual abuse and ongoing domestic violence.²³ Excluding them from claiming compensation for violence that occurs while they are convicted inmates ignores the effects of the violence they have likely survived since childhood which has led to their incarceration.

We strongly submit that that victims of violence should be able to access compensation under the VRSA, irrespective of whether the violence occurred while they were incarcerated.

Recommendation - Eligibility

1. Expand eligibility for Victims Support to people who are victims of crime whilst incarcerated

²² Ibid 11.6.

²³ Australian Law Reform Commission, *Pathways To Justice – Inquiry Into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, January 2018) 11.19.

Banking details in application form

Our clients may change their bank account details between when they lodge an application and when they are paid. This can be because they have a joint account with a perpetrator at the time of lodging, or due to coercive control the perpetrator may still have access to the applicant's bank details. Providing bank account details upfront also creates a false sense that every applicant will succeed. We submit bank account details should only be submitted when a payment is awarded, to best manage applicant's expectation and safety.

Women in custody

Women in custody generally do not have access to bank account statements to find out account details to be provided on the the application forms. This can hold up applications for months.

Recommendation – Banking Details

1. Remove the requirement to provide banking details in the application form and pay any payment by cheque to any victim/survivor who receives a payment while in custody; or
2. Make alternative arrangements with Corrective Services for payments to be paid into an account that can hold the money until at such time as the inmate exits custody.

Simplifying identity checks

Aboriginal women

Our clients have a limited access to their identity documents. Many have left violent situations in a state of crisis and have not packed relevant forms of identity documents. The same applies to any children they may have taken with them.

In general, our clients are less likely to have birth certificates, a driver's licence and other forms of photographic identity documents. We submit Victims Services should adopt a flexible approach to identity checks and enable applicants to provide identity documents at a later time.

Women in custody

Women in custody do not have access to identity documents or a photocopier/printer/scanner. We are reliant on a Correctional Centre Services and Programs Officer (SAPO) to send us copies of their identity documents to submit with the application. The only identity documents some women have is their prison identity documents (MIN) and even obtaining this can be difficult.

Recommendation – Identity Checks

1. Simplify identity checks by accepting a wider range of identity documents, including a MIN
2. Accept applications without adequate identity documentation and verify identity at a later date.

Victims Services website

The Victims Services' website is difficult to navigate. As lawyers who access the website regularly, we find it difficult to find pages we know exist. Clients frequently tell us that that they have had a look at the website and find it very confusing. This feedback comes from clients who are have good literacy and access to technology. For clients who do not use technology and have poor literacy, the website is not something they can navigate on their own.

Recommendation – Victims Services Website

1. Victims Services website clearly outlines all supports available to victims of crime

Conclusion

We appreciate you taking the time to consider the concerns and recommendations raised in this letter. We would be very happy to meet with you to discuss our concerns in detail.

Yours faithfully,

Principal Solicitor