

Statutory review of the Victims Rights and Support Act 2013

Legal Aid NSW Submission to
NSW Department of Justice

July 2016

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners.

Many of Legal Aid NSW's clients, including its defendant clients, are victims of crime. In particular, many of Legal Aid NSW's clients have experienced domestic and family violence. While grants of legal aid are no longer available for victims' compensation matters, Legal Aid NSW can provide advice and minor assistance in relation to the *Victims Rights and Support Act 2013* (NSW) (**Victims Act**).

The Legal Aid NSW Sexual Assault Communications Privilege Service also provides services to victims of sexual assault who want to prevent or restrict the disclosure of sensitive sexual assault communications in court. The Legal Aid NSW Domestic Violence Unit provides integrated social and legal services to victims of domestic violence.

Legal Aid NSW's defendant clients are also directly affected by the restitution, compensation and victim support levy provisions in the Victims Act.

Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services. These partners provide information, advice, assistance and/or representation in victims' support matters to some of the most vulnerable and disadvantaged people in NSW.

Legal Aid NSW thanks the Department of Justice for the opportunity to provide a submission to the statutory review of the Victims Act. Legal Aid NSW draw on its experience delivering services to victims and offenders, and the experiences of its partner organisations, in the preparation of this submission. The names of all clients in the case studies have been changed to protect their privacy.

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1. List of recommendations

Legal Aid NSW makes the following recommendations:

The Charter and Commissioner of Victims' Rights

1. The Commissioner should publicise and promote the right of victims to make a complaint about an alleged breach of the Charter to the Commissioner of Victims' Rights.
2. The *Victims Rights and Support Act 2013* (NSW) (**Victims Act**) should provide that the Commissioner is required to report annually on government agency compliance with the Charter, including on complaints about alleged breaches of the Charter by government agencies.
3. The role of the Commissioner of Victims' Rights should be independent of government.

The Victims Support scheme

4. The Victims Act should adopt the definition of 'domestic violence offence' in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (**CDPV Act**), as amended by the *Crimes (Domestic and Personal Violence) Review Act 2016*.
5. The Victims Act should adopt a definition of domestic violence which incorporates the definition of 'domestic relationship' in the CDPV Act.
6. Convicted inmates who are victims of crime should have equal access to support under the Victims Act.
7. The Commissioner of Victims' Rights should publish guidelines on the financial support available under the Victims Act.
8. Financial assistance for loss of earnings should be calculated on the basis of the victim's actual lost earnings.
9. Any days of leave taken as a direct result of the act of violence should be included in the calculation of lost earnings.
10. Financial assistance should be provided for expenses incurred as a result of damage to property, where that property damage resulted from, or was part of, an act of violence.
11. If the above recommendation is not accepted, property damage should be compensable where it resulted from, or was part of, an act of violence that involved domestic violence.

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12. The quantum of all categories of recognition payments should be increased.
 13. Victims Services should consider measures to improve the number and quality of approved counsellors providing services to victims under the Victims Act.
 14. Victims of ongoing domestic violence should be: (a) entitled to a higher category of recognition payment, or (b) able to have the acts of violence considered separately.
 15. The definition of grievous bodily harm in the Victims Act should be amended to expressly confirm that it includes psychological harm.
 16. No form of documentary evidence should be prescribed when submitting an application for victims support. Rather, it should be sufficient that the documentary evidence establish, on the balance of probabilities, an act of violence and resulting injury.
 17. If the above recommendation is not accepted, the prescribed forms of evidence should be expanded to include documentation from a non-government organisation or service.
 18. There should be no time limits for making claims for financial support or recognition payments for acts of violence involving domestic violence, sexual assault and child abuse.
 19. If the above recommendation is not accepted, the Commissioner should have a discretion to grant an extension of time for claims outside the current limits, with a statutory presumption in favour of granting an extension for claims relating to domestic violence, sexual assault and child abuse.
 20. The Government should provide funding to enable victims to access independent legal advice and assistance with respect to applications for Victims Support. If funding cannot be provided to all victims, then vulnerable victims, including victims of domestic violence, sexual assault, child sexual abuse and child abuse, should be given priority.

Restitution

21. Restitution orders should not be imposed for offences committed by children (people under 18).
22. Victims should be able to elect whether or not they want restitution sought from the offender if their application is successful.

Victims Support Levy

23. The imposition of the Victims Support Levy (**VSL**) should not be automatic. Instead, the Court should have a discretion as to whether the levy should be imposed, having regard to the means of the defendant and the circumstances of the case.

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24. The VSL should be imposed on a per matter basis, regardless of the number of charges.
 25. If the above recommendation is not accepted, the VSL should be set to apply at two graduated levels reflecting the number of offences.
 26. The Victims Act should be amended to clarify that for the purposes of Part 7 of the Victims Act, a 'conviction' does not include an order made under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
 27. The VSL should not apply to offences dealt with by the Children's Court.
 28. If the above recommendation is not accepted, the Victims Act should provide that children are not liable to pay the VSL unless the court orders otherwise.

2. Victims' Rights

Charter of Victims' Rights

Legal Aid NSW supports the policy of recognising and promoting the rights of victims of crime. We do not have any objection to the Charter of rights of victims of crime enshrined in Part 2 of the Victims Act. Indeed, the rights in the Charter are of significance to many of Legal Aid NSW's clients, in particular to clients of the Legal Aid NSW Domestic Violence Unit, and the Sexual Assault Communications Privilege (**SACP**) Service.

Regrettably, despite the provisions in the Victims Act designed to encourage implementation of the Charter, the SACP Service regularly advises on matters involving breaches of the Charter by justice agencies. These include breaches of:

- 6.1: Courtesy, compassion and respect. For instance, the SACP Service is currently advising and assisting four Aboriginal sexual assault complainants who allege the system response to their complaint was culturally insensitive.
- 6.3 Access to services. In our experience, victims are not always referred to legal services, such as SACP. The Director of Public Prosecutions' (DPP) Witness Assistance Service is also overstretched.
- 6.4: Information about investigation of the crime: Although specialist police services such as the Child Abuse Squad and the Sex Crimes Squad at State Crime Command have made commendable progress in this area, mainstream police services do not always demonstrate a similar standard of communication with victims of domestic and sexual violence.
- 6.5: Information about prosecution of accused: Legal Aid NSW is increasingly concerned that the shortage of prosecutorial services is having an adverse impact on the ability of domestic and sexual violence victims to be provided with this information.

Some of these breaches in turn impact upon the ability of a sexual assault victim to invoke the sexual assault communications privilege. For instance, in regional offices it is not uncommon for SACP advice to be sought *after* police have breached victim's rights. Or, if a referral opportunity is missed, 'protected' information may be included in police briefs and disclosed to the Office of the DPP and the defendant, without the SACP Service ever being contacted to advise and represent the victim. This renders the victim's legislative protections nugatory.

Legal Aid NSW acknowledges that there is provision in the Victims Act to make complaints about alleged breaches of the Charter to the Commissioner of Victims' Rights.¹ The Commissioner can then in turn recommend that agencies apologise to victims of crime for breaches of the Charter.

¹ Victims Act, s 10(1)(f).

Legal Aid NSW also acknowledges the broad power of the Commissioner to make a special report to the Minister for Parliament on any matter arising in connection with the exercise of the Commissioner's functions, including the implementation of the Charter and any breaches by an agency of the Charter.²

However, in our view these provisions should be strengthened. In our experience, the complaints mechanism in the Victims Act is not widely known. We therefore recommend that the Commissioner and/or Victims Services publicise and promote the right of victims to make a complaint about an alleged breach of the Charter. We also recommend the Victims Act include a requirement on the Commissioner to report annually on government agency compliance with the Charter, including complaints about alleged breaches of the Charter. Legal Aid NSW considers that a regular, published report of this kind would increase transparency and promote agency implementation of the Charter.

Recommendations

Legal Aid NSW recommends that the Commissioner publicise and promote the right of victims to make a complaint about an alleged breach of the Charter to the Commissioner of Victims' Rights.

Legal Aid NSW recommends that the Victims Act be amended to provide that the Commissioner is required to report annually on government agency compliance with the Charter, including on complaints about alleged breaches of Charter by government agencies.

Commissioner of Victims' Rights

Legal Aid NSW supports the appointment of a Commissioner of Victims' Rights and the functions given to that office under the Victims Act. However, in our view, the Commissioner's ability to discharge these functions may be compromised by her/his status as an employee in the Department of Justice. For instance, the Commissioner's functions include:

- overseeing the implementation of the Charter of Victims' Rights by government agencies
- receiving complaints about alleged breaches of the Charter by government agencies, and
- making special reports to the Minister for Parliament on a broad range of matters, including any breaches by a government agency of the Charter.³

² Victims Act, s 13.

³ Victims Act, s 13.

The Commissioner is therefore responsible for monitoring and handling complaints about other agencies within the Department of Justice and the Justice Cluster, including Victims Services itself (the staff of the Commissioner). We see a risk of an actual or perceived conflict of interest when the Commissioner discharges these functions. In our view, the Commissioner’s ability to fulfill his or her responsibilities would be strengthened if the office were independent of government.

Recommendation

Legal Aid NSW recommends that the role of the Commissioner of Victims’ Rights be independent of government.

3. Victims Support

Legal Aid NSW considers it a valid policy objective to establish a scheme for the provision of support for victims of acts of violence. Financial support and access to counselling can be of both symbolic and practical benefit to victims of crime.

However, in our view the terms of the Victims Act do not always secure this objective, as victims of violent crime are not always able to access appropriate support. Specific concerns with Part 4 of the Act are outlined below.

Definition of domestic violence

The Victims Act defines ‘act of violence’ to include sexual assault and domestic violence. The definition of domestic violence generally mirrors the definition on the *Crimes (Domestic and Personal Violence) Act 2007 (CDPV Act)*.⁴ This is a relatively broad definition of domestic violence, and has been expanded further by recent amendments to the CDPV Act (not commenced at the time of writing).⁵ Legal Aid NSW supports these amendments, and recommends that the broader definition of ‘domestic violence offence’ be incorporated into the Victims Act.

Recommendation

Legal Aid NSW recommends that the Victims Act adopt the definition of ‘domestic violence offence’ in the CDVP Act, as amended by the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*.

⁴ Victims Act, ss 19(3) and 19(8).

⁵ See the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*.

However, the definition in the Victims Act is slightly narrower than the CDPV Act because the list of recognised domestic and family relationships is more limited. Specifically:

- The list in the Victims Act is limited to those living in the same household as the person who committed the offence, and doesn't include those who lived in the same household.
- The list in the Victims Act is limited to immediate family members, unlike the CDPV Act which includes aunts, uncles, nephews, nieces, cousins and Aboriginal kinship relations.⁶

Legal Aid NSW is not clear on the rationale for adopting a more limited scope of recognised domestic relationships in the Victims Act. We recommend that the approach in both Acts be aligned.

Recommendation

Legal Aid NSW recommends that the Victims Act adopt a definition of domestic violence which incorporates the definition of 'domestic relationship' in the CDVP Act.

Eligibility for support – convicted inmates

Legal Aid NSW does not support the provision in the Victims Act which limits prisoner eligibility for support to situations where there are 'special circumstances'.⁷ People who are the victim of a violent crime in custody should have the same rights to support as people living in the community. There are several arguments in favour of this position:

- To properly give effect to the policy objectives of the Victims Act, the support scheme should be accessible by all victims of crime, including the most marginalised members of the community, such as prisoners. In this context, it is important to note that many prisoners have themselves been victims of crime. For instance, a study of 27 correctional centres in NSW found that 65% of male and female prisoners were victims of child sexual and physical assault.⁸ Another Australia-wide study of incarcerated women found that 87% were victims of sexual, physical or emotional abuse either in childhood or adulthood, with the majority being victims of multiple forms of abuse.⁹

⁶ See Victims Act, s 19(8)(f) and s 5 of the CDPV Act.

⁷ Victims Act, ss 25(4) and (5).

⁸ Carol Ronken and Hetty Johnston, 'Child Sexual Assault: Facts and Statistics' (Bravehearts, December 2012).

⁹ Holly Johnson, 'Key Findings from the Drug Use Careers of Female Offenders Study', *Trends and Issues in Crime and Criminal Justice No 440* (Australian Institute of Criminology, November 2004), available at: <http://www.aic.gov.au/publications/current%20series/tandi/281-300/tandi289.html>

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- While a sentence of imprisonment is intended to punish the offender, it also aims to rehabilitate the offender and reduce their risk of reoffending. Denying prisoners access to support may compromise or undermine that objective. Conversely, providing appropriate support and services may assist in reducing recidivism.
 - While in prison, inmates are in the complete custody and control of the State. If a person is the victim of a violent crime while in prison, the State has arguably a greater rather than a lesser responsibility to provide appropriate support.

Recommendation

Legal Aid NSW recommends that the restrictions on the ability of convicted inmates who are victims of crime to access support under the Victims Act be removed.

Financial assistance for victims

Financial support for immediate needs

Legal Aid NSW has seen victims benefit from the financial support for immediate needs provided for under the Victims Act and regulations. For instance, the scheme has enabled victims of domestic violence to access money relatively quickly for measures such as temporary accommodation.

However, there are apparent difficulties and inconsistencies in the way that these provisions are implemented. For example:

- Some clients have waited more than three months after filing their evidence before receiving a payment.
- Some claims have been denied for arbitrary reasons, for example, because the victim already has security cameras and therefore should not require a security door, or where reimbursement for changing locks has been refused because both parties' names are on the title of the house, despite an Apprehended Domestic Violence Order (ADVO) with an exclusion order.

It would be useful if there were more detailed guidelines on the financial support provisions in the Victims Act, including standard timeframes for the processing of such claims. Such a document would contain guidance on what kinds of 'immediate needs' could be reimbursed or paid for under these provisions. It would also promote transparency and consistency in the implementation of the Act.

Recommendation

Legal Aid NSW recommends that the Commissioner of Victims' Rights publish detailed guidelines on the financial support available under the Victims Act.

Financial support for economic loss

In Legal Aid NSW's experience, it is unclear to clients what they can and cannot claim under the category of economic loss for out-of-pocket expenses.¹⁰ The standard of proof for this category of support also seems high. For example, some clients who have had to reduce their work week as a result of being a victim of crime, and who have provided medical evidence and other documentation to support this claim, still had their claims for economic loss refused.

Our proposal for guidelines would be a useful means of clearly outlining and communicating to victims what kind of support is available under the category of economic loss, and how these claims need to be evidenced.

Legal Aid NSW also considers the calculation process for financial assistance for loss of earnings unnecessarily confusing. As the Department would be aware, a victim's loss of earnings is calculated using rates from Part 19H of Schedule 6 to the *Workers Compensation Act 1987* (NSW). These rates are in the savings and transitional provisions of that Act, and are no longer used to calculate weekly workers compensation. The applicable rate of earnings payable is the weekly rate of compensation payable after the first 26 weeks of incapacity.¹¹ The rate payable changes depending on the period during which the applicant was absent from work, and whether they had any dependent family members at the time of their absence from work. The calculations are difficult for a lawyer to understand, and even more difficult to explain to a client. It would be far more straightforward, and fairer, if compensation were based on the victim's actual loss of earnings (with a continued cap of \$20,000).

Legal Aid NSW is also concerned that victims cannot be reimbursed for sick leave taken due to an act of violence. When a victim uses a sick day as a result of a crime, it is one less sick day that they are able to use in the future. This means the victim may need to access unpaid leave later on. If the general purpose of financial support is to place the victim in the position he or she would have been in, were it not for the crime, any days absent from work should be compensable.

¹⁰ See Victims Act, s26(1)(c) and *Victims Rights and Support Regulation 2013* (NSW) ('**Victims Regulation**'), cl 8(2)(b).

¹¹ Victims Regulation, cl 7.

Recommendations

Legal Aid NSW recommends that financial assistance for loss of earnings should be calculated on the basis of the victim's actual lost earnings.

Legal Aid NSW recommends that any days of leave taken as a direct result of the act of violence should be included in the calculation of lost earnings.

Property damage

A further major concern of Legal Aid NSW is the limited ability of victims to claim reimbursement for property damage which occurs in the context of an act of violence. Property damage is currently limited to \$1,500 for damage to clothing or personal effects worn or carried by the victim at the time of the act of violence.¹² It is understandable that property damage is not, in and of itself, an act of violence causing injury to a person. However, in a domestic violence context, property is often damaged to cause psychological and financial harm. For instance, laptops and other items are destroyed with the intention of causing fear, or to impact on the victim's access to work, income or social ties. Offenders also commonly damage walls and doors in domestic violence incidents. This sort of property damage is a part of the act of violence, and can cause the victim financial (and psychological) harm. However, it is currently not able to be reimbursed, and this can have significant implications for the victim. A case study is provided below.

Case study

Lisa, a young woman who was pregnant, took out her first ever private tenancy. Her boyfriend, whom she broke up with, came to the home to collect some of his personal belongings. He began questioning her about other relationships and became angry. He told Lisa that when her baby is born he would kill it and cut her throat. He then assaulted her, threw her onto the bed and smashed her property (her ipad, computer and floor fan, amongst other things). He then smashed a window and punched holes in the door and multiple holes in the walls on the way out.

The boyfriend was charged with malicious damage and assault and an ADVO was issued.

Lisa informed the real estate agent who said: "Well it's your responsibility to sort it out."

Lisa now faces a large bill for damage she did not cause. The property damage is not compensable as it was not clothing or personal effects worn or carried by Lisa at the time of the act of violence.

¹² Victims Regulation, cl 8(2)(e).

The flow on effect is that Lisa cannot pay for the damage, and she will have a debt larger than the amount of bond held by the agent. The agent can list her on TICA (the tenancy database) as being in breach of her tenancy. This will mean she is effectively excluded from any private rental for the duration of the listing (which is 3 months).

Lisa is now living in a refuge and having some problems with her pregnancy, possibly as a result of the stress and trauma.

Property damage can also occur in the context of other, non-domestic violence, as the following case study shows.

Case study

A middle aged man and his 12 year old daughter were subjected to serious violence by their neighbour. The violence culminated in a serious assault on the father, witnessed by the daughter. The father ended up in hospital for five days due to his injuries. At the time of the assault, the neighbour threw objects at the client's home. The objects were bricks or large concrete blocks which punched holes in the façade and smashed sliding doors and windows.

Through Victims Support, the father received payment for medical expenses, including visits to the doctor and the optometrist, new glasses, and a vet bill as a result of the neighbour encouraging his dog to attack the father's dog. However no payment was made for the damage to the home.

Legal Aid NSW considers that financial assistance should be payable for property damage which occurs in the context of an act of violence. Caps could apply to ensure there were reasonable limits on such claims.

Recommendations

Legal Aid NSW recommends that financial assistance be provided for expenses incurred as a result of damage to property, where that property damage resulted from, or was part of an act of violence.

If the above recommendation is not accepted, property damage should be compensable where it resulted from, or was part of, an act of violence that involved domestic violence.

Approved counselling services

Legal Aid NSW is aware that there is a shortage of approved counsellors in rural and regional areas of NSW. In our experience, it can also be difficult to find high quality and culturally appropriate approved counsellors for clients. Clients of Legal Aid NSW and our partner organisations have had negative experiences with approved counsellors. For example, some clients have not found the counselling session to be therapeutic, as they have been asked to speak only about the 'act of violence' and to limit what they discuss. There are sometimes difficulties in obtaining updated counselling reports for clients. This has been especially problematic for clients seeking assistance for immediate needs, where such reports provide crucial evidence.

A broader definition, or new category, of approved counsellor may address shortages in counsellor numbers. However, Legal Aid NSW is concerned that 'lowering the bar' for approval may impact on the quality of counsellors providing services to victims of crime under the Act. We therefore recommend that Victims Services consider other measures to improve the number and quality of approved counsellors.

Recommendation

Legal Aid NSW recommends that Victims Services consider measures to improve the number and quality of approved counsellors providing services to victims under the Victims Act.

Recognition payments

Legal Aid NSW is concerned that the quantum of 'recognition payments' available under the Victims Act is significantly lower than the compensation payments available to victims under the previous scheme. They are also out of step with payments available to victims in other states and territories around NSW. For instance, in Victoria, primary victims can receive up to \$60,000, and in Queensland, primary victims can receive up to \$75,000.

The stated purpose of recognition payments is to acknowledge the trauma the victim has suffered. Legal Aid NSW is of the view that the comparatively small recognition payments under the Victims Act fail to achieve this goal, in particular for victims of sexual and domestic violence.

Recommendation

Legal Aid NSW recommends the quantum of all categories of recognition payments be increased.

Legal Aid NSW also has specific concerns with the structure of recognition payments, as outlined below.

Recognition payments for ongoing domestic violence

Legal Aid NSW considers it unjust that adult victims of ongoing domestic violence are not entitled to a separate category of payment which recognises the cumulative effect of multiple acts of such violence. By its very definition, domestic violence is a pattern of coercion and control. As such, most victims are subjected to repeated acts of violence and ongoing injury. Despite this, there is no higher category of payment for victims of domestic violence who have experienced repeated acts of violence and associated multiple traumas. Rather, their combined injuries are grouped together as a 'series of related acts' and often relegated to a Category D payment of \$1,500. This is the same payment that would be given for a single assault by a stranger in a one-off incident.

The absence of such a category stands in stark contrast to the separate categories of recognition payments that exist for a physical assault of a child that is one of a series of related acts,¹³ and ongoing sexual assaults.¹⁴

Our lawyers report that victims of domestic violence feel like their experience is not 'recognised' by this system. Some clients have felt like the system punishes them for not leaving the violent relationship. Many are deterred from applying for Victims Support by the nominal amount likely to be paid for years of abuse, as highlighted by the case study below.

Case study

Grace was in a six year domestic violence relationship. She was subjected to daily physical assaults, denied food and locked in a small room by her partner. She was also subjected to regular sexual assaults. She lived in a constant state of fear. She now suffers severe PTSD and agoraphobia.

Grace made three claims for victims support, arguing that the claims were not related and could be separated: 1) a claim for the daily physical and emotional domestic violence, arguing it should amount to psychological Grievous Bodily Harm (GBH); 2) a second claim for physical GBH for an incident where she was beaten so badly she was hospitalised for a period; and 3) a separate claim for the sexual assaults.

Two of these claims were successful. The first was a Category B recognition payment for \$10,000 for the sexual assaults. All other assaults were grouped as a series of related acts and awarded a Category D of \$1,500 for an assault not amounting to GBH. Grace could not comprehend how she was awarded a \$10,000 Category B payment for the sexual assaults when, in her experience, the other aspects of the domestic violence caused her the most injury.

She felt let down and offended that the other assaults were only quantified by a \$1,500 payment. She is waiting for an internal review and feels further traumatised by the process and by her experience being minimised.

¹³ Victims Act s 35(3) and Victims Regulation, cl 12(d).

¹⁴ Victims Act s 35(2) (b).

The system is also inconsistent, in that a victim of ongoing domestic violence can receive two recognition payments if he or she receives an award of Victims Support and a further act of domestic violence occurs after the support was given.¹⁵ For example, if a victim of domestic violence makes a first claim, and then the perpetrator breaches an ADVO, they are entitled to make a second claim. In this situation the acts of violence are not grouped together as series of ‘related acts’.

By contrast, a victim who only makes an application for support at a later stage is likely to have her experiences grouped together as a series of related acts of violence and only receive one recognition payment. This structure is likely to disproportionately affect the most vulnerable victims who are less likely to be aware of the scheme, such as those in regional or remote areas, clients from a culturally and linguistically diverse (CALD) background, and clients with a disability.

Recommendation

Legal Aid NSW recommends that victims of ongoing domestic violence should:

(a) be entitled to a higher category of recognition payment, or

(b) be able to have the acts of violence considered separately.

Psychological injury and Grievous Bodily Harm

In our experience, Victims Services’ interpretations of Grievous Bodily Harm (GBH) for a Category C recognition payment are inconsistent and sometimes fail to take into account psychological harm. Section 18 of the Victims Act provides that GBH ‘includes the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm’. Outside of this, it is necessary to turn to common law for guidance. Grievous has been held to mean ‘really serious’.¹⁶ ‘Bodily injury’ can be psychological, as demonstrated in *Casey v Pel-Air Aviation Pty Ltd*; *Helm v Pel-Air Aviation Pty Ltd*, where it was held that post-traumatic stress disorder could amount to a ‘bodily injury’.¹⁷

After the commencement of the Victims Act, there was little recognition that serious psychological injury could amount to GBH. Anecdotally, it seems that Victims Services assessors have become more open to entertaining submissions on this issue. This is illustrated by the decision in *BWQ v Commissioner of Victims Rights [2015]*, which clarified that GBH can extend to psychological harm for a Category C recognition payment.¹⁸ In that case, a victim of domestic violence over a two year period was found to have suffered

¹⁵ Victims Act s 19(6).

¹⁶ *DPP v Smith* [1961] AC 290; *Haoui v R* [2008] NSWCCA 209

¹⁷ *Casey v Pel-Air Aviation Pty Ltd*; *Helm v Pel-Air Aviation Pty Ltd* [2015] NSWSC 566

¹⁸ *BWQ v Commissioner of Victims Rights [2015]* NSWCATAD 197

psychological harm amounting to GBH. The harm included ‘major depression, anxiety and symptoms of PTSD’.

Despite this reported decision, our lawyers and partner organisations have had clients with very serious psychological injuries compounded over years of ‘related acts’ of domestic violence who have been refused Category C recognition payments on first determination. Even where victims have overwhelming medical evidence of very serious psychological harm linked to the act of violence, their claim of GBH for psychological injury is often refused at first instance. They are then re-traumatised by their injuries not being acknowledged and needing to invest further efforts into justifying and proving the severity of harm suffered.

Recommendation

Legal Aid NSW recommends that the definition of grievous bodily harm in the Victims Act be amended to expressly confirm that it includes psychological harm.

Choking, strangulation and suffocation

Strangulation is prevalent in domestic violence incidents, and is an established predictive risk factor for future severe domestic violence and homicide.¹⁹ It can cause significant physical and psychological harm to victims. However, as there can be minimal visible external injuries, it can be difficult to establish GBH.²⁰ For these reasons, the Government introduced choking, strangulation and suffocation as separate and specific offences under the *Crimes Act 1900* (NSW) in 2014, with heavy penalties.²¹

Despite this policy, victims of domestic violence who experience strangulation, choking or suffocation will not necessarily be entitled to a Category B recognition payment under the Victims Act. Changes are recommended to ensure consistency between the *Crimes Act 1900* and the Victims Act, and to ensure that victims of this serious form of domestic violence receive appropriate acknowledgment of their trauma.

Recommendation

Legal Aid NSW recommends that acts of violence involving choking, strangulation or suffocation be given, at a minimum, a Category C recognition payment.

¹⁹ Heather Douglas and Robin Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (2014) 36 *Sydney Law Review* 231 at 232.

²⁰ See Second Reading Speech, Crimes Amendment (Strangulation) Bill 2014.

²¹ *Crimes Act 1900* (NSW), s 37.

Making applications for Victims Support

Documentary evidence required for applications

Legal Aid NSW considers that the current evidentiary requirements under the Victims Act disadvantage certain groups of victims. In particular, we oppose the requirement that an application for financial assistance for economic loss or a recognition payment be accompanied by a police report or a report of a Government agency.²²

It is well established that there are significant barriers to reporting domestic violence, child sexual abuse, and sexual assault.²³ Victims of some communities, including Aboriginal and Torres Strait Islander and CALD communities, may be particularly reluctant to report crimes to police or a government agency for historical or cultural reasons, or because of feelings of fear or distrust. Many victims would rather report such crimes to a non-government agency, counsellor, psychologist, friends or family. Victims in rural and remote areas may also not have access to a government service, and therefore can only report to a non-government services (for instance, a non-government health service). The requirement for documentary evidence from police or government impacts unfairly on these clients.

Placing emphasis and reliance on police reports can disadvantage clients in other ways. For instance, sometimes police reports are not available at the time support is needed. Deficiencies in a police report, such as a failure to document injuries, misidentification of the primary aggressor or inappropriate remarks in police entries, can also compromise victims' claims.

Recommendations

Legal Aid NSW recommends no form of documentary evidence should be prescribed when submitting an application for victims support. Rather, it should be sufficient that the documentary evidence establish, on the balance of probabilities, an act of violence and resulting injury.

If the above recommendation is not accepted, the prescribed forms of evidence should be expanded to include documentation from a non-government organisation or service.

²² Victims Act, s 39 (2)(b).

²³ See for instance Grech, K., & Burgess, M. (2011). *Trends and patterns in domestic violence assaults: 2001 to 2010* (Crime and Justice Statistics No. 61) available at: [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/bb61.pdf/\\$file/bb61.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/bb61.pdf/$file/bb61.pdf) and ALRC, *Family Violence: A National Legal Response* (2010), ALRC Report 114, Chapters 24 and 26.

Time for lodging applications

Legal Aid NSW submits that the time limits for making applications for support are a barrier for victims of domestic violence, child abuse and sexual assault. This is compounded because there is no provision to extend the time limits, as existed in the former scheme.

There is no time limit for application for certain types of financial support or a recognition payment for primary victims of child sexual abuse.²⁴ However, strict time limits apply to all other claims. Applications for financial assistance must be made within two years after the relevant act of violence occurred or, if the victim was a child when the act occurred, within two years after the day on which the child turns 18.²⁵ For recognition payments, there is also a two year time limit for most claims, but this is extended to 10 years for acts of violence involving domestic violence, child abuse or sexual assault.²⁶

These timeframes are not always realistic or appropriate for victims of domestic violence, child abuse and sexual assault, who may delay reporting and applying for support for a range of well-documented reasons. This was acknowledged by the Supreme Court and the former Victims Compensation Tribunal in *Elena Harvey v Victims Compensation Tribunal & Anor*:

*[these] types of offences are frequently not reported or disclosed by the victims until some much later time, often because of fear of the perpetrator, shame and embarrassment, or the victim's tender age.*²⁷

The upper limit on an application for a recognition payment also means that many victims are not eligible for compensation for psychological injuries that manifest after the time limit has passed. This might include, for example, members of the Stolen Generations who were abused in care. The effects of crime can also reverberate through generations, as shown in the case study below. Many child victims of abuse later find they are not able to parent or protect their own children as a result of their experiences.

Upper time limits also suggest a one size fits all approach. This is not appropriate as every victim will respond to their experience differently. Some victims may have greater emotional capacity to withstand the trauma, others will access counselling immediately, and others will 'ignore' the event and hope it will not catch up with them later in life. Other victims may experience further trauma, making them more vulnerable to emotional harm.

The case study below is based upon clients who were able to access compensation under the former victims' compensation scheme in NSW. Most of these claims would not be successful under the Victims Act, in large part because of the new statutory time limits for applications.

²⁴ Victims Act, s 40(7).

²⁵ Victims Act, s 40.

²⁶ Victims Act, s 40(5).

²⁷ *Elena Harvey v Victims Compensation Tribunal & Anor* [2001] NSWSC 604 at [74].

Case study

Legal Aid NSW acted for a number of clients in claims under *the Victims Compensation Act 1996* (NSW) who were all members of the same family. Some of the incidents complained of were up to 40 years old and none were less than 20 years old.

The victims compensation claims were for acts of domestic violence and sexual assault by the stepfather and siblings. There were a total of 45 claims against the stepfather by multiple claimants. Each claim was successful with a maximum award of compensation, despite the absence of police reports in some cases.

The family consisted of the mother, stepfather, six children, and their children. Some of the grandchildren were fathered by the stepfather. Each of the children witnessed violence inflicted on the family which included being made to have sex with an animal, being assaulted by their stepfather, being forced to watch other family members being assaulted, giving birth at 13 years to their stepfather's child and grandchild, and generally witnessing physical and emotional suffering. The grandchildren were also abused, not only by the stepfather but also by the family who were themselves victims. The children never told the police or asked other family members for help.

The family have suffered greatly as a result of the abuse. One of the children has been murdered and another has committed a murder. The abuse experienced by the older generation has had a role in the family's continued dysfunction making them more vulnerable to trauma.

Most of the acts of violence in the above case study would not entitle the victims to financial support or a recognition payment under the Victims Act because they fall outside the two year and 10 year limits that apply to these claims respectively. The only exception to this would be any acts of violence involving child sexual assault.

This case study therefore illustrates that potential injustice that can arise as a result of the time limits under the Victims Act. Removing these time limits, or at the least introducing some flexibility into the scheme, would remedy this issue.

Recommendations

Legal Aid NSW recommends that the time limits for making claims for financial support and recognition payments for acts of violence involving domestic violence, sexual assault and child abuse be removed.

If the above recommendation is not accepted, we recommend that the Commissioner have a discretion to grant an extension of time for claims made outside the current limits, with a statutory presumption in favour of granting an extension for claims relating to domestic violence, sexual assault and child abuse.

Unavailability of legal assistance

There is currently no provision for payment of lawyers' professional fees or disbursements in respect of applications for Victims Support under the scheme. Part of the role of Victims Services Support Coordinators is to assist with claims and collection of evidence. However, staff at Victims Services are unable to provide legal advice. Only a limited number are able to write submissions for a victim, and this is only reserved for clients who make their vulnerable status known to Coordinators. This assistance can also give rise to a conflict issue, as Coordinators are not independent from Victims Services.

Our SACP service reports that in practice, the burden of writing submissions in support of sexual assault victims is often falling to clinicians. This is inappropriate, as the task is neither clinical nor therapeutic. As clinicians are not legally trained, this can also result in the victim receiving a lower category of recognition payment than that to which they are entitled.

Legal Aid NSW has also heard reports that some private lawyers will deduct their fees from any recognition payment or financial support received. This in turn further reduces the compensation victims receive under the Act. Such a practice would be avoided if the Government made provision for the reimbursement of a victim's legal costs, capped at a reasonable amount.

Legal Aid NSW acknowledges that certain straightforward claims may be able to be made without legal assistance, provided that the applicant is capable of doing so. However, the Victims Act can be complex to interpret and apply. An application must adequately address section 44 factors in order to ensure that the claim is not refused or entitlements reduced. This is difficult for a lay victim, or a non-lawyer support person assisting with a claim, such as a social worker or clinician. Clients with complex matters, or who are particularly vulnerable, also need legal assistance when preparing a claim in order to access the support to which they are entitled. Legal advice and assistance is also necessary to identify and act on a right to apply for internal review.

Recommendation

Legal Aid NSW recommends that the Government provide funding to enable victims to access independent legal advice and assistance with respect to applications for Victims Support. If funding cannot be provided to all victims, then vulnerable victims, including victims of domestic violence, sexual assault, child sexual abuse and child abuse, should be given priority.

4. Recovery of victims support payments from offenders

Legal Aid NSW accepts that the policy of restitution is well-established. However, we would nonetheless like to highlight the adverse impact that restitution orders can have on our clients. The majority of offenders are economically and socially disadvantaged. Additional debts imposed by way of a restitution order can compound this social exclusion and financial stress, and may increase the risk of reoffending. The case study below illustrates the oppressive impact that a restitution order can have on a person who commits an offence.

Case study

Alyssa was in a long term relationship with a man called Geoff, who had a son, Jai. Geoff had Jai on weekends regularly. There was non-physical domestic violence in the relationship between Geoff and Alyssa: Geoff verbally and emotionally abused Alyssa.

In 2011, Alyssa and Geoff were having a verbal argument. Jai, who was 13 at the time, was present and Alyssa asked him to tell her who had been visiting. Encouraged by his father, Jai said things like "I don't have to tell you shit", and he and his father otherwise provoked Alyssa. In a fit of anger, Alyssa grabbed a bottle of apple juice and threw juice on Jai.

The Police were called. Alyssa was charged with common assault and malicious damage to property. She wanted to plead not guilty but was advised to plead guilty to the assault charge, and did so. The malicious damage charge was dismissed. Alyssa was sentenced to a 12 month good behaviour bond on the assault charge.

Earlier this year, almost 5 years later, Alyssa received a Notice of a Provisional Restitution Order. Jai was awarded a payment of \$10,000 by Victims Services, and Victims Services now seeks to recover that amount from Alyssa.

Alyssa is due to have a baby in five months and is only just making ends meet. She has a temporary job that will end in three months and is unlikely to find another job as she will be in the late stages of pregnancy. A \$10,000 debt stemming from a common assault conviction five years ago may push her and her baby into serious financial crisis. Legal Aid NSW has lodged an objection to the provisional order on her behalf.

The imposition of restitution orders on children and young people, in particular, can have crippling effects. Children and young people, in general, have little earning capacity, and those who offend are unlikely to be able to pay off restitution debts in the thousands of dollars. Children and young people in detention are an extremely disadvantaged group who do not have the capacity to discharge debts of this kind. For example, the 2009 Young People in Custody Health Survey found that:

- 60% of young people in custody had a history of child abuse or trauma
- 45% have had a parent in prison

-
- 14% had a possible intellectual disability (IQ 69 and under) and 32% scored in the borderline intellectual disability range (IQ 70 to 79), and
 - 87% were found to have a psychological disorder.²⁸

Legal Aid NSW also notes that approximately half of all young people in detention in NSW are Indigenous. Saddling young offenders in custody with large restitution debts is only likely to compound their disadvantage, and hampers efforts to prevent reoffending upon their release into the community.

Legal Aid NSW has lodged objections on behalf of young people in custody who have received Notices of a Provisional Restitution Order. The response of Victims Services has been to defer decision-making on the matter until the young person exits custody, rather than considering the objections and making a final decision. This fails to give the young person any certainty. It can also effectively extend the time for the making of a restitution order beyond the limits that apply under the Act.²⁹

Recommendation

Legal Aid NSW recommends that restitution orders not be imposed for offences committed by children (people under 18).

The policy of recovering victim support payments from offenders also raises concerns from a victim's perspective. For victims who have escaped violence, the prospect of Victims Services seeking restitution from the offender can act as a deterrent from seeking support. For victims who have left high-risk situations, many fear retribution. Our solicitors have encountered many victims of domestic violence who have not wanted to pursue financial assistance after being advised about the possibility of restitution. Restitution may also cause a person to delay seeking Victims Support until they are in a safer situation, which can be problematic in light of the statutory time limits. It would be a safer option to allow victims to elect whether or not they want restitution sought from the offender if their application is successful. This election could be included on the application form.

Recommendation

Legal Aid NSW recommends that victims be able to elect whether or not they want restitution sought from the offender if their application is successful.

²⁸ NSW Human Services (Juvenile Justice) and NSW Health (Justice Health), 2009 Young People in Custody Health Survey – Fact Sheet, available at <http://www.juvenile.justice.nsw.gov.au/Documents/YPICH%20survey%20factsheet%20-%20all%20young%20people%20FINAL.pdf>

²⁹ For instance, section 59(2) of the Victims Act provides that a restitution order may not be made against a person if: two years or more have elapsed since the time for making a claim for Victims Support under the Act, or the date on which the person was convicted of the relevant offence, whichever is the later.

5. Victims support levy

Legal Aid NSW is concerned that the Victims Support Levy (VSL) is imposed automatically, without consideration of the circumstances of the offence, the offender's personal and financial circumstances and other factors relevant to whether a penalty should be imposed.

Many clients of Legal Aid NSW live on the margins of society, often with acute mental health, drug and alcohol problems. The majority of these clients are in receipt of Centrelink benefits and have limited prospects of securing meaningful employment. Incomes for this class of individuals are therefore low, and payments to the State Debt Recovery Office are made directly from benefits. Cumulative liability for fines, costs and VSLs may run into many thousands of dollars with no realistic prospects of ever being settled. Legal Aid NSW submits it would be more appropriate if the courts had a discretion as to whether the VSL should be imposed, having regard to the means of the defendant and other circumstances of the case.

The VSL is also imposed when a person is convicted of a wide range of offending behaviour with only some minor offences excluded from its ambit.³⁰ The Victims Act expressly states that a 'conviction' does not include an order under section 10(1)(a) *Crimes (Sentencing Procedure) Act 1999*, but only in relation to an offence not punishable by imprisonment. This clearly implies that other orders under section 10(1) do attract the VSL, even though a court makes such orders 'without proceeding to a conviction'. Legal Aid NSW clients are often confused at having left court under the impression that they have not been convicted but are then charged the VSL (and costs levy), with potentially a significant financial burden. Legal Aid NSW submits that this approach is inconsistent with section 10(1) of the *Crimes (Sentencing Procedure) Act 1999*, and that the VSL should not apply to orders made under that provision.

The operation of the VSL can also be oppressive in practice, as it is possible for numerous VSLs to be imposed in one set of proceedings. For example, a drug dependent individual will typically commit a series of low-level offences over a short period of time. Legal Aid NSW regularly represents defendants who have carried out a shoplifting spree in a shopping mall, or repeatedly used a stolen pay-wave bank debit card, on a single day. This behaviour could result in over twenty charges appearing on a single CAN. If convicted, corresponding VSLs (and court costs) are imposed for each conviction.

Legal Aid NSW considers that this issue could be addressed by imposing the VSL on a per matter basis (as defined by the eight digit 'H' sequence number),³¹ regardless of the number of charges. If this recommendation is not accepted, the VSL should be set to apply at two graduated levels reflecting the number of offences: for example, at the current

³⁰ See Victims Act, ss 105 and 106(3).

³¹ Court Attendance Notices (CANs) prepared by the NSW Police Force set out the charges faced by the accused person. These can contain a number of charges which collectively form the matter' (proceedings) before the Local Court. Each matter is allocated an eight digit 'H' number (the letter 'H' followed by eight numbers). These H matter numbers are unique numbers used to track the matter through the court proceedings and appear on the police bail reports.

rate of \$69 for up to five offences in one proceeding; and at the higher rate of \$156 for more than five offences in one proceeding.

Recommendations

Legal Aid NSW recommends that the imposition of the VSL should not be automatic. Instead, the Court should have a discretion as to whether the levy should be imposed, having regard to the means of the defendant and the circumstances of the case

Legal Aid NSW recommends that the VSL be imposed on a per matter basis.

If the above recommendation is not accepted, the VSL should be set to apply at two graduated levels reflecting the number of offences.

Legal Aid NSW recommends that the Victims Act be amended to clarify that for the purposes of Part 7 of the Victims Act, a ‘conviction’ does not include an order made under section 10 of the *Crimes (Sentencing Procedure) Act 1999*.

6. Children and the VSL

As with restitution debts, the VSL can have a disproportionate effect on children who have very low earning capacity. The Victims Act currently provides that the VSL applies to offences that are dealt with by the Children’s Court.³² However, a person under 18 is not liable to pay the levy if the Court that convicts the person directs that the person is exempt.³³ This system works relatively well for children that appear before the Children’s Court, where there are specialist lawyers and Children’s Magistrates who regularly turn their mind to this issue. However, in children’s matters before other courts (namely, in regional or remote areas where there is no Children’s Court or Children’s Court circuit), there is often no consideration as to whether the child should be exempt from the VSL, and the VSL is invariably applied automatically.

Legal Aid NSW’s first preference is that the VSL not apply to offences dealt with by the Children’s Court. If this is not accepted, we submit that the default position in section 106(3) of the Victims Act should be reversed, so that children are not subject to the VSL unless a court orders otherwise.

Recommendations

Legal Aid NSW recommends the VSL should not apply to offences dealt with by the Children’s Court.

If the above recommendation is not accepted, the Victims Act should provide that children are not liable to pay the VSL unless the court orders otherwise.

³² Victims Act, s 105(1).

³³ Victims Act, s 106(3).