

Department of Family and Community Services
Statutory review of the Victims Rights and Support Act 2013
Submission
12 August 2016

The Department of Family and Community Services (**FACS**) welcomes the opportunity to make a submission to the Department of Justice in relation to the statutory review of the *Victims Rights and Support Act 2013* (**the Act**).

FACS notes that the purpose of the review is to determine whether the objectives of the Act remain valid and its terms appropriate for achieving those objectives.

The policy objectives of the Act include to:

- recognise and promote the rights of victims of crime,
- establish a scheme for the provision of support for victims of acts of violence,
- enable financial support paid and recognition payments made under the Victims Support Scheme to be recovered from persons found guilty of the crimes giving rise to the payments,
- give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime, and
- impose a levy on persons found guilty of crimes for the purpose of funding the Victims Support Scheme.

Overall, FACS agrees that the objectives of the Act remain valid, however is concerned that the Act limits the support necessary for victims of acts of violence, particularly for victims of child abuse and neglect and domestic violence.

FACS' responsibilities to children and young people in statutory out of home care

As at June 2015, there were 17,585 children and young people in out-of-home-care (**OOHC**),¹ of whom over 13,000 were in the parental responsibility of the Minister for Family and Community Services. The total number of children who entered statutory OOHC in 2014-2015 was 3,639 children.

The overwhelming majority of children and young people who enter statutory OOHC do so because of substantiated chronic child abuse. In 2013–14, the Australian Institute of Health and Welfare (**AIHW**) reported that the two most common reasons for substantiated reports

¹ Department of Family and Community Services, Annual Report 2014-15 at 26 available at <http://www.facs.nsw.gov.au/publications> accessed on 3 August 2016. This number excludes children and young people subject to guardianship orders (n 2418).

in NSW were for emotional abuse (34%) and neglect (35.5%), with about 15% for physical abuse and 17.5% for sexual abuse.² Large numbers of children and young people entering statutory OOHC are therefore likely to be victims of crime because of the reasons they entered care.

FACS has a responsibility to ensure that children and young people in statutory OOHC who are victims of crime receive appropriate support services. This includes ensuring that claims for victims support are made on their behalf.

To ensure it meets these responsibilities, FACS has policies and procedures in place to ascertain as early as possible whether children and young people in OOHC are eligible to claim victims support, and make claims on their behalf.³ These responsibilities are also extended to non-government out of home care service providers, for children and young people placed in their case management responsibility.⁴

In 2014/2015, FACS made 1073 applications for victims support on behalf of children and young people in care. This was an increase of 8% from the previous financial year, and more than double the number of applications made in 2013/2014.

In this submission, FACS will address briefly the key areas of concern affecting children and young people in care who are victims of acts of violence, particularly:

- the adequacy of financial support available under the Act,
- issues relating to the criteria to qualify for Category A and C recognition payments,
- lack of funded legal assistance to ensure victims are empowered to exercise their rights under the Act to claim victims support, and
- privacy issues that impede FACS from sharing relevant information with parents/guardians of child victims in order to make claims on their behalf.

1. Adequacy of financial support available

The Act implemented a new legislative scheme, which commenced on 3 June 2013, to replace the previous victims of crime compensation scheme (**old scheme**). The new victims support scheme focuses on meeting the immediate needs of primary victims in the form of

² Australian Institute of Health and Welfare, *Child Protection Australia 2013–14*, Canberra, 2015 available at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554973> at Table A11.

³ NSW Department of Family and Community Services, *Victims Support Policy*, October 2014 available at http://www.facs.nsw.gov.au/about_us/victims-of-crime

⁴ NSW Department of Family and Community Services, *Supporting Victims of Crime*, October 2015 available at http://www.community.nsw.gov.au/_data/assets/file/0020/340841/supporting_victims_of_crime_guidelines.pdf

counselling, financial assistance for immediate needs, financial assistance for economic loss and a recognition payment.

This new structure benefits adult victims who have sustained actual financial costs as a result of the act of violence; it ensures they are not out of pocket, and provides an additional sum in recognition of the trauma suffered. The 'compensation' aspect of the previous scheme was replaced with 'recognition payments', which are substantially lower than previous financial compensation awards.

This change in the structure of payments from a single lump sum under the old scheme (which addressed both costs and recognition of trauma) to multiple types of payments has effectively reduced the amount of financial support available to child victims of acts of violence, particularly to children and young people in care, whose immediate needs are generally borne directly by FACS.

In effect, their entitlement is reduced to a recognition payment, which in some cases is a very small amount ranging from \$1,500 to \$15,000, as opposed to a range of \$12,500 to \$50,000 under the old scheme. In FACS' view, this small amount does not appropriately reflect the impact of significant and life-long acts of violence on children and young people, or offer them sufficient support for dealing with the long term effects of the acts of violence committed against them, once they turn 18 years.

FACS notes that statutory victim's compensation awards are much higher in other jurisdictions. In Victoria, for example, primary victims are eligible for up to \$60,000 plus \$10,000 in special financial assistance. In Queensland and Western Australia, primary victims are eligible for payments of up to \$75,000 while in South Australia, they are eligible for up to \$50,000.

In our submission, the awards available under the various categories of recognition payments should be reviewed, having regard to awards available under other statutory victims of crime compensation schemes, and with particular regard to amounts awarded to victims of crime who were children at the time of the act of violence.

2 (a) Recognition Payment: Category C – physical assault of a child that is one of a series of related acts – s 3(d) - \$5000

For a large number of children and young people in OOHC who are victims of abuse and neglect, this is the most relevant category of recognition payment.

Matters involving domestic violence (often also in the context of parental drug and alcohol abuse, mental health issues and serious neglect), generally involve one of a series of related acts, and result in significant emotional and psychological abuse/injury with long-lasting trauma. However if the non-offending parent will not co-operate, there may not be any evidence of actual physical violence on the primary victim.

Currently FACS brings claims for a Category C recognition payment on behalf of victims of abuse where there is evidence that the child has been exposed to one of a series of acts/behaviour (violence) by or between the parents that are tantamount to an assault.

‘Assault’ is not defined in the Act. At common law, an assault is any act which intentionally, or possibly recklessly, causes another person to apprehend immediate and unlawful personal violence (*Fagan v Metropolitan Commissioner of Police* [1969] 1 QB 439). There is no requirement that physical force is directly or indirectly applied in order for an assault to occur. An assault necessarily involves the apprehension of injury or the instilling of fear or fright. It does not necessarily involve physical contact with the person assaulted nor is such physical contact, if it occurs, an element of the assault (*The Queen v Phillips* (1971) 45 ALJR 467). The victim does not need to know exactly when the violence will occur (*Barton v Armstrong* [1969] 2 NSWLR 451).

In some circumstances, a parent’s actions – such as direct violence or threats of violence, or exposure to violence, drug and alcohol abuse (which renders them unable to meet a child’s needs), leaving a child unsupervised (which can cause harm/injuries), providing inadequate nutrition or stimulation, etc. - can constitute an ‘assault’ where this could reasonably result in an apprehension of imminent, harmful or offensive contact to the child. A reasonable person in this position (a child, for instance, who is wholly dependent on their parents to provide them with the necessities of life which is their legal duty) would have apprehension of injury if their parents engage in these harmful actions.

The success of these kinds of Category C claims has been variable, leaving a number of child victims without any recognition payment at all. FACS believes this is in part due to the stipulation in section 35(3)(d) that the assault be a ‘physical assault,’ which gives rise to the view that there must be actual physical contact in order for the claimant to qualify.

FACS submits that section 35(3)(d) should be amended to refer simply to an ‘assault’ in order to avoid this narrow interpretation and therefore permit victims of child abuse to be eligible under this category.

2(b) Recognition Payments: Category A - Family Relatives of Homicide Victims

Under the Act, parents, step-parents or guardians of a primary victim of a homicide qualify automatically for a recognition payment of \$7500. Yet, a child of the primary victim only qualifies for the payment if they can prove they were financially dependent on the primary victim at the time of their death.

The effect of this provision is that a child in care whose parent is murdered while the child is in care, is not eligible for a Category A recognition payment because they were not financially dependent on the parent immediately before their death. FACS submits that this is an unfair and incongruous outcome. Under the previous law, children of homicide victims were able to access victim’s compensation awards.

In our submission, there should be no requirement for children of primary victims of homicide to prove financial dependence in order to be entitled to a Category A recognition payment. Like parents, step-parents and guardians, children of homicide victims should qualify automatically for a Category A recognition payment of \$7500.

Similarly, FACS submits that children should qualify automatically for a Category A payment where their sibling or half-sibling is a primary victim of homicide.

3. Funded legal assistance

In contrast to the old scheme, there is no provision in the Act for the payment of legal professional costs to allow victims to obtain legal advice and have a legal representative make the claim on their behalf. This has a particularly adverse impact on victims of child abuse and neglect, including young care leavers, who often struggle when they leave care and don't have the financial resources or moral support of family to assist them.

While FACS understands that the new victims support scheme is intended to be a simple one that victims can access without legal representation, and notes that Victims Services' case managers provide some assistance, these case managers cannot provide legal advice nor can they prepare submissions on behalf of victims. Arguably, conflict of interest issues also arise where staff of the agency which ultimately determines applications for victims support, also provide assistance to applicants.

The Act is not easy to navigate and understand for ordinary members of the community. It is particularly difficult for victims of child abuse, who may be distrustful of the criminal justice system and government agencies in general, to know what their rights are, and to exercise those rights. It is particularly challenging, without legal assistance, to make claims that are properly supported by the necessary evidentiary requirements and address the section 44 factors.

FACS notes that there is currently no legal aid available for victims support claims. While community legal centres provide some assistance, they are financially constrained in how much they can do and how many victims they can help.

The impact of the removal of funded legal assistance is felt disproportionately by people on low incomes, who cannot afford to pay for legal representation, and unlikely to even seek legal advice given the modest amounts that they may recover if successful.

A young person who is in the juvenile justice system has access to legal advice on a range of issues including victims support. However, for young people in the community who do not have family support, especially those who have left care, there is no readily available access to legal advice and assistance. In FACS' view, this presents real access to justice concerns for victims of crime, which we submit needs to be addressed if the Act is to operate fairly and effectively.

Victims of violence, particularly victims of child abuse, sexual assault and domestic violence should have access to funded legal assistance in order to exercise their rights under the Act. There should be provision in the Act, as per the old scheme, for legal costs (at a fixed and modest rate) to be paid by Victims Services.

4. Privacy issues - information about victims support claims

Child protection law permits FACS to share relevant information that it has collected about a child or young person with certain third parties, where, broadly speaking, the information is disclosed for child protection purposes. So, for example, FACS may lawfully disclose to a parent of a child who is in care, during casework with that family, the names of persons who are alleged to have caused harm to the child. The purpose of such disclosure is to ensure that, when the child is in the parent's care, the parent takes appropriate protective action to ensure the safety and protection of the child.

However, issues arise about what information FACS may or may not disclose to a parent of a child, where the child is no longer in the care of the State, or there is no active casework on foot, and the information is not for child protection purposes.

A pertinent issue in terms of victims support, is that, after a child is restored to a parent, or parental responsibility allocated to a third person (eg a guardian), FACS is no longer lawfully able to disclose to the parent or guardian the name of the person alleged to have committed an act of violence on the child. This is necessary so that FACS can obtain the parent or guardian's consent to make an application for victims support on behalf of the child (consistent with FACS' policy to assist victims of crime).

Section 112A of the Act, which codifies the previous s 41 Direction, enables FACS (as a victims services agency), despite the disclosure provisions of privacy law, to disclose information to which a victim is entitled to a *victim of crime*, or to a *family victim*.

A 'family victim' is defined in section 22 as a person who, at the time of the act of violence, was an *immediate family member* of the deceased primary victim. Immediate family member is in turn defined as the spouse/de facto partner, parent/guardian/step-parent or sibling/half-sibling/step-sibling of the primary victim who has died. Clearly, this does not assist FACS to provide information to a parent of a living child victim.

To remedy this, FACS submits that the Act should be amended to provide that, where a victim of crime is a minor, the victims service agency may provide the information to the parent or guardian of the child. Such an amendment is, in FACS' view, consistent with the objects of the Act and the terms of the Victims Charter.