

Director, Civil Law
NSW Department of Justice
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By email: policy@justice.nsw.gov.au.

Dear Director, Civil Law

Re: Statutory review of the *Victims Rights & Support Act 2013*

Thank you for the opportunity to provide a submission for the statutory review of the *Victims Rights & Support Act 2013*. The *Victims Rights and Support Act 2013* (the VRSA) commenced (on assent) on 3 June 2013.

The policy objectives of the VRSA include the following:

- to recognise and promote the rights of victims of crime;
- to establish a scheme for the provision of support for victims of acts of violence;
- to 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;
- to 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
- to impose a levy on persons found guilty of crimes for the purpose of funding the Victims Support Scheme (VSS).

The purpose of the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The VRSA 2013 established a victims support scheme, aimed at providing holistic, responsive and more immediate support to victims of violent crime in NSW.

While the majority of the legislation is achieving its stated objectives, there are certain areas where amendment is desirable. These can be broadly categorised in the following areas:

1. Administration and case management.
2. Availability of support.
3. Miscellaneous amendments.

The main reasons for the changes to the Act were to ensure timely delivery of services to victims of crime, make the process less bureaucratic and burdensome and provide holistic services to victims of crime.

In the three full financial years the VSS has been operational the number of applications lodged by victims has steadily increased:

- 2013/14 – 10,489
- 2014/15 – 13,061
- 2015/16 - 16,821

Therefore more clients are seeking support and services under the VSS. The time taken to approve different types of support has also reduced significantly compared to the victims compensation scheme. The data for the last financial year is set out below and the tables show that support is being provided within a day of completed applications being received.

For the last financial year:

- Financial Support (all): 26 working days
 - Immediate Needs: 24 working days, Economic Loss: 29 working days
- Recognition: 170 working days
- Combined all types of support: $(26+170)/2 = 98$ working days

Financial Assistance

2013/14

Shortest	Longest ¹	Average
0 working days	308 working days	19 working days

2014/15

Shortest	Longest	Average
0 working days	415 working days	29 working days

2015/16

Shortest	Longest	Average
0 working days	645 working days	26 working days

Recognition

2013/14

Shortest	Longest	Average
0 working days	294 working days	126 working days

2014/15

Shortest	Longest	Average
1 working days	521 working days	148 working days

2015/16

Shortest	Longest	Average
0 working days	771 working days	170 working days

¹ Please note in accordance to section 40(6) an application is open for 5 years or until total maximum amounts are approved.

1. Administration and Case management

1.1 Clarification and extension of Commissioner's powers

1.1.1 Expand section 12 scope of powers to require production of documents

The Commissioner can at present only "require" production of information from a "Government agency" (cf. "public sector agency", used in the *Government Information (Public Access) Act 2009*.) In other words, a request to a Government agency under section 12 obliges that agency to produce information that would not otherwise be denied under GIPA (see section 12(5)). Further, in relation to Government agencies and people generally, the Act does not spell out the consequences of failure to comply with a request or requirement to produce.

Changes are recommended to extend the requirement or obligation such that non-government agencies like private medical practices must also comply with a notice requiring production of documents.

1.1.2 Add slip errors and clerical mistake amendment powers

There have been instances where the Commissioner has needed the power to correct clerical errors in decisions. Without a clear power to do so, the availability and scope of such a power has been questionable. Current case law has provided a questionable and limited basis to do this but a clear power and guiding considerations is desirable.

1.1.3 Allow a limited finding of "act of violence" to enable faster access to counselling

This recommendation enables the Commissioner to find, solely for the purposes of counselling, that an act of violence has occurred. It reinforces the lower threshold that an applicant must satisfy in order to entitle an applicant for counselling, and also allows the Commissioner to approve counselling on a preliminary basis so that an applicant may report to Police after, and while, receiving therapy.

1.2 Case Management

1.2.1 Lapsing claims that are not progressed

Effective management of the Victims Support Fund requires the Commissioner to report on and limit the contingent liability of the Fund. To allow for this, the Commissioner should be given an express power to lapse applications that are properly lodged but have not been progressed.

Once an application form is received, an applicant should be put on notice about what documents/information they are required to provide based on the type of support they are making (see below *Defining and distinguishing applications and claims for types of victims support*). A time limit should run within which material is to be received, after which time the Commissioner may lapse the application if considered appropriate.

This process will of course allow for applications to be made/lodged again, subject to the time for lodging applications set out on s.40 of the VRSA, if it was not "considered" previously/dismissed under this provision.

1.2.2 Defining and distinguishing applications and claims for types of victims support

The documentary evidence provisions outlined in section 39 describe a scheme that envisages different proof requirements (and, by implication, different administrative processes and considerations) for the various types of support described as “victims support” by the Act. This is not mirrored in the section describing applications for victims support (section 38). The simplistic approach to describing an “application” causes issues when attempting to interpret or apply section 40 time limitations, and specifically section 40(6) which was intended to allow applicants to claim further *financial* support for five years once they were found to be the victim of an act of violence. The provision expresses instead that once an application is properly made it remains open for five years.

When considering that there are no evidentiary requirements for counselling, compared to victims support in the form of recognition payment or financial support generally, the Fund is unable to properly assess its position once an application is considered lodged. Further, an approval for victims support includes an approval of counselling from which various rights and obligations flow (see sections 48, 49, 55, and Part 5 for examples).

Addition of provisions distinguishing an application for victims support from the various claims for support an applicant may elect on an application form is therefore recommended. In addition, amendment of section 40(6) such that the five years for further claims to be made be limited to financial support once approval of financial support or recognition payment has been given. Separate but cognate amendments to allow further counselling should also be made in Division 4.

2. Availability of support

2.1 Counselling hours to apply to events

Consideration should be given to amending cl5(3) of the Victims Rights and Support Regulation 2013. This clause stipulates that the Commissioner must not authorise payments for more than a total of 22 hours of counselling services for a person unless satisfied that there are exceptional reasons for doing so.

This clause connects the counselling hours that can be assigned to the person rather than to the act of violence. Often we see a victim experiences an act of violence against them early in their life, they then obtain counselling for that act of violence and use 22 hours of counselling. Later in life they may then experience another act of violence against them, for which they need counselling. As cl 5(3) of the Regulation is currently framed the Commissioner would need to find that there were ‘exceptional circumstances’ in order to provide counselling for this victim. Financial assistance is provided per “act of violence”.

Clause 5(3) of the Regulation should be amended so that the limit of 22 hours of counselling applies per act of violence rather than per person.

2.2 Family victim counselling increase

Family victims are at present allocated a limit of 20 hours of counselling, unlike other victims entitled to counselling. Minor regulation amendment is required to Regulation 5(6) to increase this amount to 22 to align with other victims entitlements.

2.3 Childhood sexual assault victims entitled to unlimited counselling

On 3 November 2014 the then Attorney General Brad Hazzard made an announcement that victims of child sexual assault or physical abuse would have access to unlimited counselling through the VSS. We are aware of the lasting effects of childhood trauma on individuals, and it is possible for the Commissioner of Victims Rights to find that childhood sexual assault or physical abuse is an exceptional circumstance under cl5(3) of the *Victims Rights and Support Regulation 2013*.

Amending the regulation to reflect an availability of unlimited counselling hours for victims of childhood sexual assault and/or physical abuse would provide such victims with security in relation to that entitlement. Such an amendment would also have the benefit of streamlining Victims Services processes in approving counselling hours, thereby reducing red tape for victims of childhood sexual assault or physical assault. The counselling provided should be directly in relation to the child sexual assault and/or physical abuse.

2.4 Victims Support Fund to be used to provide counselling programs for victims of crime

The traditional one-on-one counselling in a counsellor's room is not suitable for all victims – we believe in tailoring our counselling services to the victim to get the best outcome for them. Victims Services in partnership with Approved Counsellors have developed “Group work” programs that provide group counselling for victims of crime. These have proved very beneficial for some victims, as they are able to meet other victims who have been through similar situations to themselves.

In addition, Victims Services has developed a successful program within prisons and Juvenile Justice Detention Centres whereby prisoners who have also been victims of crime can obtain counselling under the Approved Counselling Service that addresses their victimisation. This program has the benefit of continuity of care in the community and by addressing their victimisation, anecdotally it reduces reoffending.

These programs are being funded by providing counsellors payment based on the hours provided to each victim. It is administratively cumbersome administering the programs in this way – it is more appropriate for group work programs and counselling in prisons to pay the Approved Counsellor per hour for the program. It is suggested that the legislation or regulation be amended to give the Commissioner of Victims Rights the ability to approve and fund counselling programs that are delivered by Approved Counsellors for victims of crime.

Victim Services therefore recommends:

- a) The legislation or regulation be amended to give the Commissioner of Victims Rights the ability to approve counselling programs that are delivered by Approved Counsellors for victims of crime.
- b) Allow the Regulations to provide for payment to Approved Counsellors running programs on an hourly basis.

2.5 Separating “indecent assault” from “sexual assault”

Further to the relocation of the definitions to sexual assault and domestic violence (discussed under *Miscellaneous Amendments*), definitional amendments of sexual assault and indecent assault are suggested so as to create a distinction between acts of indecency perpetrated upon a child or young person under 16, and the more common definition of indecent assault being an act of indecency in connection with an assault. The distinction becomes important when considering categories of

recognition payment, and the “hierarchy” of offences for which such payments are given (arguably in order of severity of offence).

The proposed amended definition of sexual assault includes the “extension” of indecent assaults in the former definition. That is, the proposed definition of sexual assault extends to acts of indecency with or towards children under 16 years and recognises the severity of such acts of indecency with or towards young children.

2.6 Reintroducing “Patterns”

This term ‘pattern of abuse’ in the 1996 legislation was, in the VRSA replaced with the phrase “that is one of a series of related acts”. For instance, section 35(2)(b) refers to “a sexual assault, indecent assault or attempted sexual assault involving violence that is one of a series of related acts.”

A “series of related acts” is defined in section 19 and is not confined to being a series of related acts of the same kind (for example, a series of related acts in the nature of intimidation is a series of related acts.) Hence the definitions in section 35 allows a victim of a single act of indecent assault, within a single incident comprising of multiple and related non sexual offences, to receive a higher recognition payment than a victim of consistent child sexual abuse or domestic violence, regardless of the severity and multitude of the offences.

This is at odds with the structure of and thrust of the legislation. It is recommended that the concept of patterns be reintroduced. Specifically relevant recognition payment categories should be amended to “a series of related acts involving a pattern of sexual assaults, a pattern of indecent assaults, or a pattern of sexual assaults and indecent assaults.”

2.7 Recognising domestic violence

The current Act provides for recognition payments for victims of domestic violence under category C and category D. Category C provides for physical assault of a child that is one of a series of related acts or an assault resulting in grievous bodily harm. All other assaults are provided for in Category D.

This arrangement lends itself to odd results and multiple interpretations. For example:

1. If there is evidence of a series of related acts comprised of verbal abuse and one assault resulting in actual, but not grievous bodily harm:
 - a. A child, whether or not a victim of domestic violence, may be approved a Category C recognition payment;
 - b. An adult victim of prolonged domestic violence may only be approved a category D recognition payment.

Adult victims of prolonged domestic violence must establish that they sustained grievous bodily harm as a result of an assault. The NSW Civil and Administrative Tribunal have broadly construed this requirement, firstly, by not requiring the grievous bodily harm to be traced to an assault, but rather, the wider “act of violence” and secondly, accepting psychological injury as bodily harm.

Victims Services does not necessarily disagree with this construction in severe instances of domestic violence. However, more clarity is desirable in the legislation to allow for this, rather than a liberal interpretation which arguably “waters down” the limitations set up by the legislature. In line with this, it is recommend defining separately, as a category C payment, an act of violence involving:

- (a) Physical assault in the course of domestic violence
- (b) Assault in the course of domestic violence that is one of a series of related acts.

We note that *domestic violence* is already a defined term in the Act. The suggested amendments specifically recognise domestic violence as a category, either where a single incident of physical violence occurs, or where a prolonged period of violence (both physical and non-physical) has occurred over time. Previously, a victim of domestic violence would have to show that they sustained grievous bodily harm as a result of an offence in order to be eligible for a Category C recognition payment.

2.8 Discarding the bar for claimants for court compensation awards

Section 25 (1) forces applicants to 'elect' between recovery from offenders through either Part 4 or Part 6 of the Act (according to section 91, the provisions of Part 6 give effect to an "alternative scheme".)

Although this clause refers to orders made under Part 6 of the Act, it probably extends to orders made under the cognate provisions of the 1996 Act: clause 17 of Schedule 2 to the Act makes directions for compensation made under the cognate provisions of the 1996 Act enforceable under Part 6 of this Act.

In practice, amounts ordered by a Court are often very low and more often than not are not recovered. Thus, the fact of a court compensation entitlement should not preclude a victim from applying for support, but rather be a consideration in line with other moneys received in respect of the act of violence. It can then factor in as a section 44 consideration.

2.9 Vexatious claimants and repeat claimants

The addition of a new subsection under 25 should be considered to remedy an oversight in the original legislation, which has required the Commissioner to rely on a common law principle (*res judicata*) to reject duplicate claims under previous legislation and under the same legislation.

Cognate amendments should also be considered to the savings and transitional provisions. Arguments have been raised, and clarity is needed, around clauses 6 and 11 in relation to applications for compensation under previous schemes that were not awarded / approved. The recommended change (broadening the existing provision to make clear that, subject to specific provisions in the current Act, namely, the provision recommended in the paragraph above, this Act does not extend or apply to acts of violence that were the subject of previous applications. The recommended change should cover applications that were administratively dealt with (dismissed for being out of time for example, or for being a duplicate of another claim already lodged, or judicially dealt with by the VCT magistrates.)

2.10 Clarifying time limits for family victims

Section 40(2) extends the two year time limit for a family victim where it is later established that the primary victim died as the result of an act of violence, to "more than" two years from that finding. Section 40(3) then places a two year limit from that finding date on financial support, but not recognition payment. Section 40(4) places a two year time limit on all recognition payments, without providing a similar allowance as section 40(3). Victims Services recommends amendments to these sections that provide for an extension that allows family victims applications and approvals of

recognition payments in similar terms to the financial support allowed under section 40(3).

2.11 Recognising children of homicide victims equally

Victims Services recommends amendments to sections 36(1)(a), and regulation clauses 12(a) and (b) that dispenses with the need of children of the homicide victims to show financial dependency. We have identified an issue when children are in the care of the Minister and having to prove financial dependency and this amendment would alleviate that requirement.

3. Miscellaneous and definitional amendments

3.1 Protection of the Fund

3.1.1 Amendment of anomaly in Schedule 2 Clause 16

The intention of clause 16 appears to be to continue the effect of provisional orders at different stages under the 2013 legislation. However, clause 16(1) of Schedule 2 refers to "awards under Part 5 of this Act". It is, of course, impossible to make awards under Part 5 of the Act. It should instead refer to *Part 4 of this Act*.

3.1.2 Power to withhold payment of approved support

The Act currently empowers the Commissioner to demand repayment of funds paid where, after payment has been made and pursuant to their obligations under section 48's standard conditions, an applicant notifies the Commissioner that they are in receipt of money from another source in respect of the same act of violence.

Where an applicant has already received monies from another source and subsequently applies for victims support, but does not disclose this, there is no power to withhold payment or demand repayment under the Act when the Commissioner becomes aware of this, unless the conduct amounts to fraud *and* a conviction is secured in relation to this (see section 56).

3.1.3 Repayment of victims support

Upon repeal of the 1996 Act there was no transitional / saving provision vesting demand and recovery powers in the Commissioner – the Commissioner only has power to impose conditions and make demands in relation to such conditions under the 2013 Act, and not prior legislation.

Changes are recommended that vest demand and recovery powers in previous victims compensation legislation to the Commissioner (and transfer debts owing to the Victims Compensation Fund Corporation to the Victims Support Fund).

3.1.4 Securing restitution – clarifying “relevant offence”

The VRSA introduced, within section 58, a third limb to the definition of a relevant offence for which restitution against a convicted offender may be pursued. The definition, by its wording, has caused some confusion and minor amendment is recommended whereby the definition is clarified, in (c) as “an offence that is one of those constituting an act of violence in respect of which victims support is given.”

3.2 Safety and privacy of victims

The 1996 Act provided that the victim to whom proceedings for an objection to a provisional order relates was competent but not compellable in proceedings for the same (see section 52 of the 1996 Act.) No such provision was ever carried through to this Act. In theory, there is nothing to stop offenders from issuing summonses

compelling victims to give evidence in proceedings on objection to a provisional order.

Changes are recommended to ensure the ongoing safety and privacy of victims. Defendants have tried to compel victims to attend at NCAT, and while unsuccessful, the absence of a protection against this is harrowing for victims. The recommended change should also relate to materials provided to the NCAT (and defendants), limiting what material the defendant will be served with in their review. Again, particularly in cases of domestic violence and sexual assault, medical reports detailing the ongoing effects on a victim can be used to continue to intimidate or control a victim.

The material submitted to support a claim for victims support is not relevant to a review of restitution by the Tribunal – the Tribunal has taken the stance that it does not look behind the decision on victims support. It is reviewing the Commissioner's decision to issue a provisional order – that is, whether a conviction for a relevant offence exists and whether the time limits have been complied with. The relevant material will be the determination of victims support itself, and documents proving the conviction such that the Tribunal can find as a matter of fact that a restitution defendant has been convicted of a "relevant offence."

3.3 Redefining "Sexual Assault and Domestic Violence"

At present, section 18 applies the term "sexual assault and domestic violence" to the entire Act. It refers to section 19(8) which – redundantly – also applies that term to the entire Act. Although the Act contains references both to sexual offences and domestic violence offences, with the exception of section 34 (which picks up specific parts of that definition for a purpose) and section 44(3) (which refers to sexual assault or domestic violence) the phrase "sexual assault and domestic violence" is not used in the Act. It is unclear why this term applies to the entire Act. It is difficult to divine the Legislature's intention when, for example, referring to domestic violence, child abuse or sexual assault in section 40(5).

In part to cure this issue of multiple and redundant definitions, placing the definition of terms in the Definitions section of the Act is recommended.

3.4 Definition of Generalist, Specialist and Psychiatrist

Victims Services' clients are often highly traumatised and it is important that only the best Counsellors be approved to see our client base. The legislation currently provides for "generalist counsellors" and "specialist counsellors". There has been some confusion by practitioners around the eligibility requirements to become a specialist counsellor – many thinking they can enter the Approved Counselling Service at a "specialist counsellor" level, merely because they have post-graduate qualifications, however they may have limited or no experience in counselling traumatised victims. Consequently, it is suggested that the definition of specialist counsellor be amended to be:

- a person who has been a generalist counsellor with the Approved Counselling Service for more than three consecutive years, and
- holds post-graduate qualifications, consisting of a Masters degree or a higher level qualification, in social work, clinical psychology, clinical neuropsychology, counselling psychology or forensic psychology, and
- in the opinion and at the discretion of the Commissioner, has specialist counselling skills due to the person's qualifications or experience to be deemed a generalist counsellor tier 2.

It is also suggested that counsellors be renamed “generalist counsellor tier 1” and “generalist counsellor tier 2” to avoid the perception that having a specialisation outside of the Approved Counselling Service entitles them to be a “specialist counsellor”. In addition, there should be a separate definition for psychiatrists as they are on a higher pay rate than either a generalist counsellor or a specialist counsellor.

3.5 Increasing family victim support for “justice related expenses”

The duration of homicide trials and coronial inquests are ordinarily longer, and the associated needs of family victims with respect to such proceedings are higher than they are for primary victims generally. Amendments to the amount of support in such cases are recommended but would be an exception.

If you have any further questions please do not hesitate to contact the writer or Matthew Ting, Senior Advocate on matthew.ting@justice.nsw.gov.au.

Yours faithfully

Mahashini Krishna
Commissioner of Victims Rights