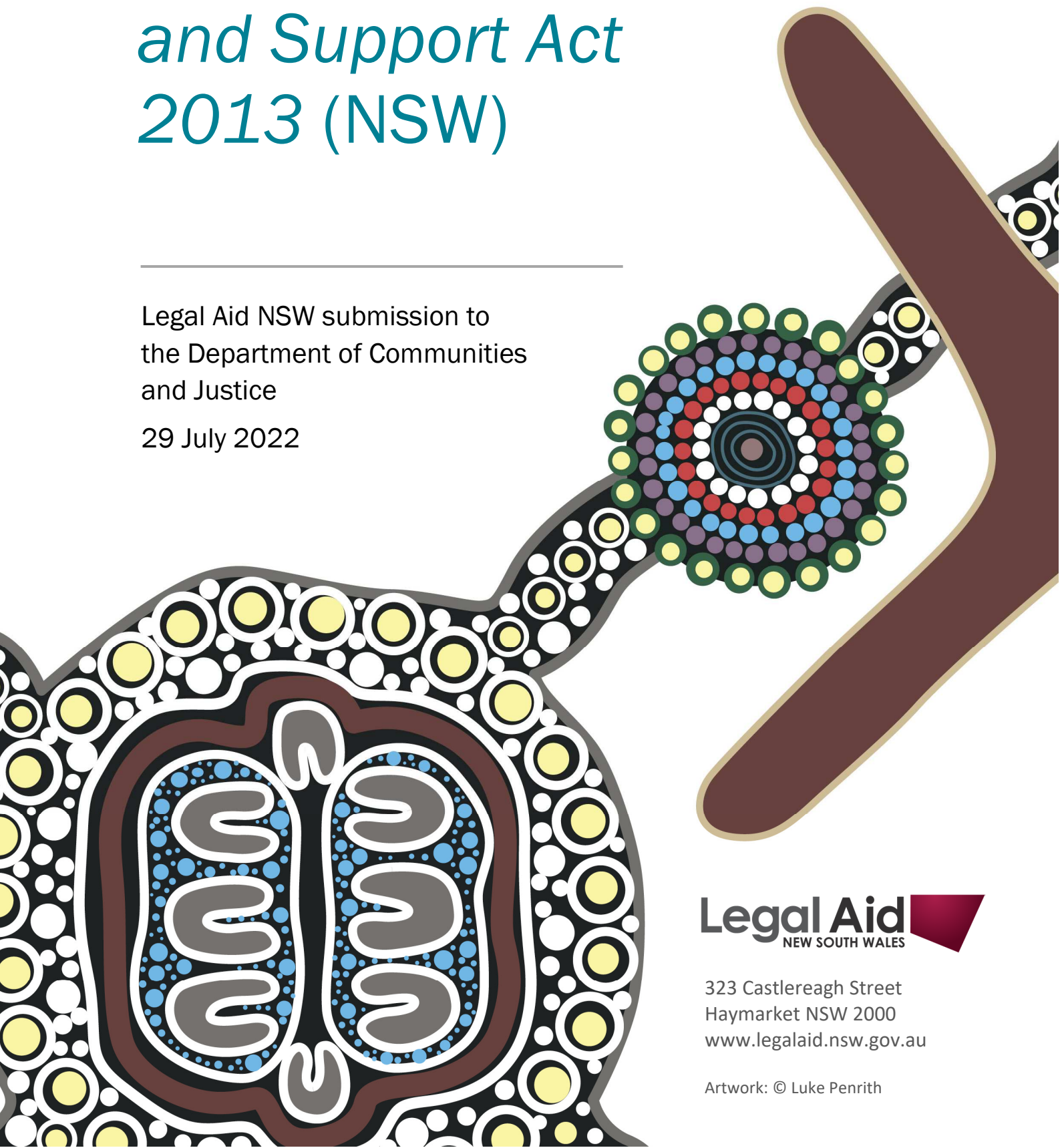


# Statutory review of the *Victims Rights and Support Act* 2013 (NSW)

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Legal Aid NSW submission to  
the Department of Communities  
and Justice

29 July 2022



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## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. 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). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family

Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

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[REDACTED]

## 2. Executive summary

Legal Aid NSW welcomes the opportunity to provide feedback to the statutory review of the *Victims Rights and Support Act 2013* (NSW) (**Victims Act**).

Legal Aid NSW assists hundreds of clients each year with matters arising under the Victims Act, primarily regarding victims compensation and restitution. In the 2021/22 financial year, we provided over 800 services regarding victims compensation.<sup>1</sup>

We support the objects of part 2 to recognise and promote the rights of victims of crime,<sup>2</sup> and of part 4 to establish a scheme for the provision of support for victims of acts of violence and acts of modern slavery. However, we consider that some aspects of the Victims Act and its administration undermine these objectives. We are particularly concerned about the current application process and lack of support for collating supporting documents provided by Victims Services. In our view, this approach reduces the accessibility of the Victims Support Scheme (**Scheme**), particularly for the most vulnerable victims. It also significantly burdens our resources, without any additional funding to offset this.

We consider that the Scheme should be accessible and inclusive. The Scheme should:

- provide support to victims to complete applications and obtain supporting documents, either by expressly providing that applicants for victims compensation are entitled to claim costs associated with the application, or by Victims Services providing this assistance (including by phone and/or with the assistance of interpreters)
- avoid processes that re-traumatise victims or place the evidentiary burden on victims
- absorb the costs of obtaining supporting documents
- assist victims to locate counsellors, and
- provide clear and accurate information on the full range of supports and payments available to the victim (for example, advising applicants that they may be entitled to separate claims for separate acts of violence).

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<sup>1</sup> Legal Aid NSW provided 539 advice services, 148 minor assistance services and 539 extended legal assistance services for victims compensation matters in the 2021/22 financial year.

<sup>2</sup> In this submission we use the term 'victim'. We acknowledge that some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors. Legal Aid NSW acknowledges every person's experience is unique and individual to their circumstances.

We also consider that amendment is needed to properly recognise acts of domestic violence, provide financial assistance for property damage, and increase the quantum of all recognition payments.

We acknowledge the object of part 5 to enable financial support and recognition payments to be recovered from people found guilty of crimes giving rise to the payments. However, we consider that this blanket approach may have harmful consequences, deter some victims from accessing support, and unfairly impact some offenders, particularly children.

We acknowledge the object of part 7 to impose a levy on people found guilty of crimes to fund the Scheme, however we consider it should be discretionary and should not be imposed on children.

We are also concerned about the imposition of management fees by the NSW Trustee and Guardian on victims compensation payments held on trust on behalf of children in out-of-home care. In our view, these fees are excessive and unfairly reduce the compensation amount for some of the most vulnerable children and young people in our community.

## Recommendations

### **Victims' rights (part 2)**

#### *Recommendation 1*

The Commissioner of Victims Rights publicise and promote the right of victims to make a complaint about an alleged breach of the Charter of rights of victims of crime to the Commissioner.

#### *Recommendation 2*

The Victims Act be amended to provide that the Commissioner of Victims Rights is required to report annually on government agency compliance with the Charter of rights of victims of crime, including on complaints about alleged breaches of the Charter by government agencies.

### **Part 3 Administration**

#### *Recommendation 3*

The role of the Commissioner of Victims Rights be independent of government.

## **Victims support scheme (part 4)**

### *Recommendation 4*

The full definitions of domestic violence and domestic relationship in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) be adopted in the Victims Act.

### *Recommendation 5*

Victims of domestic and family violence-related acts of violence involving motor vehicles be eligible for support under the Victims Act.

### *Recommendation 6*

Restrictions on the ability of convicted prisoners who are victims of an act of violence in prison to access support under the Victims Act be removed.

### *Recommendation 7*

Victims Services:

- (a) consider measures to improve the number and quality of approved counsellors providing services to victims under the Victims Act, including the number of counsellors providing services to victims in prisons
- (b) assist victims to locate counsellors for themselves and their children
- (c) pay travel expenses where it is not feasible for a victim to travel or access online sessions, and
- (d) consider ways to increase the accessibility of counselling sessions to victims in prison, including by making information readily available on counsellors who will provide treatment to victims in prison via audio-visual link.

### *Recommendation 8*

The Immediate Needs Support Package be available for victims who are homeless or lose their dwelling because of the act of violence.

### *Recommendation 9*

- 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.
- Alternatively, if this is not supported, property damage be compensable where it resulted from, or was part of, an act of violence that involved domestic violence.

### *Recommendation 10*

The quantum of all categories of recognition payments be increased.



### *Recommendation 11*

Victims of ongoing domestic violence be entitled to a higher category of recognition payment, or be able to have the acts of violence considered separately.

### *Recommendation 12*

The definition of “grievous bodily harm” in the Victims Act be amended to expressly include psychological harm.

### *Recommendation 13*

Victims of acts of violence involving choking, strangulation or suffocation be entitled to a Category C recognition payment, at a minimum.

### *Recommendation 14*

- Victims Services resume providing assistance with applications and document gathering. Victims Services could consider ways to streamline and automate this process in line with the Premier’s ‘tell us once’ and ‘government made easy’ priorities.
- In the alternative, the Victims Act be amended to expressly provide that applicants for victims compensation are entitled to claim costs associated with the application.
- Additional funding be provided to Legal Aid NSW and other service providers to provide legal advice and assistance to applicants whose application is likely to be dismissed, particularly where the application raises an allegation of domestic violence or sexual abuse.

### *Recommendation 15*

- Victims Services review and update the certificate of earnings form to include space to record the length of time the applicant had off work because of the act of violence and provide space for the employer to verify the information application and evidence forms, particularly the certificate of earnings form.

### *Recommendation 16*

- Time limits for making an application for financial support and recognition payments for an act of violence or an act of modern slavery involving domestic violence, sexual assault and child abuse be removed, and the Commissioner have a discretion to grant an extension for claims regarding other acts of violence or modern slavery.
- Alternatively, if this is not supported, 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.

### *Recommendation 17*

Victims Services consider ways to improve processing times, and publish guidance on expected timeframes.

## **Recovery of victims support payments from offenders (part 5)**

### *Recommendation 18*

Restitution orders not be imposed for offences committed by children (persons under 18 years).

### *Recommendation 19*

Victims be able to elect whether or not they want restitution sought from the offender if their application is successful.

### *Recommendation 20*

The time limit to object to a restitution order be extended to 90 days, and the Commissioner have discretion to accept an objection beyond this time limit.

## **Victims support levies (part 7)**

### *Recommendation 21*

The Victims Support Levy not be automatically imposed. 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.

### *Recommendation 22*

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* (NSW).

### *Recommendation 23*

- The Victims Support Levy be imposed on a per matter basis.
- Alternatively, if this is not supported, the Victims Support Levy be set to apply at two graduated levels reflecting the number of offences.

### *Recommendation 24*

- The Victims Support Levy not apply to offences dealt with by the Children's Court.
- Alternatively, if this is not supported, the Victims Act provide that children are not liable to pay the Victims Support Levy unless the court orders otherwise.

## Other matters

### *Recommendation 25*

- The NSW Trustee and Guardian not be permitted to charge fees for holding victims compensation payments on trust for vulnerable children and young people, especially those in out-of-home care.
- Alternatively, Victims Services pay any fees associated with the NSW Trustee and Guardian holding a victims support payment on trust for a vulnerable child or young person, especially those in out-of-home care.

## 3. Victims' rights (part 2)

Legal Aid NSW supports the object of part 2 of the Victims Act to recognise and promote the rights of victims of crime,<sup>3</sup> and we consider it remains valid.

### 3.1 Charter of victims' rights (part 2 division 2)

Legal Aid NSW supports the legislative Charter of rights of victims of crime in section 6 of the Victims Act (**Charter**). The rights in the Charter are of significance to many of our clients, however our solicitors report that some victims of crime are not treated in accordance with the Charter by police and Department of Communities and Justice (**DCJ**) agencies, particularly the rights to be treated with courtesy, compassion and respect,<sup>4</sup> and to be provided with information about the investigation of the crime.<sup>5</sup> We provide the following examples from our experience:

- Young people, particularly those in out-of-home care or who have frequent contact with the criminal justice system, are at times not treated respectfully by police, and their complaints are not always diligently progressed. This includes some female victims of domestic and family violence (**DFV**) who are perceived by police as the perpetrators of violence, and their attempts to report violence against themselves are often dismissed or not taken seriously. This is exacerbated where there have been cumulative incidents of DFV.
- Young people in out-of-home care often experience difficulties when attempting to complain about harmful experiences in care, such as abuse by a previous foster carer. This is particularly the case where the perpetrator of the abuse or assault is or was a paid employee of a funded service provider. At times the young person's credibility is perceived to be diminished by virtue of their age and out-of-home care status. The complaints process of funded services providers is often protracted and formalistic, and complaints are frequently not dealt with in a contemporaneous manner.
- A number of our clients who received an Immediate Needs Support Package (**INSP**)<sup>6</sup> have been subjected to an audit by Victims Services and asked to provide evidence of how they spent the payment. This process has been stressful for many clients, who did

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<sup>3</sup> *Victims Rights and Support Act 2013 (NSW)* s 4.

<sup>4</sup> *Ibid* s 6.1.

<sup>5</sup> *Ibid* s 6.5.

<sup>6</sup> An Immediate Needs Support Package is aimed at providing a grant of financial assistance to primary victims of domestic violence to meet their immediate needs following an act of violence: 'Immediate Needs Support Package', *Victims Services* (Web Page, 7 June 2022) <<https://victimsservices.justice.nsw.gov.au/victims-services/how-can-we-help-you/victims-support-scheme/financial-support/financial-assistance-for-immediate-needs/immediate-needs-support-package.html>>.

not feel it was courteous, compassionate or respectful of their experiences. An INSP is generally received at a very traumatic time for victims when it is difficult to keep thorough records of spending and receipts.

- In some instances, our clients have requested but not been provided with information by police about the progress of the investigation,<sup>7</sup> or information about services or remedies.<sup>8</sup>
- A recent client who was the person in need of protection (**PINOP**) in an apprehended domestic violence order (**ADVO**) against her ex-partner reported feeling harshly judged by police because she suffers from mental illness and did not feel that police treated her with courtesy, compassion and respect.

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 (**Commissioner**). The Commissioner can then in turn recommend that agencies apologise to victims of crime for breaches of the Charter.<sup>9</sup>

Legal Aid NSW also acknowledges the broad power of the Commissioner to make a special report to the Minister for Parliament<sup>10</sup> 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.<sup>11</sup>

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.

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<sup>7</sup> On request, victims are entitled to be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation: *Victims Rights and Support Act 2013* (NSW) s 6.4.

<sup>8</sup> *Victims Rights and Support Act 2013* (NSW) s 6.2.

<sup>9</sup> *Ibid* s 10(1)(f).

<sup>10</sup> The Minister responsible for the *Victims Rights and Support Act 2013* (NSW) is the Attorney General: *Allocation of the Administration of Acts (2001 SI 338)* (NSW).

<sup>11</sup> *Victims Rights and Support Act 2013* (NSW) s 13.

## Recommendation 1

The Commissioner of Victims Rights publicise and promote the right of victims to make a complaint about an alleged breach of the Charter of rights of victims of crime to the Commissioner.

## Recommendation 2

The Victims Act be amended to provide that the Commissioner of Victims Rights is required to report annually on government agency compliance with the Charter of rights of victims of crime, including on complaints about alleged breaches of the Charter by government agencies.

## 4. Administration (part 3)

Legal Aid NSW supports the role of the Commissioner of Victims' Rights and the functions of this role under the Victims Act. However, in our view, the Commissioner's ability to fulfill their responsibilities would be strengthened if the office were independent of government.

Currently the Commissioner is an employee of DCJ. The Commissioner's functions include:

- overseeing the implementation of the Charter by government agencies
- receiving complaints about alleged breaches of the Charter by government agencies, and
- making special reports to the Minister<sup>12</sup> on a broad range of matters, including any breaches by a government agency of the Charter.<sup>13</sup>

The Commissioner is therefore responsible for monitoring and handling complaints about other agencies within DCJ, 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.

### Recommendation 3

The role of the Commissioner of Victims Rights be independent of government.

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<sup>12</sup> The Minister responsible for the *Victims Rights and Support Act 2013* (NSW) is the Attorney General: *Allocation of the Administration of Acts (2001 SI 338)* (NSW).

<sup>13</sup> *Victims Rights and Support Act 2013* (NSW) ss 10, 11, 13.

## 5. Victims support scheme (part 4)

Legal Aid NSW supports the object of part 4 of the Victims Act to establish a scheme to support victims of acts of violence and acts of modern slavery, and considers that it remains valid. 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:

- the definition of “act of violence” does not properly capture all forms of family violence
- the quantum of all recognition payments are too low
- adult victims of ongoing domestic violence are not entitled to a separate category of payment which recognises the cumulative effect of such multiple acts of violence, and
- the current application process and lack of assistance to gather supporting material undermine the accessibility of the scheme, and may re-traumatise some victims.

### 5.1 Definition of “act of violence” (part 4 division 1 Preliminary)

Eligibility for support under the Scheme is based on an applicant meeting the criteria for one of several classes of victim of an “act of violence or an act of modern slavery”.<sup>14</sup>

“Act of violence” is defined in section 19 of the Victims Act to include “sexual assault and domestic violence”. However, the definition of “domestic violence” does not properly capture all forms of DFV, and in particular, does not capture coercive controlling behaviours, or financial or emotional abuse.

While the definition of “domestic violence” in the Victims Act is similar to the definition in section 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (**CDPV Act**), it leaves out the aspects of the CDPV Act definition in subsections 11(1)(b) and (c):

(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or

(c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).

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<sup>14</sup> *Victims Rights and Support Act 2013* (NSW) ss 19-22.



In our view, the full definition of domestic violence in the CDPV Act should be adopted in the Victims Act. This would better capture acts of violence perpetrated in the commission of domestic violence offences, such as coercive control and emotional and financial abuse.

It may also assist to improve the consistency of first instance decisions by Victims Services regarding non-physical acts of domestic violence. In our experience, applications for victims support for non-physical acts of violence in DFV contexts are often dismissed as not meeting the definition of “act of violence”. However, we have assisted several clients to lodge successful internal reviews of these decisions.

May’s story below is an example of an application for victims support for non-physical acts of violence which was dismissed at first instance.

### May’s story<sup>15</sup>

Legal Aid NSW is assisting May, a victim of DFV, who had applied to Victims Services for an INSP and a recognition payment on the grounds of non-physical violence. In her application to Victims Services, May had disclosed that her ex-partner used coercive control and perpetrated non-physical forms of domestic violence, including denigration, financial control, and isolation from friends and family, and installed a tracking device on her car to monitor her whereabouts. May disclosed that the violence impacted her mental and emotional wellbeing. May did not report the violence to the police.

Victims Services dismissed both of May’s applications, stating in its decision that the incidents described in May’s application did not satisfy the definition of an “act of violence” in the Victims Act.

The Victims Act also includes a narrower list of recognised domestic and family relationships than the CDPV Act:

- The list in the Victims Act is limited to those living in the same household as the person who committed the offence, and does not include those who previously lived in the same household.

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<sup>15</sup> All case studies in this submission have been de-identified.

- 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.<sup>16</sup>

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 the Victims Act be aligned to the complete definition in the CDPV Act.

## Recommendation 4

The full definitions of domestic violence and domestic relationship in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) be adopted in the Victims Act.

### 5.2 Eligibility for support (part 4 division 2)

#### 5.2.1 Motor vehicle accidents

The Victims Act excludes from eligibility injuries arising from acts of violence involving motor vehicles.<sup>17</sup> The Victims Act provides exceptions for family victims regarding the intentional killing of a primary victim with a motor vehicle where a person has been charged with murder regarding the primary victim's death, and for primary and family victims of terrorist incidents.<sup>18</sup>

Our solicitors have seen several clients injured in DFV incidents involving motor vehicles, who we consider should also be able to access victims support under the Scheme.

## Recommendation 5

Victims of domestic and family violence-related acts of violence involving motor vehicles be eligible for support under the Victims Act.

#### 5.2.2 Prisoners

Legal Aid NSW does not support the provision of the Victims Act that limits people from accessing victims support regarding acts of violence that occur while they were imprisoned as convicted prisoners, to situations where there are "special

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<sup>16</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

<sup>17</sup> *Victims Rights and Support Act 2013* (NSW) s 25(2).

<sup>18</sup> *Ibid* ss 25(2A)-(2B).

circumstances”.<sup>19</sup> People who are in custody and have been convicted of a crime, who are then the victim of a violent crime while in custody, should have the same rights to support as people living in the community. While in prison, prisoners 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 lesser responsibility to provide appropriate support.

## Recommendation 6

Restrictions on the ability of convicted prisoners who are victims of an act of violence while in prison to access support under the Victims Act be removed.

### 5.3 Approved counselling services (part 4 division 4)

Legal Aid NSW is aware that there is a shortage of approved counsellors, particularly in rural and regional areas of NSW and female counsellors in southwest Sydney. It can be very difficult for our clients to find counsellors with availability, and many clients have experienced significant waits for an available session. Even once they have engaged with a counsellor, some clients have reported that regular appointments are not available.

In our experience, it can also be difficult to find high quality and culturally safe approved counsellors. For example, some clients have not found the counselling session to be therapeutic or trauma-informed, and others have reported errors in counsellor’s reports, such as inaccurately recording the date of harm as the date of the counselling session.

The option to engage in counselling electronically has improved accessibility for many of our clients. However, some other clients have experienced difficulties accessing counselling when they cannot travel and have a disability that makes engaging online difficult, as the Scheme does not cover travelling expenses for counsellors, unlike other schemes such as that provided by Veterans Affairs. This is illustrated by Jenny’s story below.

#### Jenny’s story

Legal Aid NSW assisted Jenny, a 73-year-old woman who experienced a

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<sup>19</sup> *Victims Rights and Support Act 2013 (NSW)* ss 25(4)-25(5).

violent assault from her husband. They had been married for many decades, her husband was her carer, and he suffered from cognitive decline. The assault resulted in Jenny being hospitalised in an intensive care unit for several weeks, and then further weeks in a rehabilitation unit. Her husband was charged and refused bail. Jenny was unable to live independently and did not want to return to her family home due to trauma.

Through Victims Services, Jenny requested counselling to assist her in dealing with the trauma and complex issues arising from it. Jenny has age-related hearing loss, vision impairment and mobility issues, and so sought to find a counsellor that could see her in the aged care facility. However, as approved counsellors are not reimbursed travel costs, Jenny was unable to arrange this.

Jenny was unable to access counselling for 14 weeks after the trauma occurred, and eventually used an online option. This mode of treatment was not appropriate for Jenny due to her hearing and vision impairments, and may reduce the benefit she can derive.

### 5.3.1 Accessing counselling from prison

Victims in custody face additional barriers to accessing approved counselling services. There are limited Victims Services approved counsellors who can treat clients in custody, and the current directory of counsellors on Victims Services' website does not include this information. As a result, prisoners either cannot access their counselling hours at all, or a support service needs to individually contact several counsellors and enquire about whether they can arrange appointments with clients in custody. Some counsellors only see clients in particular gaols, so when a client moves to a different gaol, the counsellor cannot readily continue seeing them.

In our view, Victims Services should implement a more user-friendly system for prisoners to access approved counselling while they are in custody, including noting on the directory which counsellors will provide sessions to prisoners via audio-visual link (AVL). Access to counselling under the Scheme would be beneficial for many prisoners, who also encounter difficulties accessing mental health treatment and counselling while in custody through Corrective Services NSW and Justice Health due to long waitlists.

Difficulty accessing counselling while in custody can also prevent victims from accessing financial support or a recognition payment if they are reliant on a counsellor's report to support their application. Legal Aid NSW has assisted clients who have found it so difficult to obtain counselling while in custody that they have not been

able to submit their application for a recognition payment until after they were released and could engage in counselling in the community, and obtain the critical supporting evidence they required. Given the strict time limits for applying for support, this option is not available to many prisoners.

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

We also consider that Victims Services should assist victims to locate counsellors for themselves and their children.

## Recommendation 7

Victims Services:

- (a) consider measures to improve the number and quality of approved counsellors providing services to victims under the Victims Act, including the number of counsellors providing services to victims in prisons
- (b) assist victims to locate counsellors for themselves and their children
- (c) pay travel expenses where it is not feasible for a victim to travel or access online sessions, and
- (d) consider ways to increase the accessibility of counselling sessions to victims in prison, including by making information readily available on counsellors who will provide treatment to victims in prison via audio-visual link.

### 5.4 Immediate Needs Support Package

Many of our clients have benefited from the INSP available for victims of domestic violence. We consider that it is a positive initiative that contributes to meeting the policy objectives of the Victims Act by helping victims of domestic violence pay for items they need urgently to be safe because of the violent crime.

The Victims Support Scheme – Detailed Guide developed in 2021 and the application form for the INSP contain useful guidance on what kinds of ‘immediate needs’ victims can spend the funds on.

As mentioned above, some of our clients have been subjected to an audit by Victims Services, and have been asked to provide receipts or a statutory declaration to explain how they spent the funds. This has been stressful for many victims, who received the

INSP at a very traumatic time in their lives when they may not have been able to keep thorough records of their spending.

We consider that the INSP should also be made available to victims who are homeless or lose their dwelling because of the act of violence. Similar to victims of domestic violence, victims in these circumstances are also often in need of urgent funds to secure their safety. This is illustrated by Chang's story below.

### Chang's story

Legal Aid NSW assisted Chang, an elderly man with mobility issues who was assaulted, and his home firebombed. Chang became instantly homeless and lost his mobility scooter. While the National Disability Insurance Scheme (NDIS) agreed to pay for another scooter, he would have benefited greatly from immediate access to funds to pay for rent and clothing.

Chang spent an extended period of time living with family hours away from his home base, and then went to a men's hostel while waiting for other accommodation.

## Recommendation 8

The Immediate Needs Support Package be available for victims who are homeless or lose their dwelling because of the act of violence.

### 5.5 Property damage

A 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.<sup>20</sup>

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

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<sup>20</sup> *Victims Rights and Support Regulation 2019* (NSW) regs 10(e), 11(e).

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. Property damage can also occur in the context of other, non-domestic violence.

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 are reasonable limits on such claims.

### Recommendation 9

- 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.
- Alternatively, if this is not supported, property damage be compensable where it resulted from, or was part of, an act of violence that involved domestic violence.

## 5.6 Recognition payments (part 4 division 5)

Section 34 of the Victims Act defines ‘recognition payment’ as “a payment made in recognition of the trauma suffered by a victim of an act of violence or act of modern slavery.”

Legal Aid NSW is concerned that the quantum of recognition payments under the Victims Act and *Victims Rights and Support Regulation 2019* (NSW)<sup>21</sup> are too low to achieve this goal, particularly for victims of sexual assault, domestic violence and child abuse.

### Recommendation 10

The quantum of all categories of recognition payments be increased.

## 5.7 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.

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<sup>21</sup> *Victims Rights and Support Regulation 2019* (NSW) reg 14.

Domestic violence is often a pattern of abuse, and many 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 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,<sup>22</sup> and ongoing sexual assaults.<sup>23</sup> Our lawyers report that victims of domestic violence feel their experience is not ‘recognised’ by this system. Some clients have felt the system punishes them for not leaving the violent relationship.

The system is also inconsistent in that a victim of ongoing domestic violence can receive two recognition payments if they receive an award of victims support and a further act of domestic violence occurs after that support was given.<sup>24</sup> 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 a “series of related acts”. By contrast, a victim who only makes an application for support at a later stage is likely to have their 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 background, and clients with a disability.

## Recommendation 11

Victims of ongoing domestic violence be entitled to a higher category of recognition payment, or be able to have the acts of violence considered separately.

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<sup>22</sup> *Victims Rights and Support Act 2013* (NSW) s 35(3); *Victims Rights and Support Regulation 2019* (NSW) reg 14(d).

<sup>23</sup> *Victims Rights and Support Act 2013* (NSW) s 35(2)(b).

<sup>24</sup> *Ibid* s 19(6).



## 5.8 Definition of “grievous bodily harm”

Currently, section 18 of the Victims Act states 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”.

The NSW Civil and Administrative Tribunal has confirmed that GBH can extend to psychological harm for a Category C recognition payment. For example, in the decision of *ERU*,<sup>25</sup> a victim of domestic violence was found to have suffered psychological harm amounting to GBH. The harm included “a significant deterioration in pre-existing psychiatric condition and psychological symptoms as a direct result of the acts of violence.”<sup>26</sup>

Similarly, in the decision of *BWQ*,<sup>27</sup> a victim of domestic violence over a two-year period was found to have suffered psychological harm amounting to GBH. The harm included “major depression, anxiety and symptoms of post-traumatic stress disorder as a direct result of the acts of violence”.<sup>28</sup>

However, in our experience, Victims Services’ approach to determining if an applicant has suffered GBH and is entitled to Category C recognition payment can be inconsistent and sometimes fail to recognise psychological harm.

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. In our experience, many of these matters are overturned on internal review or appeal to the NSW Civil and Administrative Tribunal.

In our view, the definition of “grievous bodily harm” (**GBH**) in the Victims Act should be amended to expressly include psychological harm.

### Recommendation 12

The definition of “grievous bodily harm” in the Victims Act be amended to expressly include psychological harm.

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<sup>25</sup> *ERU v Commissioner of Victims Rights* [2021] NSWCATAD 312.

<sup>26</sup> *Ibid* [57].

<sup>27</sup> *BWQ v Commissioner of Victims Rights* [2015] NSWCATAD 197.

<sup>28</sup> *Ibid* [14].

## 5.9 Choking, strangulation and suffocation

Strangulation is prevalent in DFV incidents and can cause significant physical and psychological harm to victims. It is also an established predictive risk factor for future severe DFV and homicide.<sup>29</sup> However, as there can be minimal visible external injuries, it can be difficult to establish GBH.

Choking, strangulation and suffocation are separate and specific offences under the *Crimes Act 1900* (NSW), with heavy penalties.<sup>30</sup> Despite this, victims of domestic violence who experience strangulation, choking or suffocation will not necessarily be entitled to a Category C recognition payment under the Victims Act.

We consider that the Victims Act should be amended to ensure that victims of this serious form of assault receive appropriate acknowledgment of their trauma.

### Recommendation 13

Victims of acts of violence involving choking, strangulation or suffocation be entitled to a Category C recognition payment, at a minimum.

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<sup>29</sup> Heather Douglas and Robin Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 *Sydney Law Review* 231, 232.

<sup>30</sup> *Crimes Act 1900* (NSW) s 37.

## 6. Applications for victims support

### 6.1 The burden on applicants to provide documentary evidence

Legal Aid NSW does not support Victims Services' current application process, which requires applicants to gather and provide supporting documents (except police reports) for their application to be assessed.

This process was introduced in around mid-2020 and replaced Victims Services' previous approach of supporting applicants to complete their application, including documenting their injury and gathering supporting documents.

In our experience, placing the evidentiary burden on victims:

- creates barriers to many victims accessing support, which for some is insurmountable due to their circumstances, the impact of trauma, and/ or the costs and complexities involved in collecting their own evidence. This disproportionately impacts on vulnerable populations, particularly victim-survivors of DFV and victims of sexual violence as they often do not report the violence to the police,<sup>31</sup> Aboriginal people who are significantly more likely to experience DFV than their non-Indigenous counterparts,<sup>32</sup> children and young people, particularly those in out-of-home care, older people, people with low literacy, and people in prison who face additional barriers to accessing and collating evidence
- is not trauma-informed and can retraumatise some victims
- is inefficient. While the Commissioner has the power to compel production of information from any person or government agency pursuant to section 12 of the Victims Act, victims must use other processes such as the *Government Information (Public Access) Act 2009* (NSW) (**GIPA**). GIPA applications can be difficult, bureaucratic and slow, routinely taking up to six months, even in circumstances where individuals are accessing their own personal information. Delays in receiving information under GIPA requests can prevent victims from being able to meet application time limits. GIPA applications can also be burdensome for government agencies to process and respond to, and
- has a significant impact on the resources of support services, including Legal Aid NSW. This is discussed further below.

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<sup>31</sup> See, eg, Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017). See also Birdsey and Snowball, *Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services* (BOCSAR Issues Paper No 91, October 2013).

<sup>32</sup> Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story 2019* (Catalogue No FVD 3, 5 June 2019).

Difficulties in making an application and gathering evidence are particularly acute for applicants who do not have access to government identification documents, creating further barriers for some groups accessing support. In our experience, this can impact people urgently fleeing violence or where documents are retained by the perpetrator, and some Aboriginal and Torres Strait people who face barriers in obtaining and retaining identification documents. We consider that flexibility needs to govern Victims Services' approach to identification – when in the process it is required, in what form, and what support is provided to obtain it.

We also consider that Victims Services should adopt a flexible approach to the requirements of the application form. In the case study below, we consider that Victims Services took an overly rigid approach to requiring the application form to be signed.

### Ryan's story

Legal Aid NSW's Children's Civil Law Service assisted Ryan, a young person whose initial application for victim's support was not accepted as he had not completed a written authority form, but had verbally instructed our staff to lodge his application.

Ryan had been in the care of the Minister for Families and Communities and was experiencing family breakdown, homelessness and subsequent transience at the time. Legal Aid NSW submitted an application for counselling and a recognition payment on behalf of Ryan without any written consent as we were unable to arrange for him to sign the form before the limitation period would expire. Had we not lodged Ryan's application unsigned, Ryan would have been ineligible to apply for assistance.

Soon after, Legal Aid NSW informed that Ryan's application had been refused as without written authority it was incomplete.

Legal Aid NSW sought internal review of this decision, and Victims Services responded that Ryan's application for counselling had been accepted, but it requested further information regarding the application for a recognition payment.

Legal Aid NSW continues to assist Ryan with this matter.

People seeking to apply for victims compensation from prison face additional barriers. Many of our clients in prison have low literacy levels and/or mental illness. Prisoners do not have access to websites to enable them to efficiently contact agencies, and prison mail services are generally very slow. In addition, prisoners often move from gaol to gaol, and in and outgoing mail is frequently lost or destroyed,

making it very difficult to gather documentary evidence and stay on top of correspondence.

Andrea's story below illustrates some of these barriers faced by prisoners applying for victims compensation.

### Andrea's story

Legal Aid NSW's Aboriginal Women Leaving Custody Service (**AWLC**) assisted Andrea to apply for an INSP and a recognition payment because of domestic violence she had suffered.

Andrea has complex mental health conditions and was homeless. She had no means of obtaining the police event number or any medical or counselling records from her previous service providers to support the application while in custody.

Without legal assistance from the AWLC, Andrea could not have made the application while in custody and the INSP time limit would have passed before she was released.

Prisoners also face challenges trying to reach Victims Services via phone, as their call times are capped and often time out before Victims Services answers. We suggest Victims Services consider having a dedicated phone line for people calling from prisons to address this issue.

#### 6.1.1 Impact on Legal Aid NSW and other support services

Legal Aid NSW has experienced a significant increase in client requests for advice and assistance regarding victims support applications since around mid-2020, when Victims Services stopped assisting applicants to gather supporting documents. In the 2021/22 financial year, we provided over 800 services regarding victims compensation.<sup>33</sup> We have received no additional funding for this work.

We note that victims of crime were historically able to recover costs associated with obtaining legal assistance with the preparation of their applications for compensation. Under section 35 of the repealed *Victims Support and Rehabilitation Act 1996* (NSW), the Victims Compensation Tribunal or compensation assessors

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<sup>33</sup> Legal Aid NSW provided 539 advice services, 148 minor assistance services and 539 extended legal assistance services for victims compensation in 2021/2022.

were able to award victims costs associated with their applications for compensation in accordance with the scale of costs prescribed in rule 12 of the repealed *Victims Support and Rehabilitation Rule 1997* (NSW).

The subsequent Victims Act did not contain a similar provision, however clause 20 of Schedule 2 of the Victims Act specifically notes that:

Part 4 of the *Victims Support and Rehabilitation Rule 1997* as in force immediately before the commencement of this clause continues to apply for the purposes of determining costs and expenses payable with respect to proceedings for compensation under the repealed Act or for victims support under this Act until regulations or rules, as the case requires, are made under this Act or the *Administrative Decisions Tribunal Act 1997* for that matter.

The only relevant statutory instrument made under the Victims Act is the *Victims Rights and Support Regulation 2019* (NSW) (**Victims Regulation**). Regulation 15 of the Victims Regulation states that:

Costs payable with respect to proceedings before the Civil and Administrative Tribunal under the Act relating to victims support are to be determined in accordance with the Civil and Administrative Tribunal Act 2013.

**Note—**

This clause replaces so much of clause 20 of Schedule 2 to the Act as relates to costs payable in respect of proceedings for victims support under the Act.

Whilst the note to regulation 15 makes specific reference to clause 20 of Schedule 2 of the Victims Act, regulation 3(2) of the Victims Regulation provides that “[n]otes included in this Regulation do not form part of this Regulation.”

Accordingly, whilst regulation 15 prescribes costs where there are proceedings before the NSW Civil and Administrative Tribunal, it does not appear to limit costs recoverable with respect to the lodgement of an application for compensation, preparation of material required to enable the application to be determined, and work after the determination. Instead, it appears that costs and expenses recoverable under the *Victims Support and Rehabilitation Rule 1997* (NSW) are still recoverable under the current Victims Act. If the intention of the legislature was to retain this provision, then for the purposes of clarity, we suggest that a provision similar to rule 12 of the *Victims Support and Rehabilitation Rule 1997* (NSW) be inserted into the Victims Act.

The issue of costs and expenses was somewhat neutralised after the introduction of the Victims Act through the provision of victims support co-ordinators within Victims Services, who assisted victims with their applications and document gathering. However, since these roles were removed in 2020, and no alternative services provided, the issue of costs and expenses associated with assisting victims to prepare their applications has again arisen, particularly having regard to the time taken to assist with these matters.

Victims unable to navigate the application process themselves have turned to Legal Aid NSW and similar service providers for assistance. An internal review shows that, on average, our solicitors spend between eight and 10 hours assisting each client with their application for compensation. This means that the professional costs associated with the provision of this service are between \$1,496 to \$1,870 per application.

Given that Legal Aid NSW has not received any additional funding for this service since the withdrawal of victims support co-ordinators, Legal Aid NSW has had to cover the cost of providing this service from existing budgets. It is not appropriate, given the size of the awards generally granted to victims, nor in line with the policies it applies to its service to applicants, for Legal Aid NSW to recover any of the cost of this service from the victims themselves.

Without additional funding, Legal Aid NSW is unlikely to be able to continue providing this service. In addition, we consider that in straightforward applications, much of this work is administrative and does not need to be done by a solicitor or social worker.

Phil's story below provides an example of the time spent by Legal Aid NSW's staff to assist a client with an application for victims support. This matter was particularly time intensive because of the difficulties contacting the client due to his homelessness and transience.

### Phil's story

Phil has complex disability, including a mild intellectual disability, mental health issues, including post-traumatic stress disorder, as well as a history of homelessness and drug and alcohol issues.

Below is a description of the services Legal Aid NSW provided Phil to make an application for victims support, gather supporting evidence, and lodge an internal appeal:

- Seek initial instructions – 2 hours each by the solicitor and caseworker. This was made considerably more difficult due to the client's transience.
- Submit GIPA requests and following up on status of requests – 3 hours by the solicitor, including numerous follow ups when the GIPA requests were not complied with over the considerable period of time they remained outstanding.
- Review GIPA material – 1 hour by the solicitor.
- Seek further instructions from client – at least 2 hours each by the solicitor and caseworker. Again, this was complicated by the difficulties maintaining contact with the client.

- Complete application form for victims support – 2 hours by the solicitor.
- Liaise with Victims Services about difficulties with the client signing the application form – 1 hour on calls to the Victims Support Line by the solicitor to try to negotiate an alternative to written consent.
- Seek further instructions from the client – 2 hours by the caseworker in partnership with the solicitor (half an hour). Once again, this was complicated by the difficulties maintaining contact with the client over the long period of time for this matter.
- Seek internal review – 2 hours drafting submissions by the solicitor.
- Inform client of outcome of internal review – 1 hour by the solicitor trying to get in contact and eventually speaking with the client.
- Seek further evidence to support application for recognition payment – 1 hour by the solicitor.

Total time spent – solicitor 15.5 hours, caseworker 6 hours.

We consider it appropriate for Victims Services to resume providing applicants with assistance to lodge their application and collate the required evidence. This should include providing applicants with clear and accurate information on the full range of supports and payments available to them – for example, advising applicants that they may be entitled to separate claims for separate acts of violence. Alternatively, we consider it is appropriate to reinstate the former allowance granted to applicants to claim legal costs and expenses to allow them to seek appropriate assistance.

In addition, consideration should be given to funding Legal Aid NSW to assist applicants whose victim compensation applications are complex, or where it appears likely that their application will be dismissed, particularly where the application involves allegations of domestic violence or sexual assault. We submit that access to legal advice in these circumstances is particularly important given that dismissal of an application can have a significant impact on an applicant's mental health, and is in line with the beneficial intent of the Scheme.

Our client Beth, whose situation is described below, would have benefited from a referral to our services before a decision to dismiss her application was made. This would have provided Beth with the opportunity to address shortcomings in her application and lodge an internal review.



### Beth's story

Beth made an application for financial assistance and a recognition payment regarding physical, emotional and sexual abuse within her marriage over several decades. Victims Services dismissed her application, noting that police records did not describe violent acts, and medical records did not explain the cause of broken bones that Beth attributed to violent acts by her husband. By the time Beth sought Legal Aid NSW's advice, she was out of time to seek a review.

We also note that dismissive attitudes towards DFV and/or sexual assault have been an issue amongst some police and medical practitioners, particularly historically, which may influence the way incidents and injuries are described in supporting documents. We suggest that Victims Services be mindful of these issues when reviewing historical records and deciding how much weight to give an applicant's version of events in the absence of a police record or a different interpretation of events by police.

Erin's story below demonstrates how shortcomings in reports and documents by police can undermine applications for support, and the importance of support services in these circumstances.

### Erin's story

Erin is a young Aboriginal woman. She contacted police about incidents of DFV perpetrated against her, and was made the PINOP on an ADVO sought by police against her ex-partner.

Erin needed funds to leave her dangerous living situation, and was assisted by a solicitor from Legal Aid NSW's Children's Civil Law Service to make an application for counselling, an INSP, and a recognition payment.

Victims Services dismissed the application on the basis that insufficient supporting documents were provided, despite a copy of the ADVO being attached to the application. Victims Services stated that the application was dismissed as the ADVO only referred to an incident of property damage, rather than any physical violence towards Erin.

Legal Aid NSW's youth caseworker assisted Erin to seek an internal review of this decision, and provided a letter of support outlining the nature of the DFV our client had experienced.

Shortly afterwards, Victims Services approved Erin's application for an INSP

and counselling, and stated further evidence would be required to support Erin's application for a recognition payment.

Legal Aid NSW continues to assist Erin with this matter, and is seeking a report by a counsellor documenting the harm suffered by Erin as a result of the incidents of DFV to support her application for a recognition payment.

Without a support service to advocate for her, Erin would not have had access to the benefits available in the Scheme.

## 6.2 Premier's 'tell us once' priority

We note the NSW Premier's priority of 'government made easy' and providing services where citizens 'tell us once', and recent changes to streamline the Corrective Services NSW Victims Register. Reportedly:

victims are now assisted by Witness Assistant Officers who directly refer customers to the Victims Register, removing the need for customers to repeat sensitive information and increasing awareness of the service while enabling safer and informed communities.<sup>34</sup>

We support this approach, and suggest that the NSW Government also consider integrating the Victims Register and Victims Services so that eligible victims on the Victims Register could elect to be referred to Victims Services for assistance to make an application for victims support.

We also suggest that Victims Services consider streamlining and automating the application process in line with the Premier's 'tell us once' and 'government made easy' priorities.

## Recommendation 14

- Victims Services resume providing assistance with applications and document gathering. Victims Services could consider ways to streamline and automate this process in line with the Premier's 'tell us once' and 'government made easy' priorities.

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<sup>34</sup> NSW Government, 'Government Made Easy', *Premier's Priorities* (Web Page) <<https://www.nsw.gov.au/premiers-priorities/government-made-easy>>.

- In the alternative, the Victims Act be amended to expressly provide that applicants for victims compensation are entitled to claim costs associated with the application.
- Additional funding be provided to Legal Aid NSW and other service providers to provide legal advice and assistance to applicants whose application is likely to be dismissed, particularly where the application raises an allegation of domestic violence or sexual abuse.

### 6.3 Application forms

We suggest that Victims Services review and update the certificate of earnings form as it does not include space to record the length of time the applicant had off work because of the act of violence or provide space for the employer to verify the information. In our experience, Victims Services often requests a letter from the employer verifying the certificate of earnings document and we consider this could be addressed with the form.

#### Recommendation 15

Victims Services review and update the certificate of earnings form to include space to record the length of time the applicant had off work because of the act of violence and provide space for the employer to verify the information.

### 6.4 Time limits for making applications

We consider that the time limits for making applications for financial support or recognition payments are a barrier for victims of domestic violence, child abuse and sexual assault. This is compounded by the lack of a provision to extend the time limits, regardless of an individual's circumstances.

There is no time limit for an application for certain types of financial support or a recognition payment for primary victims of child sexual abuse.<sup>35</sup> 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.<sup>36</sup> For recognition payments, there is also a two-year time limit for most claims, but this is

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<sup>35</sup> *Victims Rights and Support Act 2013* (NSW) s 40(7).

<sup>36</sup> *Ibid* s 40.

extended to 10 years for acts of violence involving domestic violence, child abuse or sexual assault.<sup>37</sup>

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*:

[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.<sup>38</sup>

In our view, in setting time limits, there does not appear to be a policy rationale to distinguish between child abuse that is of a sexual nature and child abuse that is not.

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. Upper time limits also fail to take into account the differing experiences and capacity of victim-survivors to apply for support. This is not appropriate as every victim will respond to their experience differently. Some victims may seek to access counselling and financial support immediately, some may take some time to process or acknowledge what has occurred, and others may 'ignore' the event and hope it will not impact on them later in life.

We consider that time limits for making an application for financial support and recognition payments for acts of violence involving domestic violence, sexual assault and child abuse be removed, and the Commissioner have a discretion to grant an extension for claims regarding other acts of violence or modern slavery. Alternatively, if this is not supported, 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.

## Recommendation 16

- Time limits for making an application for financial support and recognition payments for an act of violence or an act of modern slavery involving domestic violence, sexual

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<sup>37</sup> Ibid s (40)(5). Family victims may apply for financial assistance or a recognition payment within two years of it being established that their family member died as a direct result of an act of violence if this was only determined subsequent to when the act of violence occurred: *Victims Rights and Support Act 2013* (NSW) s (40)(2)-(3).

<sup>38</sup> *Elena Harvey v Victims Compensation Tribunal & Anor* [2001] NSWSC 604, [74].

assault and child abuse be removed, and the Commissioner have a discretion to grant an extension for claims regarding other acts of violence or modern slavery.

- Alternatively, if this is not supported, 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.

## 6.5 Delays in processing applications

There is no clear guidance on the timeframes for Victims Services to process applications. Some of our clients have experienced excessive delays in Victims Services determining their applications, prolonging their distress and undermining the beneficial nature of the Scheme.

While some clients have had their application for counselling approved quickly, others have waited four to six months, and have then had to wait further for an available appointment with a counsellor. If the client requires a counsellor's report to support their application for financial assistance or a recognition payment, this further prolongs the process.

In some instances, clients have experienced very protracted waits of over two years for their applications for recognition payments to be determined. Many clients find this frustrating, and some disengage from the process. Many also feel distressed by revisiting their trauma years down the track when they are required to sign a statutory declaration to accept payment.

### Recommendation 17

Victims Services consider ways to improve processing times, and publish guidance on expected timeframes.

## 7. Recovery of victims support payments from offenders (part 5)

### 7.1 Restitution

The object of part 7 of the Victims Act is to enable financial support paid and recognition payments made under the Scheme to be recovered from people found guilty of the crimes giving rise to the payments.

Legal Aid NSW acknowledges that the policy of restitution is well-established. However, we consider that it is a complex issue and can have unintended negative consequences, particularly as it does not take into account the offender's personal and financial circumstances, and can deter some victim-survivors from seeking assistance.

Many offenders are economically and socially disadvantaged. Additional debts imposed by a restitution order can compound their social exclusion and financial stress. Many perpetrators have also themselves been victims of violence. For example, restitution would require a primary victim of domestic violence who has been the perpetrator in isolated incidents to pay restitution.

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 2015 young people in custody health survey found that:

- 68 per cent of young people in custody had a history of child abuse or trauma, with over one quarter (28 per cent) experiencing some form of severe abuse or neglect
- 21 per cent had been in out-of-home care
- 83 per cent had a psychological disorder, and
- the mean IQ score of survey participants was in the borderline intellectual disability range of ability (IQ 70 to 79).<sup>39</sup>

Legal Aid NSW also notes that approximately half of all young people in detention in NSW are Aboriginal or Torres Strait Islander.<sup>40</sup>

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<sup>39</sup> Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey* (Full Report, November 2017).

<sup>40</sup> NSW Bureau of Crime Statistics and Research, 'Young offenders in custody', *Custody Statistics* (Web Page, 10 May 2022) <[Custody Statistics \(nsw.gov.au\)](https://www.nsw.gov.au/custody-statistics)>.

Saddling young offenders with large restitution debts is likely to compound their disadvantage, and hampers efforts to prevent reoffending and integration into the community.

## Recommendation 18

Restitution orders not be imposed for offences committed by children (persons under 18 years).

The policy of recovering victims 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. While victims can write to the Commissioner and request that restitution is not pursued, many consider it too much of a risk. For victims who have left high-risk situations, many fear retribution, even if the perpetrator is in gaol.

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. In our experience, restitution being sought from the perpetrator also often deters children and young people from applying for support, particularly those who have been in out-of-home care where the perpetrator of the violence was a family member or former on/off partner, as they fear damaging fragile relationships, or repercussions from perpetrators who they continue to have contact with. 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.

In our view, it would be more appropriate 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 19

Victims be able to elect whether or not they want restitution sought from the offender if their application is successful.

### 7.1.1 Objecting to a restitution order

Some of our clients are unable to lodge an objection to a restitution order within the time limits of section 62 of the Victims Act, particularly those who receive a restitution order in prison. An objection must be lodged within 28 days, which may be extended to

up to 90 days by the Commissioner.<sup>41</sup> However, often several weeks have passed by the time a prisoner receives the order in the mail. This can be longer if a prisoner moves gaols or because of lockdowns. If a prisoner would then like to contact Victims Services, or seek assistance from Legal Aid NSW or another service, there are often additional wait times for using AVLs and then to access the service. This puts a large amount of pressure on service providers including Legal Aid NSW to prioritise these matters, at the expense of other clients with pressing legal issues.

### Recommendation 20

The time limit to object to a restitution order be extended to 90 days, and the Commissioner have discretion to accept an objection beyond this time limit.

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<sup>41</sup> *Victims Rights and Support Act 2013* (NSW) s 62(2).



## 8. Victims support levies (part 7)

The purpose of part 7 of the Victims Act is to impose a levy on persons found guilty of crimes for the purpose of funding the Scheme.

While we acknowledge the importance of funding the Scheme, 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, or other factors relevant to whether a penalty should be imposed.

Many clients of Legal Aid NSW are marginalised, often with acute mental health, drug and alcohol problems. The majority of these clients' income is Centrelink benefits, and many have limited prospects of securing meaningful employment. Incomes for people in these circumstances 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 for the courts to have 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.<sup>42</sup> The Victims Act expressly states that a 'conviction' does not include an order under section 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), but only in relation to an offence not punishable by imprisonment.<sup>43</sup> This 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* (NSW), 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 person experiencing drug dependency may commit a series of low-level offences over a short period of time. Legal Aid NSW regularly represents defendants who have carried out a

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<sup>42</sup> *Victims Rights and Support Act 2013* (NSW) ss 105, 106(3).

<sup>43</sup> *Ibid* s 105(4).

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 court attendance notice. 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),<sup>44</sup> 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 rate of \$90 for up to five offences in one proceeding, and at the higher rate of \$180 for more than five offences in one proceeding.

### Recommendation 21

The Victims Support Levy not be automatically imposed. 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.

### Recommendation 22

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 (NSW).

### Recommendation 23

- The Victims Support Levy be imposed on a per matter basis.
- Alternatively, if this is not supported, the Victims Support Levy be set to apply at two graduated levels reflecting the number of offences.

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<sup>44</sup> Court attendance notices 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.

## 8.1 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.<sup>45</sup> 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.<sup>46</sup>

In our view, the system works relatively well for children who appear before the Children's Court, where there are specialist lawyers and Children's Magistrates who regularly turn their mind to this issue. In our experience, in matters before the Children's Court, the default position is that the VSL is not payable.

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 recommends that the VSL not apply to offences dealt with by the Children's Court. If this is not supported, 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.

### Recommendation 24

- The Victims Support Levy not apply to offences dealt with by the Children's Court.
- Alternatively, if this is not supported, the Victims Act provide that children are not liable to pay the Victims Support Levy unless a court orders otherwise.

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<sup>45</sup> *Victims Rights and Support Act 2013* (NSW) s 105(1)(g).

<sup>46</sup> *Ibid* s 106(3).

## 9. Miscellaneous (part 9)

Section 113 of the Victims Act is relevant to the work of Legal Aid NSW's Sexual Assault Communication Privilege (**SACP**) service. This section provides that applications for victims support and supporting documents are not admissible as evidence in legal proceedings, except where the applicant is the accused in criminal proceedings, or in proceedings before NCAT to determine an issue in relation to the application for victims support.

We support the policy intent of this provision, to ensure that victims are not deterred from applying for support due to concerns that the information will be used in future legal proceedings. Our SACP service has relied on section 113 several times to resist subpoenas to DCJ requiring production of victims support applications and supporting documents. Legal Aid NSW considers that it is appropriate that these documents are not available to a defendant, and we support the retention of section 113.

## 10. Other issues

### 10.1 Payments held on trust by the NSW Trustee and Guardian

Where a child (person under 18 years) is in out-of-home care and is awarded a recognition payment, it is held on trust by the NSW Trustee and Guardian. This recognition payment will often be for acts of violence perpetrated against the child, often resulting in their removal and being placed in out-of-home care, or during their time in out-of-home care. The decision to hold money on trust in these circumstances is not made by the child, but rather is an automatic process directed by Victims Services.

We are concerned that the NSW Trustee and Guardian charges excessive fees for 'managing' this money for children until they turn 18. In our view, the amount of fees charged is inconsistent with the purpose of awarding a person victims compensation, and unfairly impacts on children in out-of-home care. Further, we are concerned that the fees do not match the level of management applied, in comparison to other services provided by the NSW Trustee and Guardian where there is active case management or financial planning.

These issues are illustrated in Dani's story below.

#### Dani's story

Dani is an extremely disadvantaged Aboriginal young person, who has experienced considerable trauma and instability growing up. Her family also has a history of disadvantage, with a family history of crime, incarceration, drug and alcohol use, and child protection involvement.

Dani is experiencing significant financial hardship. She is currently unemployed and receiving Youth Allowance. She has limited education and training, and significant caring responsibilities, reducing her capacity to obtain work, and improve her financial circumstances.

The NSW Trustee and Guardian held and managed victim's compensation money on trust for Dani for eight years. Over this period, the NSW Trustee and Guardian charged Dani \$2,942.95 in various fees – nearly 20% of the overall payment amount.

Dani was awarded the money in recognition that she was the victim of a crime as a child, and she had no say in the establishment or management of the trust as she was under 18 when the victims compensation payment was made.

During the time that Dani's victims compensation money was held on trust, only four advancements were made, namely: \$38 for Dani to purchase a birth certificate; \$1,200 to enable Dani's grandmother to purchase Dani clothing, footwear and to cover schooling expenses; \$3,000 to Dani's grandmother for other similar expenses; and \$500 to cover Dani for the period until she received her trust money as she had no other income at the time.

Legal Aid NSW requested that the NSW Trustee and Guardian waive its fees on the basis of the limited administrative action required to manage Dani's trust and Dani's personal and financial circumstances.

The NSW Trustee and Guardian has an absolute discretion to "waive, remit or reduce" such fees under section 111(3) of the *NSW Trustee and Guardian Act 2009* (NSW). The NSW Trustee and Guardian rejected the application to waive fees, stating that its policy is not to waive fees if there have been any advancements made.

Legal Aid NSW strongly considers that there should be an exemption of fees for holding victims compensation payments on trust for vulnerable children and young people, especially those in out-of-home care. Alternatively, we suggest Victims Services pay any fees associated with the NSW Trustee and Guardian holding a victims support payment on trust for a vulnerable child or young person, especially those in out-of-home care, so that the child or young person receives the full benefit of the payment.

## Recommendation 25

- The NSW Trustee and Guardian not be permitted to charge fees for holding victims compensation payments on trust for vulnerable children and young people, especially those in out-of-home care.
- Alternatively, Victims Services pay any fees associated with the NSW Trustee and Guardian holding a victims support payment on trust for a vulnerable child or young person, especially those in out-of-home care.



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