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Dear [REDACTED]

### Submission concerning the statutory review of the Victims Rights and Support Act 2013

Thank you for the opportunity to provide a submission in response to the Background Paper ('the Paper') concerning the statutory review of the *Victims Rights and Support Act 2013* ('the Act').

The Act establishes the rights of victims of crime in New South Wales and enacts a scheme that provides important support for victims of violent crime. The support consists of counselling, financial assistance for immediate needs, financial assistance for economic loss, and recognition payments. The Office of the Director of Public Prosecutions (ODPP) acknowledges that this scheme functions as a crucial aspect in assisting victims of crime in the criminal justice process.

The Paper invites stakeholders to consider two questions specified in the review provisions:

- (i) Do the policy objectives of the Act remain valid?
- (ii) Do the terms of the Act remain appropriate to meet those policy objectives?

Consistent with the outline of the policy objectives of each part of the Act provided on page 9-10 of the Paper, the ODPP raises the following in response.

#### **Part 2: Victims Rights: Recognising and promoting the rights of victims of crime**

Part 2, Division 2, of the Act establishes the *Charter of Victims Rights* ('Charter'). The ODPP is of the view that the Charter properly safeguards and promotes the legal protections for victims of crime. The terms of Part 2 meet the policy objectives, and it remains instructive for the ODPP. This is reflected in the incorporation of the Charter and its obligations into the ODPP Prosecution Guidelines; *Chapter 5, ODPP Prosecution Guidelines*. Accordingly, the ODPP strongly supports the continued operation of the Charter as presently drafted.

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## **Part 4: Victims Support Scheme: Establishing a scheme for the provision of support for victims of acts of violence**

The ODPP provides the Witness Assistance Service (**WAS**) to support victims involved in criminal proceedings, particularly in matters that involve serious sexual, domestic and family violence, or where the victim is considered vulnerable due to factors such as age, health, and physical or mental impairment. Our WAS officers assist victims both with respect to their role as witnesses in criminal proceedings, and with obtaining relevant support under the Act, generally by referring victims to applicable community legal centres for other applications.

Noting that Part 4 has been established with a policy objective to provide support for victims of acts of violence, the ODPP is of the view that the following areas require consideration to appropriately meet this objective.

### **Issues regarding timing for financial assistance for economic loss related to criminal proceedings**

Section 40 of the Act provides that applications by a victim or family victims for financial support or recognition payments must generally be made within 2 years after the relevant act of violence occurred. In the case where the victim is a child, the application must be made before they turn 20 years old. The application for financial assistance for economic loss, includes expenses relating to criminal or coronial proceedings and justice related expenses (up to \$5,000): clauses 10(3)(d) and 11(2)(d) *Victims Rights and Supports Regulation 2019*.

Section 39 of the Act provides that applications for economic loss are generally required to provide full particulars for economic loss for which assistance is sought (section 39(3) of the Act) and in the case of actual expenses, proof that those expenses were incurred (section 39(4) of the Act).

Indictable criminal proceedings frequently commence more than 2 years after the commission of the alleged offence. In matters where the victim is not a child, they will in such circumstances be statute barred from accessing that financial support. This issue will also arise where victims require financial assistance for costs related to additional criminal proceedings beyond the initial prosecution, such as appeal proceedings, or re-trials. In such matters, the period of time from the commission of the offence to the finalisation of proceedings often extends far beyond 2 years. Additionally, the threshold amount of \$5,000 may be insufficient to properly compensate for the expenses related to a more complicated criminal matters that involve multiple appeals and re-hearings.

Accordingly, consideration should be given to removing the 2-year time restriction for financial assistance for economic loss related to criminal or coronial proceedings. In circumstances where there are additional criminal proceedings due to multiple appeals or retrials, the ODPP would support an amendment to permit payments that exceed the \$5,000 threshold to properly compensate for the victim's expenses incurred across those proceedings.

### **Issues regarding timing for financial assistance in Homicide matters**

A similar issue arises in relation to Homicide matters. Under section 22 of the Act, a member of the immediate family of a victim who has died as a direct result of an act of violence is considered a family victim and is eligible for financial support for economic loss (including for costs related to coronial and criminal proceedings and justice related expenses). Any claim must be made within two years of the death, or within 2 years after it has been established that the death



occurred as a result of violence (e.g. by coronial proceedings or where NSW police deem the matter as a homicide).

Homicide matters are generally considered one of the more resource-intensive and complicated types of prosecutions that are undertaken by the ODPP. Such prosecutions frequently exceed 2 years from the point in time where it has been established that the death of the victim occurred as a result of violence. A 2-year time restriction imposes an inequitable barrier for family victims to obtaining proper support related to criminal proceedings in homicide matters.

**Recommendation 1:** Section 40 of the Act be amended for victims and family victims, to remove, or provide an exception to, the 2-year time restriction for financial assistance for economic loss related to criminal or coronial proceedings or justice related expenses.

**Recommendation 2:** The regulations be amended to allow payments to exceed the \$5,000 threshold for expenses related to coronial and criminal proceedings, where the criminal proceedings are subject to multiple trials, appeals or re-trials.

## Counselling

Counselling is one of the four key pillars offered by Victim Services, and it is well recognised that when implemented early, counselling has the potential to significantly improve a victim's recovery from trauma. Division 4 of the Act establishes the counselling arm of the support scheme. Specifically, the Commissioner may approve professional counsellors who provide approved counselling services: section 31 of the Act. Victims may apply to Victim Services for funding of counselling services. Upon successful application for counselling, victims are being provided with a list of approved counsellors that can be utilised.

The ODPP is aware of a number of examples where, despite a victim being approved to receive counselling services, the approved counsellors did not have capacity to accept the victim as a client. This is particularly pronounced in regional or remote areas and disproportionately affects vulnerable victims. The feedback received by the ODPP indicates that many regional areas are limited in their number of approved and available counsellors, with some regions having only one counsellor to service the entire area. Issues of access also arise where the counsellors do not have the appropriate expertise in working with vulnerable groups e.g. First Nations people, people with disability or the LGBTIQ community. This problem is further compounded in circumstances where the victim is from, or has moved to, another state.

When vulnerable victims are refused counselling on one or more occasions, they may become more reluctant to engage this service. This has obvious detrimental effects on the wellbeing of the victim but also adversely affects their involvement as a witness in the prosecution of criminal matters. When a victim provides evidence in the prosecution of an alleged offender, a victim is exposed to the real possibility of re-traumatisation. If a victim is not already being supported through counselling or does not have access to counselling services, the prospect of re-traumatisation increases. In such cases, it is not uncommon for a victim to raise those concerns and seek to withdraw from the prosecution. It is of critical importance that every effort is made to support victims throughout the entire criminal justice process, and consideration should be given to offering greater assistance to victims in matching and booking approved counsellors.

The ODPP acknowledges that recruitment and funding of a greater number of approved counsellors is a resource-driven process. However, we emphasise that the ability to access this support pillar has substantial benefits not only for the victim but for the operation of the criminal justice system as whole.



Case example: One victim in the Penrith area applied for and was approved to receive counselling services. The victim was provided with a list of approved counsellors. The victim made contact with 18 approved counsellors provided on the list. None of those approved counsellors had capacity to accept her as a client. The victim was distressed that none of the services were available and felt distraught that her symptoms of trauma were continuing unabated.

**Recommendation 3:** Improve access state-wide to approved counselling services. This includes the recruitment of a greater number of approved counsellors, particularly in regional areas.

**Recommendation 4:** Victims Services provide greater assistance and support in matching a victim to an approved counsellor.

### Financial assistance for economic loss, recognition payment and the requirement to prove injury

The previous compensation scheme was established by *Victims Support and Rehabilitation Act 1996* and required an assessment of the severity of the injury to determine the final amount of compensation. The current scheme moved away from this and provides financial assistance for actual economic loss incurred, and compensation in the form of a recognition payment. The nature of recognition payments are based on which of the four categories the offending falls into: section 35 of the Act. The categories correspond to the type of offence and the quantum for each category is set and is not indexed within those categories to the severity of the injury. The change was brought about to allow faster up-front payments and to avoid the delays that arose with the previous scheme.<sup>1</sup> The current scheme, due to the manner in which it is drafted, continues to require a victim to separately prove injury to access support. This unduly hinders the ability of a victim to access financial assistance and recognition payments.

To access financial assistance for economic loss, or recognition payment, the scheme requires the victim to prove on the balance of probabilities i) that they were a victim of an act of violence and ii) that they were injured as a result. Section 19 of the Act defines that an 'act of violence' is an act or series of acts that occurred in the course of the commission of an offence, that involves violent conduct, that result in injury or death. Section 18 of the Act defines injury as actual bodily harm, grievous bodily harm or psychological or psychiatric harm but does not include injury arising from loss or damage to property.

Section 39(2)(b) provides that a victim must provide the following documentary evidence:

- (i) *a police report, or a report by a Government agency or any other agency that provides support services to victims of crime, sufficient to support, on the balance of probability, the applicant's claim to be a victim of an act of violence or act of modern slavery, and*
- (ii) *a medical, dental or counselling report verifying that the applicant or child who is the primary victim concerned has actually been injured as a result of an act of violence or act of modern slavery.*

It should be noted that for financial assistance for economic loss, particulars and proof of the loss must accompany the application. The loss able to be compensated is actual loss and is not based on establishing the nature or severity of injury.

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<sup>1</sup> New South Wales, Parliamentary Debates, Legislative Assembly, 7 May 2013, 32 (The Hon. Brad Hazzard)



The requirement in section 39 to provide proof of injury operates as a barrier to victims accessing financial assistance for economic loss and recognition payments. There are three reasons why the ODPP considers this to be the case:

- (a) The most marginalised victims often have the greatest difficulty in accessing the relevant medical, dental or counselling services that are required to produce a report verifying injury. This difficulty is heightened in rural or remote areas where access to these services may be limited.
- (b) The obtaining of a further report to prove injury compounds the trauma of the victim, requiring them to re-tell their trauma to multiple people for compensatory purposes. It is not a trauma-informed approach and does not provide the victim agency in determining when and how to recall the experience. This issue arises frequently in sexual assault matters, whereby a victim may have only disclosed the offence to police but is subsequently forced to disclose the matter to a health professional, not necessarily to seek assistance with trauma or injury but to access compensation. The ODPP is aware that some victims have chosen not to pursue compensation under the Act in such cases.
- (c) For certain categories of offending, proof of the act of violence should in itself establish actual injury. This is true for child sexual assault, adult sexual assault, domestic violence, child abuse and modern slavery, where it is commonly accepted that the commission of the offence causes harm to the victims.<sup>2</sup> It is unsurprising that some victims are frustrated or upset when advised that they are required to 'prove' they have been injured after the commission of such offences. An acceptance of the proposed approach more closely reflects the shift from the previous scheme to the current scheme, where the offence type, not the severity of the injury, informs the assessment of financial assistance for recognition payments.

It is accepted that for certain offences the nature of the injury is relevant to determining whether a recognition payment falls within a higher category pursuant to section 39 (e.g., offending involving serious bodily injury or grievous bodily harm). In these instances, the ODPP acknowledges that proof of the injury may be necessary if a victim wishes to seek the higher category recognition payment. However, the presumptive position for basal offences for child sexual assault, adult sexual assault, domestic violence, child abuse and modern slavery, should not require proof of injury. Exemptions may be provided for offences where the existence of aggravating injury will result in a difference category of payment.

**Recommendation 5:** Remove the general requirement to separately prove injury to assess financial assistance for economic loss and recognition payments under section 39 of the Act.

### Reduction in Victim Services support to assist victims obtain relevant evidence

The establishment of the current scheme arose as a result of a Government Commissioned 2012 report by Price Waterhouse Coopers that examined the appropriate model to best provide support to victims.<sup>3</sup> As part of a move towards the current model, Recommendation 36 established a role for Victim Services to provide case co-ordinators to assist a victim through the process of making an application for support under the victim support scheme. The

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<sup>2</sup> See for example, with respect to child sexual assault, *R v Gavel* [2014] NSWCCA 56 at [110].

<sup>3</sup> PricewaterhouseCoopers (2012) NSW Department of Attorney General and Justice Review of the Victims Compensation Fund, 2012.



importance for such support from Victims Services was referred to by the then Attorney General Brad Hazzard in his second reading speech where he stated:

*Staff within victims services in the Department of Attorney General and Justice will assist victims to quickly access appropriate help under the Victims Support Scheme by assessing victims' immediate needs and preparing an appropriately tailored support package, including counselling, financial assistance and referral to local trauma agencies. Victims services also will help victims to understand what documentation they need to provide and to navigate the service system. Accessing help from the Victims Support Scheme will be so much simpler and more straightforward than the Victims Compensation Scheme, which means that there will be no need for victims to routinely obtain lawyers to help them apply for assistance.<sup>4</sup>*

On 1 July 2020, Victims Services withdrew from providing assistance to victims in gathering evidence in their application for support under the Act. This has had the undesirable effect of shifting the responsibility onto the victims and has resulted in victims being overwhelmed and unable to understand what is required from them and how to obtain it. Our WAS officers are increasingly referring victims to community legal centres to obtain such assistance. Feedback from victims regularly refer to the difficulty involved in obtaining the correct evidence to substantiate their application, and general confusion as to what is required at each stage.

The ODPP submits that Victim Services should resume its previous role in providing an option to facilitate the collection of evidence for a victim. To do so would greatly enhance the accessibility of the support scheme.

**Recommendation 6:** Victims Services resume offering a facilitative service to assist victims obtain evidence in support of their application.

### Identification documents

To lodge an application for support under the Act, a victim is required to establish their identification through the provision of one form of government issued ID. The rationale behind this is readily apparent and is generally supported by the ODPP.

However, in practice this fails to take into account the difficulties faced by some vulnerable victims, e.g., homeless victims, First Nations people, and domestic violence victims who have fled their residence. Frequently, very vulnerable victims suffer mental or cognitive impairments do not have the resources or lack the understanding of the processes to obtain a government issued identification. WAS officers have been unable to assist such victims in applying for support due to this procedural hurdle, and this has caused angst and a feeling that they are 'unsupported by the system'. Accordingly, the ODPP is of the view that a more flexible approach to the requirement for identification documents be adopted.

**Recommendation 7:** Introduce a flexible approach to the provision of identification documents that permits discretion to waive this requirement in appropriate circumstances.

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<sup>4</sup> New South Wales, Parliamentary Debates, Legislative Assembly, 7 May 2013, 32 (The Hon. Brad Hazzard).



## Conclusion

The ODPP is of the view that the policy objectives of the Act remain valid. The issues raised by the ODPP identify areas where the terms of the Act can be amended to facilitate better access to support for victims. Whilst the terms of the Act generally remain appropriate to meet the policy objectives, consideration should also be given to the proposed recommendations that seek to improve the operational processes that enact the Victim Support Scheme.

For any further information concerning these comments, [REDACTED]

Yours faithfully

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Director of Public Prosecutions

