



29 July 2016

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

Dear Director

Statutory Review of the Victims Rights and Support Act 2013

Kingsford Legal Centre is pleased to have an opportunity to provide a submission to the statutory review of the *Victims Rights and Support Act 2013* (the Act). Kingsford Legal Centre (KLC) is a community legal centre based at the University of New South Wales providing free community based legal services to people in the Randwick and Botany local government areas. KLC provides legal advice on a broad range of legal issues with a focus on assisting disadvantaged clients and conducts outreach clinics at Kooloora Neighbourhood Centre, Long Bay Correctional Centre, South East Community Connect in Eastlakes and Yarra Bay.

KLC also provides casework assistance for complex claims under the Act, mainly for victims of domestic violence, sexual assault and child sexual abuse.

In 2015 KLC provided 54 advices on victims compensation and assisted 13 clients with claims under the Act.

Note on terms

The term domestic violence is used throughout this submission to refer to both domestic and family violence. KLC acknowledges that the term family violence is a term used to reflect kinship structures and extended family relationships within Aboriginal and Torres Strait Islander communities.

Some people who have been subjected to violence prefer the term victim, others prefer survivor. This submission uses the term victim which is intended to be inclusive.

Summary of recommendations for reform

KLC makes the following recommendations for changes to the Act and its administration. KLC also endorses the recommendations made by Community Legal Centres NSW to the review of the Act.

1. Improve recognition of the impact of the trauma that is caused by domestic violence, sexual assault and child abuse. Sexual assault victims who are now eligible for a Category B payment should instead be eligible for a Category A payment. Category B recognition payment should be available for victims of a series of related acts of domestic

violence and victims of domestic violence, sexual assault or child sexual abuse who suffer serious psychological harm.

2. Category B should be amended to specifically include psychological or psychiatric harm as a form of GBH under this category.
3. Category C recognition payments should be available to victims of domestic violence who suffer psychological harm. Acts of choking, suffocation, strangulation or attempts to do those acts should be included in Category C.
4. The definition of harm for victims of domestic violence, sexual assault and child abuse should be expanded to include vocational, cultural, social, behavioural and interpersonal harm.
5. The Act should be amended to remove the requirement for a victim of sexual assault, child sexual assault and domestic violence to prove injury, unless the victim chooses to pursue a category of recognition payment which requires proof of a specific injury (such as grievous bodily harm).
6. Amend the Act so that children of primary victims who are under 18 years of age at the time of their parent or carer's death should automatically qualify for a Category A recognition payment.
7. Improve access to assistance under the Act for Aboriginal and Torres Strait Islander victims and ensure that victims seeking counselling assistance have access to Aboriginal and Torres Strait Islander counsellors, counsellors who speak languages other than English and counsellors with cultural competency.
8. Amend the Act to remove the specific requirements for documentary evidence for claims for economic loss and recognition payment. Instead claimants should be required to provide evidence of an act of violence to a standard of proof of 'reasonable likelihood.'
9. Amend the Act to change the evidence required to support claims for financial loss to allow claimants to substantiate claims with evidence from a broader range of sources.
10. Amend the Act to remove the time limits for claims for recognition payment and financial assistance by victims of domestic violence, sexual assault, child abuse and child sexual abuse.
11. Amend the Act to allow other claims for financial loss to be made out of time in exceptional circumstances.
12. Amend the Act so that the time limit for applying for internal review of a decision is longer.
13. Amend the Act so that victims of domestic violence, sexual assault and child sexual assault have a statutory right to elect whether or not the Commissioner can pursue restitution from offenders.

Aims and purpose of the Act

The Victims Rights and Support Act 2013 introduced a new scheme for supporting victims of crime. The second reading speech for the bill for the Act highlighted concerns over protracted delays under the previous scheme, and that victims were waiting on average 30 months for assistance. The objective of the new scheme was to deliver *faster and more effective support* to victims of violent crime. KLC submits that to meet that objective the Act must adequately reflect the experiences and needs of victims of violent crime.

One key change introduced by the 2013 Act is that financial assistance is payable by reference to the nature of the criminal conduct by the perpetrator, rather than by reference to the harm suffered by the victim. KLC believes that this shift has failed to take account of the fact that a significant proportion of violent crime committed against women and children is domestic violence, sexual violence and child sexual abuse, and has overlooked the serious and ongoing harm that is caused by these types of violence. KLC is concerned that the experience of women and girls experiencing domestic violence and sexual assault are not adequately reflected in the provisions and remedies in the Act.

Domestic violence and sexual assault need better recognition

A number of provisions of the Act have the potential to disadvantage victims of domestic violence, sexual assault and child sexual abuse.

A victim of crime who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence can claim for a range of benefits including counselling, financial assistance and a recognition payment.¹ The Act fails to recognise that most incidents of domestic violence and sexual violence are not reported to police (or any other government agency), that domestic violence is most commonly a pattern of violence and coercion committed over a period of time, and that the harm caused by domestic and sexual violence is broader and more pervasive than the definition of harm in the Act. Furthermore, the way in which the Act frames violence, as discrete acts, fails to consider the cumulative and long running nature of domestic violence.

The categories for payment of recognition payment privilege direct physical harm over the harm that is commonly experienced by victims of domestic and sexual violence.²

While the Act makes specific provision for sexual assault and domestic violence so that violent conduct extends to sexual assault and domestic violence it does not fully recognise the *harm* experienced by victims of sexual and domestic violence. This is because it frames violence on the concept of a one off crime committed by a stranger. The categories that set out eligibility for a recognition payment are framed by way of physical injury and do not include any reference to other kinds of harm that are experienced by victims of domestic violence and sexual violence such as vocational and educational harm, inability to form and sustain relationships, physical responses such as eating disorders, humiliation

¹ Section 5, and harm is defined as actual physical bodily harm of psychological or psychiatric harm

² Section 35.

and shame and cultural harm or exclusion.³ The grievous bodily harm definition used in Category C has had the effect of excluding psychological and psychiatric harm from these types of claim, as case law in Australia has been slow to recognise this form of harm as grievous bodily harm. The limited definition of grievous bodily harm has minimised the extent to which long running and serious domestic violence has been recognised within the Act. KLC has had many cases of women who have experienced years of serious ongoing domestic violence that have only been successful in receiving a minimum Category D payment.

KLC recommends that Category B definition of grievous bodily harm be amended to specifically include psychological and psychiatric harm.

‘Related acts’ and domestic violence victims

The disadvantaging effect of the Act for women is further heightened by the definition of ‘related acts’ which limits recognition payments where a victim has been injured on more than one occasion by the same perpetrator. Once again, this framing of payments by individual and discrete acts of violence has the effect of privileging some types of violence over others. It has the practical effect of providing only one recognition payment to victims of long running domestic violence, when the impact of that violence negatively pervades all aspects of a victims life, including their economic security.

³ Christine Forster Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions, (2005) 32 U. W. Austl. L. Rev

Case study- Inadequacy of Category D recognition payments

Fei was in a relationship with Alan for 5 years. The relationship was violent from the beginning, with Alan constantly subjecting Fei to verbal abuse at home. He would also push her around the home and physically restrain her whenever he felt jealous of her socialising with other people. Fei did not report this early abuse to the police or to her doctor, as they had a young child together early in the relationship, and she felt that she did not want to split up the family. On one occasion Alan became enraged that Fei had started hanging out with some old friends and he punched her in the face at home and smashed her mobile phone against a mirror, causing damage significant damage to their rental property. Fei had a bruised and swollen face for weeks. A neighbour called the police, and they attended and took out an apprehended violence order to protect Fei. Fei and Alan remained together for another 6 months. At that point Alan again physically assaulted Fei causing bruising to her face while they were on an interstate holiday. Fei left the family home with their child shortly afterwards.

Fei received a Category D recognition payment of \$1,500. The only injuries she could prove were the bruises that resulted from the incident attended by the police. The assault that took place interstate could not be taken into account, as it happened outside of NSW.

This is clearly an inadequate award for such a long period of sustained violence by the perpetrator. It also in no way compensates the victim for the psychiatric harm caused by the domestic violence.

The Australian Law Reform Commission, New South Wales Law Reform Commission and the recent Victorian Royal Commission into Family Violence have identified that provisions in victims compensation schemes have the potential to discriminate unfairly against victims of family violence because of the way in which the law frames acts of violence by criminal law definitions and the emphasis on physical rather than psychological harm.⁴

The recent Royal Commission on Family Violence stated:

The Commission supports a legislative approach that ensures the cumulative harm and long-term effects of family violence are taken into account, including potentially increasing the maximum amount of special financial assistance that can be awarded to victims of family violence to the category A maximum amount where there are related criminal acts.⁵

It is well documented that domestic violence causes a wide range of harm including depression, anxiety, mental illness, physical illness⁶ as well as other risks to well-being such as drug and alcohol misuse. Domestic violence has a cumulative effect on the health of victims that can endure over the lifetime of the victim.⁷ Similarly victims of sexual violence are likely to suffer from a broad range of immediate, ongoing and long-term harm that do not neatly fall within the type of harm currently recognised by the Act. They include shame, low self-esteem, depression, feelings of isolation and alienation, inability to relate to

⁴ Australian Law Reform Commission, NSW Law Reform Commission, Family Violence – A National Legal Response ALRC 114 p 1389

⁵ Royal Commission into Family Violence Report and recommendations p 86

⁶ Royal Commission into Family Violence Report and recommendations p 68

⁷ Royal Commission into Family Violence Report and recommendations p 71

others, difficulties with inter-personal and sexual relationships and impairment of sexual pleasure.⁸

Domestic violence also impacts on social and economic wellbeing with domestic violence one of the leading causes of homelessness in Australia.⁹ Victims compensations schemes play a crucial role in protecting women from future harm - helping them to rebuild their lives and keep their children safe. The small amounts of recognition payments available to women who have experienced domestic violence (usually \$1,500) is a lost opportunity to provide the effective support which is an object of the Act. The women that KLC assists use their recognition payments to help establish new homes, buy their own car so they can take their children to school or to pay debts incurred when escaping violence. The small amounts available under the scheme minimise the extent to which victims compensation can help women start again

KLC recommends that the Act should be amended to take account of the nature and effect of domestic and sexual violence. Category A recognition payments should be available to victims of sexual assault who are currently eligible for a Category B payment. Category B recognition payment should be available for victims of a series of related acts of domestic violence, and to victims of domestic violence, sexual assault or child sexual abuse who suffer serious psychological harm.

A Category C recognition payment should be available to victims of domestic violence who suffer psychological harm. Acts of choking, suffocation, strangulation or attempts to do those acts should be included in Category C. The definition of harm for victims of domestic violence, sexual assault and child abuse should be expanded to include vocational, cultural, social, behavioural and interpersonal harm.

The Act should recognise that sexual abuse and domestic violence are inherently harmful, and be amended to remove the requirement for a victim of sexual assault, child sexual assault or domestic violence to prove injury, unless the victim chooses to pursue a category of recognition payment which requires proof of specific injury such as grievous bodily harm.

Access to victims support for vulnerable people

KLC submits that Aboriginal and Torres Strait Islander people, particularly victims of domestic violence, sexual assault and child sexual abuse, should have equitable access to the assistance provided by the Act.

According to data published by Victims Services in 2014 – 2015 around 14% of applications for recognition payment were made by victims who identified as Aboriginal or Torres Strait Islander. In 2014 – 2015 around 12% of 8625

⁸ Christine Forster Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions, (2005) 32 U. W. Austl. L. Rev, 269

⁹ <http://www.aihw.gov.au/homelessness/specialist-homelessness-services-2014-15/domestic-violence> accessed 29 July 2016

applications that were lodged for counselling were from victims who identified as Aboriginal or Torres Strait Islander.¹⁰

However, it is well recognised that Aboriginal and Torres Strait Islander women and girls experience high rates of domestic violence, and are up to 35 times more likely to be hospitalised due to domestic violence related assaults than other Australian women and girls.¹¹ The current application figures by Aboriginal and Torres Strait Islander victims do not reflect the incidence of violence experienced by Aboriginal and Torres Strait Islander women.

While it is positive that Aboriginal and Torres Strait Islander victims of crime are making use of benefits that are available under the Act, KLC believes that the data does not reflect the greater rates of victimisation of Aboriginal and Torres Strait Islander people, particularly Aboriginal and Torres Strait Islander women and children.

KLC recommends that administration of the Act should be improved to increase access for Aboriginal and Torres Strait Islander people and that the arrangements in place for approved counselling should reflect the area of greatest demand and need. Claimants, including those in regional and rural areas, should have access to Aboriginal and Torres Strait counsellors, counsellors who speak languages other than English and counsellors with cultural competency.

Evidence requirements

Under the Act a claim for financial assistance for immediate needs must be supported by documentary evidence (such as medical or police report) to show *on the balance of probabilities* that the applicant is a victim of an act of violence. A claim for a recognition payment or for financial assistance for economic loss must be supported by a police report, or a report to a government agency, and a medical, dental or counselling report to *verify* that the claimant has actually been injured as a result of an act of violence.¹²

It is not clear why two different standards of proof apply to these claims. The standard of proof that applies to personal injury compensation claims is the balance of probabilities. The Act does not provide economic loss compensation in accordance with the principles that apply to those types of claims. The emphasis of the current Act is on ‘practical and financial support’,¹³ yet the Act places access to that support at a higher evidentiary standard than recognition payments.

The Royal Commission into Institutional Responses to Child Sexual Abuse recommends that a standard of proof of ‘reasonable likelihood’ should be adopted for a redress scheme that would provide higher financial payments (up to \$200 000) than those that are available under the Act. The Royal Commission describes this standard as higher than plausibility but lower than the balance of probabilities. The Royal Commission considered a number of options for standard of proof for the redress scheme, including balance of probability and plausibility, but did not recommend a standard of proof of

¹⁰ Victims Services data profiles – Recognition application 2014/15 and Counselling applications 2014/15

¹¹ National Plan to reduce violence against women and their children 2010 – 2022, 1.

¹² Section 39 (2)(a) and (b)

¹³ Second Reading Speech Victims Rights and Support Bill 2013 7 May 2013

balance of probabilities because the redress scheme it recommended for victims of child sexual abuse would not be compensating victims according to common law principles¹⁴. Recognition payments that are available under the Act are not compensation assessed according to common law principles and are what they say they are: a recognition of the harm caused by the act of violence. The Senate Community Affairs References Committee also recommended a standard of proof of 'reasonable likelihood' when it recommended a national reparations fund for victims of abuse in institutions and out of home care.¹⁵

The following case studies illustrate the way the evidentiary requirements can unfairly discriminate against victims of domestic and sexual violence, particularly the requirement for claims for recognition payment or financial assistance for economic loss to be supported by a police report or report to a government agency.

Case study: Evidence in sexual assault and domestic violence cases

Claire's husband, John abused her over a period of 9 years. The violence started soon after they were married and included sexual assault, physical and psychological violence and imprisonment. Claire reported one of the earlier incidents of violence to the police. Her husband's family called her many times to ask her to withdraw the charges; his mother promised Claire that John would not harm her again. The physical violence continued throughout the marriage and often included sexual assault.*

Claire sought medical treatment for some injuries resulting from incidents of physical violence, but she did not disclose to medical staff how they had really occurred. In one incident she suffered back injuries as a result of her husband's sexual assault but said it happened when she was weeding in the garden. Claire reported two violent incidents to the police however she did not report the sexual assaults to police. On several occasions, she was prevented from reporting incidents to the police due to geographical isolation, violence or imprisonment by her husband.

Claire's fear of her husband, and fear for the safety of her children, prevented her from reporting all incidents to police. It was not until she sought counselling and legal assistance 10 to 12 years after the violence began, and several years after the relationship had ended, that she disclosed the sexual assaults and made a statement to police.

As a result of the cumulative physical, sexual and verbal violence during the marriage Claire suffered from suicidal feelings, loss of concentration, sadness, anxiety, loss of self-respect and confidence and loss of ability to form interpersonal relationships.

Claire found it too distressing to recount some incidents of violence so they could not be included in her claims for recognition payments. Delay in reporting meant there was no evidence of sexual assault and she was out of time to make claims for financial assistance and recognition payments for some of the incidents

¹⁴ Royal Commission into Institutional Responses to Child Sexual Abuse Redress and Civil Litigation recommendation 57 p 376

¹⁵ Royal Commission into Institutional Responses to Child Sexual Abuse Redress and Civil Litigation 11.7

Case study: Evidence and time limits for domestic violence and sexual assault

Ella was physically and sexually abused for two years throughout her relationship with Adrian. Some incidents were reported to police and Adrian was convicted of assault for one act of violence that occurred at the beginning of their relationship.

However other more serious acts of violence, including multiple sexual assaults, were never reported to police. Ella was unable to report one serious assault that resulted in an injury that required surgery because she was imprisoned by the perpetrator for one week following the event in which further physical abuse and sexual assaults occurred. While there were witnesses and medical records that document the injuries Ella suffered she did not make a report to police. Ella did not report some incidents to police because she was scared that she would suffer further abuse. Eventually Ella sought help from the police to get an apprehended domestic violence order. Ella was not able to claim for the medical costs for the surgery that she had as more than two years had passed by the time she sought legal advice.

It is now widely understood that many victims of child abuse, child sexual abuse, sexual assault and domestic violence do not report to the police or other government agency for well-founded reasons. Some victims may report some acts of violence to police, while other acts of violence are not reported, particularly where a victim has suffered abuse over a period of time, or has experienced violence from an intimate partner. The Australian National Research Organisation for Women's Safety (ANROWS) reports that Australian women are most likely to experience physical and sexual violence in their home at the hands of a male current or ex-partner; and of those women 58% had never contacted police, and 24% has never sought advice or support.¹⁶

Police play a key role in responding to domestic violence but victims continue to face barriers in reporting violence to police. While there have been significant improvements in police response to domestic violence many victims still experience inconsistent and negative responses from police and that some population groups, such as Aboriginal and Torres Strait Islander people, culturally and linguistically diverse groups, lesbian, gay, bisexual, transgender and intersex people and people with disability are particularly vulnerable to poor responses from police.¹⁷

The work of the Royal Commission into Institutional Responses to Child Sexual Abuse has highlighted that child sexual abuse in institutions is widely under-reported. The Royal Commission found that research indicating delay in adult disclosure of child sexual abuse of more than 20 years was mirrored by its own analysis of people who attended private sessions with a Commissioner.¹⁸ Many survivors of child sexual abuse would not have been eligible to make a claim for a recognition payment if the Royal Commission had not been established because a report of abuse to the Royal Commission meets the requirements of section 39 for a report to a government agency.

KLC recommends that the specific evidence requirements in section 39 of the Act be removed. Instead claimants should be required to provide

¹⁶ Australian National Research Organisation for Women's Safety Violence against women: key statistics, www.anrows.org.au

¹⁷ Royal Commission into Family Violence Report and recommendations volume 3 p 7 and 8

¹⁸ Royal Commission into Institutional Responses to Child Sexual Abuse Interim Report page 158

evidence of an act of violence to a standard of proof of ‘reasonable likelihood.’

Evidence of loss in financial assistance claims

A victim seeking to claim for financial assistance for economic loss (loss of income) must provide evidence from the employer stating that the claimant was absent from work for a specific period¹⁹. Claims cannot be made on the basis of loss of capacity for work supported by other kinds of evidence. Claimants who are self-employed, or who work on a casual or sessional basis cannot comply with the requirement in the Act.

Victims who seek to claim financial assistance for actual expenses incurred as a result of the acts of violence must provide receipts, invoices or other approved forms of substantiation of expenditure.²⁰

Case study: Financial Loss

Jennifer was a victim of sexual assault which occurred in a small, close knit community where she had lived for some years. Prior to the sexual assault she worked on a casual basis at a number of different places. Following the sexual assault she continued to work however she experienced a significant drop in her income due to a number of factors that were directly connected to the harm caused by the sexual assault. While she was recovering from sexual assault she accepted fewer casual work opportunities. Due to the nature of her employment she did not have access to any paid leave.

She also had to sell up and move out of the community as a result of the sexual assault at considerable personal and economic cost.

She could not provide a letter from an employer saying she was absent from work on particular dates. She was not awarded any assistance for loss of income even though the records for her taxable income indicated that the drop in her income was connected to the sexual assault, and she could provide evidence that she had in fact refused offers of work more often following the sexual assault. This did not satisfy the requirements in section 39(4)(b) of the Act.

Case Study : loss of goods and possessions

Viva sought the help of KLC after escaping a long running violent relationship. Her partner had been addicted to drugs, was extremely violent and controlling. He regularly destroyed her clothes and possessions including clothing, handbags, jewellery and mobile phones. During this time Viva was in fear of him and did not report this damage. When she had escaped the violence and sought help from KLC

As Viva had insufficient evidence of the value of the goods and the circumstances of the loss she was not successful in a claim for financial assistance. As a result she struggled on a minimal Centrelink income to buy essential items.

KLC recommends that the Act should be amended so that victims can provide evidence regarding financial loss from a range of sources, for example evidence from a doctor about capacity to work for a specified period together with records of income received prior to the act of violence. In cases of loss of goods or possessions, this evidence may be in the form of statutory declaration and approximate valuations.

¹⁹ Section 39(4)(b)

²⁰ Section 39(4)(b).

Time limits disadvantage women and child victims

A claim for financial assistance or recognition payment must be made within two years of the act of violence, or if the claimant was a child at the time of the violence, two years after turning 18 years.

Claims for recognition payment for domestic violence, child abuse or sexual assault can be made up to ten years after the act of violence. For child sexual abuse there is no time limit for a claim for recognition payment and for financial assistance (except the time limit still applies for financial assistance for loss of income).

The time limits imposed by the Act are arbitrary and potentially discriminatory given what we now know about the nature of domestic and sexual violence, and its impact on victims and delay in disclosure of child sexual abuse.

The Act is now out of step with recent reforms to the Limitation Act which removed the limitation period for claims for damages arising from personal injury and death resulting from child abuse. In the Limitation Act child abuse is defined very broadly to include sexual abuse, serious physical abuse and connected abuse.²¹ The Act should be brought into line with these changes to the Limitation Act.

KLC recommends that the Act be amended to remove the time limits for all claims for recognition payments and financial assistance for victims of domestic violence, sexual assault, child abuse and child sexual assault.

The Act should also be amended to allow other claims for financial loss and recognition payments to be made out of time in exceptional circumstances.

Section 40(6) of the Act allows for claims to continue to be made for up to five years under an application that has been made within time; however the terms of this provision are ambiguous. It is not clear whether a claim that is made for any of the options available under the Act, counselling, financial assistance and recognition payment that is made before the expiration of the relevant time limit meets the requirement for an application to be 'duly made' in section 40(6).

KLC recommends that if a victim lodges a claim for any of the three forms of victims support within the prescribed time limit the claimant should be able to claim all three forms of assistance until the expiration of five years. This approach would recognise that victims have different and changing priorities while going through a recovery process.

Time limit for internal review should be longer

Under the Act a victim has 28 days to lodge an application for internal review of a determination. An application for internal review must be in writing and state the grounds for the review.

Many claimants do not have legal advice or representation when they make an application, and a victim who is not satisfied with a determination should have enough time to obtain legal advice before making an application for a review. KLC is able to provide advice to victims who are considering making an

²¹ Limitation Act section 6A

application for an internal review however clients commonly have to wait up to 2 or 3 weeks for an appointment at KLC. The time limit of 28 days is often not sufficient for a client to obtain legal advice and consider their position.

KLC recommends that the Act should be amended to introduce broad discretion to allow an extension of time for an internal review.

Victims of domestic violence and sexual abuse should be able to elect a restitution order is made

The Commissioner of Victims Rights has discretion to make an order for restitution of victims assistance against a perpetrator who has been convicted of an offence arising from the acts of violence. KLC is concerned in cases of domestic violence and familial sexual abuse victims may be deterred from claiming financial assistance or a recognition payment if there is a possibility that the Commissioner will make an order for restitution against the perpetrator.

KLC recommends that victims of domestic violence, sexual assault and child sexual abuse should be able to elect whether the Commission can make an order for restitution.

If you have any questions in relation to this submission, please do not hesitate to contact Anna Cody on 9385 9566.

Yours faithfully,
KINGSFORD LEGAL CENTRE



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