

Submission to the legislative review of the *Victims Rights and Support Act 2013*

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The NSW Young Lawyers Criminal Law Committee (**the Committee**) makes the following submission to the NSW Department of Justice's review of the *Victims Rights and Support Act 2013* (NSW) (**the Act**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

The Department of Justice's review (**the Review**) seeks to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The Committee submits that there are two broad aspects of the current scheme that prevent the Act from fully and effectively achieving its objectives. First, the current arrangements for recognition payments should be amended to include a wider category of victims whose trauma ought to be acknowledged. Second, there are definitional and procedural problems with the legislation which undermine the Act's ability to recognise the rights of victims and provide them with support.

Funding Model

The Committee strongly endorses the Act's policy of requiring violent offenders to provide compensation to their victims. However, this is problematic where offenders are not identified or do not have the capacity to pay. The Audit Office of NSW estimates that of

“\$258 million in restitution debts at 30 June 2015 only \$21.9 million is likely to be recovered.”¹

On the other hand, the Auditor General notes the significant increase in the balance of the Confiscated Proceeds Account over the last five years.² For example, according to the most recent publically available data,³ in 2008/9 asset forfeiture orders totalled \$12,880,208, in 2007/8 - \$25,866,752, and 2006/7 - \$14,182,417. The Auditor General’s Report recommends that “[t]he Minister for Justice and Police should engage with the Treasurer to determine how funds in the Crown Entity’s Confiscated Proceeds Account should be used.”⁴ It is noteworthy that asset forfeiture orders are not currently within the available pool of funds that is available to be credited to the Victims Support Fund under section 32(3) of the *Criminal Asset Recovery Act 1990* (NSW).

While amending the *Criminal Asset Recovery Act 1990* may be beyond the immediate parameters of this Review, the Committee submits that exploring alternative funding options may help to ensure that the Victims’ Support Scheme is able to fully achieve the objectives of the Act.

Change in Recognition Payment Amounts

One of the major changes brought about by the introduction of the Act was the removal of Schedule 1 of the *Victims Support and Rehabilitation Act 1996* (NSW) (**the former Act**), which was a list of claimable injuries and a corresponding monetary evaluation of each injury. The minimum compensation payable was \$7,500 and the maximum was \$50,000. The Committee views the removal of the Schedule as a sensible move away from artificially categorising and placing monetary value on particular injuries suffered. The change in focus from lump sum payments to financial assistance for immediate needs may well be a more effective way of allocating limited resources.

The Act and regulations provide for a (new) maximum recognition payment of \$15,000 instead of \$50,000 as allowed under the former Act. This maximum payment is limited to a family member who was financially dependent on a homicide victim. This change is

¹ New South Wales Auditor-General, *Financial Audit Volume Seven: Law and Order Emergency Services* (2015), at p 19.

² *Ibid*, at 43

³ Bartels, “The operation of jurisdictional confiscation schemes” (2010) *AIC Reports Technical and Background Paper No. 36*.

⁴ New South Wales Auditor-General, *Financial Audit Volume Seven: Law and Order Emergency Services* (2015), at p 43.

particularly onerous on victims of domestic abuse, sexual violence or who have suffered psychiatric harm, who may have been able to receive significantly higher payments under the former Act.

Noting that these payments are in addition to other expenses that are compensable under the Victims Support Scheme, the Committee is concerned that by offering a comparatively low token payment, the State may be signalling a relative disregard for the suffering of the victims. The Committee acknowledges that in many cases of severe violence, financial reparation provided by the State may be woefully inadequate to address the ongoing trauma suffered by victims. However, the Committee is strongly of the view that appropriate payments are an essential part of recognising the harm suffered by victims, and providing some form of recompense will assist in the recovery of victims.

Accordingly, the Committee recommends that the Review consider amending the quantum of Category A – C recognition payments.

Definition of Indigenous Family Victims

Presently, the definition of ‘Family Victim’ is restricted to children, siblings, parents or partners of the Primary Victim.⁵ While this extends to relationships created by marriage, it does not embrace immediate family relationships that lack this degree of recognition. In particular, it is well recognised that indigenous family structures do not always reflect those of non-indigenous families.⁶ In light of the discouraging fact that indigenous people, particularly indigenous women, are over-represented as victims of crime,⁷ the Committee recommends that the definition of ‘Family Victim’ be amended to take into account the distinctive nature of indigenous kinship ties.

Lack of Recognition for Certain Victims

The Act includes promoting the rights of victims of crime and providing them with support. As noted above, the Committee strongly endorses the provision of recognition payments as a necessary element in the restorative process. For that reason, the Committee submits

⁵ *Victims Rights and Support Act 2013* (NSW) s 22.

⁶ See eg, Morphy, “Lost in translation? Remote Indigenous households and definitions of the family” (2006) 73 *Family Matters: Journal of the Australian Institute of Family Studies* 24

⁷ See eg, Davis, Cripps and Taylor, “Sexual Violence and Indigenous Victims: Women, Children and the Criminal Justice System” (2010) *Indigenous Law Centre Research Brief No. 1*

that there are three categories of victims who are already recognised under the Act to whom recognition payments should be extended.

Family Victims of homicide

The Committee submits that the eligibility requirements for Family Victims Category A payments should be amended to include children and domestic partners of the Primary Victim. Currently children and partners of homicide victims have to prove financial dependency to be eligible. This is anomalous with the situation of parents or guardians of Primary Victims, who do not need to demonstrate such dependency. It is the Committee's view that the emotional trauma suffered by spouses and children in the event of the death of a Primary Victim are relevantly analogous to those of parents or guardians.

Secondary Victims⁸ who are members of the Primary Victim's family

Presently, Secondary Victims are not eligible for recognition payments. In the Committee's view, this is appropriate where the witnesses of the act of violence do not have a close relationship with the primary victim. However, the Committee notes that in certain circumstances, particularly situations of domestic violence, witnessing acts of violence can have significant detrimental impacts. Accordingly, the Committee submits that category B – D recognition payments should be extended to apply to *secondary victims* who are also children or family members of the Primary Victim, and who suffer a diagnosed or diagnosable psychological injury as a result.

Family Victims⁹ of sexual assault and domestic violence under 18 years of age

The Committee notes the highly damaging impacts of domestic violence situations on children. This is in part reflected in the Act, which acknowledges certain acts of violence have greater significance when they occur as part of a series of acts. The Committee is of the view that recognition payments should be available to family victims of sexual assault and domestic violence who were under the age of 18 at the time that the acts of violence were committed and who have suffered a diagnosed or diagnosable psychological injury as a result.

⁸ *Victims Rights and Support Act 2013 (NSW)* s 21.

⁹ *Victims Rights and Support Act 2013 (NSW)* s 22.

Reporting Time Limits on Certain Claims

The Act imposes upper time limits on applications for financial assistance. These are especially detrimental to victims of domestic violence, sexual assault or child abuse. Section 40(1) imposes a time limit of two years from the act of violence or if the victim was a child at the time of the offence, a time limit of two years after the day the child turns 18 for making a claim for financial support. The new legislation does not recognise that victims of domestic abuse or sexual violence often act differently to victims of other offences in that they may not immediately report offences against them or consider making financial claims for some time after the offence. In this respect, the Committee endorses the submissions made by The Law Society of New South Wales in 2014 that the upper time limits be extended for victims who were children at the time of the offence.¹⁰ The Committee also submits that the upper limits should be extended in the case of victims of sexual assault or domestic violence. To determine specific timeframes would require a nuanced dialogue with relevant stakeholders, having regard to empirical evidence related to the reporting behaviours of the relevant victim groups.

Documentary Evidence

The Committee submits that the requirement for documentary evidence relating to applications for immediate financial assistance should be amended to allow decision makers a degree of flexibility. While there is a clear need to have safeguards to prevent fraudulent claims, the Committee submits that the evidentiary and reporting restrictions are burdensome to many victims. This is particularly the case for those who suffer acts of domestic violence or child sexual abuse. Section 39(2)(b) requires a police report or report from a Government Agency and a medical, dental or counselling report verifying that the applicant has actually been injured as a result of the act of violence.¹¹ This aspect of the legislation does not account for the significant barriers to reporting of specific offences such as domestic violence or violence against children. It also fails to adequately account for the reluctance that particularly victimised groups (such as Indigenous women) have in engaging with law enforcement and other government instrumentalities. The Committee is concerned that such prescriptive requirements for documentary evidence are limiting and may act as a deterrent for special groups of vulnerable victims.

¹⁰ NSW Law Society, Submission to Attorney General, *Review of the Victims Rights and Support Act 2013* (NSW), 15 July 2014.

¹¹ *Victims Rights and Support Act 2013* (NSW) s 39(2)(a).

Procedural Assistance

The Committee sees great merit in the streamlined and simple process that allows victims to make claims without the need for legal assistance. However, it is also important to acknowledge that often victims of violent crime may present with complex personal circumstances, creating complicated claims. This is often compounded by unfamiliarity with administrative processes and a feeling of distrust of government. In such cases, Victims Services caseworkers have limited ability to provide assistance and cannot provide legal advice. Accordingly, the Committee notes with concern that there may be large numbers of victims who are entitled to, and in need of, support but who do not make claims.

The Committee submits that the Review should consider possible funding arrangements that would enable greater assistance to victims of traumatic crimes. While such funding would be an increased financial burden, it would make a vital contribution toward achieving the policy objectives of the Act. There are a range of options that may achieve this. For example, it may be appropriate to extend Legal Aid to victims with complex claims, with an appropriate increase in that organisation's budget and funding earmarked for victims support. Another option may be the introduction of a type of victims' advocate who is funded by, but independent of government, and is able to assist victims in complex or contentious claims. Such a scheme could be operated by community legal centres. Finally, the Committee reiterates The Law Society of New South Wales' previous submission that there be a limited power to award costs, as per s 35 of the former Act.¹²

Appeal of Decisions

The Committee observes two areas regarding the appeal of decisions made under the Act that warrant the attention of the Review.

The first is the time limit for review set out in s 49 of the Act. While the Committee agrees that a time limit is appropriate in the interests of certainty and finality, the Committee recommends that the legislation be amended to grant the Commissioner the discretion to waive the limit in appropriate circumstances, for example, where the applicant did not receive adequate advice regarding their appeal rights.

Second, the Committee recommends that s 48 of the Act be amended to clarify that it is a reviewable decision. Presently, the Commissioner can impose a condition on any grant of

¹² NSW Law Society, Submission to Attorney General, *Review of the Victims Rights and Support Act 2013* (NSW), 15 July 2014.

victim support requiring repayment if the victim receives a payment in relation to the injury from another source. It is not clear on the face of the legislation if the conditions imposed would be reviewable. If they are not, the NSW Civil and Administrative Tribunal would not have jurisdiction to review a decision by the Commissioner demanding repayment from a victim.

Concluding Comments

The Committee considers the Act as a vital aspect of the proper functioning of the criminal justice system. Furthermore, although many offenders have limited financial means, the general principle of requiring offenders to compensate their victims is strongly endorsed by the Committee. However, it is because of those limited means that the State will inevitably play a significant role in recognising and repairing the damage done by violent crime. Consequently, the Committee acknowledges that limiting the funding available restricts the availability of compensatory payments. However, it is the Committee's submission that making sensible changes to the Act, along the lines proposed in this submission, will ensure that the policy objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives.

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. Should you have any further queries, please do not hesitate to contact the undersigned.

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