WIRRINGA BAIYA
ABORIGINAL WOMEN'S LEGAL CENTRE INC.
Wirringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or have been victims of violence.

29 July 2016

Director, Civil Law
NSW Department of Justice

By email: policy@justice.nsw.gov.au

Dear Director,

STATUTORY REVIEW:
VICTIMS RIGHTS AND SUPPORT ACT 2013 (the VSRA)

We refer to the above and welcome the opportunity to make a submission to this review.

The work of our Centre

Wirringa Baiya Aboriginal Women's Legal Centre is a state-wide community legal centre for Aboriginal women, children and youth. The focus of our Centre is to assist Aboriginal women, children and youth who have been victims of violence. Consequently we have assisted many of our clients with applications for victims compensation and victims support applications under both the repealed 1996 legislation and the above legislation.

Previous submissions made by this Centre

We refer to our letter to the Attorney-General dated 15 May 2013, when the VSRA was first introduced into parliament as a bill. Many of the concerns we highlighted back in May 2013 remain significant concerns, as discussed below.

Our Centre also made a lengthy submission to the review of the Victims Compensation Scheme conducted by PricewaterhouseCoopers in 2012.

Submissions made by Community Legal Centre NSW (CLCNSW)

As a community legal centre and a member of the CLCNSW network we endorse the submission of that network to this review. Our submissions below seek to highlight some of the issues of particular concern to our Centre.

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Wirringa Baiya is a non-profit organisation managed by Aboriginal women.
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Our concerns

Payments for pain and trauma

As we have stated previously, when the VSRA was first introduced, we were dismayed that the Schedule of Injuries was removed and replaced with new categories of 'recognition payment' that pay significantly less awards for the pain and suffering endured by victims. This is especially tragic for victims of domestic violence and sexual assault, who are overwhelmingly women and children. Furthermore, crime statistics consistently show that Aboriginal women and children are over-represented as victims of domestic violence and sexual assault, compared to their non-Aboriginal counterparts.

The categories of recognition payments are particularly insulting to domestic violence victims. The focus is very much on the act of violence as opposed to the long term harm and trauma caused by the violence.

As was clear, and has been proven to be the case, the focus is on the physical injury suffered. The highest recognition payment a victim of domestic violence can apply for under the VSRA is a Category C payment, which includes an assault resulting in grievous bodily harm. This recognition payment is worth $5,000 Thus a victim, whom say was repeatedly pushed, grabbed and hit, causing bruising, at most would be awarded $1,500 because there was no resultant grievous bodily harm.

There is no recognition of the significant psychological damage caused to a victim. This is especially the case for victims of domestic violence who were mostly subjected to a range of threatening, controlling and physically abusive behaviour that did not involve assaults causing grievous bodily harm. Domestic violence services have fought long and hard for the government and the community to recognise threats, intimidation, stalking, social and financial control as forms of domestic violence that cause serious harm. The 'recognition payments' contradict that legislative, policy and social recognition and sends a message to victims of these types of domestic violence that their pain and suffering is less worthy.

As we have stated previously, by creating a hierarchy of acts of violence with the associated amount of recognition payment, there is no recognition that domestic violence could be ongoing. Many of our clients have endured many years of domestic violence, which has included constant assaults, threats, intimidation, control and harassment. Except being awarded separate payments for separate assaults (which has been difficult to achieve under both the repealed legislation and the VSRA) a victim of 15 years of domestic violence could at most only be awarded $5,000.00 as a recognition payment *but only if* one of those assaults resulted in grievous bodily harm.

We also note that sometimes this violence includes attempts to choke and/or strangulation. It has been recognised by the State Government that these crimes are very serious and led the NSW State Government to amend in 2014, s37 of

Crimes Act regarding the choking and strangulation offence. [1] Such forms of violence have been recognized as a risk factor for a domestic violence homicide. The NSW Domestic Violence Death Review Team report of 2011-2012 showed that where women are killed by their intimate partner (in both an identified domestic violence and non identified domestic violence context), the highest number of deaths were attributable to strangulation. Yet under the VSRA attempts to choke or strangulation are not recognized as a Category C payment, unless it can be proven that there was a resultant physical injury in the form of grievous bodily harm (despite the severity of the act the injuries are reported as 'red marks' or 'tenderness.') This is despite the fact that the maximum sentence of 25 years under section 37 is the same as the maximum sentence of 25 years under section 33 of the *Crimes Act*. Once again the VSRA fails to recognize the significant psychological injury that such serious crimes can cause.

Focus on economic loss

The VSRA enables victims to seek payments for economic loss, such as loss of wages. In relation to our clients it is meaningless and discriminatory to primarily focus on economic loss, such as loss of wages.

The reality for most of our clients is that they were never able to work because of the significant trauma they experienced. The crimes of domestic violence and sexual assault are rarely one-off single incidents of violence. These types of crimes are mostly perpetrated by people close to their victims. They are crimes that are often of a long duration. They are crimes that involve abuse that can go on for many years.

For the large majority of our clients who experienced domestic violence, the violence often begun for them when they were teenagers or young adults. Thus it occurred while they were still at school or having just finished school. Also most of our clients had children with their violent partners and generally became a parent young, either in their late teens or early twenties. This in effect means that the large majority of our clients never begun, or never had the opportunity to have paid work, and therefore any career or income of their own.

Child sexual abuse by its very nature is a crime against children, from as young as infants to late teenage years. We have had clients who have experienced sexual assault from pre-school ages through to 18 years (and in some cases into adulthood by the same perpetrator). The abuse results in serious disruption to their emotional and cognitive development and thus their schooling, adversely affecting their ability to seek or acquire paid work.

Thus our clients are not able to claim for loss of wages because they were unable to ever seek paid work as a result of their psychological injuries.

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[1] NSW Domestic Violence Death Review Team Report, 2011-2012, pages 43 and 54, Heather Douglas and Robin Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response, VOL 36:231 Sydney Law Review, 231, page 251

In summary, our clients, as a result of the prolonged violence suffer profound pain and suffering which in turn affects their ability to parent, contribute to community and society and their capacity to earn an income.

Adequate compensation for pain and suffering can also address the long-term practical impacts of violent crime; frequently victims have, throughout their lives, lost opportunities for further education, reasonable living conditions, the ability to form long-term, beneficial relationships and the pursuit of employment and travel. Our clients also mourn their inability to assist their children with financial issues such as school fees or other activities outside school. Such a list can only begin to imagine the consequences of victimisation beyond actual, direct economic loss, and adequate compensation can have a great practical effect in ameliorating this impact.

Calculation of loss of wages

Even when a victim can claim loss of wages the calculation of loss of actual wages is very complicated and confusing. The regulation refers to a schedule in the *Workers Compensation Act* that doesn't give an amount or a calculation method. The regulation requires you to look at the *Workers Compensation Act* as it was in force in 2012. However, since then that legislation has been significantly changed.

The calculation of the loss of wages needs to be clarified, simplified and embedded in the VSRA.

Recommendations

1. Significantly increase the amounts prescribed for the various categories of recognition payments.

2. Create a specific category for domestic violence that is not predicated on whether there was an assault involving grievous bodily harm and recognises significant psychological harm. At a minimum this should be equivalent to a Category C payment, and in cases of serious psychological harm a Category B payment.

3. Attempted strangulation and attempted choking should be recognized as a Category C recognition payment.

4. Create a specific category for **ongoing** domestic violence that is equal to the value of the recognition payment of ongoing sexual assault, being a Category B payment.

5. The calculation of the loss of wages needs to be clarified, simplified and embedded in the VSRA.

Proving injury for a recognition payment for a sexual assault

We also submit that it is illogical and sexist to be required to prove harm when a victim has established sufficiently to the required standard of proof that she was the victim of a sexual assault. Sexual assault by its very nature is a crime that involves serious harm in the most intimately invasive way. This is recognised by the *Crimes Act 1900*, where sex offences have some of the most serious penalties. Yet the VSRA assumes it is possible to be sexually assaulted without suffering harm, by requiring a victim to provide evidence of injury with a medical or counselling report. This is particularly offensive to victims of child sexual assault.

We have clients where there is strong evidence to establish a sexual assault, including child sexual assault, but have never sought counselling for a range of reasons, including lack of culturally appropriate counselling services, or counsellors. However, they have been forced to seek it so that a counselling report can be produced and provided to satisfy the legislative requirement for proof of harm.

We also submit that consideration should be given to eliminating the need for victims of domestic violence to prove harm, unless they seek to prove severe harm to establish a higher recognition payment for serious physical injury or serious psychological harm.

Recommendation

6. Victims of sexual assault (whether as an adult or a child) not be required to provide evidence of harm and only be required to prove that a sexual assault offence to the required standard of proof required by the Act.

Documentary evidence required for a recognition payment

Section 39 (2)(b) of the VSRA requires a victim to have reported an act of violence to police or a 'Government agency' in order make an application for financial assistance or a recognition payment. While we understand the need for independent evidence to establish a claim, there is no acknowledgement by the Government that many victims have not reported the act of violence to police or a government agency for a range of legitimate reasons. This is particularly true for victims of domestic violence and sexual violence, as often the offender was someone to close to them and in a position of power and control. In addition, Aboriginal women and children are reluctant and fearful about reporting violence to police or government due to the historical legacy of the forced removal of children, Aboriginal deaths in custody, and both historical and ongoing systemic racism.

The restriction on reporting violence to police or a government agency excludes a whole range of support services to which a victim may have reported violence

and sought assistance, such as: refuges, culturally specific support services, women's services, Aboriginal Medical Services, private doctors, non-Government schools, non-government counselling services, and youth support services.

We have had a number of clients being forced to report their act of violence to a 'government agency' to apply for a recognition payment, despite reporting the violence to many other non-Government agencies or professionals. This is stressful for clients due to firstly, having to re-tell their traumatic experience again, and, secondly re-telling it to a government agency that they mistrust. In some cases the offender has passed away, especially in the case of child sexual abuse that occurred some time ago. Thus the report has little utility to the government agency, unless it is a matter that falls in the remit of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Recommendation

7. Accept applications for recognition payments and financial loss from victims that have reported to a relevant support service/ agency, including non-government support services and agencies, as well as relevant professionals such as private doctors or counsellors.

Time limit to apply for a recognition payment

We also have significant concerns about the time limit for victims of domestic violence, adult sexual assault and child abuse. It is our strong submission that ten (10) years for an application for a recognition payment is not sufficient time for these groups of victims.

Many of our clients struggled with the consequences of the violence for many years before reaching a point where they could seek compensation and counselling. Some describe a life of half living, feeling numb and distant from their children and friends, or highly anxious, phobic and housebound; unable to talk about the terrible trauma they endured. Other clients self-medicated with alcohol or drugs for years to block out the memories of their abuse.

The very report commissioned by your department, and produced by PricewaterhouseCoopers, *NSW Attorney General and Justice: Review of the Victims Compensation Fund*, 2012 (the PwC report), stated the following:

> We recognise that any change in eligibility requirements would have a significant impact on victims. In particular, imposing stricter time limitations would have a significant impact on victims of violence which occurred many years ago, in particular those related to child sexual assault and domestic violence. We acknowledge that as the societal attitude to violence has changed and victims of historical claims have had time to reflect and come to terms with their past trauma, and feel more supported by changing cultural attitudes, they have started to come forward in increasing numbers and report these acts of violence. (page 65)

It has taken a long time for many Aboriginal victims to feel safe and secure to talk about their experiences of sexual and domestic violence, given the well-

documented and tragic history of forced removals of children and deaths in custody.

It is not clear from the PwC report why a cap of ten (10) years was considered appropriate, despite acknowledging that the last Chairperson of the now redundant Victims Compensation Tribunal had recommended 20 years. We understand that no other state has such an absolute cap on out of time applications, and most have provisions with discretion to grant leave.

Time limit for Financial Assistance

Equally we submit that the two (2) year time limit for financial assistance for loss of earnings and medical and dental expenses is too restrictive. This time limit applies to all victims of violence, including child sexual assault (the two exceptions being judicial and out of pocket expenses for victims of child sexual assault). For the same reasons stated above, many victims take years to come forward and seek assistance with victims support.

Recommendation

8. Give the Commissioner unfettered discretion to allow victims of domestic violence, sexual assault, child abuse and child sexual assault to lodge applications for recognition payments and financial assistance outside the time limit, taking into account the nature of the violence, similar to section 26(3) of the repealed 1996 legislation.

Time limits for internal reviews and appeals to NCAT

Under the VSRA a victim can apply for an internal review for a decision by the initial assessor, as well as appeal an internal review decision about a recognition payment to the NSW Civil and Administrative Tribunal. In both instances the time limit for lodging an appeal is 28 days from the date the decision was sent. The VSRA does not give the Commissioner any discretion to accept an application for an internal review outside the 28 days. It is our submission that 28 days is too short.

It is our experience that many of our clients are un-contactable for lengthy periods of time for a variety of reasons. This is in part due to their trauma, especially if they are depressed and thus disengaged. It sometimes may be due to family commitments, especially assisting other family members with who may be sick or elderly. Sometimes it can be due to a death in the family and therefore there are days of sorry business. Sometimes unbeknown to us, our clients are incarcerated and often there is a direct link between their trauma and criminal behavior, which has led to imprisonment. We have also had clients whom are difficult to contact by phone due to no phone credit, or poor mobile phone coverage, especially in some rural areas. Thus advising clients about decisions and seeking instructions about a review or an appeal can be difficult to do within 28 days.

We note under the repealed 1996 legislation the time limit for lodging an appeal to the Victims Compensation Tribunal was three (3) months from the date the decision was served on the Applicant, with discretion to allow a late appeal in 'exceptional circumstances'. An appeal to the District Court on questions of law could be made within three (3) months of the Tribunal's decision being served.

We are also assisting a client who over fifteen (15) years ago made an application for victims compensation for child sexual assault (with the assistance of a private lawyer) that was dismissed by the Assessor and the Victims Compensation Tribunal for reasons that would not be acceptable today. In this case the application was dismissed due to her inability to proceed with criminal proceedings, despite evidence being provided that she was suffering from post-traumatic stress disorder.

Recommendation

9. Extend the time limit for applying for an internal review to be extended to a minimum of two (2) months from the date the decision was served on the Applicant.

10. Allow the Commissioner to accept applications for review outside the time limit where exceptional circumstances allow.

11. The *Administrative Decisions Tribunal Act 1997* be amended to extend the time for seeking a review of a decision made by the Commissioner to a minimum of two (2) months from the date the decision was served on the Applicant.

12. The Commissioner have discretion to reconsider past determinations for child sexual assault applications which have been dismissed, where the dismissal can be shown to be manifestly unsafe and unfair.

Time limit for lodging an application for reassessment

We greatly welcomed the introduction of Part 5, Division 3 of the *Victims Support Regulation 2013* which enabled transitional applications to be reassessed under the repealed 1996 legislation. This rightly reversed the highly unjust retrospective application of the VSRA to matters that had been lodged under the repealed legislation. However, we are very concerned that applications have to be lodged by no later than 31 August 2016.

Our Centre has a number of clients, who had transitional applications eligible for reassessment, whom we have not been able to contact, despite our best efforts. These clients would greatly benefit from having their applications reassessed. We submit that it is unjust that eligible claimants who have not been successfully contacted about the reassessment scheme, will not be given the opportunity to

have the applications reassessed and submit that the deadline for lodging an application form being extended until 2020. The retrospective application of the VSRA should not have been introduced in the first place, and the Government having accepted this poor decision, should be much more generous to victims with its timeframe for seeking reassessment.

Recommendation

13. The deadline be extended for making an application for reassessment to 1 September 2020.

Provisions of the VSRA we support

Financial assistance for immediate needs

The scheme enables victims to seek financial compensation for immediate needs. We have had clients whom have benefitted from this category of financial assistance. This has included:

- Payments for removalists, when clients have had to move house due to violence
- Payment of storage fees to store their furniture
- Payments for furniture when clients have had to flee their home very quickly due to violence, and have been unable to take their furnishings

We strongly support the immediate needs payment and submit that it should be continued.

However, we add that it is often the case that the clients we assist struggle to find new accommodation to move into once they have fled their violent home. Many of them spend months in women's refuges, short-term homeless accommodation or couch surfing, waiting for social housing to become available.

Counselling

Under both the repealed scheme and the VSRA a number of our clients have sought counselling from an approved counsellor. Generally our experience is that counselling is approved swiftly. The experience of our clients with approved counsellors is mixed. Some clients have spoken highly of their counsellors and found counselling very useful. Some have found their approved counsellors difficult to engage with, or culturally inappropriate.

Counsellors approved by Victims Services need to be flexible in their service delivery, be culturally appropriate and safe for Aboriginal victims. This requirement needs to be constantly monitored and audited by Victims Services.

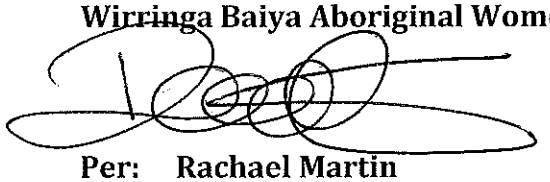
Overall we support the counselling scheme for victims who wish to utilise it.

Conclusion

We appreciate you taking the time to consider the concerns and recommendations raised in this letter. We would very happy to meet with you to discuss our concerns in detail.

If you have any questions about our letter, or are able to meet with us please contact Rachael Martin of this office on (02) 9569 3847 or by email: Rachael_Martin@clc.net.au

Yours faithfully,
Wirringa Baiya Aboriginal Women's Legal Centre



Per: Rachael Martin
Principal Solicitor

CC: The Hon. Paul Lynch, Shadow Attorney-General
The Hon. Pru Goward, Minister for the Prevention of Domestic Violence and Sexual Assault
The Hon. Lesley Williams, Minister for Aboriginal Affairs