



Justice

Statutory Review:

Victims Rights and Support Act 2013

JUNE 2018

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Statutory Review *Victims Rights and Support Act 2013*

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Executive Summary

- 0.1 The *Victims Rights and Support Act 2013* (**the Act**), which commenced in 2013, legislates the rights of victims of crime under the Charter of Victims Rights (**the Charter**) set out in the Act and establishes the Victims Support Scheme (**the VSS**) to provide practical and financial support for victims of violent crime.
- 0.2 In accordance with section 119 of the Act, the Attorney General is to undertake a review of the Act as soon as possible after a period of three years from the date of assent. The review is to consider whether the policy objects of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives.
- 0.3 The Department of Justice (**the Department**) has undertaken a review of the Act on behalf of the Attorney General. In conducting the review, we considered submissions received from a variety of individuals, Government agencies and non-government organisations. A complete list of submissions is at Appendix C. Submissions received by the Department addressed a range of issues and highlighted where there exist anomalies or inconsistencies in the Act.
- 0.4 A key feature of the VSS is that applications for victims support remain open for five years. Claims for financial assistance can continue to be made until the total amount of available financial support has been exhausted during that five year period, providing victims with continued access to practical financial support during that period.
- 0.5 At the time the review commenced, three years from the date of assent, the great majority of applications lodged under the VSS were still open. There is very limited data available about the actual operation of the scheme during a claim's life. Without data on closed applications, it is not possible to assess the overall efficacy of the VSS.
- 0.6 On balance, given the submissions and the absence of data about the operation of the scheme, we consider it too early to recommend any major changes to the VSS. A further review of the Act is required to commence between June 2019 and June 2021. At that time, a fuller data picture will be available that will enable a more informed assessment to be made about the operation of the scheme.
- 0.7 The Review does not contain significant reform proposals and we have concluded that the terms of the Act continue to secure its policy objectives. However, we have made 17 recommendations that will provide greater clarity about the operation and objectives of the Act. These recommendations will:
 - provide improved access to services and support for victims; and
 - improve administration of the VSS.
- 0.8 We have also recommended some minor technical amendments to the Act and the Victims Rights and Support Regulation 2013 (**the Regulation**), set out in Appendix A. Together, these amendments will ensure the Act continues to meet its policy objectives and provides support for victims of violence in NSW.

Recommendations

Recommendation 1

Amend section 39 of the Act to allow documentary evidence that an act of violence has occurred and/or that an injury has been sustained to be provided by a 'support service' as defined under section 3 of the Act.

Recommendation 2

Amend the Regulation to provide unlimited counselling hours for victims of child sexual assault and/or physical abuse

Recommendation 3

Amend the Regulation to empower the Commissioner to make an in-principle finding that an act of violence has occurred, for the purpose of providing 22 hours of counselling before required documentary evidence is submitted.

Recommendation 4

Amend clause 5(6) of the Regulation to increase family victims' initial counselling limit to 22 hours.

Recommendation 5

Amend the Regulation to provide the Commissioner with discretion to approve appropriately qualified people as counsellors in rural and regional areas, where there is a shortage of social workers and psychologists.

Recommendation 6

Amend clause 5 of the Regulation so that the limit of 22 hours of counselling applies for each act of violence rather than by person.

Recommendation 7

Extend the application of section 36(1)(a) so that a Category A recognition payment of \$15,000 is payable to any child of the primary victim, provided that the child was aged under 18 at the time of the death of the primary victim.

Recommendation 8

Extend the application of section 36(1)(b) so that a Category A recognition payment of \$7,500 is payable to the current spouse or partner of the primary victim at the time of death, if s/he was not financially dependent on the primary victim.

Recommendation 9

Amend clause 10(2) and clause 11(2) of the Regulation to increase the prescribed maximum amount payable for funeral expenses from \$8,000 to \$9,500.

Recommendation 10

Include a new section in Part 6 of the Act, equivalent to section 75, to permit court staff to provide information about the address and date of birth of the offender to the victim for the purpose of taking action to enforce a compensation order made by the court in the victim's favour

Recommendation 11

Amend section 49(1) of the Act to extend the time limit for an application for internal review to three months.

Recommendation 12

Insert new provisions into Part 5 of the Act to provide that:

- a victim is a competent but non-compellable witness in restitution proceedings before NCAT; and
- medical reports supporting the original application for victims support are not provided to applicants in restitution proceedings.

Recommendation 13

Remove sub-sections 44(1)(b) and 44(1)(c) of the Act.

Recommendation 14

Include a new section of the Act to empower the Commissioner to lapse an application for which the supporting evidence was not lodged within twelve months,

unless there is a good reason for the delay, provided that the Commissioner has first attempted to contact the applicant on at least three occasions.

Recommendation 15

Amend section 48 of the Act to make approval of victims support subject to an additional condition that the victim must notify the Commissioner of any money already received from other sources, in connection with the relevant act of violence.

Recommendation 16

Amend section 54 of the Act to empower the Commissioner to withhold the payment, should the Commissioner become aware that the applicant has received but not disclosed an amount from another source.

Recommendation 17

Amend the Act and the Regulation to incorporate the technical amendments listed in Appendix A.

1. Introduction

- 1.0 Section 119 of the Act provides that the Minister is to review the Act as soon as possible after a period of three years from the date of assent, to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing its objectives.
- 1.1 The Department conducted the Review on the Attorney General's behalf, as set out at Appendix B.
- 1.2 The Act provides for the rights of victims of crime under the Charter and establishes the VSS to provide practical and financial support to victims of violent crime, replacing a single monetary compensation payment for specific injuries with practical and financial support for victims, tailored to their individual circumstances.
- 1.3 The VSS is administered by Victims Services in the Department of Justice. The Commissioner of Victims Rights (**Commissioner**) is responsible for overseeing administration of the VSS and monitoring compliance of government agencies with the Charter, including reporting breaches to Parliament and helping to find ways to ensure victims' participation in justice processes. The Commissioner also chairs the Victims Advisory Board (**VAB**), comprising representatives of community and government agencies, which advises the Attorney General on policies and reforms, consults victims and victims support groups and promotes legislative and administrative reform to meet victims' needs.
- 1.4 The VSS provides a package of support, individually tailored to meet the victim's needs, including counselling, financial assistance for both immediate needs and longer-term economic loss and a lump sum payment in recognition of the victim's pain and trauma (**recognition payment**).
- 1.5 An increasing number of victims have been accessing the VSS since it commenced in 2013. Awareness of the VSS has been growing among the community and among victim advocates, meaning that more victims are engaging with Victims Services at an earlier stage and receiving tailored, appropriate support to meet their immediate financial needs and receive professional counselling. The VSS also sits within broader government initiatives such as the *It Stops Here Safer Pathway*, which often refers victims to Victims Services.

The Act's policy objectives

- 1.6 The Act's policy objectives are to
 - recognise and promote the rights of victims of crime (Part 2: the Charter);
 - establish a scheme for the provision of support for victims of acts of violence (Part 4: the VSS);
 - enable financial support paid and payments made under the VSS to be recovered from persons found guilty of the crimes giving rise to the payments (Part 5: recovery of victims support payments from offenders);

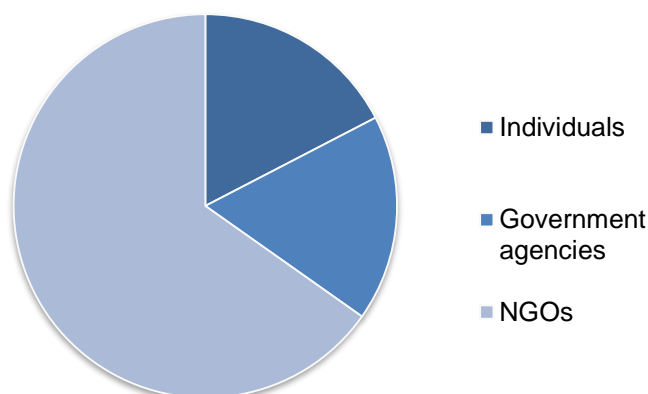
- give effect to an alternative scheme under which a court can order a person it finds guilty of a crime to pay compensation to a victim of that crime (Part 6: compensation awarded by court); and
- impose a levy on persons found guilty of crimes for the purposes of funding the VSS (Part 7: victims support levies).

There was little discussion in the submissions regarding the policy objectives themselves. A limited number of the submissions commented that the policy objectives are valid. We conclude that the policy objectives of the Act remain valid.

Overview of submissions

- 1.7 25 submissions were received from a range of stakeholders including victim advocacy groups such as Homicide Victims Support Group, non-government organisations (**NGOs**) representing specific population sectors, Community Legal Centres NSW, stakeholders from the legal profession including the Law Society of NSW, and Government agencies (See Figure 1).

Figure 1: Submissions to the Review, by type of stakeholder



- 1.8 In general, submissions to the review were concerned with the terms of the legislation and the manner in which they secure, or do not secure, the objectives of the Act. Most of the issues raised in the submissions relate to the VSS, covering issues in the following general areas:
- types of support available;
 - approved counselling services;
 - recognition payments;
 - evidence required for an application; and
 - determination of applications.
- 1.9 Many of the submissions concerned the levels of support available for victims of specific crimes, most notably for victims of domestic violence and family members of homicide victims.

- 1.10 In particular, a number of submissions argued that the VSS in general was not meeting the needs of victims because the recognition payments offered under the scheme were, in many cases, significantly lower than under the previous, compensation-based scheme.
- 1.11 While we considered these submissions carefully, this view is inconsistent with the deliberate policy shift in the VSS to an immediate, flexible and responsive scheme, which is able to meet the needs of victims in a timely manner. This conflates the purpose of the recognition payment with compensation payments. The objective of the VSS is not to provide compensation for specific injuries suffered, but to provide a package of support to meet the victim's needs and a nominal recognition payment, intended not as compensation, but as recognition of the trauma and suffering they have experienced as a result of the crime.
- 1.12 There were also a small number of submissions relating to restitution orders, court-ordered compensation and management of the Victims Support Fund.
- 1.13 Those submissions concerning non-legislative aspects of the VSS were referred to the Commissioner for consideration.

Findings of the Review

- 1.14 Under section 40(6) of the Act, a victim can continue to make claims for financial assistance under that application for up to five years after lodgement or until s/he has received the total amount of financial assistance for which s/he is eligible. As the review commenced only three years after the Act commenced, the majority of claims lodged under the VSS were still open at that date and continue to remain open. As a consequence, the data required to be able to judge the overall efficacy of the VSS and assess the need or otherwise to make substantial changes is not yet available.
- 1.15 We consider that it is premature to recommend any major changes to the VSS. The next review of the Act is due to commence between June 2019 and June 2021. At that point there will be a fuller data picture available about the scheme's operation which will enable a more informed assessment to be made about the operation of the scheme.
- 1.16 We do recommend a number of minor amendments to the Act intended to clarify provisions and address anomalies, which will improve the operation of the Act. These amendments will confirm the policy objectives of the Act and provide more procedurally effective responses to victims, in a timely manner, and do not rely on a longer-term assessment of the VSS while it remains in its infancy.
- 1.17 These recommendations will:
- provide improved access to services and support for victims; and
 - improve administration of the VSS.
- 1.18 We also recommend (Recommendation 17) a number of technical amendments to the Act and the Regulation, set out in Appendix A, to achieve greater efficiency and clarity.

2. Improving access to services and support for victims

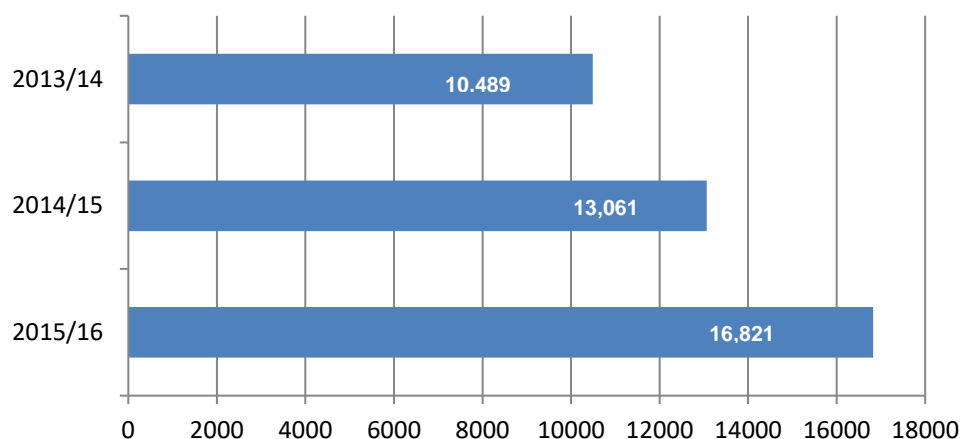
The first three years of operation

2.0 Five kinds of support are available under the VSS:

- information, referral and support;
- counselling;
- financial support for immediate needs (including relocation costs, urgent medical expenses and funeral costs);
- financial support for economic loss, (including loss of earnings and medical expenses); and
- recognition payments to recognise the violence and trauma the victim has experienced.

2.1 During 2015-2016, on average, determination of financial assistance for victims of crime took 26 days from the lodgement of a claim. Nearly 92% of claims were successful in receiving some kind of financial support. In 2015-2016, the Victims Access Line telephone service received a record 102,291 calls and 16,821 applications were made for support. This was an increase of more than 28% on applications lodged in the 2014-2015 financial year. Since the VSS was introduced in 2013, there has been a steady increase in the number of applications received by Victims Services (see Figure 2).¹

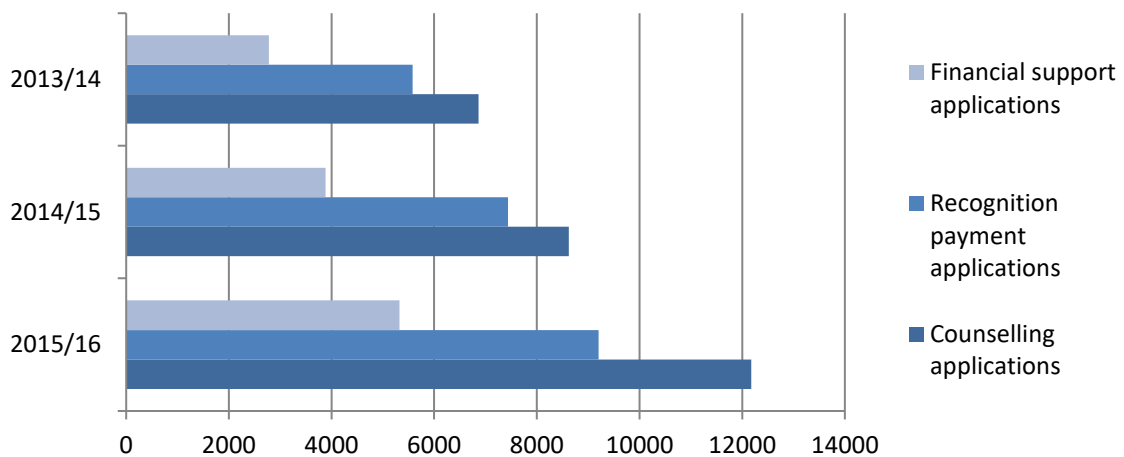
Figure 2: Number of unique applications received by Victims Services (2013/14 – 2015-2016)



2.2 Applications for all forms of support under the VSS (recognition payments, counselling and financial support) have increased each year since the commencement of the Act in 2013 (See figure 3):

1. Victims Services data profiles 2013/14; 2014/15; 2015/16
<<http://www.victimsservices.justice.nsw.gov.au>>

Figure 3: Number of applications received for all forms of support under the VSS (2013-2014 – 2015-2016)

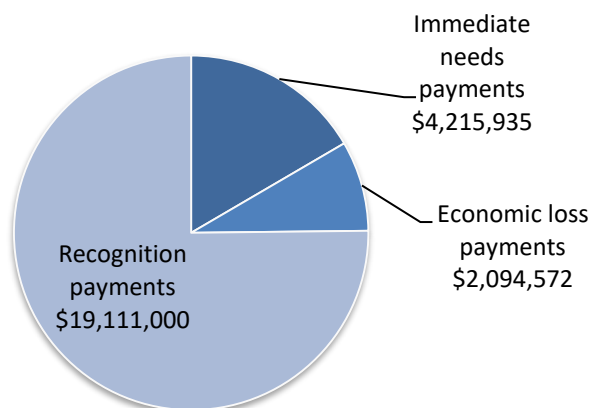


2.3 This data illustrates that an increasing number of victims are utilising the VSS, which shows that the Act is meeting its policy objective of providing support for victims of violent crime. Victims Services received 16,821 unique applications during 2015-2016.² In this period:

- 9,204 applications were lodged for recognition payments;
- 12,176 applications were lodged for counselling; and
- 5,325 applications were lodged for financial support.³

2.4 Figure 4 illustrates the monetary amount paid to victims under the VSS in the 2015-2016 financial year.

Figure 4: Payments made under the VSS (2015-2016)



2. Victims Services data profile 2015/16 <<http://www.victimsservices.justice.nsw.gov.au> >

3. Victims can indicate the support for which they are applying, that is counselling and financial support, on the one application. This is why the number of unique applications is lower than the total of all discrete applications listed above.

- 2.5 We have identified a number of ways to improve the operation of the Act to further the policy objective of providing support for victims of acts of violence. These recommendations relate to:
- providing timely support to victims through changes to documentary evidence requirements;
 - facilitating improved access to counselling;
 - extending the eligibility for recognition payments to additional family members of homicide victims;
 - increasing the amount available for funeral expenses for family victims;
 - facilitating easier enforcement of compensation orders in favour of victims
 - extending the time limit for internal review of victims support decisions; and
 - protecting victims in restitution proceedings against offenders.

Providing timely support to victims through changes to documentary evidence requirements

- 2.6 The object of the VSS is to provide timely interventions for victims in order to quickly respond to victims' needs and assist with their rehabilitation. This object underpinned the VSS reforms from the previous scheme, which provided lump sum compensation payments that involved typically lengthy waiting periods and onerous reporting requirements.
- 2.7 Section 39(2)(a) of the Act requires an application for financial assistance for immediate needs to be accompanied by documentary evidence (such as a medical or police report) sufficient to support, on the balance of probability, the applicant's claim to be a victim of an act of violence. Likewise section 39(2)(b) requires an application for a recognition payment or for financial assistance for economic loss to be supported by a police report or report of a Government agency and a medical, dental or counselling report that verifies the applicant was injured as a result of the act of violence.
- 2.8 A significant number of submissions stated that the current documentary requirements are too restrictive and may operate to deter victims attempting to access the VSS.⁴ This is because police or government agencies may not be a victim's preferred first point of contact when disclosing violence. Victims of domestic violence, child sexual assault and/or physical abuse and sexual assault, who may face significant barriers to reporting violence to the police or other authorities, are much more likely to attend health services shortly after the violence in order to receive treatment for their injuries. The current requirement may also impact disproportionately on marginalised or stigmatised groups, such as Aboriginal or LGBTQI victims, due to a reluctance to engage with law enforcement and government agencies. These victims are more likely to report or

4. See submissions from Community Legal Centres NSW (CLCNSW), Kingsford Legal Centre, Law Society of NSW Young Lawyers Criminal Law Committee, Legal Aid NSW, NSW Health, Public Interest Advocacy Centre, Redfern Legal Centre, The Shopfront Youth Legal Centre, Warringa Baiya and Women's Domestic Violence Court Advocacy Services NSW.

disclose violence to an NGO, such as a community legal centre or refuge, with which they may have an existing relationship.

- 2.9 We recommend that section 39 be amended to allow documentary evidence from a support service (including from an NGO) to be accepted, provided that it contains sufficient detail to establish the relevant act of violence or injury. This is consistent with the intent of the scheme, to assist victims of violence in a responsive and immediate way. 'Support service' is currently broadly defined in section 3 of the Act to include 'welfare, health, counselling and legal assistance services'.

Recommendation 1

Amend section 39 of the Act to allow documentary evidence that an act of violence has occurred and/or that an injury has been sustained to be provided by a 'support service' as defined under section 3 of the Act.

Facilitating improved access to counselling

- 2.10 The Approved Counselling Service provides free individual counselling to victims as part of the support available under the VSS. Counselling is provided on a short-term basis of up to 22 hours, with a clear focus on rehabilitation. Clients may also ask counsellors to support them through their justice journey, for example through providing counselling in preparation for reporting a crime to police, support to attend court, and assistance with preparing a victims impact statement.
- 2.11 Under Division 3 of Part 4 of the Act, primary victims, secondary victims and family victims (ie immediate family members of primary victims) are eligible to receive approved counselling services as part of the support provided under the VSS.
- 2.12 Counselling performs an important function in the rehabilitation of victims. We recommend a number of amendments to the Act and Regulation to facilitate improved access to counselling for certain victims.

Counselling services for victims of child sexual assault and/or physical abuse

- 2.13 Victims Services has advised that in 2015-2016, approximately 1,400 victims applied for victims support in relation to acts of violence committed against them when they were below the age of 18. According to the counselling applications received by Victims Services, a fifth (21%) of the victims who applied for counselling in 2015-2016 were aged 12 years or younger at the time of the act of violence committed against them.⁵ Victims Services has also noted an influx in counselling applications relating to sexual assault incidents that occurred more than 20 years earlier,⁶ which may in part be due to the Royal Commission into Institutional Responses to Child Sexual Abuse.
- 2.14 In 2014, the Government announced that victims of child sexual assault or physical abuse would have access to unlimited counselling through the VSS. The Regulation does not reflect this announcement. We recommend amending the Regulation to

5. Victims Services data profile 2015/16 <<http://www.victimsservices.justice.nsw.gov.au>>

6. Victims Services data profile 2015/16 <<http://www.victimsservices.justice.nsw.gov.au>>

explicitly provide unlimited counselling hours for victims of child sexual assault and/or physical abuse. In practice, the Commissioner will approve further counselling as 'exceptional circumstances' under clause 5(3). Amending the Regulation to reflect this existing practice will provide victims of child sexual assault and/or physical abuse with security and certainty in relation to their counselling entitlements. This will also improve the administrative efficiency of approving counselling hours for these victims, as the Commissioner will no longer need to approve counselling for these victims on a case-by-case basis.

Recommendation 2

Amend the Regulation to provide unlimited counselling hours for victims of child sexual assault and/or physical abuse

Providing immediate counselling

- 2.15 In order to be eligible to receive counselling, an applicant must first provide evidence to establish that s/he is a victim of an act of violence and has sustained an injury as a result. Clause 5(2) of the Regulation allows the Commissioner to authorise an initial two hours of counselling, before the relevant documentary evidence is submitted, where that counselling may assist in establishing whether the person is a victim.
- 2.16 The proposed amendment will provide immediate access to counselling for victims who are too traumatised to obtain the required documentary evidence immediately after the violence occurred. This recommendation, combined with recommendation 1, will ensure fast access to the VSS for some of the most vulnerable victims. The proposed amendment will also assist victims with no physical injuries to obtain a counsellor's report as evidence of psychological injury.

Recommendation 3

Amend the Regulation to empower the Commissioner to make an in-principle finding that an act of violence has occurred, for the purpose of providing 22 hours of counselling before required documentary evidence is submitted.

Counselling for family victims

- 2.17 Currently, family victims are only eligible for 20 hours of initial counselling. This is inconsistent with the entitlement of primary victims, who are eligible for 22 hours. It is unclear why this difference exists and it creates questions as between victims at a stressful and difficult time for no clear policy goal. We propose aligning these limits.

Recommendation 4

Amend clause 5(6) of the Regulation to increase family victims' initial counselling limit to 22 hours.

Counselling in rural and regional areas

- 2.18 A number of submissions noted that there is currently inadequate access to Approved Counsellors in rural and regional areas in NSW.⁷ This is partly due to a limited availability of counsellors in these areas who meet the current eligibility requirements for Approved Counsellors, namely tertiary qualifications in psychology or social work. Victims Services has advised that there exist people with counselling qualifications and experience working with victims, who would be appropriate and effective counsellors under the VSS, yet cannot be approved as they do not hold the necessary tertiary qualifications.
- 2.19 We acknowledge that a lack of access to Approved Counsellors in rural and regional NSW unfairly disadvantages victims seeking counselling in these areas. However, we also note the importance of ensuring a high standard of counsellors under the VSS, given the potential for re-traumatisation of victims through inadequate counselling.
- 2.20 We recommend maintaining the strict eligibility criteria for Approved Counsellors, but providing the Commissioner with discretion to approve appropriately qualified people (that is, those with recognised counselling qualifications, such as a Diploma of Counselling or membership of the Australian Counselling Association) as counsellors in regional and rural areas, where there is a shortage of social workers and psychologists.
- 2.21 To ensure the quality of counsellors, we recommend that the Commissioner be required to have regard to the following factors when exercising the above discretion:
- The experience of the proposed counsellor in dealing with victims of violent crime;
 - Whether there is an existing therapeutic relationship between the proposed counsellor and victims in the relevant area; and
 - Whether there is a shortage of approved counsellors in the relevant area.
- 2.22 The amendment will enable, where appropriate, counsellors who have an existing therapeutic relationship with a victim to be approved under the VSS in order to continue providing counselling to that victim. This prevents victims from having to retell their experience to a new counsellor and risk re-traumatisation.

Recommendation 5

Amend the Regulation to provide the Commissioner with discretion to approve appropriately qualified people as counsellors in rural and regional areas, where there is a shortage of social workers and psychologists.

Counselling services for victims experiencing multiple acts of violence over time

- 2.23 Clause 5(3) of the Regulation states that the Commissioner must not authorise payments for more than 22 hours of counselling services for a person unless

7. See submissions from Barnardos Australia, Homicide Victims' Support Group (Australia) Inc. (HVSG), Legal Aid NSW and Lucinda Gidlow.

satisfied that there are exceptional reasons for doing so. This clause connects the counselling hours that can be assigned to the victim rather than to the act of violence. In contrast, financial assistance under the Act is provided per act of violence.

- 2.24 People may experience separate and unrelated acts of violence throughout their lives. Currently, if a victim of violence uses their 22 hours of counselling for one act of violence, the Commissioner would need to find that there were 'exceptional circumstances' in order to provide counselling to that person for a subsequent act of violence. Victims Services has advised that in 2015-2016, approximately 3,500 victims applied for counselling in addition to the initial 22 hours granted to all victims and Victims Services is increasingly called upon to exercise its discretion.
- 2.25 We recommend that the Regulation be amended so that the limit of 22 hours of counselling applies for each act of violence, rather than per person. This will provide for a victim who makes a subsequent claim for a separate act of violence to be able to access new counselling sessions.

Recommendation 6

Amend clause 5 of the Regulation so that the limit of 22 hours of counselling applies for each act of violence rather than by person.

Clarifying access to recognition payments for family victims

- 2.26 Recognition payments in cases of homicide are intended to provide recognition of the traumatic effect of the homicide on close family members. Section 36 of the Act provides that parents, step-parents and guardians of a primary victim of a homicide qualify for a recognition payment of \$7,500, while a family victim who was financially dependent on the primary victim immediately before their death is eligible for a payment of \$15,000.
- 2.27 We have identified some unintended anomalies in the Act which create inequitable outcomes for certain family victims, namely:
- children who were not financially dependent on the primary victim at the time death; and
 - spouses and partners of primary victims who cannot prove financial dependence.
- 2.28 A child whose parent was the victim of a homicide while the child was not financially dependent on that parent, for example if the child was living in out of home care, is currently not eligible for a recognition payment. We consider that this is at odds with the purpose of a recognition payment to acknowledge the trauma of the loss.
- 2.29 We recommend that any child of a homicide victim should automatically be eligible for a Category A recognition payment of \$15,000 without needing to prove financial dependence on the primary victim. The recognition payment will acknowledge that the homicide of a parent is an extremely traumatic event for a child, regardless of a financially dependent relationship.

Recommendation 7

Extend the application of section 36(1)(a) so that a Category A recognition payment of \$15,000 is payable to any child of the primary victim, provided that the child was aged under 18 at the time of the death of the primary victim.

- 2.30 A current spouse who was financially dependent on the primary victim at the time of death will be eligible for a recognition payment of \$15,000. A current spouse or partner of a homicide victim who was not financially dependent on the primary victim at the time of death is currently not eligible for any recognition payment.
- 2.31 The lack of availability of a recognition payment for these spouses and partners does not recognise the trauma experienced by these family victims. Basing a recognition payment for spouses and partners on financial dependency is inconsistent with the purpose of recognition payments to provide acknowledgment of the traumatic effect of the homicide of close family members.
- 2.32 We recommend that a Category A(b) recognition payment of \$7,500 be payable to current spouses or partners of the primary victim who were not financially dependent on the primary victim at the time of death.

Recommendation 8

Extend the application of section 36(1)(b) so that a Category A recognition payment of \$7,500 is payable to the current spouse or partner of the primary victim at the time of death, if s/he was not financially dependent on the primary victim.

Increased financial support for funeral expenses

- 2.33 Clause 11(b) of the Regulation provides that the maximum amount payable to family victims for funeral expenses is \$8,000. This amount has not been amended since the introduction of the Act in 2013 and therefore does not reflect an increase in funeral costs since that time due to inflation.
- 2.34 According to the Australian Securities and Investments Commission, the current median cost of a funeral in Australia is \$9,500.⁸ Victims Services has advised that the average amount sought by family victims to assist with funeral expenses in 2015-2016 was between \$9,000 and \$12,000. The current maximum funeral expenses payment under the Regulation represents less than the median cost of funerals in Australia.
- 2.35 We recommend increasing the maximum amount for funeral expenses to \$9,500. This will account for an increase in costs since the original payment of \$8,000 was prescribed in 2013 and will more accurately reflect the current median cost of funerals.

8. Australian Securities and Investments Commission, Money Smart, *Paying for your funeral*, <https://www.moneysmart.gov.au/life-events-and-you/over-55s/paying-for-your-funeral>

Recommendation 9

Amend clause 10(2) and clause 11(2) of the Regulation to increase the prescribed maximum amount payable for funeral expenses from \$8,000 to \$9,500.

Facilitating the enforcement of compensation orders by victims

- 2.36 Under Part 6 of the Act, a court that convicts a person of an offence can order the offender to pay compensation not exceeding \$50,000 to a victim for that crime. If the offender does not pay that amount to the victim, the victim then needs to take enforcement action through a civil court. It is important to ensure that victims are able to enforce these compensation orders, as section 25 of the Act prevents a victim that is entitled to be paid compensation under Part 6 from being eligible for receiving victims support under the VSS.
- 2.37 Victims of crime, who become creditors of their offender, are at a particular disadvantage when it comes to enforcing compensation orders. Victims of crime do not always know the name or address of the offender, as there may not have been a pre-existing relationship. Debt enforcement options require the creditor to provide certain details on an application to initiate enforcement action. Victims of crime face more significant obstacles than other creditors seeking recovery of civil debts, since people in civil disputes generally have a pre-existing relationship with the person with whom they are in dispute, often of a contractual nature.
- 2.38 While an offender's details are usually contained within the record of the criminal proceedings held by the court, there is no provision in the Act to allow court staff to release this information to the victim for the purpose of debt recovery. Section 75 of the Act authorises police and other government officers to provide information about the offender's address to the Commissioner to enable the serving of a provisional restitution order or taking any other action to enforce a restitution order, but does not cover court ordered compensation.
- 2.39 We recommend that an equivalent provision be included in the Act to permit court registry staff to provide information about the offender's address and date of birth to the victim who has a compensation order to enforce. This amendment will enable victims of crime to overcome obstacles that they may face as creditors and will help to facilitate the enforcement of compensation orders in favour of victims.

Recommendation 10

Include a new section in Part 6 of the Act, equivalent to section 75, to permit court staff to provide information about the address and date of birth of the offender to the victim for the purpose of taking action to enforce a compensation order made by the court in the victim's favour.

Improving fairness through extending the time limit for internal review

- 2.40 Section 49(1) of the Act enables an applicant for victims support to apply to the Commissioner for an internal review of a decision relating to victims support. Section 49(2) requires the application to be made within 28 days after the applicant being given notice of the decision.
- 2.41 A number of submissions stated that the current time limit may not provide applicants with sufficient time to consider review options and may operate to prevent some victims from accessing their review rights under the VSS.⁹
- 2.42 The issues to be considered in an internal review may be quite complex. The applicant may need to seek legal advice to assist in preparing an application for a review. Kingsford Legal Centre noted in its submission that clients commonly have to wait two or three weeks for an appointment. Additional time would then be required to prepare the application and any submissions to accompany it. These delays can have an impact in a 28 day time period.
- 2.43 Similar concerns regarding the adequacy of the time limit are shared by other community legal centres who have noted that the time limit may impact disproportionately on vulnerable victims, including young people, people with mental health issues and Aboriginal people, and may limit their access to justice.
- 2.44 Extending the time limit to three months will enhance fairness of the VSS by providing adequate time to seek internal review.

Recommendation 11

Amend section 49(1) of the Act to extend the time limit for an application for internal review to three months.

Protecting victims in restitution proceedings against offenders

- 2.45 Under Part 5 of the Act, the Commissioner can make a restitution order against a person found guilty by a court of a crime that gave rise to a payment under the VSS. The Commissioner must first make a provisional restitution order and provide the defendant with 28 days (or a longer period to be determined by the Commissioner) to lodge an objection after the order is served. After considering any objection, the Commissioner may confirm, reverse or vary the provisional restitution order. A defendant who is unsatisfied with the Commissioner's determination of the objection may apply to the NSW Civil and Administrative Tribunal (**NCAT**) for administrative review of the original decision.
- 2.46 NCAT proceedings in relation to restitution orders are between the Commissioner and the offender. The victim has no involvement in the process and is not a party to the proceedings before NCAT. However, there is currently no provision in the

9. See submissions from Community Legal Centres NSW (CLCNSW), Kingsford Legal Centre, Law Society of NSW, The Shopfront Youth Legal Centre and Warringa Baiya.

- Act to prevent the offender issuing a summons compelling the victim to give evidence in proceedings before NCAT.
- 2.47 The prospect of giving evidence in proceedings against the offender could be harrowing for the victim and may contribute to a feeling of continuing victimisation, particularly if it is within the context of a domestic violence relationship. We consider that a victim should be non-compellable in restitution proceedings before NCAT.
- 2.48 Furthermore, documents held by Victims Services in relation to the application for victims support, such as medical reports detailing the ongoing effects of domestic violence and sexual assault, are currently provided to NCAT in restitution proceedings in accordance with the *Administrative Decisions Review Act 1997*. These documents are provided to NCAT as they are used in the determination of support under the VSS and provisional restitution orders are made in relation to crimes that have given rise to a payment under the VSS.
- 2.49 In accordance with procedural fairness, documents submitted as evidence in restitution proceedings are made available to offenders. The provision of medical reports to offenders in restitution proceedings may be detrimental to a victim's sense of autonomy and personal safety. Particularly in cases of domestic violence and sexual assault, medical reports detailing the ongoing effects on a victim could be used by the offender to continue to intimidate or control the victim.
- 2.50 We recommend that the Act be amended so that medical reports are provided to NCAT for the purpose of determining a restitution order, but withheld from defendants to protect victims' privacy and risk of re-victimisation.
- 2.51 While we acknowledge the importance of procedural fairness, we consider the public interest of protecting victims' privacy and safety to outweigh procedural fairness concerns in restitution proceedings. This reasoning is similar to the rationale for the introduction of the sexual assault communications privilege in sexual assault proceedings under Division 2 Part 5 of the *Criminal Procedure Act 1986*. We note that under the *Criminal Procedure Act 1986* the accused faces a criminal conviction, while in restitution proceedings, a conviction has already been made and the offender faces a civil order.

Recommendation 12

Insert new provisions into Part 5 of the Act to provide that:

- a victim is a competent but non-compellable witness in restitution proceedings before NCAT; and
- medical reports supporting the original application for victims support are not provided to applicants in restitution proceedings.

Ensuring victims are not disadvantaged by reporting delays

- 2.52 Sub-sections 44(1)(b) and 44(1)(c) of the Act require the Commissioner to have regard to 'whether the act of violence was reported to a police officer within a reasonable time' and 'whether the act of violence was reported to a relevant health professional or practitioner, or a relevant agency' in determining whether or not to approve giving victims financial support or a recognition payment.
- 2.53 These subsections are not necessary and are at odds with the reporting requirements already detailed under section 39 of the Act. There are often significant reasons why a victim may delay reporting an act of violence. These subsections are also inconsistent with our recommendation to allow documentary evidence from a support service. We recommend repeal of these subsections.

Recommendation 13

Remove sub-sections 44(1)(b) and 44(1)(c) of the Act.

3. Improving the administration of the VSS

- 3.0 We recommend three key amendments to improve the operation of the VSS through ensuring its financial sustainability. In its 2012 review of the old scheme, PricewaterhouseCoopers (**PwC**) found the scheme to be financially unsustainable. PwC estimated the contingent liability of the old scheme to be \$392 million at June 2012, projected to increase annually by \$38 million due to claims life and the assessed liability of unpaid claims.

Length of claims life under the VSS

- 3.1 Section 40(6) of the Act provides that applications for victims support remain open for five years, allowing the victim to continue to make claims for financial assistance during that period or until the maximum amount of financial support is exhausted.
- 3.2 Some victims lodge applications and then do not supply evidence to enable their application to be assessed and funded, despite being contacted by Victims Services on multiple occasions. There are currently more than 6,145 applications which cannot be progressed due to lack of supporting documentation. These applications remain open for the full five-year period and contribute to the contingent liability of the Victims Support Fund.
- 3.3 We consider that the Commissioner should be given the power to lapse an application if evidence has not been provided within 12 months of the last correspondence, unless the victim can demonstrate a good reason for the delay. In order to protect victim's interests, we recommend that before lapsing an application, the Commissioner be required to attempt to contact the victim on at least three occasions, if possible by multiple communication methods.
- 3.4 Lapsing an application does not prevent the victim from submitting a new application in the future, provided that they are within the application time limits set out at section 40 of the Act. In general, the time limit for financial support or a recognition payment is two years from the relevant act of violence, or two years

from a child victim turning 18 years of age. There are exceptions for recognition payments for sexual assault, domestic violence and child abuse victims, who can apply at any time up to ten years after the relevant act of violence, or ten years from a child victim turning 18 years of age. There is no time limit for a victim of child sexual assault to apply for a recognition payment.

- 3.5 The proposed amendment will reduce the contingent liability of the Victims Support Fund and ensure a more accurate representation of the number of open applications under the VSS. This will enable a more accurate evaluation of the operation of the VSS.

Recommendation 14

Include a new section of the Act to empower the Commissioner to lapse an application for which the supporting evidence was not lodged within twelve months of the last correspondence, unless there is a good reason for the delay, provided that the Commissioner has first attempted to contact the applicant on at least three occasions.

Taking into account money received from another source

- 3.6 The VSS is a scheme of last resort designed to assist victims who are not able to obtain financial support from elsewhere, such as insurance claims or other forms of compensation. The priority for the funding of the VSS must be to support those victims who have no other recourse to assistance.
- 3.7 Section 48 of the Act empowers the Commissioner to demand repayment of victims support where, after the victims support has been paid, the Commissioner becomes aware that the applicant received money from another source in respect of the same act of violence. However, where an applicant receives money from another source before receiving victims support, and does not disclose this, the Commissioner currently has no power to withhold the victims support payment when the Commissioner becomes aware of this.
- 3.8 This unintended anomaly results in inconsistencies in the Commissioner's powers and is inequitable as between users of the VSS. To ensure consistency, the Commissioner should be given the power to withhold payment of victims support where the Commissioner becomes aware that the applicant has previously received money from another source.

Recommendation 15

Amend section 48 of the Act to make approval of victims support subject to an additional condition that the victim must notify the Commissioner of any money already received from other sources, in connection with the relevant act of violence.

Recommendation 16

Amend section 54 of the Act to empower the Commissioner to withhold the payment, should the Commissioner become aware that the applicant has received but not disclosed an amount from another source.

4. Technical amendments to the Act and the Regulation

- 4.0 In addition to the issues discussed in this Report, we recommend a number of technical amendments to the Act and the Regulation to ensure that they operate as intended.
- 4.1 A table setting out these recommendations is contained at Appendix A. These recommendations have not been discussed in detail above because they do not relate to the structure or purpose of the Act or Regulation and will not result in significant policy changes to the VSS.

Recommendation 17

Amend the Act and the Regulation to incorporate the technical amendments listed in Appendix A.

Appendix A – Technical Amendments to the Act and Regulation

	Recommendation	Rationale
1	Insert a new section into the Act to empower the Commissioner, after considering and determining an application, to correct an administrative or clerical error without conducting an internal review.	<p>Once an application for victims support has been determined, there is no mechanism in the Act to enable the correction of a decision maker's clerical error, such as the recording of an incorrect amount of reimbursable expenses.</p> <p>An applicant can seek an internal review of the decision from the Commissioner under section 49 of the Act. However, only one internal review is provided for. Failing to provide a mechanism to correct clerical errors disadvantages victims by requiring them to utilise their only internal review right for a minor error, rather than a substantive decision which they wish to appeal.</p>
2	Amend sections 40(2) and 40(4) of the Act to allow for an exemption to the two year time limit for an application for a recognition payment by a family victim where it is subsequently established that the primary victim died as a result of the act of violence. The application must be made within two years of it being established that the act of violence directly led to the death.	This recommendation would be consistent with an existing exemption to the two year time limit at section 40(2) of the Act, which applies to an application for financial support by a family victim in the same circumstances. Section 40(3) requires such an application to be made within two years of it being established that the primary victim died as a direct result of the act of violence.
3	Amend section 44(1)(a) of the Act to remove the word 'condition'.	<p>Section 44(1)(a) provides that in determining the amount of financial support to be given or recognition payment to be made, the Commissioner may have regard to 'any... condition... of the primary victim concerned that directly or indirectly contributed to the injury or death sustained by the victim.'</p> <p>The term 'condition' is ambiguous and could be interpreted to apply to an impairment caused by a disability of the victim. This could lead to discriminatory outcomes for people with a disability, who may be held responsible for systematic issues that increase their vulnerability. The remaining terms: "behaviour (including past criminal activity), attitude or disposition" provide sufficient scope for the Commissioner to determine the amount of financial support and recognition payment.</p>
4	Amend section 58 of the Act to change the definition of "relevant offence". Sub-section (c) should clarify that a relevant offence for which restitution against a	Subsection (c) currently states "an offence involving one or more acts of a series of related acts (within the meaning of section 19 (4)) in respect of which victim support is given under this

	convicted offender may be pursued is “an offence that is one of those acts constituting an act of violence in respect of which victims support is given.”	Act”. The reference to section 19(4) is unnecessary and causes confusion.
5	Amend schedule 2, clause 16(1) of the Act to replace the second reference to “Part 5” with “Part 4”.	The second reference to “Part 5” is a drafting error.
6	Amend the Regulation to allow payment to be provided for Approved Counsellors running programs on an hourly basis.	<p>Clause 5 of the Regulation provides for the authorisation of payments for approved counselling services and clause 6 details the amounts of these payments.</p> <p>NSW Health noted in its submission that due to the restrictive remuneration structure under the Regulation, NSW Health services can be disinclined to refer clients to Victims Services for counselling, where they believe that a more holistic, case management or family-based intervention is necessary.</p> <p>Victims Services has developed, in partnership with Approved Counsellors, successful group counselling programs and programs within prisons and Juvenile Justice Detention Centres. However, the current Regulation means that counsellors running these programs are provided payment based on the hours provided to each victim in the group, rather than an hourly rate for the group as a whole.</p> <p>The recommendation will enable the Commissioner to approve group counselling programs and for the payment of the relevant counsellors at an hourly rate, irrespective of the number of victims involved in the group programs.</p>
7	Amend clause 7 of the Regulation to clarify the calculation of actual loss of earnings.	The current calculation process is complex and refers to the <i>Workers Compensation Act</i> , as in force in 2012, which has changed substantially since then. This recommendation will make no substantive change to the amount, but is designed simply to make it easier to understand the calculation method.
8	<p>Amend clause 4 of the Regulation to:</p> <ul style="list-style-type: none"> ▪ Replace any use of ‘generalist counsellor’ with ‘generalist counsellor tier 1’; ▪ Replace any use of ‘specialist counsellor’ with ‘generalist counsellor tier 2’; ▪ Delete the definition of ‘specialist counsellor’; ▪ Define ‘generalist counsellor tier 2’ as a person who: <ul style="list-style-type: none"> ➢ has been a generalist counsellor with the Approved Counselling Service for more than three 	<p>Clause 4 of the Regulation currently provides for ‘generalist counsellors’ and ‘specialist counsellors’. A ‘generalist counsellor’ is defined as a registered psychologist or a person eligible for membership of the Australian Association of Social Workers (other than as a student member). A ‘specialist counsellor’ is a person who holds general registration under the Health Practitioner Regulation National Law to practise as a psychologist, or is eligible for membership of the Australian Association of Social Workers (other than as a student member), and who:</p> <ul style="list-style-type: none"> (a) holds a Masters degree or a higher level qualification, in social work, clinical psychology, clinical neuropsychology, counselling psychology or forensic

	<p>consecutive years;</p> <p>➤ holds post-graduate qualifications consisting of a Masters degree or a higher level qualification in social work, clinical psychology, clinical neuropsychology, counselling psychology or forensic psychology; and</p> <p>in the opinion and at the discretion of the Commissioner, has specialist counselling skills due to the person's qualifications or experience to be deemed a generalist counsellor tier 2.</p>	<p>psychology; or</p> <p>(b) in the opinion of the Commissioner, has specialist counselling skills due to the person's qualifications or experience.</p> <p>There has been confusion among practitioners around the eligibility requirements to be classified as a specialist counsellor, with some practitioners assuming that holding post-graduate qualifications is sufficient. In fact, 'specialist counsellors' are intended to be those counsellors who have been involved with the Approved Counselling Services for some time. Victims Services receives numerous applications from unqualified practitioners seeking to become 'specialist counsellors'. Assessing these applications on a case-by-case basis is time and resource intensive.</p> <p>Replacing 'generalist' and 'specialist' with 'generalist tier 1' and 'generalist tier 2' will mitigate misconception of the 'specialist' eligibility criteria. This amendment is in line with the Psychology Board of Australia Guidelines, which recommend against use of the word 'specialist' for practice and legalistic reasons. The proposed new definition of 'generalist counsellor tier 2' makes it clear that this group of counsellors is required to have past involvement with the Approved Counselling Service.</p> <p>The definition of psychiatrists will not be affected.</p>
9	<p>Amend section 112A of the Act to provide that, where a victim of crime is a minor or lacks capacity, a victims rights agency may disclose information to the parent or legal guardian of the victim in accordance with that section.</p>	<p>Under section 112A of the Act, victims rights agencies (such as the Department of Family and Community Services) may disclose information, to which victims are entitled under the Charter of Victims Rights, to victims of crime or family victims. Section 112A does not currently allow information to be disclosed by victims rights agencies to the parents or legal guardians of victims of crime.</p>

Appendix B – Conduct of the Review

- B.1 The Review was announced and submissions called for on 3 June 2016 on the Justice, Victims Services and Have Your Say websites. The Review was also publicised on the Department's Facebook page and Twitter feed.
- B.2 The Department wrote to key stakeholders notifying them of the Review and inviting submissions. Letters were sent to relevant government agencies, NSW heads of jurisdiction, victim advocacy groups including Homicide Victims Support Group, Victims of Crime Assistance League (**VOCAL**) and Rape and Domestic Violence Services Australia, NGOs representing specific population sectors, Community Legal Centres NSW and stakeholders from the legal profession including the Law Society of NSW and NSW Bar Association.
- B.3 Submissions closed on 29 July 2016. In total 25 submissions were received (see list of submissions at Appendix C).
- B.4 The Department consulted representatives from the Department of Family and Community Services, NSW Health, Office for Police, NSW Police Force, the Department of Premier and Cabinet and NSW Treasury.
- B.5 The Department also consulted directly with representatives from Victims Services and the Commissioner. Victims Services provided statistics and operational knowledge in support of the Review.

Appendix C – List of submissions to the Review

- C.1 Barnardos Australia
- C.2 Community Legal Centres NSW
- C.3 Corrective Services NSW
- C.4 Court and Tribunal Services Department of Justice
- C.5 Deaf Society of NSW
- C.6 Department of Family and Community Services NSW
- C.7 Homicide Victims' Support Group
- C.8 Jodi Sentence
- C.9 Kingsford Legal Centre
- C.10 Law Society of NSW
- C.11 Law Society of NSW Young Lawyers Criminal Law Committee
- C.12 Legal Aid NSW
- C.13 Michelle Aorangi
- C.14 Nita Hidalgo
- C.15 NSW Health
- C.16 NSW Police Force
- C.17 People with Disability Australia
- C.18 Public Interest Advocacy Centre
- C.19 Redfern Legal Centre
- C.20 Support After Murder
- C.21 Tanith Chippendale
- C.22 The Shopfront Youth Legal Centre
- C.23 Victims Services NSW
- C.24 Wirringa Baiya Aboriginal Women's Legal Centre
- C.25 Women's Domestic Violence Court Advocacy Services NSW