

15 November 2022

Dr Jackie Hartley
The Law Reform and Sentencing Council Secretariat
NSW Department of Communities and Justice
By email: sentencingcouncil@justice.nsw.gov.au

Dear Dr Hartley,

Additional submissions to Consultation Paper on Fraud

Thank you for the opportunity to provide a submission to the NSW Sentencing Council's Consultation Paper on Fraud (**Consultation Paper**).¹

We make these brief submissions as an addendum to the Women's Legal Service NSW (**WLS NSW**) "Response to Consultation Paper on Fraud" (**WLS NSW Response**)² (attachment A) submitted on 11 November 2022, which we endorsed.

Background: Western Sydney University Justice Clinic

The [Western Sydney University Justice Clinic](#) (**WSU Justice Clinic**) is a community legal service, where practicing lawyers and academics work on client cases and law reform and access to justice projects, run health justice outreach clinics, provide community legal education, operate the university's student legal service, and teach the university's clinical legal and internship subjects.

Part of our caseload involves working directly with victim-survivors of family violence, sexual violence and modern slavery, and it is in relation to these victim-survivors that we make these submissions.

Additional submissions to WLS NSW Response

- 1.1 We consider it important to recognise the impact of coercive control and intimate partner violence (**IPV**), in relationships involving either domestic and family violence (**DFV**) or modern slavery, for people who may *commit* fraud offences in the context or aftermath of those abusive relationships, or be the *victims* of the fraud in that context.
- 1.2 For ease of reference, we refer to these relationships as 'abusive relationships' throughout these submissions.
- 1.3 While the written WLS NSW Response largely focused on the perpetrators of fraud in the context of abusive relationships, our focus in these additional submissions is on the victims of fraud in abusive relationships.

¹ NSW Sentencing Council, *Consultation Paper: Fraud* (September 2022) (**Consultation Paper**).

² Women's Legal Service NSW, "Response to Consultation Paper on Fraud" (**WLS NSW Response**), submitted 11 November 2022.

Question 3.1: Victim impact statements

- 2.1 We support victim impact statements (VIS) under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (***Sentencing Procedure Act***) being extended to victims of fraud and fraud-related offences perpetrated within or after an abusive relationship.
- 2.2 Section 27(4)(c) of the *Sentencing Procedure Act* currently appears to allow for a VIS for a fraud and related offence under Part 4AA of the *Crimes Act*, as it is an offence referred to in Table 1 of Schedule 1 to the *Criminal Procedure Act 1986* (NSW) (***CPA***). However, this is only possible where the fraud offence results in actual physical bodily harm to any person (27(4)(c)(i)) or involves an act of actual or threatened violence (27(4)(c)(ii)).
- 2.3 In the case of abusive and coercive control relationships as we have defined, there is often no physical bodily harm though there may be extensive psychological injury. It may also be difficult to prove actual or threatened violence in a relationship of coercive control, as is well documented and particularly where the issue of defining and criminalising coercive control in legislation is still being debated and clarified in NSW.
- 2.4 Rather than try to wrestle with the current provisions in an attempt to include VISs for abusive relationships, it would be more effective to amend sections 27(2) and 27(4) of the *Sentencing Procedure Act* to ensure that fraud and fraud-related offences being prosecuted in either the Local Court or District Court are included for victims of an abusive relationship, and removing the additional requirements in sections 27(4)(c)(i)-(ii).
- 2.5 Extending VISs in this way would acknowledge the experiences of victims and assist recovery, potentially raise victim vulnerability or emotional impact of the victim as an aggravating factor upon sentence, and build a greater understanding and evidence base of coercive control and abusive relationships.

Question 3.3: Reparation

- 3.1 While fraud is often underreported and known to have one of the lowest reporting rates of all crimes,³ we submit that fraud in abusive relationships is drastically underreported. Many of the reasons for this are contained within the Consultation Paper.⁴ In the cases we see, the priority for victims in abusive relationships is to meet their immediate needs, which often include emergency accommodation, relocation, child safety, food, living expenses, visa security and psychological support. Criminal prosecution, including prosecuting any fraud, is usually well down the list of priorities.
- 3.2 However, this is not to suggest that victims may not feel strongly that perpetrators should be held accountable or that victims should be compensated for any loss. There is an immediate and

³ Consultation Paper [3.20], p 27, citing C Cross, *Preliminary Submission PFR04*, 2; NSW Bar Association, *Preliminary Consultation PFC07*.

⁴ Consultation Paper, [3.21ff], p 27ff.

overwhelming need for financial assistance to recover from abusive relationships. This need may be even greater where fraud is a factor.

- 3.3 Unfortunately, the avenues to pursue that particular loss are limited, unrealistic and onerous for victims of abusive relationships. As noted in the Consultation Paper, “[i]nitiating a civil action for recovery would be an unsuitable option for many victims as it involves the investment of further time and resources without a guaranteed return”.⁵ Importantly, the very system that is established in NSW to support victims, being the NSW Victims Support Scheme (VSS) under the *Victims Rights and Support Act 2013 (NSW)*(VRSA) does not apply to victims of fraud. Only victims of an act of violence or act of modern slavery can make applications for victims support.⁶ While victims of abusive relationships we are discussing may make victims support applications, the financial assistance available to victims is restricted and does not include any financial loss resulting from fraud.⁷ For further analysis of the VRSA and some of its deficiencies in meeting the needs of victims of abusive relationships, we have attached our submissions to the statutory review of the VRSA from July 2022 (attachment B).
- 3.4 We acknowledge the difficulties in enforcing reparation orders, particularly where it is rare for the offender to have the means to make reparation and where courts may consider an offender’s financial circumstances when exercising their discretion to make a reparation order.⁸ However, the monetary amounts that have been obtained fraudulently by the perpetrator in an abusive relationship scenario are often minimal comparative to other fraud offences. This means that the jurisdictional limits in the Local Court (\$100,000) and the District Court (\$750,000) should not present a barrier to making a reparation order in an abusive relationship context. Also, the likelihood of the offender being able to repay the monetary amount is more likely and not as far-fetched, which may be persuasive to a court considering making a reparation order.
- 3.5 For example, in a recent case we have worked on, the victim in an abusive relationship had approximately \$5,000 taken from her over the course of her relationship with the perpetrator in what could potentially be framed (amongst other offences) as ‘romance fraud’. We propose that seeking reparation of that \$5,000 from the offender is not unrealistic.
- 3.6 For further context, the Commissioner of Victims Rights is empowered under Part 5 of the VRSA to recover victims support payments that have been made under the VSS from offenders where they have been found guilty of the crimes giving rise to the payments. The total amount that can be recovered under such a reparation order is the amount of any financial support or recognition payment awarded to the victim.⁹ The majority of applications we have been involved in over a period of some years have involved an average monetary award of between \$1,500 - \$10,000 for victims of abusive relationships, although we note that these figures are not definitive and are happy to seek clarity given more time and if requested. If it is reasonable for

⁵ Consultation Paper, [3.55], p 34.

⁶ *Victims Rights and Support Act 2013 (NSW)*(VRSA), section 38(1).

⁷ VRSA, sections 26(1)(b)-(c) and the *Victims Rights and Support Regulation 2019 (NSW)*, Part 3.

⁸ See, for example, VRSA section 99(c), which allows the court to have regard to “such other matters as it considers relevant” in determining whether or not to make a compensation order.

⁹ VRSA, section 60(5).

the Commissioner of Victims Rights to make restitution orders where the estimated average monetary amount to victims of abusive relationships is between \$1,500 - \$10,000, surely there is an argument that reparation orders as an adjunct to sentencing in fraud offences are reasonable in the same context.

- 3.7 We strongly support momentum to encourage and use reparation orders as an adjunct to sentencing, in fraud cases involving abusive relationships. We will put some more thought into how the use of reparation orders at sentencing should be encouraged. It may be a matter of building awareness among legal practitioners and courts of the relevant provisions and how to seek the orders. For example, in the recent case mentioned above, we will liaise with the prosecuting police to seek an order upon conviction where the perpetrator may be charged with a relevant fraud offence. It may also be that raising awareness about reparation orders and how they may assist victims, falls within the remit of the Commissioner of Victims Rights and the NSW Attorney-General, who are responsible for the VRSA.

Question 8.2: Tiered maximum penalties

- 4.1 As noted in the Consultation Paper, *“quantum of fraud may not always be the most appropriate measure of the seriousness of the offence”*¹⁰ and *“a fraud in relation to a relatively small amount may still be considered more serious because of the detrimental impact on a victim of small means”*.¹¹ This is true of many abusive relationships involving fraud where the victim often has limited means or earning potential, and is why we submit that caution should be exercised in introducing tiered maximum penalties under section 192E of the *Crimes Act* according to the value of the fraud.
- 4.2 However, we also note that a tiered approach may help ensure low level frauds and offending are subject to lower maximum penalties, which may assist the offender cohort where the offender has perpetrated the fraud due to an abusive relationship, as documented in the WLS NSW Response.
- 4.3 It may be that where tiered maximum penalties are introduced, appropriately acknowledging a victim’s vulnerability as an aggravating factor at sentencing becomes more important and needs clarifying, as discussed below.

Question 8.8: Aggravating factors

- 5.1 We submit that an aggravating factor in sentencing of fraud offences is where the victim and perpetrator of the crime were in an abusive relationship, or had been in an abusive relationship, at the time of the offending.
- 5.2 In some cases, it may be that the current aggravating factors to be taken into account under section 21A(2) of the *Sentencing Procedure Act* cover that scenario. For example, where the offence was committed in the home of the victim (section 21A(2)(eb)), where the injury, emotional harm, loss or damage caused by the offence was substantial (section 21A(2)(g)), or the victim was vulnerable (section 21A(2)(l)).

¹⁰ Consultation Paper [8.28], p 114.

¹¹ Consultation Paper [5.22], p 51.

5.3 However, to appropriately recognise the experiences of the victim and the context and seriousness of the perpetrator's actions, we consider it preferable to explicitly include this circumstance as an aggravating factor. This is also an important part of a system-wide response to coercive control.

5.4 The amendment could be made in two ways. The first would be to introduce a new section 21A(2)(q), "where the victim and perpetrator of the crime were in an abusive relationship, or had been in an abusive relationship, at the time of the offending". The second would be to expand the current category of vulnerable victim under section 21A(2)(l) to explicitly include victims in an abusive relationship. For example, "(l) the victim was vulnerable, for example, because the victim and perpetrator of the crime were in an abusive relationship, or had been in an abusive relationship, at the time of the offending". This expansion of the vulnerable victim category appears to fall well within the purview of the provision.¹²

For further discussion on the above, please contact me at [REDACTED] or T.

[REDACTED].

Yours faithfully,

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Rebecca Dominguez
Principal Solicitor
Western Sydney University Justice Clinic

Encl.

Attachment A: Women's Legal Service NSW, Response to Consultation Paper on Fraud, [here](#)
Attachment B: WSU Justice Clinic, Submissions to the statutory review of the *Victims Rights and Support Act 2013* (NSW), *attached*

¹² See further Judicial Commission of NSW, *Sentencing Bench Book*, [11-170].

10 July 2022

Policy, Reform and Legislation
NSW Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2123
By email: policy@justice.nsw.gov.au

Dear Director of Policy, Reform and Legislation,

Thank you for the opportunity to provide a submission on the Background Paper¹ to the statutory review of the *Victims Rights and Support Act 2013 (NSW)*(the Act).

Background: Western Sydney University Justice Clinic

The [Western Sydney University Justice Clinic](#) is a community legal service, where practicing lawyers and academics work on client cases and law reform and access to justice projects, as well as operate the university's student legal service and run the university's clinical legal and internship subjects. Part of our case load involves working with victim-survivors of family violence, sexual violence and modern slavery to recovery from their trauma, violence and abuse by obtaining victims support through the NSW Victims Support Scheme (VSS).

Summary of recommendations

We consider that the eight (8) specific policy objectives of the Act remain valid, however, the terms of the Act require update or reform to appropriately meet those policy objectives. We have set out our recommendations in line with the Background Paper and policy objectives parts (2) Victims Rights, (4) Victims Support Scheme, and (5) Recovery of victims support payments from offenders. A summary is provided here, with further detailed commentary following.

Victims Rights (Part 2)		
1.	Explicitly recognise international human rights law in the Act (crime and modern slavery)	In the interests of strengthening domestic law in relation to international human rights declarations such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and expressly recognising the importance of the Act in acknowledging the experiences and trauma of victims and assisting their recovery, consideration should be given to including reference to the UN Declaration in section 4 of the Act. This would help to meet the policy objective of Part 2 of the Act.
2.	Explicitly recognise international human rights law in the Act (modern slavery)	In the interests of strengthening domestic law in relation to international human rights declarations, particularly where consideration is being given to including reference to other UN instruments in the Act, and expressly recognising the importance of the Act in acknowledging the experiences and trauma of victims

¹ NSW Department of Communities and Justice, *Background Paper: Statutory Review of the Victims Rights and Support Act 2013* (April 2022) (**Background Paper**).



		and assisting their recovery, consideration should be given to including reference to the UN Convention against Transnational Organized Crime and the Palermo Protocol in section 4 of the Act. This would better meet the policy objective of Part 2 of the Act and ensure that obligations towards victims of modern slavery are appropriately captured.
3.	Amend problematic definition of “modern slavery” under section 5 of the Act	Section 5(1) of the Act should be revisited to broaden the definition of “victims of crime” to include modern slavery conduct of a kind referred to in sections 5(1)(a) and 5(1)(b) of the Modern Slavery Act 2018 (NSW). This will ensure that no modern slavery victim-survivors are excluded from accessing or relying upon the Charter’s provisions, which better supports the policy objectives of the Act.
4.	Amend exclusionary Charter of Victims Rights for modern slavery victims	The wording of section 6.17 of the Charter should be amended to reflect that a victim of modern slavery is entitled to make a claim under the VSS, for consistency with the other provisions of the Act in relation to the Scheme, and to meet the policy objective of Part 2 of the Act.
Victims Support Scheme (Part 4)		
5.	Allow modern slavery victims to make applications for acts occurring prior to 1 January 2022	Modern slavery victims should have their applications for support accepted where the act of modern slavery occurred within two years (section 401(1)), or 10 years (section 40(5)), of making their application, regardless of whether the act of modern slavery occurred before or after 1 January 2022. This is consistent with a proper reading of the Act, and the beneficial intent of the VSS.
6.	Amend problematic definition of modern slavery under section 19A(1) of the Act	The definition of “act of modern slavery” under section 19A(1) of the Act should be revisited and redrafted by removing the requirement that only victims of offences under section 93AB of the Crimes Act 1900 (NSW) are eligible to access the VSS.
7.	Remove requirement to separately prove injury	The requirement separately to prove injury under the VSS should be removed as a matter of priority, to establish a more trauma-informed approach to victim’s rights and to contemporise the Act and better meet its policy objectives.
8.	Increase amounts available under categories of recognition payments	Increase the amounts available under each category of recognition payment under sections 35 and 36 of the Act, and regulation 14 of the <i>Victims Rights and</i>



		<i>Support Regulation 2019 (NSW) to reflect inflation and adequately recognise victim's experiences.</i>
9.	Review and update acts of violence and modern slavery in recognition payment categories	Consideration should be given to reviewing and updating the acts of violence and modern slavery detailed in section 35 of the Act to better reflect the severity of offences, and reflect changes and expected changes to NSW offences.
10.	Make Victims Services responsible for collecting evidence and required to provide evidence to victims	Victims Services should bear the responsibility for assisting to collect documentary evidence, such as police material, to assist victims and ensure procedural fairness. Where Victims Services holds a victim's documentary evidence or supporting material, there should be a requirement that Victims Services provides copies of same to the victim.
11.	Remove requirement for victims to provide government-issued identification and bank account details in initial application	Victims Services should no longer require applicants to provide government-issued identification and bank account details as part of their initial applications for victims support, as it causes barriers to accessing support, and is unnecessary and potentially harmful to victim-survivors.
12.	Explicitly establish in the Act and in policy that social security benefits are not affected by VSS payments	The Act needs to explicitly state that a victim's welfare benefits will not be impacted by payments made to the victim through the VSS, and a clear policy or agreement established between Victims Services NSW and Centrelink that the recipient's entitlement to social security benefits is not affected by any payment under the VSS.
13.	Protect against unnecessary internal reviews	To support a victim-centric, trauma-informed, serviceable VSS, original applications and their supporting material should be read beneficially to victims. Further, the discretion for a senior assessor to preserve the original internal review rights of applicants under section 49 where it is clear the original decision was erroneous based on all material available at the time of the original application, should be inserted into the Act.
Recovery of victims support payments from offenders (Part 5)		
14.	Establish assumption that restitution orders will not be made in family violence, sexual violence or modern slavery matters unless victim's consent is sought and obtained	To better protect victims, the Act could establish an assumption that restitution orders will not be made in family violence, sexual violence or modern slavery matters unless the victim's consent is actively sought and obtained by the Commissioner prior to issuing a restitution order.

Detailed response and recommendations

1. Victims rights: recognising and promoting the rights of victims of crime (Policy Objective, Part 2)

Explicitly recognise international human rights law in the Act (crime and modern slavery)

- 1.1 The Act establishes the Charter of Victims Rights originating from the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (**UN Declaration**),² aiming to “safeguard and promote legal protections for victims of crime who have suffered harm as a direct result of a criminal offence”.³
- 1.2 While the Background Paper refers to the UN Declaration, there is no mention of the UN Declaration in the Act. In the interests of strengthening domestic law in relation to such international human rights declarations, consideration should be given to including reference to the UN Declaration in section 4 of the Act, which simply states currently “*The object of this Part is to recognise and promote the rights of victims of crime*”.⁴ For example, the provision could be extended to read, “*The object of this Part is to recognise and promote the rights of victims of crime, and to give effect to Australia’s commitment under the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*”. It will be a matter for the Statutory Review as to whether or how those further principles are expanded upon.
- 1.3 This insertion may also help expressly to recognise the importance of the Act in acknowledging the experiences and trauma of victims of crime and modern slavery, and the powerful role that such recognition and assistance has in helping victim-survivors to recover from their experiences.

Recommendation 1: In the interests of strengthening domestic law in relation to international human rights declarations such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and expressly recognising the importance of the Act in acknowledging the experiences and trauma of victims and assisting their recovery, consideration should be given to including reference to the UN Declaration in section 4 of the Act. This would help to meet the policy objective of Part 2 of the Act.

Explicitly recognise international human rights law in the Act (modern slavery)

- 1.4 The Act was amended from 1 January 2022 to include victims of modern slavery in the Charter’s definition of “victim of crime”.⁵ As noted by Anti-Slavery Australia and the Law Council of Australia,⁶ Australia has international obligations to ensure compensation is

² UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1983, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse>.

³ Background Paper, n1, 3.2.

⁴ *Victims Rights and Support Act 2013 (NSW)(the Act)*, section 4.

⁵ The Act, section 5.

⁶ Anti-Slavery Australia & the Law Council of Australia, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (May 2022)

available to modern slavery victims, including the UN Convention against Transnational Organized Crime (**UN Convention**) and its Palermo Protocol (**Palermo Protocol**).⁷ Particularly where mention is to be made of the UN Declaration in section 4 of the Act, consideration should also be given to including reference to the UN Convention and Palermo Protocol in section 4 of the Act.

Recommendation 2: In the interests of strengthening domestic law in relation to international human rights declarations, particularly where consideration is being given to including reference to other UN instruments in the Act, and expressly recognising the importance of the Act in acknowledging the experiences and trauma of victims and assisting their recovery, consideration should be given to including reference to the UN Convention against Transnational Organized Crime and the Palermo Protocol in section 4 of the Act. This would better meet the policy objective of Part 2 of the Act and ensure that obligations towards victims of modern slavery are appropriately captured.

Amend problematic definition of “modern slavery” under section 5 of the Act

- 1.5 The Charter in Part 2 of the Act attempts to include victims of modern slavery in its definition of “victims of crime” under section 5. However, the current definition only captures modern slavery as defined under section 5(1)(b) of the *Modern Slavery Act 2018* (NSW)(**MSA (NSW)**), which is modern slavery conduct that takes place in the supply chains of organisations.
- 1.6 This definition – intentionally or otherwise – excludes modern slavery as defined under section 5(1)(a) of the MSA (NSW), which is “any conduct constituting a modern slavery offence” as contained in schedule 2 of the MSA (NSW) and including modern slavery offences contained in the *Criminal Code Act 1995* (Cth).
- 1.7 This definition of modern slavery in the Charter is also inconsistent with the definition of modern slavery as found under section 19A of the Act in relation to the VSS. Section 19A(1) of the Act does not exclude section 5(1)(a) of the MSA (NSW) but refers instead to an act “that has apparently occurred in the course of commission of an offence or other conduct constituting modern slavery within the meaning of the *Modern Slavery Act 2018*”. We note that there are also issues with this definition under section 19A, as outlined under paragraphs 2.5 – 2.9 and comment 6 below. This inconsistency is problematic from a statutory interpretation perspective where legislative provisions are intended to give effect to “harmonious goals”⁸ and where any conflict should be resolved to allow provisions to operate coherently.⁹

⁷ United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25 of 15 November 2000, available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25 of 15 November 2000, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>. See further Anti-Slavery Australia & the Law Council of Australia, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (May 2022), pp 4-6.

⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at 381-382.

⁹ *Ibid.*

- 1.8 The drafting in section 5(1) of the Act has the consequence that it greatly limits the cohort of modern slavery victim-survivors included under the Charter and able to rely on the Charter's provisions, i.e. only victims of modern slavery where the modern slavery conduct has taken place in the supply chains of organisations. This has previously been raised as an issue by submissions to the NSW Parliamentary Inquiry into Modern Slavery Act 2018 and Associated Matters.¹⁰

Recommendation 3: Section 5(1) of the Act should be revisited to broaden the definition of "victims of crime" to include modern slavery conduct of a kind referred to in sections 5(1)(a) and 5(1)(b) of the Modern Slavery Act 2018 (NSW). This will ensure that no modern slavery victim-survivors are excluded from accessing or relying upon the Charter's provisions, which better supports the policy objectives of the Act.

Amend exclusionary Charter of Victims Rights for modern slavery victims

- 1.9 The Charter currently specifies under section 6.17 that "*a victim of a crime involving sexual or other serious personal violence is entitled to make a claim under the Victims Support Scheme*". As noted above, (seemingly limited) victims of modern slavery are now included as a victim of crime for the purpose of the Charter under section 5(1).
- 1.10 However, not all conduct involving modern slavery will have a sexual element, and it should be clarified that modern slavery is considered "serious personal violence" (e.g. where a "personal violence offence" or "serious violence offence" typically refers to offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and certain offences under the *Crimes Act 1900* (NSW)). The relevant sections of the Act regarding the VSS¹¹ do not preclude victims of modern slavery from accessing the VSS where their matter does not involve sexual or serious personal violence, as solely defined under NSW criminal legislation.
- 1.11 The wording of section 6.17 of the Act should therefore be changed to correctly reflect and ensure that a victim of modern slavery is entitled to make a claim under the VSS.

Recommendation 4: The wording of section 6.17 of the Charter should be amended to reflect that a victim of modern slavery is entitled to make a claim under the VSS, for consistency with the other provisions of the Act in relation to the VSS, and to meet the policy objective of Part 2 of the Act.

2. Victims Support Scheme (VSS): Establishing a scheme for the provision of support for victims of acts of violence (Policy Objective, Part 4)

Allow modern slavery victims to make applications for acts occurring prior to 1 January 2022

- 2.1 As noted above, the Act was amended from 1 January 2022 by amending provisions of the *Modern Slavery Act 2018* (NSW) to allow victims of modern slavery to access the VSS.

¹⁰ Submission No 88 Women's Legal Service NSW, Inquiry into Modern Slavery Act 2018 and Associated Matters, [19]-[24], pp8-11, available <https://www.parliament.nsw.gov.au/lcdocs/submissions/66196/0088%20Women%27s%20Legal%20Service%20NSW.pdf>.

¹¹ Part 4 of the Act establishes the Victims Support Scheme, and sections 19A and 23 establish that a primary victim of an act of modern slavery is eligible for support under the Scheme.

- 2.2 There does not appear to be any provision within the Act as currently drafted or amended which should prevent a victim of modern slavery from accessing the VSS for acts of modern slavery that occurred within the two years (section 40(1) of the Act) or 10 years (section 40(5) of the Act), prior to making an application for support.
- 2.3 However, in practice, Victims Services NSW have advised that, in the absence of transitional provisions that would expressly allow for victims of modern slavery to make an application for acts occurring within two years or 10 years of making their application, Victims Services NSW will only accept modern slavery applications where the act of modern slavery has occurred since 1 January 2022.
- 2.4 This will potentially lead to significant delays until modern slavery victims will be able to access the VSS, and is not in keeping with the beneficial intent of the VSS or amendments made. It ignores the reality and practical experience of victims, and one of the reasons that the two- and 10- year timeframes exist, and that is due to the time it can take for a victim to acknowledge their experience, report what has occurred, find safety, get support, and seek any financial assistance.

Recommendation 5: Modern slavery victims should have their applications for support accepted where the act of modern slavery occurred within two years (section 40(1)), or 10 years (section 40(5)), of making their application, regardless of whether the act of modern slavery occurred before or after 1 January 2022. This is consistent with a proper reading of the Act, and the beneficial intent of the VSS.

Amend problematic definition of modern slavery under section 19A(1) of the Act

- 2.5 Section 19A(1) of the Act defines an “act of modern slavery” as:
- (1) In this Act, **act of modern slavery** means an act or series of related acts committed in New South Wales, whether committed by one or more persons-
- a) that has apparently occurred in the course of commission of an offence or other conduct constituting modern slavery within the meaning of the *Modern Slavery Act 2018*, and
 - b) that has involved subjecting one or more persons to any form of slavery, servitude or forced labour of a child within the meaning of section 93AB of the *Crimes Act 1900*, and
 - c) that has resulted in injury or death to one of those persons.”
- 2.6 This definition is problematic. The use of the word “and” between sections 19A(1)(a) and 19A(1)(b) and the drafting of section 19A(1)(b) itself effectively means that only victims of slavery, servitude or forced labour of a child within the meaning of section 93AB of the *Crimes Act 1900* (NSW) are eligible to access the VSS.
- 2.7 It is unclear whether it is the legislative intention to restrict access to the VSS to victims falling within the parameters of section 93AB of the *Crimes Act 1900* (NSW) (or indeed

whether that is even necessary given that those offences covered by section 93AB of the *Crimes Act 1900* (NSW) are covered by the offences included within the meaning of the MSA (NSW)).

- 2.8 We submit that the definition should not be so limited, as it effectively excludes all other victims of modern slavery as defined under the *Modern Slavery Act 2018* (Cth) from accessing victims support under the VSS.
- 2.9 Where there is reason to include both sections 19A(1)(a) and 19A(1)(b), we submit that the conjoining “and” should be replaced with “or” or “and/or” to allow for the possibility of conveying options in the alternative and the fullest possible reading of the provisions, and the widest possible cohort of modern slavery victim to be reached.

Recommendation 6: The definition of “act of modern slavery” under section 19A(1) of the Act should be revisited and redrafted by removing the requirement that only victims of offences under section 93AB of the *Crimes Act 1900* (NSW) are eligible to access the VSS.

Remove requirement to separately prove injury

- 2.10 We are a signatory to, and support, the Joint Position Statement on “The case for removing the requirement to separately prove injury in NSW Victims Support applications” of July 2022.
- 2.11 We submit that the requirement under section 19A(1)(c) of the Act to establish injury or death should be removed. This requirement is also included under sections 19(1)(c) for a victim of crime under the Act, and in the documentary evidence required under section 39 of the Act to prove injury.
- 2.12 The requirement to prove injury and the burden of collecting such evidence is burdensome and onerous for victims, as well as being offensive and inappropriate in the context of their traumatic experiences, and defeating the purpose of the VSS as a beneficial scheme.
- 2.13 For example, where a victim has experienced sexual assault or indeed any of the personal violence offences or modern slavery offences, there should be no other requirement to prove harm. It is obvious that such experiences would have a profound, traumatic and injurious effect on a person, whether mentally, physically, socially, sexually or interpersonally.

Recommendation 7: The requirement separately to prove injury under the VSS should be removed as a matter of priority, to establish a more trauma-informed approach to victim’s rights and to contemporise the Act and better meet its policy objectives.

Increase amounts available under categories of recognition payments

- 2.14 The amount of money available to victims under the categories of recognition payments is inadequate and should be increased. While it is acknowledged that there has been growth in demand for victims support under the VSS (part 3.4 of the background paper), and that there are other packages of support available through other federal and NSW support programs (part 2.2 of the background paper), it cannot be underestimated how valuable

recognition payments under this Act can be in a victim's recovery. The inadequacy of the VSS categories of recognition payment, and the potential need for victims to seek other packages of support, detracts from the VSS being a trauma-informed, victim-centric scheme.

- 2.15 For example, under the current VSS, a victim of repeated acts of domestic violence over many years may receive a single category D payment of \$1,500 in recognition of their experiences. A victim of a single personal violence offence occurring on one occasion may also receive a category D payment of \$1,500. A victim of a sexual assault 'involving violence' is eligible for \$5,000 only, unless 'serious bodily injury' or repeated sexual assaults can be proven in which case \$10,000 may be awarded.
- 2.16 While appreciating the difficulties in categorising awards, and welcoming the move away from the previous compensation model of the VSS, we submit that there should be an increase or uplift to these categories of recognition payment to better meet the needs of victims, acknowledge the experience of victims, and bring the amounts into line with inflation and costs of living.

Recommendation 8: Increase the amounts available under each category of recognition payment under sections 35 and 36 of the Act, and regulation 14 of the *Victims Rights and Support Regulation 2019* (NSW) to reflect inflation and adequately recognise victim's experiences.

Review and update acts of violence and modern slavery in recognition payment categories

- 2.17 Further to the above, consideration should be given to updating the acts of violence and modern slavery included in each category of recognition payments to reflect changes to offences involving personal violence, family violence, sexual violence and more. For example, under the current categories detailed in section 35 of the Act, it is difficult to conceive of where the predicted crime of coercive control will be included. Also, as noted, a victim of a single act of violence involving assault may be eligible for a category D payment of \$1,500, as may the victim of repeated acts of domestic violence over many years. This imbalance could be corrected by, for example, including "domestic violence involving violence that is one of a series of related acts" in category B, which would uplift the amount payable.

Recommendation 9: Consideration should be given to reviewing and updating the acts of violence and modern slavery detailed in section 35 of the Act to better reflect the severity of offences, and reflect changes and expected changes to NSW offences.

Make Victims Services responsible for collecting evidence and required to provide evidence to victims

- 2.18 Following changes made in July 2020, the burden of collecting documentary evidence to support applications under section 39 now falls to the victim rather than Victims Services NSW, which raises an issue of procedural fairness. The requirement is onerous to applicants and potentially precludes victims from making applications, from self-representing without legal assistance, and / or from receiving the appropriate financial or other support under the VSS where they cannot gather the required material to support a certain category of violence or modern slavery. It also means that the applicant is out-of-pocket where they need to pay money to access and receive copies of their own information.

- 2.19 Additionally, where a victim opts for Victims Services to collect evidence on their behalf, there is no requirement for Victims Services then to provide applicants with copies of the evidence on which Victims Services is making their decisions.
- 2.20 For example, Victims Services no longer accesses police evidence on behalf of a victim, meaning that victims are required to make formal and paid requests under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) for their own police evidence. Even where Victims Services holds such evidence, Victims Services will not provide it to applicants meaning an applicant will not know what other evidence may need to be submitted to substantiate their application, or on what grounds Victims Services are making their decision.
- 2.21 Another foreseeable issue with victims collecting their own evidence arises in the case of a victim of forced labour (modern slavery) who may wish to apply for financial assistance for economic loss. In this instance, an applicant (the victim of modern slavery) is required under section 39(4) of the Act to provide a “*statement from the employer* [the perpetrator of modern slavery] *substantiating those particulars*” of actual economic loss and to provide a Certificate of Earnings form signed by their employer (the perpetrator of modern slavery), which is clearly problematic.

Recommendation 10: Victims Services should bear the responsibility for assisting to collect documentary evidence, such as police material, to assist victims and ensure procedural fairness. Where Victims Services holds a victim’s documentary evidence or supporting material, there should be a requirement that Victims Services provides copies of same to the victim.

Remove requirement for victims to provide government-issued identification and bank account details in initial application

- 2.22 Victims Services now requires applicants to provide government-issued identification and bank account details as part of their initial application for victims support, which is not articulated in the Act but appears to form part of a new process instigated by Victims Services independent of statute.
- 2.23 This requirement to provide government-issued identification can be a barrier for victim-survivors to access support, particularly within the strict timeframes established by the VSS and especially for the most marginalised in society who may struggle to provide such identification. For example, victim-survivors of family violence, those who are homeless, and those who are incarcerated. There have been instances where it has taken some months for a victim-survivor in prison to be able to locate such identification, seek assistance from within the prison to make a copy and then scan or send it to their representative or Victims Services. It is unclear why providing an incarcerated person’s six-digit Master Index Number (MIN) would not be sufficient identification in these circumstances.
- 2.24 It also appears unnecessary and potentially harmful to a victim-survivor to have to provide their bank account details immediately upon application. This can have a number of consequences. For instance,

- a. in the case of a family violence victim, it may be that their current bank account is shared (willingly or otherwise) by the perpetrator of the crime for which they are seeking support. This can mean that a perpetrator may become aware of the victim's actions and seek retribution against the victim, or receive the benefit themselves. There appears to be no reason why the bank account details should not be provided at a later date once the amount and type of award or support has been decided so that a family violence victim can elect safe payment.
- b. in the case of a victim who may be on a particular type of visa and receiving a Special Benefit or other form of welfare payment from Centrelink, once money has been deposited into their nominated account by Victims Services, they may have their welfare payments suspended or cancelled by Centrelink who can incorrectly perceive the Victims Services payment as 'income'. This issue, which should not occur, is discussed further under paragraphs 2.24 and comment 12 below. Until the issue is resolved, the impact of a victim nominating their bank details in the initial application form means that there is no opportunity for the victim to explain to Centrelink what the money is prior to it being deposited, and preventing the incorrect suspension of their Centrelink benefits.

Recommendation 11: Victims Services should no longer require applicants to provide government-issued identification and bank account details as part of their initial applications for victims support, as it causes barriers to accessing support, and is unnecessary and potentially harmful to victim-survivors.

Explicitly establish in the Act and in policy that social security benefits are not affected by VSS payments

- 2.25 There is nothing in the Act which indicates a legislative intention that a recognition payment received by victim-survivors from Victims Services should be considered "compensation", "income" or in any other way affect a welfare benefit being received from Centrelink by an individual. Guidance provided to victim-survivors by Victims Services NSW also notes that "Your Centrelink payments should not be affected"¹² when accessing the VSS.
- 2.26 Furthermore, the provisions of the *Social Security Act 1992* (Cth)(the **Social Security Act**), clearly state that victims support payments are not regarded as "compensation".¹³ Similarly, victims support payments are exempt from the "income" test under the Social Security Act¹⁴ and the *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Determination 2017* (the **Determination**).¹⁵

¹² Victims Services NSW Department of Communities and Justice, *Victims Support Scheme: Detailed Guide*, (06/2021), p 13, available at <https://victimsservices.justice.nsw.gov.au/documents/how-can-we-help-you/victims-support-scheme/vss-overview/VSS-detailed-guide.pdf>.

¹³ *Social Security Act 1991* (Cth)(the **Social Security Act**), sections 17(2B)-(2C), which specify that "under a law of the Commonwealth, a State or a Territory that provides for the payment of compensation for a criminal injury does not constitute compensation for the purposes of this Act" with "criminal injury" being a personal injury suffered or a disease or condition contracted as a result of the commission of an offence. For the purposes of the Social Security Act, "compensation" refers only to a payment that is made wholly or partly in respect of lost earnings or lost capacity to earn resulting from personal injury (section 17(2)).

¹⁴ Social Security Act, section 8(11).

¹⁵ The *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Determination 2017* (the **Determination**) specifies that "a payment made under the law of the Commonwealth,

- 2.27 It may be open for the *economic loss component* of a victims support payment to be regarded as compensation and affect a Centrelink payment. However, recognition payments awarded under the Act are distinct from the financial support for economic loss available under the Act, and are made to recognise the trauma suffered by a victim and should not be affected.
- 2.28 In practice, recipients of victims support payments from Victims Services have had their Centrelink benefits suspended or cancelled once lump sum payments are paid into their nominated bank account. It then becomes necessary for a victim-survivor or representative to follow up and advocate with Centrelink to have the benefit reinstated.

Recommendation 12: The Act needs to explicitly state that a victim's welfare benefits will not be impacted by payments made to the victim through the VSS, and a clear policy or agreement established between Victims Services NSW and Centrelink that the recipient's entitlement to social security benefits is not affected by any payment under the VSS.

Protect against unnecessary internal reviews

- 2.29 Under Division 7 of the Act, an applicant for victims support may apply for an internal review of the original decision made on their application. The application must be made in writing within 90 days of the original decision, state the grounds for review and provide any further material to support the review. An internal review is then done "*by making a new decision, as if the decision being reviewed (the **original decision**) had not been made, with the new decision being made as if it were being made when the application for support to which the review relates was originally received*".¹⁶
- 2.30 In practice, unnecessary internal reviews are having to be made by applicants in a number of instances. For example:
- a. where it is clear that the documentary evidence submitted with a victim's original application is not being appropriately considered by the original decision maker. For instance, police material may state that a sexual assault has occurred within the bounds of a family violence relationship. Decision makers tend to then elect to award a category D recognition payment to recognise a family violence offence or assault, but disregard the evidence of sexual assault which would uplift the recognition payment to a category C or category D payment. The uplift only occurs once the applicant lodges an internal review pointing to the original evidence submitted.
 - b. where there is a lack of understanding or misunderstanding of the nature of family violence and the provisions of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For example, where an original decision maker decides an act of violence cannot be established as there was no physical contact. In that particular decision, where an applicant was eventually awarded a category B recognition payment for the violent

or a State or Territory, for a personal injury suffered, or a disease or condition contracted, as a result of the commission of an offence" is an "exempt lump sum" under sections 5(3)(a).

¹⁶ The Act, section 49(4).

sexual assaults occurring within a family violence situation, the original decision maker refused the original application as “*at no time in that [police] statement does [the applicant] report that the alleged offender hit her in the face*” and “*[the applicant] was unable to provide any details regarding alleged historical domestic violence perpetrated by the alleged offender*”.

- c. where there is a lack of opportunity for the applicant to obtain or rely upon their own evidentiary material to support their application, before the original decision is made. This may be for reasons outlined above, such as Victims Service being unwilling to provide the evidence they hold on file to the applicant, where the applicant is unable to afford or get access to appropriate documentary evidence in the timeframe allowed by Victims Services, or a decision is made by Victims Services without notice to the applicant.
- 2.31 This tendency to read down the evidence or legislation, or to afford the applicant proper opportunity to gather, provide or rely on their own evidence, defeats the purpose and objective of the VSS being a beneficial scheme and is a denial of procedural fairness. It can be offensive and retraumatizing to applicants to have the experiences already sufficiently detailed and supported in their original applications and evidence rejected, misread or ignored. It also means that applicants are being required to make internal reviews where the original decision was clearly unwarranted and incorrect, and are losing their original internal review rights under section 49 where those original internal review rights should be preserved.
- 2.32 These unnecessary internal reviews could be remedied through guidance and training provided to Victims Services decision makers, but also the statutory insertion of a discretion for senior assessors at internal review to be able to preserve the original internal review rights of applicants under section 39 where it is clear that the original decision was incorrect given all available material at the time of the original decision.

Recommendation 13: To support a victim-centric, trauma-informed, serviceable VSS, original applications and their supporting material should be read beneficially to victims. Further, the discretion for a senior assessor to preserve the original internal review rights of applicants under section 49 where it is clear the original decision was erroneous based on all material available at the time of the original application, should be inserted into the Act.

3. Recovery of victims support payments from offenders: Enabling financial support paid and recognition payments made under the VSS to be recovered from persons found guilty of the crimes giving rise to the payments (Policy objective, Part 5)

Establish assumption that restitution orders will not be made in family violence, sexual violence or modern slavery matters unless victim’s consent is sought and obtained

- 3.1 Under Part 5 of the Act, the Commissioner has the discretion to make a restitution order, to recover the financial support or recognition payments made from a person found guilty of the acts of violence or modern slavery giving rise to the payments.



- 3.2 One issue with these restitution orders is that it means that a perpetrator of violence can become aware that a victim has made a claim involving them. This is problematic and detrimental where the relevant act of violence is one of family violence, where the victim may become vulnerable to renewed violence or retribution by the perpetrator, whether they are still involved in some capacity with the victim (e.g. through shared parenting or domestic arrangements), or where the victim has attempted to end all connections.
- 3.3 In some cases, victims are hesitant to make applications under the VSS once advised of the possibility of restitution orders because of the possibility of future retribution by the perpetrator.

Recommendation 14: To better protect victims, the Act could establish an assumption that restitution orders will not be made in family violence, sexual violence or modern slavery matters unless the victim's consent is actively sought and obtained by the Commissioner prior to issuing a restitution order.

We welcome any further opportunities to contribute to the statutory review. For further enquiries or discussion on the above or other recommendations, please do not hesitate to contact the writer at [REDACTED].

Yours faithfully,

Rebecca Dominguez
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