

**Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on violence against women, its causes and consequences.**

REFERENCE: AL  
AUS 6/2014:

19 December 2014

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council resolutions 24/6 and 23/25.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the Victims Rights and Support Act (hereafter the Act) adopted in July 2013 in New South Wales, and the discriminatory and disproportionate impact that the enforcement of some of its provisions have had on victims of domestic violence and sexual assault who are primarily women.

According to information received:

All Australian States and Territories have individual schemes to compensate victims of crime. New South Wales (NSW) first established a Victims Compensation Scheme in 1987. Since then, the Scheme has been amended multiple times, including by providing for increased funding and compensatory measures available to victims of crime.

On 7 May 2013, the New South Wales Government introduced the Victims Rights and Support Bill, which was passed in July 2013. It abolished the existing scheme for Compensation, replacing it with a new 'Support Scheme'. As such, any applications filed under the old scheme which were not determined by 7 May 2013 are now dealt under the new scheme.

Furthermore, there are additional provisions contained within the Act that raise a number of concerns, particularly:

*1. Time for lodging, and duration of, applications*

The Act imposes upper time limits to applications which were not presented under the Victims Support and Rehabilitation Act of 1996 (“the old Act”).

For instance, according to Section 40(1) of the Act, in general an application for financial support must be duly made within two years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within two years after the day on which the child concerned turns 18 of age. Moreover, Section 40(5) provides that an application for the recognition of payment in respect to an act of violence involving domestic violence, child abuse or sexual assault must be duly made within 10 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 10 years after the day on which the child concerned turns 18 years of age.

However, the two year time limit still applies to victims of domestic violence, child abuse or sexual assault in making a claim for financial support.

If victims of child sexual assault apply outside the two year limit of turning 18 years of age there are no time limits for victims of child sexual abuse applying for recognition payments, up to a maximum of \$5,000 out of pocket expenses and of \$5,000 for expenses associated with relevant criminal proceedings or other legal expenditures. However, these victims are allegedly unable to access financial assistance for loss of actual earnings, which is capped at \$20,000, or for medical and dental expenses.

Evidence shows that victims of domestic violence, sexual assault, and child sexual abuse often delay reporting such acts. This is due to many reasons, among others, stigma, shame, and loss of trust associated with the violence. It is often with time and through counselling that victims identify and recognize that what has happened to them is a crime, and they prepare themselves emotionally to report.

In addition, women victims of this type of violence may face social pressure, isolation, economic dependence from perpetrator, and the fear of more violence which deters them from reporting. Women from culturally and linguistically diverse backgrounds may additionally face cultural and community barriers to disclose such acts and may fear reporting to the police.

## *2. New categories of recognition of payments*

The previous Schedule of injuries that determined the rates of compensation have been removed and replaced with new categories of ‘recognition payments’ (see Part 4, Division 5). These awards are allegedly less in monetary terms than those under the previous scheme.

As regards domestic violence, the categories of recognition of payments in the Act focus on victims who have suffered physical injuries and do not properly recognize the impact of psychological harm.

Under the old scheme, the Schedule of injuries included a domestic violence injury and psychological or psychiatric injury. Under the previous NSW victims compensation scheme the maximum payment for a victim of domestic violence who could prove a serious psychological or psychiatric disorder was \$50,000.

Moreover, the Act does not recognize the effect of repeated and ongoing domestic violence. For instance, as per Section 35 (4) (d) of the Act, a victim who suffered years of domestic violence in the form of emotional abuse, which does not become grievous bodily harm, would only be able to recover \$1,500 as a category D recognition payment, if it was accepted that the incident was qualified as an assault.

As regards sexual assault, the new scheme offers a maximum lump sum payment of \$10,000 (Category B recognition payment) in respect of a sexual assault resulting in serious bodily injury or which involved an offensive weapon or was carried out by two or more persons; or a series of related acts involving sexual assault, indecent assault or attempted sexual assault involving violence (see Section 35(2) and Part 3 Financial assistance). However, under the old scheme, victims of the most serious kind of sexual assault were entitled to an amount between \$25, 000 – \$50,000. For all other sexual assaults, the applicant will only be entitled to receive a Category C recognition payment of \$5,000.

### *3. Restrictive documentary evidence requirement*

Under Section 39 (2) (b) of the new scheme, the documentary evidence required in an application for financial assistance for economic loss or for a recognition payment includes a police report or report of a Government agency and a medical, dental or counselling report verifying that the applicant or child who is the primary victim concerned has actually been injured as a result of the act of violence.

However, in most of the cases, women and girls victims of domestic violence or sexual assault victims may be more willing to report the crime that they have experienced to a non-government organization in lieu of the police or a government agency. This is particularly the case of women who belong to culturally and linguistically diverse communities, or living in small rural areas.

Sources allege that when victims have reported to the police under this new scheme, while the act of violence is generally included, a list of injuries is not included in the report.

There are serious concerns expressed about this restrictive approach to documentary evidence the form of which, in our opinion, should not be prescribed.

#### *4. Access to legal assistance*

Under the old scheme, the victims' legal fees were paid by the Commissioner of Victims' Rights. However, at the time of the introduction of the NSW Victims Support Scheme, it was alleged that there would be no need for legal representation as victims of violence would be assisted by support co-ordinators and case managers at Victims Services.

It is reported that Victims Services co-ordinators and case managers are not equipped to provide complex, technical advice to victims or assist them in the drafting of applications in support of their claims for compensation. This has reportedly led to instances where these coordinators have provided incorrect information about technical aspects of the legislation.

In addition, it is alleged that there may be a conflict of interest for staff from the agency that will determine whether the victims support is awarded or not as they are also involved in assisting the victim in making the corresponding application.

Under the new scheme legal representatives are allowed to charge victims for their work. If clients are successful in their claims, they will have to pay legal fees from the payment they receive, and this may have a potentially detrimental impact on their situation.

Victims of complex and multiple traumas are generally high-need victims who have been seriously affected by their experience of violence and many of them suffer from post-traumatic stress disorder, significant anxiety and clinical depression. As a result of the experience, they are affected by a psychosocial disability, drug or alcohol dependence, chronic unemployment, etc. Often, the trauma they have experienced leaves these victims with a limited capacity to work and earn a living.

#### *5. Restitution*

The Act does not allow victims to actively indicate whether they wish restitution to be pursued as the means for claiming compensation. This is generally done when victims feel that perpetrators should be held responsible and accountable for the harm done.

However, victims of domestic violence and sexual and child assault do not always pursue restitution as a way to claim for compensation due to safety concerns. They fear that as a result of being pursued for recognition payment perpetrators will try to re-enter their lives and start the cycle of violence again. Victims should be able to choose whether or not restitution is pursued in their respective cases, and their safety should be the primary concern.

#### *6. Family victims*

According to Section 36 (1) (b) of the Act, parents, step parents or guardians of a primary victim of a homicide automatically qualify for a recognition payment of \$7,500. However, as per Section 36 (1) (a), a child of the primary victim has to prove financial dependence on the primary victim at the time of their death in order to qualify. Similarly, spouses or partners of a primary victim of a homicide are required to establish financial dependence in order to qualify for a recognition payment.

### *7. Appeals*

Should a victim be dissatisfied with the amount awarded by the administrative decision maker at Victims Services, he/she may first request an internal review by lodging an application in writing within strictly 28 days of receipt of the determination. There is no provision for the victims to apply for an extension of the deadline to seek an internal review. The old Act, under Section 36 (3) (a) and (b), provided for a three month time limit to lodge an appeal to the then Victims Compensation Tribunal, and then gave the Tribunal the discretion to give further time to an appellant in exceptional circumstances.

It is argued that the new time limit is not sufficient for an applicant to seek independent advice and properly prepare an application. For the reasons discussed above, it also fails to acknowledge the impact of trauma on the victims' capacity to face complex administrative and legal requirements.

Under the Act, should the victim be dissatisfied with the outcome of the administrative internal review, he or she may appeal to the NSW Civil and Administrative Tribunal but only with respect to recognition payments.

### *8. Counselling*

It is reported that victims under the Act should contact Victims Services Approved Counselling Service and should receive counselling services through a counsellor who is part of this scheme. However, victims do not always want to develop another therapeutic relationship with counsellors that are part of this scheme, and counsellors treating this type of victims do not always want to register under the scheme.

Victims of multiple and complex traumas should be able to access free therapeutic counselling but they should be able to choose with whom they want to develop a therapeutic relationship.

Serious concern is expressed that a number of provisions contained in the Victims' Rights and Support Act 2013 contravene the right to equality and non-discrimination, and the right to the highest attainable standard of physical and mental health of women who have been subjected to violence, and hinder their rights to access to

justice and effective remedies for the harms that they have suffered. Serious concern is expressed about the retrospective application of the Act to those who had filed claims under the previous scheme, which goes against the basic principle of legality. Moreover, in this particular case, it has negative implications on the victims' access to compensation, in light of the fact that there have been significant reductions to amounts awarded for various crimes, as well as to time limits established to lodge applications as elaborated above. Concern is also expressed at the statute of limitation for the making of claims and other provisions, which do not take into account the physical and psychological needs of the victims. Finally, there are valid concerns that those affected by this decision may be re-victimized when learning about the negative effects of having their application considered under the new scheme

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned issues.
2. Please provide information on any measures that your Excellency's Government has taken to mitigate the discriminatory impact that the enforcement of this Act has had on victims of gender-based violence.
3. Please indicate the measures undertaken to ensure that claims lodged under the previous compensation scheme will be determined on the same basis on which they were initiated in order to comply with the basic principle of legality and limit the risk of re-victimization of those affected during this process.

We would appreciate receiving a response within 60 days.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Dainius Puras  
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable  
standard of physical and mental health

Rashida Manjoo  
Special Rapporteur on violence against women, its causes and consequences

## **Annex**

### **Reference to international human rights law**

Without implying any conclusion to what is illustrated in this letter, we would like to remind your Excellency's Government of its obligations under the Convention on the Elimination of All Form of Discrimination against Women (CEDAW), ratified by Australia on 28 July 1983. Article 2 of (CEDAW) places States parties under an obligation to respect, protect and fulfill the right to non-discrimination of women and to ensure the development and advancement of women in order to improve their position and implement their right of de jure and de facto equality with men. States parties shall ensure that there is neither direct, nor indirect discrimination against women.

The Committee on the Elimination of Discrimination against Women (CEDAW) in its general recommendation No. 19 (1992), considered that States parties are under an obligation to act with due diligence to investigate all crimes, including that of sexual violence perpetrated against women and girls, to punish perpetrators and to provide adequate compensation without delay. In general recommendation No. 19, the Committee sets out specific punitive, rehabilitative, preventive and protective measures States should introduce to fulfill this obligation; in paragraph 9, it makes clear that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

Moreover, the obligation to provide reparations to women subjected to violence is spelled out in the Declaration on the Elimination of Violence against Women, which places upon the State the duty to develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. The Declaration states that women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered, and that States should inform women of their rights in seeking redress through such mechanisms (art. 4 (d))

The Special Rapporteur on violence against women, its causes and consequences has argued that reparations for women cannot be just about returning them to the situation in which they were found before the individual instance of violence, but instead should strive to have a transformative potential. This implies that reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of crosscutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience before, during and after the conflict. Complex schemes of reparations, such as those that provide a variety of types of benefits, can better address the needs of female beneficiaries in terms of transformative potential, both on a practical material level and in terms of their self-confidence and esteem. Measures of symbolic recognition can also be crucial. They can simultaneously address both the recognition of victims and the dismantling of patriarchal understandings that give meaning to the violations (A/HRC/14/22 para. 85).

Finally, as regard to the question of time limits for the making of claims, the Special Rapporteur on violence against women noted in the same report that “the question of timing is also important in determining women’s access to reparations, especially for crimes of a sexual nature. Since the preconditions for reporting and testifying on sexual abuse are not always present in the aftermath of conflict or repression — especially in poverty-ridden scenarios where women’s health conditions are extremely poor — reparations programmes should not sacrifice adequate accessibility to the otherwise legitimately felt urgency of society to move forward. Narrow applications deadlines or a closed-list system may not allow different victims to come forward and claim reparations when they feel physically and psychologically prepared to do so (para. 40).”

With regard to the information received indicating that the new ‘Support Scheme’ under the Victims’ Rights and Support Act 2013 of New South Wales does not adequately recognize psychological or psychiatric harm, we would like to underline that gender-based expressions of violence cause tremendous psychological or psychiatric harm on victims. This aspect of the trauma must be duly recognized and addressed not only by providing the necessary treatment and services but also by providing access to adequate remedy, including compensation.