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NSW Department of
Communities and Justice

Via Email:
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To the Attorney General,

Statutory Review of the *Victims Rights and Support Act 2013 (NSW)*

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

Hosking & Gosling Legal currently undertakes significant victim's compensation auditing work for children in out-of-home care. Therefore, our firm has extensive experience engaging with the Act and submitting claims for recognition payments through the existing Victims Support Scheme. Through this work we have come to recognise several aspects of the Act that we feel require amendment in order to meet its outlined objectives.

The current review is focussed on two primary questions, namely:

i. Do the policy objectives of the Act remain valid?
ii. Do the terms of the Act remain appropriate to meet those policy objectives?

We outline our response to these questions below.

Question I: Do the policy objectives of the Act remain valid?

In our experience, the policy objectives of the Act remain valid. This is especially true for the objectives outlined in Part 2 "Recognising and promoting the rights of victims of crime" and Part 4 "Establishing a scheme for the provision of support for victims of acts of violence".

Question II: Do the terms of the Act remain appropriate to meet those policy objectives?

Currently, the terms of the Act are not appropriately meeting the policy objectives of "recognising and promoting the rights of victims of crime" or "establishing a scheme for the provision of support for victims of acts of violence". This is due to a number of aspects of the current Act diminishing the recognition of victim's rights or creating unreasonable hurdles for victims of violence in accessing recognition payments.

Throughout the past several years of auditing children in out-of-home-care files, our firm has come across some primary issues of concern in relation to the operation of the current Act that we believe diminish the successful attainment of recognition payments for child victims of violence. These issues of concern and recommendations for amendment are outlined below:

1) **The amount awarded by recognition payment amounts is currently inadequate to properly recognise the degree of harm caused to victims of violence – particularly child victims.**

Under the current scheme, victims of violence applying for a recognition payment outlined under s 35 of the Act will be eligible for the following payments:

- *Category A - $15,000*
  - For an act of violence outlined in s 35(1) of the Act – notably the murder of a close family member or carer.
- *Category B - $10,000*
  - For acts of violence outlined in ss 35(2)(a) and 35(2)(b) of the Act – primarily higher severity sexual assault claims.
- *Category C - $5,000*
  - For acts of violence outlined in ss 35(3)(a), (3)(b), (3)(c) and (3)(d) – inclusive of singular sexual assaults, attempted sexual assaults resulting in serious bodily injury, assaults resulting in grievous bodily harm, and physical assaults of a child that are part of a series of related acts.
- *Category D - $1,500*
  - For acts of violence outlined in ss 35(4)(a), (4)(b), (4)(c) and (4)(d) – inclusive of singular acts of sexual touching/sexual acts, attempted sexual assaults involving violence, a robbery involving violence and an assault (not resulting in grievous bodily harm).

In many claims sought under this section, the violence that has been perpetrated against the victim will have severe, ongoing consequences to their

mental health. This is certainly the case with child victims who suffer lifelong trauma following childhood abuse. In our work with auditing the files of children in out-of-home-care, we find that children who have been subjected to physical and/or sexual abuse will often be diagnosed with multiple mental health disorders or illnesses. These diagnoses generally include Post-Traumatic Stress Disorder, Complex Trauma, Attention-Deficit Hyperactivity Disorder, Reactive Attachment Disorder, Oppositional Defiance Disorder, Conduct Disorder, Substance Abuse Disorder, academic or educational delay, speech delays, extreme behavioural issues, emotional dysregulation, anti-social behaviours, self-harming and suicidal ideation. These mental health issues are frequently linked to the children's experiences of violence by medical professionals and can lead to permanent impacts including decreased wellbeing and failure to thrive in adulthood. In these cases, it is clear that the existing recognition payments will do little to "recognise" or "promote" the rights of these victims as payments as low as $1500 are unlikely to provide any substantial support in their ongoing recovery.

Another aspect which highlights the inadequacy of the existing compensation structure is its lack of ability to recognise particularly severe examples of a claim and provide increased compensation. Take for example s 35(3)(d), which creates a single $5000 payment for children who have been subjected to a series of physical assaults. In practice, this section acts to give a singular $5000 recognition payment to a child who has been physically abused by a perpetrator (such as a parent) or set of perpetrators (such as various family members in the same home), where that child has been physically abused on more than one occasion. As such, this section will equally cover a child who has been hit to the face/head on two occasions within two weeks, as it will a child who has been subjected to horrific physical abuse (including beatings, whippings, strikes to the head/body, kicks to the head/body, threats with weapons such as knives etc.) over a period of 10 years. While there is a clear discrepancy in the severity of the two examples, both are eligible for the same payment of $5000, and there is no provision under the current Act which would allow the child who has faced 10 years of extreme (or daily) physical abuse to be eligible for anything more. Though these might seem like unlikely comparisons, at Hosking & Gosling Legal, we have proceeded with claims representing both of these levels of severity on a regular basis and have received tribunal decisions awarding the same amount of compensation regardless of severity, as is required under the Act. Therefore, we believe that it would be appropriate to amend the Act to better reflect the severity of harm caused to victims of crime.

Recommendation 1: *Given the concerns outlined, we submit that it would be appropriate to provide an increase in overall recognition payment categories. If this is not possible, then an "exceptional" payment should be available for*

claimants in extreme cases of harm or in circumstances where the victim is a child.

2) The s 39(2)(b)(ii) documentary requirements for injury evidence create an unreasonable barrier to victims in accessing recognition payments.

Under s 39(2)(b)(ii) of the Act, victims applying for a recognition payment are required to evidence the injury they have suffered through the provision of 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 an act of violence or act of modern slavery*". In effect, this means that any person (including a child) who has been a victim of violence and suffered an injury, is ineligible for a recognition payment if they cannot produce a document originating from one of these three sources (medical, dental or counselling).

It is submitted that the current approach of the Act to accept reports from police, government agencies and other agencies that provide support services to victims of crime, as evidence of the *act of violence* but not as evidence of *the injury resulting from such violence*, is impracticable and places an unnecessary burden on victims of crime. In our experience auditing the files of children in out-of-home-care, it is common to see police reports (for example) that outline clear discussion of physical injuries linked to an assault. The reports may include references such as "the victim was bleeding from the nose" after being punched, or "the victim had several scratch marks to the neck, and bruising around the eye" after being attacked. These reports are clear evidence from the police that the victim was injured as a result of the assault. However, the victim may not have received medical attention as it was not necessary, or they may have refused due to mental health issues or other concerns. However, there remains clear evidence that the victim was physically injured within the police report. It is submitted that such evidence should be considered as adequate evidence of injury, just as such a police report is considered as adequate evidence of the act of violence itself. It is contradictory that the Act considers police and other government employees (such as DCJ caseworkers) able to recognise and report on acts of violence, but unable to report on injuries resulting from violence, even when the injuries are clearly apparent.

In our auditing work at Hosking & Gosling Legal, we also find there are many circumstances where children in particular face an unreasonable hurdle to produce the evidence of injury required by s 39(2)(b)(ii). For example, when a child is being physically abused by their parent, the child will have limited means of accessing medical treatment or support independently of the parent, especially when the child is young. Abusive parents often go out of their way to conceal the injuries they have perpetrated against their children, and so will

withhold them from medical attention or from persons (such as Community Services) who would assist the child to seek medical attention. In such cases, as a vulnerable victim of violence living with their abuser, there is little to nothing that a child can do to seek the evidence required by Act to evidence their injuries.

The retrospective obtainment of a Certificate of Injury also does little to produce timely evidence of the injury suffered by a person or child, as often the medical provider will just be able to reproduce a document citing what the victim has told them – which is not a more accurate representation of the injuries than the information produced in police and government reports at the time of the event. Obtaining a Certificate of Injury also places an unreasonable burden on victims to access medical treatment regarding their previous trauma, often years following the event. This is particularly difficult for victims suffering from complex mental health issues (as often experienced by child victims of violence) and can be a re-traumatising process that many victims will choose not to engage with.

Given these concerns, it is clear that the existing approach to evidencing injury under the Act both fails to "promote" or "recognise" the rights of victims of crime and fails to establish a usable "scheme for the provision of support for victims of acts of violence". Currently, the scheme places an unreasonable burden upon victims to produce evidence of injury in circumstances where the production of such forms of evidence may not be practicable, or indeed necessary (given that the injury will often be recorded in other official government reports). It also unfairly discriminates against child victims of crime who may be unable to access services which could provide such evidence in a timely manner. Therefore, in order to alleviate these hurdles to accessing recognition payments for victims of crime, it would be appropriate to amend the Act.

Recommendation 2: *The s 39(2)(b)(ii) requirements for documentary evidence in relation to injury should be removed entirely. In the alternative, the s 39(2)(b)(ii) requirements should be dispatched with for child victims of violence (i.e. victims who were children at the time of the act of violence) and for all other victims, documentary evidence of injury should be accepted from Government Departments, Non-Government Organisations, social work sources, and/or police records.*

3) Section 35 of the Act does not recognise neglect as a form of violence, despite it causing extensive injury particularly to child victims.

Currently, the Act does not make any specific provision that would allow children, or people in care, to make a claim for a recognition payment in

situations of neglect that result in injury. It is arguable that neglect of a child causing injury should be considered a valid form of "violence" under the Act, given that it is currently an offence under s 228 of the *Children and Young Persons (Care and Protection) Act 1998,* with the same maximum penalty as that of common assault. Under s 228 "*A person, whether or not the parent of the child or young person, who, without reasonable excuse, neglects to provide adequate and proper food, nursing, clothing, medical aid or lodging for a child or young person in his or her care, is guilty of an offence".* In our experience at Hosking & Gosling Legal, severe neglect of children is a common form of domestic violence perpetrated by parents or caregivers that results in the long term psychological (and sometimes physical) injury of a child. Often this neglect will occur in a wider context of domestic violence and/or drug abuse, and with a callous disregard for the basic physical and psychological needs of the child.

Throughout our work, we have seen many examples of parents neglecting their children in a variety of ways which cause injury. For instance, some parents or carers have failed to provide children with food for extensive periods of time (often instead prioritizing the purchase of drugs or alcohol), to the point that the children will rummage through bins for food or beg community members for help. In some cases, when children are removed from these environments they are found to be significantly malnourished and underweight, or have "failed to thrive" (a term often used in relation to infant victims). In other instances, parents/caregivers will fail to take the children to receive medical treatment for severe illnesses or infections, which can result in more serious, or occasionally lifelong, medical complications. For example, it is not unusual to see a child suffer from long-term hearing loss due to a failure of parents to properly treat ear infections over an extensive period. There have been instances where the parents/caregivers have failed to ensure a child receives proper treatment (even when provided for free) for medical issues affecting their feet, resulting in a lifelong limp. We have also seen instances of children living in extreme squalor, without adequate clothing or hygiene. It is not uncommon for children to be reported to have lice infestations so bad that their heads are covered in bleeding sores.

Yet, currently the Act does not explicitly provide any recognition for the harm caused to these children (or disabled adults in similar situations), even when the neglect is wilfully engaged in, and could be construed as a form of domestic violence. The children who suffer from severe neglect suffer lifelong impacts to their mental health, physical health and general wellbeing. By failing to include neglect as a category of recognition payment, the Act is failing to meet its objective to "recognise and promote" the rights of victims of crime. Therefore, it appears appropriate to amend the Act in order to recognise this deficiency in s 35.

Recommendation 3: *Neglect causing injury to a child (or person in care) should be explicitly recognised in the Act as form of violence under s 35 (or elsewhere in the Act) and be eligible for a Category C recognition payment.*

4) Assessors currently overutilize s 35(3)(d) to combine violent acts of multiple offenders in a household towards a child into one singular claim of a series of related acts.

Currently, a Category C ($5000) payment is available for claims of a "*physical assault of a child that is one of a series of related acts*" under s 35(3)(d) of the Act. A series of related acts is currently defined in s 19(4), which states:

(4) Except as provided by subsections (5) and (6), a ***series of related acts*** *is two or more acts that are related because—*

(a) they were committed against the same person, and

(b) in the opinion of the Tribunal or the Commissioner—

(i) they were committed at approximately the same time, or

(ii) they were committed over a period of time by the same person or group of persons, or

(iii) they were, for any other reason, related to each other.

Sections 19(5) of the Act also provides that "*An act is not related to another act if, in the opinion of the Tribunal or the Commissioner, having regard to the particular circumstances of those acts, they ought not to be treated as related acts*".

In our experience at Hosking & Gosling Legal, it appears that the "related acts" definition is currently overutilized by Assessors in considering claims made under s 35(3)(d). As it stands, Assessors are taking the approach of combining the violent acts of any perpetrators within a household (provided they lived in the household during a similar period) towards a child into one singular claim. This can include violent acts that a child has suffered from parents, parent's defacto's, grandparents, siblings, foster siblings and other household members. As a result, a child who has been abused significantly by multiple people (often over a period of years), will be limited to a singular claim, simply because the abusers resided in the same home during the same (or similar) time period.

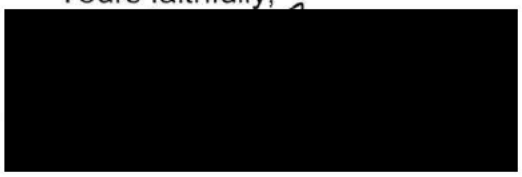
This approach appears unjust and unlikely to uphold the objective of the Act to "recognise and promote" the rights of victims of crime. Children who are the victim of multiple abusers in the home (even if it occurs during the same time period) are likely to suffer more significant harm and injury (both physical and psychological) than children who only suffer abuse from one individual, and therefore it is only reasonable they should be entitled to claims in relation to each offender. While these concerns could arguably be limited by Assessors

engaging in a more liberal application of the discretion provided in s 19(5), it seems unlikely that the issue of the "over-merging" of claims under s 35(3)(d) will be resolved without specific change to the current legislation.

Recommendation: *Further clarity should be included in s 19(4) or s 19(5) of the Act, indicating that the acts of individual persons (such as a mother and a father) should not be considered together as a series of related acts, unless they occurred jointly on all occasions.*

Overall, we wish to acknowledge the positive role that the Act has played in providing a degree of support and recognition to victims of crime in New South Wales. This scheme is a valuable tool for assisting victims of crime (particularly child victims) to move forward with their lives and access the services and financial support that they need to do so. Hosking & Gosling Legal are grateful for the opportunity to comment on the current utility of the Act and to submit our recommendations for amendments that we believe will further enable this scheme to meet its stated objectives.

Yours faithfully,



Solicitor