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SUBMISSIONS: 2022 REVIEW OF VICTIMS RIGHTS AND SUPPORT ACT 2013

Key Issues:

1. The amendment to s44 of the Act by Item 10 of the *Victims Rights and Support Amendment (Statutory Review) Act 2018* has had the opposite effect to that intended (per the second reading speech). It is causing significant disadvantage to child abuse victims. Urgent amendment is needed to clarify that injury can be established by lay evidence .

2. The Commissioner appears to be declining to assist victims with obtaining documents to complete their applications. The Commissioner is also no longer informing victims that she can assist them with obtaining documents. There have been instances of the Commissioner ignoring a written request to obtain specific documents on behalf of victims in need of this assistance and then using the absence of this evidence to dismiss the claim.

3. Claims have been getting dismissed when the proper course would be to defer determination and follow the steps in s41A.

4. The Commissioner has put additional steps in the path of victims using their VS Approved Counsellor to provide evidence of harm.

Child abuse victims disadvantaged under the Act for delays in reporting

The enactment of the *Victims Rights and Support Amendment (Statutory Review) Act 2018* has had the opposite effect to the intention stated in the second reading speech:

> Item [10] of schedule 1 to the bill will ensure that victims are not disadvantaged in their application for victims support if they delay making a formal report to authorities.

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> Subsections 44 (1) (b) and 44 (1) (c) of the Act require the commissioner to have regard to "whether the relevant act of violence was reported to a police officer within a reasonable time" and **"whether the act of violence was reported to a relevant health professional or practitioner, or a relevant agency"** in determining whether or not to approve giving victims financial support or a recognition payment. It is well documented that some victims, particularly victims of child sexual or physical abuse, delay reporting violence. **Item [10] of schedule 1 to the bill will ensure that delaying reporting will not adversely affect these victims' access to the Victims Support Scheme**.

Previously, s44(1)(b) & (c) provided that the Commissioner could reduce a recognition payment for the following reasons:

> (b) whether the act of violence was reported to a police officer within a reasonable time,
>
> (c) whether the act of violence was reported to a relevant health professional or practitioner, or a relevant agency,

Importantly, s44 considerations only become relevant after a positive finding that the applicant is a victim of an act of violence (i.e. conduct constituting an offence, involving violence, that resulted in injury to the applicant).

Because of this, s39's 'requirement' for a medical report could not be read as a mandatory precondition to a valid application as otherwise s44(1)(c) would never have any work to do. If injury could only be proved by a report from a medical professional, then all claims lacking this would never make it to the s44 stage of the decision.

This continued from the approach taken under the old 1996 Act, whereby lay evidence, where appropriate (i.e. injuries that don't require special expertise, such as bruises, cuts, grazes), was accepted as sufficient to establish injury. For example, there is a very long history of injury being accepted solely on the basis of observations in police reports.

The removal of s44(1)(b) & (c) has now opened up a more severe interpretation of s39; One where a claim can be dismissed if a victim was delayed in reporting their injuries to a health professional before they healed. Even though their injuries may have been reliably observed by persons such as police, DCJ case workers, or school teachers.

Children are disproportionally disadvantaged by this. It is a common scenario for a child to be assaulted by a parent. The injuries are recorded in a report by a lay witness. However, the child is reliant on their abuser to take them to see a health care professional to document the results of their abuse.

Unsurprisingly, perpetrators of child abuse rarely take their child to a health care professional (and mandatory reporter) to enable a record of the abuse and injuries to be made.

As a result, the child has been beaten, suffered cuts and a black eye from their parent, not been taken to a doctor by that parent, the injuries heal, and then the window has closed to obtain the medical evidence 'required' by s39.

This is causing injustice to the children of NSW and children in the care of the State.

Amendment is needed to clarify that injury can be established without a report from a health care professional, where the lay evidence of injury is sufficient to establish on balance that injury occurred as a result of the act of violence.

Commissioner declining to assist victims with their applications

There have been instances of the Commissioner declining to use the powers under ss11-12 to obtain evidence on behalf of victims. Instead, the request has been ignored and the claim dismissed for lack of the requested evidence.

The Commissioner has removed the section of the application form (previously question 25) where applicants are prompted to ask for Victims Services to obtain records for them (which is also how most would learn that this assistance is available).

This is discriminatory against many classes of victims. Many victims will need this assistance from the Commissioner for reasons of housing instability, impecuniosity, health, literacy, difficulty filling in forms, knowledge of the processes to obtain documents, and of course the Government's decision to remove funding for legal representation of applicants back in 2013, just to name a few.

This conduct is not only ethically questionable, it runs directly against the first function of the Commissioner under s10(1)(a) of the 2013 Act:

> **to provide information to victims of crime**…about support services and assistance for victims of crime and such persons, **and to assist victims of crime in the exercise of their rights**

I would also add that this conduct can call the legal validity of the Commissioner's determinations into question. To cite Nettle J in *Wei v Minister for Immigration and Border Protection* [2015] HCA 51 at [49] (which cited Wilcox J's decision of *Prasad v Minister for Immigration and Ethnic Affairs* [1985] FCA 47)

> … where it is obvious that material is readily available which is centrally relevant to the decision to be made, and the decision-maker proceeds to make the decision without obtaining that information, the decision may be regarded as so unreasonable as to be beyond jurisdiction.

Commissioner dismissing rather than lapsing or deferring applications

In the second reading speech for the *Victims Rights and Support Amendment (Statutory Review) Act 2018*, it was stated that s41A would enable the Commissioner to clear stale claims without having to dismiss them. It was said to be better that applicants not have to rely on their internal review rights where circumstances prevented them getting their evidence in on time.

Unfortunately, the s41A is being ignored and claims have been dismissed when they should have been given three requests for further evidence and then lapsed if a valid reason for the delay was not provided by the applicant.

Further steps in the path of using VS Approved Counsellors to help with applications

Previously, Victims Services Approved Counsellors were automatically required to produce progress reports for the Commissioner. This was useful both as a means to supervise the quality of the counselling provided and as a ready source of evidence to complete claims for victims.

The Commissioner has ended this practice. Now, victims that wish their VS approved counsellor to assist with their claim must arrange for the counsellor to complete a report or Certificate of Injury form.

This may seem minor, but every additional step imposed on victims reduces the likelihood of their claim succeeding. Victims are often experiencing circumstances that cause them to need assistance and a simple process.

I would propose the following: (1) The Commissioner reinstate the practice of automatic progress reports; and (2) Where evidence of injury is outstanding the Commissioner should contact the applicant, provide a copy of the progress reports to them, and seek confirmation that they would like those reports to be included with the evidence that goes to the assessor.

I also note that the new application form no longer asks victims for their preferences regarding counselling (i.e. location, male/female etc etc). This could discourage some applicants (e.g. Victims may not want a counsellor that is the same sex as their offender).

Action required

The following issues need to be addressed:

1. Urgent amendment is needed to clarify that injury can still be established by lay evidence. This is both sensible and necessary to avoid disadvantage to victims of child abuse who are usually reliant on their abusers to enable a medical record of their injuries to be made.
2. Training assessors to follow the s41A process.
3. Amending the application form to ensure that victims are aware that the Commissioner can assist with obtaining records to support their claim, and to invite victims to request this assistance.
4. Training the assessors to action requests from victims to obtain records for them where the source of those records is specified or otherwise obvious.
5. Restoring the counselling progress report practice and contacting victims to invite them to use those reports in support of their claims.
6. Ensuring that assessors are provided with training in their procedural fairness obligations (e.g. Giving applicants opportunity to respond to issues and to provide further evidence before dismissing claims).
7. Encouraging the Commissioner to use her powers under the common law (i.e. *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11) and s43(7) of the Act, to correct errors (ranging from jurisdictional to clerical) so that victims do not need to resort to internal reviews or NCAT to resolve clear jurisdictional errors (e.g. errors in understanding the requirements of the Act) by assessors.

8. Establishing a procedure whereby any determinations that are subject to internal review applications get read by the Commissioner's legal officers and advice and training provided to the assessment team. This would improve consistency and reduce the recurrence of errors.
9. Improving the quality of reasons provided for first instance determinations. The Notice of Decision has become so brief in first instance determinations that it can be impossible to discern how the assessor arrived at the decision they made – it may be useful for a prompt sheet to be provided to assessors as to the points to be addressed in their determinations so that their reasoning can be followed. Reasons need not be lengthy, but they do need to document the path taken by the assessor through the evidence, law, findings, and decision.

Yours faithfully,

LK Legal | Partner