CARROLL & O'DEA LAWYERS
When it matters

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Policy, Reform & Legislation
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By email: policy@justice.nsw.gov.au

Dear Colleagues

We refer to the Background Paper dated April 2022 in relation to the Statutory Review of the *Victims Rights and Support Act 2013* ('The Act'). We would like to thank you on behalf of Carroll & O'Dea Lawyers for allowing us to comment in response to this Paper.

Comments from Alexandra:

For over 10 years I have been assisting predominantly women and children to access support through The Act for a number of matters including but not limited to sexual violence and domestic violence.

Following the legislative amendments made in 2013, legal practitioners have been removed from the process and Applicant's are encouraged to access the scheme themselves.

Since those amendments, I have acted for several women on a pro-bono basis to Appeal initial decisions made where there was a fundamental misunderstanding of the Act and statutory interpretation. Such decisions have profoundly impacted such women and lead to a significant re-traumatisation. It causes me concern that Applicant's do not have access to legal representation to explore appeal prospects.

I have lodged a number of Appeals under the Victims Support Scheme, the most relevant as to the issue of statutory interpretation is as follows:-

1. An Appeal involving loss of wages following the end of a domestic violence relationship. Victims Services had initially asserted that the entitlement to economic loss compensation was only entitled whilst the victim remained in a relationship with the offender. I successfully challenged this with a finding that the economic loss arose

because of the impact/trauma from the domestic violence which had continued well past the ending of the relationship.

2. An Appeal involving a claim by the daughter of a woman who had been murdered by her husband in a shocking domestic violence incident. Victims Services had initially asserted that the daughter was not eligible to claim compensation as a dependent as she was not reliant on the deceased for "day to day living expenses". I successfully appealed this on the basis the decision maker had erroneously inserted this terminology into the act and that reliance should be made on the long established principles of whole or partial dependence rather than reading into the Act a term which was not contained and clearly contrary to the intention of parliament.

3. An Appeal where Victims Services had declined an Application for a recognition payment on the basis that the decision maker had failed to find domestic violence had occurred in the absence of a physical assault. I successfully appealed this on the basis that it was an offence, under the *Crimes (Domestic and Personal Violence) Act* 2007, to intend and/or coerce a person causing them to be intimidated or fearful (or both).

The purpose of the Act is to recognise and promote the rights of victims of crime as well as to establish a scheme for the provision of support for victims of acts of violence [section 4 of the Act].

The ordinary approach to statutory construction as set out in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 is to look to the scope and purpose of the statute conferring the discretionary power and its real object. Further, with regard to *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 the Assessor is obligated to consider the general principles of the Act when determining the Application for a recognition payment. I would request that the Assessors for Victims Services have more training and understanding in the statutory interpretation when making such decisions. I have seen first hand the devastation caused when Assessors get these decisions fundamentally wrong.

Comments from Isabella:

Indigenous Recognition

After attending the NSW Child Protection Conference this year, I have become more aware of the inadequacies in the current legislation when considering First Nation's peoples. The Act does not make an explicit mention of Aboriginal or Torres Strait Islander people, regardless of them being arguably the most significantly affected population in Australia regarding child protection. The rights of the child and basic human rights of the Indigenous population were stripped away as a direct result of British invasion. This marked the beginning of the Stolen Generation, where at least 100,000 children were removed from their families through government policies.

Before entering this line of work, I thought that these inadequacies had been remedied and that the Stolen Generation was an event of the past. Through my work I now see that this is not the case. Still today Indigenous children are being removed from their families and communities. Isaiah Dawe, a Butchulla and Gawara saltwater man born in 1994, is a prime example of the ongoing inadequacies in the system. During the conference, he spoke about his traumatic experience in the foster care system from when he entered at two months old. He was not

given the chance to be nurtured by his community and experienced significant abuse and racism within the system.

During the conference, Dr Sarah Kastelic from the National Indian Child Welfare Association (NICWA) spoke of the American experience and how they have supported de-colonisation in their country. The American government recognised the inconsistencies disadvantaging Native Americans and implemented culturally appropriate legislation to support children when removal is deemed necessary by placing them in the care of their community. In Australia, 54% of children in the foster care system are Indigenous. A legal system created based on the traditions and history of the European heritage is not appropriate for a country with such a rich culture. Implementation of Indigenous Customary law and Indigenous representation in the courts is essential for a fair legal system.

Understanding that this is a constitutional issue of recognition of First Nations peoples, I believe that implementation through state legislation could act as a steppingstone toward constitutional recognition. For this to be achieved, conversation should be had with the people that this legislation has impacted, First Nation Australian's. As a white Australian it is not my place to speak for those it effects, however it is my responsibility to acknowledge change needs to occur.

From listening to First Nation Australians at the conference, I recommend the following:-

1. Section 109 of the Act be amended to include a First Nations person on the Victims Advisory Board;

2. Interviews be conducted with Elders and Indigenous people to discuss the implementation of Indigenous Customary Law into the current legislation; and

3. The preliminary section of the Act be amended to include an acknowledgement of country.

Conclusion

We would like to thank the Department again for allowing us to comment on the Paper. We are appreciative of the steps taken toward effective reform and acknowledge the work of the Department in child protection.

Yours faithfully
Carroll & O'Dea Lawyers

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