

The Commission for Children and Young People and Child Guardian

promoting and protecting the rights, interests and wellbeing of all Queenslanders under 18

Advice to: Director, Strategic Policy, Department of Justice and Attorney-General

Topic: Consultation Draft - Victims of Crime Assistance Bill 2009

Date due: Friday 12 June 2009

Thank you for inviting comment from the Commission for Children and Young People and Child Guardian (the Commission) on the Consultation Draft of the Victims of Crime Assistance Bill 2009 (the Bill).

The Commission supports the timely review of the current criminal compensation scheme governed by the *Criminal Code* and the *Criminal Offence Victims Act 1995* (COVA) and the Bill's changed focus on assisting a victim's recovery, instead of simply providing compensation. In the Commission's view, the proposed Victim's Financial Assistance Scheme (the Scheme) will provide a more targeted response to assist victims in achieving an expeditious recovery.

The Commission does, however, have some concerns about the Bill as it relates specifically to vulnerable children and young people. The Commission's proposed recommendations addressing these concerns are set out below.

Summary of Commission's recommendations:

1. The Scheme Manager have a discretion to allow other persons to bring an application for assistance on behalf of children and young people.
2. The Department be subject to a positive obligation to bring applications for financial assistance on behalf of children in out-of-home care who are eligible for assistance under the Scheme.
3. Children and young people in detention be excluded from the ambit of subparagraph 48(3)(b).
4. The Department be required to comply with a request for information by a government assessor within a prescribed timeframe to support an application by a child or young person in out-of-home care.
5. Children and young people be eligible for victim assistance if they suffer injury as a result of a parent or primary caregiver being injured.
6. There be a legislated obligation to extend the limitation period to take into account delayed psychological effects commonly experienced by victims of child sexual abuse.
7. The Scheme Manager have regard to whether the applicant was a child at the time of the act of violence when considering an application for extension of time.
8. Information about the Scheme be accessible to children and young people, particularly those in out-of-home care.
9. A proportion of Public Trustee fees be claimable by children and young people awarded special financial assistance under the Scheme.

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1. The Scheme Manager have discretion to allow other persons to bring an application for assistance on behalf of children and young people

The restrictions placed on who is able to apply for victim assistance where the victim is a child subsection 48(2) may significantly delay or impede access by vulnerable children and young people to victim assistance under the Scheme. In its current form, the Bill does not allow any alternative means for children to bring an application for victim assistance where the child's parent/s are either unwilling or unable to bring an application on the child's behalf and:

- the child is under the age of 12, or
- if the child is above the age of 12, where he/she is unable to obtain legal representation.

This excludes a child or young person whose parent does not acknowledge that the offence was committed against the child (particularly in cases of sexual abuse or physical abuse resulting from domestic and family violence) or where the child is injured by a parent offender (and is in the temporary care of another person) from being able to make an application for assistance under the Scheme.

Also, the requirement that children and young people be represented by a lawyer causes difficulties for children and young people seeking redress under the Scheme. Without assistance by Legal Aid Queensland or private funding from an adult, children and young people generally do not have the financial means to engage a lawyer, prohibiting their access to this part of the justice system.

On this basis, the Commission recommends subsection 48(2) of the Bill be amended to enable other persons to bring an application for victim assistance on behalf of a child, provided that person is first approved by the Scheme Manager (acting reasonably).

2. The Department be subject to a positive obligation to bring applications for financial assistance on behalf of eligible children in out-of-home care who are eligible for assistance under the Scheme

Guardianship of children and young people in out-of-home care generally vests in the chief executive of the Department responsible for administering the *Child Protection Act 1999* (the Department). The current wording of subsection 48(3)(a) may delay or impede access to the Scheme by those children and young people, as a result of the Department's administrative processes.

Even if the Commission's recommendation, set out above, that the Scheme Manager sanction applications for victim assistance being brought by another person on behalf of a child is incorporated into the Bill, children in out-of-home care are still likely to be disadvantaged as a result of not having an eligible person (other than the Department) available to make an application on their behalf. Therefore, the Commission recommends that the Bill also impose a positive obligation on the Department to make application on behalf of children in out-of-home care who could potentially fall within the ambit of the Scheme. Such application should be made within a legislatively prescribed timeframe after the Department becoming aware of the act of violence being committed.

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3. Children and young people in detention be excluded from the ambit of subparagraph 48(3)(b)

Subsection 48(3)(b) of the Bill provides that a person who has the right and responsibility to make decisions about a child's daily care under a federal or State court order or decision, is taken to be a reference to a child's parent for the purposes of making an application for assistance.

While the Commission understands that subsection 48(3)(b), is not designed to capture children and young people in detention, the Commission is concerned that the current wording of this subparagraph is unclear, resulting in a potential for confusion.

In its current form there is scope for the subsection to be misinterpreted because the Department of Communities is effectively responsible for the day to day care of a juvenile offender in detention. Without further clarification, the current wording of the subsection could lead to an unfounded understanding that the Department of Communities would be responsible for making an application for victim assistance on behalf of an eligible child applicant in detention, and not the child's parent.

The Commission is concerned that this confusion or misinterpretation, if not resolved, could result in an eligible child's parent not making an application on the child's behalf as a result of believing that they are unable to do so, resulting in the child being prevented from accessing the Scheme.

4. The Department be required to comply with a request for information by a government assessor within a prescribed timeframe to support an application by a child or young person in out-of-home care

Subsection 73(3) of the Bill requires the Department's chief executive to provide requested information where an application is made on behalf of a child in custody or guardianship, only if the chief executive is reasonably satisfied that the government assessor reasonably requires the information requested to decide the application. The Commission is concerned that this discretion may disadvantage a child applicant, particularly if non-provision of the information results in the child's claim being refused.

Accordingly, the Commission considers that where the Department is responsible for making an application on behalf of a child, or is the custodian of information, the Department should be required to comply with a request for information under s.73 of the Bill, with compliance to occur within a prescribed timeframe.

5. Children and young people be eligible for victim assistance if they suffer injury as a result of their parent or primary caregiver being injured

While the Commission supports the Bill's broadening of eligibility requirements for victim assistance, the Commission is concerned that some injured children and young people whose parent or primary caregiver has been seriously temporarily or permanently injured, may be unduly disadvantaged by not being afforded the ability to make a claim for financial assistance.

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In the Bill's current form, children and young people are only eligible to receive assistance if:

- they are the subject of a crime
- they are injured as a result of witnessing a crime, or
- a family member dies as a result of a crime.

The Commission recommends the expansion of this criteria to allow a category for children secondary victims mirroring the definition of a *parent secondary victim* at subsection 25(3) of the Bill. Children should be able to claim financial assistance where their parent or primary caregiver has been seriously temporarily or permanently injured as a result of a crime, with a consequent injury to the child (for example, psychological distress as a result of the parent's or primary caregiver's impairment).

6. There be a legislated obligation to extend the limitation period to take into account delayed psychological effects commonly experienced by victims of child sexual abuse

The Commission is concerned that the proposed discretion to extend the time limit for a child to make an application under section 52 of the Bill does not adequately recognise and consider the needs of applicants who have experienced delayed psychological effects as a result of child sexual abuse.

Research indicates that post-traumatic stress disorder (PTSD) is a common injury sustained by victims of child sexual abuse, resulting in that person's inability to psychologically revisit the traumatic event or stimuli that may prompt or require recollection of the event. Disclosing the abuse requires direct recollection and confrontation of the abuse itself, which often results in victims being unable to readily disclose their abuse as a result of PTSD¹.

Further, where children are sexually abused by a parent or someone in a position of trust and influence, the position of superiority of the offender often deters children from taking action due to feelings of shame, embarrassment and a sense of responsibility for the acts, which can lead to the abuse being disclosed many years after the event².

In its current form, the Bill allows the Scheme Manager to extend the timeframe for a victim to apply for assistance under the Scheme, but only *where the Scheme Manager considers it appropriate and desirable to do so*.

The Commission considers that there should be a legislated obligation on the Scheme Manager to grant an extension of time for victims of child sexual abuse to apply for assistance until the expiry of a period of three years after the date the injuries become apparent to the victim.

7. The Scheme Manager have regard to whether the applicant was a child at the time of the act of violence when considering an application for extension of time

¹ B. Matthews (2004) *Assessing the Scope of the Post-Ipp "Close Associate" Special Limitation Period for Child Abuse Cases* *James Cook University Law Review* 11: pp.63-83.

² *Ibid.*

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In the *Victims of Crime Review Report*³, the Department of Justice and Attorney-General recommended that grounds to extend the time to make an application for financial assistance under the Scheme should include a consideration of whether the applicant was a child at the time the act of violence was committed.

The Commission supports the insertion of this consideration at subsection 52(2) of the Bill

8. Information about the Scheme be accessible to children and young people, particularly children and young people in out-of-home care

While the Commission supports the establishment of the Victims Support Unit as a central point for victims to access financial assistance support services, complaints resolution and information, it is important for children and young people to be adequately informed of their rights and entitlements under the Bill, particularly the availability of financial assistance under the Scheme.

In order to achieve this, awareness building with child-focused victim support groups and school guidance counsellors throughout Queensland could be undertaken to ensure that information is disseminated about the Scheme including:

- how it can be accessed
- details of services provided by Legal Aid Queensland, and
- how an application can be made to Legal Aid Queensland for legal representation.

It will also be important for assessment and information officers to be appropriately trained to address the needs of victims who are children and young people. Information provided should be available in a child friendly and culturally appropriate manner.

9. A proportion of Public Trustee fees be claimable by children and young people awarded special financial assistance under the Scheme

Where funds are determined to be paid into trust pursuant to subparagraph 92(1)(c), the Commission considers that a child victim should be eligible for additional financial assistance for Public Trustee fees incurred by the victim in having those funds administered by the Public Trustee.

The Commission notes that provision is made in the Bill for eligible applicants to claim additional assistance of up to \$500.00 for legal costs incurred in applying for assistance. The stated purpose of allocating this additional assistance under the Scheme is to minimise the potential for the benefit of financial assistance received by the applicant to be consumed by legal costs.

Similarly, the Commission considers that if additional assistance is not made available to children and young people awarded a lump sum payment by way of special financial assistance, there is a significant potential for that payment to be eroded by Public Trustee fees.

³ November 2008

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The Commission understands that the total fees payable to the Public Trustee is calculated based on the amount paid into trust and the number of transactions per annum to access the funds, charged on a per annum basis until the child turns 18. Further, the special financial assistance payment may also be subject to sanction by the Public Trustee pursuant to section 59 of the *Public Trustee Act 1978* which will entail further charges.

For example, for a special financial assistance payment of \$10,000.00, the maximum amount able to be awarded under the Bill, the Public Trustee charges (inclusive of GST):

- \$136.00 per annum for management of the assets
- \$301.00 per annum for nil to one transactions to access the funds, and
- \$748.00 (as a one-off fee) to sanction the payment.

Therefore, even based on the maximum financial assistance payment amount, there is significant potential for the rapid erosion of trust funds due to the Public Trustee's fees and charges, particularly if the child victim is young and therefore must continue to have the funds retained in trust for a number of years.

The Commission understands that there will be a joint process implemented between government assessors and the Public Trust Office to determine whether a case is suitable for administration by the Public Trustee in light of the fees payable. However, allocating additional funding for payment towards those fees (similar to that awarded for legal costs incurred) will assist to ensure that the funds held on trust for the benefit of children and young people are not depleted by the Public Trustee's fees and charges.

Please do not hesitate to contact Helena Kolenbet, Senior Policy Officer, Strategic Policy and Research Program (ph: 3221 6980; e-mail: Helena.Kolenbet@ccypcg.qld.gov.au) should any aspects of this advice require clarification.

Additional comments

The Commission considers the reference to the *Powers of Attorney Act 1998* at subparagraph 92(1)(c) is incorrect. The Commission notes that the Office of the Public Trustee is established under the *Public Trustee Act 1978*, the legislative instrument which also grants the Public Trustee its powers to act as trustee of a trust and governs the Public Trustee's management of a trust. Accordingly, the Commission considers that the reference to *Powers of Attorney Act 1998* should in fact be a reference to the *Public Trustee Act 1978*.