

Reasonable likelihood in practice

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Since 2017, the Commonwealth Ombudsman in its role as the Defence Force Ombudsman, and since 2019 as the VET Student Loans Ombudsman, can make recommendations to Australian Government agencies on the basis that it is 'reasonably likely' that an event that is being complained of has occurred. These recommendations can include reparation payments and the cancellation of student debts. However, the term 'reasonable likelihood' is not widely used in Australian law. It involves the concept that reasonable enquiries have been made to form the belief that the event occurred. This article will highlight the Ombudsman's use of 'reasonable likelihood' tests in both the Defence Force Ombudsman and VET Student Loans Ombudsman jurisdiction, to provide real and practical remedies for individuals.

Summary of 'reasonable likelihood' in other jurisdictions

Although 'reasonable likelihood' is not a widely used standard in Australia, it does arise in a range of subject matters from criminal law, wills and succession, racial discrimination, trademarks and conduct of the legal profession. Each state and federal court has generated various descriptions of reasonable likelihood which, for the most part, do not differ significantly. The most commonly cited definition comes from a Victorian Supreme Court case, *Department of Agriculture and Rural Affairs v Binnie*¹ (*Binnie*). Various state courts across Australia have since relied on this definition:

[Reasonable likelihood is] a chance of an event occurring or not occurring which is real — *not fanciful or remote*. It does not refer to a chance which is more likely than not to occur, that is, one which is "odds on" or where between nil and certainty it should be placed. A chance which in common parlance is described as 'reasonable' is one that is 'fair,' 'sufficient' or 'worth noting' ...²

The word 'likelihood' in reasonable likelihood was held to infer a standard which is less definite than probable.³

Notably, this jurisprudence on reasonable likelihood has primarily arisen in the context of respective state and territory legislation on the legal profession (for example, misconduct of lawyers) and might not be directly transferable to the meaning of reasonable likelihood within the *Ombudsman Regulations 2017*. However, a number of Federal Court cases have also relied on *Binnie* in different contexts — for example, racial discrimination⁴ and federal court rules.⁵

Defence abuse reporting function — *Ombudsman Regulations 2017*

The *Ombudsman Regulations 2017* confer on the Defence Force Ombudsman the function of taking appropriate action to respond to a complaint of abuse if the Defence Force Ombudsman is satisfied that the abuse is reasonably likely to have occurred. The regulations define 'abuse' in relation to a complainant to include sexual abuse of

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1 [1989] VR 836.

2 *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 842.

3 *Ibid.*

4 *Eatock v Bolt and Another* [2011] 283 ALR 505 [259].

5 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Emergency Transport Technology Pty Ltd* [2011] 277 ALR 388 [19].

the complainant; serious physical abuse of the complainant; and serious bullying or harassment of the complainant.

The regulations specify that appropriate actions include facilitating counselling for the complainant; facilitating a restorative engagement conference; making recommendations to the Australian Defence Force (Defence) in respect of the complaint; and making recommendations to the Defence Secretary that a reparation payment be made. A reparation payment recommendation may include a payment of \$45 000 be made to the complainant if the Defence Force Ombudsman is satisfied the abuse involved the most serious forms of abuse; or \$20 000 if satisfied the abuse involved unlawful interference with the complainant accompanied by some element of indecency. A further payment of \$5000 may be recommended if the Defence Force Ombudsman is reasonably satisfied that Defence did not respond appropriately to the abuse. Reparation payments can only be recommended for abuse that allegedly occurred on or before 30 June 2014, as this is a key date from which people could have confidence in the advances being made by Defence in reforming culture and in Defence's ability to appropriately address complaints of abuse where it occurred.

There are two elements to an assessment of reports of abuse:

- Is it abuse as defined by the regulations?
- Are we satisfied the abuse is reasonably likely to have occurred?

In the cases of reported sexual abuse, the regulations do not include the adjective 'serious' before this type of abuse. If sexual abuse is reported we move to assessing reasonable likelihood. However, in the case of non-sexual abuse — for example, physical abuse and bullying and harassment — we first assess whether the abuse meets the threshold of seriousness and then turn to whether it was reasonably likely to have occurred.

To establish the 'seriousness' of physical abuse or bullying and harassment, we assess whether the abuse is significant and consequential. It is the conduct or behaviour which must be significant rather than the effect on the person on whom it is inflicted. Once we have established that a report of abuse meets the threshold of seriousness, we then assess whether the abuse was *reasonably likely* to have occurred.

To determine reasonable likelihood, we undertake an objective assessment of the information provided by the reportee and information obtained by making reasonable inquiries, including of Defence. We are conscious that determining 'reasonable likelihood' is a very different threshold from that of determining the balance of probabilities for administrative complaints, which requires fact-finding and investigation. People making reports are required to give the information through making a statutory declaration, and the majority of the reports we have received are historical. Our assessments are also informed by whether the persons were in the locations and relevant roles at the time, what information is already known about incidents and reports of abuse in those circumstances — that is, referencing corroborating information which includes similar complaints of abuse made at the same time in the same, or similar, locations. These may involve reference to published reports and reviews, such as the Defence Abuse Response Taskforce and the Royal Commission into Institutional Responses to Child Sexual Abuse, and internal inquiries conducted by Defence. Other Defence information, such as medical records, may also be relevant.

Having regard to the nature of the abuse, an absence of any further or corroborating information will not prevent the Ombudsman from being satisfied the abuse was reasonably likely to have occurred. This is a difficult concept for traditional investigation officers to

come to terms with at times, and some ask how we can make an assessment without more substantial evidence.

Being satisfied there is a reasonable likelihood that serious abuse occurred is not definitive proof that it occurred. Rather, it reflects that the legislation is intended to be beneficial, recognising that this scheme is intended to cover historical abuse, which is often difficult to determine at the normal administrative standard of balance of probabilities.

Indicators of reasonable likelihood in this context can take into account factors such as the time that has passed since the abuse is alleged to have occurred and the amount of detail contained in the report of abuse. For example, in a report of sexual assault occurring at night, it may be reasonable that a complainant has not been able to provide the name of the abuser, as they may have been unable to see the face of the abuser while they were the subject of the sexual assault. In a report involving a hazing and initiation ritual perpetrated in 1969 culminating in an indecent assault, in which there were multiple perpetrators, it is reasonable to expect the person making the report may not remember the names of the perpetrators. A person may also be severely traumatised by an event, resulting in difficulties in memory recall.

In the more than two years since we have been administering this function, we have received 1087 reports of abuse (as at 19 June 2019). To date, 689 reports have been assessed, with 525 accepted and 164 assessed as out of jurisdiction. We have made 355 recommendations to the Secretary of Defence to make reparation payments worth \$14.43 million.

If a reportee is not satisfied with our decision, they can request an internal review, and a different decision-maker will review the matter and inform the reportee of the outcome.

To date, there have been no applications for review by the courts of any administrative decisions or recommendations made by the Defence Force Ombudsman under these regulations. We are also not aware of any legal challenges to the Defence Secretary's decisions on our recommendations for reparation payments.

VET Student Loans Ombudsman

The VET FEE-HELP scheme operated from 2009 to 2016. It assisted students with the cost of their studies through an income-contingent loan repayable through the tax system. VET FEE-HELP was substantially expanded in late 2012 to support growth in the vocational education and training (VET) sector by relaxing many of the constraints applied to training providers. However, this expansion led to a number of training providers and their agents targeting vulnerable people and signing them up to VET courses, in many cases inducing students to enrol despite unsuitability for the course. Having signed students up, the Commonwealth funded the course and raised a debt against the student. As a result of this poor provider behaviour, the scheme left many students with large debts and in most cases few or no training outcomes.

The VET FEE-HELP scheme was replaced in 2016 with VET Student Loans, with a higher bar for entry for training organisations, increased student protections and strengthened regulatory control. Additionally, on 1 July 2017, the VET Student Loans Ombudsman (VSLO) was established, within the Office of the Commonwealth Ombudsman, to assist students with complaints about their VET FEE-HELP or VET Student Loans provider.

Data collated by the VSLO demonstrated there was a significant number of individual cases that could not be remedied under the legislation in force at the time. Furthermore, most of the complaints being assessed by the VSLO involved closed providers, where there is little

student-level information available. This meant the VSLO was unable to investigate using the office's normal processes.

The VSLO and then Department of Education and Training (Education)⁶ worked closely with government and industry stakeholders to design and recommend legislative reforms to the Commonwealth.

The VET FEE-HELP Student Redress Measures (redress measures) were passed in the *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018* (Cth). The redress measures were introduced from 1 January 2019 to provide broader redress and ensure inappropriate VET FEE-HELP debts are removed for all of those affected. The redress measures currently extend to 31 December 2020.

The VSLO's role in the redress measures is to assess and make a recommendation to the Secretary of the Department of Employment, Skills, Small and Family Business (Employment) or their delegate on whether a student's loan should be re-credited and the relevant debt removed. The VSLO will assess the existing case load of over 5000 complaints received before the redress measures were introduced and new complaints received over the two years of the sunset period.

Acknowledging that information may not be available for individual students, the redress measures use the threshold of reasonable likelihood when determining whether a VET FEE-HELP debt should be removed. The use of reasonable likelihood addresses the issue of limited available information for individual students and the need to assess a large number of complaints in a relatively short period. The VSLO makes reasonable enquiries to obtain information from third parties, including Employment, regulators, and liquidators of closed providers, when assessing whether it is reasonably likely that inappropriate conduct occurred.

The VSLO, Education and now Employment had to think 'outside' their usual processes to ensure a joined-up approach that had the needs of the student at its core. For example, while the Secretary of Employment remains responsible for all decisions to re-credit students, they take a risk-based approach to VSLO recommendations — working closely with the VSLO to approve assessment processes and models and then relying upon the VSLO to act in accordance with these agreed processes. This innovative approach maximises the benefits of redress given the time-limited nature of the measures.

The VSLO has developed 'provider profiles' that outline the established conduct of a provider, based on the large amount of audit and compliance information gathered about the conduct and behaviour of these providers. This is used as a source of evidence to satisfy reasonable likelihood where information specific to a student is not available. The VSLO has also developed 'assessment models' that outline the process for assessing complaints and the criteria that must be met before a recommendation is made to the Secretary of Employment to remove a VET FEE-HELP debt.

The provider profile and assessment models are developed in collaboration with Employment and are the agreed process for assessments. This removes the need for the VSLO to send supporting evidence and a statement of reasons to Employment for every recommendation, streamlining the process.

A specialised Intelligence Team comprising staff with law enforcement and administrative investigation experience and strong content knowledge reviewed provider information and

⁶ Responsibility for the redress measures transferred from the Education to Employment on 11 July 2019 as part of the machinery of government changes for vocational education and training and skills. The VSLO worked with Education on initial implementation of the redress measures, with recommendations now made to Employment.

information from third parties to develop the provider profiles and assessment models. By concentrating expertise in a small team and using processes and guidance material to achieve consistency across assessment, the VSLO has developed a staffing model that allows for rapid expansion when needed.

The use of reasonable likelihood means that assessment staff do not need to investigate each complaint in detail, reducing the level of training required and time taken to assess each complaint.

In practice, assessment staff conduct an investigative interview with the complainant to identify the issues of the complaint, compare these to the known conduct outlined in the provider profile, and check if there is contradictory or supporting evidence available from third parties. In some instances, the only information assessment staff have available when assessing a complaint are the complainant's statements and the provider profile.

As at 9 July 2019, the VSLO has recommended the removal of VET FEE-HELP debts for 610 people, for a total debt amount of \$14.3 million.

Conclusion

While each scheme is different and designed to address either abusive behaviour or misconduct, both schemes rely on what is objectively known about a provider or a particular area of Defence at the time, to make an informed and discretionary decision about whether it is 'reasonably likely' that an event complained of occurred.

Furthermore, both the Defence Force Ombudsman and VSLO jurisdictions demonstrate how the administrative law framework can provide real and practical remedies for individuals who have been on the receiving end of abuse or misconduct that is criminal in nature through the application of the test of reasonable likelihood. In doing so, the Ombudsman is contributing to keeping a significant body of work away from the courts and tribunals and achieving beneficial outcomes for people.

