

EXECUTIVE SUMMARY	3
SUMMARY OF RECOMMENDATIONS.....	5
1. INTRODUCTION	8
1.1 REASON FOR THE REVIEW	8
1.2 FRAMEWORK FOR THE REVIEW	8
1.3 OUTLINE OF THIS REPORT.....	8
2. BACKGROUND TO THE INTRODUCTION OF THE ACTS.....	10
2.1 THE VSR ACT	10
2.2 THE VR ACT	10
3. IMPLEMENTATION	12
3.1 THE VSR ACT	12
3.2 THE VR ACT	12
4. OBJECTIVES OF THE ACT	15
4.1 LEGISLATIVE STATEMENT OF OBJECTIVES - VSR ACT	15
4.2 SUBMISSIONS – OBJECTS OF VSR ACT.....	15
4.3 DISCUSSION - VSR ACT	16
4.3.1 <i>Suggestions for alternative rehabilitative services</i>	17
FINANCIAL COUNSELLING SERVICES.....	17
VICTIMS OF CRIME EMERGENCY FUND.....	17
COURT EXPENSES FUND.....	17
OTHER SUGGESTIONS	18
4.4 LEGISLATIVE STATEMENT OF OBJECTIVES - VR ACT.....	19
4.5 SUBMISSIONS – OBJECT OF VR ACT.....	19
4.6 DISCUSSION - VR ACT.....	19
5. REVIEW OF THE TERMS OF THE VSR ACT	20
5.1 STRUCTURE OF THIS CHAPTER.....	20
5.2 COMPENSATION.....	20
5.2.1 <i>Statutory compensation under the VSR Act</i>	20
5.2.2 <i>People excluded from claiming compensation or accessing counselling services</i>	21
5.2.3 <i>Part 4 Court awarded compensation</i>	24
5.2.4 <i>The future of statutory compensation - lump sum versus other models</i>	24
5.3 COUNSELLING	25
5.3.1 <i>Increasing availability of counselling - gaps in service provision</i>	26
5.3.2 <i>Increasing availability of counselling - specific exclusions contained in the VSR Act</i>	26
5.4 COMPENSABLE INJURIES	27
5.4.1 <i>Possible new categories of compensable injuries</i>	27
5.4.2 <i>Review of the Current Categories of Compensable Injury</i>	28
5.5 RESTITUTION AND OFFENDER PARTICIPATION IN THE VICTIMS COMPENSATION PROCESS	29
5.5.1 <i>Profile of the present compensation and restitution processes</i>	29
5.5.2 <i>Offender participation in victims compensation determinations</i>	31
5.5.3 <i>The effect of the current restitution provisions and process on offenders</i>	32
5.5.4 <i>Other concerns regarding the current restitution process</i>	34
5.5.5 <i>Concerns with the set-off procedures</i>	35
5.6 DETERMINATIONS BY COMPENSATION ASSESSORS - PROCEDURAL FAIRNESS AND OTHER ISSUES	36
5.6.1 <i>Inconsistencies between assessors’ decisions</i>	36
5.6.2 <i>Content of assessors’ decisions</i>	37
5.6.3 <i>The need for procedural fairness when the Tribunal obtains material about the applicant (section 65A and clause 23 of Schedule 2)</i>	38
5.7 SEXUAL ASSAULT/CHILD SEXUAL ASSAULT/DOMESTIC VIOLENCE.....	39
5.7.1 <i>Sexual assault, child sexual assault, domestic violence and the leave provisions in section 26(3)(b)</i>	39

5.7.2 Sexual assault, domestic violence and the assistance/reporting/mitigation provisions	40
5.7.3 Sexual assault and proof of injury under section 5(1)(c)	42
5.7.4 Domestic violence, definitional issues and amounts of compensation	43
5.8 SPECIFIC PROVISION OF SERVICES	44
5.8.1 Provision of Services to Indigenous Victims	44
5.8.2 Missing Persons	45
6. REVIEW OF THE TERMS OF THE VR ACT	47
6.1 OVERALL ISSUES EMERGING FROM THE SUBMISSIONS	47
6.2 PARTICULAR PROVISIONS	50
7. CONCLUSION	55
APPENDIX A - RESPONDENTS TO THE REVIEW	56
GLOSSARY OF TERMS.....	57

EXECUTIVE SUMMARY

The *Victims Compensation Act 1987* established the first comprehensive statutory victims compensation regime in New South Wales. In 1996, it was replaced by the *Victims Compensation Act 1996*. In 2000, the *Victims Compensation Amendment Act 2000* changed the name of the existing compensation legislation to the *Victims Support and Rehabilitation Act 1996*, in order to better reflect the victim support and rehabilitative focus of the Act.

The *Victims Rights Act 1996* was enacted at the same time as the *Victims Compensation Act 1996*. Among other things, it established the Victims of Crime Bureau, the Victims of Crime Advisory Board and the new Charter of Victims Rights, which aimed to build upon the principles already adopted by New South Wales government departments and agencies under the pre-existing charter of rights for victims of crime.

The NSW Attorney General's Department has conducted a statutory review of both the *Victims Support and Rehabilitation Act 1996* and the *Victims Rights Act 1996*. Section 92 of the *Victims Support and Rehabilitation Act 1996* and section 18 of the *Victims Rights Act 1996* require that each Act be reviewed five years from the date of commencement in order to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. This report is the result of that review process, which involved seeking submissions from interested stakeholders and members of the public.

Almost all the respondents to the review supported the objectives of both Acts but most submissions identified several areas in which the terms of both Acts failed to properly secure those objectives. The submissions raised several suggestions as to how the current terms of both Acts might be amended in order to better secure those objectives. Accordingly, this report recommends a number of changes to both the *Victims Support and Rehabilitation Act 1996* and the *Victims Rights Act 1996*. The major changes are discussed at more depth in the body of the report in Chapters 4, 5, and 6.

In short, some of the major areas identified by respondents to the review where the current terms of the *Victims Support and Rehabilitation Act 1996* could be improved in order to better meet the stated objectives of the Act were:

- Compensation;
- Counselling;
- Compensable Injuries;
- Restitution and Offender Participation in the Victims Compensation Process;
- Determinations by Compensation Assessors - Procedural Fairness and Other Issues;
- Sexual Assault/Child Sexual Assault/Domestic Violence;
- Provision of Specific Services.

In terms of the *Victims Rights Act 1996*, most respondents felt that the terms of the Charter of Victims Rights were still valid for securing the objectives of the Act. Only minor adjustments to the terms of the Charter were found to be warranted.

In conclusion, the report notes that the policy objectives of each Act remain valid. However, several legislative and administrative changes are recommended in order to improve the operation of both Acts and to ensure that they continue to meet their stated objectives. This conclusion is broadly supported by the submissions received during the review process and by advice received from Victims Services, the Business Centre of the Attorney General's Department primarily responsible for administering the victims compensation and victims rights regime.

SUMMARY OF RECOMMENDATIONS

Some of the recommendations of the report are raised as alternate recommendations. They are reproduced in full below for ease of reference.

Recommendation 1:

Consideration should be given to devising a scheme that would allow victims of crimes who are not eligible for statutory compensation to elect to receive counselling and/or be reimbursed for certain expenses, such as medical, optical and dental expenses, up to a maximum amount.

Recommendation 2:

Section 5 of the Act should be amended to clarify that an ‘act of violence’ includes violent incidents in relation to which convictions are not obtained due to the incapacity of the offender.

Recommendation 3:

Section 24(3) should be amended to give the Tribunal a discretion to consider any ‘special circumstances’, taking into account the nature of the person’s offence, the seriousness of the act of violence, and any causal connection between these two factors.

Recommendation 4:

Consideration should be given to improving service delivery in rural and remote centres by making greater use of video conferencing technology and by convening regular 1-2 day counselling clinics..

Recommendation 5`:

Consideration should be given to amending section 21 of the VSR Act to remove the reference to section 24(2) and to add a new subsection to provide a discretion to refuse an application for counselling if the person’s injury arose from behaviour amounting to an offence. In exercising this discretion, account should be taken of the nature of the person’s offence, the seriousness of the act of violence, and any causal connection between the two factors.

Recommendation 6:

The categories of compensable injury should be expanded to include injury to or loss of a foetus, miscarriage as a result of violence, and associated injury to reproductive organs as a result of violence.

Recommendation 7:

The VSR should be amended to allow the determination of an application for compensation to be adjourned, pending the finalisation of another claim where the applicant may be liable to pay restitution as a convicted offender. Section 31 of the VSR should be amended to clarify that set off applies where restitution orders have been made.

Recommendation 8:

Section 65A of the VSR should be amended to require victims or their solicitors to be advised of any further material obtained under that section and to be given an opportunity to inspect this material and to make submissions.

Recommendation 9:

Consideration should be given to amending section 30(1)(b) of the VSR, to recognise reports made by victims of sexual assault, domestic violence or child abuse to health professionals or other specified agencies, as an alternative to reports to police

Recommendation 10:

Consideration should be given to amending section 30(1)(d1), (which requires victims to take reasonable steps to mitigate their injuries) so that assessors also take into account the nature of the relationship between the victim and the offender, and whether the alleged act of violence is an act of sexual assault, domestic violence or child abuse.

Recommendation 11:

The VSR Act should be amended to provide that for offence-based injuries it is not necessary to separately prove an 'injury' as defined in the Dictionary to the Act.

Recommendation 12:

Consideration should be given to amending the definition of domestic violence within the Act to exclude more remote instances of domestic violence not initially contemplated by the Act.

Recommendation 13:

Victims Services, in consultation with the Aboriginal Justice Advisory Council, should develop Aboriginal specific responses to Aboriginal victims of crime. In particular, an Aboriginal cultural model of counselling for Aboriginal victims of crime should be developed and implemented.

Recommendation 14:

Section 26 of the VSR Act should be amended to insert a subsection making allowance for the granting of leave in the specific case of missing persons, or that the finalisation of coronial proceedings be specifically included as ‘good reason’ under section 26(3).

Recommendation 15:

Consideration should be given to expanding the ‘caseworker’ scheme whereby the VCB acts as a point of contact for victims of very serious crimes and helps them to navigate the different agencies involved in the provision of services to victims of crime, and in the compensation process.

Recommendation 16:

The definition of ‘harm’ in section 5(2)(a) should be changed from ‘actual physical bodily harm, mental illness or nervous shock’ to ‘physical, psychological or psychiatric harm’.

Recommendation 17:

The terms of 6.1 should be amended to read: ‘A victim should be treated with courtesy, compassion, cultural sensitivity, and respect for the victim’s rights and dignity.’

Recommendation 18:

The wording of 6.5 (2) should be changed from ‘actual bodily harm, mental illness or nervous shock’ to ‘physical, psychological or psychiatric harm’.

Recommendation 19:

Relevant government departments and agencies should continue to work towards the provision, where practicable, of separate amenities and safe waiting rooms for victims.

Recommendation 20:

The current wording of 6.8 should be amended to clarify that it only applies to court proceedings.

1. INTRODUCTION

1.1 Reason for the Review

Section 92 of the *Victims Support and Rehabilitation Act 1996* ('the VSR Act') and section 18 of the *Victims Rights Act 1996* ('the VR Act') require that the Acts be reviewed five years from the date of commencement to determine whether the policy objectives of the Acts remain valid and whether the terms of the Acts remain appropriate for securing those objectives. Both Acts received assent in December 1996 but did not commence in their entirety until April 1997.

1.2 Framework for the Review

The reviews of both the VSR Act and the VR Act are set out in this report, which:

- brings together the main issues raised by individuals and organisations in submissions to the review;
- assesses the objectives and terms of both Acts, as required by section 92 of the VSR Act and section 18 of the VR Act; and
- makes a range of recommendations.

Consultation was an essential component of the review process:

- advertisements were placed in major newspapers in February 2002, inviting interested individuals and organisations to make submissions to the review. Advertisements were also placed on the Victims Services and the Victims of Crime websites;
- invitations were sent to identified stakeholders, inviting them to make submissions to the review;
- the Victims Advisory Board, established under the VR Act, and victims support groups were consulted directly; and
- a list of individuals and organisations who made submissions is at Appendix A

1.3 Outline of this Report

Chapter 1 of this report is an introductory chapter that explains the reason for the review of the Act and outlines the framework for the review.

Chapter 2 provides background information in relation to the history of the victims compensation and victims rights legislative regimes that has led to the current form of the two Acts.

Chapter 3 provides information on the implementation of the VSR Act and the VR Act, and a description of how each Act operates.

Chapter 4 examines the objectives of each Act and assesses their continued appropriateness, taking into account the submissions that were received

Chapter 5 examines specific terms of the VSR Act and assesses their continued appropriateness, taking into account the submissions that were received.

Chapter 6 examines specific terms of the VR Act and assesses their continued appropriateness, taking into account the submissions that were received.

Chapter 7 sets out the conclusions of the report.

2. BACKGROUND TO THE INTRODUCTION OF THE ACTS

2.1 The VSR Act

The *Victims Compensation Act 1987* established the first statutory victims compensation regime in NSW. It was replaced in 1996 by the *Victims Compensation Act 1996*. In 2000, the *Victims Compensation Amendment Act 2000* changed the name of the legislation to the *Victims Support and Rehabilitation Act 1996*, to better reflect the victim support and rehabilitative focus of the Act.

A number of changes have been made to the VSR Act since its introduction in 1996. In brief, the main amendments have arisen from:

1. *Victims Compensation Amendment Act 1998* - which made amendments relating to counselling, restitution, and certain matters relating to domestic violence and psychiatric injury.
2. *Victims Compensation Amendment Act 2000* - which changed the name of the Act and made further amendments to strengthen the support and rehabilitative focus of the legislation, particularly in relation to the provision of counselling, and which also narrowed the range of matters that could claim Category 1 psychological or psychiatric disorder.

The operation of the VSR Act has also been changed by the *Victims Compensation Amendment (Compensable Injuries) Regulation 2000*, which increased the threshold from which compensation for a compensable injury (as set out in Schedule 1 of the VSR Act) could be claimed, from \$2400 to \$7500.

The present statutory review therefore examines the current form of the VSR Act, incorporating each of these amendments. It does not formally examine the provisions of the *Victims Legislation Amendment Act 2003*, which received assent in June 2003. This Act enables victim impact statements to be read out in court by victims of serious offences or their representatives, requires victims of crime to be provided with certain information about the prosecution of accused persons, and provides for payment for counselling services for the families of people killed by the criminal use of motor vehicles.

2.2 The VR Act

The VR Act was enacted at the same time as the *Victims Compensation Act 1996* (now the VSR Act). It aimed to build upon the principles already adopted by New South Wales government departments and agencies under the pre-existing charter of rights for victims of crime. This charter was endorsed in 1989 by various government bodies involved in the criminal justice system, the health system and the community sector, which were involved in the provision of services to victims of crime. The VR Act

established the new Charter of Victims Rights, the Victims of Crime Bureau and the Victims of Crime Advisory Board.

The VR Act has been amended four times since its enactment in 1996. These amendments are:

1. *Crimes Legislation Amendment (Sentencing) Act 1999* - which made amendments to the provisions concerning the receipt and consideration by courts of Victim Impact Statements, and also to Schedule 1 of the Act which concerns the provisions relating to membership of the Victims Advisory Board.
2. *Statute Law (Miscellaneous Provisions) Act (No 2) 1999* - which repealed both the provisions concerning the receipt and consideration by courts of Victim Impact Statements, and also the provision regarding amendment of the *Criminal Procedure Act 1986*.
3. *Crimes Legislation Amendment Act 2000* - which amended section 10 of the VR Act to expand the meaning of 'victim of crime' to include a member of the immediate family of a missing person, for the purposes of the functions of the Victims of Crime Bureau.
4. *Victims Legislation Amendment Act 2003*– referred to, but not formally examined, in this review (see 2.1 above)

3. IMPLEMENTATION

This chapter of the report outlines the roles of the different bodies that administer and implement the VSR Act and the VR Act, and the various procedures they have instituted to meet the terms and requirements of the legislation.

3.1 The VSR Act

Victims Services is a Business Centre of the New South Wales Attorney General's Department. It comprises both the Victims Compensation Tribunal and the Victims of Crime Bureau. It also hosts the Victims Advisory Board, a board established under the VR Act to advise the Minister (the Attorney General) on policies, practices and reforms relating to victims compensation and support services; and to consult victims of crime and community and government support agencies on issues and policies concerning victims of crime

The Victims Compensation Tribunal is primarily responsible for administering the compensation scheme as established by the VSR Act. All payments of statutory compensation, costs and approved counselling are paid out of the Victims Compensation Fund, established by the VSR Act. The Tribunal is a specialist and discrete tribunal which provides the following services, according to the terms of the VSR Act:

- Registering applications for compensation under the Act from victims of crime and compiling supporting material (police and medical reports and submissions) to assist the processing of claims;
- Registering and processing applications for counselling under the Act;
- Assessing claims - making determinations and awards under the Act having regard to the appropriate levels of compensation for the injuries suffered;
- Restitution - recovering from defendants monies paid in compensation;
- Legal advocacy in hearings before Magistrates to settle restitution matters and to secure orders to recover money from convicted offenders.

3.2 The VR Act

Section 9 of the VR Act established the Victims of Crime Bureau as a branch of the Attorney General's Department, within Victims Services. Section 10(1) of the Act provides:

The Victims Bureau has the following functions:

- (a) to provide information to victims of crime about support services and compensation for victims of crime, and to assist victims of crime in the exercise of their rights,

- (b) to co-ordinate the delivery of support services for victims of crime and to encourage the effective and efficient delivery of those services,
- (c) to promote and oversee the implementation of the Charter of Victims Rights,
- (d) to receive complaints from victims of crime about alleged breaches of the Charter of Victims Rights and to use its best endeavours to resolve the complaints.

The Victims of Crime Bureau is therefore largely responsible for the oversight and implementation of the VR Act.

Under section 10(1)(a) of the VR Act the Victims of Crime Bureau, in conjunction with Mission Australia's Victims Support Service, conducts the Victims Support Line. The line offers information, referral and support to victims of crime across New South Wales. It operates 24 hours per day, 7 days a week, 52 weeks a year, and is staffed by officers at the Bureau and trained volunteers. In the period 2000-2001, the Victims Support Line responded to over 10,000 victim and victim-related calls. The Victims Support Line assists callers by listening to their stories, referring them to appropriate agencies and support systems such as the Approved Counselling Scheme, victims compensation, and a range of government and non-government agencies (including specialist victims groups). The Support Line also assists victims in accessing their rights under the Charter of Victims Rights by providing information and helping victims navigate the various departments and agencies which are responsible for, and which come into frequent contact with, victims and victim-related issues.

In addition, the Victims of Crime Bureau responds directly to victims by producing and disseminating appropriate information materials and packages, such as the *What Now?* booklet launched in May 2000, which contains useful information and contacts for both service providers and victims of crime regarding access to support, needs, rights, complaints, and advice for family and friends.

Under section 10(1)(b), the Victims of Crime Bureau has convened an interagency forum for the last 5 years. This forum meets on a quarterly basis and is comprised of some 25 agencies (both government and non-government) that work with victims either in a core capacity or in a related area.

The Bureau has worked closely with the NSW Police on a number of different initiatives, including the victims support card, training for new graduating police officers, domestic violence liaison officers, sexual assault detectives and crime prevention officers.

In terms of promoting and overseeing the implementation of the Charter of Victims Rights (as required under section 10(1)(c)) and receiving and resolving alleged breaches of the Charter (as required under section 10(1)(d)), the Bureau has instituted a number of different procedures. A 'plain English' Charter pamphlet has been distributed to all members of the interagency forum and systemic issues regarding the implementation of the Charter are raised on a regular basis at forum meetings. Through its ongoing relationship with different agencies and departments, the Bureau has organised 17 Charter forums across New South Wales with a view to strengthening local interagency commitment to Charter implementation and raising general awareness. The Bureau has also produced several documents which aid in Charter implementation and oversight. These include the Charter standards document, which is available on the Bureau web site, and a training package.

4. OBJECTIVES OF THE ACT

4.1 Legislative statement of objectives - VSR Act

A legislative statement of the objectives of the VSR Act is set out in section 3 of that Act:

3 Objects of Act

The objects of this Act are as follows:

- (a) to provide support and rehabilitation for victims of crimes of violence by giving effect to an approved counselling scheme and a statutory compensation scheme,
- (b) to enable compensation paid under the statutory compensation scheme to be recovered from persons found guilty of the crimes giving rise to the award of compensation,
- (c) to impose a levy on persons found guilty of crimes punishable by imprisonment for the purpose of funding the statutory compensation scheme,
- (d) to give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime.

4.2 Submissions – Objects of VSR Act

The majority of submissions to the review focussed on matters relevant to Objects (a) and (b) of the VSR Act. No submissions addressed Object (c) (the compensation levy). Object (d) was raised in very few submissions, and only to note that the alternate scheme proposed in that object is rarely (if ever) used.

Object (a)

The majority of submissions endorsed the support and rehabilitation objectives set out in Object (a). All submissions that addressed object (a) supported the VSR Act's focus on counselling, and the majority also supported the symbolic and rehabilitative significance of statutory compensation.

However, a number of respondents raised concerns over whether the current design of the Act, particularly the statutory compensation scheme, is meeting these support and rehabilitation objectives adequately. In particular, concerns were raised in relation to whether the right balance between compensation

and rehabilitative services is being achieved within the present design of the VSR Act. This issue is examined in more detail at para 4.3.

The operation of the Approved Counselling Scheme was widely applauded in the submissions, with many submissions recommending that the reach of this service be extended: see discussion of 'Counselling' at para 5.3, below. However, several submissions, including that of Victims Services, acknowledged that counselling may not be appropriate for all victims. It was suggested that the commitment to promoting rehabilitation under the VSR Act could be developed by providing access to a broader range of services and treatments than simply counselling. For further discussion of some of the suggestions for alternate rehabilitative services raised in the submissions, see para 4.3 'Discussion - VSR Act', below.

Object (b)

Object (b) refers to the restitution scheme established under the VSR Act to enable recovery from offenders of amounts paid to victims under the statutory compensation scheme.

The majority of submissions supported the retention of restitution as a concept. For this reason, no change to the content of object (b) is proposed.

However, a significant number of submissions raised issues concerning the operation of the present restitution provisions contained in Division 8 of Part 2 of the VSR Act. These issues are considered in Chapter 5 under the heading "Restitution and Offender Participation in the Victims Compensation Process" at para 5.5.

Object (c)

There were no submissions received in relation to Object (c).

Object (d)

The continued appropriateness of Object (d) was raised in a few submissions. The submission of Victims Services noted that it is not aware whether this alternative to statutory compensation, established under Part 4 of the VSR Act, is in fact utilised. However no submission suggested that object (d) be reviewed or removed.

This issue is further explored in Chapter 5 under the heading 'Part 4 Court awarded compensation' at para 5.2.3.

4.3 Discussion - VSR Act

A number of respondents expressed the view that the right balance between compensation and rehabilitation/victims services is not presently being achieved in a manner that caters best to victims needs. Most respondents appreciated that the provision of alternative rehabilitative services, in addition

to maintaining (or expanding) the existing counselling service, would require a redistribution of existing funding levels. For example, the Victims Advisory Board suggested compensation could be limited to the most serious injuries, such as homicide, sexual assault and permanent disability. People who were injured but not eligible for compensation could be reimbursed for medical and dental expenses, travel to court, in-house psychiatric treatment, counselling and other expenses.

4.3.1 Suggestions for alternative rehabilitative services

A number of detailed and diverse suggestions for services to assist and support victims of crime were put forward in submissions. These included:

Financial counselling services

Victims of crime often have difficulty managing their financial circumstances in the wake of a violent crime. This is a matter that is frequently raised by victims when seeking assistance and guidance from the Victims Services 24 Hour Telephone Counselling Service. Recipients of lump sum compensation may also experience difficulty in managing their payment in a way that will cater best for their immediate and future needs. Financial counselling services could provide people with practical assistance at a time when managing their financial affairs may be particularly challenging.

Victims of crime emergency fund

There are many emergency expenses associated with being a victim of violent crime. The establishment of a fund to assist victims to meet these emergency expenses would further the support and rehabilitation objectives of the VSR Act, at a time when such assistance is most needed.

The Victims Advisory Board suggested this fund could be used for the payment of emergency childcare, clean-up costs, replacement of glasses damaged or broken during the crime, installation of security measures following a crime. Payment would need to be limited (for example, to a maximum of \$500), and require some verification of the crime as well as invoices for expenses incurred to cover emergencies.

Court expenses fund

A fund could be established to assist in meeting some of the expenses of attending court for the families and friends of victims of homicide or serious personal violence. This could also include coronial inquiries.

When victims of crime are required to be witnesses for the prosecution, their costs for attending court are met as witness expenses. A court expenses fund would be able to assist in meeting the expenses of non-witnesses – for example, support persons such as friends and family. However, any entitlements would not exceed those of people required as witnesses. The type of expenses that the fund could meet include some of the costs of travel, lost wages, accommodation or childcare.

An additional item under this category could be financial assistance for personal carers to attend court, and other necessary expenses for victims of crime who have special needs related to a disability.

Other suggestions

Suggestions for alternative rehabilitative and support services raised in other submissions include the provision of self defence courses, group therapy, physiotherapy, massage and alternative therapies.

Comment

The redirection of existing funds to provide a greater range of alternative rehabilitation and support services would mean that less funds would be available for existing services to victims, whether that be counselling or the payment of compensation. It would also mean that systems would need to be established to accredit a broad range of service providers, just as counsellors are accredited under the current scheme.

Providing additional services and accrediting more service providers would run the risk of spreading the funds available to victims too thinly. Inevitably, the provision of more services would be at the expense of those victims who are currently eligible to receive compensation because the severity of their injuries exceeds the \$7500 threshold set out in the VSR.

It is clear from the submissions that one of the most pressing needs is to reimburse those victims who have incurred expenses as a result of their injuries, but who are ineligible to receive statutory compensation.

Victims of crime who are eligible for compensation are entitled to recover compensation for financial loss. This includes actual expenses (including the cost of medical, optical and dental treatment) loss of earnings and loss of personal effects. Victims of crime who have sustained injuries that do not reach the compensable threshold of \$7500 are not entitled to recover financial loss (see also para. 5.2.4). While these people would be eligible for counselling, it is likely that some would prefer to be reimbursed for expenses, such as the cost of a pair of glasses smashed in a bag snatch, the cost of repairing a tooth damaged in an assault, or the cost of treatment by a physiotherapist or chiropractor.

It may be possible to devise a scheme that gives victims of crime who are not eligible for statutory compensation a greater choice in the type of assistance they receive. It is already the case that a victim of crime who is not eligible for compensation may receive up to 20 hours of counselling. The maximum rate payable for counselling is \$110 per hour. If \$2200 is notionally available for counselling, the victim could be given the choice of how this notional sum is expended. For example, one person may want a replacement pair of glasses and only 4 counselling sessions. Another may need the whole \$2200 to defray dental expenses. If the type of expenses reimbursed in this way were limited to certain types of expenses, such as the cost of medical, dental and optical treatment, the problem of accreditation would not be so great as

practitioners would need to be registered under the relevant occupational registration law.

The likely cost of such a scheme is difficult to estimate. At present, approximately 500 claims are dismissed each year because they are below the \$7500 threshold for compensation; and in 2002-03 Victims Services received 7,144 applications for initial and further counselling. A significant percentage of these claimants could be expected to have incurred medical, dental or optical expenses.

While amendments to the VSR would be necessary to implement the suggested scheme, it would be consistent with the first objective of the Act. This objective is to provide support and rehabilitation for victims of crimes of violence by giving effect to an approved counselling scheme and a statutory compensation scheme.

Recommendation 1:

Consideration should be given to devising a scheme that would allow victims of crimes who are not eligible for statutory compensation to elect to receive counselling and/or be reimbursed for certain expenses, such as medical, optical and dental expenses, up to a maximum amount.

4.4 Legislative statement of objectives - VR Act

A legislative statement of the objectives of the VR Act is set out in section 3 of that Act:

3 Object of Act

The object of this Act is to recognise and promote the rights of victims of crime.

4.5 Submissions – Object of VR Act

No submission on the VR Act raised any issue in relation to the continuing appropriateness of the present object of the Act. All submissions were supportive of the Charter of Victims Rights as a means of recognising and promoting this objective.

4.6 Discussion - VR Act

Matters arising with respect the operation of the VR Act, particularly the Charter of Victims Rights, as it relates to the present object of the Act are explored in detail in Chapter 6.

5. REVIEW OF THE TERMS OF THE VSR ACT

5.1 Structure of this Chapter

This chapter of the report examines specific terms of the VSR Act and assesses their continued appropriateness, taking into account the submissions that were received by the Attorney General's Department. It deals in sequence with the following major areas:

- 1) Compensation (paras 5.2-5.2.4);
- 2) Counselling (5.3-5.3.2);
- 3) Compensable Injuries (5.4-5.4.2);
- 4) Restitution and Offender Participation in the Victims Compensation Process (5.5-5.5.5)
- 5) Determinations by Compensation Assessors - Procedural Fairness and Other Issues (5.6-5.6.3);
- 6) Sexual Assault/Child Sexual Assault/Domestic Violence (5.7-5.7.4);
- 7) Specific Provision of Services (5.8-5.8.2)

5.2 Compensation

The following issues about compensation are discussed under this heading: statutory compensation under the VSR Act; people presently excluded from accessing statutory compensation; part 4 court awarded compensation; and, the future of statutory compensation - lump sum versus other models.

5.2.1 Statutory compensation under the VSR Act

Part 2 of the VSR Act sets out the statutory compensation scheme. This scheme, which has been in place since 1987, is one of the primary means through which the VSR Act gives effect to its objective of providing support and rehabilitation to victims of crime.

The significant majority of submissions supported the continued availability of statutory compensation. These responses suggested that monetary compensation provides a symbolic recognition of suffering, assists closure, and sends a message that society does not condone the crime that the offender has committed. A number of submissions also commented that compensation can form an important part of the healing process by acknowledging the victim's right to decide for themselves how they wish to spend their money. This can provide some redress for financial disadvantage and allow victims to make positive life changes.

Under the VSR Act, 'primary', 'secondary' and 'family' victims¹ of an act of violence are eligible to apply for statutory compensation if they have received a 'compensable injury'. Schedule 1 sets out those injuries that are compensable injuries for the purpose of the VSR Act, and specifies the standard amount of compensation payable for each injury.² In certain instances, an application for compensation may be made in relation to a specified act of violence rather than injury (for example, sexual assault and domestic violence).

The maximum amount of compensation payable under the VSR Act is presently \$50,000 and the minimum amount payable for a compensable injury (the 'compensable injury threshold') is \$7500.

Although most submissions were supportive of the retention of statutory compensation, a number of alternative compensation models were proposed. These submissions are discussed at para 5.2.4 below, 'The future of victims compensation - lump sum versus other models'.

5.2.2 People excluded from claiming compensation or accessing counselling services

The submission of Victim Services identified a significant anomaly in the VSR which prevents a particular category of people from claiming compensation.

Section 5(1)(a) of the VSR defines an 'act of violence' as an act or series of acts "that has apparently occurred in the course of the commission of an offence". This means that, in cases where the 'act of violence' was inflicted by a person who is mentally ill or too young to be held criminally responsible for their actions, there is arguably no 'offence' and therefore no right to compensation.

Recommendation 2:

Section 5 of the Act should be amended to clarify that an 'act of violence' includes violent incidents in relation to which convictions are not obtained due to the incapacity of the offender.

A number of submissions also pointed to problems in accessing compensation or counselling as a result of explicit exclusions contained in the legislation, specifically those relating to motor vehicle accidents, persons engaged in conduct constituting an offence, and convicted inmates. Since the passage of the *Victims Legislation Amendment Act 2003* counselling services have been made available for the families of people killed by the criminal use of motor vehicles.

¹ See sections 6-9.

² See section 10

Persons engaged in behaviour constituting an offence

Section 24(3) of the VSR Act excludes eligibility for the receipt of compensation for “offenders”. The effect of this provision is that a person is not eligible to receive statutory compensation in respect of an act of violence if it occurred while the person was engaged in behaviour constituting an offence.

The submissions generally agreed that compensation should be denied in circumstances amounting to a serious offence, such as an armed robbery. However a number of responses suggested that section 24(3) currently excludes many deserving recipients from accessing compensation namely, those people who were committing a relatively minor offence at the time of the act of violence.

The Law Society noted that section 24(3) has operated to deny compensation to victims who have suffered quite significant injury as the result of an act of violence, notwithstanding that the offence in which they were engaged had nothing to do with the crime of violence perpetrated upon them. An example was provided of a woman who was denied compensation because she had been self-administering a prohibited substance at the time she was seriously assaulted. A similar outcome could occur if a person used offensive language (a summary offence) at the time he or she was being assaulted. It was submitted that such consequences of the operation of s 24(3) could not have been intended.

There are a number of ways that this problem could be addressed. Section 24(3) could be amended to give the Tribunal the discretion to not apply the exclusion in cases where, in the Tribunal’s view, it would be inappropriate to do so. Alternatively, as proposed in the Law Society’s submission, section 24(3) could be repealed and replaced with a provision that permits assessors to have regard to the circumstances of the offence in which the victim was engaged when determining eligibility for compensation.

As noted below, there is already a discretion vested in the Tribunal to allow payment of statutory compensation to convicted inmates in ‘special circumstances’. For the sake of consistency, consideration could be given to conferring a similar discretion on the Tribunal in favour of offenders, taking into account the nature of the person’s offence, the seriousness of the act of violence, and any causal connection between these two factors.

Recommendation 3:

Section 24(3) should be amended to give the Tribunal a discretion to consider any ‘special circumstances’, taking into account the nature of the person’s offence, the seriousness of the act of violence, and any causal connection between these two factors.

Convicted inmates

The exclusion contained in section 24(4) renders prisoners (other than a person imprisoned solely because of fine default or a prisoner on remand) ineligible to claim statutory compensation except in 'special circumstances' which justify an exception being made. The "special circumstances" that may qualify include instances where the inmate has suffered serious and permanent injury. This provision, however, is rarely used. For example, in 2001/02 the Tribunal considered 26 claims by inmates and awards were made in favour of only 2 such claimants.

Concern was raised in the submissions that, notwithstanding the limited discretion, section 24(4) denies prisoners the basic right afforded to other citizens: the right to claim compensation if injured as a result of an act of violence. On this point, the submission of the Law Society noted that over 60% of inmates received into full time custody are serving sentences of less than 6 months. Many of these people are young and especially vulnerable to physical assault. In light of these factors it was strongly submitted that there should be no impediment to prisoners who are victims of acts of violence being able to properly pursue compensation.

The substance of section 24(4) has not changed significantly since its enactment as part of the 1996 Act.³ The Hon J. W. Shaw then noted in the second reading of the *Victims Compensation Bill 1996*, that:

The Government acknowledges the community anger that offenders convicted of brutally violent crimes can claim victims compensation for assaults alleged to have occurred whilst serving their sentence. The Bill provides, however, that a person in prison solely for fine default and prisoners on remand will remain eligible to claim for victims compensation for any compensatable injury resulting from an act of violence committed against them at that time.

Given the stated aims of the legislation, the community anger expressed at inmates convicted of violent crime being entitled to access the victims compensation regime, and the existence the 'special circumstances' exception in subsection 24(5), it seems that there are grounds for differentiating between the treatment of offenders and the treatment of convicted inmates. Accordingly, this review only recommends a change to the provisions dealing with the exclusion of offenders in an effort to address some of the anomalous results identified by the Law Society in their submission on subsection 24(3). Refer also to the recommendation regarding counselling at 5.3.2, below.

³ The original form of section 24(4) in the VSR Act referred to a 'convicted inmate within the meaning of the *Correctional Centres Act 1952*'. This was subsequently amended by Schedule 4.60 of the *Crimes Legislation Amendment (Sentencing) Act 1999* to refer to a 'convicted inmate' within the meaning of the *Crimes (Administration of Sentences) Act 1999*. Neither definition encompasses prisoners on remand.

5.2.3 Part 4 Court awarded compensation

As noted in Chapter 4 above, the continued appropriateness of Object (d) of the VSR Act – to give effect to an alternative scheme under which the Court may order compensation - was raised in very few submissions, and only in relation to whether the scheme is in fact used. The submissions of Victims Services and the Chairperson of the Victims Compensation Tribunal both commented that they were unaware whether the scheme was utilised at all.

Section 71 in Part 4 of the Act empowers the Court which convicts an offender (at the time of conviction or at any time afterwards) to direct that the offender pay out of the offender's property a sum not exceeding \$50,000 to 'any aggrieved person' or persons. It is intended that such a sum be compensation for any injury sustained through or by reason of the offence, as an alternative to statutory compensation.

The section further provides that a direction for compensation may be given by a court 'on its own initiative or on application made to it by or on behalf of the aggrieved person'.

The apparent problem with this scheme is that the victim is generally not a party to the prosecution process and making an application for a direction on compensation is presently not within the DPP's mandate.

There are significant practical limitations on the DPP or the Police pursuing claims for victims compensation, or on the judge or magistrate attempting to quantify a compensation amount from inadequate or inappropriate material tendered to prove the offender's criminal liability and not necessarily the extent of the victim's injury. The more appropriate forum in which to address victim compensation claims is the specialist tribunal established for the purpose, the VCT. Given that no respondents to the review seriously questioned the continued existence of the Part 4 scheme, this report makes no recommendation in regard to its future retention.

5.2.4 The future of statutory compensation - lump sum versus other models

Introducing an 'expenses incurred' scheme

Several submissions suggested that the \$7500 threshold has been unfair in its application towards particular victims who have sustained injuries requiring costly treatment. In particular, a number of responses highlighted that the cost of dental treatment can leave many victims with significant out-of-pocket expenses.

Victims Services supports a move towards the payment of expenses for those victims who have sustained injuries which do not reach the threshold of \$7500 but who have incurred considerable expenses in their rehabilitation. The purpose of reimbursing such expenses would be to support victims of crime by providing compensation for financial losses associated with their rehabilitation from the act of violence.

Some suggestions for how an expenses incurred system might operate were put forward by the Victims Advisory Board, which recommended that consideration be given to implementing an invoicing system or a grants scheme to cover expenses arising out of the act of violence, such as dental expenses, with appropriate limits on amounts recoverable.

This report recommends that consideration be given to devising a scheme that would allow victims of crime who are not eligible for statutory compensation to elect to receive counselling and/or be reimbursed for certain expenses, such as optical and dental expenses, up to a maximum amount (see Recommendation 1). To go beyond this recommendation in order to meet a broad range of other potential expenses would require a major review and redesign of the present statutory compensation scheme. This could be achieved by either reducing the amounts payable for particular injuries, or through restricting the availability of statutory compensation to a limited number of injuries or offences (for example, homicide, sexual assault, and permanent disability). Both options would involve the reduction of compensation payments to people who are more severely injured (those who have satisfied the threshold test) in favour of those who are less severely injured.

The majority of submissions clearly did not favour restricting access to compensation. Most favoured lowering the threshold for compensation, increasing the amounts payable, and/or broadening the range of injuries for which compensation can be claimed.

It is beyond the scope of this review to attempt a major re-design of the existing statutory compensation scheme. The purpose of this review is to determine whether the policy objectives of the VSR Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The relevant objective is to provide support and rehabilitation for victims of crimes of violence by giving effect to an approved counselling scheme and a statutory compensation scheme. It is clear from the submissions received that the Act does both, and reasonably well.

5.3 Counselling

The extensive provision of counselling services under the Approved Counselling Scheme established by the VSR Act was widely applauded in the submissions. All relevant responses supported the retention of the scheme, and many recommended that it be expanded.

Over the period of 1998/99 to 2001/02, Victims Services approved 12,484 applications for an initial two hours' counselling under the Approved Counselling Scheme. A further 9993 applications for additional counselling hours were approved during the same period. Over 20,000 counselling hours are now provided each year, at a total cost of approximately \$7.5 million over the past five years.

The steady rise in applications has clearly been aided by amendments made in 1998 that make counselling available to victims of crime irrespective of whether they can establish the existence of a compensable injury.⁴ In the same vein, amendments made to the VSR Act in 2000 gave relatives of homicide victims an automatic entitlement to an initial 20 hours of counselling.⁵

A number of submissions, however, pointed to problems experienced by particular groups in accessing the scheme, either due to shortages in service provision or explicit exclusions contained in the legislation. The issues related to counselling discussed under this heading include: increasing availability of counselling - gaps in service provision; increasing availability of counselling - specific exclusions contained in the VSR.

5.3.1 Increasing availability of counselling - gaps in service provision

Access to services in rural and remote areas

Submissions received from the Law Society and the Women's Legal Resource Centre suggested that the rehabilitative aims of the VSR Act are undermined by difficulties experienced in accessing counsellors in some parts of NSW. In particular, the WLRC reported that there are real issues of access to services for clients in rural and regional centres, including difficulties in obtaining a female or culturally appropriate authorised report writer (ARW). These submissions suggested that there is sufficient demand in particular regional centres to justify Victims Services convening regular 1-2 day counselling clinics. This would also be a more cost effective way of meeting the needs of victims in these locations.

Recommendation 4:

Consideration should be given to improving service delivery in rural and remote centres by making greater use of video conferencing technology and by convening regular 1-2 day counselling clinics.

The specific issue of service provision to indigenous victims of crime is discussed separately at para 5.9.1, below.

5.3.2 Increasing availability of counselling - specific exclusions contained in the VSR Act

Motor vehicle accidents

In 2003, the the VSR Act was amended to ensure that the family members of the victims of homicide involving the use of a motor vehicle would be able to

⁴ *Victims Compensation Amendment Act 1998*

⁵ *Victims Compensation Amendment Act 2000*

access the same counselling benefits as are currently provided to the families of other people who die as a result of an act of violence.

Persons engaged in behaviour constituting an offence

The combined effect of sections 21(1) and 24(3) is to prevent people who have engaged in behaviour constituting an offence from accessing counselling benefits. This would mean, for example, that a person who used offensive language (a summary offence) and who was seriously physically assaulted, would be denied counselling. .

The exclusion of potentially deserving victims under this section could be rectified by removing the reference to section 24(3) from section 21(1). A new subsection could also be added to section 21 to provide a discretion to refuse an application for counselling if the person's injury arose from behaviour amounting to a serious offence.

Recommendation 5:

Consideration should be given to amending section 21 of the VSR Act to remove the reference to section 24(2) and to add a new subsection to provide a discretion to refuse an application for counselling if the person's injury arose from behaviour amounting to an offence. In exercising this discretion, account should be taken of the nature of the person's offence, the seriousness of the act of violence, and any causal connection between the two factors.

Convicted inmates

The combined effect of sections 21(1) and 24(4) is to also prevent convicted inmates from accessing counselling benefits. However, it is arguably impractical to remove this exclusion on the basis that convicted inmates would not be able to access the approved counselling scheme while incarcerated. The Department of Corrective Services provides health care, including counselling, to inmates of correctional centres.

5.4 Compensable Injuries

The specific issues relating to compensable injuries discussed under this heading include: possible new categories of compensable injuries; and a review of the current categories of compensable injuries.

5.4.1 Possible new categories of compensable injuries

A number of submissions identified the need to create new categories of compensable injury. This was primarily urged to address the experience of, and the unique injuries suffered as a result of, domestic violence. The Women's Legal Resource Centre submitted that there was a need to expand

the categories of compensable injury to include injury to or loss of a foetus, miscarriage as a result of violence, and associated injury to reproductive organs as a result of violence. In their submission, they state that:

many women experience domestic violence, often for the first time, when pregnant, and this violence is often directed to their stomach, back, and the unborn child, and results in significant injury which is not currently recognised in the schedule of injuries.

This point was supported by the submission of the Law Society, which suggested that the categories of injury are too narrowly drawn and that consideration should be given to instating further categories of compensable injury.

Recommendation 6:

The categories of compensable injury should be expanded to include injury to or loss of a foetus, miscarriage as a result of violence, and associated injury to reproductive organs as a result of violence.

5.4.2 Review of the Current Categories of Compensable Injury

Most submissions on this point related to Category 1, 'chronic psychological or psychiatric disorder that is moderately disabling'. Currently, this injury is compensable within the range of \$7,500-\$15,000. Category 2, 'chronic psychological or psychiatric disorder that is severely disabling' is compensable within the range of \$30,000-\$50,000. Under clause 5(3) of the Schedule to the VSR Act, claims for Category 1 psychological or psychiatric disorder are limited to situations where the damage resulted from armed robbery, abduction or kidnapping.

The submissions raised a number of related concerns about the treatment of psychological and psychiatric disorder under Category 1. Most submissions drew attention to the arbitrary and restrictive requirement that the damage occur as a consequence of one of the specific acts of violence listed in clause 5(3). The Salvation Army noted that the effect of this requirement was to exclude people in need of support and rehabilitation which it is in the spirit of the Act to provide. Both the Women's Legal Resource Centre and the Law Society drew attention to the hierarchy of victims of psychological injury created by the operation of clause 5(3). The weight of submissions agreed that the current regime produced anomalous results that were contrary to the objects of the Act in seeking to compensate and rehabilitate victims of psychological injury.

This overlooks the fact that even in cases where a person is not able to establish a right to compensation (ie because the psychiatric injury is not moderately disabling and did not arise from a bank robbery, abduction or

kidnapping) that person is still eligible to receive counselling to assist with their recovery.

In addition to the concerns about the operation of particular categories of compensable injury, some respondents to the review expressed more global concerns about the range of compensable injuries and the appropriateness of the amounts of compensation attached to them. For example, the Women's Legal Resource Centre stated:

The amounts set out in the schedule of injuries are largely insufficient, and should more accurately reflect the actual injury and the amounts that are awarded in other compensation jurisdictions, such as Workers Compensation and the District Court ... In particular the global award for domestic violence is woefully inadequate given the often long-term and debilitating effect of a violent relationship.

Similar concerns were expressed by the Violence Against Women Specialist Unit, particularly with respect to the injuries of sexual assault and domestic violence. These issues are explored in more detail at para. 5.7 below.

5.5 Restitution and offender participation in the victims compensation process

The topics of restitution and the appropriate extent of offender participation in the victims compensation process were the subject of many responses to the review. The specific issues dealt with in this chapter include:

- a profile of the present compensation process;
- offender participation in victims compensation determinations;
- the effect of the current restitution provisions and process on offenders;
- other concerns regarding the effect and effectiveness of the current restitution process; and
- concerns with the set-off procedures.

5.5.1 Profile of the present compensation and restitution processes

The VSR Act allows for a claim for compensation to be determined without a hearing. The application process puts the onus on the applicant to provide evidence of a compensable injury, and the Victims Compensation Tribunal (VCT) obtains reports from the Police as well as relevant court papers where necessary. An award of compensation is determined on the civil standard of proof (the balance of probabilities) that an act of violence has occurred, rather than on the criminal standard (beyond reasonable doubt) required for a conviction.

Consistent with the provisions under the Charter of Victims Rights in the VR Act, the fact that a victim has made a claim for compensation is kept confidential where possible. Consequently, the person alleged by the applicant to have committed the acts of violence is not notified of the claim nor involved in the determination of the matter in any way. The design of the

statutory scheme is such that an award of compensation to a victim is not dependent on the offender's ability to pay. Therefore this is not a consideration by the VCT at the time of making an award.

Since the inception of the victims compensation scheme, liability to pay restitution has been tied to the conviction of an offender. Restitution may be ordered against the perpetrator of an act of violence, where that person has been convicted of an offence arising from substantially the same facts in respect of which the award of compensation was made. In approximately 58% of awards made by Victims Services, the offender is convicted and restitution action can be initiated.

The rights of the convicted offender in relation to restitution are accommodated by the statutory requirement that the Director can only make a provisional order for restitution. The convicted offender can then object to the order either in writing or at a restitution hearing. This right is limited for some convicted offenders who have their restitution set off against any award.⁶

In restitution hearings, the VCT may reduce the amount to be paid under a provisional order having regard to the financial means of the defendant (section 51(1)(a)).

If the provisional order is not responded to within 2 months, a Second Notice is issued to the defendant warning him/her of the possible consequences of failing to respond. A further 28 days is then given to the defendant to respond to the order. If the defendant does not respond to the second notice, a Final Notice is forwarded listing the various remedies available to the Director under the *Local Courts (Civil Claims Act) 1970* to enforce the restitution debt.

From currently available statistics, 84% of defendants are located by Victims Services. The enactment of the *Victims Compensation Act 1996* included provision to improve the ability of Victims Services to locate convicted offenders so as to commence restitution action. These provisions authorised the Police, the Roads and Traffic Authority and other government agencies to provide information about the addresses of convicted offenders. Further legislative amendments in 1998⁷ provided for restitution orders to be registered as a charge on land, owned or part-owned by a convicted offender.

The majority of offenders who do respond to provisional orders elect, and are allowed, to pay their debt by monthly instalments (Time to Pay arrangements). At the time of writing there were approximately 4000 active Time to Pay arrangements, with the average arrangement being \$50 per month. Statistics also show that on average the Tribunal or Director reduces the amount provisionally ordered against offenders by 30%.

⁶ A set-off procedure is contained in section 31, and applies when an offender who is liable to meet a restitution debt has also made a successful claim for victims compensation in relation to some other act of violence (and vice versa). The provision allows the VCT to off-set one amount against the other in order to determine the final amount owed or payable.

⁷ See *Victims Compensation Legislation Amendment Act 1998*

Submissions

Overall, the content of the submissions about restitution and offender participation in the victims compensation process can be grouped under three broad themes:

1. Offender participation in victims compensation determinations;
2. The effect of the current restitution provisions and process on offenders; and
3. Other concerns regarding the effect and effectiveness of the current restitution process.

5.5.2 Offender participation in victims compensation determinations

The principal tension that arises in relation to the participation of offenders in victim compensation determinations and the restitution process was captured succinctly in the submission of the Combined Community Legal Centres Group of NSW. This Group pointed to the 'irreconcilable conflict between according procedural fairness to defendants regarding restitution, and respecting the confidentiality and rights of victims seeking compensation'.

Victims support groups have always been concerned about the right of victims of crime to apply for compensation, without fear of possible involvement of the alleged offender. One reason for establishing the VCT was to remove the compensation claim from an open court where the details of the impact on the victim would be publicly disclosed and to ensure that victims of crime would not be caused further distress.

It is nevertheless the case that a convicted offender has a substantial interest in the compensation process, if that process is to potentially result in a large restitution liability. As noted above, under the current system, the first formal notification that an offender receives of a victim's compensation claim is of the compensation decision that forms the basis of the provisional order for restitution.

A number of submissions suggested that, because of the restitution liability that follows a compensation determination, procedural fairness requires that an offender be given the opportunity to be involved in the compensation proceedings in order to make submissions or present material on the extent of the claimant's injury and/or the amount of compensation proposed. However, to be in a position to do this in an informed manner, offenders would need to have access to the victim's medical and/or counselling reports. Victims Services and the VCT currently have strict measures in place to protect the privacy and confidentiality of this information about the victim. This is the primary reason why offenders are presently not granted access to parts of the victim's file, other than the compensation determination.

It is also important to note that applications for compensation are not dealt with by way of a hearing. Assessors are responsible for determining whether an applicant is eligible for an award of compensation, and may require an

applicant to undergo further medical or psychological examination if there is any doubt about the extent of his or her injuries.

There are strong arguments against changing the present arrangements, most importantly because they are protective of victims rights and consistent with the support and rehabilitation objectives of the VSR Act.

5.5.3 The effect of the current restitution provisions and process on offenders

Effect of restitution on offender rehabilitation

The effect of the present restitution arrangements on offender rehabilitation after release from prison was raised in a number of submissions. One submission received from a previous offender questioned whether the financial burdens imposed by the restitution process may not in itself be a 'contributing factor to the ongoing cyclic nature of offending behaviours', through deepening poverty, reinforcing negative self-image, and limiting effective reintegration of the offender back into the family and community. Other submissions suggested that post-release debt 'becomes a cumulative problem and reason for recidivism'.

Indigenous Offenders

Arguments against the present restitution process were also presented in relation to indigenous offenders. The submission of the Coalition of Aboriginal Legal Services of New South Wales (COALS) commented that the scheme is inimical to the rehabilitative aims of the criminal justice system. The submission argues that the present system places immense financial and emotional burdens on the most marginalised members of society who are the least well-equipped to bear them. In relation to the specific circumstances of indigenous offenders, COALS observe that the scheme 'severely prejudices our clients' chances of rehabilitation. Further, the submission notes that when indigenous offenders do gain employment post-release, that employment is often in positions which are not highly remunerative. For further discussion on the appropriateness of restitution in all cases, see para 5.5.4, below.

Young Offenders

A number of respondents raised concerns about the effect of current restitution arrangements on juvenile offenders. They submitted that under the VSR Act in its present form, no distinction is made between adult and juvenile offenders. Consequently, even if a juvenile offender's position is recognised in practice (for example, if the restitution liability is considerably reduced by the VCT at hearing), this discretion of the VCT may nevertheless not present an adequate safeguard. On the face of the current legislation, it remains the case that a juvenile offender may (at least in theory) be liable for the same level of restitution as an adult offender – ie, up to \$50,000. However, in practice, the amount is invariably reduced.

The submissions received from the Law Society, the Shopfront Youth Legal Centre and the Juvenile Justice Advisory Council each commented that the punitive effect of the current restitution arrangements is to burden juvenile offenders with debt at an early age. Such an outcome is contrary to the spirit

of recent juvenile justice reform which has focused on prevention, diversion and the importance of rehabilitation for young people involved in offending.

It is important to note that young people who are cautioned or conferenced under the *Young Offenders Act 1997* are not convicted and so do not incur a restitution debt, even though they admit commission of the crime. However, an outcome plan for a young person who has been through the conferencing procedure may include reparation to the victim.

'Conviction' presently includes an order made pursuant to section 33 of the *Children (Criminal Proceedings) Act 1987*. Some submissions proposed that the maximum amount of restitution payable by a juvenile offender be limited to \$1000. This would bring the VSR Act provisions as they relate to juvenile offenders in line with section 36(3) of the *Children (Criminal Proceedings) Act 1987*. That Act gives the Children's Court the power to make a direction under the VSR for an offender to pay victims compensation. In directing a juvenile to pay compensation, the Court must have regard to their means and income, and compensation is capped at \$1000.

While the compensation payable by a young person is capped at \$1000, it is important to note that the compensation payable to a victim is not capped at this level, and so the potential restitution liability for a young person could be as much as \$50 000. For example, it would be possible for the Children's Court to order a young person to pay the maximum compensation of \$1000. The young person's victim may subsequently apply for victims compensation, and may be assessed as eligible for a payment of \$30000. Victims Services would pay the victim \$29000 (taking into account the Court's order) and could then seek restitution for that amount from the young offender.

Comment

There is no doubt that restitution can be a burdensome obligation on convicted offenders, particularly those who are young and/or economically disadvantaged. However, restitution is also an explicit object of the VSR and the Act is specifically designed to enable compensation paid under the statutory scheme to be recovered from convicted offenders (Section 3(b)). It is outside the scope of this review to challenge the objects of the Act.

The VSR meets the object of restitution in a way that allows the Director or the VCT to take into account the financial means of the defendant (sections 50 and 51) In practice, this means that offenders are given time to pay restitution, and may have their overall liability reduced. As noted above, there are approximately 4000 active Time to Pay arrangements, with the average arrangement being \$50 per month. Statistics also show that, on average, the Tribunal or Director reduces the amount provisionally ordered against offenders by 30%.

A small amount of compensation monies is actually recovered through the restitution process. On average, total monies recovered through the restitution process amount to approximately 4% of total compensation monies

paid. Presently, this is equivalent to approximately \$3.5 million per year. In 2002/03 the amount recovered from offenders totalled \$3.14 million.

The submissions to the review did not provide evidence that inappropriate restitution orders were being made, or that the Director and VCT were failing to take adequate account the financial means of defendants.

5.5.4 Other concerns regarding the current restitution process.

Lack of knowledge of the possibility of restitution

There is generally poor awareness in the community, including the legal profession and victim support groups, of restitution. Victims Services report that it is common in restitution hearings for the convicted offender to state that at no time during their criminal case were they informed that restitution action might follow and some consider that the victims levy paid at court was restitution. Many state that had they known about restitution they may not have pleaded guilty to the charges. The submission of the Combined Community Legal Centres Group of New South Wales raised a similar point.

Information about restitution arrangements is readily available from the Victim Services website, but there is clearly a need for offenders to be better informed about their legal position and their potential obligation to pay restitution. Ideally, this information should be provided as a matter of course by the offenders' legal representatives.

Fear of retribution in domestic violence cases

A considerable number of responses commented that the thought of an offender being pursued for restitution deters some domestic violence victims from applying for compensation because they fear reprisal. The submission of the Women's Legal Resource Centre commented that some of their clients have discontinued their victims compensation applications on the basis that the Tribunal would not rule out restitution. The submissions suggest that it is the *notification* of the provisional order for restitution that raises the fear of reprisal, rather than the end result of the restitution process.

The potential for reprisal is not unique to victims of domestic violence, but clearly harassment or retribution may be more likely where the victim and offender are related in some way. It is important to keep in mind that restitution applies only to convicted offenders, and it does not apply to those subject to apprehended domestic violence orders. The fact of conviction itself may well be sufficient motivation for reprisal, regardless of any subsequent restitution action, especially if the victim is also a key witness in the criminal prosecution.

Affording a compensation assessor or Tribunal the power to refuse to make restitution orders in situations where it is felt that there is a risk of reprisal would simply mean that some convicted offenders would escape liability for restitution altogether. In fact, there would be a real risk that convicted

offenders would be motivated to harass or intimidate so as to avoid the possibility of a restitution order being made.

Should restitution be pursued in all cases?

The recovery from offenders of compensation amounts paid to victims is contingent on a range of factors. These include the requirement that the offender has been convicted, locating the offender post-release, and determining the offender's capacity to pay.

In addition to submissions concerning fear of reprisal in domestic violence cases, it was suggested that the Tribunal should be given the discretion not to pursue restitution in relation to offenders who are intellectually disabled or mentally ill, and in other circumstances where restitution by the offender would be inappropriate.

A number of options are available to the Tribunal at the restitution hearing to accommodate the offender's particular circumstances. Under the terms of the VSR the Tribunal is entitled to take into account the financial means of the defendant and any other relevant matters. This could include any disabilities or illness suffered by the offender. The Tribunal can substantially reduce the restitution debt (sometimes by over 60%), and make arrangements for payment that best accommodate the offender's financial circumstances. In exceptional cases, the Tribunal may even reduce the liability to zero. In addition, if the offender does not wish to take up his or her entitlement to a hearing before the Tribunal, he or she may make an arrangement for repayment with the Director of Victims Services, which frequently results in the liability being reduced, for example when a lump sum payment is offered.

The restitution scheme is sufficiently flexible to take into account the particular circumstances of the offender, and there is no compelling reason to exempt particular categories of offenders from its reach.

5.5.5 Concerns with the set-off procedures

Section 31 gives an assessor the power to 'set-off' a *proposed determination for restitution* against a proposed award. This is used in situations where a victim who is eligible for statutory compensation is also the subject of a proposed restitution order. These situations present some particular difficulties. As Victims Services submitted, usually, a provisional order for restitution has been issued when the relevant award is being made, and the proposed award may be set-off without difficulty. However, problems arise in situations which do not appear to be covered by s31(1).

Example 1

An award of statutory compensation is about to be made and another claim is received in which the applicant is named as the convicted defendant. The new claim may take a substantial period of time to be finalised and as no provisional order has been issued, there is no 'proposed determination for restitution' and the proposed award cannot

be set off. There is no explicit power to adjourn matters were there is a potential for set off.

Example 2

An award of statutory compensation is about to be made and the applicant already has a restitution debt. As the provisional order for restitution has been confirmed, and is not 'proposed' it may be arguable that this section does not give the power to set off the proposed award against the debt.

In response to the problems identified in the above two examples, Victims Services submitted that a power to adjourn be introduced where there is a potential set-off until the finalisation of the matter; and that the section be amended to clarify that a proposed award of compensation may be set-off in circumstances in which an order for restitution has been made, rather than is proposed.

Recommendation 7:

The VSR should be amended to allow the determination of an application for compensation to be adjourned, pending the finalisation of another claim where the applicant may be liable to pay restitution as a convicted offender. Section 31 of the VSR should be amended to clarify that set off applies where restitution orders have been made.

5.6 Determinations by compensation assessors - procedural fairness and other issues

A number of submissions raised concerns about procedural fairness in compensation determinations. The content of submissions received on this issue can be divided into three broad areas:

1. Inconsistencies between assessors' decisions;
2. Content of assessors' decisions; and
3. The need for procedural fairness when the Tribunal obtains material about the applicant (section 65A and section 23 of Schedule 2).

5.6.1 Inconsistencies between assessors' decisions

A number of submissions raised concerns about inconsistencies between assessors' decisions. Some submissions claimed that there are inconsistencies between assessors' determinations of what constitutes a 'compensable injury'. These determinations are specifically excluded from District Court review under section 39(3)(a) VSR.

The submissions received from the Women's Legal Resource Centre, the Illawarra Legal Centre and the Combined Community Legal Centres Group

reported that the discretion presently exercised by compensation assessors in determining the existence of a 'compensable injury' can lead to widely varying outcomes for applicants. These submissions argued that in the absence of a right of appeal to the District Court, procedural fairness requires that measures be adopted to ensure a greater level of consistency between assessors' decisions.

Section 65(3) of the VSR states that the Director of Victims Services, a Department Head or any other public servant may not direct, overrule or interfere with the determination of a matter allocated to a compensation assessor. However, a number of administrative processes have been put in place at the Victims Compensation Tribunal to address the type of concerns raised above. The Registrar of the Tribunal convenes a meeting of all assessors every 6 weeks at which trends in determinations are discussed. A peer review process is also in place, which facilitates the circulation of assessors' decisions and requires the provision of feedback and comments to the Registrar. These comments are then reviewed by the Registrar and discussed at the 6-weekly assessors' meeting.

In addition, the Chairperson of the Tribunal has the power under section 65 of the VSR Act to issue guidelines that compensation assessors must have regard to in the exercise of their functions under the VSR Act. At the time of preparing this report, twelve guidelines had been issued and were available on Victim Service's website. The Guidelines cover topics such as "Electing an Injury", "Interpretation of Section 32" and "Category 1 and 2 Psychological or Psychiatric Disorder". Over time, the existence of Guidelines can be expected to enhance the consistency of decision making.

5.6.2 Content of assessors' decisions

A number of submissions raised concerns about the content of assessors' determinations. In particular, concern was expressed about whether adequate reasons are being provided for determinations, and the need for Tribunal members to express their determinations in a manner appropriately empathetic to the victim's circumstances. On this latter point, the submission of the Combined Community Legal Centres Group of NSW suggested that assessors should receive training about the impact of written determinations on victims and on how to frame determinations (including refusal of compensation) in a manner that is respectful and empathetic to clients.

As noted above, the peer review processes in place at Victim Services provide for regular monitoring of the content and style of assessors' determinations. Victim Services has also advised that assessors now receive training in 'therapeutic jurisprudence'.⁸ 'Therapeutic jurisprudence' focuses on the law's impact on emotional life and psychological well-being

⁸ For example, see David B. Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M. Cooley Law Review* 125.

5.6.3 The need for procedural fairness when the Tribunal obtains material about the applicant (section 65A and clause 23 of Schedule 2)

There are two provisions in the VSR Act that empower compensation assessors to obtain information about an applicant that has not been provided by the applicant. The relevant provisions are section 65A, which allows an assessor to make such inquiries and undertake such investigations as the assessor considers necessary, and clause 23 of Schedule 2, which empowers the Tribunal to compel the production of documents.

Victims Services reports that section 65A is rarely (if ever) used. By contrast, clause 23 of Schedule 2 is used regularly, as it is the means by which the Tribunal obtains police reports for every compensation claim. Other information obtained pursuant to this clause includes information about workers compensation claims, information from the Department of Community Services, criminal records, and information about payments from other sources. This information is sought when there is insufficient material on which to base a determination in accordance with the standards required by the VSR Act.

A number of submissions suggested that the use of these provisions could give rise to procedural fairness concerns. The principal concern raised was that if information is obtained about the applicant, relevant to the compensation determination, it should be put to the applicant so that the applicant has the opportunity to respond.

It is well acknowledged in case law on procedural fairness that the actual content or requirements of procedural fairness will vary according to the circumstances.⁹ However, giving the person who will be directly affected by the decision an opportunity to be heard is generally regarded as a fundamental tenet of procedural fairness. As was observed by the Full Federal Court of Australia in *Commissioner for Australian Territory Revenue v Alphaone Pty Ltd*¹⁰, this would ordinarily require the party affected to be ‘given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material’.

As regards the operation of clause 23 of schedule 2, a copy of the order is sent to the victim to advise them that material is being sought. They are then free to inspect the file (and the material) when it is produced. Also, assessors’ reasons often include references to adverse material and the applicant can appeal the decision when made aware of the material. The knowledge that the material has been sought, the opportunity to inspect the material and the opportunity to provide written submissions prior to determination (in addition

⁹ An influential statement on this point is found in the judgment of Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All E R 109, where his Lordship noted that “the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.”.

¹⁰ (1994) 49 FCR 576 at 590.

to appeal rights) arguably discharges the procedural fairness duties of the Tribunal.

It would be desirable for the power given to assessors pursuant to section 65A of the VSR to be similarly subject to procedural fairness considerations, even though, in practice, this power is rarely exercised.

Recommendation 8:

Section 65A of the VSR should be amended to require victims or their solicitors to be advised of any further material obtained under that section and to be given an opportunity to inspect this material and to make submissions.

5.7 Sexual assault/child sexual assault/domestic violence

This section of the report addresses issues relating to these three separate acts of violence. It first deals with issues relevant to all three acts of violence before addressing, in turn, separate issues relevant to each particular act of violence.

5.7.1 Sexual assault, child sexual assault, domestic violence and the leave provisions in section 26(3)(b)

Section 26(1) states that an application for statutory compensation must be lodged within 2 years after the relevant act of violence. An exception is made with respect to cases of sexual assault, domestic violence, and child sexual assault. Section 26(3)(b) states that: 'leave should be given [by the Director under section 26(2)] in cases of sexual assault, domestic violence or child abuse unless the Director is satisfied that there is no good reason to do so'. This section was interpreted beneficially by Dowd J in *Elena Harvey v. Victims Compensation Tribunal & Anor* [2001] NSWSC 604 to mean that leave should generally be given in these circumstances.

There were conflicting submissions on the effect of this ruling on the statutory compensation regime. The Victims Services submission stated that:

The impact of this decision is that it has the effect of virtually allowing in all applications of sexual assault, domestic violence or child abuse, notwithstanding that a substantial period of time had elapsed since the act(s) of violence, finalisation of court proceedings, or since the applicant attained the age of legal majority.

Similarly, the Chairperson of the Victims Compensation Tribunal wrote in his 2001-2002 Report that some limit should be placed on granting leave in respect of historic sexual assaults that allegedly occurred 20, 30 or 40 years ago. This was echoed in the Local Courts submission.

There is an argument of historical precedent that supports the imposition of a time limit on compensation claims. The *Criminal Injuries Compensation Act 1967* commenced the first government funded system of compensation for injuries arising from criminal offences in New South Wales. That Act did not apply to offences committed before its commencement on 1 January 1968. The VSR, however, was not so limited and this is why compensation claims with respect to acts of violence which occurred many decades ago may succeed under the more modern law. In 2002-03, 30 applications for compensation lodged out of time applied to offences committed before 1968.

Victims Services considers that the combined effect of the leave provisions in section 26(3)(b) and the decision in *Harvey* is placing significant pressure on the Victims Services budget. According to the Chairperson's Report for 2002-03, 15% of applications for compensation are lodged out of time and, of these, 59% relate to sexual assault matters. Victims Services is concerned that many cases are being granted leave pursuant to the subsection and the decision in *Harvey* and then subsequently failing on the balance of probabilities test. They are concerned the granting of leave raises false expectations.

Conversely, the Women's Legal Resource Centre submitted that *Harvey* was not being followed in practice. In their experience, assessors are reluctant to grant leave for out-of-time applications for sexual assault, domestic violence and child sexual assault and in recent years they have been requiring extensive documentation of the reasons for the out-of-time applications. The appeal mechanisms contained within the Act (section 39) specifically exclude an appeal to the District Court against a determination of an assessor to refuse an application to grant leave for a late application.

It is evident from the terms of the VSR and the Parliamentary debate at the time it was passed, that Parliament expressly intended that victims of child sexual assault, domestic violence and sexual assault should be able to make applications for compensation beyond the usual two year limitation period. This recognises the fact that victims of these types of offences frequently delay disclosure because of feelings of shame and self blame. However, the absence of any limitation period means that the Victims Compensation Fund, which is not an inexhaustible sum, may be liable for claims that relate to acts of violence which occurred many decades ago. If this is not financially sustainable, consideration may need to be given to an alternative arrangement. This may involve access to counselling, rather than compensation, for claims arising from acts of violence that occurred more than 25 years ago.

5.7.2 Sexual assault, domestic violence and the assistance/reporting/mitigation provisions

A number of submissions raised problems with the operation of section 30(1) and the specific provisions relating to reporting the act of violence to the police, and mitigating the extent of the injury suffered. These problems

specifically related to the experiences of victims of sexual abuse, child sexual abuse and domestic violence.

Currently, section 30(1)(b) provides that in determining an award for statutory compensation the assessor must have regard to whether the act of violence was reported to a police officer within a reasonable time. The Combined Community Legal Centres Group of NSW submitted that this provision does not take account of the widespread non-reporting of violent crime to police by women and by indigenous communities, and that the emphasis on reporting to police is contrary to the aims of providing support and rehabilitation to victims. In support of this submission they cited research from the NSW Bureau of Crime Statistics and the Australian Bureau of Statistics which evidenced the statistically low reporting rates of violent crime by women victims. Four main reasons were proposed by the 1998 study conducted by the Australian Bureau of Statistics. These were, namely, that women considered:

- the incident was too trivial or unimportant;
- the incident was a private matter;
- the police either would or could not do anything about it; and
- the victim feared reprisal from the offender.

According to the 1998 study, only 18.6 % of women experiencing physical assault from a man reported the matter to the police, and only 14.9% of those women experiencing sexual assault reported the matter to the police. The Combined Community Legal Centres Group of NSW submitted that these statistics provide evidence of the difficulties and barriers experienced by women reporting instances of physical, domestic and sexual violence to the police. This point was further reinforced by the Women's Legal Resource Centre, which commented that, in their experience, police were often reluctant to take statements in relation to domestic violence and sexual assault, compounding the personal barriers faced by women. Several submissions recommended that consideration be given to alternative reporting systems.

Section 30(1)(d1) relevantly provides that an assessor, when making a determination of a claim for statutory compensation, must have regard to whether the victim failed to take reasonable steps to mitigate the extent of the injury, such as seeking appropriate medical advice or treatment, or undertaking counselling, as soon as practicable after the act of violence was committed. The Women's Legal Resource Centre submitted that 'victims of domestic violence are unfairly penalised by the legislative requirement that they 'mitigate their loss' by reporting acts of violence'. They argue that this requirement does not adequately allow for the complexity of the crime of domestic violence and its differential impact on victims.

It is clear from the weight of submissions that the current regime needs reform in the way in which it deals with the requirement to report acts of violence, and in the way in which it stipulates that victims must mitigate their injury. These problems arise mainly in the context of sexual assault, child sexual assault and domestic violence.

Recommendation 9:

Consideration should be given to amending section 30(1)(b) of the VSR, to recognise reports made by victims of sexual assault, domestic violence or child abuse to health professionals or other specified agencies, as an alternative to reports to police

Recommendation 10:

Consideration should be given to amending section 30(1)(d1), (which requires victims to take reasonable steps to mitigate their injuries) so that assessors also take into account the nature of the relationship between the victim and the offender, and whether the alleged act of violence is an act of sexual assault, domestic violence or child abuse.

5.7.3 Sexual assault and proof of injury under section 5(1)(c)

A number of submissions raised problems with the way in which the current regime deals with compensation claims arising from instances of sexual assault. The compensable injury of sexual assault, as it is defined in the Schedule to the VSR Act, is an offence-based injury. The current wording of the Act requires that a complainant prove the offence, violent conduct and a separate injury (section 5(1)(c)) in order to establish that the relevant *act of violence* occurred. Injury is defined in the Dictionary of the Act to include:

- (a) actual physical bodily harm,
- (b) psychological or psychiatric disorder.

The Act as it stands thus requires sexual assault complainants to prove, on the balance of probabilities, not only that the act of sexual assault took place but that they were injured in either one of the above two ways. It was submitted by a number of groups that this requirement misunderstands the nature of sexual assault and trivialises the experience. In particular, the Combined Community Legal Centres Group of New South Wales submission made the point that sexual assault is characterised by violation and lack of consent to sexual activity rather than a physical injury, resulting in profound trauma to victims.

In light of this, both the Combined Community Legal Centres Group of New South Wales and Victims Services submitted that the additional requirement placed on victims of sexual assault to prove a psychological or psychiatric disorder was an unnecessary burden to place on these complainants given the traumatic nature of retelling their story to another professional and the expense incurred in obtaining a report. They concluded that the Act as it stands is in this respect inimical to the aims of Parliament in seeking to recognise and to compensate victims of sexual assault.

Recommendation 11:

The VSR Act should be amended to provide that for offence-based injuries it is not necessary to separately prove an ‘injury’ as defined in the Dictionary to the Act.

5.7.4 Domestic violence, definitional issues and amounts of compensation

A number of submissions stated that the standard amounts of compensation payable in Schedule 1 of the Act for domestic violence were not sufficient and did not reflect the range and the varying seriousness of injuries suffered as a result of domestic violence. The Act currently provides compensation for domestic violence of \$7,500-\$10,000. However, it is open to victims of domestic violence to elect to claim for specific compensable injuries. For example, if a victim suffers from a severely disabling chronic psychological disorder they would be eligible for the maximum award of \$50 000; and if they suffered serious facial scarring they would be eligible to receive an award of \$18 000.

The Combined Community Legal Centres Group of NSW noted that:

Victims of domestic violence often experience a range of physical injuries as a result of verbal abuse, threats, anything from common assault to assault causing grievous bodily harm and sexual assaults. There is much evidence to state that women often experience violence for the first time, or increased violence, during their pregnancies. Many of these women lose their babies before birth. The seriousness of these and other injuries is not reflected in the current category of compensable injury for ‘domestic violence’.

In this regard, it is recommended at para 5.4.1 that consideration should be given to expanding the categories of compensable injury with a view to including injury to or loss of a foetus, miscarriage as a result of violence, and associated injury to reproductive organs as a result of violence.

The definition of ‘domestic violence’ is also problematic. Currently, domestic violence is defined in the dictionary to the Act in the same terms as it is defined in the *Crimes Act 1900*:

"Domestic violence offence" means a personal violence offence committed against:

(a) a person who is or has been married to the person who commits the offence, or

(b) a person who has or has had a de facto relationship, within the meaning of the *Property (Relationships) Act 1984*, with the person who commits the offence, or

(c) a person who has or has had an intimate personal relationship with the person who commits the offence, whether or not the

intimate relationship involves or has involved a relationship of a sexual nature, or

(d) a person who is living or has lived in the same household or other residential facility as the person who commits the offence, or

(e) a person who has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the person who commits the offence, or

(f) a person who is or has been a relative (within the meaning of section 4 (6)) of the person who commits the offence.

Victims Services submits that under this definition a minor injury sustained by a victim through the actions of an ex-flatmate at a social event would automatically attract the minimum domestic violence award of \$7,500. There would be no discretion in the assessor to refuse the award because the injury would automatically come within the offence-based definition of domestic violence. Victims Services suggests that these types of cases were not initially contemplated by the legislation and 'domestic violence', for the purposes of the VSR, should be a much more circumscribed concept, limited to 'incidents involving married or de facto couples, parents and children'.

Recommendation 12:

Consideration should be given to amending the definition of domestic violence within the Act to exclude more remote instances of domestic violence not initially contemplated by the Act.

5.8 Specific Provision of Services

This final section of Chapter 5 addresses the provision of services to several different groups of victims. The specific issues dealt with under this heading include the following: the provision of services to indigenous victims; the provision of interpreters; and the case of families and friends of missing persons.

5.8.1 Provision of Services to Indigenous Victims

Victims Services has established several initiatives directed towards increasing indigenous participation in the victims compensation regime. For instance, the Victims Compensation Tribunal employs indigenous representatives in regional areas (Regional Coordinators) to facilitate community involvement and education. In March 2001, the Aboriginal Justice Advisory Council, in partnership with the Victims of Crime Bureau, held the inaugural Aboriginal and Torres Strait Islander Victims of Crime Interagency Forum. A number of different problems were identified at this forum, including the historically low levels of reporting of crime within indigenous communities;

the poor level and often culturally inappropriate nature of services provided to indigenous communities; and the failure to understand, assess and meet the specific needs of indigenous individuals and communities.

Many of the same problems in service provision were identified by respondents to the review. The submission of the Combined Community Legal Centres Group of New South Wales provided information from the NSW Bureau of Crime Statistics and Research on the high rate of offences against women and children in indigenous communities, as well as addressing both the chronic underreporting rates in the indigenous community and some of the systemic barriers underpinning these rates. Some of the barriers they identified were the lack of community understanding of eligibility for compensation; lack of evidence; lack of access to quality legal representation; fear of reporting and retribution; difficulties accessing ARW's and interpreters; and, again, the culturally inappropriate nature of many services.

The partnership between the Aboriginal Justice Advisory Council and the VCB in holding the Aboriginal and Torres Strait Islander Victims of Crime Interagency Forum is a positive step towards rectifying some of the historical problems in this area. It is clear however that the problems associated with indigenous involvement in the criminal justice and compensation system need continued attention.

Recommendation 13:

Victims Services, in consultation with the Aboriginal Justice Advisory Council, should develop Aboriginal specific responses to Aboriginal victims of crime. In particular, an Aboriginal cultural model of counselling for Aboriginal victims of crime should be developed and implemented.

5.8.2 Missing Persons

Families and friends of missing persons are a particular group who are in need of counselling, support, information and assistance, often in ways similar to victims of violent crime. This fact was recognised by the formation of the Families and Friends of Missing Persons Unit within Victims Services, and by amendments made to the VR Act in 2000 by the *Crimes Legislation Amendment Act*. The Families and Friends of Missing Persons Unit provides a Telephone Support and Counselling Service, and also makes available on its website a 'map of legal issues' which provides assistance with legal matters relating to the administration of a missing person's estate. The 2000 amendments to the VR Act provided that families and friends of missing persons would be treated as victims for the purposes of the functions of the Victims of Crime Bureau.

However, respondents to the review noted some areas where the current victims' rights and victims compensation legislation fails to properly address the needs of families and friends of missing persons. In particular, both

Victims Services and the Victims Advisory Board made submissions on the effect that the current section 26 (the leave provision) of the *Victims Support and Rehabilitation Act* has in cases of missing persons. Section 26(1) currently provides that an application for statutory compensation must be lodged within 2 years after the relevant act of violence occurred or, in the case of a family victim, within 2 years after the death of the primary victim. Under section 26(2), out-of-time applications may be accepted with the leave of the Director and the granting of leave is conditioned by several policies contained within section 26(3). As Victims Services noted, this section does not take account of the situation in which families of missing persons may find themselves, namely where a coronial finding is made 7 years after the act of violence that the person was a victim of homicide. The Victims Advisory Board also supports an amendment to the existing leave provisions.

Victims Services also submitted that the unresolved issue of the management of missing persons' estates should be clarified within the context of the current statutory review. The review notes that the Legislation and Policy Division of the Attorney General's Department is presently formulating a proposal for law reform in this area.

Recommendation 14:

Section 26 of the VSR Act should be amended to insert a subsection making allowance for the granting of leave in the specific case of missing persons, or that the finalisation of coronial proceedings be specifically included as 'good reason' under section 26(3).

6. REVIEW OF THE TERMS OF THE VR ACT

This chapter of the report will address submissions on the *Victims Rights Act 1996* (VR Act). It first details the overall issues emerging from the submissions, before addressing some of the submissions relating to particular provisions of the Act.

6.1 Overall Issues Emerging from the Submissions

Most of the submissions to the review emphasised the need for a statement of victims' rights and a prescriptive document that applies to government departments and agencies engaged in the provision of services to victims of crime. Most were in agreement that in theory the Charter of Victims Rights contained within the VR Act served this end, yet there were reservations expressed in a number of submissions about the way in which the requirements contained in the Charter are being implemented in practice. Many victims, friends and families of victims, and victim support groups observed that the terms of the Charter are simply not being followed by government departments and agencies in their dealings with victims. For example, one respondent to the review complained of how a number of different agencies, from the police through to government departments, failed to observe the terms of the Charter when dealing with the matter of her daughter's sexual abuse. In addition, the Executive Director of the Victims of Crime Assistance League, submitted that:

If agencies and services don't comply there is little effective discipline to enforce it. Progress has been slow. The handling of victims issues remains largely reliant on the subjective decision making of operatives in many disciplines, with little real cohesion or commonality of purpose between operatives and agencies in the overall processing of matters.

In particular, respondents to the review highlighted individual instances of government departments or agencies failing to adhere to the terms of the Charter; inconsistencies between government departments and agencies in their application or implementation of the Charter; and problems in addressing the failures of these bodies to implement Charter requirements.

It is important to note that the Charter set out in the VR Act does not create enforceable legal rights for victims. Rather, section 7 of the VR Act makes it clear that when agencies are dealing with victims of crime they should have regard to the Charter principles to the extent that they are practicable and relevant, in addition to any other relevant matters.

The Victims of Crime Bureau was established by the VR Act as the body responsible for investigating alleged breaches of Charter requirements and co-ordinating interagency Charter compliance.

Section 10(1) relevantly provides:

The Victims Bureau has the following functions:

- (a) to provide information to victims of crime about support services and compensation for victims of crime, and to assist victims of crime in the exercise of their rights,
- (b) to co-ordinate the delivery of support services for victims of crime and to encourage the effective and efficient delivery of those services,
- (c) to promote and oversee the implementation of the Charter of Victims Rights,
- (d) to receive complaints from victims of crime about alleged breaches of the Charter of Victims Rights and to use its best endeavours to resolve the complaints.

As discussed in chapter 3 of this report, the VCB has implemented a number of strategies to ensure compliance with the Charter. These include convening an interagency forum comprised of some 25 agencies (both government and non-government) which meets on a quarterly basis; facilitating forums targeted at specific groups of victims; and regularly liaising with government departments and agencies in order to develop in-house initiatives for those agencies. Furthermore, the VCB has produced and disseminated to all relevant agencies a number of different materials. These include a 'plain English' Charter pamphlet, a training package (which allows government departments to train their staff in Charter compliance), and a Charter standards document which is available on the VCB website. The VCB has also produced a number of booklets and pamphlets for victims. These include the *What Now?* booklet, the *Your Day in Court* video and booklet, the *Charter of Victims Rights Resource Kit*, *Standards for Providing Court Support Services for Victims of Crime*, *Standards for Counselling and Support Services for Victims of Crime*, information packages on *Victim Impact Statements*, and *Sentencing*, various information sheets for victims of crime and information kits outlining the role of the VCB, and a Victims Support Card. Finally, the VCB, in conjunction with Mission Australia, provides the Victims Support Line. Further details regarding this service are provided in chapter 3 of this report.

However, in light of some of the concerns raised by victims groups and other respondents to the review, there may be a need for a greater emphasis on the Charter compliance and oversight role of the VCB. Two main suggestions were raised by respondents to the review.

The first suggestion relates to the need to formulate protocols for the treatment of victims relevant to each particular agency, in light of their Charter rights and obligations. The Hon J. W. Shaw, in his second reading of the *Victims Rights Bill*, stated that 'all agencies involved with crime victims are required to have regard to the Charter principles to the extent it is practicable and relevant'. Clearly, different agencies will have different institutional requirements and for this reason each agency and government department engaged in the provision of services to victims of crime has its own procedures and protocols.

One measure of the extent to which agencies are complying with their Charter obligations is the number of complaints the Victims of Crime Bureau receives about breaches of the Charter. In the calendar years 1997-2002 the VCB recorded just 34 formal complaints, even though the courts dealt with hundreds of thousands of criminal matters over that same five year period. This suggests that agencies are successfully meeting the standards laid out in the Charter in almost all cases.

A second suggestion which arose out of submissions to the review was the idea of adopting a 'caseworker' model for victims of the most serious crimes. One of the problems experienced by victims of crime is the experience of getting 'lost' between different stages of the health, criminal justice, and compensation systems. As one respondent put it:

Why is no one particular contact person allocated to each claim, in order to avoid the situation of a victim having to ring, be put through to complete strangers on each occasion who are not aware of circumstances/claim history, and the victim therefore has to repeatedly relay information to numerous individuals?

Further, Ian Chalmers submitted that there should be provided:

Immediate contact by a designated person in authority and receipt of an outline of future processes. This should include contact names and details of help available.

The proposed structure of the 'caseworker' model is that the VCB acts as a point of contact for certain victims (such as, for example, family victims of homicide, or victims of domestic violence and sexual assault) in order to assist them through their experience of the different agencies and departments involved in the compensation process. The VCB already provides this service to some extent, especially for families of homicide victims. Further, Victims Services has developed an 'individual case management' system for dealing with compensation claims and the 24-hour telephone assistance line provides contacts for further assistance. The Office of the Director of Public Prosecution's Witness Assistance Service also provides a useful model for this type of initiative.

If the case worker model were to be implemented for a wide class of victims, then the resource implications would be quite significant. It could possibly entail the diversion of funds from the compensation scheme itself. Since the information needs of most victims are likely to be adequately met by other means (eg publications, telephone assistance lines) it is recommended that the case worker model be applied only in the most serious cases, where a high level of support is warranted and necessary.

Recommendation 15:

Consideration be given to expanding the ‘caseworker’ scheme whereby the VCB acts as a point of contact for victims of very serious crimes and helps them to navigate the different agencies involved in the provision of services to victims of crime, and in the compensation process.

6.2 Particular Provisions

A number of respondents to the review made submissions regarding particular provisions of the VR Act. These are dealt with sequentially, below.

Part 1 Preliminary

Section 5

Section 5 currently provides:

- (1) For the purposes of this Act, a "victim of crime" is a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence.
- (2) A person suffers "harm" if, as a result of such an act:
 - (a) the person suffers actual physical bodily harm, mental illness or nervous shock, or
 - (b) the person’s property is deliberately taken, destroyed or damaged.
- (3) If the person dies as a result of the act concerned, a member of the person’s immediate family is also a victim of crime for the purposes of this Act.

Respondents to the review identified a number of problems with this formulation. First, Victims Services submitted that the current wording of the subsection reflects the outdated perception that mental illness can be caused by an act committed in the course of a criminal offence, and that the reference to ‘nervous shock’ is similarly outdated, given that the term was used in the *Victims Compensation Act* 1996 but was dropped in the VSR Act. The DPP submitted that the current formulation implies the need for psychiatric diagnoses and that whilst a restrictive definition might be appropriate as a limitation on eligibility for compensation, such a definition is not appropriate for the purposes of the Charter.

Recommendation 16:

The definition of ‘harm’ in section 5(2)(a) should be changed from ‘actual physical bodily harm, mental illness or nervous shock’ to ‘physical, psychological or psychiatric harm’.

Part 2 Charter of Victims Rights

This Part deals with the main issues raised by respondents to the review, with respect to certain provisions of the Charter. Overall, the submissions had very little comment on the specific provisions of the VR and the Charter.

6.1

Item 6.1 of the Charter currently provides:

A victim should be treated with courtesy, compassion, and respect for the victim's rights and dignity.

The Chairperson of the Community Relations Commission commented that the principles of multiculturalism contained within the *Community Relations Commission and Principles of Multiculturalism Act 2000* were not reflected in the current terms of the Charter. It was suggested the need for cultural sensitivity should be expressly mentioned in the Charter.

Recommendation 17:

The terms of 6.1 should be amended to read: 'A victim should be treated with courtesy, compassion, cultural sensitivity, and respect for the victim's rights and dignity.'

6.5

Until recently, item 6.5 of the Charter provided:

A victim should, on request, be informed of the following:

- (a) the charges laid against the accused or reasons for not laying charges,
- (b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision for the accused to accept a plea of guilty to a less serious charge in return for a full discharge with respect to the other charges,
- (c) the date and place of hearing of any charge laid against the accused,
- (d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.

The *Victims Legislation Amendment Act 2003*, discussed in Chapter 2 of this report, amended item 6.5 of the Charter in two respects. First, it amended the current request requirement to read: '(1) A victim should be informed in a timely manner of the following ...' - in other words, the victim no longer has to specifically request information. Secondly, the Act inserted the following subsection:

- (2) A victim should be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm, mental illness or nervous shock to the victim, unless:
- (a) the victim has indicated that he or she does not wish to be so consulted, or
 - (b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

In order to maintain consistency in the language of the Charter, it is recommended that this part of the Charter should also be amended so that it is consistent with section 5.

Recommendation 18:

The wording of 6.5 (2) should be changed from ‘actual bodily harm, mental illness or nervous shock’ to ‘physical, psychological or psychiatric harm’.

6.7

The current wording of item 6.7 of the Charter is:

A victim should be protected from unnecessary contact with the accused and defence witnesses during the course of court proceedings.

A number of submissions observed that the requirement contained within item 6.7 of the Charter, namely that the victim should be protected from unnecessary contact with the accused and the defence witnesses during the trial, is not being observed in practice. The respondents contended that this was primarily a result of the lack of appropriate facilities in many courtrooms. For example, many courtrooms lack secure waiting rooms or separate toilet facilities, and Crown rooms are often located close to defence rooms. The Law Society, the DPP, and VOCAL all recommend the adoption of safe waiting rooms and the provision of separate amenities, as well as giving consideration to the timing of the entrance to, and exit from, court of the victim and the accused.

A major difficulty with these proposals is that many court houses are old, and in some cases, heritage listed. Almost all were built at a time when victims rights were not explicitly recognised by statute law. Providing additional amenities for victims within existing court buildings will not always be achievable. It would be advisable, however, to incorporate the need for appropriate facilities for victims in the designs for future courts.

The Attorney General's Department has adopted design guidelines which ensure that facilities for witnesses, especially vulnerable witnesses, are routinely incorporated into the design of new court facilities and, where possible, in refurbishments. This includes the provision of remote witness facilities, which allow vulnerable witnesses to give evidence via video link.

Recommendation 19:

Relevant government departments and agencies should continue to work towards the provision, where practicable, of separate amenities and safe waiting rooms for victims.

6.8

Item 6.8 of the Charter currently provides:

A victim's residential address and telephone number should not be disclosed unless a court otherwise directs.

The Victims Services submission identified an area of confusion with respect to item 6.8 of the Charter, namely its application to court proceedings or its application to government departments in general. Currently, the wording of item 6.8 catches situations where contact information is shared between government departments and with external agencies.

It is unnecessary for item 6.8 to apply generally to disclosures by government agencies as these agencies are subject to the provisions of the *Privacy and Personal Information Protection Act 1998*. This Act places strict limits on the way in which personal information is collected, used and disclosed by public sector agencies.

Recommendation 20:

The current wording of item 6.8 of the Charter should be amended to clarify that it only applies in the context of court proceedings.

6.14

Item 6.14 of the Charter currently provides:

A relevant victim should have access to information and assistance for the preparation of any victim impact statement authorised by law to ensure that the full effect of the crime on the victim is placed before the court.

The question of Victim Impact Statements and their use in the criminal justice system was raised in several submissions. Some respondents were critical of the way in which Victim Impact Statements were provided, often at great expense and trauma to the victim, and then not taken into account by the judge or magistrate. Several respondents also identified more systemic problems with the use of Victim Impact Statements. For example, VOCAL submitted that Victim Impact Statements should be made available in Local Court matters (as well as in District and Supreme Court matters), and that victims should be able to read aloud their Victim Impact Statement to the Court. These issues were also canvassed in a submission made by Victims Services.

The tendering of Victim Impact Statements in criminal matters is currently governed by the *Crimes (Sentencing Procedure) Act 1999*. That Act was recently amended by the *Victims Legislation Amendment Act 2003* to allow a victim or their representative to read the out the whole or any part of their statement to the court. The statement may be read out after the offender has been convicted, but before the court sentences the offender.

In addition, the *Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003* proposes greater use of Victim Impact Statements in Local Court matters. At present a victim impact statement may only be received by the Local Court where the offence being dealt with has resulted in a death, or it is an offence for which a higher maximum penalty may be imposed where death is occasioned.

The proposed change will enable the Local Court to receive victim impact statements when an indictable offence listed in Table 1 to Schedule 1 of the *Criminal Procedure Act 1986* is dealt with summarily and results in either actual physical bodily harm to any person, or involves an act of actual or threatened violence or an act of sexual assault. The offences listed in Table 1 include offences such as malicious wounding, maliciously inflicting grievous bodily harm, aggravated indecent assault, and dangerous driving occasioning grievous bodily harm. Once the Local Court has received a VIS, this will also entitle the victim to read out the VIS at such time as the Local Court determines, following conviction but prior to sentencing.

7. CONCLUSION

It is apparent from the comments made by respondents to the review that the objectives of each Act remain valid. Accordingly, this report makes no recommendation to alter either section 3 of the VSR Act or section 3 of the VR Act.

The majority of recommendations made in this report are directed towards ensuring that the current terms of the VSR Act and the VR Act better secure those objectives. In terms of the VSR, it is apparent that some legislative amendment is necessary in order to achieve this aim. Several areas of concern were raised in the submissions. These included:

- Compensation;
- Counselling;
- Compensable Injuries;
- Restitution and Offender Participation in the Victims Compensation Process;
- Determinations by Compensation Assessors - Procedural Fairness and Other Issues;
- Sexual Assault/Child Sexual Assault/Domestic Violence;
- Provision of Additional Services.

Accordingly, this report recommends a number of amendments in the above areas.

In terms of the VR Act, most respondents felt that the terms of the Charter of Victims Rights were still valid for securing the objectives of the Act. The most significant issue to arise from the review of the terms of the VR Act was that although the Charter is an important element of the victims rights regime in New South Wales, there is perceived to be a widespread problem with government departments and agencies involved in the provision of services to victims of crime failing to adhere to the terms of the Charter. This perception is at odds with the very low level of complaints to the Victim of Crime Bureau. It is apparent that the Bureau has done an extensive amount of work to ensure that agencies are aware of their obligations under the Charter, and it continues to provide a great deal of information and other assistance to both agencies and victims.

APPENDIX A - RESPONDENTS TO THE REVIEW

- 1. Claire Vernon, Victims Services**
- 2. Ron Woodham, Department of Corrective Services**
- 3. Maude Woodhouse**
- 4. Gordon Palmer**
- 5. Lyn Middleton/K. Brian Morgan, Salvation Army**
- 6. Rochelle Braaf, Violence Against Women Specialist Unit**
- 7. Catherine Carney, Women's Legal Resource Centre**
- 8. Ian Chalmers**
- 9. Margot Robinson**
- 10. N. R. Cowdery QC, Office of the Director of Public Prosecutions**
- 11. Barbara Church**
- 12. Dana Harvey, Illawarra Legal Centre**
- 13. Rosemary and Gregory Peart**
- 14. Irene Lojszczyk**
- 15. Robert McGregor, NSW Department of Health**
- 16. Nerolie Gate**
- 17. Chris Green**
- 18. Tricia Morton**
- 19. Robyn Chalmers**
- 20. Stepan Kerkyasharian, Community Relations Commission**
- 21. C. Gellatly, Premier's Department of NSW**
- 22. Bob Penfold,**
- 23. Hemal Perera, Western Aboriginal Legal Service**
- 24. Patricia Staunton, Chief Magistrate of the Local Court**
- 25. John Boersig, Coalition of Aboriginal Legal Services of NSW**
- 26. J. B. Abernathy, NSW State Coroner**
- 27. William Goard, Psychologist**
- 28. Philip Bell**
- 29. Teresa Sartor**
- 30. Lisa Sabine**
- 31. Karen Truskett-Jones**
- 32. Bill Grant, Victims Advisory Board**
- 33. Linda Burney, Department of Aboriginal Affairs**
- 34. Robyn Henderson, Department for Women**
- 35. Mary Brownlee**
- 36. Bret Walker, NSW Bar Association**
- 37. Chris Cuneen, Juvenile Justice Advisory Council**
- 38. Libby Goss, Domestic Violence Advocacy Service**
- 39. Gabrielle McKinnon, Combined Community Legal Centres Group of NSW**
- 40. Kim Cull, Law Society of NSW**
- 41. Robyn Cotterell-Jones, VOCAL Hunter**
- 42. Jane Irwin, Shopfront Youth Legal Centre**
- 43. Pam Wilde, Registrar of the Victims Compensation Tribunal**
- 44. Ken Marslew, Enough is Enough**
- 45. Paul Wade**

GLOSSARY OF TERMS

AJAC	Aboriginal Justice Advisory Council
ATSI	Aboriginal and Torres Strait Islander
COALS	Coalition of Aboriginal Legal Services
CCLCGNSW	Combined Community Legal Centres Group of NSW
DPP	Office of the Director of Public Prosecutions
VAB	Victims Advisory Board
VCB	Victims of Crime Bureau
VCT	Victims Compensation Tribunal
VR Act	Victims Rights Act 1996
VSR Act	Victims Support and Rehabilitation Act 1996
WLRC	Women's Legal Resource Centre