



PARLIAMENT OF NEW SOUTH WALES

JOINT SELECT COMMITTEE ON VICTIMS COMPENSATION

Fourth Interim Report:

***The Collection of
RESTITUTION
from Convicted Offenders***

September 1998

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TERMS OF REFERENCE

The Joint Select Committee on Victims Compensation is inquiring into the long term financial viability of the Victims Compensation Fund in particular the procedures used to recover compensation monies from convicted offenders having regard to:

- A. The rate of recovery of restitution monies and the costs incurred in such collection.
- B. The system of location and pursuit of offenders to ensure maximum recovery of compensation monies.
- C. The method of avoidance by offenders of their obligations to pay restitution.
- D. Any other related matters.

MEMBERSHIP OF THE COMMITTEE

The Joint Committee consists of five Members of the Legislative Assembly and four Members of the Legislative Council. These members are :

Legislative Assembly

Mr Anthony Stewart, MP (Chairman)
Mr James Anderson, MP
Ms Marie Andrews, MP
Mr Wayne Merton, MP
The Hon Gerald Peacocke, MP

Legislative Council

The Hon Jan Burnswoods, MLC
The Hon Michael Gallacher, MLC
The Hon Richard Jones, MLC
The Hon Bryan Vaughan, MLC

Consultant to the Committee

Mr Keith Ferguson

Secretariat

Ms Catherine Watson, Director
Ms Meryl James, Research Officer
Ms Glendora Magno, Assistant Committee Officer

CHAIRMAN'S FOREWORD

This inquiry was begun in response to a request to the Committee from the Premier, the Honourable Bob Carr M.P. following the discovery that a convicted paedophile, Anthony Reid, had transferred his \$400,000 house at Narrabeen for the sum of \$1 to avoid paying restitution.

It became clear, as a result of this incident, that the Victims Compensation Tribunal does not currently have sufficient power to deter, prevent and reverse such transfers of property by offenders. In this report the Joint Select Committee has recommended a number of ways in which the Tribunal can be given additional powers by legislative amendment. It has also recommended ways in which the Tribunal can gain greater access to information about offenders' assets. Such information is already held by other agencies within the Attorney General's Department and I do not believe that it is unreasonable that such information be made available to the Tribunal. Certainly the taxpayers of New South Wales, whose money ultimately pays for victims compensation, have a right to expect these type of administrative cost efficiencies within the one government portfolio.

Since I have been Chairman of the Joint Select Committee on Victims Compensation I have had the benefit of studying victims compensation systems in both interstate and overseas jurisdictions. One of the greatest differences I have noted is that few of our counterparts actually pursue offenders for restitution monies with the vigour that New South Wales does. This is usually because the administrative costs often outweigh the monies collected as so few convicted offenders have assets.

Despite this, the New South Wales government remains committed to making offenders' financially pay for their victims' compensation where this is feasible. I believe that this is totally appropriate and the Anthony Reid case shows that some convicted offenders actually have substantial assets. It has never been the intention that the establishment of the Victims Compensation Fund would absolve offenders from their responsibility to contribute to the financial compensation of their victims. It is important that there always be a nexus between the money a victim receives and the offender.

As Ms Jeanette Schubert, one of Anthony Reid's victims told the Committee:

People do not want money off the government; they want it off the person who hurt their family. I would not enjoy spending it near as much if I think it came from the government, not Tony Reid. When I get on that plane to take my family on a holiday I want to put my finger out the window and say 'Suck eggs, Tony Reid!' I cannot do that if you people pay for it and my husband's, my father's and my father-in-law's taxes have paid for it. I will not

enjoy spending it. I will feel that I am ripping it out of the school system.

I therefore hope that the recommendations made in this report will help make the victims compensation restitution system even more effective and we will see no further recurrences of avoidance behaviour such as Anthony Reid's.

I wish to thank all those who submitted and gave evidence to the inquiry as well as my fellow Committee members. I also wish to thank the Committee Secretariat who have assisted in the preparation of this report.

Tony Stewart MP
Chairman

SUMMARY OF RECOMMENDATIONS

1. That the *Victims Compensation Act 1996 (NSW)* be amended to allow that provisional orders for restitution be automatically deemed to be confirmed and become enforceable by operation of the Act.
2. That the *Victims Compensation Act 1996 (NSW)* be amended to provide the Tribunal with a power to lodge caveats over real property which the Tribunal has reasonable grounds to believe may be the subject of later restitution action.
3. That the *Victims Compensation Act 1996 (NSW)* be amended to create a power to have transfers of convicted offenders' property which occur after the date of the relevant offence and can be shown to have been transferred in contemplation of avoiding later victims compensation restitution declared void by the Supreme Court of New South Wales. The definition of "property" in this instance should follow the definition provided in Section 5 of the *Bankruptcy Act 1966 (Cth)*.
4. That the *Victims Compensation Act 1996 (NSW)* be amended to make it an offence for convicted offenders to dispose of property after the date of the relevant offence when such disposal is done in contemplation of defeating later possible victims compensation restitution and that substantial sanctions apply to the contravention of this provision. The definition of "property" in this instance should follow the definition provided in Section 5 of the *Bankruptcy Act 1966 (Cth)*.
5. That the Victims Compensation Tribunal be given access to information which allows them to establish whether convicted offenders, whose victim or victims may be able to claim victims compensation as a result of the relevant offence, have been either granted or denied Legal Aid on the basis of means testing.
6. That the *Justices Act 1902 (NSW)* be amended to require that defendant solicitors or unrepresented defendants present the court with an affidavit signed by the defendant outlining the defendant's current financial situation at the time of sentencing in cases where the offender's victim or victims may be eligible for victims compensation as a result of the relevant offence.
7. That Local, District and Supreme Courts be required to keep such affidavits on the court file and make them available to the Victims

Compensation Tribunal on request. Such documents should be marked "Confidential".

- 8. That the Victims Compensation Tribunal amend its guidelines for the preparation of police reports to encourage police to disclose any actual knowledge or suspicion of an offender's assets at the time of arrest.**

CHAPTER 1

BACKGROUND TO THE INQUIRY

Sections 45-58 of the *Victims Compensation Act 1996* (NSW) grants power to the Victims Compensation Tribunal to seek financial restitution from a convicted offender after the Tribunal pays out compensation to his/her victim. Historically, this restitution provision has been problematic to administer for the following reasons:

- *Lack of cash and assets held by offenders;*
- *Inability to locate what assets there are due to the strong reliance on offenders to outline truthfully their financial situation;*
- *Delays between trials and the receipt of applications, giving offenders time to dispose of assets;*
- *The fact that convicted offenders are often in prison after conviction and therefore have no, or very limited, capacity to pay;*
- *Inability to locate the offenders after orders for restitution are made.*

The Case of Anthony Reid

The case of Anthony Reid illustrates the ability of offenders to dispose of assets before restitution action can be commenced. Anthony George Reid was found guilty and convicted on 25 May 1997 of two indecent assault charges and one charge of buggery. He was sentenced on 9 October 1997 to 16 years gaol on a number of sexual abuse charges including six charges of sexual intercourse with a child under 10 years of age. At the time of sentencing the Court took into account a further eight charges of indecent assault, aggravated indecent assault and sexual intercourse with a child under 10 years. The crimes stretched over 15 years and involved children between seven and ten years of age.

In March 1998 one of Reid's victims and the victim's mother applied to the Victims Compensation Tribunal for compensation. Since then a number of other victims have also applied for victims compensation. The Tribunal is yet to make a determination on the applications.

On 23 June 1997, four weeks after conviction and while pending sentence for the offences, Anthony Reid transferred his property at North Narrabeen to his brother for the nominal sum of

\$1. The property had a market value of over \$400,000. It is apparent that the transfer of the property had the purpose of avoiding paying restitution for the injuries caused to the victims of his crime or to prevent civil action being taken by the victims against his assets. The transfer of his property effectively prevents the Victims Compensation Tribunal from seizing his Narrabeen house as the property now legally belongs to his brother. The payment of one dollar for the property means that there are no monies in Reid's possession which the Tribunal can obtain.

Legal title in Reid's property now resides with his brother who may have the intention of looking after the property until Anthony Reid is released from prison. The Committee was informed that Anthony Reid has had his sentence reduced to 12 years with a minimum of 8 years. It is apparent to the Committee that the property is currently maintained by his brother and is appreciating in capital gain and possibly rent and may be returned to Reid on his release.

The Committee questioned Mrs. Schubert about the property:

Chairman: Who is actually living in the house in question at the moment? Is it Reid's brother?

Mrs. Schubert It is Reid's brother, his brother-in-law and his sister.

Member: And you are still across the Road?

Mrs. Schubert And I am still across the road. The house I live in is a dual occupancy, owned by my father-in-law. I get that four-bedroom house for \$130. I cannot afford to live anywhere else on the northern beaches, even though I have applied for a Housing Commission home to move me and my children out of that street. I am on a priority housing list, but I still have not been called up. While waiting to move out of this street my son has moved. He refused to come home.

He (Reid) has served more than one year now, so in seven years he will be out, again living across the road from my house. My oldest son is the child he assaulted. I still have another two sons, one who has just started school and one who is in first class. Unless his home is removed from him, he will come out of gaol and live across the road from my house, and my children will be at risk all over again, except this time it will not be one, but two.

Transcript of Evidence, 20 August 1998 p.47

The action of Anthony Reid in transferring his property has effectively deprived the Victims Compensation Tribunal of its right to seek reimbursement of compensation monies paid to the victims of his crime.

When asked by the Committee how many claims for victims compensation had been lodged Mrs. Schubert stated:-

Mrs. Schubert: There are seven or eight.

Member: Have you any idea what the total amount will be?

Mrs. Schubert: I would say it would be close to \$400,000 if the claim is \$50,000 for each. The Government will be throwing \$400,000 down the drain and that is about what the house is worth.

Transcript of Evidence, 20 August 1998 p.53

Request from the Premier

On 21 May 1998, the Premier of New South Wales, the Honourable Bob Carr MP, wrote to the Committee raising concerns regarding what had occurred in the Anthony Reid matter:

It has come to my attention that there may be issues involving avoidance of restitution by convicted offenders requiring consideration by your Committee.

Given the importance of this issue, I consider it appropriate for the Committee to further investigate these issues and report back to Parliament by 30 September 1998.

Letter to the Committee, 21 May 1998

CHAPTER 2

CURRENT RESTITUTION COLLECTION PROCEDURES

Background

The 1996 legislation introduced a streamlined process for the pursuit of restitution from convicted offenders. The Tribunal now has all the powers of a Local Court to order repayment of monies.

The Tribunal's first step is to review the Criminal Court Papers to determine if there is a legal right to take such restitution action. Mr. Phil O'Toole, Director of the Victims Compensation Tribunal explained the procedure to the Committee:

The offender must have been convicted of exactly the same offences that resulted in the injury to the victim. For example, offenders break into premises and assault victims. The offender may be convicted only of break and entry and not assault. The offender might be charged with assault, but not convicted of it. In that instance we could not take restitution action because the offence that resulted in the injury to the victim is not an offence for which the offender has been convicted

Transcript of Evidence 20 August 1998 p.17

If there is a legal basis to begin restitution action the Director of the Tribunal may then issue a provisional order provided that the whereabouts of the offender can be located. In approximately fifty per cent of compensation cases the Tribunal will have the ability to take restitution action. In the other cases either the offender is found not guilty or no offender has ever been located and charged by the Police.

Locating Offenders

Prior to the 1996 amendments to the *Victims Compensation Act* the Tribunal had significant difficulties in locating the address of the offender. The inability to locate offenders was due to a number of factors including: the time lapse between criminal court conviction and the granting of a compensation award; the transient nature of offenders and; limited access by the Tribunal to government records. As Mr. O'Toole explained to the Committee:-

In previous times we would send the notice to the last known address. The provisional order would be sent to the address

on the file, which could be the address that the victim provided in his or her application or the address in the court documents when the person was convicted. It may be an address provided by police. Because the event may have taken place years before the offender may have moved numerous times. A large number of offenders are transient people. We may not receive the response, either because it went to the wrong address or because the addressee received it and threw it in the bin.

Transcript of Evidence, 20 August 1998 p.11

In cases where the Tribunal has not received a response from the offender to the restitution notice, the matter is referred to the State Debt Recovery Office for further enforcement action. Under the 1987 provisions 42 per cent of the cases referred to the State Debt Recovery Office were referred because the offender's address was unknown. This problem was addressed by the 1996 legislative amendments which gave the Tribunal considerably increased power to obtain access to database held by State Government authorities.

Section 58 of the *Victims Compensation Act, 1996* provides:-

Police officers, the Road and Traffic Authority and other government agencies are authorised to provide the Director with information about the address of a defendant for the purpose of serving a provisional order for restitution on the defendant or taking any action against the defendant to enforce an order for restitution.

The effect of the new provisions has been a substantial increase in the number of offenders located by the Tribunal.

The Tribunal now has access to the RTA database, which access has more than doubled its capacity to locate offenders. The Tribunal is in the process of finalising access to the database of the Department of Corrective Services in order that it might make on-line searches and be aware of when a person is due for release or is released from the prison system and then reactivate restitution action.

Mr O'Toole, Transcript of Evidence 20 August 1998 p.3

Access to information held by the Police Service's COPS central data bank has further assisted the Tribunal in its attempts to locate offenders.

Following the issue and service of the provisional restitution notice the Tribunal must give the offender 28 days to respond. Once the response is received it must be listed for determination by a Tribunal Member - particularly if the offender is pleading not guilty to the notice. If, at the expiration of that time there is no response from the offender the

Tribunal Registrar must place the case before a Tribunal Magistrate to have the

provisional order confirmed.

The Chairperson of the Victims Compensation Tribunal, Mr. C. Brahe has suggested in a submission to the Committee that if the offender does not respond to a provisional order the

“order should be automatically be deemed to be confirmed and become enforceable by operation of the Act. There seems to be no necessity to put the provisional order before a Magistrate for confirmation.”
[submission, Chairperson, Victims Compensation Tribunal, 14 July 1998]

As Mr. Brahe states, the provisions for restitution contained within the 1996 Act were designed to streamline the whole restitution process. Provisional orders were introduced to cut in half the time for offenders to respond to notices. Action taken for enforcement of orders can be performed using all the powers of the Civil Court without the need to register judgments in that Court. The requirement, therefore, to place the case before a Tribunal Magistrate for confirmation appears to be contrary to the streamlining provisions contained elsewhere in the Act. If the offender subsequently is contacted and it transpires that he has a reasonable defence to the restitution action there are provisions contained both within the *Victims Compensation Act* and the Regulations to seek to have the order set aside.

The increased access to information which assists the Tribunal in locating an offender's whereabouts has resulted in a significant increase in the revenue collected by the Tribunal. There has also been a reduction in the number of cases being forwarded to the State Debt Recovery Office for enforcement action and this has resulted in cost savings. In 1997/98, the Tribunal recovered \$1.9 million in restitution collections or an average of \$150,000 collected per month. Revenue collections for the financial year 1998/99 is projected to be \$3 million.

The Tribunal is currently reviewing a number of operational systems including the introduction of a computerised debtors system. When combined with the increased access to address data bases the Tribunal anticipates that it will progress to an annual revenue of \$10 million.

I anticipate we could get to an annual revenue of \$10 million. What we have reached recently and what we have projected for this year is in total absence of a proper debtors control system. We do not have the capacity to readily identify someone who defaults on an agreement. We have not routinely sent, nor do we have the capacity to send, reminders to people who have missed payments. Reminder notices and statements will be routinely sent out. The names of people who default will be sent to the State Debt Recovery Office, which has the potential to significantly increase contribution.

Mr Phil O'Toole, Transcript of Evidence, 20 August 1998 p. 12

The Pursuit of Restitution From Prisoners.

The Victims Compensation Tribunal is required by the *Victims Compensation Act 1996* to take restitution action against all offenders who have been convicted of an offence. This action must be taken irrespective of whether or not the offender is currently serving a prison sentence. The Tribunal must take action within two years of the payment of compensation. The actual number of restitution actions against prisoners constitute 5.4 per cent of all restitution actions.

The Committee received a number of submissions which supported the need for the Victims Compensation Tribunal to pursue prisoners. However, there was general agreement that it might not be economically feasible.

The Director of Victims Compensation Tribunal, Mr. O'Toole informed the Committee that the Tribunal has a policy of not actively pursuing the offender while they are in prison:

With regard to pursuing restitution action against prisoners, we currently serve provisional restitution orders on defendants who are in prison but the general policy is that once we have fulfilled the obligations of the Act of serving the order on the prisoner, which must be within two years of the award being made to the victim, the restitution action goes into abeyance until the prisoner is released from prison.

Transcript of Evidence, 20 August 1998 p.5

The reason behind this general policy is the significant costs involved in arranging for imprisoned offenders to attend restitution hearings. The submission tendered by the Attorney General's Department highlighted this problem:-

The Victims Compensation Tribunal currently serves provisional restitution orders on defendants who are in prison. As a general policy however, where a defendant lodges an objection to the provisional order, ongoing restitution action is not currently pursued as there are significant costs and logistical problems involved in arranging for imprisoned defendants to attend restitution hearings.

Submission, Attorney-General p.3

One of the difficulties that the Tribunal has in operating under this policy is that the Tribunal would be unaware of when the offender is released from prison. As Mr. O'Toole stated:-

Until now we have never had a structure in place to make us aware of when a prisoner is released from prison. We have had to rely on occasional and sporadic searches.

Transcript of Evidence, 20 August 1998, p.5

The Tribunal is taking steps to improve this situation by gaining access to Department of Corrective Services information regarding parole.

I have previously alluded to the fact that shortly, if not by the end of this month definitely by the end of September, we will have on-line access to the database of the Department of Corrective Services so we can identify when prisoners will be released.

Transcript of Evidence, 20 August 1998 p.5

An ongoing problem is that prisoners do not earn a large amount of income in prison. Further, it was the view of the Tribunal that if prisoners realised that a proportion of their prison earnings would be going to the Tribunal it is possible that many would cease income producing activity. This opinion was also held by the Department of Corrective Services who advised the Committee that generally inmates earn between \$10.50 and \$60 per week. It further advised that only a small portion of inmates earn any money - around 200 out of a prison population of 6,500. If the prisoner does earn money the Department deducts a proportion for "board". Inmates are also required to purchase the raw materials for the crafts they sell.

The Legal Aid Commission in evidence before the Committee suggested that it was not economically feasible to pursue prisoners either while they are in prison or after they are released. Mr Douglas Humphreys, Manager, Criminal Law Branch, told the Committee that, in his opinion, after an offender has spent three years in prison the Tribunal should probably wipe an offender's slate clean.

The reality is that the vast majority of clients with whom we deal-and the vast majority of people who go before the courts-do not have any assets anyway. One needs to look at it on a cost-benefit basis of bothering to pursue it. A line has to be drawn somewhere to write matters off otherwise it simply becomes an exercise in futility and a waste of public moneys in pursuing debts that simply not recoverable.....If we have got enough difficulty getting \$75 out of people I do wonder about the difficulties that Mr. O'Toole must have trying to get thousands of dollars out of people.

Transcript of Evidence, 20 August 1998, p.39

The improvement in the ability of the Tribunal to keep track of the offender upon release from prison through the Department of Corrective Services database and the improved ability of the Tribunal to locate addresses for offenders after release through other databases would support the consideration that restitution action should be attempted.

Conclusion

It is difficult to ascertain from the preliminary figures given to the Committee by the Tribunal the overall effectiveness of the new streamlined system but the trends appear

to be encouraging. The Committee also acknowledges that pursuit of restitution from prisoners will always be problematic.

After considering these figures supplied by the Tribunal and examining procedures in other jurisdictions, the Committee is satisfied that the Tribunal currently has sufficient powers under the existing legislation to pursue restitution from convicted offenders once those offenders and their assets are located and all relevant assets are still within the possession of the offender.

The Committee does, however, support further streamlining of the system as suggested by Mr. Brahe.

Recommendation:

- | |
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| <ol style="list-style-type: none">1. That the Victims Compensation Act 1996 be amended to allow that provisional orders for restitution be automatically deemed to be confirmed and become enforceable by operation of the Act. |
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CHAPTER 3

OPTIONS TO PROHIBIT THE TRANSFER OF PROPERTY BY OFFENDERS TO AVOID RESTITUTION

The Anthony Reid example illustrates how the Tribunal does not currently have sufficient power to prevent the transfer of assets by convicted offenders to prevent restitution action being taken. All submissions received by the Committee were unanimous in their view that the Tribunal needed more power to both proactively prevent the disposal of assets in which they have an interest and also to retrospectively declare transfers void which were done by the offender in contemplation of eventually becoming the subject of restitution proceedings.

The current provisions of the *Victims Compensation Act* provide absolutely no power to the Tribunal to reverse transfers of property in similar circumstances to Reid's case. The Director of the Victims Compensation Tribunal, Mr. Phil O'Toole has admitted to the Committee that "*the legislation could be tightened to avoid repetition of such transfers.*"

The Provisions of Sections 120 and 121 of the Bankruptcy Act (Cth)

The Committee, in its Discussion Paper entitled *The Collection of Restitution from Convicted Offenders*, suggested as an option for reform that the *Victims Compensation Act 1996* be amended to give the Tribunal power to declare a transfer of property void in circumstances where the transfer has clearly been made to defeat the recovery of compensation payments. Such a power would be similar to the provisions of Section 121 of the *Bankruptcy Act* which confers a power to the trustee of the bankrupt to seek a declaration that the transfer of property from the bankrupt to another person be reversed if the main purpose of making a transfer was:-

- (1)(b) (i) *to prevent the transferred property from becoming divisible among the transferor's creditors; or*
- (ii) *to hinder or delay the process of making property available for division among the transferor's creditors.*

The submissions received by the Committee were generally supportive of the Tribunal having the power to have transfers of property which were made in order to avoid paying restitution declared void and the transfer reversed. The Legal Aid Commission in its submission stated:-

The Legal Aid Commission would support the provision of a power to the Tribunal to apply to either the District or Supreme Court to declare

the transfer of a property void in circumstances where the transfer has been made with a view to defeat the recovery of compensations. By way of example, the Commission notes the diversion of funds to a discretionary trust account in Canada by Phillip Harold Bell prior to his extradition from South Africa to Australia.....It is essential that assets of convicted offenders be preserved as much as possible for payment out to victims of crime.

Submission, Legal Aid Commission, 22 August 1998

Section 121 of the *Bankruptcy Act* provides a specific guarantee to ensure that a person who has acquired the property from the offender at market value and was unaware that the transfer was made in order to avoid the property becoming part of the bankrupt's estate will not suffer financially as a result.

The Crown Solicitor, in his advice to the Committee of 18 September, supported the introduction of Sections 120 and 21 type power:

In my opinion, mechanisms like those set up in ss.120 and 121 would be effective to avoid those transactions whose main purpose is to defeat the Tribunal from confirming or enforcing a restitution order.

It is the Committee's view that any amendment to the *Victims Compensation Act* must contain similar provisions to ensure that any innocent person who buys property from the offender at market value should not be disadvantaged by the possible reversal of transfer of the property.

The Provisions of the Confiscation of Proceeds of Crime Act 1989 (NSW)

Power is provided in the *Confiscation of Proceeds of Crime Act, 1989 (NSW)* for authorities to take out restraining orders and seek forfeiture of property that was either gained by the offender through the commission of offences or which was used in the connection with the commission of offences. The Act contains certain powers to seek an order against the offender restraining him/her from disposing of the property and in certain circumstances directing the Public Trustee to take control of the property. The order may be sought either after the offender is charged with an offence or if the offender is about to be charged. The making of such an order may then give the authorities the ability to register a charge on the property at the Land Titles Office in the case of land. This prevents the offender from transferring the property to another party.

Caveats

The Committee considered whether the Tribunal currently has sufficient power to lodge a caveat against property in which it may have a future interest. It also questioned Anthony Reid's ability to transfer his property for \$1. It received evidence from Mr Frank

Ticehurst, Principal Legal Officer, Land Titles Office, who stated that if the transfer

documents are in the proper form and stamp duty on the market value of the property is paid, the Land Titles Office is under an obligation to register the documentation:

Member: Would property worth \$400,000 and being transferred for \$1 not sound alarm bells?

Mr. Ticehurst: We would not know the value of the property at all. We get a dealing that is signed by the transferee or by the owner and the property is going to somebody. We do not know the value of the property and we do not look to that value.

Transcript of Evidence, 20 August 1998 p. 30.

Only if the transfer has been fraudulently transferred might the transfer be set aside or if a particular Act had provision giving a right to lodge a caveat, or a court order.

To prevent the transfer of property a party may lodge a *caveat* against the title of the house. However, to do this a party must have a recognised interest in the land or a legal right. A debt owed to the Tribunal by an offender is not sufficient to give a right to lodge a caveat. Mr. Ticehurst stated:-

Member: So,....., the mechanism for preventing the registration of any land dealing is a caveat?

Mr. Ticehurst: A caveat or injunction

Member: Yes, a court order. A caveat can be lodged by any person who claims an interest equitable or at law so far as that land is concerned?

Mr. Ticehurst: The person must have an interest in the land

Member: That is right. For example, it could not be someone who is merely owed a debt?

Mr. Ticehurst: That is correct.

Member: So the Victims Compensation Tribunal could not lodge a caveat against a title if the amount owing had nothing to do with a particular house?

Mr. Ticehurst: That is correct.

Transcript of Evidence 20 August 1998 p. 30.

Similarly, the Crown Solicitor, in his advice to the Committee of 18 September 1998,

advised that the Tribunal did not currently have sufficient legal interest in convicted offenders' real property to lodge caveats:

The Tribunal does not have power to lodge a caveat or order against the title of land which has been transferred to another person because the Tribunal does not have an interest in the land necessary to support the lodging of a caveat.

The Crown Solicitor ultimately advised that if such a power was given to the Tribunal it would need to be done in tandem with Sections 120 and 121 *Bankruptcy Act* type powers:

The power to lodge a caveat, if included in the Victims Compensation Act, would not by itself alter the statutory position to prevent the avoidance of a restitution order. The role of a caveat is to preserve the position of the caveator so that at a more appropriate time it can undertake proceedings (or negotiate with the registered proprietor of the land caveated against) to restore or confirm its interest in the land. However, the right to lodge a caveat combined with the bankruptcy mechanisms described above (ss 120 & 121) might assist in preventing a succession of dealings in the land until the Tribunal's right to confirm and enforce a restitution order is determined.

The Committee therefore considered that legislative amendment could provide the Tribunal with a caveatable interest in circumstances where the Tribunal is aware that the offender may own real property which could be disposed of before restitution proceedings are commenced.

Sanctions for Transferring Assets to Avoid Restitution

The Committee's Discussion Paper sought submissions as to whether the *Victims Compensation Act, 1996* should create an offence in circumstances where an offender transfers assets in order to reduce or avoid his/her obligation to pay restitution.

The Committee received a number of submissions supporting the creation of such an offence. The submission from the Attorney General's Department states:-

The introduction of a penalty provision relating to participation in an asset transfer scheme designed to avoid payment of restitution, isconsidered appropriate to act as a deterrent to offenders.

Submission, Attorney General's Department, 27 July 1998 p. 2.

It is questionable whether the enactment of a financial penalty would have sufficient deterrent value to an offender who will no longer be in financial position to pay after any asset disposal. Similarly, the threat of an additional prison term to an offender who is, in many cases, already serving a lengthy period of imprisonment for the offence may have

little effect. As Dr. Peter Macdonald, MP, stated in his submission to the Committee:-

As to creating an offence, would this act as a deterrent to someone already going to or in jail? If not for deterrent effect, what would the policy reason for its creation be?

The Committee does recognise, however, that a substantial number of offenders pursued by the Tribunal for restitution did not receive a prison sentence for their offence. The threat of a penalty in those circumstances may act as a deterrent to offenders who ignore a restraining order and transfer assets to prevent restitution payments.

It is recommended by the Committee that if provision is inserted into the Act providing for restraining orders then it follows that the Tribunal should have the power to seek a penalty if the offender then ignores the restraining order and transfers property.

Freezing of Assets

The Tribunal pursues convicted offenders immediately upon the payment of compensation to the victims of crime. In its evidence before the Committee the Tribunal said that it was moving towards a more vigorous pursuit of offenders. The accessing of the New South Wales Police Database, the Roads and Traffic Authority database and random searches of other useful data, for instance the Land Titles Office, are a clear indication of this activity. However, as was illustrated by the case of Anthony Reid the delay between conviction for the criminal offence and the Tribunal seeking restitution provides ample opportunity for the offender to dispose or hide property and assets.

As already discussed the time delay makes it difficult for the Tribunal to locate a current address for the offender and, if located, ascertain whether or not that offender has any assets.

The Legal Aid Commission provided submissions to the Committee supporting granting power to the Tribunal to freeze assets. The Commission is “*generally supportive of a discretionary power to freeze or seize assets of an offender until it can be determined whether or not applications will be made for victims compensation.*” However, the Commission submitted that this power should not be used in all cases, tying up funds that might otherwise be used to meet the offender’s legal expenses.

Mr Humphreys, Manager, Criminal Law Branch of the Commission indicated the problems of freezing assets prior to the criminal court case when giving evidence:-

The New South Wales Crime Commission has a similar ability to seize assets and, indeed, it fairly aggressively follows assets which are suspected of being proceeds of crime. Usually that body has a capacity to arrive at what I call a negotiated settlement in terms of claims and, in fact, it does so. That settlement may take place before a criminal conviction is either recorded or otherwise. I am aware of one instance which arose out of the royal commission of a fairly notorious person who had assets seized under proceeds of crime orders. That person

negotiated a settlement prior to his litigation commencing. Effectively he forfeited the majority of his assets - some money was given back to him which was expended fairly quickly in relation to debts and other matters

Had that person had those assets, and had action not been taken by the Crime Commission, that person would have been ineligible for legal aid. The net result is that person has now applied for and has received substantial legal assistance. On the one hand money is going to Consolidated Revenue from the Crime Commission and on the other hand the Legal Aid Commission is left with a huge bill to pay for the legal representation of the man in circumstances in which members of the public might be otherwise very concerned as to why he is receiving legal aid."

Transcript of Evidence, 20 August 1998, p. 37.

The Committee takes this point into consideration. It is a circular trail of money if the Tribunal is taking assets from the offender and thereby then making him/her eligible for means tested government assistance.

Nevertheless the situation as it currently stands places the Tribunal at a significant disadvantage. Assets of the offender may be taken by other agencies while the Tribunal is prevented from taking restitution action and obtain funds from the convicted offender. The Tribunal is not a party to any negotiations that might be occurring between the offender and the other Agencies in respect of the assets of the offenders. The Tribunal may only seek the assets of offenders after conviction and after payment of compensation monies have been made to a victim of his crime. It should be noted that there may only be a small number of cases where the State Crime Commission and the Victims Compensation Tribunal would have competing interests in obtaining money from the offender. Nevertheless, despite the valid issues raised by the Legal Aid Commission the Tribunal should be a party to such negotiations to ensure they have some input and to can protect their interests. It should also be noted that the money confiscated by the State Crime Commission does not go to State Consolidated Revenue but to the Victims Compensation Fund.

The Tribunal, in evidence before the Committee, reaffirmed the submission of the Attorney General's Department that the seizure of assets of all convicted offenders is not feasible because applications for victims compensation are only made in between 12 per cent and 14 per cent of cases appearing before the Courts. This would result in the assets of 86 per cent of offenders whose crime does not result in the receipt of an application for victims compensation being tied up for some considerable time.

The Committee believes that the freezing of assets, apart from being an onerous administrative obligation, would simply not be the best option to deal with the particular problems the Tribunal faces relating to restitution such as delays between trials and

applications. It considers that the aforementioned options of Section 121 *Bankruptcy Act*

type provisions, restraining orders or caveats are more practical.

Specific Retrospective Legislation to Deal With the Reid Transfer

Dr Peter Macdonald, Member for Manly, who had been involved in the Anthony Reid matter from the outset and had brought it to both the Attorney-General's and the media's attention, strongly supported the notion of the Tribunal having the power to retrospectively declare transfers of property void:

Similar powers to those available under the Bankruptcy Act appear appropriate....As to the other options presented, freezing assets after conviction and pending receipt of applications is not unreasonable in cases where large amounts of compensation are likely to be due (for example because of a large number of victims), but may only be worthwhile where the offender has large assets.

Submission, Dr Macdonald p.1

Dr Macdonald, during his appearance before the Committee, indicated that he proposed to introduce Private Members' legislation into the Parliament in relation to the Anthony Reid matter as he was not confident that under the present system, the transfer of Reid's property could be voided:

The "Reid Bill" as we call it will specifically aim to try to reverse the process that occurred in June 1997. Its objects will be to cancel the property transfer from Anthony Reid to Michael Reid with no compensation payable. The bill basically seeks to put things back to the same position they were in before the property transfer.

Secondly, if the brother sells the property to someone who acquires it in good faith at market value, a provisional order for restitution will be made against the brother. Thirdly, if the restitution order is made against either Anthony Reid or Michael Reid, a caveat can be lodged on the property title. This registers the interests and warns any prospective purchaser....I do not have any particular confidence that the property will return to Anthony George Reid unless it is done through retrospective legislation that I intend to have passed in Parliament.

Dr Macdonald, Transcript of Evidence, 20 August 1998 p.50

Dr Macdonald also commented upon the responsibilities of solicitors to the court in such circumstances, not just to their clients. He was concerned that Reid's solicitor could

propose such a course of action for Reid when he/she knew that it would be defrauding

the taxpayers' of New South Wales:

Dr Macdonald: *I would have thought the question of a code of ethics should have been drawn to the attention of the Law Society and the Legal Services Commission.*

Ms Schubert: *I rang them about that. They told me that it was quite ethical.*

Dr Macdonald: *It may be permissible and it may be legal, but do not think that it is ethical.*
Transcript of Evidence 20 May 1998 p.60

Conclusion

The Committee considers that it is critical that the Victims Compensation Tribunal be given more legislative powers to deter, prevent and reverse the disposal of assets by offenders to avoid the payment of restitution.

The Committee believes that this would best be done through a threefold approach. Firstly, the Tribunal should be given a caveatable interest in convicted offender's real property. This can be created through amendment to the *Victims Compensation Act 1996 (NSW)* in instances where compensation applications have either not yet been received or compensation has not yet been paid out but the Tribunal has reasonable grounds to believe that the owner may become the subject of restitution proceedings.

Secondly, the *Victims Compensation Act (1996)* should be amended to allow transfers of all substantial property which can be shown to have been done in contemplation of avoiding restitution to be declared void by the Supreme Court.

Thirdly, that the *Victims Compensation Act 1996 (NSW)* should be amended to make it an offence to transfer property for this reason and substantial sanctions apply to contravention of this provision.

It seems most appropriate and practical that the time period for retrospective voiding of transfers should be from the date of the relevant offence.

The Committee also considers it important that transfers of all types of significant property, not just real property, be caught by these provisions. It therefore recommends that a definition similar to the one contained in Section 5 of the Bankruptcy Act 1966 (Cth) be used. In this provision, "property" is said to mean *any real or personal property of every description, whether situated in Australia or elsewhere, and includes any estate or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.*

Recommendation

- 2. That the *Victims Compensation Act 1996 (NSW)* be amended to provide the Tribunal with a power to lodge caveats over real property which the Tribunal has reasonable grounds to believe may be the subject of later restitution action.**

- 3. That the *Victims Compensation Act 1996 (NSW)* be amended to create a power to have transfers of all types of significant property which can be shown to have been done in contemplation of avoiding restitution declared void by the Supreme Court of New South Wales**

- 4. That the *Victims Compensation Act 1996 (NSW)* be amended to make it an offence to dispose of all types of significant property when such disposal is done in contemplation of defeating possible restitution liabilities and that substantial sanctions apply to the contravention of this provision**

CHAPTER 4

Locating An Offender's Assets

The Necessity to Establish a More Effective System to Locate Assets

The current system of restitution is almost totally reliant upon the convicted offender disclosing the true extent of his/her assets. This is problematic, particularly as it is not in his/her financial interest to do so.

It is administratively cumbersome for the Victims Compensation Tribunal to conduct Land Titles Office and Roads and Traffic Authority Searches in each restitution case. Few offenders have significant assets which makes the cost effectiveness of routine searches questionable.

This point was discussed by Mr Phil O'Toole the Director of the Victims Compensation Tribunal in his appearance before the Committee:

Committee Member

Can you (the Tribunal) not find out from the Land Titles Office about transfers from people from whom you are trying to get money....as a routine exercise?

Mr O'Toole:

We could, but it gets back to cost effectiveness when only a small amount of defendants have assets.

Transcript of Evidence, 20 August 1998, p.

Further, the Tribunal is currently prohibited from inquiring into the contents of offenders' bank accounts, share holdings and superannuation entitlements under Commonwealth and State privacy laws.

The Committee questioned whether there is a more effective way of locating assets than relying on a convicted offenders' word. It also considered that there was a need to streamline the Tribunal's current cumbersome searching system, particularly as other agencies within the Attorney-General's Department such as the Legal Aid Commission and the courts were already often in receipt of information relating to an offender's financial situation.

Any amendment to the *Victims's Compensation Act 1996* to extend the Tribunal's powers to allow them to either: set aside any property transfer to avoid paying restitution; place a restraining order to prevent the transfer of property and; impose a charge or caveat against property to prevent a third party disposing of that property will not be effective if the Tribunal does not have the ability to ascertain whether there is actually property in the first instance.

In the case of Anthony Reid it was neighbours who were also victims who were aware of his assets and discovered that his house had been transferred, not the Tribunal. This was discussed by Ms Schubert, a mother of one of the victims, in her appearance before the Committee:

I got referred to another solicitor. When I went to this solicitor she was actually on the ball. I told her about everything. She asked, "Does this guy have money?" I said yes. She said, "Does he own his house?" I said yes. She said, "I will go and do a search at the Land Titles Office." That is what she did and she found out that it was owned by his brother Michael.

I knew he had a lot of assets. Before my son even went to the police he (Reid) was trying to talk me into moving into another house in Narrabeen that he had bought because his accountant told him he had too much money and he was paying too much tax and he had to buy another house.

Mrs Schubert, Transcript of Evidence 20 August 1998 p.52

Mrs Schubert approached her local Member of Parliament, Dr Peter Macdonald, about the matter. Dr Macdonald then informed the Tribunal. In his evidence given before the Committee, the Director of the Victims Compensation Tribunal admitted that the Tribunal may never have found out about either Reid's property or its transfer if it had relied on Reid to disclose it:

Two days before it appeared in the newspaper, we (the Victims Compensation Tribunal) received a letter from the Honorable Member for Manly, detailing information brought to his attention by one of his constituents. He subsequently brought it the attention of the Tribunal and the Attorney that the transfer had taken place.

Whether Mr Reid would have declared it is problematical. I do not know what he would have stated, had we relied on him to do so."

Mr O'Toole Transcript of Evidence, 20 August 1998 p.14

Means Testing Relating to the Provision of Legal Aid

The provision of Legal Aid in criminal actions is means tested and the threshold for eligibility very low. By ascertaining whether or not an offender received Legal Aid during his/her trial the Tribunal could immediately identify those offenders with sufficient assets to exclude them. Anthony Reid, for example, did not qualify for Legal Aid assistance.

The Committee considers it reasonable that the Legal Aid Commission, at the very least, provide the Tribunal with a list of solicitors who are either employed by them, or undertake work on their behalf. The Tribunal could then cross-check these names against defendant solicitors' names in the court papers they receive relating to the conviction. Alternatively, the Legal Aid Commission could provide the Tribunal with information on request as to whether they have acted for particular convicted offenders.

Listing of Assets in the Criminal Court at the Time of Sentencing

In its Discussion Paper the Committee canvassed the idea that the common practice of verbally listing offenders' assets and financial commitments at sentencing hearings be made mandatory in cases where a victim has sustained an injury as a result of the offender's actions. This list would then be handed up to the court and kept on the court file.

Currently, it is normal practice for defendant solicitors to verbally outline an offender's economic situation and financial commitments to the court at the time of sentencing. This information is used to argue for a more lenient sentence or fine based on the defendant's ties to his/her community, ongoing responsibilities or inability to pay. Unlike during the restitution process, there is an incentive here for the offender to list significant assets as evidence of stability such as a steady past employment history and social contribution and responsibility.

The Committee considered that this practice should be formalised by way of legislation, and there should be an additional requirement that defendant solicitors hand these listings up to the court in a written format which can be added to the court file. There then exists a resource which the Tribunal can easily and cost-effectively access retrospectively.

The Attorney-General's Department, in their submission to the Committee stated that they did not consider this option to be feasible as:

Such a requirement as part of the prosecution of all crimes involving violence has the potential to delay the finalisation of matters in court.

Submission. Attorney General, p.2

The Committee does not believe that such a requirement would place any real additional burden on the defendant solicitor who merely needs to hand up to the court the document from which he/she is reading. Similarly, court administration will only be required to place one more piece of paper in an already substantial file. It is inconceivable how such a situation would lead to further court delays unless an offender's assets were so vast and diverse that they took a considerable period to locate. It is suggested that such a scenario would be extremely unlikely. Further, it is always in a defendant solicitor's interests to establish his/her client's ability to pay before they agree to take the case.

The Legal Aid Commission, which represents defendants in around eighty five per cent of Local and District Court cases was extremely supportive of the Committee's proposal and did not believe it would make defendant solicitors' duties more onerous:

As a defence lawyer the financial position of the defendant is a relevant matter that should be put to the court by way of submission in the sentencing process. It would be difficult for me to object to having to formalise it by way of a document.

Mr Humphreys, Transcript of Evidence, 20 August 1998 p.43

The Committee believes that defendant solicitors should not be held accountable for the validity of the contents of the document presented to the court. It should not be required that they do any more to ascertain the true status of a defendant's financial situation than is already being done under current practice. Alternately, the defendant could be required to sign a prepared affidavit.

Disclosure of Suspected Assets by the Police to the Tribunal

In discussions with Mrs Schubert it became clear that the police who were involved in Anthony Reid's case were in a position to be aware that he owned the property in which he lived:

Committee Member: In the original investigation of your claims against Reid the police would have been aware that he owned the property, is that right?

Mrs Schubert: Yes, they were quite aware of it.
Transcript of Evidence 20 August 1998 p.51

While the Committee does not consider that it would be either reasonable, appropriate or practical for investigating police to be given the added responsibility of establishing the extent of an offender's assets, it believes that they may often, in the course of the investigation, receive valuable information which could be helpful to the Tribunal. In all instances where a compensation application has been received and the crime has been reported to the police the Tribunal requires a police report to be prepared by the officer involved. The Tribunal has prepared guidelines for police as to what should be contained in this report.

The Committee believes that it would be helpful if these guidelines also included a provision that police officers list any significant assets such as houses, cars, boats etc. which they believe or suspect the offender may have in his/her possession at the time of arrest.

Conclusion

The Committee considers that the current system of relying on offenders to be truthful regarding the extent of their assets, or alternatively, the Tribunal undertaking "fishing expeditions" in instances where they believe there may be non-disclosure by an offender is impractical, inefficient and ineffective. The Committee considers that there are several simple and practical methods by which the Tribunal can gain information about a convicted offender's financial situation. Most of this information is already available through other government agencies who have been involved in the arrest, conviction and defence of the offender. This information could readily be made available to the Tribunal through minor administrative changes and would not violate the existing privacy laws or add any tangible administrative burden on either the agencies or the solicitors involved.

Recommendation

5. That the Victims Compensation Tribunal be given access to information which allows them to establish whether convicted offenders who have injured another person in the commission of their crime have been either granted or denied Legal Aid.

6. That the *Justices Act 1902 (NSW)* be amended to require that defendant solicitors present the court with a written document outlining their client's current financial situation upon sentencing in cases where there has been injury to another person as a result of the commission of the offence.

7. That Local, District and Supreme Courts be required to keep documents pertaining to a convicted offender's financial situation on file in instances where there has been an injury sustained by another person as a result of the commission of the offence.

8. That the Victims Compensation Tribunal amend its guidelines for the preparation of police reports to encourage police to disclose any actual knowledge or suspicion of an offender's assets at the time of arrest.

