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***Victims Rights and Victims  
Compensation: Commentary  
on the Legislative Reform  
Package 1996***

*by*

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***Briefing Paper No 12/96***

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***ISSN 1325-5142***

***ISBN 0 7310 5952 2***

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October 1997

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## ***EXECUTIVE SUMMARY***

This Briefing Paper discusses some of the main issues raised by the package of Bills introduced on 15 May 1996 relating to victims of crime. The paper is in two parts, the first dealing with matters concerning victims rights and the second with matters relating to victims compensation. Some of its main findings are as follows:

- the ***Victims Rights Bill 1996*** will introduce a statutory Charter of Victims Rights, which builds on and modifies the non-statutory Charter which has been in place since 1989; (pp5-8).
- the statutory Charter does not create any legally enforceable rights, which is consistent with the position in Queensland, WA and the ACT; (pp7-8).
- the Bill also establishes two bodies devoted exclusively to the promotion of victims rights - the Victims Crime Bureau and the Victims Advisory Board; (pp8-9).
- the Bill inserts a new Part into the *Criminal Procedure Act 1986* relating to the consideration of victim impact statements when sentences are imposed for serious offences; (pp9-11).
- the ***Sentencing Amendment (Parole) Bill 1996*** would require victim submissions to be taken into account in connection with the granting of parole to serious offenders; (pp11-14).
- further, victims would also be given the opportunity to make submissions to the Serious Offenders Review Council before a recommendation is made for a change in the security classification of a serious offender; (p15).
- the ***Victims Compensation Bill 1996*** redefines the term 'act of violence', making specific reference to such an act involving 'violent conduct'; (p18).
- the Bill also redefines the term 'related' acts of violence for the purpose of clarifying present uncertainties; (p20).
- the Bill abolishes the use of common law principles for the assessment of damages and adopts instead a Table of Injuries approach under Schedule 1; (p23).
- under the Bill a 'secondary victim' would be restricted to a person who actually witnesses an act of violence, with the exception of a special provision made for the trauma suffered by parents and guardians of child victims of violent crime; (p25).
- further, same gender relationships would be covered under the 'family victim' category of claimants; (p25).

- the Bill would ensure that no ‘double-dipping’ takes place between the victims and workers compensation schemes; (p27)
- police officers and prison officers would however still be eligible to apply for compensation under the victims compensation scheme as ‘primary victims’; (p27).
- certain persons would not be eligible to receive victims compensation, including convicted prisoners (other than fine-defaulters); (pp27-29).
- the threshold for compensation would be raised under the Bill from \$200 to \$2400; (p29) and
- the Bill would restrict an appeal to the District Court from a decision of the Victims Compensation Tribunal to questions of law. Among other things, the granting of leave for late applications would not be a question of law (p33 ).

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## **1 INTRODUCTION**

On 15 May 1996 the Attorney General introduced a package of Bills relating to victims of crime, namely, the Victims Rights Bill 1996, the Victims Compensation Bill 1996 and the Sentencing Amendment (Parole) Bill 1996. The purpose of this paper is to discuss some of the main issues raised by these Bills and to set out the background to the proposed reforms. In part this publication updates two previous papers published by the NSW Parliamentary Library - Briefing Note No 4/1994, *Victims Compensation: Summary of the Review of the Victims Compensation Act (The Brahe Report)*, and Briefing Note 7/ 1995, *Victim Impact Statements*. It should be emphasised that this paper does not purport to address all the matters raised in the 15 May 1996 package of Bills.

## **2 VICTIMS RIGHTS**

The Victims Rights Bill and the Sentencing Amendment (Parole) Bill 1996 implement the measures announced as part of the Government's victims of crime support reform package on 4 October 1995.<sup>1</sup>

The stated object of the Victims Rights Bill is to recognise and promote the rights of victims of crime. There are four substantive parts to the Bill. In accordance with the government's earlier pledge, the Bill introduces a statutory Charter of Rights for Victims of Crime. Two bodies, a Victims of Crime Bureau and a Victims Advisory Board are established. The promotion and recognition of victims rights informs the functions of these bodies, which are considered in further detail below. The final substantive change wrought by the Bill is an amendment to the *Criminal Procedure Act* providing a new statutory basis for courts to consider victim impact statements.

### ***Why victims rights?***

In New South Wales, and throughout Australia, proceedings in respect of crime are instituted in the name of the State, and are launched in the public, rather than any private interest. Although there is considerable overlap between these interests, conflicts between the public and private interest can and do arise at various stages of the criminal process. On each such occasion the public interest considerations prevail. The gulf between public and private interest provides a fertile source of victim dissatisfaction with the criminal process. Victims are traditionally restricted to acting as witnesses on behalf of the prosecution. The only real decisions over which victims have control is the decision to report the crime and to cooperate as witnesses. "The opinions and concerns

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<sup>1</sup> The Hon J Shaw QC MLC, Attorney General, "Victims of Crime Support Reform Package Announced" *Press Release*, 4/10/95.

of victims are ignored and requests for involvement consistently denied”.<sup>2</sup> Worse, for many victims the ordeal of the trial is very traumatic and can be as bad as the original crime.

Delays, unnecessary continuances, risk of intimidation by offenders, lack of information concerning the process and status of the case, insensitive criminal justice practitioners and their lack of standing and voice in the proceedings are recurrent and frequent complaints made by victims.<sup>3</sup> The NSW Task Force on Services for Victims of Crime (1987) noted the results of international studies which found that “process” as opposed to “outcome” plays a significant role in determining the level of satisfaction experienced by victims of crime with the criminal justice system.<sup>4</sup>

A Victims of Crime Charter is an attempt to address these grievances - it provides an acknowledgment of interests, welfare needs and rights of the victim. Although a victim’s psychological healing process is facilitated by a respect for these matters, the benefits of “empowering” victims accrue not only to the victims themselves. Respect for the position of victims enhances the efficiency of the criminal justice system generally. A victim who is not alienated by the system is more inclined to cooperate and to report crime at first instance.

The growth of the victims rights movement was described in the Parliamentary Library Research Service Briefing Note 007/95 on Victim Impact Statements. International recognition of victims rights is embodied by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This document, which has driven much of the reform process in this area, groups victims rights into four categories: access to justice and fair treatment, restitution, compensation, and assistance. The current legislative reform package cuts across these categories. The principal distinction generally drawn is between the rights of victims to services and procedural rights in the criminal process. The latter category is the most controversial since such rights have the greatest potential to impinge on the rights of the accused. The Charter outlined in the Bill, however, enshrines at least two participation rights: the right to assistance in the preparation of a victim impact statement which in the ordinary course is intended to be placed before the court before the court determines sentence; and the right to make submissions to the Parole Board and the Serious Offenders Review

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<sup>2</sup> Erez E, “Victim participation in Sentencing: Rhetoric and Reality” (1990) 18 *Journal of Criminal Justice* 19 at 22.

<sup>3</sup> See for example studies discussed in Australian Institute of Criminology *Victim Impact Statements Trends and Issues in crime and criminal justice*, No 33. Also, Miers D “The Responsibilities and Rights of Victims of Crime” (1992) 55 *Modern Law Review* 482 at 497.

<sup>4</sup> New South Wales Task Force on Services for Victims of Crime Report and Recommendations (February 1987) at 25.

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Council. These are discussed in more detail below.

There are limits to the extent to which victims can be actively involved in the criminal process. These limits are usually expressed by reference to the accused's basic rights. Recognition and promotion of the interests of victims cannot be at the expense of these basic rights, nor should they be allowed to prejudice the integrity of justice.

### *The statutory Charter of Victims Rights*

A Victims Charter has been operative in this State since 1989. Apart from four new additions the statutory Charter essentially adopts the contents of the Charter of Victims Rights approved by the Coalition government in July 1989. The most important difference is that the current Charter is embodied in legislation. The practical implications of this are considered below. For the purposes of the Charter a victim of crime is defined as 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. 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 the Victims Rights Bill.<sup>5</sup>

Endorsement of the Charter in 1989 was accompanied by an obligation upon all New South Wales agencies to ensure that their guidelines, practices and procedures comply with the terms of the Charter. Thus, procedures are already in place to give effect to these rights. For example, both the Charter and the United Nations Declaration appear as appendices to the New South Wales Office of the Director of Public Prosecutions guidelines published in 1995. Observance of the requirements of the Charter forms part of the Office's guarantee of service. A number of initiatives have been devised by the DPP to meet the imperatives of the Charter. These include: the establishment of the Witness Assistance Scheme; the establishment of the position of Sexual Assault Liaison Officer; the production of information pamphlets for victims and witnesses; establishment of a review committee on sexual assault prosecutions; representation at Regional Crime Support Group meetings; ongoing surveys directed towards identifying areas in need of improvement; ongoing officer training and ongoing contributions to community education.<sup>6</sup>

The right of victims to make submissions to the Parole Board is new to the Charter, however, it is already the current practice of the Offenders Review Board to consider

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<sup>5</sup> Victims Rights Bill 1996, clause 5. Some of the specific rights enshrined in the Charter are specified to attach to a narrower category of victim.

<sup>6</sup> Nick Cowdery, Director of Public Prosecutions, in a paper delivered at New South Wales Law Reform Commission Seminar on the Role of Victims in the Sentencing Process, 4 October 1995.



submissions of victims,<sup>7</sup> although this has been used in only a small number of cases.<sup>8</sup>

The specific modifications from the previous Charter are as follows:

- ***Right of certain victims to compensation*** : The entitlement of victims of sexual or serious personal violence crimes to make a claim under a statutory scheme is expressly incorporated into the Victims Charter.
- ***Bail***: Under the previous Charter there was never any general right to be informed about the outcome of a bail application. The previous Charter sought to ensure that a victims need or perceived need for protection was communicated in a bail application;<sup>9</sup> and that the victim was advised of any special bail conditions imposed on the accused designed to protect them or their family. Both of these rights are retained and a new entitlement to be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence has been added.
- ***Victim impact statement***: The prior entitlement to have the prosecutor make known to the court the full effect of the crime upon victims of sexual assault or other crimes of serious personal violence is replaced in the statutory Charter with the right to have access to information and assistance for the preparation of any victim impact statement.

There is however, no unqualified right to have a victim impact statement considered. Under the amendments to the *Criminal Procedure Act* the acceptance of the victim impact statement is discretionary, and will only be accepted if the court considers it appropriate.

- ***Information about change in security classification***: A new information right has been added: the right to be informed of any change in security classification that results in the offender being eligible for unescorted absence from custody. This recognises reforms to be implemented by the third cognate Act, the Sentencing Amendment (Parole) Bill.
- ***Victim submissions to the Parole Board and the Serious Offenders Review***

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<sup>7</sup> New South Wales Law Reform Commission *Sentencing* DP33, April 1996, at 7.62

<sup>8</sup> Ibid at 11.61

<sup>9</sup> This is a logical consequence of the 1988 amendment to the *Bail Act* which incorporated the protection of any person against whom it is alleged the offence was committed, as well as the protection of close relatives and any other person considered to be in need or protection, as a criteria to be considered in bail applications.

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**Council:** The final new addition to the Charter also derives from the Sentencing Amendment (Parole) Bill. Victims are given the right, upon request, to be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.

- **Other amendments:** There are a number of other minor amendments to the previous Charter. For example, an express time period for the return of property of the victim held by the State has been omitted. This obligation is now to be effected “promptly”, rather than within 21 days. A further amendment relates to information about the prosecution of the accused. Under the statutory Charter the victim is entitled (upon request) to be informed of “any decision of the prosecution to modify ... 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”.<sup>10</sup> Under the previous Charter the victim was entitled not only to be informed of any decision, but to be advised, in addition, of the *justification* for acceptance of a plea of guilty to a lesser charge, or of the justification for accepting a guilty plea in return for recommending leniency on sentencing.

**Comparison with other jurisdictions:** The Charters existing amongst the other States and Territories of Australia are similar in content, given that they were developed around the same time and against a background of mutual concerns. The proposed NSW Charter is arguably most extensive, recognising the most entitlements, including certain participatory rights.

Pursuant to the NSW Charter many of the information rights relating to the progress of the matter (such as charges laid, and outcome) are activated by request. By contrast, the provision of equivalent information in SA and ACT is apparently an automatic right pursuant to their respective Charters (subject to it being practicable and appropriate in ACT).

The Qld, WA, Vic and SA Charters provide for information relating to bail outcome as standard entitlement, which as discussed before is not (except in the case of an accused who has been charged with sexual assault or other serious personal violence) a general right under NSW charter.

The only right appearing in other Charters with no counterpart in NSW is a right which is described variously as a right to have a report taken at the time of the initial investigation which includes information regarding the harm done and the losses incurred (eg VIC, SA) or a right to have a law enforcement officer make a report of a

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<sup>10</sup> Victims Rights Bill 1996, Clause 6.5(b).

victim's version of the circumstances as soon as reasonably possible after the crime happens (Qld).

***Practical significance of "statutory" Charter:*** A critical question is the practical significance of enshrining victims rights in legislation. The 1989 Charter adopted by the government was stated to oblige all NSW government agencies to ensure that their guidelines, practices and procedures comply with the terms of the Charter.<sup>11</sup> The 1989 Charter has no force of law, and thus creates no legally enforceable rights.

The position of victims, in terms of legally enforceable rights, has not altered appreciably under the Victims Rights Bill. Clause 8 of the Bill explicitly stipulates that the Charter does not give rise to any legally enforceable rights. The validity of any judicial or administrative act or omission is not affected by a breach of the Charter, and a breach does not provide any grounds for review. Also relevant is clause 7, which appears to contemplate that circumstances may arise in which application of the Charter is inappropriate or impracticable, and will not govern the treatment of victims.

The remedy for a victim whose stipulated rights have been ignored or breached is complaint to the Victims of Crime Bureau. The Bill does provide incentive for officials to comply with the Charter, since contravention may be grounds for disciplinary action.<sup>12</sup> Furthermore, in addition to its annual reporting obligations, the Victims of Crime Bureau is also empowered to make a special report to the Minister. Enhancing the accountability of agencies in this manner is likely to further encourage compliance.

The "Charters" of Queensland, Western Australia, and the ACT also appear in legislation.<sup>13</sup> In none of these jurisdictions do the principles governing the treatment of victims of crime create legally enforceable rights or entitlements. The legislation in both Western Australian and Queensland express these principles to be "guidelines".

The lack of legal enforceability does not diminish the value of these principles. Above all, the symbolic function of the Charter should not be overlooked. The codification of minimum standards for the fair treatment of victims serves an indispensable function in raising the profile of these issues.

### ***Victims of Crime Bureau and Victims Advisory Board***

In a practical sense the key innovation brought about by the Bill is the establishment of two structures devoted exclusively to the promotion of victims rights: the Victims of

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<sup>11</sup> Foreword to the Charter of Victims Rights, 1989.

<sup>12</sup> Victims Rights Bill, cl 8(2).

<sup>13</sup> *Criminal Offence Victims Act 1995* (Qld), *Victims of Crime Act 1994* (WA) and the *Victims of Crime Act 1994* (ACT) respectively.

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Crime Bureau (“Victims Bureau”) and the Victims Advisory Board.

At present some of the functions to be exercised by these bodies are being undertaken by the Victims Advisory Council, established in 1991. In particular, the Council’s coordination and educative responsibilities are vested in the Victims Bureau, while the policy oriented functions will fall within the brief of the Victims Advisory Board.

According to a press release issued by the Attorney General in October 1995, \$6.8 million has been allocated to the establishment of the Victims of Crime Bureau.<sup>14</sup> The Victims Bureau will be a branch of the Attorney General’s Department and will be serviced by permanent staff. The core functions of the Bureau will be to provide information and assistance to victims of crime; coordinate the delivery of victims’ support services and encourage the effective and efficient delivery of such services; promote and oversee the Charter of victims rights; receive complaints about alleged breaches of the Charter and attempt to resolve the complaints. According to the Chair of the Victims Advisory Council the coordination of victim support services is vital.<sup>15</sup>

Commenting on the planned Victims of Crime Bureau the Director of Public Prosecutions is reported to have said that the Bureau appears to be a mere ‘referral service’, creating ‘additional layers of bureaucracy rather than getting the assistance on the ground.’<sup>16</sup>

The role of the Victims Advisory Board is to advise the government on policies and administrative arrangements relating to support services and compensation for victims of crime; to consult victims of crime, community victim support groups and government agencies on issues and policies concerning victims of crime and to promote legislative, administrative or other reforms to meet the needs of victims of crime. The composition of the Board includes representatives of the community, a representative of the Police Service, a representative of the Attorney General’s Department and members representing other relevant government agencies.

The only comparable office established by victims of crime legislation in other jurisdictions is the Office of the Victims of Crime Coordinator in the ACT.<sup>17</sup>

### ***Victim Impact Statements***

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<sup>14</sup> The Hon J Shaw, QC MLC, Attorney General, “Boost to Victims Support and Legal Aid”, *Press Release* 10/10/95.

<sup>15</sup> “Crime Pays”, *Daily Telegraph Mirror*, 29/6/95.

<sup>16</sup> “DPP lashes Labor over victim aid”, *Daily Telegraph*, 21/5/96, p 2.

<sup>17</sup> *Victims of Crime Act 1994* (ACT), Part III.

The general issues surrounding the use of victim impact statements were considered in the Parliamentary Library Research Service Briefing Note No 007/95 "Victim Impact Statements". The only discussion in this Paper relates to the changes effected by the new Bill to the current unproclaimed provision of the *Crimes Act* dealing with victim impact statements.

Schedule 2 to the Victims Rights Bill inserts a new Part into the *Criminal Procedure Act 1986* relating to the consideration of victim impact statements when sentences are imposed for serious offences and when life sentences are redetermined under s13A of the *Sentencing Act 1989*. It effectively repeals s447C of the *Crimes Act*. The new provisions modify the existing regime in a number of respects.

The definition of victim has been altered slightly. The fresh definition provides that a victim is a person against whom the offence was committed, or who was a witness to the act of actual or threatened violence, and who has suffered *personal harm* as a *direct* result of the offence. The italicised expressions are departures from the previous definition. Under s447C of the *Crimes Act* a victim was a person who suffered "injury" as a "result" of the offence, under the same circumstances. "Injury" and "personal harm" are defined similarly, thus the distinction is one of syntax rather than substance.

There are three substantive amendments to the victim impact statement scheme effected by the Bill. The first extends the circumstances in which use can be made of a victim impact statement. Under the Bill, victim impact statements may be received and considered by the Supreme Court in a life sentence redetermination pursuant to s 13A of the *Sentencing Act 1989*. The Attorney General in his Second Reading Speech estimated that this amendment could effect up to 88 prisoners.<sup>18</sup>

The second major departure from the existing legislation is the inclusion of a specific provision clarifying that victim impact statements are not mandatory, and that the absence of a victim impact statement is not to give rise to an inference that an offence had little or not impact on a victim. This provision meets concerns voiced by a number of commentators, since there are good reasons why a victim may choose not to make a statement.<sup>19</sup>

The final significant change concerns the category of person eligible to make a victim impact statement. The existing legislation makes no provision for the situation in which at the time of the conviction the victim is deceased or otherwise incapable of providing a statement. The Bill addresses this lacuna by permitting a family member or other representative of the victim to act on behalf of the victim for the purpose of providing

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<sup>18</sup> NSWPD (Hansard Proof), 15/5/96, p 45.

<sup>19</sup> Eg Director of Public Prosecutions in Paper presented at NSWLRC Seminar on the Role of Victims in the Sentencing Process, 4 October 1995.

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information, or objecting to a victim impact statement, in cases where a victim is dead or incapable of providing the information himself or herself. It is not immediately apparent what practical effect this provision will have in homicide cases. The provision restricts the family member or representative to acting “on behalf of the victim” and does not authorise them to act on their own behalf. Since the consequences of the offence on a homicide victim are readily apparent it is not evident what a representative can add by way of information regarding the personal harm suffered by the victim.

This provision dealing with victims who are dead or under incapacity can be contrasted with the amendments proposed in the 1994 Sentencing Legislation (Amendment) Bill which would have enabled a victim impact statement to be given *by or on behalf of a family representative* of the victim in such circumstances. [emphasis added]

### ***Parole and Reclassification***

One of the new rights inserted into the statutory Charter relates to the victim’s entitlement to be given the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.<sup>20</sup> The only other jurisdiction which confers any rights to have the victim’s views considered when a decision is being made about releasing an offender from custody other than at the completion of a term of imprisonment or detention is Western Australia.<sup>21</sup>

As noted earlier in this paper, it has been the practice, since 1989, to permit victims or their family representatives to make submissions to the Offenders Review Board or the Serious Offenders Review Council despite the lack of statutory basis. The Law Reform Commission reports that this practice has been used in only a small number of cases.<sup>22</sup>

The inclusion of this right in the Charter complements the reforms effected under the Sentencing Amendment (Parole) Bill. This Bill is cognate to the Victims Rights Bill and the Victims Compensation Bill.

The Sentencing Amendment (Parole) Bill has a number of objects, not all of which are discussed in this Paper. As the Attorney General acknowledged in his Second Reading Speech, this Bill is based on the 1994 Sentencing Legislation (Amendment) Bill which lapsed upon prorogation of Parliament. A principal objective of the Bill is to revise the procedures relating to the consideration of parole for prisoners who are serious offenders (that is, life prisoners, persons serving sentences with minimum terms of 12 years or

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<sup>20</sup> Victims Rights Bill, cl 6.16.

<sup>21</sup> *Victims of Crime Act 1994* (WA) Schedule 1, guideline 10.

<sup>22</sup> New South Wales Law Reform Commission *Sentencing* DP 33, April 1996, at 11.61.

more, persons convicted of murder, and persons managed as serious offenders).<sup>23</sup> One aspect of this revision is to require victim submissions to be taken into account in connection with the granting of parole to serious offenders.

***Parole of serious offenders*** : The current Offenders Review Board is constituted under the *Sentencing Act 1989*. The Board comprises judicial members, representatives of the community, a police officer nominated by the Police Commissioner and an officer of the New South Wales Probation and Parole Service nominated by the Commissioner of Corrective Services. In its recent discussion paper on Sentencing, the New South Wales Law Reform Commission has suggested that a victim of crime may be a suitable inclusion amongst members of Parole Board.

Decisions about parole are governed by the considerations listed in s17 of the *Sentencing Act 1989*. The Board may not make a parole order unless the Board has determined that the release of the prisoner is appropriate. The paramount concern is public interest.<sup>24</sup> Relevant comments (if any) made by the court when sentencing the prisoner and any reports must be considered, the antecedents of the prisoner and any special circumstances of the case must be taken into account and consideration must be given to whether there is sufficient reason to believe that the prisoner would be able to adapt to normal lawful community life.

The Sentencing Amendment (Parole) Bill 1996 will insert a new subdivision 3 into Part 3 of the *Sentencing Act*, which deals with parole. This new subdivision, which only applies to prisoners who are serious offenders, will require the Parole Board (the new name for the Offenders Review Board) to formulate an initial intention as to whether a prisoner should be released on parole. The prisoner's victim will be given the opportunity to make submissions to the Parole Board in two circumstances. First, if the Board forms an initial intention to make a parole order, and secondly, if a hearing is to be convened for the purpose of considering submissions by the prisoner following an initial intention not to make a parole order.

Not every victim will be notified about the possible parole of the prisoner. Only those victims who have requested that they be recorded on the Victims Register, established pursuant to clause 22M will be given notice. This is important, since many past victims may prefer not to be reminded about a particularly traumatic period in their life.

For the purposes of making submissions, a victim is defined to include not only the victim of the offence for which the prisoner has been sentenced, but also a family representative of the victim if the victim is dead or under any incapacity. In his Second

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<sup>23</sup> *Prisons Act 1952* (NSW), s 59.

<sup>24</sup> Determined at the time the decision to grant parole is made: NSWLRC *Sentencing* DP 33.

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Reading Speech the Attorney General stressed that in those circumstances where a family representative is able to make a submission he or she will be able to do so in his or her own right as well as on behalf of the victim.<sup>25</sup> The rationale for including a wide definition of victim is that, whereas a victim impact statement made to a court at the time of sentencing focuses on the effect of the crime on the victim, it is reasonable that a victim submission to the Parole Board be a document covering the possible effect of release not only on the victim but also, in some cases, on the victim's family.<sup>26</sup>

Victim submissions may be made in writing and can be presented to the Parole Board at the hearing or in advance of the hearing. Oral submissions can only be made with the approval of the Parole Board. In his Second Reading Speech the Attorney General nominated two reasons for conferring the Parole Board with a discretion to decline oral submissions. The first was to enable the Board to balance the competing interests of the various members of the victim's family. The second reason was reduce the risk of the parole hearing degenerating into a retrial of the circumstances of the offence or a forum for "inflammatory or demonstrably false information about the history of various persons".<sup>27</sup> This latter concern also arose in the debate on the Coalition's Sentencing Legislation (Amendment) Bill 1994.

Another matter of some concern in relation to the previous Bill was the desire to keep the procedure as informal and non-adversarial as possible. This desire is apparent in the current amendments and informs the amendment to clause 19 of Schedule 1 of the *Sentencing Act*, which prevents a victim or his or her representative from calling witnesses or, without the approval of the Board, giving evidence.

Although the relevant provisions are not outlined in this Paper, the Bill also gives corresponding rights to the prisoner to be notified and to make submissions if the Board forms an initial intention not to make a parole order or if a hearing is to be conducted for the purpose of receiving and considering victim submissions.

During the course of the debate on the Coalition's 1994 Sentencing Legislation (Amendment) Bill, which made similar changes to the procedures relating to parole, the main points of contention about victim submissions were that the nature, content, and parameters of the submissions were not limited or defined by the Bill, which created the potential risk that such submissions, whether made orally or in writing, may contain irrelevant material or material that can be disputed.<sup>28</sup> One suggested amendment was

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<sup>25</sup> NSWPD (Hansard Proof), 15/5/96, p 52.

<sup>26</sup> NSWPD (Hansard Proof), 15/5/96, p52.

<sup>27</sup> NSWPD (Hansard Proof), 15/5/96 at 51.

<sup>28</sup> NSWPD, 17/11/94, p5206.



that all submissions should be in writing and both prisoners and victims should be given access to each others written submissions in advance of a hearing of the Parole Board or the Serious Offenders Review Council.<sup>29</sup>

More generally, the NSW Law Reform Commission has acknowledged that the purpose of making a victim statement to the Parole Board could be misunderstood.

The only purpose for which victims should be able to make submissions is to inform the statutory criteria on which the Board decides whether to make a parole order. Such submissions should not be an occasion for vengeance or for gratuitous attempts to extend the offender's term of imprisonment.<sup>30</sup>

The purpose of receiving victim submissions is to obtain information relevant to the public interest which might not otherwise be available to the Board. Specific examples given in the Commission's discussion paper include the victim's perspective on the "antecedents of the prisoner and any special circumstances of the case" (the wording of s17(1)(d)), or "any other relevant matter" (s17(1)(f)) such as threats made to harm the victim, his or her family, witnesses or any other person; the victim's fears relating to the offender's behaviour on release; evidence of the circumstances of the offence which has come to light since, or was not revealed at, the trial; and evidence of the offender's behaviour during the time in custody.<sup>31</sup>

The tentative conclusion of the NSW Law Reform Commission in relation to victim submissions to the Parole Board was that submissions from victims were suitable for consideration by the Parole Board, since the victim may have a perspective on the various factors to which the Board must have regard under s 17(1) of the *Sentencing Act*.<sup>32</sup>

However, the Commission takes the view that submissions to the Parole Board should be in writing. Oral statements, if they are to be accepted, should be given on oath and subject to cross-examination since the statement may contain matters which the offender wishes to challenge.<sup>33</sup>

The NSW Director of Public Prosecutions has reportedly indicated that he has no

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<sup>29</sup> NSWPD, 17/11/94, p5212.

<sup>30</sup> NSWLRC, *Sentencing* DP33 at 11.67.

<sup>31</sup> *Ibid* at 11.66.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*.

objection to victims making a written submission at the time of the consideration of early release, but that he would be reluctant to extend the right further, such as victims having legal representation or giving oral evidence.<sup>34</sup>

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<sup>34</sup> "Victims find their voice", *Sydney Morning Herald*, 13/10/95.

***Submissions to the Serious Offenders Review Council:*** The Serious Offenders Review Council (“SORC”), constituted under the *Prisons (Amendment) Act 1993* has as its core functions the management of certain categories of prisoners, principally serious offenders, and the provision of advice, recommendations and reports for various purposes stipulated in section 62, including the security classification of serious offenders.

The Serious Offenders Review Council’s management involves constant monitoring of a prisoner’s progress in behaviour, attitude, work, participation in education, counselling and other programs. Recommendations concerning the security classification of prisoners are based on information gathered from interviews with serious offenders and from gaol authorities.<sup>35</sup>

Amendments to the *Prisons Act 1952* effected by the Sentencing Amendment (Parole) Bill will stipulate that in providing reports and advice to the Commissioner of Corrective Services with respect to matters listed in s 62(1)(a), including the security classification of serious offenders, the Council must consider the public interest. A number of factors are listed in the new subsection 3 which are to be taken into account. Section 62(3)(h) refers expressly to the position of and consequences to the victim, including the victim’s family. This reform replicates amendments found in the 1994 Bill.

Under the Sentencing Amendment (Parole) Bill, submissions by victims to the SORC may only be made in writing. The Victims Register is not being utilised to notify victims of the Council’s proposed change in security classification. The new s62A indicates that notice will be given in accordance with the regulations.

Whereas the Law Reform Commission perceives a legitimate role for victims submission in assisting the Parole Board to assess the statutory criteria, the Commission was concerned about the relevance of the views of victims to functions of the Serious Offenders Review Council and the likelihood of prejudice to rights of offenders. The Commission also expressed reservations about any amendments to the *Prisons Act* requiring the SORC to consider the public interest when advising the Commissioner about security classification.<sup>36</sup>

### **3. VICTIMS COMPENSATION**

The Victims Compensation Bill 1996 is the latest proposal the object of which is the comprehensive reform of the victims compensation scheme in NSW. At present that scheme operates under the *Victims Compensation Act 1987*. As the Attorney General explained in the Second Reading Speech for the Bill, these proposals are informed, in

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<sup>35</sup> NSWLRC *Sentencing* DP 33, at 7.31 and 7.29.

<sup>36</sup> *Ibid* at 11.62.

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particular, by the Brahe report of March 1993 and the Auditor-General's 1994 report to Parliament. The latter focussed on the financial viability of the victims compensation scheme, whereas the Brahe report was more wide ranging in nature and made a number of significant recommendations for reform across the entire scheme.

***Victims Compensation (Amendment) Bill 1994:*** In response to the findings of the Brahe report, the Fahey Government introduced the Victims Compensation (Amendment) Bill 1994 and in many respects that Bill can be seen as a precursor to the present proposal for reform. Dr Elwyn Elms, then Chairperson of the Victim Compensation Tribunal, summarised the more significant amendments proposed under the 1994 Bill in these terms:

- (a) to confine the expression "act of violence" to acts that are of a violent nature, that comprise sexual assault or that involve intimidation or stalking in the context of an apprehended violence order in force under the Crimes Act 1900;
- (b) to declare that compensation for injury that is awarded under the Act is intended to be by way of consolation only, and is not intended to reflect the compensation to which a person may otherwise be entitled (eg. compensation assessed by way of common law principles);
- (c) to extend the definition of "injury" to include the psychological trauma suffered by victims of sexual assault;
- (d) to restrict compensation for loss of earnings that may be awarded under Part 3 of the Act to the amount payable to an incapacitated worker under the Workers Compensation Act 1987;
- (e) to specify the matters which the Tribunal may have regard to when deciding whether to allow an out of time application for compensation;
- (f) to redefine the concept of related acts to situations where the acts involved were committed against the same person, if in the opinion of the Tribunal the acts were related to each other because they happened at the same time or because they happened over a period of time during the course of continuing relationship;
- (g) to raise the threshold below which compensation is not payable from \$200 to \$4000;
- (h) to enable matters up to \$7000 to be determined by consent by assessors;
- (i) to provide that appeals from the Tribunal's decisions must be lodged within three months, there being no discretion to extend that period, and to provide that an appeal does not lie against a referral to grant leave to bring an application outside

the two year period;

- (j) to restrict the payment of compensation in connection with a deceased victim to persons who are financially dependent on the deceased victim; and
- (k) to streamline the procedures for the recovery of compensation from persons found guilty of offences that have given rise to an award of compensation.<sup>37</sup>

The 1994 Bill was the subject of substantial debate in Parliament and beyond. However, even those who were critical of certain elements in the Bill have recognised the general need for reform in this area. For example, Glenn Bartley wrote in the *NSW Law Society Journal* in April 1996 that 'It does appear financially imperative to tighten the *Victims Compensation Act 1987*'. He suggested that the 1994 Bill tended to 'throw out the baby with the bath water' in terms of the severity in its 'reduction in eligibility for compensation, levels of compensation and victims' appeal rights'. However, he also emphasised on the other side that 'it is now time that professional associations and community groups face up realistically and fully to the budgetary issues of concern to the government'.<sup>38</sup>

The 1994 Bill lapsed. Direct comparison where relevant with the corresponding provisions of the 1996 Bill can be made under the following subject headings: definition of 'act of violence'; definition of 'related acts' of violence; abandoning the common law principle of assessment of damages; definition of categories of claimants; 'double dipping' and the workers compensation issue; definition of persons not eligible to receive compensation; increasing the threshold for compensation claims; and changing the basis of appeal to the District Court. It should be noted at this stage that the 1996 Bill would repeal the *Victims Compensation Act 1987* and it therefore proposes a more comprehensive revision of the victims compensation scheme.

***Definition of 'act of violence':*** In the Second Reading Speech for the *Victims Compensation Bill 1996* the Attorney General commented that the Government had acted to amend the present definition of an 'act of violence' in order to 'clarify that victims compensation is applicable only where there has been violent criminal conduct'. He went on to explain: 'This overcomes interpretations of the existing provision which has resulted in awards of victims compensation for injuries occurring in the course of

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<sup>37</sup> Elms E, 'Victims compensation amendments in the Lower House' (June 1994) 1 *Direct Link* DL3.

<sup>38</sup> Bartley GJ, 'Future directions in victims compensation' (April 1996) *NSW Law Society Journal* 32.

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the commission of non-violent offences'.<sup>39</sup> At present 'act of violence' is defined in section 3 of the *Victims Compensation Act 1987* to mean:

**"act of violence"** means an act or series of related acts (as referred to in subsection 3)), whether committed by one or more persons:

- (a) that has apparently occurred in the course of the commission of an offence; and
- (b) that has resulted in injury or death to one or more persons;

The Brahe report commented that, whilst the main purpose of the Act was to compensate victims of violent crime, the Victims Compensation Tribunal (VCT) has tended to interpret 'act of violence' more broadly than anticipated, extending the definition to include offences of mere negligence resulting in injury. Other illustrations of where compensation has been awarded, presumably against the spirit of the Act, is where psychological injury has been suffered as a result of items being stolen from a shopping trolley. The report asserted that the Act was 'never intended to compensate victims of all crimes' and concluded that the present broad definition of 'act of violence' does not reflect Parliament's intention in this regard, which was to 'compensate from the public purse those victims who have suffered as a result of a death or injury arising from violent criminal acts'. The recommendation therefore was that the objects of the legislation should be made clear but that, 'If there be any doubt, any amendment should protect the eligibility of victims of sexual and/or indecent assault', which make up 17.7% of all cases.<sup>40</sup>

The Victims Compensation (Amendment) Bill 1994 dealt with this issue by proposing a new definition of 'act of violence', which contained specific reference to 'violent or offensive conduct'. A detailed definition of 'offensive conduct' was also proposed, to include specific offences of sexual and/ or indecent assault, as well as the offence of intimidation or stalking.

The Victims Compensation Bill 1996 achieves the same object by expressly requiring in clause 5(1) that an act of violence involve 'violent conduct'. Reference is not, therefore, made to offensive conduct. However, that aspect of the proposed reform is achieved by clause 5(2) which extends the term 'violent conduct' to include sexual assault and apprehended domestic violence (as defined in the Dictionary).

The Bill does not appear to have incorporated the suggestion made by the NSW Law Society that the definition of 'act of violence' should include 'threatened act of

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<sup>39</sup> NSWPD (Hansard Proof), 15 May 1996, p49.

<sup>40</sup> Brahe C, *The Review of the Victims Compensation Act*, March 1993, pp18-21.

violence'.<sup>41</sup>

**Definition of 'related' acts of violence:** Another area of concern discussed in the Brahe report which is addressed in the Victims Compensation Bill 1996 is the definition of the 'related acts' in section 3(3) of the Act. The section provides:

An act is related to another act if:

- (a) both of the acts were committed against the same person; and
- (b) in the opinion of the Tribunal, both of the acts were committed at the same time or were, for any other reason, related to each other.

As the Attorney General explained in the Second Reading Speech, the difficulty is that the existing provision has been interpreted broadly in 'some decisions of the District Court on matters on appeal from Tribunal determinations. Such interpretation has enabled an award to be made in respect of every single act of violence occurring during a series of acts of violence'.<sup>42</sup> The Brahe report recommended an amendment qualifying the present section 3(3) of the Act so that a clear distinction can be made between separate acts which result in separate injuries, on the one hand, and a series of acts amounting to 'a course of conduct, the full effect of which is to cause injury to a person giving rise to one claim only', on the other.<sup>43</sup>

The Auditor-General agreed with that recommendation in his 1994 report.<sup>44</sup> Also, the 1994 Bill reflected the Brahe recommendation.

On the other side, the NSW Law Society noted the legal community's concern regarding the proposal in the 1994 Bill to amend the definition of 'related acts' to exclude multiple applications by victims of crime where there is more than one act of violence. It stated:

This would effectively limit the total amount of compensation to a victim of sexual abuse or physical abuse to \$50,000 even though such a victim may have been assaulted many times. The submission supported the Combined Legal Centre argument that such an amendment would be gender biased against women and girls, particularly in matters of incest and domestic violence. Such victims moreover are often the most

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<sup>41</sup> 'Society gears up for spring legislation on victims' compensation' (October 1995) 33 *NSW Law Society Journal* 76.

<sup>42</sup> *NSWPD* (Hansard Proof), 15 May 1996, p49.

<sup>43</sup> Brahe C, op cit. pp18-21.

<sup>44</sup> NSW Auditor General's Report for 1994, Vol 3, p26.

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significantly affected by crimes of violence and are left with ongoing disabilities. Multiple awards of compensation are relatively uncommon...and not likely to add substantially to the victims' compensation budget. A preferable limit to such claims might be \$100,000.<sup>45</sup>

The present Bill defines 'related acts' under clause 5(3) in terms which include acts committed 'at *approximately* the same time', or that 'happened over a period of time and were committed by the same person or *group of persons*', or that 'share some *common factor*' [emphasis added]. Also, clause 5(4) provides that a 'series of related acts, whether committed by one or more persons, constitutes a single act of violence'.

The present approach of the District Court to the interpretation of 'related acts' is considered in some detail in a recent article by John Boersig et al, with particular reference to *Leigh v Victims Compensation Fund Corporation* (DC(NSW), Moore DCJ, 31 May 1995, unreported). The case involved the brutal murder of a 14 year old schoolgirl. She had in fact attended a party and three youths were charged and convicted of offences arising out of incidents that occurred that night: one was convicted of sexual assault; one of common assault; and a third pleaded guilty to murder. The Tribunal had found only one act of violence and therefore the claimants had to share the \$50,000 available within the jurisdictional limits. However, on appeal Moore DCJ concluded that there were three separate acts of violence: the initial sexual assault; the assault outside and inside the clubhouse which were 'related acts'; and the murder. Moore DCJ followed the approach taken by Hunt J in *R v C* (SC(NSW), 5 March 1982, unreported) to the interpretation of the word 'related' as meaning 'to have some connection with'. As a consequence, Moore DCJ trebled the award of compensation, 'raising the available award to \$150,000'. Of the judgment, Boersig et al comment:

The findings of Moore DCJ sit squarely within this developing case law. His Honour's assessment clearly indicated that although there was some proximity in time and place in respect of the three separate acts of violence they do not for those reasons alone become related acts. Contemporaneity is not a sufficient reason for finding the assaults related, and there was only a marginal overlap constituted by the involvement of a particular young person in more than one assault. There seemed to be no single common purpose or design to all the acts of violence, nor any single transaction which related the initial sexual assault to the group

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<sup>45</sup> 'Society gears up for spring legislation on victims' compensation' (October 1995) 33 *NSW Law Society Journal* 76.



assaults inside and outside the clubhouse and the subsequent murder.<sup>46</sup>

Whilst *Leigh* is an unusually complex case, it does suggest the difficulties involved in the interpretation of the term 'related acts' under the present legislation. Would the court have arrived at a different conclusion under the terms of the 1996 Bill? Perhaps, bearing in mind that related acts could now have happened 'at approximately' the same time or 'over a period of time' and be committed by a 'group of persons'. However, presumably the acts involved would still have to have 'some connection with' one another, consistent with the test formulated by Hunt J.

In any event, it is clear that the reform proposals would offer greater scope to the Tribunal for deciding that the occurrences in question were 'related' and not 'separate' acts of violence.

***Common law principles of assessment of damages:*** In his 1994 report the Auditor General noted the following option for consideration in the reform of the victims compensation scheme: 'Establishing maximum awards for varying degrees of injury. This would involve excluding the application of common law principles to the Act'.<sup>47</sup> As the Attorney General commented in the Second Reading Speech, this option reflected the recommendation of the Brahe report which argued for the express exclusion of common law principles. The Brahe report pointed out in this context that the payment of compensation under the scheme 'does not derive from a legally enforceable right against the State, but rather as an act of grace embodied in statutory form'. It said in addition that there is a ceiling on the award of compensation under the Act, that the procedures involved are inquisitorial rather than adversarial in nature and that the rules of evidence do not apply, all of which made the operation of common law principles inappropriate in the case of the victims compensation scheme.<sup>48</sup>

On the other side, the 1986 NSW Task Force on Services for Victims of Crime held a different view. The Task Force operated on the assumption that victims have a 'right' to compensation and argued that, contrary to the approach under the corresponding Victorian Act, victims in this State should receive an award on the basis of common law damages (subject only to a ceiling):

This method of assessment [ordinary common law principles] is felt to provide victims with substantial benefits and is strongly favoured by the Task Force in preference to the less generous assessment principles

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<sup>46</sup> Boersig J, Cavanagh R and Watterson R, 'Victims compensation - separate acts of violence' (April 1996) 2 *Direct Link* DL5.

<sup>47</sup> NSW Auditor General's Report for 1994, Vol 3, p26.

<sup>48</sup> Brahe C, op cit, pp34-38.

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applicable in Victoria, where claims are assessed on a 'solatium' basis.<sup>49</sup>

With respect to the Victorian scheme the above approach was established in *Fagan v Crimes Compensation Tribunal* where Anderson J stated:

The purpose of the Act, as I see it, is not to award damages of the kind comparable or analogous to damages which an injured party, as a plaintiff, might seek and recover from a tortious wrongdoer but give to the victim of a criminal act or omission some solatium by way of compensation out of the public purse for the injury sustained, whether or not the culprit is brought to book, and whether or not the culprit might otherwise be liable to the victim.<sup>50</sup>

As noted the Victims Compensation Amendment Bill 1994 accepted the Brahe recommendation and, under proposed section 3B, would have expressly declared that compensation for injury under the scheme is intended to be by way of 'consolation only', and not as a reflection of other entitlements. Commenting on the proposal, Dr Elms said:

By far the most controversial amendment is that seeking to replace assessment by way of common law principles with awards based on consolation, or as it is more commonly known solatium. However, this proposal should be considered in the context of the burgeoning expense to governments of victims' compensation schemes throughout the world and the need to achieve some parity between awards made to crime victims. Lump sum awards were abolished for all forms of compensation in New Zealand in 1992. As from 1 April this year [1994], England switched to a straight out tariff scheme whereby specific nominated sums are allocated for particular types of injury; and in August of last year amendments to the South Australian legislation increased the minimum award from \$100 to \$1000 and required the severity of non-economic loss to be proportioned on a scale of 0 to 50, with 50 being a most extreme case scenario.<sup>51</sup>

Much of this was restated in the 1994-1995 Annual Report of the Victims Compensation Tribunal where CR Brahe, writing now as the Tribunal's Chairperson, stated: 'There is no question in my mind that the common law assessment is an inappropriate form of assessment under the Victims Compensation Tribunal where the rules of evidence do not apply'. The same Annual Report cited this statement from the Tribunal's 1993-1994

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<sup>49</sup> Ibid, p35.

<sup>50</sup> [1981] VR 887 at 889.

<sup>51</sup> Elms E, op cit, at DL4.

## Annual Report:

It seems to be supposed in some quarters that there is some aura or magic in the assessment of compensation on the basis of Common Law principles. Nothing could be further from the truth. This mode of assessment was condemned as unscientific in *Southgate v. Waterford* (1990) 21 NSWLR 427, where the Court of Appeal commented that for years Courts have struggled with the unscientific task of awarding damages on Common Law principles. The Court went on the comment that the theoretical basis of such awards has always been controversial, and to discuss the problems of achieving proportionality between awards made in individual cases. The Common Law mode of assessment of compensation is one which is becoming increasingly outmoded, and one of the principal reasons is the uncertainty it generates having regard to the varying subjective views of individual judicial decision-makers. All one can do with no great degree of confidence [is] to talk of a range which may be applicable to particular types of injury. It is a fact of life that in any particular case, one judge may feel inclined to award “X”, another “half X”, another “three-quarter X” and another “two X”. The capacity for inconsistency both within the Tribunal and the District Court and across both jurisdictions continues to be a matter of great concern.<sup>52</sup>

For all that the replacement of common law principles of assessment may still prove controversial in some quarters. The NSW Law Society noted the legal community’s opposition to the ‘consolation only’ approach adopted under the 1994 Bill, and cited the concurring views of the Bar Association and the Combined Legal Centre Group of NSW in this respect.<sup>53</sup> Likewise, Glenn Bartley, writing as a legal practitioner in this field, has said that common law principles should be retained, on the basis that a ‘consolation only’ approach ‘would have resulted in inadequate compensation for moderately and severely injured victims’. He added in this regard, ‘A table of maims also probably would compensate inadequately’.<sup>54</sup> Commenting on the current proposals for reform, Julia Cabassi, a spokeswoman for the NSW Community Legal Centres, is reported to have said that the Government has ‘created an inequitable table of injuries and maximum claims that meant someone who suffered a partial loss of smell or a sprained wrist could claim more than a victim of sexual assault’.<sup>55</sup> Ms Cabassi stated these concerns again on the 21 May 1996 edition of Radio National’s Law Report, noting in

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<sup>52</sup> Victims Compensation Tribunal, *Annual Report 1994-1995*, p14.

<sup>53</sup> ‘Society gears up for spring legislation on victims’ compensation’ (October 1995) 33 *NSW Law Society Journal* 76.

<sup>54</sup> Bartley G, *op cit*, p32.

<sup>55</sup> ‘Bill will “erode” victims’ rights’, *The Sydney Morning Herald*, 17 May 1996.

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addition that the table of injuries under the 1996 Bill will operate to the advantage of victims with tangible physical injuries and against those suffering psychological injury.

The Victims Compensation Bill 1996 makes no reference to compensation being by way of ‘consolation only’, but opts instead for the table of maims approach under Schedule 1. The Attorney General explained the rationale for the reform in these terms: ‘Experience with the present scheme illustrates that common law principles for assessing compensation cannot be properly and evenly applied. Significant variations in awards apply and the present regime for awarding compensation lacks consistency and equity’.<sup>56</sup> The solution to the problem, he said, was to standardise the amounts to be awarded for similar injuries.

An interesting feature of the 1996 Bill is that, under Schedule 1 it makes special provision for compensation for ‘multiple injuries’, using a three-stage sliding scale. Thus, where an eligible victim claims for two or more ‘compensable injuries’: the most serious injury will be paid to the full standard amount; the second most serious to 10% of the standard amount; and the third most serious to 5% of the standard amount. No amount will be paid for any further injuries.

**Definition of ‘categories of complainants’:** An option for consideration canvassed in the Auditor General’s report was the categories of victims who can be compensated should be restricted.<sup>57</sup> At present the Victims Compensation Act 1987 identifies 4 categories of claimants: primary victims; secondary victims; close relatives; and law enforcement officers. All these are defined in section 10.

In relation to *close relatives*, the Brahe report noted that in Victoria and the United Kingdom compensation is restricted to dependants only, whereas in New South Wales section 10 (1) provides

“Close relative”, in relation to a deceased victim of an act of violence, means a person who, at the time the act of violence occurred:

- (a) was the deceased victim’s spouse or was a person who was living with the deceased victim as the deceased victim’s spouse;
- (b) was a parent, guardian, step-parent or grandparent of the deceased victim; or
- (c) was a child, step-child or grandchild of the deceased victim or was some other child of whom the deceased victim was a guardian.

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<sup>56</sup> NSWPD (Hansard proof), 15 May 1996, p47.

<sup>57</sup> NSW Auditor General’s Report for 1994, Vol 3, p26.

Commenting on this section of the Act, the Brahe report rejected the strict dependency test, but recommended that the definition of close relative be altered to include spouse, de facto spouse, mother and father and dependant children. In making an award the Tribunal should take into account the contact the claimant has had with the deceased over a long period. Awards made for expenses to close relatives resident outside New South Wales should be restricted to funeral expenses in relation to the victim from the Victims Compensation Fund. The report further recommended: 'In light of anti-discrimination legislation, make clear that same gender sex relationships are covered'.<sup>58</sup>

In relation to *secondary victims* the Brahe report stated that 'This category of applicant provides wide scope for abuse'.<sup>59</sup> Under section 10 (1) secondary victim is defined to mean 'a person who has sustained injury as a direct result of witnessing, or otherwise becoming aware of, injury sustained by a primary victim, or injury or death sustained by a deceased victim' of the act of violence. Under this definition, it is not the witnessing or becoming aware of the act of violence which is at issue, therefore, but the witnessing or becoming aware of the injury sustained by the victim of that act.

The relevant proposals under the 1994 Bill have been noted. The Victims Compensation Bill 1996, tackles the issues in question in a number of ways. First, it redefines the categories of eligible claimants and defines those victims who will be ineligible under the proposed scheme. The categories of eligible victims are as follows: primary victim; secondary victim; and family victim. Leaving aside issues relevant to workers compensation for a moment, the following elements can be noted:

- the definition of primary victim is extended to include a deceased victim (clause 7(1));
- under clause 8(1) a secondary victim will be limited to a person who actually witnesses an act of violence, with the exception of the special provision made for the trauma suffered by the parents and guardians of child victims of violent crime (clause 8(2));
- in relation to a family victim, same gender relationships are covered under clause 9(3)(b), which refers to 'the victim's de facto spouse, or partner of the same sex...';
- a family victim is not defined as a 'dependant' of the deceased primary victim, but instead as a 'member of the immediate family'. However, under clause 16 absolute preference is given to a 'dependent family member' where there is more than one family victim claimant; and

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<sup>58</sup> Brahe C, op cit, p27.

<sup>59</sup> Ibid, p25.

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- the definition of family victim has been extended beyond the definition of close relative under the present Act to include ‘a brother, sister, step-brother or step-sister of the victim’.

**‘Double dipping’ and the workers compensation issue:** It was suggested in the Auditor General’s report that ‘various types of secondary victims and victims such as police officers and prison officers injured in the course of employment and who are also entitled to workers compensation’ should no longer be considered to be ‘eligible victims’ under the scheme. The issue is statistically and financially significant. An occupational breakdown shows that police and prison officers represent 10.5% of applicants claiming as primary victims. Also, according to a 1993 study by the NSW Bureau of Crime and Statistics and Research, approximately 24% of claims were work-related.<sup>60</sup>

The same matter was discussed in some detail in the Brahe report, where the issue was said to be whether the *Victims Compensation Act* should provide a safety net only for those who have no other avenue for claiming compensation, or whether it should complement and in some way operate in combination with the scheme for workers compensation. One reason suggested in the report for the high level of claims is that workers compensation entitlements do not cover claims for pain and suffering unless that claim is associated with a permanent injury and exceeds \$12,340. Further, an anomaly in the *Victims Compensation Act 1987* noted by the Brahe report is that ‘law enforcement victims are entitled to recover even when there is no act of violence’.<sup>61</sup> While recognising the difficulties and sensitivities involved, the Brahe report recommended that ‘Persons injured by an act of violence in the course of employment should not have access to the Victims Compensation Tribunal’. At the same time, the *Workers Compensation Act 1987* should be amended to provide adequate entitlement for injuries sustained in the course of employment as a consequence of an act of violence, but not resulting in a permanent disability. Alternatively, and with special reference to police officers, ‘compensation for such injuries should be an administrative function within the Police department’.<sup>62</sup> Central to the Brahe recommendations was that there should be no ‘double dipping’ between the victims and workers compensation schemes.<sup>63</sup> That view also informed the 1994-1995 Annual Report of the Victims

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<sup>60</sup> NSW Bureau of Crime Statistics and Research, *Criminal Victim Compensation: A profile of Claims, Claimants and Awards*, 1993, p v.

<sup>61</sup> Brahe C, op cit, p29.

<sup>62</sup> Ibid, p31.

<sup>63</sup> Ibid, p30.

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Compensation Tribunal.<sup>64</sup>

The NSW Law Society has said that law enforcement claimants should be excluded from the victims compensation scheme and that it supported the recommendations of the Brahe report in this regard.<sup>65</sup> Also, Glenn Bartley has written in support of abolishing victims compensation for police and prison officers, stating: ‘Their occupations necessarily bring them into contact with violent offenders. Responsibility for adequately compensating deliberately injured police and prison officers could be transferred directly to their employers’.<sup>66</sup>

The 1996 Bill adopts a somewhat different approach. The specific category of ‘law enforcement victims’ is omitted. However, the proposed definition of primary victim would clearly encompass police officers, with clause 7(2)(c) referring to suffering a compensable injury in the course of ‘trying to arrest another person who is committing, or who has just committed, that act’. Likewise, prison officers would be covered, with clauses 7(2)(a) and (b) referring to preventing another person from committing an act of violence and trying to ‘help or rescue’ another person against whom the act is being committed respectively. The explanatory notes states to this effect that the primary victim category ‘includes certain law enforcement victims’. As the Attorney General said in the Second Reading Speech, ‘The Government has no intention of excluding any person injured by an act of violence in the course of employment from access to victims compensation, where they have a compensable injury’.<sup>67</sup>

On the other hand, the Bill is designed to ensure that no ‘double dipping’ takes place between the victims compensation scheme and the workers compensation scheme. Thus, clause 23(1) provides that ‘A person is not eligible to receive more than one award of statutory compensation in respect of the same act of violence’.

***Definition of persons not eligible to receive compensation*** : In addition, clause 24 of the 1996 Bill sets out four categories of persons who are not eligible to receive compensation under the proposed scheme. These are:

- ***Claimants for court compensation awards:*** under Part 4 the Bill establishes an alternative court-based compensation scheme for victims. This is a modified

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<sup>64</sup> Victims Compensation Tribunal, *Annual Report 1994-1995*, p12. The Tribunal noted that it may reduce the award, having regard to the factors set out in section 21 of the present Act. But it adds that some District Court judges do not agree with that approach.

<sup>65</sup> ‘Society gears up for spring legislation on victims’ compensation’ (October 1995) 33 *NSW Law Society Journal* 76.

<sup>66</sup> Bartley G, op ct, p32.

<sup>67</sup> *NSWPD* (Hansard proof), 15 May 1996, p49.

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version of the scheme provided for in Part 6 of the present Act. Central to the proposal is that the court, on its own initiative or on application by or on behalf of the aggrieved person, may direct that compensation of up to \$50,000 be paid out of the property of the offender. The direction may be made ‘on conviction or at any time afterwards’. The term ‘conviction’ is defined in the Dictionary to include ‘an order made under section 556A of the *Crimes Act 1900*’, but so as to exclude (for the purposes of Part 4 of the Bill) an order made under section 33(1)(b)-(g) of the *Children (Criminal Proceedings) Act 1987*.

- **Motor vehicle accidents:** the 1996 Bill follows the Brahe report in providing that a person will not be eligible for statutory compensation if the act of violence ‘took the form of, or the injury arose as a consequence of, a motor accident within the meaning of the *Motor Accidents Act 1988*’. The Brahe report had recommended this use of the term ‘motor accident’ to exclude any possibility of double dipping. Another of its recommendations was to add an important qualification to the rule exempting claims relating to motor vehicles; that is, where a motor vehicle is deliberately used as a weapon. The report stated, ‘Consistent however with the concept of the Act being to compensate victims of “violent crime”, it would be entirely proper for an award to be made where it is proven that a motor vehicle has been used as a weapon, for instance, with the intention of injuring a person’.<sup>68</sup> That does not appear to be reflected in the Bill.
- **Offenders:** A person injured while engaging in criminal conduct will also be excluded from the scheme. The Attorney General cited the instance under the present Act of where ‘an award was made to a claimant who alleged he was assaulted and robbed whilst attempting to buy \$2,000 worth of stolen cigarettes’.<sup>69</sup>
- **Convicted prisoners:** Most convicted offenders (with the exception of fine defaulters) will also be excluded from claiming victims compensation under the Bill. This issue has of course received some media attention in recent months. In September 1995 controversy surrounded the claim of Andrew Garforth, who was convicted of murdering 9-year-old Ebony Simpson, for claiming compensation for assaults he suffered in Long Bay and Goulburn jails in 1993. At that time both the Premier and the Attorney General foreshadowed the introduction of legislation ‘to make sure that anomalies like that’ are removed from the statutory victims compensation scheme. At the same time, the Shadow Attorney General said that such an amendment should be made retrospective.<sup>70</sup> On the other side,

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<sup>68</sup> Brahe C, op cit, p33.

<sup>69</sup> NSWPD (Hansard proof), 15 May 1996, p49.

<sup>70</sup> ‘Ebony’s killer claims victims’ cash’, *The Sydney Morning Herald*, 16 September 1995.



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the NSW Council for Civil Liberties was said to be wary of the planned changes. Secretary Mary McNish warned it could open the door to 'summary justice' being handed out in prisons; she said that 'Prisoners too have rights'.<sup>71</sup> This tends to beg the question as to whether victims compensation is a 'right', a matter which was touched on earlier in the paper, or whether, as the Brahe report believed, it is 'an act of grace embodied in statutory form'.<sup>72</sup> The more practical question, as suggested by the NSW Council for Civil Liberties, relates to the potential knock-on effect this kind of distinction between the entitlements of convicted prisoners and other citizens could have for the welfare of prison inmates. In April this year it was reported that 'Convicted killers Phillip Lett and Andrew Kalajzich have applied for victims' compensation after being bashed in jail'.<sup>73</sup> The claims were criticised by both the Government and Opposition, with a spokeswoman for the Attorney General noting that 'Lett's claim had been dismissed and Kalajzich's was yet to be heard'.<sup>74</sup>

***Increasing the threshold for compensation claims:*** The Auditor General noted the option of increasing the threshold at which compensation is payable (\$200), which would free up resources for the scheme to focus on cases of more serious injury.<sup>75</sup> As noted the 1994 Bill would have raised the threshold below which compensation is not payable from \$200 to \$4,000. Writing in agreement with this proposal Glenn Bartley has said: 'This would eliminate about 37 per cent of all applications (for relatively minor injuries) and would yield a commensurately high reduction in legal and administrative costs. As injuries sustained by police officers are disproportionately minor, such a threshold would screen out about 50 per cent of applications by police officers'.<sup>76</sup> On the other side, the NSW Law Society has said that the threshold should be retained at \$200.<sup>77</sup>

It is worth noting in this respect the finding of the 1993 NSW Bureau of Crime Statistics and Research study to the effect that 'The most common type of injury sustained by victims was bruising with nearly 56 per cent of the victims sustaining bruises. Lacerations (44.3%) followed by psychological injuries (39.1%) were the next most

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<sup>71</sup> 'Cash for a killer', *The Daily Telegraph Mirror*, 16 September 1995.

<sup>72</sup> As noted, the proposed Charter of Victims Rights incorporates the right of victims of sexual or serious personal violence crimes to make a claim under a statutory scheme.

<sup>73</sup> 'Killers asking for \$50,000 compo', *The Sunday Telegraph*, 14 April 1996.

<sup>74</sup> 'Victims' compo move by criminals', *Illawarra Mercury*, 15 April 1996.

<sup>75</sup> NSW Auditor General's Report for 1994, Vol 3, p26.

<sup>76</sup> Bartley G, op cit, p32.

<sup>77</sup> 'Society gears up for spring legislation on victims' compensation' (October 1995) 33 *NSW Law Society Journal* 76.

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common types of injuries sustained by victims'.<sup>78</sup>

The Victims Compensation Bill 1996 would raise the threshold for claims from \$200 to \$2400 (clause 20). The Attorney General is reported to have said that the new threshold would 'screen out some of the minor claims such as bruising and cuts that were very costly to the scheme'.<sup>79</sup>

***Changing the basis of appeal to the District Court:*** At present section 29 of the *Victims Compensation Act* provides for an appeal from any determination of the Tribunal to the District Court. Appeals must be lodged within one month, though the District Court does have the power to permit an extension of time. It has been decided that an appeal from the Tribunal to the District Court is in the nature of an appeal de novo rather than an appeal by way of rehearing.<sup>80</sup> Under section 29(3) the District Court may make 'such orders as it thinks appropriate in the light of its decision', but expressly including the courses of action that would be available to it under clause 39(5) of the 1996 Bill.

The operation of the present right of appeal to the District Court is a source of some controversy, as evidenced by the Brahe report and several of the Tribunal's Annual Reports. The success rate of appeals is one matter which has excited comment, as is the issue of forum shopping on appeals. Both were alluded to in the Auditor General's report where it is said:

The appeals process by which victims appeal to District Courts when not satisfied with the Tribunal's determination is also of concern because an increasing number of victims are successfully appealing the Tribunal's decisions. Statistics provided by the Corporation for the year indicate that the District Courts are awarding substantially higher compensation awards for cases appealed. During the year compensation awards totalling \$1.7m (an average of \$6,615 per claim) were successfully appealed in the District Court. For the same claims the District Court awarded \$3.5m (an average of \$20,512). As discussed further below costs awarded by the District Court are also substantially higher than those awarded by the Corporation. Given these statistics, there appears to be a strong motivation to have matters appealed.<sup>81</sup>

Recommended in the Brahe report were restrictions on the victim's right of appeal to the District Court. The right should be limited to (i) questions as to whether an injury falls

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<sup>78</sup> NSW Bureau of Crime Statistics and Research, op cit, p v.

<sup>79</sup> "Bill will "erode" victims' rights', *The Sydney Morning Herald*, 17 May 1996.

<sup>80</sup> *Goldsmith v Victims Compensation Tribunal* (1993) 30 NSWLR 410.

<sup>81</sup> NSW Auditor General's Report for 1994, Vol 3, p27.

into the category of 'minor', 'moderate', or 'major'; (ii) dismissed applications, and (iii) applications affected by section 20 considerations (the factors taken into account by the Tribunal when deciding not to make an award or for reducing the amount of compensation payable). Also recommended was that appeals should be by way of a re-hearing and that appeals should be lodged within three months of date of notification of an award, with the District Court having no power to extend that time period.

The Tribunal's 1994-1995 Annual Report argued strenuously against comments made by Glenn Bartley in a paper delivered to the Young Lawyers Continuing Legal Education in May 1995. Mr Bartley is cited as saying that:

The high success rate [of 79.2%, 86.6% and 81.35% respectively in the last three financial years] of those s.29 appeals which are instituted, and therefore the significant rate of demonstrated error by the Victims Compensation Tribunal, are strong reasons for not whittling down victims' appeal rights.<sup>82</sup>

The Tribunal's Annual Report cites Mr Bartley further as saying:

Having regard to the errors of law and fact which the Victims Compensation Tribunal has made in past determinations and to the incidence of awards of compensation well below common law levels on the evidence before the Tribunal, there is considerable force in the March 1995 submission of the Combined Community Legal Centres Group of NSW to the Attorney General that the right of appeal to the District Court 'has proved to be absolutely essential to ensure the Victims Compensation Tribunal's accountability to the public.'<sup>83</sup>

The Victims Compensation Tribunal responded to these claims in considerable detail. One comment it made was that:

The appeal rate has been relatively steady at approximately 10% for the past four years. However in the twelve months under review it has shown a marked increase [to 15.5%]. Attention is drawn to the statistical information showing a relatively even appeal rate until May and June 1995 when the rate more than doubled. Is it any surprise when...Mr Bartley actually preaches appeal. It is a wonder the rate is not 100%.<sup>84</sup>

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<sup>82</sup> Victims Compensation Tribunal, *Annual Report 1994-1995*, p15.

<sup>83</sup> *Ibid*, p16.

<sup>84</sup> *Ibid*, p16.

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The Tribunal went on to reject the claim that ‘its awards are well below common law levels and therefore they are wrong’ and offered examples of the subjectivity of common law damages. It also suggested that in some cases relevant evidence was being withheld from the Tribunal: ‘The Tribunal can only rely on the material before it. If solicitors choose not to supply all material then the result can only be as it is. The suspicion is that in some cases reports are deliberately withheld from the Tribunal’.<sup>85</sup> Incorporated in the 1994-1995 Annual Report was the following statement about the appeal rate from the 1993-1994 Annual Report:

There are still those who deliberately and in my view dishonestly refuse to place the 77% figure which remains consistent with previous years, in context. The misrepresentation of the true facts of the matter is typical of the half truths and omissions the Tribunal receives in many of the matters presented to it, concerning which comment is made later in the body of this report. The figure of 621 appeals from 5836 determinations represented an appeal rate of 10.64%. The figure of 256 matters varied by increase represents 4.38% of 5836 matters determined during the year. I made similar comments in last year’s report, but there are still those who would suggest that the appeal figures mean that the Tribunal gets it wrong 77% of the time, failing also to mention the nature of an appeal is an appeal de novo, and that the introduction of fresh evidence in nearly all cases means that accordingly the District Court is often dealing with a radically different case to that presented to the Tribunal.

No matter with what degree of cavalier attention he responds or fails to respond to the Tribunal’s requisitions or other reasonable requirements (and there are many such cases), if dissatisfied, an applicant simply appeals to the District Court and remedies all the deficiencies which the Tribunal has exposed in its reasons for judgment. This occurs at public expense since costs are rarely refused.

In exposing the deficiencies in the applicant’s case, the Tribunal is in fact furnishing them with an advice on evidence, at the public expense. Many applications are poorly drafted by members of the legal profession, the Tribunal’s reasonable requisitions are not addressed adequately or at all and when an appeal is successfully mounted to the District Court after the deficiencies exposed by the Tribunal have been patched up, this is seized upon by those having an axe to grind with the Tribunal as somehow suggesting that it was the Tribunal which was in error.

Another recent trend of note is that after the Tribunal has given its

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<sup>85</sup> Ibid, p17.

reasons noting deficiencies or ambiguities in, or making comments upon, a particular interpretation which may emerge from a medical or psychiatric report, the applicant's legal representative forwards a copy of the Tribunal's decision to the psychiatrist or medical practitioner involved and solicits a further report, explaining away the matters raised by the Tribunal in its reasons.

Just how many chances does an applicant deserve in such circumstances? It would appear that an applicant's case is never closed throughout its passage through the Tribunal, and that developments before the Tribunal can be used to close all available loopholes until the matter is ultimately determined on appeal which then becomes the real forum, for determining an application. The vagaries of the present system are such that if one were advising a client, one would virtually have to say that they were mad not to appeal.<sup>86</sup>

Having quoted this lengthy comment, the Tribunal's 1994-1995 Annual Report then remarked that 'there is simply no disincentive to appeal and one can't but help feel that in some instances there is a costs incentive to appeal - after all \$2,600.00 costs in each appeal is not unreasonable remuneration compared with the scale costs of \$605.00 in this Tribunal'. It was added: 'The "top ten" appealing solicitors have lodged appeals at a rate out of all proportion to the claims lodged. It is interesting to note that the leader is a firm which represents a number of claimant police officers, many of whom had Workers Compensation rights also'.<sup>87</sup>

If nothing else, such statements suggest the depth of feeling in some quarters on the subject of appeals from the Victims Compensation Tribunal to the District Court.

Glenn Bartley's aforementioned paper to the Young Lawyers Continuing Legal Education on 24 May 1995 dealt specifically with the reforms proposed under the Victims Compensation (Amendment) Bill 1994. The paper commented that the Bill would have abolished both appeals against a dismissal of an application as a result of the Tribunal declining to extend the two year limitation period, as well as the right to seek the leave of the District Court to appeal outside the one month appeal period which presently exists. Further, the paper noted the proposal to give the Court a discretion to admit additional evidence 'only if the special circumstances of the case so require': 'In other words, a s.29 appeal would not be a de novo hearing and additional evidence, including even updating evidence, usually would not be allowed on appeal'.<sup>88</sup>

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<sup>86</sup> Ibid, p19.

<sup>87</sup> Ibid, p20.

<sup>88</sup> Bartley G, *Applications to the Victims Compensation Tribunal*, Young Lawyers Continuing Legal Education, 24 May 1995, p14.

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Turning to the Victims Compensation Bill 1996, under clause 39 an appeal to the District Court from a decision of the Tribunal can only be on a question of law. The clause makes it clear that determinations relating to the application of the schedule of compensable injuries, to whether acts of violence are related, or to the grant of leave for late applications are not questions of law. Subject to an 'exceptional circumstances' qualification, appeals must be lodged within three months of notice of the Tribunal's determination. On an appeal, the District Court may only: (a) affirm the determination of the Tribunal, or; (b) set aside the determination and remit the matter to be considered and determined again by the Tribunal (either with or without the hearing of further evidence) in accordance with the decision of the District Court on the question of law concerned. Under the Bill appeal to the District Court from a decision of the Tribunal would in fact be part of a three-stage process, beginning with the administrative assessment of claims by persons employed under the *Public Sector Management Act 1988*. A right of appeal to the Tribunal from an assessor's determination is provided, followed in the last instance by a right to appeal to the District Court against the Tribunal's determination on the terms set out above.

Commenting on these proposals, the spokeswoman for the NSW Community Legal Centres, Julia Cabassi, is reported to have said that 'victims of sexual assault would...suffer because of a decision to remove the role of the District Court as an appeal venue for out-of-time claims'.<sup>89</sup> She elaborated on these views in an interview on Radio National's Law Report on 21 May 1996, describing the appeal rights under the 1996 Bill as 'negligible' and questioning the independence of the administrative assessors under the proposed scheme and suggesting that, as government employees, their main concern would be with keeping costs down. Whether comments of this kind will prove to be representative of the legal profession's reaction to this aspect of the Victims Compensation Bill 1996 remains to be seen. In October 1995 the NSW Law Society recommended that the 'entitlement to appeal to the District Court be retained' and disputed the Auditor General's claim that appellants and their advisers are motivated to appeal at present because of the difference in costs between the Tribunal (\$605) and the District Court (\$2,600). Further, of possible relevance to the proposal to appoint administrative assessors is the recommendation by the NSW Law Society that 'Existing claims continue to be dealt with by way of an initial application to the Tribunal'.<sup>90</sup>

#### 4. CONCLUSION

The package of Bills introduced on 15 May 1996 seek to largely reformulate the legislative basis of victims rights and victims compensation in NSW. Certain elements are familiar, whereas in other respects the legislative package will introduce significant

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<sup>89</sup> 'Bill will "erode" victims' rights', *The Sydney Morning Herald*, 17 May 1996.

<sup>90</sup> 'Society gears up for spring legislation on victims' compensation' (October 1995) 33 *NSW Law Society Journal* 76.

reforms. In the area of victims rights, the statutory entitlement of victims to make submissions concerning the granting of parole to a serious offender is clearly an important legislative change. In the area of victims compensation, changes to the appeal rights of victims are particularly significant. It is certainly the case that the operation of the victims compensation scheme under the present legislation has been the subject of much comment and debate. Likewise, the wider issues relating to victims rights in the administration of the criminal justice system are matters of intense public interest and concern.