JOINT SELECT COMMITTEE ON VICTIMS COMPENSATION

Second Interim Report:

The Long Term Financial Viability of the Victims Compensation Fund

DECEMBER 1997

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TERMS OF REFERENCE

The House resolved on 27 November 1996, on the motion of Mr Whelan:

"(1) That a Joint Select Committee be appointed to inquire and report on:

(a) alternative methods of providing for the needs of victims of crime, in particular that of providing counselling and other services to victims. In examining these alternatives, the Committee should have regard to:

(i) the total cost both initially and over time of any alternative examined by the Committee in comparison with the cost of continuing the Victims Compensation Fund, either in its present form or any amended form;
(ii) the competing demands of other sectors of the community for public funds and the desire to have greater certainty and control over the cost of the Fund;
(iii) the extent of services already available to victims of crime, being either specific services or general services which may be accessed by victims of crime;
(iv) any duplication in or the need to enhance these services; and
(v) the possibility and means of funding any alternative other than through public funds; and

(b) the long term financial viability of the Victims Compensation Fund, having regard to:

(i) any projected or actual increase in the take up rate by eligible victims;
(ii) any projected or actual increase in number and size of awards;
(iii) any projected or actual increase in the size of awards through the appeal process;
(iv) the effect upon costs of different threshold claim levels;
(v) the effect upon costs of monetary compensation being limited to victims of crime with serious or permanent injuries;
(vi) the availability of sources of funding other than the Consolidated Fund and the costs that may be incurred in collecting these funds; and
(vii) any changes in the administration of the Victims Compensation Fund or the process of assessing awards which may restrain escalation costs.

(2) That the Committee consist of 5 Members of the Legislative Assembly and 4 Members of the Legislative Council.

(3) That the Legislative Assembly Members comprise:

(a) 3 Government Members nominated in writing to the Clerk of the House by the Leader of the House; and
(b) 2 Opposition Members nominated in writing to the Clerk of the House by

the Leader of the Opposition.

On 5 December 1996, the Legislative Council resolved:

(1) That this House agrees to the Legislative Assembly's Message of 27 November 1996 for the appointment of a Joint Select Committee on Victims Compensation.

(2) That the Legislative Council members of the Committee comprise:

(a) 2 Government Members nominated in writing to the Clerk of the House by the Leader of the Government;
(b) 1 Opposition member nominated in writing to the Clerk of the House by the Leader of the Opposition; and
(c) Mr Jones."

MEMBERSHIP OF THE COMMITTEE

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

Legislative Assembly

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

Legislative Council

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

* replaced The Hon Patricia Staunton, MLC (resigned 2 September 1997)

Consultant to the Committee

Mr Keith Ferguson

Secretariat

Ms Ronda Miller, Clerk to the Committee
Ms Catherine Watson, Director
Ms Meryl James, Research Officer
Ms Sally Girgis, Assistant Committee Officer

CHAIRMAN'S FOREWORD

In May 1997, following the tabling of the Joint Select Committee's First Interim Report, the Parliament granted it a 12 month extension for the completion of its inquiry. This was primarily due to the fact that the 1996 legislation did not compulsorily come into force until half way through this year. It was therefore difficult for the Committee to conduct a meaningful review of this scheme until it had been in operation for a significant period of time.

This Second Interim Report represents a financial review of the scheme after 6 months of operation. At the end of November 1997 the Tribunal presented the Committee with the results of 200 determinations done under the 1996 legislation. Most figures contained in this report are extrapolated from these cases or are projections that have been done by the Attorney General's Department specifically for the Committee's inquiry.

During the time of its existence, the Committee has also been fortunate to travel to a number of other jurisdictions to study their victims compensation schemes. A delegation, which included myself, also attended the World Symposium on Victimology in Amsterdam in August. What the Committee gained as a result of its two study tours, one within Australia and one which encompassed Canada, the United States, England and the Netherlands, was a strong comparative overview of how the provision of compensation to victims of crime is being handled elsewhere. The information gathered has formed the basis of this Report.

Basically, the Committee has applied a range of mechanisms which have been successful in restraining fund expenditure within other jurisdictions to the New South Wales scheme. The results of this exercise are contained within the contents of this Report.

I therefore hope that the Report will provide a useful tool to assist the government in both assessing the applicability of the victims compensation and victims support services that it currently provides and amending the scheme where needed.

It is with pleasure that I forward the Report to the Parliament and I thank all Committee Members for their valuable contributions to this second inquiry. I also wish to thank the Committee Consultant Mr Keith Ferguson and the Committee Secretariat for the preparation of this Report.

Tony Stewart MP
Chairman

SUMMARY OF RECOMMENDATIONS

1. That legal fees only be met by the Tribunal on a discretionary basis depending on the complexity of the individual claim.

2. That the cost of providing and training appropriate staff to assist victims of crime in completing applications for victims compensation be investigated by the Victims Compensation Tribunal.

3. That the minimum threshold to receive victims compensation be raised to $5,000.

4. That all persons who are injured as the result of the perpetration of a crime in the course their work be specifically excluded from claiming under the *Victims Compensation Act 1996* (as they are substantially provided for by the *Workers Compensation Act 1987).*

5. That the Victims Compensation Tribunal strengthen its policy with regard to assessment of situations involving social violence.

6. That the Victims Compensation Tribunal consider implementing a policy of not paying more than one domestic violence claim to a victim still living with a perpetrator unless good cause is shown. It should also be demonstrated that any funds awarded will not either directly or indirectly enrich the perpetrator.

7. That the Victims Compensation Tribunal review its policy regarding assessment of contributory behaviour with a view to reducing compensation where appropriate.

8. That consideration be given to deleting the categories of Shock other than for permanent injuries, homicide and sexual assault.

9. That consideration be given to establishing a separate category for victims of domestic violence.

10. That the provision of counselling to victims of a crime which does not involve homicide or sexual assault be capped at four to six sessions except in exceptional circumstances. The Accreditation Board should determine when such circumstances exist.

11. That the Victims of Crime Bureau be funded to employ full time counsellors within its service to provide counselling to victims of crime.

12. That the Victims of Crime Bureau outsource any counselling work it is unable to provide using a competitive tendering process.

13. That funding be provided to Victims Support Groups to allow them to better provide for

the longer term needs of victims of crime. In particular, VOCAL should be provided with funding to employ at least one full time counsellor. In relation to regional and rural areas it is recommended that funding be provided for training of volunteers to provide victim support, where appropriate.

14. That the Victims Compensation Tribunal and its enabling legislation change their titles to one more inclusive of counselling and support services.

15. That payments for loss of earnings under the scheme not be reviewed at this time.

16. It is recommended that the current system of pursuing restitution from offenders be maintained.

17. That the introduction of compulsory liability insurance not be investigated.

18. It is recommended that the standard of proof required for an award of statutory compensation under s29(2) of the Victims Compensation Act 1996, be retained at the present standard of *"on the balance of probabilities"*.

19. It is recommended that the Tribunal could consider further investigating a system whereby physicians may be used to classify physical injuries to ascertain if it is both feasible and administratively cost-effective.

20. That the Parliament consider widening the cases attracting a victims compensation levy to include all criminal cases before the courts and a levy of $20 on all traffic infringement notices, except parking fines

21. That the Commonwealth Attorney General give consideration to financially contributing to State victims compensation schemes from funds seized as a result of criminal activity.

22. That an additional power to seize property not be included into the New South Wales Victims Compensation legislation.

INTRODUCTION

As part of the second limb of its terms of reference, concerning the long term financial viability of the New South Wales Victims Compensation Fund, the Joint Select Committee on Victims Compensation canvassed a number of possible options for reform of the scheme. This report represents the culmination of this exercise.

The New South Wales Victims Compensation Scheme has historically been financially generous in comparison to its interstate and overseas counterparts. The 1996 amendments have gone some way to addressing the concerns which have been expressed for some time by both the New South Wales Auditor-General and New South Wales Treasury regarding the rapidly escalating liabilities of the scheme. However despite the recent amendments, the future liabilities of the scheme are still expected to reach $128.7 million by the year 2000.

In May 1997 the Committee undertook to present a second interim report to Parliament by 24 December 1997 concerning the financial aspects of the scheme. Unfortunately, due to a backlog of claims filed under the 1987 legislation during the transitional phase of the new legislation, and various other administrative difficulties, the Victims Compensation Tribunal only provided the Committee with 200 cases which have been determined under the 1996 legislation by 28 November 1997.

The result is that all figures and trends relating to the 1996 victims compensation scheme contained within this Report are very preliminary.

The Committee has instead concentrated predominantly on possible reform of the scheme based on its familiarity with other jurisdictions. In October 1997 the Committee tabled a Background Paper entitled *"Survey of Victims Compensation Cost Saving Measures in Other Jurisdictions".* These measures were intended to both rationalise lump sum payments from the Victims Compensation Fund and decrease reliance on consolidated revenue by attracting funds from other sources. The Committee then invited comment upon these measures from interested parties. The contents of this Report relate primarily to the responses it received in relation to the Background Paper.

After receiving submissions and taking evidence, the Committee deliberated upon which measures appeared to be the most viable. The measures contained in the Background Paper were representative of a diverse range of policy approaches to the provision of compensation to victims of crime, from the very generous to the more frugal. The Committee therefore took into consideration, in the preparation of this Report, not just whether the implementation of a particular measure had the potential to make significant savings to the Fund, but whether the measure was appropriate within the general philosophy of the New South Wales scheme.

These measures are arranged within particular Chapters of this Report. It should be noted that many measures inter-relate and therefore the Report must be read as a whole document to understand the overall potential of one particular measure to bring savings to the Fund.

PART A
Suggested Areas
For Report

A.1 LEGAL COSTS

Introduction

Under the 1996 scheme, as with its predecessor, legal costs in successful claims are met automatically by the Victims Compensation Tribunal, despite the fact that the scheme is now purely assessment based. Most other jurisdictions do not meet their applicant's legal costs in this manner. The Committee considered whether the abolition of a separate payment for legal costs over and above the lump sum compensation awarded to the victim was appropriate, given the current cost that it imposes on the Fund.

The 1996 Legislative Provisions

Successful applicants are entitled to receive legal costs over and above the amount of compensation awarded according to a prescribed scale of costs.

Section 35 of the Victims Compensation Act 1996 states that:

> applicants are entitled to be paid their costs in respect of their application or appeal;
>
> costs in excess of those to which the applicant would ordinarily be entitled may be awarded if the Tribunal or assessor is of the opinion that special circumstances exist to justify the award;
>
> costs are payable even if the application is dismissed.

A legal practitioner is not entitled to charge or recover costs in excess of the amount payable as prescribed by the Tribunal.

Clause 12 of the Victims Compensation Rule 1997 provides that:

> $750 is payable for work carried out by a solicitor or barrister in relation to the lodgement of an application for compensation, preparation of material required to enable the application to be determined and for work after determination;
>
> $1,000 is payable for work carried out in the case of an appeal determined without a hearing or $1,500 where the appeal is heard;
>
> Disbursements up to a maximum of $1,000, and which are reasonable and necessary, may be payable.

Use of legal representatives and costs

A client survey conducted by the Victims Compensation Tribunal in 1997, which is contained within its 1996-97 Annual Report, revealed that 89 per cent of claimants are legally represented at the time of lodging their applications.

The Committee was advised by the Attorney General's Department during the course of the inquiry that the Victims Compensation Tribunal paid out $8m to solicitors under both the 1987 and 1996 schemes during the 1996-97 financial year:

> *"Legal costs totalling $4.8m were awarded to solicitors in the last financial year, with an additional $3.1m for District Court appeals - something approaching $8m was paid out in legal costs."*
>
> Mr Grant, Transcript of Evidence, 10 November 1997, p3

Due to the fact that the new scheme did not compulsorily come into force until May 1997, these figures are almost exclusively based on the 1987 Act which provided for appeals to the District Court based on quantum of damages. Under the 1996 legislation appeals now can only be heard on matters of law:

> *"Under the 1996 legislation appeals to the Tribunal continue of course, but appeals to the District Court are restricted and costs of appeals to the Tribunal are fixed at a lesser rate than the costs that presently apply to the District Court - $2,600 as against $1,150 under the 1996 legislation. There really should be a falling off in professional costs in any event under the 1996 legislation."*
>
> Mr Grant, Transcript of Evidence, 10 November 1997, p4

It was estimated that approximately 8,400 applications will be lodged and registered with the Tribunal in 1997-98. At this rate approximately $5.04m will be paid for legal costs (based on approximately 20 per cent of claims being dismissed ie 6720 x $750).

Options

The Committee considered a number of ways in which payments of legal costs to solicitors could be reduced.

(i) Amend application form and increase use of support services:

The Committee gave consideration to whether simplification of application forms would encourage victims to prepare their own applications and therefore decrease reliance on the use of solicitors. Under the Family Court system, for example, applications for divorce, property settlement and residence and contact for children are designed to encourage self preparation in straightforward cases.

If victims were to prepare their own applications where possible, assistance should be made available to them through increased support services. The Western Australian

Victim Support Service is a good example of how this task can be performed by a support agency.

The 1996 New South Wales scheme in many aspects mirrors the United Kingdom scheme. However, the United Kingdom scheme does not make payments for legal costs. Like the New South Wales system, their scheme does not require victims to be personally represented in hearings before the Board. As is the case in Western Australia, publicly funded victims support services assist the victim with administrative matters such as completion of application forms. The Director of the United Kingdom scheme told a Committee delegation that this has been found to work very well in most cases.

The United Kingdom system strongly relies on volunteers. There are approximately 400 Victim Support Services in the United Kingdom which are largely staffed by volunteer personnel. Victims are encouraged to attend their local service where personnel will assist in the completion of application forms. The Criminal Injuries Compensation Board considers that this assistance provides an intelligent point of contact for victims and the Board alike.

The New South Wales Victims Compensation Tribunal and the Attorney General's Department acknowledged that such models were working effectively in other jurisdictions but argued that the New South Wales victims support system was currently not set up to deal with large numbers of victims needing assistance with applications.

The Committee received evidence from Mr Phil O'Toole, Director of the Victims Compensation Tribunal in relation to this. When questioned about the applicability of the United Kingdom model to New South Wales' system of victims compensation, he stated:

> *"I investigated that scheme when I was recently in Great Britain. The scheme ... relies heavily on volunteers. However, they have also estimated that each application referred to them costs approximately £100, which we have converted to $240 on last week's exchange rate. That is an alternative, but quite a lot of infrastructure will need to be put in place to set that up."*
>
> Mr O'Toole, Transcript of Evidence, 10 November 1997 p3

Likewise, Mr Grant, Deputy Director General of the Attorney General's Department argued that:

> *"The Victims of Crime Bureau is not established to fully assist victims and there would certainly need to be some sort of staffing review and increase if the Bureau was to provide that service. The other thing that the Bureau does not do at the moment is provide legal advice. If you were going to take away the ability for payment of legal costs, the Bureau would have to be structured totally different."*
>
> Mr Grant, Transcript of Evidence, 10 November 1997, p2

Further, in their written submission to the Committee the Department said that it considered the current victims compensation form to be as straightforward and user-

friendly as possible:

> "*Given that detailed and often complex evidentiary material is required to support a claim for victims compensation it is not considered feasible to further simplify application forms. The Victims of Crime Bureau would require significantly increased resources, including the employment of legally qualified staff if it is to provide crime victims with adequate assistance in completing applications for victims compensation in lieu of the Fund paying for legal fee"*
>
> Submission from the NSW Attorney General's Department, p3

A number of groups, including the Law Society of New South Wales, argued that simplification of application forms would not negate the use of solicitors. The argument was made that a good legal knowledge of the requirements of the legislation was needed and that it was often required that applications be accompanied by a large amount of corroborative information such as medical and police reports which were often not easy for applicants to obtain on their own:

> *"There are many aspects of preparing and conducting applications for victims compensation which fall within the skill of solicitors and which cannot be performed by non-legally trained personnel. For example, the skill of a solicitor is required to interpret legislation, advise whether the offence amounts to an act of violence ... Elimination of solicitors from victims compensation work and replacement by Bureau clerks and local volunteers would have a serious effect on the level of service victims should expect and should receive ..."*
>
> Submission from the Law Society of NSW, p3

Further, the Combined Community Legal Centres argued that if trained solicitors were having trouble classifying injuries under the 1996 legislation, where did that leave the individual applicant?

> *"The Victims Compensation Tribunal is currently facing difficulties under the new assessment scheme due to the fact that 90 per cent of the applicants or their solicitors have either incorrectly classified, or failed to classify, their injuries in line with the Schedule of Injuires. The application is not necessarily the problem. Reducing the opportunities for victims of crime to access legal representation may jeopardise their applications."*
>
> Submission from the Combined Community Legal Centre Group of NSW, p15

Mr Peter Kelso, appearing as a representative of the NSW Law Society, and a practising solicitor in the area of victims compensation told the Committee that in his experience, solicitors perform a much larger role than just filling out application forms:

> *"The present application form has evolved into its present form because of consultation by the VCT with users of the form over the last couple of years. The existing form is very much similar to the old Act form which was used before April this year. It is not a matter of simplifying a form. Solicitors do not just fill out an application form ... It is not a matter of the victim coming into your office and ...*

sitting down and getting a pen out and going through ticking boxes and filling in the blank spaces and coming up with a succinct, brief description of the act of violence or things like that.

Apart from the legal aspects that a solicitor advises on, there are the support services that a solicitor's office is set up to provide. For example, information needs to be obtained from a number of third parties in most cases before the application is complete. Information must be gathered ... That information does not always come straight away. The solicitor has to write again. There is telephone work to be done. There is a file to be kept ... A local community service or the Bureau cannot give that level of service to a client. They do not have the knowledge to know how to access this information."

Mr Kelso, Transcript of Evidence, Monday 10 November 1997, p56

However, the option of using support services rather than solicitors was supported by both the Homicide Victims' Support Group (Aust) Inc and Department of Corrective Services:

"Simplification of application forms has made it easier for victims to fill out their own compensation forms. I agree that victims should be encouraged to rely on support services in particular the Victims of Crime Bureau, for their administrative needs - as we are promoting the service - 'as the one stop shop' for victims of crime".

Submission from the Homicide Victims' Support Group, p1

"Supported, provided that application forms are simplified as is proposed. Rather than seek advice on how to make an application, a claimant could seek assistance from one of the victims groups."

Submission from the Department of Corrective Services, p1

In fact, the Homicide Victims Support Group is a good example of how a strong victims support group which has been funded to provide administrative support to victims of crime, can, and presently does, assist victims with the preparation of applications to the Tribunal.

Chapter A.6 of this Report which discusses the reform of counselling arrangements suggests a more holistic approach be taken to the provision of victims services in New South Wales. Such a system would address the need to provide adequate assistance to victims preparing applications to the Tribunal.

It is therefore the Committee's view that the Tribunal should consider ways to facilitate the self preparation of victims compensation applications by victims.

(ii) Eliminate automatic payment of legal costs:

A logical step from the option of simplifying application forms and procedures as much as possible and increasing victims support services to assist with their preparation, is the removal of a separate automatic payment of legal costs from the scheme. It is noted

that legal costs are not payable in many Australian and overseas jurisdictions such as Western Australia, Queensland and the United Kingdom. Under such schemes, if a solicitor is used, the cost is deducted from the lump sum compensation pay out, similar to most civil claims.

The Law Society of New South Wales argued to the Committee that the elimination of automatic payment for legal costs would discourage the use of solicitors altogether and this would disadvantage the victim in his/her claim:

> *"This would operate to deny people the right to legal representation and discourage them from lodging applications for compensation. All victims deserve to have their own separate legal representative. Solicitors represent the interests of their clients and make sure that victims are given every chance of being considered for every one of their legal entitlements. All solicitors who act for applicants for victims compensation do so on the contingency basis. That is, if the applicant does not receive an award of compensation from the Tribunal, the solicitor cannot charge professional costs for the work done ... Professional costs account for 9 per cent of the total expenditure to victims of crime. To suggest that solicitors costs might be deducted from awards would operate as a further diminution of compensation paid to successful applicants."*
>
> Submission from the Law Society of NSW, pp2-3

Similarly, the Combined Community Legal Centre Group of NSW opposed non payment of legal fees because it was believed that private solicitors may be less likely to accept victims compensation matters if their fees are in doubt or considerably reduced. They note various benefits of legal representation:

> *"A solicitor, for instance, can advocate for the victim of crime during a potentially stressful period after an act of violence, this is especially so for those seeking compensation for sexual assault."*
>
> Submission from the Combined Community Legal Centre Group of NSW, p15

The Attorney General's Department, however, took the view that this option could be feasible, although it would reduce the final pay outs of victims who choose to use solicitors:

> *"An alternative approach could be for legal practitioners to be able to recover fees associated with the preparation of an application from the applicant's award, rather than for such fees to be paid from the Fund separately. This approach would of course reduce the payment amount actually received by the victim."*
>
> Submission from the NSW Attorney-General's Department, p3

The Committee is of the view that, even if victims support services are bolstered to deal with applications, many applicants may still, regardless of the complexity of their claim, choose to seek legal representation. However, given that many applications do not involve complex evidentiary issues and are thus straightforward, it is questionable whether legal representation is necessary in most cases. This is particularly so given that many other jurisdictions appear to operate their schemes effectively without

automatic recourse to solicitors. The Committee visited several of these jurisdictions and was impressed by what it saw.

The current standard fee of $750 averages out over the scope of claims solicitors receive, from the most simplistic to the extraordinarily complex, so it is expected that most applicants with straightforward matters would find that they will be charged below this amount. The cost agreements which solicitors are now required to enter into with clients before undertaking a matter should ensure against the overcharging which occasionally occurred in the past.

It is therefore the Committee's view that automatic payment of legal costs to solictors in successful cases should be abolished.

(iii) Payment of legal costs at discretion of assessor depending on complexity of matter

A system by which legal costs are awarded on a discretionary basis, depending on the complexity of the individual matter, similar to the Victorian example, is a further option which was considered by the Committee.

In Victoria legal costs may be claimed under s48 of the *Victims of Crime Assistance Act* 1996. Orders for legal costs are at the discretion of the magistrate. The average order is $350 for preparation of application and $350 for appearing at the Tribunal. This may vary depending on the complexity of the matter. Even if an application is struck out the magistrate has discretion to award costs.

As stated earlier, claimants who wish to use solicitors in straight forward claims could have their costs deducted from the lump sum award.

A system which allowed for discretionary payment in complex cases would allow solicitors to charge a more realistic figure according to the work involved in each individual claim. The Committee was told during hearings for the first limb of its inquiry that many practitioners are making a loss on victims compensation applications:

> *"Most firms of private practitioners make a loss on these claims because the amount of work is far more than the $605 in value that they are paid, and it is illegal to charge more."*
>
> Mr Bartley, Transcript of Evidence. 5 March 1997, p53
> (NB, the amount of $605 was payable under the 1987 Act).

The Combined Community Legal Centre Group of NSW argued in their submission to the Committee that in complicated cases applicants could be disadvantaged by not having legal representation:

> *"Often complex legal submissions are requested by the Tribunal on various issues, and applicants often do not have the legal skill and*

knowledge to prepare adequate submissions. They would therefore be disadvantaged by not having legal representation."

Submission from Combined Community Legal Centre Group of NSW, p15

This was supported by the Homicide Victims Support Group (Aust) Inc:

"I agree that in complicated cases, the involvement of a solicitor should be sought - however I feel that provisions for this service should be made through the Victims of Crime Bureau."

Submission from the Homicide Victims Support Group (Aust) Inc, p1

The Committee agreed with these views and felt that in complicated cases, where the involvement of solicitors is necessary, fees could be paid by the Tribunal. This could be in cases involving complex evidentiary issues including those where:

- no offender has been apprehended;
- no charge has been laid;
- a charge has not been proceeded with;
- the accused has been acquitted;
- the 'act of violence' is ambiguous;
- proof of injury is problematic;
- there is contributory behaviour; and
- the act of violence has not been reported to the police.

The Tribunal is no longer an investigative body under the 1996 Act. Given that the onus is on the applicant to provide all written information under the assessment system, on receipt and initial assessment of an application the Victims Compensation Tribunal could recommend to the applicant that they consult a solicitor if it is considered necessary. The applicant would also be advised that these costs will be met by the Tribunal as a separate item. Alternately, an applicant could have a solicitor made available through the Bureau.

The Committee believes that this option, in tandem with options one and two, provides for an effective curtailment in legal costs while ensuring an equitable outcome for both victims of crime and solicitors.

Recommendations

1. **That legal fees only be met by the Tribunal on a discretionary basis depending on the complexity of the individual claim.**

2. **That the cost of providing and training appropriate staff to assist victims of crime in completing applications for victims compensation be investigated by the Victims Compensation Tribunal.**

A.2 MINIMUM AND MAXIMUM PAYMENTS

Introduction

Currently, under the New South Wales Victims Compensation Scheme, the majority of claimants receive awards in the lower end of the scale. As part of the 1996 legislative scheme, the minimum threshold for claims was increased from $400 to $2,400. The Committee considered whether further increasing the minimum threshold for claims may alleviate some of the burden on the Fund. At the same time the Committee considered the financial impact of lowering the maximum amount payable given that many schemes in other jurisdictions pay much lower maximum amounts.

Legislative Provisions

(a) Threshold amount of compensation

Section 20(1) of the Act provides that:

> Statutory compensation is not payable to a single person unless the total amount of compensation payable to that person, as compensation for compensable injuries, is at least:
>
> (a) subject to paragraph (b) - $2,400, or
>
> (b) such other amount as is fixed by proclamation.

This section does not apply to compensation payable to family victims (s20(2)).

(b) Maximum amount of compensation

Section 19(1) of the Act states:

> the maximum amount of statutory compensation payable to a single person in respect of any act of violence is $50,000.

Options

The Committee considered a number of options regarding the minimum and maximum amounts of compensation payable to victims of crime.

(a) Lowering the maximum amount of $50,000

A number of other jurisdictions were considered including:

Tasmania - maximum pay out $25,000

Northern Territory - maximum pay out $20,000
Ontario - maximum pay out $25,000

Each of these schemes provide compensation for pain and suffering but offer a much lower maximum pay out in comparison to New South Wales.

The Attorney General's Department has estimated that :

> *"Based on 1996-97 figures ... lowering the maximum award to $30,000 would have resulted in savings of $12.24m, based on the old scheme; and lowering the maximum to $25,000 would have resulted in savings of $14.87m with savings of $19.45m if the maximum award were reduced to $20,000."*
>
> Mr Grant, Transcript of Evidence, 10 November 1997 p4

It was noted that there have been approximately 20 applications under the new scheme which have attracted the maximum award of $50,000 to date. However, as could be expected, these cases have involved very serious injuries to victims such as brain damage or total and permanent loss of use of body parts.

Lowering the maximum amount payable would also have a detrimental effect on families of homicide victims who, as noted by the Attorney General's Department:

> *" ... are currently automatically entitled to the maximum award and who represent the largest group of crime victims receiving the maximum pay out figure."*
>
> Submission from the Attorney General''s Department, p3

Due to the very serious nature of both physical and psychological injury which is received by victims who attract the maximum award of compensation, despite any potential savings which could be made, the Committee is of the view that the $50,000 maximum amount payable should be maintained.

(b) Increasing the minimum of $2,400

The Committee questioned whether the philosophy behind the Victims Compensation Scheme should really be to compensate those victims who are most significantly affected by the perpetration of a crime against them. Victims who are only affected in the short term could be directed to support services. Raising the threshold to $5,000 would serve to further minimise lower level claims which are presently a large administrative and financial burden on the Fund.

This view was shared by New South Wales Treasury:

> *"An increase in the minimum level would reduce the incidence of minor claims, on which the need for taxpayer-funded expenditure is questionable."*
>
> Submission from NSW Treasury, p1

The Attorney General's Department advised the Committee that significant savings to the Fund could be made if the threshold was raised to $5,000:

> *"Increasing the minimum award to $5,000 would have reduced the number of claims by 3,044 (48 per cent of those determined) and achieved savings of $14.10m in pain and suffering. Additionally this option would have saved a further $2.07m in legal costs and considerable administrative savings, thereby enabling staff members to more promptly process the remaining 52 per cent of claims."*
>
> Submission from the Attorney General's Department, p3

It must be noted that any increase in the threshold must be done in tandem with a reform of the Shock category. During its inquiry the Committee became aware of the practice whereby applicants are using shock as their primary injury in order to get over the existing $2,400 threshold:

> *"There are a number of examples where people who have been the subject of pub brawls or assaults of that nature rather than claiming a broken nose or chipped teeth, which is no longer provided for under the Act, are claiming post traumatic stress or Shock over 18 weeks, or the number of weeks provided that will take them up into a much higher category of reimbursement of award. If the minimum threshold were raised, the claims could even increase, unless there was a change to the definition or criteria of Shock."*
>
> Mr O'Toole, Transcript of Evidence, 10 November 1997, p5

The Committee is thus concerned that if the threshold was raised, to say $5,000, applicants will begin to 'manipulate' their claims under the heading of shock in order to meet the higher threshold. Consideration has been given to this under the chapter on "Shock".

Neither the Combined Community Legal Centre Group of NSW nor the Law Society of New South Wales, however, supported this option. It was believed that the scheme already had sufficient checks in place to discourage less serious claims:

> *"Any proposal to further increase the minimum threshold should be rejected. The current Act already excludes applicants who have relatively minor injuries and were seen to disproportionally take up administrative time. Any further increase in the threshold would be an unacceptable further reduction in victims' access to compensation, resulting in many worthy victims being ineligible to receive compensation."*
>
> Submission from the Combined Community Legal Centre Group of NSW, p12

> *"Since the time it was proposed to increase the monetary threshold for victims compensation applications to $2,400, the Law Society has been concerned that many worthy recipients of compensation for acts of violent crime will be ineligible to receive any compensation at all. The threshold of $2,400 has only been in place since April 1997 and insufficient opportunity has been afforded to assess the effects of the changes brought about by the Victims Compensation Act 1996."*
>
> Submission from the Law Society of NSW, p4.

In its written submission to the Committee the Attorney General's Department raised questions as to how, in practice, the threshold could be changed and applied under the current Schedule of Injuries:

> *"Is it proposed that those injuries which are presently awarded an amount which would be in excess of a reduced new maximum award, all be awarded an amount equal to the new maximum award, or, is it proposed that all injury award amounts in the Schedule of Injuries be scaled down on a pro-rata basis?"*
>
> Submission from the Attorney General's Department, p3

If the minimum threshold was raised to $5,000 then a total of 58 categories of injury (ie 20 per cent) would be eliminated from the Schedule of Injuries. A number of categories of injury would be removed including injury to the nose or teeth, except injury to the front teeth.

In particular, injuries which are temporary, that is 'lasting 6-13 weeks', would be taken out of the Table including:

disability lasting 6 to 13 weeks
ear: temporary partial deafness - lasting 6 to 13 weeks
ear: tinnitus - lasting 6 to 13 weeks
eye: blurred or double vision - lasting 6 to 13 weeks
facial: temporary numbness/loss of feeling - lasting 6 to 13 weeks
neck: strained (disabling for 6 to 13 weeks)
shock: lasting 6 to 13 weeks
back: strained back - disabling for 6 to 13 weeks
wrist: sprain - disabling for 6 to 13 weeks

Increasing the threshold to $5,000 would have the effect of eliminating all temporary or 'minor' injuries, that is where the injury is defined as slight with no, or minimal, continuing disability. As a result the Schedule of Injuries would provide an award only in the cases involving the more serious and permanent injuries. The Committee considers that this may be appropriate in most circumstances.

If this option was proceeded with, however, consideration should be given to reassessing certain injuries such as those in the area of scarring: minor and significant disability (for example to lower limbs).

The Committee therefore recommends that the minimum threshold for payment from the Victims Compensation Fund be raised to $5,000 in tandem with the reform of the "Shock" category discussed in Chapter A.5.

Recommendation

3. That the minimum threshold to receive victims compensation be raised to $5,000.

A.3 WORKERS COMPENSATION CLAIMANTS

Introduction

The Committee considered whether workers compensation applicants should be eliminated from the Victims Compensation Scheme. Currently, the Victims Compensation Scheme is far more generous than WorkCover in relation to the provision of counselling and the payment of pain and suffering and nervous shock. This results in many employees who have been adversely affected by a crime perpetrated during the course of their job, approaching the Tribunal for these benefits.

During the course of its inquiry, the Committee questioned whether it is appropriate that the taxpayer "pick up the tab" for benefits which private insurers and employers are refusing to pay.

Background to Current Entitlements

Victims of Crime who have suffered an injury in the workplace may not always exercise their rights under the Workers Compensation Scheme or may not advise the Victims Compensation Tribunal of any Workers Compensation Award they have received. They also may not advise the Tribunal of any other pending civil action at all relating to that incident.

> "*It not infrequently happens that an applicant has lodged a Workers Compensation Claim or is entitled to do so in respect of an act of violence.*
>
> *If the act of violence occurred in the work place, Workers Compensation will pay loss of wages within terms of s.37 of the Workers Compensation Act and any medical expenses. The applicant comes to the Tribunal for assessment of pain and suffering and "top up" of wages/allowances."*
>
> Victims Compensation Tribunal Annual Report 1994-95, p12

The New South Wales Workers Compensation legislation does not provide financial compensation for pain and suffering unless the worker suffers from a permanent impairment of more than 10 per cent, based on the Table of Disabilities. That table provides for 51 categories of disabilities compared to over 250 categories of injuries under the Schedule of Injuries in the *Victims Compensation Act 1996*. If the injury does not involve permanent impairment then the worker will apply to the Tribunal to obtain compensation for pain and suffering while receiving wages paid from WorkCover.

The position is anomalous in that a victim who is injured at work in an industrial accident has rights only under the *Workers Compensation Act* while another worker injured at work as the result of an act of violence will have additional rights under the *Victims Compensation Act.*

The *Brahe Report* of March 1993 reviewed the issue of whether persons who have access to workers compensation have a right to claim compensation under the *Victims Compensation Act* or whether the scheme should only provide a safety net only for persons who have no other avenue for any form of compensation. The report concluded that :

> "*In theory persons having access to Workers Compensation should have their claims settled in that place. It is administratively inefficient that claimants use the Victims Compensation Tribunal for an award for pain and suffering (where that claim is not available under Workers Compensation legislation) and use workers compensation for other heads of claim.*
>
> *It is illogical that persons injured in the course of employment as a result of an act of violence should in part be compensated by the employer and in part from the public purse."*
>
> The Brahe Report, 1993 p30

Payments for Workers Compensation entitlements under the Act are funded, at least in part, by premiums paid to WorkCover by insurers and employees. Victims of Crime are paid compensation through the Victims Compensation Fund which in turn is primarily resourced through allocations from consolidated revenue. The present system provides that victims of workplace violence may have access to funds provided by their employer and to public funds:

> *"Logically if an employee is injured in the course of employment as a result of an act of violence all compensation should be met by the employer."*
>
> The Brahe Report, p31

The cost to the Victims Compensation Fund from claims of the Workers Compensation type cases is potentially substantial. The majority of victims injured in the course of their work and applying to the Tribunal are bank tellers, police officers, and prison officers. Others are teachers, security guards including entertainment venue employees ("bouncers") and taxi drivers. As an example, nearly four per cent of cases lodged at the Tribunal during 1995-96 involved police officers. That figure has reduced from 10.5 per cent in 1992. Under the new legislation where three per cent of the cases have so far been lodged, Mr Grant, Deputy Director-General Attorney General's Department, highlighted the decrease in the number of police officers and prison officers applying for compensation when providing statistical information:

> "*...there would seem to be a considerable decrease in the number of claims being made by police officers and prison officers under that legislation (1987 Act). I am not sure if anyone can give a reason for that, but the number of claims seems to be considerably lower than in previous years".*
>
> Mr Grant, Transcript of Evidence 10 November 1997, p12

Figures are not available from the Tribunal as to the total number of all claims lodged involving victims who suffered an injury while at the work place. The Brahe Report cited figures obtained from the study conducted by the Bureau of Crime Statistics and Research that 23 per cent of all claimants were at work at the time they became victims

of an act of violence. A survey of a sampling of claims lodged under the 1996 Act indicates that just under 17 per cent of all claims involved victims receiving their injury at the work place. The primary injury claimed by victims injured in the work place is shock (86 per cent) and, if all evidence is substantiated before the Tribunal, gives a potential payout of approximately $13m per annum.

Counselling

Employees who are suffered an act of violence in the workplace also appear to be availing themselves of the counselling option offered under the 1996 scheme in record numbers. This may often be used to strengthen their claim to both WorkCover and the Tribunal. Mr Phil O'Toole, Director of Victims Services, told the Committee that:

> *"I would say that around 25 per cent (of all counselling applications are workers compensation related). As you are aware, under the provisions of the Act a person can claim because they do not receive counselling and do not receive a pain and suffering component as a workers compensation entitlement*. But we *are receiving claims from police, prison officers, bank tellers, bouncers and other people who are exposed to danger and who incur injury as part of their profession."*
>
> Mr O'Toole, Transcript of Evidence 10 November 1997, p35

"High Risk" Professions

The Committee considers that it is appropriate that persons injured in the work place should receive compensation paid for by their employer whether the injury occurred as a result of an industrial accident or an act of violence. Police Officers are employed as law enforcement officers for the general protection of the public, employed in positions that carry an inherent risk of injury through violence. As government employees they are entitled to rights under their award and if hurt on duty are entitled to standard WorkCover coverage as well as specific "hurt on duty" benefits under their award agreement.

As The *Brahe Report* found:

> "*No one would deny injured police officers appropriate compensation but is the Tribunal the appropriate authority to make such an awards? The Police Department has its own medical, psychological and rehabilitation services. Some of the medical material presented to the Tribunal from independent sources in support of victims' compensation claims tend to suggest that police officers are not capable of performing functions which they continue to exercise. This information is not available to the Police Department. If the Police Department medical and psychological services assessed an officer, the Police Department would have a complete record of all injuries suffered by officers in the course of service and determine the fitness of the officer to continue to perform duty.* ***A form of compensation administered by the Police Department may be appropriate.****" (Emphasis added)*
>
> The Brahe Report 1993, p30

Similar comments could be made in respect of other high risk professions such as Prison Officers.

The *Brahe Report* recommended that if Police and Prison Officers were to be excluded from the Victims Compensation Scheme then consideration should be given to a separate scheme to cater for their interests.

> "*.....if police officers are not entitled to claim under the present legislation, it would effectively leave them without any entitlement to claim after suffering serious but non-permanent injuries, whereas every other citizen in the State would be entitled to make a claim."*
>
> The Brahe Report 1993, p29

The Committee understands that additional entitlements for Police in this area has been an ongoing industrial issue. The policy of high risk professions being allowed to "top up" their benefits is totally supported.

Double Dipping

There is also potential for persons injured at the workplace who apply for victims compensation to "double dip". The 1987 Act only provided that the Tribunal should take into account, when determining a victims compensation application, *"any amount which has been paid to the person or which the person is entitled to be paid from any other source including Workers Compensation."* The Tribunal has endeavoured to take into account any possible or potential claims upon Workers Compensation, however, the District Court in its appellate jurisdiction was divided in their approach. Some judgments agreed with that approach while others said the Tribunal should pay the full entitlement leaving it to the other body to reduce its payments.

It is difficult for the Tribunal to find out about monies received from other sources. This was highlighted in the Tribunal's Annual Report of 1993-94. The Report discussed the problems the Tribunal faces in obtaining information as to *"no doubt ... there are many instances in which it is not being told the full story"* in particular, whether the victim is currently working and whether or not the victim has received or made a claim to workers compensation.

> "*In one instance ... the Tribunal's s.18A examination brought to light the fact that the applicant had since returned to work. That fact was not mentioned in a later report furnished by the applicant's psychologist who said that she was still too sick to participate in regular therapy because of her fear of stepping outdoors. In another case, it was the Tribunal's questioning which brought to light the fact that the applicant had received a lump sum payment for a percentage permanent loss*
>
> *of use of the eye. The fact that a lump sum payment was being negotiated with an insurance company was never disclosed to the Tribunal."*
>
> Victims Compensation Tribunal Annual Report 1993-1994, p26

The case also highlighted the difficulties faced by the Tribunal when different reports are

prepared by medical practitioners for different compensation schemes, (in this case Workers Compensation and Victims Compensation) and the reports may be tailored to meet the requirements of each independent compensation scheme.

> *"Although the applicant's doctor assessed the applicant's visual loss firstly as 25 per cent and then raised this figure to 90 per cent, the figure for which the applicant ultimately compromised his claim with the insurance company was based on a per cent loss of use of the eye, whereas the applicant's case was presented at all times to the Tribunal as a 90 per cent loss."*
>
> Victims Compensation Annual Report 1993-1994, p26

The 1996 Act now provides that:

> *"If the compensation assessor is satisfied that the applicant may be entitled to workers compensation (or payment in the nature of workers compensation) in respect of the act of violence to which the application for statutory compensation relates, the assessor is to postpone the determination of the application until any entitlements to workers compensation have been determined."*
>
> Section 30(4) Victims Compensation Act 1996

The inclusion of this section provides the Tribunal with powers, to defer a case, indeed it is a mandatory requirement that a case be deferred, if it appears there is an entitlement to workers compensation. It is still a question of the Tribunal obtaining evidence to ensure that the medical, and other, reports tendered to the Tribunal are providing the full story. It will require vigilance and perhaps costly investigation on the Tribunal's behalf.

WorkCover has recently held an inquiry into the system entitled *"An Inquiry into the Workers Compensation System in New South Wales"*. This was conducted by Mr Richard Grellman, who identified that "*permanent impairment and pain and suffering awards as one of the key cost drivers in the workers compensation scheme*". A number of corrective measures were introduced as from 1 January 1996.

As stated in the Victims Compensation Annual Report, 1994-95

> "*The Victims Compensation Act should be the safety net for victims who have no recourse to any other form of reimbursement. If any applicant has an entitlement - even for loss of wages, in Workers Compensation that should be a bar to bringing proceedings to the Victims Compensation Tribunal. Such a provision would be similar to that relating to injuries involving a motor vehicle which are excluded from the Act."*
>
> Victims Compensation Annual Report 1994-1995, p13

Conclusion

The Committee therefore believes that the Workers Compensation Scheme is better placed to provide for compensation for persons injured as a result of an incident in the workplace. It should adequately cover all workers whether injured as a result of an accident or by an act of violence. If the scheme is failing to provide adequate benefits for employees in high risk professions such as police, prison officers and bank tellers, it should not be the responsibility of the taxpayer, through the victims compensation scheme, to address this issue.

Recommendation:

4. That all persons who are injured as a result of the perpetration of a crime in the course of their work be specifically excluded from claiming under the *Victims Compensation Act 1996* (as they are substantially provided for by the *Workers Compensation Act*.)

A.4 CLAIMS INVOLVING SOCIAL VIOLENCE, DOMESTIC VIOLENCE OR CONTRIBUTORY BEHAVIOUR

Introduction

Many jurisdictions have taken a stronger stand than New South Wales in assessing applications involving contributory behaviour, applications received from convicted offenders and applications involving domestic violence where the applicant still lives with the perpetrator. The result has been significant savings to their funds.

As part of its inquiry, the Committee examined the Victims Compensation Tribunal's current policies and procedures regarding these issues.

Legislative Provisions

Section 30(1) of the *Victims Compensation Act* 1996 provides that certain factors may be taken into consideration in determining whether or not to make an award of statutory compensation and in determining the amount of compensation to award, the compensation assessor must have regard to certain factors including:

(a) any behaviour (including past criminal activity), condition, attitude or disposition of the victim that directly or indirectly contributed to the death or injury;

(b) whether the victim participated in the commission of the act of violence;

(c) such other matters as the compensation assessor considers relevant.

Options

(a) Social violence

When a Committee delegation visited the United Kingdom Criminal Injuries Compensation Scheme in August 1997, the delegation was told that there is a policy of "taking a hard line" in relation to assessing applications based on injury caused in situations of "social violence", particularly pub brawls. The philosophy behind this is that usually alcohol and some degree of provocation or contributory behaviour is involved. The Director of the United Kingdom scheme estimates that this policy eliminates approximately 40 per cent of all possible claims.

The Attorney General's Department, on page 6 of its written submission to the Committee, noted that in 1996-97 there were 678 awards totalling $4.85m made where the act of violence was identified as having occurred in a hotel or registered club.

However, the Department also submitted that it felt that the introduction of the 1996 Act would bring about a direct reduction in these types of claims:

"In relation to claims arising from incidents occurring in or near licenced premises, it is noted that the table of injury introduced under the 1996 Act does not provide awards for bruising, laceration or other soft tissue injury. The introduction of the injury table and the increase in the minimum award threshold are expected to reduce potential for this kind of social violence claim. Further, to ensure that deserving victims are not excluded automatically where the act of violence is identified as having occurred in a hotel or registered club, it may be more appropriate to deal with these matters as contributory behaviour issues, as is currently the case, rather than exclusions based on the location of the act of violence."
Submission from the Attorney General's Department, p6

Despite the Department's view, at the time of giving evidence the Director of the Tribunal, Mr Phil O'Toole, told the Committee of numerous instances in which successful claims were being made upon the Fund as a result of pub brawls. These claims were succeeding, even though the physical injuries were minor, because the primary injury was listed as nervous shock. (See the next Chapter for more information relating to this issue.)

The Committee is therefore of the view that the new legislation does not sufficiently discourage these claims, and the area still requires considerable policy review. The Committee recommends that the Victims Compensation Tribunal should review its policy in regard to payment of compensation to victims who have been involved in situations of social violence.

(b) Domestic violence

Many jurisdictions refuse to pay domestic violence claims when the applicant is still living with the perpetrator. The philosophy underpinning this is that compensation to victims of domestic violence who live with their abuser would result in unjust enrichment of the offender.

In United States the Federal Government has instituted requirements prohibiting the States which receive grants from the Office of Victims of Crime from automatically denying all domestic violence victims compensation without due consideration being given to all individual circumstances of the case.

The Victims Compensation Tribunal was unable to supply the Committee with statistics in relation to domestic violence due to the fact that its present record keeping system did not recognise this as a separate category.

The NSW Attorney General's Department, in its written submission, responded to the issue of multiple claims in domestic violence situations by saying that:

"There is a concern that domestic violence victims may be unduly harshly treated by a restriction on awards where the applicant still lives with the perpetrator. Not all victims of domestic violence are able to leave the family home, often they have no where to go, little support and women's refuges are often filled to capacity. Such a restriction could be seen to in effect 'punish' such victims because the perpetrator is still at home"
Submission from the Attorney General's Department, p6

Similarly, Combined Community Legal Centres (NSW) opposed any review of multiple payments to domestic violence applicants on the following grounds:

"Any proposal to exclude applications involving domestic violence situations where the applicant still lives with the offender should be rejected at all costs. Arguments that all such applications will result in unjust enrichment of the offender are not only paternalistic in the extreme, but demonstrate a lack of understanding of the complexity of the cultural, social, economic and psychological issues around domestic violence and why it is difficult for many women in domestic violence situations to leave the family home.

It is inappropriate and discriminatory to exclude an entire class of applicants in this way. Each application must be determined on its merits."
Submission from the Combined Community Legal Centre Group NSW, p6

However, the Combined Community Legal Centres go on to suggest a policy in line with the Victorian model may be appropriate:

"A provision similar to section 54(e) of the Victims of Crime Assistance Act 1996 (Victoria) would be a more appropriate way to ensure that perpetrators do not benefit from awards made to their victims. Section 54(e) provides that the Tribunal must have regard to "whether the person by whom the act of violence was committed or alleged to have been committed will benefit directly or indirectly from the award."
Submission from the Combined Community Legal Centre Group NSW, p7

The Committee recognises that domestic violence is an extremely serious and complex matter. It is acknowledged that many victims of domestic violence find it incredibly difficult to leave for complex physical, psychological and financial reasons. As such it would not consider recommending that victims of domestic violence should be denied compensation where appropriate.

It does, however, believe that the Tribunal should require good reason as to why a victim should receive multiple payments when they are still living with the same perpetrator.

Further, similar to the Victorian model, it should institute a policy of ascertaining whether any funds it pays will be directly or indirectly benefiting perpetrators. If this is the case, the Tribunal could make arrangements in successful applications to ensure that funds are used in a particular way which will not enrich the perpetrator, such as the payment

of a holiday for relevant family members or school fees etc.

The Committee also strongly believes that domestic violence victims who continue to live with perpetrators will be better served by access to increased victims support services than monetary compensation.

(c) Contributory behaviour

As previously stated in (a) there is allowance under Section 30 of the *Victims Compensation Act* 1996 for a reduction in the final amount paid if, in the opinion of the assessor, the applicant's behaviour has contributed in any way to the incident. The Attorney General's Department has advised the Committee that:

"In 1996-97 there were 50 awards determined under the 1987 Act totalling $436,381 where the award had been reduced due to contributory behaviour of the victim."
Submission from the Attorney General's Department, p6

Some jurisdictions, such as Germany and some States of the United States, refuse to make any compensation payment where there has been some degree of contributory behaviour or the applicant has a felony record. David Miers in his book *"State Compensation for Criminal Injuries",* Blackstone Press Ltd, at pp. 156-157 explains that in the United Kingdom the view has been taken that it may be inappropriate for those whose own conduct led to their being injured to receive compensation from public funds. It is considered that if the victim's mode of life, the company he or she keeps or the undesirable activities in which he or she engages are connected with the incident in which he or she is injured then the State may owe no moral obligation, at least in the form of compensation, for that injury.

Section 30 of the New South Wales legislation gives the Tribunal wide powers of discretion to take into account the behaviour, condition, attitude or disposition of the victim when deciding whether or not to make an award or the amount of that award.

Despite this, as in the area of social violence, it appears that the Tribunal may still need to review its policies in this area with a view to making them stricter. According to figures supplied to the Committee by its consultant, (see Appendix 2) the issue of contributory behaviour arises in approximately 15-20 per cent of claims dealt with by the Tribunal each year. It has been estimated that approximately $3m could be saved from the Fund if tighter rules concerning contributory behaviour were in place.

Mr Cec Brahe, Chairman of the Tribunal, indicated in his oral evidence to the Committee that the Tribunal was not reducing awards involving contributory negligence to the same extent as the civil courts. He indicated that generally amounts were only reduced by 10 to 25 per cent:

"Mr Peacocke: *What has been the experience of contributory negligence findings by the Tribunal? Do they happen very often?*

Mr Brahe: *They have happened very regularly, Mr Peacocke. We do not necessarily reduce awards by a great deal, depending on the behaviour of course. Generally, I have not seen more than a 50 per cent reduction.*

Mr Peacocke: *You do not adopt the common law practice of assessing percentages for contributory negligence and reducing an award by say 30, 40 or 50 per cent?*

Mr Brahe: *Generally the amount reduced is 10 to 25 per cent. I have seen up to 50 per cent but, in my experience, probably no more than 50 per cent".*

Transcript of Evidence 10 November 1997 p8

The Committee is of the view that the Victims Compensation Tribunal should review its policies with regard to the making of awards in cases involving contributory behaviour, particularly in "pub brawl" type situations. Significant savings could be made to the Fund through reducing such claims and/or discouraging many of them entirely.

(d) Prior criminal record by applicant

The United Kingdom scheme refuses to pay applicants who have had a number of convictions for violent offences. In reference to the this, David Miers comments in his aforementioned book:

"The question is whether it is defensible to refuse compensation to a person because he has a criminal record, but one which is unconnected with the injury claimed of. Thousands of people remain eligible for State benefits notwithstanding prior convictions, and if those who are injured in incidents unconnected with their criminal history have been convicted and punished by due process of law, is it right that they should be so disqualified in the future?"
State Compensation for Criminal Injuries, Blackstone Press Ltd, pp. 158-59

This option was considered by the Committee to have the potential to result in many cases of inequity and injustice and was thus not pursued. The current scheme in United Kingdom provides that points can be awarded for a victims past offences and taken into consideration in awarding compensation. Mr O'Toole in his evidence to the Committee advised that the English system, which often serves to automatically disqualify victims from claiming, may not be acceptable in New South Wales.

It is considered that the 'catch-all' provision in s30(1)(e) which enables the Assessor to take into account 'such other matters as the compensation assessor considers relevant' is sufficient. It is noted that the equivalent of this section in the 1987 Act was used by the Tribunal to refuse or reduce awards where an applicant had a serious criminal record which extended after the act of violence.

Recommendations

5. That the Victims Compensation Tribunal strengthen its policy with regard to assessment of situations involving social violence.

6. That the Victims Compensation Tribunal consider implementing a policy of not paying more than one domestic violence claim to a victim still living with a perpetrator, unless good cause is shown. It should also be demonstrated that any funds awarded will not, either directly or indirectly, enrich the perpetrator.

7. That the Victims Compensation Tribunal review its policy regarding assessment of contributory behaviour with a view to reducing compensation where appropriate.

A.5 COMPENSATION FOR PAIN AND SUFFERING INCLUDING SHOCK

Introduction

The Committee considered, as part of its inquiry, whether modification of the pain and suffering or nervous shock components of the 1996 legislative scheme would result in significant savings.

In 1996-97 the Victims Compensation Tribunal paid out $65.75m in awards for pain and suffering. This is by far the largest compensatory item the Tribunal recognises.

Currently, all jurisdictions within Australia, except Victoria, pay compensation for pain and suffering. Recently Victoria abolished the provision for pain and suffering on the basis that lump sum compensation does not effectively address victims' needs and the most constructive way is through the provision of free support services such as counselling and payment for medical treatment which is not covered by Medicare. The Victorian focus is now on rehabilitation of the victim.

The Victorian system instead provides a mechanism for victims of crime to seek an order of the Court to direct that the offender pay compensation for pain and suffering at the time of sentencing. The victim may then enforce the order as a judgment debt in the civil jurisdiction. This is problematic as the offender usually falls within a lower socio-economic group and may not be in a position to pay monies towards victims of crime. Similarly, within the United States of America few individual States provide for payment of pain and suffering but instead focus on reimbursing victims for actual 'out of pocket' expenses. In the United States which does not have a national health insurance scheme or a strong social welfare "safety net", these payments can still be considerable.

The State of Texas' Crime Victims' Compensation Fund, for example, provides reimbursement to innocent crime victims and their families for specific expenses, such as medical costs, lost wages, mental health counselling and funeral expenses not covered by insurance or other sources. The money deposited in the fund comes primarily from court costs assessed in state and federal criminal convictions.

Lump Sum Compensation versus Provision of Services

As discussed in the Committee's First Interim Report *"Alternative Methods of Providing for Victims of Crime".* the benefit derived from the mere payment of lump sum compensation to assist in a victim's recovery from his/her ordeal is questionable. Re-focusing of resources to increase and improve support services such as counselling and other rehabilitation measures may be more beneficial in the long term to both

victims and the community.

It is undeniable, however, that the provision of a payment for pain and suffering plays some part in the psychological recovery of the victims in many cases:

> *"It will never actually compensate someone. If I have been really traumatised, give me all the money in the world, it is not going to compensate me. But there needs to be some token that says that we acknowledge that you are more than just flesh and bone."*
>
> Prof Waring, Transcript of Evidence,, 25 November 1997, p8

The Combined Community Legal Centres Group (NSW) summed up the policy behind provision of payment for pain and suffering:

> *"The rationale of statutory victims compensation schemes is to provide a forum where victims of crime can obtain some redress by way of recognition and validation of their experiences as victims of crime, to provide some acknowledgement by the state that the person has suffered harm, and through monetary compensation, to provide a tangible expression of the community's regret".*
>
> Submission from the Combined Community Legal Centre Group NSW, p7

The present 1996 New South Wales legislative Schedule of Injuries is inclusive of pain and suffering. This Schedule is not considered to be an accurate compensatory measure of what a victim has suffered, in that it does not attempt to place the victim back into the position he/she was in before the incident. In fact, it largely does not even provide for differing degrees of physical impairment. What it is designed to do is to recognise that the victim has suffered as a result of a crime by the provision of a token financial gesture. How large that token gesture should be without insulting the victim is a matter of opinion.

Conclusion

The Committee considered that the abolition or modification of the pain and suffering component under the scheme would call for a total rewriting of the legislation, including the abolition of the Schedule of Injuries. This may be a policy matter for the government, given the philosophy behind the payment of pain and suffering to victims of crime.

Further, any consideration which may be given to its reduction or abolition would be most appropriately done at a time when victims support services are at their optimum potential, rather than six months after the opening of the Victims of Crime Bureau.

The Category of 'Nervous Shock'

An area where reform does appear to be needed relates to psychological injuries or Shock. Here, the major difficulties lie in the diagnosis of Post Traumatic Stress

Disorders and the question of whether provision of a lump sum payment actually assists victims of crime in their recovery from such psychological injury anyway.

The *Victims Compensation Act, 1987* provided compensation for victims who received an injury from *"actual physical bodily harm"*, or suffered a *"nervous shock"* or *"mental illness or disorder (whether or not arising from nervous shock)"* or a combination of any of the above injuries. Nervous shock is a legal concept defined by cases under common law and it has caused confusion with psychiatrists and psychologists who have tended to take the view that the term "nervous shock" had now been replaced by "Post Traumatic Stress Disorder".

The 1996 Act provides for a definition of *"Shock"* as being a psychological injury comprising conditions attributed to post traumatic stress disorder, depression and similar conditions. It requires the presence of psychological physical symptoms as stated in Clause 5 of the Schedule of Injuries. At common law the normal emotions of grief, distress and anxiety which a person may experience as a victim of an unlawful act causing physical injury are not compensable as a separate head, but will be taken into account as part of the award for general damages. This applies to physical injuries specified on the Schedule of Injuries in the 1996 Act. The separate category of Shock is provided for cases where symptoms are more serious than grief, distress or anxiety.

Concerns have been raised by a number of witnesses before the Committee in respect to the difficulties in adequately diagnosing post traumatic stress disorders. It was questioned whether the Legislative definition of the Post Traumatic Stress Disorder is an adequate one. Professor Waring, President, Psychologists Registration Board said there was:

> *"a great deal of concern that some people are diagnosing Post Traumatic Stress Disorder without necessarily having the expertise to do so. Then within the academic mental health world, there is a great dispute about whether it is a very good definition any way. In fact everybody suffers from Post Traumatic Stress Disorder and what you are really thinking about is how long they suffer it."*
>
> Prof Waring, Transcript of Evidence, 25 November 1997, pp 7-8

Similar concerns have been raised by Chairpersons of the Tribunal in respect of the diagnosing of psychological injuries, and, in particular Post Traumatic Stress Disorders. The previous Chairperson of the Tribunal, Dr Elms, in the Victims Compensation Annual Report of 1993-94, expressed concern that some medical experts in the field of mental health were tailoring their reports to meet the criteria of the Act *"[They] regard their brief as being solely to get the applicant as much compensation as possible".* Dr. Elms provided an example of a psychiatrist who certified that an applicant was suffering from a Post Traumatic Stress Disorder although the psychiatrist had never seen the applicant.

As Mr Brahe, the current Chairperson, noted in the Tribunal's Annual Report of 1994-95:

> *"The most frequent psychological injury claimed is that of Post Traumatic Stress Disorder. There is not the slightest doubt that in many instances psychological/psychiatric reports are tailored to meet Section 3. ... It is clear that there is a core group of psychologists/psychiatrists who are targeted by solicitors as being favourable to applicants.*
>
> *The Tribunal is aware that some solicitors 'assist' their clients by advising the type of issue/question expected to be raised by the psychologist/psychiatrist. The Tribunal is aware that applicants have attended for assessment carrying with them the criteria for Post Traumatic Stress Disorder."*
>
> Victims Compensation Tribunal Annual Report 1994-95, p8

Mr Brahe further stated that the Victims Compensation Tribunal was not alone in its scepticism, adding:

> *"As one doctor wrote "nor do I share the enthusiasm of some for the diagnosis of Post Traumatic Stress Disorder, which, indeed, some would describe as the pre-financial gain disorder"*.
>
> Victims Compensation Tribunal Annual Report 1994-95, p 8

Professor Waring told the Committee in his evidence before it on 25 November 1997 that it *"surprises me the number of people who get well just after they get their cheque"*. In cases where medical reports are tendered containing questionable diagnosis the Tribunal may use its powers to obtain an independent examination. Mr Brahe stated that:

> *"In the more blatant cases the Tribunal uses its powers ... directing an independent examination, which in a number of cases confirms the Tribunal view. At times solicitors have objected to the nominated psychiatrist as being unsympathetic to their client."*
>
> Victims Compensation Tribunal Annual Report 1994-95, p 8

Dr Elms felt that the Tribunal did not wish to give the impression of persecuting victims of crime, particularly sexual assault victims, and therefore was not in a position to refer a large number of reports of psychological injuries for independent evaluations. Further, it would be an extremely costly exercise.

Both Chairpersons recommended a tightening of the area of psychological injuries particularly a system of scrutinising reports claiming large amounts of counselling. As Dr. Elms recommended in the 1993-94 Annual Report:

> *"The Tribunal should have the power to refer applicants for compensation to professionals on a list approved by itself for the purpose of obtaining a medico-legal report at the time the application for compensation is presented."*
>
> Victims Compensation Tribunal Annual Report 1993-1994, p28

Misuse of 'Shock' under the 1996 Legislative Scheme

The Attorney General said, on introducing the latest legislation into Parliament in May 1996, that it was intended to:

> *"refocus and expand assistance to crime victims in New South Wales and to ensure that the genuine needs of victims are met at reasonable cost to the community. Given that victims compensation payments are largely financed from consolidated revenue, the Government has a clear responsibility to ensure that the scheme remains financially viable and that future compensation payments do not cause an unaffordable drain on public funds."*

The Legislation provided for a greater emphasis on the rehabilitation of victims of crime and helping victims address the trauma and psychological injury caused by serious violent crime. Access to counselling was increased in addition to awards of compensation. To provide for a consistent and equitable award the legislation provided for compensation for injury to be determined according to a Schedule of Injuries. The Schedule of Injuries provides for compensation to victims who have received a physical injury as a direct result of an act of violence or a psychological injury or "Shock".

The 1996 Act has only been in operation for approximately 6 months. Nevertheless problems with administration relating to applicants claiming Shock are already appearing. Mr Brahe raised the issue with the Committee when he stated:

> *"Shock in the schedule is shown as lasting 6 to 13 weeks $2,400: 14 to 28 weeks $9,000 (actual amount is $96,000) and lasting 28 weeks but not permanent $18,000. It is remarkable the number of claimants whose 'Shock' has lasted for 29 weeks or 31 weeks."*
>
> Mr Brahe, Transcript of Evidence, 10 November 1997, p6

The problems inherent with of classifying Shock by the length of time the injury is diagnosed as persisting was also highlighted by Professor Waring in evidence to the Committee.

> *"When I look at the definition it comes down to looking at some psychological and physical symptoms and then there will be an amount of money that someone has decided on, that had to do with how long this lasts. To me, that seems like an invitation to actually extend it. Just to get over the barrier to some extent."*
>
> Prof Waring, Transcript of Evidence, 25 November 1997, p5

'Shock' as a Primary Injury

While it is accepted that compensation should be available for victims of serious violent crime who have suffered a serious injury, the scheme should nevertheless guard against manipulation of the Schedule of Injuries or exaggerated claims. As Mr Brahe stated in his submission to the Committee:

> *"It would seem that because 'Shock' is so well compensated, many applicants will claim that as the primary injury rather than their physical injury, thus increasing the award. Many solicitors now routinely send their clients for a psychological report irrespective of the physical injury."*
>
> Submission from the Victims Compensation Tribunal, p5

Evidence was provided to the Committee by the Victims Compensation Tribunal that certain solicitors are not sending their clients to a psychologist until 28 weeks from the act of violence. Consequently when the psychologist makes a diagnosis of post traumatic stress disorder, since 28 weeks has passed since the incident, the victim is considered to have been suffering from the Shock for 28 weeks and is placed in the higher award category. As the Director of Victims Services stated in his evidence before the Committee of 25 November, the approach "*is being exploited or promoted by certain members of the legal profession".*

The ease in which claims for injury are diagnosed as post traumatic stress disorders is highlighted by cases reported in the Tribunal's 1996/97 Annual Report. Applications for victims compensation were lodged by two victims alleging they had been the victims of armed robberies when in fact they themselves had been accomplices to the robbery. In each case the claims were supported by psychologists reports diagnosing psychological injury.

Another aspect of concern in respect of injuries qualifying as Shock under the 1996 Act is the claiming of Shock to obtain compensation in cases where the physical injury would not be compensable under the schedule of Injuries. One of the significant changes of the 1996 Act was the raising of the threshold to $2,400 and restricting the number of compensable injuries under the scheme. As the Attorney General said in his second reading speech:

> *"It is realistic to provide a substantial threshold in order to remove small claims which occupy disproportionate administrative time and costs and which choke the system. The new threshold is necessary to ensure that the resources of the scheme can be concentrated on the more seriously injured victims and that applications can be dealt with as quickly as possible."*
>
> Hansard 26 May 1996 p47

One of those less serious injuries excluded from the schedule of injuries is bruising and lacerations and soft tissue injury that accounted for 36.5% of claims lodged under the old scheme. However it would seem that applicants and their solicitors are now claiming Shock in cases that would otherwise be excluded from the scheme. As Mr O'Toole, Director of Victims Services, stated to the Committee:

> *" ... if ... you take certain injuries - for example soft tissue damage, scars and bruising and so forth-out of the Table, it is taking a different approach. Solicitors are heading more in the direction of claiming Shock in order to obtain some sort of award for the victim. There are quite a number of examples which indicate that before soft tissue damage and so forth was removed from the Table they would have received a considerably lower award. Now they are being placed in the Shock category which could result in an award of up to $18,000, whereas the award would be $3,000 or less if it were a physical injury."*
>
> Mr O'Toole, Transcript of Evidence, 10 November 1997, p5

This was supported by the Chairperson of the Tribunal, Mr Brahe, when he stated:

> *"If an applicant merely has bruising, that is not a compensable injury under the new Act and the applicant would receive nothing for any physical injury. But applicants are now claiming Shock either for six to 13 weeks, 14 to 28 weeks or in excess of 28 weeks and are falling within the Shock category of the schedule. That is the first thing that we are finding."*
>
> Mr Brahe, Transcript of Evidence, 10 November 1997, p6

Mr Brahe also referred to the significant number of applicants now being diagnosed with higher levels of Shock.

> *"An amazing number of people now seem to have Shock lasting for 29 weeks or 31 weeks to bring them into the higher category."*
>
> Mr Brahe, Transcript of Evidence, 10 November 1997, p 6

At the time of lodgment of claims the applicants select the primary or main injury received as a result of an act of violence. Provided applicants can substantiate the injury through medical evidence they may receive a higher award by selecting Shock as their primary injury. Mr Brahe provided an example:

> *"If a person has minor burns, under the schedule he would collect $3,600 if that were the major injury. If he suffered Shock in excess of 28 weeks, he would collect 10 per cent of $18,000 if that were a secondary injury, making a total of $5,400. But if he claims Shock as the primary injury, he claims $18,000 plus 10 per cent of the physical injury of $3,600."*
>
> Mr Brahe, Transcript of Evidence, 10 November 1997, p 6

The Cost of Misuse of 'Shock'

The increased cost to the Fund in the above scenario is $12,900, or 240 per cent higher than if the primary injury was the physical one. The Committee has received figures indicating that 54.6 per cent of applications lodged at the Tribunal under the 1996 Act have claimed Shock as their primary injury. This represents a potential cost of $47.4m if all such claims are accepted. The statistical report also shows that in 49 per cent of claims for Shock resulting from an assault, the only physical injury received was bruising or soft tissue injury. In the 1995-96 Annual Report claims for bruising/lacerations accounted for 36.5 per cent of claims lodged while psychological injuries accounted for 33.3 per cent of claims. The statistical report indicates that over 12 per cent of all claims lodged were for bruising/lacerations or a reduction of around 24 per cent. Meanwhile psychological injuries have risen nearly 22 per cent.

The report shows that 42 per cent of all assault claims lodged at the Tribunal involved the victim being assaulted in a hotel a club or upon leaving the licensed premises, in most incidences the victim is claiming Shock as the only compensable injury received, or claiming Shock as the primary injury. The Tribunal presented the Committee with a number of determinations made under the 1996 Act. The case of "W3" highlights the method used to obtain a higher award of compensation using the Shock definition within the 1996 Act.

A Case Study

The applicant was on his bucks' night out at the Pink Pussycat nightclub in Kings Cross when he claims he was assaulted by a bouncer of that club. The applicant stated that after two shows everybody was getting impatient, and he threw a glass to his friend but it missed and hit the table and broke. The bouncers came to escort the applicant from the premises when the applicant abused and grabbed the bouncer. The bouncer punched the applicant once in the face.

The applicant claimed Shock lasting over 28 weeks as the major injury and damage to two front teeth as the secondary injury. The psychologist prepared a report diagnosing the applicant as having a severe Post Traumatic Stress Disorder that was “fully attributable to the incident”and “during which he was physically assaulted and made to feel helpless and terrified.” The report stated that the disorder persisted more than 28 weeks and was of such severity that it was likely to last more than 12 months. The psychologist stated that the victim avoided places that reminded him of the incident and had a continued loss of interest in formerly enjoyed activities, emotional numbness, and a feeling of being withdrawn from others. The Senior Assessor who made the determination stated that the report does not explain what types of places he avoids that remind him of the incident. The victim was awarded $18,000 for Shock reduced by 50 per cent taking into account the “locale, the hour, the behaviour of the applicant in causing himself to be ejected from the club and the swearing at the bouncer prior to being struck. In my view the applicant contributed to his own injuries”.

As stated by the Senior Assessor, Magistrates or assessors are not bound to accept the conclusions given and expert reports, like any other evidence, are open to evaluation in the light of common sense and the realities of the everyday experience. But on the other hand *“... assessors do not possess the qualifications that have enabled the expert to write the report.”*

“Pub Brawl” Abuse of ‘Shock’

Mr Peter Kelso, Solicitor, appearing as a member of the Law Society, felt that the sum of $18,000 for 28 weeks is "reasonably generous.” In regard to the minimum categories of Shock Mr Kelso was of the opinion that six to 13 weeks was too easy to access and that most psychologists would say that it is not too difficult to start getting into the six-week to 13-week category. Mr Kelso also mentioned that pub and club violence is a very good example of the difficulties with Shock. He stated that:

> *“A typical victim of pub or club violence is one who would have soft tissue facial injuries -black eyes, that sort of thing. The new Act, with its schedule, is designed to preclude those people from being compensated as they were under the old Act. All they have to do is have a psychologist to assess them with a disorder that lasts for a minimum of six weeks. Sore ribs last for eight weeks”.*
>
> Mr Kelso, Transcript of Evidence, 10 November 1997, p52

Professor Waring indicated the difficulties in compensation for injuries received in licensed premises and having a low compensable threshold for Shock.

> *"... when we take into account the individual, there are some people obviously, where a chipped tooth on a Saturday night is almost mandatory. Their life style is such. Whereas other people find it highly traumatic. One could imagine that there are some who, if there is a system there, and I ordinarily get into a blue on a Saturday night, is going to try to make them pay. There are all sorts of variations at that level."*
>
> Prof Waring, Transcript of Evidence, 25 November 1997, p8

Homicide and Sexual Assault Victims

Many victims who suffer psychological injury are very seriously injured, for instance victims of sexual assaults, or relatives of homicide victims. Under the 1996 legislation homicide and sexual assault victims have been catered for through specific categories within the Schedule of Injuries and are therefore not solely dependent on the level of Shock or grief experienced. For example, sexual assault is divided into three categories and an award range is provided for victims which is determined according to the nature and pattern of the offence. There is no requirement to provide proof of a certain level of psychological injury.

Relatives of homicide victims share the set amount of $50,000 equally between dependants, also with no requirement to demonstrate proof of psychological injury.

The Committee has received figures indicating that approximately 80 per cent of victims of domestic violence claim Shock as their primary injury. Therefore, if an amendment is made to the category of Shock it would also be necessary to provide a separate category for domestic violence.

Conclusion

In some cases the psychological injury will persist for a long period of time despite counselling and will warrant some financial assistance in terms of pain and suffering. There is no doubt that such financial assistance should be provided in cases where there is serious and permanent psychological injury however the evidence suggests that the present categories are enabling potential applicants who would not normally be eligible for compensation to apply as victims suffering from Shock, or applicants of minor physical injuries are claiming Shock as the primary offence to increase compensation payouts. The purpose of victims compensation schemes is to ensure that the needs of genuine victims of injury are meet at a reasonable cost to the community. The scheme provides for counselling to all eligible victims of crime suffering from psychological injuries and in light of the evidence provided to this Committee, financial assistance should only be provided to those victims who are suffering long term injury.

As Professor Waring told the Committee:

"Any review that says, ' Let's find a way of tightening up the system where there is genuine need and a genuine response', can only be a move forward...."
Prof Waring, Transcript of Evidence, 25 November 1997, p8

Recommendations

8. That the "Shock" category of the Schedule of Injuries be reviewed with a view to deleting the categories of Shock other than for permanent injuries, homicide and sexual assault.

9. That consideration be given to establishing a separate category for victims of domestic violence.

A.6 COUNSELLING ARRANGEMENTS

Background

The Committee considered whether reform of the present counselling provisions could result in significant savings to the Fund.

Section 21 of the *Victims Compensation Act* 1996 provides for special payments for counselling of victims who qualify for statutory compensation.

Section 21(2) provides that a victim is entitled to an initial period of 2 hours. Section 21(3) is entitled to payment for such further periods of counselling (not exceeding 20 hours) as a compensation assessor considers appropriate. Payment for any further period of counselling exceeding 20 hours may also be made with the approval of the Director.

The current structure implemented by the 1996 Act provides for direct payments to be made to independent counsellors who have received accreditation from the Victims of Crime Bureau at the set rate of $70 per hour for social workers, $90 per hour for psychologists and $110 per hour for psychiatrists. In order to obtain accreditation counsellors make a submission to the Bureau, providing evidence of their qualifications, their recent experience in dealing with victims of crime and reports from two referees. In November 1997 the Victims of Crime Bureau had accredited 207 counsellors throughout New South Wales.

Advantages of the Current Scheme

The Manager of the Victims of Crime Bureau, Ms Marianne Curtis, outlined what she considered to be the major advantages of the current scheme. Accredited counsellors undertake to see clients within 48 hours of contact. All accredited counsellors are fully qualified and carry their own indemnity insurance. Accredited counsellors are also able to see clients outside working hours at their mutual convenience.

Concerns about the Current Scheme

The Committee has a number of concerns about the current counselling scheme. It must be prefaced that, when discussing counselling entitlements for victims of crime, the Committee is not referring to the special needs of victims of homicide and sexual assault, whose on-going need for counselling is well recognised.

As counselling provision under the 1996 Act is still in its infancy, a current realistic estimate of what counselling will ultimately cost the scheme is impossible. To date, during the first five months of the new scheme, 33 per cent of applicants to the Victims Compensation Tribunal have applied for counselling. This figure appears to have the potential for significant growth as the scheme matures for a number of reasons.

Firstly, an increased familiarity on the part of both applicants and solicitors with the existence of the benefit may lead to more victims taking up the counselling option. This is particularly so given the October 1997 launch of the referral cards which the Police Service are now handing out to victims of crime. This issue has been highlighted in the previous Chapter.

Secondly, the link between receipt of on-going counselling and applications for nervous shock claims is evident. It is in the best financial interests of applicants, and solicitors on behalf of their clients, to demonstrate serious post traumatic stress through long term counselling which will place them over the six, fourteen and twenty eight week shock thresholds.

Thirdly, the current system provides a direct financial incentive for counsellors to recommend the maximum amount of counselling for their clients. As Professor Trevor Waring pointed out in his evidence to the Committee, the current system financially rewards counsellors for maximising the amount of sessions a victim receives. Further, one of the victims support groups which submitted to the Committee expressed concern that over servicing was occurring:

> *"Currently VOCAL [Victims of Crime Assistance League] runs support meetings for the victims of crime in Sydney and Newcastle on the second and third Wednesdays, respectively, of the month, and it is often during this process that we identify those persons with Post Traumatic Stress Syndrome. In such cases we refer those victims to psychologists, psychiatrists and counsellors to attend to these clinical conditions.*
>
> *However we aware and have experienced cases where we have believed that subsequent to a referral, there have been instances of "over servicing" by some providers and we have a legitimate concern that an "industry" is developing in the victims counselling area."*
>
> Submission from Victims of Crime Assistance League (VOCAL), p1

Fourthly, there appears to be no regulatory structure to ensure quality of service delivery and to protect against possible over servicing, fraud or other types of professional misconduct. This leaves the Tribunal vulnerable to both misuse by counsellors and actions launched by dissatisfied applicants. Assessors employed by the Tribunal, who are not qualified or even necessarily experienced in the area of psychological injury, are expected to assess applications for an additional 20 hours of counselling on merit. Similarly, they are expected to review psychological reports regarding shock. It would seem prudent on the part of the Tribunal to employ a number of respected psychologists under contract to review reports, at best randomly, but at least when issues arise. This would be similar to the system currently operated by the Health Care Complaints Commission to review the medical reports it receives regarding adverse events.

Further, there is no initial assessment of victims who apply for counselling. Under its

system this has the potential to save the Tribunal substantial amounts in counselling funds. Victims now receive counselling of up to 20 hours regardless of their state of mental health before the incident occurred, or arguably, regardless of the severity of the crime. The Commonwealth Veterans Affairs Department, for example, have in-house psychologists who assess the counselling requirements of each applicant before a recommendation for counselling is made. The number of initial sessions awarded is based on this assessment.

Options for reform

In addressing the issue of reining in future counselling costs, the Committee looked at two major options which have proved successful in other jurisdictions: capping the number of counselling sessions provided to approximately five; and providing a mix of in-house and outsourced counselling under contract.

Option 1 Capping Counselling Sessions

The current New South Wales system provides for two initial sessions of counselling and a further 20 hours beyond this upon application. Figures provided by the Tribunal on 28 November 1997 indicate that, to date, 50 per cent of all applicants for counselling have requested 20 hours.

In contrast, both the South Australian and Western Australian Schemes very rarely provide beyond three sessions of counselling to victims of crime. If more counselling is required beyond that point the victim is referred to the relevant support group or counselling service. The Victorian system offers five sessions.

The view is taken that the psychological trauma resulting from the crime should remain the focus of the counselling sessions. As such, it should be dealt with separately from other issues which may be facing the victim.

Professor Trevor Waring, President of the Psychologists Registration Board and a member of the Victims of Crime Bureau's Counsellors Accreditation Board spoke to the Committee about the problems he saw with the present counselling arrangements:

> *"It surprises me that the length of provision of counselling is uncapped and that there's no ceiling. Even in private medical funds there is a cap, and in private practice I know there is also, in effect, a limit.*
>
> *There needs to be some differentiation between counselling and therapy. Some differentiation between predicament and pathology. Pathology is really therapy counselling. There needs to be some benefit if counselling is to continue.*
>
> *I have some experience in Employee Assistance Programs in the Hunter region, and most people go for six hours to a counsellor. It is the same in private practice. With BHP, in relation to its closing down, it is two sessions, and some*

> *request two more, but none have gone beyond that. It is not just working at the trauma, it is looking at the person going to the counselling, and it is a matter of what we can afford."*
>
> Prof Waring, Transcript of Evidence 25 November 1997, p2

This view was shared by Sydney City Mission who have had four years experience in running a Victims of Crime counselling service:

> *"When we started our [crime victim counselling] service we employed a counsellor and people had unrestricted access to that counsellor. Very early in the piece we found that because of the trauma a lot of other issues were brought up by victims. People said things such as, 'Everything would be okay if mother were alive'. That is a grief issue not the actual trauma. So we changed our counselling service to a limit of eight sessions, which has stopped the backlog of clients. Victims of crime now average about five sessions.*
>
> *I see a problem with the accredited system in that people may be dealing with matters other than the trauma. I am not speaking about families of homicide victims; I am speaking about victims of a hold-up or assault. Usually the trauma associated with those sorts of crimes can be dealt with in about five sessions. There are exceptions to this rule but there are always exceptions to rules and we try to accommodate those people by referring them to a relationship or grief counsellor."*
>
> Mrs Patrick, Transcript of Evidence 10 November 1997, p38

An example of a public sector capped counselling scheme is the Commonwealth Veterans Affairs Department which caps trauma counselling for war veterans at five sessions. In the private sector, the Medical Benefits Fund will pay only up $375 per annum for a psychologist, while Medibank Private pays $58 for each of the first four sessions and $25 per session thereafter, up to a maximum of $700 per annum under its SuperExtras scheme.

Option 2 Providing a Mix of In-house and Outsourced Counselling

The Use of Independent Counsellors

Currently, the Victims of Crime Bureau is relying almost solely on the use of independent counsellors for its referrals. As previously mentioned, fees for payment of these are set at $70 for social workers, $90 for psychologists and $110 for psychiatrists. The vast majority of the work is currently being undertaken by clinical psychologists at $90 per hour. Although free counselling services are available to the Bureau through agencies such as Sydney City Mission and Area Health Services, these are currently not being utilised to any significant extent.

While the Committee understands that Area Health Services tend to have long waiting lists for their counselling services and, as such, would be largely inappropriate for victims of crime who need counselling as soon as possible after the event, the Sydney City Mission expressed disappointment to the Committee that it had only received three

counselling referrals from the Bureau since May 1997. It was further argued that the degree of duplication between the Mission and the Bureau meant that the Mission was less busy than it had been in the past:

> *"Chairman: Given that the Victims of Crime Bureau is providing accredited counsellors in the community, how has that impacted on the service that you have been providing for some time? Do you see that there is duplication of a service that is already being provided?*
>
> *Ms Patrick: With face-to-face counselling, yes. It is difficult for me to make too much of a comment here. In the recent past we have noticed that our numbers are down with face to face telephone counselling."*
>
> Transcript of Evidence 10 November 1997, p39

The Committee considered it disappointing that, given the Sydney City Mission receives $150,000 per year from the State government to run the Victims of Crime Service, it may be currently underutilised by the Bureau and preference instead being given to private practitioners at a considerable cost to the taxpayer. The Mission provides counselling to victims of crime through the use of both volunteer counsellors and paid counsellors on a salary of around $45,000 per year, which is a much more cost effective option than $90 per hour.

Partial Outsourcing of Counselling: the Western Australian and South Australian Experience

Both Western Australia and South Australia provide a support service dedicated to victims of crime through their Justice Departments. These services involve a mix of full-time counsellors within their victims support services based in Adelaide and Perth and partial outsourcing to services within regional areas. These schemes have proved to be extremely cost effective.

Within Western Australia, regional services are provided through the major centre within each region. These are: Rockingham and Mandurah in the Peel; Bunbury in the South West; Albany in the Great Southern; Kalgoorlie in the Goldfield/Esperance; Northam in the Wheatbelt; Geraldton in the Murchison and Gascoyne; Port Headland in the Pilbara; and Broome in the Kimberley. A copy of the Victims Support Service contract is provided in Appendix 1.

These regional centres operate services on a part time basis between 15 and 22 hours a week depending upon demand. This work is undertaken under contract at a rate of between $36 - $38 per hour. The contractors provide face to face counselling and support to victims in their respective centres and services by telephone and fax to victims living in other centres within their region. Additional funding has been approved to provide Services in the other centres that have superior court sittings.

In the 1995-96 financial year the Western Australian Victims Support Service provided counselling for 780 victims of crime and overall support for 6,000 victims of crime at a cost of $984,000, including the cost of contracted regional services. This can be contrasted with the following figures supplied to the Committee by the Bureau.

No. of Counselling Clients	**No. of Hours Received**	**Total Cost**
2,772	2 initial hours at $90 per hour	$498,960
1,386 (50% of above clients)	20 additional hours at $90 per hour	$2,494,800
2,772 total clients	**33,264 total hours**	**$2,993,760 total cost**

Source: Victims of Crime Bureau 28 November 1997

The above table indicates that to date the Bureau has supplied 2,772 clients with counselling under the current system at a total cost of nearly $3m. This can be contrasted with the Western Australian model which has dealt with 6,000 clients including 780 counselling clients for a third of the cost. The figures for counselling provided by the Bureau have also not factored in the cost of running the Bureau which had a budget of $600,000 for the 1996-97 financial year.

Therefore, a rough financial comparison between the Western Australian and New South Wales models can be drawn.

Total Cost of W.A. Victims of Crime Support Service including the provision of counselling to 780 clients and general assistance to 6,000 clients	$984,000
Total Cost of Victims of Crime Bureau including the provision of counselling to 2,772 clients	$3,593,760
Difference in cost between the Services	**$2,609,760**

It is acknowledged that a direct financial comparison is hard to draw, given that the Bureau only offers counselling. However, although the Victims of Crime Bureau has provided counselling to over three times the amount of clients than the Western Australian Victims of Crime Support Service, the Western Australia Service has helped 6,000 victims of crime with a variety of services which are not being currently offered by the Bureau. These included assistance with applications, dissemination of information concerning the criminal justice procedures and witness assistance.

It currently costs the Bureau $600,000 per year just to refer victims to counselling while Western Australia runs a complete service including counselling for just under $1m.

During the course of its first inquiry into the provision of alternative services for victims of crime, most witnesses who appeared before the Committee were of the view that the majority of counselling services should be provided by the public sector. The Department of Health emphasised that Area Health Services and other government sector organisations already have the infrastructure in place to provide cost effective counselling in key geographic locations. The Department of Health employs Grade 5 psychologists as counsellors at a salary of $49,297 per year or $32.00 per hour with on costs.

Major Advantages of Partial Outsourcing

A major advantage of outsourcing is that counselling services may readily be provided within regional centres which would not normally demand the dedicated time of a full-time counsellor for victims of crime. The Committee fully appreciates that victims of crime need urgent access to services and can understand the concern that any funds which are directed to the Department of Health for victims of crime, given the Department's large jurisdiction of competing priorities, may ultimately be subsumed. However, it believes that the Department of Health, through its Area Health Services, may in many instances, be most appropriately geographically placed, and have the most relevant experience, to competitively bid for regional contracts should it wish to do so. Similarly, other services with existing infrastructure and experience, such as Sydney City Mission, are operating within regional centres.

The Committee was told by a number of support groups that some victims in regional areas are not being adequately serviced through the current system due to the fact that insufficient counsellors had applied for accreditation within their region.

The Committee floated the idea as part of the inquiry of some victims of crime counselling work be put out to tender. The Department of Health submitted that it was in an excellent position to bid for such contracts:

> *"In relation to the provision of in-house counselling, New South Wales Health would agree that the use of salaried staff is a more cost effective option in most situations. New South Wales Area Health Services may be well placed to respond to an expression of interest by the Bureau for contracted counselling services. Due to the training, professional development and management infrastructure in place, this option may provide better professional support for counselling staff and linkage into other services for the Bureau's clients than the Bureau employing its own counselling staff."*
>
> Submission from Department of Health p1

Likewise, Sydney City Mission indicated that it would be interested in participating in a system of partial outsourcing of counselling services by the Bureau through the Mission's regional offices, similar to the Western Australian model:

> *"Yes, we do have those (counselling) services in some of country New South Wales. I would be loathe to say that we should put on a full-time person in those areas but because we have a diversity of services, we could use that person part time in a particular service and also have him or her involved in other welfare type services. Therefore, we could be more cost effective than if he or she were employed by the Bureau, for instance, to do one task with people not gaining access to that person. We would be more cost effective."*
>
> Mr South, Transcript of Evidence 10 November 1997, p45

Other major advantages of the Western and South Australian systems are that they allow for a greater standardisation of services and data collection and can result in a more holistic approach to victims services. Through contractual obligations and the provision of training, victims are offered counselling "within a context":

> *"Counselling Services within the context of the Victim Support Service include more than just therapeutic counselling. It is counselling in a context and it is our view that counsellors need to be more than just therapists. They need a comprehensive understanding of criminal justice so that they can provide that counselling in a context. ... counsellors are trained in a range of criminal justice procedures and processes in order to provide information and support to victims. All counsellors have significant experience in crisis and trauma counselling as a prerequisite to gaining employment with the Service. There is a commitment to ongoing training and professional development for counselling staff, with regular training and information sessions as part of their fortnightly meetings."*
>
> Submission from WA Victim Support Service, p2

The advantages of such a system were acknowledged by the Manager of the Victims of Crime Bureau, Ms Marianne Curtis, during her appearance before the Committee:

> *"If we were to look at a mix of in-house counsellors and accredited counsellors, or in-house counsellors only, the most important advantage would be the direct link between the work of the Bureau and those counsellors. Some fairly simple administrative and data collection procedures could be put in place. We would be able to issue appropriate policies, procedures and guidelines. We would have internal controls to monitor such issues as potential over servicing, and we could provide easier access to training and development."*
>
> Ms Curtis, Transcript of Evidence 10 November 1997, p.20

Another major advantage of the contractual scheme is the regional coverage it provides for. The Committee has been told by victims support groups such as VOCAL that victims in some regional areas are currently missing out on counselling due to the fact that there is no accredited counsellor within travelling distance. A scheme such as the Western Australian one bolsters existing regional services while allowing the Bureau to purchase counselling hours on a demand basis only. As previously mentioned agencies such as Sydney City Mission, the Salvation Army and the Department of Health already have appropriate existing infrastructure and expertise in place in many regional centres.

Potential Cost Savings

In its submission to the Committee the Victims Compensation Tribunal and the Victims of Crime Bureau indicated that, given that the counselling scheme is currently costing $2.99m per annum, a saving of $863,000 per annum could be made through the provision of in-house counselling:

> "*If the scheme were to operate with in-house counsellors only, then based on an in-house counsellor seeing clients face to face for 20 hours per week for 48 weeks per year, each in-house counsellor could provide 960 counselling hours per year. Therefore, to provide the same number of counselling hours as envisaged under the existing arrangement, 35 in-house counsellors would be required to be employed. This is projected to result in a total cost of $2.13m per annum (this is inclusive of employee related and administrative on-costs). This represents a saving of $863,000 per annum".*
>
> Submission from the Attorney General's Department, p7

The Committee questions this calculation on a number of grounds. Firstly, only the employment of in-house counsellors by the Bureau is addressed in the submission, without reference to contracting out some of the services which may be more cost effective as it would be a competitive tendering process with a number of agencies vying for the work. Particularly, in regional centres the employment of a full-time in-house counsellor may not be necessary.

Secondly, a system similar to the Western Australian system in which a more holistic approach is taken to the provision of services would alleviate the present workload of the Bureau and other agencies of the Attorney General's Department such as the Victims Compensation Tribunal, the Director of Public Prosecutions Witness Assistance Programme and Chamber Magistrates of Local Courts.

Thirdly, the issue of capping provision of counselling at five sessions per application except in extreme circumstances is not addressed.

The Western and South Australian models demonstrate that dedicated counselling for victims of crime can be offered far more economically, and arguably more effectively, than it currently is in New South Wales. This makes the Bureau vulnerable to losing its counselling function to larger agencies which are delivering similar services more cost effectively such as the Department of Health.

The Committee believes that support services for victims of crime should ideally remain under the jurisdiction of the Tribunal to ensure victims prompt and appropriate attention. As discussed in the Committee's First Interim Report concerning the provision of alternative services for victims of crime, it is well acknowledged that to be most effective counselling should be given to victims as close to the time of the event as possible. However, careful consideration must also be given as to how best to deliver these services in the most cost-effective manner.

The Role of Support Groups

The Committee believes that in tandem with the rationalisation of counselling sessions currently being provided, funding to support groups should be bolstered in order to allow them to better provide for the longer term needs of victims. The Homicide Victims Support Group is at present receiving $200,000 per year from the Department of Health to provide, among other services, counselling to homicide victims. The Committee would like to see other support groups such as the Victims of Crime Assistance League (VOCAL), which currently receives no government funding, also receive money to provide such services. As VOCAL pointed out in its submission to the Committee:

> *"It has been our experience that support groups effectively reduce the hours of face to face counselling required, as there comes a point where a victim begins to identify with other members of the group and recognise that the emotions that they are experiencing are normal and merely part of the process of moving from victim to a contributing member of society. There is nothing more encouraging to one victim of crime than to know that their experiences have effectively assisted another victim moving on."*
>
> Submission from Victims of Crime Assistance League, p3

Further, under a system which provides for partial outsourcing of counselling, support groups may be well placed to bid for contractual work.

It is also recommended that funding be provided for training of volunteers for victims support groups within country areas of New South Wales on the basis that their services will be voluntary and could result in substantial cost savings to the scheme. As in the United Kingdom volunteers of such established groups should be trained specifically to assist victims to complete applications for compensation as well as to provide other support services.

A Change of Name for the Tribunal

The Committee also believes that it is appropriate that the Victims Compensation Tribunal change its name to properly reflect the inclusion of the counselling provision and the re-emphasis on support services. It is suggested that "support", "services" or "assistance" should be substituted for the word "compensation". This will also necessitate a change in the name of the legislation.

Recommendations

10. That the provision of counselling to victims of a crime which does not involve homicide or sexual assault be capped at four to six sessions except in exceptional circumstances. The Accreditation Board should determine when such circumstances exist.

11. That the Victims of Crime Bureau be funded to employ full time counsellors within its service to provide counselling to victims of crime.

12. That the Victims of Crime Bureau outsource any counselling work it is unable to provide using a competitive tendering process.

13. That funding be provided to Victims Support Groups to allow them to better provide for the longer term needs of victims of crime. In particular, VOCAL should be provided with funding to employ at least one full time counsellor. In relation to regional and rural areas it is recommended that funding be provided for training of volunteers to provide victim support, where appropriate.

14. That the Victims Compensation Tribunal and its enabling legislation change their titles to one more inclusive of counselling and support services.

A.7 LESS VIABLE OPTIONS

A.7.1 PAYMENTS FOR LOSS OF EARNINGS

Background

The *Victims Compensation Act, 1987* contained provisions that entitled victims of crime, on sufficient proof being supplied, to claim loss of earnings up to a maximum of $50,000. Provided the applicant could produce evidence showing a causal link between the injuries sustained as a result of an act of violence and the loss of earnings the applicant, in certain circumstances, was entitled to receive large sums of loss of earnings including any future loss. In some cases applicants have received large sums for loss of earnings on the basis that as a result of an armed robbery at their business they were forced to sell at a loss. That loss was accepted as loss of earnings.

Discussion of the Current Arrangements

The issue of payment of loss of earnings was reviewed in the *Brahe Review* of March 1993. Mr Brahe, when examining the issue of whether or not a person is victimised by a violent crime should be compensated to the full extent of his or her lost weekly income recommended, that compensation payable to all victims for actual loss of earnings, loss of future earnings and loss of earning capacity should be limited to maximum weekly rates prescribed pursuant to Section 37 of the *Workers Compensation Act 1987* from the date of the act of violence.

Mr Brahe quoted the rates under that Act and said:

> *"These rates are not generous, but they have been set with a view to enabling a worker and his/her family to live with dignity during the period of the worker's incapacity for work. There seems no reason why victims should be better off under this head of the Victims Compensation Act than under the Workers Compensation Act."*
>
> The Brahe Report 1993, p44

The 1996 Act provides for compensation for financial loss including *actual* loss of earnings limited to a maximum of $10,000. This is a reduction from the previous $50,000 provided under the 1987 Act. Loss of earnings under the 1996 Act is further limited to weekly loss of actual earnings and is to be calculated at the rate of weekly payment of compensation payable under the *Workers Compensation Act 1987* after the first 26 weeks of incapacity within the meaning of that Act.

The workers compensation provision provides for a weekly amount up to $235.20 per week, an additional $62 per week for a dependant wife or husband; and if the worker has a dependant child, then a further $44.30 is payable, $99.10 for two, $164.16 for three and $230.90 for four.

The limit on payment for loss of earnings by eliminating future earnings and secondly, by capping the weekly sum to the provisions of the *Workers Compensation Act 1987* will no doubt restrict payments under this heading. The Attorney General's Department have submitted to the Committee that as no cases involving loss of earnings under the 1996 Act have been determined at this stage it is not possible to cost the effect of introducing the new loss of earnings provisions nor is it possible to cost the loss of earnings component of awards determined by the Tribunal under the 1987 Act, as it is usually included either in the total amount awarded as expenses or as part of a "global" award determined by the Tribunal Member.

In a submission to the Committee dated 3 December 1997 in respect of claims determined, the Tribunal has indicated that a "true pattern should have emerged by the end of March 1998". This will also be so for loss of earnings.

Conclusion

The Committee concluded, on the basis of the information it received, that this option would not offer significant savings to the scheme and that the present arrangements appear equitable for victims.

A.7.2 RESTITUTION

Background

The Committee considered, as part of its inquiry, whether the pursuit of restitution from offenders was currently cost-effective.

The pursuit of restitution from offenders represents a commitment by government that offenders should contribute to the compensation of their victims. Further, the Brahe Report noted that absolving offenders of this responsibility was never a purpose of the Victims Compensation Fund. It is acknowledged, however, that actual recovery of moneys from offenders will always be substantially lower than the potential for recovery due to the financial circumstances of many offenders.

Currently, New South Wales and Western Australia are the only two States in Australia that pursue restitution from an offender. Most States and international jurisdictions consider that it is not a cost effective exercise. In some jurisdictions, such as the District of Columbia in the United States, restitution may be ordered at the time of conviction. The amount ordered is discretionary, and often determined according to the perceived capacity of an offender to pay.

Historically the Tribunal has had little success in recovering money from offenders in comparison to the total pay out of awards. According to the Tribunal's 1995-96 Annual

Report, of the $82.9m awarded in compensation in that year, a total of $1.86m was recovered from offenders. Outstanding debts to the Fund recorded by the Auditor General at 30 June 1996 totalled $113.9m, with a provision for doubtful debts of $102.9m.

While the amount recovered from offenders is nominally low it is important to recognise that not all monies awarded for compensation can be a potential source of restitution. Restitution proceedings can only commence if an offender has been convicted of a relevant offence which accounts for only 51.2 per cent of all compensation awards. Even if offenders can be located once restitution proceedings have been initiated, many are unemployed, on some form of welfare payment or are in custody.

Past Problems

Aspects of the recovery process have historically been structured in a way that creates a significant time lag between the granting of an award for compensation and the commencement of proceedings for restitution. Prior to commencement, the Registrar had to be satisfied that an award for compensation was made on the same grounds that the offender was convicted. Once a notice for restitution had been served, the offender had two months in which to show cause as to why an order for restitution should not proceed. If no cause is shown within the appropriate time, the notice was brought before the magistrate who then approved the order for restitution.

The inability to locate offenders due to the time lag has been a major impediment to successful recovery and the Tribunal's most recent Annual Report notes that the longer the delay in pursing restitution, the more difficult it is to locate the offender. In 42 per cent of cases referred to the Debt Recovery Office for enforcement, the location of offenders has been unknown.

Even when the location of offenders is known, cost effective recovery has been mitigated by practical difficulties in enforcing restitution orders when an offender did not comply with a restitution agreement. The Tribunal lacked the power to directly issue writs of execution, having to wait for authorisation to be granted through local courts when pursuing non-compliant offenders.

Difficulties in recovering funds has also been due to the lack of means of many offenders and their custodial status.

The 1996 Changes

Changes under the new Act have facilitated a more efficient recovery procedure. Under the new legislation, a provisional order for recovery can be made at the same time that an award is granted. Offenders now have only twenty eight days in which to lodge an

objection to the notice of recovery, instead of the two months provided for under the 1987 Act.

Importantly, the Tribunal now has all the powers of a Local Court (s54(1,4)). This means that the Tribunal has autonomous power to enforce restitution orders, including issuing of writs of execution and garnishee orders. The Tribunal can also charge interest on restitution amounts payable. Thus while the Tribunal continues to liaise with courts to determine whether an offender has been convicted, once the recovery process is underway, the Tribunal has sole authority to facilitate proceedings.

The new legislation provides for greater information links between the Tribunal and other agencies regarding offenders' whereabouts. Section 58 authorises agencies such as the Roads and Traffic Authority and police officers to provide the Director with the most recent address of the offender. Speedy access to this information should facilitate the Tribunal in locating offenders and thus in pursuing restitution more efficiently.

The Attorney General's Department submitted to the Committee that :

> *"We are hopeful that the amount of profit over the amount that is required to pursue restitution will steadily increase. That has been a fairly long road, but...we are starting to recover some of that amount. Of course, we will never recover anything like the amount that is paid out of the fund, but we are certainly making solid moves in the right direction.*
>
> Mr Grant, Transcript of Evidence 10 November 1997, p2

Total costs incurred in the pursuit of restitution stems from two main sources: salary costs and debt recovery fees that include a filing fee and disbursements. In 1996-97, the total amount of restitution recovered amounted to $1.8m. Of this amount, total costs (including salary costs and debt recovery fees) incurred in 1996-97 amounted to $998,023. The remainder can be considered profit.

In a submission to the Committee, the Tribunal stated that salary increases have been kept to a minimum and a new computerised debtors system has been implemented, and this is anticipated to reduce operational costs associated with pursuing restitution.

Debt recovery fees have also fallen. Previous fee arrangements between the Victims Compensation Tribunal and the Debt Recovery Office estimated the cost of a single restitution matter at $100, excluding disbursements. In early 1997 a further agreement was reached, where a filing fee of $70 per matter was to cover all action taken by the Debt Recovery Office.

The Tribunal's Annual Report 1996-97 outlined the following steady increases in recovery from offenders in the past three years:

	1994-95	*1995-96*	*1996-97*
Restitution ($mil)	*0.67*	*1.55*	*1.80*

Net restitution for next three years is expected to continue to increase:

> *"There was a projection for the financial year 1997-98 of $2.4m, which was predicated on the implementation of the new computerised debtor system. Unfortunately, that has been delayed somewhat, so it is anticipated that last year's figures will be maintained for this year. But in the financial year of 1998-99 that figure of $2.4m is expected to be realised, and we anticipate an increase of 25 per cent in the ensuing three years."*
>
> Mr O'Toole, Transcript of Evidence November 1997, p13

Conclusion

In the last two years there has been an improvement in the rate of restitution recovery to the extent that the Tribunal can claim a $802,000 profit from restitution activity. If current projections are on target, the net profit from restitution activity should continue to increase. It appears that the current recovery process is functioning relatively efficiently.

A.7.3 COMPULSORY LIABILITY INSURANCE

Background

A system of compulsory personal liability insurance has been introduced in Quebec, Canada. It is expected that this will alleviate many claims upon their victims compensation funds as victims may go directly to the insurance scheme when they know the identity of their attacker. The Committee considered whether the introduction of such a scheme into New South Wales may be a viable option.

Discussion

The Attorney General's submission did not address the issue in its submission as it did not feel equipped to do so. Mr Cec Brahe, Chairman of the Tribunal, commented in his submission that he did not consider such a scheme would meet with broad public support:

> *"I do not see this as a viable option. It is difficult enough no to get the public to insure their motor vehicles, homes and contents. I do not see the public endorsing such a proposal."*
>
> Submission from the Victims Compensation Tribunal, p 3

The issue was also not addressed in any of the other submissions the Committee received. Further, the Committee could find no evidence of any research having been done in this area in a local context. However, given that the majority of perpetrators of criminal activity are in the lower socio economic bracket, their ability to contribute to such a scheme is questionable.

Conclusion

The Committee concluded that the introduction of such a scheme would be administratively complex and costly and would have the undesirable effect of promoting a large upsurge in personal injury litigation.

A.7.4 STANDARD OF PROOF

Background

The law recognises two standards of proof. The standard applied in criminal proceedings, *beyond reasonable doubt* and the civil standard of *on the balance of probabilities.* The Committee considered whether changing the burden of proof required under the *Victims Compensation Act 1996* to the more onerous criminal standard would result in substantial savings to the scheme.

Legislative Requirements

The standard of proof imposed by *The Victims Compensation Act* 1996, is the civil standard of *on the balance of probabilities*. Section 29 (2) of the *Victims Compensation Act 1996* states:

> *"S29 (2) An award of statutory compensation must not be made unless the compensation assessor is satisfied, on the balance of probabilities, that the person to whom the application for that compensation relates:*
>
> *(a) is primary victim, secondary victim or family victim of an act of violence, and*
>
> *(b) is eligible to receive the amount of compensation provided by the award.*"

Options

It is anticipated that raising the standard of proof would have the effect of reducing the number of applicants and the demand on funds by eliminating claims which are not substantiated by strong supporting evidence.

The Committee considered the consequences of a change to the standard of proof in the light of the South Australian criminal injuries compensation legislation which requires that no order for compensation be made unless the commission of the offence

relating to the application is proved beyond reasonable doubt. The Committee has also addressed issues raised in submissions provided in response to the Background Paper it prepared in relation to this inquiry.

Application of the Criminal Standard of Proof to Criminal Injuries Compensation

South Australia is currently the only criminal injuries compensation scheme in Australia which requires proof, beyond reasonable doubt, of the commission of a criminal offence before an order for compensation may be made.

When first introduced the South Australian *Criminal Injuries Compensation Act* 1978 provided that any fact to be proved by a claimant in proceedings under the Act is sufficiently proved if it is proved on the balance of probabilities (s8(1)).

The Act was amended in 1982 to include the two standards of proof. It retained section 8(1) with its civil standard of proof and introduced the more onerous standard of proof, beyond reasonable doubt, to claims for compensation. In this respect section 8(1a) of the Act provided that no order for compensation could be made unless the commission of an offence and a causal connection between the offence and the injury could be proved beyond reasonable doubt.

The Act was amended further in 1986. It retained s8(1) and the application of the criminal standard of proof to any order for compensation in s.8(1a) but changed the standard of proof required to establish a causal connection between the commission of the offence and the injury or death addressed in the application to the civil standard. The Act was also amended to include s8(1b) which provides that where an order for compensation is sought in respect of an offence and no person has been brought to trial, the evidence of the claimant must be supported in material, particularly by corroborative evidence, in order to establish commission of the offence.

When the Act was amended in 1982 to require the higher standard of proof the South Australian Attorney General at the time, the Hon K T Griffin, explained that the imposition of the criminal standard of proof was primarily aimed at dealing with dubious claims.

In February 1995, the Legislative Review Committee of the South Australian Parliament reported on its inquiry into the *Criminal Injuries Compensation Act* 1978. One issue addressed by the inquiry was the standard of proof required to make an order for compensation. The Committee received a number of submissions critical of the existing standard. Some of these criticisms are set out below:

> *"Criminal injuries compensation is a damages claim and therefore a civil claim. We can see no reason why it should not be on the same footing as all other civil claims. Placing the highest onus on civil claims places an unfair burden on victims without apparent justification."*

In another submission to the Review Committee from Mr Mitchell:

> *"In many cases victims perceive a treble injustice. Firstly, the victims perceive an injustice in that they are a victim of crime. Secondly, the victims then perceive a massive injustice when they are unable to prove their case beyond reasonable doubt because of the inadequacy of the evidence. Thirdly, the victims perceive a further injustice in the system when they are unable to obtain compensation notwithstanding in many cases clear evidence of physical or massive psychological disturbance to the victim."*

The South Australian Legislative Review Committee's report concludes that the application of the higher standard of proof to claims for compensation is not warranted. The Committee notes that this standard is not applied elsewhere in Australia and states that it is not convinced the higher standard eliminates or even discourages spurious claims. The Committee recommends that in claims for criminal compensation proof of the commission of an offence be changed from *"beyond reasonable doubt"* to *"on the balance of probabilities".* To date, the *Criminal Injuries Compensation Act* 1978, has not been amended to reflect this recommendation.

The use of the criminal standard of proof to screen out 'dubious claims' has also been considered by the Australian Capital Territory. The Territory's *Criminal Injuries Compensation Act* 1983, provides that applications must be determined on the balance of probabilities.

A recent discussion paper produced by the Australian Capital Territory Attorney General, *"Reform of the Australian Capital Territory Criminal Injuries Compensation Scheme*", recommends that the criminal standard be applied to prove the commission of an offence where the identity of the person whose criminal conduct is alleged to have caused the injury is not disclosed in the application. The discussion paper states:

> *"The purpose of such an amendment would be to assist in screening out dubious claims. From time to time, claims are presented which appear to be verging on the fraudulent."*

The paper describes the type of evidence which an applicant would need to provide in order to meet the higher standard of proof. This includes corroborating evidence of another person who witnessed the alleged incident, evidence that the incident was reported promptly to the police or another person and medical evidence of the applicant's condition which is consistent with their account of the alleged criminal act.

It is envisaged that the stricter test would not apply where there has been a prosecution for an offence that is related to the criminal injury but would be restricted in its application to cases where there has been no related prosecution. To date the Act has not been amended to reflect this recommendation.

The Effect on Claimants of a Change in the Standard of Proof

If section 29(2) of the *Victims Compensation Act* 1996, was amended to require proof of the commission of a criminal offence beyond reasonable doubt it would have a significant effect on the success of claims for certain types of criminal injuries.

In most cases applicants would need to provide substantial supporting evidence to prove their allegations. This would eliminate claims which involve offences where it is difficult to provide corroborative evidence, a perpetrator has not been apprehended or no conviction has been recorded. These cases are estimated to account for approximately 45 per cent of all applications. Elimination of these claims would have a disproportional effect on cases of sexual assault and domestic violence.

The submission from the Attorney General's Department raises the following problems which could arise if the standard of proof is changed to beyond reasonable doubt. It states:

> *"Having a higher standard of proof will be a problem for some victims of certain types of violent crime. These include child abuse cases, including child sexual assault, sexual abuse cases including adult survivors of sexual abuse and victims of domestic violence. In these cases the dynamics of the abuse/assault are such that there may not be an offender to go to trial, a client may feel powerless or unable to report the matter, and even if reported to the police there may not be enough evidence to gain a conviction. As such, this amendment could discriminate against many victims of long standing sexual and/or violent abuse."*
>
> Submission from the Attorney General's Department p2

The submission from the Law Society of New South Wales also highlights the problems which would be experienced by victims of sexual assault if the standard of proof is raised. The submission makes the following points:

> *"Raising the standard of proof to the criminal standard will disqualify a large number of victims who are presently compensated by the Scheme.*
>
> *There are many sexual assault victims who are compensated in cases where alleged offenders are not charged, or who are acquitted, have died of natural causes before proceedings are commenced (or during them) or who suicide at various stages leading up to the trial. There would be many child victims in this category, as well as child victims who are making applications as adults for offences that occurred in their childhood years. As the Committee would be aware, corroborated evidence is rarely available in cases involving sex charges.*
>
> *Sexual assault victims would be disqualified in large numbers if the burden of proof is raised. This is because it is common for these victims to request the prosecution to discontinue charges where the victim has a real and genuine fear of retaliation form the alleged offender, the offender's family or friends. At present, these victims qualify for compensation because the civil standard of*

> *proof applies. In many cases, the victims are able to satisfy the Tribunal under section 30(1)(d) and section 30(1)(e) of the Victims Compensation Act 1996, that circumstances exist which explain the victim's failure to assist in the prosecution of alleged offenders. This type of evidence is usually accepted by the Tribunal in the form of a Statutory Declaration by the victim, possibly being supported by a Statutory Declaration from family members or friends who may have witnessed the taunts of an offender, particularly during the investigation stage.*
>
> *There is no evidence that victims who could not satisfy the criminal standard of the burden of proof are less worthy to be compensated than those victims who have been 'fortunate' enough to see an offender convicted."*
>
> Submission from Law Society of NSW p2

A submission from an adult victim of child sexual assault expressed the effect such an amendment would have in the following terms:

> *"This is a crime that is perpetrated in secret against children. They are silenced in their protest, they have no way of gathering or retaining evidence that will substantiate their claims later in life. As children there is very little chance for them to do much else than survive the abuse. It is years later that the majority of sexual abuse survivors are strong enough to seek some form of recognition for the crime committed against them."*
>
> Submission from Mrs P. Wagstaff p1

In his submission, the Chairman of the Victims Compensation Tribunal, Mr Brahe states:

> *"Applicants, particularly children, could be prejudiced in their claims where criminal proceedings have failed.*"
>
> Submission from the Victims Compensation Tribunal p1

The Attorney General Department's submission also mentions the effect this option would have on victims of sexual assault :

> *"The higher standard would discriminate for some victims including those claiming for child sexual assault and sexual abuse."*
>
> Submission Attorney-General Department, p2

The submission from Combined Community Legal Centres (NSW) highlights the remedial and beneficial nature of *the Victims Compensation Act 1996,* and states that raising the standard of proof would alter the very nature of the legislation. It states:

> *"This [raising the standard of proof] would remove the remedial and beneficial nature of the legislation. It is in complete contradiction to the spirit and intendment [sic] of victims compensation legislation in New South Wales, which includes encouraging victims of crime to participate in the criminal justice system, and to acknowledge their injuries and suffering."*
>
> Submission from the Combined Community Legal Centre Groups of NSW, p3

Procedural Problems Associated with Adopting the Criminal Standard of Proof

Applying the criminal burden of proof to claims for compensation could create procedural difficulties and legal contradictions which would result in delays and complications in resolving applications.

In its submission the Office of the Director for Public Prosecutions argued that the standard of proof should remain at the civil standard because this is the standard applied in any damages action. The submission argues against changing the standard in the following terms:

> *"It would mean that only in those matters where a guilty verdict had been reached would there be any real likelihood of compensation for a victim. Where the jury had reached a not guilty verdict and in the case of a hung jury then a victim would not be entitled. The proposal may also provide defence lawyers with the ammunition in criminal trials in alleging that the motive behind the complainants action was the need for a criminal conviction in order to obtain compensation. It follows then that compensation would only be made available after a trial and or criminal appeal which could take years in some cases.*"
>
> Submission from the DPP p1

The Victims Compensation Tribunal submission states that if the standard of proof is raised to beyond reasonable doubt, proceedings conducted by the Tribunal's Assessors could be seen as an appeals court. It states:

> *"In those cases where a judge of magistrate has dismissed a charge or a jury acquitted the offender the Assessor would in effect by sitting as an appeals court and if a different conclusion was reached on the same evidence where the onus of proof was the same, criticism of the decision of the Court at first instance could arise."*
>
> Submission from the Victims Compensation Tribunal p1

The Effect on Costs of Changing the Standard of Proof

If the standard of proof was raised to beyond reasonable doubt it would undoubtedly result in savings to the Victims Compensation Fund. However, the actual extent of these savings is not clear. The Victims Compensation Tribunal has estimated that approximately 30 per cent of all cases determined under the *Victims Compensation Act* 1987, would not succeed if they had to be proved beyond reasonable doubt. However, the change in the burden of proof could result in procedural and evidentiary changes which would be more resource intensive and costly for the Tribunal and therefore cancel out some of the savings made.

In its submission the Attorney General's Department states that:

> *"Tribunal members have estimated that approximately 30 per cent of all matters determined under the 1987 Act would not meet the beyond reasonable doubt*

> *provisions as applied in South Australia. In 1996/97 this would represent a saving, exclusive of associated professional costs and disbursements, of approximately $20m."*
>
> Submission from the Attorney General's Department p2

The submission, however, acknowledges that these savings could be, in reality, reduced by other factors such as a rise in administrative costs in other areas:

> *"It should be noted that this figure does not allow for the possibility that if the standard of proof was raised, the standard of documentation filed in support of an application may also be raised, thereby lowering the potential savings. Furthermore, the Tribunal may be required to conduct more compensation hearings in order to determine whether the higher standard of proof has been met, again reducing the potential savings."*
>
> Submission from the Attorney General's Department p2

Similarly, the New South Wales Police Service, in its submission to the Committee, expressed concern regarding the extra burden which may be put upon police:

> *"My concern is that increasing the standard of proof for compensation purposes from the balance of probabilities to reasonable doubt might lead to an increased requirement on police to appear before the Tribunal and give evidence. Under present arrangements police hardly ever appear before the Tribunal. The onus of proof is normally established by utilising written material provided to the Tribunal on request. Any proposal that results in an increase in the requirement for police to be in attendance at compensation hearings, at the expense of operational policing duties, is opposed by the Service".*
>
> Submission from the Police Service p1

Conclusion

In the light of the beneficial nature of this legislation any potential savings to the scheme which might result from raising the standard of proof are outweighed by the detrimental effect on certain claimants, particularly those who have experienced sexual assault, and the potential procedural and evidentiary difficulties which would affect both claimants and the Tribunal. The Committee does therefore not consider that the standard of proof should be raised from the balance of probabilities.

A.7.5 UTILISATION OF TREATING PHYSICIANS TO CLASSIFY INJURIES

Background

The United Kingdom system of victims compensation bases applications for compensation on a Schedule of Injuries in a similar manner to the NSW Scheme. However treating physicians provide a report to the Criminal Injuries Compensation Board in line with the Schedule of Injures, not solicitors as is generally the practice in

NSW. Physicians are paid $60 for a simple report, to $175-$200 for a report with an examination.

The Committee considered whether the implementation of this method may address the current problems in categorising injuries under the Table which are occurring in New South Wales since the introduction of the 1996 scheme:

> *"Present figures for claims registered under the 1996 amendments would indicate that something in excess of 90 per cent of claims have had to be returned to legal practitioners because they have either been not itemised which particular item in the schedule their client is claiming under or they have not provided the appropriate medical evidence to back up that claim."*
>
> Mr Bill Grant, Transcript of Evidence 10 November 1997, p14

It would appear that part of the problem stems from a lack of familiarity with the specific vocabulary needed to assess claims in line with the Schedule of Injuries:

> *"They [solicitors] were still submitting descriptions such as stab wounds rather than breaking them down to the exact internal organs that were affected as per the Schedule of Injuries in the medical terminology."*
>
> Mr Phil O'Toole, Transcript of Evidence 10 November 1997, p14

This results in a cumbersome and expensive administrative process where the Tribunal classifies the injury themselves and the application is sent back to the solicitor for comment. The Director of the Tribunal estimated that in his opinion, using treating physicians to classify injuries would halve administrative processing times and thus present overall cost savings.

It was considered that application forms could be distributed in emergency wards and among general practitioners who would complete the form when treating the victim of crime. The treating physician would then convey the form to the Tribunal.

In a submission to the Committee, the Tribunal noted that medical reports are currently an expense of the claim, costing no charge if the report is part of a bulk billed consultation, and rising to over $400 in some cases. It is clear that an arrangement between the relevant professional bodies would need to be reached over an acceptable fee arrangement if this option was pursued.

It appears that this option has support from the relevant interest groups. The Department of Health indicated in a submission to the Committee that it would support the adoption of a system whereby the physicians classify injuries and are remunerated by the Bureau on a fee for service basis.

The New South Wales Branch of the Australian Medical Association also indicated in a submission to the Committee that it would be prepared to participate in discussions

regarding fees for services provided by treating physicians.

Statistics are not currently available for the total amount paid for medical examinations under either the old or new legislation, and cost savings if this option were implemented would depend in part on the physician's fee for providing each report. Further, psychological and other specialist assessments could not be performed by the treating physicians.

It is recognised that the implementation of this option is dependent on many factors and needs to be considered in light of the current participation of solicitors in the scheme and the relatively short time that the new scheme has been operational. In a submission to the Committee, the Law Society of New South Wales wrote:

> *"It should be borne in mind that the current scheme is experiencing teething difficulties. The Tribunal itself has been slow to assess claims lodged since April, needing time to develop ways to administer the new Act. Solicitors have also struggled to come to grips with the new regime, not because of a lack of understanding of the Act but because they need the direction of the Tribunal itself."*
>
> Submission from Law Society of NSW, p7

Further, the Law Society argued in its submission that physicians should not be expected to make decisions relating to compensation payments and that it is not in the victim's interest to allow them to do so.

The Tribunal's submission acknowledged that the delay in processing claims due to incorrect classification should only be a temporary problem "*which will be addressed via practice notes and education sessions to be conducted by the Tribunal*". The Director of the Tribunal, Mr Phil O'Toole, indicated in evidence before the Committee that one of the first duties of the new Registrar will be to conduct information sessions in regional law societies, and provide further information on using the Schedule of Injuries to all solicitors.

In his submission to the Committee Mr Cec Brahe, Chairman of the Victims Compensation Tribunal suggested the following way to overcome the administrative loops that occur with incorrect classification of injuries:

> *"Rather than have the Tribunal to send the application to the treating physician for classification which may or may not result in the application form being completed and returned promptly, the regulation should provide that where the applicant fails to classify his injury, the Assessor should classify such injury as the least serious under that particular category."*
>
> Submission from the Victims Compensation Tribunal, p 4

Conclusion

Using treating physicians to classify injuries could result in administrative savings to the scheme and the representative medical body has indicated its willingness to consider classifying injuries on a fee basis. However it is clear that the implementation of this option would be complex and have implications for the current participation of solicitors in the scheme. Further, doctors working in emergency rooms of hospitals are invariably busy and required already to perform a myriad of tasks. They are often difficult to contact due to shift work. It is recognised that the United Kingdom scheme may work primarily due to the contractual nature of the relationship between the National Health Service and its physicians.

Recommendations

15. That payments for loss of earnings under the scheme not be reviewed at this time.

16. It is recommended that the current system of pursuing restitution from offenders be maintained.

17. That the introduction of compulsory liability insurance not be investigated.

18. It is recommended that the standard of proof required for an award of statutory compensation under s29(2) of the Victims Compensation Act 1996, be retained at the present standard of *"on the balance of probabilities".*

19. It is recommended that the Tribunal could consider further investigating a system whereby physicians may be used to classify physical injuries to ascertain if it is both feasible and administratively cost-effective.

PART B
Increasing Revenue Into the Fund

B. 1 LEVIES AND FINES

Background

Levies are a revenue-raising device based on the view that law breakers, as a class, should be responsible for specifically funding victims compensation before the general pool of taxpayers. The Committee considered whether an extension of the victims compensation levy to other offences would be an effective way of decreasing the Fund's reliance on consolidated revenue.

In New South Wales a levy is currently imposed upon a defendant if the offence to which the defendant is convicted was punishable by imprisonment and the sentence was imposed by the Supreme, District or Local Court. Offences taken into account under Section 21 of the *Criminal Procedure Act*, 1986 do not attract a levy. Similarly, in Children's Court cases the Court has a discretion whether to exempt the young person from a levy.

The levy imposed within New South Wales contributed to the Victims Compensation Fund from the imposition of the victims compensation levy the sum of $1.89m for the financial year 1995-96, or 2 per cent of the expenditure of the Tribunal. For the previous two years the Fund received levies amounting to $1.63m each year.

Statistical information is not maintained on the number of levies which actually accrued or were imposed but remain unpaid. However the Bureau of Crime Statistics and Research Report for 1996 "Criminal Court Statistics 1996" indicated that approximately 76,008 cases were determined in the criminal courts where a levy should have been imposed. The total amount that may be collected from levies each year using these figures is $2.28m (or 2.5 per cent of the Fund's expenditure).

Other Jurisdictions

Levies are imposed in four other States or Territories of Australia - South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. In South Australia the levy is imposed on all summary offences ($28, or $7 for infringement notices), for indictable offences ($44) and for juvenile offenders ($14). In 1996-97 these amounted to $4.2 m, or just under 33 per cent of the total payout of the Victims Fund.

In the Northern Territory the levy is $30 for an indictable offence and $20 for all other offences; $10 for juveniles and $5 for infringement notices. The Australian Capital Territory introduced a levy scheme that came into effect on 1 January 1997 of $30 on persons who are convicted of a criminal offence. As stated in the discussion paper *"Reform of the Australian Capital Territory Criminal Injuries Compensation Scheme"* issued in June, 1996*:*

> *"The proceeds [from levies] will go some small way to funding the cost of criminal injuries compensation."*
>
> *Reform of the Australian Capital Territory Criminal Injuries Compensation Scheme,* 1996 p54

In the United States 41 of the 52 States impose a levy or receive a portion of the fine imposed on the defendant, for funding compensation to victims of crime. The levies may range from $1 to $500 on varying fines and average $30 for court-based fines and $20 for traffic infringement notices. The States rely heavily on the collection of levies to subsidise their funds. Only 9 of the States are dependent on general revenue including 40 per cent funding from the Federal Government.

In South Australia levies are imposed on all persons who break the law, including delinquent motorists, on the basis that those who break the law should contribute to the Victims Compensation Fund and not the taxpayers generally. Levies in that State amounted to $4.2m or 33 per cent of the expenditure of their victims compensation fund. If New South Wales is to reduce the burden on the general taxpayer then there is a need to either increase the dollar value of the levies currently in place, the Fund to receive a portion of fines imposed, or to expand the type of cases attracting a levy.

Response to an Extension of the Levy System

Apart from increased activity in the area of restitution, increasing the amount of levies collected was considered be the preferred option. The Law Society of New South Wales submitted to the Committee that:

> *" ... one method of raising revenue to supplement legal aid, victims compensation and the general expenses of the Attorney General's Department in New South Wales would be to amend the Justices Act 1902 to increase court costs to 1 penalty unit to be levied on the recording of a finding of guilty*.
>
> *The proposal was qualified to the extent that the power afforded to Justices should be discretionary, with the Justices being required to take relevant matters into account including the means of the defendant and the number of offences proved.*
>
> *In addition to the above, a small levy on fines may well be an appropriate way of increasing revenue into the Fund."*
>
> Submission from the Law Society of NSW, p9

Increasing the amount of fines could have a detrimental effect on the imposing and collection of fines. As Mr Grant, Deputy Director-General, Attorney General's Department has stated :

> *"It is a balancing act as to how high or how low the levies are kept, the willingness of the judiciary in imposing sentences to impose the same sorts of fines as well as the levies and the ability to recover those levies. If multiple offences are involved , though $70 may not seem much for one offence, it is when one has to recover $70 times six or seven offences , and frequently it costs*

> *money to try to recover the amount. It is a balancing act of what is fair and reasonable."*
>
> Mr Grant, Transcript of Evidence, 10 November 1997, p16

Increasing the amount of the levy imposed on criminal cases would not necessarily produce a equal amount of revenue to Fund. As Mr Grant argued:

> *"The increase brought about in the 1996 legislation took it from $20 and $50 to $30 and $70 per offence. That was considered to be manageable and introduced figures people were capable of paying. It could be increased to $200 or $300 but whether that could be recovered from many people committing the offence is another thing altogether and how much it would cost to try to recover that may tilt the scales in favour of smaller increases rather than larger increases."*
>
> Mr Grant, Transcript of Evidence, 10 November 1997 p16

Therefore the potential difficulties in recovering levies if the dollar amount was increased indicates that increasing the number of cases attracting a levy would be the preferred option.

Increasing the number of cases attracting a levy to include all cases before the courts and not limiting the cases to ones that are punishable by imprisonment increases the potential amount of revenue to $2.84m. This amount is still small compared to the expenditure of the Fund. If New South Wales was to widen the cases attracting a levy to include traffic infringement notices similar to South Australia then the following amount of revenue would be generated:

Year	*Total T.I.N.'s*	*$2 levy*	*$5 levy*	*$10 levy*	*$20 levy*
1996/97	*976,364*	*$1.95m*	*$4.9m*	*$9.8m*	*$19.53m*

The combined total of levies on traffic infringement notices ($20 levy =$19.53m) and levies on all court cases ($2.84m) produces a total revenue of $22.37m or approximately 30 per cent of the Funds expenditure.

The Infringement Notice Bureau of the Police Service in 1996-97 issued 976,364 infringement notices for traffic offences including red-light and speeding camera offences, excluding parking offences. The Bureau has, after all enforcement procedures, a 90 per cent success rate in the collection of penalties on infringement notices issued and it is considered that, apart from a small bookkeeping cost, the addition of a levy on traffic infringement notices will not increase the current administrative costs of collection.

Conclusion

The Committee therefore concludes that the widening of the victims compensation levy to include all criminal cases before the courts as well as traffic infringements, would

provide a more effective equitable way of providing for funding to victims of crime than the strong reliance presently placed upon consolidated revenue.

Recommendation

20. That the Parliament consider widening the cases attracting a victims compensation levy to include all criminal cases before the courts and a levy of $20 on all traffic infringement notices, excluding parking infringements.

B.2 LESS VIABLE OPTIONS

B.2.1 CONTRIBUTION OF COMMONWEALTH GOVERNMENT MONIES

While on a recent study tour of the United States, a Committee delegation was impressed with the contribution made to State victims compensation schemes by the United States Government. Individual State compensation schemes currently receive forty per cent of their revenue from the Federal Government.

The *Victims of Crime Act 1984* established a Crime Victims Fund within the Federal Treasury. This Fund receives fines, penalty assessments and bond forfeitures from convicted Federal criminals. The majority of funds come from white collar crime, in particular, fraud. This Federal Fund supplements State compensation schemes. For the States to receive Federal funding they must provide compensation to victims of criminal offences. Grants awarded are based on forty percent of compensation payments made by the State during the previous financial year. For example, if a State pays $1m in compensation it will subsequently receive $400,000 from the Federal government. This places a direct incentive on States to maximise the amount paid out in victims compensation.

Currently, within the United States several States, such as Texas and California, are running their schemes with a substantial excess of funds which they are able to channel into services promoting rehabilitation of victims.

The Committee considered that the option exists for the Commonwealth Federal Government establish a Victims of Crime Fund similar to that operating in the United States. It can be argued that the Federal Government has a moral and political obligation to victims and should take the lead in facilitating a national funding framework for the provision of victims compensation and support. While it may not be necessary, nor practical, for the Commonwealth to provide these services directly, it could contribute to services which are provided by the States.

Offences which are covered by Commonwealth legislation such as fraud, drug importation and corruption ideally promise the highest source of restitution from offenders. Currently, the Australian Commonwealth government does not directly channel funds obtained through this type of crime back to State compensation schemes.

For example, in 1995/96 the Australian Competition and Consumer Commission collected $26, 657,000 in fines due to breaches of the *Trade Practices Act*. Over $20m was collected from one case alone. In 1996-97 $8, 433,797 was collected.

The Commonwealth Attorney General's Department presents another example. The

Proceeds of Crime Act 1987 (Cth) is administered by the Insolvency and Trustee Service (ITSA) through the Attorney General's Department. The *Proceeds of Crime Act* empowers the Official Trustee, when ordered by the court, to take control of a defendant's property pending the making of other pecuniary penalty orders or forfeiture orders. Property and assets realised under the Act is paid into the Confiscated Assets Trust Fund which is managed by ITSA. According to the Commonwealth Attorney General's Department Annual Report for 1995-96 as of 30 June 1996, the Fund had a total of $18,599,041 on hand.

Ultimately this issue is a matter of Commonwealth Government policy and, as such, outside the Committee's jurisdiction. However, the Committee strongly supports such an initiative and has decided to write to the Commonwealth Attorney General and urge him to consider a method whereby the Commonwealth contributes to victims compensation schemes. The Committee also intends to write to the other States and urge them to follow the Committee's lead.

B.2.2. FORFEITURE OF PROPERTY

Background

The Committee considered whether it would be viable to empower the Tribunal to order the forfeiture of property in certain circumstances, for example, in the event of a serious crime which has multiple victims.

This would be similar to the "Martin Bryant" amendment which has been passed under the *Criminal Injuries Compensation Amendment Act 1996* (Tas) inserting ss13-41 into the *Criminal Injuries Compensation Act 1976* (Tas). The amendments provide that where a person is convicted of a serious offence and applications for compensation exceed $100,000 in value, the court may take control of the property of the defendant and, on conviction, order forfeiture of the property . In such cases the State becomes the owner of the property, and all monies and proceeds from the sale of the property are paid directly into the Fund. Victims may claim from either, or both of, the normal criminal injuries compensation fund or the separate fund.

Discussion

The Attorney General's Department pointed out that the "Martin Bryant" amendment represents a response to a particularly unique set of circumstances:

> *"A regime involving forfeiture of an offender's property where its acquisition is in no way related to criminal activity, could be expected to face significant difficulties in relation to assets which are jointly owned, such as a family home. Such action in those circumstances would be detrimental to the interests of*

> *immediate family members who may have no association with the criminal conduct of the offender and may also be open to challenge by interested third parties."*
>
> Submission from the Attorney General Department p10

Further, Mr Cec Brahe, Chairman of the Victims Compensation Tribunal, argued that the Tribunal may already possess sufficient powers to forfeit property under its restitution provisions:

> *"If restitution is pursued to its ultimate conclusion, then under the Act at the present time, writs of execution for the sale of goods and or land is possible."*
>
> Submission form the Victims Compensation Tribunal, p5

Conclusion

Given that very few perpetrators of criminal activity own substantial property, it would appear unlikely that an amendment of this type to the New South Wales legislation would result in significant additional income into the Fund. Further, arguably, property may already be confiscated as part of restitution proceedings. The Committee is therefore not of the view that the New South Wales legislation would particularly benefit from such an amendment.

Recommendations

21. That the Commonwealth Attorney General give consideration to financially contributing to State victims compensation schemes from funds seized as a result of criminal activity.

22. That an additional power to seize property not be included in the New South Wales Victims Compensation legislation.