

# Briefing Note



**Victims Compensation**  
**Summary of the Review of the**  
***Victims Compensation Act***  
***(The Brahe Report)***

by

**Gareth Griffith**

**No 004/94**



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## INTRODUCTION

Comprehensive reform of the *Victims Compensation Act 1987* was foreshadowed in the Governor's Speech of 1 March 1994. The speech referred to a 'comprehensive package of reforms following the review of the implementation' of the Act by Deputy Chief Magistrate and former Chairman of the Victims Compensation Tribunal, Mr Cec Brahe. Mr Brahe reported in March 1993. Details of the proposed legislation are not known at this date.<sup>1</sup> To assist Members in their deliberations on this matter, this briefing note presents a summary of the main points of the Brahe report.

To help the Brahe inquiry, the Attorney-General requested that the NSW Bureau of Crime Statistics and Research analyse the pattern of victim compensation claims, claimants and awards. The Bureau submitted its report, *Criminal Victim Compensation: A Profile of Claims, Claimants and Awards*, in February 1993. Its principal findings are set out in Appendix 1.

Set out in Appendix 2 is the 'statistical information' section from the 1992-1993 Annual Report of the Victims Compensation Tribunal.

Here follows a brief overview of the structure and content of the *Victims Compensation Act 1987*.

## VICTIMS COMPENSATION ACT 1987

In introducing the Victims Compensation Bill in 1987 the then Attorney-General made the point that New South Wales was a leader in the field of criminal injuries compensation. He went on to say that 'The main purpose of these bills is to increase greatly the benefits available to victims of violent crime and to place the award of criminal injuries compensation in the hands of an independent tribunal. That tribunal is to be called the Victims Compensation Tribunal and it will be more capable of a sympathetic and sensitive response to victims' needs'.<sup>2</sup>

From this it is clear that adequate compensation for victims of violent crime to be administered by a specialist tribunal was the central plank of the legislation.

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<sup>1</sup> 14 March 1994

<sup>2</sup> NSW Parl Debs, LA, 18 November 1987, p 16270. With the *Criminal Injuries Compensation Act 1967* NSW became the fourth common law jurisdiction to introduce a government funded criminal injuries compensation scheme.

The Victims Compensation Tribunal is established under Part 2 of the Act. Membership is restricted to magistrates.<sup>3</sup>

Part 3 outlines the operation of the Act by first defining the 4 classes of eligible victims and their entitlement to compensation. The Act provides for primary victims, secondary victims, close relatives and law enforcement officers. The then Attorney-General explained that the category of law enforcement officers can include members of the public who are injured while attempting to uphold law and order.<sup>4</sup> The present Chairperson of the Tribunal, Dr Elms, has explained that the concept of 'injury' is the crux of the compensation scheme: thus, 'compensation is awarded not for the criminal act or event which produced the trauma, but for the injury which is consequent upon it'.<sup>5</sup> Significantly, section 20 provides, among other things, for the Tribunal, when making an award, to have regard to contributory behaviour by the victim. The operation of compensation proceedings and the means by which compensation is to be paid are also set out in this Part of the Act, together with provision for appeals to the District Court.<sup>6</sup>

Informal compensation hearings before the Tribunal are provided for in Part 4, followed in Part 5 by provision for recovery of compensation from offenders and fraudulent claimants. Part 6 deals with compensation awarded by a court for which purpose a distinction is made between 'major' and 'minor' offences.<sup>7</sup>

Part 6A, which provides for compensation levies, was inserted by the *Victims Compensation (Amendment) Act 1989*. According to the then Attorney-General, the levy would automatically apply to all offenders convicted of an offence punishable by a term of imprisonment or penal servitude; he added,

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<sup>3</sup> Section 4 (3)

<sup>4</sup> A primary victim is defined as a person who has sustained injury as a direct result of an act of violence. The then attorney-General explained: 'Primary victims will be entitled to receive compensation for expenses, including actual loss of earnings and loss of future earnings. Primary victims will also receive compensation for injury, which is compensation for their pain and suffering and the loss of enjoyment of life they have suffered as a result of the act of violence. Compensation will be payable also for loss of any personal effects worn or carried by the victim at the time the injuries were sustained' - NSW Parl Debs, LA, 18 November 1987, p 16270. The other classes of claimants are discussed at page 7.

<sup>5</sup> E Elms, *Applications to the Victims Compensation Tribunal*, paper presented to NSW Young Lawyers, 28 April 1993. The sole exception to the injury test is the deceased victim of an act of violence.

<sup>6</sup> Part 3, Divisions 3, 4 and 5 respectively.

<sup>7</sup> According to the then Attorney-General, Part 6 as originally enacted merely re-enacted previous sections 437 and 554 of the Crimes Act: NSW Parl Debs, LA, 18 November 1987, p 16272.

'the purpose of the levy is to make those responsible for criminal activities contribute directly towards compensating victims of crime and to take less from the public purse'.<sup>8</sup> Part 6A was inserted at the same time, establishing a Victims Compensation Fund to 'ensure that all revenue raised by the levy does in fact contribute to victim compensation'.<sup>9</sup> Section 65FA was inserted in 1992 establishing a Victims Compensation Fund Corporation.<sup>10</sup>

Miscellaneous matters are dealt with in Part 7, including the requirement that the Tribunal prepare an annual report.

## **SUMMARY OF THE BRAHE REPORT**

### **1. INTRODUCTION**

In its Introduction the report states that concerns have been expressed about the operation of both the Act and the Victims Compensation Tribunal. It then adds that the prime causes of concern are twofold: (a) the actual or perceived lack of sensitivity by the Tribunal in dealing with some applications; and (b) the low awards made in some cases as identified by the increase in the number of appeals and the success rate of those appeals. As to the issue of sensitivity, the report said it believed the matter was now resolved. The appeals issue is considered in more detail below (page 12).

### **2. TERMS OF REFERENCE**

The Brahe inquiry was established to review and report on the implementation of the *Victims Compensation Act 1987* including the operation of the Victims Compensation Tribunal with particular reference to

- persons entitled to compensation
- the nature and determination of compensation
- the review of determinations
- the payment of legal costs
- the recovery of moneys from convicted offenders, and
- the statistics and management information maintained by the Tribunal; and including any related matter.

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<sup>8</sup> NSW Parl Debs, LA, 25 July 1989, p 8456. The amount payable under the levy was set at \$50 where the offender was convicted on indictment and \$20 in other cases.

<sup>9</sup> Ibid

<sup>10</sup> *Statute Law (Miscellaneous Provisions) Act 1992*.

### **3. PERSONS ENTITLED TO COMPENSATION**

#### **Leave to apply out of time.**

Under the present Act section 17 (2) (d) provides that an application shall be lodged with the Registrar or with the Clerk of a Local Court 'within 2 years (or within such longer period as the Tribunal may, in a particular case, allow) after the relevant act of violence or injury sustained in the course of law enforcement occurred'.

The report recommended that the time limit of 2 years should be retained and that it should operate from the date of the act of violence. Alternatives, such as a period from the date of reporting to police or the charging of an offender, were rejected on the grounds that they would introduce unnecessary complexity into the legislation. On a pragmatic note, it was said that 95.3% of cases are in any event reported to the police on the day of the act of violence; also, that 85.9% of claims are lodged within 2 years of the act of violence.

It was further recommended that the Tribunal should retain a discretionary power to accept claims outside the 2 year period in exceptional circumstances, having regard to such factors as the victim's age at the time of the act of violence. Particular concern was expressed in regard to child victims of sexual assault, who may only report the act of violence long after the event.

#### **Act of Violence.**

The question was raised as to whether the definition of 'act of violence' should be altered. At present a broad definition of 'act of violence' is found in section 3 which provides

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

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

The report stated, with reference to the relevant second reading speech, that the main purpose of the Act was to compensate victims of violent crime. However, the Tribunal has tended to interpret 'act of violence' more broadly than anticipated, extending the definition to include offences of mere negligence resulting in injury. The suggested reason was the problematic definition of 'act of violence' which, according to the report, does not reflect Parliament's intention. It is argued that 'The Act was never intended to compensate victims of all crime'. As a result it recommended that the objects



of the legislation should be made clear, with the definition of 'act of violence' being amended to provide for payment of compensation to victims of violent crime only. The report added: 'If there be any doubt, any amendment should protect the eligibility of victims of sexual and/or indecent assault (17.7% of all cases involve a sexual or indecent assault).'

### **Related Acts.**

The difficulty identified by the report concerns the definition of 'related acts' in section 3 (3) of the Act. The section provides

An act is related to another act if:

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

At issue is the need to distinguish between separate acts which result in separate injuries, on the one hand, and a series of acts amounting to 'a course of conduct, the full effect of which is to cause injury to a person giving rise to one claim only', on the other. What is required, the report recommends, is an amendment qualifying section 3 (3) of the Act, referring to a continuing relationship between the victim and the offender as being a related act allowing the victim to make one claim only.<sup>11</sup>

### **Categories of Claimants.**

The Act identifies 4 categories of claimants; namely, primary victims, secondary victims, close relatives and law enforcement officers. All these are defined in section 10.

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

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

- (a) was the deceased victim's spouse or was a person who was living with the deceased victim as the deceased victim's spouse;

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<sup>11</sup> The approach of Hunt J in *Regina v C* (unreported, 5 March 1982) to the interpretation of the word 'related' was noted with approval. Hunt J followed the approach in *Regina v Martin Smith* [1975] QB 531 to the definition of the cognate phrase 'relating to'. Of the case Hunt J said: 'it is submitted in this case that each of the three offences of rape has some connection with the others in that each is precisely the same offence, committed by the same offender, upon the same victim in similar circumstances, and that on each occasion it was the relationship between the parties which enabled the repetition of the offence in those circumstances'.

- (b) was a parent, guardian, step-parent or grandparent of the deceased victim; or
- (c) was a child, step-child or grandchild of the deceased victim or was some other child of whom the deceased victim was a guardian.

The definition is relatively inclusive, which can be a problem in itself. Added to which, the report states that claims are regularly made by close relatives who have had little or no contact with the deceased for some time, or who reside outside New South Wales (in other parts of Australia or overseas).

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

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

Difficult issues of interpretation arise, especially when 'injury' is defined under section 3 to include 'nervous shock' and 'mental illness or disorder (whether or not arising from nervous shock)'. Basically, the report recommends amendment of the Act in keeping with the law of Tort<sup>12</sup> where 'one must generally show that the nervous shock or recognisable mental illness or disorder is a response to a sudden sensory perception of an immediate and horrifying impact, rather than to mere knowledge of a distressing fact'. The amendment would apply only to a sudden sensory perception of physical injury to the primary victim. Also recommended, therefore, is that 'the concept of mental disorder upon mental disorder be specifically excluded'.

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<sup>12</sup> The branch of law concerned with civil injuries and their remedy.

## **Workers Compensation Entitlement.**

The issue here is really whether the *Victims Compensation Act* should provide a safety net only for those who have no other avenue for claiming compensation, or whether it should complement and in some way operate in combination with schemes for Workers Compensation. The issue is statistically and financially significant. According to the Bureau of Crime and Statistics Research study approximately 24% of claims were work-related (Appendix 1).

An occupational breakdown shows that police and prison officers represent 10.5% of applicants claiming as primary victims, and 1.5% of applicants claiming as Law Enforcement Officers. One reason suggested in the report for this quantity of claims is that workers compensation entitlements do not cover claims for pain and suffering unless that claim is associated with a permanent injury and exceeds \$12,340.<sup>13</sup> An anomaly in the *Victims Compensation Act 1987* noted by the Brahe report is that 'law enforcement victims are entitled to recover even when there is no act of violence'.<sup>14</sup>

While recognising the difficulties and sensitivities involved, the Brahe report recommended that 'Persons injured by an act of violence in the course of employment should not have access to the Victims Compensation Tribunal'. At the same time, the Workers Compensation Act 1987 should be amended to provide adequate entitlement for injuries sustained in the course of employment as a consequence of an act of violence, but not resulting in a permanent disability. Alternatively, and with special reference to police officers, 'compensation for such injuries should be an administrative function within the Police department'.

## **Motor Accidents Act, 1988.**

The proposition here is that claimants under the *Motor Accidents Act* should not have access to the *Victims Compensation Act*. As the then Attorney-General said in his second reading speech for the latter Act, 'injuries involving a motor vehicle are excluded from the scheme'. Section 15 (6) provides

A person is not eligible to receive compensation under this Part in respect of:

(a) an act of violence; or

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<sup>13</sup> *Workers Compensation Act 1987*, sections 66-67.

<sup>14</sup> According to the report, a police officer who falls over while running towards some suspected offender can still qualify for compensation under the *Victims Compensation Act 1987* even though no offence occurred.

(b) an injury sustained in the course of law enforcement, if the person is entitled to receive damages in accordance with the Motor Accidents Act 1988 in respect of the same act or injury.

The recommendation is that the above section should be amended to better express Parliament's intention. An exclusion along the lines of the term 'motor accident' in section 3 (1) of the *Motor Accidents Act 1988* is suggested, plus the adoption of an expanded definition of 'motor vehicle' which would include 'any means of transport'.<sup>15</sup> However, the report goes on to add an important qualification to the rule exempting claims relating to motor vehicles; that is, where a motor vehicle is deliberately used as a weapon. The report states, 'Consistent however with the concept of the Act being to compensate victims of "violent crime", it would be entirely proper for an award to be made where it is proven that a motor vehicle has been used as a weapon, for instance, with the intention of injuring a person'.

#### 4. THE NATURE AND DETERMINATION OF COMPENSATION

##### The Common Law Principle.

It seems that common law principles of assessment of damages apply to awards for compensation under the *Victims Compensation Act 1987*. This contrasts with the situation in Victoria where the *Criminal Injuries Compensation Act 1972* provides for a solatium, which Anderson J in *Fagan v Crimes Compensation Tribunal* defined to mean 'compensation out of the public purse for the injury sustained, whether or not the culprit is brought to book and whether or not the culprit might otherwise be liable to the victim'.

The key question posed in the Brahe report is whether the New South Wales Act should be amended to expressly exclude the operation of common law principles. An amendment of this kind is recommended on a number of grounds, including the consideration that the payment of compensation under the Act 'does not derive from a legally enforceable right against the State, but rather as an act of grace embodied in statutory form'; also, there is a ceiling on the award of compensation under the Act, its procedures are inquisitorial and the rules of evidence do not apply.

A further recommendation is that the maximum award reserved for a worst case scenario should be specified in the Act, with other awards 'scaled

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<sup>15</sup> Perhaps an added difficulty with section 15 (6) as it stands is that the words 'in respect of the same act or injury' do not adequately express Parliament's intention to make the two schemes mutually exclusive. Rather, the implication seems to be that the 2 schemes offer alternative courses of action in respect of the same act or injury.

accordingly'.<sup>16</sup> In addition, a system of assessors to determine claims is recommended in the more straightforward cases where the award is not likely to exceed \$5,000. The comment is made that such a scheme 'will speed the disposal of claims for minor injuries'.

If common law principles are excluded then the minimum award threshold should be increased from \$200 to \$1000.

### **Contributory Behaviour.**

Section 20 of the Act permits the Tribunal, in determining whether or not to make an award and in determining the amount of compensation to award, to have regard to a range of factors, including 'any behaviour, condition, attitude or disposition of the victim that directly or indirectly contributed to the injury or death sustained by the victim'. The Brahe report's first question is whether section 20 should be amended to allow the Tribunal, in addition, to have regard to the character of the applicant when making a determination, an approach consistent with that adopted in Victoria and the United Kingdom. The suggestion was said to be against the balance of opinion in the submissions to the inquiry, which took the view that such a power was already inherent in section 20. Mr Brahe, in a truncated discussion of the issue, said he found the opposition to the suggestion difficult to understand when 'in only 3% of cases was any reduction made by reason of contributory behaviour of the victim'. The report, therefore, recommended an appropriate amendment of section 20 to include the character of the applicant. Significantly, the contrary view was expressed in some submissions that section 20 should be amended to specifically exclude victims of sexual assault.

It was recommended that, where a person is an offender in one claim and a victim in another, then any liability incurred under the first situation may be set-off against the award in the other.

### **Reporting to Police.**

At present section 20 permits the Tribunal to have regard to 'whether the act of violence was reported to a member of the police force within a reasonable time'. Having canvassed various options for reform, the report recommended amending the section so that failure to report or assist the prosecution could be excused on such grounds as the victim's age, intellectual disability, plus the position of power enjoyed by the offender in relation to the victim.

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<sup>16</sup> Recommended is a division of injuries in the range: minor - \$1000-\$5000; moderate - \$5001-\$15000; major - \$15001-\$50000.

## **The Amount of Compensation.**

Recommended was an alteration to the Act stipulating the way compensation for future expenses or future loss of earnings is to be calculated. The argument is basically for parity between the *Victims Compensation Act* and the *Workers Compensation Act*. Section 37 of the *Workers Compensation Act* should be used as a model for prescribing a maximum continuing weekly compensation rate. Thus, the compensation payable to all victims for actual loss of earnings, loss of future earnings and loss of earning capacity should be limited according to the section 37 formula; further, compensation should be payable from the date of the act of violence.

## **5. THE REVIEW OF DETERMINATIONS**

At present section 29 of the *Victims Compensation Act* provides for an appeal from any determination of the Tribunal to the District Court. Appeals must be lodged within one month, though the District Court does have the power to permit an extension of time.<sup>17</sup> It has been decided that an appeal from the Tribunal to the District Court is in the nature of an appeal de novo rather than an appeal by way of rehearing.<sup>18</sup>

Prefacing its discussion of the issues, the Brahe report notes the concern in the District Court at (a) the number of appeals from the Tribunal, and (b) the time taken to deal with them. It said these concerns were 'understandable'.

Recommended are restrictions on the victim's right of appeal to the District Court. The right should be limited to (i) questions as to whether an injury falls into the category of 'minor', 'moderate', or 'major' (see above); (ii) dismissed applications, and (iii) applications affected by section 20 considerations (the factors taken into account by the Tribunal when deciding not to make an award or for reducing the amount of compensation payable). Recommended, too, is that appeals should be by way of a re-hearing and that appeals be lodged within three months of date of notification of an award, with the District Court having no power to extend that time period.

From the way the subject of appeals is discussed in its 1992-1993 Annual Report, it is clear that this is a controversial issue for the Tribunal. The Chairperson, Dr E Elms, takes the opportunity to comment, 'It is disappointing to note the misinformation which is peddled concerning the

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<sup>17</sup> Section 29 (2).

<sup>18</sup> *Goldsmith v Victims Compensation Tribunal* (1993) 30 NSWLR 410.

Tribunal's appeal rate'. Specific mention is made in this respect of an article appearing in the *Law Society Journal* of February 1993 which refers to the 'high rate of demonstrated error by the Tribunal' in the context of the overall success rate of appeals. The following facts and figures are presented in the Annual Report

A total of 413 appeals were lodged against determinations made by the Tribunal during the year, down by 53.5% in 1991/2 when 888 such appeals were lodged. Of that 413, 54 represented appeals against refusals of leave to apply (102 in 1991/2). The appeals against determinations actually made by the tribunal represented an appeal rate of 7.9% (down from 10.5% in 1991/2). The overall quantum of the Tribunal's awards was increased in the appellate jurisdiction by a factor of 3.24 (\$2,254,026 to \$7,318,084). Overall, therefore, appeals to the District Court accounted for an additional \$5,064,058 in awards made.<sup>19</sup>

The Tribunal's Annual Report goes on to note the existence of 'forum shopping' on appeals and adds that 'the costs to be obtained in the District Court, which are of a more generous nature than the scales provided for by regulation under the *Victims Compensation Act*, are also a factor influencing appeals'. The Brahe report had responded to this problem with the recommendation that the awards of the District Court be determined by a scale of costs.

An alternative proposal for reform is canvassed in the Tribunal's Annual Report, namely, an appeal panel of part-time members drawn from the Supreme Court of Arbitrators in personal injury matters, similar in membership and operation to the Criminal Injuries Compensation Board in England. An anticipated advantage would be the injection of the expertise of the senior ranks of the private profession into the operations of the Tribunal. Dr Elms notes his 'disappointment' at the lack of support for this proposal among the ranks of the private profession. He says that at present victims compensation in New South Wales 'represents something of a half-way house between a specialist tribunal and a court based system. It is neither fish nor fowl, neither one thing nor the other'.

The Elms proposal is not considered in the Brahe report. However, the NSW Bar Association in its submission to the Brahe inquiry vigorously opposed any proposal to remove the right of appeal to the District Court. Detailed reasons were presented in support of this view, including the statement that 'Part of the justification for splintering off the victims compensation jurisdiction from the regular court system in 1988 was that there would still be supervision of the new tribunal by a mainstream common law court with expertise in

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<sup>19</sup> Victims Compensation Tribunal, *Annual Report, 1992-1993*, p 4.

medico-legal assessments and a full appreciation of the rules of natural justice'. The Association's direct opposition was aimed at a scheme of review based on a three-member panel of magistrates, a proposal it considered inadequate in terms of the Tribunal's accountability to the community.<sup>20</sup> This last proposal was recommended by Mr Brahe as Chairman of the Tribunal and canvassed in a press release of 28 May 1992 by the then Attorney-General as a possibly 'cheaper, more efficient appeals process'. The legal profession's opposition to it was duly noted in the Brahe report.

## **6. THE PAYMENT OF LEGAL COSTS**

Under section 24A the legal costs incurred by an applicant for compensation can be paid from the public purse. The scale of costs is prescribed by regulation. Legal costs in excess of the scale of costs may be awarded but, according to the Brahe report, the amount in excess is deducted from the victim's award. There is no scale for medico-legal expenses. At the same time there is provision under section 18A (2) for the costs of a medical examination required by the Tribunal to be paid for out of the Compensation Fund. The Brahe report says that the Tribunal has found that in some cases the cost of a medical or psychological report is 'inordinately high'.

What is recommended is that the scale of legal costs should be adjusted regularly and that, while no cap should apply to medico-legal costs, the Tribunal should have the discretion to disallow unusually excessive claims and apply the District Court scale in those circumstances.

## **7. THE RECOVERY OF MONEYS FROM CONVICTED OFFENDERS**

### **Recovery.**

This issue has attracted some comment, most of it unfavourable to the Tribunal. A recent editorial said, 'in the year up to October 1993, the Crown Solicitor's Office spent about \$430,000 to recover less than \$100,000 from criminals. This hardly fulfils the Tribunal's requirement in law to recover compensation from criminals to reimburse their victims'.<sup>21</sup>

The starting point for the Brahe report is that 'The government is committed to the policy of ensuring that offenders contribute to the compensation of their

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<sup>20</sup> G Bartley, *Appeals from the Victims Compensation Tribunal to the District Court*, paper presented to the NSW Young Lawyers, 28 April 1993.

<sup>21</sup> 'The farce of compensation', *The Sydney Morning Herald*, 22 November 1993.



victims'. On this basis, the report is supportive of the status quo, with some modification. One is that the tribunal should be empowered to write off bad and doubtful debts. The principle is that recovery should not be pursued beyond the point where it ceases to be cost effective.<sup>22</sup>

### **Compensation Levy.**

Part 6A of the Act provides for the imposition of a compensation levy on offenders, the proceeds of which are paid into the Victims Compensation Fund for use in the payment of awards. The report states that for the year 1991/92 a total of \$1,760,595 was collected under this scheme.

Again the report is basically supportive of the scheme, but looks for some modification. One is that, where juveniles are concerned, the levy should be subject to judicial discretion. More significantly, a different approach to the raising of the levy is suggested, where the money is to be paid out of court costs which would be increased by an appropriate amount. The main rationale behind this is that of certainty and administrative convenience, for the defendant who is present in court will learn at the time of the amount for which he or she is liable and the subsequent apportionment of the amount to be contributed as a levy becomes an administrative act.

### **Fraudulent Claims.**

In respect of fraudulent or extravagant claims, a matter provided for under Part 5 Division 2 of the Act, the report states that these should be investigated and hearings pursued, with greater use made of the Crown Solicitor and of section 18A of the Act which permits the Tribunal to direct examination by an independent medical practitioner or psychologist.

## **8. STATISTICS AND MANAGEMENT INFORMATION MAINTAINED BY THE TRIBUNAL**

It was recommended that the Tribunal should keep statistics of such matters as: the success rates of the various categories of District Court appeals and on the applications and awards made. The report recognised, therefore, that the statistical material on which the Tribunal relies is not as broad as it could be.

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<sup>22</sup> The Tribunal's 1992-93 Annual Report states: 'In 51.2% of cases the Tribunal is empowered to seek restitution of the award from a convicted offender. In the balance of cases, there is either no known or no convicted offender. During the year, the recovery of moneys from convicted offenders increased by 25.4% (from \$374,927 to \$470,161) and continues the 170% increase recorded in 1991/2. A total of 3,000 restitution orders have been forwarded to the State Crown Solicitor's Office for enforcement, compared with the previous year when 50 such orders were made'.

## 9. OTHER ISSUES

Of particular note are the following recommendations:

- *Hearings:* Under section 18 of the Act the Tribunal is endowed with a discretion as to whether or not to grant a hearing. Dr Elms has said, 'The onus is upon the applicant to convince the Tribunal that there are reasons why a hearing should be granted, and why the matter is incapable of assessment upon the basis of material presented in Chambers'. He then explained the effect of workload pressures on the availability of hearings which may still be necessary where, for example, 'an act of violence is in doubt'.<sup>23</sup> The Tribunal's hearings are informal in nature. No record is found in the Annual Report of the number of claimants seeking a hearing. The Brahe report recommended that section 18 not be changed.
- *Death of applicant:* Recommended is amendment of the Act to clarify the position where an applicant dies as a result of injury arising directly from the act of violence, or from other causes, where a determination has or is yet to be made. What needs to be clarified is whether the claim subsists in any or all these contingencies for the benefit of the applicant's estate.
- *Power to review:* The Act should be amended to provide for a limited power permitting the Tribunal to review its decision, thus enabling a victim to have a case re-opened without proceeding by way of appeal.
- *Rules of practice and procedure of the Tribunal to be prepared:* This is in order to assist both the victim and his or her legal representative.
- *Applicants to prepare own claims:* Any applicant seeking to proceed without legal representation receives and should continue to receive assistance from Tribunal staff.

## END NOTE

The Victims Compensation Tribunal has attracted considerable comment in recent years in relation to the adequacy of particular determinations it has made, its handling of some cases, the efficiency of its procedures, the number of successful appeals against its decisions, and so forth. Of particular concern has been the cost of victims compensation to the public purse and, as noted,

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<sup>23</sup> E Elms, Applications to the Victims Compensation Tribunal, op cit, pp 18-20.

the perceived failure to recover sufficient funds from offenders.

Further to this, it has been said that the general effect of most recommendations in the Brahe report 'is to reduce greatly the compensation payable to crime victims'. The comment is made in relation to the recommendations to abolish common law principles of assessing damages, that the maximum of \$50,000 be reserved for a worst case scenario and that other awards of compensation be scaled down accordingly.<sup>24</sup> This was also the thrust of press comment on the report.<sup>25</sup> Comment was made, too, on the opposition of the NSW Police Association to the recommendation to effectively remove police officers from the victims compensation scheme.<sup>26</sup>

On the issue of appeals and the Tribunal's standing as a specialist body, the concerns expressed by the present Chairperson, Dr Elms, from the 1992-93 Annual Report are worth re-stating here. His concern is that the present scheme has developed into 'something of a half-way house between a specialist tribunal and a court-based system'. He concludes, 'It is a matter for the legislature as to whether it wishes the scheme to continue on this basis, or whether it desires to return to the objectives which led to the establishment of a specialist tribunal in the first place'.

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<sup>24</sup> G Bartley, *Appeals from the Victims Compensation Tribunal to the District Court*, op cit, pp 14-15.

<sup>25</sup> L Morris, 'Payouts Cut for Crime Victims', *Telegraph Mirror*, 5 April 1993.

<sup>26</sup> J Della-Giacoma and A McGarry, 'Police Fury at Moves to Deny Compo', *The Australian*, 6 April 1993.



## Appendix 1

### Principal Findings

from

NSW Bureau of Crime Statistics and Research  
*Criminal Victim Compensation:  
A Profile of Claims, Claimants and Awards*

SGHAN & CRI 1091570

Pia Salmela  
1995



## PRINCIPAL FINDINGS

For the sample of claims for compensation to the Victims Compensation Tribunal studied, it was found that:

- Approximately 24 per cent of the claimants were employed and working at the time they became victims of an act of violence.
- More than half of the primary victims employed as police officers (90.3%), taxi drivers (85.7%), bank staff (78.3%), security staff (72.7%), prison officers (71.4%), and entertainment venue employees (61.7%) were working at the time they became victims of an act of violence.
- Assault (with a weapon or otherwise) was the most common type of offence in the act of violence for which victims applied for compensation, occurring in 72.9 per cent of the claims.
- The most common type of injury sustained by victims was bruising with nearly 56 per cent of the victims sustaining bruises. Lacerations (44.3%) followed by psychological injuries (39.1%) were the next most common types of injuries sustained by victims.
- A very small proportion of victims awarded compensation (3.0%) were judged by the Tribunal to have contributed to the injuries they sustained.
- About one-third (30.1%) of the acts of violence occurred in a dwelling and a further 20.8 per cent occurred in licensed premises.
- The majority of claims (85.9%) were lodged with the Tribunal within two years after the act of violence, the period specified by the Victims Compensation Act. The median period from the act of violence to the date the claim was registered with the Tribunal was longest for claims involving child indecent assault (31.5 months).
- About 92 per cent of the claims considered by the Tribunal were awarded compensation.
- On average, victims were awarded \$8,612 in compensation. Over three-quarters of the victims awarded compensation were awarded \$12,000 or less. This included compensation for injury, expenses and the loss of personal effects.
- Victims who claimed as close relatives of a deceased victim were awarded the largest mean award (\$11,830), followed by secondary victims (\$10,736), law enforcement victims (\$10,064) and then primary victims (\$8,437).
- Across occupation groups, primary victims employed as security staff at the time of the act of violence received the largest mean award (\$12,765). In total, however, students were awarded the largest proportion of compensation, accounting for 18.7 per cent of all the money awarded to primary victims.

## **PRINCIPAL FINDINGS continued**

- Across offence categories, primary victims who claimed for acts of violence involving adult sexual assault received the largest mean award (\$21,298). Claims from primary victims which involved child sexual assault received the next largest mean award (\$15,618). In total, primary victims claiming for assault (with a weapon or otherwise) were awarded the largest proportion of compensation, accounting for nearly 55 per cent of all the money awarded to primary victims.
- Only 3.5 per cent of claimants lodged an appeal to the District Court. Most of these victims were awarded compensation prior to their appeal, and the mean award they received prior to appealing was comparable to the mean award for those claimants who were awarded compensation and did not lodge an appeal.
- Of the total amount awarded in compensation by the Tribunal, 64.8 per cent was awarded to claims where the offender had been convicted or the alleged offender arrested (case not finalised).



## Appendix 2

### **Statistical Information**

from

**Victims Compensation Tribunal**  
*Annual Report, 1992-1993*



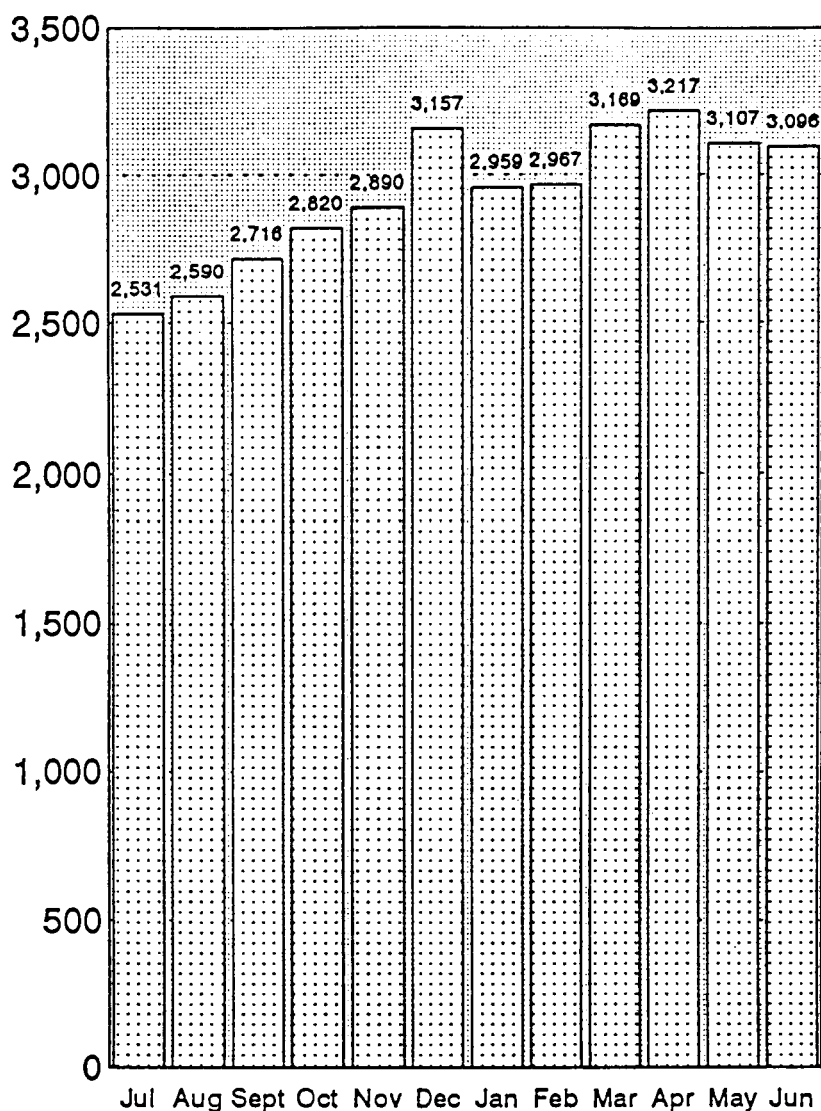
**ANNUAL REPORT.**

**1992 - 1993**

**SECTION II**

**STATISTICAL  
INFORMATION**

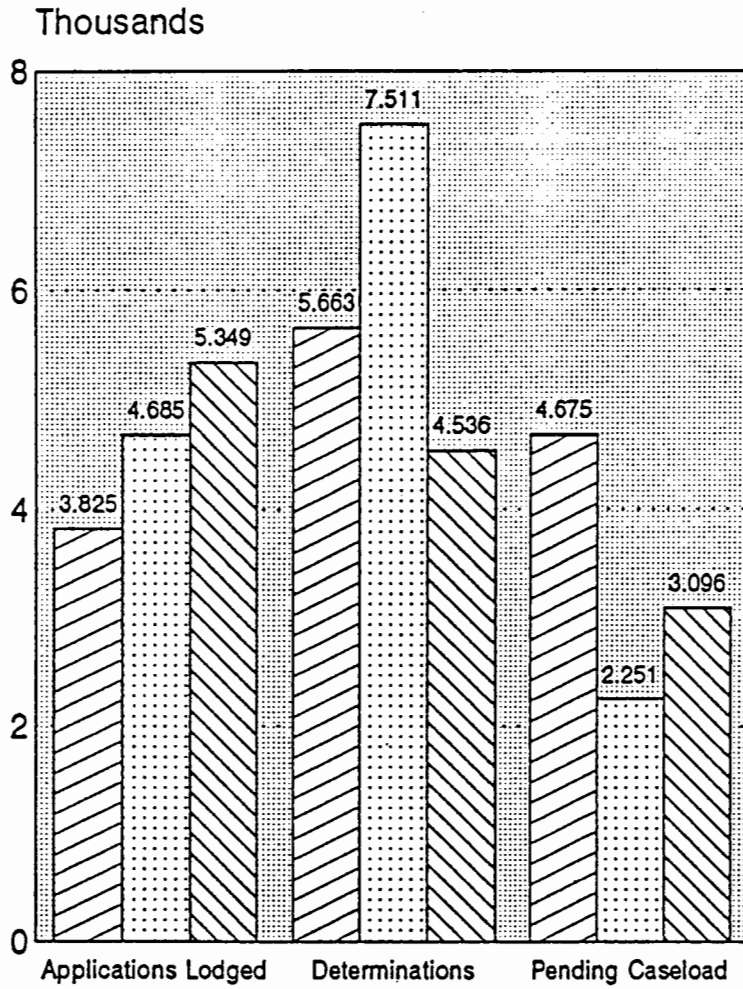
**Dr. E.E. Elms.  
Chairperson**



Pending Caseload

#### ACHIEVEMENTS.

- \* The Tribunal successfully completed the Arrears Reduction during the year 1991/92.
- \* The pending caseload fell to its lowest ebb, 2115, in May of 1992. Thereafter it rose to 2590 ( a 22.46% increase in 3 months) at the end of August when I was appointed the Tribunal's Chairperson.
- \* From August until June, a period of 10 months, the pending caseload figure increased to 3096, a further 22.49% on the August figure. Overall, the percentage increase during the year was 37.6%.

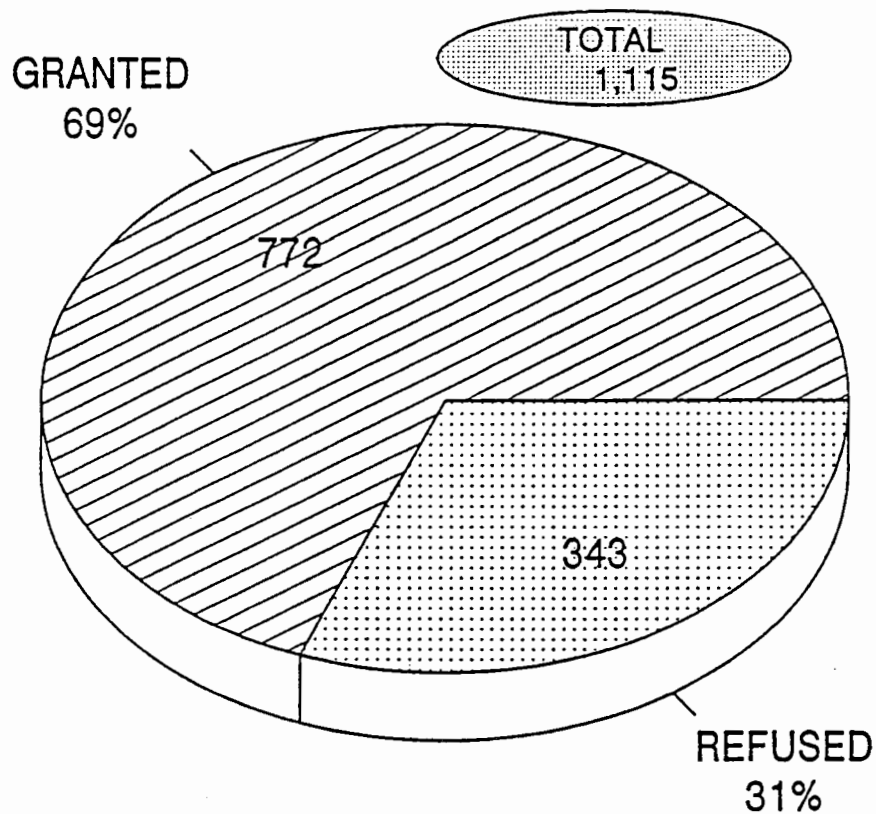


Caseload comparisons

- \* The Tribunal received an increase in the number of applications for the second consecutive year - 14.2% in 1992/93 ; 22.5% during 91/92.
- \* Determinations down by 39.6% - caseload up 37.6%. These figures are the subject of commentary in the body of the report.

## VICTIMS COMPENSATION TRIBUNAL

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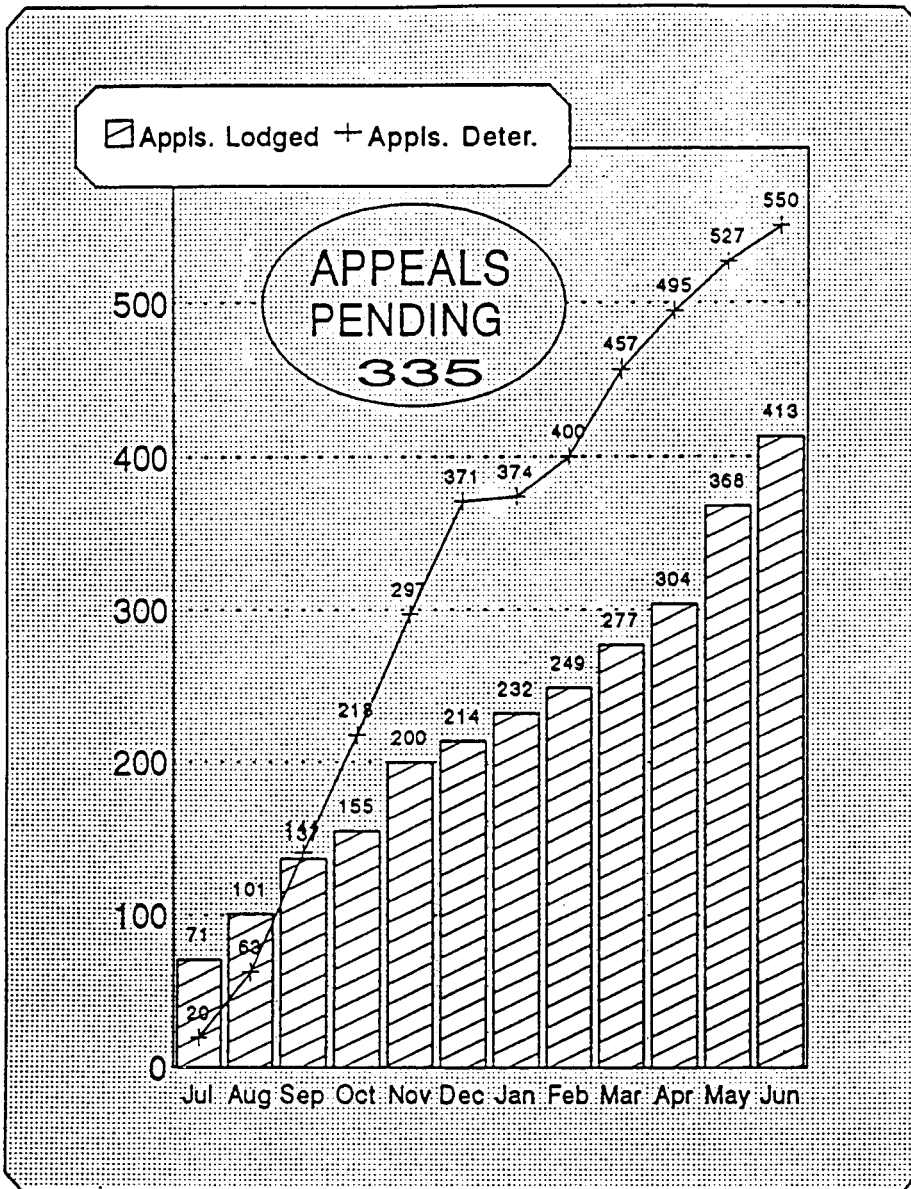


### APPLICATIONS FOR LEAVE TO APPLY

#### LEAVE TO APPLY (OUTSIDE 2 YEAR STATUTORY PERIOD)

- \* A total of 1115 requests for leave to file applications outside the Statutory two year period ( section 17) were lodged at the Tribunal.
- \* 69% ( 91/92 = 65%) of such requests were granted - 31% (91/92 = 35%) were refused.
- \* Of the 343 (407) requests refused - 15.7% (25%) lodged appeals.

# APPEALS - 1992/93

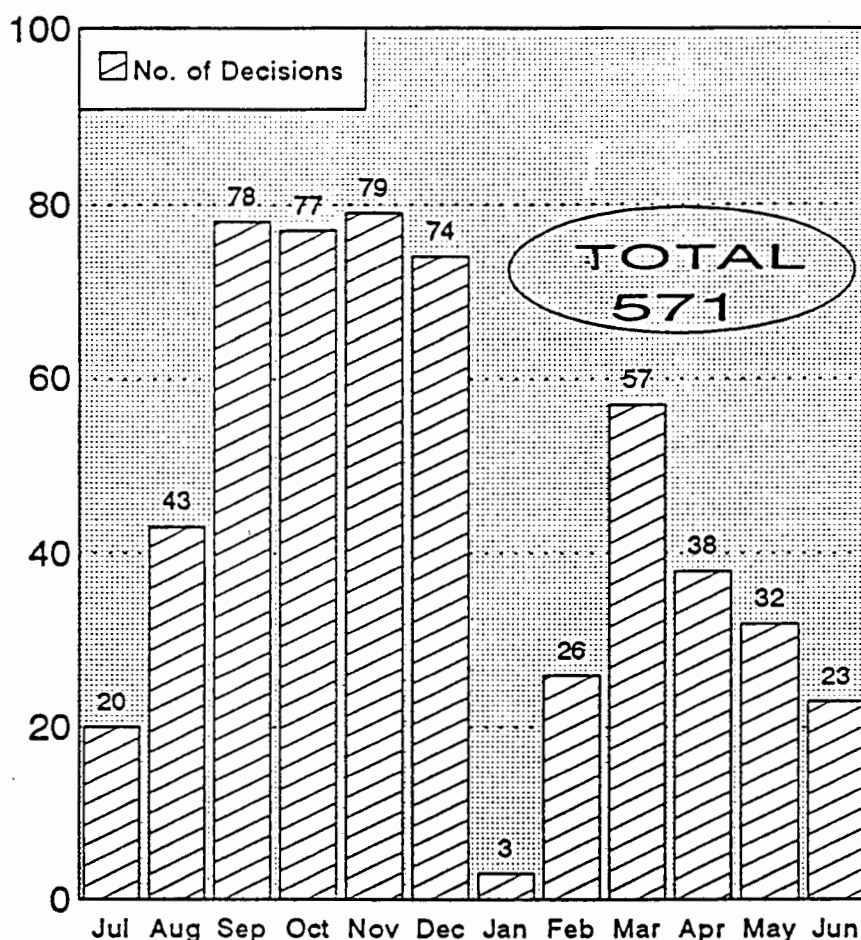


Monthly appeals lodged/determined

## APPEALS TO THE DISTRICT COURT..

- \* 413 ( 91/92 = 888) appeals against determinations made by the Tribunal were lodged at District Courts during 1992/93.
- \* Of this figure 54 were appeals against Leave to apply. The 359 appeals against determinations represent an appeal rate of 7.9% (10.5%).
- \* At the commencement of 1992/93 , 413 (91/92 = 121) cases were pending before the District Court. At the end of the year 335 (493) cases were still pending.

## APPEALS - 1992/93



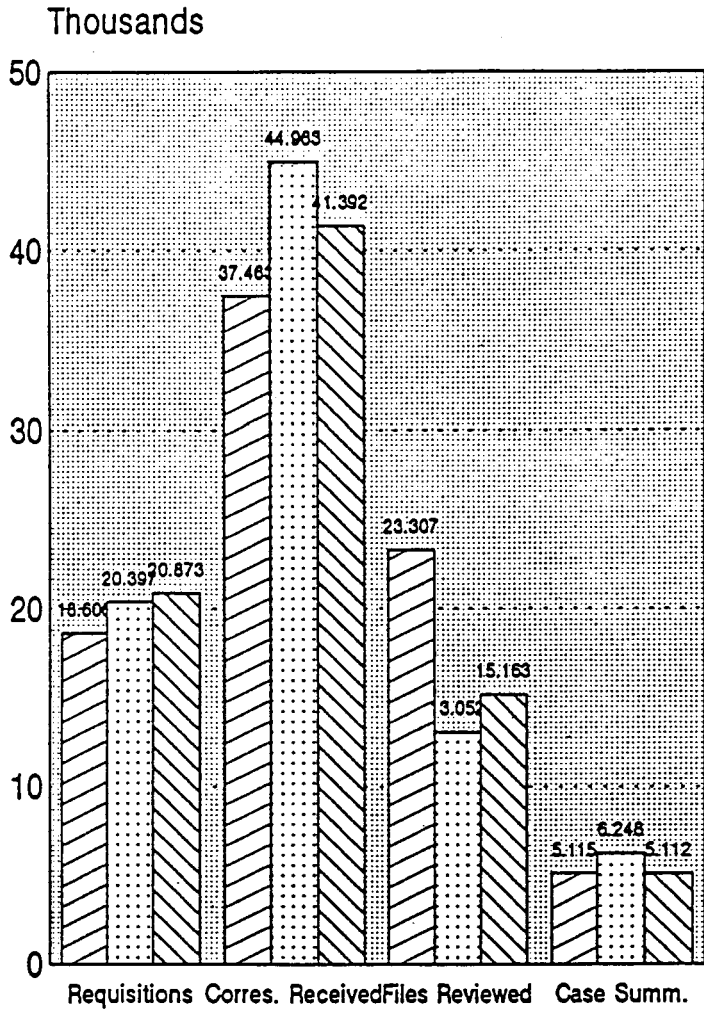
### Monthly appeals determined

\*NOTE:- 21 cases were determined in June, 1992 however result not received at Tribunal until late July 1993 and have therefore been included in this years figures.

\* The quantum of awards made upon appeal in the District Court has totalled \$5,064,058 ( 91/92 - \$6,065,653 ) or an average of \$13,723.73 (15,278.96) per case.

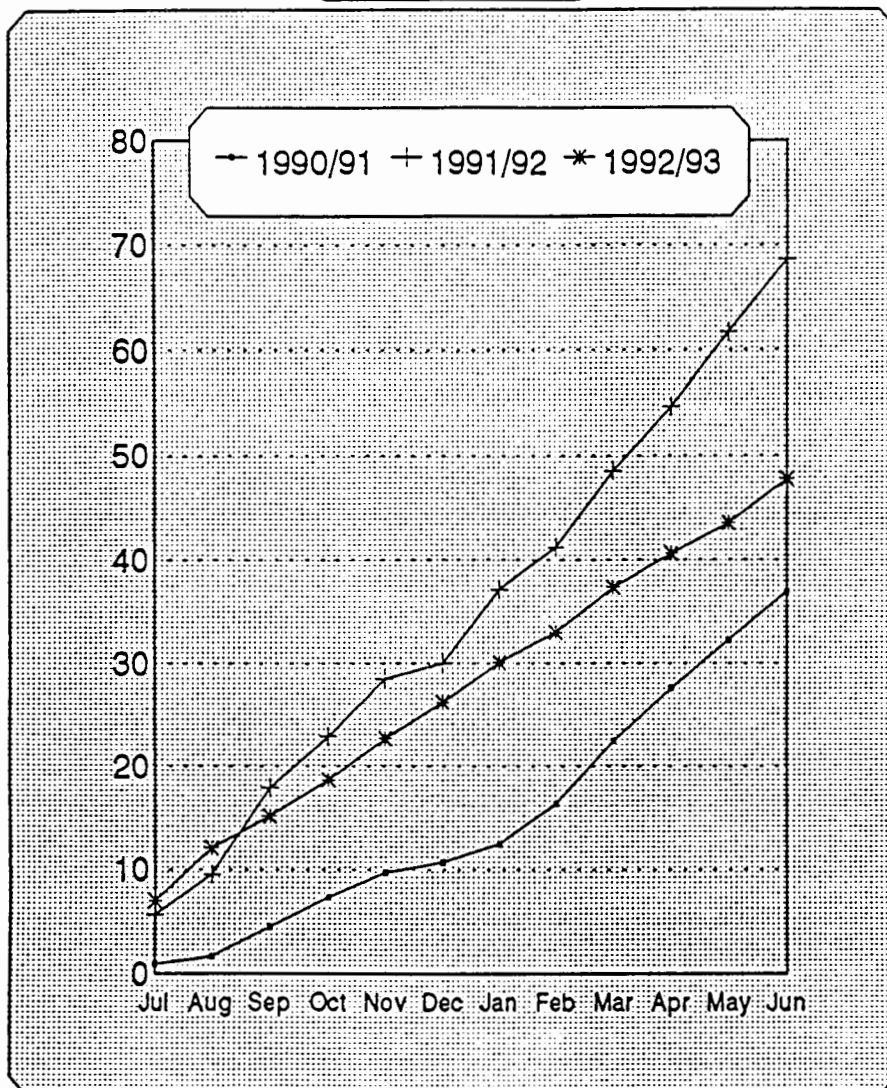
\* Professional costs on appeal to the District Court indicates an additional \$822,290 (91/92 - \$544,853) paid from the Victims Compensation fund, an average of per case \$2,015.42 (in 91/92 - \$1,846.96)





Case Management

## Expenditure



### EXPENDITURE.

- \* Expenditure for 1992/93 decreased by 30.5%.  
1991/92 however was exceptional due to the reduction in arrears.
- \* The expenditure is an increase over 1990/91 year by 33%.

# USER SURVEY *Briefing Note 004/94*

## *Victims Compensation*

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